# MANAGEMENT OF LEGISLATION IN THE HOUSE OF REPRESENTATIVES

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*Paper presented to AIAL seminar, Parliament and the Legislative Process, Canberra, 2 June 1994*

## The role of the House of Representatives in the legislative process

The comment is often made that the House of Representatives is the rubber stamp of the executive in the processing of legislation. While the House of Representatives is by definition that part of the legislature in which the majority support the executive, to subscribe to the "rubber stamp" theory is to adopt a much too simplistic approach.

In his recent work *Does Parliament Matter*[1], Philip Norton argues that the generic name applied to legislatures masks rather than illuminates what they actually do. He states a view that parliaments are not simply law-making bodies; indeed most are not even predominantly law-making bodies. Their core defining role is not to make law, but to approve it, to give legislative assent. While space and time prevent a detailed examination of Norton's arguments, for the purposes of the issues considered in this paper, I would endorse this key defining role he has identified, and indicate that the basis for determining whether this approval should be given, should be the widest possible consultation with the community at large in general and specific interest groups in particular.

Moreover, it is a mistake to believe that the approval is automatic. Draft government legislation has its usual sources either from within the ministry (or departments of state), or in response to an assessed need arising in the community and channelled to the ministry by means of members of parliament or others. However, it is a major misapprehension to conclude that the government's first attempts to provide a legislative response is the final agreed solution.

Within the framework of the legislature there are evaluation and refining bodies - eg caucus committees examine draft legislation before its introduction. There are numerous instances where caucus committees have influenced the content of draft bills. For example, during consideration of the Crimes (Investigation of Commonwealth Offences) Amendment Bill 1991, one pivotal consideration was the authority of law enforcement agencies to detain suspects for interrogation or investigation. The extent of the maximum period before a suspect was taken before a magistrate was a central issue - whether a reasonable time or a fixed time should be specified and if the latter, its extent. There was a significant body of persuasive thought that a six hour maximum period (extendable on application to a magistrate with the consent of the arrested person) should be set legislatively. However, the caucus committee was more persuasive in achieving a four-hour

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period (extendable, and with due provision for "dead" time travelling to police station periods, time communicating with family, friends or lawyer etc). The result was an advance in the protection of civil liberties and the rights of the individual.

Also, due credit should be given to private members' legislation. Procedural reforms in place for some time now have meant that every private member (defined as any member other than the Speaker or a minister/parliamentary secretary) who has a special interest is guaranteed the right to introduce a bill into the legislative forum and to be able to give a brief explanation as to its purpose. After introduction the future progress of the bill is usually in the hands of a committee of the House (the Selection Committee). While passage through the House of a private member's Bill is rare, it has happened. Moreover, by introducing the concept and arguing for it, the member has the opportunity to influence the government. On a number of occasions the concept embodied in a private member's bill has been taken up in government amending legislation, and achieved legislative effect in that form.

A Senate in which the government does not control a majority is a complicating factor. There is the impact of what has become known as the "Macklin motion" - the setting of dates in relation to the receipt by the Senate (and more latterly, introduction in the House of Representatives) after which the Senate will not, in the normal course, consider bills. There is also the prospect of a bill referred to a Senate committee, which increases the time for its passage. Another consideration is the uncertainty of the ultimate content of legislation in the light of third party or independent group attitudes and amendments they may support. Because of the greater preponderance of ministers from the House of Representatives, historically the lion's share of legislation is introduced in the House. The government can usually rely on House endorsement and Senate consideration occurs subsequently.

All this means that there is an understandable temptation to streamline legislation's passage in the House to move it to the second phase in the legislative process. An observation that could be made is that frequently the opposition is equally keen to move debate to the Senate. Nonetheless, there are some offsetting considerations:

- The calendar year is being divided into three sitting units to facilitate consideration of legislation by the House.

- More legislation is being introduced in the Senate by the minister representing the "principal" minister in that House, enabling subsequent consideration in the House of Representatives.

- The majority of opposition amendments are first "aired" in the House.

  Frequently, with agreement of government and opposition, the minister (who often has only just seen the amendments for the first time) will take proposed amendments into consideration, on the understanding that the matter may be progressed in the Senate.

- Procedural reforms have been implemented to facilitate consideration of legislation.

## Recent procedural reforms

A number of procedural reforms were introduced with effect from 21 February 1994, designed to facilitate greater in-depth consideration of legislation where this was considered appropriate. These reforms may conveniently be discussed under the headings of general, main committee and standing committee consideration

*General consideration*

Bills are given a first reading when presented or when received from the Senate. The motion for the second reading (ie the beginning of the in-principle consideration) is set down for a future day. (Previously both these steps normally occurred on the same day.) The Bill is therefore in the public arena for a period before any formal decision is made as to how it will be treated or before anyone (including the minister, apart from sanctioning the contents of an explanatory memorandum) has declared formally a position in relation to it. The available options are consideration in the chamber, in the Main Committee or by a House standing committee. In the chamber, consideration can continue immediately after the minister has moved the second reading and provision has been made for formally bracketing together consideration of related measures (cognate debates).

The stage previously know as consideration in committee of the whole has been abolished and consideration in detail has been substituted. Most of the procedures in the abolished stage apply, however, order is maintained from the Speaker's Chair (there is no longer an office including the title of Chairman of Committees) or from the Main Committee Chair. More significantly, each member may speak to every question before the Chair for an unspecified number of periods, each not exceeding five minutes. Previously the provision was for two ten-minute maximum periods. This provision facilitates greater in-depth consideration, should this be desired.

*Main Committee consideration*

Provision has been made for a second (and parallel) legislative stream in the creation of the Main Committee.

- The Main Committee is in fact a second legislative chamber to consider non-controversial bills.
- At least seven days after the first reading but before the second reading is moved, a Bill (or a number of Bills on a tabled list) may be referred to it.
- It may meet only when the House itself is actually sitting.
- All members are members of the Main Committee and may participate in its proceedings; it is chaired by the Deputy Speaker or one of his deputies.
- The Main Committee in its legislative function will deal with the following stages:
  - minister's second reading speech;
  - second reading debate;
  - consideration in detail.

  (It may also consider orders of the day for resumption of debate on motions moved in connection with committee and delegation reports and motions to take note of papers.)
- There is no provision for divisions to be called for in the Main Committee. Unless the

Committee can proceed without resolving the question, any matter not determined on the voices must be referred to the House for determination. Similarly, provision is made for consideration to be returned to the House should any members so wish (eg if proposed amendments would affect the non-controversial nature of a bill).

- After completing consideration in detail stage (or deciding that this stage is not required in respect of a particular bill), the measure must be reported to the House for report and third reading stages.

- At the time of preparation of this paper, the Main Committee had not yet met. However, it is expected to meet in the near future.

*Standing Committee consideration*

In relatively rare instances, a Bill may be referred to one of the House standing committees for consideration and advisory report. In the normal course, the motion of referral is moved at least seven days after the first reading but before the second reading is moved. Consideration in detail is not involved - the Bill would not have received in-principle agreement indicated by the second reading. Rather, consideration centres on implementation of the purposes of the Bill as outlined in the explanatory memorandum:

- Changes could be recommended to the terms of a Bill, but alterations to the text could not actually be made by the committee.

- Submissions may be invited and witnesses heard.

- Reporting deadlines may be set by the House.

- After an advisory report, a bill may be considered in the House or in the Main Committee.

The first such reference (the Crimes (Child Sex Tours) Amendment Bill) was made to the Legal and Constitutional Affairs Committee which I chair. (Because the House is still settling in to the new procedures, the reference was made after the second reading debate - standing and sessional orders were suspended.) Harking back to my earlier comments on the influence of the Senate in the overall legislative process, the minister agreed to the reference after ascertaining that it was not the intention to seek its referral to a committee in the Senate.

In view of my experience in relation to the inquiry on that Bill, perhaps I can point to some conclusions as to where I see the new procedures going and what is necessary for their continued success, and for a consequential improvement in the quality of legislation.

An appropriate commencement point is to assert the importance of consultation in the legislative process and to assert the role committee inquiry might play in influencing cultural change in relation to consultation. The committee I chair has long been an advocate of consultation in this regard. In its report last year on *Clearer Commonwealth Law*[2] the committee identified the following six factors which could affect the quality of parliamentary scrutiny of primary legislation (and, except the fourth, to subordinate legislation):

- the volume of legislation to be scrutinised;

- the readability of legislation to be scrutinised;
- the mixture of subjects in legislation to be scrutinised;
- the time between introduction of legislation and its passage;
- parliamentary time allocated to scrutiny of legislation; and
- use of parliamentary committees to scrutinise legislation (para 10.29).

A number of these factors (albeit in some instances in a modified form from that envisaged by the Legal and Constitutional Affairs Committee) have been addressed by the recent procedural reforms.

The Committee also stressed the importance of consultation to gain acceptance of policy - changes to policy and therefore complication of legislation, are likely to be minimised if the policy is widely accepted: an important way of generating acceptance of a policy is to consult widely about the policy when it is being formulated (para 2.24). It also saw consultation as minimising complexity in legislation. It recommended consultation within and outside the government at various stages in the preparation of legislation (with specified exceptions).

The consultation theme in the report of my committee, in the report of the Administrative Review Council, *Rule Making by Commonwealth Agencies* (1992) and in that of the Senate Standing Committee on Legal and Constitutional Affairs, *The Cost of Justice, Second Report. Checks and Imbalances*[3] has been endorsed by the Access to Justice Advisory Committee in its report, *Access to Justice: an Action Plan*, released last month. In its summarising overview, that committee proposes that:

- the government should introduce a general requirement for consultation to occur during the process of making legislation;
- legislation should be updated and redrafted in accordance with the new, clearer drafting style that has been adopted for Commonwealth legislation;
- resources should be provided to parliamentary committees to scrutinise closely legislation in the course of its passage through Parliament; and
- the Commonwealth's computerised database for legislation should be as comprehensive as possible and access to the database as inexpensive as possible (page 18).

The Access to Justice Committee also recommends implementation of reforms advocated by the three bodies mentioned above (Action 21.1).

One principal way to facilitate consultation is to slow the process down a little. to make greater use of exposure drafts, to allow proposals to lie on the table and reach into the community for comment. The standing orders establishing House general purpose standing committees have for some time empowered these committees to examine pre-legislative proposals. The recent reforms I have outlined enable committees to take on Bills for consideration and to make an advisory report after introduction. So the machinery is there.

When such a reference is made, two important considerations come into play. One is that the Government members of the committee,

particularly the Chair, must not be seen or see themselves to be the defenders of the legislation. The Crimes (Child Sex Tourism) Amendment Bill is one on which there is bipartisan support as to the central concept. However, the opposition expressed in the House some concern with the detail. I embarked on the inquiry with an open mind, but with experience as a public solicitor with the NSW Legal Aid Commission, a barrister and public defender in NSW specialising in criminal law, I sought to bring a litigation practitioner's view to the inquiry and attempted to establish the extent to which practitioners had been involved in the preparation process. My experience reinforced my belief that the culture must be changed so that it is recognised that all knowledge on a subject is not limited to Canberra.

The very process of involving committee members brings to bear a balance of a wider cross-section of Australian society which members of parliament constitute. This plus the wider community and practitioner involvement will enable the legislature to discharge the core function described by Professor Norton at the beginning of this paper, that of approving legislation, with the widest possible consultation in the approval process.

The second consideration is that committees undertaking such inquiries must be adequately resourced, as the Access to Justice Advisory Committee has recommended. Electorate demands upon members of the House of Representatives are great. The additional workload imposed by legislative inquiries are not insignificant and usually set a tight deadline for reports. My committee in particular has attracted a number of additional inquiries in the recent past. It is essential that the staffing support is sufficient to keep pace with the demands of members.

**Other initiatives to improve legislative functions of the House of Representatives**

It may well be that additional measures would assist the House of Representatives to perform its legislative function more effectively. However, the recently instituted procedural changes outlined above in part (ie as specifically related to legislation) represent the most significant reform of House procedure in recent years. It will be first necessary to evaluate their impact and the next phase could well be an increase in the frequency of the use of the new procedures (eg of referrals for advisory report), rather than additional reform relating to basic procedural character.

In this regard, I would request a fair evaluation of the procedural reforms. In 1987 the House introduced a revised committee system with a completely different emphasis. Since then the committees have proceeded with valuable work, albeit because of the typical nature of the House, mostly with not so high a profile as compared to committees in the Senate. Reports have dealt with government policies on small business (the Beddall report) government purchasing policies (the Bevis report); the status of women, biodiversity (a report being published in the US, such is its standing); the banking industry (the Martin report); violence in schools, and the print media. Many of the recommendations have found their way into legislation. Some major achievements have been, apart from the subject areas, development of a number of ways to make committee inquiries more "user friendly" - workshops, forums etc. Yet academia and the media, have tended to concentrate on more high profile Senate inquiries. I would suggest that

we need to judge the legislative reforms as a matter of substance and then after evaluation , ask "where next?".

## Conclusion

The House of Representatives, like the Senate, is a complex institution. Members of all persuasions have grappled with the issue of improving the way the House considers legislation. We have made similar - and successful - reforms to give greater opportunities to private members and to create a system of investigatory committees. The record on these matters speaks for itself. There are elements in the work of the House which give the impression the House could be a rubber stamp - but it now has what must be the thorniest and most dangerous handle of any rubber stamp ever made! Many ministers, and former ministers, would be able to attest to that, as would former opposition people. If this situation continues, the procedural reforms are doing their job.

## Endnotes

1 Harvester/Wheatsheaf (UK) 1993, p 5.

2 Parliamentary Paper No 127 of 1993.

3 Parliamentary Paper No 128 of 1993.