

***Section Four:
Parliamentary Oversight
from Other Perspectives***

The Scrutiny of Government Agencies by Parliamentary Joint Committees

Anthony Marinac and Jonathon Curtis*

Introduction

This paper examines the role of two Commonwealth Parliamentary Joint Committees in the task of scrutinising government agencies: the Parliamentary Joint Committee (PJC) on Corporations and Financial Services and the PJC on the Australian Crime Commission.

The Parliament has a number of other joint committees, but other than the two committees central to discussions in this paper, only the Joint Committee ASIO, ASIS and the DSD; and the Joint Committee on Electoral Matters, have similar oversight roles.

We commence with a brief overview of the statutory basis of the two Committees and outlines their operational activities in the Parliament.

The paper then reconsiders, in the light of experience, the rationale for these Committees and the contribution they make to accountability and parliamentary effectiveness. We finish with some observations on the how the committees can work most effectively and avoid certain pitfalls.

PJC on Corporations and Financial Services

The Australian Securities and Investments Commission (ASIC) is a statutory authority created under the *Australian Securities and Investments Commission Act 2001*. Its role in essence is to act as both a regulator and an enforcement agency for Corporations and Financial Services law in Australia. While ASIC was only created

* Dr Anthony Marinac, Secretary, Joint Committee on Corporations and Financial Services and Mr Jonathon Curtis, Secretary, Joint Committee on the Australian Crime Commission.

in 2001, it is the successor to the Australian Securities Commission, which performed similar functions under the old Corporations Law from its institution in 1991. ASIC forms one of the 'big three' financial regulatory agencies in Australia, along with the Australian Competition and Consumer Commission, and the Australian Prudential Regulation Authority.

ASIC's responsibilities include providing for the registration of companies, auditors, financial service providers, managed investment schemes; investigating and where appropriate taking action against regulated companies and people for misconduct under the *Corporations Act 2001* or the other legislation administered by ASIC; and consumer protection in the areas of superannuation, insurance, deposit taking and credit.

The Corporations Act in particular, provides ASIC with strong tools in both civil and criminal law. There are dozens of criminal offences contained within the Act, many of which attract the penalty of imprisonment, for periods of up to five years.

In 2003/04 ASIC briefed the Director of Public Prosecutions for 67 successful convictions. Twenty-eight people were jailed for a total of more than 90 years prison. ASIC had a 93 percent success rate in criminal prosecutions. In addition, ASIC undertook civil action in a number of large cases, resulting in the recovery of just over \$100 million for creditors and investors. 22 company directors were banned, three of them for life. 42Forty-two people including the late Mr Rene Rivkin were banned from providing financial services.

ASIC is an independent authority. It is directed by three full time commissioners, appointed by the Governor General on the advice of the Treasurer. While ASIC falls within the Treasury portfolio, the Treasurer has no control over ASIC's operations. This independence is important, as it allows ASIC in its enforcement activities to operate very much as do the police, responding to operational necessities and making decisions based on the law, and on the prospects for successful litigation. From a theoretical perspective, this independence is consistent with the limited notion of separation of powers which is preserved in the Australian system of government. While Australian governance is comfortable with — and indeed built upon — important contraventions of the principles of separation of powers, the notion that law enforcement should be at arm's length from 'political' aspects of government remains a powerful constraining factor on our institutional arrangements.

Independent agencies, however, create a challenge for responsible government. The doctrine of individual responsibility tells us that a Minister of State should be responsible to the Parliament for the operation of the department they administer. The extent to which a Minister can realistically be held responsible in this way is subject to challenge even with regard to a normal department. In the case of an independent authority, it is clearly unreasonable to, one the one hand forbid the

Minister from interfering in the authority's operations; and on the other, to expect the Minister to be accountable.

Yet it is also not good enough for the parliament to agree, in passing the governing legislation, to create an agency such as ASIC, to put it in control of substantial funds; to give it substantial power; to trust it with the successful operation of our entire corporate economy; and to do so without requiring any form of accountability.

Instead, the parliament established a direct line of oversight between itself and ASIC. The Parliamentary Joint Committee on Corporations and Financial Services was created under Part 14 of the *Australian Securities and Investments Commission Act 2001* in order to provide this line of accountability. It replaced the former Joint Committee on Corporations and Securities. Its first and most important duty is to inquire into, and report to both Houses on the activities of ASIC to which, in the Parliamentary Committee's opinion, the Parliament's attention should be directed.

The Committee is comprised of ten members. There are five from the House of Representatives, and five from the Senate. Five members of the Committee are from the government parties; four are from the opposition, and there is currently one Australian Democrat. The government holds the chair, and the Chair holds both a deliberative and casting vote. The government therefore has the majority in the Committee's decision making.

The Committee receives secretariat support from within the Department of the Senate, and has full time secretariat of four, being the Secretary, two research officers, and an administrative assistant.

The Australian Crime Commission

The Australian Crime Commission (ACC) was created in 2002 as a specialist investigative and criminal intelligence agency to combat organised crime at a national level. It was an amalgamation of its predecessor, the National Crime Authority, with the Bureau of Criminal Intelligence and the Office of Strategic Criminal Assessments.

The creation of the NCA, and its state based equivalents, emerged from a series of Royal Commission during the late 1970s and early 1980s — notably the Costigan, Stewart and Williams Royal Commissions — which concluded that a standing Royal Commission was needed to deal with the investigation of serious organised crime. Many felt that police forces had largely been ineffective against organised crime, and traditional reactive methods of detecting and investigating offences were ill-suited to the task of controlling it.

The major governing body of the ACC is a Board headed by the Commissioner of the AFP. The Board is established under section 7 of the *Australian Crime Commission Act 2002* and consists of the Commissioner of the Australian Federal Police, the Secretary of the Attorney General's Department, the Chief Executive Officer of the Australian Customs Service, the Chairperson of the Australian Securities and Investments Commission, the Director-General of ASIO, the Commissioner or head of the police force of each State and of the Northern Territory, the Chief Police Officer of the Australian Capital Territory, and the CEO of the ACC.

The Board's activities are overseen by an Intergovernmental Committee, which is also responsible for transmitting reports of the Committee to the governments represented on the Board.

The powers of the ACC are significant. Like the Australian Federal Police and state and territory police, the ACC is able to conduct searches and telecommunications intercepts, and use surveillance devices such as bugs, tracking devices, and hidden cameras. The ACC is also able to conduct controlled operations (the authorisation for officers to engage in otherwise illegal acts in the process of obtaining evidence), and the creation of false identities.

The ACC differs from the AFP in three important respects.

First, it has jurisdiction to investigate relevant criminal activity in all states and territories (whereas the AFP is limited to investigating Commonwealth offences).

Second, the ACC's investigation teams typically comprise both ACC officers as well as officers seconded from the federal, state and territory police forces.

Third, and most significant, is the coercive power. Through the mechanism of Examinations, the ACC is able to compel both the production of documents and things, and the answering of questions. Thus, the normal right to silence and the right not to answer a question on the grounds of self incrimination do not apply.

This power is not available to police and has traditionally been entrusted only to royal commissioners appointed by, but operationally quite independent from, the executive. The significance of granting these powers on a permanent basis to an executive agency should not be underestimated.

The PJC on the ACC

The Committee is established under section 53 of the *Australian Crime Commission Act 2002*. The section sets out the membership of the Committee, being ten members, consisting of five Senators and 5 members of the House of Representatives.

The duties of the Committee are then established under section 54:

- (a) to monitor and to review the performance by the ACC of its functions;
 - (b) to report to both Houses of the Parliament, with such comments as it thinks fit, upon any matter appertaining to the ACC or connected with the performance of its functions to which, in the opinion of the Committee, the attention of the Parliament should be directed;
 - (c) to examine each annual report on the ACC and report to the Parliament on any matter appearing in, or arising out of, any such annual report;
 - (d) to examine trends and changes in criminal activities, practices and methods and report to both Houses of the Parliament any change which the Committee thinks desirable to the functions, structure, powers and procedures of the ACC; and
 - (e) to inquire into any question in connection with its duties which is referred to it by either House of the Parliament, and to report to that House upon that question.
- (2) Nothing in this Part authorizes the Committee:
- (a) to undertake an intelligence operation or to investigate a matter relating to a relevant criminal activity; or
 - (b) to reconsider the findings of the ACC in relation to a particular ACC operation/investigation.
- (3) To avoid doubt, the Committee may examine, and report to both houses of the Parliament on, information given to it under section 59.

The Committee's predecessor, the Parliamentary Joint Committee on the National Crime Authority (NCA) had similar duties in relation to the NCA.

Several aspects of the Committee's duties are worth highlighting.

First, the duties clearly envisage two major roles: a specific and detailed scrutiny role of what the ACC is doing and how; as well as a more general policy brief to consider how organised crime is evolving and whether the specialised laws to combat it are effective, when balanced against the need to protect civil rights and privacy against unwarranted intrusion. It is also worth noting that the Committee has a broad capacity under this section to set its own terms of reference, in what is often referred to as 'own-motion' inquiries.

Secondly, this section carefully excludes the Committee from examination of operational matters or investigative activity. While a simple distinction in theory, in practice it has been a matter of some controversy and will be discussed in more detail below.

Role and Operations of the Committee

Scrutiny

As will be apparent from the background section above, scrutiny is the principal *raison d'être* of each Committee. The Committees have a number of methods for maintaining this scrutiny.

In the case of ASIC, the most obvious are the periodic 'oversight hearings' where the Committee calls the ASIC Chairman and other relevant officers for a free-ranging hearing, usually lasting three or four hours. The most recent of these was held in Parliament House in Canberra on 13 September. These hearings are somewhat similar to estimates, but they are conducted in a less politically charged environment. At these oversight hearings, it is not at all unusual to find government members asking searching questions in a way that happens far less frequently during estimates. Following the hearing, the Committee writes a report based on the issues covered, and this report is tabled in both houses.

Questions in these oversight hearings often go beyond the mere discussion of budget outputs and outcomes. The Committee has opportunities to question ASIC about organisational culture, its approach to addressing wrongdoing, and its philosophy of regulation. These 'soft' questions, which may often escape the more traditional processes of responsible government, are nevertheless important contributors to the performance of the organisation.

Other methods of scrutiny are more subtle. Like the ACC Committee, the CFS Committee's inquiry activity is not limited to directly scrutinising ASIC. In fact, the ASIC Act allows the Committee to inquire into the operation of corporations legislation either in Australia or overseas. The Committee has, in the past, used this as an opportunity to conduct inquiries which look and feel rather like References Committee hearings, with the obvious difference that the joint Committee maintains a government majority. Because of the subject matter involved in these inquiries, it is almost inevitable that ASIC will be an interested party. ASIC makes submissions where appropriate and ASIC officers appear as witnesses where appropriate. For instance, ASIC officers have appeared at the Committee's hearings into the property investment industry, corporate insolvency laws, and disclosure of commissions on risk products. Because, in these instances, the Committee is inquiring into areas which are on ASIC's operational turf, the Committee often receives, from witnesses and submitters, views which are critical of, or supportive of, ASIC. The Committee has not been hesitant to use these as opportunities to make observations about the performance of ASIC, and to make recommendations where necessary.

These 'oversight hearings' are mirrored in the ACC Committee during its annual hearings examining the Annual Report of the ACC. These involve close questioning of ACC officers by all members of the Committee and results in a high level of real scrutiny of the ACC's annual report. This degree of scrutiny is evident in the

resulting Report on the ACC Annual Report, which exceeds by a considerable margin the analysis of other portfolio agency reports.

Finally, and least obviously, the Corporations Committee brings together Senators and Members who have an interest in the operation of financial markets; or who have been delegated responsibility for this area of policy within their political party structures. The creation of a coterie of parliamentarians with such an interest provides for two important outcomes: ASIC knows who they must impress by highlighting their successes; and stakeholders know which parliamentarians are likely to have a sophisticated understanding of financial markets, corporations law and ASIC's role. Committee members, and the Committee as a whole, are therefore the obvious destination for stakeholders who wish to criticise ASIC.

Parliamentary Expertise

This latter aspect, relating to the formation and maintenance of a small group of parliamentarians with an interest in the laws governing both corporations and the national crime fighting bodies, bears further examination.

At the forefront of such examination must be the constant awareness of the Parliament's role. It is self evident that the core of this role is the creation of legislation, but less obvious, particularly in relation to the law enforcement activities of ASIC and the ACC, is the subtle and complex balancing act that Parliamentarians must perform in drafting this legislation and amending it over time.

This balance has two principal dynamics.

The first could be thought of in terms of individual rights versus common rights. In a free society, individuals are entitled to pursue their lives free from interference, invasions of privacy, incarceration or police harassment. Similarly, companies should be free to pursue business opportunities and maximise shareholder value within as free a market as possible. Both the freedom of the individual and the free conduct of trade and commerce are fundamental principles of our free democratic society.

However, these must be balanced against the need of society to create and enforce rules of personal and corporate behaviour for the common good.

Given the particularly violent and pernicious nature of organised crime, history has shown the need to create specialist crime fighting bodies with significant powers to combat these organised crime networks. However, it is evident from the description of the ACC's powers set out above, that the actions of the ACC have the real potential to profoundly impact of an individual citizens' freedom and privacy.

The second dynamic lies in the relationship between Parliament and the agency: the regulator and the regulated. The tension here lies in balancing an effective regulatory and accountability structure with an agency that has room for tactical flexibility and innovation and that does not need to spend an inordinate proportion of its time or resources complying with paperwork.

Again, history has shown the need for strict accountability regimes for law enforcement agencies, since left to their own devices, agencies have a tendency to become corrupt or self serving. Thus, the greater the powers possessed by these agencies, the greater the accountability mechanisms must be. But conversely, both corporate and underworld criminals are adept at finding and exploiting loopholes and circumventing the law. Now, more than ever before, law enforcement agencies must be capable of rapidly adapting to the evolving tactics of their targets. Agencies that are bound in rigid procedures and rules will lack this necessary flexibility and will rapidly lose their effectiveness.

To craft legislation that finds an appropriate balance in these relationships, the Parliament must have experts who understand both the subject matter of the regulation — corporate and organised crime — and the detail of how their agencies do their work. This includes their policies, procedures, funding and culture, all of which is also vitally important in performing the accountability function.

The need for expertise is evident in the memberships of both committees.

The CFS Committee has had a relatively stable membership over recent years. The current chair, Senator Grant Chapman (LP, SA), has been chair of the Committee since 1996. In addition, from the government side of politics, Senator George Brandis (LP, Qld) has been a member of the Committee since 2002, and was a barrister specialising in commercial law prior to his entry into politics. From the opposition side, Senator Stephen Conroy (ALP, Vic) was a member of the Committee from 1997 until 2004. Senator Penny Wong (ALP, SA) has been on the Committee since 2002 and currently holds the shadow portfolio of Corporate Governance and Responsibility. Senator Andrew Murray (AD, WA) has been a member of the Committee since 1996 and prior to entering politics had a long career in business. Senators Chapman, Brandis, and Murray are all also members of the Senate Economics Committee, with Senator Brandis the chair of the Economics Legislation Committee.

On the House of Representatives side, Mr Kerry Bartlett MP was a financial planner before entering parliament, Mr Mark Baker MP was a business and financial consultant for more than fifteen years, and Ms Anna Burke worked in the Finance Sector Union prior to entering parliament.

The membership of the ACC Committee is much newer, but still includes members with significant expertise, such as the Hon Duncan Kerr SC MP, a former Minister for Justice, as well as Mr Jason Wood MP and Mr Kym Richardson MP, both

former police officers. A recently appointed member, Senator Joseph Ludwig, is a lawyer and comes to the Committee with long experience of criminal law and policy gained from his membership of the Legal and Constitutional Committee.

It is clear from this short outline that all parties have chosen their representatives on this Committee carefully, based on both their prior expertise, and their ongoing interest in this area of policy. The result is an enhanced level of parliamentary scrutiny over ASIC and the ACC, and a much stronger capacity to engage with and influence policy and legislation.

The pattern of appointing members to the Committee based on interest and expertise, combined with the long tenure of some members, has also led to Committees which are characterised by consensus rather than by political partisanship. Committee members have worked with one another on the Committees, across party lines for some time. Committee reports are often unanimous, and despite both Committees having a government majority, reports often contain recommendations contrary to government policy. Even where reports are not unanimous, the minority reports usually reflect an effort by the opposition or Democrats to express a distinct policy view, rather than being characterised by simple point scoring.

Impact on Legislation

Unlike the eight Senate legislative standing committees, neither of the PJs has a formal or direct role in the development of legislation. However, the fact that the Committees have gathered together parliamentarians interested and expert in their areas of law, together with the relatively bipartisan views expressed in the reports, means that the committees have had a role in almost all of the significant (and relevant) legislation to pass through the parliament in latter years.

Furthermore, because of this expertise and because the committees are relatively bipartisan, they have had significant influence over laws passing through the parliament.

With regard to the CFS Committee, any number of legislative and administrative changes can be traced immediately back to recommendations of the Committee. It is reasonable to speculate that the Government has taken the view that since the Committee is expert, and since the Committee does not indulge in cheap political shots, its recommendations should be taken seriously.

For example, the explanatory memorandum to the exposure draft Corporations Amendment Bill (No. 2) 2005 clearly states that a number of the provisions arise from the CFS Committee's earlier report on Matters arising from the *Company Law Review Act 1998*.

The CFS Committee has recently adopted a process of inquiring into legislation at the exposure draft stage — that is, when a draft of the bill has been released by the

sponsoring department for public comment, but the bill itself has not yet been introduced into either house of parliament. This practice has two advantages: first, from the government's perspective, it means that the bill has already been considered by one parliamentary committee before it is even introduced; it is much less likely to then be delayed by a committee inquiry during its actual passage. Second, from the Committee's perspective, the Committee has the capacity to influence the shape of the legislation before it is introduced, thus allowing the government to adopt its recommendations without being seen to be backing down from a draft the Minister had actually sponsored in the House.

A Public Forum

Like other parliamentary committees, the Corporations Committee conducts its inquiries in public. Submissions are made public, the Committee's hearings are in public, and the Committee's reports are tabled in both houses of parliament. In the case of the Corporations Committee, however, the 'public forum' aspect of Committee work has the potential to have a very significant impact. The business press — the *Australian Financial Review*, *Business Review Weekly*, the business sections of other major dailies — follow the activities of the Committee quite closely. In addition, there are a range of online and paper industry newsletters but out by organisations such as the Institute of Chartered Accountants in Australia which track the Committee. Interesting evidence given in the Committee's hearings, or evidence given by major figures in industry — and most importantly evidence given by the Chairman of ASIC — will almost certainly be reported.

The media, by tracking the Committee closely and reporting it expertly, contribute to the Committee's effectiveness in two ways. First, they ensure that the Committee maintains a profile. While some Committee members no doubt see this as an end in itself, from an operational perspective a Committee with a solid profile attracts a larger number of higher quality submissions — and a Committee's report can only be as good as the evidence received. Second, the media enhances the scrutiny aspects of the Committee's business as ASIC knows that criticism by the Committee, or poor performance in a hearing, is almost certainly likely to find a wider audience through the media, rather than being confined to the pages of Hansard or a report.

The importance of having a public forum is particularly critical in relation to the matters considered by the ACC Committee, due to the otherwise limited sources of public information and debate. This point is explored in more detail below.

Reflections on Effective Scrutiny Committees

It should be clear from the foregoing section that, in the admittedly biased view of the authors, the CFS Committee and ACC Committee perform an effective role as scrutineers and contributors to the legislative process. However, while these may

serve as positive models for consideration by parliaments seeking to establish other similar Committees, the experience of these committees has also shown up some challenges and pitfalls.

Avoiding Capture

The establishment of the CFS Committee sets in place a formal relationship between two institutions — ASIC and the Parliament. Inevitably, that formal relationship then becomes underpinned by relationships between individual people. Senior officers of ASIC have appeared before, and been in contact with, members of the Committee many times. In a similar fashion, senior officers and government relations officers from ASIC are in regular communication with the Committee Secretary and with other staff from the secretariat.

These relationships have the potential to be very useful for both parties, by allowing a free flow of informal communication to underpin the more formalised accountability relationship. However they also have the potential to circumscribe, or even fracture the relationship of accountability if the Committee or Secretariat members become ‘captured’ by the relationship. That is, if the Committee or its Secretariat were to become too reliant on information provided by ASIC, there would be an inevitable skewing of information, and consequently of opinion, in ASIC’s favour.¹

The risk of regulatory capture is particularly a factor for the ACC Committee, given three characteristics of its portfolio:

First, many of the ACC’s operations are conducted in secret — particularly those of the greatest significance such as the examinations, controlled operations, and telecommunications intercepts. Whilst this operational secrecy is necessary, it complicates the task of scrutiny.

Second — and unlike the CFS Committee — the Committee is not able to draw upon a broader public ‘stakeholder’ group of the regulated to give an opposing viewpoint. Those involved in organised crime do not ordinarily participate actively in the Committee process, and any views they may have on the legality or fairness of the ACC are generally reserved for their legal defence in court.

Thirdly, the Committee has limited capacity to gain objective or critical information from other partner or associated agencies in the law enforcement field. Virtually all such sources of information are executive agencies that are represented on the ACC Board. As such, their views on the ACC’s effectiveness, operations or culture, are

¹ This does not, of course, imply anything improper on the part of ASIC, which can hardly be blamed for either providing Committee members with an abundance of information; or for endeavouring to ensure that that information presents ASIC in the best light.

likely to be kept within the confines of Board discussions or raised at the Ministerial level in the Intergovernmental Committee.

As a result, the Committee is mindful that a sizeable proportion of its information comes directly from the ACC.²

The Committees, in the view of the authors, are quite successful at avoiding capture. A number of strategies help.

First, as already noted in this paper, the committees include expert members and members who have served on the committees for a long time. They come to the committees, and conduct themselves within the committees, based on their own knowledge and thoughts. Consequently they are not reliant on ASIC/ACC for their information and less likely to become conditioned to the ASIC/ACC view of the world.

Second, the presence of active opposition and minor party committee members is vital. While government members of the Committee are often incisive in their questioning, the bottom line for them is that they are government members who have a fundamental interest in the government and its agencies appearing to be successful. The biggest weakness of scrutiny committees (and arguably the biggest weakness of responsible government as a whole) is that government parliamentarians, who are meant to participate in the scrutiny process, have a stake in the success of the bodies subject to scrutiny. Government parliamentarians must walk a fine line — they may have an interest in holding executive agencies to account, but they have no interest in holding the Minister, or indeed the Government as a whole, to account. For all of the authors' obvious enthusiasm about the role of scrutiny committees, the paradox of government members controlling a committee whose purpose is to scrutinise the government remains, and challenges the capacity of committees to provide genuine scrutiny.

The role of opposition and or minor parties is to be more critical. They, of course, have no stake in the success of the executive agencies or Ministers — their stake is, in fact, often in the failure of those agencies. This can be done within the committees by pursuing the agency over difficult questions. This pursuit does not compromise the relatively bipartisan nature of the committees so long as it is undertaken in an effort to genuinely hold the agency accountable, rather than being motivated by an effort to embarrass the government. Of course, this line is frequently crossed, depending on the nature of the subject matter. The CFS and ACC Committees, while often bipartisan, do regularly become fora for old fashioned political stoushes when occasion requires.

² We reiterate here the previous caveat: the ACC has consistently provided a great deal of information to the Committee, and these comments should not be taken to imply any criticism of the ACC or any attempt to mislead Parliament.

Third, in relation to the CFS Committee, the process of conducting wider inquiries in the area of corporations law means that, as noted above, a range of stakeholders find opportunities to present bouquets or brickbats to ASIC via the Committee. Business groups, shareholder groups, community groups, trade unions, the Australian Stock Exchange, groups from the finance and banking industries, all provide submissions to the Committee's inquiries, and many of these are critical of ASIC. Not all of those criticisms have merit, of course, but their presence does provide some insurance against committee members being influenced too far by ASIC's viewpoint.

Finally, both committees have full time secretariats. As secretaries to the committees, it is our job to think critically about ASIC/ACC. It is our job to conduct research to test their evidence where necessary. It is our job to brief our committees on relevant issues ensuring that where there are alternative viewpoints, all of those viewpoints are put. We admit self-interest in this matter, but we hold the strong view that a scrutiny committee cannot function effectively without dedicated secretariat resources serving the whole committee equally.

None of these strategies are completely effective. Capture remains a constant risk, and it is necessary for Committee members and secretariat members to guard against it.

Operational Issues

Both the ACC and ASIC are continually involved in large scale investigations of criminal activities involving many millions of dollars. The wrong question at the wrong time in a public forum could compromise or ruin those investigations, allowing perpetrators to escape justice. Questions about matters before the court could place prosecutors in the invidious position of trying to explain the Committee's actions to an unimpressed judge. Even worse, inadvertent release of confidential ACC operational information could endanger the safety of those involved. For these reasons, notwithstanding the wide-ranging powers of the committees to require the provision of information, both have been reticent about asking too many questions about operational issues.

While this is sensible, it is also problematic, because those operational powers and the ways in which ASIC and the ACC use them, are the precise reason for the creation of overseeing parliamentary committees. There would be little point in creating a parliamentary committee to oversee an agency with extraordinary powers; then to adopt conventions which prevent the committees from ever actually asking questions about the use of those powers.

In the end, the treatment of operational and *sub judice* issues rests on a quite delicate trust between the committee and the agency. While the committee would no doubt be exposed to criticism for demanding answers on *sub judice* issues or operationally sensitive issues, there is nothing within standing orders to prevent it

from doing so. While Senate Privilege Resolution 1(10) agreed to on 25 February 1988 allows witnesses to object to answering questions, the committees may insist and may report the refusal to the Senate. The consequence of these facts is that ASIC and the ACC only seek the protection of 'operational sensitivity' when it is necessary, and the committees do not pursue sensitive lines of questioning when it is clear that this may have undesirable impacts.

The CFS Committee recently undertook something of an experiment, by scheduling a public oversight hearing to be followed immediately afterwards by an *in camera* hearing with the same ASIC officers. Consequently, where ASIC was unable to answer in public, the Committee could either insist on the question being answered in public, or allow it to be deferred to a later private session. These *in camera* hearings allow for parliamentary scrutiny to be maintained, without operational risks. However, this was a significant step for the Committee. Parliament is by its very nature a public forum, and Committee members are reluctant to take evidence in private. The Committee has maintained a commitment to hear as much evidence as possible in public.

Again, there is no simple answer to the issue, other than to observe that ASIC and the ACC must be cautious in seeking to avoid questions on these grounds; and the Committee must continue to ask searching questions to ensure that 'operational issues' are a genuine reason for discretion, and not simply a smokescreen behind which embarrassing facts might be hidden.

An Accountability Rich Environment

The importance and value of a Parliamentary scrutiny committee is often taken for granted. Indeed, the mere fact of their existence is often cited as proof of the robustness of Australian accountability systems. However, this fact is not self evident.

In fact, to take the example of the PJC on the ACC, it is one of a quite staggering number of accountability organisations and procedures that the ACC must answer to. This is evident from a brief survey.

The ACC is bound by a complex and detailed set of reporting requirements governing the Annual Report, provided by the Department of the Prime Minister and Cabinet. Financial reporting requirements derive from the ACC Act itself, together with the *Financial Management and Accountability Act 1997*.

The ACC is accountable to its own management bodies: the ACC Board, and by extension all of its member organisations, and the Intergovernmental Committee, as well as the Minister for Justice. It is subject to Parliamentary scrutiny by not only the PJC on the ACC, but the Senate Legal and Constitutional Legislation and References Committees, via the Senate Estimates process and more general inquiries.

Its activities are further monitored and audited by the Commonwealth Ombudsman, the Australian National Audit Office, and in certain respects, the Federal Court and the State Supreme Courts.

Several observations emerge from this.

With so many accountability organisations and procedures, it is not always clear where the PJC fits in, and in what way it adds value.

Unless the PJC is clear about its role, there is a danger that it could do little more than waste the time and resources, not merely of Parliament but also the ACC. If this occurs, it also debases the currency of Parliamentary supervision, and officials may come to perceive parliamentarians as irrelevant time wasters.

It is therefore important that the PJC's activities are motivated by a clear understanding of its role, and not by mere curiosity over exciting, salacious or topical law enforcement operations.

Where then does the PJC fit into this wide accountability framework? Do the PJCs 'add value' in their respective areas?

This paper has already discussed the core roles of a PJC, and it is in these roles that we must return: public accountability, legislative experts, and a forum for public debate. From these core roles it is possible to derive three principles that should underpin committee activities.

First, in the Australian constitutional system, it is the role of Parliaments to make law: it is not the role of the Executive. First and foremost, committees should remain focused on the fact that their contribution to public policy is in the consideration of the adequacy and relevance of the system of laws. Any inquiry should have this as its starting and finishing point. This does not always happen, with a tendency on occasion to become absorbed with operational matters of dubious relevance. Following from this, committees need to be prepared to wade into the detail of legislation and make detailed proposals for change that go beyond generalised policy prescriptions. Rarely, if ever, do committee reports include draft legislative amendments.

Second, in the array of reporting requirements and agencies, the role of the Parliament and its committees is in taking the bird's eye view of the totality of laws, administration and systems. Contemporary practice has reinforced the need for interlocking systems of accountability, based on the experience that no one watchdog agency can be expected to cover the field. Accordingly, this array of accountability devices is necessary and appropriate. As befits the role of law-makers standing above the day-to-day administration, it is for Parliamentary committees to constantly assess how all the elements of this picture fit together, searching for anomalies, inconsistencies, or gaps.

Third, committees that comprise the public's representatives have the capacity and responsibility to generate the debates that enable the public to make the value judgements on key issues. Importantly, agencies and ministries are often not in a position to do this. Driven by the priorities and circumstances of their jobs, they are prone to develop a world view and associated priorities that may not accord with the values of the wider community. This is particularly evident in relation to law enforcement officials, whose thinking is understandably driven by their experience of criminality and their need to combat it.

Mastery of the Detail

To properly fulfil the role of accountability watchdogs, committees must be prepared to go beneath the surface of agency rhetoric and come to grips with the detail of how legislative grants of power have been implemented in regulations, standing orders, Chief Executive Instructions and procedures. Committees must examine these using critical and lateral thinking, to divine the possible gaps in systems in which malpractice could occur. It is about imagining what could go wrong, rather than merely seeking out what has gone wrong. Consequently while, as noted above, committees often take a systemic, 'bird's eye' view of agency performance, they need both the capacity and the will to assess the detail of performance when anomalies are noticed.

The reports of various Royal Commissions offer important clues to what committees should be looking for. Thus in the case of law enforcement agencies for example, committees should look closely at the agency's procedures for the authorising, tracking and auditing of search warrants, telephone intercepts and controlled operations.

It is evident that in this respect, the committee secretariats play an important role, since the parliamentarians who are members of the committee lack the time to perform the detailed research necessary to penetrate to this level of detail. Committees must therefore have secretariats that have the resources, in terms of both staff and expertise, to do this job.

Conclusion

Parliamentary Committees such as the Parliamentary Joint Committee on Corporations and Financial Services and the Parliamentary Joint Committee on the Australian Crime Commission can provide an effective means for parliament to scrutinise the activities of agencies which have extensive powers, but which must be placed outside the normal accountability relationships of responsible government. However the creation of such a committee is not a panacea. A scrutiny committee which did not work effectively may in fact make things worse, by giving the perception and respectability of accountability where no such accountability exists.

In our view, for a scrutiny committee to perform effectively, it should attract a membership of parliamentarians who are interested in, and if possible expert in, the subject matter at hand; strive for a relatively harmonious culture where poor performance is scrutinised and reported in order to pursue accountability, not simply in order to embarrass the government; develop a range of mechanisms by which to conduct the operations of scrutiny, rather than rely on a few formalistic scrutiny processes; engage with legislative processes in the subject area, so that scrutiny extends not only to the agency but to its legislative environment; be aware of the potential for capture, and self-disciplined in avoiding it; be supported by a well-resourced and dedicated secretariat; and remain sensitive to the need to refrain from compromising operational or judicial activity, without allowing these to block necessary accountability processes.

The creation and maintenance of these committees is hard work and costs a substantial amount of money. However, if they are sufficiently well supported, they can be a useful investment in parliamentary scrutiny and in legislative development. ▲