



AUSTRALIAN SENATE

STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

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28 October 2010

Dear Senator Crossin,

Thank you for the invitation to the Scrutiny of Bills Committee to make a submission to the Legal & Constitutional Affairs Legislation Committee's inquiry into the Human Rights (Parliamentary Scrutiny) Bills. The Scrutiny Committee takes the opportunity to provide a brief submission.

Information about the Scrutiny of Bills Committee

The Scrutiny Committee was established on 19 November 1981 by resolution of the Senate. Senate Standing Order 24 provides that:

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) 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.

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. Since its inception, the Scrutiny Committee has also taken the opportunity to engage an eminent legal adviser to assist it in its work.

The legal adviser and the Committee's Secretariat examine each bill against the five principles set out in Standing Order 24 and the Legal Adviser provides a written report to the Committee drawing the attention of members to the clauses of any of the bills that appear to infringe one or more of the five principles.

On the basis of this work, the Secretariat prepares a draft *Alert Digest*, which is usually considered by the Committee and tabled during each Senate sitting week. The *Alert Digest* contains a brief outline of each of the bills introduced in the previous sitting week and any amendments made to bills in that week. It sets out any comments the Committee wishes to make in relation to a particular bill or amendment. Comments are usually made by reference to the relevant principle.

Where concerns are raised in an *Alert Digest*, correspondence on the matter is forwarded to the Minister, Member, or Senator responsible for the bill inviting the Minister, Member, or Senator to respond to the Committee's concerns. When correspondence is received from a Minister, Member, or Senator, responding to a concern raised in an *Alert Digest*, the Committee includes this response in a *Report* to the Senate.

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', national scheme legislation and standing appropriations.

Since its inception, the Committee has operated in a non-partisan and apolitical way, on a consensus basis. In undertaking its scrutiny task, the Committee primarily sees its task as being to:

1. draw the responsible Minister's attention to any concerns and to request clarification or that consideration be given to addressing the a concern in a particular way; and
2. to advise Senators (and other readers of its reports) of the risk that particular provisions may infringe one or more of the principles in Standing Order 24.

Of course, whether legislation should be passed as introduced, or amended, is properly a matter for the Senate as a whole to decide.

Scrutiny of Bills Committee inquiry into its future role and direction

Earlier in the 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.
- (2) In undertaking this inquiry, the committee should have regard to the role, powers and practices of similar committees in other jurisdictions.
 - (3) The committee be authorised to hold public hearings in relation to this inquiry.

The Scrutiny Committee was originally due to report on 12 May 2010, however, when it became aware of the introduction of the Human Rights (Parliamentary Scrutiny) Bills it deferred further action until more was known about your report, about the terms of the enabling legislation and the ways in which, if any, the work of the two committees could duplicate their functions or otherwise be similar. The Scrutiny Committee inquiry then lapsed with the commencement of the 43rd Parliament.

Comment

It took considerable resolve from a number of Senators almost 30 years ago to establish the Scrutiny of Bills Committee with a view to introducing regular and consistent oversight of some of the basic principles of legislative good governance and improving the quality of legislation overall. The unique nature of the Scrutiny of Bills Committee at the time meant that it became the template for the establishment of other domestic legislative scrutiny committees. Recently former Senator Andrew Murray, who was a member of the Scrutiny Committee for many years, also observed in his submission to you that 'each committee develops a culture and spirit that is material to outcomes...with the result that the Scrutiny of Bills Committee's performance was enhanced beyond the bare requirements of its terms of reference.'

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 it will, as a committee of an independent House of Parliament, strongly guard its rights to take any appropriate action to meet its charter. The Committee envisages that it wouldn't simply repeat work that was being undertaken by a Parliamentary Joint Committee on Human Rights, but it would continue to be a decision for the Scrutiny 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, as a joint committee, the PJC on Human Rights will be subject to control by the Government, whereas the Scrutiny of Bills Committee has an Opposition Chair and it takes a consensus approach to its work. I also note that, while some of the remit for the each committee has the potential to overlap, the committees will also have some very different areas of responsibility.

The establishment of the PJC on Human Rights will provide many useful opportunities to enhance legislative scrutiny. The proposal is for the PJC to be operating in a new framework undertaking direct consideration of matters against international human rights conventions and this could lead to the creation of a consolidated body of precedents for human rights that are incorporated into Australian law. This will have the effect of continually improving the quality of law in the same way as the work of the Scrutiny Committee has contributed to providing a healthy framework for legislative consistency and ensuring that bills meet certain standards in relation to matters contained in its terms of reference.

The Scrutiny Committee plans during this Parliament, with the concurrence of the Senate, to continue to inquire into its future role and direction and it makes sense to the Scrutiny Committee for its inquiry to be informed by your report, by the enabling legislation for the PJC and by the content of the resolution relating to the powers and proceedings of the PJC, which are to be determined by resolution of both Houses of the Parliament. The Scrutiny Committee is particularly interested in considering the Legal and Constitutional Affairs Legislation Committee's views about managing any interaction, or dealing with any areas of potential overlap in responsibilities, between the two committees.

Senator the Hon Helen Coonan
Chair
Senate Scrutiny of Bills Committee