

Session Four Senate Committees - Can They Halt the Decline of Parliament?

Mr EVANS - For the final session of the conference, we have a most question-begging title: *Senate Committees - can they halt the decline of Parliament?* To speak on that question-begging title, we have Dr Brian Galligan who is a distinguished academic and who, at the moment, is Deputy Director of the Centre for Research on Federal Financial Relations, a body whose publications I commend to everybody as extremely interesting and informative documents.

Dr GALLIGAN - Thank you, Mr Chairman and Mr Clerk, for your introduction and also for the invitation to speak to this gathering of distinguished Senators and fellow participants.

Let me begin¹ with a number of observations about Australian politics in general and *Senate Committees and Responsible Government*, the topic of this Conference, in particular. The first is that the Senate and its Committees are not well known or appreciated either by professional commentators on Australian politics, academics or journalists, or by the public at large. The reasons for that are complex and have to do with a number of factors. These include the propensity of the media for the more dramatic, sometimes more significant, but often more ephemeral aspects of political leaders, partisanship and executive policy-making, the strong tendencies in our political culture towards democratic majoritarianism and executive dominance of the Parliament, and, the one I shall be most concerned with in this paper, deep-seated misunderstandings of Australian constitutional theory. The Senate and its Committees are unlikely to be much appreciated nor their public status recognised unless the fundamental issues of political theory and constitutional design are sorted out and confidently espoused.

The second and related point is that neither the Senate nor its Committees have reached anywhere near their full potential within Australian politics. Revolutionary as the establishment of a comprehensive system of General Purpose Standing and Estimates Committees in 1970 might have been, twenty years later the Senate remains a secondary institution of Australian government. It has yet to achieve its proper status as a first rank institution comparable, for example, with its American model. I know all the weighty reasons that are put forward, legitimately, to explain why that is the case. These include, on the American side, the additional powers that the United States Senate has in ratifying treaties, endorsing senior judicial and executive appointments, and for impeaching the President, and more importantly the fact that the President is entirely separate from Congress. On the Australian side, there are the well known reasons of disciplined parties, a Westminster-style system of responsible government that locates the political executive primarily in the House of Representatives, and more generally the strong majoritarian strand of Australian political culture that sees the Senate as less democratic and significant than the House. While all of this is true, to a large extent, it is based on a rather static and increasingly dated view of Australian politics.

This brings me to my third observation. Australian politics has changed considerably in recent years and will likely change more: away from the dominance of political parties in setting the political agenda and from partisanship in the implementation and monitoring of public policy. This is happening to a considerable extent already with parties reacting to new issues and ideas which they adopt and implement. The peace movement, the women's movement, the Aborigines' movement and the environmental movement have been broadly responsible for setting the agenda in major areas of public policy irrespective of the party in office. Moreover, managerialist ideas of efficiency and propriety in public sector management have been transforming government administration under Labor governments and eroding virtually all of Labor's traditional preferences for public ownership, larger government, and even centralisation of power in Canberra. Politics and public policy-making have become too complex for disciplined political parties to monopolise. Our major parties can no longer claim to be the sole repositories of appropriate policy or adequate distillers of best administrative practice. Nor are periodic elections in any sense an adequate means of democratic participation and political accountability. We need a diversity and range of political institutions to cope with the increasing complexity of policy issues and to represent diverse democratic interests.

The old progressive model of centralised decision-making by enlightened individuals representing majoritarian or progressive interests that dominated Australian political thinking for most of the post-

¹ I am indebted to John Uhr and John Nethercote for various ideas in this paper, and to John Uhr for much of the section on responsible government and the Senate's role in protecting rights. This version is clearly my responsibility since they both know far more about Senate committees.

war decades is now obsolete. Interestingly, it is being jettisoned by Labor in government at a faster pace than many of the Left's traditional scribes or conscience-keepers can cope with. Fortunately, we have in Australia the institutions of government that are suited to the new politics of complex issues and enhanced democratic participation. Essentially, this is our federal system of government and a bicameral national legislature constituted on different bases of democratic representation. Federalism multiplies governments and increases democratic participation in diverse levels of government, while bicameralism gives us two distinct houses of the national legislature that can improve governance through extending democratic representation and parliamentary oversight. The range of scrutiny and investigatory roles that are evident in the Senate's committee system that we are considering today is an obvious example.

If I am right, and we are entering an age of the politics of complicated issues and enhanced democratic participation, then we are indeed fortunate in having a constitutional system that is suitably designed for the new politics. But we need to rethink our constitutional ideas and understand the system we have if it is to develop and realise in practice its full potential. The new politics requires an appropriate notion of responsible government that will embody the recognition and enhancement of the Senate and its Committees, and modification of the old paradigm of party responsible government that has been dominant in Australian political orthodoxy to date.

For too long in Australia we have neglected the systematic and searching investigation of our federal democratic system of government. There are a good number of texts on Australian democracy and national government,² but none that are adequate or up-to-date on Australian federal democracy and our federal system of government. To understand the design of the Senate and its constitutional role we do need to appreciate the character of Australian federal democracy and how the Senate fits into our system of federal government. Needless to say, without such critical exploration, our collective appreciation of the system overall and of its various major parts is sadly deficient. This is apparent across the whole spectrum of our polity: from political leaders down to the citizenry, among professional commentators, be they journalists or academics, and even among the judiciary who are in a somewhat more formal sense the guardians of the Constitution.

Fortunately, for our lucky country, this has not mattered for most of the time: the system of government has worked pretty well for nearly a century, coping with great national developments and the occasional traumas of war and depression. In fact, as we begin to survey the sweep of our national history since federation, celebrating the milestones in the drafting of our Constitution through the '90s and its adoption in 1901, we will surely come to appreciate that our institutions of government have been far more significant to our collective national identity than is generally recognised - more significant in fact than any of the individuals who have worked them - and that they have been fundamentally federal in character. I am not suggesting that institutions stand alone and separate from political culture and tradition and the dynamic processes of government; rather, that they formally embody a distillation of the collective wisdom of our nation and its political ideals and traditions that structures current politics and channels it in predictable and acceptable ways.

What we need then is neither a new constitution nor major tampering with the one we have got. The 'horse-and-buggy' or 'short-pants' analogies are silly and trite. Far too much political energy has been dissipated in Australia in the pursuit of constitutional change, or in wishing that we had some other system, invariably simplified and idealised - like Henry Lawson's Bush with a capital B. Earlier on this political schizophrenia was kept alive by a Labor Party committed, at least formally, to abolishing federalism and centralising power. 'Labor versus the Constitution' was an appropriate way of summing up the first half decade of Australian federal history, as Whitlam did, in 1957;³ and the tensions between Labor and the Constitution remained during Whitlam's troubled term of office.⁴ But Labor has been progressively reconciled with federalism so that despite his government's rather poor achievement, Gough Whitlam could proclaim in 1978 that there was nothing a Labor government would now want to do that could not be done under the existing Constitution. The Hawke Government and the crop of state Labor governments throughout most of the 1980s have completed and consolidated this historic process of reconciliation. Hawke's recent call for 'closer partnership' with the states in rethinking and restructuring inter-governmental arrangements is a milestone towards revitalising the operation of Australian federalism.⁵

² For example, the leading text on Australian government for most of the post-war has been L.F. Crisp, *Australian National Government*, Fifth edn, Longman Cheshire, Melbourne, 1983 (first edn, 1965). Modern examples are G. Maddox, *Australian Democracy: in Theory and Practice*, Longman Cheshire, Melbourne, 1985; B.Brugger & D. Jaensch, *Australian Politics: Theory and Practice*, Allen & Unwin, Sydney, 1985

³ Gough Whitlam, *On Australia's Constitution*, Widescope, Camberwell, Vic., 1977

⁴ G. Evans, ed., *Labor and the Constitution, 1972-75*, Heinemann, Melbourne, 1977

⁵ R.J.L. Hawke, 'Towards a Closer Partnership' Speech to the National Press Club, Canberra, 19 July 1990

As with federalism, there is no need for Senate abolition or basic reconstruction, as has been so often recommended, but rather institutional innovation and more informed theoretical appreciation. In the Senate's case the former has been going on, intermittently, over a long period of time with the creation of the various sorts of committees. This process of creative institutional innovation only peaked in 1970 with the establishment of a plethora of Legislative and General Purpose Standing Committees and Estimates Committees. Reid and Forrest's recent classic account of Parliament⁶ is a substantial aid to greater appreciation of our parliamentary institutions of government.

The misunderstanding of the Senate is closely linked to its supposed role in the Australian federal system, and to the way in which federal and national elements of government are thought to be combined within a federal system of government. When the Australian founders met in the Federation Conventions of the 1890s to draft the Constitution, they were practiced experts in colonial responsible government, in the generic Westminster sense of the term, but had at best only a bookish knowledge of federalism. Therefore they, or at least the better read among them, looked to established federations including the Canadian and the Swiss, but particularly the great American model for which James Bryce's recently published *American Commonwealth* (1888) gave a comprehensive account.⁷ Bryce's book was revered as 'the bible', frequently referred to by delegates and displayed on the conference table throughout proceedings.⁸ Unfortunately, as James Warden has recently shown at length, Bryce's understanding of American federalism was fundamentally flawed: he had a too mechanical model of coordinate governments with separate and distinct powers working entirely independently of one another.⁹ This model neither captured the inter-governmental nature of American federalism nor represented the essentially concurrent division of powers that the Australians were putting in place. So Bryce only served to distort the early understanding of Australian federalism by dissociating explanatory dialogue from actual design.

More significant for muddying the understanding of Australian federalism and the role of the Senate is Quick and Garran's *Annotated Constitution of the Australian Commonwealth* because it became, as Geoffrey Sawer put it in his foreword to the 1976 reprint, the closest we have to a 'Book of Authority' in the field.¹⁰ Here we find a caricature of the supposed roles of the Senate and the House of Representatives based on a distortion of federal theory. Quick and Garran were spot on in articulating the 'problem' to be resolved by the framers of the Australian Constitution as being the same as that confronted by the American founders more than a century earlier:

The problem to be solved in the case of the Australian colonies desiring to federate was similar to that which had to be solved by the framers of the American Constitution; it was - how to reconcile the creation of a strong national government with the claims and susceptibilities of separate, and, in their own eyes, *quasi-sovereign* States.¹¹

The problem was with Quick and Garran's articulation of the solution. Despite a superficial plausibility that has reinforced the prejudices of subsequent generations of Australian practitioners and commentators who would prefer a fully Westminster system of more direct majoritarian government, Quick and Garran's 'solution' evidenced a fundamental misunderstanding of federalism and a related distortion of the roles of the two Houses of the Commonwealth Parliament. To be fair to Quick and Garran, I quote them in some detail:

The solution of the problem was found in a Parliament partly national and partly Federal. The national part of the Parliament is the House of Representatives - the organ of the nation. The Federal part of the Parliament is the Senate - the organ of the States, the visible representative of the continuity, independence, and reserved autonomy of the States, linking them together as integral parts of the Federal union....

The House of Representatives is one of the two Chambers of the legislative organization of the Federal Government. It gives particular force and expression to what may be described as the national principle of the Commonwealth. In that great assembly the national principle will find full scope and representation. Its operation and tendency will be in the direction of the unification and consolidation of the people of the Commonwealth into one integrated whole, irrespective of State boundaries. ...

6 G.S. Reid and Martyn Forrest, *Australia's Commonwealth Parliament. Ten Perspectives 1901-1988*, Melbourne University Press, Melbourne, 1989

7 James Bryce, *The American Commonwealth*, Macmillan, London, 1880

8 J.A. La Nauze, *The Making of The Australian Constitution*, Melbourne University Press, Melbourne University Press, Melbourne, 1972, pp. 85,273

9 James Warden 'Federal Theory and the Formation of the Australian Constitution'. Ph.D. Thesis, Australian National University, Canberra, 1990

10 John Quick & Robert R. Garran, *The Annotated Constitution of The Australian Commonwealth*, 1901 edn, reprinted by Legal Books, Sydney, 1976

11 *Ibid.*, p.414

The House of Representatives is not only the national chamber; it is the democratic chamber; it is the grand depository and embodiment of the liberal principles of government which pervade the entire constitutional fabric. It is the chamber in which the progressive instincts and popular aspirations of the people will be most likely to make themselves felt. This characteristic is not founded on any difference in the franchise of the House of Representatives from that of the Senate, because both franchises are the same; it arises from the fact that, by the Constitution, it is expressly intended to be such a House, and that by its organisation and functions it is best fitted to be the arena in which national progress will find room for development.¹²

According to Quick and Garran, the two Houses of the Commonwealth Parliament represent the duality of citizenship that federalism entails. This is in addition to the more obvious duality of being a citizen of a state and of the Commonwealth. This first sense of duality is a departure from American federal doctrine, as we shall see, but the extraordinary glosses that Quick and Garran put on the House of Representatives and the roles that they attribute to it and the Senate are antithetical to American doctrine. Such appellations for the House of Representatives, from the above passage, as 'democratic chamber', 'grand depository and embodiment of the liberal principles of government', chamber of 'the progressive instincts and popular aspirations of the people', arena of 'national progress', are entirely foreign to American federalist thought and reflect a strong bias in favour of parliamentary responsible government along Westminster lines. Quick and Garran's final flourish completes the dualist caricature of the two Houses:

From this dual citizenship, and, in order to assist in its preservation, every citizen living under such a form of government has a duality of political rights and powers...to join in returning members to the House of Representatives in which centralizing, consolidating, nationalizing, and progressive elements of the community are represented, and also to assist in returning members to the Senate, in which the moderating, restraining, conserving and provincial elements of the community are represented.¹³

But neither the Commonwealth legislature nor Australian federalism are like that. Quick and Garran are wrong about the basic character of modern federalism that the Americans invented in the late eighteenth century and the Australians copied a century later; they are partly wrong about the dual citizenship that such federalism entails and how that is embodied in Australia's federal Constitution; and they are also quite wrong about the representative character of the Senate and its role in Australian governance. All three errors are related so let us consider them briefly in turn.

First, the Americans did indeed face the same problem as the Australian founders of how to reconcile strong national government with the continuing existence of quasi-sovereign states, as Quick and Garran point out. The solution was not found, however, 'in a Parliament partly national and partly Federal' but in a compound republic consisting of national and state governments with dual citizenship in both. The American invention was not a blend of national and federal in the modern sense, but rather of national and confederal which was the meaning of federal as understood up to the American founding. A federal or *confederal* form of government (the terms were interchangeable) was essentially a league of independent sovereign states with a weak central organisation based on delegated authority. Citizens were only citizens of each league state, while the states were members of the confederation and nominated delegates to its central agencies. As a result, confederation was a weak form of national government, and that was especially so in a democracy where power comes from the people. An example was the first American constitution, the Articles of Confederation, that proved too weak a form of government in fighting the war of independence and for constituting a strong nation afterwards. Therefore, in 1789, the American founders invented a new composite form of government whereby national elements, in which citizens were directly citizens of the nation, were grafted onto the old federal or confederal form, in which citizens remained members of semi-sovereign states. They called this new composite form federal, won the ratification debate, and thereby revolutionised modern constitutional design.¹⁴

For our immediate purposes, what follows is that the Senate is not primarily a federal part, but rather part of the national part of government. This is, of course, closely linked with the second issue of dual citizenship. The duality of citizenship within a federal system (and from now on I shall be using federalism in its modern American and Australian sense) means, strictly, citizenship in the two levels of government, national and state, that make up the composite republic. The dualistic divide is in no sense between House of Representatives and Senate, as Quick and Garran would have it. That is not to deny the federal element in the representative organisation of the Senate where the determining element is

¹² *Ibid.*, pp.414,448

¹³ *Ibid.*, p.450

¹⁴ M. Diamond, 'The Federalist's View of Federalism', in G.C.S. Benson, M. Diamond, et al. *Essays in Federalism*, Institute for Studies in Federalism, Claremont Men's College, 1961, pp.21-64

not equality of voters and of local constituencies, as with the House of Representatives, but of state constituencies of voters. The relevant point, however, is that the Senate is an integral, and virtually co-equal, part of the national legislature: the citizens in voting for the Senate and the Senate in representing the citizens are exercising and fulfilling national functions. The state part of the duality of citizenship and of government is restricted to participation in state elections and politics and in state governments representing their state citizens. By painting the Senate as part of the federal, by which they mean state or state-representing, element of our system of government, Quick and Garran distort both our federal Constitution and the role of the Senate.

Once we realise this, we can simply put aside the encomiums about the House of Representatives being the truly national and democratic chamber, grand depository and embodiment of liberal principles, and promoter of centralising, consolidating, nationalising and progressive elements. To the extent that these are appropriate ways of describing the attributes of a national legislature, they apply just as much to the Senate. Nor is the Senate the home of the moderating, restraining, conserving and provincial elements of the community. Rather, the two Houses are essentially two parts of the national legislature constituted on two different formulas of representation, one of which has a federal element. But the Senate is not meant to be restricted to, or understood in terms of, some limiting notion of representing or protecting state rights or interests. In fact, quite the contrary, as the American model demonstrates. The American Senate has had a more national role than the American House of Representatives because its members are less tied to the minutia of local representation - 'piss-ant politics', as Lyndon Johnson might have called it. In the Australian instance,¹⁵ a responsible government executive and disciplined parties have substantially overridden the tyranny of local representation, while certain foreign affairs and executive functions that the American Senate exercises are absent. Nevertheless, the Australian Senate remains essentially a national part of the federal duality with a national role comparable to that of the House of Representatives.

Misunderstandings of Australian federal democracy and the national role of the Senate, that are in one way or another derivative of Quick and Garran's Book of Authority, abound in modern times. For example, constitutional lawyers Colin Howard, Charles Sampford and David Wood have all come out recently with proposals for reinterpreting or reconstituting the Senate in order to give it, in their view, an appropriate and legitimate role within the Australian system of government. Howard wants the Senate constituted by representatives of state governments rather than elected by the people of the states because he assumes that the Senate must represent some 'identifiable state interest'.¹⁶ Sampford claims that the "'federal" principle justifying the Senate's equal legislative power' can only be justified to prevent legislation contrary to the interests of a majority of States.¹⁷ Wood sees the Senate's sole legitimate function as protecting states' rights as distinct from national legislation. In a virtual reincarnation of Quick and Garran's Book of Authority, Wood distinguishes federalism from democracy, makes the Senate's role entirely federal, meaning the protection of states' rights and interests, and makes the House of Representatives the repository of unrestrained majority will.¹⁸ John Uhr and I have dealt critically with these authors elsewhere:¹⁹ I mention them here only to indicate that the matter of properly interpreting the federal character of Australian democracy and the national role of the Senate are live ones.

My purpose then is to correct the Book of Authority and the strong tradition of misunderstanding and misrepresenting the character and role of the Senate. Only if we get the larger picture of Australia's constitutional theory and institutional design right can we properly contextualise and evaluate the Senate's committees and how they relate to questions of parliamentary decline and responsible government. My reading of the record when the Legislative and General Purpose Standing Committees and Estimates Committees were introduced in 1970,²⁰ and of subsequent accounts by insiders and experts,²¹ is that the national legislative role of the Senate was taken for granted. If that is the case, my contribution might be in articulating the constitutional justification that is presupposed by this major institutional development. Once we are aware and convinced of the Senate's constitutional role, then arguably we can better defend and advance its enhanced national role that the establishment and consolidation of the comprehensive committee system in 1970 entailed.

15 For an Australian's, reflection on the constraints of single member districts and shorter terms, see Derek Drinkwater, 'Reflections on the Committee Systems in The House of Representatives', *Legislative Studies*, Vol. 5, No. 1 (Autumn 1990), pp.42-45

16 Collin Howard, *Australian Federal Constitutional Law*, 3rd edn, Law Book Company, Sydney, 1985, p.97. *ibid.* p 96, for this and the following quotations

17 C.J.G. Sampford, 'Reconciling Responsible Government and Federalism', in M.P. Ellinghaus, A.J. Bradbrook and A.J. Duggan (eds) *The Emergence of Australian Law*, Law Book Company, Sydney, 1989, p.365

18 David Wood, 'The Senate, Federalism, and Democracy', *Melbourne University Law Review*, Vol.17, No.2, Dec. 1989, pp.304-5

19 Brian Galligan & John Uhr 'Australian Federal Democracy and the Senate', *Public Law Review*, 1990

20 Commonwealth Parliamentary Debates (Hansard) Vol.S.44, 4 June 1970, pp.2048,2342

21 For example, A.R. Cumming Thom, 'The Australian Senate Committee System - Recent Developments', in *The Table*, Vol.45, 1977, pp.51-60

Much of what the Senate actually does has more to do with protecting individual citizen's rights than states' rights or executive responsibilities.²² In this respect the Australian Senate's actual role has been consistent with the original federal theory outlined by American constitutionalists. An institution such as the Senate can help make government responsible by defending and promoting individuals' interests in having duly processed government. The current Australian critics of our constitutional arrangements simply fail to appreciate the legitimate checks and balances dimension that is an integral part of federal institutions such as the Senate.

A form of British styled responsible party government emerged very early in the life of the Commonwealth, as is documented in Reid and Forrest's recent history of the Commonwealth Parliament.²³ The Senate quickly emerged as more a party house than a states house, yet it also accepted the primacy of the lower house as the house of government. The potential of the system to protect fragmented or loose parties encouraged early, if only occasional, expressions of a local variant of checks and balances quite removed from party government as practised at Westminster. The Australian hybrid model combined federalism and a responsible government executive grafted onto and, to a considerable extent, understood in terms of, established colonial institutions and practices.²⁴ It was a flexible system with room for considerable latitude in determining who was responsible for governing what. In the wake of executive consolidation in the lower house, the Senate began to experiment with defining its own role under the Constitution. If the House found little dispute with its claim to be the home of executive government, the Senate claimed greater responsibility for scrutinising the execution of government. The working out of Australian parliamentary government has involved an indeterminate clash between executive notions of mandate and parliamentary notions of public accountability, frequently located in the Senate and often justified in terms of federal constitutionalism.

In the Australian model the Senate has strong ties with state parties but has never been a states' house because state parties are primarily branches of federal parties with similar ideological colour and policy programs.²⁵ The Constitution is basically one of institutional divisions and checks on power - between national and state governments; within the national legislature between the House of Representatives and the Senate; and of governments with constitutionally specified powers and a court exercising judicial review. Rights are protected by a combination of constitutional checks and restrictions on the federalist side, and by evolved practices of responsible government and the 'common law' on the side derived from Westminster.

Australian neglect of federalist theory has hidden a powerful source in the *Federalist Papers* justifying senates as both rights-protectors and nation-builders. The hybrid quality of Australian constitutionalism ought to encourage commentators to devise new evaluative frameworks adapted from the standards of federal constitutionalism identified by Madison in *Federalist Papers* 10, 51 and 62-63 which explains activities remarkably akin to a number of Australian Senate activities. Madison's argument is in two parts: first, an explanation of federalism as promoting rights, and second, a defence of a federal upper house as a nation-building institution, particularly through the promotion of a rights-oriented process of governance, as distinct from simple majoritarianism. The relevant Madisonian distinction is between the Senate's enhancement of responsible government and the defective energies of popular government.²⁶ Coining the very word 'responsibility', Madison sought to render popular government reasonable through checks and balances, including a Senate structured with incentives to resist populism and to foster deliberative processes of governance. Rather than being a states house, the distinctiveness of the Senate consists in its 'sense of national character', and its ability to help convert popular sentiments into the public interest. In this Madisonian view, responsibility rests particularly with the Senate which alone 'may be justly and effectually answerable' for policies which respect the long term interests of the public - for public policy rightly understood. In any society, the 'view of its rulers' must be made to blend with 'the cool and deliberate sense of the community'.²⁷

The Senate's place in Australian constitutionalism fits the Madisonian model of a custodian of responsible governance. As Reid and Forrest have clearly demonstrated, the potential scope of legitimate Senate activity is vast, and historically the Senate has contributed importantly, even if more frequently on rights as affected by executive administration rather than on public policy.²⁸ The point, however, is that the Senate displays a sense of constitutional purpose that rests on rights promotion, not protection

22 What follows is a somewhat shortened version of a section of Galligan and Uhr, 'Australian Federal Democracy and the Senate'; see also Galligan, Knopff and Uhr, 'Australian Federalism and the Debate Over a Bill of Rights', *Publius: The Journal of Federalism*, Vol.20, No.4

23 *op. cit.* especially pp. 14-24, 70-79

24 This latter point is insisted upon by Campbell Sharman 'Australia as a Compound Republic', *Politics*, Vol.25, 1, pp.1-5

25 Joan Rydon, 'The Federal Structure of Australian Political Parties', *Publius: The Journal of Federalism*, Vol.18, No.1, Winter 1988, pp.159-71

26 David Epstein, *Political Theory of the Federalist*, University of Chicago, Chicago, 1984, pp.167-70, 179-85, illustrates the vital link between federal institutions and the promotion of rights

27 *Federalist Paper* No.63

28 *op.cit.*, pp.172-77, 216-30

of state interests as traditionally claimed. Two examples of Senate Committees that we are not celebrating today illustrate the point. The first is the establishment in 1932 of the celebrated Senate Standing Committee on Regulations and Ordinances to review delegated legislation. This Committee has developed an international reputation for its extraordinarily successful amendment of government regulation so as to protect the rights and liberties of citizens.²⁹ Fifty years later, the Senate established a related Standing Committee for Scrutiny of Bills to improve the impact of primary legislation on civil liberties. Both committees explain their rights promotion in terms of related improvements in the due processes of responsible governance. In the words of a Chair of the Senate Regulations Committee, that body operates through 'a miniature code of legislative propriety' and pursues 'issues of personal liberty and parliamentary propriety', examining 'the justice and propriety of ways and means'.³⁰ So too, the Bills Committee is responsible for alerting the Senate 'to the possibility of the infringement of personal rights and liberties or the erosion of legislative power of the Parliament'.³¹ These two legislative scrutiny committees have protected rights and liberties while strengthening the governing processes.

Understood in this way the Senate is not simply a federal institution with a states' rights function but a national institution with multiple purposes of national governance and protecting individual rights. Nor is the Senate simply at odds with parliamentary responsible government but can be seen as an institutional means of ensuring broader responsibility of government. John Uhr and I have been at some pains to emphasise the rights protection role of federalism and the Senate because it is important and largely neglected. It complements and extends the legislative review and executive scrutiny function that have received considerable coverage by numerous authors cited in the final section of this paper.

I have titled this section 'Great Expectations, High Hopes and Manifest Uncertainty',³² and this comes from the introduction to an excellent volume published in 1980 which was a review at that time of the major developments in the parliamentary scrutiny of administration edited by my friend and colleague John Nethercote.

Let me come finally to the question posed for this session: can Senate committees halt the decline of Parliament? I've been avoiding this question partly because I don't know the answer, and partly because I suspect my guess is probably somewhat at odds with the sentiment of this gathering.

A calculated response would insist on specifying the time frame. Whether Parliament has declined and is continuing to do so would depend upon the original point of reference. The answer would be different if that were 1905, for example, before disciplined parties were dominant and when the Commonwealth was putting in place major legislation on a range of national policies; or 1935, before proportional representation had been introduced in the Senate; or 1965, before the establishment of the Senate's Legislative and General Purpose Standing Committees and Estimates Committees. As well, the prudent respondent would want to link the committee system with the Senate's overall standing and role. Furthermore, there are matters of complexity and degree: something as complex as the decline of Parliament, if indeed it is occurring, could not be simply halted as a car or a horse might be. A detailed evaluation of practical work of the Senate committees would be required, including assessment of the significance of the issues that have been taken up and dealt with, the quality of their investigations, and the follow-through and impact of this work in improved legislation, greater scrutiny of public spending, and in better governance overall. Clearly this would require detailed and systematic research which has, to my knowledge, yet to be done.

So, in the absence of that,³³ let me conclude by reminding you of the high expectations raised by the Senate's 1970s committees innovation and the ambitious claims that have been made. J.R. Odgers heralds the introduction of Legislative and General Purpose Standing Committees as beginning 'a new era in Australian parliamentary history'.³⁴ Senator Alan Missen, although critical of aspects of the committees such as their inadequate staffing and insufficient legislative scrutiny of actual bills, described the creation of a fully-fledged Senate committee system as 'not only be[ing] a truly remarkable development, but a development which public opinion has firmly accepted as a beneficial addition to the parliamentary scene'.³⁵

Likewise, Reid and Forrest say that the 1970s innovation 'revolutionised the Parliament as a whole', 'contributed substantially towards the attainment of the ideal of parliamentary control', and is 'the

²⁹ See Anne Lynch, 'Fiftieth Anniversary of the Australian Senate Standing committee on Regulations and Ordinances', *The Table*, Vol.50, 1982, pp.70-74

³⁰ Commonwealth Parliament, Senate Standing Committee on Regulations and Ordinances 83rd Report, pp.10, 13,15, Parliamentary Paper 377/1988

³¹ Commonwealth Parliament, Senate Standing Committee for Scrutiny of Bills, Annual Report 1986-87, p.2, Parliamentary Paper 443/1987

³² J.R. Nethercote, ed., *Parliament and Bureaucracy*, Hale & Iremonger, Sydney, 1982, p.1

³³ But see valuable considerations by M.E. Aldons, 'Parliamentary Committees, Problems of Evaluation', *Legislative Studies*, Vol.2, No.2, (Spring 1987); and Derek Drinkwater, 'Case Study of a Senate Committee', *Legislative Studies*, Vol. 4, No.2 (Spring 1989)

³⁴ J.R. Odgers, *Australian Senate Practice*, fifth edn, p.476, AGPS, Canberra, 1976

³⁵ Alan Missen, 'Senate committees and the legislative process', in J.R. Nethercote, ed., *Parliament and Bureaucracy*, p.125

show-piece of the Senate post-war achievement', and that 'the work of these committees has made an important contribution towards the attainment of a parliamentary control of the Executive'...³⁶

When it comes to being specific about what has actually been achieved, even sympathetic authors like Reid and Forrest are rather vague. For example:

There can be no doubt, however, that the extensive range of enquiries undertaken and reports presented have widened the knowledge of participating senators, focused interest upon the subjects that the committees have addressed, stimulated officials to keep abreast of topics which are the subject of enquiry, and increased substantially the flow of literature about aspects of government in Australia.³⁷

There can be no question of enhanced scrutiny and criticism within the Commonwealth Parliament if quantitative measures are the appropriate ones, as Sir William Cole pointed out:

In the past fifteen years the investigatory activities of parliament and its committees have expanded dramatically. If committee activity alone is examined it will be found that, as compared with the situation twenty years ago, there has been a fivefold increase in the number of reports; the reports themselves are five times as long as previously; and the numbers of official witnesses alone have increased in similar proportions.³⁸

And as John Nethercote points out: 'even modest developments in parliament's role have considerable consequences for ministers, for parliamentarians themselves and for officials'.³⁹

My own sense is that we should be less optimistic at the beginning of the 1990s than most commentators were through the 1970s and early 1980s. The break-through was made and consolidated in the 1970s and the enhanced role thereby achieved for the Senate and its committees has been continued in routine fashion through the 1980s. The great expectations have not been realised, however, nor has the incipient renaissance fully emerged. Some new stimulus is required. Perhaps that fillip can come from greater appreciation of the Senate's role in Australian constitutional theory and design.

Mr EVANS - Thank you, Dr Brian Galligan. Since we were in this segment, trying to look to the future - if there is any future, since the future belongs to new Senators - we decided to select a collection of new Senators and we thought that was appropriate. I call on the selection of new Senators to respond to Dr Brian Galligan's paper and also to add any comments of their own. First I call Senator Rod Kemp from Victoria.

Senator KEMP - Mr Clerk, colleagues past and present, ladies and gentlemen: when I was asked by the Clerk to make some comments today I pointed out to him that in fact I was more a student than a teacher. I said that I would certainly like to come, but thought that I could actually learn more than perhaps I could teach. I suggested to the Clerk that I would be quite happy to step aside if he could find a better person to commentate. I did not hear back from him, which I can only assume is not meant as a compliment to me but perhaps is more an indication that my colleagues were more fleet of foot. One of the reasons I stood for the Senate was an earlier experience I had as a staff member of a Liberal Minister. During my preselection for the Senate I was asked by Jeff Kennett, whose name would be known to a few people here, the reason I wanted to join what he called an 'old man's house'. I pointed out to him that it was not. In fact, one of the features of the Senate which I found particularly attractive was its very extensive committee system. I found that particularly appealing, and that was one of the reasons why I decided to throw my hat in the ring for the Senate. The Senate, I would have to say, is in many ways its own worst salesman. The image that Brian mentioned, I think, is very common throughout the community. I think it is changing.

Opinion polls have been taken over the years on the question: 'Should we abolish the Senate?'. In the fifties a full third of our people thought it would be wise to abolish the Senate, another third thought it would be wise to keep the Senate and the final third had no particular opinion at all on that matter. That has actually changed. The latest opinion poll I could come across was taken in 1980, and that showed that a vast number of Australians feel that the Senate is now serving a useful role. It is interesting that this change has come about as the Senate itself has flexed its muscles.

36 op. cit., p.375

37 Ibid., p.376

38 R.W. Cole, 'Responsible Government and the Public Service', Patrick Weller & Dean Jaensch, eds., *Responsible Government in Australia*, Drummond, Richmond, Vic., 1980, p.169

39 'Introduction', in J.R. Nethercote, ed., *Parliament and Bureaucracy*, p.6

Mention has been made here of the tremendous work of our colleagues in the sixties and seventies in the formation of a committee system. There was also the constitutional crisis of 1975, when the Senate flexed its muscles in a very vigorous way. This, strangely enough, has not only failed to hurt the standing of the Senate and the public appreciation of its work - some of my colleagues may differ with me on that - and its capacity to protect the Australian public and body politic but has helped further to endear it to our public. I was interested in doing some research for these brief remarks to come across a paper by Senator Button. Senator Button, one of our most distinguished colleagues, said in 1979: 'If, however, the power to frustrate is removed,' - he was speaking about supply - 'it is no more unprincipled for the Senate to exist than it is for the human being to have an appendix. If in this situation the appendix and the Senate could each be made to serve a useful function, both the human body and the body politic would be better served'. I suggest that is a bit of the reason why we have this dilemma in selling ourselves to the wider public. The Labor Party - and I think this has been mentioned by other speakers - has had a view on the role of upper houses. I suspect this has made it hard for Labor Party members to get out and effectively sell the role of the Senate, as former Senator Black pointed out to us this morning. Nonetheless, it is quite clear from the papers which have been given here today that many Labor Party Senators have made a very effective contribution to the development of the Senate and of the committee system in particular. I give them full credit for that.

The issue in this particular section is the decline of Parliament and whether the Senate can help arrest that decline. My view, and I think it is the view of the Liberal Party, is that the last decade has seen a very substantial decline in the appreciation by the public of Parliament in general and politicians in particular. It seems quite interesting that at the moment both political parties are, in their own ways, seeking to address effectively this particular problem. You will be aware of newspaper reports about Mr Hawke and Dr Hewson and of the discussions that they have had looking at ways in which the performance of this Parliament can be improved.

I was interested in one of the lessons that we could perhaps draw out from the papers this morning. Why did this change come about? How did this Senate, which seemed to be not a particularly active body in the 1950s and the 1960s, come to develop this very powerful committee system? It came about in a number of ways. It came about because of the work of former Clerk Odgers and the research that he did. That was made very clear in Senator Rae's paper this morning. It came about also because of the idealism of a number of Senators: Senator Rae would certainly be one of those; Reggie Wright would be another; and Lionel Murphy would be another one who has contributed to it.

It also came about because the politics were right. The politics at that time made it sensible and wise. For people who were actually in the game of winning in politics there was a sense that if certain proposals were adopted in relation to the committee system they would at least obtain some advantage - perhaps at the expense of their opponents. It came about through a mixture of hard research, the work of a number of Senators who had perhaps a broader national perspective and, indeed, with the application of some short-term political advantage.

It seems to me that there is a great ferment now occurring on what we should do about the Parliament. How can we, as politicians, improve our standing? Over the next few years politicians should see how they can improve the performance of Parliament. Some of these will be, of course, looking at the role of the Senate and Senate committees. Hearing the proposals that Mr Hamer and a number of others have made here today, it seems to me to be the right time for these sorts of proposals to come up, because the public is worried about politicians and worried about this Parliament. Politicians should now start to look at the changes that they can make because they want, in the end, to address effectively what the public is concerned about.

It is quite possible that because of the research which has now been carried out - partly as a result of this meeting here and of the work of others before, like Senator Hamer, that maybe in the next few years there will be the chance at least to adopt some of the proposals which have been put forward.

I will lay my cards on the table. I am a very strong supporter of upper houses. I am a strong supporter of the institution of the Senate. I believe the changes which have been made over the last two decades to this chamber have added greatly to the lustre of our system and have added greatly to the capacity of the people to look closely at what the executive is doing.

In conclusion, I do not know whether I am a sign of the future, but I would like to give full credit to the colleagues who have preceded me and to indicate that I certainly hope that we will prove worthy of the legacy that they have left.

Mr EVANS - Our next new Senator is Senator Nick Sherry from Tasmania.

Senator SHERRY - Mr Chairman, ladies and gentlemen: I do not know whether Rod was trying to provoke me into doing a re-run of my maiden speech, but I do not really see that the topic in this session has been particularly relevant to warrant my going into the ins and outs of the powers of the Senate because the question that we have to address is the decline of Parliament. It seems to me that is not particularly unique to Australia; it is a problem that exists in all democracies, and the relative power of the Senate and its performance is not necessarily central to that. I have to be quite honest - there were two reasons why I stood for the Senate: I was, like Rod, attracted to the Senate-style approach, the ability to come to grips with issues more readily than you can in the House of Representatives; and frankly, the other reason was that I could not get elected to the House of Representatives.

I think if we look at what was perceived to be the importance of Parliament, there is no doubt that Parliament as an institution worldwide is rapidly declining. It is certainly no longer the centre of vigorous debate, questioning, and determination of policy. That is relatively rare. It certainly does not, in my view, alter policy except at the direction of the executive. Certainly, it now very, very rarely has the ability to bring about the demise of a government or the particular change of a particular policy. As I have mentioned, that is not unique to our political system. I think the reasons for this change are important because it shows what a committee system is up against in terms of trying to arrest the decline of Parliament.

Some of the reasons for the decline of Parliament include the enormously complex scope and range of issues that Parliament now has to cope with; the sheer size of the public sector; the media concentration on our political process in terms of the leaders - it is almost a presidential approach in terms of the media attitude; the very close advice - and some would say control - of Ministers by such persons as advisers and minders (Ministers now do not say a word out of place if they can avoid it and they are very carefully briefed on issues and policy); and the rise of very rigid political parties. I do not make any value judgment as to whether those sorts of things are good or bad but they are leading to a decline in the role of Parliament.

I cannot reminisce very much about my performance in the various committees although I do want to briefly relate my first day on Estimates Committee F to illustrate what I believe is a great problem that the committee structure has in arresting the decline of Parliament. Estimates Committee F examines the estimates of the Departments of Primary Industries and Energy, and Industrial Relations and it apparently, as I understand, completed its deliberations in one day which is something of a record. I asked six questions and my colleagues from the National Party and the Liberal Party must have asked 400 or 500. So my strike rate by comparison was pretty poor, but I thought my strike rate by comparison to some of my Labor colleagues was pretty good because at the conclusion of the day, having asked six questions, my Labor colleagues, I think, had asked one or two. So with great pride I bounced up to one of my Labor Senate colleagues and started talking about it and he said: 'Yes, Nick, you have set a record for a first time appearance. Don't do it again'.

The fact is that when you are in government you do not want to be scrutinised by committees. I have to say I did feel a little better later on, though, because although the Liberal Party-National Party members asked many questions in the industrial relations area - I have an industrial background - they missed almost every relevant question that they should have asked.

The great problem that the committee structure has to come to grips with is the enormous range of issues. If I look back over the last couple of weeks as a new Senator, I see no major issue that came out of the Estimates Committee of world shattering newsworthiness or political importance or that is going to change the direction of this Government. There is simply nothing that has come out of that process. I am not saying that Estimates Committees do not fulfil a useful role. They certainly do keep public servants on their toes. They certainly play an important part in dealing with some issues over a period of time. But in terms of the total picture, their ability to arrest the decline of Parliament, in my view, is fairly minimal.

I suppose, from my personal point of view - I am not a historian by background, although I do have a very deep interest in history generally - it has taken 800 years for Parliament to obtain its powers and wrest control - largely control of the political policy-making process - from the executive, yet in probably the last forty or fifty years we have gone into a very rapid decline in the sense that the executive is wresting back much of that 800-year accumulation of powers by Parliament. What concerns me more than anything is what is going to happen to our democratic process if the committee system cannot succeed in halting the decline of Parliament and I believe the committee structure cannot halt that decline - and what processes we can have to halt that decline of Parliament if we regard, as I do, the role of Parliament as central to our democratic process. I am very concerned about where that will lead us in the future.

Mr EVANS - Senator Vicki Bourne is a Democrat Senator from New South Wales.

Senator BOURNE - Like my colleagues, I am a first time Senator. If Parliament is declining then the enemy is the executive. I think that has come out a few times during our discussions today. The executive is wresting more and more power away from the Parliament and towards itself and, of course, you have to expect it to do that. What we have to do is try to grab a bit of it back again. I think one of the only places we can do that now is in committees - in Senate committees in particular, because, of course, the Senate does not have a majority with the Government.

It became obvious to me that you change a little when you get elected. I did not think I would, but I suddenly found myself defending New South Wales all over the place - with family, with friends. This was before Parliament had even sat and I had not been sworn in, but I suddenly decided that I was actually a representative of the people of New South Wales and I had to defend them and I started doing that. I think probably other people have found that they have had exactly the same experience.

When you get elected, you become a parliamentarian rather than a politician. You are still very interested in politics; you want to keep your party going; you want to keep going; you want to keep your job, but you are also very interested in representing people and making sure that the people that you represent get the best deal. You turn from the politician who is just after a bit of publicity to get elected - a lot of publicity to get elected, and if you are a Democrat that is not easy - into somebody who is genuinely representing people.

That shows up a lot in committees. Because I am a Democrat, I am on four committees. The Scrutiny of Bills Committee is one that has been actually talked about a bit today. I must say, in defence of the Scrutiny of Bills Committee and of our secretary, Stephen Argument, who is around here somewhere, that an awful lot of work is put into it and a lot does come out of it. I have a few figures here. The Scrutiny of Bills Committee has drawn attention to about one-third of all bills which have been presented to it, but only one-tenth of their suggested amendments have actually got through. Now, that really is a problem and that is one that has to be addressed. The Regulations and Ordinances Committee does do better. I want to make only two brief points. There is a very unfortunate trend towards the dominance of the Parliament by the executive. That is continuing. I think what Dr Galligan said about a time frame is also true. Since about the middle of the century, we have been a bit better than we were. Since about the middle of the last decade, we have been going downhill. So we have to wrest that back, and one way to do that is through committees.

I am on three committees in addition to the Scrutiny of Bills Committee. The committees are remarkable because, when nobody else is around, parliamentarians actually tend to agree with each other. On the contrary, we try to come to agreement by consensus. We try not to abuse each other. It is really quite different from the chamber. You would be very surprised; I was. If that sort of spirit of parliamentarianism can be kept up, that is one way to halt the decline of Parliament.

Scrutiny of legislation is the other thing, I think, that is really important. Between 1901 and 1910, twenty-three bills were passed through the Parliament per year. In the last decade an average 170 per year were passed. Obviously there are a lot of reasons for that. One reason is the dominance of the executive which has the ability, in the lower house particularly, to gag, to guillotine, to get as many bills through as it likes without proper scrutiny. That is another thing that has to be looked at.

The Senate's great strength is that there is no majority for the executive, that it has to listen to reason and that it has to send bills off to select committees when it is forced to do so. As a Democrat, I feel a bit of an inherited guilt over select committees, I must admit, because about nine or ten years ago we discovered that one way to stop a bill going straight through was to send it off to a select committee. So a lot of things were sent off to select committees by Democrats, to the point where there was even a cartoon that had Moses pointing at someone - probably a Democrat - saying, 'The road to hell is paved with referrals to committee'. I think that is still considered by the executive to be the case.

Mr EVANS - Senator William O'Chee from Queensland has the distinction, I think, of being the youngest of the new Senators.

Senator O'CHEE - Mr Chairman, past and present Senate colleagues, ladies and gentlemen: the topic for discussion in this session presupposes that there is a decline of Parliament. In order to answer that question, I believe it is necessary first of all to ask what is the role of Parliament so that one can assess whether there is, in fact, a decline of Parliament and, therefore, whether Senate committees can play a part in arresting the supposed decline of Parliament.

All of the people who have spoken this afternoon, including Dr Galligan, have viewed the decline of Parliament in terms of some sort of Diceyan division between Parliament, the executive and, unmentioned today, the judiciary. The assumption is that Parliament has declined as the executive has

risen. If we take that as the starting point, we must therefore ask: what is the role of Parliament that makes it different from the executive and why will the goals and objectives of the Parliament be different from the goals and objectives of the executive? I talk about the Parliament in this way in a conceptual term rather than the goals and objectives of the individual parliamentarians.

The role of the executive is to implement the policy of government. I think there are many people who believe that the role of the Parliament is to be a talking shop, a debating chamber, or whatever, where the principles and policies of the government are brought into question. I believe there are a whole heap of reasons why the executive has risen at the expense of the Parliament, at the expense of the discussion of government policy, government principles and objectives. Partly, they relate to the media because it is much easier, of course - it is less so now, perhaps, with the televising of the Senate - to get your message across over radio or television, or whatever, than it is to actually get what you say in Parliament out to the people. That is very clear. But the question of whether the Senate committees can play a role in transforming the balance of power is another thing.

One of the reasons that matters are referred to Senate committees is very simple - there is not enough time to deal with them in the Senate itself. That is why they are referred to committees. This therefore raises the question: if the Senate is supposed to be a place where matters are discussed, is it satisfactory that they are discussed in the committees? One can raise a substantial argument that the rise of the committee system is a derogation of the authority of the Senate and, therefore, in some respects, may contribute to a perceived decline in the role of the Senate, if one looks at the Senate or the Parliament as a place of debate.

As we all know, most of the deliberations of Senate committees are not public deliberations; there is no Hansard.⁴⁰ It is not possible to see what went on during those deliberations. One of the problems we face at the moment is the fact that a new committee procedure has been introduced for the consideration of bills. Unfortunately, the hope of the framers of that committee procedure that we would see an increase in outside people being called before public hearings of those committees has been obliterated by a decision on the part of the Labor Party to restrict the procedure at those hearings and to restrict the number of people who will appear before them and, therefore, the evidence that we bring into Hansard. If the Senate committees are to contribute to increased public debate, they can do it only by increasing the evidence available for public scrutiny in the Hansard. In many respects that debating function is lessened by private, non-recorded deliberations of those committees.

On the other side of the coin, there is an argument that can be raised that the Senate committees increase the scrutiny of executive activity because they take it away from the simple Caucus system. The committees require reports and, therefore, it requires perhaps more intellectual comment than one would get in the normal course of chamber discussion and it requires members of those committees to exercise their intellect in addressing the problem.

But, of course, the Senate committee system itself is a problem. If one looks at what Dr Galligan has said this afternoon about the Senate having a particular role in a national structure of representing particular state electorates, or if one just goes to the traditional view that the Senate is the States House - I think we are probably splitting hairs to find differences between those two viewpoints at a superficial level - one sees that the Senate committee system is unsatisfactory because there is no guarantee in the process that every state will necessarily be represented on each committee. So, in some respects, the committee system actually decreases the power of states or state electorates by failing to guarantee representation of each state upon those committees. Of course, anything that attempts to devolve authority or to refer matters away from a larger body of representative people to a smaller body of elected members who are not elected by the people will always run that risk.

I believe there is a lot of power, perhaps untapped power, in the Senate committee system; something which we will see extended, I hope, over the next five, ten, or fifteen years - not necessarily, but perhaps to the extent of the American Senate committees' power. For that reason, whilst not wishing to canvass the issue of whether there has been a decline of Parliament, I believe it is fair to say, without any shadow of a doubt, that the Senate committee system has a major role to play in the forthcoming years in changing the definition of the organs of Parliament. That is, I believe, perhaps the greatest contribution to the Parliament of this nation.

Mr EVANS - Our final comment comes from Peter Bayne, who is a lawyer - at the moment attached to the Parliamentary Library.

40 Verbatim reports of all committee meetings held in public are recorded in Hansard.

Mr BAYNE - Thank you, Mr Chairman, and may I say I express my appreciation for being invited to speak. I do not have a great deal of experience with the Senate and perhaps, unencumbered by too much in the way of knowledge or, on the other hand, despair, or cynicism, I can offer a few short, sharp comments about the potential, I think, for Senate committees to play a greater role in our system of responsible government. Throughout today's proceedings there has been frequent mention of the new Senate procedures for the referral of bills to the Legislative and General Purpose Standing Committees of this Senate.

My remarks are directed to the potential which this procedure offers for the exercise of Senate influence on the administration of the law by the administrative branches of government. The law I am talking about is that which underpins the administrative machinery of government which creates administrative agencies, such as departments and statutory authorities, or which selects existing ones and empowers them to take action which affects the citizens or the inhabitants of Australia. There are many examples one can find from the statute book of that kind of law.

Characteristic of that kind of law is that it often authorises the exercise of a discretion or the making of a discretionary judgment by the administrative official or the agency concerned. Let me give you two examples. Both come from the Social Security Act. First, there is provision in that Act which authorises the Secretary to waive the recovery of an overpayment of pension or benefit. That is all it says. It gives no indication of the circumstances in which waiver might be appropriate or the circumstances under which it might not. Another example which is less open-ended but which involves nevertheless the making of a discretionary judgment is the provision in the Act which requires a decision about whether a person is qualified for unemployment benefit to turn in part on the answer to the question whether the claimant had taken reasonable steps to obtain work - again, that is all it says.

Now the exercise of those kinds of discretions involves all Australians. It involves millions of dollars, involved, of course, in how those discretions are exercised. It affects, directly, of course, the people who seek benefits or whose benefits are sought to be withdrawn. When Parliament enacts those kinds of provisions and, as I say, they are all through the statute book, it is in effect not making a law at all. What it has really done is left that task to administration. So when the Department of Social Security states a policy in its manuals as to when it will or will not waive recovery of an overpayment, or when it will or will not find that someone has taken reasonable steps to obtain work, the Department is, through its manuals, in effect, rewriting the law.

There are occasions when Parliament does get to know about the way in which the administration has rewritten the law. If a regulation is made to fill out a discretion, or to fill in the gaps of a discretion, then the Regulations and Ordinances Committee will find out and may be able to do something about it. But that is relatively rare. In most times when the administration, as it does frequently, fills out the discretion by announcing some policy - which you can get under the Freedom Of Information Act from the Department - Parliament is unaware of the way the administration has filled out the content of the discretion. Certainly, it has had no opportunity to have any impact on how the discretion is filled out.

The reason to say all that, or to outline all that, is because it seems to me these new procedures do permit the Senate, if it wishes, to have some influence on how the discretions are filled out. These procedures may do this because they provide the opportunity for Senators in the examination of a bill, clause by clause, to question the agency about the policy it will follow as to how particular statutory discretion is going to be applied. It also gives the Senators some opportunity to impress their perception of what policy should be in the sense of guiding the exercise of that discretion.

I take the point that has just been made that this may not happen in the foreseeable future to any great extent, but the potential is there for these committees to hold hearings, to call before them public servants and to ask them: 'What do you mean by this provision in the statute?'. One can imagine the situation, in other words, where a Senator will pick up a bill which has provision in it, such as that the secretary can waive over payment of discretion, and say: 'Now, what do you mean? What have you got in mind there? When are you going to waive recovery and when won't you waive recovery?'. In that way a record can be built up. The Hansard record is very important, as Senator O'Chee has just explained. A Hansard record can be built up of the agency's viewpoint.

The other thing to say, of course, is that in that process members of the public can come along and they can have their say as to how the discretion should be exercised. On the basis of that, there will be a parliamentary record of the perception held by the Senate committee. Whether that comes about is a matter to be seen. There are some famous examples from the past of Senate committees doing just that in a very detailed way, raking over a bill, asking the agency or the public servants how it is going to

work, and having some impact on the form the bill finally takes. The committee consideration of the Freedom of Information Bill is a prime example.⁴¹

What could follow if a Senate subject committee takes on this role? In the first place the Act might be amended to tighten up the discretion. That may not always be desirable. It may be seen that we cannot do much better than have a very open-ended form of wording and simply leave it to future experience to fill in the gaps, subject to some broad guidelines being stated in the parliamentary record. Even if the Act is not amended, what may emerge is a clear statement of policy about how the Act will work by the agency perhaps in answering questions. One might add that the Ministers might find out a good deal about how their departments intend to apply Acts through this process as well.

The other thing that might follow is that bodies like the Administrative Appeals Tribunal which interpret these Acts, when they hear appeals from an administration, may pay some regard to what is being said in Parliament through the process I have described. That may require some change on their part, but again there is a basis on which they can take that action. Finally, there will be also a basis for Estimates Committees and the like to review the way in which legislation is worked if they have this yardstick presented to them in the parliamentary record generated through the close scrutiny of bills through the subject committees.

Finally, let me quote from a speech I came across recently. It is the maiden speech of Senator Durack. Given that he obviously has had a strong role in the development of these committees over the last two decades, it is appropriate to refer to his maiden speech in which he said:

Another vital role which we must evolve and to which I propose to give great attention is the close scrutiny of Bills, as they are presented, to ensure that they meet the prime requisites of legislation in that they do not provide for wide discretions in the Executive and as far as possible they create specific obligations or confer specific benefits. In this way I believe that the Parliament can, even with the pressures of this age in which we live, go a long way towards performing its historic and fundamental role as the instrument to control the Executive Government.⁴²

Now that is an ideal, if you like, that has been repeated throughout today's proceedings. What I am suggesting is that this new procedure, if the effort is put into it, could well help the realisation of that objective. Thank you.

Mr EVANS - We have time for some succinct questions, comments or observations.

Dr CLARK - A partial solution might be for the Senate to let the public know what it is doing. I will give one example. Following Senator Peter Rae's idea many years ago and a successful motion by Senator Hamer last year, the standing committees now examine annual reports. But the many people in the public who read the reports of government departments and authorities do not know that those reports even exist, how to get hold of them, or even that committees are looking at annual reports. So it seems to me that a very active promotions campaign and a very active publications unit would help a great deal in letting the public know one of the things the Senate is doing. There are many others that could also be publicised.

Mr EVANS - Yes. This was a point that was touched on earlier and I made the point in return, the somewhat negative point, that people do not want to be chopping down more trees to churn out more paper, which may or may not be read by people who are deluged with paper already. But I think one thing that has come out of this conference is that there is a need for some new publicity mechanism on the work of committees in particular. Would any member of the panel like to comment on that point? Are there any other questions?

Ms NETTLEINGHAM - I am, with other people, responsible for preparing my Department's annual report. It was with great interest that we got hold of a report from the Senate Standing Committee on Transport, Communications and Infrastructure. The Committee produced a report in May of this year detailing its comments and findings on the Department's annual report. We were looking for some feedback. The total comment was: 'apparently satisfactory' and I do not really think that that is enough for departments to go on, to know whether we are producing what is necessary and whether what we are producing is actually used.

⁴¹ Commonwealth Parliament, Senate Standing Committee on Constitutional and Legal Affairs, Freedom of Information, Parliamentary Paper 272/1979

⁴² Commonwealth Parliamentary Debates (Hansard), Vol.S.49, p.572

Mr EVANS - Well, that is a product of the new procedures, which I mentioned earlier, for the scrutiny of annual reports by committees. They are required by the procedures of the Senate to say whether a report is apparently satisfactory or not. If they find that a report is not apparently satisfactory they are required to look further into it and they are also required to examine other reports selected for examination. Now, that is an attempt to enable the committees to deal with the enormous mass of annual reports and the enormous mass of information that is contained in them and, at the same time, for the Senate to have some assurance that the committees are looking at all of the reports and are, at least, making a judgment on them.

It is simply not possible for each committee to examine, in detail, every annual report that comes before it, but that device and that phrase is an attempt by the Senate to ensure that each committee looks at every annual report it gets and makes some sort of judgment on it apart from the ones that it selects for further examination. Is that a fair comment Mr Hamer? Does any member of the panel wish to comment on that point?

Dr KUKATHAS - I am very sympathetic to everything that has been said by the various speakers who are obviously concerned about the decline of Parliament. I wonder if I could offer a different way of looking at it. Perhaps it is fair to say that Parliament has declined if you look at its powers in relation to those of the executive but that is not to say that its powers have declined absolutely. Perhaps another way of looking at it would be to say that Parliament has, in fact, increased its powers as a result of the ascendancy of the executive. This is because Parliament and the executive are not the only players. In fact, the other player is not just the judiciary but, perhaps, the society at large.

One way in which the powers of Parliament may have increased is in the very fact that the executive does now take much more responsibility for larger areas of public interest. As a result of this, Parliament itself now takes on more responsibility. If I can give a very simple sort of an example: perhaps twenty years ago it would have been much less likely for the executive to think to involve itself in the affairs of the universities - to see the universities as a part of, say, a system of national planning. Now, looking at it in this way, the executive has much more say in the way universities are run. This has to be scrutinised by Parliament. Much more responsibility for what actually goes on in universities is now not just in the hands of the executive but in the hands of Parliament and its committees. In this respect, Parliament has declined relatively to the executive, but perhaps not relative to the society at large.

Mr EVANS - I was waiting for someone to raise the question generally of the size of government and whether governments are attempting too much. Does any member of the panel want to comment on that point?

Senator SHERRY - Just very briefly, I agree. I would never have believed when I entered this place that I would have ended up on a committee on Animal Welfare.

Dr GALLIGAN - I have not been terribly convinced at all, listening over a period of time to people talking about the decline of Parliament. It does seem to me that you can go back to the Commonwealth Parliament in the first ten years to federation but that was rather a unique situation. Even then life was much more leisurely. You read the stories of the early parliamentary leaders. They had a more leisurely life. I think that this was part of the argument that I was trying to run regarding the complexity of policies and issues. The reason why the executive has grown, too, is because there are so many more things - perhaps some things that it need not be involved in, but a whole lot of things - that it is expected that the public governmental sector will be involved in. I think, if that has disproportionately gone to the executive, it is, in a sense, difficult to say that Parliament has declined. So I would agree with that rather different way of putting it.

Senator O'CHEE - I think the comment is a very interesting one. When people talk about the division between the executive and Parliament and the judiciary, and perhaps the people, they talk about it on the basis of having inherited those principles or concepts from the Westminster system. In a federal system - because the Westminster system is not intrinsically a federal system - I believe there is a difference between the two organs of Parliament. Not only does the Senate have a different set of constituencies from the House of Representatives but increasingly it is taking on different functions. There may well be very much truth in what you say. If one looks at, for example, the role of the Senate in scrutinising, and perhaps disallowing, various instruments of delegated legislation, then the House of Representatives is, and always has been, the electoral college of the government - as David Hamer said. There is no reason to believe that the role of the House of Representatives has changed at all over the period of time since federation. But it may be a different matter with the Senate.

Senator KEMP - Yes. It seems to me there are a number of senses in which you can talk about Parliament declining. The first sense is the public perception of the Parliament and how the public itself

regards Parliament and how it regards the behaviour of those in the Parliament. I made a judgement - and I do not think people have argued against that - that in that sense Parliament has declined.

The other issue is whether the Parliament is, in fact, fulfilling its proper function in effectively dealing with the legislation which has been put through the Parliament by the executive. I think, in a sense, this whole meeting today has been to look closely at that particular issue. I think the conclusion of the gathering here, or the speakers today, is that things in some ways have got better and they have got better to the extent that the Senate has improved its own role in the system, its own powers and its own capacity to scrutinise what the government is doing.

The other point that was made, and I think it was raised by Dr Clark, was that government itself has now stretched itself into so many nooks and crannies in our system and in our lives. Part of the public debate in the last eight years or so has been the extent that the government should withdraw from certain areas. We are seeing that, of course, in the current debate on the privatisation of various government enterprises. We are seeing that in the debate on the need to look more closely at the regulatory activities of government. All those things in themselves are probably connected in the sense that people are unhappy with their politicians and, of course, that in the end of the day translates into a fairly poor public perception of Parliament and politicians.

Mr MUSIDLAK - I am a little troubled, but not surprised, at the pessimism shown, because most of the discussion has tacitly assumed that the executive is setting the agenda and that the Senate is just responding in whatever way it can. Yet this morning we had the descriptions of the big issues - water pollution, air pollution, and so on - that people in groups and at individual cost decided to look at in the sixties and in the seventies, at a time when the resources of the public sector had not been mobilised to support a particular position and were able to get a lot of issues into the open and to mobilise the public to involve itself and to insist that some action be taken. I think that is a real challenge to the Senators. While there are problems in Australia there are opportunities.

Dr GALLIGAN - I think that is a good point. I think the disappointment - and this is just a broad brush impression - of looking at the Senate in the eighties as opposed to the seventies is that somehow, in a sense, it has been left behind. It seems to me that the agenda is being set now, not by the parties - they are in a sense trying to keep up and take it into themselves - but by larger groups and movements and new ideas out there, depending on the area, at quite a rapid pace. I think this was part of my argument that we have in the institution of the Senate rather a good arrangement for doing the sort of thing you were talking about, which it seems to me the Senate did more in the seventies; that public policies, like the environment, are so complex that in a sense you cannot leave them to anybody, either any one government or any one institution of government, whether executive or legislative or whatever. So if the executive is still making the running on policies it is often because it is pulling those things in. But if you say: 'Look at the environmental question', it seems to be thrown back between some of the key Ministers and the spokesmen of the big movements out there. It seems to me that somehow the Senate has not really realised the potential that it has.

Mr EVANS - From the history of those early select committees on, for example, air pollution and water pollution, they were examples of the Senate and the Parliament keeping up with the issues of the day, as Dr Brian Galligan has mentioned. In other words, they were keeping up better than they are now. Is there one last brief comment or question?

Mr GUEST - I would like to ask a question following that last remark. Is it possible that the Senate has now, in an attempt to achieve parliamentary respectability and to do something really useful, burdened itself with far too much routine work; a routine which it is now proposing to add to by looking more closely at legislation to the exclusion of some of the innovative work which was done in earlier years?

Mr EVANS - I suppose that depends on what you regard as routine work and what you regard as getting on to the issues. Does any member of the panel wish to comment on that? As I say, I think that is very much a matter of value judgement. I should say that this new system of referring bills to committees and of having the committees look at annual reports is a deliberate attempt, as I read it anyway, to steer the Senate committees towards more scrutiny of the activities of government departments and more scrutiny of legislation as against inquiring into general topics like air pollution, water pollution and so on. In other words, it is an attempt to make the priorities different and make the agenda different. Is that a fair comment, Mr Hamer? It represents, if you like, a value judgment on the part of the Senate that that sort of work is more, in some senses, productive. I think we will make that our last comment.

On behalf of the conference, I would like to thank all the speakers and panel members. I believe that out of this conference will come an agenda for future developments. An American author referred to the American Revolution as 'a revolution of sober expectations'. I think any revolution in Parliament has

to be a revolution of sober expectations and a revolution of modest expectations. The agenda which will come out of this conference, I think, will be an agenda of sober and modest expectations but, from my point of view, a valuable agenda for all that. I see Peter Rae trying to attract my attention.

Mr RAE - Mr Chairman, may I, as the first speaker after the President, who opened, simply take the opportunity of speaking on behalf of, I am sure, everybody who participated in this day and thanking you very much and thanking Ann Millar and all the rest who made possible this extremely successful day and one which, obviously from the number of people who have attended, a lot of people have found a great deal of interest in. May I say thank you on behalf of one and all.

Mr EVANS - I thank 'Senator Emeritus' Rae for that very good point on which to end. I certainly extend my thanks to Ann Millar and the other organisers of the conference.

You will be able to obtain a transcript of the conference, which will be made available to the participants later and which will also be available to other interested people, by contacting Ann Millar in the Research Section of the Senate Department. We hope that that document will provide a valuable record of what, I think, has been a very valuable conference. Thank you very much.