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**Parliaments in Evolution:  
Constitutional Reform in the 1990s**

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## Contents

<b>1. Ministerial Accountability: Lessons of the Scott Report</b>	<b>1</b>
<i>Dr David Butler</i>	
<b>2. Women's Changing Conception of Political Power</b>	<b>19</b>
<i>Professor Marilyn Lake</i>	
<b>3. Reshaping the Body Politic—The South African Experience</b>	<b>31</b>
<i>Professor Deryck Schreuder</i>	
<b>4. Defining Executive Power: Constitutional Reform for Grown-Ups</b>	<b>37</b>
<i>Professor Campbell Sharman</i>	
<b>5. Keeping Government Honest: Preconditions of Parliamentary Effectiveness</b>	<b>51</b>
<i>Dr John Uhr</i>	

## **Ministerial Accountability: Lessons of the Scott Report\***

*David Butler*

This is a lecture about a recent episode in Britain. But it is also an attempt to explore some common elements in the way Australia and Britain run their affairs and to compare our two models of government.

However, I would like to preface it with a tribute to my Canberra education. I first came here twenty-nine years ago disillusioned with the subject that I had taught for twenty years. I knew quite a lot about Britain and quite a lot about the United States, but the two systems were so deeply different that I could never make comparisons work; neither system seemed to throw light on the other. Coming here in 1967 was like a new dawn. In an attempt to understand Australian government, I asked British questions. As long as I didn't, in some imperialist way, try to impose British answers, I found they were good questions; I was even bold enough to put down what I was told in a book, *The Canberra Model*<sup>1</sup>. Since then I have come back time and again, usually to look at elections, but also to take back lessons to my own country.

Let me give three examples. I wish Britain had an equivalent to your admirable Australian Electoral Commission. I wish we had an equivalent to your Senate (especially when it is working at its best). I wish our parliamentary reformers could be bold enough to imitate the new Main Committee of the House of Representatives.

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\* This paper was presented by David Butler as a lecture in the Department of the Senate Occasional Lecture Series at Parliament House on 9 August 1996. A Fellow of Nuffield College, Oxford, and author of many books on elections and constitutional matters, Dr Butler was an Honorary Fellow of the Australian Senate in 1996.

<sup>1</sup> Cheshire, Melbourne, 1993.

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Each country that is governed under the broad rules of Westminster democracy must develop in its own individual way. But each has much to learn from the other. As a fascinated British observer, I want to take this opportunity to say thank you for what I have learnt in this city. I want particularly to express my gratitude to Harry Evans for the opportunity to work in this singular building with its wonderfully helpful staff.

When I was here for the election last February, the Scott Report on Arms to Iraq was making banner headlines in Britain and beyond. Harry suggested that it might provide a theme for this lecture, a peg on which to hang some reflections on ministerial responsibility.

On February 15 this year the House of Commons was presented with a five-volume, 2000-page report prepared by a senior British Judge, Sir Richard Scott.<sup>2</sup> He had been asked, three years earlier, to explore the way in which arms or machine tools had gone from Britain to Iraq in the period before the Gulf War. At first it seemed that his great mountain of a report had produced not even a mouse. No minister felt forced to resign. No civil servant was disciplined. No evidence of corruption or criminal intent emerged. And no arms had ever reached Iraq. What then justifies my taking up your time with a non-event 10,000 miles away?

The Scott Report is important because it represents the most exhaustive study ever produced of one aspect of that key Westminster doctrine, the individual responsibility of ministers. It is also a fascinating document for what it reveals about the working of bureaucracy and the inter-relationship between ministers and civil servants. Sir Richard comments caustically on the difficulty of extracting from departments the 130,000 documents he had to examine, and on the way key letters were lost or received no reply. He shows how Customs could not find out what Ministry of Defence export policy was and how vital intelligence reports were not passed on to those who needed to know. He highlights a notable amount of bureaucratic deviousness and casuistry. As the *Economist* put it, ‘Sir Richard exposed an excessively secretive government machine, riddled with incompetence, slippery with the truth and willing to mislead Parliament’. His report will certainly find immortality in scholarly footnotes. It may even bring about improvements in some routine procedures.

One aspect of the whole affair deserves special note. In the Westminster system, governments are seldom keen to explore their own mistakes. In Britain we did have a study of how the Falklands war came about through a rather bland Commission under Lord Franks. But we had no investigation of what went wrong with the poll tax, that most monumental of cock-ups, initiated, implemented and abandoned between 1987 and 1991, bringing down Margaret Thatcher in 1990. There was no official inquiry into Black Wednesday, September 15 1992, when the country was forced out of the European Exchange Rate mechanism in the most humiliating fashion. Sir Richard Scott’s Inquiry does at least represent a serious attempt to find out what went wrong—although it has been much criticised for the way it was carried out, in terms both of natural justice and of efficiency. Lord Howe, the former Foreign Secretary, and many others argue vehemently that a lone figure, sitting as investigator, prosecutor, judge and jury, and denying witnesses the right to counsel, is not a good way of arriving at the truth.

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<sup>2</sup> *Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions*, HMSO, London, 1996. 6 vols.

In Australia I know that the conflict between the government-dominated lower house and the autonomous Senate can cause great irritation—but at least you can be fairly certain that fiascos like the poll tax or Black Wednesday would be subject to serious scrutiny by a Senate Committee. I listened yesterday to the Senate investigation of the DIFF (Development Import Finance Facility) program which has been causing such trouble to the Minister for Foreign Affairs, Mr Downer. Senate inquiries may not be as exhaustive as Sir Richard Scott's but they probably show greater political understanding.

Let me explain briefly the story behind the Scott Report. It was set up because of the collapse of a trial of three businessmen accused of shipping machine-tools to Iraq in contravention of a set of guidelines regulating such trade. The guidelines had been drawn up in 1984 but only revealed to Parliament a year later; they had been modified in 1989 after the Iran-Iraq cease-fire but Parliament had not been told of the change. Especially after the Iranian *fatwa* against Salman Rushdie, Iraq had been treated more sympathetically than Iran.<sup>3</sup>

As the trial of the exporters approached, Sir Nicholas Lyell, the Attorney-General (a somewhat different office from the Australian one) had instructed several Ministers to sign Public Interest Immunity (PII) certificates (once known as Crown privilege), denying the defendants access to papers which they claimed would show that they had acted with official approval (indeed, one of the defendants had actually been working for British Intelligence). The case collapsed when that most egregious of ministers, Alan Clark, contradicted his own evidence in the witness box. He made plain that some parts at least of the government had approved the exports; he admitted that he had turned a 'blind eye' and had been 'economical with the actualité'.

Sir Richard Scott identified three main causes for democratic concern. I want to describe these and to ask how far they find an echo on this side of the globe. If your system proves to have better safeguards than ours, it is worth identifying them.

Sir Richard's first worry lies in the legislation under which these exporters were charged. The *Import, Export and Customs Powers (Defence) Act 1939*, was hastily passed at the outbreak of the Second World War. It provided that, while the emergency lasted, the government could issue regulations which were not subject to affirmative or negative resolutions in Parliament. These regulations could make it a criminal offence to export particular goods to particular countries. As an emergency measure the Act should, of course, have lapsed in 1945 but somehow it continued for fifty years.

Sir Richard Scott was attacked by Lord Tebbit, a Thatcherite ex-minister, for describing such an Act as 'totalitarian'. Let me quote Scott's rejoinder:

I can think of no more apt adjective to describe powers that permit the executive to impose at will, and without any necessity to obtain the approval of, or even to inform, the elected legislature, whatever import or export restrictions it wishes and that permit the executive to prescribe whatever penalties for these offences it wishes.

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<sup>3</sup> A chronology outlining the major events behind the Scott Inquiry is given at the end of this article.

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It is plain that, if MPs are not told what is happening and are not allowed to get answers to questions (or, as happened in this case, if they get disingenuous answers), something is very wrong with parliamentary democracy. Sir Richard quotes John Locke, writing in 1690:

It may be too great a temptation to human frailty ... for the same persons who have the power of making laws, to have also in their hands the power to execute them.

Sir Richard also quotes Montesquieu, who, in the 1730s, became the first publicist for the separation of powers. Sir Richard seems blissfully unaware that, since Bentham criticised and Bagehot demolished Montesquieu and his prophet Blackstone in the 19th century, it has generally been argued that the Westminster model embodies, through a cabinet of MPs and a disciplined party system, a fusion not a separation of powers.

I have tried to find out if anything comparable has happened in Australian legislation. It has been pointed out to me that far more is done here by primary legislation than by regulation, and that, certainly at least since 1932, regulations have been far more seriously scrutinised, at least by the Senate. The procedures are, I gather, being further tightened up. Some state legislatures may be less scrupulous. But in this area the Deputy Clerk of the Australian Senate, Anne Lynch, assures me that the Canberra model shows up the Westminster model.

Sir Richard's second main concern was with the Public Interest Immunity certificates which caused the initial stir. It appeared that innocent men were in danger of being sent to prison because the government would not allow the defence counsel to see the documents that would exonerate their clients. Some of these documents contained unquestionably secret material, involving the intelligence service. But most of them were only internal departmental exchanges. The Public Interest Immunity certificates were issued explicitly in order to protect the general secrecy of the governmental process; their purpose was to preserve the rules of individual ministerial responsibility under which the anonymity of civil servants is guaranteed, together with the privacy of the minister's private office.

A government lawyer told the Scott Inquiry:

It would be very difficult to distinguish between degrees of policy advice, whether it is of high or medium level ... a cautious approach is followed and all documents are claimed to be within the [high] class. The damage to the public interest if the class did not exist would be the exposure of the decision-making process.

There was a hilarious moment in the Inquiry when a minister who had certified that disclosure of a document would cause 'unquantifiable damage' claimed under questioning that 'unquantifiable damage' might mean not only 'large damage' but also 'small or minuscule damage'. He argued that each document was 'part of the process of giving advice to and implementing policy by ministers and, in my view, all of that is confidential'.

Sir Richard comments:

The government is entirely frank in its desire to continue using ‘class’ claims in order to protect communications between ministers and civil servants from disclosure in litigation. One argument put forward is that, unless these communications are protected, the necessary candour between ministers and civil servants will suffer. I have to say that I regard this ‘candour’ argument ... as unacceptable.

However, on the matter of Public Interest Immunity certificates the government got away with it. Indeed Michael Heseltine, the Deputy Premier, emerged as a mini-hero because he had questioned the advice that he had to sign a Public Interest Immunity certificate. The Attorney-General overruled him. But his colleagues at least exonerated the Attorney-General on the ground that he was only following precedent and that he had not been properly briefed. Sir Richard Scott accepted that Sir Nicholas Lyell had acted in good faith but saw him as clearly at fault; his legal advice was ‘unsound’.

The third main anxiety of Sir Richard was over the general question of ministerial accountability. The learned judge admitted rather charmingly that, before he got involved in this inquiry, he:

... would have associated ministerial accountability with a need for a minister to resign if serious errors had been committed in the department. That ... would be the understanding of most people.

Therefore, before exploring the light thrown on ministerial responsibility by the Scott Report, I must digress to analyse the concept more broadly. For it certainly is not all about resignation—or even primarily so.

The concept of ministerial responsibility is central to British government and to Australian government. But it has caused enormous confusion among the general public and even among those at the heart of affairs.

There is first the multi-meaning, punning, quality of the word responsibility: ‘She’s a responsible type’; ‘Are you responsible for this?’; ‘The responsible head’.

Ministerial responsibility is used as a technical term in the Westminster system but it has two quite different connotations. Collective ministerial responsibility is a doctrine that is totally distinct from individual ministerial responsibility. The latter is my theme today, but let us pause for a moment to consider collective responsibility.

It was, allegedly, Sir Robert Walpole in the 1730s who said of his Cabinet ‘We must hang together lest we hang separately’. It was Sir Robert Peel in the 1840s who spelt out formally that every minister shares responsibility for every decision of the Cabinet unless he resigns at once.

There are two key elements to collective ministerial responsibility. The first is that all ministers, whether or not in the cabinet, once they know of a government policy, must defend it—or keep silent about it; otherwise they must resign.

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The most common source of British ministerial resignation comes from the application of this principle. Ministers, opposed to some current or anticipated policy decision, or to the prime minister's style of running things, cite their unhappiness in their resignation letters (even though, sometimes, their resignations in fact illustrate the advice 'Jump before you are pushed').

The second element in collective ministerial responsibility is that, if a government is defeated on a vote of confidence, it must recommend a dissolution or it must resign. The most explicit recent example goes back to 1979, when having lost a vote of confidence, by one vote, James Callaghan asked for and was granted a dissolution. But the principle is regularly followed in advance. Politicians obey that most essential of political principles, the law of anticipated reactions. (We may never have been knocked down by a car but the fear of being knocked down regulates our conduct every day of our lives.) Prime ministers resign when they know they cannot get a majority when the House next meets. Wayne Goss showed that in Queensland last February and Paul Keating showed that here last March.

Essentially, collective ministerial responsibility is a wonderfully convenient doctrine for politicians. It offers the main justification for strict party discipline—discipline which is even more absolutely applied in Australia than in Britain. But let us turn back to individual ministerial responsibility. It also has two separate sides. First, there is the personal responsibility of the minister for his own actions. If a minister misbehaves privately in a way that causes disgrace or brings undue embarrassment on the government, he or she must resign. If a minister misbehaves publicly in a ministerial capacity, whether lying to the House or abusing official power, he or she must resign.

Secondly, and much more importantly, a minister must uphold the principle: 'for every action of a servant of the crown a minister is answerable to Parliament'. This is one of the few British constitutional conventions where there is a clear enforcer—the Clerk at the Table. It is the Clerk who decides (subject to the Speaker) whether a question is in order. Is it the responsibility of the minister to whom it is addressed?

In contrast to Australian practice, all House of Commons questions are on notice. In the anarchy of your questions without notice the rule is scarcely enforced (and at Westminster the Speaker has difficulty in controlling the subject matter of supplementary questions). But I gather that Clerks here who deal with questions on notice apply the same rules as their colleagues in London. A minister must respond for everything any public servant does. If a mistake has been made the minister must admit it and, it is hoped, promise an effort to prevent it happening again. The development of executive agencies in both countries has complicated the story, but the essentials remain.

In a 1994 report the Treasury and Civil Service Select Committee pointed out that the system of ministerial accountability:

... depends upon two vital elements: clarity about who can be held to account and held responsible when things go wrong; confidence that Parliament is able to gain the accurate information required to hold the Executive to account and to ascertain where responsibility lies.

Sir Robin Butler, Head of the British Civil Service and Secretary of the Cabinet, gave the Scott Inquiry a somewhat controversial distinction between ‘accountability’ and ‘responsibility’:

Ministerial ‘accountability’ is a constitutional burden that rests on the shoulders of Ministers and cannot be set aside. It does not necessarily ... require blame to be accepted ... A Minister should not be held to blame or required to accept personal criticism unless he has some personal responsibility for or some personal involvement in what has occurred.

Ministers must respond, give an answer. But there is no question of resignation, just because someone down the line was at fault. (We’d be swamped with resignations if that became the custom.)

Of course, there are always demands for ministers to go when there is a serious administrative blunder. ‘Resign! Resign!’ cry the Opposition; so do the media. But ministers never do resign, and there was never once a golden age when they did resign for the failure of their subordinates. As the Senate Committee on Pay TV commented in 1993 ‘The operation of ministerial responsibility is too often seen in terms of a minister’s resignation or dismissal’.<sup>4</sup>

Nonetheless the largest cause of popular cynicism about ministerial responsibility comes from the absence of resignations when things go wrong. I have examined all the ministerial resignations in Britain and in Australia this century. There have been plenty of resignations by British and Australian ministers but, it can be argued, almost none that can be attributed to ministers taking the blame for the faults of their public servants.

There are only three instances which can be seriously claimed to fall into that category and they are all from Britain. In 1954 Sir Thomas Dugdale resigned as Minister of Agriculture because there had been serious mismanagement over the sale of some Crown lands; but Sir Thomas had in fact been personally involved and he was in any event near the end of his career; he chose to resign but it seems clear that he could have stayed. In 1982 Lord Carrington and his junior ministers at the Foreign Office resigned because of the invasion of the Falklands. As Foreign Secretary, he had been responsible for the lowering of Britain’s guard against the Argentine dictators. Again he was not forced to go. He resigned, like a gallant gentleman, in order to take the heat off the government. The only clear-cut case goes back to 1917 when the upright Austen Chamberlain resigned as Secretary of State for India because of a foul-up in Mesopotamia, which he could not have known about but for which he was the responsible minister. (Lord Beaverbrook once commented ‘Austen always plays the game and always loses.’)

Far more impressive than these distant and marginal cases are the precedents for ministers not resigning when their department has goofed. The most notable examples from Britain are provided by John Strachey after the groundnuts fiasco in 1949 and by Jim Prior after the H-Block escape in 1982. Australians might quote Ian Sinclair and the Asia Dairy affair in 1981,

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<sup>4</sup> Senate Select Committee on Matters Arising from Pay Television Tendering Processes. *First Report*. Canberra, 1993.

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Peter Durack and the Perth Deputy Crown Solicitor in 1982 and, if I may be so indelicate, Alexander Downer this year.

It seems worthwhile to categorise the ministerial resignations that have occurred in Britain and in Australia since 1901. We have had 109, you have had fifty-seven (but we have much larger ministries in Britain). They fall into four categories: those involving collective responsibility; those involving purely private conduct; those involving personal conduct in a public capacity; and those due to acceptance of responsibility for faults lower down in the department. (I must pay tribute to the work of Margaret Healy and Barbara Page on Australian resignations.)

### **Ministerial Resignations, 1901–1996, Australia and Britain**

When a minister leaves office the nature of the departure is not always clear. This table tries to classify all instances where a reason involving either policy disagreement or personal or administrative fault has been publicly given. These figures are for the total number of individuals involved—in a few cases (e.g. Thorneycroft 1958, Carrington 1982, or Higgs 1916) several ministers resigned together over the same issue.

		<b>Australia</b>	<b>UK</b>
<b>Collective</b>	Disagreement with policy or style of government	34	75
<b>Private</b>	Conduct in a private capacity	7	13
<b>Public</b>	Conduct in a ministerial capacity	16	16
<b>Departmental</b>	Accepting blame for public servants	0	5
<b>Total</b>		57	109

Collective responsibility, policy disagreement, accounts for 69 percent of the resignations in Britain and 60 percent of the resignations in Australia. Personal conduct in a private capacity accounts for 12 percent of the resignations in both countries. Personal fault in a public capacity accounts for 28 percent of Australian resignations but only 15 percent in Britain. Resignation for the fault of underlings, on a generous interpretation, accounts for 5 percent of British resignations but for none in Australia.

It is worth noting that at least eight of the private conduct resignations in Britain seem to involve sexual matters of one sort or another but that there are no such cases in the Australian list. Happily, it is beyond the scope of this lecture to explore the reasons for this difference.

Ministerial responsibility of any sort necessarily requires some disingenuousness. There was an Oxford exam question: ‘Which involves the greater hypocrisy, collective ministerial responsibility or individual ministerial responsibility?’ To suggest that two dozen Cabinet members agree on everything is absurd—yet they have to pretend that they do. The charade is made plain by the leaks that reveal their divisions. Equally to suggest that a minister is in command of everything that happens in his department is just as absurd. Again, the charade is made plain by leaks from below and scape-goating from above.

Yet, because there are so many breaches of the pure theory both of collective and individual ministerial responsibility, that does not mean that the doctrines do not work. They are, I contend, absolutely central to the operation of government in Westminster and in Canberra. At the collective level prime ministers expect loyalty; they punish disloyalty—and not only when reshuffles take place but in day-to-day decisions over prominence and policy. At the individual level ministers do answer to Parliament and public servants do stay silent. (I must admit to some doubt about how strictly the principles are maintained in some state governments.)

The decision as to whether a minister must resign rests ultimately with the prime minister. He will let a weak minister go but he often intervenes to save a valued colleague. Need I mention Paul Keating's defence of Carmen Lawrence? In May 1992 John Major saved David Mellor when under challenge for a highly publicised sex scandal—but four months later he had to let him go when stories about an unwise holiday at Arab expense emerged.

Here the Senate Committee looking into the Pay TV case in 1993 provided the most official Australian study of ministerial accountability. Its report offers a nice list of factors which determine whether a resignation is appropriate.<sup>5</sup> They are:

- The minister's moral values
- Political ethics
- Parliamentary pressure
- Peer pressure
- Party sentiment
- Community standards
- Community reaction
- Media reaction
- Precedent

I leave you to savour that mixture of moralism and *realpolitik*. John Cain, the Premier of Victoria, once said:

What will be seen as the severity of a Minister's sins are a matter of how the government is travelling and how the Minister is travelling. It is all politics, nothing else.

Neville Wran put it more crudely when he remarked:

The test of resignation is whether you want to go into the next election with a smelly bag of dead fish in the cart.

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<sup>5</sup> Senate Select Committee on Matters Arising from Pay Television Tendering Processes, op. cit.

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That splendid public servant, Sir Geoffrey Yeend, whom I miss so much on this visit, wrote a surprising letter to *The Canberra Times* three years ago:

It is not for Parliament to determine the penalty for any ministerial shortcoming—and certainly not a chamber divided on party lines. But the parliamentary process can expose a minister and enable the electorate, ministerial colleagues or the Prime Minister to make judgments about efficiency, competence and honesty. In Australia we have a long line of ministers and ex-ministers who have suffered from this exposure, ultimately if not immediately.<sup>6</sup>

The first article I ever wrote about Australian politics was provoked by the VIP planes affair of 1967 and the non-resignation of Peter Howson. It ended:

What emerges from this case is surely that resignation must almost always be regarded as primarily a political matter. In cases where there has been a gross breach of convention a minister must go because the political price of letting him stay would be prohibitive. But there are no absolute constitutional rules ... the decision whether a minister should go or stay must depend upon political judgments, first on how valuable he is to his colleagues and, second, on the way in which his departure will be interpreted.<sup>7</sup>

But, even if I downplay resignation, I am not a cynic. In Australia, as in Britain, I have yet to meet a minister who doubts the extent to which his life is regulated by collective responsibility. I have yet to meet a senior official who denies the centrality of individual ministerial responsibility in everyday bureaucratic life.

Now let me turn back to the light that Scott throws on individual ministerial responsibility. Sir Richard declined to say whether any ministers should resign. But the Opposition demanded two scalps. The first was that of Sir Nicholas Lyell, the Attorney-General, for his mishandling of the Public Interest Immunity certificates. They did not get it. Nor did they get the second scalp, that of William Waldegrave. As Minister at the Foreign Office he had in twenty-seven letters to MPs and in nineteen parliamentary questions denied the 1989 relaxation of the export guidelines which had allowed machine tools to go to Iraq. It was generally accepted that Waldegrave was an honourable man but he had certainly misled the House. He had, on departmental advice and with the best of intentions, been 'economical with the truth', 'designedly uninformative'.

Sir Richard comments:

The obligation of Ministers to be forthcoming with information in answer to PQs about their departments' activities lies, in my opinion, at the heart of the important constitutional principle of Ministerial accountability ... In circumstances where disclosure might be

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<sup>6</sup> *Canberra Times*, 2 June 1993, p. 12.

<sup>7</sup> *Australian Quarterly*, vol. xxxix, no. 4, December 1967; reprinted in *The Canberra Model*, op. cit.

politically or administerably inconvenient, the balance struck by the Government comes down, time and time again, against full disclosure. The answers to PQs ... failed to inform Parliament of the current state of government policy ... That failure was deliberate.

A senior Foreign Office official told the Scott Inquiry that in 1988–89 three ministers agreed to change the guidelines, but they:

made a conscious decision ... not to make any announcement. Their reasoning appears to have been that any announcement, however carefully drafted, would upset somebody. Arguably this was not misleading Parliament but it may be represented as culpably failing to inform Parliament of a significant change ...

There is a handbook, once a secret but now in the public domain, called *Questions of Procedure for Ministers*. One paragraph in the latest issue reads:

Ministers must not knowingly mislead Parliament and the public and should correct any inadvertent errors at the earliest opportunity. They must be as open as possible with Parliament and the public, withholding information only when disclosure would not be in the public interest, which should be decided in accordance with established parliamentary convention, the law and any relevant Government Code of Practice.

Sir Richard commented that Mr Waldegrave ‘consistently failed to comply with the standard set’ by the government’s own document *Questions of Procedure for Ministers* and, more importantly, failed to discharge the obligations imposed by the constitutional principle of Ministerial accountability.

Out of evil cometh good. The Scott Report has a legacy. The Commons Select Committee on the Public Service has produced a bi-partisan report which recommends that the House of Commons establish a code of conduct covering ministerial accountability. The report argues that Parliament itself should define what is required from ministers in answering questions:

... must ... provide information that is full and accurate ... and must, in their dealings with Parliament, conduct themselves frankly and with candour ... The House will expect Ministers who ... knowingly mislead it to resign.<sup>8</sup>

The report wants MPs to complain to the Ombudsman when departments withhold information and wants it to become standard practice for the Government to explain the grounds on which information has been withheld.

The Conservative Party majority on the Committee would not go so far as to recommend a Freedom of Information Act or a parliamentary officer to investigate breaches of the new

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<sup>8</sup> *Ministerial Accountability and Responsibility: Report*, Public Service Committee, House of Commons, HMSO, London, 1996.

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code. But the report does suggest special parliamentary commissions to establish the facts on complex subjects, like the Arms-for-Iraq affair.

All this is progress—a hopeful direct reaction to the Scott Report. It may go nowhere. Here the Senate Committee on Pay TV in 1993 recommended a Code of Conduct for Ministers. Alas, it was not followed up.<sup>9</sup>

However, constitutional change is in the air in Britain. The Labour Party and the Liberal Democrats are very explicitly committed to it. Labour may well lose its enthusiasm, after, as it seems likely, it wins a majority next May. Oppositions love to devise reform proposals, but once in power other priorities come to the fore. Debates over procedural change are time-consuming and the rewards of change are long term, not immediate. If the Select Committee report **is** implemented we may come to think that, because of Sir Richard Scott's revelations, individual ministerial responsibility will be more faithfully honoured in the future.

All governments of whatever party, and all people in executive positions are impatient with parliamentarians, prying, embarrassing, delaying the smooth implementation of their policies. Often parliamentary questioning is tiresome and unhelpful. But often it is well judged. Governments are very far from infallible and it is healthy to have a critical Opposition (and still more to have critical friends within the majority party) to publicise objections to past policies, to present administration and to future proposals.

I have learnt in the past few weeks to admire much of what the Australian Senate does to scrutinise and improve the work of Labor and of Coalition governments, to make them more responsible. In the current ferment over constitutional reform in Britain I am clear that we have a lot to learn from Australia. But I must not end on too humble a note. Your system is not perfect. You in your turn have things to learn from Britain, even from the sour report of Sir Richard Scott.

**Questioner** — I am a bit disturbed about the suggestion that Australia could teach the British anything—I don't believe that is correct. We have much to learn from Britain. It is the other way about. In particular, I refer you to today's paper. In the remarks you finished with, you said 'the Senate shows the way in making government in the Westminster system more accountable'. I would suggest to you that the Senate is a denial of the supremacy of the representative House. It is the denial of the primacy of the representative House. It is an undemocratic body, and it is a cancellation of the Westminster system. It is the death certificate of the Westminster system, and there is no doubt about it.

**Dr Butler** — Well, I would say that the Senate is a great deal more democratic than the House of Lords, first, and second, my point is not actually to argue about the supremacy of either Chamber, but I do think—I am certainly conscious having lived the last four weeks on the Senate side of this building—that there is a sense of genuine, I think honourable, pride among people working in the Senate committees, that they are doing a useful job in drawing attention to various matters.

I have not gone into the question of delaying or refusing supply or amending budgets, which are obviously arguable questions, and I would not want to give necessarily a clean bill of

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<sup>9</sup> Senate Select Committee on Matters Arising from Pay Television Tendering Processes, *op. cit.*,

health to the *status quo* in that area. But I have no shadow of doubt that a large amount of useful criticism of government is done by the Senate, and that the Senate has, on many areas, exercised a thoroughly healthy restraint on what can be too arbitrary a government when you have the absolute authority of a disciplined party in a single chamber situation, or in a bi-cameral situation where you have total party discipline in both places. I do not want a second chamber that is a rubber stamp of the first chamber, and therefore I have, I think, increasingly over the thirty years I have been coming to this country, come to think that the Senate, not a panacea, not a solution to everything, is an extraordinarily healthy influence and on the whole has been a much healthier influence in the period since the government lost its majority in the Senate.

**Questioner** — As another personal opinion, I most strongly disagree with the former speaker, but what I would like to ask you Sir, is whether you think the proposed New Zealand system, I think it is called the MMP system, will be an improvement in getting a representative Parliament?

**Dr Butler** — Well I think it is a nice paradox. The New Zealand situation is fascinating, and you will watch what happens on October 12 when New Zealand has this election. It is worth reminding you, because it does have a parallel interest for Australia, that both parties were getting pretty unpopular—they made promises then seemed to renege on them in the 1980s. One promise was they would set up a commission to look into the New Zealand electoral system—a judge and an academic and a couple of other people that used to report—which recommended something, it was called MMP, but it was more or less the same as the West German system, where half the seats are single member seats as now, and the other half of the seats are elected proportionally to produce a proportionally representative House. Now, they had a referendum which voted 84 percent for a change in the system, and 70 percent for a change to this particular MMP system, which was then confirmed three years later by a referendum which voted something like 54–46 in favour of a change of system. It was so much the law of unintended consequences. The public was cross with the politicians so they forced on them a system which the politicians disapproved of. Both the great bulk of the Labour Party and the National Party disapproved of the change—which, in fact, is going to enormously enhance the amount of party politicking because no party will ever again in New Zealand get a clear majority under this system. So, the rules of the game of New Zealand politics are being absolutely and fundamentally changed by this exercise in mass democracy. Now why I say I thought it had an interesting Australian parallel, if I may touch on delicate contemporary matters, is when you come to the republic question. There is no doubt from the opinion polls that the mass of the Australian people when asked a simple question, want a directly elected president, but the politicians, if you are to move to a republic, want a president elected by a two-thirds majority of the two Houses sitting together, or some variant of that with states being involved, which would guarantee that whoever was nominated would be acceptable to majority and minority parties. Some sort of compromise figure would emerge. Now, if you actually have a direct election, I cannot conceive that you would get anybody other than a politician elected. There is nobody else who could run a nationwide campaign, and you would have a battle which would necessarily be, to a large extent, in party terms. And that is not the best way to get a neutral umpire. I am quite sure that the politicians are right in saying that if you want to more or less preserve the Westminster model with the head of state being a neutral umpire, you certainly want to have somebody who is seen as acceptable to both sides, and who does not have the bogus legitimacy of having been elected

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by a popular vote, perhaps more recently than the government was elected, and feels he has a moral authority to challenge it.

So, there again, if you gave the Australian public what at the moment they tell the polls they want, they would find a boomerang, just as the New Zealanders have found a boomerang. By asking the New Zealand people what they wanted, they got themselves landed with a system which will be more party political, involve more cynicism, more activity in Wellington, which will make people more cynical about the political process, than was the case before.

**Questioner** — When you started talking about the Scott Report, you indicated that one of the things encountered along the way was a concerted attempt to conceal certain government decisions which would otherwise justify what had happened. I was going to ask you what is it that is different in Australia that would not allow this to happen. Then I remembered Midford Paramount, which, whether you are aware of it or not, was a fairly recent exercise in which, again, certain actions were taken, certain people were prosecuted, and agencies allegedly went to a lot of effort to conceal certain not-well-known government decisions which would have justified the activities the firm had undertaken.

That happened in Australia, notwithstanding what I understand is a much more highly developed administrative law system than in Britain. So my question is, if administrative law is not helping, has anything come out of the Scott Inquiry and Report which is leading to a re-assessment of the doctrine of public interest immunity?

**Dr Butler** — Well, certainly the government—I am not fully briefed on this, I am not a lawyer—has said they are going to look into it again. It is interesting, the public interest immunity does not actually loom very large. I confess that I was virtually unaware of it until the Scott Report came up. I knew of administrative privilege vaguely. It is not a very widely generalisable thing. I do not want to get too excited about this particular abuse, but certainly the government has given guarantees that they will not do this particular thing again.

There is the issue which comes so fully with freedom of information and the like; the right to privacy and the right to know are in conflict not only in litigation but in all sorts of other aspects of government activity. I possibly was not candid enough in what I said, but I am in an ambivalent position about what the public's right to know is. I, on the whole, believe that Australian and British government will work better if the Cabinet deliberations are not televised, if ministers talking in their private offices with colleagues or their permanent secretary or their private people, feel that there is a wall of silence around this; that, on the whole, they are not going to have headlines tomorrow morning of something they said just in the ordinary playing around with ideas. I think that government does have to be conducted quite largely in private to be efficient. Otherwise, people just do not put things down on paper, or people go and talk in secret places where they cannot be bugged and heard saying things, and you lose control of the whole process of government, and the process of decision-making.

So, I am not actually speaking here as an open government man. I think that there is certainly a compromise between a totally secret government and a totally open government, and it is a very delicate line to be drawn—where you say this should go into the public domain and this should not. In the Scott case, it became a legal case where people were in danger of being sent

to prison. Somebody was trying to impose this principle that communications within the government machine were privileged, and if you saw some of it, you would see all of it.

I certainly have moved a long way towards open government. I used to believe the logic which was very firmly promulgated by the British Cabinet Office, and to some extent, I believe, by Sir John Bunting and others here, that Cabinet committees should not be revealed because there was collective responsibility, and that if major decisions of policy are being made by a known sub-group of ministers, then the other ministers can shrug their shoulders and say 'Well, I wasn't on that committee', and defuse the thing.

Now, we know perfectly well that a very large amount of government decision-making, much more in Britain than in Australia, is done by sub-committees of Cabinet. Cabinet does not even necessarily go through the procedure of rubber-stamping the committee's decisions, and yet collective responsibility sweeps over the whole ministerial team for a decision that is made, quite often by five or six ministers meeting together. We actually switched, and we started letting people know about Cabinet committees. First in New Zealand and then in Australia and now in Britain, there is a fairly full statement of what the government machine is, and I do not think anything significant has been lost. I do not think collective responsibility has been significantly watered down by the public acknowledgment of the structures of committees under the Cabinet, so you can open up a lot more than I used to think you could open up. I was half convinced by the bureaucratic argument of collective responsibility involved in this kind of secret solidarity, and I am not quite sure how far you can go.

The issue comes up about civil servants giving evidence to parliamentary committees—Senate or House committees, and on the whole we have something called the Osmotherly rules—for the civil servant who drew them up—and you have public service Code of Conduct rules about what a public servant can properly say when he is asked awkward questions which get near the nub of 'did he disagree with his minister?'; 'did his minister act against public service advice?'. On the whole it has been accepted in both countries that civil servants are not forced; parliamentarians show self-restraint in forcing civil servants to give evidence against their political masters, and, on the whole, I think we are probably getting nearer to a reasonable balance there. But it is not at all an easy thing. I am sure that many people in this room will know more about it than I, and have actually experienced the problem of what you say when you are under questioning in that way. So there is no easy answer there, I am afraid, to your question.

**Questioner** — My question relates to something you wrote, I think, early in 1973, entitled 'The Tragedy of Gaining Power', when the Whitlam government came in after twenty-three years in the wilderness. I was wondering if you see any similar, small or large, tragedies arising out of the present governmental situation in Australia?

**Dr Butler** — I am very glad you asked that, because while I have been here over the last four weeks, I have not only been working on this lecture, but I have also been working with John Nethercote on an article on the transfer of power, because I think it is a very high probability we are going to have a transfer of power in England next year, and people in England have become interested in 'what are the rules of the game'. So I have spent quite a lot of the last few weeks talking to veteran public servants about what they remember of 1949 or 1972 or 1983 and what the caretaker rules have been about how you transfer, and also what party preparations have been for the transfer of power. How much have the parties got ready. One

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of the things that has been said to us (and we haven't completed our interviews and I don't know what the answer is, but I put it forward) that this year you are having the least prepared transfer of power. If John Hewson had won in 1993, he had done an enormous amount. I have just been handed this morning a book which the Labor Party prepared, (Gareth Evans and others), before the 1983 election, which is quite thick—one volume of Scott so to speak—which does actually illustrate detailed preparations and some thinking about departmental structures and some thinking about what happens on day one, day two, day three of the transfer of power.

Now, it has widely been said to us that Mr Howard, with some memories of his own experience in 1987 and more sharp memories of what happened in 1993, felt that it was unwise in electoral terms to be arrogantly seeming to prepare for power when you had not yet got it, and therefore there was far less consultation. I think there may have been quite a lot done very privately, but we have not come across traces of it, in the way that it was all over the place when I was here in 1993—people thinking about how power should be transferred. I left on March 3rd last and only came back at the beginning of July so I was not around for the transfer, but there is a sense that only two or three ministers have come through as being seen to be successes, and for others there is suspended judgment. There has been, in some ways, a clumsier transfer of power than in previous times. I don't want to be too hard on the present government, because there is this basic thing that I have observed in my own country and here, that when a party loses power, or a party gains power, there is an awkward period when the outgoing ministers know far more about the business of government and the departmental briefs than the incoming ministers. They can run rings around them and make them look foolish in Parliament, but gradually the good gets worse and the bad gets better. The government ministers learn their job and the ex-ministers' expertise becomes more and more obsolete.

I would expect, if you think the government has done relatively poorly or its parliamentary performance has not been all that good, that that situation will change measurably irrespective of whether they do well or badly in terms of actual substantive policy, by their just learning the job and learning the kinds of expertise which thirteen years in the wilderness deprived them of. I am sure we shall see this much more spectacularly in Britain if Labour gets power next year. That is a seventeen year gap, and there is virtually nobody with past ministerial experience. At least Mr Howard knew quite a lot about how government ran as a minister before he came back as prime minister. I actually gave the 'Tragedy of Gaining Office' lecture to the Melbourne Fabians in October 1972 before Labor got office, saying, 'how hard it is going to be for you, you have all these hopes after twenty-three years in the wilderness, coming back, wonderful dreams that you have, and you have really tried very hard and you deserve victory and so on, and then you will come and you will find the awful reality of the juggernaut of government machines going on, and crises and decisions driving you off course all the time',—and of course that was the case. I mean it was a great turning point, the greatest turning point, I think, in Australian history that I have seen—the election in 1972 and the change of mood it produced—but although it was a great turning point, it obviously was also an enormous disappointment to many dedicated supporters of the ALP.

**Questioner** — I want to say, I also disagree fundamentally with what was implicitly said by the first questioner. I wonder whether you have had a chance, being in Canberra, to look at the Australian Capital Territory as an institution, where we do have a far better electoral system than applies either to the House of Representatives or to the House of Commons.

Have you had a chance to look at how this has affected questions of ministerial responsibility, and are you aware of a recent seminar of the Study of Parliament group on this and related matters?

**Dr Butler** — I am afraid I have to plead ignorance here. It is one of the great handicaps of my life, that I do know a certain amount about the United States, a certain amount about Australia, but I am irrevocably somebody brought up in England, and I do not think federally. The automatic federal thinking of a lot of my friends here and my friends in America, is just not part of my thinking, although I logically know what they are up to. I certainly have felt, also, coming here briefly time and again, that I can get a vague idea of what is going on in state governments, but I have never lived anywhere in a sustained way, except in Canberra in Australia, and I have never looked at state government in detail. As far as the ACT is concerned, my friend, Malcolm Mackerras, sent me proudly the ballot form saying it was the longest preferential list he knew of in any public election, (that is, when you were electing your Parliament in the ACT). But I am interested in what you say, I shall follow it up, but I have no wisdom to offer you whatsoever on that subject, I am afraid.

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## Chronology behind the Scott Inquiry

September '39	Passage of <i>Import, Export and Customs (Powers) Act</i>
September '80	Start of Iraq/Iran war. UK ban on strategic exports
December '84	Howe and Thatcher agree guidelines banning strategic exports
October '85	Guidelines 'trickle out' to Parliament
January '88	Alan Clark supports machine tool traders going to Baghdad Fair
August '88	Iran/Iraq ceasefire
February '89	Iranian <i>fatwa</i> against Salman Rushdie
February '89	Waldegrave denies policy change despite relaxation of guidelines
May '89	Government expresses concern
August '89	Stories about arms exports appear in press
March '90	Customs start questioning machine-tool exports to Iraq
April '90	News of steel tubes exported for Iraq supergun
August '90	Iraq/Iran war ends after Kuwait invasion
October '90	Three Matrix-Churchill directors arrested
November '90	Major succeeds Thatcher as prime minister
2 December '90	<i>Sunday Times</i> says Clark encouraged UK firms to arm Iraq
6 December '90	Import and Export Control Bill enacted with Opposition support
28 February '91	Victory in Iraq/Kuwait war
February '91	Disingenuous answer on trade with Iraq
February '91	Three Matrix-Churchill directors charged
Summer '91	Ministerial arguments over signing PII certificates
October '92	Matrix-Churchill trial starts
October '92	Clark gives evidence and trial collapses
November '92	Inquiry under Sir Richard Scott set up
May '93-May '94	Public hearings of Inquiry much publicised
15 February '96	Scott Report published
26 February '96	Government wins 320-319 on Scott Report debate
28 July '96	Commons Public Service Committee recommends Code of Conduct.

## Women's Changing Conception of Political Power\*

*Professor Marilyn Lake*

Today I would like to talk about the history of women's political thought in this country, in order to identify the discursive frameworks that gave meaning to the political careers of women such as Edith Cowan, Dorothy Tangney and Carmen Lawrence. I would also like to say something about the gendered traditions of political power that have shaped women's modes of doing politics and the ways in which the history of politics has been understood and misunderstood. This year is the 75th anniversary of Cowan's election (as an endorsed Nationalist, that is Liberal, candidate) to the Western Australian Parliament in 1921; and it is fifty-three years since Dorothy Tangney was elected to the Senate as a Labor representative from Western Australia in 1943; fifty-three years since people gathered in the Senate galleries to hear, to witness, a woman speak in the Senate. There seemed to be much anxiety about her speech—her 'voice' and 'delivery', could she actually speak? How would she speak? Would she shriek or would she whisper? It was almost as if some men had never heard a woman speak before—and maybe, in truth, they hadn't. In the event, there was relief all round, because even though suffering from influenza, the senator moved the Address-in-Reply—so the papers reported—in a 'clear, well-modulated voice' and she delivered her speech with 'confidence'. Fellow senators congratulated this university graduate and teacher on her 'fluency' and 'thoughtfulness'.<sup>1</sup>

I recently read Senator Tangney's parliamentary speeches for myself and found them not only fluent and thoughtful, but full of startling contemporary relevance. Tangney, a gifted

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\* This article is based on a lecture given by Professor Lake in the Department of the Senate Occasional Lecture Series at Parliament House on 20 September 1996. Professor Lake is a professor in the School of History, La Trobe University, Melbourne

<sup>1</sup> See, for example, *Advertiser* (Adelaide), 25 September 1943; *Sydney Morning Herald*, 25 September 1943.

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scholarship student who matriculated at fifteen, was a proud graduate of the University of Western Australia (she was particularly pleased to stress that it was, uniquely, a ‘free’ University) and in her contribution to the 1943 budget debate she made a passionate plea for increased public funding of universities. As we know, this is a very topical issue right now as another woman senator, Amanda Vanstone, presides over the worst cuts to university budgets since the war. I come from a university which has announced, as a consequence, that it will have to cut 250 staff. So I would like to share Senator Tangney’s remarks with you before proceeding to speak to my larger theme. ‘Assistance should be given’, she said,

... not only to university students, but also to the universities themselves, because we must look to the universities for our leaders in the arts and sciences. We must have leaders if we are to succeed as a democracy. We have now established the principle of equality of opportunity for university students, and we must also give some assistance to the universities themselves, most of which are floundering at present in financial difficulties. Yet their graduates must rise to international standards and obtain international recognition.

She stressed the implications of ill-funded universities for national life as a whole and finished with a flourish, reminding her listeners of the extent of government support for other items:

The Government subsidizes the production of wheat, pigs and almost everything under the sun. Why should it not subsidize brains?<sup>2</sup>

Why not indeed? Now it seems to me that Tangney’s speech should not only be remembered as a thoughtful and fluent document from 1943, but that it might be adopted as a veritable rallying cry by her successors in the Senate in 1996. Tangney’s speech might live again, as a ‘well-modulated’ rejoinder to the hysterical excesses of economic rationalism.

Dorothy Tangney is an interesting political figure, in that, like many Labor Party women before and since, she attempted to combine feminist values (though always disavowing the label) with the masculinist orientation of the Labor Party. She was a key proponent of Labor’s social security policy during World War Two and in her speech supporting the Unemployment and Sickness Benefits Bill in 1944, she simultaneously invoked that classic symbol of masculine degradation—the unemployed and dependent man—as well as the plight of the unpaid care-giver woman. Thus, on the one hand, she called up the experience of the Depression, when fathers (such as her own) were humiliated by their dependence on their daughters for their livelihood:

We must realize what a serious effect it would have on the morale of a man to be dependent upon his children for his means of livelihood, at a time when he was willing to work and employment could not be found for him.

On the other hand, she commended the Government for introducing what she called ‘a new phase of social security’ in the legislation—that is:

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<sup>2</sup> *Commonwealth Parliamentary Debates*, 14 October 1943, p. 550.

the protection which is being offered to young women who are forced to stay at home to care for aged and invalid parents.<sup>3</sup>

Tangney pointed out she had received 'hundreds of letters from women in that position' and argued that spinsters—whose work in caring for their parents prevented them from entering paid labour—were just as entitled to state support as were widows, women who had once married. In this recognition of both the importance of care work and of women's right to economic independence, Tangney joined a long tradition of political thought, a feminist tradition of political thought that had its beginnings in the early years of the twentieth century.

It is significant I think that in these social security discourses of the 1940s men were being promised 'freedom' (as they so often are)—freedom from want, freedom from fear—while women were being offered 'protection'. It is significant, too, that while unemployment benefits **were** introduced at that time, incomes for single women who gave up their lives to caring for their parents, as argued for by Tangney, were not. As the Melbourne *Herald* reported on her departure from politics in 1968:

She went in fighting and came out the same way for still unsuccessful causes—equal pay for women, legal aid for deserted wives, pensions for spinsters who stay home to look after elderly parents ...<sup>4</sup>

Tangney was not well rewarded by her Labor colleagues. As another newspaper reported, she had not been offered a ministry during the six years of Labor government or even a shadow post during the next nineteen years in opposition, despite being much better qualified than most of her male colleagues. Asked about the prospects of other Labor women, she replied as she departed: 'I am sorry for the women of the party'.<sup>5</sup>

Dorothy Tangney's significance is usually defined in 'first woman' terms; the first woman in the Senate, the first Western Australian woman to enter federal Parliament, the first Labor woman in the federal Parliament. These are very much male definitions I think: the standard of relevance is masculine. I would like to offer a different perspective and suggest that it might be more illuminating to see Tangney's political career as the end of a story, rather than its beginning, or, rather, as the culmination of a well-established tradition of women's politics, a tradition of protectionist politics that saw the role of the state as promoting the welfare of the people, and in particular taking care of the vulnerable, the weak and the defenceless. But as a Labor politician, Tangney also attempted a cross-over in extending 'social security' to vulnerable men and she continually stressed the mutuality of men's and women's interests.

Tangney thus announced in her Address-in-Reply:

... it is not as a woman that I have been elected to this chamber. It is as a citizen of the Commonwealth; and I take my place here with the full privileges and rights of all honorable senators ...<sup>6</sup>

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<sup>3</sup> *ibid.*, 6 February 1944, p. 195.

<sup>4</sup> *Herald* (Melbourne), 5 June 1968, p.21.

<sup>5</sup> *ibid.*

<sup>6</sup> *Commonwealth Parliamentary Debates*, 24 September 1943, p. 30.

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But almost despite herself she returned again and again in her representations to the needs of women, ‘man-powered’ women, stranded women, women deserted in the United States by bigamous US servicemen. Tangney joined a long line of women activists who imagined the state as their own surrogate, as a projection of the maternal selves: protecting, nurturing, caring for life that was all too fragile. As the leading NSW organisation, United Associations of Women, formed in 1929, explained in its ‘Aims and Objects’:

Woman’s point of view is not the same as man’s. Her sense of values is different, she places a greater value on human life, human welfare, health and morals. The changed attitude of people to these questions which has taken place in countries where women have the vote can be attributed to the more direct influence of women. It behoves women to use their power to the fullest extent possible to bring greater security and happiness into the lives of the whole community.<sup>7</sup>

We might notice in this assessment of womanpower, that power was to be realized in the use of the vote as women’s major collective resource; but there is also an assertion that the story of women’s politics is a story of **success**. Women’s political activism, the UAW asserts, had produced ‘the changed attitude of people to these questions’—the questions of human welfare, life, health and morality.

I want to endorse this assessment in proposing—contrary to popular wisdom—that the story of women and politics in twentieth century Australia is a story of **success**. I want to thus challenge what I have called elsewhere the ‘women-as-political-failures’ thesis.<sup>8</sup> Women have a long tradition of effective political activity in this country and a distinctive tradition of political thought—they were vociferous in articulating their ideas about citizenship and government—but all this has been rendered invisible by masculinist definitions and histories of politics. What research shows, however, is that women, in relationship with each other, forged a distinctive tradition of politics in this country. It was women who imagined the state in Australia as a welfare state—a protectionist state that would care for the vulnerable, the dependent, the weak. This project was premised on the understanding that men had failed in their pre-ordained role as women’s and children’s natural protectors, the role set out in nineteenth century elaborations of ‘separate spheres’ as found in texts such as John Ruskin’s ‘Of Queen’s Gardens’.<sup>9</sup> Men, feminists began to believe, were themselves too predatory for the task. As American feminist, Charlotte Perkins Gilman, caustically observed: ‘As a matter of fact, the thing a woman is most afraid to meet on a street is her natural protector’.<sup>10</sup> Thus did feminists come to imagine a maternalist welfare state, in at least two senses: first, it focussed on the needs of mothers and children and asked what sort of society they needed and

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<sup>7</sup> United Associations of Women papers, Mitchell Library, ML MS 2160/Y4481.

<sup>8</sup> Marilyn Lake, ‘Feminist History as National History: Writing the Political History of Women’, *Australian Historical Studies*, vol. 27, no. 106, April 1996.

<sup>9</sup> John Ruskin, *Of Queen’s Gardens* quoted in Kate Millet’s *Sexual Politics*, Rupert Hart Davis, London, 1969, pp. 91-6.

<sup>10</sup> Quoted in Marilyn Lake, ‘Frontier Feminism and the Marauding White Man’, *Journal of Australian Studies*, no. 49, October 1996.

how they might best prosper, and second, it understood women's nurturing capacities as providing them with special qualifications to shape national life and work as agents for the state. It was an effective politics in that it brought together the protectionist mission of Australian feminism—forged in the conditions of a colonial frontier society—and the distinctively Australian view of the state as an emancipatory force.<sup>11</sup> It was a politics whose early successes were cause for national pride, as was evident in the boast of labour activist, Lilian Locke Burns, in 1919:

In no other part of the civilised world, as far as one can ascertain, is so much being done by the State in the way of providing for mothers and children as in the Australian Commonwealth ... In Great Britain and some other countries which lay claim to some share in democratic reforms, the mothers are only protected (if protection it may be called) under some form of social insurance. In the American States also very little has been done so far in this direction beyond some attention to delinquent children and the usual institutional efforts that we find in most countries which have evolved beyond the barbaric stage. Neither in England nor America do we hear of any such humanitarian provision as the Australian maternity allowance ...<sup>12</sup>

A similar politics informed the campaigns of white women activists for Aboriginal reform in the 1920s and 1930s, campaigns which, again, are barely known about today. Women such as Mary Montgomery Bennett, Bessie Rischbieth and Edith Jones worked tirelessly to achieve land and educational rights for Aboriginal people, recognition of women's bodily integrity and the rights of citizenship.<sup>13</sup> They led the way in demanding that Aboriginal affairs be made a Commonwealth responsibility, a cause later to be espoused by Dorothy Tangney in the Senate. Mary Bennett explained her efforts to render Aboriginal girls economically independent in a letter to her colleague, Bessie Rischbieth, president of the Australian Federation of Women Voters:

The money thus earned goes back to the workers. It is enough that the women and girls can be self-supporting and are self-supporting. Economic dependence is the root of all evil ... But the women intrinsically are fine and ready for a position of respect and independence. This is why I have asked that they shall be permitted to invoke and obtain the protection of the law of the land.<sup>14</sup>

This was the point of political action for these feminists; to obtain from the state the protection of the law of the land, specifically to demand that the state provide for the economic independence of women, all women, Aboriginal and non-Aboriginal, mothers and

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<sup>11</sup> *ibid.*

<sup>12</sup> *Labor Call*, 26 June 1919, p. 9.

<sup>13</sup> Fiona Paisley, 'Ideas have Wings; White Women Challenge Aboriginal Policy 1920-37' Ph.D. thesis, Women's Studies, La Trobe University 1995; Fiona Paisley, "'Don't Tell England'! Women of Empire Campaign to Change Aboriginal Policy in Australia Between the Wars', *Lilith*, 8, Summer 1993; Fiona Paisley, 'Feminist Challenges to White Australia 1900-1930s' in Diane Kirkby (ed.), *Sex, Power and Justice*, Oxford University Press, Melbourne, 1995.

<sup>14</sup> Rischbieth papers, National Library of Australia, MS 2004/12/23.

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non-mothers. Thus did they push, from Edith Cowan through to Dorothy Tangney, across parties and across states, for equal pay in the workforce and state payment for those who performed the vital work of caring for the young and the old, the sick and the disabled.<sup>15</sup>

The heyday of this women's politics—the golden age of women's citizenship—occurred in the post-suffrage decades—between 1910 and 1950—during the **very** years usually written off as a trough between the two 'waves' of feminism which we are always hearing about. It was in fact during these middle years—the 1910s, 1920s and 1930s—that women's citizens' organisations and an amateur mode of doing politics flourished—in autonomous non-party groups such as the Women's Service Guild, the Australian Federation of Women Voters, the United Associations of Women, the Feminist Club, the Victorian Women Citizens' Association, the Housewives' Associations, the National Council of Women and the Woman's Christian Temperance Union—and overseas in the British Commonwealth League and the Pan-Pacific Congress based in Honolulu. Thus the 1943 Charter Conference was attended by representatives of ninety different women's groups.

Thousands of women citizens were engaged in different forms of participatory politics in these years. As women citizens, they developed distinctive goals and different modes of doing politics. Their campaigns were led by dedicated, vociferous and energetic 'amateur politicians' such as Rose Scott, Vida Goldstein, Muriel Heagney, Bessie Rischbieth, Jessie Street, Edith Jones, Ruby Rich, Edith Waterworth, Mary Bennett and Cecilia Downing. Downing was president of the Federated Association of Australian Housewives, which, with 139 999 members in 1940, was the largest women's organisation in Australia. As its historian, Judith Smart, has noted, while Downing has all but disappeared from public memory, the name of contemporaries such as Edith Lyons survives (and indeed has a new lease of life, we hear, in 'the Lyons Group'). The reason, says Smart, is clearly that Lyons was known in the masculine public domain of parliamentary politics.<sup>16</sup> Clearly, masculine conceptual and historiographical frameworks have rendered obscure the real political history of women.<sup>17</sup>

But did these women **do** anything? What did they achieve? (Women are always being told we don't 'do' anything—men used to explain that we were not in History, because we hadn't 'done' anything. And they say this to the 'weary sex', as William Lane rightly called women in his novel *The Workingman's Paradise*). So what did the activism of these citizen women achieve? In pursuit of their vision of protecting the vulnerable they campaigned successfully for a variety of reforms: the Maternity Allowance of 1912, free maternal and infant welfare clinics, women's hospitals, limits to the availability of alcohol, censorship of sexually explicit films and literature, women's rights to bodily integrity, child endowment (first in New South Wales and then federally in 1941), children's courts, and the appointment of women to a range of public positions in which women and girls might otherwise fall into men's hands. That is, feminists first worked to have women appointed to public positions, not as a right of access to 'careers', but as a way to protect the vulnerable; they were successful in securing the

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<sup>15</sup> Marilyn Lake, 'The Independence of Women and the Brotherhood of Man', *Labour History*, no. 63, November 1992.

<sup>16</sup> Judith Smart, "'For the Good That We Can Do': Cecilia Downing and Feminist Christian Citizenship' *Australian Feminist Studies*, no. 19, Autumn 1994.

<sup>17</sup> Marilyn Lake, 'Feminist History as National History', *op. cit.*

appointment of women as police officers, gaol warders, doctors, lawyers, magistrates, justices of the Children's Court, members of juries, factory inspectors, health inspectors. When Bessie Rischbieth set out to record the political history of women in her 1964 book *March of Australian Women* she also emphasised these sorts of reforms: 'The preoccupation of these groups as voters has had a direct bearing upon legislative enactments, such as State Children's Acts—the establishment of Children's Courts—the appointment of Women Police—the inclusion of women as Justices of the Peace—and women on Jury Service'.<sup>18</sup>

This is the untold story of the women's welfare state mobilised to protect the vulnerable, especially women and girls, from degradation, from violence, at men's hands. We are all more familiar with the story of the men's welfare state, the Labor story whose mission was to rescue men from the degradations inflicted by capitalism—especially the degradation of unemployment. But because women in the past determined their political goals in frameworks now deemed unprogressive, as historian Jill Roe has remarked, it has perhaps been difficult for feminists today, as well as men, to recognise their political achievements as such.<sup>19</sup> The Maternity Allowance of 1912, for example, has often been dismissed as a patriarchal pro-natalist bribe, a bribe to women to have more babies—a Baby Bonus—but Labor women (whose victory it was) were in no doubt about its meaning. Labor women applauded the Prime Minister, Andrew Fisher, for conferring 'this instalment of the mother's maternal rights, and we hope', they said, 'when the finances permit, to also have a child pension'.<sup>20</sup>

Labor women led the way in formulating a political platform that would both provide social/cultural recognition of the work of mothering, as well as economic independence for all women.<sup>21</sup> The radical and threatening aspect of their programme was their plan to disconnect motherhood from wifehood, that is, they objected to the idea that the cost of mothering should be dependence on a husband. Women shouldn't have to choose between mothering and economic independence, they said, and they shouldn't have to combine the arduous work of care with work in the labour market, because that was a recipe for exhaustion, that was why William Lane called women 'the weary sex' and that was why Labor women coined the slogan 'One Woman One Job'. Thus did Labor and trade unionist women such as Muriel Heagney, Lilian Locke Burns, Jean Daley and Nelle Rickie call for motherhood endowment as state income to pay for women's work of care; and it was a goal eagerly taken up by Nationalist candidate, Edith Cowan, in 1921, who also advocated equal pay, the appointment of women justices to children's courts, women's right to practice as lawyers, and as we shall see, a reduction in the number of politicians.

This women's political tradition, which crossed party lines and was advocated inside parliaments and outside, which was espoused by Edith Cowan at the beginning of the period and Dorothy Tangney at the end, and by many many women in between, was animated by

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<sup>18</sup> Bessie Rischbieth, *March of Australian Women*, Paterson Brokensha, Perth, 1964, p. 12.

<sup>19</sup> Jill Roe, 'Chivalry and Social Policy in the Antipodes', *Historical Studies*, vol. 22, no. 88, April 1987, pp. 402–5.

<sup>20</sup> Quoted in Patricia Grimshaw, Marilyn Lake, Ann McGrath and Marian Quartly, *Creating a Nation*, Penguin, Ringwood, Vic., 1996, p. 206.

<sup>21</sup> Marilyn Lake, 'The Independence of Women and the Brotherhood of Man', op. cit.

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twin principles: that the state should recognise and pay for women's work of caring and that all women should be rendered economically independent of men, whether their husbands or fathers. These demands posed radical challenges to conventional political economy and to masculine privilege and not surprisingly neither was successful. During the 1920s, however, activist women, confident of the justice of their cause and of the rights of citizens, considered they were on the brink of victory. In 1927 a Royal Commission was appointed to enquire into the feasibility and desirability of childhood and motherhood endowment. Hundreds of women rallied to give evidence. Most stressed the rights of the woman citizen and her child. Often the male Royal Commissioners and the women witnesses seemed to talk past each other—for while the female witnesses referred to the 'mother' or the 'woman citizen', the Royal Commissioners spoke continually of 'the wife'—(in that wonderful Australian way, as in 'the wife couldn't be here today'). The Royal Commissioners were clearly astonished at the feminist programme. Thus did this exchange take place between feminist, Irene Longman, who would also enter Parliament, and the Royal Commissioners:

'Your theory is that the State should pay the wife for services rendered to the State?' 'Yes, we say that her services to the state are as great as those of the men, and therefore, that those services should be paid for as an independent economic unit.'

The Commissioners were aghast:

'Women could live apart from their husbands? ... That is an alteration of the existing conditions.'

'Yes, absolutely. It is revolutionary, and that is what we wish.'<sup>22</sup>

This exchange stands as a moment of triumph in the political history of women and a gesture of defiance, but ultimately the women were unsuccessful in this most radical of demands. The Royal Commissioners decided against a scheme of motherhood endowment as it would indeed have constituted, as they said in their report, a 'revolution in the family'—the ending of the wife's dependence on the husband would undermine the 'organic unity of the family.'<sup>23</sup>

The significance of this tradition of political thought is in its definition of the meaning of 'welfare' from the perspective of women's experience of the world: the demand for a social order that recognised the facts of human interdependence—people's need for care—alongside people's right to independence and individuality. Such a definition of welfare also suggests a different sort of Charter of Rights incorporating 'the right to care' and 'the right to independence', applicable to everyone, to men and women. The right to care should not be allowed to cancel out the right to independence and vice versa. And the 'care' in right to care should be understood as both verb and noun—that is people should neither be denied their right to care for others, nor be denied their own right to be cared for.

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<sup>22</sup> Australia. Royal Commission on Child Endowment or Family Allowances. *Minutes of Evidence*. Parliamentary Paper, 1929, vol II, pp. 7–8; quoted in Marilyn Lake, 'A Revolution in the Family; the Challenge and Contradictions of Maternal Citizenship in Australia' in Seth Koven and Sonya Michel (eds), *Mothers of a New World: Maternalist Politics and the Origins of Welfare States*, Routledge, New York, 1993.

<sup>23</sup> *ibid.*

What conclusions then might we draw for today?

First, a feminist politics worth the name must attempt to incorporate the subjectivities and interests of women who aspire to lead lives in the public world of politics, paid work and the professions as well as those who spend much of their lives at home caring for others, for the disabled, for children, old people, those who are emotionally, psychologically or physically unwell. Otherwise these real divisions between women will be successfully exploited by other brands of politics, as is beginning to happen now. Historically, feminism has swung away from a maternalist, broadly humanitarian orientation towards a woman-focussed individualism and interest in self-fulfilment. In reaction against older maternalist ideologies, post-60s feminism embarked on a project of self-expression, that to many today resembles masculine self-aggrandisement.

As a result feminists sometimes seem better able to deal with racial, class and sexual differences (at least at the conceptual and rhetorical levels) than with what we might call the difference of desire, the desire to stay at home and care for children and the desire to leave the home and pursue a profession. To regain ground, feminist politics, I would suggest, must speak to those different desires, to the experience of self-sacrifice as well as the ambition for self-fulfilment.

Second, although this politics of welfare about which I have spoken was once a women's politics, it need not be so. 'Women in politics' is no substitute for a political program. Putting women into Parliament is no substitute for re-thinking our social goals and how we might achieve them. It is the vision we need to recapture, the idea and the ideal of a compassionate state that attends to the complexity of human beings, all of whom are at once independent and inter-dependent. One result of more women entering Parliament has been to subsume women's agendas into the broader economic agendas of the major political parties; and the increasing importance of women in the leadership of the market-driven Liberal Party effectively makes the point that women do not 'naturally' favour a welfare state. It has been interesting to observe how, in Victoria, Liberal Attorney-General Jan Wade has sought to address women's concerns about their physical safety within the framework of Liberal Party politics.

Third, feminists in the middle decades of the twentieth century made much of their rights and responsibilities as citizens—and political activity was conceptualised as an expression of citizenship. Politics was a form of public service and there was no real distinction drawn between women's activities inside and outside parliaments. As Marian Simms has noted, when Edith Cowan entered the Western Australian Parliament, she was already a member of twenty-four other community organisations.<sup>24</sup> So whereas men heralded Cowan and Tangney as 'firsts', from women's perspective they continued to be activist citizens like themselves. As we noted, Dorothy Tangney declared proudly that she entered the Senate as a 'citizen of the Commonwealth of Australia'. Perhaps we might honour women's tradition of political thought by renewing the vision of politics as a service rendered by citizens, rather than a career in pursuit of ever larger emoluments. In a recent article in the *Age*, Judith Brett

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<sup>24</sup> Marian Simms, 'Edith Cowan: Feminist or Philanthropist?' in Brian de Garis (ed.), *Fred Alexander: A Tribute*, University of Western Australia, Nedlands, WA, 1988, p. 78.

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deplored the ever increasing tendency of politicians to act as if their parliamentary careers were mere preludes to the serious business of life, making serious money. 'Although the public is willing to pay its parliamentarians', she wrote, 'it does not like to think that the main reason they stand for election is the self-interested chance of the salary, perks and contacts for a future post-parliamentary life. The public likes to believe that its representatives are motivated by the desire to serve the public ...'<sup>25</sup> Interestingly, Edith Cowan thought the same and one of her campaign planks in 1921 was the 'reduction in numbers of members of parliament and no further increases in salary'.<sup>26</sup> No wonder she lost her pre-selection!

In this brief review of the history of women's political thought it has become clear that conceptions of political power have changed quite dramatically. Once conceptualised as a collective resource, symbolised by and actualised in the vote, political power is now, as often as not, spoken of as something to be acquired individually by women through affirmative action programmes. Thus to Carmen Lawrence writing in 1994, the 'expansion of the political consciousness of Australian women' meant not their increased discussion about human welfare of the organisation of work or enhanced opportunities for self-government at all levels of their lives, but an increase in the 'numbers of women ... gaining political office and rising to positions of real power'.<sup>27</sup> In this scenario political power is conceptualised as the preserve of a few.

In conclusion then, I would suggest, now that parliamentary politics is no longer seen to be an expression of citizenship, but a choice of career, it becomes ever more urgent that all the rest of us reclaim our citizenship and initiate discussion about the welfare of our society and the people in it, about the means to achieve the security and freedom of the many, rather than the aggrandisement of a few, about the best means to empower the community and enjoy our 'commonwealth'.

**Questioner** — The question I would like to ask, inspired by your brilliant retrospective, is that both from the human rights point of view and as an expression of political maturity in this country, I feel that in the next millennium we should start off by having a 50/50 representation of women both in positions of power in politics and also in senior government offices. Would you like to comment?

**Professor Lake** — Yes, I think that is a terrific idea. Actually, one of George Bernard Shaw's suggestions for reform many decades ago was that if each electorate had two representatives, one always to be a woman, that would also achieve that. Yes, I would like to say that a 50/50 representation is important for two reasons. One is, of course, that it is not a truly democratic government until both sexes are equally represented, and secondly, to revert to the last part of what I was saying, precisely because professional politics is a career, woman should have equal opportunity to that, just as they should have equal opportunity to all other careers. But I suppose what I would also like to say is that that is not enough. It is not enough to focus on that as the goal. Rather we have to do some serious hard thinking about the sort of society we

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<sup>25</sup> Judith Brett, 'How Much Should a Member of Parliament be Paid?', *Age*, 30 August 1996.

<sup>26</sup> Peter Cowan, *A Unique Position: A Biography of Edith Dircksey Cowan, 1861–1932*, University of Western Australia Press, Perth, 1978.

<sup>27</sup> Carmen Lawrence, 'Personal Comment', *Australian Feminist Studies* 19, Autumn 1994, p. 10.

want to build in the next millennium—what its organising principles will be—and that is much more difficult and it requires much more work.

**Questioner** — Germaine Greer recently wrote a provocative article, that you might have seen, in which she said that for women to have sufficient numbers in any institution, to actually have some power, would indicate that that institution itself had lost power, that power had moved on. I am just wondering what you think about that idea?

**Professor Lake** — Yes, indeed that has often been said. I think the economist, Margaret Power, long ago made that point about women moving into professions or into jobs—that as soon as the numbers reached a certain point men all departed. And so, yes, that also could be applicable, I suppose, to the campaigns that might be increasingly successful to get women into Parliament. It is nevertheless important to persist with those campaigns. The discourse on power is extremely interesting, I think. I have just been re-reading Mary Wollstonecraft, back in 1792, and interestingly she had quite a different take on power, that is that she said women had lots and lots of power, it is just that it was illegitimate power. That is, that they had lots of power by virtue of their sexuality, by virtue of their position in the home, by virtue of their relationship to men, it was just that that was a sort of discredited illegitimate form of power.

What I am saying, I suppose, is that power is much more complex, I think, than the discourse about women getting power implies, and that there are many sources of power, and that as the early feminists said, there is also a huge amount of power in a democracy in our vote, and I think it is really important that Australia still has compulsory voting by the way; I think that is an immensely progressive force that we should retain.

The issue of the representation of women in Parliament is extremely complex because it is so tied up to deeper things about the division between public and private life, and it is actually one of those processes where the concrete products of previous historical decisions, that is, for example, the decision to have the national capital here in Canberra, miles away from where the majority of women and men live, was an extremely gendered decision. I mean, it had enormous implications for women's participation in politics which were not, I think, realised and discussed at the time. They were realised, interestingly, by Rose Scott, and one of the reasons she opposed federation, was because she saw, as she kept saying again and again in the 1890s that a big, new national capital would remove power from the hands of women. She was extremely prescient on that issue.

**Questioner** — Professor Lake, do you believe that more women in Parliament will lead to a greater degree or expression of citizenship?

**Professor Lake** — My whole talk was about that. I would like to stress citizenship as being a much, much more complex and various activity. I think, as I said, we should all regain our active citizenship, that citizenship involves political participation at all levels of our lives, and that more women in Parliament is just one level, I suppose.

**Questioner** — There is an assumption that is being put forward by many women, that just by the mere fact that greater numbers of women are in Parliament, it will reflect this sensitivity that women are seen to have.

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**Professor Lake** — Indeed, I know that assumption well. As I said, as history moves on, I mean, in Victoria where we have had fierce Liberal women in power for some time who do terrible things to the welfare state, one cannot any longer believe that women have particular values in that regard, or particular sensitivities.

**Questioner** — Professor Lake, a question to do with social education in view of our media today. How do you see the role of social education educating, if you like, the citizens in regard to what you have discussed today?

**Professor Lake** — Yes, well that is an interesting question. Flying up on the plane, I happened to read Stuart Macintyre's essay on the results of the civic expert group that he chaired and the report that they did about how to incorporate citizenship and civics into education. He did not come up with any precise answers, but he thought it was a very good thing, and I do too. It is a complicated thing, and I have participated in workshops in which teachers talk about how to do it, and what more can I say, except that I think that we all have to be encouraged to have greater faith and optimism in our capacities as citizens. One of the interesting things about this women's activism which, as I said, flourished in the 1910s and '20s and '30s, was precisely because they were still very optimistic, they were elated, they didn't take for granted their citizenship, they thought they were immensely empowered.

**Questioner** — I think it would help women in politics and politics generally if there were to be an all-up limit of office in Parliament of about ten to twelve years. Would you care to comment?

**Professor Lake** — Yes, that is a really interesting point. I was thinking about that myself when I was sketching the history of the way that there has been a quite dramatic shift in our understanding of what a career in politics is about, from 1900 to today. It is quite dramatic, and this has been written about in other countries as well, similar countries like Canada. That is the professionalisation of politics, for a start, and secondly, there are limits on people being in other sorts of terms of office. I think that is absolutely right. I agree with that precisely, because I think for politics to return to being seen as a form of citizen's service, it cannot be continually seen as a lucrative career which will provide you well in the afterlife.

## **Reshaping The Body Politic— The South African Experience\***

*Professor Deryck M. Schreuder*

The ‘miracle’ of South Africa’s transition from apartheid to democracy continues.

The euphoria of the 1994 elections has dissipated, there is disappointment over the agonisingly slow progress of economic and social reconstruction, and there is deep concern over a rising culture of apparent lawlessness.

And yet the ‘negotiated revolution’ of change does miraculously advance, with last week being a notable bench-mark of this progress—a new democratic constitution and bill of rights is now framed and established, some hopeful signs of growing accord between African National Congress (ANC) and the Zulu Inkatha Party in Natal Province are emerging, and Mr Mandela last Friday installed Dr Mamphale Ramphele as the first black woman Vice-Chancellor of South Africa’s premier research university in Cape Town.

The scale of this achievement should not be lost sight of as a post-apartheid South Africa begins to face its past, either in terms of social justice or of civil rights. All too quickly the critics have arrived to question the pace of change, to project a gloomy future for its forty-one million people—based often on some negative analogies from the agonies of the rest of Africa—and to associate the transition essentially with Mr Mandela’s undoubtedly remarkable role as reconciler and visionary. ‘After he is gone’ is the solemn cover story of the

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\* This paper formed the basis for a lecture given by Deryck Schreuder in the Department of the Senate Occasional Lecture Series at Parliament House on 18 October 1996. Professor Schreuder is Vice-Chancellor of the University of Western Sydney.

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British *Economist* magazine this week, with a photograph of the aging, anxious-looking President and liberator.

Just to step back from this extraordinary piece of contemporary history is important at this time, to get a measure of the extraordinary South African achievement as it reaches this point after six years on the road to democracy—since the unbanning of the ANC, the release of Nelson Mandela, the multi-party negotiations which led to the government of National Unity, the interim constitution, the first democratic elections (27 April 1994), the coalition government and now the shaping of its democratic constitution.

The process has been so extraordinary I would argue—in achievement, principle debate and democratic reforming outcomes—that other societies can well learn from this dramatic reshaping of a body politic. The South African experience should be required ‘reading’ for all in other states where liberty is not established, or even in constitutional democratic states considering reviewing their own constitutions.

Most obviously the miracle has been focussed on the establishment of a civil society, symbolised by new and democratic constitutions supported with ‘sufficient consensus’ (a key South African phrase from the negotiating phase) of all parties. But not merely a new constitution, rather one which has been assessed by an independent constitutional court of independent jurists, who have tested the new document against first principles established earlier in public debate in South Africa. Part of that constitution is assurance of an independent judiciary, a bill of rights, and a series of clauses entrenching the constitution against any transitional party political desires for its quick amendment.

James Madison, the great American founding father, once described a national constitution as being a parchment barrier between freedom and autocracy. South Africa has committed itself to that faith in ensuring liberty by assuring authority beyond Government in a democratic constitution. It has also recognised the fragility of that freedom—the mere parchment barrier—by providing checks and balances built into the constitution and the significant role which it has given to an independent judiciary, to a free press and to a citizen’s freedom of expression.

That said, I also wanted to draw from my professional experience as an historian and comment on three other dimensions of the democratic miracle which were much less obviously critical in the ultimate success of the negotiated revolution.

The first is the very method by which it was done. It is rare in history to find minority-rule regimes of power transferring their authority to a mass movement in either such a process-driven manner, or indeed engaging in what was essentially an act of extreme decolonisation as the occupying settler society.

There are lots of examples of European imperial governments negotiating a transfer of power which indeed involved bilateral negotiations with local nationalists, leading to their own withdrawal from colony or state. The classic 1960’s decolonisation in Africa, the Carribean, Asia and the Pacific all followed this pattern. But in the South African case the governing regime negotiated matters in such a way that its supporters could actually remain part of the post-independence body politic and society.

Admittedly, those in the government of Mr De Klerk had aspirations for ‘power sharing’ when they began the process in 1990 and by 1996 they had resigned from the National Unity government. Yet in that crucial interim period, the body politic had been reshaped so that a democratic society could emerge, and this had been done by entirely internal negotiation and internal transitional arrangements.

In notable contrast, the road to democracy in Zimbabwe, as a key example of another settler decolonisation, had involved the British government actually taking back the Unilaterally Declared Independence (UDI) state of Rhodesia under Imperial authority, and then engaging in the Lancaster House talks, leading to a negotiated settlement of a new constitution to be tested at the polls in the new Zimbabwe. A much nearer parallel was the transfer of power in Namibia—but even that strongly involved outside agencies, not least the United Nations as inheritor of the League of Nations’ mandate responsibilities in relation to South-West Africa.

In the end, the parties concerned in the South African settlement have agreed among themselves to construct a process and to adhere to it so that former bitter enemies could save the nation from violent catastrophe (a possibility, as Mr Mandela has recently suggested, that had existed in 1994 when over 100 000 armed rightists stood ready to launch a kind of military counter-revolution) and also shape the principles and frameworks of a constitution to assure the future of South Africa and its peoples.

Here was the remarkable second aspect of South Africa’s negotiated revolution. Commentators have already remarked on the path of reconciliation, or at least accommodation, that the various ethnic regional groups have embarked upon. But what has hardly been set out is the extraordinarily hostile historical environment from which it was created.

By that I mean more than a background history of racism. I refer rather to a modern history of some 300 years in which complex systems of domination had been developed and a tradition had evolved of illiberal politics and constitutional arrangement that was the deepest enemy of a real constitutional democracy. The Dutch and British Imperial presence had left strongly atavistic forces which assured minority white rule in a pluralist society. From the Dutch in the 17th and 18th century had come a major reliance of the state on étatism, the role of the central government and the use of bureaucratic law as constitutional rule. That had been so strong it had even been challenged by its own frontier settlers, some of whom had attempted a burgher’s republic in the 1780s and failed, others who later trekked away from the succeeding British colonialism—after 1815—and successfully established their own Boer republics on the interior grass lands. But the constitutions of both the republics of the Orange Free State and the Transvaal (of 1852 and 1854) had denied all political rights to the African indigenous peoples. These constitutions had rather created populist white states based on universal male burgher rights.

In contrast, the British approach was to build constitutional arrangements in the colonies of the Cape and Natal, which followed classic, liberal, imperial precepts of colour-blind constitutions moving to ever greater local autonomy—from crown rule to representative to responsible government. But, and it is a big but, the British (a) allowed class qualifications in determining the criteria and qualifications for the franchise, which effectively limited African participation, and (b) instituted a highly significant development in a process of indirect rule to govern the great mass of tribal indigenous peoples, when they recognised traditional black

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rulers in reserves or homelands which were defined by their own expansion. A key set of administrative seeds had been sown for the later apartheid architects.

Britain effectively decolonised South Africa as an imperial province after the Anglo-Boer war by establishing the Union of South Africa as a British dominion in 1910. Britain had actually won the war but lost the peace. Under the 1910 constitution the rights of Africans were enshrined in local autonomy, which of course meant that in the right circumstances they could be altered by South African politicians. That duly happened in the 1930s when black Africans were put completely beyond the pale of the constitution even though ‘native representatives’ (all white) were elected to the main Parliament. While parallel to that, systems of separate administration for the reserve homeland areas were instituted as part of a form of dual governments—one for the whites, one for the blacks. It was not a long step for the apartheid concept to emerge, which made the perverted but effective constitutional arrangement that Africans should have their rights secured in their own designated homeland territories. Black residents, the indigenous peoples of the country, overnight became foreign sojourners and workers in white South Africa.

There was of course significant opposition to all these trends, not least from black South Africans. The ANC has a proud tradition of challenge and contestation from the early part of the century. There is also a notable tradition of black trade union opposition, of white liberal (often Christian), radical and socialist opposition—which was ultimately ruthlessly crushed by the government in the 1950s. There was also a significant oppositional support overseas from opponents of apartheid, who included South Africans in exile. Indeed by the next decade when South Africa declared itself a republic (1961) outside the Commonwealth, and entered what I regard as its dark age of apartheid politics, the notion of constitutionalism had been thoroughly subverted to the service of white minority governments.

A new constitution was enacted in the 1980s which revealingly set out the mind-set of the rulers of South Africa. Not only was a powerful executive presidency created, with an executive presidential council (which included the military leaders) but a tricameral system of governance was projected, with parliamentary houses for different race groups—whites, coloureds, Asians—from whom the government would be drawn unequally and from which black South Africans were to be totally excluded. They had their rights, you will recall, set in their external homelands.

That system failed lamentably and the tradition of minority constitutionalism reasserted itself, only to be progressively made unworkable by forces of challenge within South Africa itself, by opposition including sanctions imposed externally, and by the extraordinary events surrounding the collapse of the Soviet system and the emergence of new alliances in world international politics.

The Government was moved in the 1980s to consider survival by other means of constitutional change. And the majority black South African liberation movement (ANC) came to the view that it should engage in what became effectively the negotiated revolution. The ANC brought with it a strong commitment to constitutional rule, to the rule of law within a democratic framework of principles—many of which had been reflected in the remarkable document of 1954, ‘The Freedom Charter’.

The miracle of what then happened was, in my view, not so much the remarkable negotiations between the National Party (NP) and the ANC involving the oppositional commitment of the two parties to each other—but the very processes which framed the outcomes.

While there was still contention over what the outcomes might be, all parties became involved in the convention for a democratic South Africa (CODESA), which developed key principles for a new constitutional South Africa, agreed on the need for an interim constitution and a government of national unity after general elections, based on a new universal colour-blind franchise.

The ANC won nearly 63% of all the party vote, but there was notably little triumphalism and the new arrangements in the GNU assured proportional representation for all significant parties, something which has lasted until the 8th of May this year when Mr De Klerk withdrew the NP from the government. Yet even that development has not fatally undermined the broad movement towards a new constitution, which has been negotiated at frantic pace over the past two years in a massive national effort, and then referred to the Independent Constitutional Court for examination. The fact that this court raised eight areas of reservation where it believed the new constitution had failed to meet the agreed principles, remarkably and revealingly did not derail the entire process, rather all parties accepted the verdict of the court, indeed welcomed the challenges and went back to redrafting, leading to last week's outcome of declaring a constitution for the new South Africa.

Being a human story it is not going to be without its fallibilities and in this case the weaknesses have been enumerated in the debate over the constitution itself. They mainly focus on the extent to which the constitution adequately reflects the views of a pluralist South Africa and the degree to which it ultimately reflects the enormous support gained by the ANC in the 1994 elections. Certainly the ANC's own strong preference for a unitary style of state is fully evidenced in the constitution, and the role of the nine provinces in what is declared to be a federal constitution, is in fact subsidiary to the role of the centre. One perceptive South African political commentator, David Welsh, has termed the constitution 'unitary but with federalist fig leaves'.

Other concerns surrounding the constitution range from the degree to which it will gain support from the Inkatha Freedom Party in Natal to its capacity to encourage the emergence of a political culture in which parties cross the ethnic lines. So far, it has been said rather sharply, South African elections look more like the taking of a census, with parties essentially winning their own ethnic communities—with a small number of cross-over voters; whites, say, to ANC, or blacks to NP. The 1999 national elections, the first under the new constitution, will be a vital step in seeing the degree to which South Africa can develop a pluralist party system reflecting a pluralist society.

But I would simply, at this vantage point of 1996, remark on the positive elements in the story so far. They are so much more encouraging than the history of constitutionalism in South Africa before 1990 and they suggest the real possibility that South Africa may become a genuine democratic society under the rule of law in the next century.

There is a significant public commitment, to start with, in making that society, after the horrors of apartheid and also after the deep colonialism of minority governments preceding apartheid. There is a palpable yearning indeed in South African society for a non-racial order, and a questioning of ethnic alliances as a basis for politics itself.

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The constitution—with its bill of rights, constitutional court and independent electoral commission—gives powerful signs of hope to a society that is painfully trying to reconstruct itself in conditions of dislocating change and difficulty, including a worrying culture of crime and lawlessness among groups either alienated from society or by simply opportunistic groups, both white and black.

When the *South Africa Act* establishing the Union of South Africa (1910) passed through the British House of Commons, the labour radical Keir Hardie commented that the motto of the new country could well be the old text, ‘Abandon all hope all ye who enter here.’

That cannot be said of the constitution of the ‘new’ South Africa. Translating hope into reality is now the quiet challenge for South Africa and its friends.

## **Defining Executive Power: Constitutional Reform for Grown-Ups\***

*Professor Campbell Sharman*

Australia is well endowed with constitutions. It has seven, one for the Commonwealth and each of the six states, and nine if the documents establishing self-government for the Australian Capital Territory and the Northern Territory are included. This gives plenty of scope for constitutional reform, that is, changing the most important rules which specify how a political community is governed. In the event, public debate over constitutional reform in Australia has been sporadic and concentrated on a narrow range of issues. Perhaps this is as it should be. Constitutions should reflect broad public acceptance of the basic rules governing the operation of government, and if the system is running smoothly, there is little reason for change. Only when events occur that demonstrate that there are shortcomings in the structure of government should constitutional reform be considered.

From this perspective, it is instructive to look at what constitutional issues have been the subject of public debate. Since 1901, the most persistent candidate for reform of the Commonwealth constitution has been the allocation of legislative powers to the central government. This was the dominant issue until the 1970s when several factors combined to change the focus of constitutional reform. The indulgent attitude of the High Court towards the extension of Commonwealth influence in the governmental process reduced the pressure for constitutional change to expand Commonwealth powers. At the same time, the growing influence of the Senate and its ability to limit government legislative programs, began to be a topic for constitutional debate. This was confirmed by the dismissal of the Whitlam government in 1975 which reinforced the views of governments on both sides of the partisan divide that the Commonwealth constitution needed to be changed to reduce the independence

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of the Senate and to remove other sources of potential embarrassment to the government of the day.

At this point it should be noted that reform does not necessarily mean improvement. One person's sensible reform may be another's dastardly scheme to undermine the structure of government. I am using the term reform in the neutral sense of change. Whether a change is desirable is a matter of opinion. For the record, and given the institution that is buying my lunch, I believe that all four attempts to limit the influence of the Senate in constitutional amendments proposed since 1974 were undesirable reforms which deserved to fail.

The events of 1975 triggered a period of introspection about our governmental system and raised questions which had broad implications for both Commonwealth and state constitutions. This was coupled with a more general disquiet about the scope of government and a concern with the constitutional protection of individual rights. By the end of the 1980s there had been two major sets of recommendations for change to the Commonwealth constitution; one set from the Constitutional Convention in 1985, and the other from the Constitutional Commission in 1988. In addition, decisions of the High Court relating to implied rights and the Mabo case have raised the issue of the role of the High Court itself in the constitutional system.

From all this activity, little has resulted in the shape of government proposals for specific constitutional change. It is true that four proposals to amend the Commonwealth constitution were put to the people in 1988, but these were intended as a fig leaf to hide the government's inaction on proposals for substantive change, and the amendments were resoundingly defeated by the voters. Whatever the merits of constitutional reform, Commonwealth governments have lost interest in the topic.

The apparent exception is the issue of Australia as a republic. I say apparent because the republican debate is as much about symbolism as substance. The excellent report by the Republican Advisory Committee raised questions about the function of the head of state, but the popular debate is about how the head of state should be chosen, not about the role of the office, and yet this is much the more important question.

The surge of interest in Commonwealth constitutional reform that was catalysed by the dismissal of the Whitlam government in 1975 has become dissipated. There is no focus for debate on constitutional issues in Canberra and the current Commonwealth government sees the republican issue as an embarrassment to be defused for fear that substantive change might be required.

So much for the Commonwealth, but what about the states? Until recently, almost nothing has been heard about state constitutions. The only major exception has been the occasional debate, vigorous at times, over the role and composition of state upper houses. These legislative councils have considerable power and, in the past, often represented only a narrow range of political interests. When these chambers persistently disagreed with government majorities in the lower house, there have been fierce disputes that have sometimes led to constitutional change.

Other than this, there has been little public debate about making substantial changes to state constitutions. Part of the explanation is that many people have never heard about state

constitutions. This is so even though they regulate the conduct of the governments that have by far the most to do with people's daily lives. Another reason is that, as state constitutions predate the Commonwealth constitution, they carry with them historical residues that make them complicated, untidy and difficult to reduce to a single comprehensive document. A further explanation is that the bulk of state constitutional provisions can be changed by the government of the day with no requirement for popular consent at a referendum, further reducing their public visibility. But the major reason is that, for the most part, the structure of state government has not been seen as needing any major overhaul.

That is, until now. During the 1980s and early 1990s, all states experienced major shortcomings in the conduct of government. For some it was corruption in the police force that called into question the integrity of the whole system of the administration of justice. For others it was incompetence and recklessness in the conduct of the state's finances that left the state with debts of billions of dollars. In the inquiries that followed, there was a persistent theme: there had been a lack of openness and accountability in the operation of government that had fostered lax administration and improper conduct by ministers and public servants. Quite apart from the detailed findings of the commissions of inquiry, there had been a structural failure in the system of government. Those parts of the governmental system that were supposed to ensure that governments were kept publicly accountable had proved ineffectual.

This is a very serious failing because the whole point of democratic constitutional government is to keep governments responsive to the wishes of citizens. This can only be done by making government open to detailed scrutiny by the public. Without openness in the conduct of government there can be no accountability, and without accountability, representative government becomes a sham.

A critical defect had been shown to exist in state constitutions. The eventual electoral defeat of governments whose administrations had been guilty of a lack of openness and accountability does not solve the problem. It is not simply a question of removing corrupt, reckless or incompetent people. The problem is how such people could do so much damage before they were removed from office. While a constitution may not be a guarantee against improper conduct, its most important role is to set out rules which minimise its likelihood, and limit the effects of such conduct should it occur. This is where constitutional reform is most needed, because our current constitutions, both state and federal, say very little about the proper exercise of executive power.

Queensland and Western Australia set up commissions of inquiry into the particular events that had led to public disquiet over the conduct of government in these states, the Fitzgerald Commission in Queensland and the WA Inc Royal Commission in Western Australia. In addition to their findings about corrupt, illegal and improper conduct by public officials, both commissions recommended that there should be wide-ranging reforms to the operation of government in these states. They also recommended that another body should be set up with a specific brief to make detailed recommendations for change across the whole public sector. These bodies were the Electoral and Administrative Review Commission in Queensland, and the Commission on Government in Western Australia.

These bodies were duly established and, after much research and wide public consultation, produced a welter of recommendations about parliamentary, electoral, financial and administrative matters in these states. Many, perhaps most, of the recommendations have

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been adopted or are likely to be so. There is no question that the review process had led to major improvements in the efficiency, probity, openness and accountability of government. But the question remains: have these changes dealt with the core problem, the defect in these states' constitutional structures that relates to ensuring open and accountable government?

My answer to this question draws heavily on my experience as a Commissioner of the Western Australian Commission on Government, but I must stress that the views which follow are my own and are not necessarily those of the Commission which completed its work earlier this month. I believe that administrative changes are very important but they are no substitute for a solution to the key problem in our constitutional system which is the effective control of executive power. While some recommendations have been made to deal with this problem, there are a series of complications that make constitutional reform of the executive especially difficult.

These difficulties are threefold. First, there is the problem of defining what the executive is, because its definition is elusive and can refer to quite separate entities. Secondly, in our system it is difficult to find out how the executive is supposed to work, as our constitutional documents provide little guidance on this topic. Finally, it is not easy to work out what constitutional reforms to the executive are appropriate, and even more difficult to set them in train.

To deal with the first problem, when people talk about the executive they can be referring to three different things. At its broadest, the executive is almost synonymous with government itself. If we take out the legislature and judiciary, all that is left is the executive, and this comprises the vast bulk of government activities. In this sense, the executive is the whole administrative machinery of state.

The executive can also be used in a narrower sense to refer to the key decision-making components of government. In particular, it can be used to mean the political executive, the prime minister or premier and the ministry—those elected officials who make the most important decisions about government policy.

Finally, it can refer to the formal seat of executive power in our system, that is, the Crown and its representatives, the governor-general and state governors in whose name all key executive decisions and appointments are made.

It is the last two of these meanings that are particularly relevant to the question of constitutional reform, the political executive on one hand, and the formal organs of executive power on the other. The fact that these two meanings of the term executive refer to different entities leads us to the second broad problem with the executive, finding out how it is supposed to work.

During the public meetings in Perth and around Western Australia held by the Commission on Government, people were often surprised to learn that there was no one document that set out all the basic rules about how government should operate in the State. This surprise turned to amazement when they discovered that there was no mention of the role of the premier in the State's *Constitution Act* and only indirect mention of cabinet and ministers. There was no statement of the relationship that should exist between the governor and the premier, between the premier and other ministers, or between the ministry as a whole and Parliament. In other

words the *Constitution Act* gave no guidance about the critical components which are supposed to ensure accountability in our system of government. How can we know if the premier is acting properly if there is no constitutional specification of how the premier ought to act? How can we have accountable government if there is no statement of what offices are to be accountable and to whom?

This problem is not Western Australia's alone. It is a characteristic of all governments in the Australian federation, state and Commonwealth. The explanation for this odd situation is that we have inherited the British tradition of parliamentary government. In this tradition, the forms of monarchical autocracy have been retained, but modified by the practices of representative liberal democracy. If one looks at the constitutional documents of the states and the Commonwealth, executive power is conferred upon the governors and the governor-general. They are given the power to call and dissolve Parliament, and to appoint and dismiss ministers; their acquiescence must be obtained for the introduction of money bills into the Parliament and all legislation must have their consent before it becomes law. They issue commissions to judges and make all key appointments to public office. They have, in sum, not only ultimate control of the exercise of executive power but have a veto over the legislative process and sole discretion over appointments to the judiciary.

Many of these functions require the advice of the executive council, a formal advisory body whose role, composition and operation is as familiar to the average citizen as the nature of a medieval theological dispute or the far side of the moon.

All this arcane machinery of the formal executive operates in practice at the behest of the political executive, the premier and the ministry. These elected officials derive their political authority from having been elected at free elections to represent the citizens of their political community. In most circumstances, the formal organs of executive power act only on the advice of popularly elected officials. But there is no statement in our constitutional documents setting out the relationship that should exist between the formal executive and the political executive. Most of these critical relationships are governed by accepted practices often called conventions. It is no doubt fruitless to try to reduce every aspect of government to a series of written rules, but the relationships we are talking about are basic to the operation of government in a parliamentary democracy. They are vital to an understanding of how our system of government operates, and yet they are not spelled out in our constitutional documents.

This issue was of great concern to the Western Australian Commission on Government. In its final report, *Report No.5*, presented in August this year, the Commission pointed out that it had been asked to consider twenty-four specified matters under the broad heading of preventing corrupt, illegal and improper conduct in the public sector of Western Australia. The Commission argued that all of its many detailed recommendations for increasing openness and accountability in government required a constitutional framework that specified the key relationships between all the important agencies of government. This was patently lacking in the documents that currently comprise the Western Australian constitution.

To deal with this problem, the Commission recommended that sections be inserted into the Western Australian *Constitution Act* to deal with five critical sets of relationships. It should be noted that the aim of the Commission was not to draft the precise responsibilities of each office, but to recommend that the general role that each institution was expected to play should be stated in the State's constitution in plain English. Nor were the Commission's

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recommendations intended to change existing practice, just to spell out what the relationships actually were.

The first topic dealt with was the role of governor as head of state. The Commission recommended that the constitution should stipulate that the governor has a duty to safeguard the constitution of the State, and that the governor acts on the advice of elected officials except in circumstances where the governor acts independently to safeguard the constitution of the State. In addition, the procedures for appointing the governor and for removing the governor from office should be set out, including the role of the premier in these procedures.

At first glance, this might look like some radical plan to change the role of the governor, but after a moment's thought, it is clear that the statements are simply describing what happens now. The difference is that it requires current procedures to be stated in a few plain words and in an authoritative document that is open to public scrutiny. The events of 1975 dramatised the dilemmas in the relationship between the head of government and the head of state. All the recommendation of the Commission on Government tries to do is to set out the dilemma and be explicit about the conflicting claims to constitutional legitimacy.

The same is true for the second set of relationships, those dealing with the executive council and the governor in council. The executive council is a meeting of at least two ministers usually chaired by the governor at which a range of official business is transacted. The Commission on Government recommended that there should be provisions in the constitution which set out the nature and function of the executive council, the procedures for appointment to and removal from the office of executive councillor, and the role of the governor and the premier in these procedures. In addition, the role and responsibilities of the governor and the premier in the function, duties and operation of the executive council should be specified. Again, no change is recommended, just the setting out of existing practice and the assumptions on which it is based.

The third set of recommendations dealt with perhaps the single most important omission from our constitutional provisions, the absence of any specification of the role of head of government, premier or prime minister. The Commission on Government recommended that the constitution provide that the premier is head of government of Western Australia, and that there should be a clear statement that the premier has a duty to uphold the constitution and laws of the State. In addition it should be stated that, the premier must be a member of the lower house, and appointment to the office of premier is made by the governor on the condition that the premier will lead a ministry which can secure the support of a majority of members of the lower house present and voting on a motion of confidence. This is to be the case except when such a requirement is inconsistent with the governor's duty to safeguard the constitution of the State.

Clearly some delicate matters are touched on here but, again, the recommendations do no more than specify the present position of the premier. This is also true of the recommendations of the Commission on the situation in which the governor may terminate the appointment of the premier. It was recommended that the constitution should provide that this can occur at the request of the premier, on the passing of a vote of no confidence in the premier's ministry by the lower house, or in circumstances where the governor has a duty to safeguard the constitution of the State.

The refrain 'duty to safeguard the constitution of the state' is inserted to focus on the important issue of the interests that the role of the governor should protect on those rare occasions when the governor acts independently of the advice given by elected officials. This is surely a more productive way of looking at the role of the head of state than sterile discussions about the so-called reserve powers of the governor.

A similar motivation led the Commission on Government to recommend that the constitution recognise the cabinet as a meeting of ministers, chaired by the premier to determine the policies of the government of the state. The Commission had previously made recommendations about publishing the procedures for calling cabinet meetings, for the conduct and record keeping of such meetings, and for the promulgation of cabinet decisions. Investigations of the questionable government activities of the WA Inc years had pointed to serious shortcoming in cabinet procedures. Many of the problems with the operation of cabinet had resulted from the constitutional invisibility of the body, and the sloppiness and deceit fostered by a lack of public accountability.

The final set of relationships dealt with by the Commission concerned the role of ministers. It recommended, in addition to some matters of special concern to the Western Australian constitution, that there should be constitutional provisions which specified that ministers are appointed by the governor on the recommendation of the premier, and may be removed from office by the governor on the advice of the premier. It should also be stated that a minister's commission is terminated on the resignation or removal from office of the premier. The Commission on Government was concerned that there should be a clear statement of ministerial responsibilities. It recommended that the constitution provide that each minister should be required to make an oath of accountability on taking office, that ministers are accountable to the Parliament for the operation of those departments and agencies listed in their commissions, and that ministers are accountable to the Parliament for decisions of cabinet.

None of this is surprising, new or controversial, except that these key relationships, without which parliamentary democracy cannot function, are nowhere to be found in our constitutional documents at present. Setting out these rules in a constitutional document is of vital importance for two reasons. The first is that it provides a coherent framework for the conduct of government and can remind the holders of executive office of the broader responsibilities of their office. Such a coherent framework is vital to establish and maintain the openness and accountability of the public sector. The second, and perhaps even more important reason, is that the absence of constitutional documents that accurately describe the way in which government operates does little to encourage public trust in the governmental system. To retain constitutional documents that wilfully mislead the citizen as to the role and nature of the executive fosters cynicism and distrust. Attempts made to encourage public knowledge of our constitutional system are seriously hindered by the obscurity and incompleteness of our constitutional documents.

All that is proposed here is an attempt to set out in our constitutional documents the way our governmental system actually works. If these changes are so desirable, why have they not been adopted years ago, and why is there no public debate on the topic? The answer is that constitutional reform of any kind that affects the role of the executive is especially difficult. That is why the subtitle of this talk is constitutional reform for grown-ups. It is not that altering the constitutional allocation of powers between the states and the Commonwealth, or

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changing the composition of the Commonwealth Parliament is especially easy, but these changes are as child's play when compared with reforming the executive.

Some of the reasons for this have already been pointed out. The constitutional obscurity of executive power hampers informed public debate, but there are other reasons which compound the problem. The first is that, in several areas, there is disagreement over exactly what the rules are or should be. During the discussions of the Constitutional Convention from 1973 to 1985, for example, there was disagreement over the scope of the governor-general's ability to act independently of the advice of elected officials. The partisan hostilities of 1975 were an element in this disagreement, but there were also deeply-held differences of opinion over what the responsibilities of the head of state were and should be. Even so, the Constitutional Convention did come up with a list of the functions of the head of state that might well have been included in our constitutional documents. This has not been used as the basis for constitutional reform even though the ambiguity in the relationship between the head of state and the head of government is an acknowledged area of weakness in our constitutional system.

The executive has little to gain from removing this ambiguity. Who is to know which of various interpretations of the role of head of state would be to the partisan advantage of the government of the day in some particular circumstance? Writing the rules down might limit the discretion of the government. Worse, it might enable a constitutional challenge to be made in the courts in an area which is now largely outside the competence of the judiciary. Writing down the constitutional relationship between the prime minister and the governor-general for example, might, by the very act of reducing it to writing, change the relationship in a subtle way.

All these points have some truth, but if the government of the day might lose under a constitutional reform that sets out the rules governing the exercise of the executive power, who might gain? The answer is, of course, everybody else. This is precisely what constitutions are for. They are designed to make life difficult for governments by requiring them to justify their actions in public. For this reason, governments do not like constitutions any more than they like elections. Both of these institutions are regarded as unpleasant necessities, and the idea of more constitutional restraints is as unpopular with governments as the suggestion of more frequent elections.

The unfortunate consequence of this is that governments are unlikely to initiate constitutional reform of the executive even if it is simply making clear the nature of executive power. Even more unfortunate is the fact that governments have a monopoly of the machinery for initiating formal constitutional change. The very institution that most needs reforming is the one in charge of the reform process. This is one of the few faults in the design of the Commonwealth constitution and explains why so few proposals for Commonwealth constitutional amendment have gained the necessary popular support at constitutional referendums. Reform of the constitution has been regarded by successive governments as a device to be used predominantly for the short-term partisan gain of the government of the day. In these circumstances it is not surprising that all but eight of the forty-two proposals put to the people have failed.

The situation is even worse in the states where most constitutional change can occur without any direct reference to the people. Since the granting of self-government in the nineteenth

century, most state constitutions have evolved in ways which have reduced the limits on the executive rather than enhanced them. The pattern of constitutional reform for both the Commonwealth and the states would have been very different if proposals for constitutional amendment could have been initiated without the veto of the government of the day.

Notwithstanding all these reasons for pessimism, there are some grounds for not despairing entirely about reform of the executive. One of these is, perhaps paradoxically, the widespread distrust of government. Governments are aware that an electorate that is genuinely aggrieved about the conduct of government is a highly unpredictable electorate. This not only means that a party associated with a lack of openness and accountability in government will be punished at the polls, but that if both the major parties are seen to be insensitive to reform the voters may turn to radical solutions. This is what has happened in New Zealand where widespread concern about the accountability of government has led to a number of reforms including a major change to the electoral system.

The unhappiness with many aspects of government in Australia has meant that both major party groupings have a public commitment to improving accountability, particularly in the state sphere, and parties with rhetorical commitments to reform may find they are doomed to implement them. This is particularly the case where there are sections of the legislature that can keep the issue of executive reform on the public agenda. It is not as if public support for major change is absent. The overwhelming impression derived from the public hearings of the Commission on Government was that there was a large constituency in Western Australia at least, willing to support genuine attempts to entrench openness and accountability in all aspects of government and particularly in the executive branch.

Another factor is the republican debate. For all the inanities talked about the Australian republic, it is an issue that has the potential to raise core issues about the role of the head of state and the relationship with the head of government. The three commonly discussed options about choosing a president—the existing procedure for choosing the governor-general or governor, election by a two thirds majority of members of Parliament, and direct popular election—are really options about the relative power of the head of state and the head of government. The more the head of state has a constitutional and political authority that is distinct from that of the head of government, the greater the limits on the discretion of the head of government. Whether such a change is desirable is a matter of opinion and political judgement about the likely consequences. Both sides of politics have gone out of their way to avoid talking about this aspect of the issue, but it may yet surface as a key component of any serious move away from a monarchical executive. The debate would certainly be better informed if the existing relationship between the Crown and the head of government were clearly set out in our constitutional documents.

The final element in constitutional change is the glorious unpredictability of politics. Just as the republican issue may mutate into a real debate about executive power, other events may occur which prompt further consideration of the need to define executive power. The talk of people's conventions to consider constitutional issues in both state and Commonwealth spheres is another potential source of unpredictability that may lead to constructive action to define executive power.

The most important point is that the basic assumption about the need to reform our constitutional documents to make them coherent statements of the basic elements of our

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system of government appears to be almost universally accepted. Sooner or later, this will oblige governments to move the constitutional debate in this direction. Whether we are to be a monarchy or a republic, it is no longer good enough to justify the maintenance of a defective constitutional structure by pointing to the foibles of English constitutional history. If our constitutions are to serve our common purpose, we must remedy their most glaring omission, the lack of openness and accountability that results from not defining executive power. This is not the only kind of constitutional reform, but it is the one that best reflects the aspirations of an adult citizenry aiming for a mature and fully accountable system of government.

**Questioner** — Last week the Attorney-General, Mr Williams, was talking about the current free-speech cases preparing for the High Court and was saying that it was the government's opinion that the current direction of the High Court was leading to a fundamental shift in political power between Parliament and the Court. Is this part of what you are talking about in terms of reform, that the government wants to keep the power all for itself and not to give anything back to anyone else which might dilute its power?

**Professor Sharman** — Well, yes and no. No, in that it doesn't really deal with the major issue of executive power that I'm talking about, which is writing down the basic way in which the executive operates; but yes, in that the problem with the High Court's implied rights is because there is no written bill of rights, and whether you want a bill of rights or not is a matter for debate. If you like, the High Court is doing to the constitution in the area of rights what the Constitution already does in relation to the executive. The High Court is saying 'well it's not actually there but we think we know how it should be, and therefore we're willing to imply these things'. What the Attorney-General is saying is 'well, we would rather the High Court didn't find too much that wasn't there because that might make life even more uncomfortable than it is already thank you very much'.

**Questioner** — Professor Sharman, I'd like you to comment on the elected head of state and the impact that might have on the way in which the executive is structured.

**Professor Sharman** — Well, at the moment the way the head of state is appointed, as you know, is that the premier or prime minister makes a recommendation to the palace and it comes back and is made flesh and appears as the governor-general, and the premier does the same thing for the governor. One of the characteristics of the notion of the Crown is that it does give the governor or governor-general a certain status separate from simply being the premier or the prime minister's person. Of the three options which are talked about in terms of changing the way in which you appointed the head of state, the question is how each would vary depending on what machinery you used. If you chose the minimalist option, which would simply be replicating the existing process, if you took away the Crown, the president would look very much as though he or she was the poodle of the prime minister of the day. Now, the other extreme is a directly elected head of state who would have not only the constitutional authority of the head of state, particularly enormous authority if the constitution were left as it was, but would have a political authority which would mean that the head of state would rival the prime minister, the head of government, as spokesperson for the interests of the federal government or the state government. So the president could say to the prime minister, 'well I'm elected and you're not', so that if you left the powers in the constitution exactly as they are you would have a head of state who had enormous power and might have the political legitimacy to use it. Now whether or not that's a good thing, you can understand

why the prime ministers are most unenthusiastic about that kind of change. I think it's interesting if people talked about that because if that option were to be a viable one, it would guarantee that the role of the head of state would be defined much, much more explicitly in the constitution. You would have to write down what the head of state was supposed to do, otherwise you would make a radical transformation, or potentially a radical transformation, in our system of government.

**Questioner** — I was just amused by four innocent little words of yours where you described the recommendations of the WA Constitutional Commission as only seeking to spell out existing powers in 'a few plain words' and that amused me for having a resemblance to the description of section 92 of the federal constitution which was once described as 'a little piece of laymen's language' and of course we all know the quagmire of legal history that has ensued since then. My main concern is that words become wedges for aggressive judicial interpretation and expansion of executive powers, and courts of course are the least accountable of supreme institutions, often dominated by centralists and lefties, and my main concern is that your very desire to restrain executive power would be contradicted by the tendency of judges interpreting such powers, the moment you set them down in writing.

**Professor Sharman** — Now that's a very real question, a very very real problem and I believe that one of the functions of lawyers is to make what seems relatively straight forward, fairly complicated. I should say, just in passing, if you want to make the judges more accountable, there are all kinds of mechanisms for doing it. Changing the way they're appointed, even using the US system (most of the US states elect their judges) would not be particularly popular, at least with the judicial fraternity. To the important question, yes, that is a problem and it was a problem for the Commission on Government because we asked lawyers to comment on recommendations to make sure we hadn't made any terrible mistakes, and we wanted to stress to our lawyers two things. First, that what the Commission was doing was not attempting to draft sections that would go into the Constitution Act but saying what those sections should achieve. Secondly, that it was not our intention to encourage judicial intervention in the constitutional process. I agree nothing is going to stop it, or at least nothing under the existing rules is going to stop it, but it is possible to make clear that the purpose is not to define the office but to make general statements of accountability. I agree there is no way that you can stop things being justiciable but the purpose would be to set out in broad language what the goals and responsibilities would be. And if you look at the recommendations of the Commission on Government, in Chapter Five you will find that most of them, or all of the ones dealing with that matter, are intended as much as a guide to the participants as they are an opportunity for the citizens to find out what is going on. I think if in the WA case, ministers had been required to take an oath of accountability, you would be able to say to a minister, well look, you've sworn to do this, why aren't you doing it? Whereas at the moment, of course, in the past few years ministers could say, well we're not responsible for this or it's not at all clear, there's some ambiguity, whatever, so it's not intended to be justiciable. But I agree nothing can stop it becoming so, and in hard cases, there would be occasions when it would be justiciable.

**Questioner** — I thank you for your address. I think a very valuable part of it was highlighting how useless, if I may say so, the word executive has become because of the range of meanings it carries. Meanings which can often be in conflict with each other, as illustrated I guess by the roles of the different sections of the executive in relation to fiscal matters. Do you think that we've now reached the stage with our simple framework terminology where it

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would be useful for us to allocate one meaning to the term executive and to have alongside it the administration rather than to continue with one term, executive, sometimes covering administration and sometimes covering the ministry and the higher level functions. If we were to expressly say, instead of having threefold division of power, we've got a fourfold—legislature, judiciary, executive and administration—that might help us simplify our thinking about the matter and it might be a very good means of communication with the wider community. Parallel with that I would ask whether or not there is an argument for further simplifying the concept of the executive and limiting it to the ministry effectively, or to those higher level functions, by identifying a ceremonial arm of government alongside the other four, which would effectively be most of the core, real functions left to the governors.

**Professor Sharman** — Yes. One of the problems is you can always be Humpty Dumpty and say, well, by this I mean this, but the point is that the term has general usage and on most occasions you can tell from the context what people are talking about. But even in that last example you gave about the ceremonial parts, well they are ceremonial, except when they're not, and that was Mr Whitlam's problem, he thought it was all ceremonial and he found it wasn't. I'm sympathetic with what you're saying. I think it would be made easier if the different offices in the constitution were specified and then you would know the executive included this, this, this and this. The problem is the constitution said it's this, when we all know it's that, and hence we all know it's partly that, hence the confusion.

**Questioner** — From your studies, is the precondition for significant constitutional reform to limit the power of the executive, that the power in the Parliament has to be shared? In other words, that an executive of either side hasn't got the ability to impose its will. Is proportional representation, or a form of that, a very close electoral contest, a precondition for significant change?

**Professor Sharman** — I thank the Senator from Western Australia for that. I thought he was going to say something else. So now I'll answer what I thought you were going to ask. I thought you were going to say, is it important to take the executive out of Parliament, because one of the things I haven't mentioned here is, it always seems to me a great shame that the executive is so closely enmeshed in the operation of the Parliament. I would like to see the legislature defined as the two houses of Parliament. Perhaps the executive would be required to sign bills, have some veto, perhaps overrideable like the US one. I happened to look at the South Australian *Constitution Act*, just the first page, and I notice that it says that, the Parliament of South Australia is the House of Assembly and the Legislative Council. So I must have a look at that to see whether they've actually made radical change. I don't think they have. I think it's just a drafting change. But now to your real question. I think your question implies that the executive would be much more accountable if it was unsure of its parliamentary base and always had to pass legislation on its merits, and that that would almost guarantee to be the effect if you had proportional representation in both houses of Parliament or in the New Zealand system in the only chamber or whatever. I think that deals with part of the problem. I agree, I think governments should always be given a hard time. I think the statement that governments are here to govern is a nonsense. Governments are here to operate the machinery of state and to try to pass legislation and regulations if they can convince people. They have no God-given right to pass their legislation, mandates notwithstanding. So that's what the Parliament is for. It is to make life exceptionally hard for governments. But that isn't really the problem I'm dealing with because even if all governments were minority governments, and even if the balance of power was held

universally by the Australian Democrats, it still would not deal with the basic problem which is the structural deficiency in the locus of executive power. As long as we have the existing machinery in place, then minority governments, whatever their benefits, still don't deal with that problem.

**Questioner** — I find this happens to me all the time in Parliament, that people don't understand my question, so I'll rephrase it if I may. My assumption is that you're not going to get any executive in Parliament in Australia to initiate strong constitutional reform to address your problem unless the Parliament itself is already finely balanced. In other words, for as long as they're secure and dominant they won't initiate strong constitutional reform.

**Professor Sharman** — I believe in constitutional reform by mistake. I think that's the most likely avenue. The best example is the Senate itself. The Labor Party introduced proportional representation, and I am told by a number of people that the Labor caucus was told it would guarantee the Labor Party a permanent majority in the upper house. So the motivation for changing the electoral system was a disaster for the people who designed it, but a benefit for everybody else. So for example, I believe that the Labor Party in Western Australia which has a very small chance in the polls of winning, has committed itself to almost everything in the Commission on Government's Reports. If, in the unlikely event it found itself to be in power, it might have to do some of those things and it might do them before it had thought about them for too long, in which case useful and interesting things might be done. But otherwise, I agree about the importance of a section of the legislature, not controlled by the government of the day, that can keep these issues before the public and I think that for example, if the Upper House in Western Australia is not controlled by the government of the day as is possible, indeed perhaps even likely, even if the government is returned, then it can do the same thing as the Senate does here. That is to remind people that things need to be changed, to do deals, that if you change this thing here maybe we will agree with this. So I agree with the premises that 1) parliaments should not be dominated by government majorities in both houses, and 2) that the role of minor parties and balance of power and upper houses is to act to keep the government honest and to keep issues before government that they may not wish to be kept before them.

**Questioner** — From your studies, what would you recommend as the most effective way of choosing a new head of government?

**Professor Sharman** — Head of government or head of state?

**Questioner** — Head of state.

**Professor Sharman** — Believe it or not I have an open mind. I'd like to be persuaded. I think if we are to keep something like our current constitutional arrangements, the proposal for indirect election is probably not a bad idea, that is, to have the head of state chosen by two-thirds of the majority of Parliament. I think the Republican Advisory Committee provided a plausible justification for that process. I certainly would insist, personally, that if we went to a direct presidential election then major changes would have to be made in describing what the head of state was. But if that were on the agenda, then I think an elected head of state has got considerable merit.

## **Keeping Government Honest: Preconditions of Parliamentary Effectiveness\***

*John Uhr*

In this paper, I identify a list of preconditions of parliamentary effectiveness as that relates to issues prominent in the agenda of the Commission on Government (COG) of Western Australia which last year completed its series of inquiries into reform of the whole process of governance in that state. My list of preconditions of parliamentary effectiveness is not confined to the situation in that one state but is relevant to the general situation of Australian parliamentary government. I used the opportunity presented by the COG inquiry to tease out the implications of what I take to be the ‘core business’ of a Parliament, which is the legislative function of considering, reviewing, amending and passing laws—as taught to me long ago by the late Western Australian Governor, Gordon Reid, who at an earlier time was professor of political science at the Australian National University where I now work.

One of Gordon Reid’s great themes was that the effectiveness of Australian parliaments in scrutinising government and public sector issues really depends on their commitment to their core function of legislating. The more responsible is their legislating, then the more effective will be their supplementary scrutiny of government activities. Legislative review might at times be a slow grind, but it is the only solid basis for a system of public sector review. As Reid came to convince me, parliaments which avoid the low road of legislation, and strive for the high road of policy warfare against the government of the day, usually come to grief. The policy becomes posturing; and the law-making becomes muck-raking.

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\* This paper was presented by Dr John Uhr as an invited address to the Western Australian Commission on Government in Perth in August 1995. John Uhr is Senior Fellow, Political Science Program, Research School of Social Sciences, Australian National University.

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My aim here is to throw light on ways in which an active legislature can also become an effective reviewer of government and the public sector, which was a topic which loomed large in the agenda of reform facing the COG. But let me warn you that my list of preconditions side-steps the conventional list of reforms. I will not call for an independent Speaker; nor for the abolition of political parties (in fact I want more rather than fewer parties); nor for the intrusion of public television into the House and its committees; nor for any fancy code of conduct for ministers to make them compliant and responsible; nor will I demand budgetary independence for parliaments. All these reforms are probably good things, but whether they really work as intended depends on the existence of more basic conditions, and it is these basic preconditions of productivity that I want to focus on.

At the outset, let me give you a practical example of what I take to be parliamentary effectiveness. The example is drawn from the Commonwealth Parliament, but it illustrates a type of involvement that could arise in any Australian Parliament, given the right conditions.

During 1994, a Senate committee completed an inquiry into sexual harassment in the Australian Defence Force.<sup>1</sup> You might remember the allegations about misconduct on HMAS *Swan*, which triggered the inquiry. The government response to the committee's report was among the most comprehensive that I have seen, supporting all but two of the sixty-six recommendations. To my mind, that inquiry and report with the positive government response illustrates the path which an active Parliament can take when pursuing its charter of public accountability.

Three features stand out.

The first is the area of government performance under scrutiny, which was compliance by public organisations with core public sector employment legislation, and the search for means through which both law and compliance could be improved. This involved the committee in a review of policy implementation, but not the development or initiation of public policy from scratch. Committees tend to do better on matters of administrative review than on matters of policy initiation.<sup>2</sup> Happily, the focus was on government administration rather than public policy as such—and primarily on the role of administrators, not ministers.

The second feature concerns the body which did the work, which was a normal Senate committee with responsibility for 'oversight' and scrutiny of an identifiable but limited span of public sector activities. The committee was neither a novice in the policy area nor such an expert that it was tempted to micro-manage that area. It saw its job in terms of facilitation and brokerage, using its comparative advantage in open and public inquiry to bring together the key stakeholders: especially representatives of senior management and professional associations. Once again, the focus was not on ministers but those administrators who put into practical effect the general strategy which ministers and Parliament had formally authorised.

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<sup>1</sup> Senate Foreign Affairs, Defence and Trade Committee, *Sexual Harassment in the Australian Defence Force*, Canberra, 1994.

<sup>2</sup> John Uhr, 'Parliamentary Measures: Evaluating Parliament's Policy Role' in Ian Marsh (ed.), *Governing in the Nineties*, Longman Cheshire, Melbourne, 1993, pp. 346–375.

The third feature goes to the real secret behind the longer-term impact of the inquiry process. It is that committee members on this special inquiry regularly participate in estimates hearings on the appropriation (or budget) bills. This leverage over the government's budget proposals is usually modest; it is a reviewing as distinct from an initiating activity.<sup>3</sup> But low-level as it might be, it allows these parliamentarians an opportunity to return directly to the agencies and to ventilate any unresolved concerns. The officials who manage agencies certainly appreciate the risks associated with even routine budgetary review, because it is they, and not their ministers, who have to front up and explain their performance.

This inquiry into sexual harassment illustrates important lessons about what makes for an effective Parliament. I can now try to generalise. One threshold generalisation is that effective parliamentary action really requires active committees, which can act as bridges linking Parliament and the community in their shared interest in improving law and government. Parliamentary effectiveness requires that the institutions of parliamentary investigation and debate comply with three general rules:

1. Focus tightly on government practices that are within its orbit of influence. Parliamentary committees can alter the pattern of public sector conduct; yet it is very rare for committees to establish the pattern of public policy. My recommendation to committees is to aim at the instruments of public administration, which in any event is really where policy success is made or unmade.
2. Delegate investigations to committees, so long as they perform more like auditors than inquisitors. In regard to review of the public sector, committee strategy should strive to focus on government compliance with appropriate standards, and to sample and test agency reports of performance against actual results. Committees add most to the process of government when they throw the light of publicity on performance, comparing official reports and claims about results with the realities of organisational conduct. Even the most routine of government documents, such as annual reports, provide Parliament with opportunity to test claim against substance.
3. Retain continuing oversight of problem areas through the annual budget process. The beginning and end of the story of effective parliamentary performance is legislation and legislative scrutiny.<sup>4</sup> The government's budget establishes the framework of expenditure priorities for the public sector, and the requirement for Parliament's consent to that most basic of laws opens the door to significant parliamentary scrutiny of government organisations. Some legislation sets the standards for public organisations; some authorises the standard-setters; still other legislation frames the budget, and this last type of legislation provides a key with which to unlock and enter almost any area of bureaucratic activity.

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<sup>3</sup> John Uhr, 'Introductory Remarks' and 'The Debatable Role of Senate Estimates Committees' in *Senate Estimates Scrutiny of Government Finance and Expenditure, Papers on Parliament*, no. 6, 1990, pp. 4–9, 79–107, and 'Senate Estimates Committees' in *Senate Committees and Responsible Government, Papers on Parliament* no. 12, 1991, pp. 70–75; J.A. Pettifer (ed.), *House of Representatives Practice*, AGPS, Canberra, 1981, pp. 355–363.

<sup>4</sup> J.A. Pettifer, *op. cit.*, p. 307; H. Evans (ed.), *Odgers' Australian Senate Practice*, 7th edition, AGPS, Canberra, 1995, pp. 249–250.

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## But what is Parliamentary Government?

The term ‘parliamentary government’ reminds us that government is the basic function, and ‘parliamentary government’ is a modified form of government. Government is essential, and can not really be avoided. But parliamentary government is different: unless government is forced to take note of Parliament, Parliament and not government will be the loser. Government has, as it were, the whip hand.<sup>5</sup> Government as such can get along quite nicely without the modifications imposed by a Parliament.

Not to beat about the bush, we might as well admit that the idea of a truly ‘parliamentary government’ runs against the grain of government. All the arsenal of parliamentary devices such as reforms to make more effective such devices as Question Time, legislative committees, and reporting requirements for bureaucratic bodies, only complicate government. So let’s be frank: these parliamentary reforms are an inconvenience to those who really do govern, such as ministers and top bureaucrats who regulate public affairs. Parliament and government overlap, but they serve different functions within the political system.

Imagine if our task was not how to blend the two functions but how to choose between them, as an ‘either/or’ choice. Then if you had to choose between the two, you would be rash not to choose government. Government is the basic function, and it is not accidental that those who govern tend to downplay the value of the legislative functions—except those, like the electoral law and budget laws, which authorise their access to power and public money.

Many societies manage to get by without a Parliament or any open and accountable legislative institution. Every society requires rulers, but not every society requires a system of rules to hedge in the rulers, as in our ideal of the rule of law, with due legislative procedures and impartial arbitration through a judiciary. Of the three basic powers of government, the executive power is the oldest and most basic: with the other two powers, the judicial and the legislative, being understandable refinements, but later additions none the less. And we welcome them, because their existence in effect defines the essence of modern constitutionalism. But in terms of the brute efficiencies of government, Parliament—in the sense of an active and effective institution—is something of an ‘add on’ or an optional extra.

Of course, I am here today because I am a very keen supporter of Parliament. I happen to believe, on the basis of what I have seen through my own experience of working in the Commonwealth Parliament, that parliaments have the capacity, if they want to use it, to improve government. But, to repeat, parliamentary government runs against the grain of government convenience. The improvements which parliaments are capable of making to government are not really ‘efficiencies’. They do not streamline the operations of government, or simplify the work of ministers or top bureaucrats. Quite the opposite really: the more effective the Parliament, the less is the freedom open to governments to act as they see fit. The speed and efficiency of government decision-making is likely to be one of those qualities modified under parliamentary government. In standing up for parliamentary government, we are siding against speed and efficiency and championing such alternative qualities as open decision-making and community consultation.

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<sup>5</sup> John Uhr, ‘Prime Ministers and Parliament: Patterns of Control’, in Patrick Weller (ed.), *Menzies to Keating: The Development of the Australian Prime Ministership*, Melbourne University Press, Melbourne, 1992, pp. 81–108.

So why do we persist in our efforts to reform our parliaments? Why do we try to make them more effective when that has the tendency to disrupt the very efficiency of government? The answer is that, as a community, we have a right to expect that the political process will respect principles other than simply that of managerial efficiency in decision-making. The norm of responsible government holds that governments should exercise power responsibly.<sup>6</sup> The core idea is that rulers will tend to act and rule responsibly when they appreciate that they do not 'own' the system, and that they must instead 'own up' to the community and account for their use of community resources, such as revenue through taxation and expenditures on public services. Groups and parties in power must balance their internal organisational efficiency against overriding external principles, like open government and democratic accountability.

What then are some preconditions of an effective Parliament that has the capacity to keep government aware of its responsibilities to the community? Let me give you seven or so preconditions and illustrate each with examples of parliamentary devices which work in other parliaments. Whether they will work here in Western Australia 'all depends': especially on the political will of three groups with a central role in the political process—the government of the day, which might have bigger fish to fry; the political parties represented in Parliament, which like any established powers might feel threatened by too much change; and the community, which might feel that the victory is not worth the fatigue and frustration of battle.

But take heart. Parliamentary reform can come about, and it need not require wholesale constitutional re-engineering. Take as an example my home state of Queensland. Although not all the promise of the Fitzgerald reforms has been delivered, the business of government has been changed fundamentally—so much so, that as the recent Queensland election illustrated, the community now demands that government be conducted in the open through greater consultation, and is willing to take governments to the wire in pursuing that public demand for open and accountable processes. Parliament is the only representative forum that fits the bill, even though the progressive reform of the Queensland Parliament has to be painfully extracted from the government by brute community force. Be thankful for elections, when parties have no choice but to listen to community groups.

Let me now list seven preconditions of parliamentary effectiveness.

## **1. Rules of Representation**

My first precondition for an effective Parliament concerns the rules of representation governing who gets in. There can be no Parliament unless there is some mechanism for popular election of parliamentarians. The great lesson emerging in the Westminster world is that our Westminster tradition is really a formula for party rather than parliamentary government. The original Westminster Parliament in the United Kingdom is facing increasing community pressure for a break with the time-honoured tradition of single-member seats with members elected on the basis of a popularity contest indicated by a bare plurality of votes

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<sup>6</sup> J.A. Pettifer, *op. cit.*, pp. 81–82; John Uhr, 'Parliament' in A. Parkin, J. Summers and D. Woodward (eds), *Government, Politics and Power in Australia*, Longman Cheshire, Melbourne, 1994, pp. 26–43.

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cast. At least Australian elections insist that preferences also be counted, in order to force a plurality into a true majority.<sup>7</sup> But as the Queensland election again shows, those majorities can be very tiny, with only a handful of votes separating the successful party from the losers.

Is there not some way in which substantial minorities can also be represented according to the proportion of their voting support in the community? Of course there is: through a system of proportional representation, practiced in the Senate for nearly fifty years, and modelled on Tasmania's pioneering Hare-Clark system.<sup>8</sup> One day the British Parliament will catch up with Australian electoral practice, just as New Zealand has with its recent adoption of a system of proportional representation designed to reserve seats at the table of government for all significant political parties, as an alternative to past practice which gave little presence and visibility to minority groups with significant following.<sup>9</sup>

My point is not to debate the merits of proportional representation, but to draw attention to its effects on parliamentary practice.<sup>10</sup> Take the Senate as an example, because it suggests that one can combine two houses in one Parliament, with the 'lower' one (not my term) sticking with traditional patterns of big party representation, the other or 'upper' one spreading the representation around to include the smaller parties. You can imagine the difference that it makes to a house of Parliament when neither the governing party nor the official opposition can get their own way. Both have to begin to negotiate and compromise, and over time the minor parties learn to change the rules to entrench processes of openness and accountability.

## 2. The Size of Parliaments

Precondition two is related to this, and concerns the optimal size of the Parliament. Both New Zealand and Queensland are single-chamber parliaments, and it is interesting to note that both are facing pressure either to enlarge the lower house, as in New Zealand, or to restore the upper house, as in Queensland. Interest in the optimal size is also alive in Canada.<sup>11</sup> The details are less important than the trend, which is to increase rather than reduce the number of elected parliamentarians. For a moment, put aside your natural resistance to forking out more money for more politicians.

Let us do a quick mental experiment. Imagine that everyone in this lecture hall has been elected to the Western Australian Parliament. A cabinet has to be formed, and we are all equally ambitious, and want to see out talents recognised. Let us say the cabinet requires twenty places, and that there is only a small government majority, with almost an even split between support for government and non-government parties.

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<sup>7</sup> J.A. Pettifer, *op. cit.*, pp. 117–131.

<sup>8</sup> H. Evans, *op. cit.*, pp. 8–11, 15–16, 117–129; John Uhr, 'Proportional Representation in the Australian Senate: Recovering the Rationale' *Australian Journal of Political Science*, vol. 30, January 1995, pp. 127–141.

<sup>9</sup> P. Temple, 'Changing the Rules in New Zealand' *The Political Quarterly*, vol. 66, no. 2, April-June 1995, pp. 234–238.

<sup>10</sup> John Uhr, 1995, *op. cit.*

<sup>11</sup> 'The Size of Legislatures', *Canadian Parliamentary Review*, vol. 8, no. 1, Spring 1995, pp. 2–11.

If the hall were small, with only say one hundred members, with a few more than fifty to government and a few less than fifty to the non-government parties, we have a government backbench not all that much larger than the size of the cabinet—a kind of ‘reserve bench’ cabinet. So too on the opposition side, with just as good a chance that most of those elected will have their turn on the front bench. This ‘small is beautiful’ formula makes for lots of party intrigue over place and preferment, with very little spare time or energy for the traditional parliamentary activities of public scrutiny and review of government performance. Especially on the government side, which is the largest side, all the incentives point to playing it safe and awaiting your turn to get to the front bench. Not much room there for robust parliamentary independence!

Now consider the effects of a larger pool of elected members. Imagine that the hall now contains around two hundred members, still with a small government majority overall. The party in government still selects twenty members for the cabinet, but that leaves around four times as many on the backbench. So too in the opposition parties. One important effect of the increase in size, probable but not inevitable, is to divert the attention of many of the government and opposition backbenchers into alternative activities. Even against their original inclinations, many of these backbenchers will come to see that ministerial life is out of reach, so that one might as well seek whatever professional satisfaction one can extract from being a good backbencher: for example, by ‘participating in’ and not just ‘sitting on’ committees, and getting a public profile and a network of supporters by acting as a bridge between government and community.

The effect of increased size is by no means inevitable. But it certainly is the case that, in the absence of a large pool of non-front-bench talent, few members can be expected to bother with parliamentary duties which might not advance their ministerial chances. And for government members, this means avoiding open conflict between government and Parliament; while for opposition members it means using every parliamentary opportunity to ‘dump on’ the government. Neither posture is consistent with the sort of effective scrutiny activity that we want to build into Parliament.

### **3. Time for Deliberation**

The third precondition is time. Australian parliaments are notoriously mean with their time, and sit far less frequently than do most comparable parliaments. Perhaps this only goes to show how efficient our parliaments really are, wasting so little time to produce so much law, regulation and policy. Each house of the Western Australian Parliament sits, on average, for about fifty-five days, which is about par for most state parliaments. The Commonwealth houses stretch it out, to around sixty-five days for the House of Representatives and around seventy-five days for the Senate.

It is interesting to note that both sets of figures are considerably lower than comparable Canadian figures, where their provincial (or state) parliaments often sit around 40–50% longer, and the national Parliament sits around twice as long as Canberra—while the British Parliament sits considerably longer again. The conclusion is that Australian parliaments do not give themselves enough time to do all the work that the community might reasonably expect them to perform.

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But returning to the Australian situation, the real difference between typical state performance and that of the Commonwealth is that federal members spend considerably more time on parliamentary committees, the work of which often flows into and enhances the primary work of the chambers. The House of Representatives legislative committee (or Main Committee as it is called) now gives members almost an additional two weeks of time to devote solely to debating bills. Figures for committee time in the Senate show that senators now spend around twice as much time in committee hearings as they do in chamber business.

But time of course can be used well or wasted, and figures alone do not tell the full story. Let me use Commonwealth examples to make a point about different ways in which time can be managed. During the late 1980s, the Senate began the practice of not considering bills which came from the House after a certain date near the end of the sittings.<sup>12</sup> One effect was to force the government to alter its use of House procedures to stagger its consideration of bills, which are now introduced in one period of sittings with the expectation that they will not pass the House until the next period of sittings. That is one example of how even finite legislative time is elastic, and can bend under the pressure of institutional will.

#### **4. Core Business: Legislation**

The fourth precondition is a back-to-basics commitment to what the core business of Parliament is all about. My Commonwealth example of the search for greater parliamentary time was historically triggered by non-government interest in expanding opportunities for examining proposed laws. The battle over parliamentary time is most fundamentally about the time available for consideration of legislation. Parliaments are, after all, legislatures. Law-making is their core business, and that should rightly occupy most of the institution's time.

There are two chief distractions which get in the way of the focus on legislative scrutiny. One—which distracts ‘wannabe ministers’—is the low-minded pursuit of ministerial scalps, for which Question Time is almost tailor-made. The other—which distracts ‘wannabe policy-makers’—is the high-minded pursuit of policy development, for which parliamentary committees are ill-suited. The hard stuff of legislative scrutiny is really the heart of productive parliamentary work.

And what are the devices best suited to effective legislative scrutiny? The essential precondition has already been mentioned, and that is time for due consideration of bills. But time, even expanded time, can be wasted. Here are some devices which illustrate how whatever available time can best be used.

A complete menu of legislative scrutiny contains three courses, and each course (or parliamentary device) is essential to the nourishment of an effective Parliament.

The first course in the menu is a basic division of labour associated with a commitment to refer bills as appropriate to parliamentary committees for detailed review and report. The idea is that the houses of Parliament may then enhance their deliberations over the passage of bills by using the preliminary reviews and reports of such committees. The advantages of such legislative committees are two-fold: first, they allow for a degree of detailed examination of

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<sup>12</sup> H. Evans, *op. cit.*, pp. 254–255.

the specifics of bills; and second, they can allow, if time is made available, for community input into that review process. A working example of such a system of legislative committees is that in use in both houses of the federal Parliament, where a significant number of bills are now processed through short but well-focused public inquiries, and where public servants compete with community interests, or at least with Canberra-based community interests, for the committee's attention.

The second course involves a legislative device such as a specialist 'legislative scrutiny committee', supplementary to the above mentioned committees, which can examine the legal form as distinct from the policy substance of all bills. Legislative scrutiny committees produce a kind of 'civil liberties impact statement', detailing how the implementation provisions of a bill might impact on the rights and liberties of ordinary individuals. Such committees are in the style of the Senate Scrutiny of Bills Committee which reports weekly, striving to avoid comment on the merits of the policy in question, but instead examining the form of implementation authorised by the bill.<sup>13</sup> The reason we have parliaments is that we desire good laws; and one threshold quality of good laws is that they do not unduly, or without good reason, trespass on the rights and liberties of ordinary citizens. A scrutiny of bills committee can test the bureaucratic 'good ideas' against credible criteria for sound legal form and due administrative process.

Here we have a good example of the link between legislative responsibilities and scrutiny of government. I know from experience that a specialist committee which examines legal form, preferably without reference to disputes over policy merits, can go some considerable way to keeping the eye of government officials on their responsibility to observe appropriate legislative standards. After all, it is the officials who have to prepare the wordy replies that ministers duly table when responding to such a committee's weekly 'please explain' reports. The fact that the committee will rarely go to the limit in holding up questionable legal form does little to reduce the inconvenience felt within the bureaucracy. The Senate example shows that over time a partnership may well build up between the committee and government law officers, who tend to reinforce one another's muscle in disciplining lax departments.

The third course includes such devices as a companion legislative scrutiny committee for regulations and other forms of delegated legislation. The same concept applies: the committee ought to try to avoid rehashing the policy disputes over the merits of the regulations. The focus is on whatever vulnerable interests are being adversely affected through the choice of legal forms, as distinct from the policy substance, of the scheme in question.

If any Senate legislative committee deserves high praise, then it is the delegated legislation committee.<sup>14</sup> Not by accident, it is the oldest of the Senate committees, reflecting an early interest in the scrutiny of big government and rule-by regulation. It is also probably the most effective of Senate committees, judging by its positive impact and the culture of compliance by government agencies. Such a behind-the-scenes committee has three valuable spin-off effects: in educating parliamentarians on their basic **parliamentary responsibilities**; in

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<sup>13</sup> John Uhr, 'Future directions: Scrutiny of Bills in the 90s and Beyond' in *Ten Years of Scrutiny*, The Senate, Canberra, 1992, pp. 75–86.

<sup>14</sup> G. Reid, 'Parliament and Delegated Legislation' in J.R. Nethercote (ed.), *Parliament and Bureaucracy*, Hale and Iremonger, Sydney, 1982, pp. 149–168; H. Evans, op. cit., pp. 354–356.

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teaching them about the focus of their more specific **legislative responsibilities** for protecting valued practices of due process and legal form; and in instructing the bureaucracy in their **administrative responsibilities** to observe appropriate public standards of law-making and bureaucratic rule.

## 5. Money Matters

The fifth precondition is money: but it is not so much access to money as attention to money. Of all legislation, budget legislation is the most basic for our purposes.<sup>15</sup> It establishes the framework of public expenditure, even when it does not directly fund all public sector agencies. No government can govern without money, even if it is only to pay the salaries of public servants. Whatever the desires of executive governments, it is ultimately up to parliaments to determine what is included in or excluded from a budget. The very term ‘appropriation laws’ suggests that it is up to Parliament as the lawful authorising body to determine what are or are not ‘appropriate’ uses to which government may direct public money.<sup>16</sup>

The passage of budgets can become very political exercises, arousing the worst excesses of partisanship. One device for disciplining some of that partisan heat is through a system of estimates or budget hearings, in which government officials from budget agencies appear as witnesses to provide basic financial information on past performance and future plans. The striking thing about estimates hearings is that they tend to work best when officials rather than ministers carry the main burden of explaining agency performance. That is, estimates hearings are legislative activities which essentially supplement the wider policy debate over ministerial explanations of the budget strategy. Estimates hearings are opportunities to draw in essential financial information directly from those responsible for managing government agencies which implement policy.

It tells us a lot about the realities of government when we realise that the committee examinations of budget bills focus more on **bureaucratic** than **ministerial** justifications of government performance. Australian public services have developed quite elaborate codes and guidelines to structure these budget encounters between officials and parliamentarians.<sup>17</sup> Parliaments need to be involved in the preparation of such government guidelines for official witnesses before committees. The hope is that officials will not be asked about the merits of ministerial policy, but confine their contributions to information about the administration of policy. Both sides seem to appreciate the need for some such ‘legal fiction’, and parliaments come to depend on estimates hearings for generating a valuable public record of information on best and worst practice in government administration.

## 6. Focus on Accountability

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<sup>15</sup> J.A. Pettifer, op. cit., pp. 355–363.

<sup>16</sup> John Uhr, *Papers on Parliament*, no.6, op. cit., pp. 79–107.

<sup>17</sup> J.A. Pettifer, op. cit., pp. 609–614; H. Evans, op. cit., pp. 448, 490.

The sixth precondition is attention to accountability. Parliament does not govern, even though it gives approval to the legal form of government. Think of Parliament as comprising an arena of public accountability, in which ministers and other public officials in government account or 'own up' for their part in government.<sup>18</sup> The trend in all Westminster-derived parliaments is to expand the opportunities for parliamentary scrutiny of officials relative to the time devoted to ministers. Question Time is still important, because ministers will never be unimportant. But the trend is illustrated by such scrutiny activities as estimates hearings, which is only one of a number of legislative hearings over government bills in which most of the evidence is produced directly by officials responding to questions from backbench parliamentarians.

Government agencies are accountable in many ways, not least through the political control exercised over the bureaucracy by ministers, as well as the managerial control exercised by agency executives. Parliamentary accountability is but one of many forms of accountability. The essential contribution that Parliament can make to the discipline of accountability is to approach the task as an instrument of public accountability, as distinct from ministerial, managerial or for that matter legal accountability.<sup>19</sup> Parliament is not an employer as a minister or bureaucratic head might claim to be, nor is it an arbitrator, as is a court. Parliament's role in the accountability process is as the elected representative of the public from whom the bulk of taxation revenue is compulsorily derived: Parliament acts as a forum or arena of public accountability staging a public explanation and justification of the uses to which that money has been put by government.

The precondition of effective parliamentary accountability is remarkably simple: parliaments must recognise that their part in holding governments accountable stems from their distinctive responsibility for 'the public account', which is where government lodges its revenue, usually under the name of consolidated revenue fund.<sup>20</sup> Under our constitutional arrangements, governments can only access the public account through authority provided by parliaments. Parliament has a responsibility to ensure that government activities funded through the public account are appropriate, in both financial and policy terms. Hence a 'public accounts' committee, with power to examine the state of financial management across government, is an essential element in that accountability strategy, even if it is only the hub of a larger circle of scrutiny activities.<sup>21</sup>

If I have emphasised the budget as an important trigger for parliamentary scrutiny, one might reasonably fear that off-budget agencies within the public sector are left off-limits to parliamentary scrutiny. Not so. That battle has been fought and won in other jurisdictions, so you do not have to reinvent this wheel of the accountability wagon. Many years ago, Liberal senator Peter Rae won the right of the Senate to examine the financial management of statutory authorities, many of which, especially those now called 'government business

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<sup>18</sup> M.L. Barker, 'Accountability to the Public: Travelling Beyond the Myth' in P.D. Finn (ed.), *Essays on Law and Government: vol. 1. Principles and Values*, Law Book Company, Sydney, 1995, pp. 228–266.

<sup>19</sup> M.L. Barker, op. cit.; John Uhr, 'Redesigning Accountability: From Muddles to Maps', *Australian Quarterly*, vol. 65, no. 2, 1993, pp. 1–16.

<sup>20</sup> J.A. Pettifer, op. cit., p. 347; John Uhr, *Australian Quarterly*, 1993, op. cit.

<sup>21</sup> J.A. Pettifer, op. cit., pp. 599–602.

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enterprises', claimed that they were exempt not only from ministerial direction but also from parliamentary scrutiny.<sup>22</sup>

That claim was again tested in June 1993 when the Commonwealth Bank unsuccessfully tried to elude the scrutiny of the Senate's Finance and Public Administration Committee.<sup>23</sup> The committee included the Commonwealth Bank in its regular review of annual reports of public bodies, in part because of public interest in the Bank's extensive restructuring and branch 'rationalisations'. The committee explained that it simply sought a 'public airing' of the issues, and was content to facilitate an on-the-record meeting of the main stakeholders, especially top management and union representatives. The ground of the committee's victory was the now-traditional one that statutory authorities, in common with all other public bodies, had an accountability obligation to Parliament to explain and justify their use of public funds.

Annual reports are useful as a trigger for a parliamentary inquiry into agency performance. The more the annual reports focus on performance, the more they lend themselves to an inquiry in which agency executives appear to explain and justify performance as stated and as achieved. Accountability is more about explanation than simply the provision of information. Reports can of course be rated on their own merits as information sources, as many Senate committees now do. Better still, annual reports can provide a platform for personal appearances for agency executives who can respond to committee uncertainties about performance, even to the extent of reassuring committees about the merits of their performance.

I suspect that in the future, many more Commonwealth committees will adopt the practice of inviting agency executives to provide regular 'updates' supplementing the information in annual reports. The personal appearance of agency executives which once so dominated the federal estimates process might well be about to move across to the less developed area of annual reporting. In both cases, much of the value of the exchanges between officials and parliamentarians is related to the fact that ministers are either absent or marginal to this facet of accountability. This is not to deny the secondary benefit associated with the opportunity that ministers themselves have to gain valuable information from the process. But the primary benefit comes from the direct 'give-and-take' between officials and committee members over agency performance.

## **7. Intelligence**

The seventh and, last precondition is intelligence: by which I mean to refer to instruments of scrutiny and advice which form the intelligence network of a Parliament. They fall into two main types: investigators and advisers.

Investigators range from the traditional so-called 'parliamentary offices', of which the auditor-general is typical, to research staff associated with the parliamentary bureaucracy, including committee staff. The existence of an independent auditor-general is essential to the

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<sup>22</sup> H. Evans, *op. cit.*, pp. 496–497, 511–512; J.A. Pettifer, *op. cit.*, pp. 490–491.

<sup>23</sup> Senate Finance and Public Administration Committee, *Official Hansard Report*, 9 June 1993; and *Report on Annual Reports*, September, 1993.

effectiveness of Parliament.<sup>24</sup> The independence of the office refers to at least three basic qualities. It refers primarily to the fact that the auditor holds a high statutory office from which he or she can not be removed by the executive government, but only through an address for removal by Parliament itself. Independence here also refers to the power of the auditor to get independent access to government financial information upon which to determine audits, including audits of agency performance as well as plain efficiency. Finally, independence refers to the fact that the auditor reports on an independent professional basis, and is not a hired gun, even for Parliament. Although the auditor might be faced with an 'order' to prepare information by a house of Parliament, the auditor would not be expected to deviate from the path of professional independence in preparing the substance of the response to such requests for assistance.

So much for formal independence: of course, operational independence depends as much on an adequate budget and professional staff, and Australian parliaments are only now beginning to reach out and become more involved in protecting the office of auditor-general from resource dependency. It is becoming clear that 'results-oriented' public services are increasingly resistant to the concept of an external audit which might involve a predominant focus on procedural accountability and due process in decision-making. The challenge for auditors today is to identify areas within public sector operations which allow them to intervene to 'add value' to the process of government. It is noteworthy that the Western Australian legislation has for a decade or so identified one important responsibility as testing the credibility of performance reporting by government agencies. I suspect that in that particular regard the state auditor leads Australian practice.

Advisers are also vital to the pursuit of parliamentary effectiveness. My experience is that scrutiny committees can not operate very effectively without specialist advisers. I know from my experience as secretary to a number of Senate scrutiny committees that expert advisers, usually academic experts in law or government, provide committees with invaluable input. This is so even when committees, as they often-enough do, decline to follow expert advice. The advice still disciplines the scrutiny process and gives the committee an external sounding board against which to measure government information.

Of course, the adviser of advisers is really the Clerk of each house, who is the principal adviser to the presiding officer and must accept responsibility for the advisory regime established for members and their committees. This is not the occasion to elaborate on the importance of the office of the Clerk.<sup>25</sup> But unlike heads of most public bodies, a Clerk is equally the adviser of all the elected members of the house. I think that the ready availability of the Clerk and other officers to all members on both sides of the house is as important a precondition of an effective Parliament as any other that I have identified today.

## **Conclusion.**

My aim has been to put before you a list of more basic preconditions which might set the right framework for 'best practice' in scrutiny of legislation and government operations. Each

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<sup>24</sup> H. Evans, *op. cit.*, pp. 388–390.

<sup>25</sup> J.A. Pettifer, *op. cit.*, pp. 237–241; H. Evans, *op. cit.*, pp. 146–148.

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Parliament has its own set of limitations, some of which are internal and some external. There is no one model of a good or effective Parliament. In the end, parliaments are representative institutions, and as such can only be as good and as effective as the community is prepared to allow, or as poor and ineffectual as the community is prepared to tolerate. Our task when participating with review bodies like the COG is to assist the community to appreciate what it might reasonably expect of a Parliament.