

CHAPTER 4

Committee powers and sanctions

4.1 A number of suggestions for amendments to existing wording in the terms of reference or suggestions for additional provisions have been made to the committee in the course of this inquiry. The content of the committee's terms of reference is naturally an area of focus for the committee and it welcomed the thought that submitters gave to these issues.

Comments on the existing terms of reference

4.2 Before considering suggestions for changes to standing order 24, the committee notes that it was pleased to receive quite a number of general comments made in submissions supporting the committee's work, which the committee takes as a positive reflection on the terms of reference.¹ In addition, Professor James Allan observed that 'your present remit covers everything that needs to be covered and is wholly appropriate, in my view.'²

4.3 A more specific comment was received from the Administrative Review Council in relation to subparagraph 24(1)(a)(iv), when its Chair observed that it:

...recognises the ongoing need for the Committee to scrutinise and report to the Senate on legislative clauses which, among other things, inappropriately delegate legislative power.³

4.4 In fact, other than the suggestions made for standing order 24(1)(a)(i),⁴ no criticism or suggestions for changes were made to the other components of the committee's terms of reference outlined in standing order 24(1)(a). This meant that the nature of the proposals for amendments to the terms of reference were suggestions to improve the committee powers, either generally or in relation to suggested sanctions for non-compliance with its scrutiny principles.

Sanctions and related suggestions

4.5 One theme apparent from submissions was in response to the limited sanctions presently available to the committee to support its work to ensure that bills meet a minimum standard in relation to scrutiny issues. Currently, the terms of

1 For example, Professor Saunders observed 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': *Submission 9* [2011], p. 1.

2 *Submission 13* [2010], p. 1.

3 *Submission 19* [2011], p. 3.

4 Discussed in *Chapter 3, Committee's approach to its work*.

reference do not contain any sanctions for non-compliance. The only option available to the committee is to publicise its views on provisions, for which the committee relies on its *Alert Digests* and *Reports*.

4.6 Other committees have different options available to them. For example, due to the nature of the delegated legislation it considers, the Regulations and Ordinances Committee has the ability to seek the disallowance of instruments that do not meet the principles outlined in standing order 23. All legislative and general purpose Senate committees have the power to send for persons and documents in the context of conducting their work in public, which is authorised under standing order 25(14).

4.7 As a result of the lack of sanctions in the terms of reference, a number of suggestions were made to the committee with a view to strengthening the committee's ability to achieve its objectives as set out in standing order 24.

Obtaining information

Committee to table instances of a lack of response

4.8 A key aspect of the committee's work requires the provision of information from proposers of bills, especially those from the government. At some points of the committee's history Ministers have regularly failed to respond to the committee when requested to do so.⁵ It has been suggested that:

Such a failure should be highlighted and censured by the Committee, with the censure tabled in Parliament, as it reflects disrespect for the parliamentary process.⁶

4.9 Former Senator Murray goes further and suggests that the committee should table a statement that the duty Minister must respond to during the second reading debate with the intention that 'This would heighten Chamber interest in the Committee's concerns, and give those concerns an immediacy they lack at present.'⁷

4.10 The committee strongly agrees that a failure to provide information it requests is a significant concern. It agrees that if it is unable to obtain the information after a reasonable period it should (after advising the relevant minister of its intention) adopt the practice of notifying the Senate of this circumstance, which could include advice that it is unable to finalise its view because of the lack of a response from the relevant minister.

5 This has not been a feature of the committee's experience during recent years, but it is clear from comparing the committee's *Alert Digests* (initial committee comments) and *Reports* (in which responses received from Ministers are published) that there have been periods in which Ministers 'commonly failed to respond to the committee'. This was commented on by the Castan Centre for Human Rights Law, *Submission 9* [2010], p. 3.

6 Castan Centre for Human Rights Law, *Submission 9* [2010] pp. 3 and 4.

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

Recommendation 2

4.11 That the committee should, in appropriate cases, after a reasonable period of time and after advising the relevant minister of its intention, notify the Senate of any instance of a failure to respond to a request for information relevant to Senate standing order 24(1).

Recommendation 3

4.12 That Senate standing order 24(1) be amended to confirm that the committee should take the action described in the preceding recommendation.

Statements of compliance and non-compliance

4.13 It was observed that, in effect, the committee's views of concern, as expressed in its *Alert Digests* and *Reports*, amount to statements of a bill's non-compliance with scrutiny principles.⁸ A number of submissions suggested that this be taken a step further by the introduction of a requirement for bills to explicitly address whether scrutiny principles have been considered in the development of the legislative proposals. The Clerk of the Senate expressed the idea in this way:

One way in which the committee might seek to add to its effectiveness in this area would be to investigate the possibility of placing onus upon departments, when developing legislation, to record in accompanying explanatory memoranda that the committee's concerns...have been taken into account...A resolution of the Senate requiring the provision of a statement that the committee's views have been considered might focus departments' collective minds on addressing matters of concern to the committee and, at the same time, provide an ongoing spotlight on those concerns.⁹

4.14 The committee endorses the idea of implementing a measure which will focus the attention of the executive on the impact of a legislative proposal from a scrutiny perspective concurrently with its creation. This would clearly have a positive effect on the committee's (and the Senate's) preventative impact. It would also allow anyone reading an explanatory memorandum to readily identify whether a bill has been developed with scrutiny principles in mind.

4.15 While the committee supports the idea, a prerequisite to implementing the suggestion is that a comprehensive record of the committee's views about scrutiny principles will first need to be publicly available.¹⁰ As discussed in *Chapter 7*,

8 The committee also notes former senator and former committee member, the Reverend Michael Tate's, related suggestion (originally made in the context of government human rights consultations), to amend standing order 24(i)(a) to change the verb 'report' to 'declare', 'thus equating its function closer to the making of declaration of compatibility or incompatibility: *Submission 2* [2010], p. 4.

9 *Submission 20* [2010], p. 4.

10 *Submission 20* [2010], p. 4.

Communication, the committee is intending to formulate and publish documents to provide support to the executive to assist departments to understand and address scrutiny principles. This approach is intended to raise awareness of the standards expected by the committee, which it hopes will mean that explanatory memoranda increasingly come to comprehensively address all matters of concern to the committee.

4.16 In addition, the committee notes that the principle of comity means that it should be considered whether both Houses of Parliament will need to agree to a proposed approach before statements of compliance could be required (rather than requested by the Senate). Nonetheless, the committee supports the idea in principle and notes that it is a matter for further consideration at an appropriate time in the future.

Other powers

4.17 In addition to the suggestions discussed above, a number of powers intended to enhance the committee's ability to discharge its function effectively, but that are not in the nature of sanctions, were commended to the committee.

Permanent inquiry powers

4.18 One such example of a possible amendment to standing order 24 relates to inquiry powers. As noted by the Clerk of the Senate in her 2010 submission:

The committee has never possessed its own inquiry powers, but has been granted them by the Senate on a case-by-case basis. This reflects the general historical approach at the time the committee was established, though it is more common now for Senate standing committees to have these powers.¹¹

4.19 In line with the suggestion discussed earlier in this report that it is desirable for the committee to undertake more inquiries into matters of principle¹² the committee is of the view that a permanent inquiry power is also desirable. As explained by the Clerk of the Senate:

While they may not be needed frequently, the committee may consider that these powers would add some flexibility to its proceedings.¹³

4.20 This view is supported by a number of submitters, including former Senators Mr Andrew Murray and Mr Bernard Cooney, the Law Council of Australia and the Rule of Law Institute of Australia.¹⁴

11 *Submission 20* [2010], p. 6.

12 See *Chapter 3, Committee's approach to its work*.

13 *Submission 20* [2010], p. 6.

4.21 The committee therefore recommends that standing order 24(7) be updated to allow it to meet in public, and therefore be able to conduct inquiries into matters of principle without the need to seek further authorisation from the Senate as a whole.

Recommendation 4

4.22 That Senate standing order 24 be amended to provide the committee with permanent public inquiry powers in line with the relevant paragraphs of Senate standing order 25 relating to legislative and general purpose standing committees.

Ability to provide advice

4.23 This suggestion relates to ensuring that the committee is able to provide advice on possible or proposed legislative provisions that have not yet been introduced into the Parliament.

4.24 The committee agrees that this is an important ability, particularly as in other parts of this report it encourages the provision at an early stage of draft proposals (including publicly available exposure drafts) to it for comment.¹⁵ The committee is of the view that it has the ability to provide advice without the need to amend standing order 24. The committee therefore remains ready to be consulted and to provide advice as needed.

Minimum time for considering a bill

4.25 One possible amendment to standing order 24 that attracted considerable comment in submissions is whether the committee should have access to a minimum time in which to consider bills, with the implication that debate of a bill is deferred until the minimum period of time has passed or the committee has commented on the bill.¹⁶ Although a minimum period of time is not granted to Senate legislation committees inquiring into a legislative proposal as such,¹⁷ the referral of a bill means

14 *Submission 1* [2011] p. 11. See also Law Council of Australia: *submission 19* [2010], p. 17. Rule of Law Association of Australia: *submission 7* [2011] p.5 in relation to seeking submissions and oral evidence. Mr Bernard Cooney that standing order 24(7) 'be amended by adding after the phrase "in private" the words "or in public.' *Submission 10* [2011], p. 2. This would have the effect of allowing the committee to meet in public in relation to is supported by other submitters (Queensland Law Society, *Submission. 21* [2011], p. 2.) The Law Society of Australia also suggests that the committee be given a specific power to conduct public hearings and to take evidence in public. *Submission 6* [2011], p. 4.

15 See *Chapter 5, Framework bills* and *Chapter 6, Uniform legislation*, below.

16 See for example, the Law Council of Australia *Submission 19* [2010], p. 5, NSW Young Lawyers Human Rights Committee *Submission 18* [2010], p. 3, and Civil Liberties Australia, *Submission 7* [2010], p. 6.

17 The time for reporting is set by the Selection of Bills Committee, subject to the approval of the Senate as a whole.

that the bill cannot pass the Senate until the committee has reported to the Senate, a date for which is set by the Senate.

4.26 By contrast, it has been a feature of the committee's history that its work would not 'hold up legislation'.¹⁸ While the committee appreciates the support for its work that is inherent in this suggestion, it is of the view that, on balance, current arrangements are appropriate. In particular, the committee notes that:

- the committee usually reports to the Senate each sitting week on the bills introduced in the previous sitting week, however this is at the committee's discretion as it can set its own timeframe for considering and reporting on a bill (although noting that the passage of legislation is not deferred pending its views); and
- the committee is of the view that while its usual reporting arrangement does not allow time for an in-depth analysis of bills against scrutiny principles, it is valuable to the Senate and elsewhere for it to operate as an 'early warning' system, which can report reasonably quickly and alert others to the possible need for further examination of provisions of concern from a scrutiny perspective.

Technical amendments

Terms of reference to refer to 'provisions' of bills

4.27 In her 2010 submission, the Clerk of the Senate suggested an amendment to standing order 24 to address a technical issue in relation to the ability of the committee to consider bills after they have been introduced in the House of Representatives and before they are received in the Senate. As the Clerk of the Senate notes, although a mechanism is utilised by the committee which 'avoids unnecessary delay', the committee endorses the Clerk's view that:

It may be worth making a technical change so that the standing order refers to 'provisions of bills introduced in the Parliament', making the reference and reporting functions, and their timing, more transparent.¹⁹

4.28 The committee agrees with this suggestion and recommends that standing order 24 be amended accordingly.

18 *Submission 20* [2010], p. 2.

19 *Submission 20* [2010], p. 6.

Recommendation 5

4.29 That Senate standing order 24(1)(a) is amended to include a reference to the committee reporting in respect of the 'provisions of bills introduced in the Parliament'.

General committee powers

4.30 Differences between general powers of standing committees and scrutiny committees is apparent from the detail of the relevant standing orders, and this issue was highlighted by former senator and then Chair of the Senate Regulations and Ordinances Committee, Ms Dana Wortley.²⁰ The matters of relevance to this committee that have not been specifically dealt with elsewhere in this report are the discretionary appointment of deputy chairs (rather than their election – c.f. standing order 25 paragraphs (9)(a) and (b)), the power to print documents and evidence (c.f. standing order 25(16)), and the power to authorise the broadcasting of proceedings (c.f. standing order 25(19)).

Recommendation 6

4.31 That Senate standing order 24 be amended to provide that the Scrutiny of Bills Committee deputy chair is elected rather than appointed (in line with Senate standing order paragraphs 25(9)(a) and 25(9)(b)).

Recommendation 7

4.32 That Senate standing order 24 be amended in line with Senate standing orders 25(16) in relation to printing and 25(19) in relation to broadcasting.

20 *Submission 33* [2010], p. 3. The submission notes that 'These powers have been granted on a case-by-case basis', but that 'consideration could be given to each of these differences and the need for their retention'.

