COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

FINANCE AND PUBLIC ADMINISTRATION LEGISLATION COMMITTEE

Reference: Charter of Political Honesty Bill 2000, Electoral Amendment (Political Honesty) Bill 2000, Government Advertising (Objectivity, Fairness and Accountability) Bill 2000 and Auditor of Parliamentary Allowances and Entitlements Bill 2000 [No. 2]

FRIDAY, 6 APRIL 2001

CANBERRA

BY AUTHORITY OF THE SENATE

WITNESSES

SENATE

FINANCE AND PUBLIC ADMINISTRATION LEGISLATION COMMITTEE

Friday, 6 April 2001

Members: Senator Mason *(Chair)*, Senator Murray *(Deputy Chair)*, Senators Brandis, Conroy, Lightfoot and Ray

Participating members: Senators Abetz, Brown, Chapman, Coonan, Crane, Eggleston, Faulkner, Ferguson, Ferris, Gibson, Harradine, Harris, Hogg, Knowles, Lundy, McGauran, Payne, Ridgeway, Tchen, Tierney and Watson

Senators in attendance: Senators Brandis, Mason, Murray and Ray

Terms of reference for the inquiry:

Charter of Political Honesty Bill 2000, Electoral Amendment (Political Honesty) Bill 2000, Government Advertising (Objectivity, Fairness and Accountability) Bill 2000 and Auditor of Parliamentary Allowances and Entitlements Bill 2000 [No. 2]

Committee met at 8.35 a.m.

EVANS, Mr Harry, Clerk of the Senate, Department of the Senate

CHAIR—I declare open the first public hearing of the Finance and Public Administration Legislation Committee inquiry into the political honesty and accountability bills. I welcome my Senate colleagues and witnesses here this morning. The Senate has referred the following bills to the committee for inquiry and report by 24 May 2001: the Charter of Political Honesty Bill 2000, Electoral Amendment (Political Honesty) Bill 2000, Auditor of Parliamentary Allowances and Entitlements Bill 2000, and Government Advertising (Objectivity, Fairness and Accountability) Bill 2000. Before we commence, I wish to advise for the record that all witnesses appearing before the committee are protected by parliamentary privilege with respect to evidence provided. I welcome Mr Evans. Do you wish to make an opening statement before I ask my colleagues if they have any questions?

Mr Evans—I have set out in the written submission my comments on the four bills which are before you. I apologise again for seeming to be so negative about these pieces of proposed legislation but three of the four bills before you do have very serious defects. It would not be advisable to pass them in their current form. I have set out the defects in the submission. I do not believe the defects can be cured by way of amendment to the bills. I think the policy of the bills and the way in which it is carried out has to be rethought. It is an area where, if the parliament is going to legislate, it has to legislate very carefully and after close consideration.

There are two traps into which we can fall in this area of ethics regulation. The first is prescribing rules of insufficient precision—vague, imprecise rules and what are usually called motherhood statements—and then attempting to enforce them, with a great deal of room for dispute about their meaning and application. The second trap is to appoint some person or body as an ethics policeperson, with no proper opportunity for review of their decisions, and putting such a person—whom I referred to in the submissions as an 'inquisitor-general'—in the position of being able to say that member X did wrong or is guilty and therefore imposing a heavy political penalty on that member, with no opportunity to correct defects and wrong

decisions in the process. The combination of those two things would be quite disastrous, in my view.

When you come to put those two policies into effect, there are other problems with the bills, which I have set out in the submission. I am sure before the hearing is over someone will ask me what I would do as an alternative to these sorts of schemes. If someone wants to ask me that question I would be glad to deal with it.

CHAIR—Thank you, Mr Evans.

Senator MURRAY—I am grateful for your honesty in, as usual, not showing fear or favour. The issue that faces us before we even deal with the bills is a fundamental one: is the practice of politics in the areas addressed by the bills satisfactory at present? If it is not, what can be done about it? If these bills are an attempt to deal with the answer that it is not satisfactory, and the bills themselves do not provide a suitable solution, the question is: what other things should be done about it?

Mr Evans—I do not think you can overcome all of the problems connected with the current public perception of members of parliament. There is a certain amount of cynicism out in the public area which results from all sorts of factors, and I do not think that you can overcome all of it. There is a public perception that members of parliament are overpaid, and I do not think anything should be done about that perception, except to do the best you can to correct it. But there is a problem with ethical conduct, and you can deal with that problem by very careful prescription and by providing mechanisms for overcoming the problem, but these bills are not the solution.

Senator MURRAY—Take, for instance, government advertising. Prior to the coalition becoming the government—when they were the opposition—they complained about the advertising of the government of the day; this opposition complains about the advertising of the government of this day; and we agree in both circumstances that the constraints were insufficient. The Auditor-General has come up with some guidelines; and both the opposition and the Democrats have tried to turn that into a legislated mechanism. You have made the point that it is still very difficult to organise and coordinate, but it is an issue of propriety, ethics and accountability, and, if you want to be absolutely virtuous as politicians, of the expenditure of taxpayer's money in a very substantial manner—hundreds of millions of dollars. Surely we are obliged to try and find a way, even if imperfect, to restrain the desire of any government to get some political advantage out of its control over advertising?

Mr Evans—Yes, I would agree with that. I do not think it is an area for legislation and criminal sanction, as one of the bills before you attempts. I think it is an area where you rely on some independent body to suggest guidelines and then to test whether those guidelines are adhered to via the political process, but the guidelines have to be fairly precise. For example, if an advertising campaign is to advertise a government program, the guidelines could say that there are to be no photographs of ministers or prime ministers; there are to be no signatures of ministers or prime ministers at the bottom of the advertisement; and it will be an advertisement setting out the features of that government program. You could frame fairly precise requirements like that and it would be fairly obvious whether there has been a breach of them.

Senator MURRAY—The problem for us, with an answer like that, is that two political parties in the process have come up with a view as to how to deal with things based on a common assessment by the Auditor-General, in turn responding to legitimate and strongly emphasised concern about accountability for public moneys. The problem with your answer is

that we are not guided sufficiently as to how to address it. In your submission, you spoke about the possibility of joint house codes of conduct on government advertising, and those have merit—conventions and codes have applied always—but the opposition have charged that this government this time have, in fact, gone beyond what was conventional practice in the past. Whether or not that is true, there is a perception that these amounts of money need to be managed more carefully in transmission than they are at present.

Mr Evans—I think there are two different questions involved here. The first one is whether too much money is being spent on promoting a program. I suppose you could say that the quantity of money is related to the political aim of promoting the program. In other words, the government is spending huge amounts of money because its political fate depends on this program being well received. I do not know that there is any solution to that, other than the normal political process of people pointing out that a huge amount of money is being spent on this program. I do not know that there is any solution to that wing of the problem.

The other problem is the form of the advertising and the advertising being used, in fact, to promote the political party which is in government, as distinct from promoting the program. As I said, you could formulate fairly precise rules to try to cut that back. If you have an advertisement saying that this is what the new program is giving you, the citizen, even if it does not have photographs of ministers and signatures of prime ministers at the bottom and so on, you can still say it is promoting the political fortunes of the party in power. I do not know that you can totally avoid that.

Senator MURRAY—The nub of the difference between the two bills addressing this issue is that the Labor bill says, 'Delay adjudication on this matter until it is taken to a court and let the court decide whether people have behaved improperly.' The Democrat view is that it is an immediate political issue which needs to be dealt with at an administrative level so that people can be advised if an advertisement breaches a set of guidelines, a code of conduct, or whatever. That means that a difficult political judgment will have to be made by non-political people, and it might put them in a difficult position.

Mr Evans—Indeed, yes.

Senator MURRAY—That is a danger, and I recognise it is a danger. The alternative approach of the Labor Party might mean that the issue is never dealt with, or is dealt with so much later that it is not an impediment to behaviour which is improper. There is a three-year parliamentary cycle, but courts seem to have a five-year or seven-year cycle on these kinds of issues. I recognise the weaknesses of both mechanisms. Where do you fall, though? Do you fall on the immediate judgment by some body—and by 'body' I do not mean person, I mean group—that something falls outside the guidelines, or do you incline towards the court area?

Mr Evans—As I said, I certainly do not think it is an area for criminal sanction and prosecution in the courts. But I see no difficulty in principle with the notion of having some independent body which sets out fairly precise guidelines and is then able to 'adjudicate' on alleged breaches of the guidelines on the spot, as it were, and to issue some sort of finding—for example, that this advertisement breaches the guidelines because it has a photograph of a minister attached to it, or something like that. I see no difficulty, in principle, with that sort of arrangement provided, as I said, that the guidelines are fairly precise and enforceable. When I say 'enforceable', I mean able to be fairly clearly interpreted in a particular situation, and provided that the body set up to do this is appropriate. As I said, I do not think the combination of the Ombudsman and the Auditor-General is the appropriate way to go. You

would have some sort of government advertising tribunal or something like that—a separately constituted body.

Senator MURRAY—Would you consider a political body appropriate—a committee like the privileges committee, a cross-party committee? Or do you think that that is impossible because the persons concerned will have a political edge?

Mr Evans—It is difficult. I would always prefer to try the route of self-regulation before going down the route of external regulation. In the area of advertising, I see merit in having some independent body outside because they are pronouncing on the activities of government as a whole, as distinct from the activities of the parliamentary sphere. A parliamentary committee really appropriately can only be looking at what goes on in the parliamentary sphere; with this body it would be looking at the activities of government as a whole. I see merit in having some independent body outside the political system there.

Senator MURRAY—Mr Chairman, I think I will leave the probing of my own bills to my colleagues. I do not think it is proper for me to indulge in that.

CHAIR—You were doing such a good job, Senator Murray!

Senator ROBERT RAY—Thank you for your submission, Mr Evans. In the last 20 years, how many private members' bills, having successfully negotiated the Senate, have become law?

Mr Evans—Since 1901, I think there is a total of eight.

Senator ROBERT RAY—Would I be right in suggesting there would only be one in the last 20 years—a minor electoral bill?

Mr Evans—I think there might have been two or three over that period, but the number is very small. They are listed in the back of that excellent publication, Odgers's *Australian Senate Practice*.

Senator ROBERT RAY—They certainly do not take up a page, do they?

Mr Evans—No.

Senator ROBERT RAY—You talk about defects in these four bills—and I concede that there are—but is this not just a reflection of the lack of resources available to Senator Murray and Senator Faulkner and, indeed, able to therefore give your staff a comprehensive range of instructions that would reflect the bill without defects?

Mr Evans—As I said at the start of my remarks, I think there are defects with the policy of the bills. Having an independent adjudicator to determine whether a member of parliament has behaved improperly is a problem in the policy of the bill.

Senator ROBERT RAY—Would you think a better term, rather than auditor of parliamentary entitlements, was inspector-general, a la the way an inspector-general is regarded in the Department of Defence or the Inspector-General of Intelligence and Security?

Mr Evans—I do not see the problem with the title; inspector-general sounds a bit more formidable than auditor does.

Senator ROBERT RAY—With respect, it is someone who responds directly to complaints about what has happened, rather than being an initiator.

Mr Evans—Yes, I see that point. It does have that connotation. The problem I see is in how the complaints are responded to and dealt with.

Senator ROBERT RAY—Do you know how complaints are responded to at the moment?

Mr Evans—If they fall into the area of illegality, someone tries to stir up the legal system, I suppose.

Senator ROBERT RAY—There is pretty firm evidence coming out of the estimates process about the protocols that DOFA's internal fraud unit looks at it, then it goes to a committee to determine whether it is referred to the Federal Police. It is a pretty good protocol, I might add, but in the major instance that it was used—that is, the Reith matter—politicians pre-empted the process and had the matter referred to the Federal Police before the committee had finalised its deliberations and gone through all its proper processes. I just see there is a weakness there if what is a pretty good set of protocols brought down by Senator Minchin is not abided by.

Mr Evans—When I said, 'Someone tries to stir up the legal system,' I was thinking of complaints coming from citizens, outsiders.

CHAIR—That would go through this process.

Mr Evans—Yes. They would stir the Department of Finance and Administration to start with. Where conduct is alleged to be in breach of the law and criminal, I think that is a perfectly satisfactory process.

Senator ROBERT RAY—The trend in this legislation to say, 'Let's give the Ombudsman this job' or 'Let's give the Auditor-General this job', which is outside their prescribed duties at the moment, is a trend that I personally very much oppose. I want to know what your views are on involving these people who already have a job to do, who suddenly are to be given another job.

Mr Evans—That is one of the problems that I see with one of the bills, namely the inappropriateness of combining those sorts of officers' distinctive functions with some new and unrelated function. I have devoted a paragraph to that problem of the bill. I think that is a serious problem.

Senator ROBERT RAY—Would you see a more serious problem in the future in that the processes for appointing the Ombudsman and the Australian Electoral Commissioner are totally secretive processes which not even the estimates committees seem able to probe? I acknowledge that the Auditor-General appointment goes to the public accounts committee for consultation, but the other two are shrouded in secrecy. If you start giving them overtly political jobs, what is to say that a government of the day, of whatever colour, will not start to try to incrementally put their stooges into these positions to protect themselves?

Mr Evans—That would be a serious danger of the sorts of arrangements that are proposed. Once you give some officer the power to declare whether a member of parliament has acted improperly, there would be a serious danger of someone trying to get the right person 'into the job'.

Senator ROBERT RAY—I have just found that you cannot probe it. We asked questions in relation to a particular appointment as to who was highly recommended, who was recommended, who was not recommended, alleging at the time that the one out of seven not recommended got the job. I do not want to go over that ground again, but I do not think there is a mechanism available to the parliament to probe appointments of auditors-general, ombudsmen, electoral commissioners, inspectors-general, et cetera.

Mr Evans—I think that is a defect of our current system in relation to all sorts of office holders and, if you were to devise a scheme involving a new independent office holder, you would try to avoid that by having some sort of formal parliamentary process involved in the appointment.

Senator ROBERT RAY—I think you can acknowledge though, just to be fair—at least I will—that virtually all governments have not tampered with the Ombudsman, the Auditor-General and the Electoral Commissioner as a matter of historical record over the last 30 or 40 years, to my knowledge. They have basically been seen to be independent people.

Mr Evans—That would appear to be so, yes.

Senator ROBERT RAY—On the question of a code of conduct, there was a committee here that looked at all this back in the mid-1990s. It had 17 meetings. I was appointed to go to the first one and when I saw Ian Sinclair and the rest of the boys there, I did not go back. You mentioned that you either have a very prescriptive set of rules which are very hard to determine, or you have what you called motherhood rules which anyone can misinterpret and have litigation on, et cetera. Is there a solution to this looking at what the US Congress and the House of Commons have done? Every week I seem to read about a new scandal in the House of Commons. I do not know whether that is because they have got the procedures to expose it, or simply that the code of conduct does not work.

Mr Evans—I can only say that I fall on the side of prescription being as precise as possible. There is a tendency to try to steer away from having 'thou shalt not' type prescription, but I think that is necessary in this area. You have to say what kind of conduct is not acceptable. There is a tendency for people to frame these things in the positive and to say 'members will be honest' instead of saying 'members will not be dishonest', and setting out what you mean by dishonesty. I think in this area 'thou shalt not' is unavoidable. You have to try to make the rules as precise as possible. If you find that they do not catch some sorts of conduct which you think ought to be caught, you have to fix them up in the future. I do not think vague and general statements such as 'members will be honest in their dealings' and so on are very helpful, particularly when you combine them with some enforcement mechanism whereby some, as I have put it, inquisitor-general, is going to say whether a member has breached such a guideline.

Senator ROBERT RAY—Even if it were possible to get tablets of 'thou shalt nots' handed down to us, the question then is: who judges?

Mr Evans—Yes, indeed. I do not know whether you want me to indicate—

Senator ROBERT RAY—Yes.

Mr Evans—There is value in having some independent person look at complaints and advise on issues arising under the code of conduct, or whatever it is, but I think it would be preferable and safer to go down the road of self-regulation, at least initially, by way of a committee to look at complaints, to look at the advice of the independent adviser on the complaints and to make a determination after all due consideration. That would be the preferable way to go.

You have two models in the world, in effect: there is the United Kingdom model of the inquisitor general, and that has caused a good deal of trouble in recent times, with members saying that the determinations are simply wrong and that the commissioner of standards has simply misunderstood the evidence, but the findings of that person are at least subject to re-

view by the relevant committee; and you have the Congressional model of internal self-regulation—peer review, if you like—by an ethics committee. I would prefer that model.

Senator ROBERT RAY—Yes, but of all the rorts that were in the US Congress, 90 per cent of them were given up in January and February 1989 in a trade-off for a pay rise, rather than for anything that that ethics committee did in its whole life.

Mr Evans—I am probably not as familiar with the history of it as—

Senator ROBERT RAY—I was in Washington that week; that is why I remember it.

Mr Evans—Certainly, those two parliaments that I have mentioned and others have had much greater problems than this parliament has had. They have had conduct of an outrageous kind that we have not seen here. I think that should be said.

Senator ROBERT RAY—You mentioned the type of advertising. One of the issues I have raised is the spending of $648,000 on floodlit freeway signs that simply said 'tax reform coming soon'. I think that is what Senator Murray and Senator Faulkner are particularly incensed about; that is, the distinction between information and advertising. We know the middle part is blurred—no question—but at the extremes it simply becomes a political campaign. I am not saying that it has happened only under coalition governments, but the quantum is changing year by year, and that must be of concern to all political parties into the future. It basically is making incumbency a major factor in our democracy.

Mr Evans—I would have to agree with that. With the sort of advertising you mentioned, there is a question of its effectiveness as advertising—does it tell anybody anything about the new government program?—and that is the sort of thing on which an independent advertising assessor could make a finding.

Senator ROBERT RAY—In conclusion, thank you for your very thoughtful submission. I know you did not even have to put one in if you did not want to, but, as always, you have had a lash, and it is great.

Mr Evans—Thank you, Senator.

Senator BRANDIS—I am particularly interested in the Electoral Amendment (Political Honesty) Bill 2000 and I want to direct a few questions to you—have you got your submission there?

Mr Evans—Yes.

Senator BRANDIS—I refer especially to the observation you make at the very foot of the first page of your submission:

> The questions of whether an advertisement purports to be a statement of fact and whether it is incorrect or misleading to a material extent are questions of a kind which the courts are equipped and accustomed to ascertain. They are not different in principle from similar questions which courts are required to determine under other laws.

I agree with that. But what troubles me most about the proposed amendment to the Commonwealth Electoral Act is that the sorts of statements to which the provision will attach will be statements made in the course of an election campaign. I put to you the proposition that it is just fanciful to imagine that a court, in the course of a two or three week election campaign, is in a position to make determinations on disputed facts, including conceptual issues like whether or not something is a fact. That is just not the way the courts work. An ordinary case, for example, in the Federal Court under section 52 of the Trade Practices Act from go to whoa takes about three years. The process might, in theory, be almost a Rolls

Royce process for determining the truth or the untruthfulness of a purported fact. But to invoke the process in the space of an election campaign is just beyond its capacity. Can I put that to you and invite your response?

Mr Evans—I do not think the courts would determine it in the course of an election campaign. I do not think the courts would attempt to determine it in the course of an election campaign. As I understand the bill, it is not aimed at getting a decision within the course of the election campaign. It would, in effect, be aimed at future election campaigns. You would get a determination of the court that certain types of advertisements are in breach of that provision and that would be guidance for future campaigns, as I understand it. But you are quite right; by adopting the legal process, you necessarily adopt the length of time that it takes.

Senator BRANDIS—There is another issue too. If you are looking at a full trial of the issues and an orthodox proceeding that will take at the minimum many months, is there not a lack of utility, as the mischief that this would be directed to would have occurred already during the course of the campaign?

Mr Evans—The answer is yes. You could not correct it during the course of the campaign. By adopting the criminal prosecution mode, you would necessarily build into it the time that it would take. It would only be useful for future campaigns, not the current one.

Senator BRANDIS—But what precedent value would it be for future campaigns, when the one thing we all know is that the kind of statements made in elections depend on the issues in those elections and that those always change from election to election?

Mr Evans—That is certainly true. That would be a difficulty. I suppose, comparing it with the Trade Practices Act—and firms are always looking out for ways to cunningly advertise—over a long period, you get a body of case law built up which gradually restricts the sort of evil that you are trying to restrict. You would be doing the same here.

Senator BRANDIS—Mr Evans, are you familiar with the fact that there is a body of case law, under our law and under English law, largely in the law of defamation, which essentially says that courts will not issue injunctions to restrain alleged defamations because they value freedom of speech more highly than the right of an aggrieved plaintiff to impose limitations on a defendant's speech. A court, after a full trial, might award damages in a proper case but it will never issue an injunction to restrain speech.

Mr Evans—Yes.

Senator BRANDIS—Why shouldn't the same apply here?

Mr Evans—It probably would.

Senator BRANDIS—Thank you.

Senator ROBERT RAY—There was something that Senator Brandis overlooked in his injunction example: he did not factor in a week for shopping for the right federal judge, so it is even worse, isn't it?

Senator BRANDIS—My own professional experience, which was in the Federal Court and had a lot to do with section 52 of the Trade Practices Act, tells me that for a very urgent case, the Federal Court can respond quite quickly. In a suitable case—a very pressing urgency—you could get a judge to hear it even on a few hours notice.

Senator ROBERT RAY—Yes, but each political party would be trying to target a particular judge.

Senator BRANDIS—That would not happen in the Federal Court because the procedure is that for an urgent application one must approach the registrar of the court in that state, not the judge.

Senator ROBERT RAY—Yes, but the timing of approaching the registrar is based on your knowledge of who may be available, so you delay it a week or you bring it forward, et cetera.

Senator BRANDIS—I cannot exclude the possibility that there could be forum shopping, but there are protections in the system.

Senator ROBERT RAY—It is another complication.

Senator BRANDIS—It is, I agree, but I do not think it is a major factor.

Mr Evans—If this bill were passed and you enacted the provision empowering the Federal Court to order the withdrawal of an advertisement, you would probably find that the Federal Court was very restrained in using that power. That is one thing you would have to accept as part of the legislation.

Senator BRANDIS—There is another consideration, and it goes back to the point we were discussing before about utility or lack of utility: when you were talking about the courts ordering people to do an act, as opposed to pay money and damages, you were talking about invoking the equitable jurisdiction of a court. One of the principles upon which that is always exercised is that courts will not make declarations or issue injunctions that have no utility. I cannot, for the life of me, see a court, months after an election campaign, making any declaratory orders about an electoral advertisement in a campaign that has gone by.

Mr Evans—That is a situation you would have to accept as part of this legislation. You would have to clarify whether the intention of the legislation is to stop something in the course of a campaign, or to build up a body of law which would gradually apply in the future.

Senator BRANDIS—That is the other problem. Let us say the legislation did have bite so that you could persuade a court to issue an interlocutory injunction during the course of an election campaign. The opposite set of considerations then apply, don't they? That is, how suitable is a court during an election campaign, on a preliminary view of the facts only, to restrain public discussion of an issue? Is not the political process itself, in which the various political parties intensely scrutinise each other's claims, a much more adaptable and suitable process for eliciting the truth and exposing falsehood?

Mr Evans—In this whole area, we should not lose faith in the ordinary political process.

Senator BRANDIS—Quite.

Mr Evans—At the end of the day, if you enacted this kind of legislation, avoiding the defects that I mentioned, you would be relying on the ordinary political process, anyway. If you had an independent person who was going to say that this advertisement breached the guidelines, that would have effect only if it became part of the political process after that stage.

Senator ROBERT RAY—In the meantime, we are expecting an Australian electoral commissioner to have the ability to judge whether or not something is factually correct—to be all-knowing—before any of this process is triggered.

Mr Evans—Yes, indeed.

Senator ROBERT RAY—It is a bit like papal infallibility, all of a sudden. When we elect an Australian electoral commissioner, he suddenly takes on all sorts of qualities that none of the rest of us has.

Mr Evans—That is a problem with setting up an independent adjudicator to perform this sort of task.

CHAIR—In relation to the Auditor of Parliamentary Allowances and Entitlements Bill, you mentioned the problem of combining advice and inquisition and that the auditor would have both those powers. You say in your submission that, potentially, someone may seek advice on a particular aspect and then later there could be inquiry into it. Could you expand on what you see as the potential conflict?

Mr Evans—There is a built-in conflict in combining the two roles. If a member goes to the auditor and gets advice on a particular course of conduct, and the auditor gives advice that the conduct is acceptable under whatever guidelines they are operating, but then subsequently somebody raises a complaint, that immediately puts the auditor in a very difficult situation. The auditor is being asked, in effect, to overturn his or her original advice, and that is a very awkward position in which to put a supposedly independent person. But if the auditor upholds the complaint, the member might then say, 'I had this cleared by the auditor; the auditor obviously does not know what he or she is doing.'

CHAIR—The defence of the parliamentarian is, 'I followed your advice.'

Mr Evans—Yes, but on the other hand, if the auditor comes out and says that the complaint is not sustained, the complainant says, 'That's probably because he had already advised the member that it was okay.' There is that built-in conflict of roles which would be unfortunate and very difficult for the person performing the task.

Senator ROBERT RAY—The problem that we have at the moment is that we have rulings from the Remuneration Tribunal and interpretations by DOFA; procedural rules by DOFA in some cases, but not others; a massive reluctance to offer written advice when you actually ring to seek advice—and that caution is not something I complain about, but just note—and, within all that complication, it is very hard to have guidance for a member. I understand your point about the conflict between basically a prosecutor and an adviser, and I think certainly Senator Faulkner would take that on board as well because it is a very valid point.

Senator MURRAY—By making the remark I concur with the validity of your observation of the dangers, but I would make the remark that auditors in the normal course of events do exactly that. They inquire into issues; they come to a judgment; quite often they give advice and quite often that judgment, the advice and, indeed, the method of inquiry, can be subject to complaint. That happens with our own Auditor-General, and I speak from the perspective of the JCPAA. I think these conflicts are inherent in quite a lot of our current activities. I do not think my remark invalidates the observation made by Senator Ray and agreed by you, but the fact is that we do cope with it within existing institutions at present.

Mr Evans—But I think the proposed legislation would enact it in a starker and more difficult form than you have, for example, with an auditor. Senator Ray's comments remind me of another point I was going to make. I have mentioned what sort of model I would favour, and that model would be precise rules, as precise as they can be, and ultimate adjudication by a committee with the advice of an independent adviser. But there would be

some value also in simply collecting together all the rules which exist at the moment. You have statutory provisions; there are provisions in the Crimes Act about bribery of members of parliament; you have parliamentary prescriptions and one of the Senate's privilege resolutions has a rule about members accepting considerations in return for performing their parliamentary duties. There would be some value in simply getting all those things together and putting them in a convenient form for members to look at. You would then be able to consider what gaps there are in the code that we have already.

Senator ROBERT RAY—Who would be the person best placed to do all that?

Mr Evans—I am not volunteering!

Senator ROBERT RAY—Drat!

Mr Evans—If the committee thought that that would be a worthwhile exercise, certainly the Senate department could perform that exercise of tracking down and gathering together the rules as they exist at the moment.

Senator MURRAY—That is not a bad offer.

CHAIR—AS there are no further questions, Mr Evans, thank you so much again for your assistance and your submission and for taking the time to be with us this morning. On behalf of my colleagues, thank you very much.

[9.19 a.m.]

UHR, Dr John Gregory (Private capacity)

CHAIR—Welcome. Do you wish to make an opening statement before I invite my colleagues to ask you some questions?

Dr Uhr—Very briefly, looking at the package of bills as a package—I know they were not designed as a package, but just responding to them as somebody outside the system—what is encouraging is that parliament is attempting to plug the gap. John Howard, as Prime Minister, has taken responsibility to try and publicly articulate a code, a set of standards relevant to his ministry, and you as legislators have taken responsibility to establish statements of values and codes for your employees—those staff in this room and the Public Service generally—and the bills are trying to actually cover some of the important ground in between ministers and public servants. I think that is an important gap that ought to be plugged.

Secondly, the focus of the legislation generally speaking—the spirit that lies behind it—is to try and establish mechanisms to set standards that are publicly credible. This has been demonstrated by some of the comments that we have just heard, for example, from Senator Ray, about the wide range of standard setting and rule making bodies in relation to parliamentary allowances and so on. Part of the difficulty there, I think, is that those of us on the outside looking in—citizens who simply contribute taxes—cross our fingers and hope for the best. It is nice to see that parliament is now trying to come out from behind the bushes and establish a publicly credible mechanism to set the right standards and then, of course, to devise the right sets of rules.

Thirdly, what is encouraging is a kind of useful modesty—that the bills in part simply try and reinforce mechanisms for impartiality; they do not reach too high in the name of grand ethics, and I think that is all to be encouraged. Auditors, honesty—that sets the right tone. There is a risk, which I will come to in a minute.

What is discouraging about the package? I acknowledge that it is not designed as a package, but what might be discouraging? The two ALP bills, if I can call them that, might be unduly modest—despite the praise that I have just given for the tone—to the extent that ministers escape any regulatory loops that are being established here. I think that would be a shame, because I think there is a responsibility and an opportunity for parliament to come forward and, as the elected forum for the community, to establish standards that ministers can live up to, and not just leave that to the Prime Minister of the day.

With the two Democrat bills—if I can briefly comment upon those—the discouraging part there might be that they are too ambitious, trying to do too much. I am thinking of one of the bills in particular, which deals with four issues. There is a kind of risk of congestion and it may be that each of the component parts, valuable in its own right, does not get full value once they are rolled into one particular bill. I am thinking of the second bill, the charter.

If I were in your position, how would I try and take the issue forward? I would be trying to just reinforce public accountability wherever you can in relation to the decision making that you are involved in, in relation to the decision making that your ministerial colleagues are involved in, and in relation to the supervisors who monitor those sorts of processes. At its best, this is an opportunity to try and establish new bridges of accountability. What I would be trying to avoid, if I were in your position, is a kind of risk of ethical overreach. There is a kind of dangerous enthusiasm out there to try and purify politics of not just the rough edges but the

kind of rotten core in the middle. There are holy rollers and others who will come in—maybe before you today—and talk up ethics and talk up ethical tsars who can come in and monitor you at the taxpayers' expense. I suggest that you focus on accountability and the ethics of accountability rather than ethics as such. The risk, I fear, is that any public authority established with a kind of charter to purify politics will not deliver the goods and that will just deepen public cynicism and we would be worse off.

CHAIR—Thank you, Dr Uhr.

Senator ROBERT RAY—I note from your background, Dr Uhr, that you have followed events over here fairly carefully. I want to put this proposition to you about parliamentary ethics, especially to do with entitlements, and I will ask you to comment. The greatest advance in this area is transparency followed by scrutiny. What we have seen in the last four years is a far more transparent exposure of what everyone has been entitled to and then proper scrutiny of that. Once that has occurred, any particular area has tended to disappear instantaneously. Let me cite travel allowance and abuse of travel allowance. I cannot remember an accusation in the last three years of a misuse of travel allowance by anyone. I think the last one was Ms Hanson, who went down to Melbourne and then claimed in Canberra. This situation has arisen because every claim is published—the location, the date, everything.

Once you put that out in the public arena, no politician is going to think about cheating on it—at least, that is what I think—because they also know that once the list comes out people like me and probably Senator Brandis will go through it just to make sure no-one is cheating on it. If we extended that transparency to every other entitlement that an MP gets—and let us face it, everyone knows our salary—and if we extended it to the charter and those other areas, the whole public could know what was being claimed. You probably would not need auditors and inspectors-general chasing around, because it would be transparent and thereby scrutinised. I ask for your response on that point.

Dr Uhr—There are two issues that are being made transparent: one is the compliance that public officials might have with a range of entitlements and the other is the transparency of the process to establish those entitlements. To my mind, in relation to the second part—the transparency of the process of establishing the various categories of entitlements—there is much more that can be done in the same vein to encourage trust and credibility in the process. But you are certainly right in relation to the former; the use and abuse of those processes and entitlements is regulated by the fact that there is an opportunity for people to take note and watch. One thing that is not captured in the bills, and I would not want it to be captured, is the important role of the media in taking note of that material when it comes into the public domain. For those of us on the outside, ordinary citizens paying our taxes, in a way the media is the most important instrument we have to know your work value. Without that, we would not be in a position to know, and nobody would want to regulate the media's use of that material. Without somebody making use of material that is on the public record, the rest of us, as ordinary citizens, would be in the dark.

Senator ROBERT RAY—Are you aware that there are substantial complaints from media because not all stuff is published and that the cost of freedom of information charges to allow them to do that job has really precluded them from doing it? There have been $400,000 FOI bills coming in to them, so they cannot get the information at the moment.

Dr Uhr—That would be regrettable. It would cut across the support that you have just given for transparency if there were rigidity within the system that got in the way of those

people who also represent the community in trying to monitor the process. There was one other point I wanted to make about transparency: it is a double-edged sword. Those of you in parliament would know that public respect for parliament has not necessarily increased with the more the public knows about parliament. The transparency of processes, television footage of question time and so on, has not lifted public trust and credibility in the system. It may be a good thing that people now see with their own eyes the flavour of parliamentary politics, but one has to embrace transparency knowing that people are going to make up their own minds about the value of what they see.

Senator BRANDIS—That is not an argument against it. If people do not like what they see, they do not like what they see. But that is not to say there ought not be the transparency in the first place.

Dr Uhr—Not at all. I agree with you totally.

CHAIR—One does not lead to the other.

Dr Uhr—Exactly. There is a wishful attitude amongst decision makers sometimes that transparency will lift public regard for their work and reputation.

Senator ROBERT RAY—Which you would acknowledge is not the point I made.

Dr Uhr—Not at all.

Senator ROBERT RAY—I am saying that transparency keeps us honest because we have got such a high opinion of ourselves.

Dr Uhr—International best practice is demonstrated by a body called Transparency International, which is a group of World Bank reformers who disengaged from the World Bank to establish a purpose built agency to help governments around the world with transparency. That is a large indication of the direction we should be going in. To a considerable extent, these bills pick that up.

Senator BRANDIS—Nobody thinks politics is a beautiful activity, merely a necessary one. Could I take you back to your observation? You drew a distinction between establishing ethical standards and the accountability for compliance with those ethical standards. Perhaps this is another way of expressing the point that you have just been debating with Senator Ray. It seems to me that the accountability mechanisms in a fairly transparent system are really the point where the system can be made to work and, in a sense, to govern itself. I am very sceptical of legislation which contains aspirational statements without anything more. But if the mechanisms of oversight and accountability are there, then perhaps those who are subject to that scrutiny will govern themselves. I think I am agreeing with what you said, but I would be interested in hearing you elaborate upon that.

Dr Uhr—That is a neater formulation than I came up with, Senator. I agree. I have got no objection to statements of aspirations and, indeed, parliament in its wisdom has put statements of aspirations in legislation governing the public service, and other public bodies like the university have adopted similar injunctions, if you like, not just mission statements, but statements of value and ethical commitment. They have greater value to the extent that people, in trying to make sense of and to honour those statements, have obligations of accountability that are on the public record and subject to scrutiny. I agree with you totally. And without the accountability it is like an anchor that never reaches the floor—it is just waving.

CHAIR—I noted, Dr Uhr, in a forthcoming book, the title of which you have included in your submission here, *Motivating Ministers to Morality*—

Dr Uhr—Not by title.

Senator ROBERT RAY—Will it sell?

CHAIR—I am sure it will be a best seller around here, Dr Uhr.

Senator BRANDIS—I can guarantee many copies will be bought.

CHAIR—It really touches on what Senator Brandis was asking before. You say:

I refer to the argument made by Judith Shklar about the necessarily limited place of personal ethical virtue in the public life of modern government.

'About the necessarily limited place'—what do you mean by that?

Dr Uhr—What she means by that is that liberal societies really rest upon the rule of law. The rule of law requires conscientious fulfilment of whatever the duties of the public office are that people find themselves in—office of citizen in my case, office of legislator in your case, shadow minister, whatever it might be. There is no particular requirement within the system that people have the highest personal virtue in themselves to do that job. Liberalism is really a principle of openness and tolerance and it allows all of us to bring whatever personal values we have into the system but not to trade upon those personal values. We do the job, and liberalism is an honestly limited form of government that can do a lot and has done a lot by not imposing codes of virtue on decision makers. It just says, 'Get on with the job, do the job and there will be mechanisms of public scrutiny and accountability in the event that you step outside the job.' It does not require a definition of wholesomeness or virtue. It is welcome if it comes into the system, but the system does not rely upon it and does not presume it. It is a kind of realistic, somewhat flat, uninspiring, but remarkably successful orientation to politics.

CHAIR—You mentioned international standards and something about the World Bank. As an academic and someone, as Senator Ray said, with long experience in these issues, what are world best practice. What has worked around the world?

Dr Uhr—I listened to the Clerk of the Senate before you, and in a way he gave you a kind of concrete demonstration that there is a fork in the road. There is not one international best practice that you can look to and take off the shelf. There is one fork of the road in a way represented by the Murray bills, which is to look to somebody who can supervise politics and regulate it at arms-length from politics. And then there is another direction that one can take, which is politicians themselves taking on a requirement to monitor ethical or responsible conduct by their own colleagues, including ministerial colleagues—and in a way that is the choice before you: whether you hand over that supervision.

I am not suggesting, Senator Murray, that it is a necessary requirement of your bill, but it is consistent with the view that some have that a kind of a holy version of ICAC come in and supervise and that you abide by the rulings of that person who devises the appropriate standards under which you do your work, or you take the responsibility and leadership yourself, which is the alternative that the Clerk was pointing to and, I think, also indicating that was his preference. It is a big responsibility for a group of legislators to peer review the mechanism but that is what self-government is about.

Senator BRANDIS—I gather from what you have said already that of the two choices, the Murray model and the self-regulatory model, you tend to favour the latter. Am I right in broadly apprehending that to be your perception?

Dr Uhr—Yes. It might be unfair to Senator Murray's institutions or to the spirit of his legislation, but if there were a tendency, as there is amongst some people, to find an ethics regulator who can come in and stand over your shoulder, monitor your work and pull you back into line, as distinct from a responsibility that you are prepared to take on yourself, subject to our scrutiny as citizens, I would go for the one where you do the work.

Senator BRANDIS—I must confess that what concerns me about the other model is that the ethics regulators inevitably will become like Platonic guardians, and that is not really the way in which a liberal democracy works—that is, an all-wise being or entity hands down the standards. Rather, it seems to me that a liberal democracy works best where it is a bottom-up system in which the standards and norms of conduct are set by a well-informed electorate, and those who aspire to win the favour of that electorate have to meet its expectations.

Dr Uhr—I agree: it is all about checks and balances. Parliaments have a role to play, as part of the system of checks and balances. There are many occasions when parliament delegates an outside body or a public authority to do a lot of its work. In this particular case, because the aspects of conduct that have been subject to our discussion and debate are essentially political, it would be unwise to hand over political evaluation of the merits of conduct by elected representatives to a non-elected official. They will have a role to play—for example, the Ray bills, if I can call them that. The establishment of auditors is an important example of where there is a role for appointed officials; we have it now with the Auditor-General. I would not want you to over-read my remarks to think that there was no role for appointed officials to help parliament to do its work, but they are helping parliament to make its own judgments and, in this particular case, there are judgments about the political merits of debatable conduct.

Senator ROBERT RAY—There are two related matters: we have mentioned the ICAC and we could mention the CJC in Queensland where we set up independent bodies, and their own internal dynamics propel them to a stage where they make a judgment on a New South Wales Liberal premier, find him guilty, he loses his job, and then a later court properly finds that the ICAC was wrong. I have found that the CJC—this is only my allegation; others in Queensland may disagree—are the most inveterate leakers in the history of the world when they cannot get their own way. Admittedly, we would try to have someone in a position of authority who would not go in that particular direction. But it is a difficulty because, when you try to deal with them, you face the public image of cynical, burnt-out politicians trying to do over the independent umpire, irrespective of whether the independent umpire has gone too far up the Mekong and has gone mad. That is the difficulty we have.

Dr Uhr—I take the spirit of your remarks. Coming from Queensland, I have been out of it too long to know in detail the strengths of the particular institutions to which you draw your attention, but there are others here this morning who can tell you about that. The danger, in principle, is that parliament hands over authority to bodies that understand that they are semi-judicial in nature and that their orientation to politics is in terms of the separation of powers and a degree of independence where you might be able to make comments about their work but you cannot direct, regulate, control or supervise. That is a risk. The auditor who appears in your own legislation—the Labor legislation—does not have any risk of taking on that sort of semi-judicial independent role.

Senator ROBERT RAY—What about the hint from Senator Brandis—I have been equally guilty of this—that we politicians should let the electorate judge us if we are guilty of these things? Is not there some differential, however, with my being No. 1 on the Labor ticket in Victoria and Senator Murray fighting off the Greens and One Nation in Western Australia? Can I not make a much braver statement than he that I will let the electorate judge me?

Senator BRANDIS—Senator Mason and I are not facing the electorate until 2004.

Senator ROBERT RAY—I know; that is why I did not mention you. Some people are born lucky.

Dr Uhr—Again, you drew attention to the importance of transparency. It is a matter of your statements being tested and verified. What we are establishing now are various mechanisms to test and verify a variety of aspects or statements that you might want to make about the use of publicly authorised entitlements.

Senator ROBERT RAY—Yes. I suspect that if we use and abuse our entitlements, from my experience, we will not be judged by the electorate, we will be judged by our preselectors and never face the electorate, but that is never going to be in the formal processes of politics.

You mentioned a weakness in Senator Faulkner's bill, to the effect that ministers escape scrutiny. I have taken a note of that to make sure that that issue is included at some stage. Senator Murray can affirm that I basically forced him to include ministers in the Auditor-General's current look at all parliamentary entitlements, so it is obviously an oversight in the bill. I think it is a valid point you have made.

Dr Uhr—It would make my response to the bills all the more encouraging if ministers were included.

Senator ROBERT RAY—I think it is a valid point.

Senator BRANDIS—I would like to just go back to Senator Ray's observations about bodies such as the CJC and ICAC. I have had a little bit to do with the CJC in Queensland. My impressions are that bodies like that are always, and perhaps inevitably, terribly elitist bodies because they are recruited largely from lawyers, or perhaps criminologists or political scientists such as yourself. They are not particularly accountable to anyone. They are staffed by people who are—

Senator ROBERT RAY—Zealots.

Senator BRANDIS—Some of them are zealots, but they are watchers of the political process rather than people who have ever actually put their toes into the water. I must record my view—and I would be interested in hearing your reaction—that bodies like the CJC, because of the narrow social base from which they are staffed and their intrinsic elitism, are in fact rather unsuitable bodies for scrutiny and oversight of a robust process like a parliamentary democracy.

Dr Uhr—Yes. I think all the qualities that you identify are understandable in the light of the historic circumstances of the Queensland parliament under which I grew up. I can understand the temptation of a community to look to all of those highly strained and pure qualities abstracted from political life as correctives to what they saw every day, which was an unhappy—

Senator BRANDIS—That, in Queensland and the circumstances of the time, was not a function of a parliamentary democracy operating optimally as a liberal parliamentary democracy, it was the reverse; it was a function of a parliament not operating as a parliament.

Dr Uhr—I agree totally. Coming out of the Fitzgerald inquiry, which dramatically illustrated the defects of the Queensland system as it then stood, it is not so surprising that the recommendations led to the creation of suprapolitical bodies to try to supervise and regulate the system. I would hate to think that, if you did not step forward and start to self-regulate more honestly and openly and publicly, the community would expect a version of that here, but it is a theoretical possibility. The longer parliament leaves things unregulated and unreformed, there are bound to be people who come into the system and say that we need something like that staffed.

Senator ROBERT RAY—When was the last time in your memory that a minister in a federal government here has been accused of accepting money and acting improperly therein?

Dr Uhr—You would remember resignations from ministers in the Senate, not on the basis of accepting money but for representing individuals who were not part of their routine ministerial duties.

Senator ROBERT RAY—Yes, I understand that. That is why I related it to money.

Dr Uhr—I have no examples of money issues. Are you talking about bribery?

Senator ROBERT RAY—In essence, yes—having their decisions affected by some emolument given to them. I cannot think of any examples; I just thought you might be able to.

Dr Uhr—There have been resignations, both in the Senate and the House, of ministers who arranged their private affairs in such a way that people thought there was a diversion of either their interests or maybe money to unauthorised recipients, but it was not necessarily the members themselves who were financially benefiting from that arrangement.

Senator ROBERT RAY—That is the point I am making. Potential conflict of interest is always a problem we face but, compared with state governments or overseas governments, I think it is never noted that not only has someone not resigned for that but I cannot think of an accusation in that regard.

Dr Uhr—One other point that I think deserves comment is that the integrity of the Commonwealth public service deserves some comment and praise. Compared with the traditional state public services, maybe the Commonwealth has a lot to take pride in.

Senator ROBERT RAY—I would agree with that.

CHAIR—Can I just clarify a point from Senator Brandis's questions? Are you suggesting that the CJC, when it was established—and these are my words, but you may agree with them—was established in response to what was perceived as a dysfunctional democracy or parliament, and that it was perhaps appropriate then?

Dr Uhr—People thought it was appropriate then. I am not endorsing it at all. I do not have enough detailed knowledge.

CHAIR—At that time?

Dr Uhr—Yes, at that time.

Senator MURRAY—Dr Uhr, I have followed your work over many years. I know you took an active interest in many of the inquiries in the various states, in particular inquiries about issues of standards, ethics, accountability and morality, of which the most recent was probably WA's Commission on Government. The reason I make that point is that this is an ongoing debate which reflects a public desire for resolution and different forms of resolution are provoked by the issues of the day.

It seems to me that we would be helped if you indicated to us where you think the bottom line should be with regard to these bills. I rather like your estimation of the one set as modest and the other as ambitious because that implies there is a way in which you can manage the two to come to something which is not too modest, not overly ambitious and perhaps throw in Mr Evans's approach of being more practical. These bills are trying to deal with the issue of where you go when the system does not work. I think Senator Ray's remarks are apposite. Senator Ray has the virtue of a great deal of experience, a great deal of longevity and a good memory. I am probably short of all three of those, but I would agree with him that, in my time in the Senate, there has been a massive improvement in transparency and reporting of parliamentary allowances and entitlements. However, the issues that are dealt with, for instance, in our bill for the charter of political honesty, go much further than that. They attend to the conflict of interest issues.

Many of our institutions try to deal with that in one way or another. If I can deal with one aspect, at the heart of this Prime Minister's code of conduct, but of any premier's or prime minister's code of conduct—and Dr Gallop has just started sliding down the slippery slope himself with trying to apply such a thing—if somebody constructs the code of conduct themselves and administers it themselves, there are inevitable problems with that. In other words, the Prime Minister's code of conduct is the Prime Minister's thing to manage and run and it results in a problem. To me, it is no different in principle from the problem of parliamentarians determining their own salaries. That is why you give that conflict of interest issue to the Remuneration Tribunal. There are numerous precedents in law and practice for the transfer of adjudication issues to other bodies. At the heart of the two bills, the Labor Auditor of Parliamentary Allowances and Entitlements Bill 2000 and the Charter of Political Honesty Bill 2000, is an intention to transfer matters which, in one way or another, the two proponents do not think can be adjudicated by the persons concerned. So with that long lead-in, I am really asking: do you have a bottom line, a legislated line, where you think we should go?

Dr Uhr—There are three issues that I would like to see pushed forward, and it does not concern me whether they come out of your bill exclusively, or out of a Labor bill, or a government bill, or some helpful combination of all three. One aspect is activity in relation to entitlements that members now have where the standard-setting process and, indeed, the compliance regime are subject to greater public accountability. That to me, I think, can be done quickly, so I would put it up front as not necessarily the most important matter, but maybe the most urgent matter because it is there in the forefront of the public's mind, and probably does not require a lot of further work by a parliamentary committee to devise mechanisms.

We know the way auditors do their work, and it cannot be too difficult to establish another stream of auditing that can report back to parliament on parliament's own compliance with those regulations. Included within that I would like to see the standard setting and the regulations coming out of bodies like the Remuneration Tribunal and whatever guidelines are now being devised within the Department of Finance and Administration being subject to greater public scrutiny as well. The auditor would supervise the entitlements aspect.

The second aspect is the code. The Commonwealth parliament now is remarkable in not having a code of conduct for its own activities. I realise there are registers of interests and the discussion of codes that goes back to the former government. I take note of the fact and endorse the Prime Minister's code, but parliament itself has not gone on the public record with any statement of its standards that the community can use to help monitor parliament's own activities. I am not surprised that there is not such a code in your bill, and I endorse the

fact that the bill establishes a parliamentary mechanism openly and honestly to devise such a code. To me, that is the second most urgent area on which maybe this committee or another parliamentary committee, including the House, must move forward.

The fly in the ointment is going to be the establishment of an investigator of some sort who can report back to the House, Senate or joint parliamentary ethics committee to help them do their work. It will not just be exhausting the work by coming up with some nice words in a code but coming up with a regime of which the code is part; that is, a parliamentary ethics committee or a set of parliamentary ethics committees which have at their disposal an investigator who can help them get impartial access to the facts in cases of disputed conduct. That is going to be more difficult than the auditor of entitlements, but it is the second area that I would move on.

The third aspect is probably more delicate: what parliament wants to do in relation to ministers. Within parliamentary environments generally, for good historical reasons, there is trust and confidence in the chief executive of the day to be the regulator and chief of the ministerial team. To me, that has got us as far as it is likely to take us. The next step is to have a second code, which is a parliamentary code for ministerial conduct—not a ministerial code for ministerial conduct, but a parliamentary code. The delicacy is that I cannot point to anywhere in the world where a parliamentary body has gone beyond its own threshold membership to say, 'We now expect the political executive to be responsible in the following ways.'

Soon after the Blair government was elected, in May 1997 the House of Commons passed a resolution that, to my knowledge, is the first in the Westminster parliamentary world stipulating certain minimal standards that it expected of ministers. It is not surprising what it included in it basically ministerial honesty in giving account of ministerial activities to the House of Commons. But, at the moment, we do not even have that. We have provisions like that in the ministerial code, and so there should be, but we do not have any similar statement by parliament of its expectations of ministerial conduct in ministers' dealings with parliament. That would be the third area. That would be a minor revolution, but the Senate has done lots of minor revolutions in its life, and I would be happy to see it take on that one as well.

Senator MURRAY—On that last point, if you take the analogy of the Corporations Law, it determines certain standards and requirements that apply to boards, management, directors and so on which are applicable at law. In our political process, I do not think any constitution in Australia—certainly not the Australian Constitution—alludes to even the existence of the premier and cabinet or the Prime Minister and cabinet. The entire mechanism for adjudicating standards relies on the political process. It is a credit to the political process that so much accountability does result.

There is tremendous pressure on ministers and the Prime Minister through the political process, and of course you have the electoral judgment every three years, but there is that issue that goes to the heart of constitutional review and whether we should manage it. It seems to me that both the great strength and weakness of democracy is numbers, because numbers determine outcomes, but numbers can also constrain or prevent proper behaviour. If the Prime Minister has the numbers in the cabinet, he can rule in a certain way. If the caucus has the numbers in the House, it can rule in a certain way, and that is it.

CHAIR—That is assuming the majority are behaving for improper purposes.

Senator MURRAY—The problem is that where conflicts of interest arise and numbers do not allow the ethical determination of those conflicts of interest, you search for other mechanisms, and parliaments have understood that. They have created independent officers deliberately so that there are proper checks and balances—ombudsmen, Auditor-General, Inspector-General and all sorts of types. This is another step in that direction. My interest is not so much in ensuring that these bills, in one form or another, become law. My interest is in ensuring that out of these bills come higher standards, either legislated or in other forms. I am not sure I have enough guidance from your submission and your statements as to how the next step should be achieved.

Dr Uhr—I have two brief comments that might help. Firstly, in a way, we have been over all of this before. The Bowen committee of inquiry in 1979, when Malcolm Fraser was Prime Minister, had delivered to it one of the best reports internationally on conflict-of-interest regimes, which recommended, in part, the establishment of a parliamentary integrity commissioner who would do a lot of this work and do it publicly. The commissioner's work would involve the investigation of disputed conduct by politicians, including ministers, and reporting back to the parliament, leaving the judgment to parliament to determine. That was not a minor revolution; that was a major revolution in 1979.

There was no public response to that committee's report by the government and parliament has not forced the issue either. In a way, a lot of the detail can be revisited by going back to a pioneering report like that and actually trying to work out what the merits and weaknesses of that model might have been. You do not have to reinvent the wheel each time. A lot of the policy framework might be just a matter of revisiting well-informed investigations that have lapsed for want of political interest and will, and it is good now that the political interest and will is returning.

Secondly, I have a brief comment in relation to your response to my suggestion about parliament's interest in regulating ministerial conduct. I put it stronger than the way you put it. There is nothing in the Australian Constitution to stop the parliament moving into that area. In fact, there is a little hook in the Constitution that says that you cannot increase the size of the ministry beyond the original size—I think seven in the Constitution—until parliament fully authorises it. Parliament has opportunities every half-decade or so to increase the ministry, and there is nothing to stop parliament at such time, or in adjunct legislation, to start laying down terms and conditions for the holding of ministerial office. It is an area that has never been thought of or explored but, again, there is nothing to stop us coming up with new ideas that are based upon the Constitution but with novel institutions to give effect to nothing prohibited by the Constitution.

Senator BRANDIS—I wanted to go back to one of the points Senator Murray made, and that was the metaphor of the Corporations Law. I want to put a proposition to you and invite your comment on it. It has always seemed to me to be a difficult analogy to say that members of parliament or ministers are like company directors and, indeed, generally the use of metaphors from private law in regard to governance have always seemed to me to be difficult because, whereas company directors are fiduciaries, pure and simple, and therefore are obliged always to act disinterestedly in the interests of the whole, politicians are not really fiduciaries, because it is part of the whole notion of a democracy in which elections are competed for and the allocation of resources is contestable, that politicians and, indeed, ministers should act in a non-disinterested fashion to advance the interests of certain constituencies at the expense of others. For example, if I were a member of the House of Representatives, I would be obliged to advance the interests of my electorate, irrespective of

whether, taking an Olympian view of things, I might regard the expenditure priorities demanded by my electorate as being overall in the national interest. Can I invite your comment on the extent to which this fiduciary analogy is applicable, or even useful?

Dr Uhr—I take your point, Senator. I think the issue is one of trying to think of forms of corporate governance that might be relevant to parliament. The example I am thinking of is an expectation, that the community rightfully has, that there be integrity in public decision making.

Senator BRANDIS—But that is a different concept from it being a position of trust in the sense of the obligation to act disinterestedly.

Dr Uhr—That is why I am drawing it to your attention because it is different and that is the expectation, I think. Let me give you an example of where a lack of integrity in public decision making, together with a belief that one was representing constituents who deserved greater access to public resources, went off the rails. That is the case in 1994, the sports rorts affair, where clearly you had government decision making being made by elected public officials who understood that their task was to represent certain constituency interests. It is altogether proper for parliament and public decision makers to understand that there are going to be winners and losers in terms of public policy. But the issue that came off the rails was not the understanding of winners and losers, it was the lack of integrity in decision making and the lack of transparency and the inability of the decision makers to actually give credible accountability of how those decisions were made.

Senator BRANDIS—And the fate of that minister was decided in the court of parliament and in the court of public opinion in a way that, if one assumes for the sake of the discussion she did act with a lack of integrity—I do not want to be argumentative about it, but let us assume that to be so—in terms of the ethical processes of politics, that was a satisfactory outcome delivered by the parliamentary and public scrutiny mechanisms which were then in existence.

Dr Uhr—The reason I bring forward the example is to support your point that there are aspects of corporate governance that are relevant to public decision making by elected members, but they bear upon integrity of decision making, illustrated in that particular case where you had rudiments of an accountability structure that did good value, one was the Auditor-General, making no judgment about the policy merits of the decisions or the merits of winners and losers, but drawing attention to the lack of integrity in decision making; and then a remarkable instance of a House of Representatives parliamentary committee doing exactly as you described, bringing its impartiality to bear to suggest that there was an issue of incompetence that it wanted to draw attention to, rather than any issue relating to trusteeship, to use the example that you have. The example I am bringing forward is to support your case of a limited analogy with corporations.

CHAIR—Dr Uhr, thank you so much for coming here today, and for your written and oral submissions. It was very enjoyable and very interesting, particularly your idea of parliamentary oversight of ministerial accountability. I look forward to that as well.

[10.04 a.m.]

BLUCK, Mr Frederick Paul, Director, Policy, Office of the Ombudsman

WINDER, Mr Oliver, Acting Ombudsman, Office of the Ombudsman

CHAIR—Good morning. Do you wish to make an opening statement before I invite my colleagues to ask questions?

Mr Winder—No, I do not, thank you, Senator.

Senator ROBERT RAY—I will be short and sweet. I take it the Ombudsman's office would not want to be on a government advertising vetting committee?

Mr Winder—Our submission indicates that we would have great reluctance.

Senator ROBERT RAY—What do you know about advertising?

Mr Winder—Nothing.

Senator ROBERT RAY—Do you think you share that with the tax office?

Mr Winder—I would not want to speculate on that.

Senator ROBERT RAY—But those who have no knowledge are easily manipulable, are they not, especially by political pros?

Mr Winder—I expect that would be right.

Senator ROBERT RAY—I raised this matter with Mr Evans. Would there be any concern that giving you a politically sensitive job—that is, telling a government what it can or cannot advertise—may have consequences in the food chain in terms of whom we appoint eventually? There may be a problem in government. There is no problem at the moment with the government saying they will appoint an independent ombudsman or deputy ombudsman. But if I think they are going to give me the green or red light down the track, I might have second thoughts as to who we put in the job. Basically, you already have a major job in government with which we do not want to interfere. Do you see that as a potential problem?

Mr Winder—Yes. We have alluded to that to some degree in the submission.

Senator ROBERT RAY—There is no transparency in the appointment of ombudsmen by any process that I know of.

Mr Winder—No.

Senator ROBERT RAY—There is slight transparency for auditors-general. I think I put that on the record.

CHAIR—Are there any examples of ombudsmen anywhere in the world, or at least in comparable countries, undertaking the sort of role envisaged here?

Mr Winder—In terms of advertising?

CHAIR—Yes.

Mr Winder—Not that I am aware of, no.

Senator ROBERT RAY—You must be flattered at least by being mentioned in the bill, because it is a recognition of your independence.

Mr Winder—Yes, we are.

Senator MURRAY—Senator Ray, as he often does, has put his finger right on the button in searching for who could deal with this extraordinary, thorny issue—who would have the full respect of the community and of the political establishment? Your office is one, and so is the Auditor-General's office. The nervousness of any independent officer or office at becoming embroiled in the political world is well understood; it can be a very fierce situation. However, there are two separate issues. One issue is whether it is accepted that a body needs to adjudicate in some way if a complaint is laid—that is, the propriety of government advertising—so that the matter can be addressed against the sorts of guidelines that the Auditor-General outlined. If the answer to that is yes, and that would be my first question to you, the second question is: who should be the appropriate body? You again get to Senator Ray's correct point of who appoints them and on what criteria.

Asking you the first question, it is quite plain that two political parties in the parliament have identified that the practice of government advertising is in need of greater regulation. Two political parties in the parliament—and I am not implying that there no others; we are just talking about the bills before us—have accepted that by and large the Auditor-General's guidelines are sensible and pertinent. Do you have any professional ability from the perspective of your office and functions to take a view as to whether further regulation and management of government advertising is necessary?

Mr Winder—I would not speculate whether it is necessary. Clearly, from the arguments that you have expressed, both parties desire there to be some kind of examination of what happens. In our submission, we suggested that there could be an alternative, which would be for a parliamentary committee to be the examiner of whether or not it was in accordance with the guidelines, because that would put it back into the process of politics, which it largely is.

Senator MURRAY—The difficulty we politicians face is that quite often we surprise ourselves and rise above the mangle of party politics, but when you get to a crucial political issue that is less likely, and government advertising could well fall into that field. Inevitably, committees are constructed on an almost proportional representation basis. I see problems with that.

Senator ROBERT RAY—Are you not really saying, Senator Murray, that a process of parliamentary scrutiny on a daily basis rather than periodic is more likely to highlight issues and then limit a government in what it does? I thought that was the proposition you were trying to put.

Senator MURRAY—Yes, but ultimately if there was to be a code of conduct or a legislated mechanism, however it is established, there needs to be persons who do not have evident partisan interest in being able to determine if something is improper. The reason that needs to be done is because of the very substantial funds involved. We are talking hundreds of millions of dollars. It is right at the core of a parliamentary duty. If persons such as the Auditor-General and the Ombudsman are not appropriate, do you see that there are any dangers in appointing persons with experience and objectivity from outside of those bodies, for instance, persons with ethical or standards training, or governance or advertising training?

Mr Winder—I would not suggest that there was a difficulty. I think that that person would have the same difficulties as somebody like the Ombudsman in terms of being able to participate perhaps in some subjective decisions at the edge as to whether something conformed with the guidelines or not, but at least it would not have the possible consequential effects of the Ombudsman being perceived as being party political which could be a situation if the Ombudsman was involved in it.

Senator MURRAY—And if those persons were appointed as a result of a parliamentary process through some mechanism that the parliament could devise, in other words not a ministerial government process, so they had the authority of the parliament as a whole—and I would assume you step from there to also having parliament as the ultimate arbiter, if you like, of any dispute—do you think that would be a proper mechanism?

Mr Winder—It would seem to be, yes. It would seem to be an option that could be feasible.

Senator MURRAY—Quite often as an office you have to deal with issues which have legal and judicial consequences, typically tax issues for instance. I know right now—and I do not want you to comment on it in this instance—that you are involved with this whole issue of mass marketed investment schemes and those are being tested before the courts in that judicial process. Do you have any comments on the mechanism in the Labor bill whereby these breaches of advertising would be determined by the courts in due course?

Mr Winder—We made the comment in relation to the Ombudsman's activity that the Ombudsman makes recommendations. The Ombudsman does not have a determinative power. The Ombudsman makes recommendations and it is then a matter for the agency and the government to act upon those recommendations. The Ombudsman's power is only to raise further reports which it can to the Prime Minister or to the parliament whether or not those recommendations are taken up.

What is proposed under the bill, as I understand it, is that the committee would make a decision which, if that decision were not followed, could be taken to the Federal Court. That is another step which, at the moment, the Ombudsman does not have power to do. He does not make a decision, he makes a recommendation and, at the moment, does not have power to take it further. It is a significant additional step and it would involve the committee in litigation. The Ombudsman does not get involved in that unless somebody else takes action against the Ombudsman, which is what has happened.

Senator MURRAY—If legislation were to be developed to provide a means of dealing with the government advertising problem and a review mechanism were required, in view of the nature of what we are dealing with, is it your view that, as you have a specific responsibility for tax, police investigations and so on, your body should be the review body, or that that review should be directed at the Administrative Appeals Tribunal? There are complaints within the system that need to be resolved in an analytical, adjudicating manner as opposed to a judicial manner. Which is the proper body to go to?

Mr Winder—We can look at matters of administration, and where somebody has a problem about the way in which a particular government agency or program is administered, we can look at that, but we do not have power or jurisdiction to investigate the actions or decisions of ministers or members of parliament.

Senator MURRAY—Which would mean that the AAT is the appropriate body?

Mr Winder—The AAT, a tribunal or a court of that nature would be able to look at decisions of an agency and would be able to overturn and change those decisions.

Senator MURRAY—Is that because the AAT has always had a specific role in evaluating ministerial and departmental decisions?

Mr Winder—Government decisions, anyway. I am not sure whether I would couch them as ministerial decisions.

Mr Bluck—In some cases they do; for example immigration and deportation.

Mr Winder—The Ombudsman does not have jurisdiction at the moment.

Senator MURRAY—I am pursuing this line of questioning because I am hopeful that Labor, as an alternative government, would attend to this issue—I am even hopeful that the coalition would attend to the issue as well. You then come to whether it is desirable for it to be resolved by courts or through administrative systems. It appears to me to be always preferable, if you can, to stay away from the courts as much as possible. It would seem to me that many of the issues pertaining to government advertising, given the nature of the Auditor-General's guidelines and given the practical instances of how government advertising has been pursued, would be best and easiest to resolve administratively rather than judicially.

Mr Winder—Certainly, if that can be sustained. As the bill suggests, the decision comes from the committee, but the final part is that if the decision is not acted on, it is for the committee to take the matter before the court. Ultimately, you have the courts involved because of the way in which the bill is constructed.

CHAIR—Mr Winder and Mr Bluck, thank you so much for your attendance here this morning.

Proceedings suspended from 10.19 a.m. to 10.49 a.m.

COLEMAN, Mr Russell Charles, Executive Director, Corporate Management, Australian National Audit Office

LEWIS, Mr Michael Kenneth, Executive Director, Performance Audit, Australian National Audit Office

McPHEE, Mr Ian, Deputy Auditor-General, Australian National Audit Office

CHAIR—Welcome. Would anyone like to make an opening statement before I invite questions?

Mr McPhee—No, thank you. We have provided our submission and, fundamentally, we have contained our comments to those proposals within the bill that bear potentially on the Auditor-General's responsibilities.

CHAIR—Thank you.

Senator ROBERT RAY—Do you know what a TARP is, Mr McPhee?

Mr McPhee—Only as a short form of 'tarpaulin', Senator.

Senator ROBERT RAY—No, it is one of these smart-alec advertising terms. I am just wondering about your knowledge of advertising.

Mr McPhee—It is very limited.

Senator ROBERT RAY—Would that be pretty true of the whole of the Audit Office?

Mr McPhee—We certainly would not have expertise in that area, that is for sure.

Senator ROBERT RAY—So the choice in Senator Murray's bill of the Audit Office is based entirely on your reputation for independence rather than on knowledge of advertising?

Mr McPhee—I think that would be correct, yes.

Senator ROBERT RAY—What would be required, therefore, is that someone in the Audit Office—presumably the Auditor because he is the one nominated—would have to become an expert in that to sit on such a committee.

Mr McPhee—Our normal practices, when we review performance of agencies and administration, are such that we do not always have experts in particular subjects.

Senator ROBERT RAY—No, sorry, with respect, this role requires you to make judgments on an ongoing and permanent basis. I think it is quite distinct from your proper role.

Mr McPhee—Yes, and fundamentally the concern we had was not so much with the expertise—we did not really get to that stage—but with the clash, if you like, between the independence of the Auditor-General's position and performing an executive function which would have a right of veto over government advertising programs. We drew the line at that point without really exploring further the knowledge requirements for the particular position.

Senator ROBERT RAY—We alluded to a danger earlier in the hearings that if this does become an overtly political position, it may well affect long term the appointment processes of auditors. It would be very hard for a government to resist wanting to have someone there who was sympathetic to their long-term advertising aims.

Mr McPhee—As I say, when you have an auditor-general who would have some sort of executive responsibilities, that would create the potential for a conflict of interest.

Senator ROBERT RAY—I think the other potential conflict here is not in an adversarial process that this would involve, but I have noted—and I am sure my colleagues here do not agree with me—a certain naivety in the tax office about advertising. They are like a kid who has just learnt it, and they do not actually understand that what may appear to them to be strictly an information campaign has all sorts of political undertones, and I think that just leaves ombudsmen and auditors in an impossible position. You are not pros at this; other people are.

Mr McPhee—Yes, it is very difficult for officials to make judgments that would be required in these circumstances.

Senator ROBERT RAY—Moving on to Auditor of Parliamentary Allowances and Entitlements Bill 2000 [No. 2], I suppose it is out of convenience that that position is really put with the Audit Office. It is not really an integral part of an Audit Office, is it?

Mr McPhee—Not integral but, as you aware, we do audits of parliamentary entitlements from time to time.

Senator ROBERT RAY—One of the criticisms, which I think is probably valid, made so far of this bill is that it requires the auditor of parliamentary entitlements—out of the best of motives, I think—to do two things: one, pursue investigations into abuse but, secondly, to give advice on entitlements because there is a major vacuum there. Do you see that as a problem?

Mr McPhee—Yes, and our submission pointed that out, absolutely. I think if you have an audit function, you should maintain it clearly as an audit function without necessarily adding on almost executive type roles to the role.

Senator ROBERT RAY—I have to be careful asking you this question because you currently have an audit on and I do not want to impinge on that, but one of the difficulties in the current system that we alluded to earlier in this hearing involves having a Remuneration Tribunal bring down a generality of rules; having a government department have to interpret them; having a government department that can regulate in certain circumstances, provided it is not in conflict with the Remuneration Tribunal; and then having an enormous reluctance to put rulings in writing because of the complexity of that task. Could I ask you whether you are looking at that in your audit, without your giving me any conclusions as to what it might be?

Mr McPhee—Broadly, it certainly strikes us that the system is very rule based and rule driven. In some ways, many other systems of administration have moved on a little from that, and the question is whether that should be the basis for going forward. As you say, there are ministerial departments with particular responsibilities, there is DOFA, and there are parliamentary departments. A range of areas is setting guidance or rules in this area—for example, the Remuneration Tribunal as well. It is difficult, I am sure, for members of parliament to clearly understand their entitlements.

Senator ROBERT RAY—I put the proposition to witnesses earlier today, and what I am asking you to do now is to draw on your experience in the Audit Office. I put the assertion—knock it down if you like—that the greater the degree of transparency, the less likely there is to be abuse. That is, greater publication of figures to do with entitlements and the use of entitlements will probably reduce abuse. Do you agree or disagree with that?

Mr McPhee—Fundamentally, I agree; transparency is a very important principle in terms of accountability and the openness of the system and people's adherence to it.

Senator ROBERT RAY—One of the things that has run through some of these submissions, rather than within the bill, as a method of avoidance, is the concept of a global budget. I do not think we will have any disagreement with that point across the table—any uncapped allowance or entitlement is a danger. Some people see that the way to do that is a global budget, but a lot of us in politics see two problems with that: first, we will be office managers for 50 per cent of our lives, which is a waste of resources for MPs; and, second, potentially uncontrolled, a global budget could create even greater problems in entitlement abuse. If you write as many prescriptive rules within that global budget, you might as well have the rules and not a budget. I do not know if you are looking at that concept or have a view on it.

Mr McPhee—Certainly, we will see what we can say on that as part of the audit. We are having a look at some overseas experience as well. I was a bit surprised when I spoke to the audit team recently and they suggested that in some places they are even more rules based than we are in Australia. I would have thought that administration generally is moving towards a more global approach to many of these matters, but it is interesting that experience elsewhere, as I am told, seems to be that prescription and rules are still the order of the day in terms of entitlements for MPs.

Senator ROBERT RAY—Have you ever—you might not have; I doubt that you have—looked at the rules necessary for a parliamentarian to travel to Norfolk Island or Christmas Island?

Mr McPhee—No.

Senator ROBERT RAY—You basically need a PhD to work it out, and the only bloke who ever worked it out did have a PhD.

Mr McPhee—Yes. That is one of the issues. One of the fundamental issues with the bill and the committee's consideration of it is whether the committee should await, or at least take into account, the audit outcome in deciding the course of action it should pursue.

Senator ROBERT RAY—Have no fear. We heard evidence from the clerk that three minor private members' bills—not substantive bills like this—have gone through in the last 20 years, so do not think that this is going to be progressed through the parliament in the next few months. There is more chance of my running a one-hour half marathon than there is of that happening.

Mr McPhee—The fundamental point is that if the system could be simplified, perhaps the concerns that have been underlying some bills would not be as great.

Senator ROBERT RAY—I have just one suggestion for you—I do not like the idea of global budgets—six mini-global budgets. I will give you an example of that. The amalgamation of all staff and spousal travel into one global fund—capped—would cut out a massive bureaucracy, but it would still be accountable in terms of transparency, because it would all be published. That might be the way to go. Another example is the amalgamation of all printing, stationery and postage into one global budget—capped—and then you move onto another area of whatever capped, et cetera. It is very difficult, I suppose, to cap an MP's travel. Senator Murray's travel budget would be about 10 times more than mine, because, first, he is Western Australian based; and, second, he has responsibilities to address meetings all around Australia, which responsibilities I do not have. So you cannot equally cap our travel budgets.

Mr McPhee—No.

Senator ROBERT RAY—So, just in summary, is it right that you would not like to be the tsar of advertising?

Mr McPhee—That is correct. I do not think the Auditor-General would like to be the tsar of advertising.

Senator ROBERT RAY—Secondly—and I do not want to lead you too much—if you were asked to provide an audit of parliamentary allowances, it would be have to be quite different than as provided in Senator Faulkner's bill.

Mr McPhee—We would obviously do whatever the outcome was. We are suggesting that there are some avenues within the existing framework for Audit, including the arrangements we have with the Joint Committee of Public Accounts and Audit where the parliament or the committee can request the Auditor-General to do particular audits. Obviously the Senate can request the Auditor-General to do more coverage in this area. So there are avenues in the existing framework to respond to not all but many of the matters covered by this bill. Our view is that the committee might explore the existing mechanisms in the first place before moving to legislation.

Senator ROBERT RAY—That is especially in terms of investigation and surveillance where we still have the problem of advice. I will give you one example: the grand circus of parliament is moving to Melbourne on 9 and 10 May. No-one at this desk knows how many staff they can take, what allowances are available or anything with a month to go. I do not blame anyone for that, but part of that is that the rules are complex, the interpretations are risky, no-one really wants to try their hand at it, which means no-one yet has made their place. There is no problem for me whatsoever because I live in Melbourne—for the rest of my colleagues? Advice is one of the problems which this bill will try to remedy, but as you properly point out, you cannot have both roles.

Mr McPhee—Yes.

CHAIR—On the system of entitlements you mentioned, and I think it is right, that it is complex with the Remuneration Tribunal, DOFA, the parliamentary departments and so forth. The point that Mr Evans, the Clerk of the Senate, made this morning was that in a sense that has some benefits. Like a separation of powers argument, if you get someone who has advice functions, investigative functions and determinative functions all together, that also has problems. You have a particular person who may be getting advice on a particular issue. If, in another context, they have the capacity to investigate a person for alleged breaches of entitlements and perhaps even to determine issues against them, does that also have its difficulties? Does that make sense?

Mr McPhee—Yes, I think it has its difficulties. I think you can put the advice function with the area that is responsible for the administration, and that normally occurs where the area, whether it is the tax office or whatever, provides rulings on the administration of the tax law, and so that is quite normal. The issue on some of the parliamentary entitlements is the extent of the coordination and whether that could be enhanced and whether the rules can be clarified and perhaps go to a more global or principles based approach. We will try and address some of those issues in the audit that will help members of parliament and also, hopefully, make the advising function much more straightforward so that it does not require a lawyer to interpret the regime of rules, but would require a middle-level public servant who says, 'These are the rules.' I think clarity is important, and I agree with Senator Ray's earlier comment about transparency, which is also a very important contributor to accountability.

Senator ROBERT RAY—The Audit Office gives advice and does investigations but, in fact, it does the investigation and then gives advice, whereas in this other role it would give advice and maybe later do an investigation.

Mr McPhee—Our advice tends to be on systems or governance, it is not at an individual officer level advice. As I read this bill, it is very much directed at assisting the individual member.

Senator MURRAY—Mr McPhee, I will deal first with the Auditor of Parliamentary Allowances and Entitlements Bill 2000. One of the aspects that the committee needs to come to terms with is where there are holes—to use somebody's earlier expression—in the audit capacity as conventionally viewed with regard to the staff of members of parliament and the expenditure of members of parliament. With regard to the staff of members of parliament, it seems to me that probably the only difference there should be is that the normal Commonwealth criteria would be in the political discretion of appointment. Apart from that, I assume you would expect all the other standards to apply—the reference checking and everything else. However, the expenditure of those staff is taxpayers' money and needs to be properly audited, properly accounted for, properly reported on and transparent. It should be available in a published form if required or subject to estimates exposure, and there should be a similar process for parliamentarians' allowances and entitlements.

I have made the point that, in my view, the transparency and standard of reporting of the latest month in our management reports is significantly ahead of that which was available on my first month of reporting in 1996. I know you are engaged in an audit exercise in this area right now but, for the purposes of the committee, could you indicate where there are shortcomings in your Auditor-General's department being able to carry out normal audit functions in these areas?

Mr McPhee—Certainly I will give you my understanding of the situation. Obviously at the end of the day it is a legal interpretation matter. When the Auditor-General's bill was first introduced, the explanatory memorandum made it clear that the performance audit provisions of the bill would not extend to auditing the performance of ministers of state in relation to the exercise of their constitutional duties or to judicial or quasi judicial officers. It made it very clear that our performance audit was to be directed to the administration of Commonwealth bodies.

What we say in our submission is that our focus is on the systems that agencies have in place to, in this case, administer parliamentary entitlements. What systems does DOFA have in place, for instance, to assure itself that the expenditure is in accordance with the remuneration tribunal arrangements or the rules that are in place for members' entitlements? Where we believe we probably run short of authority is looking at individual members. If someone said, 'Member X or member Y, can you investigate what they have been up to in terms of entitlements and their exercise of them,' we believe we may be inhibited in that area. Further, there are specific restrictions over our access to MOPS staff.

Senator MURRAY—You would not have that restriction with respect to an individual in, say, the tax office, would you?

Mr McPhee—Not at all.

Senator MURRAY—I can understand the provisions limiting you in terms of evaluating conduct because that is political and partisan by nature, but I cannot understand the limitations in terms of assessing how much money was spent on what, when and how.

Mr McPhee—We can generally do that because all the spending has to occur through departments. They approve the expenditure.

Senator MURRAY—Can you do that for an individual, either a staff member of a member or senator or the member or senator themselves?

Mr McPhee—We can certainly, for instance, look to see what level of expenditure was incurred by an individual. That is because we can review the systems in the agency. But there is a question about how much authority we have to go to the individual and ask them further detail behind that.

Senator ROBERT RAY—You would not be able to examine them and then give a report under the MOPS Act?

Mr McPhee—No.

Senator ROBERT RAY—That is the difference. But you can look at the departmental expenditure that relates to that?

Mr McPhee—Exactly.

Senator MURRAY—The point of my question is: if the parliament is desirous of retaining that restriction on your capacities, then a hole needs to be filled, or the view could be taken that a hole needs to be filled, which is what the Auditor of Parliamentary Allowances and Entitlements Bill 2000 tries to do.

Mr McPhee—Yes. There is one qualification I should add. We can, interestingly enough, under the legislation, look at MOPS staff if we are looking across the board or across all agencies. The restriction on MOPS staff is actually related to one particular agency. I will ask Mr Coleman to explain it further.

Mr Coleman—The construct is, if we were doing a single focus audit, if you like, we are not able to conduct a performance audit of staff employed under the MOPS Act. But if we are going to do an audit of a range of agencies, we can include the MOPS Act staff in that audit. We cannot single MOPS staff out and do an audit specifically of those staff, but we can include them in a broader range audit. That is the construct of the current act.

Mr McPhee—Senator Murray, the short answer to your question is that there are constraints on how far we can go in this area with MOPS staff and with individual members of parliament.

Senator MURRAY—Would you agree with me that the expenditure of taxpayers' money requires common standards of audit and, if common standards of audit do not apply in every respect and in every case for you, as a department, as an agency, then surely the proposition put by the Labor Party to put somebody else in to do that job is appropriate? Disregarding the actual elements of the bill, the principle is appropriate.

Mr McPhee—Certainly, at a principle level or a conceptual level, I have no objection to that. What you are saying is that we should fill in the gaps in terms of the review process. I do not have an in-principle difficulty with that. I recognise, certainly in our case, that the government has put some boundaries around the Auditor-General's coverage and has not given him or her carte blanche. The classic case is the GBEs, as we know. The Auditor-General can only do performance audits of GBEs when requested by the JCPAA or a minister or the parliament. We obviously fully accept that governments can put lines around the coverage of the Auditor-General. But, if you ask me whether, as a general principle, it would

be good practice to have a review function of GBEs and/or members of parliament, I have to agree that it would.

Senator MURRAY—What faces me with my question on this is that if a problem is recognised—and I think the problem is recognised—then either you extend somebody who has already got that capability to do that job, which is yourselves—

Mr McPhee—Absolutely.

Senator MURRAY—or you give somebody else the job. In the case with GBEs, as I understand it, there is a dual function. There is a private sector audit that goes on, or can be asked for within those agencies, and there is a public sector audit that goes on and can be asked for.

Mr McPhee—Yes.

Senator MURRAY—That is what this bill seeks to do. To me, the question is whether it is much more efficient for yourselves to do this job than somebody else.

Mr McPhee—I think that is the question, and what we are saying is that the audit we are doing might be helpful to simplify the arrangements in the longer term. It could be something that is done within the existing framework, rather than go to the additional arrangements of having a separate auditor of parliamentary entitlements. To take an extreme case, if the system were to be greatly simplified, with one global bucket of money, then there might not be a whole lot for the auditor to be doing. The system of administration would be straightforward and there would not be a lot of audit function there at the end of the day. I do not think we are ever going to get there, but I am just putting that extreme case in order to say that it is a bit difficult putting in a system to put in a new auditor if there is a prospect of the system changing in due course. It may be appropriate to look at the audit provisions in the context of what a new system might be.

Senator ROBERT RAY—You have the estimates system for the budget, but you still have a good look at that, don't you?

Mr McPhee—Yes.

Senator MURRAY—Endlessly. I will just move on to government advertising briefly. The reason the Auditor-General, the Ombudsman and so on were thrown into the mix was because they are regarded as independent officers of integrity—under any government. I recognise the concerns as to getting involved in these issues. However, you would acknowledge that government advertising can be a problem, as outlined in your report. Would you think it appropriate if, instead of the Auditor-General and the Ombudsman performing that function or a function similar to that proposed by the bill, that function were performed in an advisory capacity by persons agreed by parliament through some mechanism—a committee or appointment process—who perhaps had a combination of experience in governance and experience in advertising, providing there was a review process, obviously, of their determinations?

Mr McPhee—It is extremely difficult to interpret the guidelines, in the sense that the guidelines set the direction and the tone for government advertising and there will always need to be a judgment made as to whether the proposal is outside or within those guidelines. Our thinking, for what it is worth, was that we felt that probably a parliamentary committee might be the best placed of all to make these judgments because, at the end of the day, the sorts of decisions as to what people think about the appropriateness or otherwise of advertising proposals are very much made in this place.

Senator MURRAY—The difficulty with that is the conflict-of-interest issue. As I understand it, at present, government advertising, under this government anyway, is reviewed by a committee of ministers and staff.

Senator ROBERT RAY—That was also the case with the previous government.

Senator MURRAY—The criticism now, out of which these bills have arisen, is that those determinations have become overtly partisan in some instances and have expended such significant amounts of money that there is cause for concern from an accountability point of view. Whether or not a political party accepts that argument, the fact is that partisan considerations are alleged to be reflected in the current committee process, and I suspect the same would occur in the parliamentary committee process where you are dealing with issues which might have a very strong political flavour at the time. Therefore, the intent, whatever the weakness, is to search for some non-parliamentary, non-partisan, non-political body to evaluate it.

Mr McPhee—I appreciate that. I think it is the right of veto that causes the problem. I appreciate your earlier comments about an advisory committee now, but it means, at the end of the day, telling the executive government it cannot roll with an advertising program. I think that makes it a bit difficult on any particular body.

The only alternative, a sort of mid-point approach, might be to pick up on Senator Ray's earlier comment about some disclosure. There needs to be some reporting against the guidelines by the responsible minister at the time a decision is being made to get some disclosure to the parliament about his or her assessment about the proposal. That is the normal approach—to go for more disclosure. I appreciate the parliament's concern that the advertising program might be on the move in a sense. A decision is made and, from an executive government point of view, you would not want to await some deliberation by the parliament or a parliamentary committee. By getting some disclosure of the reasons for the government's decision against whatever guidelines are agreed at the time a decision is made, you could at least allow the parliament to debate it if it wished.

Senator MURRAY—That is useful.

Senator ROBERT RAY—Do you remember the first major investigation by parliament into an advertising contract on the life of this government? I think it took 17 hours of questioning at estimates on the guns buyback campaign. It is not easy.

Mr McPhee—No, I appreciate that. My assessment is that those debates are really political and can only be carried out in this place.

Senator ROBERT RAY—Isn't one of the problems here the philosophy of accountability and tendering in government processes, where—as I think you would agree and I would agree—not everything can go to an open tender because of the innovative nature compared with the reward at the end? At the moment you have a limited tender, the possibility then arises for a government to reward mates like Mark Pearson, who is the Liberal Party advertising guru that suddenly appears on the tax office payroll for hundreds of thousands of dollars to coordinate a non-political campaign; or Mark Textor, the Liberal Party pollster who suddenly gets the inside running on work; or Tony Ralph or Jonathon Gaul—a whole list of usual suspects. Is there a case, in fact, for the advertising one to have a different open tendering process—admittedly more innovative?

Mr McPhee—I would not generally agree with that, because once you start to compartmentalise your elements of administration it gets extremely difficult. The same points

that you raise could apply to selection of consultants for other purposes as well. I think the issue is to do with the Commonwealth's general procurement arrangements and the importance of agencies being able to be accountable for the decisions that are made.

Senator ROBERT RAY—You mentioned that if a parliamentary committee, and ultimately parliament, had to approve these things, it would so slow down the process it would make it inoperative. I think I would agree with that. Can I just run one up the flagpole. If you had a parliamentary select committee that actually had to take evidence before every advertising campaign, if you limited its extent of hearings of delay to only a month—assuming that it could probe on questions of tendering, the nature of the campaign, the nature of research and maybe even the publication of research—it would take a lot of the political heat out of it. It still would not limit a government from advertising, but the government would have to be far more transparent about it. I cannot think of a reason why public opinion research should not be made a public document before the advertising campaign goes out. The only reason it cannot be is that the powers that be—Labor, Liberal or otherwise—want to use it for their own purposes. It is taxpayers' money. Everyone should know what the public opinion they are going to base their advertising campaign on is.

Mr McPhee—It is another model. I do not know whether it would achieve the outcome that you like to think it would. It is very difficult.

Senator MURRAY—What Senator Ray has suggested does have the benefit of proper scrutiny or scrutiny of intended expenditure of a significant amount. I assume Senator Ray would put a threshold there. If somebody is spending $1,000, it might not attract a full parliamentary committee.

Senator ROBERT RAY—Senator, we allege, only allege, that the extra cost in Defence advertising is $683,000 per recruit. Let us take the amount of money spent in 1998-99 and 1999-2000 and the fact that only an extra 300 recruits came in—I know that is a little glib. Believe you me, if you give me a bag full of $683,000, I will get you more than one recruit for the Defence Force.

CHAIR—On that note, are there any further questions?

Senator MURRAY—No, but that was amusing.

CHAIR—Senator Ray asked earlier about a current audit that may impact on or have some relevance to these deliberations.

Mr McPhee—I do not want to overstate the impact of the audit. We were asked to look at the current system of administration of entitlements and to report back on how we found it and the potential for improvement to that system. I am suggesting that that will have an impact on the nature of the system going forward. If the government picks up any recommendations we make, it would have some impact on clarifying and coordinating the arrangements. To that extent it would be of interest to the committee but it probably does not address the fundamental principles that Senator Murray was raising about coverage and gaps within audit coverage.

Senator ROBERT RAY—I will bet on one thing: your audit report is going to be read more carefully than ours.

CHAIR—Is there a reporting date for that?

Mr McPhee—It is June. We have not shifted from June but it is going to be very tight.

CHAIR—Our reporting date is 24 May, sadly prior to yours.

Senator MURRAY—I will not object to a later reporting date.

CHAIR—I think we can discuss that later privately. Mr McPhee, Mr Lewis and Mr Coleman, thank you very much.

[11.27 a.m.]

BECKER, Mr Andrew Kingsley, Electoral Commissioner, Australian Electoral Commission

CUNLIFFE, Mr Mark Ernest, First Assistant Commissioner, Finance and Support Services, Australian Electoral Commission

DACEY, Mr Paul, Deputy Electoral Commissioner, Australian Electoral Commission

CHAIR—We have in front of us the submission from the AEC. Would you like to add any comments orally before I invite questions from my colleagues?

Mr Becker—The AEC, over a number of years, has been very concerned about the possibility of this sort of legislation coming in, which would involve the AEC in administering it. That certainly is the current view. If it were to come into force then we would be hoping that it would go to some other agency. We honesty believe that administering something like this in the heat of an election would be extremely difficult. We would need a tremendous army of people to keep tabs on it, determining the veracity of the complaints and that sort of thing. We recognise, of course, that there is some frustration that parties have when people make bald statements without, quite often, relevance or factual backing. Those things seem to be part of politics and we have taken the view that the elector can usually tell the difference between bluster and truth. That can then be their decision to take. It is frustrating, I agree, that something could be said that could change people's views in the 48 hours before an election and possibly swing it one way or another. But, as I say, the administration of this would be extremely difficult.

The other thing too, of course, is that it could drag the AEC into a political bunfight in the determination of whether the veracity of the statements and so on is correct. There is a lot of subjectivity in this sort of thing and my only experience of this was in 1993 in South Australia. It was a very straightforward one where there was a statement purporting to be a statement of facts which was just straight wrong. So that was very easily dealt with.

CHAIR—Thank you, Mr Becker.

Senator BRANDIS—I agree with everything you say, so perhaps I am not going to ask you many interesting questions. I just wondered if I could take you to the very narrow issue of how-to-vote cards. At every election, there are complaints about the circulation of misleading how-to-vote cards or other misleading information at the polling places. Do you have any views as to what steps might be taken, consistently with Evans and Crichton-Browne, under the current Commonwealth act, to deal with misleading how-to-vote cards and other misleading polling place information? I am particularly interested in hearing your views about the advance registration of authorised how-to-vote cards.

Mr Becker—If you take the view that there is some misleading statement on a how-to-vote card, and this legislation is not in place, then there is nothing that we would do about it. We would be concerned—

Senator BRANDIS—No, I mean in the technical sense and the way in which the High Court interpreted it in the case of Evans of Crichton-Browne.

Mr Becker—Like the 1, 2, 2-2-2 thing that we had? Yes, all those sorts of things have been tested and we have had to get injunctions and have threatened injunctions and right at the last minute had those things withdrawn. When there are difficulties with things like the how-to-

vote cards, and we had a few up in Ryan just recently which were not properly authorised, those how-to-vote cards were promptly withdrawn.

Senator BRANDIS—What is your position on advance authorisation of matter to be distributed at polling places?

Mr Becker—I do not know that I have a real position on that. In South Australia, they do have how-to-vote cards inside voting screens. They are vetted before they are put up inside the voting screens, but they are not what you hand out outside the polling place.

Senator ROBERT RAY—I think Victoria now has that. You must register it beforehand if you are to hand it out on the day. I think it is working all right, but I was overseas during the last state election on election day, so I did not watch it.

Senator BRANDIS—I must say my own philosophical disposition is pretty much to give carte blanche to the circulation of electoral material. But I do not think it would be an unduly burdensome inhibition on freedom of speech to prohibit the distribution outside of a polling place of any how-to-vote card which had not been registered with the Electoral Commission, let us say, seven days beforehand so that problematic how-to-vote cards, which sometimes require the commission to seek urgent injunctions the night before the election or on the morning of the election, could be avoided.

Mr Becker—We would probably not be keen on actually making a determination on the content of the how-to-vote card. We could certainly look at a how-to-vote card and say, 'Does that with comply with the specifications in the act, the advertising requirements, the printed and authorised by, et cetera?' But that, in my view, would be as far as the commission should go if that were to be the case.

Senator BRANDIS—I am not suggesting you should not. I am merely inviting your views consistently with applying the narrow Evans and Crichton-Browne test and whether it would be really of utility without being an unendurably burdensome limitation on free speech to require advance registration so that they could be scrutinised at that earlier time.

Mr Becker—No, I do not think it is a limitation on free speech. Just one other thing about the how-to-vote cards is that section 329, as Mr Dacey reminds me, does cover that situation at the point of the casting of the vote. If you have the how-to-vote card next to you and you are casting your vote and there is misleading advertising there, I suppose that could be caught.

Senator BRANDIS—I understand that—in fact, that is what I mean. Why not bring it forward by, perhaps, seven days so that nothing can be distributed at a polling place in the nature of a how-to-vote card?

Mr Becker—We are still making the judgment, and that is my concern.

Senator BRANDIS—But you do, anyway.

Senator ROBERT RAY—What Senator Brandis is saying, I think, is two pronged. I would say 48 hours rather than seven days.

Senator BRANDIS—Whatever.

Senator ROBERT RAY—That would allow three things: firstly, it would prohibit anyone from doing a last-minute dodgy thing; secondly, you could examine the how-to-vote cards to see that they were technically compliant in terms of authorisation, which would save you hassle on the day; and, thirdly, the rest of us could work out if there were some rort going on, so we could at least expose it.

Senator BRANDIS—And apply to the court, if need be.

Senator ROBERT RAY—If, all of a sudden, some hard-right group gave their preferences to a hard-left group, you would want to wonder about it, and at least you could debate it.

Mr Becker—Sure.

Senator ROBERT RAY—I agree with Senator Brandis. Would you be able to seek advice from your colleague in Victoria, the state electoral officer, as to how it has worked and provide that to us in writing? That would be pretty good.

Mr Becker—Certainly.

Senator BRANDIS—There is also the question of consistency of standards. I remember that at the 1980 federal election, the National Party in Queensland distributed a Senate how-to-vote card—there was not a coalition Senate ticket. It was printed in blue, it had a big photograph of Malcolm Fraser on it, it made no reference to the National Party and it said, 'How to vote to return the Fraser government.' It indicated a preference to National Party senators. I recall that at about 6 o'clock the night before, your officers pulled up outside the Supreme Court and sought an urgent injunction from Mr Justice Williams to stop that how-to-vote card.

From a practical point of view, why not, a few days beforehand, scrutinise all material so that you do not have to have this last-minute panic? I might say it was a kind of bootstraps argument by the National Party, because they said, 'Well, you cannot give an injunction this late because that would mean we would not be able to distribute how-to-vote cards at all, because there is not time to print new ones and, therefore, the balance of convenience favours refusing the injunction,' and that was actually the outcome.

Mr Cunliffe—That is something that we might want to consider further. There are some other issues that, in effect, are workload issues. At the moment, we have what amounts to an exception basis on the day. Potentially, what we are doing then is something which covers everybody, including very minor players, but potentially a great many of them. There is a workload impact in that week, which is a pretty busy week in preparation for a major event, and then presumably we still have an on-the-day requirement to ensure that what is actually used matches what has been approved or the picture that we have agreed. So there may be some issues that we would want to think about then if we were to turn it into a mechanistic process which covered everything positively rather than just those that jump out in any event.

Senator BRANDIS—Of course, there is no guarantee that people will not break the law, but I would not have thought that it would impose great burdens on the Electoral Commission merely to require every candidate who proposes to circulate a how-to-vote card to register it with the commission within a certain time—whether it be 48 hours or seven days, but something like that—in advance of the election so that somebody could look at it purely from a technical point of view.

Mr Cunliffe—The only thing I am trying to inject is that that 'look at it' is not just in one seat, or on one card; we are talking about each of what will be 150 House of Representatives seats at the next event. We are talking about who knows how many candidates and we are talking also about that in each of the Senate seats.

Senator BRANDIS—But the Labor Party is not going to do the wrong thing, the Liberal Party is not going to do the wrong thing, and you cannot speak for the National Party because they always do—certainly in Queensland Senate elections. If you talk about 2,000 how-to-

vote cards, most of which will come from the major parties and be in standard form, that is not going to take anybody longer than about half a day, is it?

Senator ROBERT RAY—How about their being registered in each of the 150 electoral offices, which are narrowed down for the technical look, and other candidates can come in and look at them? Again, we could get a report back on how it worked in Victoria. I have some sort of memory that a couple of ratbag groups did not get theirs in, so they could present on the day, which was a bonus, but I was not there on the day to see how it worked.

Senator BRANDIS—I have made my point. I will not take up any more time exploring it.

Mr Becker—We can prepare something for the committee. We can consult with our state colleagues.

CHAIR—Thank you.

Mr Becker—I know what it is like to register the how-to-vote cards inside the voting screen in South Australia and that is not a big issue, because they are all the same size and it is pretty straightforward. Unless you were proposing that we have standard size how-to-vote cards—

Senator BRANDIS—No, I am not suggesting that nor am I suggesting there be any limitation on people actually being outside the polling places handing out how-to-vote cards. I think that sort of great picnic of democracy outside polling places is part of the Australian way of life. I am merely putting forward the modest proposal of advanced scrutiny.

Mr Becker—We can report to the committee.

Senator ROBERT RAY—You have done a terrific job stopping those sawdust Caesars with their bit of chalk putting it in the middle of the road. I congratulate you on that.

CHAIR—The committee would appreciate that, Mr Becker.

Senator MURRAY—That was a very useful discussion I thought. I should put on the record the remark I made to Senator Brandis. I think neither Senator Brandis, Senator Ray nor I would regard this as a function which would have to be fulfilled at head office. Each DRO could do it which, therefore, makes Mr Cunliffe's point less powerful, because you spread the evaluation load and it is against the existing law, which is a technical appraisal.

Moving to the truth in political advertising issue, I think it would be no secret that this is an issue on which the committee is likely to be quite precise in its divisions and has strong views already on. The peculiar advantage of having you here, Mr Becker, is as a former South Australian you are aware that a provision similar to this has been in law there since 1985. As far as I can gather, it has not restrained by one iota the robustness or the strength of political debate in that society. So, if it does not in my view have any detrimental political effects, does it have positive legal effects? As far as I am aware, there have been only two cases which have been tested.

Before I ask you what you think the effects on behaviour have been or if you are able to assess that, I refer to Senator Brandis' use of the High Court Evans case, which as a singular case I have found is constantly referred to in adjudication matters on how-to-votes. The fact that there is not much case law does not mean to say you do not have much of an effect. If you are able to, can you comment on whether that law has had favourable or beneficial effects on behaviour in South Australia in your view?

Mr Becker—Perhaps I could describe the one event I was involved in. There have been two cases so far: one in 1993 and one in 1997. I was not involved in the 1997 one, but I was commissioner in 1993. One of the first things to say about South Australia is it is a very civilised society.

Senator ROBERT RAY—Have you ever been at a Crows' match?

Mr Becker—No. I have tried to avoid that. I barrack for Melbourne and have done since I was about two. In South Australia I treated these sorts of things and complaints from the parties—and I think by and large the parties accepted it—by at no stage getting into the business of dragging the commission into the political heat of the debate. So a lot of the statements that were made—and these are statements that we see in every election—tended to be bluster, rhetoric and add to the colour of the campaign. Whilst people would jump up and down and say, 'It is outrageous that they are saying that,' generally speaking I did not do much other than seek advice from the Crown Solicitor and see whether these things really would be caught by the truth in advertising provision.

When we got the one case I had to deal with where the statement was made by the secretary of the Labor Party, which did not agree with the statement that they maintained that the Liberal Party had made, I was then able to go to the secretary of the ALP and ask, 'What are you relying upon to make that statement?' He told me what it was and I said, 'That's not what the Liberal Party said.' It went to crown law and crown law said, 'Okay, we'll take it further.' But, of course, that could not be taken any further before the election so that had to stand for a while. When I was talking to the then secretary, Terry Cameron, I said, 'We believe it is misleading; it is not truthful and we would like it withdrawn.' He said, 'It's served its purpose; I have no problem with withdrawing it.' So he withdrew it.

The following day—it was obvious to everybody that it had been withdrawn—the Liberal Party said that the Labor Party had been forced by the Electoral Commission to withdraw this particular advertisement. That was really bringing us into the game. Terry Cameron turned around and said, 'I did nothing of the sort. I wasn't forced by the Electoral Commission to withdraw it. I was withdrawing it anyway because it had served its purpose.' That is where it was left until after the event and then it went to the Magistrate's Court. Terry Cameron was found guilty. He appealed; went to the Supreme Court and that was it. Subsequently, of course, there was one in the 1997 election, but I had nothing to do with that. But it does have the potential to drag us into the political arena. I do accept that it would be very frustrating for a party when something is said about them that they believe is not true in the run-up to the election, but administering it would be difficult. We have accepted that, if in the event that this were to come through, somebody else, like an election complaints authority, should administer it.

Senator MURRAY—Put aside your own involvement in being dragged into something and just focus on the consequence of those judgments. I used the Evans case deliberately because constantly, both in your literature and in other discussions, people refer to those precedents as guidance from lawyers and so on as to what you can and cannot do in how-to-votes and how it runs on to other issues. Has the effect of either of those judgments meant that, in respect of literature in South Australia relative to the issue of what you should or should not say in politics, there has been any kind of restraining effect on people telling political lies?

Mr Becker—The difficulty is in defining what the lie is.

Senator MURRAY—My question really is the behaviour—

Mr Becker—I do not think the behaviour in South Australia has changed.

Senator MURRAY—It might be against my own argument for the bill. My question is, is the behaviour in terms of political statements a little or a lot better in South Australia than in other states, as a consequence of that law?

Mr Becker—That is another judgment that I would have to make. I do not think so. I do not think the penalties are such that it really affected much. It was brought in in 1985 but it has been sitting there for a long while. It was a Liberal Party amendment. We chucked out the old act and brought in a new act. It was not in the original bill, but it was added to it. I prosecuted the ALP in 1993 and my successor prosecuted the Liberals in 1997, so the Liberals did not learn from the 1993 experience. That was a successful prosecution too.

Senator MURRAY—You do not want to handle this if, by any extraordinary circumstance, it got back into law in the Commonwealth. Do you have a suggestion as to which agency would be appropriate to handle it?

Mr Becker—Going back to what I mentioned earlier, something like an electoral complaints authority or election complaints authority.

Mr Dacey—There is actually an attachment to our submission in section 6, which talks about the electoral complaints authority. We certainly stand by that suggestion.

Mr Becker—That was a 1996 submission, too.

Mr Dacey—It is in the attachment to the submission we made to this committee.

Senator MURRAY—You would not foresee it going to an existing agency?

Mr Becker—In the South Australian case, I made the decisions based on advice that I got from crown law, but you are still standing out there pretty naked.

Senator MURRAY—What you are saying is as the front man on a political issue.

Senator BRANDIS—Mr Becker, could I just ask a couple of technical questions about the operation of the South Australian act? Does it withdraw from private citizens, including candidates, a private right of action? Does it deal at all with the question of the existence of a private right of action?

Mr Becker—No, I do not think it would. The act does talk about the Electoral Commissioner taking these actions, but that in itself would not necessarily prevent anybody else from doing it.

Senator BRANDIS—The law is that, if a conduct is prohibited and a regulator is given a power to take action, a private citizen who had a particular interest could also take a private right of action unless that right were to be expressly withdrawn by the act. It has not been, as far as you are aware?

Mr Becker—No, it has not been.

Senator BRANDIS—Are you aware of whether any private actions for injunctions have been taken in South Australia under the act?

Mr Becker—Not in my time, and that is 30-odd years.

Senator BRANDIS—Does the act give the court the power to require a retraction or a clarification in the event that there was a successful finding that a false statement had been made?

Mr Becker—It is not as explicit as that. We are saying here that we have got two issues. The Electoral Commissioner can ask that the advertisement be withdrawn and a retraction published, then it goes to the Federal Court, or it could go into the Federal Court and then the same things could apply. But that is not specific in the South Australian act to my knowledge; it may have changed.

Senator ROBERT RAY—Have you ever studied philosophy or historiography throughout your career?

Mr Becker—Not that I recall. I have studied a lot of things.

Senator ROBERT RAY—They seem to be two disciplines that establish and debate what is a fact and what is not a fact.

CHAIR—There is also law.

Senator ROBERT RAY—It goes into subjective and objective issues, and by the time you have sat through them all you come to the conclusion that there is no such thing as truth or untruth and no such thing as fact. I just thought for some reason you may have been uniquely blessed here as Senator Murray wants to give you this power.

Mr Becker—No, I am not uniquely blessed As I say, I have only ever been involved with one case out of the several hundred complaints.

Senator ROBERT RAY—I am not going to be a smart alec and give you a test, but you did mention that you acted on advice. I take it that, if this were to come into being, you would probably go to the Government Solicitor's office for advice again, wouldn't you?

Mr Becker—We could. Certainly we would not be doing things that are necessarily straight out of our own motion without taking advice.

Senator ROBERT RAY—Apart from people who want to play by the rules, a la South Australia, isn't there the potential for misuse? I could very easily organise a whole range of statements by one lot of people and I would object to them all and tie you down right through the campaign period, when you would have to work 24 hours a day doing nothing else but deal with my complaints.

Mr Becker—That happened to me in 1993 when I suggested that there was some substance to this complaint. He is no longer a member of the party, but he said, 'I am going to complain about everything.' And of course he just fired off three or four a day.

Mr Dacey—I think probably our major concern is the potential to divert the resources that we require to run the election in that immediate period before the election and on polling day.

Senator ROBERT RAY—So you two would be the judges. I take it that, when you were both appointed, no white smoke went up the chimney?

Mr Becker—No.

Senator BRANDIS—If the proposals that Senator Murray is putting forward were to be adopted, it may have an intimidating effect on more timid or circumspect candidates who may refrain or forbear from making political utterances that they otherwise would have made for fear that they might be accused by a vexatious complainant of breaking the law.

Senator ROBERT RAY—That is a long bow.

Mr Becker—They may—

Senator BRANDIS—It might repress free public discussion.

Mr Becker—It may, but it would largely depend on the size of your penalty, too. The penalty in South Australia is so small that Terry Cameron said to me that he had got his 600 bucks worth, because that was the fine, or something of that order.

Senator ROBERT RAY—It is the best free advertising known: you put out the false thing; the objection is on it; every TV channel runs it; and you are not paying as much per minute. It is fantastic if you can develop one of these.

Mr Becker—The penalty would have to be very significant.

CHAIR—Are there any further questions from my colleagues? It must be the Adelaide influence. Thank you for your civilised evidence. I remind you that you took a matter on notice. We require that by 20 April.

[11.56 a.m.]

PRESTON, Dr Noel William, Adjunct Professor, Key Centre for Ethics, Law, Justice and Governance, Griffith University

CHAIR—Welcome. The committee has your submission. Would you like to talk to that briefly before I invite my colleagues to ask you questions?

Dr Preston—As you see, the thrust of my recommendations has been to see a lot of merit in the suggestion about the auditor of parliamentary allowances and entitlements, with some finetuning, and to suggest in respect of Senator Murray's bills that something extremely valuable can be retrieved out of them, with the implementation of an ethics committee and the development of a code with, perhaps, an ethics commissioner working alongside that. Another assumption that has been important in my assessment is that in the presentation of these bills, particularly Senator Murray's, there has been a little bit of confusion between ethics support to executive government and cabinet and ethics support to members of parliament. I would want to see a distinction in how that is dealt with. Although it is outside the direct province of this committee, I want to give a strong endorsement to a recommendation that puts before government and any future governments the position of an ethics councillor alongside the executive, much the same as the Canadian model.

Those are the broad recommendations I have made. My assumptions supporting all of them were that prior advice is a highly desirable contribution to the political process in these matters, rather than the political dogfights subsequent to some ethics misdemeanour; and that the name of the game is not to get scalps or to punish people, but rather to support them. I would endorse a supportive regime. It goes without saying, but as I am an academic I ought to say it, that my presumption is that these measures should appeal to what we might call enlightened self-interest and should take very seriously and realistically the political process. They cannot be pie in the sky. Those are some of the thoughts behind my recommendations, but I would rather have a dialogue.

CHAIR—You touched on the politicisation of ethics and then you said that it has become part of the political debate. You then went on to say that an ethics counsellor would be a good thing for the Australian parliament and for parliament in general. Why do we not just leave ethics to the marketplace of politics and the electorate and simply concentrate on transparency and accountability?

Dr Preston—We certainly need to do that. That is a prerequisite. But I think there still are matters of judgment and I do not really see why we quarantine off ethics as an area in which government and MPs should receive advice from any other area. It can still be useful to have advice.

Senator BRANDIS—Dr Preston, didn't Aristotle say that politics is a branch of ethics?

Dr Preston—Yes, two sides of the one coin, indeed. What we are talking about here is something inevitable and it is just a question of appropriate measures to institutionalise and support the process.

Senator MURRAY—Yes. I think ethics, values, accountability and a package of things which relate to behaviour is really a massive issue in democracies, not just in this country but worldwide. I find that whenever I ask voters or residents of Australia what they think of politics or the political system in Australia—that kind of general question—the answer is almost immediately on to the accountability framework. It is about ethics, values, attitudes and behaviour. People do not answer that question saying, 'I think our road system is awful,'

or, 'I would love to have electric trains,' or stuff of that nature. They do not. It is about style and attitudes. I am convinced by everything I hear and read that there is a legitimate demand for improvement in these areas. For me, it is for the committee to accept that and then to ask whether these bills are a useful movement forward and, if they are not, then what other mechanisms are appropriate? I found the submissions from everybody very helpful, and in my own approach I regard my bills as draft bills and certainly not something you have to draw the line on.

Dr Preston—Sure.

Senator MURRAY—With that kind of introduction, the Senate—and probably the House, although I know less of their functions—already deals with ethics and values in a number of ways. The Senate Privileges Committee and the register of interests committee have to deal with those issues and, at times, functioning committees have to deal with them because of behaviour of particular senators.

In your answer, I thought there was a danger that, in establishing an ethics committees, of isolating ethics as something separate rather than integrated into other functions, and that the title itself provokes the dislike of purism—I am more pure than you kind of stuff—and people dislike that. Titles matter a lot and I find a resistance amongst parliamentarians to the idea of parliamentary commissioners or ethics commissioners, and so on, but often not to the policy. Is there a way of framing an advice and, sometimes, the adjudication capacity within the parliamentary process which would integrate the drive for higher standards, greater transparency and better behaviour which is not captured in these bills and can be better addressed?

Dr Preston—Are you talking about nomenclature or the whole process?

Senator MURRAY—I am talking about nomenclature because I think that is important, but I am also talking about a way in which it would become attractive to, and desired by, members of parliament?

Dr Preston—One way of commencing a response to what you have said, Senator Murray, is to recognise the starting point and the bottom line, the end point in all of this, is that we are dealing with issues that are critical—and you said this in your introductory remarks—to public confidence in the institutions of government and politics. I am not so sure that there is a diffidence and uncertainty about using terms like 'ethics' these days out there in the professions at large and the community at large. This discourse is now much more accepted. Although I do accept that even terms like 'conflict of interest' trigger some instant reactions that are unfortunate. It is seen as a pejorative term. Of course a conflict of interest is not in and of itself unethical, it is what may flow from it and how it is to be managed that become critical. I have seen some literature recently where people prefer to talk about dualities and pluralities of interest, which is an accurate description.

To a point I take the point that the nomenclature matters, but my judgment would be that the parliament would not do itself any disservice in the eyes of its public by adopting nomenclature such as ethics commissioners or ethics committees. You would be well aware I am sure that terms like this are used quite freely particularly in North America. In Queensland—and I think we are now developing practices that are worth study by other jurisdictions in Australia—there is a privileges and ethics committee and an integrity commissioner, whose brief is directed towards executive government. I guess I am not prepared to concede too much in the area of nomenclature. I wonder, having heard what you

have said, whether the title you gave your bill—charter of honesty—was an attempt to get around that.

Senator MURRAY—I am actually prompted by the government. They introduced a charter of budget honesty. I said, 'Let's have a charter of political honesty.'

Dr Preston—Yes.

Senator MURRAY—The reason I am asking this question—this is not for me academic or esoteric—is I have already heard amongst witnesses and in the debate a fear of absolutism. There has been reference to tsars, inquisitor-generals or papal infallibility. That is an understandable fear of an extremist, purist sort of approach. People do react to words. One of the phrases I have tried to generate of recent times is 'political governance'. People talk about corporate governance. Would political governance cover the range of standards, values, ethics, behaviour, et cetera or do you need to be very precise? Because for most of us it is also about disclosure and accountability, which is a principle not so much as an ethic—or I suppose it might slip into that.

Dr Preston—It is the product that we need—that is, accountable government and accountable political practice. Terms like 'governance' and 'political governance' as an umbrella for many of these issues would sit happily with me. We are going to continue to run into this hesitancy and presumption that this is the ethics inquisition coming in on us until we actually do these things, get some runs on the board, have people with the right kinds of qualities playing the functions and have the politicians and the public beginning to experience that these measures can be supportive of the political process and can be protective of politicians rather than a threat to them.

Senator MURRAY—Once you move from trying to find in the nomenclature the right breadth and depth in description, you then have to move to who does it. There is the argument as to whether it should be self-regulatory or whether there should be an independent body, or as independent as you can make them, which provides appropriate advice and jurisdiction in these areas. The bill argues that, because of the inherent conflicts of interest between partisan people determining issues where the outcome may affect the political fortunes of strong numbers within the parliament, you therefore have to have an independent body for advice. Do you think that you can advance the cause of ethics and integrity in political governments—frame it as you will—as effectively through internal mechanisms as you can through the combination of those with external independent authority?

Dr Preston—Constitutionally and institutionally, the sovereignty of parliament is critical because so much depends on that in our system generally. Therefore, I want to move carefully in the area of setting up bodies that appear to be in judgment on parliament. At the same time, I think that in the practical experience in other sectors of life—where these governance, to use your term, issues are concerned—an appropriate balance of independent scrutiny and autonomy works well. I think we can have a both/and approach here. That is why I am suggesting that the committee would be master of its own business obviously, but it would be supported and complemented by—let us keep using the term; you might come up with a better one—an ethics commissioner. I think it can be a happy partnership.

The other distinction that needs to be borne in mind here on the independence and external scrutiny thing is the distinction between investigative type functions in this regime and advisory, pre-emptive and preventative sorts of measures.

Senator MURRAY—Including training?

Dr Preston—Including training, exactly. I think it becomes very tricky to put the investigative powers in the province of the commissioner—at least the final responsibility for it. I think it is much better to leave that as the committee's final judgment. Of course, there is the need for the courts and there is the need for our super watchdogs on some fronts, like CJCs and the like. But when we are talking about something that is primarily conceived as a support and as a facilitating and advisory mechanism, I am very loath to put much of the investigative task in the hands of these external advisers or commissioners.

Senator MURRAY—It has interested me that the two models that are available to us in this area, the UK and the USA model, occur in situations where the separation of powers is entirely different. In the United Kingdom the executives are within parliament and, therefore, they have felt it necessary to have their regulatory body outside of parliament, because of the extra conflicts that arise when you have the executive—

Dr Preston—Are you referring to the parliamentary commissioner of standards?

Senator MURRAY—Yes, when you have the executive dominating parliament. Whereas in America, where you have the executive outside of parliament, they have gone for a self-regulatory mechanism. I do not have enough information to judge which of those is the most effective in their circumstances. Where you have an inadequate separation of powers, as we do in our system with the executive within parliament, I wonder whether that inclines the judgment to require an independent parliamentary commissioner rather than an internal self-regulatory committee system or something of that sort.

Dr Preston—Yes. What I am encouraging the committee to consider at this point in time is, I think, a bit of a both/and. Your bill talks about this commissioner and, indeed, the committee drafting a code for both ministers and members of parliament. I want to separate those tasks. I think the government of the day must create its own standards and its own support mechanisms. That is why I think the Canadian model has a lot going for it. It is what, in a more limited way, we are experimenting with in Queensland—it has only just begun. Maybe what I am suggesting does not reflect precisely the reality and the mixed picture of separation of powers that we have, but I think—operationally and in terms of the integrity of the institutions and the functions they play—it is a better way to go. Sure, ministers as MPs have a code that belongs to the parliament. They may have access to the ethics committee and the ethics committee may have some function in scrutinising them there. But I am unsure about the way you have rolled it all together.

Senator ROBERT RAY—We are talking about a commissioner for ethics. How does that person come into being?

Dr Preston—The selection process needs to be as bipartisan as possible. This is the parliamentary role that I am talking about. Obviously, if we are talking about the ethics counsellor to government, there is a different process.

Senator ROBERT RAY—Yes.

Dr Preston—Again, Senator Murray's bill talks about the presiding officers of each house being the key mechanism for appointing this person. I do not go along with that. Probably some parliamentary committee, and certainly some representation of the parliament that is bipartisan, needs to play a key role in that appointment. Within your question, Senator Ray, I presume there is an invitation also to make some comment about what kind of person and what kinds of qualities.

Senator ROBERT RAY—By all means.

Dr Preston—I think this is extremely important. There are some obvious things to say. Obviously it needs to be someone who has recognisable standing in the community. A critical point will be the ability to develop the confidence of members of parliament. That is a more intangible set of qualities. Not surprisingly, I also want to go in to bat for appointing someone who has some knowledge of ethics, particularly public sector ethics. The man who does the job in Canada, Harry Wilson, for the Canadian government is an economist. The quality he has is the fourth quality I would want to emphasise, which is a very real practical knowledge of how government works and how politics works. I guess those things go without saying but, going back to your original question, I envisage a bipartisan process of appointment.

Senator ROBERT RAY—I have a bit of trouble with analogies with Canada. I agree with someone who said that it is the largest NGO in the world, so things do not always translate.

Dr Preston—Fine. We have to grow our own thing. I am clear about that.

Senator ROBERT RAY—I am still not clear, from my experience here, how we would get to a bipartisan position through an existing committee. It may well be that you want to create a committee. We do have bipartisan committees in this parliament. They are rare; but there are some, though they are not directly related to this area. I know the Committee of Privileges so far has been bipartisan—it has never had a split vote on anything.

Dr Preston—Queensland has wedded their privileges function and their ethics function. That could be the committee. There would be plenty of experiences in the Commonwealth sphere such as we have in Queensland with the appointment of commissioners to the CJC, for example.

Senator ROBERT RAY—I think you just killed your case with that one.

Dr Preston—The appointment process?

Senator ROBERT RAY—The result process is tragic for Queensland.

Dr Preston—The CJC?

Senator ROBERT RAY—Yes.

Dr Preston—I am just talking about the appointment process. If your case rests on the appointments having been the wrong appointments and therefore the outcome—

Senator ROBERT RAY—I therefore would say that that reflects back on the process.

Dr Preston—The system there is that the government presents a name to a parliamentary committee and there must be agreement of a majority of that committee, including a member of the opposition.

Senator ROBERT RAY—I think you are getting there with that.

Dr Preston—That is one way to get there.

Senator ROBERT RAY—It is certainly superior to relying on the guidance of presiding officers. I am not criticising them, but they were not elected to do that job.

Dr Preston—That is right. I feel that strongly. It is also part of establishing the confidence of members of parliament and also the public confidence in this role.

Senator ROBERT RAY—I agree with you in dividing MPs and the executive, although I would think all members of the executive would be encompassed under MPs.

Dr Preston—I meant that, yes.

Senator ROBERT RAY—One of the problems we have is we set up a guide for ministerial behaviour, which was published by this government. It previously existed in the handbook.

Dr Preston—A guide?

Senator ROBERT RAY—Yes. The guide to ministerial behaviour is a document oft quoted around this building. Every time a minister does something and we say he or she is in breach of it, one-third of the time we are right, one-third of the time we are wrong and the other third who knows? Because of the adversarial nature of this place there is no objectivity when people quote the code, so an enormous load is put back on some commissioner for ethics. None of us is going to be fair about it. Criticise as you may adversarial politics, I will show you that it is a lot more honest than a lot of other systems that do not have that adversarial nature. But that is what we have got.

Dr Preston—Your own case is referring to executive government—the code for ministers.

Senator ROBERT RAY—Yes.

Dr Preston—I am wanting to handle that a little differently. I am not expecting the same bipartisanship there. At the end of the day, that system rests on the Prime Minister's integrity, and that is a political matter.

Senator ROBERT RAY—I will put it this way. If you have an adversarial system, there will be constant nitpicking around the edges of the code. The American system is not adversarial—it is the old boys' club. Up until 10 years ago, all the congressmen were teeing up at the first hole and getting paid $2,000 to play golf with X and Y. Yet they had a beautiful code of conduct and they had the committee process to do it in, but they did not have an adversarial system between each other, so no-one was going to expose anyone else. I am not really expecting you to resolve all this, Dr Preston, because it is a difficulty.

Dr Preston—That has not meant that the ethics process in the US Congress has not been politicised, because it has. Notwithstanding what you are saying, it is only proving the point in a way. At the end of the day, a judgment has to be made whether, considering the public confidence factors and the potential good that might be achieved through this, notwithstanding its limitations, we have to bring the fourth estate into this discussion. How they play the game in relation to an ethics regime is not unimportant. Can they be relied on? Or can we imagine some cultural shift going on gradually if this process is taken seriously? Perhaps I am a superoptimist, but I think it would be a sad conclusion if we dropped all these possibilities on the basis of, you know—

Senator ROBERT RAY—I worry about who we appoint and about the processes and rules either being too specific or too vague. But what I do assert—and you may like to comment on this—and I made this assertion earlier in the day, is that the more transparent you make everything to do with parliamentarians, be it in terms of allowances, what they own or what they have interest in, the better the behaviour will be because the one thing no politician wants is exposure, or vulnerable exposure, if I might say so. Sure, some cheating on travel allowances occurred up until about 1997. The moment that matter became transparent and everyone could read every claim, virtually, it has disappeared. If we could get that regime in, at least it does not preclude any point you have.

Dr Preston—No, and I do not disagree with that. In terms of the public perceptions, the entitlements and the superannuation areas are where it really hurts. Building public confidence will have to include dealing with those measures. Any system is about transparency

because accountability has to be achieved on the basis of openness and knowledge. Ethics will always be contestable, but let us have the contest around the facts and an open debate and a community conversation about the kinds of values we want to support in our political life.

Senator ROBERT RAY—Should we have a code of conduct and an ethics commissioner in academia, given the recent examples of people being bumped over into a pass mark or an honours mark on the basis of what they, or their father, have donated to a university?

Dr Preston—I have been on that train in academia for a few years.

Senator ROBERT RAY—Have we got there?

Dr Preston—No, but up in Queensland we have developed codes of conduct. Our research ethics act is getting together a bit better. It is an ongoing process; we will never get it perfectly right and there will be ambiguities. What we are talking about here is not exclusive to this institution or this profession.

Senator ROBERT RAY—Thank you.

CHAIR—I have a question which relates to something that Senator Murray raised before about the ethics or truth commissioner, or whatever nomenclature you like, and it relates to this concern that parliamentarians do not like the idea of someone running around and taking their pulse for virtue or for truth.

Dr Preston—Of course.

CHAIR—The assumption underlying your submission and many submissions is that the appointment of an ethics commissioner, or whatever, would enhance the protection of politicians and would set some standards. It might also potentially even raise their stature in the community, but we had some evidence this morning that that may not, in fact, be correct. It may make it worse. Dr Uhr can cite you the example, and that was parliamentary question time.

Dr Preston—We are going to have lunch together and I will be put right by John.

CHAIR—What do you think about that? In other words it could be worse for us, not better.

Dr Preston—We do not have enough experience in the Australian context about these measures to make any clear judgment about that. I think that it all gets mixed up with the community's increased sensitivity to these issues. The pressures are increasing, so sorting out all the variables in making a judgment about whether the politicians come out in front or not is not easy, it seems to me. I am loath to be drawn to a precise opinion on this.

I believe that people who are opinion leaders in the community would take advocacy of the cause of political reputations much more seriously if they saw serious measures being taken from within the parliaments of Australia. It is vital how these things are constructed. The integrity commissioner position in Queensland has been made so secret in its dealings with executive government that it may rebound on government and reach the point at which people can attack and say, 'What's the integrity commissioner saying about this?' or, 'Have you asked the integrity commissioner?' and everyone is dumb. That is not the model that I would be talking about. There has to be an appropriate level of secrecy and confidentiality. I like Senator Faulkner's bill in terms of the balances it achieves, but it is by no means quite as tight as the integrity commissioner approach in Queensland.

Senator BRANDIS—The integrity commissioner in Queensland does not seem to have changed the culture much when you have a Premier who openly boasts about being a liar and the fact that all politicians are liars, and laughs about it. I am from Queensland, and I do not think the existence of the integrity commissioner has changed the culture of politics in Queensland one iota.

Dr Preston—The person appointed took up office in September last year.

Senator BRANDIS—It is a bit soon to hope.

Dr Preston—None of these measures on its own is going to be a panacea, let us be clear about that.

Senator ROBERT RAY—I take it that the Liberal Party up there will not trouble the starters much; there are only three members there.

CHAIR—It is not even a panacea; some of us are concerned that it might make matters worse. I think that is the point.

Senator BRANDIS—I think that is the point. I want to give you a hypothetical—

Dr Preston—How does it make matters worse?

Senator BRANDIS—Let me illustrate my point by giving you a hypothetical case. Let us say you have a government that is facing an election, and it is very close to the margin, so the government commissions its pollsters to conduct intensive research in marginal seats. The pollsters report to the government and they say, 'If you promise this, this, this and this, it will benefit marginal voters in these particular marginal seats, and you will stand your best chance of winning the election.' None of the ministers of the government believes for a second that any of those measures are in the long-term or even the short-term interests of the nation. They are not against the interests of the nation, but they are not important matters of national interest. The ministers of that government decide to implement those measures for the nakedly political reason of trying to survive at an election, heedless of considerations of national interest. Is that unethical?

Senator ROBERT RAY—Just put in one other thing—that the government did not pay for the research. I think that would make your question perfect.

Senator BRANDIS—All right, the government did not pay for the research, the political party did. Is that unethical?

Dr Preston—Are you asking whether it is unethical or are you asking how an ethics regime might operate?

Senator BRANDIS—No, we are using the word 'ethics', which has many shades of meaning.

Dr Preston—We are talking about ethics as applied to political practice. A given within political practice is the need—if one is to exercise power—to win in the political process. So that is a considerable factor to respond to in making a contextual judgment.

Senator MURRAY—Because it is a contest?

Dr Preston—Yes. The system does govern how you make judgments about what is ethical, so I think an ethical justification can be mounted for that line of action. However—there is always a however for an ethicist—it clearly begins to bump into the transparency thing, because there is a certain amount of deception being practised in that.

Senator BRANDIS—Dr Preston, I do not think you were here for Dr Uhr's evidence this morning, but he used the expression 'ethical overreach'. What I understood him to be saying was that we should not try to make a purist view of ethical conduct do too much work, because there comes a point at which the political process, as long as it is an accountable and transparent—

Senator MURRAY—And contestable.

Senator BRANDIS—and contestable process runs itself.

Dr Preston—What I said was not inconsistent with that.

Senator BRANDIS—No, and I accept that.

Dr Preston—John probably also said—because I have heard him use a phrase like this on other occasions—that the aim here should be 'minimising vice not maximising virtue'.

Senator ROBERT RAY—A purist would say, like the Democrats, that you should get rid of how-to-vote cards because you have to cut down a lot of trees to print them. Pragmatists like me just draw the conclusion that they cannot staff their polling booths. So it depends on which perspective you are coming from.

Dr Preston—We will never be free of the contest or making judgments, and no-one is going to be able to claim they are right.

Senator ROBERT RAY—They do and that is the problem with our system—they do claim they are right. I am not talking about the Democrats now. People make claims to this. So the purity argument, taken with the adversarial nature of politics, makes it much harder to get to it.

Dr Preston—I happen to believe that the small community of advocates for a more intentional approach to ethics in political practice in this country, of which I would number myself as one, is not as off on the purist kick as sometimes the people who are in politics think they are. I think there is much more of a potential for meeting of minds around the nature of the political practice than perhaps either side would concede.

Senator BRANDIS—I find myself in almost complete agreement with Senator Ray on this—and you should not infer that that is because we represent the two major parties either. If you had complete transparency and complete accountability—and, as is necessarily the case, political outcomes are always contestable because politicians have to stand for election and the voters know exactly what we did—and you had the intense peer review that the adversarial politics generates so that motives are always questioned and scrutinised and policy failures are always exposed, can't the electorate make its own judgments about who is doing the right thing and who is not?

Dr Preston—Of course, but—

CHAIR—Leave it to the marketplace; is that right?

Dr Preston—Might not the participants and competent players who are not just the elected officials—and there is a whole set of them around—benefit and, therefore, the whole process benefit? It might be ultimately in the public interest if, injected into that process, there were guidelines, interpreters of guidelines, advisers, opportunities for conversation, induction processes and the keeping of soft case law—if that is an accurate term—to learn from. That is not incompatible with the process you are talking about. It might, in fact, lend for greater

accuracy in choice of decision and line of action that puts us all in the better situation when the contest comes to make more, as you say, transparently informed decisions.

Senator ROBERT RAY—I do not disagree with much of that, but the bottom line is that, if I am going up to Mildura and I am going to claim travel allowance up there and I am really on party business not parliamentary business, I will tell you what is going to stop me doing it. It is not going to be an ethics commissioner or the rules, it is the knowledge that George Brandis is going to read my form and may cross-reference it with the *Mildura Times*, which says that I hosted a quiz night. I am shot, so I do not do it.

Committee adjourned at 12.42 p.m.