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Parliamentary Committees

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Thank you for the invitation to speak to you today. I would like to acknowledge that this meeting is being held on the traditional lands of the Ngunnawal people, and pay my respects to their elders past and present.

The theme of your conference is representative democracy and participation. I would like to focus this afternoon on the contribution of parliamentary committees to both participation and to democracy as a whole.

The great strength of the committee process is that it brings parliament to the people. The role of committees is to investigate and to draw attention to what they find. They throw light in dark corners and give advice.¹

Today, the Commonwealth is distinguished internationally by having three committee systems, namely:

- Senate Committees
- House Committees, and
- A third set, which operates at the interface between the two houses and composed of members from both – these are the Joint Committees and the Select Committees

Committees today

Committees take up a substantial amount of time for Members and Senators as part of their parliamentary duties. The Senate website shows that in 2010, the Senate sat formally for 359 hours but that Senate Committees met for a total of 1,681 hours in the same period.²

Under, if I may say, ‘the new paradigm’, the membership of committees is vital and will usually include at least one independent and/or one member of the Australian Greens.

The current Parliament makes extensive use of committees. In terms of what they do, there are two broad categories. The first category is internal committees, those that deal with the procedures and administration of the two Houses.

The second category is the investigation and scrutiny committees, described as those that scrutinise the work of the Executive and its administration.

Within that broad categorisation of the committee system, there are various **types** of committee. I will focus on three: standing, select and joint committees.

Standing committees

Standing committees are permanent committees established under Standing Orders or by resolution of the House or the Senate for the duration of a Parliament.

They are usually re-established at the beginning of each new Parliament and most cease to exist with the dissolution of the House. The Senate asserts that some of its committees can continue to function until the commencement of the next Parliament. When there is a double dissolution all committees of both Houses cease.

Standing committees allow ongoing surveillance of defined fields of government activity and call upon research and advice.

In 1987, the House of Representatives developed its comprehensive committee system based on the departments supervised by the various committees.

In October 1994 the Senate restructured its committee system by establishing a pair of standing committees—a *References Committee* and a *Legislation Committee*—in each of eight subject areas. Each pair of committees has overlapping membership and a shared secretariat. This restructuring was intended to better co-ordinate committee work, to incorporate the estimates committees into the general framework of the committee system and to ensure that membership and chairmanship of the committees more accurately reflects the political composition of the chamber.

So, for example, the Senate Legal and Constitutional committee has a set of portfolio responsibilities that includes the Attorney-General's Department and the Department of Immigration and Citizenship.

Relevant Bills are generally referred to the Legal and Constitutional **Legislation** Committee. It must perform three specific tasks:

1. It must consider proposed government expenditure.

In this regard, the Legislation committees carry out the work previously performed by Estimates Committees. You will all be aware of Estimates hearings, given just how much they lend themselves to the powerful media soundbite!

2. It must consider legislation.

Indeed, the practice of referring more bills to committees at an early stage has integrated the work of the standing committees more closely into the legislative process itself. A legislation committee has no power to amend a bill referred to it, but it may recommend amendments or it may advise the Senate to agree to the bill without changes. Some bills may require consideration only from a technical point of view while others may need to be examined in terms of their substance and impact. The committees meet in public to hear evidence from the appropriate minister and officials, and usually a number of independent experts or representatives of organisations affected by the bill.

3. It must consider annual reports and the examination of government administration.

Legislation Committees have a specific mandate to monitor the performance of departments and agencies. Under a resolution adopted by the Senate in 1989, the annual reports of all government departments and agencies are automatically referred to the appropriate committee for consideration.

The second of the pair – the References Committee - generally undertakes longer-term inquiries as referred by the Senate. On occasion, a bill (or part of a bill) can be referred to the References Committee for examination.

For example, the report on the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999 was produced by the References Committee.

The Legal and Constitutional References Committee has also inquired into such diverse matters as:

- the rights and obligations of the media
- the Australian legal aid system
- powers of officers of the Australian Securities Commission
- national citizenship indicators
- protection of Olympic words and symbols, and,
- the need to protect against sexuality discrimination.

These types of general purpose inquiries, now undertaken by the References Committees, have been the major component of committee activity since 1970.

The work of the House committees has tended to focus more on policy inquiries, often of a longer term, rather than legislative inquiries. These have had many notable successes. The negotiated regulatory regime for stem cell research adopted by the Council of Australian Governments in 2002 was based on very thorough and hard work done by the House Legal and Constitutional Affairs Committee – principled, but also practical and achievable recommendations.

In the current Parliament there has been a greater use of bill inquiries:

- In accordance with provisions of the agreements which resulted in the formation of the minority government, this 43rd Parliament, standing order changes allow the Selection Committee (domestic committee) to refer bills *'regarded as controversial or requiring further consultation'* to the relevant House or Joint Committee (standing order 222),

- To the end of the last sitting week in the winter sittings, 36 bills of the total of 170 bills introduced to the House have been referred to committees under these procedures.

Select committees

The **second type** of committee I would like to talk about is the select committee.

These are *ad hoc* committees created to inquire into and report upon a particular matter. They may be established at any time by a resolution of the House or the Senate. That resolution will specify the committee's composition, terms of reference and powers.

A select committee has a limited life and ceases to exist on the presentation of its final report or on the day fixed for such presentation unless the House or Senate has granted an extension. An example of this is the Joint Select Committee on Australia's Immigration Detention Network which has just been established and which I chair.

Joint committees

The third type is the **joint committee**. They may be statutory (established by Acts of Parliament), or select or standing committees (established by resolution of both Houses).

There are currently seven Joint Statutory Committees dealing with:

- Public Accounts and Audit
- Public Works
- Corporations and Financial Services
- Intelligence and Security Australian Commission for Law Enforcement Integrity
- Law Enforcement, and
- Broadcasting of Parliamentary Proceedings.

There are several Joint Standing Committees including that for Electoral Matters of which I am the chair.

Contributing to the work of a committee

In terms of making a contribution to a parliamentary committee, it is important to keep an eye on the lists of committee activities published by Parliament in *The Australian* newspaper. The Australian Parliament House website (www.aph.gov.au) is another vital tool in staying abreast of parliamentary business – it's a wonderful resource and I would encourage you all to use it.

Given that the purpose of parliamentary committees is mainly to conduct inquiries into specified matters, there are similarities between committees and the court system in terms of the gathering of evidence. For committees, this task involves:

- taking submissions
- hearing witnesses
- sifting evidence
- discussing matters in detail and
- formulating reasoned conclusions.

So, how do you get involved? For individual practitioners and their professional associations, it will generally be through making written submissions to inquiries and giving oral evidence, usually at public hearings.

Very often, individuals or organisations with specialist knowledge or representative views may be specifically invited to make a submission.

Committees provide a public forum for the presentation of the various views of individual citizens and interest groups.

In a sense committees take Parliament to the people and allow direct contact between members of the public, and groups, with their parliamentarians.

Because they can travel extensively throughout Australia and have flexible procedures, they provide opportunities for people to have their say on the issues being investigated. By simply undertaking an inquiry a committee may promote public debate on the subject at issue.

This is the essence of the participatory process as people become involved either by making a submission to a committee or by testifying at a committee hearing, or both.

Usually the committee and its staff will also seek information from relevant government departments and agencies as well as undertaking their own research.

The committees examine the material submitted to them, sometimes with the assistance of expert advisers, and then proceed to examine or test a selection of the submissions by inviting witnesses to appear before the committee to answer questions and comment further on their submissions.

Committee powers

Although committees have the power to summons witnesses and compel them to attend and produce relevant documents or give evidence, these powers of compulsion are rarely used.

In fact, Committees have considerable powers, usually delegated to them by the House that appoints them. Committees established by laws, such as the various statutory committees, have particular powers set out in the relevant law.

To support and enforce such powers, both the House and the Senate have the power to punish offences that interfere with the work of its committees.

A person summoned to appear before a committee but who refuses to attend, or a witness who refuses to answer a question or produce a document, may

be punished for contempt by reprimand, fine or imprisonment. The same holds true for anyone who lies to or misleads a committee.

Similarly, a person attempting to influence a witness or to prevent a witness from giving evidence would be guilty of contempt and may be prosecuted under the *Parliamentary Privileges Act 1987*.

The proceedings of committees are recognised as proceedings of Parliament. On that basis, they have the same privileges and immunities as Parliament itself. It means witnesses are provided with several important rights and protections so that they may give evidence freely and honestly without fear of recrimination.

Section 4 of the *Parliamentary Privileges Act* defines it as an offence to interfere improperly with “the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member.”

Of course, parliamentary privilege also means that witnesses cannot be sued or prosecuted for what they say in evidence to the committee.

The task of assessing whether or not any rights have been transgressed is usually referred to the Committee of Privileges. It may call and examine witnesses and report on whether, in its opinion, an offence has occurred. Where the House agrees that an offence has been committed it may order punishment by a fine or by imprisonment.

Committees generally prefer to take evidence in **public hearings**. Where there is a risk that a particular committee inquiry will prejudice proceedings before a court, and then a committee may decide to hear evidence *in camera*.

Committees may also decide to go *in camera* where evidence may adversely reflect on a person, or where it may threaten national security or commercial confidentiality.

Witnesses may also request that all or part of their evidence be heard in private. Normally, evidence given *in camera* is not published but the committee cannot guarantee this.

Witnesses may also request to be accompanied by and consult counsel during their appearance before a committee. I stress that witnesses may *consult* their counsel. Unlike in court, a lawyer may not get to his or her feet and speak on behalf of their client. If lawyers want to address the committee, they must do so on their own behalf.

Public servants appearing in their official capacity before committees have the same rights and duties as other witnesses but are also subject to a set of special guidelines. They are expected and encouraged to provide full and accurate information to committees about the factual and technical background to policies and their administration. However, public servants are expected to be politically neutral and so are not required to express opinions on Government policies.

As I mentioned earlier, papers and documents presented to a committee are absolutely privileged because they are proceedings in the transaction of Parliamentary business. Most committees are allowed to publish such documents and evidence and the proceedings of public hearings are usually recorded in a published transcript.

All documents received by a committee during an inquiry remain in the custody of the House or the Senate after the committee has conducted its inquiry.

Reporting and follow-up

Once a committee has evaluated the evidence, a draft report, usually prepared by the secretary under the supervision of the chair, is circulated to

the committee. This is known as the 'Chair's draft' and it is considered by the full committee. Eventually a final report with conclusions and recommendations is agreed to.

On some occasions, not all the members of a committee will agree to the final report and recommendations and they may prepare a minority or dissenting report. While committees usually attempt to reach consensus, dissenting reports are not uncommon when the issues under consideration are controversial.

In response to a committee report, the Government will prepare a written statement to the House. It may accept the committee's recommendations – in full or in part – and announce its intention to take certain action. Of course, the Government is free to reject the recommendations, and sometimes it might just want to give further consideration to others.

Case studies

Child Sex Tourism

To illustrate how effective the committee process can be in shaping legislation, I would like to highlight some case studies. The first involves the Crimes (Child Sex Tourism) Amendment Bill 1994. The House of Representatives Standing Committee on Legal and Constitutional Affairs inquired into this bill. I was chair of the committee at that time.

Expert evidence and witnesses were brought before the Committee, at hearings held around the country. A great many lawyers went to the trouble of making submissions or appearing before the Committee. These included Ian Barker QC, Greg James QC as president of the NSW Criminal Lawyers' Association, Professor David Lanham of the Melbourne University law school, and Dr Jill Hunter, Dr Sandra Egger and Ms Dorne Boniface of the UNSW law school.

On 19th May 1994, John Dowd gave evidence as the then Chairman of the Council of the Australian Section of the International Commission of Jurists. Mr Dowd used the appearance to build upon written submissions from the ICJ, and moved fluidly between the big picture and the finer detail.

When I presented the Committee's advisory report to the Parliament, it contained the very kind offer from the NSW Bar Association to provide its legal brain power to help the Government overcome some of the practical and legal problems identified by the inquiry!

In response to that recommendation (number 36 in the committee's report), the Government gave "Mr James QC and Mr Sides QC an opportunity to comment on the amendments to be made to the Bill."

In its advisory report, the committee made a total of 37 recommendations to the then Labor Government. In response, the Attorney General tabled a report that accepted most of our recommendations and rejected some, noting that "it is useful to have a body, such as the Committee, look at [the bill] from a fresh perspective."

Kind words. But politics involves robust debate. The response went on to say, and I quote: "The Government does not accept the committee's general criticism that the Bill as introduced is not 'sound legislation' or that it departs unreasonably from 'traditional safeguards', or in the extreme language the Report cites from one witness, that it 'throws aside 200 years of criminal justice with fairness for the accused'."

The final result of the Committee's inquiry was better legislation. Of the 37 recommendations I mentioned, a total of 32 were accepted by the Government and almost 90 amendments were made to the bill (all of which, in my humble opinion, made it much more soundly-based legislation).

I am a strong believer that the Committee process must deliver up better legislation through a bipartisan approach. When I presented the Committee report, I told Parliament that:

“The Committee has been concerned to ensure that a bill which has almost universal political support for its fundamental objective is workable and effective. At the same time, it must maintain the presumption of innocence and ensure that persons charged receive a fair trial. If the Parliament accepts the recommendations made by the committee in this report, the bill will be a much clearer and more effective piece of legislation. It will provide a stronger deterrent than the current draft, and it will be enforceable.”

Australian Crime Commission

Another example of the legal profession having a hand in shaping legislation is the move in 2002 to replace the National Crime Authority with the new Australian Crime Commission.

The National Crime Authority was originally set up by the Hawke Labor Government in 1983. Its job was to investigate complex organised crime on a national basis and to collect, analyse and disseminate relevant criminal information and intelligence.

A defining feature of the NCA was its special powers, which are similar to those of a Royal Commission. These are the powers to obtain documents and other evidence, and to summons a person to appear at a hearing to give evidence under oath.

Under the NCA model, the powers could only be exercised in very defined circumstances. Ultimate accountability lay with Ministers through the Inter-Governmental Committee, a body that had oversight of the NCA. The model was set up in that way because nobody at that time believed any police force should ever have access to coercive powers.

However, the bill establishing the Crime Commission introduced a new governance structure. It put in a place a Board made up of the Australian Federal Police, the Attorney-General's Department, Customs, the Australian Securities and Investments Commission, ASIO, and the Police Commissioners of every state and territory.

This Board would not only determine priorities, it would also have the power to press the green button on the use of the Commission's special coercive powers. Police forces were no longer kept at arm's length from coercive powers.

Lawyers had strong views about these proposals and they made them known to the Parliamentary Joint Committee!

Submissions were received from the Australian Bar Association, the Victorian Bar Association, the Victorian Criminal Bar Association, the Law Council of Australia, Frank Costigan QC and the Bar Association of Queensland.

At the Melbourne hearings, the lawyers were out in force. Among those giving evidence that day were Judge Betty King (appearing in a private capacity), James Lorkin of the Criminal Bar Association of Victoria, Greg Melick SC, and David Neal and Michael Rozenes QC for the Victorian Bar and the Australian Bar Association.

For two days, the Committee heard from lawyers who were horrified by the idea that police would control the Crime Commission and make decisions about when to use coercive powers. At one point, the chair of the Parliamentary Joint Committee, Bruce Baird, snapped at Judge King: "This is what I hear from the lawyers club throughout the day as everyone gets terribly horrified: 'Is this person a lawyer?' With good administration of the organisation, surely you can handle this body without having a law degree?"

Anti-terrorism and ASIO legislation

A Senate inquiry in 2002 investigated the Government's proposed anti-terrorism legislation. The ASIO Bill, as many of you would know, attracted a great deal of attention when various Senate committees looked at it. One committee inquiry attracted an astounding 434 submissions.

However, in terms of the other Bills that made up the original package of anti-terrorism legislation, their final shape bore little resemblance to the bills that were originally introduced into the House. The legal profession was instrumental in bringing about that change, through its lobbying and efforts right across the political spectrum.

There were significant amendments, such as maintaining the presumption of innocence and maintaining the golden thread that runs through our legal system that puts the onus on the prosecution to prove its case to the required standards in our system of justice. Other amendments ensured that legitimate protest or industrial action could not be treated as terrorist offences under the legislation.

The end result of the legal profession's hard work in re-shaping this country's anti-terrorism laws was to ensure we continue to enjoy the very freedoms that define a functioning democracy. Principles as basic as the rule of law, freedom of speech and the right of free movement were under threat from the wave of reaction that washed over Australia in the wake of September 11 2001.

The legal profession played a crucial role in protecting those principles. The cool-headed advice of the scores of lawyers who made submissions to the various committees helped the politicians come up with alternative models that dealt with the threat of terrorism while also protecting our democracy.

Conclusion

I hope I have given you some insight into the workings of the Committees. As I said at the outset, federal parliamentary committees have a major role to play in the development, implementation and explanation of legislation and policy. Increasingly they are viewed as an important element of a citizen's right to participate in the democratic process.

When Committees work well, any citizen has the opportunity to shape policy and/or legislation. Massive amounts of time, research, investigation and analysis go into the reports produced by parliamentary committees. Those reports become an integral part of the public record and can be used for many many years as a resource not only for the parliament but for the public as a whole.

¹ Senate Brief # 4, December 1998. Available on the web at www.aph.gov.au

² <http://www.aph.gov.au/Senate/pubs/briefs/brief04.htm> accessed 8 July 2011