

Session Two Senate Committees - Keeping Parliament Responsible

Mr EVANS - For this segment of the conference our principal speaker is former Senator David Hamer who has recently retired as a Senator and from the position of Deputy-President of the Senate, and who has had a leading role in recent developments in the Senate committee system. He will be speaking on the somewhat cryptic title Senate Committees - Keeping Parliament Responsible.

Mr HAMER - Mr Clerk, ladies and gentlemen: I hope to be more controversial than those we have heard so far, because all is not sweetness and light and ease with the committee system or the parliamentary system. When Walter Bagehot wrote, in 1867, his seminal work called *The English Constitution* his main thesis was that the political system, as it was, bore no relation to the political system as it was portrayed. It had changed at least thirty years before. He argued that what everyone was talking about - the way the political system worked - was based on the settlement of 1688, where you had a separation of powers between the executive and the legislature in the Parliament.

He argued that since the first Reform Act of 1832 this had completely changed. The House of Commons performed both functions: choosing the executive - as he said, it could choose and dismiss as it liked - and the quite separate task of being the legislature. He claimed that the Commons could dismiss whom it liked, appoint whom it liked, but was not bound to accept the proposed legislation of the executive it had chosen. The essence of his system was responsibility: the responsibility of the Cabinet to the House of Commons, and the responsibility of the House of Commons to the people.

It will be my thesis that 125 years later we will fall into exactly the same trap. We are still talking as if the system he described, which is an accurate description of what it was in his time, still applied when what we are doing now is as out of touch with what he described as the previous system was when he spoke. What has happened since then has been the enormous growth of party discipline. What we now have is not a responsible government; it is a party government. Australia has gone to the extreme lengths of viewing all legislation as a vote of confidence and any legislation amended by the House of Representatives against the Government's wishes as a vote of no confidence in that Government. This is an extreme version of party government.

What has been going on in the executive? The Government has been confusing executive power with legislative power. In fact, the Government regards the two as synonymous and the Government is no longer responsible to the House of Representatives. The House of Representatives chooses it, to use the American expression, as an electoral college, but thereafter the Government knows it is not going to be thrown out by that electoral college. It has tenure as long as it can hold its party together. Its responsibility is to its party, not to the Parliament. Very recently, the Treasurer said that Question Time in the House of Representatives was not a right, but a privilege granted by the Government.¹ I think the sense of responsibility has gone slightly astray there.

As far as legislation is concerned, the Opposition does not intend or hope to amend Government legislation. It debates it, tries to make points with a view to winning the next election, and tries to become the next electoral college. As far as legislation is concerned, the House of Representatives is a mere rubber stamp. You can see it perhaps in its extreme form at the end of a session where forty bills can be guillotined through the Parliament in a week with virtually no effective debate. That is not a legislature and it cannot be a legislature under the present system. I am not saying it does not do anything. It acts as an electoral college; it acts as a sounding board for the next election. I suppose you could say that it puts the senior members of the Opposition, the alternative Government, on the public payroll. It does those things, but it cannot be a legislature. You could ask, I suppose: 'Does that matter?'. Why do we not have an elected dictatorship, to use the words or the expression I think first coined by Thomas Jefferson, but repeated more recently by Lord Hailsham, two very different characters separated by two hundred years? But that is not what we are discussing today.

I would love to argue the damage and dangers of an elected dictatorship, but what we are trying to argue is how we have responsible government. I am making the point that the Government feels responsible to the government party; it does not feel, in any significant way, responsible to the House of Representatives.

¹ Commonwealth Parliamentary Debates (Hansard), Vol.H.R.164, 24 November 1988, p.3206

If you are going to have a legislature, under our system all you have is the Senate, and the Senate is a very good legislative body. Proportional representation ensures that the Senate represents, more accurately than the single member constituency system in the House of Commons, the range of views in the community. It is, admittedly, slightly distorted by the fact of equal representation of the States. Nevertheless, the composition of the Senate is much more representative of the general viewpoints of the community than the House of Representatives, with single member constituencies, ever can be.

It is also vital, if the Senate is going to perform as a legislature, that it is not controlled by the Government. Under our system of twelve Senators for each state and two for the Australian Capital Territory and for the Northern Territory, and the system of electing Senators by proportional representation, it is most unlikely that the Senate will ever be controlled by the Government, and with party discipline as it is, once you have a legislature controlled by the Government, it functions very poorly.

If the Senate is a legislature keeping responsible government alive, how does it do it? I would like, firstly, to draw out one area that people do not look at very often and that is delegated legislation - regulations. The Senate has had a committee dealing with those matters for sixty years and it calls on the advice of an eminent lawyer who goes through every regulation. About fifteen hundred regulations are issued each year. By a quirk, when the Acts Interpretation Act was written in 1901, each House of Parliament, separately, was given the right to disallow regulations. No government would contemplate doing such a thing now and in other jurisdictions it is always that both houses have to do it; that is, the Government controls the lower house, meaning the Government is in control of whether regulations are disallowed or not. But in 1901 the concept was that the House of Representatives represented the people and the Senate represented the states. It was logical to give each house, separately, the right to disallow regulations it did not like.

What happens in the Senate is that each instrument of delegated legislation is examined by the Standing Committee on Regulations and Ordinances, and if it breaks certain rather formal rules, notice of disallowance is given. The rules show the way in which that Committee operates. They are: to look at each regulation to see that it is in accordance with the statute; that it does not trespass unduly on personal rights and liberties; that it does not unduly make the rights and liberties of citizens dependent on administrative decisions which are not subject to review on their merits by a judicial or other independent tribunal; that it does not contain matter more appropriate for parliamentary enactment.

Now most of these rules are basically non-party political, although the last one has some potential party political elements, and the Committee is nearly always unanimous; it gives notice of disallowance and the Government usually gives in or compromises. In fact, my impression is that Ministers are usually slightly surprised at what their public servants have been trying to get away with. Anyway, there is normally an agreement reached, an offensive regulation is withdrawn and the system works very well.

There is one of the Committee's rules that I draw particularly to your attention and that is the one with respect to containing matter more appropriate for parliamentary enactment. There is a tendency to widen the scope of regulations rather than include such material in the principal Act. Sometimes that is necessary for future examination and development. Too often, matters that should be in the main Act and debated by the Parliament are put into regulations. I think that is an area where the Regulations and Ordinances Committee has got to be rigorous to see it does not happen. That is not to say, by the way, that although we can disallow regulations which are what might be called improper in the way they operate, the Senate retains the power to disallow regulations on other grounds.

The most dramatic instance of the Senate's power to disallow regulations concerned the Australia Card, which required a regulation to bring it into operation. The Senate gave the warning that it would not pass such a regulation, and the whole Australia Card scheme collapsed.² In that way, the Senate was reflecting the general wishes of the community more accurately than the Government or the House of Representatives. That is a very rare use.

One other matter I should mention is in relation to the commencement date of legislation. In my view, all too often these days, the Government is putting in clauses that allow it to decide when laws that are passed by the Parliament should come into operation. We want to ask ourselves, why should the executive have such a power? Why? The legislature has passed a law which should come into effect. If the Government can see good reasons why a law passed in good faith by the Parliament should not come into effect, it should come back to the Parliament and argue its case. It should not arbitrarily withhold the full enactment of the law because, again, that is usurping the function of the legislature.

² Commonwealth Parliamentary Debates (Hansard), Vol.S.122, 8 October 1987, pp.861-75

The Regulations and Ordinances Committee is well established, as it has existed for nearly sixty years. I would like to draw everyone's attention to that fact, even though it was firmly opposed by the Government of the time when it was first set up. Governments do not like what they are doing to be looked at.

Based on the success of the Regulations and Ordinances Committee, a Scrutiny of Bills Committee was set up in 1981. This was to do essentially the same job with bills, using the same sort of terms of reference. In my view, it is not yet as successful as the Regulations and Ordinances Committee. The matters which are usually raised in the Committee are sent around to all Senators. As yet, it has not developed a method where, as a united group, it can impose its will on the Government. There is no machinery to ensure that it can make the Government come to heel, as there is with disallowance. It should have that. I draw your attention, again, to the fact that the setting up of a Scrutiny of Bills Committee was opposed by the Government.

We now come to the matter of the consideration of bills. They can be, in fact they nearly always are these days, considered in the Committee of the Whole. The Government does not control the Senate. The way bills tend to get through is by a process of deals; however, that is a very inefficient way of dealing with complex legislation. After the next election, the balance of power may be in the hands of independents. At the moment, the balance of power lies with the Australian Democrats, and the Government has been doing deals with the Democrats, saying: 'We will accept your amendment to this, or two or three amendments', which is very satisfactory to the Democrats. The trouble is, from the point of view of proper legislative procedure, that the Democrats are then locked into supporting the remainder of the bill and also refusing to send it off to a committee.

As one leader of the Australian Democrats said to me when I asked him why they would not support what was, in my view, a very defective, non-urgent bill being examined by a committee, he said: 'Oh, we have got our four amendments agreed to; why should we want to go off to a committee?'. That is the danger of trying to do complex drafting of bills by agreements on the floor of the chamber. A number of bills have been sent off to our standing committees - about four a year out of 180. That is not very many, bearing in mind that in the House of Commons, for instance, virtually every bill goes off to a committee. Some committees have never had a bill referred to them. I think I am correct in saying that governments oppose bills going to Senate committees.³ Their attitude is: 'This bill has been drafted by the Public Service, been through Cabinet, been through party committees, been through party meetings, possibly outside bodies and we have all agreed on it, why should Parliament be examining, correcting and altering it?'. What the Government wants is a rapid rubber stamp from both houses of Parliament. This applies to all governments, not any particular government. They do not want committees to examine bills and find defects in them though I think that it is the almost universal view that bills that have been referred to committees have been greatly improved.

As a result, in 1988 the Senate set up a select committee to look at the question: should more bills be referred to standing committees and, if so, how? That Committee reported in December 1988.⁴ I was a member of that committee and we were conscious of two particular matters. The first was that we could not produce a system that would create unreasonable delays in the passage of legislation. In my view legislation is very rarely as urgent as the government contends. Nevertheless, you could not have an enormous backlog of legislation.

The second matter that occupied our attention was that if we were going to have separate committee hearings on bills the Senate would have to sit longer, and we found no enthusiasm amongst Senators for sitting longer. I think there should be more enthusiasm. After all the Senate sits for about eighty days a year - it will be much less this year with the election and the very short Autumn session. The House of Representatives sits about ten days less. The Canadian and British Parliaments, to take two examples, both sit for double that time - about 160 days a year - and, incidentally, they pass about one third the number of Acts per year that we do. When looked at on a productivity basis we pass six times as many bills per day as they do. That is one area where high productivity I do not think is admirable. I think we should sit longer, but there are difficulties.

The first problem is that the political expectations are that Senators will be back in their states. This does not really come from the electorate as a whole; it comes from party members. All Senators know that feeling - you are expected to be back in your state, what are you doing wasting your time in Canberra, you should be opening a tea party somewhere in Victoria or whatever state it is. That is one thing. It is a genuine problem.

³ See Senator Durack's comments, p.49

⁴ Commonwealth Parliament, Senate Select Committee on Legislation Procedures, Report, Parliamentary Paper 398/1988

The second problem is the amount of free travel that Senators get. I have not checked recently, but it used to be the case that American Senators were eligible for four free trips home a year. Our Senators have limitless travel. For instance, when they tried to reorganise parliamentary sittings so that they sat from Tuesday to Friday one week and Monday to Thursday the next, the idea was that people would be staying in Canberra over the weekend. No one stayed in Canberra. That is no reflection on Canberra; they just preferred their homes. This included Western Australians who went home on Friday afternoon and came back on Sunday night. No one stayed in Canberra. Everyone wants to get away and I think the free travel is one of the factors that makes it more difficult to keep people in Canberra longer.

The third problem is that the minor parties in our system have no representation in the lower house. Therefore they have to do in their own states many of the functions that would be carried out by the representatives of the major parties. For those reasons there are great difficulties, in a sense, with sitting longer but I think the Senate should sit longer and the Senate certainly should not be governed in how long it sits by the House of Representatives which, as I said, is an electoral college, a political stage, but not a legislature. Why a legislature should have its length of sittings decided by a body with totally different functions is not clear to me.

Anyway, the select committee looked at the matter and made some suggestions for saving time in the Senate's procedures - I was always doubtful whether in fact they would work because they required goodwill and cooperation. When people are given opportunities to talk, goodwill and cooperation are not usually very evident. The suggestions could work, but I do not know whether they will. In my view the public examination path is vital. The reason something like the Regulations and Ordinances Committee works so well on a bipartisan basis is that it gets expert apolitical advice on pointing out technical problems or difficulties. If all they got was political advice, they would split along political lines. These standing committees, if they are going to look at bills, must get criticism from people without a political axe to grind on how the bill would work, what its problems are or what unintended consequences there might be. Therefore, it is vital they should take public evidence. Also, although I hate to use the word, if it took public evidence it might reduce the amount of alienation in the community from the political process. People feel they have no involvement in politics, no chance to influence it. If proposed laws that were going to affect them were open for their criticisms, it would be an improvement.

The second recommendation of the Committee was that there should be a Selection of Bills Committee, which is really the Whips committee, that would recommend which bills go to which committee, and by when the committees should report, and at what stage the bill should go to a committee. In my view, bills should very rarely go to a committee before the second reading. The second reading can properly be decided and determined on the floor of the Senate. Normally a detailed examination of a bill's provisions and possible difficulties in wording should be made by a committee after the Senate - representing as it does, pretty well, the strands of political opinion in the country - decides whether it wishes the bill to go ahead. There was an arrangement for the Selection of Bills Committee's report to be considered daily by the Senate in regard to what bills should be referred.

Finally, and perhaps most controversially, the Committee recommended that each Wednesday should be set aside as a committee day. It was deliberately put in the middle of the week so that Senators would not be tempted to go home. The Senate would sit on Tuesday and Thursday, and Wednesday would be a committee day, to get good attendance.⁵

But there were problems with this system. Firstly, there was the disruption caused by the election. The report was produced -I have it here; it is worth reading if anyone is interested - before the election. No one knew who was going to be in government, so both sides were genuinely looking for a good solution. No one knew who was going to be in opposition in the next Parliament. But the election caused disruption, the short Autumn sitting caused disruption, and the system is only now gradually coming into existence.

The Government, having won the election, became more questioning about the desirability of doing it at all. I think that has been reduced; nevertheless, it is an inevitable result of government. I repeat - governments do not want Parliament to look at their laws. They want Parliament to rubber-stamp them.

I would like to see a situation where all bills, or virtually all bills, go to a committee, because the ones that sometimes contain the most traps are the ones everyone agrees with. Everyone agrees with the bill because it is a good idea; no one looks at the fine print of the clauses. So they are the ones that perhaps should be quickly scrutinised with outside assistance to see that there is nothing in them that should be amended.

⁵ The Senate ultimately decided that Friday should be set aside as the day on which bills should be referred to committees.

But if we can make this advance, converting the Senate into a proper legislature - recognising that the House of Representatives, whatever its qualities, is no longer a legislature, cannot be a legislature - if we can accept that and convert the Senate to do that role properly, we would have made the most dramatic advance in the system of responsible government that has been achieved for nearly a century.

Mr EVANS - Thank you, Senator Emeritus David Hamer. As the first of our panellists, we are very privileged to have a very distinguished serving Senator, Senator the Honourable Peter Durack, a Senator of very long standing - the father of the Senate, in fact the longest serving Senator - and a former Attorney-General.

Senator DURACK - Mr Chairman, members of the panel, ladies and gentlemen: I puzzle somewhat over the title of this session: *Senate Committees - Keeping Parliament Responsible*. I think what we are really talking about is keeping the Parliament up to its role under a system of responsible government.

In any democracy, whether it is the Westminster model or not, there is of course always great tension between the executive and the legislature, and those tensions are resolved in the United States by the sort of very formal process, the very public one that has been going on recently, between President Bush and Congress to get a budget through under the pressures that the system has already put in place under the Gramm-Rudman Act.

In our system - which is broadly referred to as the Westminster system, of course - we have sought to resolve that tension by having Ministers as members of the legislature, and part of the legislature. The theory of that - as Mr Hamer has already referred to, espoused very clearly 150 years ago by Bagehot - has worked in its own way, but certainly in modern times it has not worked very well, and there have been all sorts of ways of trying to improve that relationship and to lessen those tensions, if in fact they ever can be lessened. Probably it is good that there are tensions; that is part of the lifeblood of our process of democracy. Nevertheless, those tensions have to be resolved. Over the last twenty years or so there have been very great advances made in resolving those tensions and in ensuring that the executive is more responsible and accountable to Parliament and indeed to the people. One of those ways - which may be discussed today, I do not know - is of course the development of the system of administrative review, a very elaborate system in Australia. Probably we have led the western world in that sphere. Professor Pearce is quite an expert on it and in his role as Ombudsman has contributed greatly to that process.

There are a whole series of steps in that direction over the last twenty years that I do not propose to go through, but certainly it has been a very important development. During this same period, however, there have been very great advances within the Parliament itself, that is the federal Parliament, but particularly by the Senate, and there is no doubt whatever that the Senate has played the leading role by far in making its contribution to the resolution of this problem.

My first experience of Parliament was in the lower house of the Western Australian Parliament in the mid-1960s, and the experience there was very salutary. One found that there was no standing committee except the Standing Orders Committee, which had not met for about seven years when I joined the Assembly. There were no other standing committees. There was the odd select committee, but they were very rarely appointed. Ministers brought in bills, and would not allow any word of a bill to be changed no matter how inappropriate it might be. There was this rigid dominance, or rigid attitude by the executive dominating the legislature and, from what I have heard, that was the position which applied in the federal Parliament as well during that era.

I suppose if one is frank about it, it probably still applies pretty considerably in the House of Representatives. But for various reasons, that has certainly changed in the Senate, and I had the good fortune to become a member of the Senate just after these revolutionary changes, which have been outlined during the first session this morning, were made. All I can say is that there has been, and now is, a vastly different attitude to the question of responsible government in action in the Senate than there was twenty years ago in the Western Australian Legislative Assembly. I might say that there have been improvements in Parliaments around Australia as well over these years, but I think in many ways that leadership has come from the Senate.

The committee system that has been established definitely contributes to the resolution of that tension between the executive and the legislature. The Estimates Committees probably have been the most revolutionary in the sense of providing information to Parliament, but the process of the standing committees of the Senate has also made a remarkable contribution.

The question has been asked earlier this morning by Professor Sawyer: what about the role of the House of Representatives, what about joint committees? Certainly, there are a number of joint committees that

have been established in recent years and many of them statutory committees; there are also select committees. One of the most noteworthy, in my view, is one that I, in fact, established as Attorney-General - a joint select committee to review the Family Law Act which had come into operation some years ago. It was, of course, a revolutionary Act. In many ways, decisions were made on a non-party basis. I thought it was a very suitable that both Houses of Parliament should participate and provide a sounding board for community opinion about the way that Act was working. There are now proposals that something similar should be done again.

By and large, the House of Representatives has not proved very good at establishing a committee system. I do not know why that necessarily should be so. When all is said and done, it works very effectively in Westminster, as again Professor Sawyer has noted. But here, it seems the responsibility has been left to the Senate and that responsibility has been taken up by the Senate, and I think has been very successfully discharged by it.

There are, of course, reasons for this. Obviously, the fact that the Government by and large is not game to control the Senate has contributed to its success. It also involves, as Chris Puplick mentioned earlier this morning, having bloody-minded Senators who are prepared to buck their own party from time to time, and that is not confined only to Senators on one side of the chamber. Nevertheless, there obviously are a number of reasons why the Senate has had this opportunity. The important thing is that it seized the opportunity and has given the leadership and has done a lot to resolve this deficiency in our system which was so apparent to me, as I said, twenty-five years ago when I first joined the Western Australian Parliament.

One of the least successful features of the Senate committee system has been the failure to refer many bills to Senate committees. David Hamer has already indicated the report of the Select Committee on Legislation Procedures, and that report is in the process of being implemented. Indeed, in the usual parliamentary style there has been considerable behind-the-scenes negotiations going on between Government, Opposition, Democrat and independent Senators. We are probably going to come up with some compromise to determine what bills should be referred to committees and when those committees should sit. It may not necessarily be on a Wednesday as has been recommended. But these are minor matters. The fact is that a lot more bills will be referred to Senate committees - the standing committees of the Senate - than have been in the past.

I also take issue with David Hamer that governments have always resisted referring bills to committees. He should not have said that because he was a member of a committee that reviewed the Freedom of Information Act. That was not resisted; the sending of the bill to a committee was not resisted. Even though I might have had a lot of difficulty with the recommendations of the committee, governments have not always resisted sending bills to committees. It is very interesting that the Government of today has not resisted this proposal and there is a more formal process for sending bills to committees. I am sure that will be only beneficial.

There are some bills, of course, that are more appropriately dealt with by committees than others. I think taxation bills, for instance, are ones which have been badly neglected by Parliament, and I am hoping that they will be corrected by the new system. But, certainly, the Committee of the Whole debate in the Senate, I hope, will not be lost as a result of this process. I think, in fact, the committee report will only assist and improve the debate of the Committee of the Whole. That is another area where the Senate has been effective in the past, whereas the House of Representatives has not been. I am looking forward to an improvement in the whole process as a result of the latest initiative in the Senate.

Mr EVANS - Our next panellist is a recently retired Senator, John Black, who will, no doubt, be remembered, in the immediate future anyway, as the Chairman of the Standing Committee on Environment, Recreation and the Arts which carried out the Drugs in Sport inquiry.⁶

Mr BLACK - I will continue the Mutt and Jeff act that Chris Puplick was kind enough to initiate on our behalf this morning and respond to the question that he asked. I think that a goodly portion of the recommendations of my Committee will be adopted by the Government - those relating to law enforcement and regulation of the professions. I have less optimism about those recommendations relating to the regulation of sport. Every now and again in the Labor Party we slaughter the odd sacred cow, but I am afraid that one is still roaming free.

I also would like to take up a point that David Hamer introduced when he was talking about Paul Keating and the attitude of the executive to the Senate and to the Parliament generally. I bring into the

equation, because it has not been done hitherto, the role played by the media and, of course, by the Democrats.

As a naive young Senator, I was really chuffed to make it to my very first Caucus meeting because I had the view that is where things really happened in government. I can recall reading about the days of the Whitlam Government when the Caucus presumed to move some amendments to budgets and, in some cases, was relatively successful in doing that. It created a little bit of a disturbance at the time, but it ensured that Caucus remained relevant to the procedures in this place. I sat at my first Caucus meeting for my first Budget briefing. In came the Treasurer, still with the make-up which had been freshly applied for the press conference to the journalists in the lockup. The idea was that if we changed anything that he had already given a press conference about, then it would embarrass the Government to the extent that the pressure would be intolerable. Hence we were told that we could not change anything in the Budget because the press had already been told about it.

We got the briefing about what the figure was going to be - at that stage I think it was still a deficit - and we were exhorted not to tell anybody about it because it would reduce the media impact. This was so, although it was about five to eight at that stage and the Treasurer was about to walk in and tell the world. So we had been given this pretty important piece of information and we were, as I say, feeling pretty chuffed about it. Walking back to the Senate side to listen to the Budget being delivered there, we ran into the Democrats who were told about it two hours before because they got their own special briefing.

So if you have a look at the order in which people are actually told about the Budget it gives you an idea as to their various positions in the pecking order. The Finance Minister is briefed at around about 2 o'clock in the afternoon and the Cabinet shortly after that. But they go through the figures so fast that you have to write them down really quickly so you really cannot get an accurate figure. Then come the Democrats and the second eleven, the outer Ministry. Then the Treasurer puts on his make-up and goes to talk to the media. Then comes the Caucus and a few minutes after that the people. That will give you a pretty fair idea as to the hierarchy of things around here. It also reinforces my next point.

When I was chairing the Senate Standing Committee on Environment, Recreation and the Arts, I presented a couple of reports before I dealt with drugs in sport; one was on Kakadu National Park, and the other was on the environmental impact of development assistance. The intellectual input into the report on Kakadu National Park was far superior to anything that I think either my Committee or I were able to do with the later ones. It was a good deal more complex. Similarly, the environmental impact of development assistance was a very difficult thing to deal with, but because the media had not been involved in the early stages of those inquiries, it felt no commitment to and had no involvement in the process itself, and hence there was very little media support for either of those recommendations. After that, I resolved to involve the media at all stages of the drugs in sport inquiry. If I had resolved to keep them out of it, they probably still would have been involved, but I think that was a very successful part of those inquiries.

If we are talking about making Senate committees more relevant, the media have to be direct participants in the process because they can effectively put pressure on the executive to be responsive to what people actually want. There is no doubt that, to varying degrees, Cabinet Ministers act as representatives of their departments. If they can get their departments' views through the Cabinet, and if they do not have a Senate to worry about, it is all plain sailing and the Public Service can go on running the country the way it feels that it should, without having any nuisances like me asking questions about where the money is being spent. So I think that the media have to be involved and that is something that has to be taken into account.

I fully support all of the decisions that have been taken to open up the Senate to television broadcasting. In fact, I fail to see what logical grounds we can use to discriminate against television as a legitimate arm of the media. I was always at a loss to understand the reasons. I think, frankly, that some of my colleagues were afraid of the bright lights. Do not ask me why.

As far as the Senate committees are concerned, I think another thing that we have not touched on, that ought to be dealt with, is the extent of the pay for members. I am not one now, so I can talk about that. I can tell you it is bad. There is not a great deal of incentive to become a committee chairperson; you need to be a bit masochistic or you are simply told to do it because the Manager of Government Business has to find about forty of these chairpersons. So you have to be pretty bad not to get at least one. So there is no incentive there. Everybody wants to be a Minister, because the pay is better. I think committee chairpersons receive about \$6,000 a year.⁷ If you compare that amount to the amount paid on a daily

⁷ At the time of this Conference, the Chairman of a Senate standing committee was receiving an allowance of \$6 310 per annum, and the Chairman of a Senate select committee an allowance of \$1 718 per annum.

basis to at least one of the commissioners conducting an inquiry into Aboriginal deaths in custody, you will find that we get paid about as much in a year as one of the commissioners gets in a day. So it is not a really big incentive. I think if we allied a move there with a move to remove the Ministers altogether from the Senate, then you would actually find the Senate doing the job that it is supposed to do, and that is to keep an eye on the Government. Clearly, nobody else within this place is actually doing that at this particular time. The media does it from time to time to varying degrees, but not with outstanding success because they tend to become bit players in the process.

I think if it is handled correctly, and dealt with on an issue basis rather than on a party basis, the committees can work effectively. I had no party votes whatsoever during the course of the two-year inquiry into drugs in sport. When the committee membership changed after the last election, I think I had two within forty-eight hours, including a rescission motion. So I think that is an extremely important part of the whole process. You have a problem where Senators see their role as the chairperson of a committee as being part of a stepping stone, if you like, to greater things, and everybody aspires to be in the executive and hence they want to defend it wherever they can. So you get the situation arising now where the Whips and the managers of business call all the chairmen of the committees together for a bit of a pep talk about not letting these committees get away with scrutinising government actions too much: 'You are working a little bit hard, fellas, just slow it down a bit'.

The same sort of thing goes on with the Estimates Committees, where the legislative body, which is the Senate, is basically drawn into a conspiratorial role, whereby it acts as protector of the Government. Of course, at those informal discussions - you will be pleased to know this, Harry - we all say very nice things about you and your defence of the Senate committee system.

I think that it is true to say that the Labor Party has not been very supportive of the Senate in the past. I can recall a situation when it was against party policy to actually retain the Senate, and we supported the abolition of it. That was a very strongly held view in the Queensland ALP - which I think is probably a pretty good reason why you should not support it. In fact, one Senator who had all the right qualifications, the right trade union background and so on, and the numbers to be preselected some years ago, was actually asked what he thought about the Senate. Instead of saying he thought it was an appalling organisation and should be abolished, he actually supported the Senate. Of course, he lost the vote. From then on, everybody was sent off to the Senate after reciting the fact that they felt it was a body which was unworthy and should be abolished as an impediment to the democratic processes.

In conclusion, I think there are a number of things that can be done, the sorts of things I mentioned about the number of Ministers in the Senate and the level of remuneration and so on. They are things that could be put in place without a great deal of change. I do not think any legislative changes would be needed. Then you would create an incentive, I guess, for the members of the Senate to develop some sense of pride in being members of the legislature. As things now stand in other countries, such as the United States, people can aspire to a career as a member of the legislature and hold their heads up proudly and say: 'I did a good job; I was responsible for this piece of legislation or amendment'. It can be quite a satisfying career without entering the executive. In Australia, because the executive is selected from the legislature, both the Senate and the House of Representatives, the executive is the ultimate goal to which all the members aspire. Whilst that remains the case, then the Senate will make a good deal less progress in acting as an effective watchdog on the House of Representatives or the electoral college, as David called it. Thank you.

Mr EVANS - Our next comment comes from a very distinguished academic who has maintained a great interest in parliamentary matters over the years, and now occupies the position of Commonwealth Ombudsman: Professor Dennis Pearce.

Prof. PEARCE - This morning's session sounded to me the sort of thing I get all the time from the executive: 'We are all splendid chaps, and one should not dare question us'. I was beginning to wonder how this whole conference was going to proceed. But I think it changed its tone from Chris Puplick on. I think this session has served very usefully to reveal a range of matters that it is necessary for persons interested in the Parliament to address. The committee system has taken us a certain way, but there are still matters that need attention which the future is going to require the committees to look at if they are going to live up to their early promise. I want to deal with two matters in that context. One of them did get a fairly extensive mention in David Hamer's presentation. But there is an aspect of it I would like to follow up, and that is this question of responsibility for legislation.

The committee system that was set up, and which we are here now to celebrate, is, of course, the Legislative and General Purpose Standing Committee system. The legislative side has not had much emphasis at all, although the Senate has two committees which have been concerned with legislation.

David Hamer mentioned those. They are the Regulations and Ordinances Committee and the Scrutiny of Bills Committee.⁸ The Senate is justifiably very proud of the Regulations and Ordinances Committee. It says so with frequency, in fact, to the point where in relation to that Committee I just see some dangers of complacency creeping in. Nonetheless, it has served an immensely useful purpose, and it has picked up that element of the legislative package which must not be neglected. In sheer volume it far exceeds the bills element of the legislation. It does not matter much whether you are prosecuted under a section of an Act or a regulation. It hurts just as much, as the controls that are imposed by delegated legislation are just as significant. So, the Regulations and Ordinance Committee has had a fairly significant task. It has managed to achieve that because of the support that it has received from the Senate.

It is a very different tale for the Scrutiny of Bills Committee. I was the first adviser to the Scrutiny of Bills Committee. We had great hopes for its value as a body, that it would do for bills what had been done for regulations by the Regulations and Ordinances Committee. It was intended that the Scrutiny of Bills Committee, among other things, would coordinate with the Regulations and Ordinances Committee because the pattern of delegated legislation can only be that which is directed by the primary legislation. The Scrutiny of Bills Committee has not really come up to the mark. I think that is fair to say, and I think David Hamer indicated that. Others who have been involved probably can give a better insight than I can about the reasons, but certainly it has not had the support from the Senate that the Regulations and Ordinances Committee has had. It has made reports, but there has not been the follow-on to take steps to implement what the Committee has said that has occurred in relation to the Committee concerned with delegated legislation.

I would hope that this new move to refer bills to the Legislative and General Purpose Standing Committees may break this pattern. I would hope that the way to the future for the Senate on the legislation side is to see itself functioning on a coordinated basis, which is something it never has seemed to have done. So the impact of the whole legislative package runs through Legislative and General Purpose Standing Committees, the Scrutiny of Bills Committee and then if the committees can coordinate their activities we will get, I think, true responsibility for legislation. So I see that as being a point at which the committee system is at something of a crossroad. It can go forward and assume a much more significant role than it has up to date on the primary legislation side - a role that might be equivalent to that which it has provided on the delegated legislation side.

Another little point I wanted to pick up - quite briefly, because we are very much down on time I can see - follows on from what Senator Durack has said. The administrative review system was largely set up because it was felt that the Parliament was no longer carrying out its function of being responsible for executive action vis-à-vis individuals. I think it is almost at the stage where the Parliament has, to a large extent, abdicated that field for Ombudsmen, the Administrative Appeals Tribunal and the multitude of other tribunals that have been set up.

What I would like to see happen, which does not seem to me to be happening, is for there to be feedback to the Parliament from those administrative review bodies. By that means the Parliament can reassume a responsibility for an area in which it is either not doing terribly well or which it has completely abandoned. There has been a failure to make use of these institutions which are out there looking at the interrelationship between the executive and the individual in a manner that is of considerable significance to the public in general. For example, the Government has always paid great heed to the Auditor-General's report and uses it for Estimates Committee purposes and other purposes.

There has been no really effective use of the information that is contained in the Ombudsman's annual reports. There have now been thirteen annual reports and they have been reviewed by a parliamentary committee on two occasions. The Ombudsman has submitted only two special reports, despite a power to do so. In relation to those reports the committee concerned endorsed the Ombudsman's recommendations; the recommendations went back to the agencies concerned, which said: 'We are not the least bit interested in giving effect to what you are saying', and that was the end of the matter. That is a problem, I think, that the committees have got to come to terms with, at two levels. One problem is in relation to the administrative review system where a resource that could be used to further increase the power of the Senate is being wasted. Secondly, I do have a feeling with the committees that they get topics, they deal with them, they report on them and they say: 'Thank God we have done that, and now we will go on to the next one'. There is not sufficient follow-up to committee reports. I think that is an element of responsibility that the Senate committees need to grapple with if they are going to roll forward from the splendid start that has been there over the last twenty years, and make a really effective system for the governance of our country.

⁸ These two standing committees are generally referred to as the legislative scrutiny committees.

Mr EVANS - We are very pleased to have Professor Diane Yerbury, the Vice Chancellor of Macquarie University, who will give us another view from, I think I could fairly say, a totally different direction.

Prof. YERBURY - Thank you very much, Mr Clerk. I guess the reason I am here is as living proof to quaking public servants and shaking statutory officers that there is life after the Senate Estimates Committee, having survived some marathon drilling, especially from Senator Michael Baume of the Waste Watch Committee in one of my previous existences as Chief Executive of the Australia Council. It is that aspect of parliamentary scrutiny that I want to talk about, and well might these hapless officers quake and shake.

I am not going to reassure them by airily pretending to those who have yet to undergo this twentieth century version of the Spanish Inquisition that there is really nothing to it. With experienced inquisitors, with the appropriate fanaticism and lack of mercy, no detail of operations is too insignificant for their attention, no contract or grant too modest, no expenditure too routine to be passed over without scrutiny and commensurate misery for the officers concerned.

I have read somewhere that people who have swotted for the sort of three-year final exams that we used to torture students with go on having bad dreams about exams on and off for the rest of their lives. In my case that was well deserved because I managed in one never-to-be-forgotten law exam to get 4 per cent after advising the examiner that trade regulations are regulations regulating trade, after which I ran out of ideas. That is indeed the sort of experience that nightmares are still made of 30 years down the track, and I am sure you will have no difficulty in appreciating the nightmare-making qualities also of defending the Community Arts Board's 'Art in Working Life' program from Senator Michael Baume's relentless questioning as to why we gave a particular grant, say, to an anarchistic performance group to parody life on the assembly line and the details of how every cent of that was actually spent. He could keep up that sort of questioning for hours tirelessly, and we would prepare ourselves for days for this ordeal by Baume quite literally by having a couple of our more obsessive and sadistic officers impersonate him. They would pounce on us, unannounced, at any time of the day and often late into the night, with remorseless interrogations, and quite seriously, this was part of our homework to manage this exam to beat all exams. The Senators probably had no idea what they were inflicting on us.

Some Senators were obliging enough to have their research officers telephone our authorities or departments beforehand with sudden and esoteric questions about matters in which they had never previously shown any interest whatsoever, but which, carefully nurtured, might just yield the stuff that political and bureaucratic embarrassments are made of.

Truly we would go down on our knees before our little cots at night, ladies and gentlemen, with pathetic gratitude for such unplanned tips. And, sometimes, they actually would turn out to be pointers to what otherwise might have been a ticklish inquiry in the committee.

Another Senator I used to go down on my knees to express gratitude for was actually Senator Chris Puplick, as he then was. A rare breed is Chris. He was genuinely more interested in the arts and getting the best value for public subsidy to the arts than in conducting the longest interrogation in Senate history or tossing in the curliest, most unpredictable, nastiest question that a macabre Senatorial mind could possibly devise. So, he would actually thoroughly brief himself, and even allow us to brief him beforehand and on a continuing basis so that a Senate Estimates Committee hearing was only one part of a continuing accountability process in which he kept himself informed of our expenditures. I sincerely regret that we never managed to persuade him that the Australia Council was really one of the most worthwhile institutions in Australia. We obviously went wrong somewhere.

You will realise that I am addressing my remarks, of course, mainly to the public servants and fellow victims who have to appear before these committees and, as someone who has experienced some dreadful moments at the hands of these fearful committees and has the scars to prove it, perhaps I might be permitted, Mr Clerk, to pass on a few basic survival tips about the homework one can usefully do in advance.

Firstly, I would advise, find out as much as you can about the Senate committee system and what it is all about which, of course, is what you sensible people are all here for today. I do not want to kid you that this background knowledge will actually minimise the pain, but at least you will appreciate more fully why you have to grin and bear it and you might even conclude that it is all in a good cause.

I would go on to suggest, too, that you familiarise yourself with the proceedings, the setting, and the type of questioning beforehand if you have not actually done this before. Go and see for yourselves as an observer and remember it really is a spectator sport - it is like feeding animals at the zoo. Talk to others who have done it and if all else fails, read the Hansard. I know that sounds like a fate worse than death, but it really is a faithful record of what does happen before a Senate committee and much more

faithful, to be honest, than asking others for their war stories. Then, if all else fails, you can actually talk to the Senate officers because they do really know exactly what is going on and are usually very competent, obliging people. I used to pick their brains quite shamelessly.

Then, of course, you can always try talking to the Senators themselves; though some, to carry my zoo analogy a bit further, might argue that that is really putting your head in the lion's mouth. But certainly you should find out who they are, who is likely to ask you questions, and what their particular interest and pet enthusiasms and obsessions are. I used to go further than this and would actually offer to brief them well before the committee hearings - even immediately after a committee hearing while it was fresh in my mind.

Gritting my teeth - and to be honest lying through my teeth - I would write to them or ring them up after a particularly devastating question and say how delighted I was at their evident interest in the inner workings of the Australia Council and the arts, and how happy I would be to brief them on this in future and to take them and show them this, that or the other. Of course, this is not something I recommend you do without letting your Minister's office know.

Next on my list is preparation. If there is any one secret for survival, I would name sheer hard grind. There is nothing like doing your homework and being on top of your facts, and at least knowing enough so that you do know what you do not know, and know when to take the question on notice. I used to prepare very well-organised briefing folders, with the idea that I could look up just about any briefing paper in a matter of seconds. Then, of course, I would have nightmares about leaving them on the plane. Sometimes, too, I found it helpful to take along with me enough copies of information on a particular matter so that I could table it if that question came up. I was never denied permission to table a document and I was once actually thanked, which unexpected kindness almost reduced me to abject tears and to a dangerous desire to tell all.

One thing that is important in your preparation is to make sure that your subordinates tell you all in advance. It is even worth giving an amnesty to find out the unspeakable facts of a disastrous error, at least a couple of hours before a steely-eyed Senator confronts you with it. Sometimes your Minister might also appreciate at least a few minutes advance notice. If it is a big enough organisation or budget, or complex enough, do not forget that you can always spread the misery around a bit. There is such a thing as overkill but I never encountered any difficulty in taking along, say, two officers with me to a Senate committee or inquiry and, of course, then we could divide up the preparation of work between us. So if the Senator asked about equal opportunity for performing seals, that was his job. If he wanted to zero in on the rights of Melbournites to have far more literary grants or huge subsidies for the state opera, that could be her responsibility.

Essentially, what comes out at these committees is what the Government and its leading public servants want to come out. When all else fails, tell yourself that except for the unlikely eventuality that what you have said, or failed to say, hits the press, it will soon be buried and forgotten in Hansard and few people will ever actually get to know the gory details. If that is not the case, and you do gain some often well-deserved notoriety or even find yourself the subject of a parliamentary inquiry or a cause célèbre, remind yourself that this is merely the price of democracy on the one hand, and genuinely improved administration on the other. If even that worthy thought fails to cheer you up, tell yourself: 'Never mind, it may be the waste-watchers chance to be in the sun today, but in twenty years time parliament may just hold another seminar and we can come along and have a few minutes to turn the tables on them'. Thank you very much.

Mr EVANS - Once again we will take a moment for a question, comment, or attack from the floor. I see a distinguished former Senator - Senator Mulvihill.

Mr MULVIHILL - Yes. Mr Chairman, my question is to former Senator John Black. By way of preface, I refer to the danger we all face as Senators on committees in that we must not emulate Joe McCarthy by overdoing our right to interrogate people. I put it to Mr Black this way. Some years ago I had to lean on amateur athletics officials because the money various governments gave them was given to sprinters and none was given to field games girls. As a result of my direct questions, Gael Mulhall got a special grant. I wonder whether you overdid it in questioning one girl about her urine sample.

Mr EVANS - John Black, would you like to respond to that?

Mr BLACK - The questioning that you are talking about, Tony, was conducted *in camera*, so I cannot talk about it. That more or less ends that. What the Committee was concerned about was a situation where there is testing for performance-enhancing drugs and we thought that a lot of legal problems would arise in relation to privacy and so on. We felt it would be good to get the ground rules established before we started to run into the problems.

I think a case in point was the New South Wales Rugby League, which thought it would be a good idea to have drug-testing, but they were not quite sure what they were going to do if they actually caught anybody. We thought about all the sorts of problems that had arisen in relation to, say, random breath tests, where somebody is picked up and refuses to give a sample. That is deemed, in effect, to be a positive sample. We also thought about the problems which could arise, for instance, if the passenger of the car offered to provide the breath sample. What sort of penalty ought to be administered in that situation?

So what we were concerned about was simply a desire to ensure that there was integrity and impartiality in terms of the imposition of penalties. Six months after writing to the management of the sport concerned, and not receiving an answer, we simply indicated that it would be a good idea if perhaps they concentrated their minds on it. That is basically the end of the matter.

Mr HAMER - Perhaps I could answer a question that Professor Sawyer asked before which was not answered in the first session, with respect to the House of Representatives committee system. I will just say very briefly that the House of Representatives set up, in 1987, a system of eight standing committees. I do not think they are what we would like to see, because they have a Government majority on them - which is proper in view of the fact that the Government has more members in that House - but they virtually act under the Government's control. The Minister can give them references to pursue, and because of the Government majority they can only do business the Government wants.

Of course a good committee will investigate matters the Government does not want investigated, to find out why the Government does not want such investigation, but these committees are not working for the Parliament; they are working for the Government. There was a proposal that there should be joint committees on this system between the House of Representatives and the Senate - the idea being, in the proposal put forward, that the Senate committees, who also have a Government

majority, could decide on their own to go on a joint investigation with the House of Representatives. This would result in the Senate committees also working for the Government rather than for the Senate. It was therefore resisted. I do think, although they may do useful work, that the House of Representatives committees must always be regarded as doing work on behalf of the Government - not on behalf of the legislature.

Mr EVANS - There might be time for just one more brief question, comment, or attack. Brian O'Donovan.

Mr O'DONOVAN - I am a former public servant and a lawyer, and have been the object of committees' attention rather than participating in their deliberations. The first comment I would like to make is in relation to Professor Yerbury's instruction on how to go about preparing for committees. That may be very appropriate if you happen to be an officer of a statutory instrumentality, but your Minister may not be entirely happy with your consulting with Senators of both sides if you happen to be an officer of a department. So I think there is some caution to be made there.

That is not really what I got up to say. I really wanted to say, what is this chap Hamer doing? Is he putting the boot into lawyers? Does he want to improve legislation by having it go through committees and having it so good that lawyers cannot make a living? Does he also want to have it start when it gets assent?

I have just looked at the Public Service Act and it has, I think, six subsections under the heading 'Commencement'. Two of its sections commenced on the date of assent, one of those being the short title, the other being the commencement section. The first of them commenced two years after assent and the last of them nine years after assent. All that is in a single section.

Regrettably, there seems to have been a change in the drafting system. I find in the most recent pieces of legislation that the date of commencement of a section is now printed at the end of that section. That seems to me to be a regrettable piece of retrogression.

Prof. YERBURY - Just quickly, I agree that statutory authorities and departments are different in this regard but, even as a statutory officer, I would advise, as I always did, that one lets the Minister's office know that you propose to contact the Opposition and what you are going to tell them. The Minister, in my experience, is not terribly keen on finding out afterwards that the Opposition knows more than he or she does.

Mr EVANS - If I could just make a comment on commencement clauses. Recently there was initiated in the Senate a move to have a statement tabled showing all the provisions of Acts which commence on

proclamation, those which have not been proclaimed, and the reasons for their non-proclamation. The first list when it was tabled so outraged a number of Senators that I think a very effective clamp has now been put on commencement clauses whereby no provision will commence more than twelve months after the date of assent.

Luncheon adjournment