

Referral of Bills to Senate Committees: An Evaluation*

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SINCE 1990, procedures for the systematic referral of bills have been in place in the Australian Senate. This paper evaluates the referral process, its achievements, and areas of concern.

A primary achievement of the system has been the enhancement of the Senate's legislative function, in its ability to scrutinise the activities of the executive. The taking of written and oral evidence by committees from government officials, and from the broader community, opens up government policy making to public scrutiny. In addition, a wider range of interests is consulted through the committee process than would otherwise be the case, and thus the public interest is better served.

The bill referral process has also resulted in the improvement of many pieces of legislation. In the consideration of bills through public hearings, committees have, for example, become aware of undesirable consequences of bills, and have been able to recommend amendments to those bills.

Greater public participation has also been achieved, and a wider range of groups are now able to have an input into the legislative process. The conduct of public hearings has evolved since 1990, with hearings now held all over the country, not just in Canberra, and with different formats now being employed, including round-table discussions and video/audio conferencing.

An aim of the new procedures was the more expeditious processing of legislation. Whether or not this has been achieved is hard to determine, but at the very least there is evidence that

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chamber debate following committee consideration is more informed and focused. The overall educative effect for senators of committee consideration of bills has been a great side-benefit of the system. Senators from minor parties have particularly benefited in this regard, but have also gained from the scope the committee system allows them to increase their participation in the legislative process.

Several concerns exist, however, regarding the bill referral process. It is, say some, too rushed, and despite the increased public participation, some feel there are still groups which are not included. Most concerns, however, revolve around the way that the bill referral process is inescapably linked with politics, and how this link limits the effectiveness of the process. A cynicism exists about the impotence of committees to do little more than merely 'go through the motions' of public consultation, when the real battles are fought out on the floor of the chamber. Oppositions can use bill-referral as a delaying tactic, and governments resent this (even though they themselves may have done so in the past, and may again in the future). Committee reports on bills are also seen as political documents, with reports regularly being polarised between government and non-government senators. Whilst the evolution of procedures concerning bill referral will no doubt continue, and improvement may occur, prospects for fundamental change to the bill referral system are limited while party politics has such a large influence over the whole process.

1. Introduction

In 1990, the Australian Senate adopted new procedures for the regular and systematic referral of bills to committees. The reforms were a long time coming, Australia being relatively slow compared with other countries in using committees for legislative scrutiny. A system of standing committees had been established in the Senate in 1970, but in the ensuing 20 years, bills were only occasionally referred. The reforms were a result of recommendations of the Senate Select Committee on Legislation Procedures, reporting in 1988, which recognised the benefits of committee referral in improving the legislative process.¹ The Select Committee put forward recommendations it hoped would achieve the dual aims of more thorough examination of legislation and more efficient (expeditious) processing of legislation. Since the implementation of the new procedures, referral of bills has increased markedly. From 1990 to 1996, 279 bills were referred, whereas only 30 bills had been referred in the preceding 20 years. Thirty per cent of bills are now commonly referred.

The aim of this study has been to evaluate the referral process, to identify the achievements over its seven years of operation so far, and to identify any areas of concern. Research has been undertaken using both documentary analysis (of committee reports, Hansards, and various Senate publications), and by interviewing a range of participants in the process, including Senate staff, senators' staff, and senators. None of the interviewees are identified in the report, for reasons of confidentiality. As a case study, research has been focused for some aspects on the Senate Legal and Constitutional Legislation Committee and its activities in the period May 1996–May 1997.

The Selection of Bills Committee, which was set up as a result of the 1988 Select Committee, considers all bills before the Senate except appropriation bills, and makes recommendations for the referral of bills to committees. The committee, which comprises nine senators,

¹ Senate Select Committee on Legislation Procedures, *Report*, Canberra, 1 December 1988.

including party whips, meets regularly during sitting weeks. A member of the Committee (usually a non-government senator) proposes that a bill be referred to a committee, giving reasons for referral, nominating a committee and a possible reporting date, and suggesting witnesses from whom submissions or evidence may be obtained. If the proposal is agreed by the Committee, which is usually the case, the bill is recommended for referral in the Committee's report to the Senate.

Bills can be referred to one of eight standing committees, and are occasionally referred to select committees. The committee receiving the referral is free to seek submissions, and take evidence at public hearings. Evidence at public hearings is recorded in Hansard. Following the receipt of evidence, both written and oral, the committee produces and tables a report. The committee can make recommendations for amendments but does not have the power to actually amend legislation.²

2. Achievements

The revised bill referral procedures were introduced with a view to improving the legislative process in the Senate. This section will deal with the positive achievements of the system, and how the legislative process has been improved.

2.1 Enhancement of the Senate's legislative function

A fundamental achievement of the new procedures and the increased referral of bills has been the enhancement of the Senate's legislative function.

A principal function of a legislature is to make laws: to examine and approve proposals for legislation put forward by the executive. Under the doctrine of separation of powers the legislature is separate from the executive, but in the Australian Parliament, this separation is confused by the fact that the executive government is formed by a majority in the lower house of the Parliament, the House of Representatives.

The legislature thus sustains the executive government, and the executive government controls and dominates the legislature. In this situation, proper scrutiny and accountability of government is hard to achieve. Governments traditionally resist scrutiny and are by nature secretive.³

The Australian Senate provides an antidote to this affliction of government dominance, because in the Senate, with its proportional representation electoral system, governments do not necessarily have a majority. For many years now, governments have not had a majority in the Senate, and are unlikely to ever have a majority in the future. But an undominated Senate is not enough. It is only a capable and empowered committee system within the Senate that enables the Senate to perform its scrutiny role effectively, and the revised referral procedures since 1990 have gone a long way towards creating a more capable and empowered

² Full details of the referral procedures are given in *Odger's Australian Senate Practice*, 8th edn, edited by Harry Evans, AGPS, Canberra, 1997.

³ J.A.G. Griffith and Michael Ryle, *Parliament: Functions, Practice and Procedures*, Sweet & Maxwell, London, 1989, p. 517.

committee system. There is evidence that the ability of Senate committees to scrutinise governments has been much enhanced.

Crucial to this enhancement of scrutiny has been the ability of committees to take oral and written evidence at public hearings, and by doing so to consult openly with those who make policy, and those who are affected by it. The natural tendency of governments to privacy and secrecy is thus overcome, and is replaced by openness and publicity.⁴

Beyond this level of 'openness' achieved by committee scrutiny, is the further benefit that not only is government consultation with favoured groups brought out into the open, but other less favoured groups are given the opportunity to make submissions and the chance to influence legislation. The public interest is thus served, because a wider range of interests is consulted than would otherwise be the case. And there is evidence that this wider consultation not only keeps executive power in check, but results in better legislation.

2.2 *Improved legislation*

In establishing the revised procedures for bill referral, the 1988 Select Committee recognised that committee consideration of bills could result in 'more effective' and 'vastly improved' legislation.⁵

There are many examples of bills that have been considered over the past seven years which have been improved as a result of referral. Earlier writers have highlighted some of the early success stories of the new procedures.⁶ The Education Services (Export Regulations) Bill 1990 sought to reduce the financial burden to the taxpayer of having to pick up the pieces when independent educational colleges collapsed and overseas students who had paid fees in advance were left in the lurch. Committee consideration found that the remedy proposed by the Bill was flawed, and that neither the rights of students nor institutions were adequately addressed. The committee recommended extensive amendments to the bill, which were taken up by the government.

The Australian Nuclear Science and Technology Organisation Amendment Bill 1992 has been held up as another example of a committee producing improved legislation. The public hearings into the bills stirred considerable community concern over the activities of the organisation, and compelled the government to amend the bill.⁷

More recent examples of improved legislation include the Social Security Legislation Amendment (Newly Arrived Resident's Waiting Periods and Other Measures) Bill 1996. This bill sought to increase the period that newly arrived residents to Australia would have to wait before receiving social security benefits, from 26 weeks to 104 weeks. The inquiry into this bill, conducted by the Senate Legal and Constitutional Legislation Committee, attracted submissions and witnesses from a wide range of groups representing migrants, such as the

⁴ Harry Evans, 'Parliamentary committees and the public interest', *Legislative Studies*, vol. 8, no. 1, Spring 1993, p. 16.

⁵ Senate Select Committee on Legislation Procedures, *Report*, 1988, p. 3.

⁶ Brenton Holmes and Doug Hynd, 'Committees and the legislative process', *Committee Bulletin*, February 1994, p. 6; and Harry Evans, 'Parliamentary committees and the public interest', *Legislative Studies*, vol. 8, no. 1, Spring 1993, p. 17.

⁷ Harry Evans, 'Parliamentary committees and the public interest', p. 18.

Immigration Advice and Rights Centre, and the Australian Council of Social Services. As a result of the committee's consideration of evidence presented, it became clear that for some categories of migrants, significant hardship would result, and several amendments were recommended and taken up by the government.⁸

An even more recent example is the inquiry into the Copyright Amendment Bill 1997, which seeks to amend various provisions of the Copyright Act 1968, including provisions relating to moral rights. The inquiry by the Senate Legal and Constitutional Legislation Committee prompted a concerted campaign by screenwriters who felt that their moral rights as primary creators of film productions were being taken away by the legislation, and the appearance of a bevy of well-known writers at public hearings attracted a deal of media interest. As a result of their representations, the committee has in its recent report recommended amendments to the Senate that will maintain screenwriters' moral rights. These amendments have bipartisan support, and should be received positively by the whole Senate when it considers the bill.⁹

These few examples indicate the value in referring bills for detailed consideration by committees, in particular committees that have the power to call witnesses from all parts of the community. This ability to refine and improve legislation is a clear achievement of the new processes.

It has been pointed out elsewhere that this improvement in legislation is less likely when bills before a committee are more controversial.¹⁰ Opposing parties are more likely in these cases to use committees to 'rehearse their arguments' for and against a bill, with little chance of reaching agreement over its contents or possible amendments. This shortcoming of the committee process is directly related to the party political influences which overlay all parliament's activities, and which especially affect the effectiveness of the committee system. This issue of the political overlay of committees will be addressed later in this paper.

A factor which can negatively affect the ability of committees to improve legislation is a lack of time. Governments are always keen to minimise delays to their legislative program, and seek to impose short timeframes on committee consideration of bills. Earlier writers questioned the ability of committees to adequately digest large amounts of information on bills in the short timeframes allowed, and the capability of interest groups to produce a useful input with only short notice for a submission or hearing.¹¹ In the early days of systematic bill referral, an inquiry period of only one week was envisaged. Since that time, the period for inquiries has extended, with very few limited to only one week. Bills inquiries in the Senate Legal and Constitutional Legislation Committee over the period May 1996–May 1997 generally extended over one to two months, with extensions of reporting time being sought

⁸ See Senate Legal and Constitutional Legislation Committee, *Report on the Social Security Legislation Amendment (Newly Arrived Resident's Waiting Periods and Other Measures) Bill 1996*, Canberra, 10 September 1996.

⁹ See Senate Legal and Constitutional Legislation Committee, *Report on the Copyright Amendment Bill 1997*, Canberra, 27 October 1997.

¹⁰ Brenton Holmes and Doug Hynd, *op.cit.*, p. 6.

¹¹ 'Legislative Friday—the effectiveness of Senate legislation committees' *Committee Bulletin*, December 1993, p. 6.

and granted to seven of the nine inquiries. Details are at Appendix A. Nevertheless, short timeframes imposed on bills inquiries remain a concern.

2.3 Greater public participation

The previous section explored how the process of committee consideration has been able to improve legislation, largely because of input to the consideration process by the wider community, and by groups that government may not normally consult when formulating policy. It is timely here to delve a little into the process whereby this public participation is achieved, and into how public hearings are conducted. This section will then explore the diversity of public input.

2.3.1 Seeking public input

On receipt of a bill referral, a committee will, through its secretariat, seek submissions from interested parties. Representative groups and individuals known to have an interest and/or expertise in the area are invited to submit written submissions, and may be invited to give oral evidence at a hearing. Advertisements seeking submissions are placed in major metropolitan newspapers, and on the Internet. Specific groups may be targeted by selected advertising: rural newspapers to reach wheat growers affected by a wheat marketing bill, for example, or foreign language newspapers to reach residents of inner city Sydney suburbs affected by a bill relating to aircraft noise. Advertising tends to draw little response, though, according to several committee secretaries. Most submissions to bills inquiries are by groups or individuals who are already aware of the bill's existence, or who are contacted by politicians or their staff, or by the committee secretariat. In proposing that a bill be referred, the member of the Selection of Bills Committee usually includes a list of suggested witnesses. The proposal to refer the Social Security Legislation Amendment (Work for the Dole) Bill 1997, for example, suggested that witnesses include relevant government departments, trade union groups, Australian Council of Social Services, representatives of organisations which use volunteers, and representatives of older unemployed people. Witness recommendations for the referral of the Immigration (Education) Charge Amendment Bill 1996 included the Refugee Advice and Casework Service, Women's Electoral Lobby, and an academic lawyer from Sydney University.

2.3.2 Conduct of formal hearings

When the systematic bill referral process was first set up, it was envisaged that one day each sitting week would be set aside for committees to meet.¹² Friday was eventually settled on as the day for meetings, in Canberra, before senators returned to their home states for the weekend. Over time, however, the process has evolved and developed, and public hearings are now held all over Australia, on any day of the week and often in non-sitting weeks.

A survey of bills inquiries conducted by the Senate Legal and Constitutional Legislation Committee over the period May 1996 - June 1997 showed that for the eight bills inquiries taking evidence publicly, 21 different hearings were held, an average of 2.6 hearings per bill. The hearings were held primarily in Canberra, but also in Sydney, Melbourne, Adelaide and Darwin. Details are included in Appendix B.

With their ability to travel out of Canberra (accompanied by Hansard reporting staff), Senate committees are able to go where witnesses may be concentrated, and 'take the Senate to the

¹² Senate Select Committee on Legislation Procedures, *Report*, 1988, op.cit., p. 14.

people'. One committee secretary pointed out that this can be 'good PR' for the Senators, and for the institution of Parliament itself. An example of a well-travelled committee is provided by the inquiry into the Workplace Relations Bill 1996, which visited 13 different cities and regional centres, holding 18 public hearings.¹³

The format of public hearings can vary depending upon the location and the subject matter. A common format is for committee members to face witnesses across a table, or on separate tables, interviewing one group or individual at a time. A round table format, with all groups and individuals participating in discussions, is another arrangement that is used. Participants find this useful in terms of being able to respond immediately to points raised by those from different groups.

A development in recent years has been the use of audio- or video-conferencing, particularly when taking evidence from a witness who is remotely located, who may otherwise be unable to attend a hearing. Some participants find offputting the shortcomings of current video-conferencing technology, such as the sound-vision delay. Others see this method as being particularly valuable, and useful in disciplining committee members in their questioning of witnesses. Modern technology can be used not only to enable remote witnesses to 'attend' a hearing, but senators may also 'attend' in this way. Standing orders were amended in 1997 to allow both members and witnesses to participate in committee proceedings by electronic communication, without being present.¹⁴ This development has been welcomed, particularly by Western Australian senators, who can thus avoid long distance travel, especially when hearings are held in non-sitting weeks.

2.3.3 *Who participates?*

Having surveyed the processes for gathering and hearing evidence from the public, the question needs to be asked: Who gives evidence, and whose voices are heard when legislation is referred to committees? Are all the voices heard which should be heard when a particular piece of legislation is being considered?

One way of addressing the question of who gives evidence is by surveying the lists of submissions received by committees and the lists of witnesses giving evidence at hearings. A survey of the submission and witness lists for bills inquiries by the Senate Legal and Constitutional Legislation Committee in the period May 1996 – May 1997 shows that a diverse range of evidence was received. Of the bills inquiries which involved public hearings, and excluding the Euthanasia Laws Bill 1996, an average of 20 submissions were received, and an average of 16 witnesses were heard.¹⁵

The Euthanasia Laws Bill is excluded because it was a highly unusual bill, being a private member's bill and dealing with moral issues that aroused strong emotions. This bill alone

¹³ Senate Economic References Committee, *Report on the Workplace Relations and other Legislation Amendment Bill*, Canberra, 22 August 1996.

¹⁴ Senate Procedure Committee, *Second Report of 1995*, Canberra, October 1995. Provisions for electronic communication were incorporated into Standing Orders in February 1997.

¹⁵ Details are included at Appendix B.

attracted 12,577 submissions, and its inclusion would thus seriously distort any statistical analysis.¹⁶

At public hearings, witnesses invariably include representatives from the executive arm of government: from the public service agencies responsible for implementing, or affected by, legislation, and often but not always, the responsible minister. The majority of witnesses, however, are those representing various organisations and groups from the community that have an interest in, or are affected by, the legislation. Also appearing at hearings regularly are expert witnesses, such as an academic expert on education or migration, or a Queen's Counsel, when expert legal advice is required.

An example from the Senate Legal and Constitutional Legislation Committee will illustrate the diversity of witnesses. Evidence taken at public hearings in June 1996 concerning the Social Security (Newly Arrived Resident's Waiting Periods and Other Measures) Bill 1996 was given by 38 witnesses from the following organisations:

- Minister for Social Security
- Department of Social Security
- Department of Immigration and Multicultural Affairs
- Department of Employment, Education, Training and Youth Affairs
- Attorney-General's Department
- Human Rights and Equal Opportunity Commission
- Australian Council of Social Services
- Migrant Resource Centre of Canberra and Queanbeyan Inc
- National Welfare Rights Network
- Ethnic Communities Council of New South Wales
- Immigration Advice and Rights Centre
- NSW Grant-in-Aid Migrant Welfare Workers and Agencies Cooperative Ltd
- Fairfield Migrant Interagency
- Fairfield Migrant Resource Centre
- Australian-Serbian Welfare Centre
- Refugee Resettlement Working Group
- Legal Aid Commission of New South Wales

In addition, two academic witnesses from Sydney and Monash Universities gave evidence.

Many of the groups listed would not normally have had access to government decision-making processes, and the process of bill referral to committee allowed them the opportunity to have their views heard, and placed on the public record. As mentioned earlier, several amendments were made to this piece of legislation as a result of evidence received at these public hearings. There was wide agreement among participants interviewed that the broadening of community participation facilitated by the referral of bills to committees has been a great achievement of the reforms since 1990.

A criticism sometimes levelled at the process, however, is that bills inquiries regularly attract submissions and witnesses from the same organisations, and 'witness cliques' develop around certain issues, such as immigration and industrial relations. Governments and opposition

¹⁶ Senate Legal and Constitutional Legislation Committee, *Report on Euthanasia Laws Bill 1996*, Canberra, March 1997.

parties alike are accused of ‘rounding up the usual suspects’ to support their positions. An implication of this criticism is a cynicism that the same old paths are being trodden as particular issues regularly arise, with predictable outcomes.

While it is difficult to determine whether this criticism is valid, most participants interviewed expressed confidence that a wide range of viewpoints were being represented at bills inquiries. The regular attendance at hearings by established interest groups is in any case to be expected, as they are performing their role in a pluralist society, of representing to government the interest of the members of their groups. The example list of witnesses above suggests that this particular bill inquiry, which had major ramifications for migrants to Australia, attracted a fairly wide range of groups, not just the major migrant advocacy groups. Nevertheless, some participants interviewed pointed out that participating in committee inquiries was difficult for some groups, particularly smaller groups and voluntary organisations with limited resources. This difficulty was increased when only short timeframes were given for preparing submissions.

Dissatisfaction of some with the range of groups consulted is exemplified by a recently tabled report of the Senate Community Affairs Legislation Committee on the Child Care Payments Bill 1997. The report included a dissenting report from the Opposition, critical of the inquiry for being ‘rushed’, and for limiting witnesses to peak national organisations, to the exclusion of the ‘full range of groups concerned’.¹⁷

It is worth noting that those interest group representatives who have become familiar with inquiry procedures by regularly writing submissions or appearing as witnesses are often able to represent their organisation’s interests more effectively.

2.4 More expedient processing of legislation

We have seen how revised bill referral procedures have enhanced the Senate’s legislative role, produced better legislation and increased public participation. But what of the hope that the increased referral of bills would lead to the more efficient use of chamber time, and assist in the expedient processing of legislation? Whether or not this aim has been achieved is difficult to measure. A comparison of time spent on bills referred with those not referred carries little meaning because bills likely to be even slightly contentious are generally referred, and the bills not referred tend to be those of a more routine, non-controversial nature, to do with the machinery of government. Bills that were not referred over 1996-97 included the following:

- Laying Chicken Levy Amendment Bill 1996
- Labelling of Genetically Manipulated and Other Foods Bill 1996
- Flags Amendment Bill 1996
- Radio Licence Fees Amendment Bill 1997

Bills such as these are likely to pass swiftly through the Senate, often being listed for debate on a Thursday lunchtime, the designated time for non-controversial legislation.

¹⁷ Senate Community Affairs Legislation Committee, *Report on Child Care Payments Bill 1997, Child Care Payments (Consequential Amendments and Transitional Provisions) Bill 1997*, Canberra, October 1997, p. 22.

Of the bills that are referred to committee, it is difficult to determine whether the time spent in debate in the chamber once the committee has reported back to the Senate is less than it would have been had the bill not been referred. Some participants interviewed felt that post-committee debate in the chamber was often more informed and focused as a result of the educative process resulting from committee hearings. The need to spend chamber time just coming to grips with an issue from scratch was thus avoided. One participant suggested the possibility that on occasion, *more* time was spent in chamber post-committee, because senators were better informed, and had more to speak about.

A survey of time spent on bills referred to the Senate Legal and Constitutional Legislation Committee, details of which are in Appendix B, paints an inconclusive picture. The bills considered differ in complexity and degree of contentiousness. Public hearings and private meetings for consideration of the Migration Legislation Amendment Bill (No. 3) 1996, which, among other measures, sought to limit the numbers of visas issued, took a total of 6 hours and 14 minutes, followed by debate in the chamber of 2 hours, 37 minutes. For the Social Security Legislation Amendment (Newly Arrived Resident's Waiting Periods and Other Measures) Bill 1996 previously mentioned, committee time was nearly 12 hours, and chamber time nearly 5 ½ hours. In both cases the time spent in the chamber was about half the time spent in committee. Yet in the consideration of the Constitutional Convention (Election) Bill 1997, which established a process for the election of delegates to the Constitutional Convention, the committee consideration of just over 10 hours was followed by 16 ½ more hours of chamber debate. Governments have expressed frustration at lengthy chamber debates following committee consideration, but the 1988 Select Committee recognised the inappropriateness of trying to restrict chamber debate on bills that had been referred to a committee. As the report stated:

Contentious, complicated or significant bills are likely to attract debate [in the chamber] regardless of how thoroughly a standing committee has considered them. The more consideration a bill has attracted in a standing committee, the more likely it is to attract consideration at various stages in the Senate itself.¹⁸

If conclusions on the expediency or otherwise of bill referrals are hard to draw from time data alone, it is possible that the successful takeup by the whole Senate of recommendations for amendment in committee reports may be a suitable measure. But this approach too, has its problems. Committees can only recommend amendments, not pass them. When suggested amendments have the support of all committee members, then the passage of the amendments in the chamber is usually straightforward. But for bills where committee members are split, usually on party political or ideological grounds, recommendations in the report, made by the government majority, have little hope of easy passage in the chamber. The question of political influences on the bill referral process will be discussed in a later section.

The success or otherwise of committee recommendations for amendments may not be the only measure of the value of committees in saving chamber time. One participant interviewed, an opposition staff member, pointed out that committees can be used as a forum for opposition parties testing out ideas for amendments, and attempting to determine whether or not a proposal has merit or is viable. In this process, possible amendments may be tested, and rejected, and never see the light of day in the chamber, thus saving chamber time.

¹⁸ Senate Select Committee on Legislation Procedures, *Report*, 1988, p. 17.

Some participants interviewed, with long-term experience, felt that chamber debate had been shortened as a result of committee consideration, but overall, it would have to be said that the evidence on the benefits of bill referral in making more efficient use of Senate time is inconclusive.

2.5 Committees as educators

When interviewing participants in the bill referral process, a frequently mentioned positive aspect was the educative benefit of public hearings for all those involved, particularly senators. Public hearings can have the effect of providing senators with a comprehensive, balanced, and up-to-date briefing on the issues involved in the particular bill being considered. This educative process often runs in parallel with similar exposure in other committee forums, such as those considering annual estimates of expenditure, annual reports of government departments, and inquiries on specific issues (not concerning particular bills).

As previously mentioned, the presence in the Senate chamber of committee members who have been informed through the committee process can have the effect of raising the level of debate and avoiding poorly-informed contributions. In addition, committees provide a significant opportunity for backbenchers of all parties, who otherwise take a back seat in the legislative process to question ministers and shadow ministers. They can become informed and be involved in the legislative process in ways they could not be if the committee process did not exist, and the systematic referral of bills to committee since 1990 has expanded this exposure.

Participants interviewed believe that there has, to some extent, been a development of expertise by some senators as a result of the expanded bill referral process. Senators, who often have managed to get themselves on to a committee which matches their interests, usually stay on a particular committee for the life of the Parliament, and often into the next Parliament. In this way they are regularly exposed to issues, as legislation on the same issues crops up repeatedly.

The reports produced by committees can also be a useful educative tool, especially for minor party and independent senators who have limited resources to participate in committees. The reports are often fairly comprehensive documents, detailing the arguments for and against particular pieces of legislation, and documenting the different viewpoints presented at public hearings. They can thus provide senators with an easy way of becoming briefed about legislation that is before the Senate.

2.6 Minor party perspectives

Participants interviewed agreed that the expanded committee consideration of legislation has had a beneficial effect for minor parties and independents in their ability to play a part in the legislative process. In an electorate where votes for candidates of non-major parties regularly reach over 14% of the total,¹⁹ it is important in terms of democratic representation that the elected representatives of these parties have the ability to contribute to the legislative process. Participation in the committee consideration of bills plays a vital role in enhancing this ability.

¹⁹ Harry Evans, 'Government and Parliament' in Gwyn Singleton, *The Second Keating Government*, Centre for Research on Public Sector Management, University of Canberra, 1997, p. 23.

Minor parties can benefit in several ways from participation in committee consideration of bills. Participants from minor parties interviewed saw committees as an opportunity to get their viewpoints across, and to ensure that witnesses supporting their position were able to give evidence at hearings. Some minor party senators felt that committees enabled a focus on issues, rather than on the party political debate that tended to dominate in the chamber.²⁰

Minor party senators in particular feel the great benefit provided by committees as educators. One former minor party senator has said:

If you can get a selection of experts before the committee and ask questions, you are likely to get to the nub of the issue in an authoritative way very quickly.²¹

For minor party senators with limited staff resources, these opportunities are invaluable.

Another benefit for minor parties is the way committees can be used to raise public awareness of issues that may otherwise be marginalised. This is particularly so if a Private Senator's Bill is introduced, and then referred to committee. Evidence from what might be considered 'non-mainstream' groups can thus be taken and put on the public record. These issues receive greater exposure than would be the case if consideration of the bill was confined to the Senate chamber.

Despite the benefits for minor parties, they nevertheless face the problem of trying to 'cover all the bases' with only a small number of senators, limited time and limited staff numbers. Having representatives able to participate on all committees, for all bills, is very difficult. For independent senators, it is impossible.

3. Political Aspects of the Committee Process

This report has so far documented what has been achieved over the last seven years since systematic referral of bills to committees was established as the norm. The report has focused on the positive aspects of the process, including the enhancement of the Senate's legislative role, the increased scrutiny of legislation and the improved legislation that has emerged, and increased public participation in the legislative process.

Optimism about the committee process was expressed by all participants interviewed, but at the same time, a generally pessimistic and cynical view was also apparent. This cynicism has its basis in the way that all facets of bill referral are affected, and pervaded, by politics. This section will address the way politics, in particular party politics, dominates the process of committee consideration of bills.

3.1 Are committees just going through the motions?

A common criticism levelled at the process of bill referral to committee is that committee consideration does not change anything. Positions on a bill, it is said, are decided along party lines before the bill goes to committee, and the committee process is just 'going through the motions'. Outcomes are already known, and all the committee process achieves is to enable the parties to 'line up' those witnesses who will support their respective positions. The real

²⁰ 'The role of minor parties in the committee process', *Committee Bulletin*, February 1994, p. 3.

²¹ *ibid.* (Former Democrat Senator Sid Spindler).

test will occur when the bill is put to the vote in the chamber, where achieving the numbers necessary for passage (or rejection) of the bill is all that matters.

This criticism discounts the benefits that can be gained, and the improvements to legislation that have been achieved, through detailed scrutiny of bills. But on anecdotal evidence, the criticism does seem valid for controversial bills, especially those where the parties are divided on ideological lines. Issues surrounding industrial relations and privatisation of government assets are examples of such issues.

3.2 *Is bill referral used as a delaying tactic?*

Governments are always keen to have their policies implemented through legislation without any hindrance or delay, and the committee consideration of bills is often seen as a tactic used by oppositions to delay the programs of government. There is evidence that this latter accusation is true. On the basis of advice from long-term political staffers from both major parties, who have gained experience from both government and opposition perspectives, the use of bill referral as a tactic to ‘mess up’ a government’s program is not uncommon. From an opposition perspective, few tools are available to successfully counteract the dominance of the governing political party, and bill referral is one of these tools. By delaying legislation, oppositions can not only act as ‘spoilers’ but they also gain time. Time can be important to an opposition with limited resources and without the backing of a government department to provide advice and services. Time allows an opposition to become better informed on the issues involved, and this is important with the large volume of legislation dealt with by Parliament. Time also allows the mustering of support from constituency groups, who may be able to mount protest campaigns through the media.

The effectiveness of bill referral as a delaying tactic has arguably been reduced in recent years, due to developments in the bill referral process. When the original reforms were put in place, it was envisaged that referral to committee would commonly take place after the bill had been through its first and second readings in the Senate. It is more common now, however, for the *provisions* of bills to be referred, in anticipation of and before the bill actually is introduced to the Senate. In the period May 1996–June 1997, 86% of bills recommended for referral by the Selection of Bills Committee fell into this category.²² The result of this development is that not only is the delay reduced for some bills, but for others, delay is non-existent, because bills are being referred, scrutinised, and reported on before they are even introduced into the Senate. Of the nine bills recommended for referral to the Senate Legal and Constitutional Legislation Committee between May 1996 and May 1997, five were reported back to the Senate *before* formal introduction. Full details are included in Appendix A. Even once introduced, a bill and the committee’s report may not be considered by the whole chamber for some time, due to heavy loads of legislation before the Senate.

3.3 *Do committee members ‘keep their powder dry’?*

Another criticism levelled at committee consideration of bills is that committees are not effective in providing a forum for open discussion of issues. Instead, senators do not flag their true intentions in committee, and ‘keep their powder dry’, saving their substantive contributions for the debate in the chamber. One opposition staff member pointed out that although this sometimes did occur, often what appeared to be ‘keeping powder dry’ on the

²² Of the 78 recommendations for referral made by the committee during this period, 67 were made on the basis of provisions. Details of the referral of bills may be found in the Senate publications *Business of the Senate* and *Work of Committees*.

part of opposition senators was really a case of opposition committee members genuinely not having all the information they needed until after the committee had reported. With limited resources to cope with the large volume of legislation being processed, non-government senators may not, at the time of committee consideration, have had time to become fully cognisant of all possible aspects of the bill.

3.4 1994 changes to the committee system

The procedures put into place in 1990 involved referral of bills to the then existing group of standing committees. Each of the seven (later eight) standing committees to which bills could be referred had six members, with the government holding the chair, and a casting vote.

In 1994, the then Opposition sought changes to the committee system so that committee composition and chairmanship better reflected party representation in the Senate chamber. A dual system of committees was established, with each standing committee splitting into a Legislation and a References Committee, with an overlapping membership, and a shared secretariat. Government control of the Chair was retained for the Legislation Committees, which have the task of legislative scrutiny and examination of annual estimates and reports, but References Committees, which conduct general inquiries, are chaired by a non-government senator.

This new dual system, set up for largely political reasons, has proved on some accounts to have its drawbacks, which themselves are politically related. In the three years since its implementation, some participants see that it has degenerated into a two-sided system, with Legislation Committees seen as ‘the Government’s show’ and References Committees as the ‘non-government show’. As a result, it is seen that the committees do not work as constructively as they might. The extent of this ‘degeneration’ varies from committee to committee, and can depend on the individual senators involved.

3.5 Referral of bills to references committees

Despite the intention of the 1994 changes that bills would be referred only to Legislation Committees, non-government senators in 1996 used their numbers on the floor of the chamber to have two contentious bills referred to References committees, where non-government senators held the chairs. The bills were the Telstra (Dilution of Public Ownership) Bill 1996 and the Workplace Relations and Other Legislation Amendment Bill 1996, and their referrals to References committees were politically motivated. Non-government senators were able to take advantage of having control of the committee through the chair, and conduct a relatively long and detailed inquiry. Use of this tactic has not occurred recently, however, and it could be that the use in 1996 can be explained in terms of an opposition examining the major policy planks of a new government. It seems unlikely to become a common feature of the bill referral process.

3.6 Committee reports

The reports produced and tabled at the completion of the inquiry process are also affected by party politics. Because the committee report is a report of the majority, and therefore of the government, it is inevitable that the report will reflect the government view. Although the reports from most committees attempt to present a balanced coverage of viewpoints expressed in inquiries, the conclusions and recommendations of the report are those that have the support of government. This sometimes can have the effect of engendering cynicism on

the part of many participants, including witnesses who may feel their views have been ignored.

Reports produced in the early days of the new procedures after 1990 were generally fairly short, by comparison with the reports currently produced. Reports on bills produced by the Senate Legal and Constitutional Legislation Committee in the period studied (excluding the Euthanasia Laws Bill) had an average length of 64 pages, and generally followed a format of detailing arguments for and against the bill.

Non-government members have the ability to prepare minority or dissenting reports, which are attached to the majority report. Because of the tight timeframes imposed for reporting, only a limited amount of time is available for the preparation of minority reports by non-government senators. Nevertheless, comprehensive minority reports are often produced.

3.7 Bill referral and party politics in a positive light

Although party politics can clearly have a negative effect on the effectiveness of committee consideration of bills, it is also the case that the bill referral process can be seen in a positive light in relation to party politics.

The procedures of the Selection of Bills Committee are seen by most in a positive light. Recommendations to refer, or not refer, a bill tend to be made on a consensual basis. If one member of the Committee wishes to refer a bill, then that bill is referred. There is little merit in the government whip opposing a referral, because non-government senators can take the matter to the whole Senate, and take up valuable time in debate. According to one participant, the Selection of Bills Committee process ‘takes the heat out’ of the referral process, because a bill referral is now usually a simple process, not one that attracts debate on the floor of the chamber.

Another positive aspect is the bipartisan cooperation that can occur on legislation committees when considering bills. Despite the party conflict that can be played out in the committee process, it is nevertheless possible for senators on opposing sides of politics to pursue a genuine spirit of inquiry on many issues, especially those of a less controversial nature.

In conclusion, politics pervades all aspects of the bill referral process, from the referral itself, through to hearings and reports, and the surrounding procedures.

4. Conclusions

The systematic referral of bills to committee for legislative scrutiny has had its achievements and successes but, as this report has shown, these achievements, and any future achievements, are tempered and limited by the influence of politics.

The revised arrangements have enhanced the ability of the legislature to scrutinise the executive government, by opening up the government’s consultative process, and by increasing the chance that a wider range of interests will have an influence on legislation. Non-government senators are better able to be true legislators, because through the committee process they become better briefed. The enhancement of the Senate’s legislative function that results, however, has limits. While the process may help non-government

senators become better informed, the additional information received is unlikely to match or counteract the information and resources of the executive government.

Similarly, the ability of the committee process to affect legislation has its limits. Although the revised arrangements have sometimes seen the emergence and endorsement of improving amendments, with bipartisan support, partisan differences nevertheless dictate that a large number of bills will report back to the full Senate with little or no agreement on desired outcomes. In addition, the pressure placed on committees to complete their inquiries quickly will not dissipate as long as the executive government seeks to push through its legislative program with minimal hindrance. Meanwhile oppositions are not likely to let up on their attempts to slow down the process, seeking to use every tool at their disposal which will enable them to counteract the power of the executive government.

Prospects for improvements to the system are limited. It has been suggested by some that partisanship in Parliament is increasing, and this clearly limits the receptiveness of all parties to any changes that may require a certain level of bipartisan cooperation and a traditional, parliamentary approach.

It has been suggested that committees be empowered with the ability to pass amendments to legislation. The inability of committees to do this underlies cynical views about the committee process being merely 'going through the motions' with the real battle being fought out on the floor of the chamber. Empowering committees with the ability to pass amendments is not, however, a reform that is likely to gain support, unless a way could be found to make committee composition accurately reflect representation in the whole Senate. Clearly, this is impossible in a situation where independents can hold only one or two seats in a 76-seat chamber, and where the balance between the government and opposition parties can hinge on one seat. Not even a committee of 38 senators, or even 50, would be truly representative.

Apart from reforms that might attempt to redress the political overlay of the bills referral process, it might be asked whether there are any procedural or structural changes possible that might improve the process. One suggestion has been the disbanding of the standing committee system as far as bill referrals are concerned. Instead of referring bills to eight standing committees plus select committees, bills could be referred to ad hoc committees, supported by a central bills secretariat, which would have the responsibility for progress of a bill through all its stages, and have suitably qualified staff who could draft (and re-draft) amendments. Support staff would also include a pool of specialised research officers, who would be assigned accordingly as each bill was referred. Very often, bills cover a wide range of issues that cut across the responsibilities and expertise of several of the current committee secretariats. The current standing committee system creates an artificial distinction between subject areas. Committee composition itself could vary from bill to bill, senators nominating themselves according to their interests, but still retaining the existing balance of party representation.

Another reform that has been suggested attempts to improve the procedures for processing amendments to bills. Following consideration of a bill by a committee, committees could be given the responsibility of sorting amendments into those that have general agreement and those where dispute remains. Debate on a bill could thus be streamlined, with consideration in the whole chamber concentrated on the central areas of disagreement, while areas of agreement could be 'fast-tracked'. Given the appropriate resources, committee secretariats could actually draft the amendments, and this would further streamline procedures. These

procedures may be applicable on only a small number of bills, possibly at the discretion of the Senate, but would be very worthwhile for those bills with large numbers of amendments.

The systematic referral of bills to committees in the Australian Senate has proved to be a significant and in many ways a successful innovation. The increased exposure of executive government to the scrutiny of the legislature, and through it, the public, has been a substantial achievement. So has the increased and more open public participation that has occurred. However, the limits imposed on the system by the conflict between the executive and the legislature, and by party politics, act to restrict the ability of committees in the Australian Senate to effectively take on the executive government.

Appendix A

REFERRALS TO THE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE, MAY 1996•MAY 1997

Bill title	Date referred by Senate	Date report tabled	Time from referral to tabling of report	Extensions	Date bill introduced to Senate	Time from introduction of bill to tabling of report	Length of report
Social Security (Newly Arrived Resident's Waiting Periods & Other Measures) Bill 1996	30 May 96	10 Sep 96	3 months 10 days	2	30 May 96	3 months 10 days	94p.
Migration Legislation Amendment Bill (No. 2) 1996	24 Jun 96	27 Jun 96	3 days	0	20 Jun 96	7 days	32p.
Bankruptcy Legislation Amendment Bill 1996	28 Jun 96	9 Sep 96	2 months 11 days	1	8 Oct 96	1 month before introduction	18p.
Hindmarsh Island Bridge Bill 1996	31 Oct 96	5 Dec 96	1 month 5 days	1	18 Nov 96	17 days before introduction	49p.
Migration Legislation Amendment Bill (No. 3) 1996	31 Oct 96	5 Dec 96	1 month 5 days	1	5 Feb 97	2 months before introduction	52p.
Euthanasia Laws Bill 1996	7 Nov 96	6 Mar 97	4 months	2	12 Dec 96	2 months 24 days	205p.
Human Rights Legislation Amendment Bill 1997	6 Feb 97	26 Jun 97	4 months 20 days	2	27 Jun 97	1 day before introduction	135p.
Auditor-General Bill 1996 (Clauses 35 & 37)	6 Mar 97	15 May 97	2 months 9 days	0	5 Mar 97	2 months 10 days	48p.
Constitutional Convention (Election) Bill 1997	26 Mar 97	15 May 97	1 month 20 days	1	26 May 97	11 days before introduction	84p.

Appendix B

TIME SPENT IN CONSIDERATION OF BILLS REFERRED TO THE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE, MAY 1996 • MAY 1997

Bill title	Time spent in committee	Submissions	Witnesses	Hearings	Time spent in Chamber		
Social Security (Newly Arrived Resident's Waiting Periods & Other Measures) Bill 1996	Public hearing	10:45	29	40	4 hearings, Sydney, Canberra	2nd Reading Debate	2:35
	Private meeting	1:14				Committee of the Whole	2:53
	Total	11:59				Total	5:28
Migration Legislation Amendment Bill (No. 2) 1996	Public hearing	4:50	8	10	1 hearing, Canberra	No debate yet	
	Private meeting	1:18					
	Total	6:08					
Bankruptcy Legislation Amendment Bill 1996	Public hearing	0:00	10	–	None	2nd Reading Debate	0:00
	Private meeting	0:16				Committee of the Whole	0:00
	Total	0:16				Total	0:00
Hindmarsh Island Bridge Bill 1996	Public hearing	8:08	24	13	2 hearings, Canberra	2nd Reading Debate	2:09
	Private meeting	0:23				Committee of the Whole	4:39
	Total	8:31				Total	6:48
Migration Legislation Amendment Bill (No. 3) 1996	Public hearing	5:51	14	17	2 hearings, Canberra	2nd Reading Debate	1:33
	Private meeting	0:23				Committee of the Whole	1:04
	Total	6:14				Total	2:37
Euthanasia Laws Bill 1996	Public hearing	24:39	12 577	76	3 hearings, Canberra, Darwin	2nd Reading Debate	0:00
	Private meeting	9:11				Committee of the Whole	16:35
	Total	33:50				Total	16:35
Human Rights Legislation Amendment Bill 1996	Public hearing	4:47	45	22	2 hearings, Canberra	No debate yet	
	Private meeting	0:27					
	Total	5:14					
Auditor-General Bill 1996 Clauses 35 & 37	Public hearing	3:55	3	6	1 hearing, Canberra	2nd Reading Debate	0:00
	Private meeting	0:24				Committee of the Whole	1:37
	Total	4:19				Total	1:37
Constitutional Convention (Election) Bill 1997	Public hearing	9:35	36	20	2 hearings, Canberra, Adelaide	2nd Reading Debate	5:07
	Private meeting	0:28				Committee of the Whole	11:23
	Total	10:03				Total	16:30