

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.