Conference theme

Scrutiny and Accountability in the 21st Century

'the contribution specialist legislative scrutiny committees can make to better governance'

A Paper presented on Tuesday 7 July 2009 at 09h45 to the
Australia-New Zealand Scrutiny of Legislation Conference
Parliament House Canberra Australian Capital Territory

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Parliamentarians, delegates and guests – I was delighted to be invited to address the 2009 Australia-New Zealand Scrutiny of Legislation Conference.[1]

When I asked what was expected of me, I was told the 'paper' in mind was not a heavily footnoted academic piece (whew!), but essentially a personal reflection as a long-standing former member of the Senate Scrutiny of Bills Committee.

I was posed these questions:

- Does the scrutiny committee form part of that tangled web of institutions that ensure or promote accountability? If not, should it? And how?
- If it does, are there things it does well? How do they promote accountability?
- Are there other things it could do, or things it could do better, which would improve that role?
- And is the committee itself sufficiently accountable to the parliament? Could (or should) it be more so?

[1] Former Senator Andrew Murray is best known in politics for his work on finance, economic, business, industrial relations and tax issues; on accountability and electoral reform; and for his work on institutionalised children. He wrote the Report to the Australian Government: Review of Operation Sunlight: Overhauling Budgetary Transparency Senator Andrew Murray June 2008, Canberra.

That's harder to answer than it looks, so I will parody all politicians and evade those questions, for now anyway. Hopefully some answers will emerge in the paper overall.

It is a particular type of scrutiny that is at issue here.

Scrutiny is intrinsic to all parliamentary work. Parliaments, particularly second chambers, are always houses of scrutiny, of review and debate. Scrutiny is often political, but scrutiny in the review sense concentrates both on the *policy* contained in the legislation or measures governments propose to carry out or have carried out, and on the related funding or resourcing of the course of action favoured by the government.

Scrutiny in the context we are discussing has an entirely different and narrower meaning.

Except in giving legislation context, the Senate Scrutiny of Bills Committee largely eschews consideration of the policy lying behind legislation. Instead it focuses on those policy measures that affect rights, as when it is government policy to curtail or advance rights; or it focuses on those policy measures that might allow the abuse of executive power.

The Committee is not required to report on the course of action proposed by the government. It is required to report on whether bills trespass unduly on personal rights and liberties; make rights, liberties or obligations dependent upon insufficiently defined administrative powers; or make them unduly dependent upon non-reviewable decisions; inappropriately delegate legislative powers; or insufficiently subject the exercise of legislative power to parliamentary scrutiny.

There is a threshold question to address: over and above the debate on policy with respect to rights. Does scrutiny of rights and safeguards in legislation matter much and if it does, why?

Humans long ago learnt they need government, and to work effectively governors needed power; but power without restraint was and is dangerous.

That is why liberal democracy stresses the rights of the people, the importance of the separation of powers, the rule of law, representation, and having to account to the people.

That is why liberal democracies stress the importance of parliaments as a necessary safeguard, separate from and at times opposed to governments.

This intended parliamentary safeguard is made more complicated and difficult by our political system, as both in law and practice the executive is intertwined in our parliament.

While Section 1 of the Australian Constitution places the Queen in parliament: *'The legislative power of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives....'* and Section 52 gives the parliament *'exclusive power to make laws'*, Section 58 foils this power by giving the Queen exclusive power to allow or disallow those laws or to reserve the law *'for the Queen's pleasure'*. The Constitution hammers the point home in Section 61: '*The executive power of the Commonwealth is vested in the Queen....'*

We know that the development of our democracy has seen the elected executive turn the assent function of the Queen's representative, the Governor-General, into a legal formality rather than a potential legal impediment. There is no likelihood of any law approved by the political executive not being assented to.

The intent of the Constitution is that the executive should have the last say as to whether parliament's legislative decisions become law.

The executive-minded and those with the numbers can have a 'get-out-of-my-road' mentality, coupled with a desire to short-cut process, and a reluctance to own up and account for all of their actions. Scrutiny is not always welcomed by those with this mindset.

Professor Dennis Pearce, the Senate Committee's first legal adviser, told the Committee's tenth anniversary seminar that at the Committee's inception: *The resistance ... was quite extraordinary.*

That resistance has largely dissipated. Feared by the executive at its conception, some ministers now value the Senate Scrutiny Committee as a safeguard – as a means to help keep their own Departments up to the mark. Undoubtedly other ministers think it a nuisance and I suspect others judge it a paper tiger.

Scrutiny committees need to be more of a nuisance and less of a paper tiger. If you don't ever get under the skin of a minister then you are not doing your job.

Because the principle of accountability is locked into our liberal democratic system, the political executive and the bureaucracy have no choice on accountability. It is not an option. But that does not mean they have no wriggle room. The difficult part is always just how much accountability you can get from them.

Over and above the scrutiny of policy and the funding of that policy, there are two types of scrutiny that are essential to the effective rule of law in a liberal democracy – scrutiny of the laws and rules that legitimise power, and scrutiny of conduct. We are concerned here with the former.

One question asked in the abstract is how scrutiny can work when by definition every politician is partisan; partisan meaning to take one side, to be biased.

One answer is that scrutiny on rights and safeguards in our society is often less partisan than scrutiny on policy. There is generally much common ground on rights and safeguards. Our politicians share many democratic ideals and principles, and accept most.

Another answer is that every elected member I've ever met has known their duty and their mission. Their duty is to serve the people as best they can, and their mission is to leave their nation better for their service. Most politicians on scrutiny committees can therefore be expected to diligently address their given terms of reference.

A further answer is that experience and wisdom has been used to lessen partisan impulses – wisdom in creating scrutiny committees and processes[2]; wisdom in designing their terms of reference; wisdom in adopting a non-partisan principles-based style; and the wisdom of using practical learned legal advisers to ensure a continuity of purpose and performance.

The virtue of the Senate Committee's terms of reference is that it requires every bill to be tested against set principles. It requires the Committee to take the high ground in protecting rights and liberties covered by the terms of reference, and to advise the Senate in regular timely public reports of its views on every bill.

Potentially this could have led to disaster.

The Scrutiny of Bills Committee is but one part of a busy political and parliamentary life. No Senator could or would ever be able to carefully read all 200-250 bills and explanatory memoranda a year, to make the judgements on time required by the Committee's terms of reference.

More dangerous still, because the terms of reference required a determination of principles, that meant executive decisions on legislation would not just be questioned but criticised. This presented difficulties for Senators who might be then seen as disloyal to their own government or party policy position, and a partisan disputatious committee was therefore likely.

This was avoided by three devices – getting a genuinely independent legal adviser of high quality; insisting on an unfailingly direct but consistent courteous and professional style of inquiry of the executive; and devising sets of non-partisan words whereby the Committee drew the Senate's attention to its concerns.

[2] The Senate Committee's Report on the 40th Parliament outlined the process: *1.17 Copies of all bills introduced in either House of the Parliament, including private Member's or private Senator's bills, are provided to the Committee by the Friday of each sitting week. A copy of each bill, together with its explanatory memorandum and second reading speech, is then forwarded to the Committee's legal adviser. The legal adviser examines each bill against the five principles set out in Standing Order 24 and provides a written report to the Committee by the following Monday. This report draws the attention of members of the Committee, and of the Committee Secretariat, to clauses of any of the bills that appear to infringe one or more of the five principles.*

The harshness of Committee critiques was disguised by the subtlety of an auditor's pen.

The Committee's practice is to express no concluded view on the provisions in a bill, but rather to advise Senators and other readers of its reports of the risk that particular provisions may infringe one or more of the principles in Standing Order 24.

The consequence was that the Committee retained its equanimity and unanimity even facing the most fractious consideration of bills in the Chamber.[3]

I was asked at the outset: are there other things a scrutiny committee could do, or things it could do better, which would improve that role?

Yes there are. In the Senate it is the practice to table reports of all bills under consideration. I would suggest that for any bill where a reply is still due from the government, or is unsatisfactory, or has not allayed the original concern, that during the second reading debate the Chair of the Committee or their delegate should be required to table a statement that the duty Minister must respond to in the debate, on the record.

This would heighten Chamber interest in the Committee's concerns, and give those concerns an immediacy they lack at present.

I was also asked at the outset with respect to the performance and accountability of scrutiny committees whether they jump up and down enough. If they table a report and it is ignored, is that the end of their job?

In my case if I thought there was merit in a scrutiny committee concern, I would try and have an amendment moved based on it. It meant that the Senate not only had had its attention drawn to that concern, but it would be forced to actually debate it. However, few committee members do this, and the committee itself never does.

[3] Some of these remarks were first made in a tribute by me on the 24 November 2008 on the occasion of a farewell dinner for Emeritus Professor Jim Davis to mark his retirement as Legal Adviser to the Senate Scrutiny of Bills Committee after 25 years of outstanding service.

Is it time for scrutiny committees to be more courageous? Why shouldn't committees move the necessary amendment, and rather than put the case in person, just table the argument, and the chamber vote accordingly?

There are situations where it clearly might apply: it would be relatively straightforward tabling an amendment giving someone a right of appeal where none existed, or removing a Henry VIII clause. There are situations where it would be much more difficult. If the legislation curtailed rights (for example, in the name of reacting to terrorism), then the amendment might have to be that the Bill, or that Part of the Bill, not be passed – which is what the debate on the bill itself would be about.

Another possibility is for the committee to draft a suggested amendment in relevant cases, include it in their report, and leave it to the decision of any parliamentarian to adopt and move it.

In many respects the very large economic social and environmental reform agenda of the 21st century does not differ much from the broad aims of the past - to make our various states and countries more productive, more efficient, more competitive; better and happier societies, and to better safeguard the future.

Governments and parliaments have always been troubled by weaknesses in data and analysis, or struggled to assess expected consequences, or forecast the future. As ever, in the absence of perfection, judgement has been required.

Is judgement more rushed and less considered than it was? Certainly the volume of legislation is tenfold what it once was.

What also distinguishes this time in political life from the past is the astonishing acceleration of technology; the burden of excessive unsorted and sometimes indigestible information; the stress of the 24-hour media and political cycle, and the immediacy in effect of national and global trends and events. It is a demanding time.

People are demanding much more of their governments. They want their governments proactive, responsive, professional, far-seeing, productive, and performance driven. They want their needs met. The push for higher standards and better performance is strong.

Governments have said they will respond with a broad reform agenda. Expectations have been created. The gap between expectation and performance has to be addressed. [4]

In this milieu sits legislation and regulation, and the scrutiny committees. If at the heart of this scrutiny lies principle, rights and obligations, democratic values, transparency and accountability - does that help to meet the demands of the people on government?

Firstly, it is important to remember that the people also demand improvements to these principles and values. It is not just hospitals and roads that attract their attention.

Secondly, my thesis is that the preservation of rights and safeguards makes for a calmer more settled more civil society; and that there is a clear link between soundly based legislation and regulation, accountability transparency and openness, and better governance and improved social and economic outcomes.

Those who sit on and serve scrutiny committees need to have a good sense of history. History tells us that the one arm of government most feared for its actions has been the executive – whether tribal, monarchic, theocratic, dictatorial, or parliamentary. Beware a system or a parliament that raises the executive above all else, and diminishes the checks and balances explicit in the separation of powers.

It helps committees to have a healthy and practical suspicion of the executive and its handmaiden the bureaucracy.

One of the traps executives set for parliaments is the 'trust me' argument – that they and their colleagues will never use their full new powers, and will never abuse them. That may indeed

[4] This section draws in part from a 17 February 2009 public lecture given by me in Brisbane for the Australia & New Zealand School of Government: *Essential Linkages – Situating Political Governance Transparency and Accountability in the Broader Reform Agenda*.

be the case for some who want to be taken on trust, but what about their successors, or the public servants who actually use those laws?

When I was on the Scrutiny Committee I sometimes reminded my colleagues of the importance of not assuming that laws will always be administered by governments of good faith. Seared into my political experience was the Smith regime's introduction of 'temporary' 'emergency' oppressive anti-democratic laws that decades later were still being used by the Mugabe regime.

I seem to recall a recent interview with the current Fijian Attorney-General who responded to criticism about the machinations in that country by saying, in effect, 'we're only using laws originally passed by the British'.

Scrutiny committees can should and must, in effect, highlight the potential for the devil in bad law, because sadly the devil never seems to leave us.

Committee members and their secretariats need a good dose of idealism, because our liberal democracy is built on great ideals; and, a practical understanding of politics as to what is possible.

Scrutiny on rights and safeguards has to be a habit, a mindset, worked at consistently. Effective scrutiny is long-term, a campaign not a skirmish.

Power needs to be in your mind. The separation of powers, assessing how power is acquired or grown, how restrained, who has power over what, how money is raised and spent, and by whom. Scrutiny means examining the question of imbalances between the people and their rulers, the issues of rights, liberties, obligations, protections, representation and accountability.

You do need to think about what is missing in your battery of protections. If you do not have an independent appointment on merit system, such as in the United Kingdom under the

'Nolan principles'[5], you are always at risk from partisan interference in what would otherwise be independent agencies or institutions. External independent oversight bodies, staffed by people of skill, ability and integrity are essential to good government.

Nevertheless, if you do have an Auditor General; Solicitor General; Ombudsman; Equal Opportunity, Human Rights, Privacy, Freedom of Information and Public Disclosure Commissioners; an independent judiciary; an independent police force; and a Crime and Misconduct Commission - and effective laws and adequate resources to empower them and to ensure their integrity – then you are on your way to the protections needed in a civil society against abuse of power, waste, inefficiency, corruption and mismanagement.

As delegates know, whether Australia should have a bill or charter of rights is currently under review by the Commonwealth. Like all great reforms, the matter is contentious.

In the late 90's the eminent long-serving former chair of the Senate Scrutiny of Bills Committee Senator Barney Cooney and I tried to get the Committee to agree to inquire into whether specific rights should augment the Committee's terms of reference, and indeed whether a bill or charter of rights should be considered by the parliament.

The matter seemed too controversial for the Committee to stomach but the issues that provoked Barney and I to suggest that inquiry have remained of concern and importance.

Rights were always a global matter, hence the word 'universal'. This is even more the case in this age of globalisation. Rights world-wide have common themes and structures, not least in the 1948 Universal Declaration of Human Rights.

[5] The Nolan Committee was appointed by the United Kingdom Parliament in 1995 to examine appointments on merit. It set out principles to guide and inform the making of such appointments. The UK Government fully accepted the Committee's recommendations. The Office of Commissioner for Public Appointments was subsequently created (with a similar level of independence from the Government as the Auditor General) to provide an effective avenue of external scrutiny. UK Prime Minister Brown later announced that even better scrutiny will be introduced for appointments in particular areas, including involving Parliament's select committees in the appointment of key officials.

Canada's 1960 Bill of Rights was superseded by the much more powerful Canadian Charter of Rights and Freedoms constitutionally entrenched as Part 1 of the *Constitution Act 1982*, adjudicated by the courts.

Despite the precedent of the Magna Carta, resistance to constitutional or legislative enshrinement of rights in Britain and Australia has been long and sustained, but in Britain those attitudes were finally brushed aside by EEC pressure to conform to the European Convention on Human Rights. The British *Human Rights Act 1998* meant that UK courts could adjudicate breaches of the Act or the Convention, without the need to go to the European Court of Human Rights.

Years ago I was briefed on the South African constitutional draft by some of its authors. I was particularly interested in the central role given to the Constitutional Court. Chapter 2 of the *Constitution of the Republic of South Africa Act, 1996* covers the Bill of Rights, and Chapter 8 includes the Constitutional Court that oversees all such issues.

The 27 rights listed for protection in that Constitution include equality; human dignity; life; freedom and security of the person; privacy; freedom of religion, belief and opinion; freedom of expression; freedom of association; political rights; citizenship; property; children; education; access to information; and access to the courts.

I believe that eventually rights will be codified in law in this part of the world, but the fact is that whether there is any charter of rights in a country or state or not, rights remain integral to the considerations of scrutiny committees.

For obvious reasons of time efficiency and cost it is far better that rights issues are resolved by parliaments so that they need not be a matter for the courts.

I have a couple of suggestions. I have long thought scrutiny committees unnecessarily limit themselves as to the rights they report on. The beauty of my suggestions is that no terms of reference need be revised.

As you know the Senate Scrutiny of Bills Committee's term of reference 1(a)(i) requires bills to be assessed as to whether any provisions *trespass unduly on personal rights and liberties.*

It is time for that to be interpreted a little more liberally. I think scrutiny committees should have their secretariats trawl the major international conventions and acts, and list those rights committees agree they should routinely check legislation against and report on. It will inevitably be a more comprehensive list than at present.

Secondly, I think this conference could adopt the common European practice for cross-parliamentary meetings of this sort – tasking each Conference for examination of an issue to be reported back at the next meeting. Review on a thematic basis is an efficient and necessary part of good governance. As an example, some years ago the Senate Scrutiny of Bills Committee reviewed entry and search provisions from a principled perspective.[6]

Plainly, scrutiny committees are too busy to conduct wholesale reviews of all legislation, but they are able to do one or two focussed inquiries a year. I suggest each Conference agree on the same topic each scrutiny committee in each jurisdiction should review, each to produce a report for the next conference, and at that conference to agree on a combined report at a plenary session. That would really give parliaments and governments a useful common cross-parliamentary view on essential rights and safeguards. Over time a considerable body of scrutiny opinion could be built up.

For a people believing in a free society under a representative democracy, scrutiny committees are vital, albeit still unremarked at large. Their contribution to liberty may be modest overall, but the constant nature of their principled advice has been invaluable to those seeking to stiffen resistance to abuse of power or excessive power.

In the Commonwealth jurisdiction, that the Committee is necessary and that the terms of reference remain relevant is attested by four in every ten bills still attracting Committee comment, three decades after its inception.

[6] Senate Standing Committee for the Scrutiny of Bills Fourth Report of 2000 *Entry and Search Provisions in Commonwealth Legislation*, Canberra. The Government response was provided in August 2003.