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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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31 Transcript of Evidence, p 1184.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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