CHAPTER 2

History and outline of the work of the Scrutiny of Bills Committee

Background

Establishment of the committee

2.2 The Standing Committee for the Scrutiny of Bills (the committee) was established on 19 November 1981, by resolution of the Senate[1]. For the first six months of its operation, the committee shared the membership of the Constitutional and Legal Affairs Committee. On 25 May 1982, the Senate resolved to establish a separate membership for the committee.

2.3 During the first six years of its operation, the committee existed by virtue of a Senate resolution and, later, a Senate Sessional Order. This approach required that the committee be re-established at the commencement of each new Parliament. However, on 17 March 1987, with the adoption of a new Senate Standing Order,[2] the committee became a permanent feature of the Senate committee system.[3]

Committee membership

2.4 The committee consists of 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, nominated by the Leader of the Opposition in the Senate or by any minority parties or independent Senators.

2.5 The Chair of the committee is a member of the opposition party appointed on the nomination of the Leader of the Opposition in the Senate, meaning that the Government does not have a majority of members on the committee. The Chair may from time to time appoint a member of the committee to be Deputy Chair. The Chair, or Deputy Chair when acting as Chair, has a casting vote when votes on a question before the committee are equally divided.

Role and operation of the committee

2.6 The current role of the committee is to examine and assess proposed primary legislation against a set of specific accountability standards which are set out in the committee's terms of reference. The public interest is served by the committee’s work as it assists Parliament to consider whether all legislation meets minimum

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1 Senate, *Hansard*, 19 November 1981, pp 2418-2428.

2 Senate Standing Order 36AAA, which later became Standing Order 24.

3 Senate, *Hansard*, 17 March 1987, pp 775-776.

administrative law standards. In particular, the committee’s scrutiny work broadly focuses on:

- protecting individual rights and liberties;
- keeping the government accountable;
- maintaining administrative fairness and openness; and
- upholding parliamentary propriety.

2.7 The committee's terms of reference are set out in standing order 24 and require the committee 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.

2.8 When the committee identifies a potential problem with a bill, it alerts the Senate (by tabling its *Alert Digest* each sitting week) and follows the matter up with the responsible minister. Having received and considered the Minister's response, the committee then reports again to the Senate (by tabling its *Report* each sitting week). The Committee's initial ("traditional") approach was that it did not recommend particular action on a bill but simply raised issues for the Senate's consideration. It was open to the government to respond to issues raised, and individual senators could take up concerns raised by the Committee and draft amendments accordingly. How the committee's approach to its work has since evolved is discussed in *Chapter 3, The Committee's approach to its work*.

2.9 During the 39th Parliament, the committee secretariat also began systematically examining parliamentary amendments to bills. Amendments agreed to by either the House of Representatives or the Senate, as recorded in the *Votes and Proceedings* of the House of Representatives and the *Journals of the Senate*, are also evaluated and, where appropriate, drawn to the Senate's attention.

2.10 The committee takes a strictly non-partisan, apolitical and consensual approach to its work, which has a significant influence on the capacity of the committee to meet its objectives. Such an approach is possible because the committee's usual practice is not to focus upon policy intent but to undertake a focused examination of legislation in light of standing order 24.

The committee's legal adviser

2.11 Due to the technical nature of the committee's work, the committee employs a legal adviser to assist with the scrutiny of legislation. Associate Professor Leighton McDonald from the ANU College of Law of the Australian National University is currently the committee's legal adviser.

Committee's publications

Alert Digest

2.12 The *Alert Digest* is the document which first alerts senators to the committee's comments about bills and amendments. It contains a brief outline of each bill introduced in the previous sitting week together with any comments the committee wishes to make about a particular bill. The *Alert Digest* also includes comments concerning any amendments and notifies Senators of any information offences; standing appropriations and national scheme legislation in the publication. The committee finalises each *Digest* at its regular meeting on a Wednesday of each Senate sitting week and it is tabled in the Senate on the Wednesday afternoon or the Thursday morning of that sitting week.

Report

2.13 Correspondence received from a Minister, Member or Senator responding to a concern raised in an *Alert Digest* is considered by the Committee at its regular meeting every sitting week. The response and the relevant *Alert Digest* extracts are included in the committee's *Report* and are tabled either on the Wednesday afternoon or the Thursday morning of each sitting week.

2.14 The committee wishes to place on the record its thanks to Ministers, Parliamentary Secretaries, Members, and Senators for their cooperation and goodwill shown over the years in responding to the committee's concerns. Responding to the committee provides important material which the committee needs for the effective performance of its duties. This issue is discussed further in *Chapter 4, Powers and Sanctions*.

Other reports

2.15 On occasions the committee produces reports on matters which have been referred to it by the Senate. In addition to this inquiry, an example is the *Report into Entry, Search and Seizure Provisions in Commonwealth Legislation*, tabled on 4 December 2006.

2.16 Since October 1993, the committee has also produced *The Work of the Committee Report* which provides an account of the operation of the committee during a particular parliamentary period. The report includes examples of issues that have arisen under each of the five criteria against which the committee tests legislation. This document is discussed further in *Chapter 7, Communication*.

Publication on the internet

2.17 The committee's website is updated immediately following the tabling of the committee's *Alert Digest* and *Report* in the Senate each sitting week. These publications are at available http://www.aph.gov.au/Senate/committee/scrutiny/index.htm to anyone interested in the work of the committee, such as ministerial or departmental staff.

2.18 When an inquiry is referred to the committee by the Senate it is loaded onto the committee's website. A webpage is established where all relevant information concerning the inquiry is loaded. During the course of the inquiry, further information such as submissions, hearing programs and the report are progressively loaded onto the site.

Committee's monitoring role

2.19 At various stages since its inception the committee has, within its terms of reference, added depth to its role by monitoring and reporting on the following:

Monitoring of penalty provisions for 'information' offences

2.20 During the 38th Parliament the committee tabled its *Eighth Report of 1998* which reported on the appropriate basis for penalty provisions where legislation created offences involving the giving or withholding of information. This matter was referred to the committee following debate in the Senate about the appropriateness of specifying a penalty of imprisonment for failing to provide information to the Productivity Commission.[4]

2.21 In the *Eighth Report of 1998*, the committee recommended that the Attorney-General develop more detailed criteria to ensure that the penalties imposed for such offences were more consistent, more appropriate, and made greater use of a wider range of non-custodial penalties. On 14 December 1998, the Minister for Justice and Customs responded to the committee, advising that the issue of penalties for offences of this type would be dealt with progressively as part of the development of the Commonwealth *Criminal Code*.

2.22 Since the publication of this report the committee has continued to identify penalties imposed for these offences and details them in its *Alert Digests*.

Monitoring of national scheme legislation

2.23 During the 39th Parliament the committee began monitoring and reporting in its *Alert Digest* on the introduction of Commonwealth bills which proposed to give effect to national schemes of legislation (i.e. legislation which is uniform, or substantially uniform, and has an application in more than one Australian

4 *Journals of the Senate*, No.122, 3 September 1997, p. 2419.

jurisdiction). National scheme (uniform) legislation is discussed in more detail in *Chapter 6, Uniform legislation*.

Monitoring of standing appropriations

2.24 Following the publication of the committee's *Fourteenth Report of 2005*, which examined accountability and standing appropriations, the committee determined that as part of its standard procedures it would draw the attention of senators' to the presence in bills of standing appropriations. The committee does so under the principles (1)(a)(iv) and (1)(a)(v) of its terms of reference.

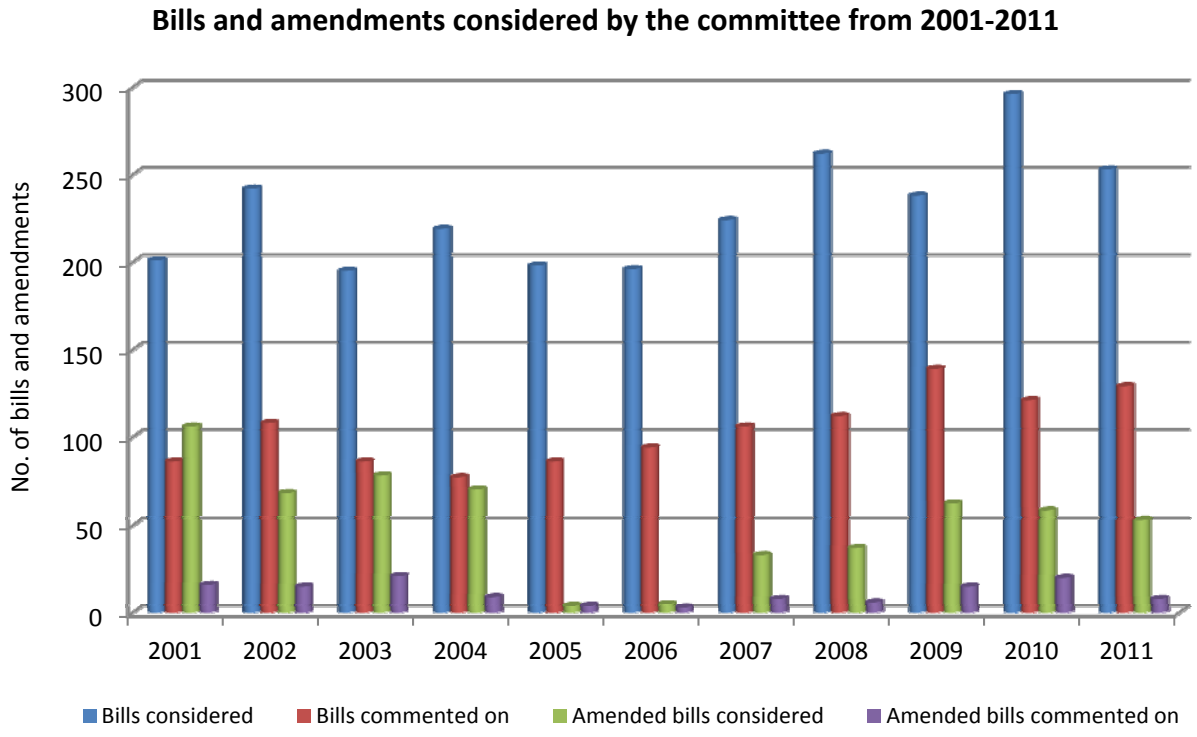
Workload of the committee

Scrutiny of legislation

2.25 From 2001 to 2011 the committee considered a total of 2524 bills and commented on 1144 or 45.3 per cent of these bills. During the same period 574 bills or 22.7 per cent all bills were amended. Of the amended bills the committee commented on 125 amendments or 21.8 per cent of these.

2.26 Figure 1 below provides a yearly overview from 2001 to 2011 of all bills and amendments considered, and of these, the number on which the committee made a specific comment.

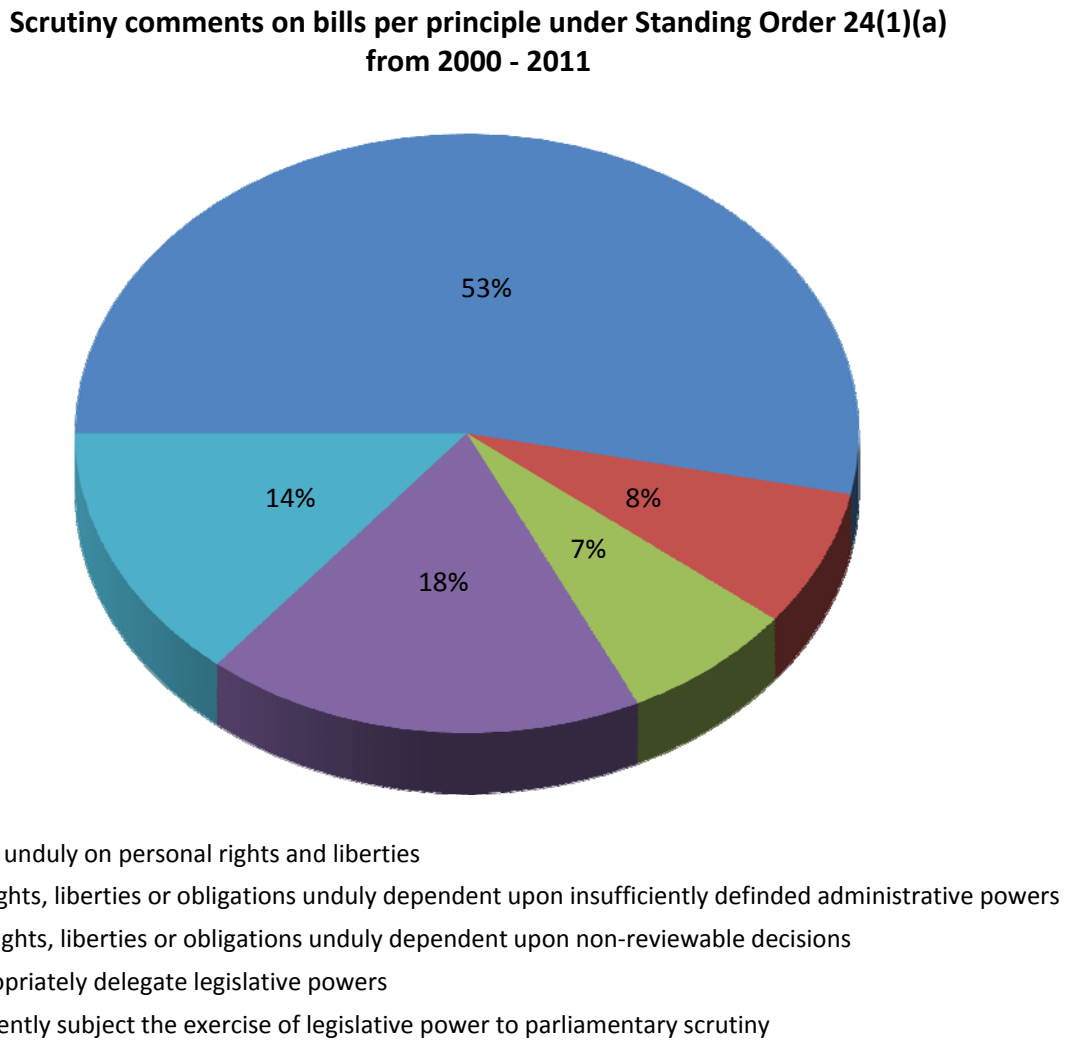
Figure 1



Comments on bills per principle under Standing Order 24(1)(a)

2.27 As noted earlier, the committee examines all bills which come before the Parliament against five principles under Standing Order 24(1)(a). Figure 2 below provides a breakdown, by principle, on comments made by the committee on bills introduced from 2000 to 2011 inclusive.

Figure 2



Source: Compiled from *Alert Digests 2000 – 2011*.

Inquiries conducted

2.28 Although the main function of the committee is to scrutinise legislation, another key aspect of the committee's work, which supplements its primary scrutiny role, is the ability to conduct inquiries into matters of importance. The committee has over the years conducted several inquires, which include:

- *The Appropriate Basis for Penalty Provisions in Legislation Comparable to the Productivity Commission Bill 1996* – report tabled on 25 June 1998;

- *Inquiry into Entry and Search Provisions in Commonwealth Legislation* – reports tabled on 6 April 2000 and 4 December 2006;
- *Inquiry into absolute and strict liability offences in Commonwealth Legislation* – report tabled 26 June 2002; and
- *The Quality of Explanatory Memoranda Accompanying Bills* – report tabled 24 March 2004.

2.29 The Government has recognised the importance of these inquiries by providing responses to four reports and adopting several of the committee's recommendations. For example, in the 2006 inquiry into *Entry and Search Provisions in Commonwealth Legislation* the committee made 14 recommendations, the Government accepted 10 recommendations fully and two in part. As a consequence of the recommendations in the report, amendments were made to the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. The amendments addressed many of the areas specified in the report.

Effectiveness of the committee

2.30 The committee's effectiveness can be broadly evaluated in several different ways, and the committee believes it is having a positive effect in each. The various indicators include:

- the number of bills and amendments commented on, and the ministerial responses received (quantitatively);
- the frequency of explanatory memoranda and bills being amended as a result of the committee's comments (remedial impact);
- having an impact on future legislation, whereby the committee raises awareness of scrutiny issues by bringing matters to the attention of Ministers or departments (preventative effect); and
- by the committee's views on certain issues and topics being included in documents which departmental instructing officers and legislative drafters are obliged to consider (educational impact). For example, the *Legislation Handbook* (issued by the Department of Prime Minister and Cabinet); the Office of Parliamentary Counsel's *Drafting Directions*; and *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (first issued by the Minister for Justice and Customs in 2004).

2.31 In support of the impact the committee's work has in shaping future compliance with minimum standards for legislation, the Clerk of the Senate observes that:

> Arguably, however, the committee's most effective work has been in influencing approaches to, and standards in, the drafting of legislation and the provision of supporting documentation (such as, explanatory memoranda). Although some of the committee's work in this area might be characterised as formulaic, there is a risk that, if the committee stepped

> away from this work, it would not take long for drafting standards to reflect the absence of a watch dog.[5]

2.32 In addition, people who have experienced the committee's work in different ways have made comments indicating the importance of the committee and its effectiveness. Mr Andrew Murray, a former senator and committee member, stated that the effectiveness of the committee is attested to as 'four in every ten bills is still attracting Committee comment, three decades after its inception'.[6] Mr Murray also commented that:

> ...some ministers now value the Senate Scrutiny Committee as a safeguard – as a means to help keep their own Departments up to the mark.[7]

2.33 In its submission the Rule of Law Institute of Australia's (RoLIA) stated that it 'has been a very strong supporter and interested observer of the Scrutiny of Bills Committee, so much so that we have issued a media press release congratulating them on their work in ensuring that our laws uphold the rule of law'.[8] In RoLIA's press release of 8 March 2008 it commented that it:

> ...applauds Senate Standing Committee for the Scrutiny of Bills on its assiduous reporting of potential breaches of important rule of law principles, bringing them to the attention of the Senate and relevant Ministers.[9]

2.34 Other comments made to the committee in the course of this inquiry include:

- the Queensland Law Society noted that it 'considers the committee performs an invaluable role in objectively reviewing new bills';[10]
- the Law Council of Australia stated that it 'greatly values the scrutiny function currently undertaken by the Committee';[11] and
- Professor Cheryl Saunders argued that '...the Scrutiny of Bills Committee has been the main catalyst for acceptance of the principle that proposed legislation should meet certain basic standards that might broadly be equated with the rule of law.[12]

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5 *Submission 20* [2011], p. 3.

6 *Submission 12* [2010], p. 2.

7 *Submission 12* [2010], p. 3.

8 *Submission 7* [2011], p.1.

9 Rule of Law Institute of Australia, 'ROLIA commends Senate Scrutiny of Bills Committee for upholding the rule of law', Press Release, 8 March 2011, available at: <http://www.ruleoflawaustralia.com.au/Downloads/Press_release_vocation__education_bill.pdf >

10 *Submission 21* [2011] p. 1.

11 *Submission 6* [2011], paragraph 8.

12 *Submission 9* [2011], p. 1.

2.35 However, it is also clear from submissions that there is a view that there is scope for the committee to improve its efficacy. This is primarily apparent from the extent and nature of the suggestions for amendments to the committee's terms of reference, to its approach to its work, and to its other processes.

Comment

2.36 Since its inception 30 years ago, the committee believes that it has played a valuable and vital role in the scrutiny of legislation in the Parliament. The committee has included the positive comments to this effect in the above paragraphs in order to demonstrate that key stakeholders believe that it is working effectively on the basis of its current terms of reference. In assessing bills against the principles outlined in standing order 24 and reaching a position about compliance with them, the committee is of the view that its strictly non-partisan approach to its work enables it to work effectively and productively.

2.37 However, as is evident from the fact of this inquiry, the committee is also committed to actively reflecting on its current circumstances (terms of reference and powers) and its philosophy (approach to its work and other processes it adopts). The committee is seeking to identify whether change is needed to modify or supplement the existing terms of reference and to continually review and reinvigorate its philosophy and processes to ensure that it remains relevant and valuable.

2.38 The combination of general support for the committee's work and an interest in improving its ability to scrutinise bills successfully underpin this consideration of the committee's future role and direction. In particular, the committee has examined the general scope of its work, its approach to its work and the technical detail of its terms of reference. The committee’s conclusions about changes which are intended to assist it to remain effective and appropriate in years to come are outlined in the remainder of this report.