Rights under Scrutiny

Stephen Argument

Protection of personal rights and liberties . . . by Parliament?

In October 1992, Peter Costello MP, then the Shadow Attorney-General and Shadow Minister for Justice, said (in the context of the High Court's decision in the *Political Broadcasts* case):[1]

> If the [Federal] Parliament does not reassert an interest in defending human rights and if the [High] Court takes up that role it will inevitably politicise the role of the Court and ultimately damage its prestige.

He went on to say:

> A parliamentary committee to scrutinise legislation against accepted principles of individual rights would be a good step in showing the Parliament is interested in taking up this role[2]

In fact, the Federal Parliament has had such a committee since 1981, when the Senate Standing Committee for the Scrutiny of Bills was first established. Since Spencer Zifcak's article in this issue refers to the role of such committees, it may be useful to set out some information about the work of the Scrutiny of Bills Committee and, in particular, to consider the Committee's role in relation to the protection of individual rights.

The Scrutiny of Bills Committee's terms of reference

Under Senate Standing Order 24, the Scrutiny of Bills Committee is charged with reporting to the Senate, in respect of each Bill introduced into the Senate, as to whether any of the clauses of those Bills

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make such rights liberties or obligations unduly dependent on non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

While terms of reference (iv) and (v) above are aimed more at protecting the power of the Parliament itself, terms of reference (i) to (iii) are directly relevant to the issue of protecting individual rights.

Of most obvious relevance is term of reference (i). Since its formation, the Committee has drawn attention to a wide variety of matters as possibly constituting an undue trespass on personal rights and liberties. They include issues such as retrospective legislation (including the topical issue of 'legislation by press release'), abrogation of the privilege against self-incrimination, reversal of the onus of proof, strict liability offences and limitations on the conferral of powers to search and seize without a warrant.[3]

If (in the Committee's view) a Bill contains provisions which do any of these things, the Committee will draw the attention of the Senate to the relevant clause(s) and, in so doing, set out its concerns. It will also invite the Minister responsible for the relevant Bill to respond to those concerns, giving the Minister the opportunity to offer whatever she or he can by way of explanation or justification for the provision(s). If such a response is received, the Committee is then able to report it to the Senate, thereby giving the Senate further information on which to base its final decision as to whether, in all the circumstances, it should pass the relevant clause(s). In this context, it is important to note that the final decision about the provision(s) always rests with the Senate.[4]

Stephen Argument is the Secretary to the Senate Standing Committee for the Scrutiny of Bills, though, at the time of writing, he was on secondment to the Department of Social Security.

The Scrutiny of Bills Committee and 'human rights'

In the last few years, the Scrutiny of Bills Committee has become increasingly involved in what might be termed 'human rights issues'. It is useful to set out a little more detail on two such instances because, apart from anything else, they demonstrate how the Committee fits into the parliamentary and legislative processes.

In its *Alert Digest No. 8* of 1991, the Scrutiny of Bills Committee considered the *Political Broadcasts and Political Disclosures Bill* 1991 which, readers will recall, was ultimately the focus of the *Political Broadcasts case*. Readers will also recall that, among other things, the Bill proposed to amend the *Broadcasting Act* 1942 in order to prohibit the broadcasting of political broadcasting at all times.

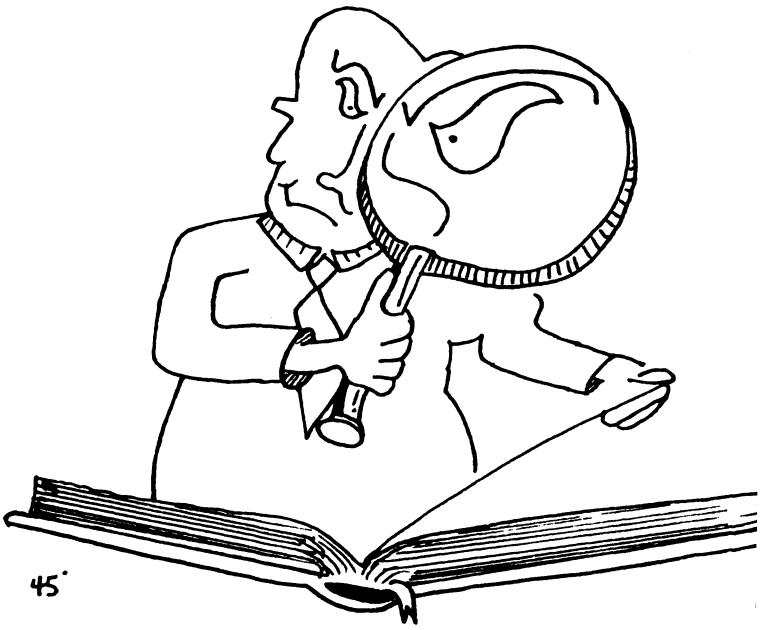
The Committee observed that, *prima facie*, the limitations that the Bill proposed would amount to an interference with the freedom of expression. In so doing, the Committee drew the Senate's attention to Article 19 of the International Convention on Civil and Political Rights (ICCPR), which enshrined that freedom. However, the Committee also noted that the freedom was not absolute and that Article 19 contemplated there being 'necessary' restrictions on the freedom, based on the need to respect the rights and reputations of others and the need to protect national security, public order, public health or morals.

After noting what kinds of restrictions were currently regarded as necessary (referring to matters such as defamation, pornography and the incitement of racial hatred), the Committee concluded that, ultimately, what was a 'necessary' restriction was a matter of public policy. In the Committee's view, this was a matter for decision by the Parliament, not the Scrutiny of Bills Committee.

The Parliament decided that the restrictions imposed by the Bill *were* necessary. As readers will be aware, in the *Political Broadcasts case*, the High Court subsequently decided that they were not.[5]

The second example is the amendments to the *Migration Act* 1958 that were implemented by the *Migration Amendment Act* 1992. In essence, the amending Act inserted a new Division into the *Migration Act* that dealt with the custody of 'certain non-citizens' – that is Cambodian 'boat people'. As a consequence of the way the amendments came into the Parliament and also the speed with which the Parliament then dealt with them, the Scrutiny of Bills Committee raised certain aspects of the amendments *after* they had actually been passed.[6]

In its *Seventh Report of 1992*, the Scrutiny of Bills Committee observed that the amendments to the *Migration Act* appeared to make special rules for a particular group of people – contrary to paragraph 2 of Article 2 of the ICCPR – and to deny those persons access to the courts – contrary to paragraph 4 of Article 9, paragraph 1 of Article 10 and paragraph 1 of Article 14 of the ICCPR. As with the amendments to the *Broadcast Act*, the Committee suggested that whether or not such measures were necessary was a matter for the Parliament. However, the Committee emphasised that its role in these kinds of circumstances was to ensure, as far as possible, that when the Senate considered such measures it was aware of the possible implications for the Committee's terms of reference.[7]



The Committee concluded by noting that a legal challenge to the legislation had already been foreshadowed. That being the case, it accepted that the legality of the Bill would, in all probability, ultimately be determined by the High Court and, accordingly, made no further comment. In fact, the High Court dealt with the amendments in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 67 ALJR 125. In that case, a significant number of the amendments were found to be invalid, for the kinds of reasons alluded to by the Committee.

The Scrutiny of Bills Committee and the Parliament

One of the things that these examples demonstrate is that (quite properly) the will of the Parliament is an important factor in all of this. While trespassing on individual rights (whether or not those rights are the subject of international treaties or other forms of explicit obligations) is 'a bad thing', the Parliament can *do* bad things. This is a necessary (and, perhaps, unfortunate) feature of parliamentary supremacy. Given the activities of the High Court in recent years, however, it is probably the case that the Parliament is not quite as supreme as it might think it is.

The concept of parliamentary supremacy should also be borne in mind when considering the likely impact of the *Legislative Standards Act* 1992 in Queensland, which Dr Zifcak has so clearly set out in the preceding article. Without wishing to pour a bucket of cold water on what Dr Zifcak has said, a note of caution would have to be added. That is, it should always be remembered that, despite the new Act, despite the existence of statutory standards, despite the new and independent Office of Parliamentary Counsel and despite that Office's active new role in the legislative process, the capacity will always exist for the Queensland Parliament to override the *Legislative Standards Act* and to ignore the protestations of the Office of Parliamentary Counsel. It should *also* be remembered that Queensland has a unicameral parliament, which means that, in practice, the government of the day rules the roost.

While it is fervently to be hoped that the Queensland Parliament *does not* seek to ignore the *Legislative Standards Act*, the Scrutiny of Bills Committee's experience would tend to suggest that parliaments do not necessarily take much notice of bodies that try to tell them what they can and cannot do. This was implicitly acknowledged by Peter Costello in his 1992 comments, where he asserted that his proposed parliamentary committee would

> only work if the Government takes it seriously – if it allows independence to its members and takes notice of its decisions.[8]

This is true. More to the point, however, is that *the Parliament* must take the committee seriously and that *the Parliament* must take notice of its decisions.

I will now pick up on two small points from Dr Zifcak's article before concluding.

The role of Parliamentary Counsel as a legislative scrutineer

Dr Zifcak refers to the enhanced role, under the *Legislative Standards Act*, of the Office of Parliamentary Counsel, which becomes a more active and visible participant in the legislative process. In the Commonwealth sphere, it has been increasingly evident that the Commonwealth Office of Parliamentary Counsel does much good work in the area of legislative scrutiny. In 1991, the (then) First Parliamentary Counsel of the Commonwealth, Mr Ian Turnbull QC, told the Scrutiny of Bills Committee's tenth anniversary seminar that, in his view, it was

> safe to say that the provisions that get into Bills and come before the Scrutiny of Bills Committee are the tip of the iceberg. I think that a far greater number that would have offended have not been put in the Bills because [the drafters] have advised the departments and the departments have had the sense to withdraw them. After all, when we say that the Scrutiny of Bills Committee does not like something, that is a very powerful weapon in our armoury.[9]

It may also be said that the more informed and attentive legal and legislation areas of the better Commonwealth departments[10] act as a further filter, by cutting out at an even earlier stage of the process some of the more outrageous proposals emanating from the so-called 'policy' areas of their departments. The 'enmeshment' of Parliamentary Counsel in policy issues under the new Queensland regime may help to alleviate these sorts of problems. However, in the Commonwealth sphere, regardless of the combined efforts of these areas and the Office of Parliamentary Counsel, some fairly obviously offensive material still gets to the Parliament (and, obviously, it often gets passed).

The spread of scrutiny of bills committees

My second point is that the Scrutiny of Bills model is spreading. Dr Zifcak notes that a committee with responsibility for scrutinising primary legislation is proposed for Queensland. Such committees now exist in the Australian Capital Territory and Victoria. The Scrutiny of Bills model has also been partly adopted (though, unfortunately, not the individual rights aspect) by the British House of Lords. It is to be hoped that this spread continues.[11] The establishment of a committee in Queensland, however, would be an important next step, as it will be particularly interesting to see how such a committee works in conjunction with the *Legislative Standards Act* and the new, improved Office of Parliamentary Counsel. It can only work better than the system that was in place before.

References

1. *Australian Capital Television Pty Ltd v Commonwealth* (1992) 108 ALR 577.
2. See Costello, P, 'Administrative review, Parliament and the courts', (11) *Australian Institute of Administrative Law Newsletter* 22, at p.24. See also Kingston, M., 'Parliament must reclaim role on rights: Costello', *Age*, 7.10.92, p.1.
3. For a more detailed discussion of these matters, see Senate Standing Committee for the Scrutiny of Bills, *Report on the operation of the Senate Standing Committee for the Scrutiny of Bills during the 36th Parliament* – hereafter referred to as 'the Report of the 36th Parliament – October 1993, pp.11-27.
4. For more detail on the actual operation of the Committee, see the *Report of the 36th Parliament*, pp. 5-9.
5. See *Report of the 36th Parliament*, pp. 28-9. See also 'The High Court and the Committee', paper presented (on behalf of the Committee) by Senator Amanda Vanstone to the Fourth Australasian and Pacific Conference on Delegated Legislation and the First Australasian and Pacific Conference on the Scrutiny of Bills, 28-30 July 1993, Melbourne.
6. For a more detailed explanation of the background to this matter, see *Report of the 36th Parliament*, p.29.
7. See *Report of the 36th Parliament*, pp.31-2.
8. Costello, above, ref.2, p.24.
9. Senate Standing Committee for the Scrutiny of Bills, *Ten Years of Scrutiny*, p.62.
10. Of which the Legal and Legislation Branch of the Department of Social Security is, of course, one!
11. For more information on the spread of scrutiny committees, see Argument, S, 'Legislative scrutiny: Exporting wisdom to Westminster?', (1993) 12(3) *The House Magazine*, 12 May, p.5.