

Chapter 13

Clerks of Houses of Parliament

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What is the role of the Clerk of a house of Parliament?

*Two wise old owls sat at the table,
Their wigs were grey, their gowns were sable,
They looked so sad, so melancholy,
As if depressed by human folly.¹*

There is no shortage of material on the advisory and administrative roles² of Clerks of houses of Parliament, but the casual parliamentary observer may be forgiven for overlooking them. As Prime Minister Robert Menzies noted, they are neither flamboyant nor obvious. Indeed, anyone showing those attributes would be unsuitable for the job.

But this is to miss the vitally important role they carry out as minders of corporate history and providers, on a non-partisan and strictly confidential basis, of advice on parliamentary law and procedure to all members. At this deeper level they fulfil a vital but often unacknowledged role in assisting to maintain the integrity of Parliament, responsible government and the doctrine of separation of powers. This address seeks to go beyond describing their basic role to consider the important democratic principle that Parliament should be supreme.

The basics

The role of the Clerk dates from 1315 when there was a need to provide the largely illiterate membership of the Parliament with information as to the proceedings. Essentially the main job qualification was that they could read and write.

Robert Melton became the first recorded Clerk of the House of Commons in 1363, while the first Clerks for the Australian Houses of Parliament were appointed in 1901.

The Clerks of the House sit at the table of the House, in front of the Presiding Officer's chair. In the House of Representatives they wore wigs until the practice was discontinued at the Speaker's direction in 1995.³ They still wear academic gowns, mainly to distinguish themselves from the members.⁴

They are the only non-elected participants in Parliament who are allowed to speak on the floor of the Chamber as they read items of business and announce bills at the appropriate stage.

The main role of the Clerk is to provide procedural support and advice to all members, but most often to the Presiding Officer. It is common for the Clerk to meet the Presiding Officer each morning that Parliament sits to consider the agenda for the day and possible problems that may arise.

The Clerk's role is more than advisory and includes administrative support to the appropriate House under the provisions of the relevant legislation. However, a Clerk is not to be appointed unless they have “. . . extensive knowledge of, and experience in, relevant Parliamentary law, practice and procedure.”⁵

Who are the Clerks?

If the Clerk's role is so central to Parliament, how are they to be classified? Are they public servants or officers of Parliament or something else? To answer this question we must first consider the often-conflicting roles of Government and Parliament and the vexed question of separation of powers in the Australian context.

The doctrine of the separation of powers, entrenched in the Constitution, refers to the three arms of government (the Parliament, the Executive Government and the Judicature) being separate. Whereby the legislature enacts law, the executive (Prime Minister and Cabinet or Premier and Cabinet) applies these laws and the courts resolve disputes relating to the legality.

The vast bulk of debate on this doctrine swirls around the notion of judicial independence where there is a more clear-cut separation. The doctrine becomes unclear when the Executive Government and Parliament are considered, for in Australia a complete separation of powers is not possible as the ministers, who constitute the Executive, must also be members of Parliament.⁶

The Executive is therefore integrated into the legislature, often resulting in confusion over references to Parliament and Government.⁷ In fact the founding fathers did not believe a complete separation, such as the United States, was desirable. They instead adopted the British system of responsible or cabinet government.

The American position was described as:

The doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but by means of the inevitable friction incident to the distribution of the government powers among the three departments, to save the people from autocracy.⁸

A significant minority of the delegates to Australia's constitutional conventions wished to adopt the American position⁹ but Sir Samuel Griffith, speaking during the Constitutional Convention on 4 March 1891, argued against such a complete separation of powers and supported the Executive residing within parliament. To him the American system showed the "unwisdom . . . of having ministers dissociated, and the executive government entirely dissociated, from the legislature".¹⁰

In Australia, under responsible government, the Executive is to be accountable to Parliament and only hold power as long as it retains the confidence of the House of Representatives.¹¹ There is little doubt within a bi-cameral parliamentary system, however, that the Executive has the most influence when a party majority occurs. The Executive sets government priorities, allocates resources to particular issues and makes the most important policy decisions. It is because of these powers that many regard the lower house as subordinate to the party-room of the governing Executive.¹²

It is now widely believed¹³ that, as Chalmers and Davis express it, power has become skewed in the Executive's favour and that the primary forum for decision-making is now the party room.

The dominance of the Executive is entrenched by party discipline, procedural control, a monopoly of information and advice, increasing government complexity and workload, and the scarcity of parliamentary time.¹⁴

If the Government of the day forms the view that its role includes “managing” the Parliament, rather than being ruled by it, then how it responds to the regulatory attempts of Parliament to ensure disclosure and accountability will be coloured by this perspective.

If the concept of responsible government is to have any meaning it is of the utmost importance to ensure accountability of the Executive to Parliament. Parliamentary scrutiny of executive actions is accountability – and public accountability means the Executive has an obligation to explain publicly.

But, with a strong Government, what assistance can be given to Parliament, through the Opposition, independent and even government backbench members, to ensure accountability so central to responsible government? It cannot be the public service for a number of reasons.

At least on paper the Australian public service accepts the requirement for accountability.¹⁵ It requires departmental secretaries and heads of executive agencies to assist the responsible agency minister to fulfil their accountability obligations to the Parliament by providing factual information about the operation and administration of the agency.

In this regard public servants can be described as apolitical and, in a highly defined way, impartial, but they are still expected to provide advice having regard to the Government’s interests and policy framework above others. To senior public servants “politics” are part of the job:

Impartiality does not mean that the APS gives equal treatment to all sides of politics. It is not the role of the APS to serve the Opposition. Employees should generally have limited contact with the Opposition and other non-government parties.¹⁶

The public service is therefore “. . . not neutral between the government and the government’s opponents but is in fact obliged to serve the government party, often against the interests of its opponents”.¹⁷

The Tasmanian Government has confirmed the role of the public servant in preparing question time briefs:

The drafting of a question time brief or media statement by a public servant is not an offence; it is normal business for many public servants . . . They are scripts that need to be clear, consistent with the Government’s view . . . A professional public servant will understand the purpose and nature of these documents and compose them accordingly.¹⁸

Therefore public servants, unlike Clerks, are subject to the Government’s agenda. Their advice provided to the Executive to be technically accountable to Parliament is neither independent nor unbiased.

With the skewing of the powers of the Executive and the primary responsibility of the public service to the Government rather than Parliament the role of the Clerk becomes of vital importance in providing independent and confidential advice to members to facilitate Parliament in its supervisory role.

If Clerks are not public servants, how should they be categorised? Are they best described as officers of Parliament for, in practical terms, they act on behalf of Parliament and not the Executive or Government?

If so, what qualifies someone as an officer of Parliament? When the term is used, the offices of Auditor-General and Ombudsman are more often thought of than the office of Clerk. There are some immediate differences in that the formers' roles are ones of examining the actions of the Executive and reporting to Parliament; clearly the Clerk has no reporting role, nor one in examining the actions of the Government.

A statement of the Victorian Public Accounts and Estimates Committee assists in further consideration:

. . . the categorization of officers of parliament depends on whether the functions and responsibilities of a particular office-holder are primarily directed to serving the interests of parliament rather than the executive government. In other words, are the functions and responsibilities of an office-holder concerned with independent review or scrutiny of the implementation of executive government policy on behalf of parliament, or do they constitute, even with a clear and vital independent status, an inherent element of the policy framework of the government or have a judicial role.¹⁹

Although the Clerks have no reporting role there can be no doubt that their responsibility is to Parliament and not the Executive. But are they sufficiently independent to be an officer of Parliament? One author includes as major factors of independence the following;

- Appointment – whether selection and appointment is by the Executive or Parliament.
- Tenure – the appointee must be secure in the knowledge that an unhappy Executive could not remove him or her from office.
- Statutory independence – this is a practical and highly symbolic way of asserting independence from the Executive.²⁰

A consideration of the three points leads to the conclusion that Clerks do qualify as officers of Parliament, even though a review of Australian parliaments²¹ does not disclose a coherent legislative approach to appointments.

Some are statutory, involving a requirement for the Presiding Officer to consult with members while others are silent. Some have clear limited tenure, such as a 10-year non-renewable term for the Commonwealth Parliament, while others have no set term. Some may be removed by the Speaker whilst removal of others would require a resolution of the relevant House.

Federally, the Clerk is not subject to direction by the Chair in relation to advice sought by other members.²² In other jurisdictions, although it is not specified, Clerks are independent of the Speaker in providing confidential advice to all members.

The criteria for appointment, tenure and independence fits the role of the Clerks of the Senate and of the House of Representatives and generally the Clerks of State parliaments, but, in coming to this conclusion, there is a caveat that the Executive still has some elements of control. A government with a majority can amend legislation and Standing Orders.

Professor John Wanna, commenting on a dispute between the President of the Australian Human Rights Commission, Gillian Triggs, and the Federal Government, issued a clear warning:

One of the dimensions of statutory independence is for the office-holder to retain the respect and confidence of the parliament, and that includes the executive in our Westminster system.

Statutory office-holders and the commissions or authorities they head are primarily the creations of executive government. This point is generally ignored by those who think these officers are free spirits able to criticize governments at will.²³

David Solomon, in his review of Queensland developments relating to independent statutory offices, particularly the turbulent history of the Criminal Justice Commission, highlighted the ability of the Executive to alter their roles and functions depending on the Government of the day – true independence is not always guaranteed.²⁴ Indeed, there is a common, although not publicly spoken, view that the now limited tenure of 10 years for Commonwealth Clerks had its genesis partly in the desire of the Government to rid itself of a too outspoken Clerk.

The retention of the respect and confidence of the Parliament is something of which the Clerks are vitally aware. McClelland points out that non-partisan and impartial advice is to be provided to all members of Parliament independent of the Executive.²⁵ Clerks recognise that once they are no longer seen as non-political and independent, their position is lost.

The position of Clerk in Australian parliaments is therefore one where impartiality is an integral part of the role. This recognition colours, by necessity, how they interact with members. The members themselves, who do not understand the Clerks' requirement for independence, often make this more difficult.

The principal responsibility of a parliamentary officer is to provide timely, accurate and apolitical support to the members in order that the members can effectively perform the duties of their office. It is not appropriate to allow a personal relationship with a member to affect the advice we give or the service we provide.

In the work sense, when parliamentary officers are providing advice or assistance to members, they are not our mates, but our 'clients.'²⁶

For the Clerks' role to be properly executed, the concept of a member of Parliament as a client is uppermost. Both the Usher of the Black Rod in the NSW Legislative Council²⁷ and a former Clerk of the Senate underline the client/adviser role and the need for frank advice:

An advisor who tells the client what the client wants to hear and supports every course of action suggested by the client is not only useless but dangerous.²⁸

The following can be distilled: Clerks as officers of the Parliament have independence from the Executive and, in providing confidential advice to all members of Parliament, are not subject to the directions of Presiding Officers. Their position is protected from the Government to some degree, but only as long as their work is held in regard by Parliament.

In this respect they fiercely protect their high standards and the recognition that experience is not gained overnight. With up to twelve years between staff movements, the knowledge gained is comprehensive but also requires the attribute of patience.²⁹ This also underlines the body of parliamentary corporate knowledge they carry as the authoritative recorder or "memory" of Parliament.³⁰ By comparison, in the 43rd Parliament 65 percent of the members had less than 12 years experience³¹ and in the 44th Parliament 25 percent of the members for the House of Representatives and 18 percent of senators were new.³²

Although not usually prone to public comment, the regard Clerks have for these high standards and the institution of Parliament sometimes enters the public domain. The following dispute highlights the issues previously canvassed: the difference between public servants and

Clerks, the requirement to provide frank and sometimes unwelcome advice and the requirement of high levels of specialised skills.

The 1991-92 Annual Report of the Department of the Senate presciently noted a tendency for the participants in political debate to attack the advisers, not on the grounds of unsoundness of the advice but on the basis of the advice not being welcome.³³

In 2014 the recently-retired Clerk of the Senate, Dr Rosemary Laing, again noted a continuing tendency of senators, who in the past would either adopt the Clerk's advice as their own or ignore it, thereby preserving the anonymity of the advice, to involve them now in political disputes.³⁴

In 2014 she was involved in two public altercations. In the first she warned her staff not to tolerate "unacceptable behaviour" by a newly-elected member of the House of Representatives, Clive Palmer. Palmer had tried to have distributed amendments to what were effectively money bills and constitutionally could not originate in the Senate. The Clerk refused to allow them to be distributed. Palmer was not amused and complained, but to no avail.

In a staff bulletin with a clear reference to Palmer, she warned against workplace bullying: "None of you need have any contact with the member in question if you feel at all threatened or intimidated by him".³⁵

In August 2014, Laing intervened in a clash between the Speaker of the United Kingdom House of Commons, John Bercow, and a group of senior members of the House of Commons fighting against the appointment of the Secretary of the Commonwealth Parliament's Department of Parliamentary Services(DPS), Carol Mills, as Clerk of the House of Commons. Mills had managerial experience but lacked the necessary parliamentary experience.

Speaker Bercow was keen to modernise Parliament and the Clerk's Department. He ensured the appointment was advertised for the first time since the position was created in 1363, seeking a person with strong managerial experience. At the stage of intervention a six-member panel to replace the retiring House of Commons Clerk, Sir Robert Rogers, had approved the prospective appointment of Mills.

Laing, in an e-mail to the retiring Clerk, wrote that both she and her colleagues had followed the events with "increasing disbelief and dismay". "It seemed to us impossible that someone without parliamentary knowledge and experience could be under consideration for such a role".³⁶ She continued that there was not one of her colleagues ". . . who has not seen this candidacy as an affront to our profession and the professionalism of us all." Laing specifically commented on the requirements of the role:

It (is) not a simple matter to move from serving the executive government to serving the parliament if there is a lack of understanding of what parliaments are and what they do.³⁷

Laing expanded her comments to say that the DPS did not have an appreciation of and/or respect for the roles and status of members and senators and had an over-emphasis on the authority of the Presiding Officers. In essence the head of the DPS lacked the impartiality so necessary to the role of a Clerk. (Mills later lost her DPS position and withdrew her application for the post of Clerk of the House of Commons.)³⁸

It is therefore clear that one of the Clerk's roles is to provide frank advice, even if it is not what the recipient wants to hear.

Can Clerks, however, sometimes fall prey to a parliamentary Stockholm syndrome whereby they deliver advice favouring their own Chamber?

In the final report of the Senate inquiry into the children overboard affair, correspondence between the Clerks of the House of Representatives and the Senate was released. It dealt with conflicting advice as to the ability of one House to summons a member or ex-member of the other.³⁹

The Clerk of the House of Representatives, Ian Harris, advised that immunity applied to members and probably extended to ex-members. The Clerk of the Senate, Harry Evans, disagreed. Within the correspondence was an indication of how they viewed their role with a hint of partisanship towards their respective Houses. It was indeed pens at ten paces.

Ian Harris's letter of 2 April 2002 to the Secretary, Senate Select Committee on a Certain Maritime Incident, said:

. . . In the absence of decisions of the House, unelected officials do not have the power to assert with any finality the practices of the House in question. My attitude would always be to regard myself as the servant of the House for which I work, and not as a determiner of its practices.

Evans, in a letter of 5 April 2002, stated:

Mr Harris' letter contains serious misrepresentations of the actions of the Senate . . . these misrepresentations add several more layers of confusion over the issues.

Harris's letter of 8 April 2002 observed:

Over the years I have noted a number of occasions when the Clerk of the Senate has responded to comments by people who have a different opinion to his own with accusations of misrepresentation, being confused and creating confusion, and being bellicose . . . The ploy seems designed to give weight to the Senate Clerk's opinions by personal attacks on those who think differently.

As in the past such attacks have been made on people with at least the same level of skills and training as the Clerk of the Senate and myself, and in some instances with a higher level of intellect than the Clerk of the Senate and myself, I thought myself in good company and was prepared to let the matter rest there. However, . . .

Apart from entertaining a certain delight at the unusually public display of emotions, the question remains: would the advice of the Clerks remain the same if they had different positions?

An almost identical dispute later occurred in the Parliament of Tasmania. The Clerk of the House of Assembly and the Clerk of the Legislative Council were at odds over the ability of the Legislative Council of Tasmania to summons members and ex-members of the House of Assembly – indeed, the advice proffered looked suspiciously similar to that given in the “children overboard” affair.⁴⁰

Therefore, apart from recognising the human nature found in all occupations, what conclusions can we draw?

With the creeping power of an Executive that tends to regard Parliament as a hindrance rather a force for accountability, the Opposition and independent members must have complete

faith that there is a source of independent, professional and confidential advice to assist them in their role of keeping the Executive accountable to Parliament. The fact that the advice given may be counter to the agenda of the Government of the day is necessarily irrelevant. A properly operating Parliament ensures accountability of the Executive and Government.

Unlike public servants, Clerks are beholden to Parliament and are clearly officers of Parliament with elements of tenure, independence and parliamentary rather than government appointment; their role goes beyond the purely administrative and advisory. Although not immediately obvious to the casual observer they are vital in supporting the concepts of separation of powers and responsible government.

They are the holders of parliamentary corporate knowledge and providers of valuable advice to members, many of whom are newly-elected. They contribute to the smooth operation of Parliament and individually advise members so that the institution of Parliament and the concept of responsible government operate as efficiently as possible.

The advice can be given freely in the knowledge that the institution of Parliament protects the Clerks' position. This is not a protection granted without condition, however. To retain the respect of Parliament and all members Clerks are reliant on their professionalism and their interaction with members. Thus they must be at arm's length from members and regard their interaction as one of client/adviser. As one retired Clerk accurately described, they must be "friendly to all but friends with no-one".

Endnotes

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