

Role and Contribution of Legislative Scrutiny Committees

CHAIR (Prof. UHR) — I mentioned earlier on that I had worked with a legislative scrutiny committee so it is a privilege for me to be able to convene a panel especially dedicated to legislative scrutiny committees. They are a kind of back-office operation. The Senate Standing Committee on Regulations and Ordinances and the Senate Standing Committee for the Scrutiny of Bills do not typically hold public hearings, but they do that fine-grained, detailed examination of government legislative proposals looking in particular at the potential impact on individual and civil liberties that is a hallmark of the value that the Senate has brought to the legislative process. Senator Coonan will be our first speaker and then Amanda Vanstone will be our second speaker.

Senator COONAN — Thank you very much, John. Ladies and gentlemen, I am really delighted to join you for the next session of what I hope you are finding is a very informative and interesting session on the workings of the Senate. Having come out of the executive and having spent quite a bit of time as a minister, I am actually really enjoying getting to grips with some of the very important work that the Senate does quite independently of the executive to scrutinise legislation and, in another role, regulations and ordinances. I think you will be looking at that a little later. I am currently the chair of the Scrutiny of Bills Committee which is a very granulated and detailed technical committee that I will tell you about in just a moment for those of you who may not know what it does in detail. I want to mention that I am proceeding on the premise, as no doubt earlier speakers have today, that parliamentary committees are, we think, absolutely essential to the operation of modern parliaments. Australian Senate committees have for some decades been pivotal to the maintenance of government accountability to the Australian Parliament, particularly through hearings to scrutinise the Budget and through public inquiries on policy issues which take place throughout the year.

The committee system is also essential to the Senate's role as a house of scrutiny and review. I am still astounded by misunderstandings that people hold on the workings and values of our various parliamentary committees. I am not referring just to members of the public; we often say that our colleagues in the House of Representatives do not know what a scrutiny committee in the Senate does. So forgive me if you are already familiar with the workings of the Senate Standing Committee for the Scrutiny of Bills because I am going to discuss very briefly the role and contribution of the committee so that the value I think it adds to our democracy can be evaluated.

The Scrutiny of Bills Committee is a very old committee. It was established on 19 November 1981 by resolution of the Senate. Its purpose is to assess ‘legislative proposals against a set of accountability standards that focus on the effect of proposed legislation on individual rights, liberties and obligations, and on parliamentary propriety’.

By examining all bills, every one of them—we had, I think, about 80 introduced bills that had built up the last time that Parliament was prorogued—that come before the Parliament the committee plays a role that complements the examination of all delegated legislation, as I mentioned, by the Senate Regulations and Ordinances Committee. It reports to the Senate on whether a bill trespasses unduly on personal rights and liberties; makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers; makes rights, liberties or obligations unduly dependent upon non-reviewable decisions; inappropriately delegates legislative powers or insufficiently subjects the exercise of legislative power to parliamentary scrutiny. Those are the five heads against which we evaluate every piece of legislation that gets introduced into this place.

The scrutiny committee has six members, three of whom are members of the government party—nominated by the Leader of the Government in the Senate—and three of whom are members of non-government parties. The chair of the committee is a member appointed on the nomination of the Leader of the Opposition in the Senate. That is interesting because it is one of the few committees where the chair is in opposition.

Since its inception the scrutiny committee has also taken the opportunity to engage an eminent legal adviser to assist in its work. This adviser provides a written report to the committee identifying any of the bills that appear to infringe on one or more of the five principles that I outlined. The committee regularly publishes two documents: the *Alert Digest* and the report. The digest contains an outline of each of the bills introduced in the previous sitting week that we consider at our meeting as well as any comments the committee wishes to make in relation to a particular bill. When concerns are raised in a digest the committee writes to the minister responsible for the bill inviting the minister to respond to its concerns. Next the committee produces a report containing the relevant extract from the digest, the minister’s response—which is nearly always polite—and any further comments the committee may wish to make or to draw to the attention of the Senate.

The response varies markedly, of course, but sometimes it can be as extensive as rewriting sections of a piece of legislation, sometimes it can be a tweak to an

explanatory memorandum or a better explanation that can inform why the bill appears in its current form. Reports and digests are generally presented to the Senate on the Wednesday afternoon of each sitting week and they are available online after tabling. Occasionally the scrutiny committee also produces reports on matters specifically referred to it by the Senate. The committee also monitors penalty provisions for information offences, for national scheme legislation—because you can imagine how complex it is to implement legislation in various jurisdictions—and on standing appropriations.

Additionally, the committee has served as an inspiration, as I am happy to say, for the establishment of other scrutiny committees, both domestically and internationally. At the time the committee was established in 1981, it was the only committee of its kind in the world. Since then six of Australia's eight state and territory jurisdictions have established committees with a function to scrutinise primary legislation, with only Tasmania and the Northern Territory being the exceptions. The Scrutiny of Bills Committee's 10th anniversary seminar in 1991 had a distinguished participant, Lord Thurlow, from the House of Lords, who came to the seminar with the express purpose of examining the operation of the Scrutiny of Bills Committee in Australia. In a 1992 report the United Kingdom select committee on the committee work of the House recommended that a delegated power of scrutiny committee be established with terms of reference almost identical to ours and it was acknowledged that our workings as a scrutiny of bills committee had been influential in formulating the recommendations, and the functions of that committee still exist today. So we think we have got good provenance. That is a good example of giving back to the Mother of Parliaments, as we sometimes refer to Westminster.

Coming back to our own committee, prior to its introduction in 1981 there was some concern that the committee's work would slow down the passage of legislation through the Parliament—and that was a very legitimate concern. But it moves awfully quickly once a bill is introduced and over time we have proven that this has not been the case and that the process has worked efficiently, not least due to the work of the committee's members and a very dedicated secretariat. A key point, I believe, in relation to the effective functioning of the committee is its bipartisan membership and approach. This strengthens the quality of the committee's work, and I believe that there is no way that the committee could function if it did not operate in a bipartisan fashion. It is interesting to think of what might happen. Sometimes, as you will hear, on some of our committees you do get a bipartisan approach and it is often said by people that that shows the Senate working at its very best. By operating in a non-partisan and apolitical way and by making decisions on a consensual basis, the committee primarily sees its task as being to draw the responsible minister's attention to any concerns, to request clarification or to ask that consideration be given to

addressing the concerns in a particular way and to advise senators and other readers of its reports—I am sure there are some—of the risk that particular provisions may infringe one or more of our five principles.

If we stop to think about the purpose of the committee, it quickly becomes apparent that the committee does have a double agenda. One is that it should be there to support the civil rights of citizens, but at the same time it should be free to criticise Parliament, bureaucracies and the executive. It is the support of the civil rights of citizens that is perhaps the committee’s greatest challenge and which naturally brings us to the liveliest debate that I think might exercise us this afternoon.

Any committee that has functioned well for a very long time obviously has to face the future and look at whether our terms of reference need to be refreshed or we should go on the way that we are going. The future role of the committee has been a topic of particular interest this year to the committee members and externally. Earlier this year, during the 42nd Parliament, the committee commenced an inquiry into its future role and direction. The terms of reference for the inquiry were to inquire into and report on:

- (1) The future direction and role of the Scrutiny of Bills Committee, with particular reference to:
 - (a) whether its powers, processes and terms of reference remain appropriate;
 - (b) whether parliamentary mechanisms for the scrutiny and control of delegated legislation are optimal; and
 - (c) what, if any, additional role the committee should undertake in relation to human rights obligations applying to the Commonwealth.

Then, on 21 April this year, the government announced, as part of its Australia’s human rights framework policy, the establishment of a new parliamentary joint committee on human rights to review legislation against human rights obligations. The case for improved and comprehensive parliamentary scrutiny of human rights in Australia has been recognised by a number of international human rights bodies, a range of non-government organisations and of course by the federal Opposition. The coalition’s submission to the Brennan committee that looked at what Australia may do in relation to better scrutiny of human rights concluded: ‘A statutory bill of rights is not the best model for advancing human rights in Australia’. I am sure that excites a

great deal of different opinion and is itself rightly the subject of debate. But, for the purpose of the government's response to the Brennan report, the coalition have adopted as a preferred mechanism, as part of our policy for advancing human rights in Australia, that of enhanced parliamentary scrutiny, based on a model which includes the establishment of a new parliamentary committee—either a joint standing committee or a standing committee of the Senate—invested with the specific task of considering legislation from a human rights point of view and reporting to the Parliament on any possible incompatibilities between a bill before the Parliament and the international human rights instruments to which Australia is a party. It is envisaged that this committee would operate within the framework of a human rights Act which would ensure greater consideration of human rights in the development of legislation and policy in the parliamentary process in general.

It is very interesting, because the question then arises: if our committee already has a remit to look at some aspects of human rights, what will this committee, if it got up, actually do? Much guidance as to how such a committee would work can be drawn from our colleagues in the UK—it is nice to see it going back the other way—where a Joint Committee of Human Rights was established in 2001. That committee has six members from each house of Parliament. Its somewhat broad mandate is to consider human rights issues within and outside the legislative process, excluding consideration of individual cases. However, this idea of a parliamentary joint committee or a Senate human rights committee is not, we think, without its own weaknesses. It should be noted that a parliamentary joint committee would, in all likelihood, be House of Representatives and possibly executive-dominated, although who knows with the current configuration, and may hinder its practical effectiveness. For example, the Senate may well be inhabited in amending legislation on civil liberties grounds when legislation has already been approved by a joint committee. Another question is whether this human rights remit would really look at more than just potential technical breaches of human rights, which is, of course, what our committee does, and whether it would actually venture more into policy.

It goes without saying that the work of the parliamentary joint committee on human rights is likely to have an impact on our remit, no matter which way it goes, and on the work of the Scrutiny of Bills Committee. In the event that it does not proceed for any reason or the establishment of a joint committee on human rights does not get up when the legislation is argued or, indeed, does not proceed for any reason, we feel that the resources and mandate of the Scrutiny of Bills Committee and the Regulations and Ordinances Committee could be augmented to undertake examination of human rights issues.

Let me just remind you that at present the committee scrutinises bills from the perspective of protection of traditional common law rights and liberties. The question is whether, in the absence of a statutory bill of rights, the committee's terms of reference are really sufficiently wide enough to enable it to scrutinise international human rights. While there is nothing in the Scrutiny of Bills Committee's current terms of reference to prevent its consideration of such rights, I think a common view held is that, if this approach were to be followed, its terms of reference would need to be augmented in order to properly safeguard the rights and liberties that would otherwise be included in a bill of rights. So, before the Scrutiny of Bills Committee develops a position on its future role and direction, we must thoroughly consider the content of the enabling legislation and, in the case of the establishment of a parliamentary joint committee on human rights, the ways in which, if any, the work of the two committees could duplicate their functions or otherwise be similar.

The scrutiny committee envisages that it would not simply repeat work that was being undertaken by a parliamentary joint committee on human rights; it would continue to be a decision for the committee on a case by case basis whether it also needed to comment on bills and to determine the content of those comments. This is particularly relevant in view of the likelihood that the parliamentary joint committee on human rights would be subject to control by the government, whereas the Scrutiny of Bills Committee has an Opposition chair and takes a consensus approach to its work. These are big questions for us to tease out when looking at the future of the scrutiny committees.

It is also important to remember that, while some of the remit for each committee has the potential to overlap, the committees will also have some very different areas of responsibility. The Scrutiny of Bills Committee is looking forward to continuing to fulfil its role as one of the key providers of legislative scrutiny for the Senate. In doing so, as a committee of an independent house of Parliament, it will strongly guard its rights to take any appropriate action to meet its charter. Therefore, the scrutiny committee plans during this Parliament, with the concurrence of the Senate, to continue to inquire into its future role and direction, taking into consideration the impact of the enabling legislations for the parliamentary joint committee on human rights.

In conclusion, it is fair to say that the Scrutiny of Bills Committee, despite its long and illustrious history, is very much a work in progress and that is precisely what it should be when you look at the role and future of Senate committees.

Ms VANSTONE — My thanks to the Department of the Senate for the invitation to participate today and join with former and existing senators in confirming that the

lower house is not called that without good reason. One example, and there are many that can justify that claim, is the Senate committee system. There can be no better group of committees than the scrutiny committees as an example of why we are so much better. I have enjoyed my time in Australia since returning from Rome, in particular watching those dear people in the lower house talking about a new paradigm with the independents and the minor parties. Well, the Senate has had that for donkey's years and managed it quite well. The Senate has very good systems for managing it and the experience at managing it. It is new to the Reps, I know. It is like a new galaxy for them. But they will adjust and manage, and life will go on.

But it has been of interest to me to note how few Reps people have even referred to the fact that this has been in the Senate for a long time, as if the Senate does not matter. In fact, all the bills that become Acts of Parliament have to go through the Senate. For all my time in the Senate, bills went through a house of Parliament that was littered—and I won't say 'cluttered', that might be unkind—with minor parties and independents. But I will move on from the lack of ability of the House of Representatives to understand how the world really works.

The benefit of these two committees is that they really do work. All the Senate committees occasionally work in a very bipartisan fashion. There would be plenty of occasions where that has happened. But it always happens with these committees. They are not there to be used for party political purposes and that has clearly been understood by the membership. Before I left, if the Regulations and Ordinances Committee had ever taken a motion before the Senate to have some regulations disallowed, they always won.

So, when I was a minister, if a new young Liberal—wet behind the ears, got a job in the minister's office, very happy, very keen, got a mobile phone and therefore very important!—came and said, 'I've got some stupid letter from some committee saying you should change such and such', I would just say: 'Change it. Have a look at it. If it's completely ridiculous, we won't do it. But I think you'll find there will be some merit in that, and we're going to lose anyway, so let's do it'. That is not easily understood by people until they have had some experience of it.

Not so with the Scrutiny of Bills Committee—that works in a different way. It does not have that overriding threat of a committee that is not lost. I do not know if it has lost since I have been here. The Scrutiny of Bills Committee looks to point out to Parliament where these problems are and, sure, negotiates with the minister through reports and correspondence, but in the end it is left up to the Parliament to decide, because they are commenting on a substantive Act of Parliament and that is for the Parliament to decide upon, whereas the Regulations and Ordinances Committee has

this charter to really scrutinise the regulations and ordinances and to strongly advise Parliament by moving a resolution if it thinks something has not gone the right way.

The things that these two committees look at sound similar but they are a little bit different. Let me just run you through what the Regulations and Ordinances Committee looks at: is the delegated legislation in accordance with the letter and spirit of its enabling legislation?; does the legislation trespass unduly on personal rights?; are discretionary decisions made, subject to adequate appeals?; and does ministerial lawmaking deal with significant issues, the merits of which Parliament itself should look at? They are the sorts of things that the Regulations and Ordinances Committee looks at. I have picked out just a couple of examples of things that have been looked at, because it is nice to talk in terms of principles but it is perhaps handier to have a good understanding of some of the practical issues. One was where the Health Insurance Commission sought to breach medical confidentiality by authorising the completely unlimited transfer—I am not suggesting that there could not be any transfer—to the Department of Social Security of any information held by the commission. That meant that any of your medical records could be sent to the then Department of Social Security. As you might imagine, there was a bit of argy-bargy about this and the Minister for Health agreed to the disallowance of the regulations without debate.

On another occasion the right to trial by jury was, in effect, restored by this committee. It did only relate to the ACT—and I do not mean to diminish the ACT by saying ‘only’, but that is where the powers were. Magistrates had the jurisdiction to hear minor indictable property offences, but, if the property was the Commonwealth’s, they might value it and that might give them the opportunity to decide whether you have got a trial by jury or not. Again, there was a bit of argy-bargy, and there was lots of commentary by lots of people, but in the end it was restored.

In another context, the committee looked at the repeal of some provisions which permitted a limited search warrant. There is a reason we have search warrants: it is so that people cannot come barging into your house or your office and go through all your personal stuff looking for anything they might be interested in—or might not be interested in in the first instance but subsequently become interested in. Anyway, there were provisions which permitted a limited warrant to be deemed to be wider than its express terms if, in the course of its execution, officials believed it should be widened: ‘This is fantastic! We’ve got permission to look in the matchbox but, now that we’ve got here, we think there are a few things we want to look at in the cupboard and under the sink and under the bed and perhaps in those computer files so we will just deem that permission we got is wide enough to do that’. That renders completely

useless the whole purpose of asking you to get a warrant. What would be the purpose of doing it?

So, these things need to be done by a committee. There are so many miles—a galaxy—between a cabinet decision for a bill to be brought into Parliament and it actually becoming law in practice with all the attendant subsidiary legislation that goes underneath that. An army of people need to be brought in with special skills to decide what forms to fill out, how you apply, what happens if you have not applied on time and what appeal rights you have got. There are masses of ways in which you and I are affected by the application of the law. It is not that we necessarily disagree with the main bill and its intent but, in the implementation of it, there is plenty of risk—or opportunity—for things to go badly wrong. That is why we have these two committees.

Senator Coonan gave you the outline of the tasks of the Senate Scrutiny of Bills Committee, but perhaps I could give you some examples of how a parliament can unintentionally put undue trespass on personal rights and liberties. One can be by retrospectivity. We all understand that in tax, because there have been long issues about that. We could take hours to debate it but we understand that, if we allow it to wait until the bill passes Parliament to have any effect, there will be all types of gouging and opportunities by accountants and lawyers, so we have some understanding of that. But there are other ways it can be done—legislation by press release. Abrogation of privilege against self-incrimination is an example, as is reversing the onus of proof. When you think a ship is the only one down in the Antarctic and there is an oil spill, is it okay to say, ‘Well, you prove it wasn’t you’? Is it fair enough to keep reversing the onus of proof because it is convenient and easy and too hard to prove that they are at fault? The temptation is to say, ‘Yes, it is, because we want to protect the environment and that was the only ship there’. But if you keep nicking at the reversal of onus of proof and just keep cutting little bits in that artery of freedom then eventually, out of all the little bits, you get the flow that would come from the equivalent of a gash to that artery of freedom. Anyway, there may well be others. If I may, I will come back to some examples of some of those.

Another reference that was mentioned was the undue dependence on insufficiently defined administrative powers. I will come to an example where one body sought to give itself the capacity to delegate all its powers to a person—anybody. It could be a lunatic; it didn’t matter. It could be any person. What would be the purpose in establishing a statutory authority with all the rules associated with it if it could then give all its powers to anybody? This is what you might think of as nitpicking but it is not nitpicking. It is actually protecting your and my freedom. It is making sure of what Parliament intends when it does the sort of high-level debate at the second

reading—I know some people think it is not always high level, but you know what I mean—on the principled issues. Parliament never intends for these kinds of little things to happen, and they do. If you do not have these sorts of committees looking at them, you will not have the protection against what is really just the might of the bureaucracy, not intending to do you and me over—not at all, because they are citizens too—but, without thinking, wanting to implement the purpose of the Act and inadvertently, I hope, treading on your and my civil liberties.

I just want to come back briefly to the concept that I started on—that is, they are not called the lower house without good reason. The Senate committee system is the best example of that, and these scrutiny committees are the best examples of the Senate committee system because there is nothing party political about them. This new news where they want to have a lot of group hugs and sing ‘Kumbaya’ or something happens every week in the Senate. People sit down and work together for the betterment of our political system. My first experience was on the Senate Standing Committee on Regulations and Ordinances, when someone said to me, ‘I have a great committee for you as a new senator’. I said, ‘Really?’ I thought it might be legal and constitutional affairs or something I really wanted. They said, ‘Regulations and ordinances’. I said, ‘Oh, okay’. I was not that happy about it, but later I was really happy, because for a new senator it is a perfect committee. You get an understanding of the best the Senate can do and you get an insight across all portfolios because they all have regulations and ordinances and statutory rules and everything else.

As I recall, the chairman or acting chairman at the time was a fellow called John Coates. I think it was the education department that had been niggling: their reply would always come in at the last minute and they were never willing to come early and discuss things. They were always trying to trim down our time. In the end the committee stood firm. The department said: ‘Look, the minister’s inclined to agree, but we just don’t know where he is. He’s overseas. We can’t get him’. Having been a minister, I know that is rubbish; they know exactly where their minister is every minute of the day. John Coates was not a tall man, but he rose to his full height and said, ‘I don’t care if you don’t know where he is, but if you don’t have an answer by the time we go to print tonight then this is being disallowed tomorrow; it’s just that easy’. They said, ‘But we don’t know where to get him’. He said, ‘That’s not my problem’. Bless their little socks, they came back 40 minutes later and said, ‘We’ve found him; it’s all okay’. ‘Good, thanks’. Why is that important? Because it is a Labor senator to a Labor government, because the committee do not work on a basis of using either their power or their commentary for party political purposes.

Another example I would like to raise with you vis-à-vis the Senate committee system involved Senator George Georges. It is admittedly an estimates example, but I think

the examples that new senators get early on affect their attitude and approach for the rest of their time. I too had a Button story this morning. I had been asking him a question and I got a bit of a curt reply. I do not know whether he was just fed up waiting for lunch or whether I had found something, but if I had found something then I did not know what I had found. So I did not quite understand. I thought, 'Something's going on here; I'll ask it again', and I got exactly the same answer—not reworded but a bit more curtly spoken. I think that it was the third time when he got really snappy. George Georges was the chairman, and I thought, 'Okay, let that go'. Senator Georges stopped and he looked at the minister, who was Button, and looked back at me and said: 'You don't mind, do you? I don't think you're really happy with that. No, actually I don't think she's happy with that. Minister, you'll have to do better than that'. I do not know that that would happen now on an estimates committee. I do not think I saw it that often, but there again was a Labor chairman saying to a Labor minister: 'Not good enough, sport. You're in here. You were asked a question. You didn't make it clear. You're getting away with it because it's a new senator, and I'm not going to let you get away with it'. So that was a really good example.

The bureaucracy in many ways can try to fob off senators, like the people who said to Senator Coates: 'Sorry, we don't know where the minister is. We'd like to agree. Will you take an undertaking that we'll do it at the next round of ordinance or regulations changes?' Yes, I've heard that before! It is like, 'The cheque's in the mail'. I was at an estimates committee hearing, and I knew that the Attorney-General's Department had a terrible, terrible problem with the security of their emails. I knew that because I had received what the *Financial Review* described as the biggest leak in Commonwealth history, not by the content but by the size—discs and discs and discs, which I had given back to them, because I figured that this guy was not a whistleblower; he was just a crook stealing information. It was quite a story, but that is for another day. Anyway, I knew they had real, serious problems. So we were in estimates and I said to Stephen Skehill, who was then the secretary of the department, 'I'd just like to ask a question'. I had already returned the discs to him. We had the Federal Police looking at them, touching them with pencils and things. In the end they caught the guy and he went to the slammer for a while. I said, 'I have a quick question: how's the security of your email system?' I thought, 'This'll get him; there'll be a twitch or something'. There was no facial expression whatsoever. He just said: 'It's very good, thanks. We're very confident in the security of our email system'. He and I knew that up until a day and a half before they were not. They had made some changes, and it had been a complete disaster. So I knew how close that question was, and he knew. I wanted to see his face, and I saw it, and it gave away nothing. It predetermined me to understand that they do not really have to tell you anything if they do not want to.

Last but not least, these committees can only work because of the Senate secretariats and the work that they do. Do not let any senator tell you they read all the regulations and ordinances; they do not, nor do they read all of the bills. But the legal advisers do, and if you work on these committees then you get the opportunity to work with people like Professor Douglas Whalan, now deceased, and Professor Jim Davis—I do not know if he still works with us or has retired. These are fantastically intelligent, well-trained people who know what they are looking for and can serve it up on a plate and say, ‘Here are the problems; you’re the guys that have to decide what to do with these problems’. The legal advisers and the secretariat do an enormous amount of work.

Let me just quickly run through a couple of these examples. Retrospectivity: a customs and excise legislation amendment bill. Everyone was happy with the Diesel Fuel Rebate Scheme until the court started to widen those who could apply, so the government of the day introduced a bill to say, ‘Actually, it’s only these people who could apply—back a few years’. The law had been clear up to that point. At that point, the government said, ‘Actually, we don’t think that’s what we meant, so we’re going to make a law now to change what we meant back there, meaning a whole bucket of these people in here would not get the diesel fuel rebate’. That is not something that anybody other than those who wanted the diesel fuel rebate were interested in. It was not a front-page issue, but it was an issue about what the law was and whether you should let a government get away with changing it.

The Crimes Amendment Bill was one. We used to allow the cops to go and let drugs run and money run and undercover people participate, until some smart lawyer from my state said: ‘Hold on. You can’t prosecute this guy. You had dirty hands. You were in this drug deal yourselves’. So they changed the law. They changed the law, which would have made illegal acts legal for the purposes of those controlled operations. You might say, ‘Well, that’s a good thing, but if it wasn’t legal at the time why should it be made legal later?’ Well, because we want to put druggies in jail. My time is up. Thanks.

CHAIR — We have another session starting in five minutes or a little bit less, so we have time for discussions, questions, queries, challenges, special ops. We can turn the tape recorders off; you can speak honestly and openly!

QUESTION — I would like to draw your attention to something that we should all have—it was there at the beginning—called the Magna Carta. That is outside of manipulation. It has come down as a safeguard against everybody. How about we read that and have an argument about it? Isn’t it time we found out on what basis we are standing? That is my question. On what basis is this country standing?

CHAIR — Thank you. Senator Coonan, we have a charter of rights.

Senator COONAN — It is a very good point. But, if I may say so, what we are looking at today is how the Senate committees can actually safeguard individual rights and liberties, back to those very foundation principles of the Magna Carta—how we can stand up to the executive and what role these committees can play to ensure that citizens are not railroaded by excesses of the bureaucracy or by other forms of zeal, either by ministers or otherwise. It is the sort of system which I think from time to time needs to be looked at to see whether we can refresh it and whether it is actually meeting its aims and objectives. But certainly from the scrutiny perspective—I have been on both of these committees at various stages in my career—they are technical committees, but, as I think Amanda was outlining with some of her examples, you often find when you look at it that there are so many unintended consequences when you actually start to write down a piece of legislation.

When I was the Assistant Treasurer, for example, people used to say to me, ‘We’ve got to do something to simplify the tax system’. Who could seriously disagree with that as a proposition? So you would start out to do that. You would have principles-based drafting. And then you would have scores of people coming through the door saying, ‘Oh, we need a carve-out because we’re in the middle of doing this particular project’, or, ‘We need a different time frame, so it shouldn’t apply to us’. Then you would have other people saying: ‘It’s not certain enough. If you just base it on principles, we haven’t got enough certainty to make huge investment’. So these are the sorts of things I think are critical. You try and take legislation and make it meaningful, and this Senate does such an important job to make sure that with excessive zeal or unintended consequences you do not irrevocably affect people’s rights and liberties.

QUESTION — You spoke about the committees as assessing new legislation for human rights implications. One of the advantages of a bill of rights is that it can be used as a lens to look at existing legislation. Would there be any scope to implement that through a committee system?

Senator COONAN — It would depend entirely on the terms of reference for the committee to look at it. The government, for example, might decide that there would be an exercise to look through the lens of how the human rights arrangements would apply to existing legislation. But I would think that, unless there was specific reference to do that or the Senate of its own motion decided that that would be something the committee should look at, you would only be looking at legislation that would be coming to the Parliament in future.

CHAIR — Amanda, do you want to use that as an opportunity for a final comment?

Ms VANSTONE — Yes, I do. Whether it is through a committee, any charter of rights or whatever, I think the most interesting aspect of any list of rights is how you handle it when they come to compete with each other. Most of these conventions have exemption clauses—that is, the means by which you can get out of living up to the commitment—that are justified under the particular treaty. A classic example where there might be competing rights is in relation to the right to privacy, which we cherish so much in Australia—and which, I personally think, we have gone overboard with. An example is your right to tell, as I raised earlier, the health commission something and for it not go to social security, tax or whatever. How does that right to privacy sit against the child’s right not to be abused and our obligation to protect the child and therefore to share information between institutions? That is not something we are looking at or handling effectively in Australia at the moment. I think the greatest challenge is not what human rights should be but, when they compete with each other, which one you are going to put on top, because you will be put in that position one day.

CHAIR — Please join me in thanking the two speakers.