PARLIAMENTARY COMMITTEES AND PUBLIC ACCOUNTABILITY

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Presented at a meeting of the joint NSW chapters of the AIAL and the Royal Australian Institute of Public Administration in Sydney, 22 September 1993 and first published in AIAL Newsletter No 16 1993.

In 1989, the Chief Justice of the High Court, Sir Anthony Mason, gave the inaugural Blackburn Memorial lecture[1]. His topic was 'Administrative review - the experience of the first twelve years' but, in the course of his lecture, his Honour also had some things to say about parliamentary review of Executive and administrative action. His Honour said that, as a result of 'the increasing complexity of social and economic life', a 'more sophisticated and flexible' form of regulation and control had been called for and that one of the end results of these new forms of control was that the material welfare of the individual had come to be more and more dependent on the Executive and its agencies. His Honour said that administrative action began to replace legislative enactment and judicial adjudication in creating legal rules and also in resolving disputes.

His Honour then went on to say:

> The standard response to this problem is that the electorate, through its elected representatives, controls the Executive and the actions of administrators. This is a gross overstatement. Although Parliament has the capacity to control the Executive and administrative action, that capacity is exercised to a limited extent only. Indeed, there are those who assert that the Executive controls Parliament. There is a very large measure of truth in that claim.[2]

His Honour went on to say:

> [T]he blunt fact is that the scale and complexity of administrative decision-making is such that Parliament simply cannot maintain a comprehensive overview of particular administrative decisions. Parliament's concentration on broad issues and political point-scoring leaves little scope for oversight of the vast field of administrative action.[3]

His Honour then went on to discuss what he perceived as the decline of the doctrine of ministerial responsibility. He said:

> The decay of the doctrine of ministerial responsibility appears to be a consequence of a perception that it is beyond the capacity of ministers to oversee all that is done by their departments or the statutory authorities for which they are responsible. What is beyond the capacity of the minister is certainly beyond the capacity of Parliament.[4]

In a paper that I wrote a couple of years ago, I had occasion to disagree (respectfully) with his Honour[5], principally because of my faith in the various accountability procedures that had been developed in the Senate and because of the opportunities that those procedures gave Senators to scrutinise the activities of Commonwealth departments and authorities. At the time, I concluded that the Parliament had the *capacity* to oversee and to scrutinise the operation of government departments and authorities; the big question was whether or not it had the *will*.

In the course of trying to think of something sensible to say today, I re-visited this conclusion. I was reminded of some things that former Senator Fred

Chaney said to a seminar that was held in 1991, to mark the tenth anniversary of the Senate Standing Committee for the Scrutiny of Bills. Mr Chaney said:

> [M]y own view as to the extent to which we can improve the performance of Parliament is one which is tempered by the reality that once you get to the point that you are putting functions on senators and members of the House of Representatives which in fact is physically impossible for them to fulfil because of the volume of material, the volume of work and the multiplicity of tasks that you are performing, then you are holding out the promise of simply a new form of 'the new despotism'. You are simply offering another set of faceless, nameless bureaucrats, a decision making power over the people of Australia where there is no accountability.[6]

As one of those 'faceless, nameless bureaucrats', I found this sobering.

So, what is my message?

Well, for those State Parliaments that are inclined to embrace the Senate model, I think one clear message is that increased mechanisms for accountability bring with them an increase in work. I have enough experience of parliamentarians to know that an increase in workload is probably something that they neither need nor would welcome.

Another message is that increased obligations of this sort bring with them an increase in responsibility, including for the parliamentary bureaucracy. Speaking for myself, I have always regarded that the opportunity I have had over the past few years to work in Parliament and to participate (albeit in a small way) in the legislative process - which, as a lawyer, gives me a particular thrill - is a great privilege. However, it carries with it an onerous burden, as you must always be sure that you keep yourself out of it - that you act as a facilitator, rather than as an active participant - that it is the Committee's views that are promulgated and not your own. I assume that my Senate colleagues think the same way.

Re-reading Mr Chaney's words reminded me of this.

I feel that I should conclude by saying something a little more positive (and a little less self-indulgent).

For those who are interested in the accountability of the administration to the Parliament, surely one of the best 'reads' of recent years is the Pearce Report - a report by Professor Dennis Pearce on his inquiry into recent events involving the Commonwealth Department of Transport and Communications. In his report, Professor Pearce makes some significant comments about another aspect of increases in accountability and scrutiny. He said:

> The greater scrutiny of public servants' decisions nowadays by the Parliament, courts and tribunals, and the press, makes it impossible for departments to deal with the public on the basis of common practice. ... Working arrangements or understandings between departments and industry, while to be encouraged, cannot ignore legal requirements. Where substantial interests are at stake and there are avenues for review, someone will take up the legal issues - as has occurred in this case. The administrative culture must embrace the legal culture - or at least learn to understand it.[7]

Professor Pearce suggested that, as a result, it was desirable that training programs be introduced, to increase the awareness of officers of the significance of legislation and other legal requirements.

In Canberra, there is a certain amount of effort already being made in this regard. The Senate Procedure Office, for example, has for several years been running seminars on the legislative process. These seminars deal with how legislation is made by the Parliament, including the role of the various scrutiny committees. These seminars are primarily run for Commonwealth public servants but non-government attendees are also welcome.

It is important that they are open to non-government attendees because, in terms of understanding the legislative process, the average person who comes into contact with the process - including most lawyers - is not much better off than the bureaucrats criticised by Professor Pearce.

If I can concentrate on the lawyers for a moment, most of them that I come across have little or no idea about what really goes on in Parliament. They tend to have little or no understanding of the parliamentary process. Most seem to think that 'the law' is some thing that comes either out of casebooks or the mouths of judges. Occasionally, it is something that they look up in an expensive loose-leaf service or that they are forced to purchase (at an exorbitant price) from their local Australian Government Bookshop. An alarming number of them have only a superficial knowledge of how those laws get into the bookshops in the first place.

It almost goes without saying that most lawyers have no appreciation of the good work done (in all Australian parliaments) by the various different types of committees which scrutinise government activity. This is a great shame because, apart from any other reason, scrutiny committees can often be of great assistance to lawyers.

In my view, therefore, it is no good to just improve and develop accountability mechanisms. There also needs to be an effort made to educate people - and particularly the bureaucracy - about these mechanisms.

I would like to illustrate the need for this by recounting something that happened in my first year as Secretary to the Senate Scrutiny of Bills Committee.

The Committee had before it a Bill that emanated from the Finance portfolio. There was something about the Bill which did not seem right. The Committee was not sure what the Bill was all about. As often happens, the explanatory material on the Bill was of no help.

I have always advised the Committee that, in such situations, the best approach is to operate with an abundance of caution. The safest course is to draw the Senate's attention to the Bill and to seek from the relevant Minister some further details about that part of the Bill which it did not quite understand. It's always better to be safe than sorry.

The Committee took my advice and a letter went off to the office of the Minister for Finance.

A couple of day's later - it was late on a Friday afternoon, as I recall - I received a telephone call from a relatively senior officer of the Department of Finance. The officer was, to put it mildly, 'agitated'.

He wanted to know why the Committee had commented on the Bill.

I explained that the Committee wanted some more details about what the Bill was all about because, on its face, the Bill raised - for the Committee - some particular concerns. The officer told me that these concerns were 'nonsense'.

If they had difficulties with the Bill, why hadn't they simply rung him up?

I pointed out that, apart from anything else, the time constraints imposed by the way the Committee was forced to operate

precluded the Secretariat - let alone the Committee - from doing much in the way of research on these sorts of matters. I did not dare mention that, trying to get hold of the relevant public servant in these circumstances was difficult enough in itself, let alone the further difficulty of finding one who was familiar enough with the work of the Committee - and who trusted you enough - to actually help.

The officer, nevertheless, went off his brain about the trouble that he had been caused over 'nothing'. He ranted and raved, on and on.

One thing he said has stuck in my mind. At the end of his harangue he said:

'Who do these Senators think they are?'

Frankly, I was too stunned to give him the obvious answer - that they think they are one of the three arms of 'the Federal Parliament' which, under the Constitution, is entrusted with the legislative power of the Commonwealth. Equally, I was too flabbergasted to point out that it was the legislative power of the Commonwealth that was the source of authority for most of what he, his Department and his colleagues in the Australian Public Service did from day to day.

Of course, I would not suggest - and I do not believe - that all public servants are like this person. Far from it. He's really just the worst example that I have come across in my three years with the Scrutiny Committee. However, the Pearce Report leads me to believe that he's not the Lone Ranger. That being the case, it is - in my view - equally important that parliamentary committees work to ensure that the bureaucracy knows what they are doing and - more importantly - where they fit into the grand scheme of things[8]. If they do, it can only help.

Endnotes

1 Reproduced in (1989) 18 *Federal Law Review* 122

2 *Ibid*, 128

3 *Ibid*, 129

4 *Ibid*

5 S Argument 'Annual reporting by Commonwealth departments and statutory authorities - the cornerstone of executive accountability to the Parliament', 1991 1 *Legislative Studies* 16, at 23

6 Senate Standing Committee for the Scrutiny of Bills, *Ten years of Scrutiny* (1992), 29

7 Department of Transport and Communications, *Inquiry into Certain Aspects of the MDS Tendering Process 1992-93 Volume 1 - Report by Professor Dennis Pearce* (May 1993), 9

8 For more on this point, see Argument, S, 'Quasi legislation: Greasy pig, Trojan Horse or unruly child?', paper delivered to Fourth Australasian Conference on Delegated Legislation and First Australasian and Pacific Conference on the Scrutiny of Bills, 29 July 1993, pp 22-5.