SEVENTH AUSTRALASIAN AND PACIFIC CONFERENCE ON DELEGATED LEGISLATION

AND

FOURTH AUSTRALASIAN PACIFIC CONFERENCE ON THE SCRUTINY OF BILLS

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At Sydney on Thursday 22 July 1999

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The conference convened at 9.00 a.m.

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POLICY OR POLITICS?

CHAIR (Mr Wiese, Western Australia): It gives me a great deal of pleasure to introduce Professor Dennis Pearce, our first speaker this morning, who will speak about "Policy or Politics?" Professor Pearce is Emeritus Professor and Visiting Fellow of the Faculty of Law at the Australian National University. He is the author of *Delegated Legislation in Australia*, *Commonwealth Administrative Law*, *Australian Law Schools* and *Statutory Interpretation in Australia*. He is a member of the Copyright Tribunal, and Chairman of the Australian Press Council and the Commonwealth Attorney-General's Copyright Law Review Committee. His special interests include government, administrative law, civil liberties, constitutional, industrial and intellectual property law.

Prof. PEARCE (Australian National University): Mr Chairman, ladies and gentlemen: This is an unusual experience to talk in the round. You are all used to it, but I am not. I usually have some people out there whom I can look in the eye but not people behind me, waiting to stab me in the back. As I said, you are used to it. May I start with a story that is set in Queensland, because all good stories come from Queensland at some time or another. There was an instance where a farmer was run down by a car. He was proceeding home to his farm in his horse and cart. That suits the story; I will not say that is the way they still get around in Queensland. He was run down from behind and injured, and he duly brought an action to recover damages from the insurance company. Counsel who was appearing for the insurance company said to the farmer, "Now, Mr Farmer, isn't it true that you said to the policeman who was investigating this matter after the accident that you felt perfectly well?" The farmer said, "Well, yes, I did say that to the policeman." Counsel for the insurance company sat down, content with having carried the day and not needing to do anything further to earn his money.

But counsel for the farmer jumped up and said, "Perhaps you would like to tell us a little bit more about this event, Mr Farmer." The farmer said, "Well, there I was lying on the ground and this policeman came up. There was my old horse thrashing around, and he went over to it and shot it in the head. And there was my dog lying on the ground, yelping and carrying on, and he went over to it and shot it in the head. Then he came up to me and said, 'Are you all right?' I said 'Yeah, I'm perfectly all right'." I usually tell that story to students on the basis that it seems to me to be important, particularly for lawyers and politicians, never to take things at face value. That notion of not taking things at their face value is applicable also to parliamentary acceptance, particularly by committees—and scrutiny committees even more particularly—of the notion that what is being put to them is government policy - that that should be the end of the story and there is no reason for going behind that. Indeed, there is reason for going behind it, in that ill consequences might follow for the committee, for the functioning of the committee. That is the theme that I want to pursue today: merely taking the notion that something is government policy should not be the end of the day for a scrutiny committee; there are many other things that should be taken into account before retreating from the field at that sort of assertion.

The paper I have prepared has been made available to you, and I do not intend to read it but to talk to it. The gambit is to look at what is meant by the word "policy ". It is something that is always bandied around. It is a word that is common to the gatherings of parliamentarians and government officials. Everywhere you go you stumble across this word "policy". It is interesting to go to the dictionary to have a look at what the word is defined to mean. The conventional definition is "a course of action adopted by Government." That is the one we normally think of when the word "policy" is used. But if you run down through the definitions you see that "policy" is also defined to mean "political sagacity". If one goes even further down the list one finds that it also means "craftiness".

There is a tendency always to advance the first meaning and to rely on the first meaning. But in fact those latter meanings can reflect the claims of the Executive as readily as the first meaning. As you well know, the Executive is quite inclined to a round of political sagacity and even more inclined to craftiness. So when you see the assertion being made that something is a matter of policy, you can usually count on the notion that it involves all three elements of that definition—certainly a course of action adopted by the Government, one hopes political sagacity and, very frequently, craftiness.

Against that sort of background one should then look to see what scrutiny committees can do, because it is of extraordinary relevance to those committees to get that meaning of policy right. I thought it was worth trying to do that by looking at the policy and the politics of the relationship between the three arms of government. I thought that to a gathering of this kind it might be teaching you to suck eggs, and you might well think that. But sometimes it is handy, I think, to go back to the fundamentals, particularly in a conference of this kind, to see where it is all coming from and how it might all fit together. So I start the paper by looking at the question of the separation of powers—something that a former Premier of Queensland said did not exist but which is, in fact, the fundamental basis of why you are here today.

We have always worked on the basis that our system of government functions by that separation of powers notion: Parliament legislates; the Executive carries through that legislation, the money for its activity having been raised by parliamentary approval; and the judiciary then proceeds to enforce the laws on behalf of the other two arms of government. It is, of course, a complete misunderstanding of the way in which our system works. Parliament engages in Executive activity in the very way that you people do, by examining what has been done by the Executive. The Executive produces legislation. It also can control the execution of those laws by dint of the power of the Director of Public Prosecutions and the Attorney General to choose not to prosecute. So the notion of enforcement being the sole role of the judiciary is one that needs to be qualified. The judiciary, of course, gets itself involved pretty heavily in Executive-type matters by dint of the power to review Executive activity. It also makes legislation in the form of rules of court, which in turn come before you people for review, so you go around in the circle.

There is a feeling, I think, by virtue of the power of the Executive, that one arm could take over the total running of government, particularly as the Executive can control Parliament through the numbers and it can close down the courts by simply not giving the judiciary any money. But it is one of the great claims of our system of government that that has not happened, that we still go along with the three arms all carrying out broadly their own functions and all in many ways assisting one another, while at the same time elbowing one another aside to ensure that their position is retained. It is that pressure between the arms of government to ensure that they hold a position in the tetrarchy or the trio of places of government that bears a bit more consideration against the powers that are exercised by the scrutiny committees. It is essential that the balance between those three arms of government be maintained if the society as we know it is to continue in existence.

So let me start by looking initially at the relationship between the judiciary and the executive. I will come at the end to why this is of major importance for the scrutiny committees. Back in 1607 there was a meeting between the Lord Chief Justice of England, Lord Coke, and the king of the time, James I. James was not a man who was all that kindly disposed to people who disagreed with him and he had a way of ensuring that they did not for the future, by removing troublesome heads from reluctant bodies. An issue arose as to whether the King was subject to the law. Lord Coke, showing an extraordinary degree of bravery, said to James I that the King ought not to be under a man but under God and the law. By making that statement he established the position of the judiciary as one of the essential arms of the trio of government. It

is interesting that James accepted what he said. James at that time was head of the executive: Parliament had very little power. Yet the judge asserted a very strong power over the executive. I have always been convinced that James' acceptance of this was an early case of counting the numbers. He realised that he had to accept what was being said. He did not have sufficient power to be able to say, "No, that is not so. I am going to gather all power unto myself and I shall judge, legislate and execute"—in all senses of that word.

So from that point forward there was established what we have come to know as the rule of law, that the judiciary does have the capacity to check the activities of the executive. Rolling on from there has been the capacity of the court then to award damages against the government for breach of contract and for liability in negligence and so forth. More particularly from our point of view, the judiciary could review the validity of the actions taken by the executive; it could provide a form of review of administrative action. Again, what has rolled on from there has been a steady accretion of power to the judiciary in that the grounds on which it has been prepared to review executive action has at times very much teetered on the brink of substituting members of the judiciary for the executive as decision makers. If you have as grounds of review the ground of unreasonableness, the ground of disproportionate to the legislative power, the ground of failing to take account of a relevant or irrelevant circumstance—nobody knows what those relevant or irrelevant circumstances are until the courts say what they are—it is a pretty fair sort of a power for a court to be able to exercise. So the courts have assumed this facility to be able to overturn a decision of the executive on grounds that are very close to the grounds or the basis on which the executive itself may have made its own decision.

That has been an assertion of political will by the judiciary. It has said that the rule of law is such that we, the judiciary, can say that you, the executive, are wrong and you have to do something about it. That has been an extraordinary check on totalitarian rule, and it is largely in countries that have followed the system of government that we have that there has been freedom from totalitarian rule through the assertion of power by the courts to keep the executive in check. But the important thing is that the executive has accepted it. From the time of James they have accepted that role of the judiciary—they did not need to but they have. They have not accepted it without criticism, and they have acted at varying times to check the extent to which the judiciary can interfere with executive-type actions.

I wanted to draw attention to a drift that may be occurring with the High Court in the last 12 months or so perhaps indicating that the lower courts ought to watch a bit what they are doing. In this sort of shuffling backwards and forwards as to who has the right power, where the power base should lie, how far one should act to overcome another, the High Court has said to the Federal Court, "Be careful. There is a limit to how far you can push and we are not too sure that you are not going just a bit beyond what is an appropriate stance for the judiciary to take." In other words, it is saying, "Our policy ought to be not to be too interventionist".

That policy, of course, is simply an expression of politics, because it is appreciating that you can go too far when taking on the executive. It would be wrong to think that the executive has rolled over and put its feet in the air and said, "Anything that you like to say to us, judges, we will accept without any problem at all. We will just get on with it and let you do what you want." In my paper I mention a few ways in which the executive has responded, some of which are very significant from the viewpoint of what the scrutiny committees should be looking at.

The first one, which tends to be overlooked, was the changes that were made to the Interpretation Acts of all our jurisdictions which say that when the courts are interpreting law they should look to extrinsic materials. Those extrinsic materials are, of course, produced by the

executive. That means that the executive can get another bite at the cherry as to what the law should be because not only has it had a great deal of say in what form the legislation has taken but it can produce subsidiary documents which are taken into account for the purposes of understanding the legislation.

More to the point are the two significant powers of the executive by which it can curb the way in which the judiciary goes about its task. First is the inclusion in legislation of clauses called "privative clauses" which prevent the courts from exercising a full range of powers over the nature of the executive decision. They will say that a decision is not invalid because certain types of errors have been committed. The courts have not always taken those legislative statements at their face value, which is fairly understandable, because here you are seeing an attack by the executive on the power of the judiciary. So the judiciary is going to fight back and not give those clauses the full scope of power that the executive would like. Nonetheless, they are there: they have to be given some effect and there is no question but that they do act as a constraint on the full scope of the judicial power. They can be very strong, as we see happening at the Commonwealth level in relation to migration decisions with the Federal Court's jurisdiction being more and more confined. That is a straight out executive response to what it considers is a wrongful intrusion by the judiciary into executive decision making.

The other way in which the executive can control the courts is by achieving their abolition. This has happened from time to time in Australia: a court or tribunal has simply been abolished—no messing around; it does not exist any more. It has not happened at the higher levels but the Supreme Courts in all the States are a creature of statute and if the executive wanted to it could abolish them and that would be that: they just would not exist any more. That could happen if the executive really wanted to assert power over the judiciary.

The way in which the courts have taken perhaps the strongest line of resistance to executive intrusion, however, is by maintaining the position that the final processes of enforcement of the law must lie with the court, that you cannot give that sort of power to a tribunal and that the executive cannot enforce final decisions itself. The High Court has been absolutely rigid in taking that sort of view towards attempts to enable bodies such as the Human Rights and Equal Opportunity Commission or various other tribunals to enforce their own understanding of the law and to carry out the execution of their decision themselves. You will always have to go back to get a court order before an executive decision can be carried into effect. That is a significant holding point for the judiciary to have taken. The courts are dependent on the executive for their continued funding and for their continued existence. The executive can control the range of jurisdiction of the court but at the very end of the day if a decision is to be carried out you have to turn to the judiciary to be able to do that. That is the recognition of their stance in the trio of power bases.

The interesting development that has occurred in parallel with this is the position in relation to tribunals—which are not courts—which are closer to the Executive. Issues have arisen as to the extent to which a tribunal can override a government decision, a decision usually made by a government department. The Federal Administrative Appeals Tribunal had to grapple with this question and deal with the extent to which policy considerations by government drive the outcome of decisions by the Tribunal. The position it reached is that it will take the policy into account but it will not be bound by it. But, the more high level the policy, the more it ranges up to being a ministerial, political-type policy, the more the tribunal will feel obliged to make decisions that accord with that policy. That is a very significant distinction because that is a line that scrutiny committees ought to look at as an approach to their work.

That is enough about the Executive and the judiciary. I will now talk about Parliament and the judiciary. Most parliaments do not recognise that the judiciary has been very

kind to them. It has never taken the heavy constraint lines it has applied to the Executive and applied them to Parliament. If parliaments do not comply with their own procedures, if they make legislation that does not accord with standing orders in the way in which the procedures are laid down, it does not matter, the legislation will still be good. If an Executive decision is taken with failure to comply with required procedures it will be invalid. The attitude the judiciary takes towards Executive decision making is in total contrast to the attitude it takes towards parliamentary decision making. The courts have been kind to Parliament in that respect.

The courts have recognised that parliamentarians can exercise power over their own members, they can discipline their own members. That is not recognised so far as members of the Executive are concerned. The Executive is bound by the legislation it enacts in its control over its own members. Recently, in relation to this building, but not this Chamber, the courts recognised the power of the Legislative Council to compel a Minister to provide information to the Council in the case of *Egan v Willis*. It was a very significant decision upholding the strength of the power of Parliament vis-a-vis the Executive. It is most interesting that in many ways the courts have recognised the power of Parliament to penalise people pursuant to the contempt power. As I said, the Executive is not allowed to do its own judging. If there is a capacity to put somebody in gaol, then it has to be done by the judiciary. Not so in relation to Parliament. That interrelationship between parliaments and the judiciary has been very different from the relationship between the Executive and the judiciary.

Has Parliament reciprocated for the courts? The answer is no. Parliament has not really acted to prevent Executive intrusion on the activities of the judiciary. It has tended to let go, without much fuss, various provisions that limited the powers of the judiciary. It has allowed privative clauses to be included in legislation. It has allowed courts to be abolished. It has never made much noise when the judiciary has said, "We are underfunded. If we are going to carry out our role properly we need more money." I have not seen parliaments jumping up and down and saying, "This is wrong! Give them some more!" There has not been that degree of reciprocity from parliaments in support of the judiciary.

Moreover, Parliament has intruded into the activities of the judiciary in relation to review of rules of court. I think all of you have jurisdiction to review rules of court and do so from time to time—not often, but occasionally. There you have an example of Parliament actively calling the judiciary to account for material it has produced. I do not think that is wrong because the way in which rules of court are structured can have a marked effect on access to justice. If you set up very complex procedural rules people have to employ lawyers, and that makes obtaining justice very much harder. But it has to be recognised for what it is: Parliament quite clearly straying into the domain of the judiciary.

Finally, on inter-reactions there is the question of the relationship between Parliament and the Executive. I really think that Parliament is its own worst enemy in this respect. There is no doubt that when you guys change sides, as happens occasionally, it is remarkable how the defender of Parliament becomes the attacker of Parliament and vice versa, and very often that has undermined the capacity of Parliament to be able to resist activities of the Executive.

But in a sense that is by the way. What is a real worry in the context in which I am talking is the status that is afforded to assertions that government policy is in some way or another sacrosanct. You cannot ask Ministers for a statement on government policy. You cannot ask a public servant to comment on government policy, even though the public servant may have written it. There has been a tendency to let that concept of government policy assume too great

a level of status. It is that which I wish to talk to. It is very important for Parliament to be aware of how far it allows the Executive to go because that will destroy the balance between the three arms of government that has been the saving grace of our form of society.

I now turn to what the scrutiny committees should be doing in this area. I know I step boldly here because all of you are doing it, and it is very easy for someone to come from outside and say, "I reckon you ought to be doing something different." You will undoubtedly raise that by way of comment. When I say "scrutiny committees" I mean the bill scrutiny committees and the delegated legislation committees, because most of the remarks I make are intended to apply to all legislation, not only to delegated legislation.

I refer firstly to legislation that affects the courts. It is very important for Parliament to be aware that it needs allies and the courts are its allies, but it is easy to lose allies. It would be unwise for Parliament not to assist the courts, the judiciary, when it can. It is important to remember that the rule of law still lies with the judiciary. It is important to remember that in our society the rule of law is a very important concept and should not be lightly put to one side. It is interesting to consider what I have said about the way in which the courts have assisted Parliament, and I pose the question: What would be your position if the Egan case had gone the other way, if the High Court had said that parliamentary committees cannot require a government Minister, and through a government Minister a government official, to produce evidence to an inquiry? It would have been devastating, because it would have cut out the basis for parliaments being able to oversight Executive activity. It would have left the parliamentary committees in the position in which they simply had to content themselves with what the Executive gave them. The courts have given Parliament an immensely significant weapon.

You should treat the courts right because they are looking after you. That being so, let us look at it in its applied application. If legislation comes before Parliament that is directed to abolition of a court or abolition of a tribunal, the scrutiny committees should look very hard at why it is there. The politics of abolition is almost always not what it purports to be. I doubt if there has been an instance in Australia where the abolition of a court or tribunal has been on the grounds of efficiency, or whatever has been put forward. It has almost always been because there are people on the court or the tribunal that the Government does not like, and, indeed, sometimes even the court does not like, but they cannot get rid of them. The only way to get rid of them is to abolish the body and not reappoint those people to the successor, and that has happened.

The other basis on which they have been got rid of is because they do not fit the Executive's policy line. The Victorian example of the abolition of its compensation court is a clear indication of that. At the Federal level we have seen several instances of various models of the variously named Conciliation and Arbitration Commission and the Industrial Relations Commission and other industrial labels added to the body because it has not fit the pattern the Government wanted carried through. It is not that the body has been inefficient, but the politics have been such that it was not the body the Government wanted. It is very important that scrutiny committees look behind the straight statement, "We are going to get a more efficient show on the road here," and ask the real reasons and expose the real reasons to public scrutiny as to why courts are being abolished.

If limitations on jurisdiction are being proposed, again it is very important for scrutiny committees to be quite clear as to why that is happening. Is it simply because the Executive does not like the run of decisions it has been getting, or is it genuinely because the

court concerned has overstepped the mark and has moved into an area that is the arena of the Executive? A case can be made out for that in relation to the constrictions that have been put on the Federal Court vis-a-vis the immigration decisions. A case can genuinely be made that the Federal Court has gone too far in interfering with the way in which the immigration program is being administered. But that fact has to be out there on the table and made quite clear that it is the basis on which the constraint is occurring, and not simply because there has been a run of awkward decisions for the Government that it does not really like.

All of you have as one of your review grounds a notion that administrative decisions should be subject to review of some kind. It is important to bear in mind that the nature of review is such that you need to have the capacity to pick up both judicial review as to validity and merits review, because they do not necessarily go hand in hand with the one body. At the Federal level they absolutely do not, but even at the State level you can find that review powers are being given to a court that can look at validity issues but not merits issues, or vice versa. It is important that care be taken by scrutiny committees to see exactly what it is that the Executive is proposing, exactly what the scope of the review power is, and be sure that it is enough to ensure that people will have a full opportunity to challenge decisions of the Executive.

It is wise for the committees to scrutinise rules of court because the complexity of procedure can reduce access. It is appropriate that committees call on the courts to explain their legislation. If the courts can call on everybody to explain their activities, there is no reason that it should not apply in reverse.

In relation to the question of whether committees look at policy issues it is significant to ask, as I asked at the outset, what policy means. If you take the very broad definition that it is a course of conduct adopted by a government, scrutiny committees would have no powers at all because everything that is in legislation is, of course, conduct that has been adopted by a government. As far as I am aware, no scrutiny committee has been prepared to accept that definition, and that is wise. But thereafter where do you draw the line?

In my paper I have included a couple of quotes from old friends. One quote is from Ken Jasper, who was the chairman of the Victorian subordinate legislation subcommittee. Ken said that it was not ever possible in practice for scrutiny committees to completely divorce policy considerations from technical or legal scrutiny criteria. He was not seeing that the distinction between policy and non-policy issues could be readily assumed. More interestingly, the second quote is from Adrian Cruickshank, who I had hoped would be here today to join in the discussion. At the Fourth Australasian and Pacific Conference on Delegated Legislation Adrian said:

> Contrary to conventional belief, committees are likely to behave more cohesively and not divisively by involvement in issues of policy. Bipartisanship is preserved and not diminished by committees questioning policy decisions implemented in delegated legislation if it is apparent that the decision involves a fundamental breach of human rights. Committees are more likely to act cohesively if they are seen to be involved in matters of substance and not, as in the past, matters of form.

The last sentence is a fairly bold statement. I do not know whether all of you agree with it, and I am sure views will be expressed about it. At present it is the policy of scrutiny committees to avoid policy issues. I am suggesting that perhaps it should be the politics of committees to avoid political issues. This should be your test: Is this truly a political issue that must be avoided? In determining that, it is appropriate to look at the level of policy. For example, is it a Cabinet-produced policy or is it something that has come from the public service? Is it truly sensitive?

What is it its significance?

I suppose what I am saying is that you should not simply assume that a committee should back away from something because it can be said to be policy. The assertion requires a much more sophisticated examination than perhaps has always happened in the past. It may well require a committee to conduct some sort of inquiry. I know that most of you do not conduct inquiries, but I wonder whether there is room for some limited use of that.

Returning to my original definitions, scrutiny committees should not be taken in by the course of government action meaning of policy; rather, they should show political sagacity and if necessary craftiness because it is these definitions that the Executive uses as it tries to assert power over Parliament.

Mr LEE (Canada): I enjoyed the presentation this morning. Professor, I was struck by your characterisation of the *Egan v Willis* decision as a kind of gift from the judiciary to Parliament. My conception of this is quite different. Parliament's constitutional right to send for a person's papers and records is at least 300 or 400 years old. It was not created by the judiciary; it was created by Parliament. So all that the court in Australia has done is recognise that that principle exists and is a living one. It is not a gift; it is simply a statement of the law. If it were a gift from the court, surely the court, in reinterpreting it, could take it away. Of course, that is not my view. Parliamentary privileges and the power to send for a person's papers and records are a fundamental part of the constitutional law of Canada. I had assumed that the same was true in Australia, having imported the same bundle of parliamentary law as Canada. Can you comment on that?

Prof. PEARCE: The point at issue is that the judiciary recognised that that was indeed the law of the land, and I am glad that they did. But one should move that stage back further. The crucial fact was that it is the judiciary that must scrutinise that. It would have been no use for Parliament to jump up and down saying, "We are entitled to these papers" if the Executive had then said, "We will not give them to you." That would have closed the day for Parliament. They could have put Mr Egan out onto the footpath.

Ms SAFFIN (New South Wales): Which we did.

Prof. PEARCE: Which you did. If the judiciary had not said you could do it then you would have been liable for an action for assault. It would have been the judiciary that would have enforced that, and it would have been the judiciary that would have put the Clerk of the Parliaments into gaol for doing so. It is this interweaving of the three arms that is so important. If you go back to a base of separation of powers, James recognised that it was the courts that executed the laws; it was not Parliament. Parliament makes the laws, except in relation to contempt procedures. Again the court has recognised that Parliament has that power. That does not apply to all parliaments. This Parliament does not have a full-blown contempt power. It has the power of self protection but it does not have a true contempt power.

The Commonwealth Parliament and the Victorian Parliament have a full-blown contempt power but the New South Wales Parliament does not. So you have had that as variance on the recognition of the various powers of Parliament all coming back to the point that it is the court that must give the imprimatur to that because it is the judiciary that says what is the law of the land. In this case it recognised the law of the land and thereby was on the side of Parliament and gave—I think the word "gave" is not unreasonable—the tick of approval to Parliament

exercising the power that had long been found in the constitution. However, it could have gone the other way. If it had, the Clerk or whoever put Mr Egan onto the street would have been up the next day with Mr Egan bringing an assault and false imprisonment charge, without a shadow of a doubt.

Mr LIDDELL (New Zealand): I enjoyed Professor Pearce's paper this morning and I should like to explore one aspect of it. I am interested in his assertion that committees could afford to be a little bolder in their examination of government policy. I should like to explore what Professor Pearce sees as the in-principle justification for a committee being bolder with policy which has emanated from the public service than that which has emanated from Cabinet. What is the in-principle distinction, or is it a question of pragmatics? I am interested in this matter because in the New Zealand system virtually all bills go to select committees where the whole gambit of the policy behind them is subject to examination and to submission by members of the public. Frequently, bills are substantially changed and thereby some aspects of policy may be modified. Given that that is accepted open territory when it comes to Parliament's preparation of a bill, in New Zealand anyway, I wonder what Professor Pearce sees as justification for a distinction in approach between policy emanating from the public service and policy emanating from Cabinet.

Prof. PEARCE: First, the New Zealand experience in relation to the use of legislation committees is not emulated in all Australian jurisdictions, as you are probably aware. The reason I suggest that there is a distinction in a sense stems from the attitude that scrutiny committees have tended to take in the past that they must be very wary of entering into the policy domain. The great strength of the committees in Australia has been the fact that they have acted unanimously. They have not divided on party lines and they have been able to carry their recommendations in Parliament because of that factor. If committees were to be seen to divide on party lines and a recommendation was made for disallowance of delegated legislation in particular it would not get up. The great strength has been the capacity of committees to present one face. The more you get into the policy arena the more likely it is that there will be a division on party lines.

So that capacity to put one view forward will go and the strength of the committee will go with it. It is that view that Adrian Cruickshank was attacking. I quoted Adrian because his view broke from the traditional view that existed in Australia and I thought people might wish to pursue it. I drew a distinction between, as it were, Cabinet policy and public service policy because I thought that if you are prepared to get into the policy examination area there is less likelihood of a division on party lines and the level of production of the policy. It is exactly that attitude that the Administrative Appeals Tribunal has taken in regard to its application of policy in considering the validity of administrative decisions. It is an interesting concept that was invented by Justice Brennan, when he was president of the tribunal, who saw the politics of that: If you wanted to survive in a tough world of looking at Executive decisions you had to bear in mind that ministerial decisions are probably no-go land. I wonder whether the same sort of distinction applies at the scrutiny level.

Mr HIRD (Australian Capital Territory): Professor, when you said that you normally have people in front of you rather than behind you I was reminded of a story. A new chum had just been elected to Parliament. He was so enthusiastic about his new position in life that he rushed up to one of the old timers on the front bench—a bit like Senator Cooney—and said, "Isn't it good to look the enemy straight in the eye?". The old timer said, "They are not out in front of you, son, they are behind you." I suggest that too much can be made of opposition between Parliament and the Executive. As someone said yesterday, the Opposition is the

Executive in the waiting room. No doubt this explains why parliaments are reluctant to control the Executive. But is this not consistent with the responsibility of government? If bodies such as scrutiny committees try to control the Executive, do they not frustrate representative government? Can it not be that you get the Executive saying that it has through the process of responsible government a mandate from the electorate? On that note, is it the farmer of whom you spoke, who wisely answered the police officer as to his well being, who is the fourth arm?

Prof. PEARCE: I am not quite sure what I should say to that. In fact, I am not too sure it should not be said by somebody around here because you are the people who are elected and who have to judge the extent to which you are prepared to argue with the present Executive, knowing full well that with an ounce of luck in three or four years time they will be arguing with you because you will be the Executive and they will be saying that what you are doing is wrong. I must confess I would be appalled if the people that I elected—whether I gave them a mandate is another question, but the mandate I thought I gave them was to be their calling the Executive to account for the actions that they are taking and not simply saying, "You had the numbers on the day and I will now retire for the next four years. I will not trouble you any more and I will accept entirely what you choose to do because you had the numbers on that election day." I think that is a contradiction of the role of Parliament and breaks down our three arms of government that I was talking about.

Mr REDFORD (South Australia): In your paper you ask us to be bold in dealing with the Executive yet timid in dealing with the judiciary. I understand your basis is that we need all the friends and allies we can get. Occasionally we look on the Executive as an ally, not as an enemy, and we have to work together. I do not think you have touched on one important matter and I would like your comments on it. You appear not to have looked at the fact that our committees give people an opportunity to air policy considerations, bring them out into the public arena and give the Opposition or members of Parliament the opportunity to subsequently raise those issues in Parliament, which inevitably they do.

It is not uncommon for one of the Opposition members in our Parliament to go out under their own steam in the name of the Opposition and move a motion of disallowance on the basis that they do not like that policy. That is their legitimate right and, indeed, their responsibility. The committee has acted by giving them the forum and the information to enable them to do that. In those circumstances why should we take the risk of getting involved in policy decisions and inviting divided decisions from committees when the current system is actually working reasonably well and those sorts of policy issues are in fact being aired?

Prof. PEARCE: I think it is a case of whether you consider that airing is enough. The power of the delegated legislation committees, as distinct from the scrutiny of bills committees, has been that they have been able to reach a conclusion that a particular piece of legislation should no longer exist and they have achieved that either by the Minister agreeing to amend or withdraw the legislation or, in the ultimate, actually having it disallowed by Parliament. There seems to me to be a world of difference between a committee actually committing itself to the removal from the books of a piece of legislation and simply airing concerns and leaving the legislation on foot with the Executive being able to say "It was a very interesting airing but we are not going to do anything about it."

That is where I think one needs to look at the distinction between the legislation that is clearly driven by the wishes of the government in terms of the cabinet or the government that is there actively governing, and legislation that is being driven from the public service sector

because of a desire by the public service to make its life easy by, for example, allowing inspectors to enter premises without a warrant, which is every public service inspector's dream. I think you have to have a committee to say, "That will not do and if you try to keep on with it we will disallow your legislation". I do not think it is enough to simply get to the stage of airing the issue. We can all agree that the warrant provision should go, but where one draws the line after that is where the difficulties arise. I would invite committees to go further or at least consider whether they should go further than just staying with those obvious cases.

Ms SAFFIN: I would just like to make some comments on the characterisation of what is policy and what is not policy. I have had experience in administrative law as an advocate for people and as a member of the Social Security Appeals Tribunal, and serving on committees I do not have a problem with the characterisation of it. However, I understand why some of my parliamentary colleagues grapple with that question at times. I am in a position where I can characterise anything as policy or something we can genuinely deal with. We seem to adopt the view adopted by the Administrative Appeals Tribunal and the Administrative Review Council in Australia but it is sometimes a problem for committees.

We are often told that something is policy and we cannot touch it. Professor Pearce has said that we need closer examination or scrutiny because on examination we find that it is not policy but that someone has made an ad hoc decision on the run and said it is policy. Sometimes we are told by a bureaucrat that something is policy when it is not government policy but is action taken by the bureaucracy. This may come to us by way of rules, regulations or policy and on examination we have found that the interpretation of the law is incorrect. I have had experience of that at a tribunal level and at a parliamentary level on the committee.

In New South Wales we undertake public inquiries, and I would be interested to ascertain the experience of other States and Territories. This system has been successful. Ministers may give evidence to an inquiry or engage in round-table discussions. As a result of that we have actually had regulations changed. They have been returned to the drawing board and been amended, with the involvement of interested parties. We have held many inquiries, although I cannot remember the number. That has been an interesting way for the committee to operate to try to negotiate changes.

Prof. PEARCE: I commend what has been said.

Mr MULITALO (Samoa): I am a member of Parliament and Deputy-Speaker of the Samoan Parliament. I am also chairman of the parliamentary committee on the judiciary and justice, police and prisons, and Land and Titles Department. I suppose that is why I am here. Please excuse my ignorance and my stupidity if I make a wrong comment on the paper. Thank you very much for the paper presented this morning and those presented yesterday. I am very thankful to be a participant in this conference.

A point was made this morning about the interrelationship of Parliament and the judiciary. In my country recently there were many differences between the Government and the Office of the Controller and Chief Auditor. Our Constitution was drafted by one professor from Australia and one from New Zealand together with the Constitutional Convention from all over Samoa way back in 1960 and in the Constitution a person is appointed to the post of the Controller and Chief Auditor for life. Very recently, in 1995, the Government at the time had a lot of differences with the Controller and Chief Auditor so it proposed a bill to become legislation in order to amend the Constitution. It is very difficult to amend the Constitution but the

Government was fortunate and had a two-thirds majority at that time, and it reduced the term of the 62-year-old person holding that position to a three-year term contract.

The Controller and Chief Auditor took the case to the Supreme Court, and the Supreme Court said that Parliament has supremacy for changing and amending the laws. Even so, this gentleman appealed to the Appeal Court of Samoa, which comprised members from the Supreme Courts of Australia, New Zealand, Canada and the United Kingdom. Their Lordships said that it is Parliament of the day which has the supremacy of making laws and the judiciary has to act according to what is said by Parliament. The point I am trying to raise here is that nowadays we can see that the Executive has many powers where it can corporatise a department in order to see through the transparency achievements of the day. That is a problem because the government can also make regulations. In my own country regulations were prepared only for the Executive and then passed on to the Head of State to approve, without the same from Parliament.

Is this in order with the democratic relationship of the Executive and Parliament, because sometimes Parliament never sees a regulation but only approves bills through the first reading, second reading and third reading? I raise this because recently there was a lot of argument from the Opposition in my Parliament about an increase in fees from the islands of Samoa, where the shipping corporation raised the fees from $6 to $7. There was a lot of argument from the Opposition and the Government said we had no right to do that because there was a separate port running the shipping corporation. Professor, can you explain to me the power of the scrutiny regulatory committee, because it appears that we have no power to do this. When the shipping corporation wanted to raise the fees it brought its own regulations to the Government, the Executive and then from the Executive to the Head of State for approval. Later on the public had no say.

Prof. PEARCE: The position that you describe used to exist in Australia, and still does exist in relation to a lot of minor legislation. The bodies which can make that legislation simply have it signed off by the Governor and it becomes the law. However—and this is the area that your Parliament will have to pursue—the parliaments in Australia realised that the Executive was using that power in an abusive fashion. Legislation was passed which said that Parliament was entitled to see the legislation and had the power to disallow it, to make it cease to operate. But that power came from Parliament because, as you rightly said, Parliament is the supreme law-making body. It can lay down the law for all areas of government and the judiciary to comply with. So the essential element is to get Parliament sufficiently interested in giving itself the ability to look at that type of legislation and to be able to set it to one side.

We are going through the same debate in Australia. Whilst the committees that are here all have power over some government legislation, not all of them have power over all Executive-made legislation. There is still the capacity in Australia for some governments to pass legislation of exactly the same kind as you are talking about, the increase in fares, and for Parliament to have no power to set that aside. Most of our parliaments are worried about that. Many of them are trying to broaden the powers of Parliament to disallow that sort of legislation. What you have to do is go back and get the numbers because it is the politics that are going to count.

Mr MULITALO: Where does the regulation committee come in—after the regulation is passed by the Executive or the Governor-General? For example, my Government is looking into privatisation. If that is the case, the corporate body or the organisation would freely put in their own regulations, but Parliament would have no say in it. At the same time, if

the regulations come through Parliament where would we be?

Prof. PEARCE: It is the very same problem that exists in Australia. As governments corporatise their activities, then the capacity of Parliament to be able to oversight the activity that is going on decreases. Unless a separate law is passed which says that shipping company tariffs are subject to approval by Parliament—and you could do that—then there will be no capacity to be able to control that sort of action. I think it is a world-wide problem. As the attraction of corporatisation becomes more and more part of the general approach taken by the Executives, they see more and more an ability to bypass the oversight role of Parliament. You are not an orphan.

Mr MINSON (Western Australia): Professor, it has often been a matter of some puzzlement and frustration to me that our Parliament can only allow regulations to stand or be disallowed in their entirety. We are not allowed to alter or amend them in any way. It is often a difficult thing for us. There may be a whole raft of elements that we want and are popular and some elements that we do not want. So it becomes politically unpalatable to disallow the regulation because that causes a problem. Is that problem general across Australia and, if so, should we be looking at having a mechanism where Parliament can modify regulations rather than merely disallow them?

Prof. PEARCE: What you are saying is the general position in Australia, but others—Mr Argument for one—will be able to correct me if I am wrong. It was interesting to see in the Legislative Instruments Bill which the Commonwealth has been playing around with for years that there was a power to disallow part of a regulation and to modify the regulation. I have always thought that there ought to be that power. The argument against that is an attitude that parliaments cannot be trusted to be sensible. It is reasoned that if Parliament disallows one element and the rest of the regulation is interdependent, the whole system will collapse because the one bad apple in the barrel has been removed. I have never thought that argument is right.

I think that disallowance of one part ought to be possible because otherwise what happens is the reverse. If there are a lot of good elements in the regulation but one bad element, then the argument will carry the day that all of the you-beaut stuff could not be set aside just because you were upset about one little element of it. So the one bad bit goes through hanging on the coat-tails of the good part. I would have thought that it was desirable for committees to move down that path.

ETHICS AND THE LAW: A CASE STUDY OF CONFUSION IN THE RELATIONSHIP BETWEEN THE TWO

CHAIR (Ms Holmes, Western Australia): It is my pleasure to chair this session on behalf of the Western Australian Standing Committee on Uniform Legislation and Intergovernmental Agreements. This session is on ethics and the law: a case study of confusion in the relationship between the two. Our speaker today is Dr Bernadette Tobin, Director, Plunkett Centre for Ethics, Sydney. Bernadette, a senior lecturer in philosophy at the Australian Catholic University, has qualifications in philosophy from the University of Melbourne and in the philosophy of education from the University of Cambridge. Bernadette has taught at the University of Melbourne and at the Australian Catholic University in both Melbourne and Sydney. In 1990, Dr Tobin was the inaugural post-doctoral research fellow at the New South Wales Australian Catholic University. From 1991 to 1993 she was an Australian Research Council post-doctoral fellow and her research project was on the development of a virtues-based approach to the ethics of health care. Dr Tobin is a member of the Australian Health Ethics Committee, a principal committee of Australia's National Health and Medical Research Council. She chaired its transplant ethics working party, and she is the author of articles on moral development and moral education, and on various aspects of the ethics of health care. I introduce delegates to Dr Bernadette Tobin.

Dr TOBIN (Director, Plunkett Centre for Ethics): When I was asked to address the subject of ethics and the law and the relationship between them it struck me that I could do one of two things: the first would be to speak generally or abstractly about that relationship; and the second would be to tell a story—to give a case that would illustrate what I think is the right way to think about that relationship. The law is intrinsically ethical or inherently moral; it cannot help but be. So any scrutiny of the law, any interpretation of the law by judges, is inherently moral or ethical. Therefore, it matters that we get the ethics right.

Mine is a case study of a confusion in the relationship between ethics and the law. Anthony Bland, then aged 17, was very seriously injured in the disaster which occurred at the Hillsborough football ground on 15 April 1989. His lungs were crushed and punctured and the supply of oxygen to his brain was interrupted. As a result, he suffered catastrophic and irreversible damage to the higher centres of his brain which left him in a condition known infelicitously as a persistent vegetative state. The medical opinion of all who been consulted about his case was unanimous in the diagnosis and also all were agreed on his prognosis that there was no hope of any improvement in his condition for recovery. At no time before the disaster had he indicated his wishes if he should find himself in such a condition. But his father, in evidence, said that his son would not want to be left like that. With the concurrence of his family, the consultant in charge of his care and other independent physicians, the Airedale National Health Service Trust, the health care authority responsible for the hospital where he was being treated, sought declarations from the court that they might, first, lawfully discontinue all life-sustaining treatment and medical support measures designed to keep the patient alive in his existing state, including the termination of ventilation and nutrition of hydration by artificial means, and second, lawfully discontinue and, thereafter, not furnish medical treatment to the patient except for the sole purpose of enabling the patient to end his life and die peacefully with the greatest dignity and the least of pain, suffering and distress.

The court granted the declaration sought. On appeal by the Official Solicitor, appearing as guardian ad litem, the Court of Appeal upheld the judgment of the original court and, on a further appeal by the Official Solicitor, the law lords affirmed the decision of the Court

of Appeal. However, in concurring with the judgment that it would be lawful to discontinue life-sustaining treatment, Lord Mustill spoke of his "acute unease" with the court decision, which emphasised what he called "the distortions of a legal structure which is already morally and intellectually misshapen". Lord Brown-Wilkinson agreed that the decision would seem "almost irrational". In this paper, I shall argue that this is a correct evaluation of the court's reasoning in the Bland case. To put the matter crudely, the courts came to a reasonable decision on unreasonable grounds. In doing so, I hope to show a way in which ethics and the law are intrinsically connected.

I will now set out a background to traditional medical ethics and the proper limits to treatment. Medical practice is informed by an ethic, the first expression of which is found in the Hippocratic Oath. Two key ideas are worth recalling. According to that traditional ethic, the goal of medicine is health, its restoration or maintenance, together with the relief of the symptoms of illness. So the business of medicine is quite specific: it is to cure illnesses where possible, to maintain a person in a reasonably satisfactory condition, and to relieve the symptoms of illness. Notice that, according to this traditional ethic, the prolongation of life is not, in itself, a goal of medicine. It is not what medicine is ultimately about. Of course, in some circumstances the avoidance of premature death will be the immediate objective of medical interventions. Much of what goes on in any accident and emergency department has the avoidance of premature death as its objective, just as much of what goes on in the post-operative suite is aimed at ensuring that the patient does not die from the surgery that he has just undergone. But that immediate objective of the preservation of life needs to be understood in the context of medicine's traditional ethic that health is its business.

The other idea from medicine's traditional ethic which needs to be recalled is the idea that the individual person is responsible for making decisions about his or her health care, including whether or not to accept life-sustaining treatments. Of course, sometimes that is not possible at all because the patient is incompetent. Sometimes the patient's capacity to make decisions for himself is greatly compromised, and so others have to assist in the decision-making. But, in principle, the responsibility for decisions lies with the individual whose health is at stake. Having noted these two ideas from medicine's traditional ethics, we are now in a position to see that there are two sets of circumstances in which medical treatments, even life-sustaining medical treatment such as artificial ventilation and artificially supplied nutrition and hydration, may be withdrawn or withheld: when the patient refuses those interventions and when the interventions are futile, that is to say, they are insufficiently therapeutic or overly burdensome or, to put it another way, when those interventions do nothing or an insufficient amount towards achieving medicine's own goal.

A patient for whom life-sustaining treatment is withheld or withdrawn is likely to die sooner than he would have had that treatment been continued. And so the question arises whether, in withholding or withdrawing life-sustaining treatment, either because it is refused or because it is futile, a doctor is doing the equivalent of intending to bring about the patient's death. The answer is no. If a doctor withdraws treatment precisely on the grounds that it is futile, he need not be aiming at bringing about the patient's death, even though he can foresee that withdrawing that treatment will hasten the patient's death. His purpose may be simply to cease to administer a non-therapeutic treatment. Similarly, if a doctor withdraws treatment precisely on the grounds that the patient refuses to undergo it, he need not be aiming at bringing about the patient's death in spite of the fact that he can foresee that the patient will die sooner than he would have had he undergone the treatment in question. His purpose may be simply to respect a patient's choice about his own life and health.

One last point needs to be made. The withholding or withdrawing of life-sustaining treatment which is either refused and/or futile is different from euthanasia. Euthanasia is the intentional bringing about of death, motivated by the desire to relieve the patient's suffering. Euthanasia may be brought about either by an act, for instance, a lethal injection, or by an omission, for instance, the withholding or withdrawing of artificial ventilation. So it follows that one and the same kind of act, say, sedating a patient with terminal restlessness, may be either good medical practice according to medicine's traditional ethic, that is, relieving the symptoms of illness, or the intentional bringing about of death. Similarly, one and the same kind of omission—say, the withdrawing of artificial ventilation— may be either good medical practice according to medicine's traditional ethic—that is, the withdrawing of a futile treatment—or the intentional bringing about of death. In each case the difference lies in what the doctor is aiming at in the relevant act or omission, what he is doing *in doing that*.

I come now to the confusion in the Bland judgment. The confusion at the heart of the Bland judgment should now be apparent. Given that medicine's business is the restoration and maintenance of health, together with the relief of the symptoms of illness, it would have been reasonable to judge that the limits of medical endeavour had been reached. The duty of Bland's doctors to provide reasonable treatment and care had been met: as doctors they had no duty to provide him with treatments that merely kept him alive and could do nothing to restore or maintain his health. Even in an affluent society there must be limits to medical treatment and it is reasonable to decide that no-one should be sustained indefinitely by costly medical regimes. Anthony Bland was beyond recovery. The treatments being administered to him could reasonably have been judged to be futile and thus withdrawn for that reason.

But what the majority of the law lords actually said was something quite different: they decided that life-sustaining treatment could be discontinued, not because it was futile but precisely in order to bring about Bland's death. Claiming to find a distinction between an act aimed at bringing about Bland's death and an omission aimed at exactly the same end, they said that though the former would be illegal the latter was legally proper. So, when Lord Mustill said that the foundations of the courts' decisions were "morally and intellectually misshapen", he anticipated not just Lord Browne-Wilkinson but just about every subsequent commentator. There is widespread agreement that the claim that an act aimed at bringing about death is improper but that an omission aimed at exactly the same end is proper is based on a confusion.

There is near-universal agreement that, on the matter of withdrawing or withholding life-sustaining treatment, the Bland judgment has left English law on the forgoing of life-sustaining treatment in a confused state. Just about everyone wants this confusion cleared up. Of course, people vary on the matter of how the law needs to be clarified to dispel the confusion. The different views on that matter depend largely on each commentator's opinion about whether the law should be changed so as to permit euthanasia. Those who wish to see the law changed to permit euthanasia have asked why there should be a difference between an omission and an act aimed at bringing about exactly the same result, and have thus argued that the law should be reformed in such a way as to make both an act and an omission with this objective legally permissible. On the other hand, those who wish to see the legal prohibition on the taking of life, even when motivated by concern for a patient's suffering, remain in place, argue that what is needed is a restoration of the traditional medical ethic which is expressed in the legal duty of care. They argue that, though a doctor who undertakes a duty of care to a patient in Bland's circumstances may have no duty to exercise that care so as to sustain life, he may never exercise it in a manner intended to bring about that person's death.

What does this judgment tell us about the relationship between ethics and the law? It is sometimes thought that there is only one interesting question about that relationship, and that is: May the law be used to enforce morality? Here discussion centres on a distinction between conduct which is "self-regarding" and conduct which is "other-regarding", between the realm of "private morality" and that of "public morality". It is argued that conduct which involves the violation of the rights of others—for example, rape, murder, etcetera—is obviously a proper object of State regulation, but that conduct which is merely regarded as immoral by some proportion of the public—the example often given was that of homosexual acts between consenting adults—lies outside the scope of legitimate State concern. Contemporary discussion of the scope of the law owes its origins to John Stuart Mill's classic text *On Liberty*, in which he argues that the only purpose that justifies a society in coercing any of its members is to prevent harm to others. Certainly that question, about the proper scope of the law, is one which needs to be regularly revisited. Developments in genetic testing, for instance, cut across old distinctions between what is a matter of so-called private morality and what is a matter of so-called public morality.

But I wish to reflect on a different question: What is the nature of the relationship between the law and ethics? Here there are two competing theories. On one account law and ethics are totally distinct: law is a matter of what is authoritatively laid down or posited by the lawmakers, regardless of its moral status. This is so-called "legal positivism". It is associated with the work of the nineteenth century English legal philosopher John Austin, who divided the study of the law into two quite distinct areas of inquiry: analytical jurisprudence, which studies the law as it is and seeks to interpret, clarify and arrange in a logically systematic order actual legal concepts and doctrines; and normative jurisprudence, which reflects on how the law ought to be and thus subjects actual legal doctrines to moral evaluation and criticism, often advocating legal reform in the name of such values as social utility or justice.

On the other view—and this is my own view—law and ethics are intrinsically related. Moral and legal concepts are essentially connected, and indeed there is a part of morality—the part containing rules of just social co-operation—that necessarily overlaps with the rules of legal order. This view is sometimes called a "natural law" view. But the tag "natural law" is used to mean so many different things that I shall avoid it and call this view of the relationship between law and ethics that of a "necessary relationship". On this view, you cannot inquire into actual laws, in particular you cannot inquire into whether a judge is properly interpreting a law, or an administrator is properly expressing that law in a specific regulation, without engaging in an evaluation of the law. Legal doctrines and principles, together with regulations which express them, are essentially moral in nature. Thus moral evaluation is required even for the analytical task of interpretation and the administrative task of writing regulations.

In some circumstances, this is quite obvious. Laws which ban cruel and unusual punishments, unreasonable searches and seizures, denials of equal protection and due process, all cry out for moral interpretation. So too do judgments related to the practice of medical and health care generally. I would like to suggest that an analysis of the confusion at the heart of the reasoning in the Bland case reveals a relationship of "natural necessity" between law and ethics. The proposal of new laws, the analysis of existing laws, and the expression of law in regulation, all presuppose some understanding of what really is good for human beings, both individually and communally, and some understanding of the objective, the significance or importance, of human practices and institutions such as medicine and health care.

There are many ways in which the Bland judgment reveals this essentially evaluative aspect of jurisprudence. I shall mention just two. First, the very possibility of seeing that the majority judgment was confused depends on a prior recognition of two items of morality. Second, it would be unsatisfactory to leave the law in this state just because it contravenes a moral requirement of what we know as the "rule of law". Let me explain. In so doing, I hope that I will explain the two criticisms that Lord Mustill made of the majority decision in Bland: that the foundations of the courts' decision in Bland were both "morally and intellectually misshapen".

Firstly, the very possibility of seeing that the majority judgment was confused depends on understanding two features of any sound moral system: (a) the moral equivalence of an act and omission which are aimed at the same end—here, bringing about death— and (b) the moral difference between an omission which is motivated by one objective—here, the discontinuance of futile treatment—and an omission which is motivated by another objective, that is, the bringing about of death. That is at least part of what is meant, I suggest, by Lord Mustill's claim that the foundations of the Bland decision were morally misshapen.

Secondly, we use the expression "the rule of law" to refer to that state of affairs in which a legal system is in good shape. To the extent that a particular legal system has certain characteristics, it exemplifies the virtues of the rule of law. These characteristics are that its rules are: (a) prospective, not retrospective; (b) not in any other way impossible to comply with; (c) promulgated; (d) clear; (e) coherent with one another; (f) sufficiently stable to allow people to be guided by their knowledge of them; (g) that the making of decrees and guidelines applicable to relatively limited situations is guided by rules that themselves have these characteristics; and (h) that the people who make, administer and apply these rules in an official capacity are accountable for their compliance with rules applicable to their performance and do actually administer the law consistently and in accordance with its tenor.

I suggest that the reasoning employed in the Bland case fails to exemplify the rule of law on at least three of these criteria: as court-made law it is not clear; it is not coherent with the principal legal duty of care that health care professionals have towards their patients; and decrees made in accordance with it must themselves lack clarity and coherence with that legal duty of care. Thus the foundations of the courts' decisions were intellectually misshapen.

I have discussed a decision of the English courts. It may not be followed in our own courts. I hope not, for it exemplifies the kind of bad law which results when the intrinsic relationship between sound ethics and well-made law is ignored.

Mr WIESE (Western Australia): At what stage in the prevention of a terminal cancer, for example, do you believe that it is possible—and hence, by your paper, legal—to make a decision that further treatment would be futile?

Dr TOBIN: I do not think it is a matter of "stage." On this matter, before Bland, good ethics and the law spoke with one voice: If further treatment would be futile then it may be withdrawn or withheld. Whole libraries are written on the meaning of "futility" but it seems to me that it has an ordinary, everyday sense that is accessible to the understanding of ordinary human beings. To call a treatment "futile" is to say that the therapeutic benefits it is likely to bring are somehow outweighed by the burdens it is likely to impose. So there is a kind of judgment that has to be made about whether the benefits that a treatment is likely to bring are worth the burden it will impose, primarily on the patient.

Judgments about futility will differ from case to case. For one person, another month or so of a treatment will be worth the burdens that the treatment will impose. The patient may be awaiting the birth of a grandchild, hoping to see a child through exams, still not reconciled with someone in the family or waiting for someone to come back from overseas. But for another person, another month or so may not be worth the burdens that the treatment will impose. Who is to make that judgment? If the patient can, it is the patient's responsibility. The Americans say that it is a right. I think that a better notion is responsibility.

But even patients who are perfectly competent will be diminished by their illness and may need in their decision-making the help of others. Of course, if the patient is unable to make the decision, then the decision-making falls primarily on the doctor, properly informed by the family and other carers. So one cannot give a general answer. There is no general rule about it. It will differ from person to person. What that illustrates is something about ethics, and also something about good law, which is that it is particular. It has a particularism built into it. General principles have to be understood in the particular case. Does that answer the question?

Mr WEISE: Yes, it does. It does not make it any easier but yes, it does.

DR TOBIN: But notice that it would be wrong and it would also be harder if you had a general rule because you would have to take your general rule and try to interpret it in a particular case. You would be no further advanced. The general rule would be likely to take you further away from making a wise and compassionate decision.

Mr WAPPEL: This case illustrates the principle that hard cases make bad law. This is sure a hard case. But I would like to ask you what is "treatment" in ethics? Is the provision of food and water medical treatment or is it something else? It seems to me that the law lords were being asked to give permission to starve someone to death or to permit them to die of thirst. If a hunting dog were kicked by a horse and broke its back and the owner said, "That dog is not worth much any more, I just will not give it any water" and it died of thirst, I am sure that owner would be charged with cruelty to animals. So is the provision of food and water medical treatment or is it something else?

Dr TOBIN: First, I think that psychologically and emotionally cases like this are very hard. But they were not morally or even legally hard until the Bland decision. I think that the ethical and legal principles are in fact clear, or were clear until Bland. That is because the ethical and legal tradition of accepting that life-sustaining treatment may be withdrawn when it is refused or when it is futile is clear. So intellectually it was not a difficult case, although I accept that very often a judgment about whether a further bout of chemotherapy for, say, a patient with advanced cancer might be medically very difficult.

The other part of your question relates to the notion of treatment. It is a good question to ask whether the provision of food and water is medical treatment. In asking that question you reveal one of the presuppositions of my paper and my case. We were talking about medical treatment to a patient and, when we are talking medical treatment, medicine's activities and business and goals are quite specific. The question you raise is: But surely the provision of food and water lies outside the whole traditional ethic of medicine? Surely the provision of food and water is something that any ordinary, decent person would always provide for any other person, whatever the circumstances? Surely that is the kind of obligation and responsibility that all of us have, not just doctors?

In the judgment—90 pages—quite a lot of discussion went to that point, whether the provision of food and water is medical treatment. In the discussion that has occurred since then the conservative view on the withholding or withdrawing of life-sustaining treatment is inclined to say, "Look, this is not medical treatment; this is what any decent person ought to be prepared to provide for anybody else and thus traditional medical ethics do not cover this case." But it is one thing to spoon some food into the mouth of a very sick person who is unable to feed herself; it is one thing to spoon some water into the mouth of someone who is too weak to get it himself; it is one thing to moisten the mouth of someone who is not dehydrated but whose mouth feels dry; but it is another thing to supply food and water in that medically-assisted way.

So it seems to me that we are talking medical treatment in this kind of case. However even if we were to have stopped feeding and hydrating Anthony Bland, this need not have been starving him to death. What the Bland judgment did was to say that it is permissible, it is legal, to starve him to death. But they could have come to the conclusion that artificially supplying food and water could be withdrawn just on the grounds that it was not doing him enough good to make it worth continuing, in which case it would be just false to say that the doctors were starving him to death.

Ms SAFFIN: I have a comment and then a question. One of the inquiries we undertook was to do with the prevention of cruelty to animals Act. The committee became quite confused about the ethics of the whole situation. It was a very emotional debate and it went on for a long time. Dr Tobin was able to give advice, information, clarification or whatever to the committee and it was really instructive for us. Government departments preparing regulatory proposals have to do so with a cost-benefit principle that is intended to ensure that there is a net public benefit before the regulation goes ahead. As a committee we also grapple with that because so many of our regulations now are to facilitate business and implicitly, therefore, good for the public, and the public will benefit. Sometimes for the public to benefit we impose many and heavy burdens on the public. The question is: Are there any practical methods that parliamentary committees can adopt to ensure that ethical considerations are given sufficient balance in the cost-benefit assessment.

Dr TOBIN: Let me answer the question by taking up just one point, the notion of "net public benefit". There is a moral theory which says that in life one must always do whatever will bring about the greatest good. That is utilitarianism. Sometimes it makes sense to talk about net public benefit. However on other occasions the "net public benefit" involves an injustice or an unethical decision towards one person. Your question is really: Are there any practical ways of ensuring that, when one goes for net public benefit, one has it ethically right? Well, let me answer in this way: Be very suspicious of the notion of net public benefit. Think of that lovely little book *To Kill a Mockingbird*. You will remember that the law-maker was deeply tempted to frame an innocent man. He had very strong and, one might say, good motivation for doing so. He knew that the man who committed the rape was a white man and he knew that if this were to be revealed all hell would break loose in the community, and that things would be much more orderly from a social point of view if he were to frame an innocent man. In fact I think he could make a good case for saying that the "net public benefit" might have justified framing the innocent man!

Ms SWAN: Could Dr Tobin pass comment on whether the moral issue in this instance is better solved by an emphasis on individual choice or the agent for the individual in the form of the family taking that choice? I make the comment with regard to advance directives that may be used by a patient whereby a well-informed family takes on the moral duty of decision

making rather than allowing that imperative to rest on the shoulders of the medico involved, which gives me a great deal of concern. You have commented about the clear directive for medicine in this area. I am afraid of moving or interfering with this area on the simple ground of the last question, which involves the concepts of rational economics and administration that are quite improper in dealing with an issue of such deep morality. Could you comment on whether we are better served in the law by placing an emphasis on individual responsibility or the agent of the individual in the form of the family obtaining information to the best of its ability so the choice or responsibility rests on its shoulders?

Dr TOBIN: I am told that the advance directives provisions in the Medical Treatment Act of Victoria are largely unused and that the medical profession and the health care professions are generally puzzled as to why what looked like a really wonderful advance in the law, a really wonderful deepening of the individual's capacity to decide for himself, seems not to have been taken up. That experience has been found in the United States as well. There is some place for things like advance directives, but it has to be only "some place" because the best advance directives in the world, if we are talking about a written document, cannot anticipate the precise circumstances in which someone may want to rely on them.

My view is that a better way of approaching advance directives is to appoint someone else to have medical power of attorney. That is what people need to do. If you think about transplantation and the donation of organs after death, it seems to me that both those who are very much in favour of it and those who are very much against it have to make their wishes clear to the people who are likely to be consulted, because then those people will have a clear sense of what would be the right thing to do. If the patient is capable of making a decision for himself it is important to insist that that decision-making capacity be fostered and relied upon.

I am struck by the number of doctors who will go to extraordinary lengths to find out what the patient would really want: that is a wonderful habit. However, once you are confident that the patient is incompetent, then the decision-maker has to be the doctor, properly informed by the family as to what they may know, if anything, about what the patient would have wanted, properly informed about their capacity to continue to look after the patient. But it is both morally and, of course, legally a mistake to say that the decision-maker is either the competent patient or the family.

The other day a doctor in my company joked that families are a kind of medical condition that we all suffer from; they are a kind of complication. He is a doctor working in gerontology, so day in, day out, he is confronted with families who are unable to let their beloved family member go, and will require and authorise the doctor to inflict all kinds of cruelties on the person they love because of their inability to let that person go. (Of course other families are keen for the sick family member to move on a little bit quicker than he is. People get bored and very tired with the time it takes people to die.) It would be quite irresponsible of a doctor to make a decision without taking seriously what families said, but their views can be less than completely reliable. Ultimately the doctor is the one with the best knowledge of what further treatment can offer and what burdens will be imposed.

Ms SALIBA (New South Wales): Ethics are interrelated with the culture of society and its institutions. How can we bring about ethical behaviour in a multicultural and pluralistic society?

Dr TOBIN: I understand that someone else will address that topic this afternoon. But if I may make a couple of points, the suggestion is sometimes made that in a multicultural society it is just not possible to arrive at sound moral principles because different cultures will have different views about the morality or immorality of a particular practice. Of course, different cultural groups do have different views about the morality or immorality of a particular practice. An obvious case is female genital mutilation. No doubt it is going on in Australia. No doubt some cultural groups find it ethically untroubling, some cultural groups find it ethically desirable.

But the challenge for all of us is to work out what the truth of the matter really is, whether it really is an ethically untroubling or ethically permissible practice. It simply does not follow from the fact that a whole cultural group finds it ethically untroubling that it is; nor does it follow from the fact that most of us in this room would make the opposite judgment, that morally it is very troubling, it is immoral. We have to work it out. We have to come to the truth of the matter. Morality is a part of the truth about human beings, individually and collectively.

There really is such a thing as moral truth and moral falsehood. It seems to me that people, certainly students who have been brought up on various theories that deny it, find this theoretically troubling. But by and large people recognise that that is true. What is really difficult, as we were saying earlier, is to decide what is the right thing to do in a particular case. It is all very well to say that futile treatment ought not be administered—that is true—the hard part is to say: Have we reached the point at which this treatment really is futile?

Mr COONEY: I was thinking about the Bland case in the House of Lords. The whole problem would have been solved had they sent this case to one of the Australian scrutiny committees.

A CRITIQUE OF CRITERIA AND CASES: PARLIAMENTARY SCRUTINY OF ACTS, REGULATIONS AND CODES

CHAIR (Ms Saffin, New South Wales): I apologise to Professor Margaret Allars, who is our next speaker, for not having her curriculum vitae. Without going through specific details, Professor Allars has made a large intellectual contribution to the legal system, legal institutions and the institutions of government in this country and, I am sure, internationally.

Prof. ALLARS (Faculty of Law, University of Sydney): This paper aims to examine systematically the criteria applied by parliamentary committees in Australia in scrutinising delegated legislation. The focus is on delegated legislation rather than bills. I want to thank the officers in various delegated legislation committees who kindly sent me copies of their annual reports and examples of recent particular reports of interest. They certainly assisted me in this task. This paper does not quite reach the level of critique I would have liked. I found, first of all, that it was necessary to survey the criteria and work out which criteria are applied by each committee and to conduct a comparative exercise.

The survey prompts a range of questions that could well provide a synopsis of what a future, more thorough critique would involve: questions about whether criteria should be expressed in a very general way or with a greater specificity; questions about which criteria should be applied at the stage of review or scrutiny of delegated legislation and which are better applied at the stage of scrutiny of bills. Questions are also prompted about the role of human rights in the scrutiny of delegated legislation, whether these be constitutional rights, or fundamental common law rights, which, of course, are important in the application of principles of statutory interpretation and international human rights jurisprudence.

These questions are raised along the way as this comparative exercise of surveying the criteria is undertaken. The survey has resulted in identification of about 12 different criteria. Four fundamental ones, which are drawn from Senate Standing Order 23, are the first I examined. I then look at a fifth criterion, which is fairly common, concerning the form of the delegated legislation. In what is roughly a third area I look at the criterion of non-compliance with regulatory impact assessment. Finally I look at some additional criteria which are perhaps a little novel. We find these additional criteria cropping up particularly in New South Wales, Queensland and Victoria. As I said, they are somewhat surprising.

I turn to the first fundamental criterion which we find in the Senate Standing Order. Indeed, it is common to all the delegated legislation committees in Australia. It is the question whether the delegated legislation is in accordance with the statute or with the Act's general objects or objectives. This criterion does not differ from the common law principle that delegated legislation is invalid if it is made in excess of power, or ultra vires—a fundamental administrative law principle which is applied by the courts in judicial review.

In some cases around Australia there is also specific mention of subdelegation of legislative power being a basis for scrutiny; in other jurisdictions this is simply understood as falling within the general idea of excess of power or ultra vires. In looking at the question of excess of power some committees stray into constitutional issues. In looking at the validity of the delegated legislation in their own State they may look at section 109 of the Commonwealth Constitution and ask whether there is an inconsistency with Commonwealth regulations. This is a difficult area because it raises complex constitutional issues for committees.

The excess of power criterion is quite useful if there is a need to deal with the problem of incorporation of codes in delegated legislation. If a provision is inserted into the relevant Interpretation Act it is possible to have this kind of issue dealt with as an excess of power issue. An example is provided by section 49A of the Commonwealth Acts Interpretation Act, which provides that legislative instruments may incorporate or adopt material other than Commonwealth Acts and regulations but only as they are in existence at a particular time. This means that a code as it exists from time to time, as it is modified by another decision maker, cannot be incorporated; the code must be incorporated as at a particular time.

The Senate Standing Committee has had occasion recently to apply this criterion, as recorded in its most recent annual report, to the Airports Environment Protection Regulations. An environment testing method approved by American agencies from time to time was incorporated, and this infringed the provision in the Acts Interpretation Act.

There is a related criterion to the straightforward excess of power criterion. This criterion asks whether the delegated legislation appears not to be in accord with the spirit of the empowering Act or whether it makes unusual or unexpected use of the powers in the empowering Act. This goes beyond ultra vires because it can be used to criticise delegated legislation which is actually within the power.

I turn now to the second fundamental criterion which is also common to all the committees and with which you would all be familiar. This is the question whether the delegated legislation trespasses unduly on personal rights and liberties. There is a slight difference in the South Australian and Victorian criteria, which provide that the rights or liberties must be previously established by law. That seems to cover rights established under statute or at common law, such as fundamental common law rights. Certainly it would cover anti-discrimination legislation. However, there is a real question whether that particular qualification in South Australia and Victoria would cover international human rights when Australia has international obligations which have not been incorporated into domestic law, such as the International Covenant on Civil and Political Rights.

Some of the categories of case which are simply assumed in most jurisdictions to fall within this question of unduly trespassing on individual rights and liberties are specifically enumerated in the Queensland and Victorian Acts as subcategories of the test. These are the questions whether the delegated legislation has a retrospective effect, whether it imposes a tax, fee, fine, imprisonment or other penalty, whether it purports to shift the onus of proof to a person accused of an offence, whether it confers power to enter premises and search for documents or other property without a warrant issued by a judge, whether it provides appropriate protection against self-incrimination, and whether it confers immunity from proceedings or prosecution without adequate justification.

There are three additional rights or liberties enumerated in the Queensland legislation which are notable. They seem to enter into new territory. The first is whether the delegated legislation is consistent with principles of natural justice, or procedural fairness, as we tend to call it these days. This is also found in the South Australia criteria. The second is whether the delegated legislation provides for compulsory acquisition of property only with fair compensation. That is a test we are familiar with in Federal constitutional law but it is a new one for a delegated legislation committee at the State level. The third—and this is the most interesting one in Queensland—is whether the delegated legislation has sufficient regard to Aboriginal tradition and island custom. I would be interested to hear whether that is being applied by the

Queensland committee, and how that committee would go about applying it in a non-partisan fashion.

The typical cases in application of the "unduly trespasses on individual rights" criterion are cases of power to enter premises without a warrant to conduct inspections and cases of power to remove vehicles which are illegally parked. It is interesting to see that in New South Wales this has been taken one step further in a case in which power was conferred in a regulation to enter homes to inspect when a home was registered for home schooling. The power to enter was not directly enforceable, but the Minister had power under the Act to cancel the registration of a parent if entry was refused, so there was an indirect means of enforcing this power. This was seen to be a basis for report by the committee under the particular criterion of individual rights and liberties.

I turn now to the third criterion which is frequently found in lists of criteria for committees. This is the question whether the delegated legislation unduly makes rights and liberties dependent upon administrative decisions which are not subject to merits review by a judicial or other independent tribunal. I have taken that formulation from the Senate Committee criterion in Senate Standing Order 23(c). There are slight differences in the formulation around Australia, and those differences are important. The criterion in the Senate criteria was added in 1979 after the Administrative Appeals Tribunal [AAT] was established in 1975. Its application by the Senate Committee frequently results in a recommendation or, indeed, an undertaking by the responsible Minister to confer new jurisdiction on the AAT to review the discretionary power conferred in the regulation.

These recommendations are not always accepted. There is an example in the most recent report of the Senate Committee of a Minister declining to agree to review by the AAT or the Australia Competition Tribunal of decisions made by the Australian Competition and Consumer Commission to grant concessional fees for applications for authorisations of agreements affecting competition.

The Federal criterion suggests the solution to conferral of broad discretionary powers which affect individual rights. It suggests a solution of including conferral of merits review jurisdiction upon the AAT. The formula used in some of the other jurisdictions does not so readily suggest such a solution to the conferral of discretionary power.

For example, in Queensland the criterion simply refers in a general manner to administrative power which affects rights and liberties being sufficiently defined and subject to appropriate review. In Tasmania, Victoria, Western Australia and the Northern Territory the criterion asks whether the delegated legislation unduly makes rights and liberties dependent upon administrative decisions and not judicial decisions. This formula makes no suggestion that the solution is merits review. Therefore, there could be a tendency for these committees to have resort instead to the more closely related criterion, which will be the next one I discuss, that the delegated legislation contains a matter which is more appropriately contained in the Act itself.

From what I have already said you will guess that I prefer the formula in the Senate criteria because it contains a commitment to merits review, that is, a review of not only the legality of the decision but also the factual findings and the policy aspect of the discretionary decision. It is somewhat surprising that this is not the formula adopted in those States where there does exist a general merits review tribunal like the Federal AAT upon which merits review jurisdiction could readily be conferred. In Victoria there already exists the Victorian Civil and

Administrative Tribunal, formerly called the Victorian AAT. In South Australia and the Australia Capital Territory it is possible for merits review jurisdiction to be conferred on the South Australia District Court or the Australia Capital Territory's AAT. However, the formula used there is whether the delegated legislation affects rights, liberties and obligations without creating review rights. Again, merits review is not mentioned.

In New South Wales the Administrative Decisions Tribunal [ADT], which was established in 1997, conducts merits review. I would argue that the time is ripe for amendment of the criteria applied by the Regulation Review Committee to include a criterion formulated like the Senate committee criterion. In fact, New South Wales lacks any criterion within this category. Like the Federal AAT, the New South Wales ADT is intended gradually to acquire new merits review jurisdiction. New South Wales lacks an administrative review council to monitor the jurisdiction of the ADT. That is in contrast to the Federal level where there is an Administrative Review Council. This strengthens the case for the Regulation Review Committee to apply such a criterion.

It is not an answer to this argument to say that this criterion is more appropriately applied by a scrutiny of bills committee. It is a criterion which is applied by the Senate Standing Committee on Regulation and Ordinances, although that committee's role is differentiated from that of the Senate Standing Committee for the scrutiny of bills. To this we can add that the OECD report on regulation review in New South Wales has recommended extension of the Regulation Review Committee's role to scrutiny of primary legislation and bills, at least within a certain threshold test.

Let me turn to the fourth of the fundamental criteria, one which we again find in the Senate Standing Order. This is the question of whether the delegated legislation contains matter more appropriate for parliamentary enactment. In considering this criterion we also need to look at the question of Henry VIII clauses. The criterion is applied by each of the delegated legislation committees except New South Wales, so again New South Wales misses out on this criterion. The criterion does work closely with the other criterion of unduly trespassing on personal rights and liberties. If it is necessary to trespass on personal rights and liberties, that should be done in the Act itself rather than in delegated legislation.

For example, in Queensland it has been reported recently that a regulation creating environmental offences with heavy penalties should not have been created by a declaration in a legislative instrument but, rather, the offences should have been created by the empowering Act. The kinds of matters which should be included in Acts rather than delegated legislation have been summarised by the Senate Committee on previous occasions. I have listed on page 6 the criteria set out in the Senate Committee's Seventy-seventh Report and that is reproduced in its most recent Annual Report. Of that list of characteristics of rules which indicate they should be in the Act, there are three which are important. First, does the rule manifest a fundamental change in the law intending to alter or define rights, obligations and liabilities? Second, are the rules complex and long? If that is so, there is a case for more of it being in the Act. Third, do the rules introduce an innovation of a major kind into the pre-existing legal, social or financial concepts in the area of regulation? If so, this should be contained in an Act.

The Senate Committee has recently applied the criterion and, indeed, placed a protective notice of disallowance on an amending legislative instrument which established Comcover, a managed insurance fund within the Department of Finance and Administration. The Act itself contained very little detail. The instrument appeared to place an obligation upon certain

bodies to join Comcover. The report resulted in an undertaking by the Minister to amend the instrument to at least make it clear that Federal agencies could seek exemption from insuring with Comcover, but apart from that the issue of where the detail should be contained seems not to have been fully resolved.

I turn now to Henry VIII clauses, an issue which comes up within this area and which has been of particular interest to the Queensland committee. The Queensland committee's criteria include whether the delegated legislation amends only statutory instruments. As well, in that committee's scrutiny of bills role the question is asked whether a bill departs from the principle that an Act should only be amended by another Act. A provision in an Act which confers power to amend the Act, expressly or impliedly, by delegated legislation or administrative action is called a Henry VIII clause. Obviously the most effective way to ensure that delegated legislation does not operate in this way is to deal with the problem of what is in the Act. This is really a scrutiny of bills issue. We should not have Henry VIII clauses in Acts.

Nevertheless, this deficiency often arises for delegated legislation committees, either because there has been no scrutiny of bills committee applying the equivalent criterion in the scrutiny of the bill or because the Act was passed at an earlier stage before scrutiny of bills had been put into operation. An example provided by the Queensland committee is the report on the Commission of Inquiry (Forde Inquiry—Evidence) Regulations. This was an inquiry into alleged abuse of children resident in institutions. The regulation provided that the inquiry could require evidence to be given, irrespective of statutory duties of secrecy of staff and children within the institution. Those statutory duties of secrecy were intended to protect children and staff. However, the inquiry could require evidence to be given and this was secured through a regulation.

The problem was that there was a Henry VIII clause in the Commission of Inquiry Act itself, which provided that these kinds of changes could be secured by regulation. The Queensland committee decided that since the Forde Inquiry had already exercised the power to obtain evidence extensively and since the progress of that inquiry would be seriously disrupted if the regulation were disallowed, it should not recommend disallowance. However, it did make a recommendation for removal of the Henry VIII clause from the Act. The Queensland committee has also reported on this kind of Henry VIII clause in relation to government-owned corporations and the way in which they are established. In each case the committee has relied upon a report it made on Henry VIII clauses in 1997, which said that their use can only be justified if they do remain in the Act, where it is needed to facilitate immediate executive action. I guess that is a fairly broad and discretionary kind of test and we would like to minimise the occurrence of these clauses in the first place.

I turn now to what is a different area, moving away from the criteria we find in the Senate committee which are duplicated in most cases around Australia, to some criteria which are not found in the Senate Standing Order. The first is the question of whether the form or intention of the delegated legislation calls for elucidation. This criterion is applied by all committees except for the Senate committee, the Western Australian committee and the Australian Capital Territory committee. In Queensland the criterion is listed as a subcategory of the unduly trespassing on individual rights criterion and it is formulated a little bit differently, asking whether the delegated legislation is unambiguous and drafted in a sufficiently clear and precise way. That is a clearer way of expressing what the criterion is all about.

The Queensland committee applied the criterion where fees payable for applications to the Magistrates Court set out the classes of application to which the fees did not apply but left the position unstated as to which kinds of applications were indeed subject to the fee. The question arises as to how this criterion is applied around Australia because I know that the South Australian committee concluded that regulations for the management of water resources did not breach the criterion, even though the regulations were not clear, indeed they were ambiguous and extremely complex.

Let me turn to the sixth criterion, which seems to be related to the one about ambiguity. It is the question of whether there is duplication, overlap or conflict with any other delegated legislation or Act. This criterion is separately itemised only in the New South Wales set of criteria. However, I think it is unlikely that other committees would disregard such issues. As well, the regulatory impact assessment [RIA] processes are likely to deal with such issues and in those jurisdictions which have not introduced RIA, it might be expected that the test of excess of power—the first criterion that we looked at—would sometimes raise these kinds of issues.

I turn now to what is roughly a third area, that is the area of regulatory impact assessment. The criterion is non-compliance with consultation and regulatory impact statement requirements. This criterion is applied in New South Wales, Queensland Tasmania and Victoria where RIA has been introduced. I note that the Victorian criterion is weakened by the qualification that the non-compliance must be of a substantial and material nature.

New South Wales has applied this criterion in an interesting way in relation to a regulation concerning registration for home schooling, interesting because the application concerned the consultation aspect of RIA and that aspect is found chiefly in the Subordinate Legislation Act itself, which imposes a duty to consult in relation to principal statutory rules. In relation to other statutory rules, that is the ones of a machinery nature or which simply amend a major statutory rule, the consultation requirements are not found in the Act. However, the committee has found that because clause 3 (a) in schedule 1 to the Subordinate Legislation Act, which sets out the mental process which the delegated law-maker must go through and refers to the need for the delegated law-maker to base the rule on adequate information and consultation—and schedule 1 applies to all the statutory rules— it was possible for the Regulation Review Committee to report on failure to consult in the making of this amending regulation concerning home schooling. The Office of the Board of Studies in New South Wales argued that it had consulted for years with parents over the guidelines which the regulation replaced. But the committee said that this did not excuse the Board from consulting with parents before making the amending regulation.

There is another aspect to RIA, that is, that the RIA procedure can be avoided by certification by the responsible Minister. If that happens, obviously there is no occasion for applying the criterion. But the question arises as to whether the committee may report on the Minister's decision to exempt the delegated legislation from the process.

This issue arose for the Victorian committee in relation to a regulation which imposed a strict liability offence of entering into or remaining in any forest operation zone. It happened at the time that some fairly hectic protests were occurring in the relevant area of the forest. The amendment defined the forest zone, that only authorised persons could enter, and this was exempted so the amendment occurred without any notice and without any regulatory impact statement. The Minister exempted the regulation on the basis of a provision in the statute which said that this could be done when public knowledge beforehand would render the regulation

ineffective, posing an unacceptable threat to the safety of people, in this case workers in the forest. Consultation in this kind of case was thought to render the process unhelpful by encouraging the protest.

I think it is arguable that this is the very kind of case, in which there are strongly opposed interests, that consultation associated with RIA can be most valuable. A parliamentary committee arguably can offer a different and calmer forum for negotiating issues of freedom of expression of political opinion, freedom of movement of other persons, the alternatives, and the costs and benefits of conducting a protest in a particular way and in a particular place.

Let me move on to other criteria which are closely related to non-compliance with RIA. First, could the objective have been achieved by an alternative and more effective means? This criterion is applied by the New South Wales committee and by the South Australian committee. In the case of New South Wales this criterion of course arises anyway in relation to non-compliance with RIA. In the case of South Australia where RIA has not yet been introduced, it is interesting to see that it has been included as a criterion.

The other one, again found in the New South Wales criteria, is whether the delegated legislation has an adverse impact on the business community. Again, potentially this can arise in relation to non-compliance with RIA. There is a Victorian criterion which is very similar in its intent. Without mentioning the business community the Victorian criterion asks whether the delegated legislation is likely to result in administration and compliance costs which outweigh the likely benefits sought to be achieved. South Australia also has a related criterion about cost benefit assessment. In Queensland the likelihood that delegated legislation will impose an appreciable burden is not a criterion of scrutiny, but it is an important component of the threshold test as to whether the RIS applies at all.

To give an example of the application of the New South Wales criterion, a regulation for licensing pawnbrokers and second-hand dealers required even small businesses with a low volume of sales to computerise their records. Of course, the objective was to restrict trade in stolen goods. The committee played an important role in facilitating negotiation between the various stakeholders in this case. The RIS had simply stated that there would be savings in police inspection of licences by having a computerised system. However, it did not assess the cost of monitoring the computer records or the impact of computerisation on small businesses. Through negotiation, a compromise solution was reached by exempting the smaller businesses that were already licensed.

In Victoria, by certification that a proposed rule would not impose an appreciable economic or social burden on a sector of the public, a rule can be exempted from an RIS. The Victorian committee has been prepared to comment on this certification issue, which raised the same issue, but not without some qualms as to whether it is proper for the committee to do so in terms of separation of powers. An interesting dilemma was raised for the committee recently in relation to a regulation restricting the taking of abalone in certain areas.

Finally, let me turn to criteria which are novel, such as the Queensland criterion about indigenous rights. The first is whether the delegated legislation is inconsistent with principles of justice and fairness, which is found in the Victorian legislation. This is a broad test of social justice. It invites the committee into the area of policy choice which non-partisan delegated legislation committees try to avoid. Recent examples of its application by the Victorian committee suggest that it is being interpreted by reference to domestic anti-discrimination

legislation, giving it a clear and very restricted scope. One example concerned discrimination in relation to schooling of children with disabilities. The other concerned privacy of records of HIV patients. The final criterion, unique to Western Australia, is whether there has been unjustifiable delay in the publication or tabling of an instrument before the Legislative Assembly.

Let me conclude that this survey of criteria reveals some degree of uniformity, but also some diversity in the criteria themselves. A more thorough study of how the criteria are applied would be required so as to reach conclusions about consistency in operation, even in relation to the criteria which are common to the committees. It would also be important to study the processes of negotiation to see how the committees respond to ministerial undertakings and offers to amend delegated legislation. The survey reveals that the long-standing concerns of committees about individual liberties and proper division of matter between primary and secondary legislation has not diminished. This is an area which will benefit from a broader understanding of human rights developments which indirectly affect statutory interpretation and the common law in Australia. The introduction of RIA in some jurisdictions has added a new dimension to the committee role, drawing in through the criterion of non-compliance with RIA a large range of new considerations.

Regulatory impact assessment has also extended the negotiating role of committees in the period prior to completion of their reports and in a very unpredictable way to a role of committees in negotiating with eclectic gatherings of interest groups in the community which are affected by particular delegated legislation. In some cases, committees have clearly engaged in an ongoing process of monitoring the operation of delegated legislation after the report has been completed and have facilitated the deliberative processes by which some common ground can be found to accommodate competing interests of groups through amendment of legislation. This is new territory for delegated legislation committees. It signals the prospect of strengthening the independence of the legislative branch from the executive branch. It also signals development of a stronger role for the legislative branch in making the executive branch accountable and, indeed, a new role in promoting more effective forms of communication and dispute resolution between interest groups affected by regulatory proposals.

CHAIR: Thank you, Professor Allars. I am surprised that it took us until day two to have Henry VIII clauses raised. It would not be a delegated legislation conference without Henry VIII clauses and, of course, ultra vires being discussed. In the beginning Professor Allars said that she surveyed the territory and that it does not reach the level of criticism or critique that she would like to go to. However, her paper contains reliable information and maps the parliamentary scrutiny landscape in Australia. To that degree, it provides the information that all committee members require. When we become new members it is the work that we should undertake ourselves, but given the nature of our duties we are unable to. So, in a sense, it is a map and a blueprint which we can use. I thank you, Professor Allars, for undertaking our work.

I would like to give an abridged curriculum vitae of Professor Allars. It is appropriate to do so because delegates like to know a bit about the speaker. Professor Margaret Allars is a Professor in the Faculty of Law, University of Sydney, New South Wales. She is the author of *Introduction to Australian Administrative Law* and *Administrative Law Cases and Commentary* and many articles and book chapters in that area. In 1993 she was appointed by the Australian Federal Government to chair an Inquiry into the Use of Pituitary-Derived Hormones in Australia, and Creutzfeldt-Jakob disease, which reported in 1994. She was chair of the National Pituitary Hormones Advisory Council during 1995-96. Professor Allars was Acting Head of the Department of Law, University of Sydney, during 1997. She teaches undergraduate

and postgraduate courses in administrative law and constitutional law and the postgraduate course in government regulation, health policy and ethics in the Master of Health Law degree. She is the co-ordinator of the Master of Administrative Law and Policy degree, which commenced in the Faculty of Law in 1996. Are there any questions from delegates?

Mr THOMPSON (Victoria): I am reminded that after the turbulent early days of the Victorian Kennett Government in 1992 approximately 100,000 people congregated outside Parliament House to express their appreciation or otherwise about a number of legislative initiatives and reforms. My colleague sitting next to me, Mr Tony Plowman, member for Benambra, was attending an Anglican church service in the bush, in some of the finest territory in the north-east of Victoria. Having sat through the sermon, he stood up after the minister had made a number of constructive remarks on the politics of the day and asked very politely, "I was wondering whether you would mind if I had a right to reply." I am delighted that Professor Allars has made a study of the important area of the work of parliamentary committees. Often as members of Parliament we embark upon our work in a hidden and unseen way. It is really only those matters which make their way into the annual report that have the opportunity of being the subject of wider comment.

In relation to two or three matters that Professor Allars has commented upon, the very fact that they have found their way into the annual report of a parliamentary committee indicates that the committee has exercised its collective mind and wisdom upon the propriety of the regulations or procedures which a Minister has sought to enact. At the outset, I see that as a very positive point. A number of regulations were commented upon. One related to the operation of a forest operation zone, on which the committee did exercise its mind. The regulations imposed strict liability on those people who found themselves within a forest operation zone. The committee was mindful of enthusiastic bushwalkers or Sunday drivers who might inadvertently find themselves in that predicament. There was an exchange of correspondence between the committee and the Minister, there being no regulatory impact statement, on the basis that if there had been it may have rendered the rule futile in part.

I take issue with Professor Allars' conclusion in part and would welcome dialogue. In that particular case the regulations were designed to protect the safety not only of the workers in the zone but also of the protesters who were embarking upon a course of civil disobedience, in one sense, to promote their cause by chaining themselves to gum trees and bulldozers, thereby precluding otherwise legal work taking place. They were welcome to demonstrate outside. In a more rarefied or detached atmosphere I am not sure that a regulatory impact statement would have achieved a constructive outcome. It was not a debate about whether the area was worthy of national park status, but rather that the regulations had the intent to protect both the protesters from their activities and the workers within the zone.

The second part relates to a set of regulations regarding a distinction between the school-leaving age of disabled children and of able-minded or able-bodied children undertaking their VCE. The committee was concerned with the disparity. Rather than limiting its deliberations and determinations according to anti-discrimination legislation—that being the narrow focus of what was fair, reasonable or just—it used another law to support a process of committee negotiations with the Minister in order to seek constructive change. I value Professor Allars' comments and assessments, which provide great help to the parliamentary committee, but I also add my comments for the record.

Prof. ALLARS: I am not sure that I can add much to the case of the strict liability offence in the forest, other than to say that a demonstration like that is an attempt to

participate in the political process, just as consultation under RIA is an attempt to provide for participation in the political process, although obviously in a more structured way. There is value in providing a structure which will show respect to people and to enable the process to function in the way it is intended, rather than to use delegated law-making powers which catch people unawares, particularly when it is a strict liability offence that is in issue. In relation to the Victorian schooling issue, I have noted in the paper that an undertaking was made by the Minister to provide for discretionary exemption from the school leaving age of 18 years for children with disabilities. This occurred after a process of exchange of information in which the Minister pointed out that other special programs were available for the benefit of these children, which was new information for the committee. So useful dialogue occurred in that case.

Ms LAVARCH: I concur with the comments made by Murray Thompson from Victoria, although I do not think Professor Allars was asking for a right of reply. I think she challenged us to reply to some of the issues she raised. In relation to the fundamental legislative principle [FLP] of Aboriginal tradition and island custom, for the information of all delegates, this is an example of the FLP having sufficient regard to rights and liberties. We must be mindful that it says that it requires that only sufficient regard be had. When the Queensland committee is dealing with delegated legislation and it identifies concern generally, it requests information from the Minister as to what impact that regulation would have on Aboriginal and Torres Strait Islander communities, and what impact it would have on Aboriginal tradition and island custom. We also seek information as to what steps have been taken for the purpose of consultation, and we seek to ensure that Aboriginal tradition and island custom have been taken into consideration when regulations are made.

It is a little different when the committee is dealing with bills. However, I will not go into that today other than to say that, in Queensland, time is given in each parliamentary session for the debate of private members' bills. We now have a private member's bill before Parliament which I think will be debated at the next session. The bill, which was introduced by a One Nation member, seeks to remove that subcategory from our legislative standards Act and to replace it with these words: All legislation should treat all people equally before and under the law, regardless of race. That FLP was introduced because the parliamentary Electoral and Administrative Review Committee was concerned about the fact that we have mono values in our legislation. It recommended that that be included as a legislative standard—a blind spot to which Parliamentary Counsel, drafters and policy makers of legislation should have regard.

I will speak briefly about another aside in relation to this issue. Our committee usually deals with legislation that impacts directly on Aboriginal and Islander communities. That committee has not gone as far as determining whether every piece of legislation and every regulation marries up with Aboriginal custom and laws. This matter was brought to the attention of the committee in a bill which the committee scrutinised called the Transplantation of Anatomy Amendment Bill which, again, was a private member's bill, seeking to make it compulsory that, when you tick the box on your licence to indicate that you are going to donate your organs, it be taken as conclusive consent by doctors so they do not need to consult with families, et cetera, to increase the number of organs available for transplant. The Queensland committee commented on that bill. It then received quite a lengthy submission from the Aboriginal Legal Service, stating that the committee had failed to indicate that this bill did not pay sufficient regard to Aboriginal tradition and island custom. The submission then set out what is Aboriginal tradition and island custom and the opposition to organ transplant. That just gives delegates an example.

In relation to Henry VIII clauses, the Forde inquiry and disallowances, delegates will see that that is an illustration of the problem when a regulation is made and we recommend disallowance. As I recall, the commission was set up in November, the regulations were made in December, Parliament was in recess and we did not sit again until February. Until that time the committee had been effectively taking evidence for nearly three months. I point out a few other matters. Our committee has a policy in relation to the appreciable costs of a regulatory impact statement [RIS] in Queensland. If fee increases are in accordance with the consumer price index [CPI] we find that acceptable. The committee does not raise the issue if it is less than 5 per cent above CPI but, if it is greater than 5 per cent above the CPI, we seek justification if an RIS has not been made in relation to it—to provide justification for failing to do an RIS. There are a few other matters but I will deal with those tomorrow when we wrap up.

Mr REDFORD: Professor Allars, you criticised one aspect of the South Australian Legislative Review Committee. I accept your criticism; I think you are absolutely correct.

ROUNDING UP THE REGULATORS: GETTING DELEGATED LEGISLATION UNDER CONTROL

CHAIR (Mr Redford, South Australia): Peter Nagle must have a delicious sense of humour, in the sense that this is the only paper to be delivered by a New Zealander. I am from South Australia, which is where the Chappell brothers came from. For those of you who do not remember, we bowled underarm to them one day and they are still spewing about it. I recall that the first time I ever visited New Zealand I was picked up at Wellington airport and driven to somewhere near Palmerston, where I had to deliver a speech. I was introduced, quite flatteringly, which I was pretty pleased about. I was just starting to relax a bit when the fellow who introduced me said, "Look, Angus, there is just one thing you must do before you commence your speech, and that is to answer this question." I said, "What's the question?" He said, "Why do Australians have accents?" I said, "I don't know." He said, "So even the blind can hate them. Welcome to New Zealand." I have been harbouring this opportunity for revenge for about 10 years, and I do get the last word.

Jonathan Hunt comes to us with a very proud history. He is the father of the New Zealand Parliament, having first been elected to Parliament in 1966. He held the seat throughout the first-past-the-post period. He was appointed Junior Government Whip in 1972. He went on to hold the positions of Deputy-Speaker, Acting-Speaker and Senior Opposition Whip. He was Minister of Broadcasting for six years, Postmaster-General for three years, Minister for Tourism, Minister of State and Leader of the House from 1987 to 1990, Minister of Housing, Minister for the New Zealand Symphony Orchestra, and Minister of Communications in 1990. I understand he enjoys classical music and has a particular interest in cricket. I welcome John to the conference.

Mr HUNT (New Zealand): I will not make any New Zealand-Australia jokes, except to reflect that it is closer from here to Auckland than it is from here to Perth. In the Australian Constitution it may interest you to know that New Zealand is provided for as one of the States if it ever so decided to join. I am very much in favour of the New Zealand-Australia free trade agreements and the close relationships between New Zealand and Australia. I have a lot of friends and relatives here, and I have visited Australia many times. I reflect that when I talked to one Cabinet Minister in the Federal Government about 10 or 15 years ago, he said he had been to Ulan Bator before he had been to Wellington. I think that the idea that there is a much greater interchange between Australia and New Zealand is very good. That is why I, as Chairman of the New Zealand Regulations Review Committee team, welcome the opportunity to take part in this Regulation Review Conference.

We are all aware of how quickly times are changing. It is just as important for a legislature to move with the times as it is for the citizens it governs. Our law-making processes must embrace regulatory flexibility to meet changing demands and technological advances. While adaptability is important, our committee has reached the conclusion that Parliament needs to be more pro-active in the management of the law-making powers it delegates. Parliament should be satisfied that added flexibility will not result in diminished scrutiny and control. This paper poses the question: Is it time to round up the regulators? I pay a special tribute to Shelley Banks and Debbie Angus, the Clerks of our committee, for the work that they have done in helping me to prepare this paper. They have provided much of the inspiration for it.

Earlier this month our committee reported to the House on an important inquiry. The inquiry takes stock of the variety of delegated legislation being made in New Zealand in the

late 1990s, with particular emphasis on a class of subordinate legislation we refer to as deemed regulations. Deemed regulations are statutory instruments that are deemed by their empowering legislation to be regulations for the purposes of disallowance and post-promulgation scrutiny, but are largely exempt from the pre-promulgation processes applicable to traditional regulations. Over the past two years we have noticed a large increase in the number of statutes which authorise the making of deemed regulations—around 50 at last count, but growing all the time. In 1998, 467 new regulations were published in our annual Statutory Regulations series, but an additional 118 deemed regulations were created. These covered a broad range of subject areas including land transport, civil aviation and maritime transport rules, health sector and privacy codes of practice, legal services board instructions, food standards, financial reporting standards and penal operational standards.

In some instances the power to make subordinate legislation is delegated to a single Minister or to the head of a government department. It is extraordinarily useful to have been a former Minister of the Crown before serving on this particular committee. I worked out immediately that the chance for ambush of a Minister and a government is very considerable—in fact, it has happened in New Zealand—and it provides for an interesting question time in Parliament. In other statutes, legislative authority is delegated to a public agency such as the Australia New Zealand Food Authority, the Accounting Standards Review Board, the Privacy Commissioner, or the Medical Council of New Zealand. What led us to initiate the inquiry? We became concerned about the proliferation of deemed regulations for a number of reasons. Parliament intends each instrument to be treated as if it is a regulation.

The instruments, therefore, are subject to disallowance and post-promulgation scrutiny by our committee. They are not, however, subject to the same pre-promulgation processes as traditional regulations. By this I mean professional drafting by the Parliamentary Counsel Office, scrutiny by the Cabinet, the requirements of the Cabinet Office Manual, and publication in the Statutory Regulations series. We started receiving complaints about deemed regulations from members of the public. As Chairman of the Regulations Review Committee I have held that any member of the public who is on an electoral roll is entitled to write to me to ask that a regulation be examined. This has meant that we have had an increase in our work, but we have also had an increase in our effectiveness at getting things changed. We noticed a marked lack of consistency in the pre-promulgation processes, the drafting quality, and the public accessibility of different types of deemed regulations.

As an extreme example, we examined penal operational standards issued by the Chief Executive of the Department of Corrections. The operational standards specify procedures for collecting and analysing urine samples used to detect drug and alcohol consumption by prison inmates. This referred, in fact, to prison inmates who were not even adults. We identified a number of inadequacies with the format and content of the standards. The titles of the standards did not adequately identify the nature, status or year the instruments were made; the clauses were not numbered, nor were the pages; there was no clear statement of the department responsible for administering the standards or where the public might go for further information; and the drafting was generally unclear and did not conform with plain language drafting principles.

In our view the operational standards did not meet the required standard of an instrument that is, in effect, a regulation. After we had held our investigations and heard from witnesses, including people from the Law Society, the department agreed to revoke the standards and reissue them after taking our comments into account. Scrutiny of deemed regulations has become an increasingly onerous responsibility. In my view, issues such as the quality of drafting,

formatting, and clarity of deemed regulations should be resolved long before they are tabled in Parliament and referred to our committee. Our experiences made us realise that post-promulgation scrutiny is no substitute for an effective pre-promulgation process.

We started this inquiry in August 1998. We advertised for public submissions in all the major daily newspapers in New Zealand. We issued a discussion paper setting out the inquiry's terms of reference and some background information. We identified and wrote to all persons and organisations empowered to make deemed regulations, and to a few people who we thought would make an interesting submission, and requested information about their legislation-making processes. This was not straightforward because there is no central list of deemed regulations, and they are generally not subject to the same printing and publication requirements as regulations published in the Statutory Regulations series. We received submissions from the Chief Parliamentary Counsel, the Law Commission, the Legislation Advisory Committee, the New Zealand Law Society, the Crown Law Office, several government departments and Ministers, the Regulation Review Committee of the New South Wales Parliament, various industry groups, and several other organisations and individuals. The main objectives of the inquiry were to consider when it is appropriate for legislation to provide the power to make deemed regulations, and what general principles and standard procedures should apply to all deemed regulations.

Prior to 1990 there were very few examples of deemed regulations in New Zealand. Over the past 10 to 15 years, our regulation-making processes have evolved to the extent that deemed regulations are now an established legislative feature. Before we considered when it might be appropriate for Parliament to allow the making of deemed regulations, we decided to take a closer look at the origins of deemed regulations. New Zealand has had a Regulations Review Committee in its current format since the fourth Labour Government, of which I was a Minister, introduced this procedure in 1985. We established that an Opposition member would always be chairman of the committee. The present Speaker was the first chairman. The next chairman was the present Attorney-General, the Rt Hon. Sir Douglas Graham, then the Hon. David Caygill, one of my colleagues who had been a senior Minister in our Government, then another member or two and then I became chairman.

At present the committee has eight members. There is an Opposition chair, There are four what we might call Opposition members. There are three Labour, three National, one member who was a member of the Opposition party but has changed his party and one member who has also changed his party but generally speaking votes with the Government. That results in a four-all committee. There is no casting vote under our MMP system, because that goes against the principles of proportionality. So in order to get any report returned to Parliament we have to have a clear majority. Except on two occasions when there was a five-three vote every report has been unanimous. I have worked very hard to ensure that this is so. I must pay tribute to my colleague Annabel Young, who will deliver a paper tomorrow, for the enormous amount of assistance she has been in making the committee work as a truly parliamentary committee.

The committee's first report, in 1986, noted that the definition of "regulation" not only determines which instruments appear in the statutory regulations series and are tabled in Parliament but also which instruments are subject to scrutiny by the committee. The committee recommended that when draft legislation delegates a power to make subordinate legislation the legislation should state clearly whether the instrument will be a "regulation". In the committee's second report it examined the provisions of the Regulations Act 1936 and recommended a replacement bill that would be enacted. The committee considered what definition of "regulation"

should be adopted in the new Act. The committee's view was that if statutory instruments are made by a person other than the Governor-General or a Minister, have a legislative character, and are intended to apply generally to a class of persons, they should be brought within the scope of parliamentary control.

I should emphasise that this then was a committee which was chaired by an Opposition member of Parliament making a recommendation to the Government of the day, which accepted it. The committee believed that a provision to this effect should be included in the primary legislation. The definition of "regulation" recommended in that report formed the basis of the definition that now appears in section 2 of the Regulations (Disallowance) Act 1989 and is carried over into the Acts and Regulations Publication Act 1989 and in Standing Order 3. The advent of the rules process, now established in the transport sectors, came several years later. The rules process for land transport and maritime transport is modelled on the process initially developed for civil aviation and introduced in the Civil Aviation Act in September 1990. The main reason for adopting the rules process was to translate a large body of delegated legislation, including secondary and tertiary instruments, into one set of coherent rules for each transport mode.

Since the early 1990s the number and variation of deemed regulations has increased each year. References to instruments "deemed" to be regulations will soon disappear from our statute books in a move towards plain English drafting. Parliament is currently considering a bill—I am sure it will be enacted—which will substitute the reference in the present definition to "an instrument deemed to be a regulation" with a reference to “an instrument that is a regulation or that is required to be treated as a regulation". Both new versions of wording are already starting to appear in primary legislation. By examining the history of deemed regulations we discovered they were originally created to enable Parliament to exercise a greater degree of control over delegated legislation. Parliament started specifying in primary legislation whether a statutory instrument was a regulation or not.

The purpose of deemed regulations was to elevate tertiary instruments to the same status as traditional regulations for the purposes of parliamentary scrutiny. As deemed regulations have become more widely used their original purpose appears to have been overlooked. As a matter of general principle, we disapprove of shifting material from traditional regulations into deemed regulations. In our view most delegated legislation should be in the form of traditional regulations. Deemed regulations should only be created if there are special reasons for doing so. In other words, they should be the exception and not the rule. There are two key issues in determining when it is appropriate for legislation to provide the power to make deemed regulations. The first is to decide whether it is appropriate for Parliament to delegate the law-making power at all. The second is to decide, if delegated legislation is seen as appropriate, what form should be used and to whom should the power be delegated. There are few principles or guidelines to assist those promoting legislation to identify what kind of subordinate legislation is appropriate.

Our report identified some general principles to be taken into account when legislation which delegates law-making powers is being developed. The first principle is the importance of the delegated power. There are some law-making powers that should never be delegated, such as the power to impose taxes. An assessment should also be made of the effect of the delegated legislation on the rights and interests of individuals. As a matter of principle, criminal offences should not be created by delegated legislation but by Parliament itself. The second principle is the subject matter of the power. Some subject matters lend themselves more

naturally to a specialised legislation-making process. For example, civil aviation rules are more suitable for deemed regulations than some other instruments. The subject matter is detailed and technical and the instruments impose obligations and requirements on only a limited class of persons, all of whom are highly focused and intelligent. The rules often implement New Zealand's obligations under international civil aviation agreements.

The third principle is the application of the power. If the delegated legislation will affect a narrowly defined or clearly identifiable group it will be more appropriate for deemed regulations than legislation that applies to the public at large. We do not consider that a land transport rule containing the requirements for obtaining and renewing a driver's licence—something that applies to most adult New Zealanders—is suitable for a deemed regulation. The fourth principle involves the agency to which the power is delegated. The most appropriate legislator should be chosen for the particular delegated legislation. This legislation should have qualified personnel to draft the legislation and be able to demonstrate he or she has followed an appropriate process for making the legislation. We recommended to the Government that the principles in our report be taken into account when legislation is being developed.

Every member of our committee agreed that deemed regulations should be submitted to Cabinet in the same way as other regulations. It is not clear why deemed regulations are presently excluded from the Cabinet process. These instruments are still regulations and represent executive law-making, even if promulgated by a Minister or other agency. The advantages of Cabinet scrutiny are that consideration is given to matters such as the adequacy of consultation, compliance with legal obligations under the New Zealand Bill of Rights Act 1990, certification by the Parliamentary Counsel Office, and compliance with the 28-day rule for the coming into force of regulations. We believe that Cabinet approval would give effect to Parliament's intention that deemed regulations are to be treated as regulations. I make special emphasis of this point to members of committees. It would also act as a safeguard for the Government. Costly and potentially embarrassing mistakes could be avoided by providing for a greater degree of pre-promulgation control of deemed regulations. To put it quite simply, more than one Minister would have to read them and more than one department would have a chance to have a look at them. So they would be able to sort out what essentially have been some very silly and embarrassing mistakes that have been made in New Zealand by the present Government and its Ministers.

After Ministers have been called before the committee some of them have worked out pretty quickly that they have not had the expert advice and backup they would have if the proposals had been referred to a proper cabinet process. Under the standing orders of our House of Representatives—remember we are a unicameral legislature and consequently have the responsibility of dealing with all legislation—we can examine any regulation-making power in a bill before another committee and report to that committee. We quite often have a bill referred to us and submit recommendations to, say, the Energy Committee about an electricity bill. We recommend four or five changes and we are usually pretty pleased with our strike rate. Debbie, I think we achieved 100 per cent the other day with one.

Ms ANGUS: Ninety-nine.

MR HUNT: It was pretty good going. I am sure the one-hundredth one will end up before us as a complaint. We intend to adopt a new standard procedure for reviewing regulation-making powers in bills. We will consider any power in a bill creating deemed regulations and may request departments to report to us explaining why deemed regulations are

necessary and whether the regulation-making provisions in the bill conform with the general principles and recommendations in our inquiry report. We will then report any concerns we have about the appropriateness of creating deemed regulations instead of traditional regulations to the select committee considering the bill. As I emphasised, every bill in the New Zealand Parliament, except a few urgency bills on budget night, by our standing orders has to be referred to a standing committee, which can have public hearings. In examining what general principles should apply to the printing and publication of deemed regulations, we started with the basic premise that people must be made aware of what Parliament is doing and be able to read the letter of the law. The principle that every citizen is deemed to know the law will bring the law into disrepute if it is impossible or impracticable to comply with.

A significant number of deemed regulations are exempt from the requirements of the Acts and Regulations Publication Act 1989. Those instruments have their own notification and publication requirements. In our experience not all of the requirements are consistent. We examined the printing and publication requirements of regulations published in the Statutory Regulations series and concluded that the same requirements should be applied to all regulations and deemed regulations, unless there are very good reasons for exempting a deemed regulation from those requirements. In our view, most deemed regulations should be published in the statutory regulations series. Where separate printing and publication requirements are allowed, the minimum standard should be that: first, notice is given in the *Gazette* and any other publication relevant to the individuals or organisations affected; second, deemed regulations are available for inspection free of charge and for purchase at a reasonable price at locations which are publicly notified.

We recommended that existing Acts with lesser printing and publication requirements should be amended. We also recommended that all new bills for introduction which empower the making of deemed regulations should include these standard requirements. There is currently no published list of all regulations. The Parliamentary Counsel Office compiles the annual "Tables of Acts and Ordinances and Statutory Regulations in Force", but this does not include deemed regulations. As I said, last year there were more than 100 of them. This makes it very difficult for our committee to keep track of deemed regulations. Our staff have to check every issue of the *Gazette* to see if any new deemed regulations have been made. To facilitate this, we have prepared a list of all empowering Acts which authorise the making of deemed regulations. We must also keep track of new deemed regulation-making powers enacted by Parliament in order to keep our list up to date. We recommended that deemed regulations be included in the tables as other regulations have to be. The absence of a central record also raises issues of public accessibility. We recommended that the Government consider how accessibility to deemed regulations can be enhanced, including making them available for purchase and inspection from an identifiable source or requiring deemed regulations to be deposited with public libraries.

This is something that I know my colleague Annabel Young was particularly concerned with. A number of regulators already publish their deemed regulations on the Internet. While this is commendable, the onus is on the Government to ensure the law is publicly accessible. We recommend that the Government consider improving access by publishing a central list of deemed regulations on the Internet. Our experience in scrutinising deemed regulations makes us aware that, given the variety of subject areas they cover, there will inevitably be some differences in drafting style. Flexibility is one of the advantages of making deemed regulations. There are, however, some basic drafting standards that should be met in all cases. An example will highlight the sort of problem we have encountered.

We scrutinised a financial reporting standard issued by the Accounting Standards Review Board. The standard was first approved by the board in June 1994. We were confused about why a standard should be tabled in Parliament in February 1999 when it had been in force for several years, so we asked the board for clarification. We learned that the standard was originally tabled in 1994. The recent tabling was the result of an amendment to the standard approved by the board in December 1999. While the amendment was notified in the *Gazette*, the re-issued standard did not indicate on its face that amendments had been made or where those amendments appeared in the standard. The board acknowledged that this was particularly confusing, and that its policy of annotating revised standards had been overlooked.

In the past if you wanted to become an accountant and you had to get these rules, you had to pay quite a large sum of money to get them, which really was an attack on anyone who wanted to become an accountant and that in itself, we thought, was totally unjustified. We considered that a reprinted standard should make it clear that amendments had been made to it by including a date of re-issue on the front of the standard, in a way similar to that used for reprinted statutes. Several submissions we received on the inquiry suggested that the Parliamentary Counsel should have oversight of all legislation, including deemed regulations. We did not think it desirable for the office to be responsible for drafting all delegated legislation, but we recommend that the Government ask the Chief Parliamentary Counsel to develop detailed drafting guidelines for deemed regulations in consultation with relevant government departments, regulation-making authorities and our committee.

The extent of consultation required for deemed regulations depends on the specific provisions of the empowering statute. Complaints about regulations often relate to the adequacy of consultation undertaken by the administering government department. Many industry groups are critical of consultation undertaken, particularly in relation to land transport rules. There is a view that industry groups participate in a consultation process on draft rules at considerable expense, but have no guarantee that their views are taken into account. There is frustration that the outcome of the consultation process is unknown until a rule emerges at the end of the process. We identified some general principles for effective consultation and recommended that they be applied to all deemed regulations. We also recommended that the Government consider extending the consultation process for land transport rules so that submitters would have a chance for further comment on a proposed rule before it is given to the Minister for Transport for signature.

The Motor Trade Association raised the issue of negotiated rule making and asked us to consider recommending that the process be applied in the New Zealand context in appropriate cases. We are aware that the negotiated rule-making process has limitations, particularly in its need to achieve consensus. The idea, of course, of negotiated rule making is that the two sides appoint one each, there is an independent arbiter and there is a decision, and everyone accepts the result. We do not suggest that that is an appropriate process in every instance or for all topics. Where workable, however, we considered there may be advantages in adopting a much more co-operative approach. We recommended that the Government investigate opportunities for adopting a negotiated rule-making process in the New Zealand context. In many cases the power to make deemed regulations includes the power to incorporate by reference other material which is not actually set out in the regulation itself.

Overseas standards or codes of practice are commonly incorporated into New Zealand delegated legislation in this way, especially in transport rules. We, of course, get some of these from Australia. We identified some general principles for the use of incorporated

material. The power to incorporate material by reference should be expressly authorised in the empowering statute, be exercised in limited cases where the document is appropriate for that purpose, and be used only to incorporate material that is technical in nature. In addition, material incorporated by reference should be available for inspection free of charge and for purchase at a reasonable price. Advisory circulars and guidance sheets may be prepared by government agencies and distributed to users to supplement or clarify deemed regulations. The material does not form part of a deemed regulation itself. Undoubtedly, advisory material can be used in clarifying complex technical requirements and assisting in the interpretation of deemed regulations.

Problems can occur, however, when users are unclear about the status of advisory material. The risk of this increases if advisory material appears to prescribe requirements that have to be met. Users may believe that if they follow the advisory material they will be complying with the rule itself. In fact, we had a wonderful example: A sheet was sent out to every car repairer, every garage, in New Zealand. Repairers had to put it up on their wall. At the bottom there was a little disclaimer which said, "Well, even though we sent you this, this might not be the right way." The document was issued by the authorities. It is a classic catch-22 situation: none of those involved could be expected to have really technical knowledge or knowledge of the law-making procedures. We believe the lawmakers should state in the advisory material itself that the legal requirements are set out in the deemed regulation or in the Act.

Advisory material should clarify a deemed regulation but should not contain additional requirements. In conclusion, this inquiry proved to be a very interesting and satisfying exercise. We rediscovered that the original purpose of deemed regulations was to enhance parliamentary scrutiny of delegated legislation. This was something we reflected upon in making recommendations to the Government about how deemed regulations should be used in the future. We believe that the most delegated legislation should be in the form of traditional regulations. Deemed regulations should be created only if there are special reasons for doing so. They should be the exception and not the rule. Scrutiny by our committee is the only form of parliamentary control over many deemed regulations. This has become an increasingly onerous responsibility, and it is extremely difficult for us to keep track of deemed regulations because of the rapid increase in their use, the lack of a central record of deemed regulations and the inconsistent printing and publication requirements for deemed regulations.

We spend a greater proportion of our time examining deemed regulations and investigating complaints about deemed regulations than any previous regulations review committee. Post-promulgation scrutiny of regulations is no substitute, as I said earlier, for effective pre-promulgation control. We have raised some important constitutional issues for the Government to address. Issues such as the quality of drafting, formatting, and the clarity of deemed regulations should be resolved long before deemed regulations are tabled in Parliament and referred to our committee. Wherever possible, the same pre-promulgation processes should be applied to deemed regulations as to traditional regulations, including approval by the Cabinet and the publication requirements equivalent to those in the Acts and Regulations Publication Act 1989. I am very pleased with discussions I have had with the Secretary of the Cabinet, which indicate that Cabinet will consider an appropriate change to the Cabinet manual.

The Government is required to table a response to the recommendations in this report within 90 days—that time expires on 4 October this year, which is about the time Parliament will dissolve for the election. In our report, we encourage the next regulations review

committee to re-examine the issues raised in this inquiry during the next parliamentary term. This would allow the new committee to follow up any undertakings from the Government in response to this report, and provide an opportunity to examine any further issues that emerge in the interim. We are mindful of the challenges future delegated legislation committees will face with the development of more flexible and market-sensitive means of regulation to meet rapidly changing situations.

It is our hope that by setting out our views and some general principles in relation to deemed regulations a more considered and consistent approach will be taken in the future to the development and continued expansion of deemed regulations. We believe it is time for Parliament to consider taking steps to round up the regulators and regain some control of delegated legislation. It is important to remember that while Parliament has delegated the authority to make delegated legislation it has not relinquished its ultimate law-making responsibility.

CHAIR: Thank you, Jonathan, for a terrific paper. Recently we had a beauty: we had not only deemed legislation but national scheme deemed legislation. The Harness Racing Authority put together a pile of rules about how stewards and others ought to behave—riders and drivers in particular. The blood alcohol level was zero. We felt a bit sorry for the odd fellow who might win the first race, but not have another race. He would still be liable for prosecution. In South Australia local government is probably the biggest area we encounter with deemed legislation. We are constantly dealing with inconsistent drafting standards and practices, which makes it difficult. I know that a report entitled "Rulemaking of Commonwealth Agencies" was issued by the Administrative Review Council in 1992 and I commend that report to your attention as well.

Ms LAVARCH (Queensland): I share with you the frustration on the drafting standards of deemed regulations. We in Queensland call them exempt regulations. In the past six months our committee has had about 20 exempt regulations before it, and of those 20 we raised concerns about eight. That compared with traditional regulations, where we raise concerns with probably less than 10 per cent. Of those about which we raised concerns, the Minister declined to table one. That is a whole thesis on what happens when the Minister does not table a deemed or an exempt regulation. I will not go into that. Our committee has also recommended that guidelines be prepared by the Office of the Parliamentary Counsel [OPC], and we are following that through at the moment. There is actually a commitment by the Executive that the OPC prepare guidelines. I want to know why your inquiry did not recommend that the OPC draft regulations.

Mr HUNT: Basically because the Parliamentary Counsel is stretched for work now. There would have to be a considerable increase in his staff. We also stood back and considered that perhaps there are some things that it is not appropriate for the Parliamentary Counsel to draft, and I am thinking in particular of civil aviation rules, where it is the pilots who meet with those who make the rules to come to some considerable agreement. They will be in technical language, but I do not think it is necessary to have more than an oversight by the Parliamentary Counsel. One of the things we recommended in our report was that Parliamentary Counsel should issue guidelines and we should have a strict look to ensure that the guidelines are being followed. I know deemed regulations similar to those produced by the Corrections Department, which I referred to earlier, will never be brought forward again because we made it pretty clear that they were totally unsatisfactory and very unprofessional.

AGAINST WHAT VALUES IS LEGISLATION SCRUTINISED?

CHAIR (Mr Balch, Northern Territory): It is my pleasure to chair this session and to introduce our speaker, who could be recognised as an elder statesman in this forum. Senator Barney Cooney was born in Currie, King Island, Tasmania. He has a degree in law from Melbourne University and practised as a barrister at the Victorian bar until his election to the Senate for Victoria in 1984.

In a long and distinguished parliamentary career Senator Cooney chaired the Senate Standing Committee on Regulations and Ordinances in 1985, which shows his long involvement with this particular area. He was also chair of the Scrutiny of Bills Committee in 1985. He was chair of the Senate Legal and Constitutional Affairs Standing Committee and the Senate Legal and Constitutional Legislation Committee. He was also chair of the Senate Select Committee on Certain Aspects of the Airline Pilots' Dispute in 1989 and the Senate Select Committee on Matters Arising from Pay Television Tendering Processes in 1993. Ladies and gentlemen, it is my pleasure to introduce Senator Barney Cooney to present his paper entitled "Values and Principles in the Scrutiny of Legislation".

SENATOR COONEY (Commonwealth): The origin of this speech was the Victorian committee which invited me down and entertained me very nicely with tea, coffee and biscuits. The committee was discussing, among other things, the minor issue of whether a Supreme Court judge should be able to give a warrant to allow the police to set up, in effect, a spy station next door. I thought that this was pretty heavy stuff. It was the sort of stuff the people I meet from year to year talk about at these committees. The big thing about it is that the values applied were the values that Peter Ryan, Carlo Carli, Bob Cameron and others applied there and then. That is what was guiding the comment on that particular piece of legislation. No doubt their values and principles were modified a little by political reality.

Yesterday Bob Wiese said that he got the gun legislation through. I thought that was terribly courageous; no doubt it was a value and principle that Bob suffered for. It fascinated me. What brings us to the point at which we as a group can say that this is good or this is bad? Learned people in this area of law have judgment, skill and ethics. Stephen Argument and Dennis Pearce know more than the rest of us put together and have written learned books. However, they do not have the responsibility we have as elected people to make a judgment. I will put you to the test. You can give me advice about things I must make judgments about, but in the end it is my responsibility.

Later I will ask you for answers to these questions. Melbourne or St Kilda? Essendon or the Kangaroos? Geelong or the Western Bulldogs? Sydney or Richmond? Fremantle or Port Adelaide? Adelaide or Hawthorn? Brisbane or West Coast? Collingwood or Carlton? You can give me advice about all that but in the end it must be my decision. As members of scrutiny committees we must remember that what we are elected to do—and I suppose what we are paid to do—is give our opinion on a particular aspect of law. We can get all sorts of help but in the end it is our decision, which is a worry when you think about it.

I started with the question of where we get our values from. I then wrote a paper about this and never got the answer because all sorts of other things interfered with the issue. Yesterday the people from the OECD talked about issues relating to good economic practice. I am a bit concerned about us as a group across the parties trying to discuss such issues. To return to the analogy I was using earlier, I think we can say that the ball was out of bounds, or that you should not push people in the back. They are quite clear issues on which we would all agree. However, I do not think we can say that you should play down the centre rather than to the sides. That is a policy decision that you leave to your Mick Malthouses.

We can decide certain fundamental issues, which I shall try to come to, but in the end I think policy is a real problem. Policy must be left to the Mick Malthouses and the Malcolm Blights. I shall go through the values and principles I think we agree on and test them against the five criteria used by the Senate Scrutiny of Bills Committee. The criteria are: first, does the bill trespass unduly on personal rights and liberties—that is a standard criterion that we all know about; second, does a bill make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers; third, does it make rights, liberties or obligations unduly dependent upon non-reviewable decisions; fourth, does it inappropriately delegate legislative powers; or, fifth, does it insufficiently subject the exercise of legislative power to parliamentary scrutiny.

The first criterion - that is, that the committee will identify bills which may trespass unduly on personal rights and liberties - is very wide. Other countries have bills of rights about that, and I shall come back to that. Considering legislation in this context evokes values and principles, including the belief in every person's right to life and bodily integrity—I am sure we all agree that people should not be bashed—and respect as a human being, in his or her status as a member of the community, in his or her entitlement to due process. I think people generally would say that you should not give public servants the right to break down doors without having a warrant, but people may not agree that a public servant, who may be from the tax office, is enforcing the right policy, enforcing the goods and services tax, or whether that is a good or bad thing.

It is a real problem. I think people would say that a public servant should not be enforcing the policy in that way. However, I do not think we should get into the issue of whether a certain tax system or regulation is more efficient in terms of the economic program we are adopting. If these sorts of committees get into those sorts of issues they are in real trouble. That is a matter for discussion in the party room. To digress, parliamentarians have a big effect, particularly in the party room, on the scrutiny of legislation. Ultimately, we might look at whether a lot more can be done in the party room, particularly the government party room—when you are in Opposition you do not get the stuff until afterwards.

When we were in government—and an excellent government it was—we used to call in departmental staff beforehand and go through bills before they were churned out. In government you can do that; in opposition you do not get that chance. Nevertheless in the party room you can decide whether to support a bill. I think we let the odd bill through that we should not have. Under the second criterion of whether a bill makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, considering legislation in this context evokes values and principles, including the belief in the need for the Executive to be responsible to parliament. We would agree with that principle but we may not agree with its exercise.

Does the rule that the Executive should be responsible to the parliament include the Executive giving up all its documents? The courts have had a few things to say about that, and learned people in this area would know that. We would certainly all agree with the principle that the Executive should be responsible to parliament. However, we would disagree with the way that manifests itself—and of course it depends on whether we are in power. That may sound a little cynical. People say that you will change your mind once you get into government. Of course you will change your mind once you get into government because, after all, all this is done in a political context, a context in which we have very strong beliefs in what the party proclaims.

None of us is a careerist. None of us enters parliament for the sake of getting a seat. We all enter parliament because we are principled. Whenever we are looking at the issue of parliament scrutinising legislation we must remember that we are members of parliament

elected by the people on the basis of our own merits, with a little help from the party. Nevertheless that is what we are. Our approach to this is different to that off the courts. A judge would say that he must decide whether a bill or regulation is in accordance with the criteria, and that he will judge it strictly on the merits of the evidence. It is nonsense for us to put ourselves in this position. We can try to eliminate it but in the end we are members of a political party in a political system and we have to look at it in that way.

Under the third criterion the committee will identify bills which make rights, liberties and obligations unduly dependent upon non-reviewable decisions. This important issue will come up in the Federal Parliament soon and it becomes a political issue also, but on the other hand as a matter of principle we would agree that the decision is as good as could be made. Nevertheless, it demonstrates a problem with distinguishing between what sort of values we can bring, what we can scrutinise and whether it is a political issue. However, we will see what happens there. Under the fourth criterion the committee will identify bills which inappropriately delegate legislative powers. They can be enforced without a great deal of problem, although I might be wrong.

Considering legislation in this context evokes values and principles, including the belief in the right of the people to elect its legislatures, in the supremacy of parliament, which is freely and popularly chosen, in its obligation to make that legislation which is appropriate for it alone to make. In other words, there are some matters that should be dealt with by parliament and we would all agree with that. Parliament had to deal with the gun legislation rather than simply permitting regulation by the gun lobby. Under this criterion the committee will identify bills which insufficiently subject the exercise of legislative power to parliamentary scrutiny. That is self-evident. Committees should point out what parliament should look at.

The next heading is the obligations of parliament and its meeting of them. It refers to quotes from Sir Gerard Brennan in 1990 when talking to a meeting in Canberra about that classic problem we have all faced of whether parliament is doing its job vis a vis the Executive—and that has been discussed forever. Under the heading of "How are values and principles set", I wish to speak specifically about criterion one, which requires the Scrutiny of Bills Committee to examine Commonwealth bills to see whether by express words or otherwise they trespass unduly on personal rights and liberties. This criterion is an express provision that those subject to Commonwealth legislation will have their rights and liberties taken into account when it comes before the parliament. Australia does not have a bill of rights, so therefore it is people such as ourselves who protect the community.

The court can do great things and I can remember , although many of you would not, the landmark decision of the High Court on the Communist Party Dissolution Bill. However, specifically the only body that really looks at these issues by direction, that is bills, at a Commonwealth level is the Scrutiny of Bills Committee. Senator Coonan's committee looks at regulations. I am subject to correction, but I think Australia is unique in being the only country where parliamentary bodies look at bills and regulations in terms of civil rights. The United States of America, Canada, South Africa and New Zealand all have a bill of rights and a written list of detailed tests that the legislation must meet and which can be applied by the judicial arm of government. For example, in Tasmania, that great State of my birth, whether its legislation meets the tests will depend upon the people who apply them and it is their values and principles that count. This concept struck me as I was listening to the spokesperson for Victoria, not the State of my birth but nevertheless the State in which I live. People do adopt bills of rights. The Republic of South Africa has adopted one and that makes it subject to judicial interpretation. I am not going to discuss whether one should have bills of rights because that has been discussed many times.

I have a heading "Free approach to scrutiny." I have been a member of the Scrutiny of Bills Committee for some time now and I have had the privilege of attending bodies such as this. Parliamentarians should not be restricted by any of these criteria. We can be creative in what we do or do not do and exercise judgment, which is important. We can decide which is policy and which is not. There might be many difficulties in the system but we can say what is right or what is wrong or whether something is too close to the bone for the committee to deal with and we will slam each other in the Chamber.

Much of this appears in the book of James Warmenhoven, an excellent volume; it is not quite up to the Pearce standard but it is a lot cheaper. That demonstrates what we as a committee have done and how we have done it.

I want now to develop the point about the work of Ministers who have values and principles, and we should respect them. It is possible that the Scrutiny of Bills Committee might be wrong on the odd point and one should respect that. The idea of how legislation should be processed and how it should go forward can be developed by dialogue between the Minister, the committee and with advisers, in our case Professor Davidson, who has principles and values, as well as with the secretary of the committee and others.

Some of our greatest values have been brought to us by James and his eminent predecessors, such as Stephen Argument. The idea for an exchange of dialogue came from Associate Professor Hiebert of Canada, who refers to a conversation between the Canadian courts and the Parliament and I have included a quote from her paper. In Canada there is a conversation, as she describes it, between the courts, the parliament and the Executive to work out what might be right or wrong. We can get dialogue going between the Minister and the committee and between the committee, the advisers and the secretary, so that there is an input.

It is much more immediate than the courts. Hopefully, we can talk to our Ministers, depending on how they are feeling and what you have said, because you can get yourself in some trouble.

We have heard about Henry VIII clauses. Some people suffer from Henry VII clauses, who as you know predeceased and also ruled before Henry VIII. He got rid of a lot of his opponents by cutting off their heads. I know that people in this room, for example, have had their heads cut-off for raising issues, even in the party room, that the leader did not like, so there is a degree of courage in all of this. Nevertheless, we can get a bit of dialogue going and that will produce the good values and principles that we need.

I then refer to the principles and where they come from and I mention the Universal Declaration of Human Rights and the International Covenant of Civil and Political Rights and the Ten Commandments. These are articulations of values and principles, but in an endeavour to be true to ourselves—to use a phrase from the pulpit—as the elected representatives in charge of these committees and after discussing it with the Minister, amongst ourselves and with advisers, in the end we make the decision.

I want to refer to advisers. Scrutiny committees gain their understanding of the meaning and ramifications of legislation largely through the help of their advisers. They are crucial to the success of scrutiny work. Professor Jim Davis has been central to the endeavours of the Senate committee looking at bills. The secretariat, which presently consists of James Warmenhoven, Margaret Lindeman and Sue Blunden, is fundamental to good scrutiny. I want to mention Doug Whalan whom many here would know. For about 18 months Emeritus Professor Douglas Whalan stood in for Jim Davis when academic duties took him away from the committee. Most people here would have known Professor Whalan and would have held him in

high regard. Douglas died on 10 October 1997 and his memory lives on and his spirit is still with us. I would like to pay tribute to him because he was a wonderful man and had a great influence in this area.

Advisers are crucial to a scrutiny committee's understanding of legislation. They also contribute greatly to ensuring that a committee's values and principles are sound. In performing both these functions they help keep the quality of the committee's work high. Quality control over the work of scrutiny committees is a major matter. Quality control in the legal system is maintained by appeal courts. If the courts make a mistake you go through a series of processes until you get to the High Court, and the High Court cannot make a mistake by definition. But at least there is quality control. In a certain sense we do not have quality control. What we write and publish cannot be corrected. Nevertheless, a de facto scrutiny control is brought about by dialogue between the Ministers and committees.

That is vital to keep the quality of scrutiny over legislation high. So too is the work of the committee advisers. Without an appellate system comparable to the judicial one, committee members need to be forever conscious of the high task they perform. Committees bear heavy responsibilities in being the only bodies in Australia with the specific and discrete task of measuring legislation specifically in terms of human rights and due processes. Canada and New Zealand have a system, but in Australia, such as the situation in Victoria, we do not have an appeal system to correct our decisions. Accordingly, we must impose our own quality control.

Meetings such as this conference are essential. I did bring the OECD report which I was going to say some nasty things about, but fortunately I have run out of time.

Mr HIRD (Australian Capital Territory): Senator Cooney, you referred to a football team called St Kilda. Could you enlighten us as to whom they are playing this weekend? I do not know because I do not have the facts. If you could tell me, I will know the appropriate team to back, which will be St Kilda in any case.

SENATOR COONEY: Melbourne versus St Kilda at the MCG. I can remember when St Kilda got into the grand final a while back. My wife, Lillian, said, "I have always been a great St Kilda fan." I said, "You don't seem to have gone very often." She said, "I am a very regular attendant." We went to the grand final and we all had to stand up for the national anthem. She got up and said, "Good God, they don't still play God Save the Queen, do they?" That remark gave her away.

Mr HUNT (New Zealand): Senator, does your committee look at every single regulation that is produced from the Federal Parliament as a matter of course? Do you go through all of them and say that you are not interested in some and not others? As a matter of course, on your agenda do you go through every regulation?

SENATOR COONEY: I have obviously misled you. Senator Coonan, who is giving the next speech, looks at every regulation. We look at every bill, every bit of legislation that is put through. One matter that is a problem is that we do not look at amendments. I am not sure how others deal with amendments to bills.

Ms LAVARCH (Queensland:) No, we do not look at amendments, unless it is an amendment bill.

SENATOR COONEY: It can be disastrous. I remember one bill at Christmas time, a most disastrous bit of legislation that went through. Right on Christmas there was an amendment which we all passed. I think it would have to be the most disastrous amendment that

has been passed because we were all leaving for our Christmas trips. Someone realised that the effect of the amendment was that public servants would not be paid over the holidays, which did not particularly worry everyone. Also, the judges would not be paid, but that again did not worry everyone. Then we realised that the politicians would not be paid, and we were all brought back. Not being able to check amendments is a problem.

Ms SALIBA (New South Wales): Senator Cooney, earlier today Dr Tobin talked about ethical issues. As one of our longest serving chairmen, what is your view on the practicality of securing ethical behaviour both within the Parliament and within the broader community?

SENATOR COONEY: We have to trust the ethics of the people. Politicians, as part of their job, have to put up with criticism from the media. This is a self-serving statement: ethics means acting according to your beliefs. Therefore, there will be a variation at certain levels in what people do. Generally—and I think delegates would agree—the population is fundamentally ethical. I mean by that that they try to do what is right. We are all in need of redemption, we all do the wrong thing from time to time. But when people are working in this area and are dealing with legislation they try to act ethically, that is, according to the way they feel.

If a person puts a position in the party room and the vote goes against him, he has to stick by what the party says. Otherwise, the system will not work. The ethical principle is there. Those who have been Ministers would know that. There has to be a vote in the party room. If a Government is not assured of a vote in Parliament from its members on a bill, it would be impossible to govern and the system would break down. So when you talk about ethics, you have to say what you mean by "ethics". All it means is acting honourably. We then have to define "acting honourably". It means to put your position, but at the appropriate place. If you put it in the party room and you lose, that is it. You have to vote with the party in Parliament.

On certain fundamental issues the use of arbitrary power should be restrained. I suppose there would be a time when any one of us would say that a situation is so intolerable we may have to resign. Dr Tobin's statement was a very necessary one. But ethics is a more complex issue than simply saying that people have to follow a set of commands. A variety of issues have to be taken into account. As elected members of a party we have to adhere to certain principles. I think that acting ethically means acting in the light of all the pressures upon us. As to ethics within the broader community, my belief is that generally we have an ethical community. I cannot resist having a shot at the OECD. If matters are to be measured solely in terms of economic considerations, then there will be problems with ethics.

Mr TURNER (New South Wales): Senator Cooney, in between the football results you said it was not the task of committees to examine alternatives to particular regulatory proposals. Does that mean you do not support the use of regulatory impact analyses which involve a comparison of the merits of alternative options?

SENATOR COONEY: We must have regulatory impact statements. However, I am concerned that we must make allowances for the fact that we have different principles and values which are manifested in the party that we belong to. Indeed, in some parties there are factions, all very good factions, expressing their own values. If you are going to use impact statements and at the same time try to have basic principles that everyone can agree with, then there might be problems. If you get an impact statement that everyone agrees with on a particular occasion, well and good. I am not against that; we have to be developing the whole time. I am worried that there comes a point when it is a matter for political debate. To envisage a scrutiny system where there is agreement across the parties, there is only a limited range that can

encompass.

Ms LAVARCH (Queensland): I agree with you that the most animated discussions are on the scrutiny of bills, such as fishery ones, and even regulations, in which members have a particular interest—and my interest is not in fishing. I have learned a lot from chairing the Queensland committee. The committee had the interesting experience recently of being lobbied by an outside lobby group on behalf of an organisation that would be affected by a piece of legislation. Have you had that experience at the Senate level, or have other delegates had that experience in their committees, and how have you dealt with it?

SENATOR COONEY: Our committee is lobbied and we have received letters. We send all of the letters to the Minister with our comments. If someone wants to lobby us we talk with them. Government members and other people attend before the committee to put their cases. We have held inquiries. We are holding an inquiry into search and enter and people have attended and sent submissions. We could keep the letters to ourselves and write to the Minister, but if people write to us it is fair to the Minister to tell him what they have said. If people do not want that, I would not do it. It is not a bad idea to encourage lobbying because then the committee receives more information.

Mr RYAN (Victoria): I will take up a few points that Senator Cooney raised. First, in relation to the last issue, we have submissions made to us as a committee and we quite regularly receive groups from the community who have a point of view to put. On the occasion of the passage of the police confidence legislation, which has drawn a bit of attention recently in Victoria, the Police Association put its point of view to us. Similarly, over the native title legislation, Senator Sid Spindler and a group of people put their point of view to the committee. That has occurred in a number of instances. We will quite often make that part of the report that we table in the Parliament. So we do that as a matter of course.

I take up one other point. In a sense, I resisted the urge this morning to take issue with Professor Pearce to some degree. I do not want to drop on him now that he has left the podium. I am sure that, if he wants to comment further, he will. I endorse the point that Senator Cooney made. It is my strong view also that we should not get embroiled in policy issues and it is a mistake for these committees to do so. Yesterday I said that we are commentators, not legislators, for this purpose. When we come to a forum such as this and discuss this important issue in isolation in this sort of environment, we see that, in its practical application, it does not happen in isolation.

There is a significant cause and effect involved in doing what parliamentarians are required to do to fulfil the role that these committees require. The dynamics of the activity, in a practical sense, in a real world, are real. That is what moves me to say that I regard the function of parliamentarians on these committees as being one of the most difficult of roles to fulfil in the parliament—whether they be the government of the day or the opposition. It is a big ask to require the nine people on the committee that I chair to come to a room, take off the political hat that they wear outside that room and, for the one instance, fulfil their roles as elected representatives. It is the one time when that group of nine people gather round the table and shed the politics. It makes the committee function very well. It involves joint trust, which is substantial. In an adversarial system such as the one that we have—like it or not we do have it—it is a significant ask.

That is why I would be concerned about getting into these policy issues. I highlight the fact that the distinction is seen when you hear the debate which subsequently transpires in the House. When the matter comes into the House, those members of my committee who are from another political persuasion are undaunted and give us a fair flogging if they think

it appropriate for the purpose of the parliamentary debate on the floor of the House. When the issue passes over for the consideration of the parliament we, as parliamentarians, within our elected role, debate the legislation which is then under consideration. It is in that forum that this issue of policy is able to be debated, as it ought properly to be debated.

I strongly support Senator Cooney's fundamental view about this. If these committees are to function and if they are to do the excellent job that they do, they are required to do that in an environment where these issues of politics and policy are able to be put aside for that important time when they fulfil this function. Finally, on process, we write to Ministers if we think it appropriate to express a concern about a given issue, and we receive the correspondence from the Minister in due course. That material then forms part of our report. We make sure that, when we are tabling the report, the parliament and the world have available a composite of the point of view put to us by interest groups who come to us; the correspondence that we send to a Minister in relation to concerns raised; the response that we receive from the Minister in dealing with the issues that we have raised for that Minister's consideration; and the point of view that we eventually conclude with for the purposes of our report. It is all there in the document for the world to see.

CHAIR: I declare this session closed. A paper has been provided by Western Australia called "Standing Committee on Uniform Legislation and Intergovernmental Agreements─Uniform Legislation Paper." The delegate who was to speak to that paper has not been able to attend the conference. The paper has been tabled and delegates should seek to obtain a copy of it if they wish to do so.

EXPLANATORY MATERIAL FOR LEGISLATIVE INSTRUMENTS—THE COMMONWEALTH EXPERIENCE

CHAIR (Ms Hervieux-Payette, Canada): It is an honour and a privilege for me to chair this session, especially as an outstanding person is to make the presentation. The clerk of our committee has several copies of a document that refers to what the Standing Joint Committee for the Scrutiny of Regulations is doing. That document was updated in June 1999 for the purposes of this conference. If it proves useful to some of you it is available from Mr Onu, clerk of that committee. My colleague from Canada has undertaken a study and produced a very good book called *The Power of Parliamentary Houses to Send for Persons, Papers and Records*, which was printed by University of Toronto Press. He does not have copies for sale but that book is available. If delegates are interested in it, they may ask him for information about how to obtain a copy of this document. The document gives a good background of power over several hundred years of history. I think his views are different to those put forward by a speaker today about the power of parliamentarians to summon people with paper and the power to do so without the court.

On behalf of the Canadian delegation, I say that we feel at home. We feel that we are meeting our cousins. For us it is a great pleasure to attend these meetings. It is the twenty-fifth anniversary of our committee so that must be the rationale that was used to authorise us to travel outside the country, since our committee has not travelled for at least the last 10 years. It is a real treat for us to visit you. We appreciate the fact that the weather is nice. Let me refer delegates to the curriculum vitae of our next speaker. I had a chance to talk to her before this meeting. She and I have a lot in common in regard to women's issues and youth—issues in which I know all delegates are interested. Helen Lloyd Coonan, a lawyer by profession, was elected to Federal Parliament as a Liberal senator for New South Wales in March 1996. In November 1998 she was appointed Deputy Government Whip in the Senate.

She serves on a number of parliamentary committees. She must be working hard because she is on a lot of committees: the Senate Standing Committee on Regulations and Ordinances, the Senate Standing Committee for the Scrutiny of Bills, the Joint Statutory Committee on Public Accounts and Audit, the Joint Standing Committee on the Socio Economic Consequences of National and Competition Policy and the Senate Legal and Constitutional Legislation Committee. In the meantime she is attending our meeting.

Senator Coonan has participated in inquiries in many areas and she serves on several government backbench policy committees, including treasury, finance, administration, attorney-general and justice, customs and communications, and the arts. She is also the Director of the Council for Equal Opportunity in Employment, having been nominated by the Prime Minister. Recent issues with which she is involved include: parliamentary Senate reform—something which is very popular in Canada—the creation of an international criminal court, the portrayal of women in the media and the socioeconomic impact of competition policy. Before entering politics Senator Coonan had a long career in the legal practice. She has a history of commitment to the interests of women and children in the areas of health, welfare, education, and legal rights. I am intrigued by the fact that Senator Coonan has been a regular commentator on news and current affairs programs and she was a regular panellist with John Laws—somebody about whom I have read a lot these days—on a program called *Beauty and the Beast*. I have no problem in saying that she was not the beast. I introduce Senator Coonan.

SENATOR COONAN (Commonwealth): Distinguished members of Parliament and distinguished delegates, welcome to all overseas visitors. I have a couple of confessions to make. I really like this Parliament House because, as you will have noticed, I have not been able to attend most of the conference, but I just walked in and I got a seat on the frontbench. That is pretty good. The other confession I have to make is that my involvement with John Laws and the *Beauty and the Beast* was so long ago that I did not even have to pay him for it. My third confession is that, in a way, I think I am here a little under false pretences because I am only the chair designate and I am sure that my knowledge about this complex and important area of parliamentary scrutiny is not equal to the knowledge of other delegates in this room. So I hope that what I have to say to you will be as informative as I can make it. Afterwards, if you need to a ask questions that challenge the depth of my knowledge, if you cannot be gentle, be kind.

Let us go to explanatory material for legislative instruments. I want to talk about the Commonwealth experience. First, the Senate Standing Committee on Regulations and Ordinances has a long association with making sure that legislative instruments sent for tabling have some proper explanatory material to go with them. This goes back a long time—to 1932, the year that the committee was established. I wonder whether it is the oldest committee; I think it might be. It certainly dates back to 1932 and there probably are not many that go back before that. In its second report in 1993, the committee advised that it had instituted the practice a year earlier of the department responsible for a new or amending instrument supplying an explanation of the effect of that instrument. It is significant because, at Commonwealth level, the committee has operated continuously for a longer period than any other committee responsible for scrutiny of the actions of executive government. The committee has found, however, that its early initiative has not always been well implemented, with the committee being obliged to write regularly to Ministers about the quality of material tabled with instruments.

I am about to succeed a very distinguished former Chair, Bill O'Chee, who would be known to many of you. I said to Bill, "What do you have to do as Chair of this committee?" He said, "Just be prepared to stand up to Ministers." That is probably good advice. The paper will describe some of the problems which the committee has found with explanatory statements, which is the general description for the explanatory documents prepared for tabling with Commonwealth legislative instruments. The paper will include the responses of the committee to some of the more significant deficiencies in this area. It will then discuss proposals for change to the existing system of explanatory material and the fate of those proposals. The resulting changes are significant because they not only resulted in the introduction of regulation impact statements for most important Commonwealth legislative instruments, but also because they were implemented by administrative direction rather than by legislation.

The committee has noted many deficiencies in the quality of explanatory statements, about which it has written to the appropriate Ministers. Some were simply too brief or inadequate to be of use, with insufficient information to enable informed scrutiny of the instrument by the committee or by individual Senators. In one such case the explanatory statement was scarcely one page long, although the complex regulations were 88 pages. Others included wrong references to enabling legislation or to legislative requirements. Others gave misleading information. Others conflicted with the provisions of the instrument which they were supposed to explain. In one case the explanatory statement advised that the instrument provided for grants to three named institutions, although the instrument itself did not refer to two of the three but did provide for three others which were not mentioned in the explanatory statement. Another advised that the instrument gave a specified power to the Minister, but it did not. Some explanatory statements did not advise of the date of gazettal of instruments which commenced

on gazettal. One advised that most of the many provisions of the instrument were minor, which necessarily meant that some were not minor, but gave no indication of which were the major changes.

Many legislative instruments provide for the details of taxes, fees, charges and allowances and this is an area where the committee often finds problems with explanatory statements. In some cases the explanatory statement advised of substantial increases in fees with no explanation at all. In other cases unusual provisions were not explained. For instance, there was no explanation of a fee for an original certificate of $13.65 and a fee of $270 for a replacement certificate. The problems of inadequate explanatory statements are compounded where the instrument deals with sensitive matters which may be controversial or of interest to special groups. Of course, that brings in the problem of lobbying, which the committee has had a couple of instances of.

The explanatory statement for regulations dealing with the export of hardwood wood chips was very slight with only a few lines of background information and brief notes on individual provisions. The explanatory statement for the equally sensitive regulations providing for an important new process of family law primary dispute resolution included only general background with no notes on individual provisions. One group of regulations removed export controls on alumina, bauxite, coal, mineral sands and liquefied natural gas, but the explanatory statement did not explain that their provisions were identical to a group disallowed earlier by the Senate or the legal and administrative consequences which flow from the disallowance and remaking. I am sure you have discussed already in various sessions the difficulties of simply keeping track of this sort of thing and the need to be able to monitor when someone does something sneaky. In reply to the committee's concerns the Minister advised that these were salient issues which should have been addressed, but that the omission was inadvertent and not intended to mask the sensitivity of the subject matter.

Many Australians are interested in sport and the committee is no exception to this rule. For instance, the Broadcasting Services Act 1992 includes provisions, known as the anti-siphoning rules, which prevent pay TV licensees from acquiring exclusive television rights to events which the Minister considers should be free to the general public. However, the Minister may allow pay TV licensees to acquire rights to these events if, for instance, the free to air broadcasters are not interested in the events, or where the broadcaster fails to televise an event, or televises only an unreasonably small proportion of the event. The Minister does all this by legislative instruments. The committee scrutinised three such instruments made in 1998, but unfortunately neither the instruments nor the explanatory statements gave the slightest indication of what the relevant events were.

Those affected by the legislation would have been forced to consult the original regulations made in 1994. The committee duly wrote to the Minister, who acknowledged that the instruments were legalistic and that it could be difficult for the average lay person to readily understand their contents. The Minister advised that future instruments would be better, and he was true to his word. The explanatory statement for the next one set out in detail that it applied to the cricket test matches to be played by Australia in the West Indies in March and April 1999 and the one-day cricket matches to be played in April 1999. As an additional bonus there was also a regulation impact statement.

The explanatory statements for two sets of recent regulations, however, revealed more fundamental problems. The Crimes Regulations (Amendment), Statutory Rules 1996 No. 7 were quite short and had only one purpose, which was to exempt the then Australian Securities

Commission from the Spent Convictions Scheme. That scheme includes important safeguards and protection for the personal rights of people previously convicted of an offence. The enabling Act, however, provided for the regulations to exempt agencies from the scheme and the present regulations did this for significant areas of the operation of the Australian Securities Commission.

The committee noted, however, that the enabling Act provided for the Privacy Commissioner to receive applications for exemptions from the scheme and to advise the Minister on whether an exemption should be granted. Neither the making words of the regulations nor the explanatory statement even referred to this mandatory requirement, much less whether it had been observed, or the substance of the Privacy Commissioner's advice. The committee assumed that the omissions were because the matter was routine, with no unusual or unexpected features. Nevertheless, for the record, the committee wrote to the Minister asking for confirmation that the Privacy Commissioner was consulted and, if so, the result of the consultations. The Minister replied 3 months later, advising that the Privacy Commissioner was indeed consulted but that the Minister had overruled the commissioner's recommendation that exemption should not be granted.

This advice concerned the committee, because the incomplete explanatory statement meant that the committee and individual Senators with an interest in legislation affecting personal rights were not alerted at once to a matter of interest and importance. Also, by this time it was too late to give a notice of disallowance of the regulations. The deficient explanatory statement and the delay, whether inadvertent or not, resulted in important questions being concealed from the scrutiny of the Senate. The committee wrote back to the Minister, setting out these concerns and suggesting that, in the circumstances, it may be appropriate for the regulations to be repealed and remade, with a complete explanatory statement. The committee advised the Minister that this would preserve the options of the committee and the Senate but would not disturb the present position pending informed parliamentary scrutiny. The committee also obtained advice from the Privacy Commissioner that he was not aware that the explanatory statement failed to refer to his recommendation and that he appreciated the continued support of the committee in carrying out its function and seeking to promote a more open approach by agencies in relation to differences of view with his office. In fact, I think it was one of the finest

examples of the committee being above the parliamentary fray in trying to provide a conduit between the commissioner's office and the Minister's office.

In addition, the committee was briefed by departmental officers. The Minister then replied to the committee suggesting that the explanatory statement was adequate. In brief, the committee then advised the Minister that this view was not supportable and reported to the Senate that the present case was a matter of regret and a breach of parliamentary propriety. The committee advised that its position was that explanatory statements intended for tabling should refer to any mandatory consultation and its results, particularly if the outcome was unusual or unexpected or, as in this case, even adverse. The committee is pleased to report that the Minister then accepted the committee's position, but only after considerable tenacity on the part of the committee.

Another area of concern to the committee in relation to explanatory statements was acknowledgment of the role of the committee in the making of instruments which implement undertakings given by a Minister to amend principal instruments to meet its concerns. The committee considers that the explanatory statement should mention the committee's role, so that Senators are kept informed of the type of matters which the committee raises. If an explanatory

statement fails to do this the committee writes to the Minister, who then advises that future explanatory statements will comply with this practice. In the case referred to in the paper, the Family Law (Child Abduction Convention) Regulations (Amendment), Statutory Rules 1996 No. 74, rectified a significant breach of personal rights which the committee had drawn to the attention of the Minister. The explanatory statement for the regulations, however, did not refer at all to the committee. The committee then wrote what it thought was a routine letter to the Minister asking that this be done in future cases.

The Minister replied with surprising and unexpected advice to the effect that on one view there might be some advantage in limiting explanatory statements to the purpose and effects of amendments without reference to their policy objectives or other background. According to the Minister, this would ensure that explanatory statements are not complicated. In an ideal world, if explanatory statements were not complicated one might still be well informed. However, that is not the case in the world in which we live. The Minister further suggested that the committee seek the advice of all Ministers who issue explanatory statements if it wished to pursue its views. However, as helpful as those suggestions might be, the committee was quite emphatic in its response, advising that the inclusion of the role of the committee in explanatory statements was a long established and universally accepted convention.

The committee gave instances of where the convention had been implemented by successive Attorneys-General, Ministers for Justice and the Attorney-General's Department, who administered the regulations in question. One of these explanatory statements mentioned the role of the committee in the first sentence. Another was for earlier amendments of the same principal regulations about which the Minister now had reservations. The Minister then accepted the committee's position. This gives you an idea of how tenacious the committee has had to be to have the issues of principle accepted. In order to ensure that the committee's position was adopted by all Ministers the committee then wrote to the Parliamentary Secretary (Cabinet) to the Prime Minister asking that the Federal Executive Council Handbook be revised as soon as possible to recognise formally the views of the committee in relation to these two matters—namely, the requirement for explanatory statements to refer to mandatory consultation and its results and mention of the committee's role. This suggestion by the committee was accepted and a revising circular was sent to all departments and agencies.

I will now deal with rule making by Commonwealth agencies. The first substantial proposals at the Commonwealth level for what could be called regulation impact statement requirements were included in the report of the Administrative Review Council on Rule Making by Commonwealth Agencies, presented in March 1992. I assume many people would be familiar with that report. The report made comprehensive recommendations for change in all areas of Commonwealth delegated legislation, with a new Legislative Instruments Act to be the vehicle for the new regime. The saga of the Legislative Instruments Act is also well known. No doubt there will be some discussion at the end of the formal discussion about what future it might have.

The main recommendations included parliamentary scrutiny and control and mandatory publication of all legislative rules, adoption of these procedures for rules of court and national uniform legislative schemes, sunsetting of all rules on a 10-year rotating basis, improved practices to ensure better drafting of rules and better guidance on which matters should be included in an Act of Parliament and which in rules. The distinction bedevils us all. In relation to regulation impact statements, however, the report devoted considerable discussion to public consultation procedures, which set out the general considerations relating to this issue at the Commonwealth level.

The report suggested that any legislation, whether an Act of Parliament or delegated legislation, is improved by considering a diversity of views, particularly from those members of the public whom it will affect. Also, consultation before making legislation is consistent with natural justice principles in that it enables groups that have a particular interest in the rule to express a view. This serves the public interest, and it makes good sense for us as legislators to consult widely. It makes the Government account for its proposals, and all these things in the end lead to much better legislation, certainly legislation which has a degree of public support, and ultimately that is what we need.

The report emphasised that mandatory consultation is especially important for delegated legislation, which does not have all of the procedural safeguards and publicity of the parliamentary passage of a bill. It is very easy when regarding delegated legislation to allow very unfair legislation to slip through if you do not keep a very close eye on it. In fact the Commonwealth provided for mandatory consultation as early as the Rules Publication Act 1903, which required 60 days notice of intention to make a regulation and copies of drafts to be made available to the public. Any person could make representations and the rule maker had to take these into consideration.

This provision was repealed in 1916, but the report suggested that the number and type of regulations today is such that the public would readily use such a provision. The report noted that at present there is no general Commonwealth statutory requirement for consultation before making legislation, although individual Acts may provide for specific consultation, as with the one I mentioned previously, usually with sectional interests or those who are going to be most affected, or who perhaps squeal the loudest about something that is going to effect them. Most agencies which made submissions in relation to the report claimed that as a matter of administrative practice they consulted widely with interest groups.

That of course raises its own problems. The report suggested, however, that in these circumstances agencies will hear what they want to hear from the bodies they choose to consult. So it is not really the sort of consultation we had in mind. Most submissions from agencies in fact argued against mandatory statutory consultation. They argued that the existing informal procedures were sufficient and that formal procedures would be counterproductive and costly. The report, however, rejected these views and instead recommended that the proposed Legislative Instruments Act should provide general mandatory consultation procedures for the making of all regulations, subject only to limited exceptions.

These exceptions included where advance notice would provide an advantage to individuals, such as notice of some taxation changes, or where the Attorney-General tables a certificate at the same time as the regulation is tabled to the effect that the public interest in not having consultation is greater than the otherwise required procedures. Such a certificate would give reasons for the exemption and the regulations themselves would be subject to disallowance in the usual way. So it would be up to the Attorney to establish that there was a greater public interest that required the exemption.

The report also recommended that agencies need undertake only “first round” consultation. That is, that if the initial consultation results in substantial changes to a regulation, even to the extent that the regulations may be considered virtually a new instrument, there should be no mandatory requirement for another round of consultation. I was interested in a question asked of Barney Cooney by a speaker from the floor which raised what happens if there are amendments to the legislation that do not go back for further scrutiny. This is the same principle where there are amendments of a regulation that might otherwise not come back to our

committee. Here also the report noted the safeguard of possible parliamentary disallowance of any regulations which are eventually made.

The report recommended that the procedure for consultation should include wide notice of intention, together with a draft instrument and a rule-making proposal, essentially an RIS, describing the proposal and its objectives, analysing alternative methods of obtaining these objectives, providing the financial and social costs and benefits to the government and the affected public and the reasons for the preferred choice. Anyone should be able to make a submission within at least 21 days, public hearings should be held for controversial or sensitive proposals, and agencies must take into account all submissions. The agency should also prepare a memorandum describing the consultation process, which, together with the rule-making proposal and a memorandum about drafting, would be tabled at the same time as the regulations.

The Legislative Instruments Bill 1994 implemented the Government's response to the ARC report. The second reading speech for the bill advised, however, that the Government did not accept all of the ARC recommendations. In particular, the speech advised that the Government had not accepted that the consultation process should be undertaken in all cases, because of the burden this would involve. Instead, consultation would apply initially only to legislative instruments affecting business. Any future extension would depend how it went and on a review by the ARC after the whole scheme had operated for three years.

The bill itself diluted further the consultation procedures described in the speech. The relevant part of the bill in fact commenced on a positive note, providing that the consultation process was intended to ensure that persons likely to be affected by an instrument should have an opportunity to make submissions on its policy and content. However, the effect of this worthy objective was then substantially reduced. For instance, consultation only had to occur where an instrument actually affecting business was made under one of a finite list of Acts, which could be changed by regulation. So you can see it being gradually squeezed down.

Also, the Minister could decide whether there was an organisation or body that represents the interests of all those likely to be affected by the instrument, in which case it was sufficient to consult only with that body—another set of short cuts. In addition, the Attorney-General could allow a period of less than the usual 21 days notice for submissions. Importantly, the Attorney-General could also certify that the public interest required that an instrument be excluded from consultation. The bill also reflected the other exemptions recommended by the ARC. So it was starting to look a very pared down bill indeed. Finally, failure to comply with the consultation procedures did not affect the validity of a legislative instrument and no decision relating to consultation was reviewable under the Administrative Decisions (Judicial Review) Act.

On the positive side, the bill also provided for a legislative instruments proposal, which was an RIS by another name, along the lines recommended by the ARC, for each case in which consultation was required. There was considerable debate in the Senate about aspects of the bill, which owed much to a detailed report by the committee, although the consultation and related provisions were not generally points of contention. The bill was still before the Senate when Parliament was prorogued for the 1996 election.

After the 1996 election the Coalition Government introduced another Legislative Instruments Bill. The second reading speech for this bill, which referred to the role of the committee, expressly advised that it included a more structured consultation regime to increase government accountability. The consultation procedures were definitely more structured,

covering more than 20 pages compared with less than four pages in the previous bill. They followed the some basic scheme as the previous bill and included a number of new safeguards, although there were additional exemptions.

As with the earlier bill, the Senate could not agree to certain provisions not related to consultation and the bill had not become law at the time of the 1998 elections. No further Legislative Instruments Bill has been introduced. I wonder what those present think we should do about it, whether we should press for it or whether it could be done in other ways. The Commonwealth requirements for RISs have been in force since September 1997, but they were imposed by administrative means, not by legislation, as is the case for a number of State and Territory RIS provisions.

The Commonwealth requirements apply not only to delegated legislation but also to bills, treaties and quasi-legislation such as codes of conduct and the like. They apply, however, only to reviews of existing regulations and proposed new regulations that will have a direct or indirect effect on business, or which will restrict competition. A regulation is deemed to affect business where it imposes a cost or confers a benefit on business. This in fact covers most important regulations. In addition, regulation impact statements must be prepared for any Council of Australian Governments regulatory action that has an impact on business or individuals, which is a wider standard than for solely Commonwealth action.

There are exemptions from the need to make an RIS, most of which are unexceptional, but there are a few which are more significant. For instance, an RIS is not necessary where a regulation is required in the interest of national security, meets a Commonwealth obligation under an international agreement, gives effect to a specific budget decision, or gives effect to a specific election commitment. Commonwealth RISs are intended to assist decision making by presenting all relevant information to the decision maker in a logical, standardised framework.

The RISs are intended to be a public and transparent account of that decision making. The RIS must include most of what can be called the classic ingredients, which in the case of the Commonwealth are as follows: the problem or issues which give rise to the need for action; the desired objectives; the options, both regulatory and non-regulatory, to achieve those objectives; an assessment of the costs and benefits on consumers, business, government and the community of each option; a consultation statement; a recommended option; and a strategy to implement and review the preferred option.

The Assistant Treasurer is responsible for RIS compliance and he or she is also responsible for initiating sanctions for an absent or inadequate RIS. These sanctions include drawing the matter to the attention of the responsible Minister or the Prime Minister. In some cases the Assistant Treasurer may suggest that the regulatory proposal be withdrawn. Where the Cabinet is scheduled to consider the regulatory proposal the Prime Minister may co-opt the Assistant Treasurer to assist the Cabinet discussion. Deficiencies in the RIS may also result in parliamentary or public criticism after it is tabled or made public. Finally, the Productivity Commission must report annually from 1997-98 on compliance with the RIS requirements.

The Productivity Commission tabled its first annual report on compliance on 10 December 1998, following which the committee met with the Chairman of the Productivity Commission and the head of the Office of Regulation Review, which is the part of the PC responsible for RISs, to discuss matters of mutual interest. Of course, that was Bill O'Chee, not me, although today I was offered—and I intend to take up—a new invitation to discuss these

matters of mutual interest. In its report the Productivity Commission advised that in its first year of formal reporting, only the overall performance of Commonwealth agencies was assessed. In future, however, the Productivity Commission may provide disaggregated information at the departmental and agency level. The commission reported that it had developed a set of compliance indicators to measure Commonwealth RIS performance, which was assessed in the 1997-98 report against 184 bills and introduced into Parliament; 1,230 pieces of subordinate legislation; 30 pieces of quasi-legislation such as codes of practice; and 47 treaties tabled. The report advised, however, that these figures probably underestimated substantially the numbers of delegated legislation and quasi-legislation. Once again, back to the problem of keeping track.

The Productivity Commission report concluded that, given 1997-98 was transitional, the results of compliance were encouraging, although there was clearly room to do better. The report suggested that it was more difficult to monitor compliance with delegated legislation, quasi-legislation and treaties than it was for bills, and that there was substantial scope for better performance in these areas. What has been our role in the scrutiny of RISs? The attitude of our committee towards the RIS requirements is that they are a most significant development in the quality control of legislative instruments.

The committee now scrutinises the RISs which are tabled, in addition to the explanatory material, with all legislative instruments that affect business or competition. The committee has found that the RISs do, in fact, assist overall scrutiny to a considerable extent, although the committee has different priorities to the Office of Regulation Review, which is responsible generally for the quality of the RIS, and that is a very important distinction to bear in mind. The committee scrutinises legislative instruments to ensure compliance with the highest standard of parliamentary propriety and possible impact on personal rights, while the Office of Regulation Review mandate is for the most efficient and effective regulations from the perspective of the Australian economy.

While these objectives certainly differ, they are complementary and the committee has reported to the Senate that RISs have enhanced its capacity to carry out its functions. The main way in which the RISs have helped us is that they are more detailed and thorough than explanatory statements in the information they give about the background and the function of the instrument. This characteristic is emphasised by the way in which they are put together. Each RIS must point to a problem and the various ways in which it could be addressed. So, right up front you have a statement of what we are trying to address.

The RIS often describes these problems with a commendable frankness which leads the committee to inquire further of the Minister about these problems; so you have a bit of an alert system. In this context one RIS advised that the instrument was being made because there were considerable doubts about the validity of the existing scheme, but the explanatory statement, of course, had helpfully made no mention of this. In this case the committee wrote to the Minister about whether this was really the proper way to operate a scheme with incomplete or invalid legislative backing in the first place.

Other instances where RISs have alerted the committee to possible problems have included deficiencies in personal rights which had not been addressed for an inappropriate length of time. This does not mean that RISs should replace explanatory statements, because they both have value and they emphasise different areas. Explanatory statements are weighted towards the legal authority for the instrument and some of the details and provisions of individual clauses, while RISs are weighted towards the effect of the instrument in the context of the

competitiveness of business and the productivity of the economy, so that they give a very good composite.

The committee, however, does not scrutinise RISs in the same way that, as described earlier, it scrutinises explanatory statements and writes to the Minister about deficiencies in the explanatory statement. The committee reads all RISs and, as noted earlier, finds numbers of indications of problems with the actual instrument. The committee does not, however, scrutinise the process of the making of an RIS or the adequacy of an RIS in complying with the administrative guidelines. The reason for this is, and this also comes back to a point that was made in an earlier session, that an RIS is essentially a policy development process and the success of the committee, along with its non-partisan operation, is due to the fact that it does not question policy.

Once again, I absolutely endorse earlier speakers who said that the whole success and the whole ability of these committees to function in the way they do and to provide the scrutiny they provide is because it is one of the occasions in one's parliamentary life when one can look to principle; one can rise above some of the partisan heat and look at what falls to the bottom as some of the universal givens. On the other hand, the Office of Regulation Review is a specialist agency with the mandate to oversee the whole RIS process—a very different group—and the committee considers that liaison with the ORR along the lines of its recent meeting with the Chairman of the Productivity Commission and the head of the ORR will enable it to keep up with relevant developments.

One more aspect of the Commonwealth RIS deserves special mention and will be of interest to you. The Australasian legislative scrutiny committees have long recognised at conferences and meetings of chairs that scrutiny of national uniform legislative schemes presents particular challenges, challenges for all of us. This is because of the tendency of Commonwealth, State and Territory Ministers to reply to concerns raised by scrutiny committees by stating that such schemes are the result of intergovernment agreements which cannot be changed. It is a very convenient sort of response that, no doubt, has force in some cases.

In fact, this has not greatly affected the work of the committee, which has been able to obtain important undertakings from Ministers to amend national scheme instruments and not to bring existing provisions into effect unless and until all other governments have agreed to the changes. However, it still raises a concern. It is pleasing, indeed, that the Council of Australian Governments now has a mandatory requirement that new or amending legislative instruments which are agreed by Ministerial Councils or national standard setting bodies are to have an RIS with the same features as a purely Commonwealth RIS.

The introduction of this for national uniform instruments is useful for the same reasons as for other RISs, allowing the committee to have a wider perspective on these often complex instruments, particularly when it has a national operation. This may lead the committee to issues of personal rights or parliamentary propriety which it may have missed if it had to rely solely on the explanatory statement. As with other RISs, the RISs here are quite candid in their background comments and have proved a very useful source of inquiry. The committee has from its first year of operation in 1932 actively initiated and enforced the practice of Ministers and departments providing explanatory material to assist the committee and individual senators.

The council report "Rulemaking by Commonwealth Agencies" and the bills which it inspired subsequently have, in fact, paved the way to further reform along the lines of regulation impact statements, which are essentially a policy development process. These

proposals came to fruition with the administrative direction that Commonwealth agencies must implement regulation impact statement procedures for legislative instruments affecting business or competition. The committee regards this as a thoroughly beneficial development, which both supplements and complements its operations, with the RISs indicating possible breaches of its principles.

The committee, however, does not raise directly any aspects of the quality of RISs, because we do not want to intrude into policy issues. Once again, as I said a few moments ago, avoiding this is the very bedrock of the operation and success of the committee that I will be privileged to chair when Parliament resumes. In closing, I should pay tribute to the work of Bill O'Chee, who chaired the committee with distinction for several years. He has been very helpful to me. I have also had the great privilege of serving with Barney Cooney as the chair in the scrutiny of bills. I will probably not be able to continue on that committee, but I have learned a great deal from both Barney Cooney and Bill O'Chee. I very much look forward to the next occasion we meet when I hope I can, in my own right, add more than I can today.

Mr THOMPSON (Victoria): Reference was made in your speech to the Commonwealth legislative instrument's bill, which indicates that it has been introduced on a couple of occasions. I was wondering whether there are any provisions in the bill, which has been presented to the Parliament on two occasions but has not been preceded with, that parliamentarians would regard as being worthwhile if expedited through the Parliament.

SENATOR COONAN: As I explained, it has had a pretty tortured path. We have really taken another path to achieve very much the same sort of outcomes. My view is that there would be some value in trying to pursue it again and trying to get some proper criteria in some legislation. I really think it is a worthwhile objective. However, it tends to founder a bit and, as I explained in my paper, what you start off with ends up being so eroded you wonder whether, in some modified form, it is really worth having. The way we have managed to get around it by other means that I have described in my paper means that we have a pretty good system within which we can operate. But I would certainly like to keep it under consideration, so that if need be we can, with the various scrutiny committees, look at whether we can bring it back, where it might founder again and whether it would be worthwhile trying to pare down the core we want to achieve and pushing it again.

Mr NAGLE (New South Wales): We have had explanatory notes in New South Wales since 1988. When the committee recommended their introduction it included a statement of what the regulation does and a statement of the source of the power of the relevant Act to make the particular regulation. The explanatory notes to the regulations were also introduced. However, the committee has often expressed the view that the explanatory notes should go further and give comprehensive reasons for the regulation, not just what it does but why, in much the same way as the Federal register in the United States operates. What is your opinion about that?

SENATOR COONAN: You can do a lot to improve the material that explanatory statements cover. What we have done and how we presently operate is that, together with the RIS, we more or less get there. In other words, you get a statement of what it is about, what its core objectives are and you get fairly frank disclosure. Whether you put it all into the explanatory statement and whether you have it as a composite might be a matter for debate. But so long as you cover the material one way or another and it is available, in other words it is open to public scrutiny, that is really what we are trying to achieve. I am certainly open to discussion

and suggestions if anyone else wants to make a comment that you can do more to meet these objectives within the explanatory statement.

Mr BECK (Commonwealth): I remind delegates about a difficulty that the courts can now look at extrinsic material associated with the bill. I believe that we have not settled the process of regulatory impact statements well enough for them to be considered by the courts. Also, it might act as a hindrance to the frankness in the regulatory impact statement.

SENATOR COONAN: I think you are absolutely right. Once it is going to have an impact beyond what it is purported to do, particularly if it is going to be used by a court, all sorts of other considerations arise. We must keep in mind that our objective is to have a transparent and open process. It would be a backward step if the information in the regulation impact statement was not made as frankly and as candidly as it is at present because it is a great aid to scrutiny committees.

SENATOR COONEY (Commonwealth): You have had vast experience of the Bar and you have been in Parliament for a little while. This issue is not as pronounced here as it is in say Canada and New Zealand, but what is your impression as to what the courts and Parliament can do about legislation? I know you have had a few things to say about the Senate and how it should be elected. Can you give us an impressionistic comparison of how you think legislation can be kept well in terms of human rights? Do you have any impressions about those issues?

SENATOR COONAN: One of the most revealing aspects of being in parliament is the extent to which parliamentarians and the processes that you go through are very much geared to being alert to human rights abuses. That is why these committees are so valued in the parliamentary process. Of course, you slip up from time to time. You often get a different interpretation from the courts, and you get much angst in the ranks of government of all persuasions if it looks as if the courts are taking over and legislating as such. It is the most important thing as far as human rights go.

Basically, the courts are there to safeguard human rights in a practical sense and to implement what parliament has said. We have a much more theoretical job to understand our obligations internationally, our obligations to each other and our obligations to the community. As I said, one of the most gratifying aspects of these committees is the extent to which all of us on the committees are well intentioned and able to look at what falls to the bottom: What are the universals in the area of human rights that should transcend some piece of legislation that might impact on those human rights?

You mentioned the problem we will have shortly with privative clauses. It will be difficult for parliamentarians with some background on the issue to reconcile whether there is some other public interest that should subvert what we have come to recognise as a fairly fundamental right. Parliaments and the courts have very different and distinct roles. We have found in a couple of instances that if we abdicate and do not grasp the difficult issues relating to human rights the courts try to fill the vacuum. While we set ourselves a very difficult task, it is an area where the more we can look at what are the givens, the universals that all of us adhere to, the more we will be able to interpret the framework of legislation in a way that is beneficial to human rights. That is the way I see it.

NOTICES OF MOTIONS

CHAIR (Ms Saliba, New South Wales): The timing of this conference has been perfect for me. I have been a member of the Regulation Review Committee for approximately one month and I am still learning about the roles and responsibilities of the committee and what is expected of me. This conference has been a good but steep learning curve. It has given me the opportunity to learn a lot about regulation review and the scrutiny of bills, and I thank those who have presented papers for that opportunity. I look forward to the remainder of the conference. I now call for notices of motions.

There being no notices of motions the conference is adjourned until 9.30 a.m. tomorrow.

The conference adjourned at 5.22 p.m.