hl.pro.prob.15619

No. 216

for the sitting period 10—20 September 2007

21 September 2007

COMMITTEE REPORTS

Many committee reports, including 15 released in
the non-sitting weeks and tabled on the first sitting day, were presented during the period.

Some highlights of the reports of procedural interest were:

- The Environment, Communications, Information Technology and the Arts Committee presented a report on 20 September on two cases of suggested interference with witnesses. The committee investigated the matters itself, and came to the conclusion that the circumstances did not warrant the raising of a matter of privilege and a reference to the Privileges Committee, but indicated that it would remain "vigilant" in protecting its witnesses. (Privilege Resolution 1(18) explicitly requires that committees inquire into such matters.)

- The Legal and Constitutional Affairs Committee tabled on 13 September correspondence relating to evidence given by departments and agencies about the government's knowledge of the "rendition" of Mr Mamdouh Habib to Egypt. Some answers given in estimates hearings indicated knowledge that Mr Habib was in Egypt, while other answers did not concede that he had ever been there. The tabled correspondence from the departments and agencies concerned sought to explain the apparent inconsistencies. Senator Nettle was not satisfied with the explanations, raised the matter under standing order 81, and succeeded in having it referred to the Privileges Committee on 18 September.

- The Rural and Regional Affairs and Transport Committee reported on a case of unauthorised disclosure of the committee's report before its presentation. The committee, following the resolutions of the Senate of 20 June 1996 and 6 October

2005 relating to unauthorised disclosures of committee material, decided to not raise the matter as a question of privilege. A member of the committee confessed to the unauthorised disclosure and the committee recorded its reprimand of him in its report.

- The Economics Committee presented its report on the tightening of the secondary boycott provisions by the Trade Practices Amendment (Small Business Protection) Bill 2007 and the apprehended threat to freedom of speech involved in the Australian Competition and Consumer Commission taking representative actions against boycotters. In his additional comments, Senator Murray called for an amendment of the bill to clarify the understanding that the bill does not authorise action against persons for advocating consumer boycotts of particular firms. The bill was not dealt with by the Senate during the sittings.

- The Finance and Public Administration Committee reported on the Commonwealth Electoral Amendment (Democratic Plebiscites) Bill 2007, the attempt by the government to override Queensland legislation forbidding local councils to undertake plebiscites on proposed council amalgamations. The majority of the committee accepted the government's assurance that it had legal advice on the constitutional validity of the bill, but did not insist on the disclosure of the advice. Now that the Queensland government has withdrawn its prohibition, it is unlikely that the legislation will be challenged in the courts. The Opposition members "requested" the advice. Senator Murray drew attention to the precedent of the government relying on the International Covenant on Civil and Political Rights as an authority for legislation, and raised the question of why the government did not legislate to apply the whole covenant to all state and federal legislation. The legislation could be applied to other issues. He and other non-government senators subsequently, and unsuccessfully, moved amendments to that effect.

- The Foreign Affairs, Defence and Trade Committee presented its third progress report on the implementation of reforms to the military justice system, indicating its determination to continue to monitor the implementation of the recommendations it made in its major report on the subject in 2005. The committee expressed some disquiet about some cases and promised continued monitoring.

- The Environment, Communications, Information Technology and the Arts Committee recommended amendments to the National Greenhouse and Energy Reporting Bill 2007, and the bill was amended by the government in the House of Representatives. The Foreign Affairs, Defence and Trade Committee recommended one amendment to the Defence Legislation Amendment Bill 2007, which has not been dealt with.

- The report of the Community Affairs Committee on the Patient Assisted Travel Schemes provided an example of a multipartisan critical analysis of government programs, of a kind seldom seen in these more partisan times.

- The Employment, Workplace Relations and Education Committee report on standards in schools, unsurprisingly for such a controversial subject, was not unanimous, but also provided analysis of the issues.

- The committees presented their reports on departmental and agency annual reports, all substantive and containing praise for some bodies and criticism of others.

    - The Legal and Constitutional Affairs Committee reported its close scrutiny of the annual reports of the federal courts, with comments and suggestions, reinforcing the role of the Senate in scrutinising the administrative activities of the judiciary.

    - The Finance and Public Administration Committee made further observations on the matter of ordinary annual services, and gave examples where it appeared that appropriations should not have been included in the ordinary annual services appropriation bill. The committee also made recommendations for matters to be included in future reports.

    - The Foreign Affairs, Defence and Trade Committee report again highlighted the value to the committee of the separate report by the Judge Advocate General as an independent assessment of the military justice system.

PRIVILEGES COMMITTEE

The Privileges Committee reported on 11 September on whether misleading evidence had been given to the Finance and Public Administration Committee and whether there had been an improper refusal to give information to that committee. The inquiry related to the evidence of one Mr Greg Maguire in the course of the committee's inquiry into regional grants (the inquiry was conducted by the Finance and Public Administration References Committee before the change in the committee system took effect in late 2006). Mr Maguire claimed that he had donated money to the election campaign of Mr Tony Windsor MP, and offered to provide evidence of this, but subsequently refused repeated requests by the committee for the evidence he claimed to have. The Privileges Committee found that there was a refusal to provide information but, in view of the repeated refusal of Mr Maguire to provide the claimed evidence, was unable to find that false or misleading evidence was given. The committee refrained from exercising its power to compel Mr Maguire because, before making a finding of contempt against him, it would have had to grant him the full protection

of the procedures laid down by the Senate in its Privilege Resolutions, including the right to examine Mr Windsor, who could not be examined in a formal hearing leading to a finding of contempt by virtue of the rule of comity between the Houses whereby one House does not allow such a formal examination of the conduct of a member of the other. The committee was highly critical of Mr Maguire, who, it said, emerged from the process with little credibility. The committee's findings were adopted by the Senate on 20 September.

The committee received a reference on 18 September on evidence given in estimates hearings relating to Mr Mamdouh Habib, following the examination of the matter by the Legal and Constitutional Affairs Committee (see above, under Committee Reports). The government indicated its reluctance to agree to the reference, but allowed it to go to the committee on the basis of "due process". This no doubt was a reference to the strictures which followed an earlier instance of a privilege matter being determined on party lines.

The committee presented a report on 17 September recommending publication of a response by the principals of an Indonesian organisation to remarks made about the organisation in the Senate. The Senate's right-of-reply procedures do not preclude responses by foreigners, and the committee takes the view that an attack on an organisation can warrant a reply by its principal office bearers. The reply was duly published by the Senate.

See above, under Committee Reports, for committees dealing with privilege matters arising in relation to their proceedings.

The Privileges Committee made an oral report on 13 September, recommending that the Senate's order of 6 October 2005, relating to unauthorised disclosures of committee materials, which was adopted as a temporary order, be made permanent. This recommendation was adopted by the Senate on 17 September.

SCRUTINY OF BILLS COMMITTEE

In its Digest tabled on 12 September the Scrutiny of Bills Committee drew attention to the current habit of the government of including in its legislation provisions which exempt legislative instruments from disallowance by either House. The explanatory memoranda accompanying such provisions claim that the Attorney-General has exempted the instruments in question from disallowance. The committee pointed out that the Attorney-General has no such power under any law, and that it is for the Parliament to determine whether any particular instruments should be subject to disallowance.

The committee, in its report tabled on 12 September, expressed concerns about the Northern Territory emergency package of bills, concerns which now cannot be acted upon because the bills have passed (see Bulletin No. 215, p. 3).

The committee in a statement accompanying a Digest presented on 19 September pointed out that it did not have adequate time to comment on the Australian Crime Commission Amendment Bill, which had already passed, again drawing attention to the effect on the work of the committee of the government rushing bills through the chamber. The committee also commented on the proliferation of strict liability offences and its requirement, also contained in the government's own guidelines, that such offences must be adequately explained in accompanying explanatory memoranda. A particular case of inadequate explanation led to this observation, which has been frequently made by the committee.

REGULATIONS AND ORDINANCES COMMITTEE

The Regulations and Ordinances Committee put down a lengthy series of disallowance notices on the last day of the sittings. These are "holding notices", which the committee regularly gives before the time for giving such notices expires, to reserve its right to move to disallow instruments while it investigates them. If the general election occurs before the Senate sits again, as is expected, the instruments concerned will be deemed to be tabled on the next day of sitting, under the provisions of the Legislative Instruments Act, so that the time for disallowance will begin again.

UNANSWERED ESTIMATES QUESTIONS ON NOTICE

Senator Carr on 13 September used the procedure under standing order 74(5) to pursue a large number of unanswered estimates questions on notice put to the Department of Education, Science and Training. The questions included those relating to the government's Parliamentary and Civics Education Rebate scheme, which replaced the parliamentary Citizenship Visits Program. He did not succeed in obtaining the answers or an explanation for their non-appearance. He tried again on 17 September, but with no greater success.

Statistics on answers circulated at the end of the sittings indicated that there were still 119 answers outstanding from a total of 9235 questions placed on notice during the 2006 hearings. It is not expected that those questions will be answered. For the 2007 hearings there were 1637 answers outstanding from a total of 5861 asked. The Department of Employment and Workplace Relations again bulks large in the figures. Some departments may be hoping that the impending election will relieve them of the obligation to answer the questions, but they are always reminded that answers are still expected.

LEGISLATION

In proceedings on the Australian Citizenship Amendment (Citizenship Testing) Bill 2007, the government accepted two amendments arising out of the scrutiny by the Legal and Constitutional Affairs Committee, but did not accept other amendments, including those

providing for the disallowance of instruments made under the act for the purpose of the new citizenship testing scheme.

The Telecommunications Legislation Amendment (Protecting Services for Rural and Regional Australia into the Future) Bill 2007 is an attempt by the government to "lock away" money in the Future Fund to prevent a future government from using the fund for other purposes. The Higher Education Endowment Fund Bill attempts to do the same for another fund. These attempts will be successful only if one House (presumably the Senate, in the government's calculations) declines to alter this legislation in the future.

The Trade Practices Legislation Amendment Bill (No. 1) 2007 was amended by the government on 17 September to respond to pressure to do more about "predatory pricing". The government claimed that the amendments were unnecessary but responded to widespread concern about the alleged practice. Other amendments recommended by the Economics Committee were not accepted by the government, with the minister and former committee chair, Senator Brandis, expressing his embarrassment at this decision.

The Australian Crime Commission Amendment Bill, dealt with on 18 September, retrospectively validated summonses, and therefore prosecutions for offences relating to those summonses, which were found to be defective. The bill was rushed through with the reluctant support of the Opposition but was opposed by the Democrats and Greens.

UNPROCLAIMED LEGISLATION

The regular report required by standing order 139(2) on provisions of statutes which have not been proclaimed to have come into effect, tabled on the first sitting day, revealed that, except for some old and intractable cases and some newer statutes, there has been a "cleaning up" of the statutes which have not commenced, and very few now appear on the list.

COMMITTEE REFERENCES AND GOVERNMENT RESPONSES

An attempt by the non-government parties to initiate a wide-ranging inquiry into climate change was rejected on 13 September, in spite of assurances that the government takes this subject seriously.

A proposed reference to the Foreign Affairs, Defence and Trade Committee on uranium sales to Russia was rejected by the government on 17 September.

By contrast, a Greens' motion was passed on 19 September for a reference to the Rural and Regional Affairs and Transport Committee on drought and agriculture. This reference had apparently been the subject of extensive negotiations to achieve acceptability.

The allegation of government contempt for the committee system was raised on 13 September when ten government responses to committee reports were tabled, and it was pointed out that some of the responses were years late. A response presented on 20 September to a report by the Community Affairs Committee on aged care was two years late.

JUDICIARY

Senator Kirk introduced on 11 September a bill to establish a judicial commission to inquire into allegations against members of the judiciary and report to the Houses on whether any judge should be removed under section 72 of the Constitution. Such a scheme appears inevitable, as the proposal has wide support. Some of the states, the United States at the federal level and the United Kingdom have established similar schemes.

"PRIVATE INQUIRIES"

The Australian Democrat senators held a "private inquiry" on their bill relating to entitlements of same sex partners after the government refused to allow the reference of the bill to a Senate committee (see Bulletin No. 215, p. 3). A "private inquiry" occurs when a group of Senators conduct their own inquiry into a matter, sitting in a committee room and hearing evidence from witnesses and compiling a report in the same manner as a Senate committee. The disadvantage of this type of inquiry is that it is not constituted as a Senate committee, the proceedings do not have the full protection of parliamentary privilege, and facilities available to Senate committees, such as transcripts, are not available unless the senators provide them from their own resources. The Democrats conducted a similar inquiry in 1992 in relation to tariffs in the textile, clothing and footwear industries. On that occasion they also tabled their report in the Senate. The report arising from the recent inquiry was tabled by leave on 20 September.

VACANCY

On the first day of the sittings the resignation of Senator Calvert was reported, and Senator Bushby, having been appointed by the Parliament of Tasmania, was sworn in.

ACCOUNTABILITY REPORT

The legislative process was rushed in the expectation that the sittings would be the last before the general election, and inevitably the attention given to the details of bills fell off. At various points in debate senators expressed the hope that more rigorous scrutiny would be applied in the new Parliament.

Committees were rushed to get reports in, and functioned under a degree of pressure not conducive to appropriate scrutiny.

This situation is more or less normal at this stage of the electoral cycle.

OCCASIONAL NOTE

Attached to this Bulletin is an occasional note on the complexities and anomalies that arise from the constitutional and statutory provisions governing the conduct of general elections.

RELATED RESOURCES

The *Dynamic Red* records proceedings in the Senate as they happen each day.

The *Senate Daily Summary* provides more detailed information on Senate proceedings, including progress of legislation, committee reports and other documents tabled and major actions by the Senate.

Like this bulletin, these documents may be reached through the Senate home page at www.aph.gov.au/senate

Inquiries: Clerk's Office
(02) 6277 3364

hl.proc.15626
21 September 2007

OCCASIONAL NOTE

ELECTIONS: CONSTITUTIONAL COMPLEXITIES AND CONSEQUENCES

General elections at the federal level in Australia are governed by a complex of constitutional and statutory provisions which, apart from determining how elections are held, also determine the balance of power between the legislature and the executive. The provisions both empower and limit both branches of government. They are explained and expounded at election times, and then forgotten until the next election comes around. Their history and rationale are not well understood. This occasional note may partly fill the gap.

The Constitution provides for senators to have fixed terms of six years, with half of the places of the state senators turning over after elections every three years. The terms of the senators end on 30 June six years after they began (sections 7, 13). (The territory senators, whose places are created and governed by legislation, also have contiguous terms, but extending from the polling day of one general election to the polling day of the next.) The House of Representatives has a maximum term of three years, but may be dissolved, in effect by the government, at any time (section 28).

This combination of fixed and non-fixed maximum terms is a result of the framers of the Constitution drawing on republican models characterised by fixed terms and continuous legislatures (principally the United States and Switzerland) for the Senate, and on the British tradition of a dissolvable legislature for the House. The latter goes back to the constitutional situation of the parliament being only an advisory body to the monarch and existing only at the monarch's pleasure. The combination of two different models was basically the result of a compromise between two schools of thought at the constitutional conventions. The attempt by the framers to reconcile these two contrary models led to some very strange results.

Elections for the Senate may be held at any time within one year before the Senate places turn over (section 13). This provides flexibility so that Senate and House elections may be synchronised despite the House being dissolvable at any time. The possibility of states holding Senate elections at different times, however, is left open by the provision that the state governors issue the writs for Senate elections (section 12). This places Senate elections ultimately under state control and removes them from control by the central government, with some consequences, as will be seen.

The House of Representatives lasts for three years from its first meeting (section 28), so that the life of the House is tied not to the time when it was elected but to the time when it meets after an election. This also reflects the British tradition. It has the consequence that if all Houses continued for their full term and were allowed to expire before a general election, the electoral cycle would be continually stretched and each election would be later than the previous one. The expectation was, again following the British tradition, that Houses would end their life by early dissolutions and elections would be held usually at the time chosen by the government. This expectation has been fulfilled, in that only one House has been allowed to expire, that of 1907-10.

An early dissolution and election of the House, unless it occurs within one year of the Senate places turning over, results in the Senate and House elections being desynchronised and occurring at different times. This happened from 1963 to 1974, after Prime Minister Menzies held an early election for the House at a politically convenient time, and the elections were not brought back together for some years. The conventional wisdom now is that separate Senate elections result in poor Senate results for governments and should be avoided if governments wish not to have unfriendly Senates. This imposes a restraint on prime ministers in calling early elections, a restraint not really foreseen by the framers. They envisaged early House elections when governments lost support of the House, something which has not occurred for over sixty years, and would occur only if a government did not win a clear majority in an election in the first place.

The issue of writs for Senate elections by state governors imposes another restraint on prime ministers. When a prime minister chooses the election date, the Governor-General has to write to the state governors, who act on the advice of their state governments, to ask them to issue the writs for the Senate elections for the same polling date. An attempt by a prime minister to manipulate the electoral cycle, for example, by delaying a Senate election or holding it before a House election, could be foiled by unfriendly state governments declining to cooperate in the issue of the writs.

The Constitution was amended by referendum in 1907 to change the date for the beginning of senators' terms from 1 January to 1 July, on the basis that the first half of the year was a more convenient time for general elections. The intention of this amendment has been defeated by prime ministers choosing to go to elections in the second half of the year, which is now regarded as the normal and most favourable time for federal elections. This also has had an unfortunate consequence, as will be seen.

In relation to the timetable for elections, the Constitution prescribes only the outer boundaries of the process. Writs for a general election must be issued within ten days after the dissolution or expiration of the House (section 32). At the end of the whole electoral process, the Parliament must be summoned by the Governor-General to meet within 30 days of the

date fixed for the return of the writs (section 5). The first provision ensures that the government cannot dissolve the House and then delay the process of its replacement, and the second provision ensures that the government cannot unduly delay the first meeting after a general election, so that, for example, a government which has lost its majority in the election cannot remain in office by delaying the first meeting. The whole election process in between these boundaries is left to legislation, to provide flexibility. The Commonwealth Electoral Act fills in the process with a series of minimum and maximum boundaries. The significant provisions are for a minimum of 33 days and a maximum 68 days from the dissolution of the House to polling day, and a maximum for the return of writs of 100 days after their issue, with an absolute maximum of 140 days for the whole electoral process before the newly elected House meets.

A provision which supposedly further strengthens the legislature against the executive, also adopted from Britain, is the prescription that Parliament must be in session at least once every year (section 6). This would not have been necessary if the framers had not kept the ancient power of the crown to prorogue Parliament, ie., terminate its sittings until it is summoned to meet again (section 5). This provides the executive government with a potentially great power to dispense with an inconvenient Parliament, at least temporarily.

The combination of a fixed term Senate and a variable election cycle for the House means that there is normally some time between the first meeting of a Parliament after a general election and the half of the state senators then elected beginning their terms and taking office. Some such delay is a feature of all fixed term systems. Thus, the President, the whole House and one-third of the Senate elected early in November in the United States do not take office until early in January the following year, resulting in a transitional period. The corresponding period in Australia has been greatly expanded by the framers' compounding of the two models and the frustrated intention of the 1907 amendment. This results in the Senate places not turning over for up to eight months after the elections.

Apart from any other effect, this increases the chances of conflict between the two Houses, in reality between the Senate and the government, with Australia's rigidly disciplined political parties. A government may have to wait for up to eight months before being able to work with a Senate subject to election at the same time as the government itself was elected.

The framers provided for conflict between the Houses by the double dissolution provisions in section 57 of the Constitution, whereby a dissolution and re-election of the whole of both Houses overrides the fixed term of the Senate. The provision in section 13 for resetting the fixed term after a double dissolution, by backdating senators' terms to the previous 1 July, creates more problems and another possibility for Senate and House elections to be out of synchronisation. This occurred after the double dissolution of 1951, with separate Senate and House elections in 1953 and 1954, respectively, until they were brought together in 1955.

There is a theoretical possibility of a double dissolution occurring before the senators elected at the previous Senate election have taken their places. A government could resort to a double dissolution in the eight month period when it is still attempting to legislate with a Senate the composition of which dates back to the election before last. This has never occurred. If it did happen, it could result in a set of senators duly elected never taking office, perhaps the most bizarre outcome of all.

Most, but not all, of these problems could be overcome by a constitutional amendment to provide for a fixed term for both Houses of the Parliament. Such a proposal has gained support from time to time, and was contained in a bill passed by the Senate in 1982. An essential element of that proposal is that a House would be dissolved early only if it could not support a government, and the House then elected would last only till the end of the fixed electoral cycle, so that Senate and House elections would be brought back together at the next election.

Most versions of this proposal, however, would not solve what is perhaps the most serious problem with elections in the Australian system. Because the House of Representatives is dissolved, or expires, for an election, during the election process the country is without a complete Parliament, so that no legislation can be passed. This leaves the country in the hands of the executive government over an election period. It is in stark contrast with republican systems like the United States, where the legislative places turn over at a fixed time and the newly elected office holders then begin their terms, so that the country is never without a legislature. That arrangement makes the legislature much stronger in relation to the executive. A dissolvable and prorogable legislature is inherently in a much weaker position. The British model results in an extremely strong executive and a relatively weak legislature, and in Australia is only partly ameliorated by the republican elements of the Constitution relating to the Senate.