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**Parliament: Achievements and Challenges**

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## *Parliament: Achievements and Challenges*

This issue of *Papers on Parliament* brings together in published form the six lectures given in the period June—November 1992 in the Senate Department's *Occasional Lecture* series.

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## Accountability, the Parliament and the Executive

Bill Blick

I want to say a couple of things before I launch into this paper. I want to thank the Senate for inviting me here today. Standing here, with stage fright rapidly descending upon me and seeing the assembled throng, I am not sure that gratitude is necessarily the emotion I should be expressing.

To some extent, I have you here on false pretences. A flier went around describing what was going to be in this paper. That arose because Ann Millar, who invited me to give the speech, rang me up several weeks ago and said, 'We need to say something about what is going to be in your paper'. I sat down, not having done any drafting on the paper, and proceeded to think about what might be in it. All I can say in relation to that is — I am sure Icarus must have said this as he sat on the ground — that it seemed like a good idea at the time.

In fact, the paper has ended up being a description from the point of view of the public service, of the sorts of services the Public Service provides to ministers in fulfilling their parliamentary accountability obligations. I have attempted to go through a range of ministerial accountability obligations and the way in which they are fulfilled, and I describe the way in which we try to give support to ministers. In that sense, it is not a paper about the Parliament. In any discussion of accountability I think it is necessary to have a clear perception of what the Parliament is and does. It is also not the purpose of the paper to attempt an exhaustive discussion of what is meant by the executive.

Standing here today, I am very conscious that very much more intelligent and knowledgeable people than I have written very long tomes on this subject. I cannot seriously expect to stand here, in the three quarters of an hour of the lunch break, and knock it off.

What then is the function of the Parliament? Perhaps the most useful recent description was given by the distinguished authors of the British reference work entitled *Parliament — Functions, Practice and Procedures*. The three authors should know what they are talking about: two of them have held senior positions as officials of the British Parliament and the third is Emeritus Professor of Public Law at London University. In their view the Houses of Parliament:

. . . cannot properly be described as governing bodies, nor correctly analysed as being institutions with initiating or law making functions within the constitution. They are better presented as forums within which the contending powers . . . publicly debate the issues of the day and matters of their choosing, and through which the government may secure the authority it needs for the implementation of its policies and the exercise of its powers. If these forums can be said to have a principal function, it is that of exercising constant scrutiny over those who have the powers of government and of debating all matters brought before them whatever source, and, through the operation of the government's majority in the

Commons, of enabling the members of the government to fulfil their constitutional role.<sup>1</sup>

They say it is therefore as a debating forum and not as a governing body that Parliament should be assessed. These authors quote from Leo Amery's work entitled *Thoughts on the Constitution*, in which he says: 'The main task of Parliament is still what it was when it was first summoned, not to legislate or govern, but to secure full discussion of all matters.' It goes to the very heart of the accountability issue by saying: 'It is in this sense, by ensuring that ministers are always liable to be required to explain and publicly justify their policies and their actions, that Parliament may be said to be the custodian of the liberties of the people'.

Defining the executive and its role does not lend itself to such ready generalisation. First, a wide range of activity is carried out under prerogative powers for which parliamentary approval is not specifically required. The conduct of foreign affairs is an example, as is the creation of a new government department or the abolition of an existing one. Secondly, there are activities which may have required parliamentary involvement at some time in the past, but then go on year after year without the need for further conscious deliberation by the Parliament except in so far as it may approve the annual appropriations. There are those matters for which it is essential to obtain formal parliamentary approval at the time, such as setting up a new statutory body, revising social welfare schemes or varying rates of taxation. However, what can be said with safety, particularly in modern Australia, is that, whatever the formal position, there is no area of government activity that is beyond at least the potential purview of Parliament.

In many cases this derives, sometimes tenuously, from the power of Parliament to approve the annual appropriations. But there are many occasions, other than during consideration of the appropriations, when the Parliament debates matters for which its formal approval is not needed. Such debates are not confined to the Senate, where the government does not have control, but occur regularly in the House of Representatives where it is in a position, if it wants, to have its way on all matters.

What this means is that governments, whatever their parliamentary strength or weakness in terms of numbers, recognise and embrace the need to be accountable to the Parliament. That need arises ultimately from political imperatives involving the fact that electoral success and the future of governments depend upon public perceptions. Those perceptions are affected, directly or indirectly, by the government's conduct of its relationship with the Parliament.

In case that sounds a bit cynical, let me say that accountability also arises from recognition by government of fundamental human desires to be governed fairly and openly. In Australia, as in other countries with parliaments, the contest between the Parliament and the executive goes on. But in Australia the ground rules are accepted without question by both sides. In recent years governments have increasingly promoted and furthered concepts of public accountability.

It is fair to say that at the federal level we have some special parliamentary traditions and institutions which sharpen the sensitivity of governments to their accountability obligations. For example, question time in the House of Representatives, whatever else you may say about it, would be one of the most testing occasions in the parliamentary

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1. *Parliament: Functions, Practice and Procedures* by J.A.G. Griffith and Michael Ryle, with M.A.J. Wheeler-Booth, London, 1989, p.6.

world. In modern times, governments have not been able to command a majority in the Senate, which unlike many of its overseas counterparts has almost equal powers to those of the lower House.

There have been at least two direct and important results of the latter phenomenon. First, governments have constantly needed to explain and compromise in order to gain approval for their legislative proposals. Secondly, there has been the development of a committee system — including estimates committees — which enables the Senate to define and promote its needs and demands for explanation and justification of the actions of the executive.

Having said something of what the executive does and that government is a part of it, let me also state the obvious and mention another component of the executive — the public service. It is apposite to bring in the public service at this point because the interface between the Parliament and the executive involves public servants most directly and obviously within the parliamentary committee system.

The public service is the instrument of the government of the day and is accountable to it. Ministers, as we have seen, accept and try to fulfil a range of accountability responsibilities to the Parliament. Public servants, as instruments of the executive, are duty-bound to assist ministers in carrying out those responsibilities. It is important to emphasise that the obligations of public servants in this regard are established and defined by ministers, not by the Parliament. There are, of course, differing views about this. Some would hold that there are cases in which there is a different or higher obligation for the public servant.

There is no doubt that the public service can present ethical dilemmas — in some cases very serious ethical dilemmas. The classic case in recent times was that of Clive Ponting in the United Kingdom. Ponting was a senior official who believed it his duty to leak to a parliamentary committee material which indicated that the government was attempting to mislead the committee about certain events in the Falklands War. The Thatcher Government prosecuted him under the Official Secrets Act, but he was acquitted by a jury despite clear directions to the contrary by the judge.

While having great sympathy for the position in which he found himself, I believe that in this case Ponting should not have done what he did. As a public servant his clear duty was to advise his minister and perhaps, ultimately, his Prime Minister in the most persuasive manner he could of his views about any action calculated to mislead the Parliament. If having done that he found that his conscience could not accommodate collaborating with the minister in the deception, there were other courses open to him, including ultimately offering his resignation. Taking the action he did violated one of the fundamental principles of Westminster government, namely, that ministers, not public servants, take responsibility for the relationship between the executive and the Parliament. Fortunately most of us are unlikely to ever encounter such an unpleasant dilemma. But we do need to keep in mind at all times that our relationship with the Parliament is conditioned and shaped by our duty to serve and to be accountable to the government of the day.

There is, incidentally, an important element of trust here. Let us suppose that a public servant perceives it as his or her duty to provide members of the Parliament with information without the knowledge of the minister, and in circumstances in which the minister would disapprove. Realistically, we are talking about leaking information to the opposition. It is highly unlikely that, in the event of a change of government, the incoming minister could accord that person the trust that is essential between ministers and their public service advisers.

So how do public servants assist ministers to carry out their accountability obligations? First, and often overlooked, is ministerial correspondence. A high proportion of letters to ministers come from members of the Parliament who are making representations on behalf of constituents. A large proportion of the rest are likely to go to the local member or senator if they do not get satisfaction. Nearly every reply signed by, or on behalf of, a minister has been drafted by a public servant. I have not done a complete survey, but a quick inquiry reveals that, for example, the Social Security portfolio deals with some 10,500 letters to its minister in a year; Employment, Education and Training deals with roughly 16,000; while Health, Housing and Community Services handles a massive 50,000. The Prime Minister, for the record, gets about 150,000 letters a year.

Across the service this is a huge task and the implications for our accountability are substantial. Most of the correspondents are seeking something from government. In the nature of things, the best that most of them can hope for is clear, prompt acknowledgment that their situation is understood, together with a sympathetic explanation of the reasons for it. It cannot be in the interests of ministers if replies are slow in preparation, negative in tone, or difficult to understand. Sometimes it has to be conceded that the replies are all three, but overall — and given the immensity of the task — my sense is that the performance of the service in this important area is good and improving.

A second, largely unheralded, but again vital area of support for ministers is in relation to the preparation of legislation and other parliamentary material. In recent times governments have come into office with ambitious plans and programs for change. To fulfil their promises and intentions they require legislation, which the public service has to prepare and implement. It is also, in many cases, responsible for explaining the impact and implications of policies and programs and, of course, it drafts many of the speeches that ministers make — both in and out of the Parliament.

In 1990-91, in two parliamentary sittings, the government introduced 217 pieces of legislation, there were 23 government statements by ministers and 581 government papers were presented to the Parliament. Many of the bills would have required second reading speeches, and in most cases ministers would have been assisted by public servants in explaining the various measures to members of the Parliament and committees — again, a massive task and one in which there is a clear requirement for the public service to appreciate the accountability needs of ministers from a variety of perspectives.

A minister's reputation could well depend upon the successful carriage through the Parliament of a vital bill. Major policies of a government might be at risk if, for example, technical explanations provided by public servants to a committee fail to satisfy senators. Failure to translate the government's wishes via drafting instructions into a piece of legislation that works in practice, and achieves the desired objectives could lead to the embarrassment of unwanted amendments or worse.

From my own perspective in PM&C, two observations can be made about the performance of the public service in relation to legislation. First, we are too ready to promote a legislative solution to a policy problem. Often the problem is more imagined than real, and natural bureaucratic tidiness rather than genuine need is the impulse. We do not necessarily do government or the Parliament a service by promoting more rather than less legislation. Secondly, however, the overall quality and performance of the legislation areas of departments and of the Office of Parliamentary Counsel is quite outstanding.



Another important area in which the public service provides extensive support to ministers in fulfilling their accountability obligations to the Parliament is that of parliamentary questions — both upon and without notice. In the last 20 years, between 2,000 and 3,000 questions without notice per year have been addressed to ministers in both Houses of the Parliament. Ministers do not turn up for question time unprepared; they take with them comprehensive briefing on the issues of the day as they affect their portfolios, for they can expect at any time to receive a question on a matter for which they have ministerial responsibility. This is where the public service comes in. Every department prepares for its minister or ministers a question time brief which attempts to anticipate the range of possible questions that might be asked and suggests the lines upon which they might be answered. This involves, as one would expect, having systems in place to monitor current events and to create and update the minister's briefing, often in the very restricted time between the issue being reported in the morning newspapers or on the radio, and question time, which starts at 2.00 p.m.

Being responsible for a minister's question time needs can involve, in addition to a lot of hard work, some degree of creativity. I well remember in the early 1970s working in a department where the minister, who was on the verge of retirement, was extremely and incorrigibly short-sighted — in the physical sense, of course. We developed a system involving a typewriter with extremely large print and triple space capitals. In addition, the brief was colour coded according to subject matter. Whenever the minister received a question, the private secretary, who sat in the advisers' box, would hold up a coloured card to indicate the portion of the brief to which the minister needed to refer. We all felt that the quality of the answers improved markedly as a result.

Preparing question time briefs also requires, obviously, a feel for the politics of an issue. I think it was Sir Paul Hasluck who once said that a public servant can no more avoid politics than a fish can avoid the water. However, it should go without saying that the fact that public servants can and do make judgments about the political impact of current events in no way implies that the traditional political neutrality of the public service is under any kind of threat.

Departments, and in my experience ministers' officers, are always conscious of the need for public servants to avoid crossing that rather ill-defined line between providing support for the government of the day which it needs as a government, and that which it might desire as a political party. For the latter purpose, ministers have advisers in their private offices. These advisers will provide any necessary briefing to assist the minister with answering questions about party political matters, including the more juicy hyperbole often directed at their political opponents. In any good system, for the preparation of a question time brief there will be extensive consultation between the minister's private office and the department so that the brief that is produced is properly tailored to the minister's needs. In case that gives the impression that ministers are mere tools of their advisers, let me hasten to emphasise that ministers can and frequently do depart from the terms of their briefs however carefully written — sometimes, it must be admitted, to the dismay of officials. That is their prerogative and it must always be so, because in our system the ministers have to take responsibility for governmental actions.

From the public service perspective the present question time system is not conducive to efficient and sensible use of resources. Throughout the public service people are employed in preparing briefing, much of which — in the nature of things — will not be used for its ostensible purpose. When one considers that the majority of questions

in the House of Representatives are to the Prime Minister and the Treasurer, and that some ministers very rarely receive a question, it is evident that a great deal of effort is being put into preparing for events which occur only haphazardly, if at all. Even when ministers are asked questions, it is certain that their folders will contain possible answers to a large number that they will not be asked.

This is not to say that there are no advantages under the current system. It ensures that departments are always conscious of the issues which may be of concern to their ministers. It also guarantees that during sitting periods there will be up-to-date, succinct briefing on a range of live topics readily available in each minister's office — much of which would desirably have been prepared anyway. From the Parliament's point of view, the system provides a realistic expectation that ministers will at all times be in a position to fulfil their accountability obligations.

By way of contrast, the system of question time that has evolved in the House of Commons at Westminster exhibits some interesting features. There, ministers are rostered to appear for question time at regular intervals. The roster is decided by the government in consultation with the opposition. A minister's turn is always on the same weekday, although not every minister appears every week. Members wishing to ask questions give notice by placing the question in writing. There is a lottery to decide the order in which questions are asked. Usually these questions are very short and seek basic information.

I will give you a couple of examples from questions given on Wednesday 12 June 1991. The first question on the list is to be asked by Mr Robert Hicks, South East Cornwall. He is to ask the Secretary of State for Foreign and Commonwealth Affairs about the latest position concerning the establishment of a Middle East conference and whether he will make a statement. The next is Mr Gerald Howarth, Cannock and Burntwood, who is to ask the Secretary of State for Foreign and Commonwealth Affairs what priority the Commonwealth attaches to the promotion of good government amongst its members. After the minister has read out the answer the Speaker will allow a number of supplementary questions on related topics, often from several members, before the minister passes to the next question on the list.

The Prime Minister's question time operates according to the same basic rules, although the Prime Minister appears twice a week. The initial question to the Prime Minister from each member on the list is purely formal. It is usually a question about the Prime Minister's engagements for the day. Following that, supplementary questions are allowed, with some preference given to the Leader of the Opposition. Then there is open slather in much the same manner as with our question time.

Finally, in recognition of the fact that there is some interval between ministers' appearances and important issues emerging at any time, there is provision for questions on urgent matters. Notice must be given by noon on the relevant sitting day and, if allowed by the Speaker, the question will be asked of the minister at the end of normal question time. A number of supplementary questions will again be allowed.

The advantages of such a system from the public service point of view will be readily apparent. While ministers still have to be briefed, there is neither the haste nor the waste associated with our system. When it is a minister's turn to attend it will be apparent, at least in general terms, what the interests of members are. If an urgent issue arises that is likely to require a minister to respond, the department will know in time to prepare the necessary brief. I have to concede that this system would not have much to offer my department: briefing for four days a fortnight would not be greatly different from seven.

From the point of view of the accountability needs of the Parliament, the main advantages of such a system would appear to be the potential that it offers for more detailed examination of their stewardship by ministers in portfolios which now, because of the inevitable concentration in question time on the major players, receive comparatively little attention. On the other hand, some might not want to risk losing the daily theatre, which is undoubtedly the main attraction of question time in the House of Representatives.

In Australia, questions upon notice, for which ministers provide written answers, provide a means whereby members of the Parliament can seek more detailed information than ministers can realistically be asked in question time. In the last Parliament, over 2,200 questions were placed on the *Notice Paper* in the House of Representatives and nearly 1,400 were placed upon notice in the Senate. In this Parliament, the comparable figures so far are 1,640 and 2,042 respectively.

Nearly all questions upon notice are answered; although it is not unknown for ministers to decline to answer on the grounds that the resources required would be too great. Virtually all questions upon notice are about matters for which the preparation of replies by the public service is essential. In other words, only a tiny minority of questions upon notice are about purely party political matters. It is impossible without doing a survey to provide a realistic estimate of the resources that the public service puts into answering questions upon notice; as far as I know, no such survey has been done for the Commonwealth in recent times. However, anyone who has worked on answers to questions knows that the effort is considerable — and this is evident from many of the answers. Someone once said that the criteria for the perfect answer to a parliamentary question were that it should be short, truthful and not provide any information that the questioner did not already have. Two of these three criteria have been well and truly ignored by the drafters of answers to most questions upon notice that I have seen.

A couple of observations can be made about the current system. First, many questions seek information that is already available from public sources. For example, it is not uncommon for a question to seek statistical information that appears in departmental annual reports — sometimes over a number of years. There is ample precedent for ministers to point to such sources in their answers and it should not be regarded as any avoidance of the ministers' accountability obligations if the answerer declines to reproduce such material.

Secondly, officials take very seriously their obligations to ministers in preparation of replies. Misleading the Parliament is one of the most serious allegations that can be levelled against a minister. In signing answers, ministers, more often than not, have to take on trust the reliability of the information in them. That there are so few cases where ministers have to correct answers, or are accused of having provided misleading information in them, is, I would suggest, testimony to the care with which their replies are prepared.

The remainder of this paper is devoted to considering executive accountability in relation to parliamentary committees, with special emphasis on the Senate, and with special reference to estimates committees. That emphasis is not to deny the importance and relevance of other types of committees. But the fact is that estimates committees have a special place in our system — a matter I will explore at greater length in a moment.

The Australian Parliament — especially considering its comparatively small size —

has a remarkably well-developed committee system by world standards. Some of that is attributable, as I have said, to the fact that governments find it hard to obtain control in the Senate. We also have a large number of House of Representatives committees as well as, of course, various kinds of joint committees.

With the exception of the committees that concern themselves solely with the internal affairs of the Parliament, all committees impact upon the public service to some degree. During any parliamentary sitting, public servants may need to prepare submissions for a committee inquiring into a particular matter of public interest; appear to give evidence before such a committee; give evidence to a committee considering a bill referred to it by the Senate; prepare material for inclusion in a departmental program performance statement for a Senate estimates committee; or prepare material for inclusion in an annual report, the guidelines for which are subject to agreement by the Public Accounts Committee.

In 1991-92, the standing committees of the Senate — each of which concerns itself with a particular area of government activity — received, or were already working on, some 40 references, held 86 public meetings and tabled 34 reports. If one also considers select committees, the figures go up to 48 references, 128 public meetings and 43 reports. In addition, some 42 bills were referred to committees which held 29 public meetings and tabled 24 reports as a result of their deliberations.

Senate estimates committees, as I have said, have a special place in our system. The need for the executive to gain support for spending proposals was, of course, the main reason for the rise of the power of Parliament in the first place. Thus, the scrutiny of the estimates which these committees carry out can be seen as an important symbolic expression of the role of the Parliament in holding the executive accountable.

Leaving aside for the moment the question of whether there is a better way of doing things, the need for the public service to support ministers' accountability obligations is at its most apparent and public before these committees. During last year's budget estimates hearings, the estimates committees sat for 158 hours and 38 minutes. During consideration of this year's additional estimates — which, of course, involve much less money than the budget estimates hearings — the total sitting time was 109 hours and 30 minutes.

The longest time spent by any committee — Estimates Committee B — was 33 hours and 40 minutes on the departments of Defence; Foreign Affairs and Trade; Treasury, and Finance. More than half of that was on Treasury, which I suppose is understandable in the year in which *One Nation*, and *Fightback!* were produced. The committee sitting for the least time was Estimates Committee D, which spent 8 hours and 23 minutes on Administrative Services; Immigration, Local Government and Ethnic Affairs; and Arts, Sport, the Environment and Territories.

To enable some appreciation of the number of officials attending, let me take a random example. On 5 September 1991, Estimates Committee F met to consider the estimates of the portfolios of Industrial Relations and Primary Industries and Energy. Sixty-two officials are listed as attending, including four from the Department of Finance, which has the invidious task of sending officers to all estimates committee hearings.

Before the officials got there, they would have participated in the herculean task of preparing annual reports and program performance statements. In this year's additional estimates, the program performance statements totalled 924 pages. At budget time, the statements run to in excess of 10,000 pages. Annual reports, which

agencies try to have available at least in draft for the main estimates process, are of comparable size.

In addition to this preparation, most agencies will receive questions on notice from senators before the hearings. No department these days should contemplate attending a hearing without giving careful consideration to the issues that senators might want to raise and to the answers that might be given if they do.

Preparation for the hearings may include asking the committee secretariat to identify matters that may be raised; studying the *Hansards* of the previous estimates hearings; noting matters that senators have asked questions about in Parliament, made public statements about, or raised in other parliamentary forums such as the Public Accounts Committee; being alive to topical issues that may be of interest to the Parliament generally; and, importantly, being aware of the contents of the government guidelines for official witnesses before parliamentary committees. In PM&C we also have at least one meeting of those who are to attend in order to ensure, so far as possible, that likely — and in some cases unlikely — topics have been identified and covered.

One question that might be asked — and indeed has often been asked — is whether all this effort is worth it. After all, notwithstanding the lack of a Senate majority, governments do have some choice when it comes to acceding to the information requirements of the Parliament. Estimates committees do not have the power to require the attendance of witnesses or to take evidence on oath or in camera. The question of who should attend and what information should be provided is at the discretion of ministers.

The fact is that what has suited the Parliament has also suited the executive. For some years now, government has been concerned that the public sector become more efficient and more accountable. The process of increasing public sector accountability, particularly in relation to financial management, has included such reforms as greater devolution to portfolios of financial management responsibilities; publication of the forward estimates; using the forward estimates as the starting point for budget estimates, thus removing the need for annual budget bids by agencies; program management and budgeting; and an increased emphasis on achieving identifiable results.

While the Parliament, through estimates committees, has been attempting to obtain a better and more useful view of what the executive is doing — and in the process has been pushing for more meaningful information and documentation — the executive has itself been reforming its own operations so that it can better discern and control the direction of public expenditure, and be more accountable in the process. One result of this is the program performance statements. In recent years they have become, on the whole, models of clarity and are improved every time they are produced.

The question of whether it is worth it from the Parliament's point of view is not for me to answer. It is worth noting, however, that the Senate is almost continuously reviewing the process — I suspect largely because there is, understandably, lack of unanimity about its primary role. On the one hand, there are senators who would, I am sure, see it as a means of causing maximum political difficulty for the government, either directly, or as a result of the use to which they can put the information they obtain. In this context, I note the comment of the Standing Committee on Finance and Public Administration in its 1991 report. It states that 'on occasions the proceedings have little to do with financial accountability and much

more to do with political advantage, irrespective of which party is in government'.<sup>2</sup>

Other senators have a somewhat different approach. They see the estimates committee process as an aid to the Parliament's scrutiny function and as a means of improving the conduct of public administration. The same report, to which I have just referred, quotes Senator McMullan at a seminar in 1989 as saying: 'I think all Senators have seen the benefits that have flowed from the scrutiny process, challenging people to lift their standards'. As one of those people I have to say that I agree.

This is not to say that the process, like most processes, cannot be improved; there must be scope for the massive amount of documentation to be reduced and rationalised. Much of what is in annual reports, which are a statutory requirement, is also in program performance statements, which are not. Recently there have been improvements in scheduling committee hearings, but one would like to think that there could be more. In spite of reforms in recent years, the committee of the whole has expanded into full-scale reconsideration of departmental expenditures and activities, thus effectively doubling the process of preparation.

The question of who should and should not attend committee hearings, at least additional estimates hearings, could do with some sensible reconsideration. At this year's additional estimates hearings a number of agencies were asked to attend and were asked questions when they did not have any additional estimates bids. However, in the case of the Prime Minister and Cabinet portfolio, and one or two others, the only officers who attended were those responsible for programs for which additional estimates were being sought. Even the President of the Senate registered a mild protest when members of Estimates Committee A asked questions about matters not the subject of estimates bids for the parliamentary departments.

The latest proposal for change from the Senate Procedures Committee would enable estimates committees to conduct supplementary hearings to explore matters now raised in the committee of the whole. That will be debated early in the budget sittings. If the change is made, it will be interesting to see whether it offers a significant advance over the present system.

Finally, since this paper is about accountability, let me make some remarks about the concept itself. The Australian public service Management Advisory Board has put out a discussion document entitled, *Accountability in the Commonwealth Public Sector — An Exposure Draft*, which states that accountability exists: 'where there is a direct authority relationship within which one party accounts to a person or body for the performance of tasks or functions conferred, or able to be conferred, by that person or body'.

Utilising this definition — which I hasten to emphasise is a perfectly respectable and orthodox description of an accountability relationship as between public servants and ministers, ministers and the Parliament, and public servants and other more senior public servants — the paper asserts, inter alia, that public servants are not, shock horror, directly accountable to the Parliament, but are accountable to and through ministers. I do not expect that proposition to be challenged in this place, but I do wish to emphasise that asserting it is not an attempt to evade responsibility, merely to define it.

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2. Senate Standing Committee on Finance and Public Administration, Report, April 1991, *Estimates Committee Documentation and Procedures*, paragraph 2.46.

Today, more than ever, it is vital that public servants understand to whom they are accountable, what they are accountable for and why. Before going to what we are accountable for, let me pose the question: what is accountability for? In my view, the aim of accountability is good governance. It has its ancient origins, in fact, in the desire for good governance. It seems to me no coincidence that, both today and in the past, those societies with systems of government that we would regard as lacking in accountability, have by and large been unable to deliver to their citizens the kinds of rights, freedoms and benefits enjoyed by people living in more open societies.

In my view, the answer to the question, 'What is accountability for?', is by no strange coincidence the same as the answer to the question, 'What are public servants accountable for?' Public servants are ultimately accountable for good governance. In that sense at least, the Parliament and the executive are, thankfully, both on the same side.

Mr Evans — On behalf of this assembled gathering, I thank our distinguished speaker for that thoughtful contribution. During the next two weeks, when the government will be trying to get an extraordinary amount of legislation through the Senate, I will quote that bit of your speech about there being too much legislation.

I am going to do what I very seldom do, and that is take the chairman's privilege of asking the first question. What if a character in Ponting's situation is before a parliamentary committee and he is directly asked questions the answers to which would reveal his knowledge of the government misleading the Parliament? Does he decline to answer the questions, which is a contempt? Does he lie, which is also a contempt? Or does he tell the truth, which puts the government right in it?

Mr Blick — There is a fourth possibility, as there always is in these situations. Under our government guidelines for evidence before parliamentary committees, I think the person being questioned would be entitled to ask either that the question be directed to the minister, or that he be able to consult the minister before providing an answer. That would certainly be the way I would approach it.

Mr Evans — But I covered that by saying, 'What if he is being asked about his own knowledge of the matter?'.

Mr Blick — Of course, as you know, there are different types of parliamentary committees. We would have to be fairly careful about defining which committee we are talking about. But there are precedents in our system. Not all that long ago, as I recall it, the head of a government department told a committee that he was unable to answer a question about the whereabouts of Coronation Hill because the minister had instructed him not to answer any questions at all on the subject.

Questioner — You talked about the minister being responsible, but do you think that, overall, the minister really knows enough? I know it is not possible to dot all the "i's" and cross all the "t's" and know everything that goes on in every department, but it seems to me, from my own experience, that sometimes the information that goes to the minister is selective. Do you have any thoughts on that?

Mr Blick — I am not going to stand here and say that the information that goes to the minister is not selective, because that is exactly what ministers need. I made a point somewhere in the paper about the exercise of judgment. That applies to judgment about not only matters of politics but also information the minister needs in order to conduct our activities. Inevitably, in exercising a process of judgment about what the minister needs to see, a number of considerations will come into play.

In the first place, even with the comparatively large number of ministers that we have in our system at the moment, we have to remember that ministers see vast amounts of information every day. Running their departments is not the only activity that ministers are engaged in. It is therefore essential for public servants, when providing information to ministers, to engage in a fairly careful process of contemplating the amount that the minister will be able to digest. It seems to me inevitable that, in that process, there will be occasions, particularly when ministers find themselves in difficulty, when people will be able to say more information should have been provided in the first place. But it is very much an exercise in judgment and, by and large, I think that people tend to get it right.

Another point that I made in the paper was that ministers have their own private staffs. There are quite substantial resources available to minister's private offices these days and a lot of what they do involves casting their eyes across material that comes from departments and deciding whether, in fact, the minister has sufficient information in that material. It is quite open to them — and indeed they do on many occasions — to go back to the department and ask for additional information if they think that what is there is insufficient.

To summarise, certainly there are occasions when the minister does not have enough information, but there are many occasions when the minister has far too much. Unfortunately, the cases which cause difficulty are likely to be those where, after the event, it could be said that more information should have been provided.

Questioner — You referred to the significant workload contributed by most public servants appearing before senate estimates committees. I know that a lot of departments in fact make the effort to contact committees and talk to members of the committees to assist them in preparing their information. You also alluded to the fact that some of these committees are sometimes used as a political forum — and I will leave it at that. From your experience, what do you suggest to those public servants seeking protection from some vexatious senators who may be pursuing their own platform and, therefore, personalising the approaches that are sometimes pursued through these committees? I do not want you to say that you always have the minister there to protect you in these committees, because it is not always the case. I was wondering — we are talking about accountability and various forums — whether some sort of ethic is to be pursued in regard to members of Parliament: how they use these forums and how they treat public servants.

Mr Blick — The first point to make in relation to that is that fundamentally this is an issue for the Parliament. Indeed, if Mr Evans has any observations to make on that subject, I will breath a sigh of relief and let him do so. Committees are chaired and the chair of the committee has the basic responsibility for ensuring that the proceedings of the committee are conducted in a way in which they should be conducted.

I am sorry you said you did not want me to tell you the minister was there because that was one of the things I was going to tell you. Ultimately, if the minister is not there, the responsibility falls back to the Chair of the committee. We as public servants have to remember that, notwithstanding any feeling we may have about the justice or injustice of the proceedings, it is our duty to conduct ourselves with decorum and politeness and to provide the maximum assistance we possibly can within the constraints of, as I have said, the rules of ministerial accountability.

Mr Evans — One of the pieces of advice I give to public servants at seminars on these sorts of subjects is, first, do not let your minister delegate responsibility downwards. I



tell public servants that they sometimes have to be firm with senators. If they are asked questions that they cannot properly answer, they just have to be a bit firm with them. There are times when public servants have to be firm with ministers and, if necessary, say in the presence of the minister that that is a question for the minister. There is a certain tendency, I think, for ministers to allow the public servants to take a pasting, thereby avoiding it themselves. One of the difficult tasks of public servants is occasionally to say, 'You're the minister, and that's what you're there for'. Firmness is required, sometimes with senators and sometimes also with the ministers.

Questioner — Could Mr Blick describe what he sees as the role of the Auditor-General in the set of accountability relationships. Does he believe there is any need to change whatever he sees as the role of the Auditor-General?

Mr Blick — Let me get out of the question in a sense by saying that the role of the Auditor-General is defined in the statute — the Audit Act. The Auditor-General has a role, it seems to me, of assisting — as the parliamentary committee set out in the excellent report on the role of the Auditor-General — both the Parliament and the executive in examining the actions of the executive and exposing, where he believes it necessary, the capacity for reform.

I assume that the second part of the question refers to the possibility of the Auditor-General becoming an officer of the Parliament. First, this government, at any rate, has contemplated that possibility and decided against it. Secondly, I am not sure that it would make any difference to the role of the Auditor-General. There is a very clear independence for the Auditor-General. So far as I am aware, that has never been challenged in any serious sense. If the Auditor-General were to be made an officer of the Parliament — in effect shifting the appropriations of the Auditor-General in with the appropriations for the parliamentary departments — nothing much would change; ultimately the parliamentary departments are as dependent as any other publicly funded body on the decisions of the government for the total size of what they get.

Questioner — I will ask you a question from a slightly different perspective. You have said much more about the input of bureaucrats to committees. I would like to ask you a question from the other direction. First, how well do you think estimates committees handle the information that you give them, because you say that you give them an awful lot of information? Secondly, what do you see as the value of their output?

Mr Blick — That was one of the things that I said at the beginning: I changed my mind about talking about it in this paper. I think to some extent I can hardly do better than refer you to the various reports that have been produced on this over the years by the committees that have reviewed the operations of estimates committees. From a purely personal perspective, I think it is fairly patchy. Some estimates committees both obtain and use excellent information and seem to have a very focused and constructive approach to the material before them. When you see their reports to the Senate — in other words, the end product of their deliberations — it is apparent that it has been a constructive exercise.

Other committees sometimes lose their way a bit. This is not necessarily because they have not asked penetrating questions but, in many cases, because they are not always able to focus on issues which, I guess from our public service point of view, we regard as being important or material. Do not get me wrong; that is not a criticism of the way estimates committees conduct themselves. As I said at one point in the paper, it has been widely agreed that many senators in estimates committees regard this as a mainly political exercise. If that is their attitude towards it, they are entitled to it.

Fundamentally, one could argue that any scrutiny by the Parliament of what the executive does is ultimately a political exercise. If I have to be pushed to a conclusion, it is that on the whole, and increasingly, estimates committees are engaging in reasonably positive activity, but it is not difficult to point to areas where they are not.

One more point I should make is that — particularly in the last year or so with the improvement that we have been making in program performance statements and particularly in relation to reporting on the way in which our activity has related to results — the estimates committees have been able to focus far more on matters that we regard as important, such as the results of spending the money we are seeking to appropriate, as distinct from what was widely recognised as a deficiency in the past: that of either looking for mistakes in the documentation or focusing on very narrow issues of spending which really had no great importance in the wider scheme of things.

Questioner — We have seen a number of government departments hived off into government business enterprises. Do you see that as a dilution of ministerial responsibility? What is the role of an employee in those sorts of areas?

Mr Blick — That is a very interesting question. When it comes down to it, ministerial responsibility has never been exclusively defined in terms of a relationship between a minister and a department of state. However, that is the relationship by which the traditional Westminster notions of ministerial responsibility and accountability are at their most easily defined. Once you start getting away from that relationship you get a range of arrangements — probably all of which have been defined one way or another by the Parliament — where either the Parliament or the executive, or both, have decided to distance themselves from decision making, and thus have in effect given up some accountability requirements that would apply, for example, in departments of state.

The Auditor-General is not a government business enterprise, but I guess it is one end of the spectrum. No-one would seriously want the government — or for that matter the Parliament — to interfere with what the Auditor-General does. Therefore, the Parliament has enacted a piece of legislation which, so far as possible, protects the Auditor-General from interference by either of those entities.

In setting up government business enterprises — which is a comparable activity, although I accept it is in a different area — governments and the Parliament deliberately and consciously decide to waive certain rights in relation to those particular entities. In relation to government business enterprises, the government has also taken back some of those rights; it has redefined them; it has said that it will set corporate goals for these entities and that it will contract with those entities to get certain results, but that it will not care too much about what goes on in those entities so far as their management is concerned. That is the size of it, as far as I am concerned. There has been a deliberate decision. It does not necessarily mean — and indeed the Parliament would strongly resist the view that it means this — that the Parliament is not entitled to inquire into the operation of those entities. The government is distancing itself from responsibility for their management on a day to day basis.

Questioner — Could I revisit the convention concerning accountability between ministers and the Parliament, and public servants and their ministers. I note that recently there has been a significant change or diminution in the concept of ministerial responsibility. That convention seems to undergo change every decade.

I wonder whether there is some dysfunction between the new emphasis on accountability and the very adversarial nature of our politics. I think that has been highlighted in a couple of questions today. I for one would be much happier if accountability rather than the adversarial nature of politics won out. I wonder whether you have any comments, particularly in the light of the first question on Ponting, which highlights the adversarial nature and the accountability requirements quite pointedly.

Mr Blick — I want to take issue, to some extent, with some of the thoughts that I think were underlying that question. First, let us assume that you are saying that things are changing and getting worse and that ministerial responsibility is not what it was. Let me suggest to you that if the Clive Ponting case had happened in the 1930s or 1920s the poor guy may have found himself being executed. That is the difference in the total situation. As I mentioned, in that case a jury of twelve good people and true decided that what was being put to them by the government and the judge was all nonsense and they duly acquitted him.

As I said to you in the address, I happen to think what Ponting did was not what he should have done. I think that there are some very clear and simple rules for public servants in these cases. I have to emphasise that this does not mean that public servants are not entitled to a conscience. It does not mean that public servants are not entitled to put to ministers the very real fears that they may have if ministers are, as they perceive it, engaged in doing things that are not in accordance with the system. But as long as it is not a crime to mislead a parliamentary committee then my view is that ministers, if they are ultimately silly enough to want to do it, have the right to do it. It is on their heads and not the heads of the public servants if that is what they do. What is on the heads of the public servants, if they are aware that it is likely to happen, is to point out to them in the strongest possible terms the consequences that might flow from it.

In our system of government, as I mentioned in the paper, misleading the Parliament is one of the sins that ministers have been most sensitive to. Certainly, in my experience, if there is ever any suggestion within the executive that a minister has misled the Parliament — usually the suggestion is that it has been done inadvertently — every effort is made, at the earliest opportunity, to put it right. I could go on but I hesitate to do so.

Mr Evans — We all express our appreciation to the speaker.

## Parliament: An Unreformable Institution?

Harry Evans

The Senate Department has been conducting these occasional lectures since 1988. The very first lecture in that year was on the Revolution of 1688. Little did we know then that we were living in a revolutionary era all of our very own. Since that time, we have had a long line of very distinguished lecturers. You might say, 'The long line comes to an end here', but I hope this one will not be the start of the decline of the series.

There are two reasons for this lecture: having on so many occasions introduced other lecturers, I had a strong inclination to get in my two cents worth, and secondly, it is very difficult to get speakers to come to Canberra in the middle of winter. I am tempted to use the Shakespearian line 'Now is the winter of our discontent . . .', which is somewhat appropriate because the subject of this lecture is the discontent with the workings of the parliamentary system of government over the last thirty years or so, and the outcome of that discontent.

By the parliamentary system I mean the system whereby government is carried on by a ministry formed by the majority party in the lower house of the parliament, the system which has been inherited from the United Kingdom by many other countries, and particularly by the 'old Commonwealth' countries, Australia, Canada and New Zealand. In all of those countries the workings of the parliamentary system have been perceived to have similar problems, and the discontent with its operations has led to a parliamentary reform movement, or movements, which have waxed and waned over that period. In recent times those movements have undergone a significant change. The purpose of this lecture is to examine the perceived problems with the institutions, the parliamentary reform movement and its manifestations and significance, and suggest some conclusions, particularly with reference to Australia.

The fundamental reason for the discontent with the parliamentary system to which I have referred, is the tendency in all those countries towards stronger and stronger executive government control over parliament through the operation of the party system. Executive domination of parliament has been the great theme of the parliamentary reform movements. The phrase which catches this theme is that parliament has become a 'rubber stamp'. It is perceived that there has been a significant change in the role of parliament, in that it has ceased to perform its traditional role as a check on executive government, in both senses of scrutiny and restraint, and has become a mere tool of those wielding the executive power. Instead of executive governments being responsible to parliaments, parliaments have become responsible to executive governments. The body which is supposed to be scrutinised and controlled by parliament has actually come to control the body which is supposed to be doing the scrutinising and controlling — a reversal of roles.

The reason for this change, it is universally agreed, is the rise of the modern political party, a highly cohesive and tightly disciplined organisation, the aim of which is to

ensure that all its members in parliament always vote with the party and, when the party is in the majority, always support the government formed by the party. The executive government was supposed to be responsible to the lower house of parliament. The modern political party has grown up as a device for avoiding that responsibility, to make sure that the executive is responsible to the party and not to the parliament, and that the parliament, particularly the lower house, never administers that responsibility. Members of parliament no longer see themselves as the scrutineers and controllers of executive power, but as either the supporters of the government or the supporters of the would-be government. This system of two highly disciplined parties, competing for the executive power and turning parliament into a mere electioneering forum, is no more than one hundred years old, having emerged in the United Kingdom in the 1880s and gradually spread to the colonies in the early years of this century. The parliamentary reform movements to which I have referred are essentially about what to do to correct this problem of the reduction of parliament to a rubber stamp and the degeneration of its scrutiny and control function.

It is very easy to be cynical about the demands for parliamentary reform, as it is about the workings of parliament itself. A Canadian correspondent of mine, who is a long-time student of parliamentary matters, observed that when the government had a secure and compliant majority in the Canadian House of Commons, people complained about parliament being a rubber stamp, and when there was a minority government and parliament operated as the UK Parliament did between the two reform bills, as the scrutineer and controller of the executive, people complained about instability of government. There is a good deal of truth in this, but underlying the demands for parliamentary reform are very real problems with parliamentary institutions as they now operate.

It could be said that the parliamentary reform movement began at the same time as the modern party system. No sooner had Mr Gladstone won the 1880 election and the modern two-party system was established, than authors such as Sir Henry Maine were warning of the dangers of the control of parliament by latter-day Napoleons claiming a popular mandate and using their party majority to overwhelm all opposition.<sup>1</sup> The discussion and agitation for parliamentary reform, however, was particularly a phenomenon of the 1960s and 1970s. Starting in the late 1950s, there was assembled in the UK a vast literature on the subject of parliamentary reform, beginning with diagnoses of the ailments of the 1950s House of Commons and extending into elaborate programs of specific reforms. Probably the high-water mark of the movement occurred in 1964 with the publication of a book entitled *The Reform of Parliament*<sup>2</sup>, by Professor Bernard Crick, a professor of political science who became a high priest of the movement, and whose program became the established orthodoxy. Discontent with parliament was by no means confined to radicals, and some of the most devastatingly critical and significant contributions were made by the conservative Lord Chancellor, Lord Hailsham. It is not true, by the way, that he became a parliamentary reformer only when there was a Labor government in office, and some of his most trenchant observations were made after some years under Mrs Thatcher<sup>3</sup>, which may be significant.

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1. *Popular Government*, 1885. Also speech by Lord Salisbury, in A. Beattie, ed., *English Party Politics*, vol. 1, 1660-1906, 1970, pp. 157-8.

2. 2nd ed., 1968. The prefaces and the first chapter refer to some of the other literature.

3. 'Elective Dictatorship', BBC address, published in pamphlet, 1976. 'The role of an Upper Chamber in a modern Parliamentary Democracy', *The Parliamentarian*, October 1982, p. 290, esp. at 293.

The demand for parliamentary reform spread from the UK to the dominions, as they were then still called, extremely quickly, and it is easy to identify a parliamentary reform literature and agitation in each of the countries I have mentioned by the mid-1960s. Of all those countries, the movement was the weakest in Australia, a matter to which I shall return, although it was still much in evidence. I recall reading in 1965 or thereabouts, an essay by a well-known member of the House of Representatives, H.B. Turner, in which he described the problem of executive control of parliament and set out his own remedies, particularly an expanded committee system.<sup>4</sup> Perhaps the most conspicuous proponent of parliamentary reform in Australia was the late Professor Gordon Reid, who subsequently became Governor of Western Australia, and whose writings may be taken as representative of the parliamentary reform literature in Australia.

In the parliamentary reform movements there were two schools of thought: those who believed that the problem of parliamentary government could be rectified only by radical constitutional or institutional changes, and those who thought that moderate institutional and procedural changes could help to ameliorate the situation.

The radicals tended to consider that the parliamentary system contained a fatal flaw in the combination of the legislative and executive powers in the cabinet, and that supervision of the executive by the legislature could not be restored except by major changes to the institutions of government, generally speaking involving some greater separation of the executive and the legislature. This school of thought often manifested itself as a hankering after the American system of the separation of the legislative and executive branches. It was reflected in the editorials of *The Economist* for some years, if not in recent times.<sup>5</sup> It is not generally known that the then Leader of the Labor Party, Mr Arthur Calwell, in a speech in the House of Representatives in 1965, said that the parliamentary system was hopeless and that Australia would have to embrace a presidential/congressional system<sup>6</sup>; this may have been an expression of frustration rather than his considered view of the matter.

The dominant school of thought, however, was that of the moderate procedural reformers. They thought that the problem of parliament failing to supervise or control the executive could be at least partly overcome by modest and piecemeal procedural reforms. This was the dominant view in the 1960s and 1970s. In his seminal work, Professor Bernard Crick made much of his avoidance of radical institutional changes, in which category he included, for example, proportional representation. His program involved equipping the House of Commons with the procedural means of better scrutinising the executive.

The great remedy which nearly all parliamentary reformers embraced was an expansion and enhancement of the parliamentary committee system. This was the one measure which was adopted by virtually all shades of opinion, from the most radical to the most moderate. It would be no exaggeration to say that the whole parliamentary reform movement was a movement for parliamentary committees. A comprehensive, subject-specialised, standing committee system for the House of Commons was the centrepiece of Crick's program. Expanded committee systems were

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4. 'The Reform of Parliament', *Australian Quarterly*, December 1965, pp. 56-64. Also 'Backbenchers', *Current Affairs Bulletin*, 18 April 1966, which also contains a bibliography of reform literature.

5. 'Blowing up a Tyranny', *The Economist*, 5 November 1977; 'The British Constitution, cont', 11 May 1991; 'Time to Change', 6 July 1991.

6. *House of Representatives Debates*, 14 October 1965, pp 1818-19

seen as the means of redressing the balance between parliament and executive. They would provide parliament with the procedural machinery to scrutinise executive activities more effectively and to exert a greater influence over legislation and administration. 'Get the business of parliament into committees', was the cry, 'and there the stranglehold of the ministry will be weakened, the business will be dealt with in a more parliamentary fashion and the government held more effectively accountable'.

This remedy was not only propounded in the literature in all the countries about which I am speaking, but was adopted as a practical measure in various guises, at one time or another. After a period of experimentation with various kinds of committees, the British House of Commons established a comprehensive committee system, one of the first measures of the then newly-installed Thatcher government in 1979. The Canadian House of Commons and the New Zealand House of Representatives strengthened and enhanced their systems of committees in the 1960s and again in the mid-1980s. Also after a period of experimentation with select committees, the Australian Senate established a comprehensive standing committee system in 1970. It was a remarkable instance of the way in which practical measures are influenced by the prevalence of an idea whose time appears to have come. Accompanying the establishment or improvement of the committee systems were many other procedural measures which can also be traced back through the literature of the parliamentary reform movements.

What was achieved as a result of this spread of reform measures? It is generally agreed that the expansion of committee work has improved the performance of the various parliaments as monitors and scrutineers of policy and administration, and that the committee systems have done a great deal of good work. It is fairly clear that all of the parliaments concerned perform better in this regard than their predecessors of the 1950s. Contrary to the expectations of some of the more optimistic reformers, however, not much of a dent has been made in executive government control over parliaments, particularly lower houses. There may have been a minor shift in the balance of power between the legislature and executive, but everywhere the initiative in policy and legislation still rests very firmly with the executive, and the influence of legislatures as such is marginal.

Perhaps because the balance has not radically changed, discontent with parliamentary institutions has not gone away. On the contrary, there has been a noticeable radicalisation of the parliamentary reform movements and a tendency for reformers to move towards radical constitutional and institutional changes. There has been a shift to a view that parliament is unreformable, and that it is necessary to go over parliament's head, so to speak, to the people and the constitution. This radicalisation of the reformers is apparent in all countries, but with variations which are significant.

It is ironical that this phenomenon of the radicalisation of the reformers is most noticeable in the UK where, of all places, the parliamentary reform movement had the greatest success. It would appear that the committee system which was established in the British House of Commons has been the most successful of all. The committees have now become a conspicuous and important part of the parliamentary and political landscape. Their inquiries appear to be nearly always topical and on important subjects. Their success may be measured by the amount of trouble they cause the government, and that is very significant indeed. They habitually inquire into matters which the government would prefer to keep under cover, and are often present in great political crisis. The most recent example of this was the way in which the Social Security Committee was able to pursue the matter of the Maxwell pension

funds and act as a focus for the concerns about superannuation to which that affair gave rise. There is now an extensive literature analysing the work of the committees<sup>7</sup>, and it is difficult not to feel a certain admiration for what they have achieved when one goes through that literature.

Whether there is any connection between the establishment of the committee system and the noticeable decline in government control over the House of Commons is a moot point; that decline appears to have begun in the 1970s but to have been accelerated by the committee system. Although a government with a reasonable majority still has a very strong hold over the House, there has been a notable increase in the number of occasions on which the House does not do what it is told. This weakening of executive control has been chronicled by Philip Norton, one of the moderate parliamentary reformers.<sup>8</sup> The most recent manifestation of the Commons kicking over the traces was the election of Betty Boothroyd as Speaker; apparently the government took note of past hints and kept right out of the matter. As for the House of Lords, its praises as a non-partisan restraint on government have been sung in many places, and a constitutional author recently suggested that, as the Lords is now a restraint on governments of both parties, contrary to the demands of reformers over many years it should be left as it is.<sup>9</sup> It would be a great irony if that view prevailed and people came to the conclusion that the only way to get a properly functioning house of parliament is to keep the old House of Lords.

Notwithstanding this apparent improvement in parliamentary performance, the parliamentary reform movement in the UK has become very radical and more vociferous. The reformers have turned to fundamental constitutional and institutional reforms as the solution to the perceived problems of the system of government. It is not possible even to dip into the literature on government and politics in recent years without coming upon programs calling for a written constitution, an elected second chamber, a bill of rights and a federal system, with provincial parliaments for Scotland and Wales. Much of this agitation has to do with Britain's membership of the European Community: that has made many Britons feel that their old constitution is out of date compared with those of their neighbours. The jurisdiction of the European Court has greatly added to the demands for a domestic bill of rights, so that constitutional rights cases will be heard in Britain rather than Strasbourg. While this is a significant factor in constitutional agitation, it is easy to see that the more radical reform movement of the late 1980s and 1990s is a direct descendant of the earlier, more moderate movement. Apart from anything else, it has much the same membership: Bernard Crick announced in 1989 that the earlier reforms which he had so successfully championed were largely a waste of time and that more radical constitutional changes are now required.<sup>10</sup> There is a body known as Charter 88, formed at the time of the tercentenary of the Revolution of 1688, which advocates wholesale constitutional change starting with a written constitution.<sup>11</sup> The program of the reformers has found its way into the platform of the Labor Party, which went into the last election committed to an elected second chamber and some sort of federal

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7. For example G. Drewry, ed., *The New Select Committees: a study of the 1979 reforms*, 2nd ed., 1989; also 'Select committees: progress report 1989-90', *Contemporary Record*, April 1991, pp. 29-30.

8. *Parliament in Perspective*, Hull University Press, 1987. Also 'No to a new constitution', *The House Magazine* (UK), 20 May 1991, p.14.

9. R. Brazier, *Constitutional Practice*, Oxford, 1988, pp. 220-3.

10. 'Beyond parliamentary reform', *Political Quarterly*, Oct-Dec. 1989, p.396.

11. R. Holme and M. Elliott, eds, *1688-1988: Time for a New Constitution*, Macmillan, 1988.



system. Recently I was visited by a Labor peer who had come to look at an elected upper house to see how one might function with proportional representation in the UK. I do not know whether he went away enlightened or frightened, but he found it interesting because, as he said to me, 'we might be in office and we might have to put one in place; people will hold us to it'. The result of the last election may postpone any result of this constitutional fermentation, but it is a fairly sound prediction that it will be a postponement only. The majority of judges and lawyers now accept at least an incorporation of the European Convention on Human Rights into the domestic law of the UK.<sup>12</sup>

Turning to Canada, we find nothing less than the unravelling of the whole country. The constitution and the whole system of government has been thrown into the melting-pot in the most remarkable turn of events in any of the countries under consideration. It is obvious that the main cause of this is the problem with Quebec.

The collapse of the Meech Lake Accord on constitutional reform, brought about by the demands of Quebec for special status and the refusal of some other provinces to accept such a status, is obviously the major factor and the major difficulty in the constitutional deliberation process which is still going on. It is also fairly obvious, however, that discontent with the performance of parliament and a continuation and a radicalisation of the parliamentary reform movement has been a major ingredient in the current situation. In particular, a constant theme which runs through the literature and agitation on constitutional change is discontent with the performance of the House of Commons and the appointed Senate. The enhanced committee system of the House was not a great success; the committees acted like miniature Houses in a way in which that phrase was not intended, because the party whips exercised rigorous control over their membership and activities. The poor performance of the committees is a recurring theme in the remarkably strident attacks on the House of Commons, which is seen as something even less than a tool of government of the day. As for the Senate, the replacement of that body with some sort of elected second chamber has been close to the top of all reform agendas for over ten years. The less populous provinces, particularly the western provinces, feel a great sense of alienation from the political system, which they regard as dominated by Ontario and Quebec, and they attribute this to the swamping of their representatives in the House of Commons. The principal demand from the western provinces has been for what they call a 'Triple-E Senate', a Senate which will be elected, equal and effective. They have demanded equal representation in a directly elected Senate which would have sufficient power to correct the imbalance in the House of Commons.<sup>13</sup> This has obvious significance for Australia, to which I will return. In recent months the federal government has drawn up its preferred constitutional change package, and an elected Senate is one of its principal proposals, although questions about composition and powers are only vaguely answered. A few days ago it was announced that the government had capitulated to the demand for equal representation of the provinces in the Senate.<sup>14</sup> A significant feature of the constitutional discussion is the recognition that the new constitution should have the authority of adoption by referendum. It can be predicted with considerable confidence that there will be radical constitutional changes in Canada because there is nowhere else for the country to go.

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<sup>12</sup>. *A British Bill of Rights*, Institute for Public Policy Research, Constitution Paper No. 1, 1990. Also K.D. Ewing and C.A. Gearty, 'Civil liberties: decline in 1980s', *Contemporary Record*, April 1991.

<sup>13</sup>. Alberta, Select Special Committee on Upper House Reform, *Strengthening Canada: reform of Canada's Senate*, March 1985; also R. White, *Voice of Region: the long journey to Senate reform in Canada*, Dundurn, 1990.

<sup>14</sup>. 'Premiers break unity log-jam', *The Globe and Mail*, Toronto, 8 July 1992.

When one talks to New Zealanders about their parliamentary system, two observations keep recurring. One is that they are closest of all to what Lord Hailsham described as the elective dictatorship, with no written constitution, no entrenched rights, no second chamber and no provincial governments. There are many New Zealanders who claim to lie awake at night worrying about the fact that nothing stands between them and the unlimited power of a majority of the House of Representatives. The other frequent observation is that the select committee system of the House is meant to be a substitute for a second chamber. On paper the committees look impressive. They are very active, most bills are referred to them, they habitually take evidence from affected groups and interested members of the public on legislation, and legislation is frequently extensively amended in the course of their deliberations. Governments still appear to have the final say, however, even on the committees, through their party majority. The home-grown reformers are certainly not satisfied with the system, and radical criticism of parliament and the system of government has grown noticeably in recent years.<sup>15</sup> It does not seem to have been satisfied by the measures of the National government or by its noticeably weaker party discipline. I have a New Zealand correspondent who writes on parliamentary matters and who habitually likens the House of Representatives to its Albanian counterpart, which must be at least a mild exaggeration.<sup>16</sup> Since the revolution in Albania he will no doubt have to find a new analogy. There have been strong movements in recent times in favour of an elected second chamber of some sort, and of the election of the House of Representatives by proportional representation. The National government, before its election, flirted with both of these ideas, and decided to hold a referendum on proportional representation, which is due later this year. It is difficult to believe that the existing parliamentary system will emerge intact from this period of constitutional agitation.

Looking at Australia, it is found that most of the parliamentary reform measures have been concentrated in the Senate, with the establishment of the standing committee system and, in more recent times, the enhancement of the scrutiny of legislation through the establishment of the Scrutiny of Bills Committee, and the new procedures for the reference of bills to committees. A conspicuous feature of Australia's recent history has been the diversion of reform demands into non-parliamentary channels, and the establishment of a structure of non-parliamentary safeguards and institutions which are still the subject of intense foreign interest. I refer particularly to the freedom of information legislation, the overhaul of administrative law and the establishment of the administrative appeals jurisdiction through the Administrative Appeals Tribunal, the enhancement of other review mechanisms, and the establishment of a host of other institutions such as independent prosecutors, independent commissions against corruption, criminal justice commissions and so on. The establishment of these institutions has put Australia well ahead of other countries in this field, and it could be said that, of the four countries under consideration, Australia has exhibited the most radical changes in its system of government, through purely legislative and non-constitutional means. The parliamentary reform movement, however, remains fairly strong; nearly everyone who writes about parliament is a reformer, and the literature is full of the compulsory lamentations about the party system and executive government dominance. The pace of change in

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<sup>15</sup>. The *New Zealand Law Journal* had a series of articles on constitutional reform: 'A second chamber for the New Zealand Parliament?', January 1988; 'Constitutional arrangements', October 1990; 'Electoral reform', November 1990; 'A second chamber', December 1990; 'The form and powers of a new second chamber of Parliament', January 1991.

<sup>16</sup>. T. McRae, 'National's upper house plans need rethinking', *National Business Review*, 17 April 1990.

parliamentary procedures has quickened noticeably in the last few years, and undoubtedly will not slow in the near future.

The conspicuous difference between Australia and the other three countries, however, is that there has been no real radicalisation of the parliamentary reform movement into an agitation for changes to the fundamental institutions of government. It might be argued that the recently-revived republican movement provides some evidence of a demand for fundamental changes, but, on the contrary, the agitation of the republicans is clear evidence of the absence of a demand for changes to the basic institutions of government. The republican movement, following the line taken by its principal academic proponent, Professor George Winterton, is very anxious to convey that it aims only to replace the head of state with some sort of indirectly elected presidency which would amount to a governor-general without the crown.<sup>17</sup> The republican literature stresses that the two Houses of the Parliament and the basic structure of the Constitution would be left alone. This may be merely a tactical line, and may not reflect the real views of a good many members of the movement, but even as a tactical line it is strong evidence of the absence in Australia of any widespread demand for radical changes to the basic institutions of government, and particularly to the Parliament.

It might also be contended that this is another example of Australia having not completely caught up with the overseas intellectual fashion, which will arrive and gain a hold on these shores just as it is weakening in other places. This might be so if one could dismiss the constitutional agitations in the other countries as merely the latest preoccupation of the 'chattering classes'. This, however, is clearly far from a sufficient explanation of the discontents which have arisen in those countries. They clearly reflect real problems affecting real people. In the UK the inhabitants of the provinces feel burdened with the centralisation of Whitehall, and people caught up in the toils of government have real frustrations with the seeming immovability of the system and the absence of clear legal remedies except through the institutions of the European Community. In Canada the alienation of the smaller provinces, which has given rise to the demand for an overhaul of the Parliament, is clearly a major political factor to be reckoned with. In New Zealand there is a real sense of frustration with the system whereby a government winning forty-odd percent of the vote can virtually instantly dismantle all the economic and social measures put in place by the party which won the forty-odd percent in the last election, and the ghost of the Muldoon Government, with its close regulation of the economy, hangs over the system. These or similar factors are simply not present in Australia in anything like the same strength.

This leads to the major significance for Australia which I would draw from the radicalisation of the reform movements in the other countries. The most striking feature of those reform movements is that they are demanding the very institutions which Australia already possesses: written constitutions with the authority of popular approval, elected second chambers as brakes on the powers of governments with entrenched control of lower houses, constitutional and legislative safeguards against excessive executive government power, and real federal systems. The demand by the alienated provinces of Canada for equal representation in an elected second chamber should demonstrate how much that institution has contributed to Australia's stability without our really being aware of it.

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<sup>17</sup> G. Winterton, *Monarchy to Republic: Australian Republican Government*, Oxford, 1986, Chapter 7; also his model constitutional amendment bill and introductory article in *The Independent Monthly*, March 1992.

The significant thing about these reform movements as I have characterised them is that they do not really have any new ideas. The ideas they are propounding are old ideas of the last century. I maintain that that is because in government there are very few new ideas. In many of their aspects the reform movements are a rediscovery of the liberal constitutionalism and the constitutional devices which were propounded in the last century. This may be seen as part of a general cultural phenomenon of the present era. The first eight decades of the 20th century were something of a mini-dark age politically, and the mini-renaissance which is now taking place is a rediscovery of political principles formulated in the 18th and 19th centuries. This is clearest in relation to Eastern Europe where, as some commentators have suggested, there has been what might be called a great leap forward into 19th century liberalism. A Russian academic visited me a year or so ago and somebody said to him, 'Who was the greatest Western author who influenced your recent revolution?' He answered in a half-ironical tone: 'John Stuart Mill', which I think characterises the nature of the revolutionary changes that we are now going through, a rediscovery of principles of previous centuries and a rediscovery of the validity of those principles. The same phenomenon is evident in the West.<sup>18</sup>

In this situation, the fact that Australia has preserved intact a constitution framed in accordance with the principles of late-19th century liberalism and constitutionalism, puts it ahead of the other countries we have been considering. Australia already possesses those institutions which they are now seeking to establish or revive. The allegedly out-of-date character of the Australian Constitution is actually an advantage. To some extent this is due to our founding fathers being cleverer than theirs. The people who drew up our Constitution did not stick with the Westminster model as it had been handed down to them; they were willing to adopt institutions and ideas from elsewhere, to draw on the radical liberalism of the 19th century and the institutional remedies that were propounded by that school of thought. The determination of the framers of the Canadian and New Zealand systems to follow the British pattern as closely as possible and avoid such things as genuine federalism and elected second chambers can now be seen to be a serious mistake in need of rectification. In large part, however, credit is due to the relative difficulty of changing the Australian Constitution, which has meant that we have preserved intact the very institutions of 19th century liberal constitutionalism which they have lost and are now painfully rediscovering.

This is not to say, of course, that constitutional and institutional improvements cannot be made in Australia, but it does mean that we can afford to eschew fundamental constitutional changes and concentrate upon improving the operation of the institutions we already have. In the absence of any real demand or need for changes to the basic institutions, we can afford to be 1960s-type moderate parliamentary reformers, seeking modest institutional and procedural adjustments to ameliorate the difficulties to which the parliamentary system gives rise. In so doing we can actually adopt some of the institutional and procedural changes which have worked in other places.

There are several such measures which the Australian Parliament could adopt to improve our system. To give a simple example, in the UK House of Commons not only do the party numbers on committees reflect the party strengths in the House, but the chairmanships of the committees are divided up in a similar way. This is probably a reason for the relatively impressive performance of their system. In Australia the

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<sup>18</sup>. The 20th century has contributed nothing radically new to political thought or practice, except totalitarianism. To continue the Renaissance analogy, thinkers like F.A. Hayek and Karl Popper may be considered to be our Petrarch and Boccaccio, leading the way in a revival of the lost learning.

chairmanships of committees are held by government members and they tend to be seen as government jobs. It could greatly improve the operation of the committee system if we adopted this device of sharing the chairmanships. The same principle could well be applied to other parliamentary offices, including those of the Presiding Officers and their deputies.

One area in which the Australian Parliament has been relatively backward is the consideration of legislation in committees, which has great potential to improve the scrutiny of legislation as well as save time in each House. There is a great deal of potential for expansion in this area in the Australian Houses, building on the tentative step taken by the Senate in 1989 and 1990. The most important advantage of this proposal is that it allows an expansion of public participation in law-making.

Another area in which the Australian Houses have been relatively backward is in time management. This means not only management by the Houses of their available time but better management by the executive government of its legislative program. No other houses are asked to pass so much legislation in such a short time, and no other houses put up with such a lack of appropriate information about the government's program. There is great scope for better organisation in this area.

One of Australia's great strengths is the highly developed system for the technical scrutiny of legislation, through the two Senate legislative scrutiny committees. This is also a feature of the Senate which foreigners frequently come to study. A recent report by a House of Lords committee, for example, seeking to improve the scrutiny of legislation in that House, drew heavily on the Australian experience.<sup>19</sup> In accordance with the principle of building on established strengths, useful work could be done in this area, for example, by strengthening the links and coordination between the various committees and with expert bodies, such as law reform commissions, concerned with legislation.

There is already occurring, mainly through amendment of legislation in the Senate, a considerable expansion of the parliamentary control over delegated legislation and quasi-law made by the executive government. There is great scope for improving parliamentary control over legislation and administration in this area. This is also an Australian strength on which we can build. These sorts of reforms will not remove the control of lower houses by governments, but will strengthen the institutional arrangements we already have which ameliorate that control.

This is the lesson which I would draw from this little essay in comparative government. Of all the countries which adopted the so-called Westminster system, Australia, by amalgamating it with the kinds of safeguards favoured by 19th century liberal constitutionalists, ended up with probably the most durable and soundest version. By the kinds of improvements I have mentioned a fundamentally sound system can be made better, and can continue to provide an example to other countries.

Questioner — Do the new British House of Commons committees have a significant influence on legislation? Are bills referred to them, for instance? Does the executive take any notice of them?

Mr Evans — Bills are referred to them only on an ad hoc basis at present, and there is a strong move to refer other bills to them. As you probably know, the British have

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<sup>19</sup>. Select Committees on the Committee Work of the House, HL 35 of 1991-2.

strange things called standing committees which look at legislation. They are not like our standing committees; they just do what we do in the committee of the whole. They virtually always vote on party lines, although government defeats in standing committees are not unknown on particular pieces of legislation. But there is a move to send legislation off to the specialised select committees. They have dealt with a number of bills and, like our Senate committees, whenever they get hold of a bill they almost invariably change it quite extensively, and people think that they have done a fairly good job and there ought to be more of it. If that happens, the committees will impact in a very significant way on legislation, I believe. Government control over legislation is much less rigid there than it is here anyway. Governments do not expect to get their legislation through intact. They certainly do not expect to get all their legislation through intact as they do here. A certain amount of amendment of legislation goes on anyway. But if these committees become more active, I think there will be a very significant impact on legislation.

Questioner — I have two questions on Australian reform. I want to know what the status is of the call for a bill of rights as part of your Constitution and also whether you would have to radically revise the Westminster system to have any mechanism where the minority party in power could also introduce legislation so that there would be more of a bipartisan approach to some of the debate.

Mr Evans — Bills of rights are high up on the agendas of the reformers in the countries that I have mentioned, including, as I said, in the UK. There is a very sound intellectual case that can be made against bills of rights in so far as they transfer legislative power to judges. You get judges law-making to a far greater extent than they do now. Some people are frightened by the example of the United States, where important public policy questions, such as abortion, are decided by the Supreme Court. While an intellectually respectable case can be made out against bills of rights, it is significant that bills of rights feature high in the agendas of the reformers in those countries. The Canadians adopted one of sorts; that will no doubt be built into their new structure, whatever their new structure is. But people do feel that governments are too powerful vis-à-vis the individual, that individual rights are insufficiently safeguarded and that bills of rights and judicial remedies will be a solution to that problem. It is probably inevitable that every country will end up with a bill of rights of some sort. The British have already acquired one through the European Convention. It is inevitable that they will end up with that in their domestic law in one form or another. I think the same thing will happen in other places. Even though one can make out a case that it is not a very good idea in some respects, it is an idea which will come, I am sure.

In regard to the other question about opportunities for non-government people to participate in legislation, that has been the most marked feature of the development of the Westminster system. Governments have insisted on keeping total control over legislation. They want their legislative program enacted, preferably without changes at all, and they do not want anybody else's legislative program enacted. I think that will break down to a certain extent. I think that governments will maintain the initiative basically, but in the future in all so-called Westminster countries that will break down. You can see it to a certain extent in some places now. Possibly it will break down by the adoption of proportional representation, and by greater representation of independents and minority parties in parliaments. That will be one mechanism which will bring it about. But I think that apart from such changes there will be a breakdown in rigid government control over legislation. There again, we are one jump ahead of everybody in that respect because, as an author pointed out not so long ago, Australia has always had strong bicameralism and troublesome upper

houses that interfere with government programs and reject legislation<sup>20</sup>, so it is nothing new to us.

Questioner — You brought up the point of delegated legislation. Are there any countries where parliaments can actually amend regulations, as opposed to just knocking them out? That seems to me to be a major area where the Parliament is thwarted. Even though it thinks it has done what it wants to do, it then cannot get the regulations it wants in.

Mr Evans — While we have a very good system for controlling delegated legislation through the Senate Regulations and Ordinances Committee, some countries are ahead of us in this because there is a much greater use of delegated legislation which does not come into effect until it is approved by both houses, and delegated legislation which can be amended by both houses as well as merely vetoed by either house. Even some of the Australian States have got into that area. It is starting to creep in at the federal level in Australia by ad hoc amendment of bills in the Senate. Senators look at bills and think, 'Here the Minister is empowered to make guidelines. These guidelines are pretty important. We will put in an amendment to make them subject to the approval of both Houses, or subject to amendment by both Houses'. We have instruments that are subject to amendment now by a process of ad hoc amendment of bills in the Senate. I think that area will expand. One of the things I have suggested as a reform we can undertake is greater use of delegated legislation as an alternative to primary legislation. That frightens people because they think that it increases the power of the government. But if the two Houses keep control of it by the sorts of devices that we have mentioned, you can make greater use of delegated legislation while still enhancing the power of the two Houses. Delegated legislation subject to amendment and to parliamentary approval could help to ease the legislative log-jam that we have in the two Houses at present.

Questioner — It was said in the recent claim by the Australian Democrats that they regard the vote for the Australian Senate as entirely different from the vote for the House of Representatives, which brings the prospect of major legislation initiated in the lower House being different from the intention of the majority of members of the Senate. Are there any moves afoot to make resolution of such a prospective dispute easier than the current double dissolution method?

Mr Evans — We have the situation already where the government does not control the Senate and is at the mercy of a minority party, or the combination of the minority party and the Opposition. I do not think that situation is going to change. Governments have learned to live with it over the years and they will probably continue to live with it. As for an alternative to the double dissolution mechanism, I think the only alternative is compromise. The founding fathers, as you know, proposed referenda as one possible deadlock-breaking device, and there are other propositions, but I think the only practical alternative to double dissolution is compromise.

I mentioned before that part of the program of the reformers is proportional representation. They promote proportional representation because they say it leads to no party getting a majority and to a European-type situation whereby the parties have to compromise, to come to agreement about measures. That is seen as a good thing because the alternative is having someone who, as I said, has 40 per cent of the vote,

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<sup>20</sup>. C. Sharman, 'Australia as a compound republic', *Politics*, May 1990.

running the country. So it is significant that proportional representation is a large part of reformers' programs in other countries.

I think in the future we will move away from the idea that government is all about electing a government which can do what it likes for three years, at the end of which time we decide whether to throw it out or not, having regard to whether the other lot are any good. Other countries do not run their affairs like that, and I think eventually the so-called Westminster countries will come not to run their affairs like that.



## The Truth About Parliamentary Committees

Senator Bruce Childs

Ladies and gentlemen, the issue of parliamentary committees is, of course, a vast topic and I will not try to be comprehensive. I will try to give you a subjective analysis based on Senate committee experience. Everyone in the political process has an angle. Senators and members are clearly political animals. They have clear political objectives — or sometimes not so clear political objectives — which might be covered by high sounding rhetoric. The truth is that everyone in the government process has an angle, an agenda or preconceived ideas that influence their actions. Sometimes there is harmony, but very often there are differences and very often they are not acknowledged.

Take executive government. You have a cabinet and ministers. Those ministers have usually worked hard for the day when they lay down their policy in their political image. The individual minister has a small personal staff of half a dozen who have to look after their minister, facing the outside world and, of course, over their shoulder, the department. The ministerial staffers are like the tasters to the kings of old. If they make a major mistake in any direction, they and their minister can be politically dead.

Then there is the department. We all know that the department's view should be similar to the minister's in the implementation of government policy. However, the senior echelons of the department also develop a corporate view. Clearly there can be differences. *Yes Minister* has fascinated all of us as the unofficial textbook on contradictions — contradictions between what the textbooks say and what happens in practice.

In government, the next body of absolute importance is the caucus, in my case, or the party room in the case of the coalition. The caucus consists of all government senators and members. The back bench is the litmus of government fortunes and the electorate's reaction to the government. Members of the caucus are very conscious that they are answerable to the people. Everybody else in the process is indirectly accountable.

Over the last decade, the average political life expectancy of a member or senator has been five, six or seven years. Just look for a moment at the average length of service of a member of the House of Representatives going back a decade from 1990: 1987, 1985, 1983 and 1981. The periods from 1990 are seven years and two months, five years and seven months, five years and five months and six years and ten months. Senators follow a similar pattern. From 1990 going back, the periods are: six years and six months, five years and one month, seven years and five months, seven years and three months, and six years and two months.

A textbook on Senate committees naturally fails to pick up the vast differences between individuals, even of the same party. It is amazing how different people are coming from different parts of Australia. Each committee will have its own dynamic. Speaking of dynamics, you have all the psychodynamics of a small group without the therapy. When you have somebody verging on a personality disorder, or others that I

would categorise as primitive personalities, you can end up with tension and conflict. An example of what I call a primitive or selfish personality in a senator was the senator who always pushed in to get the first question. The senator would ask questions then leave and make phone calls for the next hour. The senator would then return and push in again to ask more questions. That is what I call a primitive personality, which you occasionally come across.

When you consider the political differences that exist between senators, it is amazing that, for most of the time and on most committees, you have a civil and productive result. To balance the story I have just related, I should give an example of a mature committee. Back in 1982-83 I was a member of a select committee<sup>1</sup> of which Peter Rae was the Chair. The committee membership consisted of Reg Withers, Austin Lewis, John Coates, myself and Peter Walsh, who became a minister before the committee could finish its activity, when Labor won the election. It was a sign of cooperation that we urged Peter Rae to continue on as chairman of that committee. However, the election had intervened in the committee's work.

We had a very keen person from the secretariat who, while we were away fighting the election, prepared the whole report. When we came back, Peter Walsh had dropped off the committee because he was a minister. That left John Coates and me as the only representatives of the government. We found that the report was untenable from our point of view so we did another thing that I would like to demonstrate happens. We got down into the trenches and fought every sentence and every paragraph of that report because all of it was unacceptable to us.

Finally, Reg Withers, who is a very practical fellow, said, 'Bugger this. Let's get the report down to twenty pages and we can put all the rest in as an appendix'. From that point, where everybody agreed, we proceeded to get a proper report. That is an example which has always stuck in my mind of the maturity of the people involved in a committee. We finally got a report that I think was quite a good one.

The problem of Opposition members needs to be mentioned as it has a direct bearing on how parliamentary committees work. The Opposition usually gets seven days notice of legislation. It faces a frantic rush to form its position on the proposed legislation. It has some departmental assistance, but it has to rely particularly on staffers, party experts and the interest groups involved. This pressure on the Opposition makes the option of delay of legislation more attractive. So you have delay added to the other options, apart from accepting the legislation, of defeat, or dilution of a bill. The Democrats have advantages and problems based on their balance of power position in the Senate. They have more limited resources, but they will be wooed and assisted by those opposed to legislation in the process of examining the bill. In addition to political opposition, there can be opposition based simply on poor legislation, and I will say more about that later.

The availability of resources to government and opposition senators is an important issue because it determines how effective you can be. I would say quite proudly that the present government has increased the facilities we have received in the last decade. This is particularly so since we had the catalyst of the move to the new Parliament House. We have had additional staff, facsimile machines, computer equipment and electronic data links. In the past we had the situation of the parliamentarian having inferior resources to the public service or a modern business. Parliamentarians were expected to compete against those people with inadequate

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1. Commonwealth Parliament Senate Select Committee on Statutory Authority Financing, *Report*, Parliamentary Paper 203/1983.

resources.

The background to our committee work has to be an understanding of how parliamentarians fit their committee work into the rest of their duties. The speed of communications, the explosion of information and the complexity of government administration has accelerated since I first came into the Parliament. The fax, the mobile phone, radio, television and continuous plane travel dominate our lives. A great deal has been written about senators in what I believe is an idealised folklore that hankers for the days when orators spent weeks honing their speeches which shook the Senate when they were finally made. They might have done that then; it is harder to do it now.

Commentators refer to senators as having more time for reading and contemplation compared with their House of Representatives colleagues. It is said that we have more independence and freedom because we do not face elections each time the House goes to the polls. I have been elected five times since 1980 and have never proceeded into the second half of any of my six-year terms because of double dissolutions.

Another claim which is silly, is that we are more independent. The inference is that we are more noble, and independent of all the crass political pressures. The simple truth is that the Senate is dominated by people who have come into this place by virtue of their prominence in the state party machines. That occurs on all sides of Parliament. There is an additional group of people, if you put them into categories, who are preselected because their party machines want representatives in particular regions. Once again, it was a decision of the party machine that applied special pressure to get them into the Senate.

Against this background of speeded up activity and party pressure, I would like to turn directly to the work of Parliament, and parliamentary committee work. I recently received a breakdown of my parliamentary attendances for sittings of the Parliament and committees of the Senate. The figures reveal that I am away from home for over 40 per cent of the 365 nights of the year — usually in Canberra but occasionally in another state. My figures, I am sure, are typical. When you add the party and official functions that take you away from your home city, you would find that many senators would be away from their homes for half of the year.

With the mix of standing committees, select committees, joint standing committees, joint select committees, estimates committees and house committees, the workload is out of hand. That is one of the points I want to emphasise when we consider what changes should occur. I believe that the standard of involvement of senators is declining. Too many senators are token members of committees. The standard of work will finally decline because senators are not even able to attend meetings or keep up with the work of the committee. To this extent, there is a serious problem to be faced. Our problem is that there is an incremental increase in the number of committees.

However, the most significant issue is that the standing committees have increased their responsibilities with the general inquiries that committees themselves may decide, and those which are referred to them by the Senate; the examination of annual reports; shorter inquiries — as they usually are when referred by a majority vote of the Senate on particular issues — and, more recently, the examination of legislation. The pressure on the staff of the secretariat is measurable and increasing.

It is not easy to measure senators' workloads. Senators tend to grumble about committees and, when they are pressured, to agree to go on yet another one. But the reality is that they are not getting the time to give their attention to the work of a

committee or, more significantly, they do not have the ability to do research for the committees that they are on. The truth is that there is a crisis that needs solution before the burn-out factor actually kills some people off.

I would like to deal with just a couple of aspects of this problem in, I hope, a constructive way. In December 1989 the Senate adopted a set of procedures for the reference of legislation to standing committees for detailed scrutiny. The aim was to replace some of the time-consuming debate in the committee of the whole by referring legislation to the appropriate standing committee where the relevant minister may, at times, be in attendance. As could be expected, our experience has had mixed results. This reflects the different types of bills referred and the political controversy surrounding each bill.

I would like to point out why I believe the consideration of bills by the standing committees can be of great value. As I have said, there is a tendency in what is written to link the minister and his department together as executive government when, in real life, it is a bit more complicated. Of course, the minister must accept the political responsibility; that is the way the system works.

The legislation, in the first place, will usually be initiated by the minister or the department. The minister will seek in-principle support from the cabinet and his caucus committee. There is often a process of consultation with interest groups directly affected. The legislation is then drawn up and submitted to cabinet, the caucus committee and the caucus for approval.

The percentage of legislation having weaknesses which are not picked up in this process is significant. The so-called unintended consequence could be a political weakness that would alienate support for the government because the government has not realised that a particular section of the community was adversely affected by the legislation. This usually occurs because the broad political implications of the bill have not been worked through by the government. Usually, these problems are picked up by the back bench at the caucus consideration of the bill.

Of course, there are technical mistakes and the legislative scrutiny of civil rights and liberties issues covered by the work of the Standing Committee on Regulations and Ordinances and the Standing Committee for the Scrutiny of Bills, are most important. However, an alarming amount of unsatisfactory legislation gets through the system. The conventional wisdom is that if you are a government member, you defend the government whether it is right or almost right. The truth is, it is foolish not to acknowledge these weaknesses.

Let me share, as they say nowadays, a couple of examples which I believe show the value of parliamentary scrutiny through the use of standing committees. The Senate Standing Committee on Industry, Science and Technology had before it a package of bills. The bills completely transform the administration and management of the fishing industry, taking away direct departmental control and substituting a statutory authority model. I do not know all the details, but what I can say is that the internal struggle in the fisheries section of the department took at least a year. Clearly, there were going to be winners and losers as the new positions were filled. Apart from rivalry for the plum jobs, many officers felt insecure and uncertain as to their future career prospects. Many had passionate views about the structure of the new industry control. The fishing industry, for its part, was angry with the delay. Our 'fishers', as they are known, are a rugged lot and they see Canberra as a landlocked obstacle to them making a fortune. Environmentalists were concerned to lock the protection of natural resources into the new fishing legislation.

When the minister came before the caucus, he emphasised the urgency of the reforms and the pressure from the industry for speedy passage. The complex package of bills got a cursory examination at the caucus and the caucus committee, and came into the Parliament. My committee — and I should add here that they are a very practical bunch of people with a variety of industry experience — examined the legislation. To be brief about it, we were lucky at about that time to get a minister, Simon Crean, who was prepared to work flexibly and informally with the committee. In the result, eighty government amendments to that legislation were introduced arising from the process of the committee work. I pay particular tribute to the Deputy Chair of the Committee, Senator Brian Archer who, having a well-established close bond with the fishing industry, played a vital role in bringing the conflicting views together.

If we look at this experience of poorly prepared legislation, we can see a less than competent section of a department finally handing the government a raw prawn — and that, I think, is the way to put it. Although the government must accept the responsibility, I think this illustrates the conflicts of interest within the government process, and highlights the advantage of using a standing committee to review legislation. It also illustrates several types of inquiries that standing committees can make or usually undertake: firstly, the examination of legislation that is intended to be similar to the committee stage in the chamber; and then the more inquisitorial style of inquiry that standing committees take in respect of ordinary references in order to examine an issue more thoroughly. In this case, we have used a composite of both. Our standing committee, with the minister's support, agreed to a full inquiry into the experience of the legislation in twelve months' time, which will be about next Christmas, so there will be an ongoing examination of this matter.

The second example that I would like to mention briefly is the Australian Nuclear Science and Technology Organisation Amendment Bill. This ANSTO Bill dealt with the controversial issue of nuclear waste. Once again, legislation had gone through the government procedures and the caucus committee process. Ministers had given assurances that the government did not intend to further develop the Lucas Heights site in Sydney as a waste repository. However, there was widespread concern at every level in the community, as ANSTO is not widely trusted. The committee had a unanimous front of opposition before it from local councils across Sydney, community groups, the state government and, significantly, every political party. In this case, the minister was persuaded to add words to the report to make abundantly clear his intention not to create an extended repository. The Standing Committee has also said it will seek a Senate reference if the commitments are not followed by ANSTO.

I hope that these examples show that it is possible to extend the forms of parliamentary democracy through the use of the parliamentary committee system. However, I must at the same time assert that there is always a constant struggle between government and opposition, and to ignore its impact on the system would be foolish. Anthony Fusaro wrote in 1968: 'When the Senate was controlled by government prior to 1949 it did little except act as a rubber stamp for cabinet decisions. When dominated by the opposition it seems in the eyes of many to be bent on using obstructionist tactics for purely partisan motives'.<sup>2</sup>

When the opposition is dominant in delaying government legislation, I believe it is

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2. Anthony Fusaro, 'The Australian Senate as a House of Review: Another Look', in Colin A. Hughes, *Readings in Australian Government*, University of Queensland Press, 1968, p 138.

engaging in a legitimate parliamentary tactic. This allows for the organisation and mobilisation of pressure groups. In the process, the opposition hopes to undermine support for the government and possibly gather support for its own policies. However, the Whitlam Government experience saw the extreme use of this tactic. The Senate between 1973 and 1975 rejected more legislation than in the previous seventy-one years. So that experience to some extent has left its scars.

The other issue I want to mention is the rivalry between the two chambers which permeates every level of this building and has to be acknowledged as part of the background. This House chauvinism is manifest in many ways. The House considers that senators are the second XI, frustrating smooth government. The view from the Senate is that the House is full of rowdies dropping artillery shells of personal abuse on each other. The truth is that the rather childish mutual recrimination prevents a more rational solution of problems.

I have argued that the Senate system is under strain. If senators' workloads are extended beyond a reasonable level it is difficult to be effective. I would argue that because there are various types of parliamentary committee inquiries, it would be better to rationalise parliamentary committees over both chambers, and the House of Representatives should consider some draft legislation before it comes into the chamber. It should do this in the first place on a trial basis.

The government often presents to the community a draft bill. I propose that the House of Representatives standing committees have hearings, when necessary, on this type of legislation. I would argue over time that it is in the government's interest to extend that process — to reduce delays on the Senate side, which they complain of; to avoid the unintended-consequences problem that I have referred to; and to gain approval for legislation in the community by the use of that process. I am not for a moment suggesting that the Senate should not continue with its current program — if you like, the experiment that it is undertaking.

It is interesting that during the Whitlam Government period the government proposed that a number of joint committees be formed. The Senate retaliated that the House of Representatives should form committees to examine legislation. So, in a way, what I am saying is not new. If the House of Representatives were to now take up that option, we could have a more even and consistent vetting of bills, reducing delays at the end of the process in the Senate — which is the way it tends to come out. I believe what I am saying is logical and workable, and that the existing system is not logical enough. A change would benefit both government and opposition.

The second area of parliamentary committee activity I would propose to change, if I were a dictator, is the estimates committee system. First, let me say that in the last few years with the introduction of program budgeting, there has been a vastly improved availability of useful information. In my experience, there has been a great improvement. Secondly, the estimates committee process is one of the main opposition checks on government. So no change can occur without the opposition's support. But I believe that we should merge the roles of estimates committees and standing committees. I would pass the estimates function to the standing committees. The procedure would be much the same, but we would overcome a number of estimates committee weaknesses that exist at the present moment. At the moment there is no organic link.

The estimates committees are twice-yearly marathons where all the questions, all the political points, have to be fired off under the pressure of a day and night hearing that can go on endlessly. The examination of annual reports is split between estimates

committees and standing committees at the moment. The estimates committee staff are twice a year pulled off their other duties and dumped into the estimates with no continuity or effective follow up. Senators, for their part, apart from filing away material for use as future questions, every six months have to say to themselves: 'What was I doing six months ago?'

I argue that the advantages of standing committees dealing with estimates are that senators and the secretariat would develop a corporate memory in each committee; that this would make their work more effective, give them a deeper understanding of the problems that exist in departments and, indeed, would develop a liaison that breaks down now because of a lack of continuity between the parliamentary secretariat and the departments. Under the suggested system, issues raised during estimates committees and requiring further attention would be taken up by the standing committees in a short inquiry. You could very easily pick out those matters requiring further attention and follow them through with a separate investigation. The 'cast of thousands' atmosphere at the current estimates committees might then be minimised with resultant cost savings. I always notice that it is those senators that want to save the taxpayers' money who want the biggest audience of public servants at midnight, watching them perform.

The reason why having standing committees would be more effective is that standing committees can hold in-depth inquiries when only the officers concerned with the particular program need to be present for proper and thorough discussion. At the moment, any matter requiring further consideration arising after an estimates committee has met, goes to some ad hoc committee arrangement without any consistency being established. The disruption of standing committees would be minimised, and the detailed examination of annual reports would not occur under duress, as is currently the case with the estimates committee arrangement, where there is a mad scramble to get draft reports into that particular cycle. In the rush there is often not enough detailed examination of the working of departments.

The opposition would need a special provision to allow the participation of shadow ministers but, as the government's ministers are involved, this should present no problem. This is vital to the opposition as its shadow ministers often use that opportunity to probe the government.

The speeding up of the process for the examination of legislation between both Houses that I have outlined, and the integration of the estimates process into the standing committee process would, in my view, enhance the work of the Parliament. More significantly, it would broaden the access of citizens to the parliamentary process. We ignore the need of ordinary citizens to make representations and participate through their democratic organisations at our peril. There is a democratic distemper in world democracies which is reflected in grumpiness with, and alienation from, governments across the world, as people feel frustrated that they cannot participate in government. This is partly a reflection of the world recession and partly a reflection of the fact that multinational companies have more power and that governments have less. In Australia, our historic problem of vast distances has been reduced by modern communication.

The truth is that the institution of Parliament has to be forged into a more effective vehicle for democracy. Equality of opportunity requires the empowerment of the less powerful. Those excluded from the power structure must have access. The challenge is how grassroots democracy in all its diversity can find a voice in the Parliament. Thank you.

Mr Evans — I thank Senator Childs for that interesting address. As usual, questions are now invited.

Questioner — As regards written submissions by members of the public, are such submissions always read by every member of the committee? If not, are they always read by some of them? If not, are they always read by at least one person, who then advises the rest? Is it possible that a member of the public might make a submission to a committee of which that committee never becomes aware?

Senator Childs — I can best answer the question by saying that there is always somebody who has read the submissions. I can guarantee you that. The secretariats of the committees spend their lives reading submissions. Often they make a précis of all the submissions for the committee members. It would then be up to the individual senators to seek out the submissions that they want to read in full. That is the way the system usually works. This is the very point I am making. There are just so many submissions that, if you are on six or seven committees, you get inundated with the paperwork. A typical picture is that of a senator swotting up on the submissions as he goes off to the hearing that morning in the plane or the night before as he comes down to Canberra. This is the system which has got out of hand. I hope that answers your question.

Questioner — You mentioned a proposal for bills to be referred to House of Representatives standing committees. Do you envisage them then going to Senate standing committees? Secondly, do you see annual reports that might be referred to House of Representatives standing committees also being duplicated before Senate standing committees?

Senator Childs — First of all, I think it would be possible for the Senate to decide at any time that it wanted to look at legislation again. My proposal makes it easier for the government to find out where the problems are and correct them before the legislation comes into the chamber. There is a lot of legislation that would suit that purpose admirably. At the same time there is no way that you would be able to prevent the Senate from examining the legislation again. But I am working on the basis that astute people will work that out and try to make sure that they use the appropriate avenue.

Even at the moment in the Senate, the Selection of Bills Committee makes a political judgment on what is wise to send to a committee and what should be dealt with in the committee of the whole. The general approach to legislation is that a political judgment is made.

Questioner — And annual reports?

Senator Childs — I have not thought very much about it but, once again, I think a House of Representatives committee could look at annual reports. I suspect that they would be very happy for us to keep them. What I am really saying is that the senators want to examine the annual reports and quiz officers on them during the estimates process. That is an intrinsic part of the estimates committee process. My argument is that we also have staffers working away on annual reports and thus we are duplicating the work. If the annual reports were raised in the standing committees the members would be more likely to be able to pick out issues of concern from time to time. These could be matters raised at estimates — or other matters. I think you would have a more thoroughgoing analysis of the annual reports. But I suspect that the House of Representatives would be happy for the Senate to continue handling the annual reports.



Questioner — Can you tell me whether there is any committee at the moment looking into the proposed merger of the Bureau of Mineral and Resources and the CSIRO? If not, is there likely to be a committee looking into that?

Senator Childs — I cannot answer that question in terms of whether there is a committee, but as far as I know there is not. The only thing I can suggest is that you approach senators and ask them to raise that. The only qualification I have is that my committee is industry, science and technology and you might be asking my committee to take a reference. Could I use that to illustrate the problem. I said that everybody has their angle. What happens in the Parliament is that the opposition decides that there is some politically hot issue and so they, by majority, decide that a committee should look at it. The committees also recommend their long term inquiries. The problem is that there is continual interruption to the committee's program of activity. I would hope that, if the standing committees and the estimates committees came together, it would be possible to rationalise even further the activities of those committees. Finally, you will just have to lobby and persuade people that that particular issue is sufficiently important for a particular committee to look at it.

Questioner — Could you give us your views on what you think are the qualities of an effective committee chair?

Senator Childs — First of all, the chairperson has to take a longer term view because you have to live together. It is an intimate relationship and you have to try to get the best out of a committee — like a good coach, I suppose. You need to have a fair understanding of where you want to go. I personally would argue that you achieve more if you take all committee members with you. I would say that that would be the more successful method, whilst acknowledging that there are conflicts between government and opposition politics. If the chair is indecisive, you can get into a great number of problems. It is very hard to steer the line between being cooperative and being indecisive. The good thing about it is that, with the motley group of people who land here as senators, you get a mix of people who tend to work fairly well together. The system works reasonably well.

Questioner — Would you consider the possibility of using educated unemployed people and retirees to assist with work on parliamentary committees in non-urgent matters?

Senator Childs — That is a difficult question for me to address because it would require a very detailed knowledge of the working of the committees. We all live in crisis in the Parliament. My impression is that most of the secretariats are in a particular crisis because of the pressures on them. Their ability to use people, or even to teach people, is a bit different from an ordinary department. Whilst I believe that the government should make efforts to increase the number of people who are being trained or used through departments, I would think that the departments where this would be more difficult would be the parliamentary departments. Having said that, there are quieter times during the year and we have exchange programs where people could perhaps come into the Parliament during those times. But they are not very long periods during the year. Finally, you raised the issue of unemployed people doing work. It is a matter of what work could be given to those people that would not cause problems because of the ordinary public service structures.

Questioner — In relation to the estimates committees, you mentioned the different approach that has been taken with program budgeting over the last few years. Do you and other senators have a view as to the usefulness of elements of the program

budgeting structure, such as performance indicators, evaluation cycles and so forth? How much are they used in the deliberations of estimates committees?

Senator Childs — It is like ringcraft; when things like objectives are put down, at least we have something to fight over, which is very good. The process of getting everything down to a couple of paragraphs is probably an important one for enabling people to concentrate on what their roles will be. I would have thought that this issue constantly arises at estimates committees. It is a constant way of checking how far people do have a concept of where they are going and what program they are seeking to fulfil. Generally, the approach is welcomed. I am generalising from what has been said at committees. People believe that it is far superior to the old system where people looked for the miscellaneous — chasing the flowers or the pot plants. That sort of system was quite stupid. Certainly the current system, where you have an explanation, should save many hours of unnecessary discussion.

Questioner — From your point of view, what would you regard as the most important qualities of committee secretaries and the secretariats that support committees?

Senator Childs — That is a loaded question. I have seen many secretaries at work. The vast majority are quite efficient. Apart from technical competence — and I usually assume that they have technical competence — the real issue is whether they are mature enough to get on with the chair. I know of secretaries of committees who are not mature enough to get on with the chair. If I had my way, I would encourage those people to go into different fields, because if they cannot reasonably work with the chair of a committee, that committee's work becomes a great difficulty. The issue of being able to work with the chair, no matter who that person is, is a vital point. If they cannot make it, even with a bit of help and guidance, they should be encouraged to go elsewhere.

Questioner — Do the committees have sufficient staff to make them fully effective?

Senator Childs — The answer is probably no. One difficulty is the nature of the work. When Parliament meets, there are often other pressures on the secretariats. They have the problem that they are expected to give original thought to a problem in chaos, because our chaos tends to be reflected on to the staff. I will give you an example. You can be given a bill on Wednesday that is supposed to be dealt with on Friday. What do members of the staff do if their minds are on a report or something like that? They have to drop everything and become experts on that topic — as we expect them to be — by the Friday. This is the difficulty you have. There probably is an argument for greater staff numbers.

If you were able to take some of the pressure from Senate standing committees over to the House side as an extension of democracy, I envisage that you would also have the advantage, if the estimates and standing committees came together, of some rationalisation. I would not complain if that meant that, to do all the things we should do, you had to increase the staff. That is an argument about improving the democracy of the Parliament.

Questioner — You referred to the possible use of Senate and House of Representatives committees. How do you encourage committees and people giving evidence to them to attend to the administrative aspects of draft legislation rather than the political parts of it?

Senator Childs — Your point is well made. There is a natural tendency for the politician to look to the politics of legislation. Invariably, that is the first thing that

politicians look for; that is their whole training. It requires extra help and time for the politician to be able to go further and become an expert on a piece of legislation. I have always thought that every time a new piece of legislation comes before you, you almost have to absorb yourself in that legislation; it is not something that is easy to pick up. One problem is that, unless you make provision to have more time, the system will be slick and unsuccessful.

Questioner — My question concerns House committees previewing legislation. Have you raised this with key caucus members of the government? If so, what sort of response have you received?

Senator Childs — No, they are just the humble views of a backbencher. I thought I would try them out on you first.

Questioner — Why would a department wish to give a Senate committee more time on a bill?

Senator Childs — I appreciate that question. I hope it is clear that I was alluding to that problem. It is amazing how bills come in at the last minute in absolute crisis. That is why I told you the fishing story. At the same time, annual reports come in at the last moment, and there is a fight and a tussle to get them. We are now happy even with draft reports. The whole system is madness. I do not say that anybody will finally win or lose, but I think that a more flexible system could perhaps allow a better check and balance.

Questioner — Would extra sitting days overcome that situation?

Senator Childs — It is clear that what is already happening on the Senate side is that — and you can look at the figures; I just have not got them in my head — senators are here for longer and longer periods. If my figures are right, sitting days have been at an average of 82 days and 800 hours since 1986. If my system of having House committees doing more of the work was successful, that might balance the parliamentary work on the House side. I suspect that there could not be many more days that the Senate could meet without there being a rash of divorces in this country. In addition, the question raises another problem. Both senators and members of the House of Representatives in Australia are expected, on pain of preselection loss, to go home every weekend. In my case it might be to go to some small town. No House of Representatives person can afford not to go home to a function. Our culture is to insist on the politician returning from Canberra. I live in Sydney. My heart goes out to politicians from Perth, North Queensland or the Northern Territory who have to do all that and stay normal.

Mr Evans — On behalf of a significantly large audience, I thank Senator Childs very much for that very stimulating address and answers to questions.

## Parliamentary Responsible Government and the Protection of Rights

Brian Galligan

As Australia approaches its constitutional centenary, there is a new urgency in informed public debate about how well human rights are protected and what additional measures ought to be adopted for better protecting rights including, most notably, a bill of rights. Australia is inevitably caught up in the international wave of concern for enhanced protection of human rights which is producing an expanding web of influential international agreements and expectations. Comparable liberal democratic countries with which Australia is accustomed to identify itself, such as the United Kingdom, Canada, the United States and New Zealand have all adopted bills of rights or, as in the case of the United Kingdom, become increasingly subject to European international rights jurisdiction.

Heightened concern with protecting human rights in Australia has been evident in a range of public statements and forums in recent years. In 1988, the Chief Justice of the High Court, Sir Anthony Mason, announced that he had changed his mind in favour of a bill of rights because Australia was going against the international trend and getting out of step with comparable countries such as Canada.<sup>1</sup> Again in 1988, the Constitutional Commission, after exhaustive consideration, came out in favour of a Canadian-style entrenched bill of rights for Australia and proposed that a new chapter be added to the Constitution or that purpose.<sup>2</sup>

Nor was such public interest in the improved protection of rights scotched by

the abortive 1988 referendums. In that instance, a modest proposal to extend three existing guarantees of human rights which bind the Commonwealth — religious freedom, just compensation for property acquired by the state, and trial by jury — to also bind the States suffered the worst defeat of any proposal ever put to the Australian people, winning only thirty per cent support.<sup>3</sup> At the Constitutional Centenary Conference of 1991, the issue of guaranteeing basic rights was put firmly back on the public agenda. This national meeting of leading citizens from across the spectrum of Australian public life identified twelve key issues for review, with a view to possible constitutional reform, in the decade leading up to the constitutional centenary. Topping the list was 'Guarantees of Basic Rights' regarding which the Conference said: 'There was strong support for a guarantee of basic rights in some form, entrenching basic rights, and especially basic democratic rights. This would also have an important symbolic function. But achieving this would require broad support

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1. Sir Anthony Mason, 'A Bill of Rights for Australia?', Address to the Australian Bar Association Bicentennial Conference, 1988.
  2. *Final Report of the Constitutional Commission*, 1988, pp. 435—838, and draft Bill No. 17 for 'An Act to alter the Constitution so as to guarantee certain rights and freedoms', pp. 1018-21.
  3. Brian Galligan, 'The 1988 Referendums and Australia's Record on Constitutional Change', *Parliamentary Affairs*, vol. 43, 1990, p. 497 at p. 499.

from the Australian community, and would necessarily be part of a long-term process of education and discussion.'<sup>4</sup>

Previously, for three quarters of a century, political leaders and commentators by and large had been confident, even quite smug, about how well human rights were protected in Australia. Shortly after retiring as Australia's longest serving prime minister, Sir Robert Menzies confidently asserted to an American audience: 'Responsible government in a democracy is regarded by us as the ultimate guarantee of justice and individual rights. Except for our inheritance of British institutions and the principles of the Common Law, we have not felt the need of formality and definition. I would say, without hesitation, that the rights of individuals in Australia are as adequately protected as they are in any other country in the world.'<sup>5</sup>

In his leading textbook on Australian politics which went through four editions and five reprints between 1965 and 1978, Fin Crisp persisted with a similar confidence: 'There has been an extraordinary solidity and general pervasiveness of civil liberties during this century. . . . Australian governments normally live as quietly and unobtrusively as they may in the civil liberties field, even tolerating much very free and hostile speech and much possibly subversive fringe activity.'<sup>6</sup>

This traditional view of the adequacy of Australia's system of responsible government for protecting rights, articulated by Menzies and Crisp, remains strong today, being essentially the view of the non-Labor coalition parties and much of the legal establishment. Moreover, this is the view that has informed Australia's political culture and been embodied in its political and legal institutions.

There have been significant criticisms of, and reforms to, Australian governance and law orchestrated by lawyers and judges and implemented by non-Labor coalition governments: most notably, the 'New Administrative Law' and the Human Rights (now the Human Rights and Equal Opportunity) Commission. As well, the earlier smugness of Australians with the excellence of their system of rights protection has been steadily eroded during the last couple of decades by a barrage of criticism against the dangers of big and intrusive government, executive dominance and party dictatorship. Moreover, the old confidence in the effectiveness of parliamentary responsible government and the common law for protecting human rights has been undermined by more realistic accounts of the weakness of parliament and the increasingly residual domain of common law compared with the plethora of statutory laws.

Nevertheless, the Australian response to improving human rights protection so far has been to modify and add on to, rather than change radically (as with an entrenched bill of rights) the traditional order. This has resulted in a patchwork of human rights measures: national legislation against racial and sexual discrimination; administrative review of executive decision making by the Administrative Appeals Tribunal and other special departmental bodies such as the Immigration Review Tribunal as well as the Ombudsman; and the establishment by the Commonwealth and States of special commissions and officers to monitor, investigate, expose and, in some instances, remedy human rights violations. In addition, there have been improvements to parliamentary review especially through Senate committees. Most notably, a new Standing Committee for the Scrutiny of Bills was established in 1981 for the purpose

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4. Constitutional Centenary Conference, Statement (1991).

5. R.G Menzies, *Central Power in the Australian Commonwealth*, London, 1967, p. 54.

6. L.F. Crisp, *Australian National Government*, Melbourne, 1978, p. 134.

of alerting the Senate, which invariably is not controlled by the government, 'to the possibility of the infringement of personal rights and liberties or the erosion of legislative power of the Parliament'.<sup>7</sup> And procedures for referring bills to committees have been improved.

While these developments in statutory law, administrative review, improved parliamentary scrutiny of legislation and the establishment of independent commissions and officers have been significant, they have been modifications to the existing order which have not disturbed its basic structures and processes. In contrast, the reformist view favouring a constitutional bill of rights would entail more fundamental change, with key social and political issues which are now decided in the political arena being transferred to the courts.

The reformist view was set out in 1988 by the Constitutional Commission which discounted the strengths of the established regime rather more severely than do its traditionalist critics. The Commission opted for an entrenched bill of rights, albeit with the ingenious Canadian compromise of a legislative override. Politically more significant, however, was the earlier conversion of the Australian Labor Party to a bill of rights. Under the influence of progressive Labor lawyers such as Murphy, Whitlam, Dunstan and Wran, this traditionally centralist, statist and socialist party modified its formal commitment to centralising power in the Commonwealth government and adopted a bill-of-rights plank. Successive Whitlam and Hawke Labor Governments actually made abortive attempts at implementing statutory bills of rights in 1973, 1984 and 1987.<sup>8</sup>

#### Responsible government and federal constitutionalism

Responsible government is commonly considered to be the primary part of Australia's system of government and is certainly the oldest part. Nineteenth century Australian egalitarian democracy embraced the institutions of parliamentary responsible government which fortuitously were receiving their classic form at the time.<sup>9</sup> Colonial Australians were innovators in extending the democratic franchise and devising new electoral laws and voting arrangements.<sup>10</sup> The Australian colonies were also institutionally creative in modifying responsible government, particularly the doctrine and arrangements of ministerial responsibility, to incorporate the management of giant government instrumentalities, such as railways.<sup>11</sup>

Parliamentary responsible government is an appropriate representative system for egalitarian democracy. In contrast to a presidential system, parliamentary responsible government has the executive based primarily in the popular or lower house to which it is accountable on a day-to-day basis. Hence there is a fairly direct line of accountability from the people who elect the members of parliament to the executive which holds office subject to confidence of the popular house of parliament — at least according to the classic theory. This theory of the parliamentary accountability of

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7. Senate Standing Committee for Scrutiny of Bills, *Annual Report 1986-1987*, Parliamentary Paper 443/1987, p. 2.

8. Brian Galligan, 'Australia's Rejection of a Bill of Rights', *Journal of Commonwealth and Comparative Politics*, 1990, p. 344 at pp. 357-62.

9. Walter Bagehot, *The English Constitution*, London, 1867.

10. Joan Rydon, 'The Electoral System', in *Australian Politics: A Fourth Reader*, Henry Mayer & Helen Nelson (eds), 1977.

11. P.D. Finn, *Law and Government in Colonial Australia*, Melbourne, 1987.

governments did seem to explain colonial solutions in which short-lived governments rose and fell depending on the shifting factions in pre-party colonial parliaments.<sup>12</sup>

Moreover, the English doctrine of the sovereignty of parliament, which has enjoyed exaggerated currency in Australia, ties the legal system neatly into this democratic paradigm.<sup>13</sup> But of course Australian government was never simply parliamentary responsible government either before or after federation. In colonial Australia, egalitarian democracy did not translate into majoritarianism, albeit leavened by the strong British inheritance of the rule of law. Imperial law cast a heavy shadow over early colonial government and the Colonial Laws Validity Act 1865, ironically passed to strengthen the hand of self-governing colonies, proved to be a two-edged sword which curtailed as well as affirmed the legislative autonomy of colonial parliaments. Perhaps more importantly, colonial upper houses representing established property interests provided a constant check on governments elected on a broader franchise and based in lower houses. Thus, well before federation, Australian colonial government incorporated constitutional norms of limited powers and judicial review as well as legislative checks and balances through bicameralism.<sup>14</sup>

Federation built upon, but greatly extended, this colonial constitutional tradition by adopting essentially the American federal system of limited governments, divided powers, a controlling constitution and judicial review by an independent court. The Australian founders, however, were deeply attached to parliamentary responsible government which they retained and married with federalism as the Canadians had previously done.

There has been a tendency among Australian commentators to exaggerate the extent to which responsible government has dominated Australian politics and, in particular, the working of the Australian Parliament, and to downgrade or ignore constitutional federalism and the role of the Senate. Andrew Parkin has pointed out that 'the conventional wisdom of Australian political culture and of Australian political science' which has featured as the textbook paradigm of Australian politics has been 'party responsible government'.<sup>15</sup> Even Elaine Thompson, in her much-cited 'Washminster' mutation interpretation of Australian politics, emphasises the separation of powers within the Commonwealth government but surprisingly overlooks the more important federal division of powers.<sup>16</sup>

Despite the majoritarian assumption or preference of many that Australia is, or ought to be, a centralised and unitary system of government, the reality is radically different. Australia is a federal democracy with the people organised into dual political communities, national and state. The federal principle is profoundly evident throughout the constitutional system: in the controlling document which formally established the system of governments, specifying in detail the structures of the

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12. P. Loveday & A.W. Martin, *Parliament Factions and Parties: The First Thirty Years of Responsible Government in New South Wales*, Melbourne, 1966.

13. M. James, 'The Constitution in Australian Political Thought', in M. James, ed., *The Constitutional Challenge: Essays on the Australian Constitution, Constitutionalism and Parliamentary Practice*, Sydney, 1982.

14. For strong accounts of this see Campbell Sharman, 'Australia as a Compound Republic', *Politics*, vol. 25, no.1 (1990), and 'Parliamentary Federations and Limited Government: Constitutional Design and Redesign in Australia and Canada', *Journal of Theoretical Politics*, vol. 2 (1990), p.205.

15. Andrew Parkin, 'Pluralism and Australian Political Science', *Politics*, vol. 15, no. 1, May 1980, p. 50 at p. 51.

16. Elaine Thompson, 'The "Washminster" Mutation', *Politics*, vol. 15, no. 2, (1980) at pp. 34, 38.

Commonwealth and guaranteeing State constitutions and residual powers; in the federal division of powers between the Commonwealth and State governments; in the bicameralism of the national Parliament with the Senate based on equal state representation and having virtually coequal powers with the House of Representatives<sup>17</sup>; and in the referendum procedure which makes the people masters of the constitution and requires 'double majorities' of the electors overall as well as in a majority of the States.<sup>18</sup>

The fact that Australia has a rich hybrid system of parliamentary responsible government *and* the entrenched institutions of federal democracy are both highly relevant to the rights debate. There has been a tendency in the past to focus unduly on the former and argue that responsible government plus the common law was sufficient for protecting rights in Australia. This traditional position was best articulated by Menzies, but neglected entirely the important contribution of federal constitutionalism. The reformist position advocating a bill of rights quite rightly criticises the adequacy of the traditional Menzies view, but it also neglects the significance of the federal constitution. Likewise, the reformists and Laborites who favour a bill of rights couple this extra safeguard for individual liberties to a greater centralisation of power at the national level which they prefer. The inadequacy of this narrow focus on parliamentary responsible government is developed in the next section.

#### Australia's impoverished rights debate

What I want to suggest is that, for the most part, public discussion and debate about how well rights are protected in Australia have not taken proper account of the richness and complexity of Australian political culture and constitutional design. The proponents of the established order such as Menzies have relied on partial accounts based upon parliamentary responsible government. Reformists such as the Australian Labor Party have embraced a bill of rights but as a counterbalance to greater centralisation of power in the national government which they prefer. In other words, the public debate over protecting rights in Australia has been partial and distorted on both the traditional and reformist sides, as the following examination shows.

#### The responsible government heresy

Although the American federal constitution was 'an incomparable model' for the Australian founders, as Sir Owen Dixon pointed out, they departed from it in two important respects: by retaining a responsible government executive and not adopting a bill of rights to restrict legislative action. The two exceptions were related, as Dixon explained to the American Bar Association in 1944:

The framers of the Australian Constitution were not prepared to place fetters upon legislative action, except in so far as it might be necessary for the purpose of distributing between the States and the central Government the full content of legislative power. . . . It may surprise you to learn that in Australia one view held that these checks on legislative action were undemocratic, because to adopt them argued a want of confidence in the will of the people. Why, asked the Australian

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17. The only restrictions to the Senate's legislative powers are that it cannot initiate or amend money bills, but it does have specific right to advise changes and of course can veto or fail to pass them outright. The restrictions were imposed by the Australian founders to preserve the primacy of responsible government: that is, the executive is responsible for monetary policy and is based in the lower house.

18. Brian Galligan, R. Knopff and John Uhr, 'Australian Federalism and the Debate Over a Bill of Rights', *Publius*, vol. 20, no. 53, 1990, at pp. 63-5.



democrats, should doubt be thrown on the wisdom and safety of entrusting to the chosen representatives of the people sitting either in the federal Parliament or in the State Parliaments all legislative power, substantially without fetter or restriction?

In our steadfast faith in responsible government and in plenary legislative powers distributed, but not controlled, you as Americans may perceive nothing better than a wilful refusal to see the light and an obstinate adherence to heresies; but we remain impenitent.<sup>19</sup>

The Australian heresy was to eschew a constitutional bill of rights for democratic reasons which were closely linked to the preference for responsible government — namely, that the combined processes of parliamentary representative democracy and responsible government were considered a sufficient protection.

Menzies quoted with approval these views of Dixon, his legal mentor, in public lectures delivered at the University of Virginia in 1967 shortly after he had retired as Australia's most successful Liberal prime minister. Menzies gave his own articulation which is a classic statement of the traditional Australian view that the people's democratic control over the executive through a parliament of elected representatives obviated the need for a bill of rights:

With us, a Minister is not just a nominee of the head of the government. He is and must be a Member of Parliament, elected as such, and answerable to Members of Parliament at every sitting. He is appointed by a Prime Minister similarly elected and open to regular question. Should a Minister do something which is thought to violate fundamental human freedom he can be promptly brought to account in Parliament. If his Government supports him, the Government may be attacked, and if necessary defeated. And if that, as it normally would, leads to a new General Election, the people will express their judgment at the polling booths.<sup>20</sup>

Menzies concluded, in the passage quoted earlier, that democratic responsible government was regarded 'by us as the ultimate guarantee of justice and individual rights', and claimed that the rights of individuals in Australia were as adequately protected as in any other country in the world.<sup>21</sup>

I doubt whether Menzies, or Dixon before him, would have convinced their American audiences because the position being advocated was quite alien to American political culture. The American rights tradition is strongly informed by liberal assumptions giving primacy to the individual and distrusting popular democratic government because of its assumed propensity towards tyranny of the majority. The Australian tradition, in contrast, is premised on a more positive view of representative democracy and buttressed by a faith in the ability of democratic processes both to express the popular will and to protect individual rights. But neither would Menzies' formalised account of democratic responsible government convince many Australians today because it ignored the iron grip of party discipline and executive dominance over parliament.

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19. Owen Dixon, speech to the American Bar Association in August 1944, in *Jesting Pilate and Other Papers and Addresses*, Melbourne, 1963, pp. 101–02, quoted in R.G. Menzies, *Central Power in the Australian Constitution*, London, 1967, pp. 52–3.

20. Menzies, *op. cit.*

21. *ibid.*

Even in Menzies' time, the transformation of parliamentary responsible government through dominance of disciplined parties was well documented. In reinterpreting Bagehot, R.H.S. Crossman has spelt out 'the transfer of effective power from the floor of the Commons to the great party machines and the bureaucracy of Whitehall'.<sup>22</sup> Party discipline enabled stronger and stronger executive government control over Parliament, as Harry Evans has recently emphasised, causing a reversal of roles within parliamentary responsible government: 'Instead of executive governments being responsible to parliaments, parliaments have become responsible to executive governments. The body which is supposed to be scrutinised and controlled by parliament has actually come to control the body which is supposed to be doing the scrutinising and controlling — a reversal of roles.'<sup>23</sup>

The consequences for rights protection are disturbing, as Justice Brennan has recently pointed out: 'A further danger to human rights and fundamental freedoms is posed by the dominance of the Executive Government, supported by its bureaucracy, over the Parliament. This dominance has undermined the theory that the Westminster model of responsible government effectively guarantees democratic control of executive power . . .'<sup>24</sup>

If Menzies' stylised account of parliamentary responsible government was substantially weakened by the brute reality of party discipline, his defence of the Australian system might have been significantly strengthened by pointing out its federal constitutional features. His account was incomplete as well as distorted. Menzies' own disgraceful lapse of jeopardising basic human rights when seeking to ban the Communist Party in 1951 had been remedied not by responsible government but by constitutional restrictions to the Commonwealth Parliament's powers enforced through judicial review by the High Court. The defeat of Menzies' draconian measures for dealing with Communists was confirmed by the Australian people voting in referendum, and not via the ballot box.<sup>25</sup>

Had Menzies articulated the federal constitutional aspects of Australia's system of government his American audience would have found much familiar ground. For the Australian Constitution ensures a highly fragmented and decentralised system of government with many features that the American Federalists argued, in defending the American Constitution, were an institutional means of protecting individual rights and freedoms. In the ratification debate before the Bill of Rights was added to placate the Anti-Federalists who believed that liberal democracy was possible only in small republics and decentralised confederations, Hamilton had claimed that the elaborate system of checks and balances made the American constitution 'itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS'.<sup>26</sup>

With the notable exception of the executive branch, Australia has a similar array of federal and constitutional measures embodied in its system of government. An entrenched constitution specifies the powers of government, including the federal

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22. Introduction to Bagehot, *The English Constitution*, 1963, p. 37.

23. Harry Evans, 'Parliament: An Unreformable Institution?', *Papers on Parliament*, No. 18.

24. G. Brennan, 'The Impact of a Bill of Rights on the Role of the Judiciary: An Australian Response', Conference on Human Rights, Australian National University, Canberra, 15-17 July 1992, p. 8.

25. M.D. Kirby, 'H.V. Evatt, the Anti-Communist Referendum and Liberty in Australia', *Australian Bar Review*, vol. 7, no.2, 1991.

26. Alexander Hamilton, 'The Federalist No. 84'.

division of powers; the legislative will is divided through bicameralism with a strong Senate; there is a jurisdictional umpire in the independent High Court exercising judicial review; and constitutional change is provided by a referendum procedure requiring 'dual majorities'. This part of Australia's system of government is grounded in principles of federal constitutional democracy which are more pervasive than the majoritarian ones associated with parliamentary responsible government. In fact, from an institutional design point of view, it is the latter which are grafted onto the former since responsible government is the executive form within the larger constitutional system. Hence, Menzies' defence of the institutional adequacy of rights protection in Australia was doubly wrong: first, because of his benign but misleading account of parliamentary control of the executive; and second, because he omitted the elaborate constitutional system of checks and balances restricting both parliament and the executive.

#### Counterbalancing centralism

Curiously, reformists who favour an Australian bill of rights are usually imbued with a similar disdain for federal constitutionalism. Their advocacy of a bill of rights is not to further complement, but rather to substitute for, the dispersion of power inherent in the federal constitution. The Labor Party and critics like Geoffrey Sawyer have advocated a bill of rights as a counterbalance to greater centralisation which they also preferred. This partisan link between centralism and a bill of rights has coloured much of the public debate in Australia and needs to be properly appreciated.

The rights debate in Australia raises a puzzle about the positions of the major political parties: they seem to have been on the wrong sides. The Liberals have been generally opposed in principle, sharing Menzies' satisfaction with parliamentary responsible government and the common law, but nevertheless innovative in adopting the 'New Administrative Law' to enhance the protection of rights in a more pervasive administrative state and in establishing special human rights commissions. Labor, on the other hand, plumped for a bill of rights which was incorporated into its platform after extensive discussion in national conferences and party committees during the 1960s.

Previously, the federal Labor Party had favoured constitutional reform in order to centralise political power for purposes of 'state socialism', economic management and collective social policy goals. The Curtin and Chifley governments of the 1940s epitomised Labor's practical commitment to such purposes, centralising fiscal power in Canberra through monopolising income tax, attempting to nationalise private banks and airlines, and laying the foundation for Australia's postwar national welfare policies and Keynesian style management of the national economy. Moreover, for most of its federal history, the Labor Party was formally committed to the abolition of federalism on the grounds that such a structure of government fragmented political power and restricted reformist and socialist state action. In opposing this, the Liberals have been the self-professed guardians of the established federal system.

Labor's civil liberties platform, piloted through the 1969 party conference by Lionel Murphy, was a milestone in setting the reformist parameters of Australia's public debate over human rights protection. Its first three planks committed Labor to the following:

- (1) The constitution to be amended to provide for the protection of fundamental Civil Rights and Liberties;
- (2) The Commonwealth and State parliaments to pass Acts providing for human rights and civil liberties, and to take all possible legislative and administrative action and judicial proceedings to prevent infringement of such rights and

- liberties and in particular to prevent discrimination on the grounds of colour, race, sex, creed or politics; and
- (3) Australia to pass laws and to press for worldwide and regional implementation of international covenants on human rights. The states also to pass any laws necessary for such implementation.<sup>27</sup>

Labor's switch to human rights protection was complemented by substantial modification of its traditional commitment to centralisation of political power and reconciliation with federalism.<sup>28</sup> Concerns with the dangers of 'big government', commitment to quality-of-life concerns, greater sophistication in economic thinking and in working the federal constitution were all elements in Labor's 1960s reorientation. Nevertheless, the Labor Party remained committed to a greater centralisation of power within the Australian constitutional system and tempered this with its new commitment to a bill of rights. This was apparent in the abortive 1988 referendums proposed by the Hawke Government and championed mainly by Attorney-General Bowen: one proposal was to extend the existing few entrenched rights by making them binding on the States, while another was to bring the Senate's term in line with that of the House of Representatives. The former would have extended rights protection but at the expense of the States, while the latter would have increased executive dominance at the expense of the Senate. Both elements were significant in the crushing defeat of both proposals.

The most notable academic proponent of greater centralism of constitutional powers tempered by a bill of rights was Geoffrey Sawer. Sawer advocated what he called 'organic federalism', a curious term for an advanced stage of centralisation in which the centre dominates the regional states which are reduced to administrative units. Sawer called this alternatively a 'Bill of Rights state', which he sketched as follows:

It is possible that the development towards organic federalism may better be described as a development towards a Bill of Rights state; geographically guaranteed autonomy may be replaced, gradually, by guarantees appropriate to a plural society in which the entrenched protection of an area of *individual* autonomy is the basis for denying omnipotence to a centrally organised Leviathan. The entrenching of decentralised *administration* may be regarded as an aid to protecting the Bill of Rights.<sup>29</sup>

In Sawer's view, and that of the Labor Party more generally, a bill of rights is linked to a larger reformist constitutional agenda. It needs to be recognised that the position favouring a bill of rights for Australia has been a partisan one, with the Labor Party and reformist critics like Sawer in favour and the Liberals together with more conservative commentators, opposed. That in itself has been enough to ensure that public opinion is divided and constitutional entrenchment by referendum foreclosed. Even the more modest attempts of federal Labor governments to introduce statutory bills of rights have been stymied by partisanship and blocked by the Senate.

There has been a tendency among those who favour a more enlightened public debate to decry such spoiling partisanship, but not to recognise the deeper underlying

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27. Australian Labor Party, *Platform, Constitution and Rules*, 1969, 'XXV: Civil Liberties', p. 31.

28. B. Galligan and D. Mardiste, 'Labor's Reconciliation with Federalism', *Australian Journal of Political Science*, vol. 27, no. 1, 1992, p. 23.

29. Geoffrey Sawer, *Modern Federalism*, Carlton, 1976, p. 104.

differences between the major parties. Labor's bill-of-rights plank has been part of a reformist constitutional agenda which, despite substantial modification, favours greater centralisation and nationalisation of power. And as American and Canadian experience clearly demonstrate, an entrenched bill of rights is a powerful nationalising instrument. Sawyer's 'Bill of Rights state' is unashamedly centralist and this model has deep resonances with traditional Laborist thinking. So far at least, such political partisanship has been sufficient to preclude the implementation of an Australian bill of rights.

### Conclusion

The traditional defence of the adequacy of Australia's political system for protecting human rights, given by such eminent proponents as Menzies and Dixon, relied on the efficacy of parliamentary responsible government and the common law. While the common law can still be a vehicle for redressing rights issues, as in the recent *Mabo* case which recognised indigenous peoples' title to land and reversed the centuries old doctrine of *terra nullius*,<sup>30</sup> it has been swamped by hyperactive legislatures. This eclipsing of common law puts a heavier burden for rights protection on parliamentary responsible government. The case for the adequacy of parliamentary responsible government for protecting rights was premised on two key propositions: one, that Australia's political system was essentially one of parliamentary responsible government; and two, that parliamentary responsible government worked according to the classic model of the executive being responsible to parliament which was in turn democratically accountable to the people. Since neither proposition is true, however, this traditional account of the adequacy of rights protection in Australia is fundamentally flawed.

Even by Menzies time, distinguished commentators like R.H.S. Crossman had reinterpreted Bagehot's classic account of parliamentary responsible government to take account of party discipline which led to executive dominance. In other words, an increasingly powerful political executive backed up by a huge administrative bureaucracy had come to dominate parliament by means of party discipline. This substitution of party for parliamentary control was reflected in the Australian paradigm of 'party responsible government' which, as Parkin pointed out, was the conventional wisdom of Australian political culture and of Australian political science. Clearly, party responsible government was more of a threat to, rather than a bulwark of protection for, human rights.

But fortunately, this was only a partial and distorted picture of Australia's system of government which consists of a federal constitution, as well as parliamentary responsible government. Even if party responsible government had become 'elective dictatorship' without effective checks against executive despotism, as Lord Hailsham brilliantly characterised the English constitution, Australia could never be described in this way. That is because Australia has an entrenched system of constitutional government in which power is diffused among multiple governments with limited powers, in which an independent court decides jurisdictional disputes concerning a government's powers, and in which the powerful national government does not usually control the Senate. Such dispersion of power substantially checks and restrains government in Australia and is a powerful institutional protection for human rights. We are forcefully reminded of this by the High Court's recent decision

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30. *Mabo v. Queensland* (1992), 66 ALJR 408.

to strike down Commonwealth legislation banning political advertising on the electronic media on the eve of two state election campaigns.<sup>31</sup>

The failure to articulate and appreciate the potency of the federal constitution for protecting rights has led to a superficial and unrealistic public debate about the adequacy of rights protection in Australia. To make sensible assessments of the institutional arrangements which we have and to offer realistic proposals for reform, we do need to understand the system which is in place. A more enlightened public debate over the adequacy of Australia's established institutions for protecting rights would need to recognise the erosion of *parliamentary*, and its subversion by *party* responsible government. And the potential threat to human rights from party responsible government would need to be balanced against the substantial restraints imposed by the federal constitution.

Questioner — I am Dennis Stevenson from the ACT Parliament. The Labor Party, for much of its existence, has supported the right of citizens to initiate referendums. Would you comment on whether you think that their ability to initiate referendums — perhaps on the three areas of recall, initiating new legislation, and vetoing existing or proposed legislation — would hand a level of power back to the people.

Prof. Galligan — This is a very good issue. You compare Australia's record of constitutional change with others, and you see that it is not that bad. What is bad is the proportion of proposals that succeed compared with the number that we make. Even if you said that our record was fairly bad, one of the obvious reasons is that proposals can be put up under the existing formula only by the national government — and you would expect the national Government would, for the most part, be putting up proposals which would enhance its own power, and this has usually been the case.

I am very much in favour of broadening the means whereby you can bring forward constitutional amendments. For example, I would find it quite favourable to have some formula for bringing them from the States, either the majority of the States or something like that. With reservation, I would also be in favour of a popular referendum scheme where a specified number of citizens could bring forward some proposal. I suppose my reservation would be to ensure that that process was not taken over by a sort of fringe ratbag group. Who is a fringe ratbag depends on where you sit and what your position is. But there is a tendency for single issue political groups to be able to marshal the numbers, to get proposals up, which would not have any chance of gaining the support required for a referendum to be successful.

In short, I would be in favour of broadening the avenue for bringing forward constitutional proposals. I think, if nothing else, it reflects the health of the system — if people are sufficiently interested, they will bring a constitutional amendment rather than be disillusioned and drop out or, worse still, perhaps start rioting in the streets. So, with reservations, I would be in favour of both State and popular referendum avenues.

Questioner — My name is Joan Macnee — a Londoner from Melbourne and also a very responsible citizen. There is a need, I believe, for us to all understand that we need to look at not only our own methods but other people's as well. Unless we look at

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31. *Australian Capital Television v. Commonwealth* (1992) 66 ALJR 695.

it in context and have some understanding of Switzerland, Scandinavia et cetera, we are really not getting a good look at it at all.

Prof. Galligan — I appreciate those comments and I would appreciate your comments on this, as I would any others. On understanding other peoples, I think that although I have been dwelling, in a sense, on the institutional aspects of this, the human understanding, the human learning part is crucial. You can have a Bill of Rights and still have slavery for nearly a century, as the Americans did to their shame. You can have a Bill of Rights and have some of the grossest forms of racial discrimination, as again the Americans did up until the 1950s.

I think that we need an informed institutional debate in Australia but the people of Australia also need perhaps a change of heart. You might even argue then that, if we need to have a change of heart, we do not need any institutional changes.

As far as learning from other countries is concerned, I think it is very important for Australians to be aware of the institutional developments in other countries and also how, increasingly, the instruments of international human rights are having a direct impact on Australia. If you look at the major opinions in the Mabo case reversing the doctrine of terra nullius you will see that the judges specifically say there that we need to re-interpret the common law in Australia to take account of the international accords which govern these matters in other countries and also the current values of Australians.

Questioner — In weighing up the pros and cons of a bill of rights, I would be interested to hear your comments on the costs. I have heard some people's reservations that a bill of rights could be very costly for countries. What is the evidence from overseas and what are your comments?

Prof. Galligan — It is very hard to know. You can, in a sense, work out a list in which there are costs and savings. Presumably, if a lot of difficult political, bureaucratic issues, which are now dealt with by the executive, are transferred to the courts — which they would be — then there would be savings on the bureaucratic, political side. But presumably there would be extra expenses in the cost of litigation through the courts.

It is very hard to quantify this. Certainly, you can say that the courts get a lot more action. Individual groups and individuals themselves, depending on their right of taking things to the court, become very adept at doing that. For example, if you are a women's electoral lobby member in Canada — they probably do not call it that now — you do not waste much of your time lobbying politicians. You would get some good lawyers, get some money together and make a case before the Supreme Court. If you win, you do so regardless of what all the legislatures across Canada might think.

It is very difficult to say. Gerard Brennan, in an address a couple of weeks ago — the one I quoted here today — drew attention to the cost factor in current litigation and the implications of that when you had a bill of rights. If we can afford a one billion dollar parliament, it seems to me that the costs, as well as the pluses and minuses, of having a bill of rights are really neither here nor there, particularly if, at the end of the day, we get better justice from it.

Questioner—Why do you consider the Democrats' approach to government to be silly and not workable? Would you like to expand on it, please?

Prof. Galligan—I have great respect for the Democrats. However, there was a statement which came out over the weekend that perhaps we could do away with the States and somehow, out of this sort of centralist Utopia, there might come better policies. I thought that everyone had buried this idea long ago. If the Democrats had the balance of power in Canberra, I guess it would make their job much easier if we did not have any States.

These days, I think that serious proposals canvassing whether we ought to abolish the States are really quite silly. I can give you one of my discussion papers that Harry Evans was flashing around earlier which makes the case at some length for that. I am going to send one to the Democrats' headquarters as well. Thank you.



## Parliament's Last Stand

Senator the Hon. Terry Aulich

Ladies and gentlemen, I am not sure why so many are here today; maybe it is because in the *Canberra Times* this morning the commentary about my speaking here today was juxtaposed with the heading 'Triumph of a Champion'. There was a picture of a horse winning the Cup. Was it the heading 'Turf idol imposes superiority' or was it 'Corporate crime: Costello on attack'? Either way, I was amongst good company and you are bound to read anything about me as a result of my being in that company.

I have very deliberately chosen this title today as a result of the fifteen years or so that I have had — I was going to say 'as a working politician' — as a politician in both the state and federal arenas. For some time I was also the Chief Administrator of the Labor Party in Tasmania. This meant that, as State Secretary, I had the beautiful job of raising the money to run campaigns, collecting money from private enterprise, making sure all the candidates were ready to run, finding new candidates, organising the finances of the Party and, on the whole, learning a great deal more about politics from that position than I did as a member of Parliament.

I chose the phrase 'Parliament's Last Stand' because in some ways it reminds me of General Custer, who in his day was a hero — he was worshipped, adored and respected — but about whom history has not been kind. Primarily he did not realise that he was surrounded; he did not realise what the terrain was like; he did not realise that there were hostile people out there; and, ultimately, he walked into a disaster and took many people with him.

Parliament is like any other institution: it is not immutable; it is not permanent. Even the church has had to change a great deal over 2,000 years. Its approach, its functions and its ideology have had to change in accordance with the times, even though there is a core of belief. Similarly Parliament has evolved over a very long period. The form as we know it came to fruition primarily in the nineteenth century and the early twentieth century. That is what we have been stuck with right through the twentieth century.

I guess the question I am asking today — and I constantly ask myself this — is whether this institution, as we know it in the Australian context, is the most appropriate vehicle for dealing with the problems of the latter part of the twentieth century, or is Parliament becoming irrelevant, in a sense a parade, rather than an effective instrument to debate ideas and create policy? As I have indicated, all institutions — whether they be the church, the Masonic Lodge even, or Parliament — at some time or another have to sit down and examine where they are going, what their problems are and how they are going to resolve those problems, otherwise they are bound to go the way of the dodo.

If you believe that parliamentary democracy is the norm around the world, then you ought to look very closely at the governmental structures that operate in most countries. For example, if you believe that even in fairly permanent democracies the

parliamentary system will continue, as a right, because history says it is the ultimate form of progress, then you ought to look again at what has happened in a significant number of countries that once had their own elected parliaments but which became irrelevant to the needs and aspirations of the society that they served.

Remember the communist revolution and the 70-odd years of loathsome dictatorship that prevailed in the Soviet Union followed by the creation of a democratic parliament? Similarly, Uruguay had a workable democracy right through the twentieth century and in the 1970s simply lost it overnight. Romania and Bulgaria had their own parliaments and yet those countries ended up with fifty years of awful totalitarian dictatorship.

Democracy is not an immutable, unchanging institution which will survive despite the worst or best endeavours of politicians in the communities that they serve. Democracy is something that has to be fought for and is relatively rare. In fact, Australia can be considered historically as one of the longest-established working democracies in the world.

My picture of Parliament at the moment is of an old athlete, trained and improved by the reforms of the nineteenth and early twentieth centuries, but now limping into the 1990s, ignored by many and respected by few. As an example of that, I indicate to you a survey that was done by the Australian Electoral Office and a number of other survey units, which showed that only 5 per cent of people interviewed at the time knew who the Deputy Prime Minister of Australia was, but more than 60 per cent knew who the Duchess of York was. In terms of recognition, obviously we have some problems, so I use the words 'ignored by many and respected by few'. Yet Australia was once at the forefront of the great democratic experiment. Universal franchise and votes for women first surfaced here in institutional form, and constant reforms of the voting process, to bring about fairness and to defeat corruption, have been noteworthy in the federal system.

What has happened in a country which successfully borrowed and blended the British and American systems? In this paper I will attempt to explain why the parliamentary system is in need of reform, so that it once again represents a commitment to the public exchange of ideas and embodies, as it should, 'the symbolic value of both the unity and diversity of the nation'.

At the heart of the matter is the increasing power of the executive, party control and the dominance of rigid economic ideology. This is the theme which underpins my paper today. Let us first look at political parties. The most prominent feature of the Australian federal parliamentary system is the almost complete dominance of a rigid party regime. Parties are a necessary evil. As David Lovell said: 'Parties can be helpful in the transaction of parliamentary business but ultimately they prove a threat to parliament itself'.

A subset of the extraordinary discipline of Australian political parties is the factional system. All parties contain factions grouped around individuals or personalities and/or ideological teams: Dries and Wets, Left and Right and Centre Left, Powell versus the rest, Chaney versus the rest — the permutations are endless.

However, it is the Labor Party which is in government and which has dominated the political arena for nearly a decade at both a state and federal level. It is the Labor Party, one of the world's oldest continuous political parties, which has institutionalised factionalism as a modus operandi of politics. Much of what I have to say about the effect of party discipline on Parliament must perforce be centred on that particular

political party. I will spend some time analysing the factional system. People talk about it and they write about it — particularly the media — and they assume that people understand how it works. It is much more Byzantine than occasionally appears in the media.

First, factions provide a broad, rather than a limited, ideological grouping allowing the Labor Party in particular to contain the full political spectrum of political beliefs, from extreme Left to what occasionally is called knee-jerk Right. Unlike most other social democratic parties, the Australian Labor Party has almost never needed to govern in coalition with other parties of the Left, or even of the Centre. Recent state coalitions in Tasmania, for example, with the Greens, and in South Australia, with independent Left members, may indicate a trend away from this traditional monolithic construction. But even those coalitions have been primarily the result of temporary political expediency rather than long term ideological commitment. It has been said that the Labor Party now accepts that the Democrat power in the Senate constitutes an in-built requirement to work in coalition. I will comment later on the implications of that situation.

In the future, the Labor Party may well need to encapsulate in a formal manner the drift of voters towards third or fourth party groupings, especially on the part of younger voters, who in the past consistently voted Labor. In fact, our polls in a number of states have shown that in the last decade, young voters — that is, those people under twenty-five — voted for the Labor Party between 60 and 85 per cent of the time, depending on whether there were other green candidates in the election. The Labor Party has basically had a monopoly of that young vote. That is not guaranteed any more. As the Greens have shown in Tasmania, and as the Greens, Democrats and independents have shown in Senate races, they have a capacity to pull votes away from the Labor Party. Therefore, the capacity of the Labor Party to continue to work as one monolithic party — in other words, to govern in its own right — may well be in question over the next five or six years.

Secondly, the factions allow a systematic method of providing preferment to their members. Preselections to safe or winnable seats and a high place on the Senate ticket are the obvious rewards for those who can capture support within their factions. In many cases, significant trade union support is essential, especially in the Senate preselections.

At a caucus level, here in Canberra, the faction system has provided cabinet and ministerial representation almost on a mathematical basis with only limited horse trading on the margins between factions. For example, the last time we chose our cabinet here, the Prime Minister of the day, Bob Hawke, got to choose only three members of his cabinet, and that was after a great deal of horse trading and prevailing on the factional leaders. The rest were elected by the caucus via their factions and they were elected on a pro rata basis; that is, if the Right had 40 per cent of the vote in the caucus, then it basically got 40 per cent of the ministerial positions. The Prime Minister, even after a successful period in office, was able to effect the election of only three members of the cabinet and ministry. Similar as-of-right representation applies to caucus and parliamentary committees, as well as to parliamentary office holders. In other words, the factions within the Labor Party also divvy up most of the key positions — that is, the chair of Senate committees, the Speaker of the House of Representatives and the President of the Senate. All of these are part of the deals that go on.

The effect has been a stabilising one, because most people know that sooner or later — if they stay in the system, if they are relatively loyal, if they do not rock the boat too

much, and if they are not absolutely incompetent — they will get into the ministry, or some reasonably senior position. On the whole, the amount of time you have been here tends to determine whether you get a cabinet or a ministerial position. There are exceptions to this, but it certainly helps to get in early. In the case of the current Labor Party ministry, it certainly helped to have been in the shadow ministry before Labor was elected in 1983. So you can see that the threads go back a long way. Service to your faction and to your party is an essential part of promotion.

Finally, when it comes to the Liberals, there is ultimately only one faction that counts, and that is the leader's faction. All others are in exile. Since the leader chooses his executive and important policy committees, none are elected by the Liberal Party members. That is a significant difference between the two parties. In the Labor Party caucus, they are nominally elected, usually via their factions, and the Prime Minister does not choose. In the case of the Liberal Party, whether in government or out of government, the leader has the total say about who actually gets in his ministry or shadow ministry. That has some fairly significant implications.

The system has its peculiar problems, since those who do not receive preferment from the leader in the Liberal Party are motivated to seek out an alternative leader who will provide the magic ticket into the shadow ministry or ministry. The Howard-Peacock coup and counter-coups of the 1980s are a case in point. If you were out, you had to get back in again, but basically you had to choose an alternative leader who was out in order to attach yourself to his caravan.

Although the Labor Party's electoral success has not been without its presidential component, one could not help noticing the televised entrance of the *Fightback* package into the opposition party room, borne aloft like the ark of the covenant to the rapturous applause of party members, only one or two of whom had seen or read what will be the most important opposition policy document of the decade; a document that may well place a question mark over at least some of that carolling multitude. It is interesting. There was massive applause, and they rose in their seats as the leader came in with the *Fightback* proposal. The vast majority had never seen that before; not even sections of it. That gives you an indication of the power of the leader in the Liberal Party as opposed to the power of the leader in the Labor Party. There is a presidential component in both parties, but the Liberals certainly tend to choose a leader and give him the power to dominate his executive and his party. That moment of evangelical fervour that we saw with *Fightback* being brought into the Liberal Party room was almost as good as the times I was in our caucus when the Treasurer, with make-up still remaining from his television interviews, unveiled the budget to the Labor caucus fifteen minutes before it was to be presented to the Parliament and an hour or so after he had discussed every detail with the press. So you can see where the power lies. The last people in the line are those in the Labor Party caucus who 'okay' the budget, as they must according to party rules. They must 'okay' every bill before it can go in to the Parliament, but they do it with only fifteen minutes to spare, and with the Treasurer standing there with his make-up still on from the interviews, and he has already told the world about that particular budget arrangement.

Fourthly, party discipline means precisely that in both parties. The Labor Party expels those who vote in the Parliament against party decisions, and all members are required to pledge themselves to be bound by the party platform.

The Liberals do not have such ironclad rules but lack of preferment, and ultimately, withdrawal of endorsement have been used against those who have transgressed the policies and ethos of the parliamentary party machine. I might add that the other day when I was in Romania — it seems strange to say that I was in Romania the other day

— I was talking with a number of significant American politicians and political organisers. The Speaker of the New York Assembly came up to me and said: 'I remember some very interesting people from the Australian Parliament, one of whom was Ian McPhee, one of the most competent men I have met on the world stage. How is he going at the moment?' I said, 'He got knocked off by his party for preselection'. I think, more than anything else, that encapsulates what can happen to relatively talented people who step out of line in either of the two parties.

For all the major parties, the use of the whip and group strategies have caused a diminution in the role of private members in the Parliament to the point where I believe many members have forgotten that neither the Constitution nor Parliament's standing orders originally recognised political parties. Most members, however, know where their bread is buttered, or in which cupboard the whip is kept. For example, on the question of free trade versus protectionism, nothing changes. At the turn of the century we had that and we are now getting back to the same argument. Few private members are willing to oppose the prevailing orthodoxy of free trade, despite the fact that ending tariffs and other industry restructuring may have caused economic and social damage to their own electorates. As with sugar tariffs, car tariffs et al., the private members have forgone their roles as constituency representatives in order to maintain their positions within their respective political parties.

I now move to growth and domination of the executive. The word 'cabinet' does not appear in the Constitution, yet it is cabinet which effectively dominates the parliamentary and political process. There are many reasons for this, some of which vary from party to party, but essentially the capacity and willingness of Parliament to make the executive responsible to it has diminished.

I will try to explain why this has happened, and in doing so it is necessary to accept the fundamental point that the executive has a responsibility to govern rather than to react to the whims of individuals or, dare I say, the press. First, the leaders of the parties have effectively captured the parliamentary machines and, in the Labor Party, probably the party structures as well. The process is relatively simple. It goes a bit like this. The cabinet makes decisions, then uses its cabinet solidarity to create a solid voting block within the parliamentary caucus. In the case of the ALP, cabinet makes the decision, co-opts the rest of the ministry and parliamentary secretaries and is able to guarantee on most issues that it has forty votes out of the 109 member caucus. So a small group in cabinet — let us call them the economic ministers; they are a group of about three or four — can then win the vote of cabinet. Cabinet then wins the vote of the ministry as a whole, because remember that being on the outer ministry is like being close to Siberia but not actually in Siberia, which is where the back bench resides. The outer ministry is then compelled to vote according to ministerial solidarity with the inner cabinet. Finally, they all walk into the Labor Party caucus with forty votes on block out of 109, and that is not a bad start in any caucus. You add a few sympathisers, maybe those who are genuinely converted by the argument and ambitious sycophants — and there are a few of those around in politics — and cabinet is, as we say in horseracing terms, over the line on any issue.

Within the Labor Party, a complex system of caucus committees and factional meetings may have an impact either before, during, or after the decision, but that is not a formal process; they are just ways of trying to exert influence — as a backbencher you use whatever means are at your disposal to ensure that. There have been some significant wins for private members, but tact, timing, skill, and determination are absolutely essential if the normal process of cabinet dominance is to diminish. Since 1983, the caucus has never overturned a cabinet decision once a formal decision has been made. Given the experience with the approval process

surrounding *Fightback* and the power of the leader to choose his own ministers, one cannot see the Liberals changing this pattern of decision making. Secondly, cabinet now has a sophisticated network of support mechanisms to ensure that it has the information and the brain power to dominate its own Party and thus Parliament. There are eight specialist committees and an elite bureaucracy to ensure that this happens. Thirdly, and associated with my second point, is the creation of an ethos amongst bureaucrats and ministerial officers which occasionally regards all those members of Parliament not in the ministry as potential opponents. These ministerial staffers vary in skill, life experience and attitudes but have on many occasions, in my experience, been less willing to open the processes to their own party backbenchers than their own ministers, who at least mix with government backbenchers in various committees and on social occasions.

It is interesting to note that all the ministerial staffers of any significant position earn far more than a senator or member. Their 'use-by' date may come up earlier because, if their own Minister goes then they go too, but most manage to keep themselves within the system and to keep a door open back into the public service, if that is where they come from, or to open a door in to the public service, if that is where they want to go, or to open doors into private enterprise, if that is where they want to go.

Ultimately, the position of ministerial staffers is a very important one. Occasionally it is one which allows them to isolate other members of Parliament from their own ministers. You would be amazed at how often a quick chat with a minister in an informal situation can unravel what appeared to be an incredibly complex web of contacts, discussion, appointment-seeking, et cetera — a web that has been created by ministerial staffers. That is not all ministerial staffers — some are extremely good — but some become more ministerial than the minister and that has an effect on the way that all members of parliament can deal with the ministry, whether they be in opposition or in government.

Fourthly, the workload of ministers has dramatically increased, reducing the time for them to network with other members or even to take time out to think. This development has been accelerated by the creation of super ministries recommended by the Block report in 1987. Reporting directly to the Prime Minister, Mr Block recommended a reduction of the existing twenty-seven departments to sixteen. The result has been the creation of a core of overworked, superpowerful ministers and bureaucrats and an effective watering down of the concept of ministerial responsibility. If you are the minister for construction and a building falls down, then there is only one person who gets the blame and who must stand up in Parliament and be accountable, and that is the minister for construction. When you are the minister for construction et cetera, et cetera and you have three ministers under you, plus a parliamentary secretary, who do you blame? Who was signing the paperwork that day? Who takes ultimate responsibility?

So the creation of super departments complicates the question of who you go to in the first place, but it also avoids the capacity of the public, the press and the Parliament to pin accountability on one particular minister. The ultimate sanction that we have in the Westminster system — or I should say in our case sometimes the axminster system, if we are talking about putting things under the carpet — is a capacity to make a minister admit his or her mistake and resign. That has now gone. It is very significant that this major change that flowed from the Block report was described by the then Prime Minister, Bob Hawke as 'the greatest single reform of the public service', yet it did not even pass through cabinet. We restructured the whole of the public service and the way it related to Parliament, and it did not go to cabinet. Block reported directly to the Prime Minister and the Prime Minister, in this case, used his

presidential powers and put it through. I might say that a similar proposal to do that with the Tasmanian Public Service and the Tasmanian Government, was thrown out the window when it came to the cabinet that I sat in, because all of us said, 'We are the ministers, if we deserve the praise, we want to get the praise. If there is praise around to get, we'll have it. If there is blame around to get, we'll take that as well. Ultimately, the minister has to be responsible. We do not want this diffusion of responsibility throughout the system by the creation of super ministries'.

The last point I want to make on this is that the perceived power and privilege of the ministry is self-perpetuating. Life on the back bench can be miserable and powerless. Some members of parliament here travel the equivalent of Moscow to Paris every week. They get home, walk in late Friday night or Saturday morning and say hello to their spouses — that is if they are lucky and the spouse is not minding the kids or trying to run life as he or she has done for a week or so without the partner. They are then usually off to some function. They then get on the plane on Sunday and they are back in Canberra. They have had probably a few hours at home — that is it — and they then travel back again from Paris to Moscow. This goes on week after week.

Members of parliament have very little privacy. They get paid a lot less than many of them should be paid. Many of them, I believe, are highly educated. I think at least half the politicians in this Parliament have university degrees, yet they seem to be under a lot of pressure, badly remunerated and, of course, not very respected in the community at large. It is not a great career advertisement. Being on the back bench is not the nicest place to be for many of them. The people who especially think that are their spouses. I think the greatest reason for resignation or failure is probably the pressure that is put on them by the spouse saying, 'Give it up. Is it worth it?' I will explain the consequences of that in a minute. Ministers in the Labor Party in particular, are safe from effective challenge to their preselection. That means, for example, that if a minister is running for preselection and his party decides not to preselect him — as it did in the case of Michael Tate; it dropped him to number four on the ticket in Tasmania — then the national executive automatically reindorses him at the top of the ticket. Similarly with Speaker Leo McLeay. He virtually has a ministerial position and so he gets put back on the ticket. Something will be found for people such as these and anyone else can go down the chute. It is very important within the Labor Party to ensure that you get into the ministry. If nothing else, it helps you with preselections; it actually ensures that you get preselected the next time around. The ministers' club dominates the national executive and the national executive has plenary powers to intervene in any State ALP branch to change preselection procedures. There are no Ian McPhees. If Ian McPhee had been in the cabinet or the Labor Party ministry he would never have lost his seat.

Ministers are not only safe from effective challenge but they also enjoy a higher profile, which adds to their salary, pension, electibility and probably their effectiveness in achieving personal policy goals. Thus, most backbenchers will cooperate in any way with faction leaders and the powers in cabinet in order to be invited into the golden circle that is the ministry.

Given that parliamentarians in Australia last an average of only eight years federally, and that few return if they suffer defeat, there is unlikely to be a core of experienced, confident members of the back bench who are able and willing to shake up the system. This is of course in direct contrast to the United States, where a significant number of senators consider themselves back bench senators but wield enormous influence in the American Congress. Similarly the rise of Margaret Thatcher in the United Kingdom was basically occasioned by the power of back bench committees within her party. They were the ones who said, 'The party needs a new voice, a radical

approach'. They were the ones who put her in the position to be the first woman leader of a conservative party. The back bench is significant elsewhere; in Australia, it is a place where you stay on your way to somewhere else — either out of the Parliament or into the ministry.

I will now look at the issue of Parliament itself. It is assumed by most commentators that the House of Representatives works basically as a numbers crunching exercise — in other words, if you have the majority, you can do pretty much what you like. In the last twenty years, few if any members of that House have crossed the floor on a matter of principle. The guillotine is routinely used and question time is highly organised to score corporate points for both the opposition and the government. Even on House of Representative committees, the relevant minister gives the terms of reference to the committee and expects to influence the outcome of committee inquiries. Only through informal processes or faction meetings can backbenchers exert influence over ministers whose politics or policies they oppose.

In the Senate, on the other hand, there is a difference. Private members are able to exert greater influence, primarily because the government has not had, and is unlikely to have, a majority in its own right. Committee activities and inquiries have been known to take a momentum of their own, often against the wishes of the executive. Former senator John Black's drugs in sport inquiry and former senator Peter Rae's corporate affairs inquiry are just two of the more overt examples of this process — although the fact that they are both *former* senators may be a telling point. It is not unknown for government senators to use Democrat or even opposition support to conduct inquiries, the existence and outcomes of which have been unpopular with the executive. It is true: if I do not like something my minister is pushing and I get outvoted in the caucus — because, as I indicated, the minister carries with him forty votes into the 109-member caucus — obviously there is room for discussion between the Democrats, the Opposition and me.

There have been occasions when I have clashed very overtly with some of my ministers. I am still, incidentally, Chairman of the Senate Standing Committee on Employment, Education and Training; John Dawkins is not the minister for education any more. That was an example of a case where I said, 'I will take on the minister, but I need the support of all members of that committee, regardless of what party they come from'. Their unanimous support on all the issues that I was pushing against my own minister was an essential part of the process of my being able to create a debate about the issue that would otherwise not have occurred.

It was once very unfashionable for the Labor Party to support the existence of the Senate. Indeed, until recently, abolition of the Senate was part of the ALP's official platform. However, the committee system fathered by the late Senator Lionel Murphy has now proved to be of such potential value to the political process that few, if any, Labor senators would vote for its abolition — self-interest notwithstanding.

Senator Bruce Childs, in his Senate occasional lecture of 10 August 1992, covered comprehensively the value and functions of the Senate committee system. In the interests of brevity, I will refer you to his paper rather than go through some of the pluses, but there are certainly many pluses and a lot of potential for the future. However, Senator Childs did touch upon the major problem facing senators trying to make the system work, namely, the work overload — as senators sitting on formal and informal committees have found to their detriment and to the detriment of the system itself.



My own view is that work overload is not a problem that arises simply from the amount of work to be done, but is primarily a problem that stems from senators themselves being unwilling to set and to stick to their priorities. In other words, it is essentially a matter of bad work practices and probably an inadequate view of parliamentary theory that causes their work overload.

The main problem is attitudinal. If there is a choice between the cavalry's, and say, the foot soldiers' view of political action, it is obvious that too many senators have opted to be foot soldiers; that is, they accept that the job must be done and rarely attempt to question whether some jobs are worth doing at all. If estimates committees, for example — which, incidentally, have great value in making the bureaucracy accountable — sit until three in the morning, or if debates on contentious issues run into the night, or if senators find themselves marching between one committee and another, it is their responsibility to ask why this is so. If some senators believe that the length of time they sit is a measure of their manliness — and that includes women senators — then they have only themselves to blame.

Let us have a look at them. First, there is no reason why estimates committees, for example, cannot be preceded by written questions on notice so that issues before the committees can be more focused. Smarter senators do this already, knowing, especially if they are in opposition, that the press is probably home in bed on those occasions when committees sit until the early hours of the morning.

Late at night, I often look at the lonely AAP reporter sitting up in the press gallery — the only member of the press there; there are probably others still glued to their television sets in their office, but probably quite a few have gone home to bed — and I wonder, 'Why is this Senator, why is this House of Representatives Member still insisting on giving a 20 minute or a 40 minute speech repeating the same issues, the same ideas, the same arguments that have been repeated *ad nauseam* by his colleagues?'. The answer is that they wish to punish themselves. There can be no other reason. It leads to no political benefit. The press will not cover it. Members of the press have wisely gone home — and I do not blame them. But senators have not quite got that point; they can empty a room without knowing it.

In both Houses superficial and repetitious debate usually occurs because little advance notice is given of the content and introduction times of government legislation. On many occasions members and senators are given only a few hours warning of impending debates or legislation, hence the poor quality of their speeches. Sooner or later the Parliament will need to set fixed times for debates so that all parties can plan their approach to debates and choose those speakers who have genuine knowledge about the issue. The press can then be alerted and the public informed well in advance about which issues will be dealt with, at which hour and on which day. The increased public interest, fostered perhaps by notices in the media, the better level of debate and improved scheduling of parliamentarians' time, would do much for the standing of all parties and the political system in general.

I cannot recall a single occasion, in the nine years or so that I have been here, when I have been able to say either to the press or to any interested groups: 'This debate on this particular issue is going to occur at 3 o'clock and I will speak at 3.30'. I have never yet spoken on schedule. On many occasions it has been three to four hours late because of the fiddling around that occurs under our current procedures. In fact it could be three weeks late or it could be debated in the early hours of the morning.

One of the most important bills, in terms of principles, that went through this Parliament was the War Crimes Bill. It was a very interesting debate yet it was held

just before Christmas into the early hours of the morning and most of the debate was not reported. Yet I think anyone listening to that would have been extremely interested and should have had advance warning of that debate being on. That debate should have been on at a certain time and it should have been advertised. Of course, both Opposition nor government will not allow fixed time debates to occur. Why? Because they both think the other will be advantaged. Who is right or wrong? I do not know, but they will not move. They will not give anything. They think that there might be the possibility of the other side being advantaged through the public, the press and, I might say, parliamentarians knowing that a particular debate is going to be on at a particular time in the week.

There are other matters that would help improve the system. Above all, the normally antagonistic and unscheduled procedures for voting, the calling of quorums and so on must be reconsidered. Quorum calls should be limited to perhaps three a day, voting on all bills should be adjourned to a fixed day, as is the case in many other parliaments, and question time discipline is required to ensure that answers are kept brief and to the point.

If these procedural anachronisms which leave the public bewildered and uninterested are not re-examined, Parliament's progress towards irrelevancy in the public mind will be complete. For example, in the Senate we are just now starting to work on the basis of restricting the time that ministers have to answer questions so that we can get more questions in, so that in the end all the controlled questions that have been put up by both political parties on either side run out of steam and private members start to get their questions in at a time when the public's mind is more likely to be focused on Parliament than at any other time.

If you believe that the reform of Parliamentary procedures is an esoteric matter, that it has no bearing on the goal of making the executive accountable to Parliament, then compare the Canadian Parliament, the British Parliament, the American Congress with our own. In the British House of Commons the average number of questions in its one hour question time is seventy. In Ottawa the average in 45 minutes is forty questions. In our House of Representatives the average in sixty minutes is twelve questions. It goes from seventy to forty to twelve. Look at it another way. In the 1970s the average number of questions without notice in the Australian House of Representatives was 1,000. In the 1980s the average had dropped to 600.

Where do we start? There are two positions which can open that process up. A driving force behind the reform of these procedures should be the President of the Senate and the Speaker of the House of Representatives. Their offices and influence could be used effectively to persuade all parties to see that a revamped system could operate to the advantage of all members of Parliament discounting those who are congenital sufferers of psychotic aggressiveness and others who suffer from what I would politely call 'wind disorder'.

In order to change this, the first step must be to ensure the independence of the President and the Speaker. Of all the steps we can take in Parliament, that has to be the first. Both should resign from their respective political parties and in return be guaranteed a fixed term, an uncontested re-election at the next general election. This is not unknown in many other parliaments throughout the world. This would not be a recipe for growing old and feeble-minded in the job, as failure to be elected Speaker or President within the Parliament when it returned would then require those who were unsuccessful to seek party endorsement the next time around.

I think that is the key to all the changes. There is no point in having these positions unless they can be used positively to influence the way Parliament evolves. To enable them to do that they must be independent and free of the constraints of seeking endorsement and free of constraints of having to seek election at the next election. They must be impartial and they must be movers and shakers in the system. Their main job is not to preside over question time or to make sure that the dining room pays its way; they have greater responsibilities than that. By making them independent we can allow them to use those responsibilities.

The last point I want to make about possible areas of change and improvement is related to the Democrats and the independents. The Democrats and independents have been the window of opportunity for the partial reform of the Senate. As yet these have not affected the processes of the House of Representatives. If I were a Democrat I would probably be a member of their cavalry rather than a foot soldier. Their numbers are insufficient to allow the Party to cope adequately with the ever increasing waves of legislation that arrive in the Senate each sitting week and reform of Parliamentary procedure may not be a sexy topic, but a few of the Democrats would do very well to specialise in this area. The governments may be forced to concede to a Democrat-inspired reform of procedures in order to get their legislation through. The Democrats have the ball in their court: they can barter — 'If you want your legislation, you give us Parliamentary reform'. They have not yet woken up to the potential and the power that they have, but the day they wake up to that there can be some changes here.

I want to cover the bureaucracy and the press because they have a role to play in this. A word must be said about the bureaucracy: in theory, those who advise governments and implement policy. Does the executive receive the breadth and depth of policy advice it needs? I have already mentioned the creation of super departments in 1987. In 1984 the Senior executive Service, the SES as it is now known, was introduced as a measure to change the focus of the senior bureaucracy from a department of constrictions to one that was more broadly based with a wider perspective of what government and society in general required.

So far so good. Salaries went up, careers were advanced, but what has changed and what has been lost? There has been a narrowing of advice to government. Dr Michael Pusey and others have correctly pointed out the dominance of one system of belief — that of dry economic rationalism characterised by its views about free trade, user pays and market force ideas. These econocrats, as I call them, tend to share the same ideas, the same economic biases, and the same social and often the same educational backgrounds. They have much in common with their ministers, who either adopted or grew up with their ideas. I cannot characterise them in a logical way, but I will use the George Orwell way of characterising them through a liturgical response: tariffs, bad; inefficient industries should go to the wall; deregulation, good; privatisation, good; Darwin's survival of the fittest, good; level playing fields not only exist but are good; the young and those with economic degrees shall inherit the earth; and there should be free markets without end — Amen. That is basically the ritual of their beliefs.

To these advisers, carefully promoting each other to key posts in the bureaucracy, the creation of the SES and the super departments has been a godsend, allowing them to capture the holy ground of political debate. It does not matter that their advice has led to the failed boom of the 1980s, the banking mistakes, the long unemployment lines, the rusting manufacturing industries, the loss of Australia's strategic economic base, the lack of any significant value being added to our primary industries or the diversion of investment into minimally productive real estate. At Harvard in their

MBA courses or at the economics faculty of Sydney University and similar universities, they learned that failure was due not to the illogicality of what they believed but to an incapacity by politicians and business people to make, as they put it, the hard decisions — 'If we just keep making the hard decisions everything will be all right. Australia just needs to restructure, to make itself more open to market forces, et cetera'. You know the liturgy; you have heard it before.

When politicians and economists convinced the electorate that they needed small government, these econocrats were there to provide it. Elaine Thompson described the process as one in which there is not even 'a hint of the bureaucracy's need to respond to and reflect the interests and needs of people at large. Instead efficiency has come absolutely to dominate the role of the public service. It is not efficiency in any broadly conceived way. It is a narrow technocratic managerialism where short term dollar savings are used to justify the direction of policy'.

And, I might add, all of this in a country which comes in only eighteenth amongst OECD countries in terms of GDP spent on government services. In other words, in terms of government expenditure as a proportion of GDP we are way down the list. The notion that has been sold to people in this country that Australian governments are big spenders, especially that the Federal Government is a big spender on government services as a percentage of our national wealth, is absolutely wrong. We are eighteenth on the list and that is behind virtually every developed country that I know, with the exception of Japan.

Finally, a word about the media. I will be brief on this one because they like everything to be pithy and brief. Jackals or good guys — what are they? I do not contribute to the conspiracy theory of media control except when the media magnates' vested interests are threatened, such as when we wanted to restructure the television industry or stop Fairfax being given to a particular person or whatever. That is when they come out of the woodwork and express their personal views and maybe they affect what is being written. But on the whole the parliamentary press gallery is on a day-to-day basis pretty well master and mistress of its own destiny. Australian television, radio and newspapers are voracious particularly in their appetites for a good story — too voracious to worry about the long term political biases of their owners. The gallery is generally well educated, young, and peer-group aware. They play a user game with politicians and in turn we play a user game with them.

If all of us share a belief that democracy is the civilised clash of alternative views and the cooperative pursuit of solutions, we need the media. But parliamentarians in particular must understand the constraints, mechanics and motivation of the media. Rather than complain, I think we have to understand how the media works, particularly in this place. You would be surprised at how many parliamentarians do not understand the constraints that the media work under. If parliamentary debates, for example, are repetitious, colourless and banal, if politicians have no capacity to communicate their own successes and/or the failures of their opponents, if their stories are lost because they timorously follow the party line, if they do not understand that timing is important and the press do go to bed even if the politicians do not, if we do not understand that a free press also means an entertaining and informative press, we as politicians have only ourselves to blame.

When my own stories get spiked — the term we use for a story that is sent to the press and which then goes on a spike; in theory, it goes on a spike but, as a member of the press told me, if they do not like the story it goes in to the cylindrical filing cabinet — I think of *Pravda*. If you recall, *Pravda* was the official propaganda newspaper of the Soviet Union. In a free society it has now gone bust. That is the fate of all propaganda

units; all media that just become propagandists rather than informers or entertainers. So I think about *Pravda* and I wonder about what I said, when I said it and who else was competing with me for column inches or television or radio time. I do not blame the press because they did not take down my pearls of wisdom; it may have been me as a politician expecting them to accept something which probably was not newsworthy on the day, or which was less newsworthy than other things.

So there it is; Parliament, like General Custer, unloved and unlamented in the late twentieth century. I hope this tour today of the battle field has provided what every parliamentarian and the public needs: food for thought, time to think, and a chance to prepare for Parliament's last stand.

Harry Evans has indicated that if anyone would like to ask questions he would be happy to have me answer them.

Questioner — I have one simple and short question to start. How many days, how many weeks, do the two Houses sit? I was thinking of your story about the long distance travellers who have to go home for the weekend. It seems to me that the sitting days have reduced quite disgracefully.

Senator Aulich — On the whole it is difficult to say how many days. I will start off with one question at a time just so we have equity and fairness in the questioning. The number of days that Parliament sits cannot be judged just by the number of days the Parliament, the chamber, is in session because there are also committee hearings both here in Canberra and, in many cases, around Australia. So my guess is, from the studies I have done, that parliamentarians must be away from home at least 120 nights a year on committee or parliamentary business. That is about the average from surveys that I have done amongst members. The number of days that Parliament sits in the chambers is not always the relevant factor to look at. That may have gone down, but certainly the committee system has created a greater burden in terms of time.

Questioner — Would you agree that the importance of helping people feel more responsible is becoming ever more important because of the danger of two leaders coming to an agreement? Who is to tell the general public otherwise? To help that, we might perhaps use democratic processes — as the way to speak of it — instead of democracy; democracy not being really an institution but the democratic processes are building all the time.

Senator Aulich — I passed over the question of the independents. I take it for granted that, provided there are sufficient numbers of independents elected to a parliament, you have another influence on the process. I would not like Parliament to be full of independents because you might get a lot of conservative independents or radical independents — they all take a position somewhere. But I must say that the election for the seat of Wills was a very healthy event. It was healthy because the independent, Phil Cleary, has a philosophy — intelligent protectionism. He went and sold that in the electorate; he did not back away from that issue. He took on the econocrats up here who believe that protectionism — tariffs in particular — is old fashioned and ought to be done away with. He said: 'I stand for this' and the electorate had a very good idea of what his political philosophy was. He was also clever enough to organise people within his electorate and the trade union movement to back him so that there was a genuine alternative for the voters of Wills to choose from in addition to the other two parties.

Sometimes the independents can help change the process and they have to be recognised for the role they play. Most political parties hate independents, and they do not like Democrats much either because they believe that they are not really a political party — just a collection of individuals. But the independents and the Democrats are necessary to force political parties to rethink their agenda.

It is very interesting to watch Paul Keating retreating slightly from free trade ideas. The closer we get to an election the more he looks at how the honourable member for Wills, Phil Cleary, polled, and the more John Hewson continues towards the goal of implementing a zero tariff policy by the year 2000. It is interesting that we are starting to go back to the old party differences, which is healthy. It was Tweedledum and Tweedledee in terms of economic policy for many years. Now you are starting to see both parties pull apart slightly.

I think the vote for Phil Cleary did a lot to make people in the Labor Party start to reassess economic orthodoxy in this country. Let us face it, it failed in the United Kingdom and the United States — and they are about to punish Bush for that — so dry economic rationalism cannot be all that effective either politically or economically in the 1990s. It is going to be challenged and independents are going to start that challenge. I think the political parties will have to accept that challenge or lose support, and not just at the fringes, but basic support.

Questioner — In your talk you emphasised the negative aspects, if you like, of party discipline. To go to the opposite extreme, it seems to me that we basically have seen the degutting of the Democrats by personal things being played out very much in public through a lack of factional and party discipline. I think that at least factions give some order to the political process. Perhaps you have emphasised a notion of individualism, but that does not necessarily open up the political process to any greater democratic thrust, and there is something to be said for knowing where people stand within a party to make it function effectively.

Senator Aulich — I agree with you. I accept political parties as a necessity. You need to know where the bulk of your members of parliament stand in terms of their beliefs. They are essential for making parliament work in a relatively productive way. But when they become almost an end in themselves, it is time to call in the Democrats and the independents to shake the system a little. Once people work in a system which rewards and punishes, with the sophistication that both the major parties can apply nowadays, that essential component of the system — that is, individual initiative and creativity in ideas — is lost. The capacity to ask why we are doing this and why this country is going down the chute using policies that are ten years out-of-date is also lost. So it is a balance. The basic structure has to be the party structure. The independents and the Democrats are needed. Let us face it, personal animosity can break up political parties. I will not say that we had a good time when Hawke and Keating were vying for the top job. It almost cracked us up. We were without a father or mother for seven months.

Questioner — Are you saying that the country has been going down the chute for ten years?

Senator Aulich — Yes, statistically we are. We are not the only ones — the United Kingdom and the USA are in the same boat. All developed western democracies of the Anglo-Saxon mould that have followed dry economic rationalist policies have experienced a massive recession. I am not blaming one particular party. In fact, I blame both political parties for getting in bed together on this question of economic policy.

Questioner — You spoke about accountability. That seems to be the key ingredient that the electorate is dissatisfied with in democracy. Not only here but also in the western world, the level of accountability does not seem to be adequate. You have spoken about the committee system. I have had some exposure to the committee system. I made some recommendations for change to the committee system to the Joint Parliamentary Privileges Committee ten years ago, in particular, in relation to the power of the committee system. What do you think needs to be done to improve the adequacy of accountability through the committee system in the Senate? What powers do they need to have? I have my own suggestions, but I would like to hear whether you feel it is adequate. You spoke about the work of these committees absorbing the time of the local member. I suggest that they are ineffective in terms of time.

Senator Aulich — They already have immense powers. Senate committees and, I might say, House of Representative committees can pull anyone before them. They can punish people if they refuse to come. They have the power to investigate government departments. Their powers are pretty well unlimited. I would say that their powers are as great as a lot of royal commissions, probably greater than those of a court of law. But the politicians themselves have yet to work out those powers — how you go about it; how you can make yourself effective; how you can make yourself time-effective in the way you approach things.

More than anything else, I think that the Speaker and the President of the Senate should be given independence to change the structures, rejig the committee systems, gee people up, create an ethos in which the committee system becomes much more important than it is now; debate ideas, call people in from the various parties, and say, 'Look, I'm the President of the Senate. Twenty of you are going to sit around with me tonight over dinner and we are going to have a chat about how we make this committee system work. If the ministers do not like it, that is tough luck because I am an independent President of the Senate, and I want to create a working Senate in which senators are not overloaded with work but are able to focus their attention on making the executive accountable'. There are various ways, but I have tried to put it in a nutshell. You have to come back to the independence of the Speaker and the President because they will have a vested interest in making the system work.

Questioner — I have two questions. Do you agree with Senator Hill's proposal to limit questions in Senate question time to two minutes? Would you like to see it extended to the House of Representatives?

Senator Aulich — Two minutes is not enough. I think it should be four minutes, and it should be extended to the House of Representatives. Those figures that I gave you on question time are pretty disgraceful. I might say that both parties cause them. There are constant points of order from the opposition and people are waiting to be kicked out in order to be on the front page of their local newspapers, et cetera, to make a point of principle. The government, on the whole, answers Dorothy Dixers as if there were no chance to make ministerial statements elsewhere in the place. So both parties have been abusing question time. We have to learn how to control ourselves. We can simply move in the Senate, with the Democrats' support of course, to enable the four minute question time to be the norm for the future.

Mr Evans — The Senate sits in thirty-five minutes, which is bad news for me, but your comments are much appreciated. Thank you very much.

## Parliament and People

Senator the Hon. Peter Durack, QC

As you will be aware, the topic I have chosen for my lecture today is 'Parliament and People'. I stress that it is 'Parliament and People', not 'Parliament and the People'. I was asked to draw on my experiences and recollections of what is now nearly twenty-two years as a senator and prior to that, three years as a member of the State Parliament of Western Australia. I certainly think the most rewarding aspect of my career has been the contact that I have had with individuals of all ages, interests and types. In this day and age there is such a great deal of concern being expressed about the Parliament. For that reason I choose a topic that relates to the fundamental issue of what the Parliament is about — that is, representing people.

I preface my remarks with a quote from a judgment of Sir Anthony Mason, the Chief Justice of the High Court. The judgment was from a recent decision — and one that will be considered one of the most famous High Court decisions ever — namely, the political broadcasts case; at least that is what I call it. As I am not addressing lawyers today, I will not quote the full title of the case. I am sure you will know the case that I am referring to. Sir Anthony said: 'The point is that the representatives who are Members of Parliament and Ministers of State are not only chosen by the people but exercise their legislative and executive powers as representatives of the people. And in the exercise of those powers the representatives of necessity are accountable to the people for what they do and have a responsibility to take account of the views of the people on whose behalf they act.' I have chosen this quotation to begin my address because, I believe, it is a classic statement of our system of democratic government.

However, I want to concentrate on one particular aspect of the system which I also believe is fundamental to it; that is, the role of the Parliament in furthering individual rights. In a general sense it is about the rights of individuals but it is also about the individual and his or her rights, claims and remedies. The performance of any parliament will no doubt vary considerably and its concentration on such issues will be determined by the major preoccupation of the community it represents. However, the perceived failure of Australian parliaments in recent times to perform this historic role has given rise to widespread concern and cynicism.

I believe there are good reasons for that prevailing concern. In my opinion, the major reasons for that concern are the size and complexity of modern government and the strength of the party system in the Parliament. Both these phenomena indicate a preference for corporatist solutions to political problems rather than the encouragement of individual expression and initiative by both the people and their representatives.

I also think that the isolation of the Federal Parliament in Canberra adds to the concerns of people that it is out of touch with them and cannot be influenced by them. Federal members represent large numbers of people. In many cases they are spread over wide distances, and there is little opportunity for personal contact. Modern systems of communication — although far better and indeed revolutionary



compared with the past — replace personal contact and create an unreality about the work of the Parliament.

There is undoubtedly a strong backlash to these dominant features of modern political life and a clear obligation for members of Parliament to address this growing concern. Let there be no mistake by governments and party organisations of the ultimate responsibility of members of Parliament to their electors. That is why the judgment of Sir Anthony Mason is fundamentally important.

Under our system of universal suffrage and one vote one value, in the House of Representatives, that responsibility is ruthlessly judged in the ballot box. If governments ever forget this, they are regularly reminded of it. Recent political history is replete with such examples: the demise of Churchill in 1945, Whitlam in 1975 and Bush only a few weeks ago, to name the most notable examples. Even the threat of such judgments has been enough to topple powerful leaders — and seemingly in their prime — such as Margaret Thatcher and Bob Hawke.

If members of Parliament are doing their job, the concerns of the people they represent are rapidly conveyed to the most powerful of governments and party machines. The member's role is by no means confined to the parliamentary chamber. The party system, with regular formal meetings of its members together with numerous formal or informal committees, provides great opportunities for members to speak up on behalf of their constituents. In the end though, the system relies on the quality of the relationship between the representative and the people.

Another safety net in the system is that we have chanced upon a different electoral system for the Senate and the House of Representatives. This is not why the Senate was included in the Constitution but, with the adoption of proportional representation — and that occurred only in 1949 — governments are unlikely to be able to control the Senate. There has always been, to a varying extent on each side of politics, a tradition of greater independence for senators. This is unlikely to change given the current dissatisfaction with the party system. The double dissolution procedure with the availability of a joint sitting of both Houses of Parliament can resolve any major conflict, if it seems important enough to the government of the day — and, of course, if the people support the government in that special election.

Therefore, it seems highly probable that governments will have to negotiate with the Senate to obtain the legislation that they desire. This may be irksome for them, but it provides a most effective check on executive power. As a former minister, I can attest to the fact that the braking effect of the Senate can be a bit irksome. Incidentally, a Senate minister has a harder time than do his colleagues in the House of Representatives.

In recent times there have also been a number of improvements implemented or proposed in parliamentary procedures. These have been addressed in this lecture series. I do not want to devote much time in this lecture to canvassing the changes which have been made in the working of Parliament — and I go back over the last 20-odd years. However, I want to emphasise the point which has already been made by Harry Evans in this series that parliaments in Australia have responded to these modern challenges in a significant and effective way. There is not a great deal of additional reform which can be made, or needs to be made, on an institutional level. An outstanding example of that is the committee system that has been put in place. In this area the Senate was the leading light in Australia, but now the committee system has been adopted in other parliaments and, to an extent, in the House of Representatives.

The change which I have seen in my own parliamentary career has been most impressive. For example, when I was first elected to the Western Australian Parliament in 1965, that body sat for only one session of about four months each year. I was elected to it in February and did not take my seat in the Parliament until the end of July — nearly six months later. There was only one committee, namely a standing orders committee, which had not met for seven years. Now the Western Australian Parliament has two sessions a year and a number of effective committees — and I suppose there could be debate about how effective they are. Nevertheless, there has been remarkable reform in the Western Australian Parliament.

We have now come to the position in the Senate, as Senator Childs pointed out in a recent lecture, where senators are suffering severe indigestion from a surfeit of committee work. I generally agree with Senator Childs's comments about the working of the committee system. Fortunately, nobody is saying that it should be in any way abandoned. In 1981 the Senate set up a standing committee known as the Scrutiny of Bills Committee, which, with expert help, examines bills to check them against selected criteria for individual rights — that is, mainly the extent to which a bill may breach such rights. That Committee was modelled on a longstanding Senate committee which was set up in 1932 to perform the same responsibility in relation to subordinate legislation. It has had a very long and distinguished record.

The Senate Standing Committee on the Scrutiny of Bills, which is a little over ten years old, has performed a most useful function. Unfortunately however, senators and members pay insufficient attention to its reports in the course of committee debates on bills. I think this indicates that the Parliament has dominantly had other interests of a policy kind and has failed to give priority to the impact of a bill on individuals. This perhaps explains the current concern of the judiciary, which is called upon from time to time to enforce quite draconian legislation.

I recommend to you a report of a seminar held, probably in this room, in November 1991 — just a year ago — to mark the tenth anniversary of the Senate Committee on the Scrutiny of Bills and particularly the address given to that Committee by Mr Ian Turnbull, who was the First Parliamentary Counsel. He makes the very important point that the mere existence of the Committee and the guidelines within which it operates have meant that most of the problems that we had in the past with bills grossly breaching individual rights, imposing self-incrimination, retrospectivity and so on, have been headed off at the level of parliamentary counsel — not because parliamentary counsel themselves as such are independent of the executive, but because they have been able to point out to the instructing department that this or that provision will run foul of the Scrutiny of Bills Committee. Therefore, one reason the same attention has not been given to bills is that, as a result of the existence of this Committee, they are now drafted in a far more acceptable way.

If the Parliament fails to adequately protect individual rights in legislation, whether by neglect or intention — and I am afraid that some of it is quite intentional — it is not only accountable to the electorate; the High Court has now signalled that it may well intervene. In the recent landmark decision on the political broadcasts case, it has identified a major protection within the Constitution for free speech, at least in public affairs and in political discussion. There can be no doubt about the importance of this decision, which is based upon perfectly sound legal reasoning — implications from the words of the Constitution itself.

Although the High Court has in the past struck down major legislation, notably the banking case and the communist party dissolution case, it has always been very

cautious in drawing implications from the Constitution. But in the political broadcasts case, the judges have done precisely that, and by similar reasoning may do so in other situations.

Without going as far as Justice Toohey, it seems to me likely that the court will remain active in its protection of individual rights. Although the Parliament should not abandon its prime responsibility for this — and I stress that we should not just let things go because we think the High Court will fix it up — there is now a safety net in our constitutional structure without the uncertainties which would be created by a formal Bill of Rights. I greatly welcome this High Court decision and this development.

A wise and much respected former Premier of Western Australia, Sir David Brand — under whose leadership I first served as a backbencher — liked to point out that the representations that governments received were of two kinds: one to increase government expenditure and the other to reduce taxation. It is a pity that more parliamentarians did not ponder that dilemma over the last twenty-five years, because it is now clear that people are protesting more and more about the size, the cost and the intrusiveness of government. The volume of legislation required, or thought to be required, is mind-boggling. It is really beyond the capacity of the Parliament to deal with it adequately.

This volume of legislation with which the Parliament has to grapple — and we are told that in the last four weeks of the current sitting of the Senate we are to embark upon tomorrow we will have seventy bills — should and could be reduced. There is also no reason why it needs to be so complex. Again, I refer to Mr Turnbull, the First Parliamentary Counsel, who admits to the unnecessary complexity of a lot of legislation. He says that the complexity is due to the fact that they often are not given time to draft it. It is harder to write something short and succinct than something that goes on forever. The nature of the instructions they have received from the departments is another explanation for the complexity. Probably the best explanation lies with the members of Parliament giving way to pressure groups.

Parliament has already told the courts, by legislation of course, that they are to interpret legislation according to its purpose. There is no need for the legislation to try to spell out all the conceivable applications which it may have to individual cases; that can be done perfectly well by the courts on a case-by-case basis.

It is showing some signs of improvement. To illustrate my point, I include two tables (see pp. 109-10) showing the number of Acts passed over the last twenty years. It is up to date but this year is not completed; there are presumably at least seventy more Acts to be included in 1992. It shows very starkly this growing increase in the complexity and length of legislation, perhaps not so much in the number of bills, but in the length and the detail that is included in them. The number of pages of the Commonwealth statutes — going back to the early 1970s — seem to vary between 1,500 and 2,000 pages per year. We now have legislation which is running, on average, to more than 3,000 pages; some run to 6,500 pages a year. It is a very stark reminder of this major problem. We are talking about how we will protect individuals and individual rights. This is one of the major reasons for the problem. There is this volume of complex legislation. By and large, structures and policies are being implemented and no thought is given to how they affect each and every individual.

As I have acknowledged, despite reforms to the system over the last twenty years, there is a widespread feeling that representatives are not sufficiently responsive to the views of their electors. I have suggested some major reasons for that concern, but I am

not convinced that the charge is entirely justified, at least in relation to social and moral issues, which have become prominent over the last twenty years.

There is a strong case to be made that parliaments around Australia, particularly the federal Parliament, have taken up, debated and in many cases passed legislation on a wide range of social issues. A list that comes to mind includes the following: racial discrimination, sex discrimination, human rights, censorship, funding for abortion, rights of de facto spouses, family law, human embryo experimentation, rights to privacy, freedom of speech, freedom to advertise certain products and, in the last few weeks, disability discrimination legislation. The legislation relating to homosexual conduct between consenting males has been a major issue in State parliaments, although for obvious reasons it has not figured in the Federal Parliament.

In most of these cases legislation passed by the Parliament, such as the *Sex Discrimination Act 1984*, has greatly extended the individual rights of people who are targeted by it, but may to some extent restrict the rights of others. That, however, is a balance which has to be made in regard to all these issues. Censorship has been an interesting example. A revolutionary change of attitude was made by successive governments and parliaments in the early 1970s to affirm the principle that people should be free to choose what they read, see and hear. Interestingly, there have been recent debates about this, and proposed legislation has tended to place restrictions on this principle in response to the widespread availability of material depicting pornography and extreme violence. The point I wish to stress, however, is that Parliament, far from ignoring these issues, has given a great deal of attention to them. There will always be debate about the wisdom of its solutions, but it is certainly not fair to allege a lack of responsiveness by modern parliaments on these matters.

I now turn to another aspect of this lecture. My purpose is to discuss the role of the Parliament in protecting not only individual rights as such, but also in protecting the rights of particular individuals who complain about their treatment by government or by their fellow citizens. This question does not appear to receive much consideration in the current debate about making the Parliament more responsive to the people, or better securing their rights in legislation, or giving people better access to the Parliament through an improved committee system. It seems to be a fundamental problem in any society which sees itself as concerned about the individual, as we claim to be.

Responsive parliamentarians, concerned committees and fewer and better statutes do not of themselves solve the problem of citizen A, B or C who complains about the application of a particular decision under a particular law in so far as it affects him or her. You may well say that that is none of the business of the Parliament; that is for the courts to decide. In principle I agree. However, that depends on the availability of judicial remedies and the quality of access to them. Furthermore, my experience as both a lawyer and a politician has been that ordinary people are extremely loath to seek their day in court. They try to have their grievances resolved by less fearsome and costly methods.

All of this means that Ministers, members of Parliament and those who assist them have to be prepared to spend time and effort on the individual problem, as well as on the formulation and execution of policy with which we are more familiar and more competent. How should Parliament or parliamentarians tackle this question? We certainly cannot turn a blind eye to it because electors have become more and more demanding of attention. Nor do I think members of Parliament are reluctant to give them that attention.

We now operate under a very sophisticated system of government based on the theory of the separation of powers. This was formulated a couple of hundred years ago in the United Kingdom. It has been enshrined in the constitution of the United States and in our federal Constitution. Despite the fact that we and many others are said to follow the Westminster system, the history of parliament and of the government in the United Kingdom has never presented such a clear case of the separation of powers between legislature, executive and judiciary. Nor have we in Australia slavishly followed that theory, despite the framework of our Constitution.

Parliament is often called the highest court in the land. Why should that be so under our system of separation of powers? The practice of Westminster parliaments — and indeed in the United States — has revealed a concern for the problem of the individual as well as the more usual subjects of taxation, law making and public administration. There is a clear example of this in the United Kingdom, where the House of Lords, albeit now in a special judicial role since 1876, is in fact the final court of appeal in the United Kingdom. There was an old process known as impeachment: the trial of senior officials by Parliament for high crimes and misdemeanours. This was used particularly in the great struggles of the seventeenth century parliaments against ministers appointed by the King. It led to the nemesis of Charles I. This has now fallen into disuse but it is available in the United States, as President Nixon learned.

However, we do not have to rely on such exotic examples. Section 72 of our Constitution requires that Parliament should determine the capacity, incapacity or misbehaviour of federal judges. The New South Wales Parliament decides the fate of its police commissioners, as Mr Pickering and all of us found out recently. Breaches of privilege of parliament are also decided by Parliament and not by the courts.

Until comparatively recent times there has been a long history of private bills — not so common in the Federal Parliament as in State Parliaments (I myself moved one when in I was in the Western Australian Parliament) — the purpose of which was to grant an individual a right or concession. At one time, that in fact spawned a parliamentary bar in London. Until 1857, that was the only way you could get a divorce.

A more practical and immediate means by which individual cases can be brought before the Parliament — if not in fact decided by Parliament — is the adjournment debate. The adjournment debate has traditionally been a means by which a member can raise the grievance of an individual. The Senate was recently treated to a series of such speeches outlining in considerable detail the complaints of the customers of a leading Australian bank.

Question time is often mentioned as an opportunity for a member of Parliament to raise any matter affecting an individual constituent and to put pressure on a Minister to investigate the way in which he or she has been treated by the bureaucracy. However, it is rare for questions such as this to be asked these days because the daily question time has become a political battlefield. Nevertheless, questions on notice are a valuable means of requiring a minister to have regard to any of his responsibilities including grievances of an individual.

In the Senate, a new sessional order has given any individual who claims to have been defamed under parliamentary privilege by a senator's speech a right of reply to be printed in *Hansard*. This is a unique procedure developed by the Senate and it has been availed upon on a number of occasions. It is administered by the Privileges Committee. These are some very public examples of the role of the Parliament and

parliamentarians in at least giving recognition to the important demand by individual people that their grievance be heard and attended to. However, in a far less public way, but perhaps a more effective way, every senator and member of this Parliament —and no doubt every member of a state Parliament — through his or her staff, is at least daily listening to and making representations on behalf of his or her constituents. Furthermore, these representations are not always confined to complaints about people's treatment by government — although that is mainly the case.

The question that arises, therefore, is not whether there are means by which individuals can be heard and their grievances attended to, but whether these means are effective from the constituent's point of view. In many cases they are. In many other cases people are simply wanting to get something off their chest and are satisfied if they have been heard by somebody they perceive to be in a position to do something about it. In some cases, they are not even interested in following up what, if anything, has been done. Nevertheless, there still remains a hard core of cases which, for one reason or another, requires a more effective solution than any which can be provided by the means I have described.

I turn now to a remarkable series of initiatives taken in the Federal Parliament during the past twenty years which have squarely addressed this problem and which have operated more effectively than anywhere else, either in Australia or overseas, to solve this problem. The essential nature of these measures has been the provision of a less formal method than the judicial remedy, but one which observes basic rules of natural justice and provides a solution to the problem. These new remedies are contained in a series of Acts of the federal Parliament. I will deal only with those Acts of the Federal Parliament because it has been, outstandingly, the leading parliament in this development.

The Acts commence with the *Administrative Appeals Tribunal Act 1975* and follow with the *Ombudsman Act 1976*, the *Administrative Decisions Judicial Review Act 1977*, the *ASIO Act 1979*, the *Human Rights Commission Act 1981* — which was incorporated into the *Human Rights and Equal Opportunity Act 1986* — the *Complaints (Australian Federal Police) Act 1981*, and the *Freedom of Information Act 1982*. In this context, mention should be made of the *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984* and the *Privacy Act 1988*. Although these Acts have created new substantive rights, they have also provided administrative as well as judicial remedies and should be considered in this context.

In addition, the Parliament has recently made provision for the external review of decisions under the Migration Act. These matters were traditionally dealt with by ministerial discretion. Amendments have not only hugely limited that discretion by regulations, but have also led to the setting up of a Migration Review Panel. The Administrative Appeals Tribunal came into operation in 1976. It was the first tribunal to provide for an appeal against administrative decisions on their merits across a wide spectrum of the bureaucracy. Since then, numerous Acts of Parliament have added to its jurisdiction and it is now the major appeals tribunal with a general jurisdiction.

The Administrative Decisions Judicial Review Act, known commonly as the ADJR Act, modernised and expanded the opportunities for judicial review of administrative decisions, not on their merit but on legal grounds. Importantly, it also introduced the requirement for reasons to be given for most administrative decisions. A schedule to the Act provides exemptions from this requirement but, although there are probably too many of them, they are at least the exception rather than the rule.

The requirement of giving reasons for a decision is of enormous importance to the individual. For a start, it greatly concentrates the administrator's mind if he or she is rationally to justify a decision. It obviously gives greater satisfaction to the person concerned and it provides a means of challenging the decision both on its merits as well as on a legal basis. The ASIO Act, which for the first time introduced a charter for ASIO, also set up a security appeals tribunal to which people who were the subject of an adverse security assessment could appeal. Interestingly, this tribunal has had surprisingly little work to do.

The purpose of the Human Rights Commission, as originally structured, was to advise government and parliament about acts and practices of the Parliament, and Acts or a proposed Act of the Parliament, which might offend the International Covenant on Civil and Political Rights and several other international human rights instruments. It did not give any redress to individuals other than for them to complain and for the complaint to be investigated and conciliated. However, in 1986 the original Commission was replaced by the Human Rights and Equal Opportunity Commission, which does have jurisdiction to provide remedies to individuals subject to appeal to the courts.

The combined effect of this collage of legislation has been to greatly enhance the opportunities for individuals to seek consideration of and redress for their grievances about their treatment, largely by government but in some cases by others — for instance, under the Sex Discrimination Act. In some cases, new rights have been created which were not previously recognised by the law. But the main purpose of collecting them has been to exemplify the better remedies for redress which they provide.

My purpose in this lecture has been to examine the relationship between Parliament and the people who elect it and to assess its accountability to them. Our system of parliamentary democracy is not unique to Australia, but the development of our own model is something of which we should be proud. There are current criticisms of it and I have tried to assess the reasons for them and what has been done to improve the system. I do not say the system is perfect, but it is better than any other alternative.

I have not mentioned — nor of course have I had time to mention — any of the proposed structural changes to the Constitution which have been canvassed over the years, such as four-year parliaments, fixed term parliaments, simultaneous elections of the Senate and the House of Representatives, limiting the reserve powers of the head of state, abolishing or emasculating the Senate, or a bill of rights. These are all subjects on which a lecture could be given. However, I make only two comments about them. First, most of them have been debated in parliaments and at constitutional conventions since 1973. Some have been put to the people at referendums and have been rejected. I do not believe that the Australian electorate is so dissatisfied with our system that it is likely to pass any of them. Secondly, one feature running through all of these proposed structural changes is that they take power from the people and give more power to the executive and/or the judiciary.

The purpose of my lecture today has largely been to justify the workings of the system we have and to show that it is both resilient and responsive enough to change and adapt, and that we have an adequate safety valve with our highly democratic electoral system, which operates all too frequently as far as some people are concerned. I do not think Australians want to change this, nor should they.

Mr Harry Evans — Senator Durack has indicated that he will take some questions.

Questioner — At the beginning you talked about the strength of the political parties. You did not really get back to that. Could you comment on the positive or negative benefits to the people, as the political parties are so strong now. Also, could you specifically deal with the Australian government as opposed to the American system, possibly where the President is elected separately and the political parties do not have quite as much strength, I think.

Senator Durack — I specifically said that I have not had time to deal with this in the lecture — and it was not the lecture's purpose to deal with the structures, such as whether you had a Westminster-type system or a presidential-type system. The fact is there is a basic similarity between them, and that is that both systems are democratic; both systems rely on and give recognition to the rights of people to determine what the course of the government will be.

You raised the party system, and I mentioned it because it has, in a sense, become interposed between the people, the electors, the Parliament and the executive. Let me say straight away that I believe the party system, of some sort or another, is here to stay. I believe it is a workable system. It just had to have some safety valves in it. As I have said, this ultimately depends upon the strength of members of Parliament to be prepared to take a line against their party in certain cases — extreme cases maybe — but certainly the member has ultimate responsibility to his electors — not to his party and certainly not to his government.

The party system itself is a necessary feature of our system. In two hundred years the United States has had only two parties — the Democrats and the Republicans. They seem to be alive and well and operating quite successfully. In our system we have tended to have more than two parties. In fact, I suppose the average has been four, if you count the National Party, which has normally been in coalition with the Liberal Party. It would be quite unwise to say they are the same party. Our system has generally accommodated about four parties, and some independents have been elected from time to time.

I think, on the whole, looking back at our political history, we have had a fairly fluid system. This system is portrayed to the electorate — this is perhaps one of the reasons for the dissatisfaction — as hidebound and so on: people in straightjackets, no freedom, that sort of criticism. There is, of course, some justification for that.

But the fact is — and perhaps I have not developed it enough here because I have not had time — that the individual senator or member has many opportunities to express his, and his constituents', views; within the party forums you can have very rugged debates. Indeed, you have clear-cut factions in the Labor Party that have been established as well, all of which have added to the opportunities for the individual to stand up for his electors, his own beliefs and conscience. As I say, ultimately, there is a safety valve in that occasionally people do cross the floor or displease their party in what they say.

Questioner — Senator, my question is concerned with tenure of office. Do you feel that overall there would be an improvement or decline in the quality of government if an absolute cap of say four to eight years were to be placed on the holding of parliamentary office, whether member or senator?

Senator Durack — Having spent twenty-five years in Parliament, I can only say that I believe that is a very foolish idea. I think Harry Evans mentioned that I have been the senior senator now since the 1987 election. Anyway, I had been in the Senate for



sixteen years when I became the senior senator. When I first came into the Senate there were a number of senators who had been here for more than thirty years.

There is now a completely revolutionary change. That shows that there has been considerable responsiveness. The people themselves have indicated this responsiveness in how they have voted. Party organisations have responded to that. But I think it would be fairly foolish to say that people could stay for only four years or something — maybe a longer period could be justified. But being a politician is a profession in itself — whether it is an honourable one is another matter.

The longer you are here, the longer you are learning and, if you are still learning and still doing your job, I think you have something more to contribute than people who have just come in. As long as you have a balance between new people coming in and infusing the system with new ideas and those who have been around for too long who are being discarded or going voluntarily or whatever, I think it is working perfectly well. My philosophy is that when something is working, do not try to fix it.

Questioner — I am a former research political scientist from the ANU. It is not possible to sack a senator except in quite exceptional circumstances, such as in the last election when grey power sacked Senator Puplick. In an ordinary Senate election six out of seven voters have to put a senator last to be sure to get him out. However, in the House of Representatives, only half the voters plus one have to put an incumbent member last to put him out.

Senator Durack, do you consider that both the Liberal Party and the Labor Party are effete and tired and have run out of political creativeness and vigour? Do you consider that both parties should be eliminated from the House of Representatives by the actions of voters and by two or three vigorous, thinking, responsible independents standing in every electorate?

Both the Labor Party and the Liberal Party are creations of the Second World War, during which two independents destroyed the Menzies' United Australia Party on the floor of the House in 1941. The electorate then destroyed the United Australia Party in 1943. I suggest that this should be done with either party, or preferably both parties, in the coming election.

Senator Durack — That question indicates the sort of dissatisfaction that I have indicated I already know about. The viewpoint expressed was that we should get rid of all parties. I suppose you could get rid of the system as well. You were not too clear about that. I thought at one stage you were expressing dissatisfaction with the Senate voting system as well.

Basically, my response is that we have a highly democratic system. Every citizen over eighteen years of age has a vote and we have a good response to voting. Maybe it is because voting is compulsory, but I think that explanation is overdone. The UK has always had a very high voluntary turnout at elections. If the system is working, that will happen: people will vote for independents, new parties and so on. The views within the party system have changed quite considerably. You say that the Labor Party is a creature of post-Second World War. That hardly does justice — not that I am out to do a great deal of justice to my political opponents — to the Labor Party. It has been around for 100 years or so — it may now be a very different party. So it has changed. The Liberal Party's ability to greatly change its policy direction since its defeat in 1983 has been very considerable. That has been a result of the various pressures. That shows that our party system and our parliamentary system of representative

government has a very great capacity for changing under pressure. If people want the system to change, it will change.

Questioner — It is probable that you and I were both told by our mothers that it is rude to point. Does that not ring a bell with you? My mother certainly always told me, 'It is very rude to do that'. That, unfortunately, is now par for the course in the Parliament.

Do you ever watch question time? If so, are you proud of what you see? Do you think that you are conveying an image of public responsibility? Parliamentary committee hearings are praised, but how many of the committee hearings are nothing but squabbling that would not be allowed in a high school debating society? There is a serious point here. I am surprised that it is not being addressed — the importance of the Parliament and the public image which it itself is creating.

The pointing is regarded by the Parliament as nothing other than a joke, whereas to me it is symptomatic. If you are trying to tell your kids how important government is and how it ought to be carried on, the last thing you want to do is to give them a copy of *Hansard* or turn on the television. Could you comment on that and give an explanation for the public disregard of the Parliament?

Senator Durack — What you have said raises an important point. To my mind there is a ready explanation — whether it is the full one or not is another matter. Modern systems of communication, which I have mentioned, have impacted greatly on the perceptions people have about the Parliament as an institution. This has been with us in this country ever since the first radio broadcasts of the Parliament. I have noticed that people get very upset indeed when there is a big storm in the House of Representatives on some issue or other. When a lot of shouting and mud-slinging and so on goes on, people register their reactions to that very quickly. People ring up and make mention of it and so on. Television has compounded that problem.

I have a certain amount of personal distaste for the sort of slanging match that occurs in the Parliament from time to time. Certainly, it is not as big a problem in the Senate as it is in the House of Representatives, but then the political debate is perhaps not so willing in the Senate as it is at times in the House of Representatives.

However, the impression people get from the reporting of the Parliament — whether from what they see on television, from what they hear on the radio or from what they read in the paper — gives only a very limited perspective as to how the Parliament operates. One of the problems, as I have acknowledged, is that the reporting of the Parliament in the press tends to pick up, and highlight, some of the more dramatic events such as somebody being thrown out or some slanging match.

But the major impact of Parliament as a whole ought to be one of utter boredom. Most of the time Parliament is sitting — in the House of Representatives just as much as in the Senate — the debate would not interest people very much to stay and listen. That is the nature of the subject. I suppose people could improve the quality of their speeches. But again, I do not think people would listen very much. It is like going into a court or any other public institution where a lot of the time it is all fairly dull stuff.

It is a pity that the image of Parliament now obtained through television and radio is very slanted and skewed. I think parliamentarians should perhaps accommodate to that better than they have been and try to think in terms of what people are seeing. But the more difficult problem is this: how do people get a message about what their parliament is doing if they cannot see what is going on? This is one of the problems

about it being in Canberra; it is very difficult for people to pop in and see what is going on. Furthermore, with the party system, a lot of the important discussions take place in the Party or the Caucus meetings, not in the Parliament. Yes, I agree it is a problem. It is another problem that parliamentarians perhaps ought to address more.

Mr Harry Evans — Thank you, Senator Durack. We all appreciate your speaking before us today.

## TABLES

Table 1. *Number of Acts assented to 1973-83 together with number of pages each year*

Year	Number of Acts	Number of pages
1973	221	1628
1974	166	1872
1975	121	1124
1976	209	1952
1977	161	1294
1978	211	1859
1979	191	1872
1980	177	1860
1981	182	2828
1982	158	2298
1983	147	2450

- Notes
1. The number of Acts was extracted from the Attorney-General's 'Table of Acts of the Commonwealth Parliament', 1992 edition.
  2. The total number of pages for each year has been calculated from the bound volumes of Commonwealth Acts.

Table 2. *Numbers of Acts assented to 1983-92 together with the number of pages each year*

Year	Number of Acts	Number of pages
1983	147	2450
1984	175	2840
1985	202	2747
1986	168	3463
1987	184	3635
1988	155	2941
1989	183	4832
1990	144	3029
1991	216	6586
1992	137	2734
totals	1711	35257

- Notes
1. Figures exclude Constitutional Alterations (11 pages) not passed in the 1988 referendum.
  2. Figures for 1992 include all Acts passed up to and including 11 November 1992 (*Act No.137 of 1992*).
  3. Figures from 1983 to 1990 (inclusive) extracted from the bound volumes of Acts.
  4. Figures for 1991 and 1992 were obtained from a manual count of pages of individual Acts assented to each year and the number of pages may differ from the bound volumes of Acts.
  5. Figures from some bound volumes include Table of Contents pages whereas those from individual Acts do not.

## Procedural Digest 1992

The following information about procedural developments and items of procedural interest is adapted from the Department of the Senate's *Procedural Information Bulletin*. Details of legislation and other matters considered by the Senate, including committee reports, may be found in *Business of the Senate 1 January 1992 — 31 December 1992*, available from the Senate Table Office. Items are arranged in alphabetical order.

### Amendments and requests

#### *Local Government (Financial Assistance) Amendment Bill 1992* .

So supportive was the government of an Opposition amendment to the Local Government (Financial Assistance) Amendment Bill 1992 that the Minister for Justice, Senator Tate, moved the amendment. On 25 June the House of Representatives returned the bill with a claim that this amendment should have been a request in that, contrary to the relevant paragraph of section 53 of the

Constitution, it increased a 'proposed charge or burden on the people'. Although the amendment changed a sum of money to a greater sum, the effect was to increase a maximum figure within which the responsible minister may determine a figure which is then used to calculate an amount which may be a grant to a state, and the stated intention was that such a grant be in substitution for another grant so that no increase in actual expenditure would be involved. The view which has been taken in the Senate is that an amendment does not have to take the form of a request unless it necessarily and directly involves an increase in expenditure. Because there was not time to dispute the matter, Senator Tate moved a motion to turn the amendment into a request, the motion including the words 'while not conceding that Senate Amendment No. 2 should have been a request'. The request was duly made to the House, the requested amendment made, and the bill returned again to the Senate for final agreement. Opposition senators having expressed the view that a request was not required, and Senator Tate having expressed a wish for further consideration of the matter, it was arranged that a paper be prepared on the matters in issue during the long adjournment.

On 18 August the President tabled another paper on the interpretation and application of the relevant constitutional provision (an earlier paper was tabled in 1989). The paper responded to a request in the House of Representatives for a further explanation in relation to the matter, and set out the reasons for the difficulties which had arisen in recent times. The paper suggested that the Parliament had been neglectful of proper parliamentary control of expenditure by agreeing to unlimited and indefinite appropriations and to provisions which conferred wide discretions on ministers and other officials, set out suggested principles which should be used to determine questions arising under the provision, and suggested that the interpretation and application of the provision in the past had been confused and inconsistent. A further paper, commenting upon a House of Representatives paper on the subject, was tabled on 26 November. Copies of the papers are available from the Table Office.

### Appropriation bills

The items of expenditure in the main appropriation bills which estimates committees were unable to examine due to shortage of time were referred to two standing committees on the initiative of the Opposition on 25 November. As was pointed out in debate, this procedure, in effect, anticipates the recommendation of the Procedure

Committee whereby follow-up hearings of estimates committees would be held as a substitute for committee of the whole proceedings on appropriation bills.

Statements of expenditure under the Advances to the Presiding Officers were considered in committee of the whole on 26 November in the same way as statements relating to the Advance to the Minister for Finance. It is intended that these statements be dealt with in this way as a regular practice.

#### Extra appropriation bills

An extra appropriation bill was introduced on 30 March and immediately proceeded with. This bill was designed to appropriate to some government programs some of the money which would have been appropriated by the ordinary appropriation bills, and the reason for introducing the bill was that these programs were expected to run out of money before the ordinary appropriation bills were passed. It is believed that this is the first time that a government has undertaken this procedure.

The estimates of expenditure contained in the extra bill had been referred to the estimates committees on 26 March, but notwithstanding that step the Opposition vigorously attacked the government in relation to the extra bill when it was debated and finally passed on 30 March. The Opposition succeeded in having the Senate agree to a second reading amendment condemning the government over the introduction of the bill, but was not successful in moves to have the bill itself referred to the estimates committees or to three of the standing committees. Had the bill been referred to the estimates committees this would have been an unprecedented step, because estimates committees normally consider the particulars of proposed expenditure contained in appropriation bills rather than the bills themselves.

Additional appropriation bills were introduced on 30 November to move some funds provided for employment-generating projects to different projects; the particulars of expenditure contained in the bills were tabled on 24 November. The Opposition initiated a reference of the bills to the relevant estimates committees, but the motion was amended to refer them to Estimates Committee B only. An attempt to have the Senate direct that officers of the Treasury and the Department of Finance attend the hearings of the committee to discuss the general strategy of the bills was unsuccessful on 3 December. Estimates Committee B duly presented its report on 8 December, and the bills were considered on the following day. The Chairman of Committees was obliged to make another ruling about the scope of debate in committee of the whole, which led to some further disputation.

#### Postponements and amendments

An unusual motion to postpone consideration of part of the appropriation bills was passed in committee of the whole on 28 May. Consideration of the question for the adoption of the report of Estimates Committee B in respect of the Department of Finance was postponed until 'questions asked of Senator McMullan are answered and relevant documents are produced' in relation to the accommodation of the Australian National Audit Office. The matter under consideration was the propriety of the Audit Office leasing space in a building owned by the Australian Labor Party. Theoretically it was not possible to resume consideration of the postponed question until the questions were answered and the documents produced, but this problem was overcome by a motion, moved by Senator McMullan, that the committee resume consideration of the postponed matter, the view being taken that, the committee of the whole not having reported its resolution to the Senate, it was open to the committee to take that course. That motion having been passed, Senator McMullan then tabled relevant documents, and the postponed question was eventually passed after further questioning based on the documents. The Opposition subsequently gave notice of a

motion to refer to the Standing Committee on Finance and Public Administration the question of the accommodation of the Audit Office.

A request for an amendment was proposed to delete a sum of money from Appropriation Bill (No. 3) 1991/92 associated with the transfer of funding of the John Curtin School of Medical Research. However, it was discovered that the request would not have the intended effect as there was a peculiarity in the way in which the figures were presented (a transfer of funds from a particular item was disguised by other increases in the expenditure proposed for that item and that this was not explained in the Program Performance Statement). Instead of the request, the committee of the whole passed a resolution calling for a change in the Program Performance Statements to reveal more clearly the effects of adjustments to appropriation items. The government accepted the view put by senators that the statements should explain changes in expenditure of that character.

On 18 August the President tabled correspondence from the Minister for Finance and the Department of Finance in response to the Senate's resolution. The department agreed that the guidelines for Program Performance Statements be altered to ensure that changes in expenditure of that sort are fully identified and explained.

#### Casual vacancies

The President reported on 25 February the vacancy in the Senate caused by the resignation of Senator Vallentine. There was some debate on the failure of Western Australia to fill the vacancy, and later in the day notices of motion criticising the Western Australian government were given. One of these motions, moved by Senator Coulter, was debated and passed at general business time on 5 March.

The background to this matter is a question of interpretation of section 15 of the Constitution, which provides that a vacancy is to be filled by the Houses of the state Parliament, but may be temporarily filled by the state Governor if the Parliament is not in session. In the past the state of Western Australia has interpreted this to mean that the Governor may make an appointment if the Houses are not sitting even though the Parliament has not been prorogued and is therefore technically in session. Other states have adhered to the strict construction of the section and their Governors have not made appointments to vacancies unless their Parliaments have been prorogued. This interpretation is undoubtedly technically correct, and on this occasion the Western Australian government determined to adhere to that interpretation. It was pointed out, however, that the Western Australian Houses were sitting when the vacancy was notified and therefore could have made the appointment, and the criticism of the Western Australian government was directed to its failure to bring about this procedure.

Senator Vallentine's replacement, Senator Christabel Chamarette, having been appointed by the Houses of the Western Australian Parliament on 12 March, appeared and was sworn in on 24 March. One of her first actions in the Senate was to give notice of a motion referring to the filling of casual vacancies.

The President tabled on 28 April a letter from the Premier of Western Australia responding to the resolution passed by the Senate on 5 March criticising the Western Australian government for the delay in filling the vacancy caused by the resignation of Senator Vallentine. The Premier's letter suggested that the Senate was misinformed and that the problem was caused by an anomaly in the Constitution. Senator Chamarette, however, again pointed out that the vacancy could have been filled by the Western Australian Houses when the vacancy was notified to them.



When the resignation of Senator Olsen was announced on 4 May, Senator Chamarette again drew attention to her notice of motion relating to the filling of casual vacancies and suggested that the Senate give early attention to it.

On the motion of Senator Chamarette, a further resolution on casual vacancies was passed on 3 June. This resolution is a very significant expression of the Senate's view on the filling of casual vacancies. It expresses the belief that casual vacancies should be filled as expeditiously as possible so that no state is without its full representation for any time longer than is necessary, recognises the problem which may arise when the Houses of the state Parliaments are adjourned but not prorogued, which, on a strict reading of section 15 of the Constitution, prevents the state Governors making appointments, and suggests to the state Parliaments that their Houses adopt procedures whereby they are recalled to fill vacancies if they are adjourned but not prorogued when the vacancies are notified. Such a procedure is already in effect in Queensland. The resolution has been communicated to the Presiding Officers of all the state Houses and, on the suggestion of Senator Chamarette, to the Premier of Western Australia.

Senator Olsen's replacement, Senator Alan Ferguson, having been appointed by the South Australian Houses on 26 May, was sworn in on 1 June. As with other recent swearings-in, only a faxed copy of the certificate of appointment was available at the time, but the original certificate was tabled later in the day.

#### Code of conduct

As an outcome of the Marshall Islands affair (see p. 123), a motion was passed on 25 June, moved by the Australian Democrats, calling for the development by the beginning of 1993 of a code of conduct for senators, members and ministers. The motion was supported by the government, but opposed by the Opposition, who attempted to substitute, by way of amendment, a select committee to inquire into the whole affair.

#### Committee Proceedings and Reports

##### Discussion and background papers

A discussion paper and a background paper prepared by the Legal and Constitutional Affairs Committee in relation to its reference on the cost of justice were tabled on 26 February, having been presented to the President during the long adjournment under the procedures relating to the presentation of reports in that circumstance. The view has been taken that, as committees have the power to report from time to time, it is open to a committee to treat a background paper or a discussion paper in all respects as if it were a report. The committee presented a further discussion paper in relation to this reference on 5 March. The Select Committee on Superannuation has also adopted the practice of publishing issues papers relating to its inquiry.

##### Committee seminars

The Select Committee on Superannuation presented on 12 November a report of a seminar on superannuation. The holding of seminars as part of committee inquiries appears to be a fruitful method of augmenting the conventional methods of committee inquiry.

#### Delegated legislation

##### Amendment and approval

The Senate on 15 October added to the growing category of delegated legislation which is subject to amendment and approval by both Houses of the Parliament. An Opposition amendment to the Disability Discrimination Bill 1992 applied this form of

parliamentary control to standards made under the bill. Under the bill as introduced those standards were to be contained in regulations, which would have been subject to disallowance only. There is now a considerable body of delegated legislation subject to amendment or approval. The Regulations and Ordinances Committee maintains a list of delegated legislation subject to the various methods of parliamentary control.

#### Disallowance of instrument

An instrument relating to Defence Force superannuation benefits was disallowed on 9 September on the motion of Senator Newman, the Minister for Defence, Senator Ray, not resisting the disallowance motion. Senator Newman stated in debate that certain defects in the instrument which caused unfairness to beneficiaries had been admitted only after she had obtained independent advice on the effects of the instrument. The Minister indicated that the problem with the instrument had arisen from the complexities of the subject matter.

#### Disallowance motion

On 24 March the Chairman of the Regulations and Ordinances Committee, pursuant to standing order 78, gave notice of her intention to withdraw a disallowance motion in relation to certain regulations under the Freedom of Information Act. The committee had decided to accept for its purposes an explanation by the responsible minister of certain provisions in the regulations relating to the life of conclusive certificates declaring that certain documents are exempt from disclosure under the Act. The Opposition, however, did not accept the minister's explanation and, under the procedures contained in the standing order, the notice of motion was transferred to Senator Bishop's name and was passed later in the same day, so that the regulations were disallowed. That day was the last day for resolving the notice of motion.

The use of these procedures to transform a committee notice of motion into an Opposition notice of motion has occurred previously, and regulations have previously been disallowed in that way. This situation arises because there are sometimes policy considerations in addition to the considerations arising under the Committee's principles of scrutiny.

#### Political broadcasts regulations

During debate on 26 and 27 February on a motion to disallow regulations under the Political Broadcasts and Political Disclosures Act, attention was drawn to the extraordinary series of errors made in the processes of proclaiming the Act and making the regulations. The proclamation to commence the Act was not gazetted until the day after the day of commencement, and the proclamation was therefore probably void. A new proclamation was made and gazetted on the following day. Regulations containing the original intended commencement date were then repealed and new regulations substituted, but it was realised that these new regulations were void because of the prohibition in the Acts Interpretation Act against the remaking of regulations which have not been tabled or which are the subject of an unresolved disallowance motion. A third set of regulations was then made amending the original set. The possibility was raised, however, that none of these regulations were in force because of technical defects. The motion for the disallowance of the regulations was negatived. On 5 March unusual notices of motion were given by the Opposition to disallow the regulations which were not covered by the original disallowance motion. These notices were expressed to be for a future day, namely the day on which the responsible minister tables the advice received by the government in relation to the regulations. The minister had earlier declined to table that advice.

On 1 April the Regulations and Ordinances Committee made a special report, by way of a statement by the chairman, on the regulations. The statement indicates that, due

to the various errors in the making of the regulations, there is considerable doubt as to which if any of the various regulations are in force. The Committee did not express a concluded view, but noted the possibility that none of the regulations were in force, and indicated that only a court could determine the question.

The notices of motion given by Senator Parer to disallow the regulations remained on the Notice Paper for 15 sitting days until 26 May, and the regulations were then deemed to be disallowed under section 48(5) of the Acts Interpretation Act. The notices were given for the day on which the government tabled the advice it had received on the validity of the regulations, and that advice not having been tabled, the notices were never called on.

On the last day of the autumn sittings the government was obliged to move a motion to authorise the remaking of regulations which had been deemed to be disallowed. Because regulations the same in substance as disallowed regulations cannot be remade within six months without the approval of the disallowing House, and because the government could not take the risk of a state or territory election occurring within the next six months, the motion was moved to allow new regulations to be made during that period. The motion was passed, with the support of the Australian Democrats. The Opposition attempted, by way of amendment, to make the authorisation of the remaking of the regulations dependent on the tabling of the government's advice on the validity of the original regulations, but the Minister for Administrative Services, Senator Bolkus, again declined to table the advice, saying that it was given orally. (See also *High Court Judgments*, below.)

#### Regulations disallowed

Regulations under the Family Law Act and the Administrative Appeals Tribunal Act were disallowed on 3 March. The regulations had increased fees payable in respect of proceedings under those acts. Motions to disallow regulations relating to fees under the Federal Court Act and the Judiciary Act were not carried.

#### Unusual disallowance provision

By way of an amendment made in the Senate, an unusual disallowance provision was inserted in the *Superannuation Guarantee (Administration) Act 1992*, which was passed in the Autumn sittings. The relevant provision provided for a prescribed figure, known as the superannuation charge percentage, to be altered by regulation subject to disallowance up to a specified date. This provision had the effect of altering the normal period of disallowance provided by the Acts Interpretation Act for other regulations. A motion to disallow the regulations was moved but negatived on 8 December.

#### Estimates committees

In a report presented on 24 March the Procedure Committee recommended the adoption of the new procedures suggested by the Committee in a discussion paper presented on 19 December 1991. The essence of these proposals is that supplementary meetings of estimates committees to deal with specific notified matters would take the place of committee of the whole consideration of the appropriation bills. Senator McMullan gave notice of a motion on 25 March to adopt the new procedures, but consideration of the motion was postponed till the first sitting day in 1993, as was the consideration of the Procedure Committee's report.

#### Meeting *in camera*

Estimates committees are required to hold all their hearings of evidence in public session, and all documents presented to the committees are made public. On 4 November a motion was moved, following a special report by the committee, to

authorise Estimates Committee D to meet *in camera* to take evidence concerning allegations of misuse of the printing facilities of the Department of Social Security. The Department had indicated an unwillingness to give the evidence in public session because this might prejudice police investigations and subsequent action.

The motion to authorise the committee to meet *in camera* was opposed and adjourned, senators expressing a reluctance to set a precedent for estimates committees meeting *in camera*. On 10 November a motion was agreed to refer the matter to the Standing Committee on Community Affairs. Standing committees, unlike estimates committees, are empowered to hear evidence *in camera*, and the standing committee is able to accede to the request to do so if the committee considers that course appropriate.

#### High Court judgments

Political broadcasting: portion of Act declared invalid.

The political broadcasts segment of the *Political Broadcasts and Political Disclosures Act 1991*, which was passed by the Senate after very protracted and difficult proceedings in December 1991, was found by the High Court to be invalid on 28 August 1992.

#### Qualification of senators.

The judgment of the High Court in the case of Mr Cleary, given on 25 November, provided significant guidance on the interpretation of section 44 of the Constitution relating to the disqualifications of members of both Houses. Senator Kernot introduced, on 24 November, a Constitution Alteration Bill to remodel section 44 along lines recommended by various bodies, including the Legal and Constitutional Affairs Committee, over a number of years.

On 17 December the President, in response to a question, made a statement relating to the membership by senators of statutory bodies in the light of the interpretation of section 44.

#### Legislation

##### Amendments

Procedurally interesting and significant amendments to legislation during the year included the following items.

\* A feature of amendments made to legislation in the Senate in recent times has been the insertion into bills of provisions to subject various types of ministerial determinations and instruments to disallowance or approval by either House. As a result, such provisions are rapidly multiplying. Examples of these occurred with the Taxation Laws Amendment Bill (No.2) 1992 on 17 June and the Health, Housing and Community Services Legislation Amendment Bill 1992 on 22 June. An interesting example occurred on 25 June in relation to the Territories Law Reform Bill 1992, which dealt with the application of the laws of Western Australia to the territories of Christmas Island and Cocos (Keeling) Islands, and into which the Senate inserted a rather elaborate provision which would allow either House of the Parliament to disallow, in effect, the application of any particular law of Western Australia to the Territories.

\* Senator Harradine was successful in proposing on 25 November to the Broadcasting Services (Subscription Television Broadcasting) Amendment Bill 1992 an unusual amendment whereby codes of practice applying to television stations could be amended by both Houses of Parliament. The amendment included provisions to ensure that proposed amendments would be dealt with by each House. On the

following day the Senate agreed to substitute amendments proposed by the government in the House of Representatives which retained the provision for amendment by both Houses but removed the provisions to ensure that proposed amendments are dealt with.

\* Among the amendments to the Transport and Communications Legislation Amendment Bill (No.3) were provisions to restore the so-called "election blackout", the prohibition on the broadcasting of political advertisements in the three days before polling day in an election, which, having been in force since 1942, had been removed by the ill-fated political broadcasts legislation held to be invalid by the High Court.

#### Bills negated in committee

*Forest conservation and development.* The Forest Conservation and Development Bill 1991 was negated in committee of the whole on 4 May, the committee of the whole rejecting the question that the bill as amended be agreed to. This was the second occasion on which a bill had been rejected in this way, the earlier precedent occurring in 1981. In this circumstance the Chairman of Committees reports to the Senate that the bill has been negated in committee and the report of the committee is then adopted. Normally the rejection of a bill occurs on the motions for the second or third reading.

*Industrial relations.* Due to the absence of some government senators in the early hours of the morning of 16 December, one of the questions necessary for the passage of the Industrial Relations Amendment Bill (No. 2) 1992 in committee of the whole, the question that the bill as amended be agreed to, was negated. This is the third occasion on which a bill has been negated in committee. The resolution of the committee was reported and the report adopted. The Manager of Government Business then immediately, by way of a motion to suspend standing orders, moved for the bill to be recommitted. The bill was recommitted, agreed to in the committee, reported and read a third time. An amendment to recommit the bill on the motion for the adoption of the committee report under standing order 121 could have been used; this was not done partly because it was initially thought that the recommittal of the bill would be left until the following sitting, and there was some doubt about the propriety of using that procedure when a bill is negated in committee of the whole. Arguably when a bill is negated in committee of the whole it should be revived only by a motion on notice, and the recommittal amendment procedure should be used only for reconsideration of a bill actually reported out of committee of the whole.

#### No cut-off date set for legislation

A very large volume of business was compressed into the last weeks of sittings for the year, and even with the extended sittings and hours not all of the business was reached. It is not clear whether this was partly due to the failure of the Senate, for the first time since 1986 to set a deadline for the receipt of bills from the House of Representatives; the House having risen on 26 November, was recalled on 16 and 17 December to deal with legislation passed and amended by the Senate.

#### Error in schedule of amendments

After the two Houses rose for the winter long adjournment on 25 June, it was discovered that the schedule of amendments made by the Senate to the Superannuation Guarantee (Administration) Bill 1992 forwarded to the House of Representatives contained four amendments which had not in fact been agreed to by the Senate. The bill was one of those dealt with during the end-of-sittings rush when the House of Representatives is recalled to deal with Senate amendments. The House had agreed to the amendments made by the Senate.

The question of how to deal with this problem was complicated by the fact that the bill contained a commencement date of 1 July, and if it were brought into operation after that date it would be purportedly retrospective but without any explicit retrospective commencement provision.

There were two legally safe options for dealing with the problem. The incorrect documentation could have been altered and the bill proceed as actually amended by the Senate. This option could have been adopted on the basis that the Houses were clear as to what they intended to do, and it would have been legally safe because the courts accept the records of the Houses of their proceedings and do not review the operation of the internal procedures of the Houses. The government was persuaded not to adopt this option, probably largely because it would involve conceding that the House merely endorses the Senate's amendments without making a positive decision actually to approve each amendment. The bill was therefore not sent for royal assent before 1 July. (In agreeing with other senators that this course could have been followed, Senator Harradine suggested in debate that it would have to be abandoned if any member of the House of Representatives could honestly state that he or she knew what was in the schedule of amendments, a possibility which he regarded as remote!)

The other legally safe option was to have the error corrected by action by the two Houses when they returned, and the bill amended to make it clear that it was intended to operate retrospectively. The resulting statute could then not be challenged on the basis that it purported to operate retrospectively without any explicit retrospective commencement provision.

The commencement date having passed, however, the government apparently realised that the second option involved the bill being reconsidered in the Senate and the danger that it would be further amended or perhaps even not carried. In order to avoid this danger, it was suggested that the President should forward a substitute schedule of amendments to the House without consulting the Senate. This the President declined to do, on the basis that the Senate should be consulted as to the remedial action to be taken, particularly as the bill would operate retrospectively. On 18 August, therefore, the President reported to the Senate the problem and his refusal to adopt the course of seeking to correct it without first consulting the Senate.

Instead of moving that the bill be returned to the Senate for further consideration, however, the government, apparently still anxious to avoid the possibility of further amendments to the bill, moved that a corrected schedule of amendments be forwarded to the House. This motion was agreed to, but only after senators had pointed out the danger that it posed to the bill because the bill would not contain an explicit retrospective provision. The House then agreed to the corrected schedule of amendments and the bill proceeded. The further consideration of the content of the bill by the Senate was thereby avoided but at the risk involved in the commencement provision remaining unchanged.

Government bills: increase in number first introduced in Senate

A notable feature of the year was the large number of government bills first introduced in the Senate. In the course of 1992 some 43 government bills first introduced in the Senate were passed by both Houses, far exceeding the number of private Senators' bills introduced during the year (12 such bills were introduced and five draft bills were tabled; there were, however, 44 private Senators' bills on the Notice Paper at the beginning of the year).

Marshall Islands Affair: Production of Documents

The disputation over what came to be called the 'Marshall Islands affair' produced a number of precedents and matters of procedural interest.

The Minister for Transport and Communications, Senator Richardson, was censured by the Senate on 7 May for allegedly misleading the Senate, attempting to interfere in the justice system of the Marshall Islands, and failing to declare an interest as a minister.

The reaction of the government to the raising of these matters was to place again before the Senate a motion for the registration of senators' interests. Such a proposal was debated in 1983, 1986 and 1987 but was not brought to a decision.

On May 26 the President made a statement in which he gave an account of his contact with Mr Greg Symons and the subsequent action he took to introduce Mr Symons to an officer in the Australian Embassy in Washington. Consideration of the President's statement was provided for by an unusual motion, moved by leave, that the statement be called on at the conclusion of question time as if it were an order of the day. The statement was duly called on for consideration after question time, and the Leader of the Opposition moved a motion expressing 'grave concern that the President of the Senate failed to exercise due care in requesting the Australian Embassy in Washington to assist Mr Symons'. After fairly lengthy debate this motion was negatived. Significant elements of the President's statement were that Mr Symons had produced to the President letters from the Marshall Islands government indicating that Mr Symons was authorised to act on behalf of that government, and the President's letter to the Washington Embassy was a letter of introduction based on those credentials.

A significant part of question time on that and subsequent days was devoted to the Marshall Islands matter, the Minister for Foreign Affairs and Trade, Senator Evans, tabling a number of relevant documents in the course of question time on the first two days. On 2 June, after another debate on the matter, the Senate passed a resolution calling on the government to establish a judicial inquiry into government involvement with Mr Symons, and there was speculation that, if the government did not establish such an inquiry, a Senate committee of inquiry might be appointed.

In response to requests for the tabling of all documents relating to the matter, Senator Evans appeared to suggest in some of his answers that he would not provide information which would not be made available under the Freedom of Information Act. On 3 June, after several such responses, a motion was moved by the Opposition and carried repudiating 'the claim repeated by the Minister for Foreign Affairs and Trade that the exemption provisions of the Freedom of Information Act provide grounds for not producing documents to a House of the Parliament'. In response to this motion Senator Evans explained that he did not intend to imply that the Freedom of Information Act is in any way applicable to the production of documents to a House by a minister, but that he was merely adopting a shorthand expression to indicate that in examining the documents he would have regard to criteria similar to those contained in the Act. The motion also called upon him to produce by noon on the following day all relevant documents. Although this was not a formal order for the production of documents, it was regarded as having the same practical effect, and before noon on the following day Senator Evans tabled a substantial collection of documents. Some questions were asked based on those documents during question time on that day, and Senator Evans tabled further documents during question time.

The Procedure Committee, to which was referred the matter of the minister's references to the Freedom of Information Act, reported that the use of that Act as some

kind of checklist of grounds on which ministers could decline to table documents did not absolve ministers of their responsibilities to the Parliament.

#### Motions for suspension of standing orders

On 16 November the Leader of the Opposition in the Senate moved a motion pursuant to contingent notice to suspend standing orders to enable him to move to alter the routine of business. This motion was unsuccessful, and he immediately attempted to move another motion to suspend standing orders using the same contingent notice. The President then ruled that no more than one motion to suspend standing orders using the contingent notice may be moved on any one occasion. The contingent notice, which is an 'all-purpose' contingent notice designed to achieve the suspension of standing orders to allow a motion to rearrange business at any time when there is no other business before the chair, is expressed to have effect when the Senate is between items of business. The effect of the President's ruling, therefore, is that only one attempt to suspend standing orders pursuant to the contingent notice can be made on each such occasion. The ruling is designed to prevent obstruction of business by the moving of successive motions to suspend standing orders.

After some discussion of the ruling, during which senators expressed concern that the ruling could be unduly restrictive of their rights, the President agreed, with the concurrence of the Senate, to allow Senator Hill to move a second motion for the suspension of standing orders, on the basis that no further such motions would be moved, and also agreed to refer the problem underlying his ruling to the Procedure Committee.

Motions to take note of answers. See *Question time*

#### Orders for production of documents

An order for the production of a document to a standing committee was passed on 5 November on the motion of Senator Knowles. Normally orders for the production of documents require them to be laid before the Senate. Senator Knowles' successful motion required that a report to the government on Medicare fraud be provided to the Standing Committee on Community Affairs.

On 9 November the committee reported that the document had not been produced to the committee. The Minister for Health, Housing and Community Services had indicated an unwillingness to produce the document because he did not wish it to be made public. (The presentation of a document to a committee does not automatically make it public, but the committee is able to authorise the publication of the document.) The Minister representing the Minister for Health, Housing and Community Services in the Senate, Senator Tate, moved by leave a motion to the effect that the document be provided to the committee but that the committee not publish the document until after 11 December. This motion, representing a compromise on the issue, was agreed to.

Normally orders for the production of documents passed by the Senate are directed to ministers, but they can also be directed to statutory authorities, private organisations or any other persons or bodies in the jurisdiction. An unusual order was agreed to on the motion of Senator Harradine on 16 December. It called for the production by the Auditor-General of certain financial statements in relation to postal services. The statements are required to be produced by the first sitting day in 1993. It is believed that this is the first occasion of an order for the production of documents directed to an independent statutory authority.

#### Presiding officers



The Parliamentary Presiding Officers Amendment Bill 1992, introduced by the Deputy-President and Chairman of Committees, Senator Colston, was passed by the Senate on 8 October. The statute which it amends provides for the exercise of statutory powers of the Presiding Officers, and the bill takes account of the change in the title of the Deputy-President. The bill was amended in the House of Representatives when the House decided to make a similar change in the title of its Chairman of Committees, and the House amendments were agreed to on 26 November and the bill proceeded to royal assent. Senator Colston thus became the first member of either House to have two of his bills put onto the statute books.

## Privilege

### Alleged Interference with witnesses

*Community Affairs.* The Standing Committee on Community Affairs presented on 2 April a report indicating that some of its witnesses in relation to its inquiry into pharmaceutical restructuring measures may have been subject to attempted intimidation in respect of their evidence. The committee asked that the matter be referred to the Privileges Committee. Under standing order 81 the President determined that a motion to refer the matter to the Privileges Committee should have precedence over all other business, and such a motion was immediately moved and passed, which is permitted under the standing order when the Senate is about to adjourn for more than a week.

On 9 September the Privileges Committee reported that the persons who made the allegations suggesting that witnesses had been subjected to threats of legal action had not been willing to place any further evidence before the Committee. The Committee therefore did not conclude that there had been any interference with witnesses, but included in its report a warning about persons making claims in relation to the serious matter of interference with witnesses which they are not prepared to substantiate. Apart from that warning, the Committee's report will be useful for future reference as an analysis of questions relating to interference with witnesses. On 17 December the Senate passed a resolution endorsing the findings of the Committee.

*Corporations and Securities.* On 14 September the Joint Committee on Corporations and Securities reported on a case of an officer of a statutory body, the Australian Securities Commission, who had been charged with an offence under the Public Service Act for making submissions to the joint committee at variance with the submissions of the Commission. The joint committee pointed out that this prima facie constituted the contempt of improper interference with witnesses and the criminal offence of interference with witnesses under the *Parliamentary Privileges Act 1987*. As the charge was withdrawn as soon as the joint committee drew the matter to the attention of the Chairman of the Commission, the committee did not recommend that any further action be taken by the Senate, but it would still be open for any senator to raise the matter as a question of contempt. The joint committee also inquired into other matters in issue between the Commission and the officer concerned to assure itself that there were no other actions by the Commission which could constitute interference with a witness.

On October 8 the Deputy-President, presiding in the absence of the President, reported that two senators had raised the matter with him as a matter of privilege under standing order 81, and ruled that a motion to refer the matter to the Privileges Committee could have precedence over other business. The matter was duly referred to the Privileges Committee on the motion of Senator Spindler on the following sitting day.

The letters to the Deputy-President by the senators and the material tabled in conjunction with his ruling indicate that there may be additional evidence relating to the matter which was not known to the joint committee.

#### Interference with witness and misleading evidence

On 25 June the Privileges Committee presented its report on the National Crime Authority Committee case, which was referred to it in November 1990. The essence of this case is that members of the National Crime Authority engaged in certain activities in relation to one of their number, the result of which was that he was not to give evidence before the Parliamentary Joint Committee on the National Crime Authority without the approval of the Authority. When asked before that committee whether that member had been restricted in the evidence he could give to the committee, a member and an officer of the Authority answered that he had not.

The Privileges Committee found that the activities of the Authority had the effect of restricting the member concerned in the evidence he could give to the parliamentary joint committee, and that the answers given in evidence before that committee misled the committee. It was found that the members of the Authority believed that they were acting lawfully but had avoided facing the nature of their actions by resorting to legalistic rationalisation. The Privileges Committee determined that it should not make a formal finding that a contempt had been committed, but recommended that the Senate should warn persons dealing with parliamentary committees that they should direct their attention to the real effects of their actions and should not take refuge in such rationalisations. The committee also recommended that the law relating to the National Crime Authority and the parliamentary joint committee should be clarified, and suggested to the Senate that if these two actions were taken this would be a productive outcome of the case. On December 17 the Senate passed a resolution endorsing the findings of the Committee.

#### Publication of a document

At question time on 12 October, Senator Bishop asked the Leader of the Government in the Senate a question concerning the Australian Taxation Office's investigation of alleged tax avoidance by a state member of Parliament. Having asked the question, Senator Bishop handed to Senator Button an envelope containing the name of the person concerned.

This gives rise to a question of whether Senator Bishop's publication of the name to Senator Button is covered by parliamentary privilege.

Although the procedures of the Senate do not provide for the sort of action taken by Senator Bishop, it is quite common for information to be made available to ministers in conjunction with the asking of questions or to senators in conjunction with the answering of questions, without that information forming part of the questions or answers and therefore part of the primary proceedings in parliament. The provision of information in this way is probably covered by the definition of proceedings in parliament in section 16 of the *Parliamentary Privileges Act 1987*, which includes 'all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee'. In this case, the publication of the name was in itself meaningless except in the context of the question, which of course could not be used in any legal action.

Senators also frequently make information available to ministers without reference to any proceedings in parliament. Such provision of information, however, is usually privileged under the common law interest and duty immunity, which covers, amongst

other things, asking a person in a relevant position of authority to investigate an allegation.

#### Procedure committee

The Procedure Committee reported on 30 April on proposed changes to standing orders 61 relating to the consideration of government documents and 27 relating to the right of senators to attend meetings of committees of which they are not members. The Committee did not recommend the procedure suggested by Senator Kernot for deferring consideration till the following day of documents presented after 12 noon, but recommended an alternative procedure. The Committee pointed out that the change to the standing orders proposed by Senator Harradine to extend the right of non-members to attend committee meetings to all committees would probably not be effective in relation to joint committees.

The Procedure Committee presented on 15 October a report including a discussion of the grounds on which ministers may seek to withhold documents required by either House of the Parliament. This was a matter which arose out of the Marshall Islands affair.

#### Question time

Disputes about the conduct of question time led to a number of significant developments during the year.

#### Extension of question time

On the last day of the autumn sittings, the Opposition successfully moved a motion, for which the Opposition Leader has on the Notice Paper a special contingent notice of motion to suspend standing orders, to extend question time, after complaints about long and irrelevant answers by ministers (it should be noted that ministers also complain, about long questions, points of order and supplementary questions).

#### Time limitations on questions and answers

On the initiative of the Opposition, a special order was agreed to on 14 September to limit the asking of questions to one minute and the answering of questions to two minutes during question time. This action was taken after Opposition complaints about the length of some ministers' answers, and a general discontent with the conduct of question time. The order was expressed to apply only to the remainder of that week. The operation of the order during the week resulted in a significant increase in the number of questions asked and answered, but also caused an increase in the number of supplementary questions.

On 6 October these procedures were again adopted for the following two weeks but with an amendment moved by the Australian Democrats to extend the time for answers to questions to four minutes. They were adopted again for the first two sitting weeks of November and on November 24 these procedures, together with those concerning motions to take note of answers after question time, were renewed as sessional orders.

#### Motions to take note of answers

The Opposition is making increasing use of the device of moving by leave after question time motions to take note of answers given by ministers. On 26 March, for example, four such motions were moved after question time. On 31 March there was a short debate on this procedure, after three such motions had been moved, the Leader of the Government expressing concern about the use of the procedure, and the

Leader of the Opposition indicating that the practice was being used because of Opposition dissatisfaction with answers by ministers at question time. On 2 April the meeting of the Senate was prolonged beyond the scheduled adjournment time, which was at 12 noon to allow estimates committees to meet, by follow-up debate on answers to questions. On that occasion, however, the debate which took up most of the time was actually initiated by a minister. The Senate had to negative the question for the adjournment to conclude necessary items, principally the presentation of committee reports, before finally adjourning to allow the estimates committees to meet.

The government began to show impatience with the increasing use by Opposition senators of this procedure of moving by leave after question time motions to take note of answers which can then be debated without limitation of time. At first tolerating these motions, ministers began on 17 June to refuse leave to move them. The result of this, however, was several motions to suspend standing orders to enable motions to take note of answers to be moved, and the merits of the answers then being debated on the suspension motions. A return to granting leave was tried, and then there was a return to refusing leave. Finally, on the last day of the autumn sittings, the Manager of Government Business resorted to moving his own special motion which allowed senators to move motions to take note of answers but to speak only for limited times.

On 14 September an attempt was made by the government to limit the time spent on motions to take note of answers to questions, by making the granting of leave for moving such motions conditional on the senator seeking the leave speaking for only two minutes. This condition was refused, and leave to move a motion was refused, but this resulted in a motion to suspend standing orders, on which senators can speak for five minutes and there is a total time limit of 30 minutes. After one such suspension motion was disposed of, leave was granted to move three further motions to take note of answers.

On the following day the Manager of Government Business moved a special motion to limit debate on motions to take note of answers to two minutes per speaker and a total of 30 minutes. This motion was agreed to, with an amendment to extend the speaking time to four minutes, on 16 September. This motion also was expressed to operate for the remainder of the week. It appears to have had the effect of increasing the number of motions to take note of answers, three such motions being moved on 16 September and five on 17 September. These procedures were agreed to again for the two sitting weeks in October and the first two sitting weeks of November. On November 24 these procedures, together with those concerning time limits to questions and answers at question time were renewed as sessional orders.

In its report presented on 15 October, the Procedure Committee, noting the experimental nature of the procedures concerning the length of questions and answers, and motions to take note of answers after question time, made no recommendations on them but undertook to keep them under review. The Opposition circulated a paper on the effect of the orders on the conduct of question time.

#### Overdue and unanswered questions

On 16 June Senator Watson made use of the procedure relating to questions on notice unanswered for 30 days to have passed an order for the production of documents, whereby the overdue answers were to be tabled on the following day. The answers were duly tabled, and, perhaps inspired by this success, a senator then used the procedure to require an explanation of the failure to answer a question which was not technically a question on notice but a question to which an answer had been promised during question time.

The order of the Senate relating to unanswered questions on notice was subject to interpretation by the Chair on two occasions on which, a senator having asked for an explanation of failure to answer a question, an answer was produced by a minister. The Deputy President ruled that where an answer is produced following such a request it is not open to a senator to move the motions otherwise authorised by the order. The rulings were given on 2 and 8 December, and on the second occasion the Deputy President explained that the rationale of the order is to encourage ministers to answer questions, and once a question is answered the procedure in the order no longer operates in relation to the question.

#### Tabling of answers to questions

On 16 June, a senator took the unusual step of tabling by leave answers to questions which he had received, and then by leave moving a motion to take note of the answers and debating them.

#### Suspension of sitting over three days

The sitting of the Senate which began at 10 a.m. on Thursday, 12 November continued until 6.11 a.m. on Friday, 13 November, due to protracted consideration of the appropriation bills in committee of the whole. A motion was then carried to suspend the sitting of the Senate until 2 p.m. on Monday, 16 November. When the Senate assembled on Monday the sitting continued, which meant that the consideration of business was resumed at the place in the routine of business where it was left off, and consideration of the appropriation bills proceeded, after an unsuccessful attempt by the Leader of the Opposition in the Senate to suspend standing orders to have a question time. The sitting continued until 12.41 a.m. on Tuesday, 17 November. A motion to suspend the sitting until 9.30 a.m. that morning was then carried. When the sitting resumed, the Leader of the Opposition in the Senate was successful in having a motion carried to provide for question time, but apart from that the consideration of the appropriation bills continued until concluded that afternoon.

This device of extending a sitting over more than one day by means of suspensions of the sitting was used in the Senate in the past but has not been resorted to for many years. The advantage of suspending the sitting instead of adjourning is that the Senate can continue with government business without interruption by other items in the routine of business, such as question time. If used excessively by a determined majority, the procedure could be severely restrictive of the rights of individual senators. On this occasion it was rationalised by the need to pass the appropriation bills and the fact that the Senate was not originally scheduled to sit on the extra days, so that no scheduled sitting days were lost so far as other business was concerned.

The extension of one sitting over three days raised the question of the effect of statutory provisions for the tabling of delegated legislation. Those provisions require delegated legislation to be tabled in the Senate within a specified number of sitting days, usually 15 sitting days, and legislation which is not tabled within the specified time ceases to have effect. It has not been determined whether a sitting extending over more than one day is one sitting day for the purposes of those statutory provisions. On this occasion departments were warned that to avoid any doubts about the valid tabling of delegated legislation they should assume that 16 and 17 November were separate sitting days for that purpose.