



**Australian
Privacy
Foundation**

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Inquiry into the future direction and role of the Scrutiny of Bills Committee

Submission to the Senate Scrutiny of Bills Committee

April 2010

The Australian Privacy Foundation

The Australian Privacy Foundation is the main non-governmental organisation dedicated to protecting the privacy rights of Australians. The Foundation aims to focus public attention on emerging issues which pose a threat to the freedom and privacy of Australians. Since 1987, the Foundation has led the defence of the right of individuals to control their personal information and to be free of excessive intrusions. The Foundation uses the Australian Privacy Charter as a benchmark against which laws, regulations and privacy invasive initiatives can be assessed. For further information about the Foundation and the Charter, see www.privacy.org.au

The Inquiry

The inquiry is to be into 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.

In undertaking the inquiry, the committee should have regard to the role, powers and practices of similar committees in other jurisdictions.

Introduction

We refer you to our June 2009 submission to the National Human Rights consultation (<http://www.privacy.org.au/Papers/index.html>) for some important context and background to this submission.

The Australian Privacy Foundation strongly supports both the continuation and an expansion of the role of the Scrutiny of Bills Committee, at least as an interim step in the development of wider mechanisms for the recognition of important rights and freedoms. The Committee has for many years performed a valuable function in sometimes identifying, and drawing to the attention of the Parliament, privacy and related implications of proposed legislation. However, the Committee's effectiveness has been compromised by the lack of clearer criteria and guidelines, the limited resources and the very compressed timetable for consideration of Bills.

No other mechanism currently exists for the routine and systematic assessment of Bills and other legislative instruments to check that they do not infringe a range of fundamental rights and freedoms. Interested third parties such as ourselves try, to the best of their ability given limited resources (in our case all-volunteer), to monitor the introduction of legislation and detect possible conflicts with important rights and freedoms. But only the Scrutiny of Bills Committee does so on a (theoretically) universal basis.

However, at present, the ‘benchmark’ for the Committee’s assessment is unclear. We assume that the Committee has regard to those human rights listed in international treaties to which Australia is a party — most notably, the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights* both of which include privacy (at Articles 8 & 17 respectively).

The Committee will understandably have regard to existing privacy legislation – notably the Privacy Act 1988 but also the many privacy related provisions in other laws. We note however that there are major gaps in privacy law in Australia. The Privacy Act itself is severely weakened by the wide range of exemptions and exceptions (some of which may be addressed by amendments foreshadowed by the government in response to the 2008 ALRC Report 108 ‘For your Information’.) Another gap is the absence of a private right of action - which has now been recommended by both the Australian and NSW Law Reform Commissions. Such a right would allow individuals to take action for a range of privacy intrusions which do not necessarily involve personal information or data (such as ‘real-time’ CCTV surveillance, exercise of stop and search powers, or body searches. We argue that the Committee must interpret privacy rights, not only by reference to existing privacy legislation, but more broadly by reference to world-best practices.

Ideally, the Committee should have a clear set of criteria against which legislation can be assessed which includes the full range of potential privacy intrusions.

Currently, the three limiting factors mentioned above (criteria, resources and time constraints) combine to ensure that the Committee often ‘misses’ the significance of provisions in proposed legislation – in recent years the raft of anti-terrorism laws and laws imposing or modifying identification requirements are good examples.

Having identified a potential conflict with rights and freedoms, the Committee could also usefully develop clearer criteria for weighing the balance of interests. In this respect, s 7(2) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) offers a useful precedent.

Even where the Committee does identify and comment on a potential conflict, the very short time period before reporting means that third parties (as well as legislators themselves) have little opportunity to use the Committee’s reports in the course of parliamentary debates. While the Committee’s own view on conflicts are valuable, its reports are even more valuable, potentially, as a trigger for wider debate. Few pieces of legislation are so urgent that a longer period for consideration, both by the Committee and by third parties, could not be provided.

While we did not take a position for or against a statutory charter in our submission to the National Human Rights Consultation referenced above, we support many of the recommendations of the final *National Human Rights Consultation Report* (2009). Until and unless a statutory charter of rights is introduced, the Scrutiny of Bills Committee can continue to play a valuable, if inconsistent and unreliable, role.

As an interim improvement, the role could be enhanced by the Committee developing clearer criteria, obtaining more resources and securing a longer opportunity for consideration of Bills, both by the Committee and by third parties. Whilst conscious and respectful of the primacy of Parliament and its Committees, we suggest that there would be benefit in the Committee liaising more closely with the Privacy Commissioner (and with other relevant statutory officers in respect of other rights) both in developing better criteria and in assessing particular Bills.

Ideally, the enhanced criteria should be legislated. While it would be preferable for this to be done as part of the wider introduction of a statutory charter of rights, if this wider goal is significantly delayed, then limited legislation to give a clearer 'benchmark' for parliamentary scrutiny of bills would be a 'second best' option. The Parliament, in establishing the Committee's terms of reference, would of course retain the right to require consideration of factors going beyond the terms of any legislative criteria, but they would at least provide minimum criteria as a 'floor'.

Another interim improvement may be for the two Houses of Parliament to set up a *Joint Scrutiny of Bills Committee*. Provided membership of a Joint Committee did not result in an overall majority of governing party members, the involvement of members of the House of Representatives could contribute to the House being less of a 'rubber stamp' for government policy and playing a greater role in detailed consideration and review by the legislature of the Executive's proposals. Consideration by a joint committee before a Bill had been debated in the House of Representatives could also lead to sensible amendments before the government was 'locked in' to defence of detailed provisions.

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