



AUSTRALIAN SENATE

PARLIAMENT HOUSE
CANBERRA ACT 2600

CLERK OF THE SENATE

16 May 2012

Ms Dennett
Secretary
Legal and Constitutional Affairs Legislation Committee
Parliament House
Canberra ACT 2600

Dear Ms Dennett

COURTS LEGISLATION AMENDMENT (JUDICIAL COMPLAINTS) BILL 2012
JUDICIAL MISBEHAVIOUR AND INCAPACITY (PARLIAMENTARY COMMISSIONS) BILL 2012

I return corrected proofs of Hansard from the committee's hearing last Friday.

There is one further observation about the Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012 that I would like to make in relation to the separation of powers. In my evidence to the committee, I referred to the doctrine of the separation of powers as it was interpreted in the bill as confused, and was then asked to explain what was meant by the separation of powers. I omitted to explain my comment about confusion.

The limitation of the powers of a commission is apparently justified on the grounds that it would not be appropriate for Parliament to require judicial officers to give evidence or be subject to search warrants issued by a Commission. While this acknowledges the "separate and independent functions" aspect of the doctrine, it ignores the equally important "checks balances" aspect of the doctrine which I described as those interrelationships existing between the arms of government by which they regulate one another. Section 72 of the Constitution and the accountability of judges to both parliament and the executive on questions of fitness for office is one of those checks and balances, but the limitations adopted in the bill inhibit its effective operation in the preliminary investigative phase by a Commission.

There is also, in my view, an unnecessary intrusion by the executive into the appointment of members of a Commission in clause 13 and the choice of presiding member in clause 14, with the requirement that they be nominated by the Prime Minister. While the actual appointment is by resolution of each House, the need to specify the source of a nomination is not justified in the explanatory memorandum and was not a feature of the 1986 legislation where the choice of

members and the presiding member in sections 4(2) and (4) was solely by resolution of the Houses. The requirement to consult with the Opposition leader in the House of Representatives is said to reflect “the structure of a Commission as a joint Parliamentary body and the non-political role a Commission will take when executing its function” (EM, p. 13). How consultation between the chief officer of the executive in the parliament and the chief officer of the alternative executive, both members of only one house, reflects the joint parliamentary nature of the body is not – and cannot be – justified. If a Commission is truly to be a joint parliamentary body, why is there no role for the Senate in the prior consultation? This feature of the bill confirms that Commissions will only be a practical option when there is consensus on the need for one. The difficult cases will continue to require a different approach.

I have also attached a response to a question on notice.

Please let me know if I can be of any further assistance.

Yours sincerely

(Rosemary Laing)