COMMONWEALTH OF AUSTRALIA

JOINT COMMITTEE

of

PUBLIC ACCOUNTS

Reference: Review of Public Service Bill 1997

CANBERRA

Thursday, 7 August 1997

OFFICIAL HANSARD REPORT

CANBERRA

JOINT COMMITTEE OF PUBLIC ACCOUNTS

Members

Mr Somlyay (Chairman)

Mr Griffin (Deputy Chairman)

Senator Coonan	Mr Beddall
Senator Faulkner	Mr Broadbent
Senator Gibson	Mr Fitzgibbon
Senator Hogg	Mr Georgiou

The terms of reference for this inquiry are:

(a) the Public Service Bill 1997 and the Public Employment (Consequential and Transitional) Amendment Bill 1997 be referred to the Joint Committee of Public Accounts for consideration and an advisory report by 4 September 1997;

(b) the terms of this resolution, so far as they are inconsistent with the standing and sessional orders, have effect notwithstanding anything contained in the standing and sessional orders; and

(c) that a message be sent to the Senate acquainting it of this reference to the Committee.

WITNESSES

JOINT COMMITTEE OF PUBLIC ACCOUNTS

Review of Public Service Bill 1997

CANBERRRA

Thursday, 7 August 1997

Present

Mr Somlyay (Chair)

Senator Faulkner
Senator Gibson
Senator Hogg
Mr Griffin

Observers

Australian National Audit Office	:	Ms Dahlenberg
Department of Finance	:	Ms Messner

Senator Allison

The committee met at 9.10 a.m.

Mr Somlyay took the chair.

CHAIR—I officially open this public hearing of the Joint Committee of Public Accounts into the Public Service Bill. Before we start the formal part of the meeting, we need to do some machinery business.

Resolved (on motion by Mr Griffin, seconded by Senator Gibson):

That, the Public Service Commissioner's initial response to the JCPA's overview of issues paper, submitted by the Public Service Commissioner on 6 August 1997, and the summary of points relating to the Public Service Bill, submitted by the Women's Electoral Lobby, June 1997, be received.

Resolved (on motion by Mr Griffin, seconded by Senator Gibson):

That, the overhead slides used by the Public Service Commissioner be incorporated into the transcript of evidence taken on 6 August.

CHAIR—Yesterday the committee canvassed the views of a wide range of participants at a round table public hearing. Today the committee wishes to hear the views of witnesses who have provided submissions on specific aspects of the bill.

I remind you that the hearings today are legal proceedings of the parliament and warrant the same respect as the proceedings of the House itself. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. The evidence given today will be recorded by *Hansard* and will attract parliamentary privilege.

I refer any members of the press who are present to a committee statement about the broadcasting of proceedings. In particular, I draw the media's attention to the need to report fairly and accurately the proceedings of the committee. Copies of the committee's statement are available from the secretariat staff present at this hearing. Observers here today are Maria Messner from the Department of Finance and Katherine Dahlenbury from the National Audit Office, who will be with us later.

Also sitting at the table is Senator Allison from the Australian Democrats. Although not a formal member of this committee, Senator Allison has had an ongoing interest in the development of the public service bills. With the concurrence of those present, we will allow her to participate informally in the proceedings today.

EVANS, Mr Harry, Clerk of the Senate, The Senate, Parliament House, Canberra, Australian Capital Territory 2601

CHAIR—Welcome, Mr Evans. I invite you to make an opening statement about your concerns on the Public Service Bill.

Mr Evans—Before making a brief comment on the bill, I mention that the other heads of the other parliamentary departments have made submissions to you in which they draw attention to the very great importance of the question of mobility between the Public Service and the parliamentary service. I did not mention that in my submission. That is not because I do not think it is important, but I was dealing with it on the basis that that would be dealt with in the context of the Parliamentary Service Bill, not the Public Service Bill. Therefore, that could be left for another day, but it is an extremely important issue.

In relation to the Public Service Bill itself, what I am principally concerned about is the effect on the relationship between the Public Service and the Parliament. For a number of years, the Senate department has been conducting seminars for public servants at senior officer level and SES level about relations between the Public Service and the Parliament. In the course of that, I have been talking to these people about that relationship.

One of the points that I stress is that, as professional servants of the state or servants of the public, they have a duty to assist the parliament, which is one of the elected bodies of the country. They have a duty to assist the parliament by cooperating with parliamentary inquiries and by answering frankly and freely questions put to them in the course of parliamentary inquiries and so on. That advice is given to them on the basis that they are a professional public service and that that is part of the duties of a professional public service.

I am having increasing difficulty maintaining that position, not because they have any lack of acceptance of it, but because they perceive it as being increasingly difficult to maintain in the future with the direction in which the Public Service is going. It is difficult to maintain a theory in the face of actual power relationships, and there is a shift in the actual power relationship represented by this bill.

What this bill tells us is that the Public Service belongs, body and soul, to the ministers of the day, and that the concept of some distinction between the professional Public Service and the ministers of the day, on the basis of which they have a professional duty to assist the parliament and to cooperate with parliamentary inquiries and so on, can no longer be maintained. That development, as I say, is encapsulated in this bill. There is something about this which I think is called the ‘boiling frog syndrome’, that this shift which has occurred has occurred gradually and people do not notice it.

This bill regularises a shift which is occurring and has occurred, and people do not realise that a shift is occurring and that we will end up in a worse situation than that which we were in before. There will be a tendency for people to say in a few years time, 'All your dire predictions have not come true; things are going along fine,' not realising that in fact there has been a significant shift in the power relationships in government and that things have not improved but, in many respects, have got worse. So that is something that has to be borne in mind when considering this bill. It is not just the bill. It is a development over a long period of time.

It may well be that the culture of the Public Service will also change gradually in response to this bill. For a few years you will get a continuation of the old culture of the Public Service, but the actual power relationship established by this bill will gradually shift that culture. It will remove that old culture. That is my main concern with the bill—the effect on the parliament and the parliament's place in the system of government.

CHAIR—Do you want to cover the specific point of the parliamentary departments?

Mr Evans—As I said, I did not mention that because I made the assumption that we were going to deal with that in the context of the Parliamentary Service Bill. The government made a decision that the parliamentary departments would not be covered by this legislation and that there would need to be separate legislation to cover the parliamentary departments. The Presiding Officers, in response to that decision, have developed a Parliamentary Service Bill. That has been drafted. The President has made it available to the Senate Appropriations and Staffing Committee. It has also been made available to parliamentary staff for comment. What we envisage is that that bill will be introduced and will go ahead in tandem with the Public Service Bill.

At the moment, the Public Service Bill, or its associated bill, provides that the old act will continue to apply to the parliamentary departments. But if I remember rightly the application of the old act can be changed by regulation. That obviously is not a terribly satisfactory situation and one that we would not want to continue for any length of time. So the new bill is designed to proceed in tandem with the Public Service Bill and to come into effect. The government has decided that the parliamentary service will be covered by separate legislation, and I believe—although I do not actually have this in writing—it has also been said that it will be a matter for the parliament. I hope that the development of the Parliamentary Service Bill and the shape in which it emerges really will be a matter for the parliament.

Senator FAULKNER—To follow that through, Mr Evans, have there been discussions with government in relation to the listing of the Parliamentary Service Bill so that the two bills we are dealing with—the Public Service Bill and the transitional bill—along with the Parliamentary Service Bill, would be dealt with as a package, which I think is what you are suggesting to the committee is likely? Is that any more than just a hope

that you are expressing to us? Is there a clear indication that that is how the matter is going to progress?

Mr Evans—There have been discussions between the Presiding Officers and the government during which that wish or intention was expressed. The view of the government on that particular matter has not been put clearly and finally.

Senator FAULKNER—In your view, what would be the consequences if we had a situation where the parliament dealt with the Public Service Bill and the transitional bill, but the Parliamentary Service Bill was not debated simultaneously?

Mr Evans—As I understand it, if the Public Service Bill and its associated bill were to be passed, the provisions of the old Public Service Act as they apply to the parliamentary departments would continue to apply. So we could continue to operate under the old provisions. There is a provision that that application can be altered by regulation. So a sharp lookout would have to be kept for regulations coming out of the regulation-making machinery. But the parliamentary departments could continue to operate for a period under those old provisions. As I said before, it would be fairly unsatisfactory to do so for too long. It would create a good deal of uncertainty.

Senator FAULKNER—Government spokespersons have argued strongly that one of the advantages of the approach that they are taking is very much the simplification of the existing Public Service Act. I do not know if you were here yesterday when I was questioning the Public Service Commissioner in the morning about the fact that so much of what is being proposed will be left to subordinate legislation.

Mr Evans—I am aware that that is the case.

Senator FAULKNER—I would be interested in hearing your view about that change. In other words, so many matters currently within the primary bill will be delegated to subordinate legislation. Do you have a strong view about the appropriateness or otherwise of that approach?

Mr Evans—The new bill certainly does simplify the legislation, but simplification is not an end in itself and sometimes can be a bad thing. In particular, if you are going to have safeguards, safeguards are complex, necessarily. They necessarily complicate things. You can always simplify things by removing safeguards. So simplicity is not a desirable end in itself.

It is an unsatisfactory characteristic of this bill that a lot of things are left to subordinate legislation and, in particular, a lot of things that we would regard as safeguards are left as subordinate legislation. You can say that is okay because the Senate can disallow subordinate legislation, but it can only disallow it; it cannot amend it, it cannot change it. There are situations, as you know, where the disallowance power is a

very blunt instrument in attempting to bring about particular results. So I would much rather see safeguards in the bill rather than it be left to subordinate legislation, even though the bill might be more complicated.

Senator FAULKNER—You talked in your opening statement about power relationships being affected by the bill. I think it might be useful from the commission's perspective to hear a little more from you on what you think might be the longer term consequences and what the nature of these power relationships are.

Mr Evans—Under the very simple provisions of the bill, every departmental secretary will have in the back of their minds that their employment depends entirely on the Prime Minister, that the Prime Minister is their boss wholly and solely. Every public servant will have in the back of their mind that they are employees, in effect, of the departmental secretary, that the departmental secretary is their boss wholly and solely. Inevitably the result of that will be that public servants in that situation will tell their boss what their boss wants to hear.

There will not be incentive for a departmental secretary to say, 'Mr Minister, there are serious difficulties with this bright idea that you have come up with.' There will be no incentive for ordinary public servants to say to their senior officers and to their departmental secretary: 'We think there are serious problems with the course of action that you seem to be determined to engage in here.' Frank and fearless advice, independent advice—in other words, useful advice—cannot be given by people who know that they are owned, in effect, by the recipients of the advice.

People will say: 'You are taking a cynical view of human nature. We will get good ministers who will be ready to listen to contrary advice and they will value the professional advice of public servants and they will listen to it even where it goes against their wishes.' But we have had plenty of examples in the past where that has not been the case. In those sorts of situations, the effect of this bill will be to remove a source of independent advice which might prevent serious miscarriages of public administration and of government in general.

Senator GIBSON—You said there have been many examples in the past where there have been, if you like, problems with secretaries having a problem with their ministers in not giving fearless advice. That implies that the current act is not satisfactory.

Mr Evans—Indeed. Under the current legislation you get public servants and departmental secretaries who are not game to give the advice they think they ought to give. But what I am saying is that that situation will become the norm rather than the exception. The further back into the past you go I think the more of an exception it is. This situation has developed over a period of years and that situation will become the norm.

To say that the current legislation does not always provide the safeguards or that the safeguards do not always work is not a good reason for abandoning them altogether. If I were to give you examples from recent times, I might be accused of being partisan, so in my submission I have reached back into the fairly distant past and into another jurisdiction and another government and given you that example and a report via a fearlessly independent body on that situation.

We all know that the awarding of contracts—which is the example there—is an area which constantly leads to difficulties. It is an area where there is a great temptation for things to go astray, to be steered in a particular direction. It is an area where you really need public servants who will say, 'Mr Minister, the awarding of contracts is done by due process and really you shouldn't be getting involved in that. Let us do it by due process.' There are more recent examples of that. Those sorts of problems will have a tendency to multiply in the future, I believe.

Senator GIBSON—You have made that point strongly in your submission to the committee. Would you care to elaborate on the two minimum requirements that you have stated? For the purpose of the committee, could you go into some detail about those?

Mr Evans—Yes, I have said they are minimum requirements. There is a great deal of flexibility in employment in this bill. The great danger of it is, though, that departmental secretaries will be clones of the Prime Minister of the day and, over a period, staff in departments will tend to become clones of the departmental secretary. If they are not when they are hired, which is likely, they will soon become clones of the departmental secretary.

What I have said in relation to departmental secretaries is that there should be some appointment mechanism, and I have suggested the old-fashioned appointment mechanism of the Governor-General in Council. I have suggested that it be for a fixed term. That is to get over the problem of people saying, 'We'll be stuck with dud secretaries for years.' But there needs to be some mechanism which is a statutory signal, if you like, that these people are not simply the creatures of the Prime Minister of the day. They have a higher public function.

You can say that the Governor-General will always be bound by the Prime Minister's advice and so on, but there is a difference between a Prime Minister signing a piece of paper to get rid of a departmental secretary and putting something up to the Executive Council with an explanation to the Governor-General as to why this departmental secretary should go.

I have suggested that, within the term, departmental secretaries should only be removed on stated grounds by the Governor-General. The whole purpose of that is that, with that sort of arrangement, you will hope you will get departmental secretaries who will say, 'If you don't mind, Mr Minister, awarding contracts is something which the

department must do by due process and you should not get involved in,' and so on. You cannot guarantee it, but at least you would be more likely to get it than with the current situation.

In relation to other staff, I think there should be some independent external review mechanism to ensure that employment really is on merit and staff are not disposed of simply because they have not told their senior officers or the departmental secretary what they want to hear.

Senator GIBSON—While we are on the secretaries, isn't it true today that most of the secretaries are on fixed-term appointments?

Mr Evans—Yes, and they are fairly easy to dispose of as we have discovered in recent times.

Senator GIBSON—How is what you are proposing any different from that?

Mr Evans—In that they can only be removed within the term by the Governor-General on those stated grounds, which are similar to the grounds for other independent officers.

Senator FAULKNER—What about remuneration for departmental secretaries and agency heads? This is also an issue that I was canvassing with the Public Service Commissioner. Hitherto, these salaries of course have been set by the Remuneration Tribunal. Now there is a proposal that the salary of departmental secretaries be set by the Prime Minister.

The Public Service Commissioner says you can only make such a determination after consultation with the Remuneration Tribunal, but the transitional arrangements bill actually includes amendments to the Remuneration Tribunal Act to specifically remove from the tribunal the function of providing advice on remuneration for secretaries and the Public Service Commissioner.

When I asked about the logical inconsistency in those two positions, the Public Service Commissioner suggested I go and ask the Department of the Prime Minister and Cabinet. I do not know whether I will be able to during the life of this committee, but we might try to chase it through.

I am very interested in the general principle of remuneration of departmental secretaries. I would be interested in your view as to what you believe is an appropriate mechanism. Does a Remuneration Tribunal decision in relation to such salaries assist in the creation of an independent and apolitical Public Service, or do you think the proposal that the salaries of secretaries be set by the Prime Minister and salaries of agency heads be set by the relevant agency minister is a useful reform?

Mr Evans—I think Senator Faulkner's first proposition is the sounder one—that is, the remuneration of secretaries of departments should be set by an independent tribunal and be alterable only by the independent tribunal. Under this legislation, the secretaries will know that not only does their tenure of office depend entirely on the will of the Prime Minister but so does their remuneration, which is another factor working against the giving of frank and fearless advice.

Inevitably, what you will get is articles in the press saying, 'Secretary X's remuneration has been increased. It is now higher than the remuneration of secretary Y. This is because secretary X has been a loyal henchman of the Prime Minister. On the other hand, secretary Y slightly offended the Prime Minister by telling some parliamentary committee what he should not have told them,' and so on and so forth. It will just add to the unhealthiness of the whole operation.

Senator FAULKNER—At a later stage during the hearings I intend to question Sir Lenox, who is at the table now, about another contribution to public debate in this country by the Secretary to the Department of the Prime Minister and Cabinet, Mr Max Moore-Wilton, yesterday. I would refer, if I could, Mr Evans, to an article in this morning's *Sydney Morning Herald*. I just want to quote the first par of the article and ask you for a response:

The Prime Minister's top bureaucrat, Mr Max Moore-Wilton, yesterday questioned the right of Parliament to scrutinise Government actions, criticising the existing system of accountability requirements as ineffective and an impediment to efficiency.

I appreciate that is a journalist's summation, if you like, of Mr Moore-Wilton's views. First of all, have you had an opportunity to hear of or read Mr Moore-Wilton's contribution on this issue?

Mr Evans—I did not hear his address yesterday, although some reports were made to me about it. I had not seen this article before coming to the committee meeting this morning, but the remarks paraphrased in the first paragraph of that article simply reinforce my fears about the effect of this bill: that parliament in fact will be seen to be a nuisance and interfering in the conduct of public administration whenever any parliament or any of its committees wants to find out what is going on. It just reinforces what I have said about the effect of this bill and the philosophy underlying this bill.

Senator FAULKNER—I do want to ask Sir Lenox a little later about leadership in the Public Service and how these sorts of contributions affect the leadership role that the Secretary to the Department of the Prime Minister and Cabinet has, but a direct quote from Mr Moore-Wilton is this:

There are a number of people who have confused frank and fearless with just being a bloody nuisance.

I have my owns views about this, but I would be interested in any that you might care to express to the committee.

Mr Evans—I commend to the committee a reading of the ICAC report to which I drew attention in my submission. That report draws the distinction between giving frank and fearless advice and being a nuisance. What it says in effect is that public servants must give frank and fearless advice and, if a minister insists on ignoring that advice and going off in a particular direction, the Public Service has discharged its responsibility and should not be a nuisance in the sense of persisting in trying to restrain or otherwise advise a minister who refuses to accept the advice.

But the point about this new Public Service ethos is that that advice will not be given in the first place—there will be an enormous disincentive to give that advice in the first place. That ICAC report makes the point that, if a senior public servant believes that a minister is embarking on a dangerous or improper course, that public servant should strongly express those views to the minister in writing. Under the new Public Service legislation, we certainly will not get to that stage most of the time. We will not get to the stage of public servants making even moderate noises of doubt in cases like that.

Senator FAULKNER—Could I just ask you about part 3 of the bill, proposed section 10, which is on APS values. Mr Evans, you would be aware of it. We had some discussion with witnesses, including Dr Shergold and representatives of the ACTU, yesterday in relation to a number of the values, but I wanted to concentrate on just values (e) and (f). In relation to value (e), I would be interested in your view as to whether it would be worth while for the issue of to whom the APS is accountable to have words such as: 'The APS is accountable for its actions within the framework of ministerial responsibility to the government, parliament and the public'. Do you think that would be a useful addition?

Mr Evans—Yes, I think that would be a useful addition. All this documentation associated with the new regime in the Public Service has been silent about accountability to whom, and that paragraph (e) is another example of it. Accountable to whom? Well, you read the rest of the bill and you say accountable to the Prime Minister and the ministers. There has been enormous neglect of accountability to parliament and total silence about accountability to the public. It would be useful to put that change in as a corrective to the sort of signal that this bill sends to people.

Senator FAULKNER—If I could go quickly to the next APS value—(f). This is the debate around frank and fearless. The ACTU witnesses argued for those words to be added to timely advice. Mr McLeod had a different form of words but not dissimilar in a sense—frank, honest, comprehensive and accurate. Again, I would be interested in your views in relation to this section of the bill and whether you think that either those words or the spirit that they embodied within them would be a useful addition to the bill and go some way to alleviating any of the concerns that you might have, which I understand are

fundamentally, however, based on other aspects of the bill.

Mr Evans—It is significant. The traditional phrase is 'frank and fearless'. It is significant that from that last formulation the word 'fearless' is dropped. I think the word 'fearless' should go in because it draws attention to a very significant problem. To use a phrase which has been used in recent times, part of the role of the Public Service is to speak truth to power. Public servants are speaking to powerful people and it takes a great deal of courage to tell powerful people what they may not want to hear. The word 'fearless' should certainly go in, stressing that declarations of values are not much comfort on their own.

Senator FAULKNER—Do you think at the end of the day it really defies logic that, when a public servant's employment future lies in the hands of his or her agency head or secretary to the department, he or she is actually in a position to supply frank and fearless advice?

Mr Evans—That is exactly the problem. There is an enormous disincentive against providing that sort of advice in that situation, and only the most outstandingly courageous public servants will do so.

Senator FAULKNER—Would you describe Mr Moore-Wilton's advice of yesterday as frank and fearless?

Mr Evans—I have the disadvantage of not having heard his address in full or not even reading this article in full. But frank and fearless advice essentially consists of telling, as I said, a powerful person what they may not want to hear, which goes against their inclinations, their ideological predilections, their political considerations, et cetera. That is what one of the roles of the Public Service should be. In this whole new Public Service ethos I see no evidence of any appreciation of that, certainly none in the words that you have quoted.

Senator FAULKNER—I want to raise this with Sir Lenox in a little while, but I am interested to hear your view of the Australian Public Service from your perspective as Clerk of the Senate. I had a little bit of an interchange yesterday with Dr Shergold about this. My own view is that it has been a very strong, unified and apolitical Public Service. To that I think you can add the fact that it has been a very honest Public Service. Obviously it has not been a Public Service that has been torn asunder by corruption scandals and the like. My own view is that it has been very well regarded internationally. But I would be interested to hear your views as to whether you consider it far too hidebound. You probably heard some of the comments that were made by the Public Service Commissioner, who tried to I think balance his remarks. I would be interested to hear in a general sense, from where you sit, your view of the Australian Public Service.

Mr Evans—We all criticise the Public Service that we have got and we all say

things like, 'There is too much red tape, they are too cautious, they are too secretive, they never give anything away,' and so on and so forth. You hear a lot of those sorts of criticisms in and around parliament and you will hear them from parliamentary officers for a time. But basically I agree with Senator Faulkner's assessment: the Public Service has been in the past a professional Public Service.

You have had a lot of very professional people who see themselves as serving the country, serving the state, serving the public. They are not interested in making a lot of money. If they were interested in making a lot of money, they would go and be stockbrokers or used car salesmen or something. Basically they have not been interested in making money; they have been interested in a career in serving the public. They have been certainly very honest. The reason we have not had corruption scandals is basically that we have not had much corruption. We have had very honest public servants who have deeply instilled into them the fact that you have to be careful with money.

One of the criticisms that is made is that the Public Service is process obsessed; they are obsessed with process. That entirely misses the point. I make the comment to public servants that the Public Service is by definition a body which works by due process. The dismissal of process is entirely wrong, because process is extremely important to the proper conduct of government and to the conduct of government in the public interest. A classic example of that is the awarding of contracts, a subject which keeps on causing trouble. The awarding of contracts is something that should be done by due process. Public servants trained in due process are the people to handle that sort of activity. If you do not stick to due process, you end up in enormous political trouble and you end up with enormous alienation in the public. So I basically agree with Senator Faulkner's assessment: we have had a sound, professional Public Service in the past.

Senator GIBSON—The second point you made in your submission about minimum requirements was, 'A genuinely independent Public Service Commission.' My reading of the bill is that the commissioner is to be appointed by the Governor-General for a period of five years and he is basically to fulfil that role. What is wrong with the wording in the current bill, in your view?

Mr Evans—The problem is that too much is being left to the Public Service Commissioner; too much is being expected of the Public Service Commissioner by the legislation. A lot of the things that the Public Service Commissioner is expected to provide for should be provided for in the bill. This gets back to the point that was made earlier on about safeguards being in the legislation. But, given that so much is expected of the Public Service Commissioner—more than should be expected of that office—the bill does not provide sufficient buttresses for the independence of that office.

For a start, it is only one person. One person is in a much more vulnerable position compared with, say, a group of three or five people. One person can be summoned to the Prime Minister's office and be told, 'I want you to do this,' and one person has more

vulnerability to that sort of situation. That is one problem—the fact that it is only one person.

Five-year term: five years is a reasonable time, but to have an independent commissioner who has to do all the things that this person has to do under this act I do not think it is a sufficient safeguard. In other words, if you are really going to expect the Public Service Commissioner to do all these things that is expected of him or her, you certainly need to buttress the independence of the position to a greater extent than you have in the act. I would not leave all those things to a Public Service Commissioner or to a Public Service Commission.

One of the things the Public Service Commissioner has to do is to give a report before a departmental secretary's appointment is terminated. What is the report to say? What is the report to deal with? The Prime Minister will say, 'I want to get rid of this departmental secretary. Give me your report (favourable).' The Public Service Commissioner would be in a very difficult position. The act does not tell the commissioner what is to go in that report and what the report is expected to say. Chances are the report will say, 'Very good, Prime Minister.'

CHAIR—What happened in the past when that situation arose?

Mr Evans—I really do not know what happened in the past. As I said before, departmental secretaries are not terribly secure at the moment. In effect, the bill only regularises the current situation in many ways. What has transpired in the past with the termination of the appointments of departmental secretaries, I really do not know.

Senator GIBSON—On the other hand, Mr Evans, under the bill the commissioner will be able to issue directions which will be disallowable. It is a new initiative which is not available now.

Mr Evans—Yes, that is true, but again why leave everything to those directions? You are simply depending too much on those directions. As I said before, like all delegated legislation, they can be disallowed, but that requires a certain amount of political effort, particularly in the Senate, which is the only place where they will be disallowed, and you cannot amend them or substitute new directions for old ones. Disallowance is a very blunt instrument.

Mr GRIFFIN—Mr Evans, I am going to read a quote from the Prime Minister in a lecture in 1995 and then I want to ask for a couple of comments on that quote. It says:

No person who holds parliamentary sovereignty dear could be other than disturbed at the steady decline in both the actual power and the reputation of the parliamentary institution. I wish, in advance of election of a coalition government, to commit the next government of this country to a series of reforms which will restore greater authority, dignity and meaning to our parliamentary institutions.

I would ask you to consider that quote in the context of two things: one, given the comments that you have made on the question of frank and fearless advice and its implications for the parliament in terms of its doing its job and, two, although you have not had a chance to consider them fully, in terms of the comments attributed to the head of the Department of the Prime Minister and Cabinet, do you think the actions outlined through this bill are in line with that stated view from the Prime Minister of the role of parliament?

Mr Evans—I have already indicated that I think the Public Service Bill, as now before you, takes us in the opposite direction. Obviously, the reforms which were promised there are yet to come.

Mr GRIFFIN—On the issue which you referred to earlier, the politicisation of the Public Service, which has been alluded to as occurring incrementally over a period of time, is it fair to say from that that this particular bill, in terms of what it actually will do, is in fact a further step and quite a significant step forward into the politicisation of the Public Service.

Mr Evans—I have not used the word 'politicisation', and I usually avoid it because it conjures up an evil which is too simple and stark and we should be concentrating on more subtle problems. The reason I avoid the word is that it conjures up an image of political hacks being appointed as departmental secretaries and to the staffs of departments. That may well happen and there is absolutely no barrier to it in this bill. This bill would allow that to happen.

CHAIR—And there is no barrier in the current bill or the old bill.

Mr Evans—There is very little barrier left in the current legislation, that is true. But in a few years time people will say, 'Well, there are no obvious political hacks in positions of departmental secretary. Your fears have not been justified.' The problem is politicisation, I suppose, in a more subtle sense, in that departmental secretaries and staff will think of themselves as there simply to carry out the will of the Prime Minister and the minister of the day and nothing more. They will be politicised in that sense—not that they will be party political zealots who have come straight out of some party machine organisation into the Public Service but that they will be people who will regard themselves as simply instruments of the will of the Prime Minister and the minister.

Mr GRIFFIN—Their circumstances will lead them into a situation which is de facto politicisation.

Mr Evans—Yes. It is politicisation in a different sense, I suppose you could say.

CHAIR—Can you give us your views on the problems with mobility between the two services? I think this will be the last opportunity we get to take evidence on that

specifically from the point of view of the parliamentary service.

Mr Evans—There must be ready mobility between the Public Service and the parliamentary service in the sense that public servants should be able to come readily to the parliamentary service and to bring with them the entitlements that they have as public servants. Parliamentary officers should be able to move freely into the Public Service and to take with them the entitlements that they would have if they were going from one part of the Public Service to another. I stress that we do not envisage parliamentary staff taking with them all the entitlements that they have as parliamentary staff, because some are peculiar and will not exist in the Public Service.

Without that ready mobility, the parliamentary service will wither on the vine, because it relies for recruitment on the Public Service very heavily. We rely on getting good people coming from the Public Service into the parliamentary service and going back again. If they do not feel that they can readily move to the parliamentary service and go back again, we will not get the quality of staff that we have been getting in the past. So that mobility is absolutely crucial. The absence of it would so cripple the parliamentary departments that it would cripple the parliament.

In the Parliamentary Service Bill, there are provisions that have been included to provide for that mobility. Our expert advisers tell us that those provisions by themselves would be sufficient to ensure that mobility without any complementary provisions in the Public Service Bill. What they do is confer a right on public servants to move into the parliamentary service and to bring their Public Service entitlements with them and on parliamentary officers to move into the Public Service. In other words, they confer a right on both groups of people. If that bill goes through as it has been drafted, it would appear that it would secure that mobility that we absolutely need to keep the parliamentary departments going.

Senator FAULKNER—Do you think that is also important for public servants who might go and work for a minister or for an opposition office holder and the like? Personally, I think the idea of cross-fertilisation is good for government, good for the parliament and good for the parliamentary parties.

Mr Evans—It is essential to preserve that mobility as well. There have been a lot of very valuable people who have worked on the personal staffs of senators and members and ministers and who have later returned to the parliamentary service or returned to the Public Service because they are professional public servants. That cross-fertilisation, as you call it, has been very valuable in a lot of cases.

CHAIR—Is it going to have any effect on the parliamentary departments from the point of view of the budget process?

Mr Evans—It is not clear to me that there will be any direct and obvious effect of

this legislation. Other things are impinging on that, of course, but this legislation as such does not seem to have any obvious direct effect on that.

Senator ALLISON—(Question put through the Chair)—Mr Evans, you have not mentioned so far the more flexible pay arrangements which have been talked about, such as performance pay and broadbanding of various levels. Could you comment on that.

Mr Evans—I think it is desirable to have a flexible classification system and a more flexible remuneration system for the Public Service generally. Nothing that I have said contradicts that.

I should say that one of the items that you mentioned—performance pay—as you would know, has had some problems in the past. I have in the past expressed great scepticism about performance pay and how it has worked. I go back to what I said before. Your professional public servants are not basically here to make money. If they were interested in making money, they would be doing something else. The idea that money is all they are here for translated into policy will mislead us about how to have a good Public Service.

CHAIR—Thank you, Mr Evans.

[10.10 a.m.]

COVENTRY, Ms Helen Elizabeth, Lecturer, School of Administrative Studies, Faculty of Management, University of Canberra, PO Box 1, Belconnen, Australian Capital Territory 2616

SAWER, Dr Marian, 5 Wisdom Place, Hughes, Australian Capital Territory 2605

CHAIR—I now welcome Dr Marian Sawer and Ms Helen Coventry to this session of today's hearing. I invite Dr Sawer to make an opening statement

Dr Sawer—Thank you, Mr Chair. I must start by apologising for the fact that I am suffering from a rather heavy cold. However, my colleague is not similarly handicapped.

CHAIR—You are not the only one, by the way.

Dr Sawer—I will not be traversing the broader issues of the need to safeguard the provision of frank and fearless advice from the Public Service which Mr Harry Evans has been taking us through earlier this morning. I wish to focus here simply on the issue of the merit principle and on the arrangements for the monitoring, reporting and review of the equity impact of the new Public Service Bill.

Concerning the merit principle, research suggests that, within a devolved management framework, appointments are often made in accordance with the comfort principle rather than in accordance with the merit principle. To counteract this tendency, it is desirable that more statutory guidance in relation to the merit principle be provided than is the case in the current bill. A definition of 'merit' needs to be written in, preferably based on the widely accepted definition provided by the *CCH Equal Opportunity Law and Practice Guide*, although I understand that the ACTU and the Public Service and Merit Protection Commission would like some minor modifications to that.

Additionally, as noted in my original submission, if the government is serious about managing for diversity, consideration needs to be given to complementarity of skills. If the government wishes to expand the repertoire of skills, backgrounds and perspectives represented in the Public Service, then complementarity needs to become a consideration in merit selection. This can best be done through group recruitment rather than through the serial filling of individual positions. This would be an additional consideration analogous to the consideration of potential for further development which has in the past played a role in Public Service selection processes.

As well as the spelling out of the meaning of 'merit', there needs to be guidance within the bill as to the broader legislative framework governing employment practices in this country. At present, there is no equivalent in the bill to the old section 33 of the Public Service Act prohibiting discrimination on various grounds, such as those accepted

by the government under ILO convention 111. Personally, when I was director of staff selection in EEO in the Department of Foreign Affairs and Trade, I found that section 33 was invaluable to me in my work in ensuring equitable practices in the department.

Nor is there currently any reference within the bill to the prohibition of direct and indirect discrimination under the Commonwealth Disability Discrimination Act, the Racial Discrimination Act or the Sex Discrimination Act. I believe that it is extremely important that those references be included within the Public Service Act. Many senior managers are not aware of the implications of the prohibition of indirect discrimination, and the presence of that reminder within the act would be salutary indeed.

As suggested in my submission, reporting and monitoring arrangements are crucial in the effectiveness of workplace equity programs. It is essential that robust agency specific data be provided in the Public Service Commissioner's annual report to parliament. That should certainly include the impact of performance pay on women and members of designated groups. Furthermore, I believe that a major independent review of the effects of the new act, including the effects on those groups, should be conducted after three years, and provision for that should be made in the act.

It is also clear that agency specific performance indicators rather than the current service-wide ones must be developed for the effect of monitoring of equity outcomes. The Public Service Commission's 1996 report on implementation of equal employment opportunity in the Public Service showed that 33 agencies had already exceeded the year 2000 goal for the representation of women in the SES. That is the goal established in the service-wide strategic plan. That goal was 20 per cent. For example, women already constituted 38 per cent of the SES in the then Department of Human Services and Health in June 1995. Some senior executives mistakenly read this as meaning that further efforts were not required in relation to gender equity.

As argued in my submission, I believe that the Dawson equity index provides a much more meaningful measure of gender equity, particularly in feminised agencies such as DEETYA or the Department of Health and Family Services. Professor Andrew Hede has presented another version of this index, which he calls the managerial inequity index. These indexes show the proportion of female employees in senior positions relative to the proportion of male employees in senior positions.

As I have said, it is particularly important in analysing the position of women compared with that of men in occupations which are female dominated, such as teaching and in departments such as DEETYA or Health and Family Services, with a majority of female staff. The equity index quickly gives an indication as to whether the situation is equitable or not.

The Dawson equity index was originally developed to analyse gender equity within the ACT school system. In this system, as elsewhere, EEO statistics were expressed in

terms of the proportion of senior positions filled by women—that is, the kind of indicator used currently in the strategic plan in the Public Service. Presentation of statistics in this form suggested that gender equity was steadily increasing. However, this completely overlooked the feminisation of primary school teaching. Through applying the Dawson index, it was discovered that, although the proportion of promotion positions held by women had increased, in fact, in 1991 women primary school teachers had a one in six chance of being in a promotions position while men had a one in two chance. That ratio basically remained unchanged in 1991. So between 1976 and 1991 that ratio remained unchanged, although women were an increasing proportion of those holding promotion positions.

When DEETYA launched its equal employment program promoting equity and diversity this year, it assumed that because females made up 31 per cent of their senior executive service they had exceeded the year 2000 objective laid out in the service-wide strategic plan. That overlooked the feminised character of the DEETYA work force. When the equity index is applied to the DEETYA data, it can be seen that, although women make up 58 per cent of staff, they occupy only 32.4 per cent of above ASO4 positions. For the SES alone the equity index for women is 0.3 and for men it is one—that is, men have three times the likelihood of being in the SES in that department.

Clearly, the existing performance indicators are misleading in relation to gender equity. I recommend that more work be done in the development of performance indicators for the purposes of monitoring the equity outcomes of the new arrangements and for making those outcomes more transparent in the reporting to parliament.

CHAIR—Ms Coventry, would you like to make a statement?

Ms Coventry—Yes. I share with my colleague concerns about equity. In my submission I also raised a number of other concerns—in particular the need to legislate for cultural change. I see the act being a vehicle for that purpose. I am concerned about the fragmentation of employment practices in the APS and the resulting inequities that will result from that. Following on from that, I have concerns about in-built rigidities for the government in its ability to govern with the APS being structured in the way that is proposed.

I have some concerns as well about the role of the commissioner and, finally, the skill level in the APS to cope with the devolved people management functions that will be required if this act comes into being. There has been generally recognised a need to rewrite the Public Service Act in that the environment has changed substantially since 1922, although there have been significant amendments to the act since that time. This act now really is large and complex and is rather cumbersome. It has been difficult for managers in the Public Service to manage their people as a result. Undisputedly, I believe that there is some need for a revision, but I do not know if revamping the legislation to a smaller, plain English document is necessarily going to result in changed behaviours in the

APS.

As I mentioned, the act is being used as a vehicle for reform and that reform is to a private sector model for the Public Service. This model is held to provide greater discretion to managers as to who they engage and disengage and the terms and conditions of employment. All of this is being modified by the Workplace Relations Act 1996. The appropriateness of this model, as intended by the Public Service Bill 1997, is of concern and has to be seriously considered. There is a significant amount of literature that is available on the difference between the public and the private sector. I do not think there is any need to canvass any of that literature at this stage.

However, it should be noted that the Public Service is the mechanism to provide advice to government and to administer the various programs that are required of government. To facilitate this process, the machinery of government has been organised along functional lines, according to the government's requirements. Each agency therefore should not be considered as a separate entity but be viewed as a unit within a corporation.

In a private corporation a chief executive is unlikely to deliberately create different cultures amongst the various units. The reason for this is that the chief executive is well aware of the need at times to restructure the corporation. The chief executive does not have power to legislate to achieve the particular end but tends to use a collaborative approach in terms of managing his or her organisation. There has to be a strong emphasis in any corporation on coordination and control if the overall strategy is to be achieved. If the chief executive wants to reorganise to achieve the desired outcome that person has the prerogative to do so.

It is in the best interests of senior management in a corporation to have that transition being as smooth as possible. If the various units in a corporation, though, have different cultures and different conditions of employment, then that transition is not going to be a very smooth process at all. If there are perceptions, for instance, of inequities between units, structural change becomes quite problematic and to be effected it is necessary for the senior management to address those inequities. It is much the same for the Public Service.

The vision of the Public Service as separate entities each with their separately negotiated conditions of employment, I believe, is one that is fraught with problems for the government. To pursue this model it is going to be extremely difficult for the government of the day to change the machinery of government when it is required. We have seen this at times when there has been necessity to do so.

Historically, when there have been such changes, when there have been amalgamations of various agencies, there have been, as a result, inefficiencies. For example, if we go back to the machinery of government changes in 1987, and just to take one example, when the Department of Trade and the Department of Foreign Affairs were

combined there were significant problems in trying to blend the two cultures. Also we see this when we have mergers and takeovers in the private sector.

To some extent any change produces productivity losses, but the losses can be minimised—I would really like to strongly emphasise this point—if there are more common features on which to build amongst the units that are being combined. In the past the mechanism which facilitated this type of change in the public sector was the common terms and conditions of employment. We did see different cultures, but at least that was a strong base on which to effect such change.

In addition, members of the APS identified with membership of the APS. There has always been a stronger sense of belonging to the Public Service than belonging to a particular agency. If people get asked what do you do in a social context, they normally say, 'I am a public servant.' This identification can be attributed to a belief in the role of government and wanting to serve government. The values of the Public Service have to some extent selected individuals who personally share these values. So there is a self-selection process that goes on, just as Mr Evans identified earlier.

These values which underpin the Public Service are a manifestation of a recognition of market failure in some economic activities. Activities in the public sector are there because, when left to the fragmented decision making processes of unregulated markets, they will produce sub-optimal results. Consequently, the public sector undertakes different activities from those of the private sector, and these have to be different for reasons of the public interest. We have to keep coming back to the fact that the Public Service is serving the government of the day and the public, and it is accountable to both. From my experience, public servants respect that difference, and they derive a great deal of satisfaction from working for the government of the day and the public.

With such committed and dedicated staff, the question that I believe needs to be raised is why it is necessary to incorporate the values of the APS into legislation. The guidelines on official conduct of Commonwealth public servants appear to have been a useful reference document which most public servants have abided by. The development of this code was not imposed on the Public Service; rather, it was one that metamorphosed over time, identifying appropriate behaviours. It was not something that was just developed and put into place as an appropriate way of behaving.

In other words, the guidelines represented the cultural norms and values of the Public Service at the time they were developed. We use these guidelines to reinforce behaviours and to assist new members of the Public Service to learn and know the appropriate behaviours in that sector. This is a normal method of cultural transmission for any organisation.

In seeking to change a culture, it is not appropriate simply to legislate a desired cultural framework, as this approach can be met with resistance. There is a significant

body of literature from the organisational psychology discipline which concerns such resistance.

What is needed is for the process of cultural change to be managed, rather than being legislated and imposed on what is an already committed work force. If we are going to have cultural transmission and core values for the agencies—I see some dilemma between having a forced value system on the one hand and a fragmented Public Service on the other—communication is required. Again I come to my concerns about the inequities that could exist amongst the various agencies if those agencies are on different terms and conditions of work.

In the past, we have seen inequalities in power relationships, or perceived power relationships, amongst various agencies actually inhibiting effective communication. For instance, the perception of power of the Department of Finance, prior to the financial management improvement program in the mid-1980s, was such that there was not open discussion between the various agencies and the department. There was a recognition of the power of that department. Hence, I believe the enactment of the legislation may further create those inequities, stop communication and affect the advice that is given from the agencies to government.

In a devolved environment, it is essential that there be coordination and control to ensure that the overall objectives are achieved. CEOs of private sector organisations have put in place mechanisms for this function. But there is a very real fear that the proposed arrangements in the APS will not be effective in this result. This concerns centres on, firstly, the lack of uniform skills in the APS to ensure quality and equality across agencies and, secondly, the role of the Public Service Commissioner under the proposed act.

The APS in many respects has been a leader in managing people, particularly in the application of the merit principle, training and occupational health and safety. It should be noted, though, that there is considerable room for improvement in these functions. However, despite there being better outcomes than many organisations in private sectors, differential standards have been observed across the APS with these functions.

I have noted that Hazel Moirs's submission, which is attached to the WEL submission, has identified variations between agencies in respect of promotional levels of women. Another example which was mentioned earlier today was the attempt to introduce performance based pay into the APS in the early 1990s. It resulted in major concerns in measuring what performance is in the public sector. Also, different skill levels of the public sector managers became evident in this regard. We had some fairly botched attempts at performance based pay being incorporated into the Public Service as a result.

My second point relates to the Public Service Commissioner as detailed in the Public Service Bill. I see this role as being quite ambivalent in the way it is presented. In

one respect, the Public Service Commissioner is given greater powers than the office already possesses by it having responsibility for the setting of standards and the monitoring of those standards.

As to monitoring, the commissioner does not have the authority to direct change. There is no power in terms of the review undertaken by the commissioner as a result. Hence, in my paper I noted that the role of the commissioner appears to be that of an ombudsman rather than a leader of best practice, in that the legislation has given the commissioner inadequate powers in respect of forcing some change.

The discretionary powers of the agency heads could result in certain people management functions falling below best practice as a result, with little consequence. I believe the commissioner would be put in an unenviable position if the proposed structure remains. To overcome this dilemma, there needs to be consideration for separating the function of standard setting and review.

I believe that an external review body would provide for a more just Public Service as a result. I think that is what we should all be seeking—that is, a just Public Service. In addition to the external review body monitoring and making judgments on employment practices, it is essential that an extensive evaluation be undertaken of the whole Public Service if the APS continues along the road towards an equitable work environment and maintains its position as leader in people management.

I noted in my submission that the APS has made significant reforms to many practices over the last decade. Much of the value of this reform could be lost if the APS is reduced to a segmented, uncoordinated conglomerate of agencies characterised by inequitable practises which are perpetuated by weak reviewing powers.

As a result, I recommend the following: firstly, that the terms and conditions of employment remain consistent across the APS; secondly, that the role of the APS Commissioner be clarified so that this office can ensure that employment practices continue to develop as best practice; thirdly, that an external review body be established to ensure consistency of practice across agencies in terms of the commissioner's directions; fourthly, that an extensive independent evaluation be undertaken within a reasonable time frame after the introduction of the act of all agencies to ensure that best practice of people management is reached.

CHAIR—Yesterday we had considerable discussion about the concept of merit. It was put to us that merit should be included in the principal act and we had a discussion about a definition of merit. There are apparently three references, not definitions, in the current act. Do you have a definition of merit that you would like to put to the committee?

Dr Sawer—I feel sympathetic with the definition that was discussed at yesterday's

round table with the modifications suggested at that time. I am happy to endorse what was before the committee yesterday in this matter, with the exception that I believe that that principle should be supplemented by a consideration of complementarity, as I have said in my own submission.

Senator FAULKNER—We had a discussion yesterday at the round table and a suggestion was made that found some favour that the definition of merit, as the chairman said, be enshrined in the primary act and then application, of course, be subject to subsidiary legislation. Do you have a view about that proposal which was canvassed yesterday?

Dr Sawer—Yes, I do. I believe it is extremely important that the definition of merit be spelt out in the primary act together with references to the anti-discrimination legislation, that regulatory regime within which employment practices must be conducted. So I think that both things are important—the definition of merit and the references to Commonwealth anti-discrimination legislation and the ILO convention on discrimination, to which Australia is a party.

Senator GIBSON—Ms Coventry, you said towards the end of your submission this morning that you thought the Public Service Commissioner was not able to, if you like, push best practice through the Public Service. In reading through the bill, the intention of the commissioner's directions is to do that very thing, is it not? What is wrong with that procedure?

Ms Coventry—The Public Service Commissioner can make recommendations but cannot direct, from my understanding of the bill.

Senator GIBSON—No, under proposed section 42 of the bill, 'Commissioner's Directions', it states:

> (1) Commissioner's Directions cannot create offences or impose penalties.
> (2) Agency Heads and APS employees must comply with Commissioner's Directions.
> (3) Commissioner's Directions are disallowable instruments for the purpose of section 46A of the *Acts Interpretation Act 1901*.

In other words, they are disallowable through the Senate.

Ms Coventry—From my readings, from discussions that I have had with others and from a seminar that I have attended in this regard, it became clear that the commissioner's role was one of identifying best practice and making recommendations, but not being in a position, or not having the powers, to force those recommendations. The agency heads will be given considerable power to determine the appropriate practices for their respective agencies.

Senator FAULKNER—You are in a similar position surely, Ms Coventry, to

members of the committee in that the commissioner's directions, along with so many other important matters, are subject to subordinate legislation which you have not and we have not had the value of seeing.

Ms Coventry—That is right.

Senator FAULKNER—That is obviously a matter the committee has been canvassing, but the arguments in relation to the commissioner's directions are as strong as for any other aspect of the subordinate legislation that we have been talking about.

Ms Coventry—That is right. I have not had the benefit of seeing the subordinate legislation, but I have heard the commissioner speak at a seminar. From that seminar, I was able to determine the perceptions on the extent of the power of the commissioner in this regard.

Senator FAULKNER—I appreciate that. The point I am making is that much play is made of the simplification of the Public Service Act. The point is that one of the reasons it is a much smaller bill than the current act is that so much will be delegated to subordinate legislation.

This committee, being charged with examining the Public Service Bill and the transitional bill, I think struggles, because so many of the key issues are difficult to grapple with in the absence of the draft regulations. The Public Service Commissioner has indicated that those are going to be made available to the committee prior to the conclusion of our deliberations, which will be of assistance to us. Do either of you have a view in relation to this approach that the Public Service Commissioner says to us—quite rightly, in my view—that many of these instruments are disallowable? Of course, that is a pretty blunt instrument in itself. It does not give either house of parliament an opportunity to amend or change that legislation. You will have an opportunity only to disallow. Often disallowing such a regulation, of course, has quite serious consequences.

Do either of you care to make a comment on this general approach that we have before us? In other words, there is the strong argument that the new Public Service Bill is much shorter and much simpler, which I think everyone basically accepts. Of course, I would argue that there are two other significant pieces of legislation—the transitional bill, which is a substantial bill in itself, and the Parliamentary Service Bill, which we have canvassed briefly this morning with Mr Evans, the Clerk of the Senate. Then there is a raft—covering a number of areas I went through yesterday with Dr Shergold—of subordinate legislation. I would be interested to hear any views you might have about that approach.

Ms Coventry—I think that it would be far preferable if the subordinate legislation were made available so that there is a common understanding as to what is included in that subordinate legislation. I think that the presentation of a much smaller bill, which is to

be the act, in itself, does leave a lot of questions unanswered as to the respective roles of the individuals who are obliged to enact this particular Public Service act when it comes into being.

Dr Sawer—I would also like to briefly respond to the Senator's question. Following on from my submission, I believe that the principles of equity and the principles of equal opportunity are so important to the operation of the Public Service that it is crucial that those principles be spelt out in greater detail within the primary act so that they can be subjected to the full process of parliamentary scrutiny, amendment and so on. I believe that it is crucial for the detail of those principles to be spelt out, rather than being left to the Public Service Commissioner's directives.

I should add that I do believe it is essential that there be reference to indirect discrimination as well as to direct discrimination in the wording of the act. As I said, many senior executives with extensive employment responsibilities within the service are not familiar with the ramifications of indirect discrimination. Just to refresh perhaps your memories of the significance of this principle of indirect discrimination, I refer to the British case of Home Office v. Holmes, where it was found that the Home Office had engaged in discriminatory conduct in refusing to allow Holmes, returning from maternity leave, to go on to a permanent part-time basis of employment. The tribunal found that the Home Office had not been able to establish that it was essential for the job to be performed on a full-time basis. You can imagine what the ramifications of that are. So that is why I think it is so important that managers be alerted to the requirement for non-discrimination on both a direct and indirect basis.

Senator FAULKNER—I do not know whether you have had an opportunity to see the ACTU submission on the issue of promotion of employment equity. It supports the extension of coverage of the EEO Commonwealth authorities act to all agencies covered by the Public Service Act. It also argues, obviously, for no watering down of that legislation. If you have not seen that submission, you may not want to take a question on the run in that regard; you may prefer to take it on notice. I would be interested in knowing whether you support the thrust of those arguments that have been developed by the ACTU.

Dr Sawer—Senator, I am afraid that I have not had a chance to read that submission and therefore I do not wish to comment on it.

Senator FAULKNER—I thought that might be the case. Could either of you take that on notice and provide a response to us? It would be interesting to hear what you might have to say on that.

Dr Sawer—Yes.

CHAIR—Thank you very much for appearing. You have both made very

comprehensive submissions and opening statements and have covered many areas.

Dr Sawer—Mr Chairman, I seek permission to table an additional statement and also an article showing how to construct a managerial equity index.

CHAIR—We will accept those as submissions. Thank you.

[10.53 a.m.]

HEWITT, Sir Lenox, OBE, 9 Torres St, Red Hill, Canberra, Australian Capital Territory

CHAIR—I welcome Sir Lenox Hewitt, who is appearing as a private citizen and who is accompanied today by his daughter Patricia, who was recently elected to the House of Commons and whom we welcome as an observer to our public hearing. Could I invite you to make an opening statement, Sir Lenox?

Sir Lenox Hewitt—Yes, Mr Chairman. Thank you for the opportunity of doing so. I made a submission, which I wrote without access to the transitional provisions bill. I found it very difficult in London, where I was at the time, to locate relevant issues of *Hansard* and the like, so I will be making a supplementary statement in the course of what I have to say.

When I looked at the Public Service Bill itself I was quite taken aback. I looked back at the discussion paper that had been circulated late last year by the minister and then at his second reading speech. In neither of those documents nor anywhere else could I discover the reasoning and the reasons for what I said in my written submission was to me the single core issue in this proposed legislation, and that is the intention to change, indeed to destroy, the Australian Public Service and to convert it into a series of appointments at pleasure—at the whim, in the case of secretaries, of the Prime Minister; in the case of agency heads, of the minister; and, in the case of employees, of the secretaries of departments. That to me is a fundamental change in the service that was established.

I do not wish it to be thought that I am saying things behind people's back. I am sorry not to see the Public Service Commissioner in the room, but there are things I intend to say and must say. I cannot conceive why this central core feature has not been brought prominently to the attention of the legislature and of the public. I listened assiduously to the presentation yesterday morning and the only clues that I could find to the reasons for this fundamental change appear in the joint submission by the Public Service and Merit Protection Commission and the Department of Workplace Relations and Small Business. The submission on page 240 of your document, circulated yesterday, says:

Rationale for the Changes—
The Government—

and I emphasise 'The Government'

considers that the APS—

the Australian Public Service—

should operate, to the maximum extent consistent with its public responsibilities, under the same industrial relations and employment arrangements as apply to the rest of the Australian workforce.

In the initial presentation yesterday morning—and I am sorry I haven't seen a *Hansard* proof and I cannot check my hasty recording of the words—I think it was said that there is not a single labour market in the Australian Public Service. The government made this decision, and presumably the advisers fell into line in this service of today and produced the flesh and bones to give effect to that decision in the bill which is before you for review. There has been a single labour market in the Australian Public Service since its foundation.

When the presentation yesterday commenced, so much was made of the Public Service Act 1922. The Commonwealth Public Service was founded by the public service bill of 1901, and that is the starting point for any understanding of the Commonwealth Public Service, its relationship to the executive, its relationship to the parliament, its relationship to the head of state, its relationship to the Crown and its relationship to the public, and to ignore it is at one's peril.

There has been a proud history in this service of its homogenous nature. Many a distinguished Australian commenced his working life as a telegraph messenger—if anybody remembers what telegrams were and what the telegraph messenger was—and became very distinguished permanent heads of Commonwealth departments. Although I have never met the gentleman, I think the present secretary to the Treasury—if my memory of my reading is correct—commenced his working life as a linesman in the post office in Queensland, and the former secretary to the Treasury commenced in like circumstances.

One of the great problems of the Commonwealth Public Service has been the stupidity of the Public Service Board in not being able to recognise that, although it was a homogenous service, there were reasons for paying different amounts for different work in different places. The archives will show that in the early 1950s, because of some blind observance to relativities, the Government Printing Office in this city was at crisis point. It was not producing documents as it should. The reason was that it could not get liner type operators and it could not get machinists, and the reason it could not get machinists and liner type operators was that it could not pay them the rates being paid for those who had worked at the printing office and had gone to the private sector. The reason why rates were not paid was that the Public Service Board said, 'There is some relativity with a gravedigger in Alice Springs'—or some other unlikely comparison—'and therefore that is what must be paid.'

What was the outcome? Departments exercised their prerogative. They put their annual reports out to tender. They were printed quickly. They were printed by the liner type operators and the machinists who probably went there from the printing office. The public paid for it. The job was done.

In my frustration, because it became one of my responsibilities of the day in the Treasury, in the early 1950s I put forward—and the archives will show this—the

suggestion that the Government Printing Office be sold. If the Public Service Board had recognised the need to pay appropriate rates—as they suggest today individual secretaries should determine independently, department to department—then those problems would not have arisen.

I want to go on and speak now of the basic principles relating to the Commonwealth Public Service. It is well known and well accepted that, in the expenditure of public money in the purchases of goods, tenders should be called—partly to secure value for the Commonwealth, but most importantly to ensure that every person, every citizen, every member of the public who wishes to compete for public business paid for with public funds should know of the opportunity and have the opportunity.

Public funds are the source of employment in the Australian Public Service and the like principle prevails—open competition. Anybody who wished to apply for a Public Service position in the career Public Service was entitled to apply, to secure appointment on merit and to go through the processes of promotion.

Setting aside all the hoopla, all the irrelevancies of complex and subordinate legislation, these are things that we used to tidy up as a matter of course. They were Treasury instructions, Treasury regulations. We would do the job. There was no hoopla, no great performance about it at all. They were modernised; they were changed.

The core matter in this bill is to remove the sine qua non of a career—that is to say tenure, that is to say a permanent appointment subject to the sanctions, such as good behaviour, efficiency and proper conduct. All the requirements, the needs and the necessities for this were the subject of very interesting discussions by your predecessors when they considered the public service bill of 1901.

I have prepared for you, Mr Chairman, and your members a summary of all that was said that is relevant to what the parliament is being asked to do in this bill and the reasons why your great predecessors determined on the form of the Public Service that has operated since Federation. I would like, if I may, to take you through this in some detail, because it puts in words far better than I can deploy the thoughts that I hold and the thoughts that I believe are just as apposite today as they were at the beginnings—and the beginnings were not in 1922; the beginnings were in 1901.

Resolved (on motion by Mr Griffin):

The document from Sir Lenox Hewitt be received as a submission.

CHAIR—That now has privilege in public.

Sir Lenox Hewitt—Can I read it, please?

CHAIR—Yes.

Sir Lenox Hewitt—It reads:

The creators at Federation of the Commonwealth Public Service were critical of ". . . the working of some of the Public Service Acts in the States. . . "[1].

They had the benefit of the experience of the kind of thing that is being put in front of you in this bill.

Referring to ". . . signs of the trail of the American system of appointing officers to go out with the political authority which appointed them", Sir William Lyne in his second reading speech[2] of the Commonwealth Public Service Bill 1901 said:-

> "But there is nothing of the kind in the Bill, and my colleagues and myself are absolutely opposed to allowing the measure to be even tinged with the suspicion of the possibility of that happening under it. . . I cannot see that there is any necessity for an officer leaving the service because his Ministerial head is changed, unless perhaps he took an extreme part in politics".

Mr Chairman, I intervene there to say that we—the system, the community—have handled that kind of situation in the past. Some of you will remember Dr John Burton, who was thought to have affiliations with the minister of the day, who subsequently was appointed as High Commissioner in Ceylon and who then vacated the post and stood for parliament, unsuccessfully, and ceased to be a public servant. He did not seek reinstatement, as I recall. But the framework to deal with the situation was there and it did not require measures of the kind that are proposed in this bill.

Central to the Bill was the establishment of a Commonwealth public service of a non-political character as a profession removed from any fear of political influence or favour; an attraction to the most intellectual men in the country; one that guaranteed a life's occupation for the best men the country could produce. As it was put, most vividly, by Mr Bruce Smith:-[3]

> ". . . the young civil servant should always know that, by good conduct, and by making an effort to distinguish himself, he may . . . reach. . . the leg of mutton on the top of the greasy pole:-

The debate emphasised—

as it went on—

the importance of having ". . . the Public Service Act free from political control".[4]

The underlying theme, encapsulated by Mr Cook was ". . . to get the civil servants of the Commonwealth to confidently believe that they will, at any rate, get fair play. . . they are human beings, and have to conduct a great portion of the business of the State and they ought to have fair play. . . The further we remove civil servants from political control the better, and the more

guarantees we can give them that they will be fairly dealt with, the more satisfied both they and the people of the Commonwealth are likely to be ".[5]

Those employed in the service of the public should not be ". . . subject to capricious treatment by any particular officer in their department. . . "[6] Mr Hume Cook[7] was to speak of ". . . the sweet will of the permanent head. . . ".

Mr Clarke[8] was even more direct:-

> ". . . I know from my own experience. . . that many officers are kept back owing to the peculiarities or the state of the liver of their superior officers, and I know on the other hand of other officers who, for some reason other, have been shoved along. . . "

Discussing the position of the permanent head of the Treasury, Sir William McMillan said[9] that:-

> ". . . it is essential. . . that you should have a man, who, while not dictating to his Minister, can be safely relied upon to put his hand to no improper act, no matter what the Minister may attempt".

In relation to the usefulness of discussing with him any question in which the Ministry is vitally interested, Mr Ewing[10] posed the question, "Supposing. . . it turns out that a man we—

he is speaking collectively—

have chosen and placed in a high position is really a tool of the Executive".

He was speaking of the relationships between parliament and the executive. There has been much said, Mr Chairman, and I go back to the riding instructions, apparently, on page 240—and I say 'riding instructions' because it seems to me it is the only rationale I can find for this destruction of the service:

The Government considers that the APS should operate, to the maximum extent consistent with its public responsibilities, under the same industrial relations and employment arrangements as apply to the rest of the Australian workforce.

That also had its day back in 1901. The debate was wound up by the Attorney-General, Mr Deakin, who aptly pointed to the difference between private business and the Public Service. This is what Mr Deakin had to say:

In the control of a private business the head of that business acts according to the best of his knowledge or, if it pleases him, according to his whim. He has absolute control of all those beneath him without reference to anybody. He says to a man "Go, and he goeth." There is no inquiry into the circumstances. Why should the man be paid if he is not wanted? He goes. And if the manager wants another man with certain qualifications, he says, "Come, and he cometh" . . . that is, if he offers him a sufficient salary. That man stops just so long as he is required. But the circumstances under which men of capacity, and with a knowledge of human nature and a knowledge of what they require are able to conduct these great enterprises are entirely different from those which apply to the

undertakings of the State.

They are, Mr Chairman, and that is the burden of what I say. Yesterday we were told in the presentation that the service had changed, that times had changed, that the service was a relic of a bygone age. It is not, Mr Chairman. The senior officers of the Commonwealth Public Service, as I said in my original submission, are subjected to enormous pressures. Ministers and Prime Ministers are subjected to enormous pressures.

I commend to the committee an article that was written in the 19 July this year edition of the *Spectator* London journal. It was written by the former editor of the *Sun*, which is a tabloid newspaper in the United Kingdom which has I think the largest circulation. It purports to centre itself upon the day that Mr Major lost the election in Great Britain recently and it relates to the day upon which this former editor attended Mr Major at No. 10 Downing Street. The reason why I commend the article is that it illustrates the pressures that are placed upon Prime Ministers and, down through Prime Ministers and ministers, on people in the SES, what used to be the second division, and on secretaries, who used to be permanent heads. If you forgive me, I will read the concluding paragraph because I think it is illustrative of what these pressures can be and how they can filter through. He writes:

> Perhaps the most difficult problem of all—

and he is speaking of Prime Ministers—

> is the relationship, not just with the journalists, editors or even chief executives of newspaper companies, but with the dynastic likes of Mr Murdoch and Lord Rothermere. No matter how painful, a prime minister—even the current one—has to come to terms with the fact that prime ministers come and they go. However, the dynasties of the newspaper business have been and will be around for generation after generation. So in some ways these families look upon prime ministers of nations in much the same way as they view their editors, that is to say that they have done a pretty good job but life goes on. So, it is within this historical context that the country's leaders have to view their relationship with the proprietors.
>
> Finally, my advice to them—

Prime Ministers—

> would be the same advice that I would give any editor. A massive dollop of brown-nosing never goes amiss. Better be a brown-noser at No. 10 than a non-brown-noser working out how on earth you are going to spend the rest of your life with your family.

The public, the Prime Minister and ministers need the wisdom, the help and the guidance of the servants of the public, established as it was in 1901. They do not need to be exposed, as this bill proposes, to instant termination with no reason given, to be there at the whim of the Prime Minister or, in the case of those putative secretaries, at the whim of

the current secretary to the department. I regard it as an outrage that, on top of that, the bill removes their right of recourse to the protection of the industrial relations legislation. We listened to some nonsense yesterday, theoretical rubbish, that if an SES man were dismissed he would have some constitutional right to approach the court to claim redemption. Has the author of that silly statement no understanding of what it costs in up-front money to go to a court today? I can tell them; I can show you. Nobody could face it.

What we are dealing with here, too, is not the dismissal; it is the threat hanging over. You will destroy frank, fearless, honest advice if you are party to this proposal of the executive. One final word, if I may. I was horrified, beyond words almost, to look at the transitional provisions bill. The executive, in that bill, is inviting the parliament to indulge in an act of repudiation. It says that all existing continuing SES officers and the few continuing secretaries will be deemed to be employed under the new arrangement. Those people entered the Commonwealth Public Service on the conditions as they stood. They should not have those conditions changed. They have tenure. The transitional bill would provide that they would henceforth be employed under the terms of the bill and be subject to instant dismissal. Unless there is something in this unseen, subordinate legislation, I read that as a projected act of repudiation. Thank you for hearing me.

CHAIR—Thank you. I do not need to ask this question, but: are there any questions?

Senator FAULKNER—I have a couple which I flagged with Sir Lenox during Mr Evans's evidence to the committee. Firstly, Sir Lenox, I would be interested in hearing briefly what your opinion is of the standard and the quality of the Australian Public Service.

Sir Lenox Hewitt—Mr Chairman, better to inform myself, I came here to be in attendance at yesterday's sittings and earlier this morning, and I listened to confusion which I believe was developing during the answers to questions that were put to witnesses. The Australian Public Service is still in existence under the legislation—1901 to whatever the date of the last amendment was—but a number of public servants—I am speaking at the moment of secretaries and I think second SES officers, but secretaries certainly—succumbed to the blandishment of more money, relinquished their tenure and accepted contracts. They, it has been demonstrated, are already suffering what is proposed in this bill for all public servants: the termination of their services with perhaps some monetary compensation for the unexpired portion of the contract. I believe that the effect of that can already be seen in a severe deterioration of the advice that is being given to ministers.

I think that any who are still employed under the terms of the legislation and are not the beneficiaries of contracts, or the victims of contracts, are carrying on with the traditions and with the kind of advice that we always were giving. So I make the distinction between the two classes of people who are giving advice today. In the case of the old-timers, those under the act properly, I am sure it is as good as it ever was. I regret

the traducing of the memory of the great, which took place yesterday, which said that those employed under the act—and that was why they should be exposed to this threat of dismissal—had no vision, no with-it advice at all. To say that of people like Coombs, Wilson, Bunting and Wheeler is just a travesty. Those under contract, I am sure, must be in the position of having to weigh their words carefully, if I can put it as kindly and gently as I can, and you can see it in evidence. I am happy to give my opinion about it, if need be.

Senator FAULKNER—In your view, is the Australian Public Service held in high regard internationally?

Sir Lenox Hewitt—Yes. It has had a very high reputation, in my experience, in America, in continental Europe, in Whitehall and in Westminster. Yes, it has been so regarded.

Senator FAULKNER—The Australian Public Service has been described in a pejorative sense as cautious, conservative and risk averse. I am interested in what your view is of the accuracy of that description.

Sir Lenox Hewitt—I think that is nonsense. I think the Public Service has been brilliant. Let us take one illustration: Westerman in his advice to John McEwen, the former Deputy Prime Minister, came up with many suggestions and proposals, adopted by the government of the day and subsequently not palatable to successive governments and so on. But in terms of what became government policy at the time, they were innovative; they were full of flair and imagination.

Senator FAULKNER—Should a public service be cautious and risk averse or should it be bold and risk taking?

Sir Lenox Hewitt—It is a question of exercising judgment. Certainly to describe the Australian Public Service as I distinguish it, it was wise and prudent and exercised good judgment and was appreciated by those it served—by the ministers, by the parliament and, if I may say so, I believe by the committees of the parliament.

Senator FAULKNER—We have a situation where the Public Service Commissioner himself—in other words, Dr Shergold, the current Public Service Commissioner—is a very strong advocate of these changes, and I think he would accept that, and was an advocate before this committee. Do you have a view about that or its appropriateness?

Sir Lenox Hewitt—I think his views are misconceived. I think they are misguided, as reflected in the bill. But it seems to me he was conforming with riding instructions. The government had decided that the Commonwealth Public Service was to have the same employment relations arrangements as applied to the rest of the Australian work force,

which Deakin dealt with in his winding up of the debate.

I presume the commissioner does not already have access to it, but what would make interesting reading is the advice tendered by the Public Service Committee to the minister in relation to this bill. If I may say so, it would be extremely interesting to see the advice tendered by secretaries of departments to the minister or to the government in relation to this legislation, particularly the advice of continuing secretaries—I think there are some. That is where you will find the answer to these questions.

Senator FAULKNER—We tiptoed around that a little yesterday in an interchange between myself and Dr Shergold. It is difficult for public servants obviously to provide that sort of advice to committees of the parliament.

But one thing that has become public since is an article in this morning's *Sydney Morning Herald*. I read to Mr Evans the first paragraph of an article which is headed 'PM's man wants to slash red tape'. Mr Evans properly indicated, of course, he had not seen a transcript of the speech; neither have I. I am just taking on face value the report in the *Sydney Morning Herald*, the first paragraph of which gives the spirit of a contribution that Mr Moore-Wilton has made. It reads:

> The Prime Minister's top bureaucrat, Mr Max Moore-Wilton, yesterday questioned the right of Parliament to scrutinise Government actions, criticising the existing system of accountability requirements as ineffective and an impediment to efficiency.

This is the titular head of the Australian Public Service, the Secretary to the Department of the Prime Minister and Cabinet. I do not know if you have had an opportunity to look at the article and what is directly attributed to Mr Moore-Wilton, but I would be interested if you had any views you might care to express to the committee on that article?

Sir Lenox Hewitt—Mr Chairman, I refrained at the outset—when I was asked in what capacity I appeared and I answered the question—from qualifying myself to express views to the committee other than saying that I had had something more than 40 years service here. But this, in fact, was one of the offices that I have held in the past. I had not seen the article but I have had greater opportunity than Mr Evans to read it and consider it.

The first thought that came to me was that I know without a shadow of doubt what the reaction of Sir Robert Menzies would have been if the head of the department when he was Prime Minister had been reported in these terms. I can only hope that the present Prime Minister, whom I know has the highest regard for the late Sir Robert, will see it in a similar light. So much I have said has taken my breath away in this matter, but this takes the cake.

I have not seen any submission to this committee—and I presume all submissions

have now been circulated—from Mr Moore-Wilton. I understand he is giving his views to you through this public statement, through this media. Just setting aside matters of common courtesy, it said that he questioned the right of parliament to scrutinise government actions criticising or saying that parliamentary scrutiny was an impediment to efficiency.

Either he has been misreported or he is out of his mind. Mr Chairman, you warned me of contempt of parliament if I misled or gave you untruths. I am only a humble layman, but I would have thought this is running very close to the wind of contempt of your committee, if not of parliament. I would have thought that Mr Speaker and Mr President would have something to say. It is not only the first paragraph that it seems to me to be in that—

Senator FAULKNER—I used the first paragraph to give the tenor of the article without reading a lot. Please go on.

Sir Lenox Hewitt—He seems to turn the knife quite without mistake. He dismissed criticism about the new bill and said:

> Some of the people expressing those concerns seem to me to have had little or no practical experience in managing resources, or where they have managed resources, they've taken little interest in managing them efficiently—

and then he goes on to say—

> and we need look little further than a large building on the hill . . .

That must be Mr Fraser's fantasy. That must be this place. He is talking about you people.

Mr Chairman, I say only one more thing. If he will identify me with the bottom of this first column, I will be glad to take it further. The article states:

> He rejected concerns that the new Public Service Bill . . . would reduce public servants' ability to give frank and fearless advice to their political masters by taking away their job security.
>
> "There are a number of people who have confused frank and fearless with just being a bloody nuisance," Mr Moore-Wilton said.

If he is calling me a bloody nuisance or the Clerk of the Senate a bloody nuisance—I think there are one or two others: Ives and Volker delicately make some allusion to this—the place to express these views is to you, before this committee. I am sorry that this is such a long-winded answer to your question.

Senator FAULKNER—Sir Lenox, I heard what you said about what you thought Sir Robert Menzies might do. Would you share with us what your view would be?

Sir Lenox Hewitt—He would first establish the facts, of course. Maybe this is a newspaper fantasy, in which case Mr Moore-Wilton will have his remedy available to him. If it were established as being correct, I am sure that Sir Robert would first require apologies to the parliament. I would think he would have invited Mr Moore-Wilton to take his talents elsewhere.

CHAIR—He would not have had the power to sack him.

Sir Lenox Hewitt—There are more ways of skinning a cat than hanging it. I would be very happy if the committee wanted, in the future, to go through the way in which problems of this kind have been disposed of.

I can remember one very distinguished public servant, a former secretary to the war cabinet. I was present when he cut his throat in evidence before this committee. He was consigned to the dungeons of Victoria barracks to write a history that has never been published. Dr Burton removed himself. I have been dismissed by a Prime Minister. You can be abused, you can be exiled and you can be sent to coventry, but the only thing they could not do to you—and still for those, as long as the act remains—would be to throw you in the gutter.

Senator FAULKNER—You have heard me question a number of witnesses about the changes to the setting of departmental secretaries' salaries; in other words, this being a matter for the Prime Minister as opposed to the Remuneration Tribunal. You would be aware of the issue I canvassed in relation to the transitional provisions bill after Dr Shergold indicated that he believed the Prime Minister would consult with the Remuneration Tribunal. I think that is at the point when he told me, 'It is a bit too hard. Go and ask the Department of the Prime Minister and Cabinet,' which we will try to do at some stage.

I am more interested in the general principles, Sir Lenox. Do you believe, in the case of departmental secretaries, that the Prime Minister should set the salary level in the case of the Public Service Commissioner—that being the minister responsible for Public Service matters—and in the case of agency heads, the relevant agency minister? Is that the case, or do you believe that, in the interests of an apolitical and an independent public service, it is better to have a body such as the Remuneration Tribunal making those decisions?

Sir Lenox Hewitt—I am quite sure it is the much better course. I do not for a moment endorse the lack of imagination in the Remuneration Tribunal. I believe that is the proper machinery. I think it is a very unfortunate proposal to place the leg of mutton in the hands of the individual minister.

Senator FAULKNER—Is it illogical to expect that when a public servant's employment future is in the hands of a departmental secretary he or she is in a position to

be able to provide frank and fearless advice?

Sir Lenox Hewitt—Of course he can't. He will duck, he will weave, he will go sick and he will avoid. He is faced with this stark choice. The stark choice, as this wretched former editor put, is, 'A massive dollop of brownnosing never goes amiss; better to be a brownnoser in the service than a non-brownnoser working out how on earth you are going to spend the rest of your life with your family.'

Senator FAULKNER—Could you give the committee any examples from your own experience in the Australian Public Service which might illustrate the risks of moving to the model that is proposed in this bill?

Sir Lenox Hewitt—Yes, I would be glad to do that. I spent a number of years as a Treasury official. I was accused by the press—I have absolutely no personal recollection of this at all—at one time, having dubbed me Dr No, of questioning the then Prime Minister's expenses, Robert Menzies' expenses. As I say, I have no recollection of that whatsoever.

The archives will show a matter that I do recall—that is, the proposal that came from the Prime Minister of the day, Sir Robert, to the Treasurer of the day at the behest of officers of the Prime Minister's department to rehabilitate a property in Sydney called Kirribilli House. The rationale for it was that the Australian government should have a guesthouse for visiting dignitaries coming to Australia as guests of the Commonwealth—guests of the government. This fell to my lot and my officers in the Treasury to examine and to report on it to the Treasurer. We felt that it was less than wholly justified and supported. I speak now from memory, but the archives will show all this.

The frequency and number of distinguished guests was not such that really made the cost of providing for them at this mansion compare with the then Australia Hotel or other hostelries in Sydney. There were some words in the proposal to Sir Arthur Fadden, the Treasurer, that in justification for the expenditure and in recognition of the then infrequent distinguished guests, at other times and on occasions of visits to Sydney by the Prime Minister, he could occupy the premises and thereby there would be no payment of the daily rate of travelling allowance. It still really did not make economic sense. I remember that Sir Arthur stood his ground—I think, from memory, for about 18 months—before he finally had to capitulate.

I always had the impression that I had not endeared myself by the views I had given in draft letters to the Prime Minister which I had composed for the Treasurer's signature. I certainly did not believe that it gained me any favours. I certainly believe that I would have been disposed of under the terms of this proposed legislation.

I was disposed of by a subsequent Prime Minister. I was disposed of by yet another later. I saw two other distinguished Australian public servants disposed of, one a

head of Foreign Affairs, whose name was Plimsoll, and Roland Wilson. There were three of us. I was in distinguished company. Roland Wilson was able to set his own terms and timing of disposal and conditions. Plimsoll was exiled to India. I was offered a series of overseas appointments, which I did not wish to take up. One promise was maintained and the other was dishonoured, but the subsequent Prime Minister said that it gave him great personal delight to honour the dishonoured promise of his predecessor in office.

I could go on, Mr Chairman. It is not a very pleasant affair. One can be greatly humiliated. There was never any dirt money in the secretary's pay. Never any hard lying allowance for this kind of thing. But you could not be put into the gutter with a mortgage around your neck and four children at school or university. Today, if this bill becomes law, that is what could happen to the secretaries of the departments and that is what the secretaries could do to the man who made their life uncomfortable by giving frank, fearless and honest advice.

Senator FAULKNER—You have heard the discussion and questioning about the subordinate legislation which the committee is yet to have provided to it. As you know, the new Public Service Bill is much simplified, but there is a transitional provisions bill which you have referred to, a parliamentary services bill, which was only circulated last night to a couple of Senate and House of Representatives committee members, and substantial subordinate legislation which the Public Service Commissioner has indicated he will be providing to the committee before it concludes its deliberations.

Do you have any view about whether we have, under the guise of simplification of what would be the new act, so much that otherwise was subject to the provisions of the old Public Service Act in subordinate legislation giving the house of parliament, obviously, the chance not to amend but just to disallow, which we know is a blunt instrument? Do you have any views on that situation? The committee is due to investigate further when we receive draft regulations and we will need to report on that.

Sir Lenox Hewitt—I do, Mr Chairman. I think it quite improper that a summary timetable has been imposed upon this committee to consider this draft legislation and grossly improper that much that is germane to it, in fact absolutely basic to it, is sight unseen. I do not think you should have been put in a position of commencing this inquiry until all of the relevant legislation was in front of you—the bill, the transitional bill, the regulations, the directions. You do not have in front of you at all what it is. If you are called on to report within this very tight timetable, I warrant that you will not have all the subordinate material before that report is prepared. You certainly will not be able to have time for further hearings.

I can only say that in my experience permanent heads of departments would have fought tooth and nail to prevent this half-baked proposal being put in front of you until everything was ready to go. There is so much unanswered. You drew attention to something this morning. If all this new threat of instant dismissal is good for secretaries

and is good for SES officers, why this clause 47? Why this special consideration for the Public Service Commissioner? If it is a good thing that a secretary to a department is subject to instant dismissal, why doesn't the Public Service Commissioner believe in it for himself?

CHAIR—The first change of government in my adult life was in 1972 after 23 years of government of one persuasion. Do you agree that there was a massive mistrust because of that long period of government, a massive mistrust built up in the opposition towards the Australian Public Service?

Sir Lenox Hewitt—Yes, I do—very much. I was there. I lived through it, and I saw the injustice that was wreaked on Kevin Murphy and Gus Paul. But they were not thrown into the gutter. I think the mistrust was a mistake, but it was understandable after 23 years of a government. May I go on?

CHAIR—Certainly.

Sir Lenox Hewitt—There was much more vicious mistrust in 1972, which I also lived through. It had been a long time—23 years. It was mayhem. But, again, no person could be thrown into the gutter. There were faults on both sides in 1972. I and perhaps two others had previously worked to a Labor government minister. I repeat: no-one in 1972—no-one in 1952—could be or was thrown into the gutter.

There was a long gap in 1972 in placing people. I took it upon myself to speak to the Prime Minister and to say that it was not doing him or his government any good that there were individuals sitting around being paid and being left. I offered some suggestions of appointments and where their services could be utilised, and positions were offered and accepted. Since then there have been further times and episodes of gross distrust, leading today to the proposal in this bill that all appointments should be at pleasure.

With long periods of one government there can be distrust on both sides. I spend a lot of time overseas, and it has been interesting to me, in study and as an observer, to see exactly the same thing—distrust—happen in the United Kingdom.

CHAIR—Do you think the appointments of secretaries, departmental heads, predominantly should come from within the service or outside of the service?

Sir Lenox Hewitt—I have a totally open mind on the subject. I have lived through and seen appointments in the past, beginning with the appointee landing in a helicopter in the Snowy Mountains—Commander Jackson, as he was then. Mr Casey was the minister who appointed him with high hopes and grand hopes. The appointee was out of his milieu and did not last. I have seen a similar appointee come into the Department of Education. I cannot immediately think of any grand success from outside, and I do not think this report this morning is an advertisement for appointments of that kind.

I have always had a very relaxed view about it. I think the very nature of the responsibilities and the duties of the secretary to a department are such that he needs to have experience. I know there is a point of view that, if you have run a chewing gum factory, if you have run a slaughterhouse or if you have received major money selling sausages or something, you will do a better job as head of a department than a public servant who knows something of the business.

In fact, if you want a good permanent secretary, you are most likely to find him in the ranks of the existing service. If I may say so, if you were to care to take chapter and verse of appointments in relatively recent times in the services of Queensland, New South Wales and Victoria, you would find ample support for what I have said.

CHAIR—Thank you very much, Sir Lenox. It was very interesting meeting with you. I should say, in defence of Mr Max Moore-Wilton, that he spent his formative days in the Department of Trade under Sir Alan Westerman.

Sir Lenox Hewitt—Somebody the other day told me something that I had quite forgotten—that at one stage I was responsible for his provisional promotion into the Prime Minister's department.

CHAIR—No more questions, thank you.

Sir Lenox Hewitt—I have not followed his course of career through the Wheat Board and the state department of road transport. It is something I have thought about doing.

Senator FAULKNER—He had multiple careers all at the same time. I assure you, it is hard to keep a handle on it.

Sir Lenox Hewitt—May I read one more gem from the *Hansard* of 1901?

CHAIR—Certainly. Why not.

Sir Lenox Hewitt—This was Sir William Lyne in his second reading speech on the Commonwealth Public Service Bill 1901:

But when we have our own Federal capital, as I hope we shall have, the central place for the permanent head of the department will be that capital. He will reside there.

Mr Chairman, I think today we pay them not to reside in Canberra.

CHAIR—That could not have been a core promise. Thank you.

[12.16 p.m.]

NEAVE, Professor Marcia, President, Administrative Review Council, c/- PO Box 3222, Canberra, Australian Capital Territory 2601

CHAIR—Welcome, Professor Neave. This is the first session of the JCPA to be conducted by electronic communication. As we cannot adhere to our normal procedure of administering an oath, I must remind you that the hearings today are legal proceedings of the parliament and warrant the same respect as the proceedings of the House itself.

The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. The evidence given today will be recorded by *Hansard* and will attract parliamentary privilege. I now invite you to make an opening statement about your concerns about the Public Service Bill 1997 and then we will proceed to questions.

Prof. Neave—Thank you. This is the first time I have used this technology too, so I am a little unfamiliar with it. I have not prepared an opening statement, but I can certainly take the committee through the propositions that were contained in our submission, and there were several of those. The first issue to which I would like to refer relates to the provisions for external review, which are contained in clause 33 of the bill. The bill provides in clause 33 that:

An APS employee is entitled to review . . . of any APS action that relates to his or her APS employment.

In our submission to the committee, we referred to that clause and we referred to the need to ensure that review would be available if there were a breach of clause 17 of the bill, which is the clause relating to patronage and favouritism, or if there were a breach of clause 15(3), which is the clause which provides certain guarantees of procedural fairness in a situation where consideration is being given to applying sanctions against an APS employee who has breached the code of conduct. So we felt that, in the general provision about the APS action that relates to his or her employment, it would be desirable if a specific link were made to those clauses that I have referred to; that is, clause 17 and clause 15(3).

The second issue that we raised also related to clause 33. In that clause, there is provision for exclusions for the right to review to be contained in the regulations under the act. I think it is fair to say that it is rather difficult for the council to form a view on the adequacy of the right of review provided by the Public Service Bill in the absence of seeing those regulations. In our submission, we expressed the view that it might be desirable to have a clearer statement of the broad categories of exclusion than were contained in the explanatory memorandum.

We also referred to one specific problem. In the second report there was reference to the possibility of excluding review if an employee could not make a prima facie case. I understand that the purpose of that provision is to prevent people from seeking review in a

situation where, basically, there is no ground for their claim. I do not think we would have any difficulties with the proposition that the regulation could prescribe an exception along the lines that if the application for review were frivolous or vexatious then the Public Service Commissioner should not proceed to hear it or, indeed, the person should not have any entitlement to review. But we were a little concerned that the requirement that the employee establish a prima facie case placed too high a barrier to the APS employee seeking review of an action relating to their employment.

Let me turn now to the provisions relating to whistleblowers. There are provisions in the bill relating to the protection of whistleblowers, which we have referred to in our submission. We were again concerned that you could have a situation where there was a certified agreement which provided a procedure for review of an employment decision and thereby excluded the Public Service Commissioner's involvement in the review process. We felt that, in a situation where the concern was a concern that a whistleblower was experiencing some action because they had been a whistleblower, the commissioner should have a power to protect the whistleblower in those circumstances. We felt that the provision which would possibly send the issue off to the Workplace Relations Act would not necessarily adequately deal with that situation.

The next issue that we raised in our letter related to the reduction of the relevance of the AD(JR) Act. You will recall that judicial review of administrative decisions is currently available where there is a decision of an administrative character made under an enactment. That currently means that that procedure is available to public servants in the context of employment decisions where, for example, they have not been accorded natural justice or where irrelevant considerations have been taken into account and so on.

It is clear in the report that led to this bill that the scope for making an application under that legislation will be confined. We thus thought that it was important that the steps that the Public Service Commissioner could take in a situation where the Public Service Commissioner reviewed the decision and concluded that the decision was unjustified, but was unable to resolve the matter, should be strengthened to some extent.

I think there is a suggestion in the report that led to the legislation that if a matter could not be satisfactorily resolved, that is resolved to the satisfaction of the Public Service Commissioner, there should be a report to the parliament. The council took the view that there should be clear provision to that effect in the bill. That provision does not exist at the moment. There is provision for the Public Service Commissioner to make an annual report, but there is not a provision in the bill of the kind that is found in section 17 of the Ombudsman Act. That proposes an escalating set of procedures that the Ombudsman could go through in a situation where a complaint was not satisfactorily resolved. Under the Ombudsman Act the process is that the Ombudsman attempts to resolve the matter with the department, can then go to the Prime Minister and can then report to parliament if the matter is not satisfactorily resolved.

There is no equivalent provision in this bill. So if the Public Service Commissioner had an inquiry, reviewed a decision and concluded that that decision was unjustified then the Public Service Commissioner would be confined to reporting that matter in the Public Service Commissioner's annual report to parliament—he or she could not make a special report to parliament on that matter. We thought it was particularly important to deal with that provision satisfactorily in light of the removal of the possibility of applying under the Administrative Decisions (Judicial Review) Act.

Finally, we made some reference in our paper to some problems that arise in the context of secrecy. These come out of our report on freedom of information, where we pointed out that penalties could apply to a public servant currently where a public servant released information which was able to be released under the Freedom of Information Act but where there had not been a formal request for the release of that information. If the information is released and there has been a formal request under the FOI Act, the release of that information is protected. But, assuming that there has not been a formal request under the FOI Act, that protection does not exist.

We expressed the view that there needed to be some revision of the relationship between the Crimes Act provisions relating to secrecy, the FOI Act and so on to ensure that the spirit of the FOI Act was able to be carried out. We think that that is an issue that could be addressed in light of this legislation. It would be an opportune moment to deal with that secrecy provision. I think that view is strengthened a little by the reference in the code of conduct in clause 13(6) requiring an APS employee to maintain appropriate confidentiality. So that raises issues about secrecy, about FOI and so on. I think that the relationship between those various pieces of legislation should be addressed along the lines that we have proposed in our FOI report. They are the main issues that we raised.

Mr GRIFFIN—How has the question of merit been handled under the bill? I believe you have some concerns on that issue. A number of witnesses who have appeared before the committee have talked about the need in their view to define 'merit' in the legislation and there has been some discussion about what the basis of that definition should be. Would you like to make some comments on that issue?

Prof. Neave—I do not know that it is a matter that the council has considered. As you would know, the council's primary concern is with issues relating to administrative review, so we did not focus particularly on the issue of merit. As a personal comment, I think it might actually be rather difficult to define precisely what is meant by merit in any meaningful way, but that is not a view that has been put to council or that council has considered.

CHAIR—A number of concerns that you expressed in your opening statement may well be in the subordinate legislation, which we have not seen. Nobody has seen it—not witnesses or anybody who has made a submission. The Public Service Commissioner has promised that we will see it within a fortnight before we report. Do you have any

reservations about what appears in the subordinate legislation and what does not appear in the principal bill?

Prof. Neave—Yes, we made a comment on that in the submission—that it would be desirable at least for the broad boundaries of the exemptions from review in clause 33 to be set out in the legislation. I think we would make exactly the same point as you have—that is, it is difficult to comment on the bill in the absence of knowing what is actually going to be in the regulations.

Mr GRIFFIN—On the issue of whistleblowers, could you expand a bit on the particular concerns you had and which you mentioned in your opening statement?

Prof. Neave—If you do not mind, I will consult my notes on that to remind myself and to take you through it. The explanatory memorandum for the bill suggests that the commissioner is going to issue directions outlining procedures for departments to take when a person has been a whistleblower and when a report is received. We are concerned not so much about that issue, rather about the issue of safeguarding whistleblowers and ensuring they are not victimised. Clause 16 does contain in it the provision that:

A person performing functions in or for an Agency must not victimise, or discriminate against, an APS employee because the APS employee—

is a whistleblower. Let us assume this scenario. Let us assume I am a whistleblower, and there is a breach of that clause and I am dealt with in a way that I regard as attributable to the fact that I was a whistleblower. I may then want to seek external review of a decision—say, a decision to transfer me or whatever—and the external review provisions, which are really the key concern that we have, contained in clause 33 provide a number of ways in which a decision can be reviewed. It can be reviewed by the Public Service Commissioner, but that review may not occur if, for example, there is a certified agreement or if the matter goes off and is dealt with under the Workplace Relations Act.

We were concerned that the powers of the commissioner should be able to cover those whistleblowing situations—that those situations should not necessarily be dealt with by the alternative procedures—because we regarded this issue as an issue which is relevant to the integrity of the Public Service. Whilst it might be appropriate for normal employment issues to be dealt with by those alternative procedures, we thought there was an additional public interest element in the problem of whistleblowers and the possible victimisation of whistleblowers to justify that matter being dealt with by the Public Service Commissioner. That is the basis of the concern that we have.

Mr GRIFFIN—A couple of times witnesses have raised the question of whether the whistleblower clause should really go further than the APS employees—possibly taking into account contractors, et cetera. Have you got a comment on that issue?

Prof. Neave—Yes, we raised that and we said there needed to be some consideration of that, at least in the context of non-department employees and possibly in the context of contractors, although we have not formed a view of that. The council actually has a project at the moment on contracting out when some of those issues will be examined, but I would not at this stage be in a position to make comments about statutory agencies and so on.

Senator GIBSON—With regard to reporting powers of the commissioner—particularly to parliament—I presume we are really talking about the commissioner's inquiry powers in clause 43 of the bill. That talks about the inquiries and clause 43(2) basically says which provisions of the Auditor-General Act will apply. Is that the part you are particularly concerned about—the reporting of inquiries to the parliament?

Prof. Neave—More the reporting of a situation where the Public Service Commissioner has been unable to satisfactorily resolve an employment issue. I do not think it is the functions under clause 41 that we are talking about which would be picked up by 43. I think we are talking about review under clause 33, which contemplates that the commissioner would be able to undertake a review of certain employment matters, unless there is some other process for review set up. In other words, the commissioner can undertake a review. There may however be alternative processes established for that review. That is the situation that we would be concerned with.

You are catching me on the hop a bit but, if I have a quick look at clause 43, I am not sure the situation that we are talking about is actually covered by clause 41. I think it is covered more by, as I said, clause 33.

Senator GIBSON—Pardon my ignorance, but what actually happens under section 17 of the Ombudsman Act that you refer to?

Prof. Neave—The process is the Ombudsman attempts to resolve the matter with the department; if the matter cannot be satisfactorily resolved by the department, then the matter goes to the minister, which in this case is the Prime Minister, and then ultimately to parliament. If, for example, a department says they are not going to fix it, then in that situation the matter can be drawn to the attention of parliament. We had thought in fact that that was what was contemplated in this situation. I think in the report it was suggested that that mechanism of a report to parliament should exist, but there isn't a provision for that in the bill except for the general provision about an annual report. So it would be swallowed up, in a sense, in all of the other stuff that goes in an annual report, in all of the other material.

Senator GIBSON—Thank you for that. I understand that.

Mr GRIFFIN—Should the bill place an obligation on an APS employee to report a breach of the code of conduct or include a positive encouragement to report such a

breach?

Prof. Neave—Again, I think that is a matter that the Administrative Review Council would probably consider not within its brief, and it is not a matter that we have examined. There are a number of issues that might be raised in the context of this particular bill that the council has not considered. What we really focused on is that issue of the reviewability of decisions, the processes, by which natural justice is provided to employees and so on, because that is what our sphere of expertise is.

Mr GRIFFIN—A bit more of a general question: do you believe that the bill provides an administrative framework which will ensure that the APS is accountable to the public?

Prof. Neave—I think that, if the matters that I and the council have raised were addressed, the framework would be established, yes.

Mr GRIFFIN—Do you believe that the commissioner is an appropriate person to be responsible for review under clause 33?

Prof. Neave—It seems to me that, once the decision is made to alter the existing processes, it is appropriate to have a commissioner who can do that. The provisions for the appointment of the commissioner and the commissioner's removal from office do provide to the commissioner a high degree of independence. So one would hope that the commissioner would be able to exercise powers in such a way that the necessary accountability would be maintained and that the traditional values of the Public Service would be maintained—the values expressed in the bill.

CHAIR—There being no further questions, thank you very much, Professor Neave. Having electronic communication is a landmark occasion for us. I am sure we will use it much more in the future. It has been quite successful from our point of view. Thank you for your participation.

Prof. Neave—Thank you. It has been a landmark for me too.

Luncheon adjournment

[2.10 p.m.]

ROSE, Mr Alan Douglas, President, Australian Law Reform Commission, GPO Box 1995, Canberra City, Australian Capital Territory 2601

DEPUTY CHAIR—Welcome. I invite you to make an opening statement on your observations about the Public Service Bill 1997 before we proceed to questions.

Mr Rose—Thank you. I can keep this brief. I make the submission that the commission has put to the committee. In addition, I should say that, as the committee will judge from reading it, on the whole we support the proposals that have been put to the parliament for very substantial changes to the employment regime within the Australian Public Service and, in a way, most of those changes are quite consistent with the changes that we have made in our own employment regime over the last three years. In 1994, although employing staff under our legislation and not under the Public Service Act, we were adopting essentially all of the Public Service Act regulations and most of the major public sector awards as our employment regime.

In the last three years we have unwound that position to the point where we now have a certified agreement—if the committee does not have a copy, I can certainly leave one—which replaces in total all of that Public Service Act and Public Service employment regime heritage and it is all now encompassed in 41½ pages of A4 paper, 1½ spaced. It can now be fully understood by all members of staff and the management of the ALRC. It is a simple and direct form of contract employment where the ALRC is the employer and all staff, with the exception of four staff at the moment, are now either contract employees or casual staff of the commission. That meets far more effectively our employment needs and our corporate plan needs, and without it we would not have been able to accommodate the 30 per cent reduction in our resources that has taken place in the last 18 months.

The only reservation that we have about the Public Service Bill 1997 is that there are still echoes from the past and, to put it bluntly to the committee, they are echoes of want of confidence and trust in chief executives in the APS. That is, it is still believed that the chief executives of Public Service departments and agencies are unable to exercise, at either the level of competence or of integrity, the sorts of discretions that are exercised in the wider Australian economy, including in all states of Australia and territories. There is still, as we have identified briefly in our submission, the desire to have overarching abilities not simply of audit but of direction and residual powers with the Public Service Commissioner. We do not think they are justified and, as we have said very briefly, to the extent that investigations and audit need to be conducted—and they quite obviously are essential within any large organisation, public or private—they could best be conducted by expanding the capacities and resources of the Australian National Audit Office, as is done in a comparable way through the use of auditing in the private sector. With really that one substantial reservation, we see the draft bill as being a very substantial step forward. The

proof of the pudding is in the eating.

We have a very effective and simple piece of legislation. The only thing, as I say, which we would be looking to see happen in addition to the removal of that unnecessary oversight is the negotiation of an agreement at least as simple as our own so that transparency and simplicity will do the majority task of ensuring that those values which are so important within a public sector organisation are maintained.

If I can make myself very clear, the easiest way to keep people up to the mark is to have a very simple mark to be kept up to. Everybody should be able to judge from day to day what performance is. Having that performance tested publicly—whether it is before a committee like this or some other avenue in the parliament—is the best and most effective and, thankfully, also the cheapest way of ensuring that those values of integrity, honesty, efficiency and so forth are not only practised but seen to be practised from day to day within the Australian public sector.

My experience over 30 years is that most of the failures within the Australian Public Service—including, at times, quite considerable amounts of inefficiency—have been caused by ambiguity and complexity. If by comparison with those three documents one were to line up the current public sector law and management directions, without too much of an exaggeration, they would almost stretch from me to Sir Lenox Hewitt. They are understood by almost no-one. They are practised by very few. They provide abundant excuse for lack of performance. That is all I have to say, Mr Deputy Chairman.

DEPUTY CHAIR—A number of witnesses who have appeared before the committee have said that they have difficulty making firm judgments about large aspects of the bill on the basis that so much of the detail is to be included in directions from the commissioner and other subordinate legislation. You do not seem to have had that sort of problem with coming to a conclusion about the operation of the bill.

Mr Rose—No—with the one caveat that it is kept simple and direct—I do not. The essential conceptual and philosophic underpinnings are in the legislation and, providing you have the relevant amount of trust and confidence in those employers under the provisions of the legislation, you will have a system that works effectively.

DEPUTY CHAIR—You mentioned the private sector comparison. What about the view, though, that if you are talking about a chief executive of a private sector company they normally have a board of directors that they are responsible to on a relatively regular basis. Do you see that as being a different situation from the position of an agency head?

Mr Rose—No, I have been an agency head and my board of directors, if I can use that analogy, were the ministers of the cabinet and government of the day. Again, in my experience, they were fairly testing, often difficult, but never less than a challenging board of directors.

We do live in a democracy. We do practise democratic principles and, whether one may like the particular crew at the time or not, they are the national board of directors. That is the group to whom I, admittedly a little bit more arms-length now, certainly as a secretary to a federal department worked. It was their measure that I had to meet—no-one else's. They were responsible to the people of Australia as to whether or not their policy and their performance were up to speed.

Senator GIBSON—Mr Rose, the committee has had evidence from others suggesting that, with regard to the appointment or termination of a secretary or head of agency, there is not enough permanency in the bill. Do you share that concern?

Mr Rose—Not at all, no. Probably because, if I could explain, I think too much has been made out of permanency and out of the notion of public sector employment being a career or a vocation. The key element of a secretary's role is the relationship that he/she can maintain with the minister and the government of the day. It is a mutual respect that has to be maintained. To the extent that it is not, there is only one thing that has to happen, and that is that the secretary of the day gives way. So I do not think it is a question of permanency.

At the expense of repeating myself, the government of the day on average, about every two years and nine months, runs a very particular test, as you would be well aware. That is the democratic process. Regardless of the fact that formally we have a monarchy as the head of state, we do not live in a country which has an establishment which has some separate test of competence, integrity or whatever. For the purposes of proper transaction of government business, secretaries are very much expendable in the terms that, as I say, they maintain the confidence of the government of the day or they go. You accept appointment on that basis.

Senator GIBSON—In order to keep it open, giving frank and fearless advice, clause 51 in the bill says:

(1) The Prime Minister may appoint a person to be the Secretary of a Department for a period of up to 5 years specified in the instrument of appointment.

One possibility would be to put a minimum in there that the appointment has to be for a minimum of, say, three years or something. So if a person is dismissed—as is normal in the commercial world—and there is a contract for a certain period, they basically get paid out for the rest of that period if there is not a satisfactory arrangement between them and the board or whoever is employing them.

Mr Rose—Again I would argue against any minimum period. There are provisions at the moment, as the committee would know, with respect to 'paying out' part or whatever of the term. We have similar principles in our certified agreement with respect to staff. They are very different from the principles that have applied in the APS to date; that

is, the redundancy principles pay for length of service rather than what remains. We have obviously turned it on its head. Secretaries do not get paid out, and should not be paid out in the future, for the length of service.

But, when one comes to the fundamental position, frank and fearless advice is rhetoric. Realistic, practical, workable and politically feasible advice is what successful secretaries have always delivered to their ministers and to governments. Their capacity to do that is the only reason for the maintenance of their appointment. If they can no longer do it, they should go. You can do that in a number of ways: you either recognise it personally and resign or you do not and others have to tell you—and then you go.

It has never been the case that simply because it was difficult to remove someone that was some guarantee that they gave frank and fearless, competent—and so forth—advice. This is very much a competitive position. Politics is very much a competitive game, as is advising on public policy. If you fail to be competitive—if I can put it in that language—then again your time is up. You only hold your position on the A team while you are a winner in the A team, and the judgment—there can be no other judgment—is the judgment of the government of the day that is employing that secretary. Whatever the formal process, that is the reality.

DEPUTY CHAIR—What is your practical method of measuring that when we talk about frank and fearless advice as a terminology? For example, if you are the minister and I am the permanent head and the circumstances are that I give you advice which you do not agree with, we can say that that is frank and fearless advice or, alternatively, it is advice that you do not like. If I give you advice which I either agree with or it is what you want to hear, then you are going to consider it to be good advice. The question is when a judgment is made on that. It may take years to discover whether the proper advice has not been given. If on the tests we said that on average it occurs every two years and nine months, it may well be that the question is no longer an issue for that particular minister.

Mr Rose—True. 'I told you so' is often a great hindsight judgmental tool. But an adviser as a good advocate carries a couple of responsibilities. One is not only to be right but also, if I can put it very simply, to sell the fact that he or she is right. It is selling it to that group of ministers that is important. Rarely is it a matter of one on one—it may be in certain specific decision contexts—but, in most cases, one is dealing with a government. Usually two or three ministers, if not the whole cabinet, are involved if we are talking about something of real moment. So that judgment and the ability to sell that judgment are being tested—not against one idiosyncratic individual who may not exactly relate to the secretary in terms of personal chemistry, but against a broader group. The inability over a period to sell that advice as being effective is one of the tests that I will leave with you.

Second, in the terms of management, it is pretty clear over a period—the period is very short; six to 12 months are the sorts of periods in a three-year parliament that we are

talking about—whether that secretary is galvanising a team of people to deliver a particular result, whether it is a management result or a policy result. These jobs are short-term pressure jobs. They are not, in the more leisurely sense of the 1950s, a job which one grows into after a period of years. You either fire on the day or you go—that is the second test.

DEPUTY CHAIR—I question that, though. In a lot of public sector areas, you are in a situation where your method of appraisal, of how well you are going, is sometimes difficult to establish and, having established what it is, may be subject to quite a deal of variation over a period. To give you an example: let us say that you are looking at DEETYA and that the ultimate judgment is performance levels within the department and the unemployment level. There is always a reason why the unemployment level is going up or down. There is also the situation that many other factors come into play around the question of what you achieve. How quickly do you make a judgment as to whether something is working under those circumstances?

Mr Rose—Again, the judgment is being made by two broad groups: the immediate government that you are working for and the community at large. The communications systems these days are extremely effective. You will have impressed or not impressed the group of ministers, as I say, within six months—let us make it 12 months to be generous. The various interest and client groups which have an influence within a portfolio like DEETYA are very vocal. They have very sophisticated communication processes. Again, both the secretary and ministers will know within six to 12 months whether that secretary is performing in the eyes of those particular groups. That is a rough judgment but that is the realistic judgment. It is not against some third objective test of whether in 10 years this is successful. That is what I describe as an academic test of perfection. This is a business of government which votes every three years on whether—

DEPUTY CHAIR—I would argue two things on that: first, the nature of impressing a group of people over a short term may have more to do with sales skills than the question of actual administrative ability; and, second, the judgment of groups in the community—they are actually, if you like, players within a portfolio area—can often be the judgment of that group by the government itself. So the argument can often be: 'Yes, they always complain.' The argument can also be: 'Yes, there is a problem there but it is a problem which goes beyond the question of administration; therefore, we are just going to have to ride it out and hope to get past the next election.' There is a whole bunch of other factors that come into play there.

I guess the problem I have with it is when I deal with people in the private sector—in manufacturing or in other service industries. They say, 'My job is to make widgets, and I make widgets. My whole operation is to make widgets. We made more widgets last year than we did the year before.' Those are the tests. Whereas when you looking at a government department and at implementing policy changes, which can confuse the question of what has been the performance of the department, it can then be

difficult to get those firm indicators in place in order to be able to get a judgment.

Mr Rose—In any final sense, what you are saying is correct. But there is both a selling and a management task with respect to all of those stakeholders within a portfolio that the secretary needs to be directly concerned with, remembering that in most cases the majority of the actual activities of the department—policy, administration or whatever—are being carried out by teams of other people. But it is the secretary's task under the minister to ensure that the overall policy and strategic approach of the department and portfolio are being achieved. That means dealing at that level.

It is the judgment of those peers as well as of government that is important in making an assessment of the secretary. It is not whether from a long-term, 10-year judgment the approach may have been right or wrong. That is hindsight; that is history. Secretaries are not involved in judgments on history; they are involved in achieving a particular result in a very tight, limited time frame.

Senator GIBSON—I have just one more question on the appointment of a secretary. The bill allows for the Prime Minister to appoint a secretary to a department following receipt of a report from the Public Service Commissioner. We have had suggestions put to the committee that instead of it being just the Prime Minister, it ought to be to the Governor-General in Council, following advice from the Public Service Commissioner. Do you agree with that suggestion, or does it matter?

Mr Rose—I personally do not think it does. I was just about to say that it is a bit like Bagehot's comment on the English constitution—there's ceremony and form and there's reality. The reality is that it is the Prime Minister of the day and his interaction with his colleagues and their judgment on an individual which is important. The fact that—if I can be a little flippant—the piece of paper comes from Yarralumla is really a matter of form and ceremony. But the reality of getting the job done is the confidence that that particular Prime Minister and his senior ministers have in the individual that is important.

Senator FAULKNER—Mr Rose, do you consider that our existing system of accountability is ineffective and an impediment to efficiency in the Public Service?

Mr Rose—A lot of what we have is incredibly inefficient in the sense that we have not under the Public Service Act, the Audit Act and the way the central coordinating agencies operate, clearly focused on where accountability is to be sheeted home in primary terms. If we had, we would be somewhere close to where this Public Service Bill aims to take us or under our own ALRC legislation and our certified agreement—that is, the primary objective is to identify who is accountable for what and to whom. That is putting it very simply.

We have obfuscated over the years that simple identification. We have looked to

have certain people in certain jobs with certain responsibilities and then to overlay the system with so much capacity to intervene in the way they executed their discretions and the way they carried out their responsibilities that by the time one comes to test accountability, ambiguity is the order of the day and, in colloquial terms, buck-passing is the process—that is, you cannot finally say, 'That is where responsibility lies; that is the individual who is accountable.' I see the current changes as being in a way a recognition of that failure and inefficiency of the past and a straightening out of it.

We have been at this process now since 1987 when the old Public Service Board was abolished. Unfortunately, it has taken us another decade to bite the bullet in unwinding the employment relationship so it is clear who the employers are and for what and for whom they are responsible so that one can test whether integrity, honesty, openness, merit based selection and so forth are being carried out. You have to know who it is, whose judgments and whose performance you are testing before you can make judgments.

My own judgment of the last 30 years is that the service has never been as effective as it has been in the last few years and it is only since 1987 that we have started to get a degree of clarity and a degree of direct accountability from secretaries and agency heads for these fundamental judgments and decisions that they make.

Senator FAULKNER—So you would agree with the ACTU's submission, which suggested a change to part 3 of the act, section 10, on APS values. Currently that clause in the bill, clause (e), reads:

the APS is accountable for its actions;

So you would support the ACTU and others who have argued to this committee that words should be added to that to indicate accountability to whom and how?

Mr Rose—The clarity and directness of that responsibility and accountability are what we need. There is no question about that.

Senator FAULKNER—So you would identify that as a weakness with the current bill?

Mr Rose—To the extent that there is still what we described in our submission as the ability to intervene and an overarching capacity to direct, yes, we do recognise that as a weakness.

Senator FAULKNER—Would you support the words that the ACTU have suggested to add to part 3, section 10(e), which currently reads 'the APS is accountable for its actions'? They have suggested the addition of words 'within the framework of ministerial responsibility to the government, parliament and the public'. Would that be the

sort of wording you think would be a useful addition that has been so strenuously opposed by the government, Dr Shergold and others?

Mr Rose—I have no difficulty at all with the notion. Rather than the APS, I would put it terms of individual CEOs and agency heads, whatever their titles are, being directly responsible and certainly in terms of responsibility to the government and for most of what they do directly to the parliament. That is in fact what we have said in our submission.

Senator FAULKNER—I want to draw your attention to another proposed APS value, section 10(f), which currently reads:

the APS is responsive to the Government in providing timely advice and implementing the Government's policies and programs . . .

There has been a suggestion that the words 'frank and fearless'—or Mr Ron MacLeod had another possible prescription: 'frank, honest, comprehensive and accurate'—should be added to 'timely' in that particular value. I was interested to hear your views in relation to that.

Mr Rose—I have no difficulty with those additional words. As I said, I tend to think most of that comes down to being rhetoric. It is the practice of it that is important.

Senator FAULKNER—You seem to be saying to us that we have a more simplified Public Service Bill before us and that is a good thing. I think most people would embrace that. No-one has appeared before the committee arguing for a more complex legislative framework for the Australian Public Service. But what we have, as you correctly identify, is a much shorter, I personally believe, easier to read bill. But then we have the consequential and transitional amendment bill. We also have, as you would be aware, a Parliamentary Service Bill, which has only just been drafted. I suspect you have not had the opportunity to look at that yet.

Then we have a raft of subordinate legislation in a whole range of what I think are pretty key areas. Dr Shergold correctly tells us that many of those regulations will be disallowable by a house of parliament. Do you see this as a useful approach from the Law Reform Commissioner's perspective? In other words, a lot of the determinations and detail are not contained within the primary bill but are relegated to subordinate legislation. Is this really, when it boils down, a fundamental reform?

Mr Rose—Quite obviously the content of that subordinate legislation and other instruments are important in the final judgment. In terms of style of legislation, that is a much better approach than what is unfortunately the traditional federal Australian approach of trying to put every bit of detail into the principal legislation. But there is a self-denying ordinance that needs to follow with it, and that is that the subordinate legislation and any

instruments, guidance under that principal act or subordinate legislation is kept to the absolute minimum. And here I guess this committee or the parliament as a whole has a principal role to play in preventing the regrowth of much of the thicket that I was very critical of a few minutes ago.

For our part, we would much prefer to see the overwhelming majority of rules, if I can call them that, confined to consensual documents; that is, certified agreements, workplace agreements or whatever and not legislative, not included in the act or legislation or any other legislative form, so that they are amenable periodically to very close negotiated review and, therefore, to ensure that the actual terms and conditions applying in a particular department or agency, are able to meet changing needs and the changes in the environment generally, whatever those changes are.

In other words, I guess what I am saying to the committee is that there should be a much smaller role for legislative intervention in that employment relationship than there has been in the past. To a much larger extent the outcomes for individual departments and agencies, which will be very different one from the other, should be for their management and staff to settle within the terms of the principles laid down in the major piece of legislation from time to time with the capacity—it is at least twice a year under our current processes with the Senate and its committees in particular—to scrutinise the actual performance, whether it is the human resources performance, the financial performance, the policy performance or whatever, of the department and agency concerned.

Senator FAULKNER—You accept that it is reasonable then for this committee, which is examining and reporting upon these bills, to obviously have an opportunity to examine the subsidiary instruments in draft form before passing any judgment on the bill?

Mr Rose—I think there are two separate judgments to be made. I have given you my view on the first—that is, in form, this approach to the legislation is a good approach. I do not think you need to see all of the fine detail before the parliament could consider endorsing the principles that are clearly set out in the legislation. But what it means, and what I think is good practice, is that the committees of the parliament should look very closely at the detail that is included in subordinate legislation at the time that it is proposed to be made, and to look at it against at least those tests that I have suggested to the committee for maintaining a minimum and simple set of additional prescriptions.

The character of the service in the future is very clear from that draft legislation. I know it is a self-denying ordinance, but much of what is in the current legislation, or has legislative force and effect, is far too detailed for legislative prescription and intervention by either the Governor-General in Council or the parliament. It should be properly left for the discretion of agency heads and, as I have said, for negotiation rather than legislative intervention.

Senator FAULKNER—But many of these will be disallowable instruments, so a

house of parliament will have an opportunity to accept or reject them.

Mr Rose—That is true.

Senator FAULKNER—Obviously there would not be an opportunity to amend them. This is often quite an invidious choice, as you know. I would be interested in your view on this. These are very much an integral part of this reform package, aren't they? It is plainly incomplete without them. I think that all the witnesses who have been at the table have agreed on that point.

Mr Rose—It is obviously incomplete in the sense of the logic of it, unless one is contemplating having the subordinate legislation reincorporate into the total legislative package all of the current overburden of the Public Service Act, regulations and general orders, and so forth—that is, there is a very sensible and complete conceptual and principal framework for a new Public Service in the bills.

I think that it can be quite sensibly considered and have a judgment made on it by the parliament without having all of the very fine detail of the way an individual department will operate and without having displayed in front of you all of the material that may come into the regulations which will be there for disallowance or acceptance—whatever is the case. The parliament will not be any better advanced at that stage than it currently is now in its ability to affect the super structure by amendment to the current bills, if that was its wish.

Senator FAULKNER—I want to ask you about the Legislative Instruments Bill. You would obviously be well across the detail of that. I think that it has had its third reading in the House of Representatives, and it now is on the forward legislative program of the Senate. The bill basically includes a provision to sunset all legislative instruments five years after they have commenced.

I do not know whether the Law Reform Commission has had a look at the possible impact of it on the public service bills. If you have had a look at it, I would be very interested to hear what you think this might mean—what might lapse after five years in accordance with the provisions of that bill and what might be its consequences, particularly when you have the situation where most of the conditions of service—which will be regulated, as you know, by determinations—for APS employees would lapse after five years. What sort of security does that give to APS employees?

Mr Rose—There are a couple of questions there. I was a member of the Administrative Review Council that recommended what is now the Legislative Instruments Bill, so I strongly support the policy of that, including its electronic register and so forth. On sunsetting, my answer is to hold up our certified agreement. It is the total security that the staff of the Law Reform Commission have. It is a three-year deal. All of the terms and conditions of their employment are there. They are all up for grabs. This replaced an

agreement made last year that was for only 12 months. They have successfully negotiated with us. It is a replacement for three years. It is radically different from what their terms and conditions were three years ago, in 1994.

DEPUTY CHAIR—How many staff do you have at the commission?

Mr Rose—About 30. The principles are identical. My answer to Senator Faulkner is this: this notion of security is purely relative. The idea that the terms and conditions should be included in the act simply means that the Australian Public Service would become, more quickly than it has up until now, both irrelevant and out of touch with the broad Australian employment regime.

The current act and its regulations and superannuation arrangements, and so forth, were based on a series of principles that was distilled up to and including about 1922. Well before this point, they have been totally out of touch with reality. All you are inviting by having in the new act a replication of that approach is the terms and conditions of employment in the Australian Public Service being well and truly out of touch with reality in another five or so years. Employment has fallen in the Australian Public Service for one simple reason: apart from those employed at the top, employment classifications, skill levels and costs got so far out of kilter with their private sector equivalents that they were totally uneconomic.

All you are doing by having all those terms and conditions put into the act, or into regulations that cannot be sunsetted, if that is the approach, is simply inviting the same thing to happen again. What is fundamental to an employment relationship is that, period by period, management and staff must frankly confront the market realities of the position they are in and draw the obvious conclusions in settling their terms and conditions, amongst other things. One does that by agreements rather than by legislation.

I know to a certain extent agreements certified under the industrial relations workplace legislation are legislative in form, but they are changed and changeable by the parties concerned. All I am saying to Senator Faulkner and the committee is that that is a much better process for guaranteeing security in the proper sense of that word, in the long term, than having unrealistic terms and conditions ossified in legislation resulting in gross loss of employment period by period when one triggers the threshold of unreality, which we did in the Australian Public Service over the last decade.

Senator FAULKNER—I have to say to you that your answer to my question contains a series of value judgments, some of which I consider to be absolute codswallop, but obviously you are entitled to put them to the committee and I do not want to canvass them because these are matters of opinion and I respect yours and the fact that you have provided it to the committee. I just do not agree with much of it.

I just want to ask one specific question going to your role in the Law Reform

Commission—and I do want to be clear on this. That is, would the subsidiary instruments under the Public Service Bill, or the bills that are before the committee at the moment, be regarded as legislative instruments in the terms of the government's Legislative Instruments Bill, which has had its third reading in the House? I appreciate you have presented a view in relation to those other matters. We do not have time to canvass them.

Mr Rose—They would obviously be legislative instruments subject to that fundamental review.

Senator GIBSON—In your submission, with regard to performance agreements between a head of a department and the respective minister, you say:

> 4.3 The Commission envisages that these performance agreements also with strategic plans etc. would be public documents against which each agency head would be required to report publicly on an annual basis to the Minister and, through the Minister, to the Parliament.
>
> . . . . . .
>
> The Commission would like to see each Agency annually reviewed by a parliamentary committee on its human resource and financial management performance.

Would you care to elaborate a little bit on that? It is quite clear to me. Do you think that is important?

Mr Rose—We do, yes, in the sense that, in the discussion we were having earlier on about independence, it is obviously important that the basis on which the government, the parliament and the community at large are looking to make a judgment of a particular chief executive officer is clear to the extent that you can set down in something like an agreement what that department and agency for a start is intending to achieve over a 12-month or three-year period. It is very much important to know the priorities that are being given in terms of policy administration and so forth to that chief executive officer.

Senator GIBSON—Thank you.

Resolved (on motion by Senator Gibson):

That the additional document supplied by Mr Rose be accepted as a supplementary submission.

DEPUTY CHAIR—Thanks very much, Mr Rose.

[2.58 p.m.]

VOLKER, Mr Derek, 3B Arkana Street, Yarralumla, Canberra, Australian Capital Territory 2600

DEPUTY CHAIR—Welcome, Mr Volker. In what capacity are you appearing before the committee today?

Mr Volker—I am appearing in a private capacity.

DEPUTY CHAIR—Mr Volker, I invite you to make an opening statement to the committee on your concerns about the Public Service Bill 1997 before we proceed to questions.

Mr Volker—There are a few things I want to add to my submission. Reform of the Public Service Act has been under consideration for some years. A good deal of the contents of the bill now before this committee derives from processes begun under the previous government.

It is important that there be broad agreement about the roles, functions and status of the Public Service. It is a fundamental part of the governance of Australia, and the people, the parliament and the executive cannot be well served if we do not have a public service which is confident about its roles and functions, which has non-partisan professional and competent leadership and membership and which is adequately resourced.

The Public Service has faced massive change over the last decade and a half. It has been reduced sharply in size, but its functions overall have increased and become more complex. It is subject to unprecedented scrutiny and its decisions are open to review and appeal. The fact that it has continued to do a competent job in an environment of doing more with less, waves of fashionable management initiatives and a convoluted and outmoded Public Service Act demonstrates the resilience and the strength of an institution which has been based on an ethos of a non-partisan, professional career and fair, equitable and incorrupt administration.

If the Public Service is to continue to be effective, it needs certainty about the legislative framework within which it has to operate. It is important that a new Public Service Act and the complementary legislation be passed as quickly as possible, but it is also important that the basis for the legislation be broadly supported in the parliament and that some significant issues be debated, clarified and resolved—even to the extent of amending the bill.

In my view, the bill overall is a reasonable basis for determining the composition, ethos and operations of the Public Service in the new environment of contestability and continuing change where flexibility in appointments, terms and conditions of employment

and operations of the Public Service are required. This flexibility is fundamental to the development and maintenance of a high performance Public Service in the age of information technology and of resource constraint. With some amendments, the bill should enable that flexibility to be achieved, while maintaining the values of the service and affording opportunities for scrutiny of performance through accountability mechanisms.

Having established overall support for the bill, I would like to raise some areas where I believe the parliament and this committee ought to look closely at what is proposed. The bill does not refer to the Public Service as a career service. Indeed, overall it gives the impression that the Public Service, at least in terms of top level and SES appointments, is the servant of the government of the day—not the government, but the government of the day. This is an important issue since, at least as someone who may be somewhat conservative in respect of the role of the Public Service, it is crucial that there be a career service which serves the community and which is primarily responsive to government but is not simply the instrument of the government of the day.

In that respect, I would just like to make a few comments about some things that Sir Lenox Hewitt said this morning. I might add that I think it is very desirable that people with a distinguished history of experience and reputation such as Sir Lenox should contribute to this very significant debate. It is to be hoped also that the media will afford this debate and the content of the bill the sort of attention that it deserves.

As regards tenure of secretaries, I think the simple fact is that the horse bolted some time ago—probably about 1984—and it is very difficult to put that horse back in the stable. As from that time, the permanent heads of the day were no longer permanent heads but rather departmental secretaries. If anything, the trend has been fairly consistent since then to make the tenure of departmental secretaries even less certain.

I think those of us who did take term appointments in 1994 did so with our eyes open and in the knowledge that we could continue to give frank and fearless advice. What happened at that stage was that secretaries in effect had no tenure—or very, very little tenure—and most of us took the view that we might as well have a loss of tenure allowance seeing we had no tenure. That might be a cynical approach, but I think it was a very realistic one in circumstances where there was virtually no opportunity of increasing secretaries' salaries except by some mechanism such as that. There was a strong view that, if secretaries' salaries did not increase, there would be a very great difficulty in attracting good quality people and in retaining people who were competent at that level.

I might also add that they were not really contracts that we are talking about; they were term appointments. It was very interesting that, when some of us left in something of a hurry last year, nobody could actually find a copy of the term appointments around the place. I suspect that in many respects secretaries may be better off having contracts with fairly well defined provisions relating to the circumstances in which they are to go and the arrangements which apply rather than having the very uncertain and ill-defined

arrangements that apply under the term appointments arrangements.

In my view, there was no difference in the advice that was provided under those arrangements. In fact, I could see no difference in the advice and the performance given by the very few people who remained under the old arrangements compared with that given by those who took the term appointments.

Giving frank and fearless advice has been said really to be a matter of character rather than of the form of appointment or tenure. I think there is something in that, but I must say that I am afraid that the proposed arrangements are at the stage where some secretaries must be wondering if their reward for maintaining strength of character by giving frank and fearless advice will come in the private sector or in heaven.

There is a risk, in my view, that what is proposed in the bill—where decisions on appointments and termination of appointments of secretaries will be taken by the Prime Minister rather than the Governor-General in Council—could lead to routine wholesale changes in secretaries, agency heads and SES employees whenever there is a change of government or even a change in Prime Minister. We have seen the Secretary to the Department of the Prime Minister and Cabinet depart following each of the last two changes in Prime Minister—only one of which was following an election.

We see secretaries depart in a continuing stream to the extent that, if there were to be one or two more mass departures, the thread of continuity of experience and knowledge—which is crucial to protect the community interest and, for that matter, the interest of government—will be frayed virtually beyond repair. This concern would still exist but would be lessened if the provision for reviews of APS actions in clause 33 of the bill unequivocally were to apply to SES employees.

In 4.41.5 of the explanatory memorandum, it is proposed that employment matters relating to the SES be excluded from review by the regulations. This is a mistake. It appears to be intended to cover the relatively few situations where inconsistent or inefficient SES officers are absolutely intransigent about leaving. Unfortunately, what is proposed could be used to remove any SES employee without recourse to a review. I would hope that this committee would see the sense of ensuring that SES employees can use the review mechanisms.

I do not understand the reason for, and particularly the timing of, departing from the substance of section 67 of the constitution in respect of the appointment and termination of secretaries. As far as I have been able to find, the reasoning for the change has not been made public. It may be claimed that it is a matter of form and not a matter of substance, but I believe there is a very significant symbolism attached to the present arrangements.

I can see why some people may want to move in that direction, largely related to

responsiveness to the policies and approaches of the government of the day, and that is an objective which should not be dismissed. However, the change is of such symbolic significance that it ought to be considered closely by parliament and the community. What is proposed involves a head of government taking over the longstanding role, even if it is largely a nominal one, of the head of state.

A couple of republicans have actually told me of their dilemma about what is proposed. While they see merit in removing the Queen's representative in Council from such a key area of decision making, they think it preferable to look at the issue in the context of overall arrangements under a republican constitution.

I wonder also whether the government has considered the prudence of the Prime Minister making secretary appointments and terminations. It could open a Pandora's box in respect of action under the Administrative Decisions (Judicial Review) Act. It may well be that no disappointed potential secretary or secretary whose appointment was being terminated would take action under this act or be able to afford to do so, but moving away from appointments by the Governor-General in Council opens the possibility, as I read the legislation.

A related point is that, as far as I can see, there is no exemption from the AD(JR) Act where the Prime Minister rather than the Remuneration Tribunal takes decisions about remuneration and conditions of secretaries. Indeed, section 13 of the AD(JR) Act, in my view, would apply. So there could be action taken to seek to obtain findings of fact and also to seek reasons for decision which would open all sorts of possibilities in such circumstances as where some people felt disgruntled about the actual arrangements made in respect of their terms and conditions.

I might just add by way of digressing slightly that the issue about actually taking some legal action was raised by some former secretaries last year, and they were actually talked out of that as not being in the interests of sound governance and so forth. But, with the increasing recourse to litigation in this country, one wonders how long it would be before in fact somebody did take action under the AD(JR) Act. The circumstances could involve, for example, the Prime Minister having to appear before the court, which does not seem a sensible arrangement.

The other worry about the AD(JR) Act is that in certain circumstances it could delay appointments of secretaries or changes in personnel at a very crucial time—for example, after a change of government.

I note also that some of the changes which apply and which are connected with the provisions about which I am talking—for example, the non-retention of section 92 of the present Public Service Act—do seem to require some attention. It may well be that the whole question of gazetting appointments, promotions, transfers and terminations will be covered in the regulations but, as far as I can see, in the present bills before the committee

and before the parliament there is nothing that actually requires gazettal of such decisions.

I have made in my submission some points about particular provisions in the bill and some suggestions which may be of interest. The only ones to which I want to refer now include, first, that it is not clear to me that secretaries are actually required under the bill to comply with the values. The second reading speech says they will, but the bill itself uses the words 'uphold and promote the APS Values' under the heading of 'Agency Heads must promote APS Values' rather than using words which involve complying.

Second, there could be some problems associated with the use of the word 'coercion' in clause 13(3) under 'The APS Code of Conduct' heading. As I understand the word 'coercion', it could include coercion in accordance with the law. The current wording could give rise to some problems with respect to action taken by officers of some departments and agencies to give effect to legislation—particularly, say, in Social Security and perhaps even in the Department of Employment, Education, Training and Youth Affairs, the Australian Taxation Office and so forth. One wonders how it would apply in respect of the position which officers at present or employees under the new bill would be placed in with respect to, for example, action taken in relation to the work for the dole legislation, which certainly involves coercion.

Third, clause 27(1) enabling the Public Service Commission to move an excess APS employee to another agency without anyone's consent seems to me to be completely unwise and not in the interests of an efficient Public Service. Finally, the committee may wish to look at the words 'inside information' in clause 13(10). I have suggested some words which might cover that situation.

Senator FAULKNER—Could I ask you, Mr Volker, about this issue of the salaries of agency heads, which you touched on in your contribution a moment ago. Apart from the mechanism which you talk about and the possibility that it would be subject to review in a way that perhaps had not been anticipated by government, if I could go back a step and just ask you about the principle. In other words, in your view is it a good thing that the salaries of departmental secretaries are set by the Prime Minister? Is it a good thing that the salary of the Public Service Commissioner is set by the minister responsible for Public Service matters? Is it a good thing that the salary of agency heads are set by the responsible agency minister as opposed to the situation where they would be independently set by, let us say, the Remuneration Tribunal?

Mr Volker—I think as a matter of principle, at least in my view, it is sensible and desirable that terms and conditions of appointment of the people you are talking about be set by an independent body. One can speculate about the reasons why this particular change has been included. Really, I should not speculate because I do not know what the reasons are, but it may well be to do with the move towards contracts in a meaningful sense where that would be facilitated by the proposed change. But it does not necessarily follow that it is a necessary change in order to be able to move to contracts since, even if

the remuneration and conditions of employment were fixed by the Remuneration Tribunal, that could be taken into account in whatever contracts were being negotiated or determined.

I think as a matter of practical politics there is a lot to be said for having an independent body actually setting the terms and conditions. It does, I would have thought, bring the Prime Minister into a situation where he or perhaps she in future is faced with a whole range of demands for action to be taken in respect of the terms and conditions, particularly salaries and allowances, of a whole range of people who at present have their terms and conditions determined by the Remuneration Tribunal.

You do not need to reflect too far to see the complications that would arise if, for example, it became known that particular secretaries were receiving a substantially larger amount of money than other secretaries, that that was considerably more than the amounts being received by judges, other statutory office holders, ministers, members of the parliament and so forth. That is not the sort of situation which is likely to lead to the Prime Minister being able to sleep very easily at night. But also I think we have to bear in mind that that power under the bill is able to be delegated. I am not aware of any statement which indicates that in fact the Prime Minister would not delegate that power or indeed a number of other powers that are seen, at least by some of us, as being very important in terms of what is in the bill.

Senator FAULKNER—The explanatory memo for the bill states that, as a matter of practice, the Prime Minister or minister would normally make such a determination only after consultation with the Remuneration Tribunal. What I am interested in in that situation is whether that would leave any obligation with the decision maker to take any account of whatever advice might be received by the tribunal.

Mr Volker—I think the committee would need to get legal advice on precisely the situation. But at least at first sight it would appear that the Prime Minister would not have to take account of the advice obtained in actually reaching the decision or making the determination.

Senator FAULKNER—I have asked the Public Service Commissioner on this very point how the consultation with the Remuneration Tribunal in these circumstances fits with the transitional amendment bill, which actually includes amendments to the Remuneration Tribunal Act to specifically remove from the tribunal the function of providing advice on remuneration for secretaries and the Public Service Commissioner. Is that something that you have had a look at?

Mr Volker—Yes, I did see that. I do not follow what is in the explanatory memorandum in respect of that particular provision; it does not seem to make sense to me. I am not quite sure what the question was.

Senator FAULKNER—The decision maker, the Prime Minister in the case of departmental secretaries, would normally, according to the explanatory memorandum, make such a decision only after consultation with the Remuneration Tribunal. But specifically in the transitional amendment bill there are amendments to the Remuneration Tribunal Act which remove that function of providing advice on remuneration for secretaries and the Public Service Commissioner from that act.

Mr Volker—As I read the complementary bill, it does actually take away the power of the Remuneration Tribunal to take decisions and provides for the Remuneration Tribunal to provide advice to the Prime Minister in respect of terms and conditions of employment of secretaries and of some other people. But the point is that it does not require the Prime Minister to seek that advice and it does not require the Prime Minister, having sought advice, to take account of the advice or to act in accordance with the advice.

One just wonders how the procedure would operate. Would there be an opportunity, for example, for secretaries to make representations about what salary level there ought to be to adduce information about perhaps comparisons with industry if there were to be graduated levels of remuneration? In respect of allowances, what opportunity would there be, in accordance with the bill as distinct from practice, for secretaries to bring forward information to be taken into account in taking decisions? That is another reason why it is sensible to have a mechanism which enables a process to be in place so that information can be provided, including by the people directly affected, rather than a situation which is as uncertain as it appears likely to be under the arrangements pertaining to the bill.

Senator GIBSON—Clause 33 of the bill enables APS employees to seek reviews of action relating to their employment. The previous witness, Mr Rose, suggested that perhaps, rather than using the Public Service Commissioner for that role, you ought to consider using the Auditor-General. Do you have any views about that?

Mr Volker—It is not something that I had thought about. It seems to me to be likely to provide a very great deal of work for the Auditor-General and possibly to compromise what I think most of us would see as being the basic role of the Auditor-General. As between the two, I would have thought it would be more sensible to give that role to the commissioner.

Senator FAULKNER—I am interested in asking you specifically about the prohibition on patronage and favouritism, which is section 17 of part 3 of the act. We did not have time to canvass this really with Dr Shergold. Of course, the explanatory memorandum says that, if a person is exercising powers under the bill, they will be required to do so without patronage or favouritism. The rule is wide enough to apply to a minister, but of course it does not apply to the appointment of secretaries or heads of agencies. I suppose that must come as a bit of a relief, does it, Mr Volker, or not?

Mr Volker—I have to confess that, having been a secretary for 14½ years or whatever it was, I was not aware that under the existing Public Service Act in fact the prohibition of patronage and favouritism did not apply to appointments and other decisions in relation to secretaries. So I had gone blithely through a fairly long career not knowing that in fact there was no such prohibition in respect of secretaries.

I am not sure when that was included in the Pubic Service Act and it was one of the things that, when I read the bill, I immediately thought, 'I must note that one down as being something I ought to bring to attention,' but unfortunately it is in the present act. There is not much one can say about that except to say that it is interesting, when one stands back from the whole situation, to think that the merit principle, as I read the bill, does not apply. Patronage and favouritism prohibitions do not apply. The guidelines in respect of secretaries are interesting, particularly in terms of terminations of the appointments of secretaries. I suppose that must be one of the things that is left to goodwill and good judgment on the part of ministers in particular.

However, it is a point that the constitution at present does provide that, until the parliament otherwise decides, appointments and terminations of other officers of the executive—and this clearly is intended to apply primarily to people now called secretaries—are to be made by the Governor-General in Council. The Public Service Act requires that, in making an appointment, the Governor-General in Council shall act only in accordance with a recommendation from the Prime Minister but it is interesting that, in fact, the Governor-General in Council could decide not to make an appointment. The Governor-General in Council cannot make an appointment other than in accordance with the recommendation of the Prime Minister but, strictly speaking, the Governor-General in Council could decline to make an appointment or to terminate an appointment.

DEPUTY CHAIR—The 1975 argument.

Mr Volker—Yes. It is an interesting point. Maybe I am being excessively finicky about the issue in this respect but it does seem to me that there is a very significant symbolism in terms of having appointments and terminations made by the head of state in respect of what is the role of the Public Service. That is something that I think ought to be considered, debated and the whole issue resolved and clarified. I hope that this committee might in fact give some thought to that particular issue. It is not just a matter of form. I think the symbolism is so strong that there is some substance in the actual arrangement that was set down in the constitution, particularly bearing in mind that the constitution itself says 'unless the parliament otherwise decides'. This is specifically something where the parliament has to decide. It is an instance where the parliament ought to take the issue very seriously indeed.

Senator FAULKNER—I suppose the other aspect of this section 17 is obviously not applying to departmental secretaries but what the process would be for determining breaches and then what the sanctions would be. That is absolutely unclear to me and it

may well not be relegated to subordinate legislation.

Mr Volker—Again, of course, it is something that has been there for a very considerable time. I am not aware of what case law there is in respect of patronage, the meaning of patronage and favouritism or what sorts of precedents there are around the place. I think it is something that we had seen as being part of the ethos of the Public Service, that the merit principle applied, that you did not appoint somebody because they were from the same suburb or the same social club or, in the old days, a Mason or a Catholic, as the case may be, and so forth. I do not know how, in fact, that provision was applied in former days in the Public Service when one heard all sorts of stories about appointments and promotions on that sort of basis.

It may well be something that will be clarified in determinations by the Public Service Commissioner, but I think if I were the Public Service Commissioner that is an area where I would stick to the merit principle rather than trying to define what patronage and favouritism mean.

The more important point about this is the one I made about the exclusion of SES employees, as they are termed, under the bill from access to reviews of actions under clause 33. I really do think that in terms of motivation in the service, in terms of maintaining a career public service, that is something the committee ought to look at very closely. From what I can understand, that exclusion from the clause 33 review of actions is intended to deal with those very few occasions when there is a SES officer who simply will not go or who cannot be removed, even though they are clearly incompetent or extremely inefficient. But I think it is very undesirable from the point of view of maintaining a career service and maintaining strong motivation and the opportunity of moving up the ladder in the service not to have a means of review available to be able to cope with capricious terminations of employment or terminations of employment which really are not justified on an objective basis.

Senator FAULKNER—In your original submission, you talk about the issue of those who seek appointment to the Australian Public Service. At times the issue of remuneration and conditions—the salary package, so to speak—is not the only matter that ought motivate such a person. There are other issues involved—a commitment, if you like, to policy development, an interest in making a contribution to the general welfare of the community. I suppose it goes to, in layman's terms, what we might talk about: the more old-fashioned concept of the Public Service. In the arguments that we have before us, there is this attempt to say, 'Well, the salary package of those heads of agencies ought to, in some sense, be placed on a par with salaries of their counterparts in the private sector.' Is there a real risk as we look at that issue that you really do undervalue what are the other quite unique aspects of the responsibilities of someone who is a senior public servant in this country?

Mr Volker—I think there is that possibility. I am not sure a lot of my former

colleagues would agree with what I am going to say, but I think there are some unreasonable and unreal expectations about salary levels for secretaries and for senior officers. Those of us who make the transition to the private sector can see some significant differences. It is a salutary experience to have to make money to justify your existence and survive and keep out of the gutter, as Sir Lenox mentioned this morning.

I think all of us who have joined the Public Service hoping to make a career there have done so in the expectation that we were going to be reasonably well paid, that we would have security in the old days, that we would have a reasonable superannuation arrangement. We recognised that with those very crucial things that provide security and a reasonable standard of living we were not going to get rich. In fact, I can recall, on the first or the second day I joined the Public Service, Sir Henry Bland saying to me, 'Bear in mind that as a public servant you are not going to get rich. If you are, we will probably send the police around to find out why.'

The point is that you join the Public Service hoping to have a career there for the reasons I have given but, more particularly, I think it is because of the opportunity to work in very interesting places. You can contribute to the good government of the country, where you can be at the centre of things if you move up the line, where you can have some influence within principles of accountability and due process over the way in which the community operates. I think they are very important things that should not be lost sight of when the community is trying to find ways of ensuring that we have a framework for the Public Service which is going to mean that you have a high performance Public Service that is going to be flexible in terms of appointment and so forth and that is going to be able to cope with the massive change that is around the place and the complexities of modern life. We should not underestimate that and we should not undervalue it.

Having said that it is probably unrealistic to be looking to equate secretaries' salaries and conditions with those of what some may see as equivalent positions in the private sector, I think there is no doubt that the salaries have lagged behind far too far and that some mechanism has to be found to provide some reasonable increase that is not going to set off a whole train of all sorts of problems, where members of parliament, ministers, statutory officers and judges are going to feel badly done by. In many respects, I am very glad that that is the sort of task that presumably other people, who must be much more competent and intelligent than I am, are grappling with now.

Senator FAULKNER—Do you think that people in the Public Service, including people at senior levels, are motivated by factors other than financial remuneration? If you do, do you think there is a recognition of that by government, given the nature of these sorts of reforms?

Mr Volker—I think there is no doubt that just about all of my colleagues that I could think of had those sorts of motivations. They have recognised that, in fact, there is a

great deal of merit and value in being able to contribute as a secretary or as a senior officer of the Public Service.

DEPUTY CHAIR—Unfortunately, we are running out of time. We will miss our planes, so I might call it quits there. Thank you very much. That was very interesting. If we need to get back to you about any of those issues, we will.

[3.35 p.m.]

BOLTON, Mr Michael William, Secretary, Joint House Department, Parliament House, Canberra, Australian Capital Territory 2600

DEPUTY CHAIR—I now welcome Mr Mike Bolton from the Joint House Department to this session of today's hearings. Mr Bolton, as I think you are aware, we are running out of time. What I would like to do is ask you to make a statement on the record. We will not ask questions today. Obviously, as you are based in the building, it is going to be easy for us to get you to a further hearing if there is a need to get back to you with some questions. If we go on that basis, I would appreciate it.

Mr Bolton—The committee would be aware that I tendered a joint submission with Mr John Templeton, a parliamentary departmental head colleague. Unfortunately, for minor medical reasons, Mr Templeton is unable to be present at this hearing.

Specifically, our submission dealt with the question of mobility and our belief, which is supported by the other parliamentary departmental heads, that the quality of the parliamentary service will suffer if mobility between the two services is not maintained.

In the first instance, the removal of the parliamentary service from coverage under the Public Service Act has been forced upon us. Without consultation the parliamentary departments were cut off. The Prime Minister wrote to the parliamentary Presiding Officers on 13 May 1997 and said:

> . . . it would be more appropriate for the parliamentary departments to be covered by their own legislation in the future because this would recognise the unique position of the staff of the departments providing services to the Parliament and the independence of the Presiding Officers.

Under the existing act, in the way it is currently framed, the parliamentary administration is independent. All the powers of the Public Service Commissioner reside in the Presiding Officers, and subordinate legislation under the Public Service Act is only picked up where appropriate. The great benefit of remaining under the Public Service Act was that, because both executive and parliamentary departmental staff were covered by the one act, mobility between the two services was assured. As Mr Templeton and I have outlined in our submission to the committee of 30 July 1997, the Public Service Bill as it is currently drafted has the potential to penalise those who seek a promotion or transfer between the Australian Public Service and the parliamentary service.

On another aspect, I believe there is a close relationship and commonality of interest between the two services which should be preserved. Both the Australian Public Service and the parliament serve the entire Australian public. The issues raised in both areas on a great many occasions require consideration or action by both parties. The development of government policy is brought to the parliament for consideration by way

of legislation. I believe both the APS and the parliamentary service can both better serve their respective constituents and the public if the existing mobility rights and interchangeability of staff are preserved.

I have taken out some information just in relation to mobility between the Australian Public Service and the Joint House Department in the period from 1992 to 1997. I will be so bold as to suggest that it is a fact that in this period the APS is in the parliament's debt as far as mobility goes. In that period in terms of promotions, seven persons were promoted into the Joint House Department from the APS, while the APS promoted to itself 35 persons from the department.

In terms of transfers at level in that same period, 27 persons were transferred from the APS into the Joint House Department, while 48 were accepted on transfer by the APS. Joint House Department is a small department with a large number of industrial staff who are not counted in those statistics that I have given you. This illustrates that the APS appreciates the qualities and abilities of parliamentary staff and that mobility is working in favour of the APS.

In conclusion, as Mr Templeton and I have explained in greater depth in our joint submission, we believe it is in the best interests of both the APS and the parliamentary service to maintain mobility. In our submission we recommended that a similar mobility provision to that drafted in the Parliamentary Service Bill be incorporated into the Public Service Bill. As the Clerk of the Senate advised this morning, expert advice, which we have received subsequent to the provision of our submission, suggests a similar clause is not required in the Public Service Bill and the clause in the Parliamentary Service Bill will, if enacted, preserve mobility between the two services. I thank the committee.

DEPUTY CHAIR—Thank you, Mr Bolton. We will call it quits there. If we need to, we will get you back. Thank you for coming today. We have mucked you around a bit and we apologise. I would like to thank everyone who attended today, particularly Sir Lenox. I would also like to thank Hansard for their participation over the last couple of days.

Resolved (on motion by **Senator Gibson**):

That, pursuant to the power conferred by section 2(2) of the Parliamentary Papers Act 1908, this committee authorises publication, including publication on the parliamentary database, of the proof transcript of the evidence given before it at the public hearing this day.

Committee adjourned at 3.40 p.m.