

## **Personalities versus Structure: the Fragmentation of the Senate Committee System**

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I should like to thank my fellow members on this Committee for what I regard as the most impressive performance by a Senate committee in the time that I have been in this place ... This report is virtually unanimous. On only one point of substance was there a disagreement, and this did not follow party lines.

How positive this statement would have been had it been any chair's statement when presenting a series of Senate committee reports on the goods-and-services tax. In fact, it was a statement by the Chair of the then Senate Constitutional and Legal Affairs Committee, Senator James McClelland, on 15 October 1974. At that time, such unanimous reports constituted the norm for Senate committees—even though they were still in their infancy, were conducting inquiries during arguably the most controversial period in the history of the Australian Senate, and were dealing with highly-contentious policy questions, on which the respective parties had polarised positions.

The report in question was on the most far-reaching changes to matrimonial law that this country had ever seen: the Family Law Bill. But the same comment could have been made about committee reports into such diverse subjects as death duties, capital punishment, and a policy particularly beloved by the then government—a national compensation scheme. Later reports of the same order, about which similar remarks could have been made, included freedom of information legislation, plant variety rights and a series of foreign affairs matters.

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## **A snapshot of dissenting reports**

In preparing this paper, I sought statistics on the level of dissent reflected in Senate committee reports, excluding those that might be regarded as housekeeping or routine, for 1978—during the Fraser government, which held a majority in the Senate at the time; 1988, half-way into the near-decade of the Hawke government, and during the transition from the old parliament house to the new; and finally 1998—two years into the period of the Howard government.

In 1978, there were no minority or dissenting reports. In 1988, several dissenting reports were published. In most cases, however, the breakdown was not on party lines, and also included several addenda and reservations by individual senators or parties. In one case, a government senator dissented along with three opposition senators, while a further two involved opposition senators only. By 1998, in respect of the primary evaluative committees of the Senate, the Legislative and General Purpose Standing Committees, the trickle of dissent on each side had become a flood. It is difficult to find any report on any but the most anodyne of subjects that has not resulted in a splintering of views. This is especially true in respect of legislation referred to the committees. The reports, both government and non-government, tend to restate the policy of the respective parties, articulated well before the matters even reach the relevant committees, and rarely address the detailed provisions of the bills—much less suggest or recommend amendments.

## **Structure of Senate committees**

Many explanations of the increase in dissenting reports fall back on the excuse that the present structure of committees has led to a fragmentation of views. This structure derived from a recommendation of the Procedure Committee that the Legislative and General Purpose Committees should be divided into references and legislation committees, covering the range of Commonwealth activities, each with a core membership and sharing a common secretariat. The recommendation came into effect in 1994. References committees were established to continue the work, previously undertaken by the Legislative and General Purpose Committees, of dealing with general issues that the Senate, the committees themselves or interested parties considered worthy of examination. These committees are chaired by non-government senators with the chair having a casting vote, thus creating a non-government majority. Legislation committees, chaired by government senators with a casting vote and with an in-built government majority, were intended to examine legislation, through brisk inquiries, and to scrutinise the government through evaluation of annual reports and general supervision of government departments and authorities. In particular, these committees absorbed the function, previously performed by the estimates committees, which were abolished under the new proposal, of examining in detail proposed expenditure of government departments and authorities.

The restructuring had two main features:

- (1) a recognition of the significance of the non-government majority in the Senate through the appointment of non-government senators as chairs, and with a non-government majority of committee membership; and

- (2) a further recognition that the Senate's scrutiny of legislation had previously taken second place to its more general inquiries.

The establishment of legislation committees, together with a streamlined process for examining the majority of bills, was intended to fulfil a demonstrated need for 'out-of-chamber' examination of the provisions of bills, in order to accommodate the legislative overload that was particularly prevalent in the Senate at the time.

A subsidiary aim of the restructuring was to limit the number of select committees, which had proliferated to such an extent that they were draining both finance and resources from the more structured standing committee system. These select committees were invariably established to deal with highly contentious and 'coloured' inquiries and, in my view, were with honourable exceptions the genesis of the split inquiries that are now a feature of Senate committee proceedings.

Given the observations made at the beginning of this paper, it is difficult to imagine why this structure intrinsically should have led to the present state of affairs. Apart from the occasional select committee in earlier times, when a government was deliberately denied a majority and not infrequently an independent senator or a senator from a minor party was given the mediating role between entrenched government and opposition senators, most Senate committees were government controlled. It might be expected, therefore, that non-government senators would have had more need to find an outlet through the dissent mechanism. This simply did not occur then, for what must seem an obvious reason. It was clear that, if a government had too much say over the proceedings or the outcome of a committee inquiry, there was an appeal to a higher authority: the Senate plenum.

Yet this feature remains true in the present system—perhaps even more so. If an adventitious majority, whether of government or official Opposition, controls proceedings or suppresses information, there is a ready outlet within the Senate proper for a committee minority to publicise its concerns.

A further explanation for the increase in acrimony and dissent suggests that it is the volume of legislation being referred to committees, and the attendant intensity of political debate, that has led to contention and dissent. This, too, seems difficult to sustain, because in previous years it was mostly contentious legislation that was referred to committees, which managed their inquiries with a minimum of confrontation.

If, therefore, the structures are not to blame, are there any particular procedural constraints that have led to the profusion of split reports?

### **Time constraints on committee inquiries**

There is one, significant, procedural constraint on non-partisan committee deliberations: the dearth of time available to committees both to examine and to report on legislation. When the proposal that there be more systematic examination of legislation was first mooted in 1988, there was an understandable anxiety that the government's program should not be held up by extensive committee inquiries. This led to the establishment of a select committee that, in its report adopted by the Senate

in 1989, came up with a proposal for fast-tracking committee consideration of bills. This in turn resulted in the introduction of what came to be called the 'Friday committee' process. The intent was that a subject-specialist Legislative and General Purpose Committee would receive a bill from the Senate after in-principle agreement was signified by passage of the second reading, and that evidence be taken primarily from the minister responsible for its passage, accompanied by departmental officers familiar with the detailed provisions. In effect, the Legislative and General Purpose Committees were to be mini committees of the whole, performing a comparable function to committees examining estimates. In their early stages, this is what occurred.

The scheme also retained committees' normal powers to conduct more extensive inquiries, involving taking evidence from other witnesses and travelling, if required, throughout Australia. In practice, the committees created a 'hybrid' format, resulting in very fruitful inquiries, most often held in Canberra and not infrequently in a round-table format, taking evidence from not merely the minister and public servants, but from interested groups and persons with a specialised knowledge of the subject area. The committees also began to take evidence through video and teleconferencing facilities to enable maximum access for other interested parties.

This process continued successfully in the succeeding years, which also encompassed the committee restructuring referred to earlier. However, as the volume of legislation being referred to committees increased, so too did the strains involved in conducting a series of brief inquiries within a tight time-frame. The problems for the committees derived from the speed with which complex arrangements, and grasp of the topic, had to be arrived at. There has been little opportunity for committees to discuss and analyse evidence presented to them, leading almost inevitably to a restatement of already-known positions.

This problem has been recognised in informal discussions, and has been stated with admirable clarity by the Legal and Constitutional Legislation Committee in an interim report on two complex bills. The timetable given to the committee is instructive. A recommendation that the bills be referred to the committee was made by the Selection of Bills Committee, which consists of the whips of the various parties and the independent senators. This latter committee was created as the mechanism for streamlining and coordinating suggestions that bills be referred to committees. The Selection of Bills Committee's report recommending the referral was tabled on the afternoon of 24 March 1999. A hearing was proposed for Friday, 26 March, and the date for tabling the report was specified as 29 March.

In its interim report to the Senate on the day the report was due, tabled to meet the Senate's order to report, the Legal and Constitutional Legislation Committee advised that it did not proceed with the hearing. After giving what I regard as extremely cogent reasons as to why it could not conduct the reference in the time available, it suggested that 'the Senate, through the Selection of Bills Committee, reconsider the suggested hearing and reporting dates, and do so in consultation with the Legal and Constitutional Legislation Committee'. The committee sought, and was given, an extension of time to 19 April to report, and brought down the report on the due date. As a matter of rueful interest, the bills that were the subject of the inquiry were not dealt with before the Senate rose on 30 June. So much for artificial deadlines.

This account represents the norm, not the exception. Constantly committees are ordered to report within an absurd deadline only to find that both the report and the legislation about which the report is made languish in the nether regions of the Senate basement and the notice paper, respectively, until the legislation is hastily rushed through at the fag end of a sitting period. As the Legal and Constitutional Legislation Committee puts it, ‘... such short reporting deadlines do not inspire confidence in the fairness of Senate processes.’

However, this known procedural problem has an easy remedy. In addition to the sane suggestions made by the Legal and Constitutional Committee, a ‘civilised guillotine’ for consideration of bills in committees could be established, in the same way that proposals for programming Senate business through the use of a similar device might be developed. We can but hope that the very few Senate experiments with the civilised guillotine (also now known in the new managerialist jargon as ‘time management’) have proved so irresistibly successful that they might become the norm.

### **Personalities and the Senate**

While acknowledging the only structural difficulty leading to hasty reports, this still does not explain the proliferation of confrontationist inquiries and fragmented reports that are now so much a feature of Senate committee inquiries.

My own view is that the change can be laid at the feet of the personalities of rather too many of the senators who are at present responsible for the operations of the Senate and its committees. Some years ago, the then Leader of the Opposition, Senator the Honourable Fred Chaney, contrasted Senate behaviour with that of members of the House of Representatives. As he put it, the need to negotiate on matters, given the government’s failure to gain a majority in the Senate, leads to a climate of ‘enforced reasonableness’. Senators who were constantly abusive to senators representing other parties were, in those days, isolated by their peers, and were in the worst position to seek co-operation at another time. Even when debate in the chamber, notably at question time, was somewhat robust, this behaviour was rarely translated to out-of-chamber activities. There was an assumption that, even if matters were highly contentious—particularly when legislation was referred to committees—the confrontational element would be set aside, committee members would treat each other and witnesses with courtesy, and significant areas of commonality would be found. There were never any illusions about policy differences being the ultimate determinant of voting in the chamber. Nevertheless, it was assumed that provisions of legislation could be tested by evidence, suggestions for amendments incorporated within the main body of a report and provision made, even within the majority report, for dissent when agreement on particular areas simply could not be reached. The result was usually—dependent on whether haste was a determining factor—a useful analysis of the legislative proposal and majority—and most usually unanimous—recommendations included in the body of the report, with defined areas of dissent forming an integral but nonetheless small part of the report as tabled.

Now, however, it appears that every committee examining all but the most innocuous bills—which are rarely referred to committees—appears to work on the assumption

that there will be an 'us versus them' report. Government members appear to consider all legislation perfect, while opposition members consider every piece of legislation as hopeless or antithetical to the 'tablets of stone' policy positions established by their lower house counterparts.

On the rare occasions where a majority (government) report analyses a bill and makes constructive suggestions for amendments, this is still not good enough for the Opposition. Thus, a dissenting report will be produced, often of the same length as the majority report. In order to differentiate the 'product', much in the majority report is repackaged and there is always an earnest desire to go further than even some quite 'courageous'—in the Sir Humphrey-esque meaning—departures from the government party line. Add in participating membership of the Democrats, Greens and the occasional other independent senator. We find in any volume tabled in the Senate up to four or five reports that, while they state or reiterate party political attitudes, are devoid of detailed or constructive analyses of the legislation referred, and are not conducive to good legislative process.

In addition, the highly active nature of Senate committees and the unpredictability of outcomes in the Senate have kept the media's attention firmly focused on the work of Senate committees. It is possible that some senators have found the temptation irresistible to play to the media gallery in order to obtain greater coverage of their immediate party position or agenda, rather than to adopt the long-term strategy of working with their committee colleagues on an effective solution to problems with legislation identified during an inquiry.

The perfect illustration of my concern is represented by the GST reports to which I referred earlier. Despite considerable protest from the Howard government, the Senate after the October 1998 elections made it clear that the massive tax package, which was guillotined through the House of Representatives soon after the parliament commenced, should be scrutinised by the Senate's committee system. As a result, the government was forced reluctantly into a compromise arrangement whereby various parts of the package were referred to three Senate references committees: Community Affairs; Environment, Communications, Information Technology and the Arts; and Employment, Workplace Relations, Small Business and Education. An over-arching select committee was also established, which the Senate ordered to produce a report on the general terms of reference and then to evaluate findings of the other committees. In addition, this select committee reported on further bills that the government had added to its tax package some months after its passage through the House of Representatives.

It may be observed that all the legislation was referred, not to the Senate legislation committees, on which the government had a majority, but to the references committees, with their non-government majority. (The select committee, too, was constituted by a non-government majority, with the Chair of the committee being the Deputy Leader of the Opposition.) This continued what I regard as an unhealthy trend that developed early in the life of the Howard government. While most bills are still sent to legislation committees, 'big picture' bills have been sent to references committees on the pretext of enabling full inquiries, not constrained by the perceived limitations of sending bills to legislation committees. In fact, contentious bills such as the Telstra Privatisation Bill and major proposals for changes to industrial laws have

been referred to references committees primarily because they have had a non-government majority.

Experience on some committees has justified non-government senators' mistrust of government senators 'shutting down' inquiries at the behest of their ministerial masters. Conversely, government senators have been justifiably fearful of opposition senators marching to the beat of their own drum, without regard to the rights and duties of their government and small-party colleagues. Whatever the reasons, the atmosphere of mistrust and potential confrontation, demonstrated by the over-riding of the well-established practice of referring bills to legislation committees, has illustrated the problems that I believe have beset Senate operations in recent times.

Nowhere was this more obvious than during the proceedings of the GST committees. After some of the most acrimonious confrontations ever experienced, affecting committee members, witnesses, consultants and certain committee staff, the committees all managed to report. Surprisingly, all met the Senate deadline. Less surprisingly, all reports consisted of majority and dissenting reports. The select committee probably set all records for amazing reporting structures—its three reports, spread over a two-month period, included virtually all the combinations of reports, dissents, findings, addenda, and conclusions that only the most fertile procedural mind could devise.

The unfortunate consequence of the intransigence of most of the participants in the inquiries was that it became ridiculously easy for the government and its supporters to trumpet 'I told you so' and declare the futility and waste of time and resources involved in the production of the reports. Indeed, the government would have been able to ignore them in their entirety if it were not for one factor: the series of Democrats' reports ultimately became the basis of the discussions with government and of the negotiated settlement required for the passage of the tax legislation.

That the government had treated the committee reports with disdain became obvious during the negotiations: it was clear that no-one had addressed either the content of the Democrats' reports or the amendments flowing from them. Thus the freneticism and haste that resulted from their being ignored between the tabling of the reports in February, March and April and the in-principle agreement that found ultimate expression in the successful legislative package late in June.

## **Conclusion**

For all the futility of the reporting process, and despite the acrimonious and politicised hearings, the references of the tax package to various Senate committees turned out to be vital, for the most important reason of all: the quality of the evidence given. Senators with a commitment to gaining benefit from the process used the hearings intelligently to shape their views and ultimately their voting decisions, and also used the evidence to formulate their own legislative proposals. The more sophisticated economic and political commentators drew heavily on the evidence to inform their readers, viewers and listeners. In particular, as mentioned, the Democrats used the committee process to formulate and refine their views. They created all their substantial amendments after the committees had deliberated and reported, and circulated them in the Senate during the taxation package debate. The Senate had

considered several by the time the Democrats reached agreement with the government, and many were incorporated into the legislation as finally passed by the Senate and the House of Representatives.

So, despite the confrontational and oppositionist nature of much of the Senate committee process, good outcomes can result. Confrontation makes life easy. The individual member of a parliamentary committee does not have to think; does not have to worry about the consequences of diverging, however inadvertently, from the party line; and does not have to become involved in an understanding of detailed provisions of legislation and the time-consuming negotiation of a desired outcome. One can but hope that those members of committees who have intentionally dealt themselves out of the constructive committee process might in the foreseeable future come to realise that a return to the culture of enforced reasonableness, which for so long was the hallmark of the Senate, can be both productive and rewarding.