

**20th Anniversary of the Establishment of the House of Representatives Committee
System**

Session Three: Future directions and developments

Professor Geoffrey Lindell: Panel Address

Speaking Notes

1. Introduction

(i) I have long been a strong supporter of parliamentary committees of inquiry both in terms of the -

- advice they can provide on policy questions ; and
- in holding the government to account.

(ii) My first proposal is concerned with the first of those functions and the potential to use such committees in charting the future

I support the plea advocated by Ian Marsh and David Yencken in their book aptly entitled, *Into the Future: The Neglect of the Long Term in Australian Politics* ¹

The book has been described:

- as arguing persuasively that, an increased role for parliament and enhancing its committee system,
- would greatly assist in the essential task of informing public opinion and mobilizing the necessary public consent ²

Clearly there is a need - as they argue - for open and transparent examination of strategic issues about the future. ³

- I believe that through bi-partisan cooperation and also by involving the public and interest groups, parliamentary committees can provide a very important forum for discussing the future.

(iii) To all this I would add the following provisos:

1st: As with all committees of inquiry, I believe more can, and should be, done to monitor their efficiency. ⁴

- It is a mistake to think that such inquiries (whether parliamentary or otherwise) are cost free in terms of valuable staff resources and the time and the expense incurred in doing their work.

¹ Black Inc: Melbourne, 2004 (Public Interest Series).

² By Michael Keating, the former head of the Department of Prime Minister and Cabinet at p 2.

³ At p 18.

⁴ See for a summary of the writer's views presented at an evaluation forum in Canberra, "Under scrutiny: Are parliamentary committees an effective accountability tool of parliament or a waste of time? Is there a way to evaluate how effective they are?" *About the House* (House of Representatives Magazine) Issue 24, August 2005 at pp 55-6. Monitoring their *effectiveness* represents a much more difficult - if not in some cases - impossible task

- Developments in the UK point to the increasing attention that is being paid to this matter in that country.
- Normally efficiency would be measured by reference to the extent to which recommendations were adopted and implemented
- ✚ but the efficiency of inquiries about the future need to be measured by reference to their success in stimulating debate and facilitating public education about future policy options

2nd : We need to explore further ways of publicizing and communicating with the public the contents of the reports of parliamentary committees

- this is especially important if such reports are to play an educative and influential role in furthering policy debates about the future
- (iv) I have chosen two examples to illustrate the potential future use of parliamentary committees which are, not surprisingly, taken from one of my areas of expertise, namely, constitutional law:
- (a) Constitutional review and amendment.
 - (b) The description of the purposes for which public funds are appropriated.

2. Constitutional review and amendment

- (i) I begin by praising, as I should, the useful work done by both the Senate and the House of Representatives *Legal and Constitutional Affairs Committees*
- As I indicated in the *Australian Parliament's Vision for Hindsight Project* a number of useful reports have been prepared by both Committees on constitutional matters.⁵
 - A recent example is the report prepared by the House of Representatives Committee on the *Harmonization of Legal Systems* in 2006.⁶
 - But - as Professor Saunders argued in the *Vision in Hindsight Project* - Parliament has the potential to play a significant role in relation to constitutional review.⁷

⁵ G Lindell and R Bennett (eds), *Parliament: The Vision in Hindsight* (Federation Press, 2001) at pp xxxvii – xxxviii (introduction).

⁶ House of Representatives Standing Committee on Legal and Constitutional Affairs Report on “Harmonisation of legal systems within Australia and between Australia and New Zealand” (November 2006, Canberra)

✚ In this address I present my version of what that role could look like.

(ii) What I am proposing today:

(a) Involves the *continuous* and *regular systematic* review of the operation and adequacy of Australia's Constitution

- In other words, I do not have in mind *ad hoc* inquiries into specific issues referred to parliamentary committees by either or both Houses, as has occurred in the past

✚ although this is not for one moment to deny their utility.

(b) The task I have in mind might usefully be undertaken by a *Joint* Parliamentary Committee given the importance of securing parliamentary approval for any proposed constitutional alterations

(c) Thus I envisage the need for a *standing* reference to

- both review and recommend proposed measures to improve and modernize the operation of the Constitution
- but I should emphasise that its role would *not* be confined to formal constitutional amendment or referrals of power

(iii) There are a number of issues that could be usefully addressed

(a) Not the least is the current "blame game"

A report in a local Adelaide suburban newspaper (attached to the handout distributed for this talk) provides a striking illustration of the present dysfunctional operation of Australian Federalism

- It concerned what appears to be pre-eminently a local matter, namely, the repair of a municipal bridge.
- The report is quite remarkable since it assumes that the South Australian Government was not itself responsible for funding the repair and Members of the South Australian State Parliament were not even mentioned as being interested in rectifying the problem.
- Instead, reference was made to the ideas and involvement of the Federal Member for Hindmarsh!

⁷ "The Parliament as Partner a Century of Constitutional Review" in Lindell and Bennett above n 5 esp at pp 484-5.

(b) The answers to the present problems need not necessarily call for *constitutional amendment* or *references of power* by the States to the Commonwealth even though it has been clear for some time now that it is necessary to devise a new list of roles and responsibilities of federal, State and local government.

- Such a list can be the subject of an intergovernmental agreement between the Federal and State Governments and Parliaments without the need to alter the Australian Constitution by referendum or references of power

(c) The current approach to the judicial protection of federalism seems to assume that the main responsibility for protecting federalism may well be, in large measure, *political* and not *legal*

- As is well known, the roles of State Governments are not defined in our Australian Constitutions (as they are in Canada)
- It has been clear for some time now that the description of the enumerated powers of the Commonwealth in ss51 and 52 of the Australian Constitution are no longer adequate to describe the *full* range of federal legislative powers which has evolved as a result of -

✚ the judicial interpretation of the Constitution; and

✚ the superior financial resources of the Commonwealth

(d) Of course the answers to those issues may well raise fundamental questions regarding whether federalism is appropriate to our circumstances

- New surveys ⁸ and the recent erosion of State responsibilities during a decade of government dominated at the national level by major political parties that were supposed to be committed to federalism -

✚ may well give rise to doubts about the continued attachment of the public to that form of government

✚ and the former Prime Minister may well be right in thinking that people are now more interested in outcomes rather than who delivers them.

- Has the time come, for example, to remove all the words after “peace, order and good government of the Commonwealth” in s 51 of the Australian Constitution?

⁸ See A J Brown, “After the Party: Public Attitudes to Australian Federalism, Regionalism and Reform in the 21st Century” (2002) 13 *Public Law Review* 171.

✚ This would not abolish the States and their separate Governments and Parliaments.

✚ But it would dispense with the costly and largely fruitless litigation which challenges the validity of federal legislation as going beyond powers contained in Const s 51.⁹

(v) Elaboration

(a) A good starting point would be some of the previous reviews of which there has not of course been any shortage!

- But the last major review took place in 1986 – 1988¹⁰ apart from the specific issue of the republic in the 1990's¹¹
- One of the previous reviews was the 1959 *Joint (Commonwealth Parliamentary) Committee on Constitutional Review* which achieved a remarkable degree of consensus.

(b) The lesson to be learnt from the 1959 Committee, however, was that we ask too much of parliamentary inquiries – particularly when undertaken at only one level of government - if we think their recommendations for constitutional alteration,

- however sound and unanimous, will be sufficient *by themselves*
- much more is needed to achieve the community support necessary to obtain a successful amendment of the Constitution at the referendums required by s 128.

- But they can still play an important role in debating and exploring the possibilities for the future,

✚ and also in educating the public on these matters.

- There seems to be a widespread community assumption that constitutional review can be left to the judiciary even at a time when courts are facing increasing public scrutiny and charges of judicial activism -

✚ even if those charges are I think largely exaggerated and unfounded.

⁹ Some major constitutional challenges appear to have been mounted by the States for political purposes rather than as a genuine attempt to test the existence of, or limits to, federal legislative powers: see in the writer's view for two modern instances, *Western Australia v The Commonwealth (Native Title Act Case)* (1995) 184 CLR 188 and *New South Wales v Commonwealth (Work Choices Act Case)* (2006) 81 ALJR 34.

¹⁰ Constitutional Commission, *Final Report* (1988) and the reports of its five advisory committees published in 1987.

¹¹ The Report of the Republic Advisory Committee on "An Australian Republic: The Options" (1993) and Constitutional Convention, Report (Department of the Prime Minister and Cabinet, 1999)

(c) A further task that could be assigned to the Committee would be to inquire and report on the way referendums to amend the Constitution are conducted

✚ Eg whether they are held separately or in conjunction with general elections for the Parliament

✚ The Committee could also review recommendations made by the *Constitutional Commission* and the *Australian Constitutional Convention*¹² regarding the processes of initiation and approval of proposed constitutional alterations.

It would include a continuous review of the way in which the public can be properly informed about the advantages and disadvantages of proposed alterations

(d) Another task concerns what may be termed the “statute law revision” of the Constitution to consider the deletion of outmoded and obsolete constitutional provisions (using those terms in a purely legal and technical sense),

- particularly where their retention does not serve any historical purpose.

A proposal along these lines was developed by the *Australian Constitutional Convention* and was approved by the Parliament as one of five proposed constitutional alterations which, although they were passed by the Parliament, were not put to the electors in 1983¹³

(v) Finally, I should add that to be fully effective, my proposal may require making available regular parliamentary time for the discussion of the findings of the Committee I have proposed.

3. Parliamentary specification of purposes for which public funds are appropriated

(i) The second example to illustrate the potential future use of parliamentary committees is taken from a recent submission which I addressed to the *Senate Standing Committee on Finance and Public Administration* in its reference on “Transparency and Accountability of Commonwealth Public Funding and Expenditure”.¹⁴

¹² See Constitutional Commission: *Final Report* above n 10 at pp 851- 3 and 859 – 872 - 879 The Commission summarized and cited the recommendations made by the *Australian Constitutional Convention* at pp 856 – 8. The Convention met during 1972 – 1985.

¹³ *Constitution Alteration (Removal of Outmoded and Expended Provisions)* 1983. It was not put to the people because of a dispute about the funding of the “Yes” and “No” Cases: see G S Reid and M Forrest, *Australia’s Commonwealth Parliament: 1901 – 1988 Ten Perspectives* (Melbourne University Press: Carlton, 1989) at p 246. See also in that regard the recommendations made by the Constitutional Commission: *Final Report* above n 10 at pp 879 – 881.

¹⁴ (March 2007) Submission No 10 at sub- paras 4(g) and 24 (v) at pp 2-3 and 10 respectively. The Report of the Committee was published in March 2007 but unfortunately no specific reference was made to the proposal advanced in this talk although it did accept a number of the other recommendations made in the submission which was cited in several places (Report: paras 3.1, 4.52, 5.19 – 5.20 and 6.18 – 6.20).

- I need first to provide some background in order to help understand the nature and purpose of that submission

(ii) Background

(a) There is a fundamental constitutional principle which in Australia is derived from ss 81 and 83 of the Constitution, namely: ¹⁵

- “ that no money can be taken out of the consolidated Fund into which the revenues of the State have been paid, excepting under a *distinct authorization* from Parliament itself’ ... ” ¹⁶

As has been observed the principle “[s 83] emphasizes the constitutional rule of the control of Parliament over expenditure and the issue of public money.” ¹⁷

Obviously enough, it forms a fundamental mechanism for holding the Executive accountable to the Parliament.

(b) Unfortunately the modern reality is that the Parliament is gradually losing control over the expenditure of public funds.

- Appropriations are increasingly *permanent* rather than *annual* and they are also framed in *exceedingly broad terms*.
- This has been accentuated by the adoption of *accrual budgeting* in 1997 under which the authority to spend is expressed in terms of “outcomes” that are framed with a *high level of vagueness and generality*.
- A good case in point is the item of the Appropriation Act under which the former Commonwealth Government purported to charge its *Workchoice* advertising campaign.

In short, it is doubtful whether the fundamental principle I mentioned regarding the need for a “distinct authorization from Parliament itself” continues to be observed in any meaningful sense

(b) The modern reality was made even worse recently when a majority of the High Court in the *Combet Case* ¹⁸

¹⁵ So far as they are relevant, those provisions state:

“81. All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the *purposes* of the Commonwealth ...

83. No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law.” (emphasis supplied)

¹⁶ (1990) 169 CLR 195 at p 205 quoting with approval from the Privy Council in *Auckland Harbour Board v The King* [1924] AC 318 at p 326.

¹⁷ W Harrison Moore, *The Commonwealth of Australia* (2nd ed., 1910) at p 522.

- upheld a category of expenditure which left it to the Departments to determine in their discretion for what purposes public funds could be spent
 - and thus appeared to reverse an assumption which held true until then regarding the inability of the Parliament to appropriate funds in blank¹⁹
- (c) Even if it is now thought to be legally permissible, Parliament should not allow the making of such appropriations²⁰
- (d) The aim of my submission was to recommend the restoration of adequate but flexible descriptions of the purposes for which public funds can be spent.

(iii) Nature of the proposal

- (1) In the submission I proposed that the Senate should assign to an existing Standing Committee, or establish a new Standing Committee, to report to it
- on whether any *Appropriation Bills* comply with guidelines drafted to give effect to suggestions I made in the light of the *Combet Case*.
- (2) The key task of such a committee would be to check and monitor financial legislation and report to the Senate on whether any such legislation is expressed in such a form as to comply with the suggestions made in that submission.
- In particular it would develop standards to regulate the specificity of the purposes for which public funds are appropriated
 - I need to stress that it would not be able to review or pass upon the *policy* or *merits* of the legislation.
 - It would also mirror the kind of work done for different purposes by the Senate Standing Committees on *Scrutiny of Bills* and *Regulations and Ordinances*.
- (3) There is no reason why such a committee should not be established by the *House of Representatives* (or perhaps, but more debatably and in order to save resources, both Houses as a *Joint Standing Committee*?)

¹⁸ *Combet v the Commonwealth* (2005) 224 CLR 494. For the writer's extensive critique of this case and the likelihood of remedial action being taken in the future to reverse its far reaching consequences see G J Lindell, "The *Combet Case* and the appropriation of taxpayers' funds for political advertising - an erosion of fundamental principles?" (2007) 66 (3) *Australian Journal of Public Administration* 307 - 328).

¹⁹ Unless the majority judgment is construed in the possible way suggested in the article by the writer cited above n 19 in at p 326, fn 68.

²⁰ As has already been recommended by the Committee to which I addressed my submission: Standing Committee on Finance and Public Administration Report above n 14 paras 6.13 – 6.23 (Recommendation 19).

- My suggestions were originally addressed to the *Senate* but in truth they could also have been addressed to the *House of Representatives*

(4) Thus both Houses of Parliament should:

(a) Insist on the alteration of the relevant provisions of future appropriation bills including those which the Senate cannot legally amend under the Constitution (*'Appropriation Bills No 1'*)²¹

- in order to restore the need for any approved expenditure to be linked to and connected with specific purposes or outcomes.

(b) Reject appropriations in blank and also lay down the standards mentioned earlier.

(c) In the interests of flexibility, and consistent with the need for greater specificity of purpose, they should seek the drafting of a category of departmental disbursements which describes running and regular expenditure -

- which is incapable of being identified by reference to particular policies or purposes required to be implemented by any department or public body

✚ eg the acquisition of office furniture, stationery and salaries.²²

- But ensure at the same time that this category *excludes* departmental expenditure which *can clearly be identified* by reference to the nature of the policies promoted and implemented by a department or public body when those policies have yet to be approved by Parliament

✚ eg the advertising that was involved in the *Combet* case.²³

4. Concluding observations regarding both proposals

- (i) As regards the *second* of those proposals, and as I have argued before, the effect of the *Combet* case has been to place the onus on the Parliament if it is to regain its control over the appropriation and expenditure of public funds.²⁴
- (ii) The difficulty is, however, that Governments irrespective of their political persuasion are unlikely to want, or perhaps even allow, this to happen, at least in the House of Representatives

²¹ In particular the provisions of the *Appropriation Act* (No 1) 2005 – 2006 (Cth), s 7(2) and the reference to “Departmental Expenditure” in s 3. See above n 21.

²² A good starting point was the understanding referred to in the footnote of the article cited above n 20.

²³ Submission to the Senate Standing Committee cited above n 14, sub-para 24(iii) at p 9.

²⁴ Article by the writer cited above n 18 at p 319. Reference was also made there in n 82, to the same view expressed by J Uhr, “Appropriations and the legislative process: Where do the Limits Lie – Combet v Commonwealth” (2006) 17 *Public Law Review* 173

- thus leaving such work to be done, if at all, by the Senate and its Committees
 - but that I think is a second best outcome because I have always believed that the House of Representatives should not abdicate its own role in this area even if it has not been willing to exercise it in recent times
- (iii) Finally, the failure to adopt the *first* proposal I advanced to enable the House of Representatives to become involved again in the subject of constitutional review, would represent a lost opportunity in charting our constitutional future