Introduction

The Senate Department welcomes the opportunity to contribute to the review being conducted by the House of Lords Liaison Committee into House of Lords Investigative and Scrutiny Committees.

Committees are an integral part of the parliamentary process, and because each legislature develops its own procedures and culture, there is no one, unchanging model for effective committees.

Nonetheless, history has shown that parliaments can learn from each other. So the Senate Department is happy to offer comments on best practice in Senate committees.

The committee system of the Australian Senate has been evolving since the first select committee (into steamship communication with Tasmania) was established in July 1901, and indeed it continues to develop as illustrated by recent procedural changes which strengthened the rights of individual senators to question the executive at estimates hearings (and which are discussed below).

On the other hand, the large number of inquiries being undertaken simultaneously – a total of 63 in June 2018 which had peaked at 83 in February 2016 – presents new challenges to senators and the parliamentary staff who support them. While modest additional resources have been provided to the Senate Department in recent budgets, the number of senators remains constant and this has been reflected in difficulties in scheduling hearings and clearing draft reports. In addition to the number of references, the complexity of various inquiries has also posed challenges.
The Department makes no comment about the House of Lords Investigative and Scrutiny Committees or the direction they should take. On the question of whether there is scope to incorporate aspects of the Senate committee system, it may be useful to provide specific responses to some of the issues that are of interest to your review, including:

- current structure of Senate committees;
- scrutiny of legislation;
- Budget estimates: procedural changes; and
- best practice generally: community engagement, outreach and use of online surveys.

**Senate legislative and general purpose committees—brief history, overview and salient features**

Initially Senate committees were considered fact-finding bodies which generally undertook inquiries into significant policy areas and operated on a largely bipartisan basis. Perhaps as committees were not considered primarily forums for the pursuit of partisan political issues, chairs were generally government members (apart from the chairs of select committees). However, from the early 1990's there was pressure for a proportion of chairs of the standing committees to be allocated to non-government senators. In 1994 a bifurcated system of standing committees was established which reflected the composition of the chamber through allocation of chairs of the legislation committees to government senators while non-government senators held the chairs of reference committees. This system was also intended to reflect the composition of the chamber through differing membership of legislation committees, which effectively had a government majority, and references committees, which had a majority of non-government senators. This is the current system of Senate legislative and general purpose standing committees.

For a brief period from 2006 to 2009, when the government held a majority in the Senate, the Senate reverted to a system of single standing committees, all with government chairs. During this period, new inquiries on matters of policy or accountability certainly declined. However, the bill inquiries conducted during this time demonstrate that there is not a rigid connection between committee membership and chairing arrangements, and the capacity of committees to perform their critical role of scrutinising proposed legislation. For example, committees chaired by government
senators still presented reports recommending amendment of
government bills.

The main features of the current system are follows:

- eight pairs of committees are established under standing order 25 with a references committee and a legislation committee in each subject area;
- references committees inquire into matters referred to them by the Senate, other than matters to be referred to legislation committees;
- legislation committees inquire into bills, estimates, annual reports and the performance of agencies;
- each pair of committees is allocated a group of government departments and agencies;
- each committee has six members, with the government party having the chairs and majorities on legislation committees and non-government parties having the chairs and majorities on references committees;
- six of eight references committees have opposition chairs and two are from the largest minority party; allocation of these chairs is determined by agreement between the opposition and the largest minority party and, in the absence of agreement, is determined by the Senate;
- committees with government party chairs elect non-government deputy chairs and those with non-government chairs elect government deputy chairs; the chair, or the deputy chair when acting as chair, may appoint another member of a committee to act as chair during the temporary absence of both the chair and deputy chair from a meeting;
- chairs have a casting vote when the votes are equally divided, as do deputy chairs when acting as chairs;
- the chair, or the deputy chair when acting as chair, may appoint another member of a committee to act as chair during the temporary absence of both the chair and deputy chair from a meeting;
senators may also be appointed as substitute members, replacing other senators on committees for specific purposes, or as participating members, who have all the rights of members except the right to vote;

if a majority of members of a committee is not present, participating members may be counted for the purpose of forming a quorum;

provisions authorise other senators who are not members of committees to attend and participate in all estimates hearings;

committees may appoint subcommittees with a minimum of three members;

subcommittees have the same powers as the full committees, including the power to send for persons and documents, travel from place to place and meet in public or in private and notwithstanding any prorogation of Parliament or dissolution of the House of Representatives;

the pairs of committees may confer together to coordinate their work, and the chairs of these and any select committees form the Chairs’ Committee, which meets with the Deputy President in the chair, to consider and report to the Senate on any matter affecting the operations of the committees;

each pair of committees is supported by a single secretariat unit.

The committees therefore have the capacity to perform any of the Senate’s roles on its behalf.

The system allows a great deal of flexibility, particularly through the use of participating members. The price of greater flexibility, however, is a loss of the kind of committee cohesion that was evident in past decades when committees had a very stable membership and were more likely to operate in a largely non-partisan manner in the expectation of producing a unanimous report. With regular membership changes and a floating population of participating members, the loss of some cohesion is evident in the incidence of dissenting or minority reports.

It would also be fair to say that the system is under pressure from its success. A Senate committee inquiry is often regarded as a remedy of first resort, with the result that the incidence of referrals reached record levels in 2016 and remains high to this day. Committees must prioritise
their work and seek extensions of time in order to deal with the large number of inquiries being fielded simultaneously (in excess of a dozen per committee at some times, and as high as 18 in one case).

**Scrubtiny of legislation**

A critical role of the Senate legislation committees is to scrutinise proposed legislation and recommend to the Senate whether a bill should be passed and, if so, whether there should be any amendments to the bill. Approximately 40 per cent of all bills (including government bills and private senators’ bills) are referred to legislation committees for inquiry.

Bill inquiries often serve to identify technical problems with bills and regularly lead to amendments to bills. Another key function of bill inquiries is to examine whether bills will deliver the stated policy aims. One recent example of this is the Legal and Constitutional Affairs Legislation Committee inquiry into a private senator’s bill, introduced by former Senator Xenophon, to amend the *Criminal Code Act 1995* (Criminal Code) in order to extend the retrospective operation of provisions that make it an offence to harm Australians overseas. While the committee report generally endorsed the stated aim of the bill, the committee also expressed concern about practical difficulties associated with prosecutions under the proposed provisions and recommended further consultation occur in relation to the bill before its consideration by the Senate.¹ A bill to achieve similar policy aims was subsequently introduced jointly by the Attorney-General and Senator Xenophon and passed by both Houses in November 2015.²

The inquiry process is particularly important if there has been a truncated consultation process with respect to the proposed legislation. Moreover, a bill inquiry can help to identify amendments to the bill or changes to the policies and administrative practices underpinning the legislation which may make the bill acceptable to a majority of the chamber.

**Examination of bills and delegated legislation by legislative scrutiny committees**

In addition to these specific bill inquiries, three legislative scrutiny committees examine all bills and delegated legislation introduced into the Parliament:

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• the **Senate Regulations and Ordinances Committee** examines all disallowable delegated legislation against principles relating to personal rights and parliamentary propriety;

• the **Senate Scrutiny of Bills Committee** examines all bills against a set of accountability standards to assist the Parliament in undertaking its legislative function (these standards focus on the effect of proposed legislation on individual rights, liberties and obligations, and on parliamentary scrutiny);\(^3\) and

• the **Parliamentary Joint Committee on Human Rights** which considers the compatibility of all bills and delegated legislation with seven human rights treaties to which Australia is a party.

An important contribution of these committees has been to increase awareness and consideration of fundamental principles of good legislating and human rights by ministers and departments who have carriage of most of the legislation considered by the Parliament.

The work of the legislation committees on bill inquiries links closely to the work of the Scrutiny of Bills Committee. Indeed there is now an explicit requirement for legislation committees to consider the comments of the Scrutiny of Bills Committee with respect to bills referred to them (Standing Order 25(2A)). Legislation committees also routinely consider any views expressed by the Parliamentary Joint Committee on Human Rights. The Regulations and Ordinances Committee also draws matters to the attention of relevant portfolio committees where this may assist their deliberations.\(^4\)

**Budget estimates**

The examination of executive expenditure by parliamentarians is a key accountability mechanism and a central role for any parliamentary house of review. Nonetheless, there will always be a tension between the practicalities of parliamentary scheduling, the desire and ability of individual members to inquire into the details of government programs and expenditure, and the executive’s desire to limit questioning. (In fact, a major challenge for all parliamentarians is how to understand

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\(^3\) Further information about the work of the Scrutiny of Bills Committee is contained in the committee’s annual reports.

increasingly complex and technical executive programs and the associated resourcing so that the right questions can be posed.)

A number of procedural changes in the Australian Senate agreed in June 2014 have increased the capacity of individual senators to question Ministers and officials and so hold the government of the day to account.

It should be noted that the adoption of a program and the time allocated to individual senators to question and probe areas of particular interest will always be a matter of negotiation for each committee. However, under changes to orders of continuing effect agreed in 2014, provision was made for further hearings for estimates committees. In particular, Standing Order 26(4) was amended so that

...If a senator has further explanations to seek, items of expenditure shall not be closed for examination unless the senator has agreed to submit written questions or the committee has agreed to schedule additional hearings for that purpose.

Furthermore, under a procedural order of continuing effect:

...an additional hearing of a legislation committee considering estimates is taken to be required if any 3 members of the committee notify the chair in writing of a requirement for the committee to meet for that purpose, including for a specified period of time.5

There are usually approximately 70 estimates hearings each financial year. However, in the 2016–17 year, 77 hearings were held and in the 2017-18 year, 83 hearings were held which demonstrates a gradual increase under the new order.

Several senators expressed reservations about the new procedures when they were introduced, on the basis that they created greater uncertainty about the timetabling of estimates hearings. However, in more recent estimates rounds most scheduling issues have been resolved by agreement within the particular committee. The new orders have therefore contributed to the “enforced reasonableness” which underpins the operation of committees in a multi-party chamber.

Community engagement and outreach

5 25/06/2014, Journals of the Senate, p.1005.
While the key role of a parliamentary committee is to gather information and undertake the inquiry function delegated by the chamber, participation in this process by community members serves a range of useful purposes. In the first place, while parliamentarians have long had to deal reactively with lobbyists, committees can seek evidence from a variety of interested and disinterested witnesses with expertise and experience such as government officials, academics and community groups. In addition to gathering information, many committee inquiries also allow individuals and groups in the community, who might otherwise be very unlikely to influence policy or legislative changes, a chance to be heard. For some marginalised groups in the community, this process of being heard by parliamentarians may be almost as important as the more tangible outcomes of inquiries.

For the financial year 2016–17, a total of 7,143 witnesses assisted Senate committees undertaking estimates, bill inquiries and other references. Committee secretariats have developed expertise in maintaining databases of key officials, subject matter experts, advocates and community groups. In the past, the main means of raising awareness about committee inquiries was newspaper advertising, and while still used in a more targeted fashion, the main communication medium used nowadays are committee web pages.

The Senate has adopted more innovative community engagement practices such as round table discussions with key witnesses, online surveys and use of social media to publicise inquiries. Committees in recent years have also had an increased focus on addressing barriers to participation in inquiries facing people with disabilities. This has been reflected in increasing use of Auslan interpreters and the translation of some key inquiry information into Easy English by the Community Affairs References Committee to facilitate participation in inquiries by people with intellectual disabilities.

No doubt the issue of how best to use scarce resources to support committees confronts all parliaments. Parliaments should also be conscious of the demands inquiries place upon submitters and witnesses. In particular, there are risks in imposing too great a burden, particularly on non-government organisations, through repeated requests to participate in inquiries especially if timeframes for the inquiry are short (as they often are for bill inquiries).

Perhaps even more important is that committees manage the expectations inquiries may generate. Inquiries are rarely an effective
vehicle for providing individual redress, yet that is precisely what many submitters expect. Understandably, a report which recommends legislative or policy action may be cold comfort to submitters who have suffered personal or financial harm.

There is also the question of the “shallow” engagement which new technology enables versus engagement that actually supports committees and parliamentarians to perform their functions. Arguably, the mass email campaigns that accompany contentious inquiries or the consideration of controversial bills do little to inform parliamentarians particularly in proportion to the administrative burden they generate. For example, it is probably no surprise to parliamentarians that views about euthanasia are sharply divided and passionately held on both sides of the debate. For committees, community engagement is not an end in and of itself. The key questions are surely, “What is the purpose of community engagement through the committee process?” and “How does it support parliamentarians, and ultimately the chamber, to perform their roles?”

Several committees have adopted resolutions in response to mass email campaigns which improve the capacity of the committee to manage large volumes of correspondence to inquiries. For example, committees have resolved to publish only a sample of form emails received sometimes with an indication of the total numbers received by the committee.6

**Role of the secretariat**

Senate Committee Office staff are generalists and while officers are attached to particular secretariats, the uneven workload between secretariats has meant that staff regularly assist other committees. It is also common, because of workload pressures, for an inquiry of one committee to be entirely managed from a different committee secretariat. In addition, variations in the usual workload of different committees have meant that the usual staffing of secretariats varies significantly.

Experts have been used sparingly by Senate committees and, as committees cover such large and diverse portfolios, it would not be possible to engage experts in all of the fields their inquiries traverse. In truth, the expertise committees require to perform their roles effectively comes from submitters and witnesses. Having said that, there have been some highly technical areas where committees have engaged consultants

or seconded specialist staff during the inquiry to good effect. Recent examples include:

- the Economics References Committee inquiry into Australia’s innovation system where the committee engaged an expert consultant;\(^7\) and

- the Rural and Regional Affairs and Transport References Committee inquiry into aviation accident investigations where an expert from the Department of Defence was briefly seconded to the committee secretariat.\(^8\)

One exception to the sparing use of expert advisors by Senate committees is the work of the legislative scrutiny committees (the Regulations and Ordinances Committee, the Scrutiny of Bills Committee and the Parliamentary Joint Committee on Human Rights) which have all retained specialist legal advisors. This reflects the technical legislative scrutiny remit of these three committees and the largely non-partisan approach these committees have traditionally taken in performing that role.

The issue of committees traversing such wide intellectual territory that no single content expert could cover the required ground is a perennial one. For example in 1972, soon after the establishment of the system of Senate standing committees, the Select Committee on Foreign Ownership and Control noted that:

> The committee have considered the appointment of a permanent adviser. It has been agreed that the terms of reference could not adequately be covered by such an adviser and it has therefore been agreed that advisers will be sought from Industry, Government or the Universities on a short-term basis as each area is investigated.\(^9\)

Instead, the expertise that permanent committee secretariat staff provides relates to their ability to support committees, to develop the procedural knowledge to be effective committee clerks, to distil the key viewpoints presented to inquiries and to prepare reports that inform legislators.

\(^7\) Economics References Committee, *Australia’s Innovation System*, 3 December 2015, report, p.2.

\(^8\) Rural and Regional Affairs and Transport References Committee, *Aviation Accident Investigations*, 23 May 2013, report, p.2.
