

The lion's den: respecting and working with the Parliament



The formidable Senators John Faulkner and Robert Ray who led Senate Estimates interrogations during the Howard government years from 1996 (photo by kind permission of the Australian Society for the Study of Labour History)

Elements of the role

Secretaries are responsible through their ministers to the Parliament. They interact directly through:

- appearances before Parliamentary Committees
- occasional constituency activities involving departmental program management
- meetings of government committees
- official functions.

Senate Committee hearings are the main occasions when secretaries interact directly with Parliament and its members. Departments appear before their respective Senate Legislation Committees (still commonly referred to as Senate Estimates Committees) at least twice and usually three times a year: directly after the budget, when the committees are focusing on the Appropriation Bills 1 and 2 for the year ahead; in November, when they have annual reports for the year behind to examine; and often again for the 'Additional Estimates', Appropriation Bills 3 and 4, about February.

Despite the ostensible focus of each of these hearings, by convention, committee members may inquire about any matter relevant to the department's policy and program management responsibilities. I always took the view that, as secretary, I should lead the department's officers in these hearings, unless I was genuinely and unavoidably unavailable, such as overseas for meetings that could not be rescheduled. This reflected my view of my statutory responsibilities and the respect the APS must give to the Parliament. That has not been everyone's practice in the past, though the Rudd Government has now stated its expectation that secretaries appear.

In most cases, a minister formally represents the executive arm of government, but committees are always conscious of the right of Parliament to call witnesses and most questions are directed to officials, ministers intervening when issues of policy (and politics) are raised. For most agencies most of the time, the minister sitting at the table is not the minister directly responsible, but a minister in the Senate representing the minister concerned. This adds to the pressure on the officials to answer questions.

While non-departmental agencies (including the Australian Public Service Commission) might not face lengthy hearings (or might not be called at all), departments are more frequently there for the long haul. In the Department of Health, it was usually two full days each time, from 9am until 11pm.

Table 5.1 Lessons for new players

I remember a conversation with a new Chief Medical Officer as I drove her to her first Senate Estimates meeting when she asked to confirm the meeting was from nine until 11, as she had another appointment at lunchtime. I carefully explained, to her horror, that it was from nine in the morning until 11 at night, for two days, with the possibility of further hearings after that.

It was not uncommon for the Senate, in addition, to establish inquiries into aspects of departmental management or relevant government policies and to require officers to attend. Depending on the nature of the inquiry, I would usually attend these in person also. Examples included inquiries into magnetic resonance imaging (MRI) and aged care, which were particularly sensitive politically, and where major questions of departmental management were being raised. My attendance was not only because of the sensitivities involved and my respect for the Parliament, but to demonstrate to my staff that I accepted responsibility for the administration of the department.

More technical reviews of new legislation, such as on gene technology, would be handled by the appropriate experts and managers. Similarly, I left to the relevant experts advice provided to ministers when new legislation was being debated in the House or Senate.

The House of Representatives has fewer committees than the Senate and they are usually not on highly partisan issues, the government being in control of their establishment and terms of reference. Accordingly, any departmental support required is usually of a technical nature not requiring a secretary to attend.

As a consequence, secretaries are generally more familiar with senators than members of the House, other than members who are or were ministers—and vice versa: thus many new ministers who are not senators have had little if any contact with the Public Service and secretaries.

Members of Parliament also interact with officials in their day-to-day work on behalf of their constituents. Such interaction is usually codified through rules developed with the minister and the minister's office. These usually require, at the very least, that the minister's office is kept informed of any such interactions. I usually took close interest in the development of such rules, but rarely in the real interactions that took place.

Table 5.2 Working with politicians: conflicts of interest for politically active public servants

I have an old-fashioned view that the Public Service values of political neutrality and impartiality have precedence over a public servant's right to participate in politics and that this means that senior public servants should not be members of political parties. Others have different views, and there is no prohibition.

The potential for conflict of interest, however, can arise even at levels below the SES.

In the Health department, the regional director in North Queensland was a prominent member of the Labor Party and occasionally the subject of press speculation that she might be a candidate for the Senate. Her official duties required her to interact frequently with local Members of Parliament, all of whom were from Coalition parties. Some complained to the minister, questioning the director's capacity to act in a non-partisan way.

I had no evidence that the director acted other than professionally at all times. I also felt the option of compulsory transfer to Brisbane or Canberra (where she could be placed so as not to be in regular contact with politicians) was a pretty tough option and could be challenged, quite probably successfully.

There was, however, a perception of conflict of interest held sincerely by a number of politicians. I remained uncertain about the right answer here, but chose to pass on through my deputy a clear message to the director to behave with utmost professionalism at all times and to advise the minister's office that any specific complaints be forwarded to me and that the MPs could make contact with more senior staff in the department if they preferred. I did not receive any specific complaints.

On occasion, I met with government backbench MPs personally to discuss important policy or management issues (not constituent matters). This was more common under Labor, which had active caucus committees that ministers wished to have onside. Mostly, a ministerial staffer would accompany me at such meetings. Under the Coalition, I sometimes (though rarely) met influential backbenchers such as Brendan Nelson on a one-to-one basis with the approval of the minister.

Secretaries also come into contact with Members of Parliament at official functions such as state dinners for visiting heads of state and public meetings and seminars. These provide useful opportunities to meet and recognise respective roles;

sometimes they also provide insights (for both parties) about capabilities, interests and attitudes.

Table 5.3 Surprising insights from future ministers

At one state dinner, my wife and I were seated at a table with a prominent shadow minister, who proceeded to lead the conversation in berating the Public Service. I tried to respond diplomatically. It was to no avail. Moreover, I felt we were being treated as 'servants' rather than as fellow guests (and fellow hosts) at the dinner.

This became particularly clear at the end of the evening when the MP asked my wife and me to arrange more red wine; when I explained that the wine service had stopped, she readily accepted my wife's offer of her full glass! It was a useful tip for when the MP later became a senior minister.

Differences

Dealing with House of Representatives committees is generally different from Senate counterparts. The former are not only rare, they are generally far less combative. The atmosphere of Senate Committees also varies somewhat according to whether the government has a majority in the Senate or not. Even when the government is in control, however, opposition members of committees are still allowed considerable latitude in their questioning of officials. In any case, it is not unusual for government members to take an independent stance on issues of departmental management in particular.

The extent and style of interaction also vary with the nature of the agency and its functions. Departments are closer to ministers and weaknesses in departmental management are more easily sheeted home to the minister and government than are weaknesses in management of other agencies. Statutory authorities most commonly (but not always) escape partisan inquiry and both sides of politics treat independent statutory officers either as professional experts able to offer constructive advice or as (objectionable) decision makers who need to explain themselves. For me, it was far easier as Public Service Commissioner than as departmental secretary (see Chapter 12).

On the other hand, many statutory officers and their staff are less experienced in the political environment and opposition senators do at times exploit this to try to embarrass the government. 'Fishing' can prove very effective and one of the roles of the portfolio secretary in Senate Estimates is to intervene subtly in such situations (see further below).

It was also easier in the Department of Housing and Regional Development than in the Department of Health, with the narrower range of responsibilities, fewer portfolio agencies and less involvement in direct service delivery.

Changes over time

The extent of direct interaction with the Parliament has increased over the years as the level of scrutiny of government administration has increased. More open government, increased Australian National Audit Office (ANAO) activity, the role of the Ombudsman and the increasing effectiveness of interest groups have all added to the legislature's capacity to scrutinise and, since the 1970s, much of that scrutiny is via direct interaction with the Public Service, not indirectly through ministers. (In an ironical reversal of normal Westminster practice, in Australia, it more often falls to officials to explain and even defend the minister, than for the minister to defend officials.)

Corresponding with this change has been the increasing investment by the executive arm of government in measures to manage communications and maintain control of the political agenda. Accordingly, the scale of activity to prepare for Senate Estimates has not only increased steadily, there is now more close involvement of ministerial staff on politically sensitive matters. Public servants are keenly aware that their ministers' staff (and at times the ministers themselves and even the Prime Minister) are watching the TV monitors during Senate Estimates hearings, if not sitting at the back of the room.

Technology is also affecting the process. Committee members these days sit with PCs in front of them, allowing their own advisers to prompt and to draw attention to information that might be used to dispute or follow-up answers given in the hearing.

Table 5.4 Responding to new technology in Senate Estimates

When committee members first started to bring laptops to hearings, we had a discussion in the Health department about whether we too should bring our laptops to allow us to refer immediately to data and documents beyond what we held in briefing folders. I decided we should not, as there is sometimes advantage in taking questions on notice in order to allow more careful reflection not only of the facts but of the context. We did, however, have a computer in the officials' room behind the committee room.

What has not changed much, despite all the efforts surrounding program budgeting and outcomes/outputs frameworks, is the focus of Senate Committee scrutiny. It continues to be strongly partisan, with opposition (and minor party) members seeking ammunition to attack ministers and the government, and

government members (and ministers at the table) looking to defend their policies and distance the government from any failures of administration. Questions might sometimes relate to the documents the committee is ostensibly reviewing (appropriation bills, portfolio budget statements, annual reports), but more often they concern issues running in the media already or populist matters that can grab media attention. One can be despairing of this, but it is important to recognise that, as a colleague once told me, 'the plural of anecdote is data'. That is, petty failures that embarrass and grab attention might indeed reflect poor management or complacency or arrogance. Of course, they might not.

Part of the problem is the opaqueness of official documents these days. The rules governing portfolio budget papers and annual reports seem to have left most of them almost impossible to read, and the financial tables under the arcane accrual accounting that is now used do not highlight key issues and trends even for specialists, let alone lay readers. I suspect, however, clearer, more readable documents will still not shift committee members' attention from possible scandals to overall performance and program effectiveness.

Issues of accountability

The most demanding issue for secretaries and other senior officials is balancing responsibilities to the minister and the elected government and obligations to the Parliament, to whom ministers are accountable (secretaries are statutorily required to assist ministers to meet their accountability obligations, as mentioned in Chapter 1). There are formal rules for public servants appearing before committees and supporting guidance from the APS Commission, which coordinates some excellent training courses for senior public servants assisted by the parliamentary departments and the Department of the Prime Minister and Cabinet.

The rules relate to being honest and not misleading, while not answering questions relating to policy or policy advice. The issue of balance comes most often in whether to elaborate a strictly accurate answer in order not to mislead, with the risk of revealing through subsequent questions matters embarrassing to the government. For the secretary, this turns on whether and how to intervene to take a question or to cut off an answer, including where the questions are to officers of a portfolio agency that is not strictly within the secretary's responsibilities.

Table 5.5 Rule 1: keeping answers short

To the occasional chagrin of the minister sitting beside me, I did not always stick to the rule of answering only the question asked, even if that rule is generally a good one. At times, I felt respect for the Senate demanded some explanation of the context of an answer, but I usually

preferred to give that myself rather than allow a less experienced person to do so.

I can recall on one occasion a minister doodling rather ostentatiously and constantly on a pad beside me as my officers and Health Insurance Commission officers answered questions on Medicare, the doodling being in the form of a schoolchild's 50 lines, each stating something like 'Why don't they just answer the question. Why don't they just answer the question'.

Sometimes getting the balance right is best managed by applying the 'no surprises' rule, warning ministers of the answers that must be given if discussion moves in a particular direction, despite the possible political embarrassment involved.

Table 5.6 Landing them in it: handling unavoidable questions

When Minister Wooldridge was under attack for not correcting a statutory declaration he had tabled in the House of Representatives to defend himself against accusations of leaking confidential budget information on MRI benefits, I was acutely aware we would be questioned on the matter when we appeared before the Senate Estimates Committee. I therefore spoke beforehand to the minister's chief of staff clarifying what I would say in answer to the questions I expected. He was decidedly unhappy about my intentions, but at least he was forewarned and could consider how best to handle the inevitable political fallout. I warned that, while I would refuse to answer any question about the real advice I had given, I would have to answer questions as to whether I had given advice and, if so, when.

Senator John Faulkner was cleverer than even I had anticipated. He tested me about my understanding of the need to correct, at the earliest possible opportunity, any misleading — deliberate or otherwise — information provided by a minister to the Parliament. I could not avoid giving an answer and I acknowledged that we were aware of the guidelines in this area. He then asked the questions I had foreshadowed: had I given advice, when, whether orally or in writing. I answered each question, as indeed I had to, while knowing everyone in the minister's office was watching on their TV monitors. While he also unsuccessfully sought a copy of my advice, he did not really need to. (The full picture was not all bad for the minister, as he had eventually agreed to correct the record, but I was hardly popular at the time.)

An issue I found particularly difficult was the right of Parliament to access market research collected by a department. Such information is inherently politically sensitive, providing guidance to the government about how to manage an issue, while simultaneously revealing the public relations risks that need to be addressed. My approach was to try to apply the FOI principles, but this was not easy to do.

Table 5.7 Parliamentary access to market research

Senate Estimates were continually interested in the market research conducted by the Howard Government into private health insurance.

The market research helped us in particular to develop strategies for introducing the complex Lifetime Cover initiative, including the language to use and the stakeholders to involve (those to whom people most often turned for advice).

I felt there were entirely legitimate reasons for Parliament's interest, given the risk that the research might be used for partisan purposes and/or that it might be exploited to run advertising campaigns of a partisan nature (because of content or scale). Release of the information could, however, equally undermine the program of government support for private health insurance membership and the implementation of the Lifetime Cover initiative, by informing opponents how they might most effectively damage public understanding and support. Accordingly, release would not be in the public interest.

I prepared some guidance for the department on appropriate investment in market research and consulted the minister's office. The guidance focused on the legitimate role of market research if it was focused on program effectiveness or successful implementation of a new initiative and was non-partisan. It also suggested that the research should be made public in due course, but not while this could undermine the program's objectives or the initiative's successful implementation. This clarified the public interest case and could also put a brake on attempts by ministers or their advisers to use market research for partisan purposes.

I tabled the guidance at a Senate Estimates hearing and gained some temporary support. The support fell away during the next few years, however, as the research was still not made public and we continued to argue the risk of undermining the private health insurance program objectives (the minister and his office had ruled out tabling the research at the time anyway).

I was conscious that this understandably left the committee uneasy about the legitimacy of the research. As a result, we prepared summaries of

the research omitting details that could be used to undermine the program but demonstrating that it was being used for legitimate purposes.

Getting the balance right also involves deciding when to be proactive and how. On a few occasions, I decided to make an initial statement to put on the record the context of a matter under investigation and our approach towards dealing with the issue. While this was intended to put the matter in the best light for the government in the circumstances, and to dampen enthusiasm to go for the jugular, it was also intended to acknowledge the concerns of senators and our respect for the point they had raised. I did this during the MRI inquiry in 1999 (the 'scan scam') and the hearings on aged care in 2000 (the 'kerosene baths' case); I also did it when accrual accounting first came in, admitting openly that the financial accounts in our annual report, while fully audited, were very difficult to follow, and stating that all of us were on a learning curve on accrual accounting.

Table 5.8 Treading the line between ministerial and departmental performance

A perennial concern of Senate Estimates Committees is the slowness of responding to committee Questions on Notice. The health portfolio was frequently singled out, with little sympathy for the much higher number of questions we received compared with other portfolios. The problem was not just slowness in the department: it was gaining clearance from ministers. The bulk of the outstanding questions related to aged care.

After a series of hearings in which the department's performance was heavily criticised, I was asked sharply to explain the worsening record and our failure to take the committee's concerns seriously. I decided it was time to defend my staff. I provided data on the numbers of answers to questions that had been drafted by the department and sent to the minister's office, as well as the (much smaller) number of answers cleared and sent to the committee. Committee members' eyes lit up. My relations with the minister hit a low point.

At the next hearing, I was asked for an update of the data and revealed that hold-ups in the minister's office had worsened and that the department itself had provided draft answers to the majority of questions asked. The committee went on strike. It refused to proceed with oral questioning of the department until more answers to the Questions on Notice had been received. During the next hour or two, I was asked for regular updates on the situation. We had more answers cleared more quickly that morning than ever before, or since.

I have seen public servants go too far, advocating rather than basically explaining government policies and being disrespectful or even dishonest in avoiding answers or giving answers that are just too smart. As a secretary, I was always mindful of the influence my own behaviour would have on my staff and portfolio colleagues. In hindsight, I did not always call it right, but just having the issue of balance always in the front of mind is no bad thing.

Lessons

In parliamentary committees, secretaries are on the stage, along with their senior officers. Members can and do grill you, in large part for the sport of catching out a minister. You are in the witness box and everything you say is in *Hansard*, on the record. Parliamentary privilege represents real power.

The main lesson I drew from my experience therefore was the need always to be wary and to be seen to show respect for the Parliament and its members and senators. Apart from anything else, it is salutary to keep in mind that any one of those interrogating you today could be your minister tomorrow. Most show great respect for the Public Service, but even those who do not deserve respect from public servants nevertheless.

Most ministers most of the time are also very respectful of parliamentary processes and, while frustrated at times with public servants giving away more information than they would prefer, or recommending that embarrassing documents be tabled, they do not usually appreciate public servants being cavalier or too clever. Advisers are not always as appreciative of these issues.

At times, it is not possible to avoid embarrassing a minister. Alerting ministers beforehand to this risk is always good practice.

A minor but useful lesson I learned is that *Hansard* does not reveal silences: taking a few moments to check papers or to consult officers behind you might seem at the time to reveal uncertainty or lack of responsiveness, but getting the record right in *Hansard* is of far greater importance. Do not be pressured to answer off the cuff: no-one sees the delay when reading *Hansard*.