SUBMISSION

To the Senate Standing Committee for the Scrutiny of Bills Inquiry into the future direction and role of the Scrutiny of Bills Committee[1]

Andrew Murray[2] March 2010

Note

Thank you for the Committee invitation to make a submission to this Inquiry. I am glad to be able to take it up, but I have not attempted a comprehensive response.

This is a personal submission by Andrew Murray and does not represent the views of any other individual or entity. For most of his 12 years in the Senate Andrew Murray was a member of the Senate Standing Committee for the Scrutiny of Bills. This Submission draws directly on much of that work and experience.

1 Introduction

On 7 July 2009 I presented a paper to the Australia-New Zealand Scrutiny of Legislation Conference held at Parliament House in Canberra. The Conference theme was Scrutiny and Accountability in the 21st Century and my paper was entitled *'the contribution specialist legislative scrutiny committees can make to better governance'*.

I was posed these questions:

- Does the scrutiny committee form part of that tangled web of institutions that ensure or promote accountability? If not, should it? And how?
- If it does, are there things it does well? How do they promote accountability?
- Are there other things it could do, or things it could do better, which would improve that role?
- And is the committee itself sufficiently accountable to the parliament? Could (or should) it be more so?

[1] The Inquiry into the future direction and role of the Scrutiny of Bills Committee is to report by 12 May 2010. The following matters are for inquiry: (1) The future direction and role of the Scrutiny of Bills Committee, with particular reference to: (a) whether its powers, processes and terms of reference remain appropriate; (b) whether parliamentary mechanisms for the scrutiny and control of delegated legislation are optimal; and (c) what, if any, additional role the committee should undertake in relation to human rights obligations applying to the Commonwealth. (2) In undertaking this inquiry, the committee should have regard to the role, powers and practices of similar committees in other jurisdictions.

[2] Andrew Murray BA Hons (Rhodes) MA (OXF) was a Senator for Western Australia 1996-2008 and a Member of the Senate Scrutiny of Bills Committee 1996-2008. He is best known in politics for his work on finance, economic, business, industrial relations and tax issues; on accountability and electoral reform; and for his work on institutionalised children. He wrote the Report to the Australian Government: Review of Operation Sunlight: Overhauling Budgetary Transparency Senator Andrew Murray June 2008, Canberra.

These questions are close enough to the Committee's terms of reference for me to repeat relevant extracts from my paper in this submission; and, to add further views.

Scrutiny is intrinsic to all parliamentary work. Parliaments, particularly second chambers, are always houses of scrutiny, of review and debate. Scrutiny is often political, but scrutiny in the review sense concentrates both on the *policy* contained in the legislation or measures governments propose to carry out or have carried out, and on the related funding or resourcing of the course of action favoured by the government.

Scrutiny in the context we are discussing has an entirely different and narrower meaning.

Except in giving legislation context, the Senate Scrutiny of Bills Committee largely eschews consideration of the policy lying behind legislation. Instead it focuses on those policy measures that affect rights, as when it is government policy to curtail or advance rights; or it focuses on those policy measures that might allow the abuse of executive power.

Under its present terms of reference the Committee is not required to report on the course of action proposed by the government. It is required to report on whether bills trespass unduly on personal rights and liberties; make rights, liberties or obligations dependent upon insufficiently defined administrative powers; or make them unduly dependent upon non-reviewable decisions; inappropriately delegate legislative powers; or insufficiently subject the exercise of legislative power to parliamentary scrutiny.

These remain valuable and relevant terms of reference.

For a people believing in a free society under a representative democracy, scrutiny committees are vital, albeit still unremarked at large. Their contribution to liberty may be modest overall, but the constant nature of their principled advice has been invaluable to those seeking to stiffen resistance to abuse of power or excessive power.

In the Commonwealth jurisdiction, that the Committee is necessary and that the terms of reference remain relevant is attested by four in every ten bills still attracting Committee comment, three decades after its inception.

If I have a concern, it is that the Committee does too few inquiries on matters of principle; an example of such an inquiry being its inquiry into search and entry powers across Commonwealth agencies.

I suggest that the Committee could periodically invite parliamentary and extra-parliamentary recommendations as to topics it could inquire into. Two such references each parliamentary term seem achievable.

2 The Australian Constitution, the executive and parliament

The terms of reference include *(c) what, if any, additional role the committee should undertake in relation to human rights obligations applying to the Commonwealth*.

Does scrutiny of rights and safeguards in legislation matter much and if it does, why?

Humans long ago learnt they need government, and to work effectively governors needed power; but power without restraint was and is dangerous.

That is why liberal democracy stresses the rights of the people, the importance of the separation of powers, the rule of law, representation, and having to account to the people.

That is why liberal democracies stress the importance of parliaments as a necessary safeguard, separate from and at times opposed to governments.

This intended parliamentary safeguard is made more complicated and difficult by our political system, as both in law and practice the executive is intertwined in our parliament.

While Section 1 of the Australian Constitution places the Queen in parliament: *'The legislative power of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives....'* and Section 52 gives the parliament *'exclusive power to make laws'*, Section 58 foils this power by giving the Queen exclusive power to allow or disallow those laws or to reserve the law *'for the Queen's pleasure'*. The Constitution hammers the point home in Section 61: '*The executive power of the Commonwealth is vested in the Queen....'*

We know that the development of our democracy has seen the elected executive turn the assent function of the Queen's representative, the Governor-General, into a legal formality rather than a potential legal impediment. There is no likelihood of any law approved by the political executive not being assented to.

The intent of the Constitution is that the monarchical executive should have the last say as to whether parliament's legislative decisions become law, but the effect has been translated to the elected executive having the last say as to whether parliament's legislative decisions become law.

I doubt there is any significant desire to change this balance of power between the executive and parliament, but that does not mean there is no discontent.

The executive-minded and those with the numbers can have a 'get-out-of-my-road' mentality, coupled with a desire to short-cut process, and a reluctance to own up and account for all of their actions. Scrutiny is not always welcomed by those with this mindset.

Professor Dennis Pearce, the Senate Committee's first legal adviser, told the Committee's tenth anniversary seminar that at the Committee's inception: *The resistance ... was quite extraordinary.*

That resistance has largely dissipated. Feared by the executive at its conception, some ministers now value the Senate Scrutiny Committee as a safeguard – as a means to help keep their own Departments up to the mark. Undoubtedly other ministers think it a nuisance and I suspect others judge it a paper tiger.

Scrutiny committees need to be more of a nuisance and less of a paper tiger. If the Committee does not ever get under the skin of a minister then it is not doing its job.

The Committee should take the view that addressing human rights obligations as they apply to the Commonwealth strengthens our democracy. Strengthening Australia's democracy cannot be considered in isolation of constitutional change. [3] The Government's second Electoral Reform Green Paper is alert to this and has raised constitutional issues.

The Australian Constitution provides the basis on which the federal parliament is established and authorises the powers parliament wields. It also spells out the relationship of the Commonwealth to the States. Its obligations to its citizenry are less explicit. The parliament is needed for this purpose.

This brings a further issue to mind; the legislative directions taken by the federal executive and parliament are often mirrored by the States, (and sometimes vice versa). If such directions entail a reduction in rights or a deterioration in the protections afforded Australian citizens in law, then there is a national consequence, not just a federal consequence.

The resulting question is whether this can be effectively policed by scrutiny committees or by Australia's nine parliaments, or whether constitutional safeguards need attention.

In this regard the question for the Committee is whether the Constitution needs to be reviewed and modernised; or at least examined on that basis.

Constitutional review needs to be a considered and lengthy process. If change is recommended by that review, it is possible such lengthy development may make successful change more likely.

There is no Commonwealth body that is responsible for reviewing the Constitution. The Joint Standing Committee on Electoral Matters and other parliamentary committees have examined constitutional matters periodically, but never holistically.

The 2020 Summit included the following 'Top Idea'[4]: *Institute an overhaul of federalism, including a constitutional convention and a National Cooperation Commission.*

Our political compact, our social contract, is under strain in certain respects. Some of this strain comes from a constitution and institutions with roots in the 19th century that do not fully nourish the 21st century, and there is a consequent need to refresh and modernise Australia's governance.

The foundation of any nation is characterised by the political compact, the social contract. Australian federalism is a political system of checks and balances. No reform of the Australian system is likely to be fully successful unless it accommodates revised checks and balances to ensure that the social contract is strengthened and refreshed.

A holistic approach is needed. It is difficult to improve the economic or the social entirely without also improving political governance.

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[3] This section partly draws partly on the Submission by Senator Andrew Murray as Electoral Matters spokesperson for the Australian Democrats to the Joint Standing Committee on Electoral Matters Inquiry into the Conduct of the 2007 Federal Election, April 2008; further developed in Andrew Murray's November 2009 public submission in response to the Australian Government's September 2009 Electoral Reform Green Paper STRENGTHENING AUSTRALIA'S DEMOCRACY.

[4] Australia 2020 Summit – Initial Summit Report: April 2008: *Australian Governance* p33.

That means reassessing the constitution, the separation of powers, a republic, whether the federation should stay and if it should in what form, and the powers states and the commonwealth should each have. It means reassessing how power is acquired and restrained, who has power over what, how money is raised and spent, and by whom. It means addressing the issue of what rights and obligations should be enshrined in the Constitution.

To achieve lasting reform, anticipate a ten year struggle as for the original Constitution, to allow time for dialogue with the people.

To ensure momentum what is needed is a standing elected constitutional convention, serviced by a permanent secretariat, and with a budget to allow for full engagement and dialogue. This could be supplemented by a university based institute for constitutional change, producing discussion papers and fostering public awareness and debate. This is serious business and needs a serious approach.

If we were to go back to basics on the Constitution, a useful early exercise would be to identify those aspects which facilitate a more balanced relationship between the centre and the states.

We need to identify those aspects of the Constitution which have fostered imbalances between the three tiers of government. Then there is the question of imbalances between the people and their rulers, the issues of rights, liberties, obligations, protections, representation and accountability.

Power can only be controlled by countervailing power. Since the beginnings of government, citizens have learnt to fear their rulers, and democracies have tried to institute checks and balances. Executives continually find ways round those restraints.

A revised Australian social contract, a new political compact, is indeed necessary to address the real strains in our system. That means a refreshed and modernised Constitution and the political and other institutions that flow from it.

The question for the Committee is not whether it supports constitutional reform, and if so of what kind, although obviously it is competent to take a view if it wishes. I think that the present question is whether the Committee supports constitutional review.

With respect to terms of reference *(c) what, if any, additional role the committee should undertake in relation to human rights obligations applying to the Commonwealth,* the question for the Committee is to consider whether to lend its support to the 2020 Summit's 'Top Idea' for a constitutional convention, which by definition, being broad in scope, would have to discuss whether some human rights should be constitutionally enshrined and if not, how human rights should be dealt with.

The constitutional convention might well consider, in the absence (or even in the presence) of a legislated charter of human rights whether there should be a South-African style constitutional court which could rule on any legislation referred to it on human rights prior to or post assent of legislation, in a set and expeditious time frame.

3 Accountability

Because the principle of accountability is locked into our liberal democratic system, the political executive and the bureaucracy have no choice on accountability. It is not an option. But that does not mean they have no wriggle room. The difficult part is always just how much accountability you can get from them.

Over and above the scrutiny of policy and the funding of that policy, there are two types of scrutiny that are essential to the effective rule of law in a liberal democracy – scrutiny of the laws and rules that legitimise power, and scrutiny of conduct. We are concerned here with the former.

One question is how scrutiny can work when by definition every politician is partisan; partisan meaning to take one side, to be biased.

One answer is that scrutiny on rights and safeguards in our society is often less partisan than scrutiny on policy. There is generally much common ground on rights and safeguards. Our politicians share many democratic ideals and principles, and accept most.

Another answer is that every elected member I have ever met has known their duty and their mission. Their duty is to serve the people as best they can, and their mission is to leave their nation better for their service. Most politicians on scrutiny committees can therefore be expected to diligently address their given terms of reference.

A further answer is that experience and wisdom has been used to lessen partisan impulses – wisdom in creating scrutiny committees and processes[5]; wisdom in designing their terms of reference; wisdom in adopting a non-partisan principles-based style; and the wisdom of using practical learned legal advisers to ensure a continuity of purpose and performance.

The virtue of the Senate Committee's terms of reference is that it requires every bill to be tested against set principles. It requires the Committee to take the high ground in protecting rights and liberties covered by the terms of reference, and to advise the Senate in regular timely public reports of its views on every bill.

Potentially this could have led to disaster.

The Scrutiny of Bills Committee is but one part of a busy political and parliamentary life. No Senator could or would ever be able to carefully read all 150-250 bills and explanatory memoranda a year, to make the judgements on time required by the Committee's terms of reference.

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[5] The Senate Committee's Report on the 40th Parliament outlined the process: *1.17 Copies of all bills introduced in either House of the Parliament, including private Member's or private Senator's bills, are provided to the Committee by the Friday of each sitting week. A copy of each bill, together with its explanatory memorandum and second reading speech, is then forwarded to the Committee's legal adviser. The legal adviser examines each bill against the five principles set out in Standing Order 24 and provides a written report to the Committee by the following Monday. This report draws the attention of members of the Committee, and of the Committee Secretariat, to clauses of any of the bills that appear to infringe one or more of the five principles.*

More dangerous still, because the terms of reference required a determination of principles, that meant executive decisions on legislation would not just be questioned but criticised. This presented difficulties for Senators who might be then seen as disloyal to their own government or party policy position, and a partisan disputatious committee was therefore likely.

This was avoided by three devices – getting a genuinely independent legal adviser of high quality; insisting on an unfailingly direct but consistent courteous and professional style of inquiry of the executive; and devising sets of non-partisan words whereby the Committee drew the Senate's attention to its concerns.

The harshness of Committee critiques was disguised by the subtlety of an auditor's pen.

The Committee's practice is to express no concluded view on the provisions in a bill, but rather to advise Senators and other readers of its reports of the risk that particular provisions may infringe one or more of the principles in Standing Order 24.

The consequence was that the Committee retained its equanimity and unanimity even facing the most fractious consideration of bills in the Chamber.[6]

I can see no reason to change this approach or style significantly, but the sum of my suggestions herein is that a little more assertiveness is needed.

A question the Committee should face is its make-up. Naturally I am unaware as to how much thought goes into appointments of members to the Scrutiny Committee by the various political parties. There are no desired criteria or skill-sets laid out, yet experience indicates that certain member-attributes seem desirable.

Continuity and longevity (corporate memory) is one; having a member or members with legal training might be another; having a solid grounding in ethics and in the theory and practice of human rights liberties and obligations might be another. I had the honour of long service under the highly respected Chair of the Committee, Senator Barney Cooney, who covered all these attributes. The point being that in my opinion the importance of this Committee is so great that it should always be served by parliamentarians most suited to the task.

This could perhaps best be guaranteed by the political parties who allocate Committee roles being fully alert to the Committee's importance and needs. The same applies to those Senate officers who decide on the Committee's secretariat.

Committee members and their secretariats need a good dose of idealism, because our liberal democracy is built on great ideals; and, a practical understanding of politics as to what is possible.

Scrutiny on rights and safeguards has to be a habit, a mindset, worked at consistently. Effective scrutiny is long-term, a campaign not a skirmish.

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[6] Some of these remarks were first made in a tribute by me on the 24 November 2008 on the occasion of a farewell dinner for Emeritus Professor Jim Davis to mark his retirement as Legal Adviser to the Senate Scrutiny of Bills Committee after 25 years of outstanding service.

Power needs to be in your mind. The separation of powers, assessing how power is acquired or grown, how restrained, who has power over what, how money is raised and spent, and by whom. Scrutiny means examining the question of imbalances between the people and their rulers, the issues of rights, liberties, obligations, protections, representation and accountability.

The Committee does need to think about what is missing in its battery of protections for citizens. For instance where does the Committee stand on the issue of independent not partisan appointments and the appropriate provisions in legislation?

If Australia does not have an independent appointment on merit system, such as in the United Kingdom under the 'Nolan principles'[7], it is always at risk from partisan interference in what would otherwise be independent agencies or institutions. External independent oversight bodies, staffed by people of skill, ability and integrity are essential to good government.

4 Human rights

In many respects the very large economic social and environmental reform agenda of the 21st century does not differ much from the broad aims of the past - to make our various states and countries more productive, more efficient, more competitive; better and happier societies, and to better safeguard the future.

Governments and parliaments have always been troubled by weaknesses in data and analysis, or struggled to assess expected consequences, or forecast the future. As ever, in the absence of perfection, judgement has been required.

Is parliamentary judgement more rushed and less considered than it was? Certainly the volume of legislation is tenfold what it once was.

What also distinguishes this time in political life from the past is the astonishing acceleration of technology; the burden of excessive unsorted and sometimes indigestible information; the stress of the 24-hour media and political cycle, and the immediacy in effect of national and global trends and events. It is a demanding time.

[7] The Nolan Committee was appointed by the United Kingdom Parliament in 1995 to examine appointments on merit. It set out principles to guide and inform the making of such appointments. The UK Government fully accepted the Committee's recommendations. The UK Nolan Committee set these principles which the UK Government now uses in making appointments:

- A Minister should not be involved in an appointment where he or she has a financial or personal interest;
- Ministers must act within the law, including the safeguards against discrimination on grounds of gender or race;
- All public appointments should be governed by the overriding principle of appointment on merit;
- Except in limited circumstances, political affiliation should not be a criterion for appointment;
- Selection on merit should take account of the need to appoint boards which include a balance of skills and backgrounds;
- The basis on which members are appointed and how they are expected to fulfil their roles should be explicit; and
- The range of skills and backgrounds which are sought should be clearly specified.

People are demanding much more of their governments. They want their governments proactive, responsive, professional, far-seeing, productive, and performance driven. They want their needs met. The push for higher standards and better performance is strong.

Governments have said they will respond with a broad reform agenda. Expectations have been created. The gap between expectation and performance has to be addressed. [8]

In this milieu sits legislation and regulation, and the scrutiny committees. If at the heart of this scrutiny lies principle, rights and obligations, democratic values, transparency and accountability - does that help to meet the demands of the people on government?

Firstly, it is important to remember that the Australian people also demand improvements to these principles and values. It is not just hospitals and roads that attract their attention.

Secondly, my thesis is that the preservation of rights and safeguards makes for a calmer more settled more civil society; and that there is a clear link between soundly based legislation and regulation, accountability transparency and openness, and better governance and improved social and economic outcomes.

Those who sit on and serve scrutiny committees need to have a good sense of history. History tells us that the one arm of government most feared for its actions has been the executive – whether tribal, monarchic, theocratic, dictatorial, or parliamentary. Beware a system or a parliament that raises the executive above all else, and diminishes the checks and balances explicit in the separation of powers.

It helps a Scrutiny Committee to have a healthy and practical suspicion of the executive and its handmaiden the bureaucracy.

One of the traps executives set for parliaments is the 'trust me' argument – that they and their colleagues will never use their full new powers, and will never abuse them. That may indeed be the case for some who want to be taken on trust, but what about their successors, or the bureaucrats who actually apply those laws?

When I was on the Scrutiny Committee I sometimes reminded my colleagues of the importance of not assuming that laws will always be administered by governments of good faith. Seared into my political experience was the Smith Rhodesian regime's introduction of 'temporary' 'emergency' oppressive anti-democratic laws that decades later were still being used by Zimbabwe's Mugabe regime.

I seem to recall an interview with a Fijian Attorney-General who responded to criticism about the machinations in that country by saying, in effect, 'we're only using laws originally passed by the British'.

Scrutiny committees can should and must, in effect, highlight the potential for the devil in bad law, because sadly the devil never seems to leave us.

[8] This section draws in part from a 17 February 2009 public lecture given by me in Brisbane for the Australia & New Zealand School of Government: *Essential Linkages – Situating Political Governance Transparency and Accountability in the Broader Reform Agenda*.

Whether Australia should have a bill or charter of rights is currently under review by the Commonwealth. Like all great reforms, the matter is contentious.

In the late 90's the eminent long-serving former chair of the Senate Scrutiny of Bills Committee Senator Barney Cooney and I tried to get the Committee to agree to inquire into whether specific rights should augment the Committee's terms of reference, and indeed whether a bill or charter of rights should be considered by the parliament.

The matter seemed too controversial for the Committee to stomach but the issues that provoked Barney and I to suggest that inquiry have remained of concern and importance.

Rights were always a global matter, hence the word 'universal'. This is even more the case in this age of globalisation. Rights world-wide have common themes and structures, not least in the 1948 Universal Declaration of Human Rights.

Canada's 1960 Bill of Rights was superseded by the much more powerful Canadian Charter of Rights and Freedoms constitutionally entrenched as Part 1 of the *Constitution Act 1982*, adjudicated by the courts.

Despite the precedent of the Magna Carta, resistance to constitutional or legislative enshrinement of rights in Britain and Australia has been long and sustained, but in Britain those attitudes were finally brushed aside by EEC pressure to conform to the European Convention on Human Rights. The British *Human Rights Act 1998* meant that UK courts could adjudicate breaches of the Act or the Convention, without the need to go to the European Court of Human Rights.

Personally I am inclined to oppose trying to place *all* human rights as a class in the Australian Constitution because it is difficult to provide a timeless unchanging universal exhaustive list. There can be dangers unforeseen; the USA's 'right to bear arms' is an example of a constitutionally entrenched right that has become a tyranny.

I am not opposed to some rights being constitutionally entrenched. I suspect among those rights most worthy of consideration would be those relevant to political freedom and justice - perhaps among them, freedom and security of the person; freedom of religion, belief and opinion; freedom of expression; freedom of association; political rights to vote and representation; citizenship; access to information; and access to the courts.

Years ago I was briefed on the South African constitutional draft by some of its authors. I was particularly interested in the central role given to the Constitutional Court. Chapter 2 of the *Constitution of the Republic of South Africa Act, 1996* covers the Bill of Rights, and Chapter 8 includes the Constitutional Court that oversees all such issues.

The 27 rights listed for protection in that Constitution include equality; human dignity; life; freedom and security of the person; privacy; freedom of religion, belief and opinion; freedom of expression; freedom of association; political rights; citizenship; property; children; education; access to information; and access to the courts.

Perhaps that is not a bad list for the Scrutiny Committee to routinely refer to in its deliberations.

A legislated non-exhaustive charter of rights that is capable of expansion or contraction and alteration over time is a worthy goal, particularly if it includes a charter of essential obligations and responsibilities, such as citizenship obligations.

I believe that eventually rights will be codified in law in this part of the world, but the fact is that whether there is any charter of rights in Australia or not, rights remain integral to the considerations of scrutiny committees, and scrutiny committees will still be needed.

For obvious reasons of time efficiency and cost it is far better that rights issues are resolved by parliaments so that they need not be a matter for the courts.

I have a couple of suggestions. I have long thought scrutiny committees unnecessarily limit themselves as to the rights they report on. The beauty of my suggestions is that no terms of reference need be revised.

The Senate Scrutiny of Bills Committee's term of reference 1(a)(i) require bills to be assessed as to whether any provisions *trespass unduly on personal rights and liberties.*

It is time for that to be interpreted a little more liberally. I think the Scrutiny Committee should have its secretariat trawl the major international conventions treaties and agreements that Australia has signed up to, and list those rights the Committee agrees they should routinely check legislation against and report on. It will inevitably be a more comprehensive list than at present.

Secondly, Australia's scrutiny committees at our various parliaments could adopt the common European practice for cross-parliamentary meetings – tasking each Conference for examination of an issue to be reported back at the next meeting. Review on a thematic basis is an efficient and necessary part of good governance. As an example, some years ago the Senate Scrutiny of Bills Committee reviewed entry and search provisions from a principled perspective.[9]

Plainly, scrutiny committee members are too busy to conduct wholesale reviews of all legislation, but they are able to do one or two focussed inquiries a parliamentary term. I suggest each Conference agree on the same topic each scrutiny committee in each jurisdiction should review, each to produce a report for the next conference, and at that conference to agree on a combined report at a plenary session. That would really give parliaments and governments a useful common cross-parliamentary view on essential rights and safeguards. Over time a considerable body of scrutiny opinion could be built up.

5 A few other suggestions

In my June 2009 paper I was asked at the outset: are there other things a scrutiny committee could do, or things it could do better, which would improve that role?

Yes there are. In the Senate it is the practice to table reports of all bills under consideration. I would suggest that for any bill where a reply to the Committee is still due from the

[9] Senate Standing Committee for the Scrutiny of Bills Fourth Report of 2000 *Entry and Search Provisions in Commonwealth Legislation,* Canberra. The Government response was provided in August 2003.

government, or is unsatisfactory, or has not allayed the original concern, that during the second reading debate the Chair of the Committee or their delegate should be required to table a statement that the duty Minister must respond to in the second reading debate, on the record.

This would heighten Chamber interest in the Committee's concerns, and give those concerns an immediacy they lack at present.

With respect to the performance and accountability of scrutiny committees do they jump up and down enough? If they table a report and it is ignored, is that the end of their job?

In my own case if I thought there was merit in a Scrutiny Committee concern, I would try and have an amendment moved based on it. It meant that the Senate not only had had its attention drawn to that concern, but it would be forced to actually debate it. However, few committee members do this, and the committee itself never does.

It is time for scrutiny committees to be more courageous. The Committee should move the necessary amendment through the Chair or Deputy Chair, and rather than put the case in person (which might be awkward from a political party membership perspective), just table the argument, and let the chamber vote in the normal way.

There are situations where it clearly might apply: it would be relatively straightforward tabling an amendment giving someone a right of appeal where none existed, or removing a Henry VIII clause. There are situations where it would be much more difficult. If the legislation curtailed rights (for example, in the name of reacting to terrorism), then the amendment might have to be that the Bill, or that Part of the Bill, not be passed – which is what the debate on the bill itself would be about.

Another possibility is for the Committee to draft a suggested amendment in relevant cases, include it in their report, and leave it to the decision of any parliamentarian to adopt and move it.

Andrew Murray