

Submission to the Committee for the Scrutiny of Bills by B Cooney

Parliament and the Senate Standing Committee for the Scrutiny of Bills

The Senate Standing Committee for the Scrutiny of Bills does crucial work. My submission is aimed at making a great Committee even better. This can be done in two ways: first by increasing the scope of its duties and secondly by giving its work increased profile and prominence.

The Committee's work is to identify and report on those instances where legislation compromises rights, liberties or civic fairness. That is an essential function of Parliament. Presently the dynamics between Australia's three arms of Government denies the Parliament adequate influence. Giving more impact to the work of the Committee would help correct that situation.

Parliament, the Judiciary and the Vindication of Human Rights

Government comprises the Parliament, the Executive and the Judiciary and its purpose is to provide Australia with a good civil life. The Community will best be served where the relationships between the three are in happy balance.

On the 7th August 1990 the then High Court Justice Sir Gerard Brennan talked lucidly of the relationship between the three arms of Government when he delivered the Blackburn Lecture entitled *"Courts, Democracy and the Law"*. It is set out at page 32 of the Australian Law Journal for January 1991. It raises issues relevant to the present inquiry in a most apposite way.

In his address Sir Gerard said that the Judiciary remains the most effective restraint on Government and that Parliament has come to lose much of its capacity to temper the actions of the Executive. He said

"As the wind of political expediency now chills Parliament's willingness to impose checks on the Executive and the Executive now has a large measure of control over legislation, the courts alone retain their original function of standing between government and the governed."[See page 35]

Call for Bill or Charter of Rights The People's Constitution

The perception that the Executive is restrained by the Courts rather than the Legislature gives impetus to the call for a bill or charter of rights. Such instruments now exist in the Australian Capital Territory and Victoria. During its present period in office the Commonwealth Government established the Human Rights Consultation Committee which reported to it on the 30th September 2009. I made a submission which I enclose.

It is well to refer to an address by Mr Isaac Isaacs, as he then was, to the Australasian Federal Convention in Melbourne on the 8th March 1898. He said: "*We want a people's Constitution, not a lawyers' Constitution.*" [See page 2002 of the Official Record of the Debates.] He later became a Justice, and then Chief Justice, of the High Court. He was certainly not against lawyers. He was for the people having confidence in the Parliament they elected. Indeed the Federal Parliament is the only institution the Australian people directly elect.

There is no Bill of Rights Responsibility of Committees

In any event Australia does not have a bill or charter of rights and this places considerable responsibility on Australia's parliamentary committees and especially on those which scrutinising legislation to see whether it breaches human rights. In respect of a particular piece of unfair legislation the Scrutiny of Bills Committee may provide the only remedy to its flaws.

Parliament Not to be Too Readily Discounted

The oversight the Parliament extends over the Executive can be too readily discounted. When Sir Gerard Brennan delivered the Blackburn Lecture he stressed that Parliament does exert a real restraint on the Executive, albeit not a sufficient one. [See page 36] There is still much to be done.

The Committee System and the Scrutiny of Bills Committee

The committee system provides Parliament with a powerful means of checking the Executive. In particular the Senate Standing Committee for the Scrutiny of Bills gives notice to the Executive when it intrudes upon the rights and liberties of the people. It is a most important body. It should be given more power and prominence. It should be seen as vital to the quality of civil life in Australia.

Suggested Changes

In my view the following changes would assist the Committee in carrying out its duties.

1. The duties it has should be expressed to include that of testing bills and acts against Australian legislation enacted to preserve human rights and against the provisions of treaties, conventions and like instruments made for the same purpose and into which the Commonwealth has entered.

In my view there is nothing to stop the Committee from doing that now but for the reasons given below it should be expressed.

2. The resources available to the Committee should be increased to enable it to obtain added advice. Within that context it should gain the assistance of retired judges who have served on an appellate court.

3. More time should be given in the Chamber to the Committee's reports.

4. The Committee should have regular meetings with like committees and with other bodies working in the area of civil rights.

Proposed Amendments

I set out below order 24 with my suggested amendments marked in bold italics.

24 Scrutiny of Bills

(1)

(a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:

(i) trespass unduly on personal rights and liberties;

[ii] fail to meet the provisions of Australian legislation enacted to preserve human rights

[iii] fail to meet the provisions of treaties, conventions and like instruments entered into by Australia to preserve such rights.

(ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(b) The committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

(2)

(a) The committee shall consist of 6 senators, 3 being members of the government party nominated by the Leader of the Government in the Senate, and 3 being senators who are not members of the government party, nominated by the Leader of the Opposition in the Senate or by any minority groups or independent senators.

(b) The nominations of the opposition or any minority groups or independent senators shall be determined by agreement between the opposition and any minority groups or independent senators, and, in the absence of agreement duly notified to the President, the question of the representation on the committee shall be determined by the Senate.

- (3) The committee may appoint sub-committees consisting of 3 or more of its members, and refer to any such sub-committee any matters which the committee is empowered to consider.
- (4) The committee shall elect as chairman a member appointed to the committee on the nomination of the Leader of the Opposition in the Senate.
- (5) The chairman may from time to time appoint a member of the committee to be deputy chairman, and the member so appointed shall act as chairman of the committee when there is no chairman or the chairman is not present at a meeting of the committee.
- (6) When votes on a question before the committee are equally divided, the chairman, or the deputy chairman when acting as chairman, shall have a casting vote.
- (7) The committee and any sub-committee shall have power to send for persons and documents, to move from place to place, and to meet in private session and notwithstanding any prorogation of the Parliament or dissolution of the House of Representatives.
- (8) The committee may appoint with the approval of the President counsel to advise the committee.

[9] The Committee is to have available to it the ongoing advice of retired appellate court judges which is to be obtained with the approval of the President

- (9) The committee may report from time to time its proceedings and evidence and any recommendations, and shall make regular reports of the progress of the proceedings of the committee.

[10] On the Wednesday of each sitting week the chair of the Committee will speak for up to 15 minutes on the considerations of the Committee. Further debate about these matters will then take place for up to 30 minutes.

Parliament and the Committee to Test Legislation against Human Rights

The intent of these amendments is to have legislation, at an early stage of its history, tested against human rights instruments by an arm of Government namely the Parliament. The testing is to be carried out regularly through the Senate Standing Committee for the Scrutiny of Bills. This means that there is a consistent and persistent examination of legislation against human rights instruments from the beginning and without cost to those who might be affected by it.

Problems in the Legal Process for Vindicating Rights

This is in no way to discount the Judiciary. But it is to point out the flaws in using the Courts to vindicate rights. Any testing has to wait until the legislation is challenged in the courts. That can be a long, delayed and chancy process. It is frequently an expensive one.

The Judiciary is that arm of government which interprets and applies the law. But it does so only when a person raises an issue before it. Until that happens statutes which fail to meet the standards set out in the relevant instruments persist within the Australian Community. That is an unhappy state of affairs.

The Committee's Potential to Obviate these Problems

Considerable benefits would follow were the Committee to express an opinion about whether or not legislation failed to meet these standards at the time it was introduced. For example those proposing it could take such action as they considered appropriate at its birth. For example it could be debated in the Chamber with the Committee's comments available. For example the people of Australia would have the opportunity to express their thoughts and opinions about the legislation in a way not open to them were it being considered by the courts. They can lobby parliamentarians but not judges. They can take parliamentarian to task in a way unavailable to them in respect of judges.

Committee Must Give Senate Its Advice.

In its reports the Committee must always give the Senate its views about the legislation it has considered. Parliamentarians are well able to assess whether a bill or a statute transgresses upon human rights and liberties. They can give proper weight to their duties to the Public, to the Parliament, to their Party and to the principles underpinning civil rights.

Committee's Ability to Gain Advice

That the Committee must give its views to the Senate does not mean it must deny itself advice. In fact it has traditionally had legal assistance available to it. Were the Committee equipped with proper resources to obtain the advice of retired appellate judges as to whether legislation impinged upon relevant instruments protecting rights it would gain a judicial like opinion to assist it in making its own assessment of the particular bill or statute. The Committee could choose to publish the opinion. If it did a judicial like advice would be made public without the delays and cost involved in going to court.

Duties of the Parliament and Duties of the Courts

None of this in any way diminishes the duty and the powers of the Judiciary. But the duty and powers of the Courts do not relieve the Parliament of its duty to fulfill its role as protector of the rights and liberties of the people.