

CHAPTER 1

BACKGROUND AND OPERATION OF THE COMMITTEE

Introduction

1.1 The Senate Standing Committee for the Scrutiny of Bills was established on 19 November 1981. On 25 November 1991, the Committee held a seminar to mark the tenth anniversary of its establishment. The published proceedings of that seminar, *Ten Years of Scrutiny*, includes a paper presented by the then Chairman of the Committee, Senator Barney Cooney. In that paper, Senator Cooney provided an update to a paper on the early work of the Committee, *The Operation of the Australian Senate Standing Committee for the Scrutiny of Bills 1981-1985*,¹ that was given in 1985 by his predecessor as Chairman, Senator Michael Tate. These papers provide an excellent overview of the early work of the Committee.

1.2 In October 1993, the Committee published a report on its work during the 36th Parliament.² Similar reports on the work of the Committee during the 37th,³ 38th⁴ and 39th⁵ Parliaments were published in 1997, 1999 and 2002 respectively. These documents are the main source of information for persons wishing to know more about the work of the Committee.

1.3 In a similar manner, this report outlines the work of the Committee during the 40th Parliament. In this context, it is useful to first re-examine the main features of the operation of the Committee, including the background to its establishment.

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- 1 Senator M Tate, 'The Operation of the Australian Senate Standing Committee for the Scrutiny of Bills 1981-1985', paper presented to the Conference of the Australasian Study of Parliament Group, Adelaide, August 1985.
 - 2 *Report on the Operation of the Senate Standing Committee for the Scrutiny of Bills during the 36th Parliament*. Parliamentary Paper No. 208/1993.
 - 3 *The Work of the Committee during the 37th Parliament: May 1993 – March 1996*. Parliamentary Paper No. 116/1997.
 - 4 *The Work of the Committee during the 38th Parliament: May 1996 - August 1998*. Parliamentary Paper No. 146/1999.
 - 5 *The Work of the Committee during the 39th Parliament: November 1998 - October 2001*. Parliamentary Paper No. 313/2002.

Report of the Standing Committee on Constitutional and Legal Affairs

1.4 On 9 June 1978, on the motion of then Senator Fred Chaney, the Senate referred to its then Standing Committee on Constitutional and Legal Affairs the following matter:

The desirability and practicability of referring all legislation introduced into the Parliament to a committee of the Senate for the purpose of examining the legislation and reporting to the Senate as to whether there are provisions in the Bills, whether by express words or otherwise, which:

- (a) place the onus of proof on a defendant in a criminal prosecution;
- (b) confer a power of entry on to land or premises other than by warrant issued according to law;
- (c) confer a power of search of the subject, land or premises other than by warrant issued according to law;
- (d) confer a power to seize goods other than by warrant issued according to law;
- (e) purport to legislate retrospectively;
- (f) delegate authority to amend any Act of the Parliament of the Commonwealth, or to create exemptions from the operation of any such Act, by means of subordinate legislation;
- (g) authorise administrative decisions affecting the rights and liberties of the subject without prescribing objective criteria to govern such decisions or without providing a right of appeal to a Court or competent Tribunal;
- (h) affect the liberty of the subject by controls upon freedom of movement, freedom of association, freedom of expression, freedom of religion or freedom of peaceful assembly; or
- (i) otherwise trespass unduly on personal rights and liberties, or make the rights and liberties of citizens dependent upon administrative rather than judicial decisions.⁶

1.5 Following its inquiry, the Constitutional and Legal Affairs Committee tabled its *Report on Scrutiny of Bills* on 23 November 1978.⁷ That report recommended the establishment of a Parliamentary Joint Committee to highlight provisions in bills that had an impact on persons, either by interfering with their rights, or by subjecting them to the exercise of undue delegations of power. The Committee recommended that, in particular, this new Committee should examine the clauses of all bills introduced into the Parliament to determine whether, by express words or otherwise, they:

- (i) trespass unduly on personal rights and liberties;

6 Senate, *Hansard*, 9 June 1978, p. 2689.

7 Parliamentary Paper No. 329/1978.

- (ii) make rights, liberties and obligations unduly dependent on insufficiently defined administrative powers or non-reviewable administrative decisions; or
- (iii) inappropriately delegate legislative power or insufficiently subject its exercise to parliamentary scrutiny.

Establishment of the Scrutiny of Bills Committee

1.6 As a consequence of the Committee's report, a Standing Committee for the Scrutiny of Bills was established on 19 November 1981, by resolution of the Senate.⁸ Its establishment was by no means easy and owed much to the work of its first Chairman, the late Senator Alan Missen. As Professor Dennis Pearce, the Committee's first legal adviser, told the Committee's tenth anniversary seminar:

The resistance ... was quite extraordinary. The Government had, pursuant to the ordinary arrangements that existed, the standard arrangements, responded to the [Constitutional and Legal Affairs] Committee's proposal and it opposed the establishment of this Committee. But the resistance to this suggestion was so great that you even find the Opposition refusing to allow Senator Missen to table the Government's response to the Legal and Constitutional Affairs Committee's proposals. And this was done not once but twice.

It really was quite remarkable that the Senate seemed to be worried by the thought that it might be able to engage in informed legislating. There was a problem in relation to the joint committee proposal and there was a problem in relation to the timing proposal. But they seemed to be used as much as anything to resist this notion that a parliamentary committee should actually begin to identify problems relating to legislation that were recognised as being inappropriate in delegated legislation.

Two more years went by and Senator Missen again moved to establish the Committee. He had had various forays along the way. He was supported, very strongly, in November 1981, by Senator Tate. The Government was still opposed to this proposal - this radical and wicked proposal. A compromise was suggested by Senator Hamer that the Committee should have a six-month probationary period, in effect, and that the work should be done by the Constitutional and Legal Affairs Committee. With that compromise, there was an acceptance of the Committee, and it finally did get under way⁹.

1.7 Professor Pearce's account of the establishment of the Committee was supported by the Hon Fred Chaney, formerly the Federal member for Pearce and a former member of the Senate:

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

9 Pearce, D. 'Opening Address' in Senate Standing Committee for the Scrutiny of Bills, *Ten Years of Scrutiny*, pp. 5-6.

I think that those who are concerned about the parliamentary institution can learn something from the history of this Committee. One thing is that a relatively obscure backbencher can have an influence on the way the institution operates. When I put forward this proposition, originally in a speech in February 1978 and then in a formal motion later in the same year, I had been in the Senate for less than four years and it was possible to get one's colleagues to focus on a proposal for change. We used the existing committee system (which again had been forced upon the Government of the relevant day by senators) to examine this proposition. Indeed, I had a wonderful and unusual chance to see both sides of the operation.

Shortly after the Senate committee commenced its consideration of the resolution [relating to the establishment of the Committee], I was appointed to the Ministry. This, some people say, is on the basis that, if you are enough trouble, that is one way to shut you up. I then sat in the Fraser Cabinet room as a non-Cabinet Minister and listened to the discussion of the proposition that we should have this Committee as was recommended by the Constitutional and Legal Affairs Committee. I then was in the embarrassing position of having to come into the Senate to defend a decision which I totally disagreed with: to oppose the establishment of the committee that I had advocated.¹⁰

I must say that it gave me great pleasure to find that senators really were not terribly impressed by the Executive Government's decision. They, in fact, took it into their own hands to establish this Committee, originally through putting its functions into the Constitutional and Legal Affairs Committee. I think the first thing to remember about it is that this was done not at the behest of or with the approval of the Executive Government, but against the objection of the Executive Government. Of course, the Executive Government's concern was that the legislative process would be slowed down, and effective and efficient government would be impeded.¹¹

1.8 Though the Constitutional and Legal Affairs Committee had recommended that a joint committee be established, the Scrutiny of Bills Committee has always been a Senate Committee. As noted above (paragraph 1.6), for the first six months of its operation, it had the same membership as the Constitutional and Legal Affairs Committee. On 25 May 1982 the Senate finally resolved to establish a distinct Scrutiny of Bills Committee.¹²

1.9 For the first six years of its operation, the Committee existed by virtue of a Senate resolution and, later, of a Senate Sessional Order. The relevant resolution or Sessional Order established the Committee and set out its terms of reference and its method of operation. A consequence of this approach was that the Committee had to be re-established at the commencement of each new Parliament. However, on

10 Chaney, F. in Senate Standing Committee for the Scrutiny of Bills, *Ten Years of Scrutiny*, pp. 24-25.

11 *ibid.* p. 25.

12 Senate, *Hansard*, 25 May 1982, pp. 2341-2342.

17 March 1987, the Committee became a permanent feature of the Senate committee system, with the adoption of a new Senate Standing Order 36AAA.¹³ This was in similar terms to the previous resolutions and Sessional Orders. When the Senate Standing Orders were re-numbered, it became Standing Order 24, which currently governs the operation of the Committee.

Senate Standing Order 24

1.10 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.¹⁴

1.11 The 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 (as nominated by the Leader of the Opposition in the Senate or by any minority groups or independent Senators).

1.12 The Committee Chairman is a member appointed on the nomination of the Leader of the Opposition in the Senate. The Chairman may from time to time appoint a member of the Committee to be Deputy Chairman. The Chairman, or Deputy Chairman when acting as Chairman, has a casting vote when votes on a question before the Committee are equally divided. However, the relative numbers of the political groupings represented on the Committee has proved to be of little or no significance to the Committee's operation. The culture of the Committee is, and always has been, non-partisan.

1.13 Standing Order 24 sets out various other matters, including the Committee's power to appoint subcommittees and its power to send for persons and documents. One of the most significant powers of the Committee is that of appointing a legal adviser.

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

14 Senate, *Standing Orders and Other Orders of the Senate*, September 2006, p. 21.

The Committee's legal adviser

1.14 Since its inception, the Committee has always taken the opportunity to engage an eminent legal adviser to assist it in its work. As noted above, the Committee's first legal adviser was Professor Dennis Pearce. However, its longest-serving legal adviser is the current appointee – Emeritus Professor Jim Davis, formerly of the ANU Law Faculty – who has been with the Committee since 1983. Professor Davis's tenure was interrupted by a 13 month leave of absence, during which time the Committee was assisted by the late Professor Douglas Whalan, also of the ANU Law Faculty.

1.15 At the tenth anniversary seminar, Senator Cooney noted the Committee's great debt to its legal advisers. He recorded the Committee's appreciation 'for the hours of hard work, largely undertaken over weekends, put in by these three eminent legal minds' and also expressed the Committee's gratitude 'to the Law Faculty of the Australian National University, from whence they have all been poached'.¹⁵

The operation of the Committee

1.16 As outlined above, the operation of the Committee is governed by Senate Standing Order 24. Within the limits set out in that Standing Order, the Committee has evolved a method of operation that is now well-established (refer below).

1.17 Copies of all bills introduced in either House of the Parliament, including private Member's or private Senator's bills, are provided to the Committee by the Friday of each sitting week. A copy of each bill, together with its explanatory memorandum and second reading speech, is then forwarded to the Committee's legal adviser. The legal adviser examines each bill against the five principles set out in Standing Order 24 and provides a written report to the Committee by the following Monday. This report draws the attention of members of the Committee, and of the Committee Secretariat, to clauses of any of the bills that appear to infringe one or more of the five principles.

1.18 Since the 39th Parliament the Committee Secretariat has also systematically examined parliamentary amendments to bills. Amendments agreed to by either the House of Representatives or the Senate, as noted in the relevant *Hansard* and recorded in the *Votes and Proceedings of the House of Representatives* or the *Journals of the Senate*, are also evaluated against the five principles set out in Standing Order 24 and, where appropriate, drawn to the Committee's attention.

The Alert Digest

1.19 On the basis of the legal adviser's report, the Secretariat prepares a draft *Alert Digest*, which is considered by the Committee at its regular meeting on the Wednesday morning of each Senate sitting week. The *Digest* contains a brief outline of each of the bills introduced in the previous week, and any amendments made to

15 Senate Standing Committee for the Scrutiny of Bills, *Ten Years of Scrutiny*, p. 16.

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. The *Alert Digest* is tabled in the Senate on the Wednesday afternoon or Thursday morning of each sitting week.

1.20 Where concerns are raised in a *Digest*, correspondence on the matter is forwarded to the Minister, Member or Senator responsible for the bill or the amendment, on the Thursday following the tabling of the *Digest*. This correspondence invites the Minister, Member or Senator to respond to the Committee's concerns. The Committee requests that any response be received in sufficient time for it to be circulated to members for consideration prior to the next Committee meeting.

Committee Reports

1.21 When correspondence is received from a Minister, Member or Senator, responding to a concern raised in a *Digest*, the Committee includes this response in a *Report* to the Senate. The *Report* contains the relevant extract from the *Digest*, the text of the Minister's, Member's or Senator's response, and any further comments or requests for information the Committee may wish to make as a result. As with the draft *Digests*, the draft *Reports* are considered at the Committee's regular meeting. The Committee agrees on their content and they are then presented to the Senate on the Wednesday afternoon or Thursday morning of each sitting week.

1.22 The Committee wishes to place on record its thanks to Ministers, Parliamentary Secretaries, Members and Senators for the promptness and comprehensiveness of the responses provided during the 40th Parliament. The co-operation and goodwill shown has greatly assisted the Committee in the effective performance of its duties.

1.23 Occasionally the Committee also produces reports on matters specifically referred to it by the Senate. For example, during the 40th Parliament the Committee held an inquiry and tabled a report on the application of absolute and strict liability offences in Commonwealth Legislation (see the Committee's *Sixth Report of 2002*, which is discussed further in Chapter 7).

Publication on the Internet

1.24 Copies of *Alert Digests* and *Reports* are provided to all Senators (on request), relevant Ministers and other interested persons and institutions. They are also available for download at www.aph.gov.au/senate_scrutiny.

Monitoring of penalty provisions for 'information' offences

1.25 In addition to its legislative scrutiny work, as outlined above, during the 40th Parliament the Committee also monitored the penalties specified for 'information' offences in Commonwealth legislation. In its *Eighth Report of 1998*, the Committee 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 after debate in the Senate about the appropriateness of specifying a penalty of imprisonment for failing to provide information to the Productivity Commission – an organisation that provided the Government with general advice on microeconomic reform.

1.26 In its report, 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*.

1.27 Since the publication of its *Eighth Report of 1998*, the Committee has continued to monitor the penalties imposed for such offences. Imprisonment continues to be provided for as an appropriate penalty for such offences on some occasions. During the 40th Parliament it was specified as a penalty in a number of bills, including the Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2003, the Building and Construction Improvement Bill 2003, the Inspector-General of Taxation Bill 2002, the International Criminal Court Bill 2002, the Surveillance Devices Bill 2004, the Textbook Subsidy Bill 2003, and the Water Efficiency Labelling and Standards Bill 2004.

Monitoring of national scheme legislation

1.28 During the 40th Parliament, Committee *Alert Digests* also monitored the introduction of Commonwealth bills that 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 jurisdiction) or decisions reached at Ministerial Councils. Examples of such bills during the 40th Parliament included the Jurisdiction of Courts Legislation Amendment Bill 2002, the Regional Forest Agreements Bill 2002, the Therapeutic Goods and other Legislation Amendment Bill 2002 and the Water Efficiency Labelling and Standards Bill 2004.

Consensus

1.29 Since its inception, the Committee has operated in a non-partisan and apolitical way, on a consensus basis. In reporting to the Senate, the Committee's practice is to express no concluded view on the provisions in a bill, but rather 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. In essence, the Committee sees its task as drawing the Senate's attention to provisions in legislation which may infringe people's civic entitlements. Whether the legislation should be passed as introduced, or amended, is properly a matter for the Senate to decide.

The Committee's workload

1.30 Each year the Committee analyses approximately 200 to 250 bills. The following table sets out the bills and amendments considered during the 40th Parliament.

Year	Bills considered	Bills commented on	Amended bills considered	Amended bills commented on	Digests tabled	Reports tabled
2002	245	108	68	15	16	16
2003	195	86	78	21	16	15
2004*	159	55	68	7	10	10
Total 2002- 2004*	599	249 (41.6%)	214	43 (20.1%)	42	41

*To August 2004.

The Committee's effectiveness

1.31 Determining the Committee's effectiveness depends on which particular impact is being measured. Its effectiveness can be assessed quantitatively, in terms of the numbers of bills commented on, ministerial responses received, and so on. These details are set out in Appendix III of this report. In addition, each *Alert Digest* contains a running index of bills commented on by the Committee, which indicates whether a ministerial response was sought and, if so, whether or not one has been received.

1.32 Further measures of effectiveness might be amendments moved or amendments passed in respect of provisions of bills on which the Committee has made comment, or amendments made to explanatory memoranda in response to concerns expressed by the Committee. Examples of such amendments are included throughout this report in the commentary on specific bills. Additional examples include the:

- Aboriginal and Torres Strait Islander Commission Amendment Bill 2002. The Committee had commented on subclause 4(1), which would have the effect of making a number of amendments contained in Schedule 1 of the bill apply retrospectively. Amendments passed by the Senate on 20 June 2002, removed subclause 4(1) from the bill;
- Superannuation Legislation (Commonwealth Employment) Repeal and Amendment Bill 2002. In its *Fifth Report of 2002* the Committee requested that the Minister table an additional explanatory memorandum to the bill, containing the information that the Minister had provided to the Committee in

response to their concerns. The Minister tabled the additional explanatory memorandum on 26 June 2003; and

- Import Processing Charges (Amendment and Repeal) Bill 2002. In its *Alert Digest No. 6 of 2002* the Committee commented on commencement provisions in this bill, which were not explained in the explanatory memorandum. The Minister agreed to amend the explanatory memorandum to ‘address the matters raised by the committee and to make it absolutely clear that there is no intention that any of the amendments will have retrospective operation.’¹⁶ The replacement explanatory memorandum was tabled in the Senate on 16 September 2002.

1.33 While the indicators of effectiveness outlined above are relatively easy to quantify, other measures of effectiveness are less tangible. For example, the impact that the Committee has in preventing issues from arising in the first place, rather than drawing attention to them once they have arisen. Many of the concerns raised by the Committee are discussed in the Drafting Directions issued by the First Parliamentary Counsel and all drafters are required to comply with these directions. As such, it might be argued that the Committee is effective in preventing problems from arising in the first place, but the extent to which this occurs is impossible to quantify.

1.34 More impressionistic indicators of the Committee’s effectiveness are comments made about it by people who have experienced its work. For example, in 1998 Senator the Hon Robert Ray, noting that he had originally voted against the establishment of the Committee, indicated that:

my concern at that time was not that bills should be scrutinised but that the job would be delegated to staff and consultants and that senators would merely rubber stamp the recommendations that came through.

What became clearly obvious from the work on both sides of the chamber on this committee as it evolved in the 1980s is that the committee took its task very seriously. It looked at legislation. I found it most valuable as a minister when we had legislation up before the chamber. Quite often, matters brought up by the Standing Committee for the Scrutiny of Bills had not been thought of by the minister in scrutinising the legislation. It was quite a useful tool for a minister to have some other body away from departmental advice evaluating the legislation and pointing out weaknesses in it. So I have to say – this is very difficult for me – that back in 1981 and 1982 I was probably in error in voting against it.¹⁷

Explanatory memoranda

1.35 During the 40th Parliament, the Committee had cause to express concern at the quality of explanatory memoranda accompanying many of the bills that came before

16 Scrutiny of Bills Committee, *Ninth Report of 2002*, p. 381.

17 Senate, *Parliamentary Debates*, 1 July 1998, p. 3977 (Senator R Ray).

the Committee. The Committee relies on the explanatory memorandum to explain the purpose and effect of the associated bill and the operation of its individual provisions. In particular, the Committee expects that an explanation will be given for any provision within the bill that appears to test or infringe the principles outlined in Standing Order 24 and that the explanatory memorandum will provide reasons or justifications for this.

1.36 The Committee's continuing dissatisfaction with explanatory memoranda resulted in a series of statements to the Senate during 2003¹⁸ in which it highlighted its concerns with the quality of explanatory memoranda, noting deficiencies and providing guidance to government agencies on the matters that it expected to be addressed. In particular, on 19 March 2003, the Committee noted that:

The most common comment in the *Alert Digests* tabled by the Committee is that the explanatory memorandum for a bill does not explain the background and reasons for measures which on their face might affect personal rights or parliamentary propriety. The result is that explanatory memoranda are less useful than intended and the Committee is obliged to initiate correspondence with Ministers.

These problems are by no means universal, with many comments in *Alert Digests* noting an apparent concern which was met by a full explanation in the explanatory memorandum. Nevertheless the Committee was disappointed at the standards of some explanatory memoranda.¹⁹

1.37 The problem continued, however, and in its *Third Report of 2004*, the Committee:

...noted a decrease in the quality of information in a number of [explanatory memoranda]... to the extent where any correspondence to ministers is often aimed at discovering *whether* a bill attracts its terms of reference as opposed to *why*.

The Committee has also noted that rather than, or as well as, seeking an explanation, it has increasingly found the need to seek clarification from the relevant minister of the effect of a provision which could have been avoided if the explanatory memorandum had been clearer'.²⁰

1.38 With a view to improving the quality of explanatory memoranda, in its *Third Report of 2004*, the Committee recommended that:

1. the Department of the Prime Minister and Cabinet amend the *Legislation Handbook* to provide further guidance on the matters that the Committee considers should be addressed in explanatory memoranda;

18 Senate, *Hansard*, 19 March 2003, p. 9714; 14 May 2003, p. 10955; 18 June 2003, p. 11881; and 25 June 2003, p. 12531.

19 Senate, *Hansard*, 19 March 2003, p. 9714.

20 Senate Standing Committee for the Scrutiny of Bills, *Third Report of 2004 – The Quality of Explanatory Memoranda Accompanying Bills*, 24 March 2004.

2. the Department of the Senate develop a set of guidelines to assist senators in the preparation of private Senators' bills;
3. information relevant to the preparation of explanatory memoranda currently contained in the *Legislation Handbook*, Legislation Circulars and Office of Parliamentary Counsel Drafting Directions, be consolidated into one primary source of information, namely the *Legislation Handbook*;
4. an appropriately qualified person should check the explanatory memorandum accompanying a bill before the bill is introduced into the Parliament, so as to ensure that it fully explains the effect and operation of the proposed legislation and complies with the requirements contained in the *Legislation Handbook*, as amended; and
5. consideration be given to developing a course to train departmental officers in the preparation of explanatory memoranda.

1.39 In response to recommendation 2, above, the Department of the Senate developed a set of guidelines - *Preparing Private Senators' Bills, Explanatory Memoranda and Second Reading Speeches. A Guide for Senators* - to assist Senators in the preparation of private bills. Senators were alerted to the existence of the guidelines in October 2004. The guidelines are available from the Clerk-Assistant, Senate Procedure Office and over the intranet.

1.40 At the end of the 40th Parliament, the Committee was awaiting the Government's response to its *Third Report of 2004*.

1.41 This report now turns to more detailed consideration of the work of the Committee during the 40th Parliament. This will be discussed by considering how the Committee tested bills coming before it against the five principles that govern its work.