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

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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.