CHAPTER 3

The Committee's approach to its work

- 3.1 In framing the terms of reference for this inquiry the committee was interested to explore not only practical and technical changes to its terms of reference, but also:
 - conceptual issues of relevance to its work; and
 - process issues that do not relate directly to the content of the committee's terms of reference in standing order 24.
- 3.2 The issues the committee considers falls into these categories that it has selected to discuss in this chapter are:
 - whether the committee's role in considering whether bills 'trespass unduly on personal rights and liberties' should be widened;
 - the committee's approach to its work; and
 - the timing of its reports.

Scrutiny of Bills and human rights

Introduction

- 3.3 A particular issue of interest to a number of submitters relates to the scrutiny of legislation for compliance with human rights. Many of the submissions address the question of whether the committee should be taking a different approach to considering human rights.
- 3.4 Standing order 24, which describes the criteria against which the committee scrutinises bills includes a requirement that the committee assess bills as to whether they 'trespass unduly on personal rights and liberties' (standing order 24(1)(a)(i)). The provision is based on a broad statement that does not specify particular rights, but which allows a range of rights falling within that description to be considered. Professor Bryan Horrigan's analysis of the scope of 24(1)(a)(i) is that it encompasses some international human rights standards, but also includes other scrutiny principles that go beyond this category and are not components of human rights, such as:
 - ...all other aspects of legislative scrutiny that are equally important legislation's proper respect of democracy, the institution of Parliament, and requirements of the rule of law in law-making...
- 3.5 Some examples of the types of issues the committee has commented on under this provision as a result of its scrutiny of bills include:

¹ Submission 11 [2011], p. 2.

- the use of coercive powers;²
- breaches of the privacy of individuals;³
- the right to vote;⁴
- the use of strict liability provisions;⁵ and
- the abrogation of the privilege against self-incrimination.⁶
- 3.6 There are, of course, numerous other examples, all of which are primarily considered to fall into the category of 'personal and political' rights, though standing order 24(1)(a)(i) does not cover all rights in this category. In the context of this inquiry, the question has therefore arisen as to whether the committee's terms of reference should be broadened or otherwise changed to articulate a detailed framework for the assessment of bills against human rights standards.

The First Inquiry

- 3.7 The first inquiry sought to directly address this issue. One topic the inquiry was to consider was 'what, if any, additional role the committee should undertake in relation to human rights obligations applying to the Commonwealth'.
- 3.8 However, in April 2010, before the committee could significantly progress the inquiry, the Commonwealth Attorney-General announced as part of the government's *Australia's Human Rights Framework Policy* the establishment, by legislation, of a new Parliamentary Joint Committee on Human Rights (PJCHR) to review legislation against human rights obligations. This decision arose in the wake of the National Human Rights Consultation.⁷
- 3.9 As a result, it was apparent to the committee that:

The work of the Parliamentary Joint Committee on Human Rights is likely to have an impact on the remit of the work of the Scrutiny of Bills Committee. It will be relevant for the Scrutiny of Bills Committee to

For example, see *Alert Digest No. 2 of 2011*, Combating the Financing of People Smuggling and Other Measures Bill 2011 and *Alert Digest No. 1 of 2006*, Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005.

For example, see *Alert Digest No. 1 of 2011*, Human Services Legislation Amendment Bill 2010.

For example, see *Alert Digest No. 1 of 2011*, Electoral and Referendum Amendment (Enrolment and Prisoner Voting) Bill 2010.

For example, see *Alert Digest No. 1 of 2011*, Stronger Futures in the Northern Territory Bill 2011.

⁶ For example, see *Alert Digest No. 14 of 2011*, Defence Trade Controls Bill 2011.

⁷ The Committee presented its report to the Australian Government on 30 September 2009. See http://www.humanrightsconsultation.gov.au/ for details.

consider the content of the enabling legislation before it can develop an informed view of its own future role and direction.⁸

3.10 The committee therefore deferred its 2010 inquiry pending the introduction of the relevant bills.

Parliamentary Joint Committee on Human Rights

- 3.11 The two bills that, among other things, sought to establish the PJCHR were introduced into Parliament in June 2010. They were the subject of a Senate Legal and Constitutional Affairs Legislation Committee Report, tabled on 28 January 2011, and they were passed and received the Royal Assent in November 2011. The joint resolution of both Houses of Parliament establishing the details of operation for the committee was passed in March 2012 and that committee now has in place all of the necessary legal and procedural foundations for its operation.
- 3.12 For the purpose of this report it is sufficient to note that in the scope of operation for both committees there are significant areas of overlap and significant areas of difference. Professor Horrigan has expressed his view of this as follows:

One committee (ie the Joint Committee) has a scrutinising role that is solely concerned with human rights and confined largely at present...to what I have termed the 'international consistency' dimension of compatibility in the earlier submission. The other committee (ie the Senate Committee) has a scrutinising role that includes but extends beyond the subject matter of human rights. This extension in the Senate Committee's role operates on two levels. First, it covers individual rights and liberties that might not strictly be conceived in international human rights terms. Secondly, it covers other non-rights-based aspects of scrutiny too, such as legislation's fidelity to other aspects of the rule of law in a parliamentary democracy.⁹

3.13 In light of the (then) proposed PJCHR, the committee made a submission to the Senate Legal and Constitutional Affairs Committee inquiry into the Human Rights (Parliamentary Scrutiny) Bills about its continued operation:

The [Scrutiny] Committee envisages that it wouldn't simply repeat the 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....I also note 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. ¹⁰

⁸ http://www.aph.gov.au/Senate/committee/scrutiny/future_direction_2010/interim_report/index.htm, p.1.

⁹ Submission 11 [2011], p. 4.

Submission made by letter from Senator Helen Coonan, then chair of the Scrutiny of Bills Committee, to Senator Trish Crossin, chair of the Senate Legal and Constitutional Affairs Committee, dated 28 October 2010, p. 3.

3.14 In its report into the bills, the Senate Legal and Constitutional Affairs Committee expressed the view that:

...the new joint committee should not prevent existing Senate scrutiny committees from continuing to perform their valuable roles. While there may be some overlap between the role of the new joint committee and these existing committees, the committee is confident that the committees will identify and develop constructive means of operating in tandem, and effectively managing any such interaction.¹¹

Comment

3.15 The committee wholeheartedly agrees that it is 'politically and legally desirable to avoid a situation in which the committee and the PJCHR are ever covering the same ground on questions of how human rights matter for scrutiny purposes'. The committee endorses the Senate Legal and Constitutional Affairs Legislation Committee view that:

...there are many circumstances where Senate, House and joint committees have overlapping responsibilities: parliamentary committees are often required to perform their functions in a manner that prevents unnecessary duplication and accords comity to the activities of other committees.¹³

3.16 Some time is needed to determine how the work of each committee unfolds. The scrutiny committee is of the view that the work of the two committees will complement each other, but that each has its place. In this regard, the committee endorses the view of the Clerk of the Senate that:

What enhancement [the PJCHR] may bring to the process of considering legislation it ought not be seen as a substitute for the work of the Scrutiny of Bills Committee.¹⁴

3.17 In relation to the scope of standing order 24, the committee notes the view expressed that it is open to the committee to consider the scope of the existing terms of standing order 24(1)(a)(i) ('trespass unduly on personal rights and liberties') more broadly. Calls have also been made for its scope to be defined more clearly. For example, former senator and former committee member, Mr Andrew Murray, argues that he has 'long thought scrutiny committees unnecessarily limit themselves as to the rights they report on' and that it is time for 24(1)(a)(i) '...to be interpreted a little more liberally'. Mr Murray also suggests that the committee should 'list those rights the

Senate Legal and Constitutional Affairs Standing Legislation Committee report of 28 January 2011 into the Human Rights (Parliamentary Scrutiny) Bills, p. 112.

¹² Submission 11 [2011], 2012 Supplementary submission, p. 5.

Senate Legal and Constitutional Affairs Standing Legislation Committee report of 28 January 2011 into the Human Rights (Parliamentary Scrutiny) Bills, p. 112.

¹⁴ Submission. 15 [2011], p. 2.

Committee agrees they should routinely check legislation against and report on. 15 Numerous other submissions called for changes to the standing order itself. 16

- The committee considered and noted these views. However, the committee is not persuaded at this time that change of this type is warranted. Given the committee's role and its commitment to taking a non-partisan approach to its work, the committee is generally satisfied with the terms of standing order 24(1)(a)(i) and is of the opinion that its current scope is appropriate.
- In addition, it is inherent in the view expressed by Mr Murray above that the existing terms of reference already allow some flexibility for the committee to consider emerging issues and to reconsider existing ones. With this in mind, the committee believes that it, with the assistance of its legal adviser, approaches the scrutiny of bills as to whether they 'trespass unduly on personal rights and liberties' appropriately.
- 3.20 In relation to the second issue raised by Mr Murray the committee does not, at this time, agree that a list of rights should be included in standing order 24(1)(a)(i). However, the committee is taking steps to improve awareness of matters of concern to it from a scrutiny perspective and this is discussed further in *Chapter 7*, Communication.

Committee's approach to its work

Introduction

Another key issue considered by the committee relates to a fundamental aspect of the committee's effectiveness: how it approaches its work. As the Clerk of the Senate has observed:

The committee's present inquiry provides an opportunity for it to examine and challenge...assumptions and to determine whether its traditional practices and approaches remain appropriate.¹⁷

3.22 More particularly, the Clerk of the Senate articulates the position as follows:

Since its inception, the committee has interpreted its role as being one of technical scrutiny. This is a self-imposed interpretation and there is considerable latitude for the committee to reinterpret its role within the existing terms of standing order 24.

¹⁵ Submission 12 [2010], p. 11. See also the views of the Law Council of Australia Submission 19 [2010], the Rule of Law Association of Australia Submission 7 [2011], former senator Mr Michael Tate Submission 2 [2010] and Uniting Justice Australia Submission 8 [2010].

See for example, Law Council of Australia, Submission 6 [2011], paragraphs 133 and 134, 16 p. 27 and Australian Lawyers for Human Rights, Submission 24a [2011], p. 5.

¹⁷ Submission 20 [2010], p. 2.

The committee's existing terms of reference in standing order 24 would allow it to develop new approaches to its work, should the committee wish to do so. 18

3.23 It is correct that the committee's method when scrutinising bills involves focusing primarily on technical scrutiny issues: the detail of the policy of any particular bill is primarily relevant only to the extent that it provides context for each provision. Taking this approach the committee has, over the years, articulated case-by-case (through its Alert Digests and Reports) a wide range of scrutiny principles. The approach allows the committee to focus on its commitment to taking a non-partisan approach to the scrutiny of individual bills, but this does not require that a policy vacuum exists. A former member of the committee and former Senator, Mr Andrew Murray, described the committee's approach this way:

Except in giving legislation context, the Senate Scrutiny of Bills Committee largely eschews consideration of the policy lying behind legislation. Instead it focuses on those policy measures that affect rights, as when it is government policy to curtail or advance rights; or it focuses on those policy measures that might allow the abuse of executive power. 19

Questions for the committee

- 3.24 A number of questions have been raised for the committee's consideration in relation to its approach to its work. The Clerk of the Senate has suggested that the committee may consider whether a reinterpretation of its role might involve the committee:
 - (a) undertaking forays into particular areas of policy concern (as it did, for instance, in the area of entry, search and seizure);
 - developing its own legislative policy, drawing particular 'lines in the sand' on (b) matters of concern, as it has done, for example, in relation to the reversal of the onus of proof or the use of strict liability offences;
 - (c) recommending particular amendments addressing matters of concern in legislation.²⁰
- 3.25 Other comments on this topic relate to a perceived timidity by the committee, and to questioning whether the committee should focus more on the policy aspects when undertaking its work. On the first of these two points former Senator Murray

Submission 20 [2010], p. 2. 18

¹⁹ Submission 15 [2011], p. 2.

²⁰ Submission 20 [2010], p. 2. The view in relation to inquiries is echoed by others, including Mr Andrew Murray, who suggests that more inquiries should be undertaken, and that recommendations for topics could be invited: submission 12 [2010], p. 2. In relation to suggesting amendments the Rule of Law Association of Australia also supports former Senator Murray's view that amendments could be proposed by the committee: submission 7 [2011], p. 3.

observed that 'scrutiny is not always welcomed...' and noted that 'scrutiny committees need to be more of a nuisance and less of a paper tiger'. The Castan Centre for Human Rights Law has suggested that:

The Committee should be much braver in making such decisions, rather than deferring to the whole of the Senate on most occasions, if it takes action at all.²²

3.26 In relation to the second point (about the role of policy), while noting the importance of the bi-partisan nature of technical scrutiny, Professor Horrigan has observed that he supports the:

...possibility of broadening the Committee's approach beyond technical scrutiny to include more policy orientated approaches...at the same time, the distinction between technical and policy-based approaches to scrutiny is often more blurry than bright, because many scrutiny issues have their own policy dimensions too. So, the way ahead lies in recognising that scrutiny raises its own policy-orientated questions and that this can and should be addressed more explicitly, without jeopardising in any way the trust that has developed between the various organs of government involved in legislative scrutiny. ²³

Comment

- 3.27 The committee notes the above comments and agrees that it is relevant to consider its approach to its work. The committee agrees with the Clerk of the Senate that this inquiry provides an opportunity for it to consider utilising the scope it has already (and has, at times, exercised in the past) to continue developing an appropriately robust approach to its work.
- 3.28 In this context, the committee notes that it has, over the past few years, moved on from the committee's initial approach of raising issues but not expressing a view on them. For example, when it is warranted it is now common for the committee to directly identify its concern and to broadly request an amendment to a provision.²⁴ This is consistent with the requests for the committee to take a more robust approach

22 Submission 9 [2010] p. 3

²¹ Submission 1, [2010] p. 3.

Submission 9 [2010] pp. 3 and 4. The primary focus of this submission was on whether the committee should have a wider remit to consider human rights issues, but this was a comment which was made in relation to the committee's work more generally.

²³ Submission 11 [2011], 2012 Supplementary submission, p. 2.

See, for example, *First Report of 2012*, Customs Amendment (Military End-Use) Bill 2011 in relation to merits review and parliamentary scrutiny, pp. 5 and 6. In relation to this bill the committee had 'request[ed] that the bill be amended to require annual reporting to Parliament on the exercise of the discretionary power in paragraph 112BA and [sought] the Minister's advice as to whether the bill can be amended to this effect'. The Minister replied to the committee that: 'I have written to the Minister for Home Affairs to seek his agreement with your recommendation...'.

to its work. Insofar as the issue of sanctions for non-compliance with the principles in standing order 24 relates to this issue, these are discussed in *Chapter 4*, *Powers and sanctions*.

- 3.29 Another related aspect of the committee's approach to its work raised for consideration is whether it is much of a step further for the committee to recommend amendments to provisions of concern. This is one of the ways in which the committee could offer a stronger view about potentially unsuitable provisions. The committee agrees that, in appropriate instances, it could extend its current approach of broadly suggesting the scope of an amendment to providing detailed wording for an amendment. The committee envisages that a practical issue may arise as a result of the sometimes extremely tight timeframes for the provision of its comments. However, in principle the committee endorses this suggestion. No amendment to the terms of reference is needed to implement this suggestion.
- 3.30 The committee also endorses the other specific matters mentioned by the Clerk of the Senate: undertaking forays into particular areas of policy concern through appropriate inquiries (as it has done in the past) and developing its own legislative policy on scrutiny issues (this is also an approach the committee has used in the past). In relation to inquiries, the committee is open to undertaking further inquiries, and to facilitate this it discusses powers relating to inquiries in the next chapter (*Chapter 4, Powers and sanctions*). In relation to developing its own legislative policy, the committee intends to explore this further in the context of consolidating and reviewing its statements of principle and issuing guides to its work, discussed in *Chapter 7, Communication*.
- 3.31 The final issue to consider in this section is the question of whether the committee should alter its current approach to increase its consideration of policy issues. In the committee's view, the fact that it has a highly technical focus to its work is appropriate, but it does not mean policy considerations are completely irrelevant or totally ignored. Nonetheless, the committee notes the Clerk of the Senate's observation that 'Recommendations about the content and operation of proposed legislation are now commonplace, and often made by Senate legislation committees on a non-partisan basis.' In that context, the committee acknowledges the Clerk of the Senate's point that:

...it is time to ask whether taking a more robust approach, or exploring policy areas of concern to the committee, would pose the same threat to the committee's existence as was apprehended in 1981.²⁶

3.32 In this regard the committee notes the way in which the directness of its comments on provisions of concern have evolved and believes that it is appropriate

²⁵ Submission 20 [2010] p. 2.

²⁶ Submission 20 [2010] p. 2.

for it to continue to cautiously develop its approach to its work, in line with its non-partisan tradition.

Timing of reports

- 3.33 A practical issue has been raised by the Clerk of the Senate in relation to:
 - ...whether there are ways of bringing forward, in appropriate cases, the publication of ministerial responses and the committee's concluding comments. This might be done by:
 - increased use of supplementary meetings outside of the committee's usual timetable...;
 - pre-authorising publication of ministerial responses...; and
 - settling and finalising reports by 'electronic' meetings or means during non-sitting periods (for instance, to give another committee inquiry the benefit of the Scrutiny Committee's views).²⁷
- 3.34 The committee is keen for its comments to be as useful as possible in the legislative process and endorses the suggestion to implement ways in which to bring forward the publication of its comments when this would assist in the consideration of legislative proposals.

Recommendation 1

3.35 That the committee should consider and publish its comments during non-sitting periods in appropriate cases.