

Day Three of Public Hearings:

Session: Parliamentary scrutiny – the view from the Hill

Summary of remarks by Harry Evans, Clerk of the Senate

The Senate has two legislative scrutiny committees which scrutinise legislation on civil liberties criteria. The Scrutiny of Bills Committee looks at primary legislation, and the Regulations and Ordinances Committee at delegated legislation. Each committee is required to draw to the attention of the Senate any legislation that trespasses unduly on personal rights and liberties.

Both committees work by requiring ministers to explain provisions in legislation that appear to infringe that principle, and then report to the Senate on the result. Both committees receive undertakings from ministers to amend legislation.

The committees have a considerable impact on the content of legislation. Their scrutiny discourages executive departments from attempting any major infringement of rights and liberties in the preparation of legislation. They also bring about the amendment of legislation after its introduction. It is difficult to numerically calculate the impact of the committees, because of their deterrent effect, and also because it is not always obvious when legislation has been amended as a result of the committees' scrutiny. Primary legislation is often amended by governments, sometimes before it is received in the Senate, without explicitly acknowledging that the Scrutiny of Bills Committee is the cause of the amendments. The Regulations and Ordinances Committee reports on amendments to delegated legislation as a result of ministerial undertakings, but its reports do not attract wide attention.

In practice, the committees seldom detect egregious infringements of personal rights and liberties in legislation. Such infringements are generally confined to "big ticket items" on the legislative agenda, such as anti-terrorism legislation. The committees draw attention to possible infringements of rights and liberties in such legislation, and it is then left to the essentially political judgment of the Senate to determine where the balance should be struck between those rights and liberties and the achievement of the aims of the legislation.

It is sometimes suggested that the scrutiny of legislation would be enhanced by replacing these committees with a joint committee of both Houses. This would be a major mistake. The ability of the committees to bring about amendments of legislation largely depends on the lack of government control over the Senate; when the last government controlled both Houses (in July 2005 to December 2007), government legislation generally passed

unamended. Joint committees are invariably controlled by the government. The Senate could be inhibited in amending legislation on civil liberties grounds when the legislation would have already been approved by a joint committee.