

The Senate

Senate Standing Committee
for the Scrutiny of Bills

Final Report

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

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MEMBERSHIP OF THE COMMITTEE

43nd Parliament

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Senator Mitch Fifield (Chair) [till 16.3.12]	LP, Victoria
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Senator Mark Bishop	ALP, Western Australia
Senator Sean Edwards	LP, South Australia
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42nd Parliament

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Senator Mark Bishop, Deputy Chair	ALP, Western Australia
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Senator Rachel Siewert	AG, Western Australia

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Recommendations

Chapter 3

Reporting during non-sitting periods

Recommendation 1

3.35 That the committee should consider and publish its comments during non-sitting periods in appropriate cases.

Chapter 4

Notifying the Senate of a failure to respond to the committee

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.

Permanent inquiry powers

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.

Technical amendment relating to 'provisions of bills'

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

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.

Chapter 5*Framework bills***Recommendation 8**

5.15 That Senate standing order 24 be amended to specifically include the scrutiny of bills which excessively rely on delegated legislation for their operation.

Recommendation 9

5.16 That Scrutiny of Bills Committee develops guidelines in relation to the appropriate level of detail required in primary legislation.

Recommendation 10

5.27 That the Senate Committee for the Scrutiny of Bills and the Regulations and Ordinances Committee consider issues relating to the scrutiny of delegated legislation discussed in this report, including the scrutiny of draft delegated legislation, to develop a response to these matters.

Chapter 6*Uniform (or national scheme) legislation***Recommendation 11**

6.18 The committee recommends that where there is a proposal for uniform legislation, amendments to uniform legislation or delegated legislation and the nature of the proposal means that the ability of the Senate and its committees to effectively scrutinise and amend the relevant proposal is limited, exposure drafts should be provided as soon as practicable to this committee, the relevant legislative and general purpose standing committee, and the Senate Regulations and Ordinances Committee if the proposal includes delegated legislation. All relevant information about the proposal, including any formal agreements or correspondence should also be provided to the committees to assist in their consideration of the exposure drafts.

Recommendation 12

6.19 That standing order 24 be examined to confirm whether the Scrutiny of Bills Committee is empowered to consider, advise and report on exposure drafts and associated information and, if it is not, that standing order 24 be amended to allow the committee to do so.

Chapter 7

Comments on bills

Recommendation 13

7.11 That the Senate refers to the Procedure Committee the Scrutiny of Bills committee's request that standing order 24 be amended to provide that the committee's comments on bills stand referred to legislation committees inquiring into those bills.

Scrutiny resources

Recommendation 14

7.25 That the committee develop checklists, guidelines and other supporting documents as appropriate and continues to implement improvements to its use of technology in raising awareness of the committee's work.

CHAPTER 1

Introduction

1.1 This report is the result of the committee's commitment to inquire into its future role and direction. The inquiry itself has had several incarnations. Most recently, on 3 March 2011, the Senate referred the following terms of reference:

The Committee shall inquire into and report on:

- (1) The future direction and role of the Scrutiny of Bills Committee, with particular reference to whether its powers, processes and terms of reference remain appropriate.
- (2) In undertaking this inquiry, the committee should have regard to the role, powers and practices of similar committees in other jurisdictions.
- (3) The committee be authorised to hold public hearings in relation to this inquiry and to move from place to place.
- (4) The committee be authorised to access the records and papers of the 2010 inquiry into its future role and direction.

1.2 The reporting date was set for the last sitting day in June 2011. However, it was important for the committee to have adequate opportunity to review the terms of reference thoroughly. Given this, and as a result of changes in committee membership, the Senate agreed to extensions of time and an interim report was tabled on 23 November 2011. The interim report outlined the major themes of interest to the committee which it intended to explore further such as:

- the committee's approach to its work;
- framework bills and national scheme legislation;
- committee powers and sanctions;
- communication; and
- technical amendments.

The interim report was also sent to interested parties for further comment. The above themes are discussed in detail in later chapters of this report.

Background

2010 Inquiry

1.3 The current inquiry follows the commencement of a similar inquiry in 2010 into the future direction and role of the committee. The terms of reference for that inquiry had substantial similarities with the committee's current terms of reference.¹ The difference between the two inquiries was that the 2010 inquiry also inquired into the following two areas:

- whether parliamentary mechanisms for the scrutiny and control of delegated legislation are optimal; and
- what, if any, additional role the committee should undertake in relation to human rights obligations applying to the Commonwealth.²

1.4 The 2010 inquiry was due to table its report on 12 May 2010. However, on the 21 April 2010 the then Attorney-General, the Hon Robert McClelland MP launched Australia's Human Rights Framework (the Framework) in response to the *National Human Rights Consultation Report*, published in September 2009. One of the key commitments in the Framework included the establishment of a Parliamentary Joint Committee on Human Rights.

1.5 Given the potential overlap between the work of the two committees, on 12 May 2010 the committee produced an interim report which stated:

The work of the Parliamentary Joint Committee on Human Rights is likely to have an impact on the remit of the work of the Scrutiny of Bills Committee. It will be relevant for the Scrutiny of Bills Committee to consider the content of the enabling legislation before it can develop an informed view of its own future role and direction.³

1.6 Accordingly, the committee recommended:

That the time for the presentation of the committee's report on this inquiry be extended, with the reporting date to be determined after the introduction of legislation to establish the proposed Parliamentary Joint Committee on Human Rights.

1.7 However, the 2010 inquiry ultimately lapsed due to the 2010 federal election leading to re-referral of the inquiry on 3 March 2011 (see paragraph 1.1).

1 See appendix two for the 2010 inquiry terms of reference.

2 The changes in the terms of reference were primarily as a result of developments in these areas, discussed further in *Chapter 3, The committee's approach to its work*.

3 http://www.aph.gov.au/Senate/committee/scrutiny/future_direction_2010/interim_report/index.htm, p.1.

Conduct of inquiries

1.8 Both inquiries were advertised in *The Australian* and on the internet. In both instances the committee invited submissions from Commonwealth, state and territory departments and interested organisations and individuals.

1.9 The committee received 34 public submissions to its 2010 inquiry and 23 public submissions to the 2011 inquiry. A list of individuals and organisations who provided submissions authorised for publication by the committee is at Appendix 1.

Structure of the report

1.10 The structure of this report is as follows:

- (a) Chapter 1 – Introduction
- (b) Chapter 2 – History and outline of the work of the Committee
- (c) Chapter 3 – The Committee's approach to its work
- (d) Chapter 4 – Powers and sanctions
- (e) Chapter 5 – Framework bills
- (f) Chapter 6 – Uniform legislation
- (g) Chapter 7 – Communication

Acknowledgments

1.11 The committee acknowledges and thanks all those who have assisted with the inquiry by making submissions and providing additional information.

CHAPTER 2

History and outline of the work of the Scrutiny of Bills Committee

Background

Establishment of the committee

2.2 The Standing Committee for the Scrutiny of Bills (the committee) was established on 19 November 1981, by resolution of the Senate¹. For the first six months of its operation, the committee shared the membership of the Constitutional and Legal Affairs Committee. On 25 May 1982, the Senate resolved to establish a separate membership for the committee.

2.3 During the first six years of its operation, the committee existed by virtue of a Senate resolution and, later, a Senate Sessional Order. This approach required that the committee be re-established at the commencement of each new Parliament. However, on 17 March 1987, with the adoption of a new Senate Standing Order,² the committee became a permanent feature of the Senate committee system.³

Committee membership

2.4 The committee consists of 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, nominated by the Leader of the Opposition in the Senate or by any minority parties or independent Senators.

2.5 The Chair of the committee is a member of the opposition party appointed on the nomination of the Leader of the Opposition in the Senate, meaning that the Government does not have a majority of members on the committee. The Chair may from time to time appoint a member of the committee to be Deputy Chair. The Chair, or Deputy Chair when acting as Chair, has a casting vote when votes on a question before the committee are equally divided.

Role and operation of the committee

2.6 The current role of the committee is to examine and assess proposed primary legislation against a set of specific accountability standards which are set out in the committee's terms of reference. The public interest is served by the committee's work as it assists Parliament to consider whether all legislation meets minimum

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

2 Senate Standing Order 36AAA, which later became Standing Order 24.

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

administrative law standards. In particular, the committee's scrutiny work broadly focuses on:

- protecting individual rights and liberties;
- keeping the government accountable;
- maintaining administrative fairness and openness; and
- upholding parliamentary propriety.

2.7 The committee's terms of reference are set out in standing order 24 and require the committee 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.

2.8 When the committee identifies a potential problem with a bill, it alerts the Senate (by tabling its *Alert Digest* each sitting week) and follows the matter up with the responsible minister. Having received and considered the Minister's response, the committee then reports again to the Senate (by tabling its *Report* each sitting week). The Committee's initial ("traditional") approach was that it did not recommend particular action on a bill but simply raised issues for the Senate's consideration. It was open to the government to respond to issues raised, and individual senators could take up concerns raised by the Committee and draft amendments accordingly. How the committee's approach to its work has since evolved is discussed in *Chapter 3, The Committee's approach to its work*.

2.9 During the 39th Parliament, the committee secretariat also began systematically examining parliamentary amendments to bills. Amendments agreed to by either the House of Representatives or the Senate, as recorded in the *Votes and Proceedings* of the House of Representatives and the *Journals of the Senate*, are also evaluated and, where appropriate, drawn to the Senate's attention.

2.10 The committee takes a strictly non-partisan, apolitical and consensual approach to its work, which has a significant influence on the capacity of the committee to meet its objectives. Such an approach is possible because the committee's usual practice is not to focus upon policy intent but to undertake a focused examination of legislation in light of standing order 24.

The committee's legal adviser

2.11 Due to the technical nature of the committee's work, the committee employs a legal adviser to assist with the scrutiny of legislation. Associate Professor Leighton McDonald from the ANU College of Law of the Australian National University is currently the committee's legal adviser.

Committee's publications

Alert Digest

2.12 The *Alert Digest* is the document which first alerts senators to the committee's comments about bills and amendments. It contains a brief outline of each bill introduced in the previous sitting week together with any comments the committee wishes to make about a particular bill. The *Alert Digest* also includes comments concerning any amendments and notifies Senators of any information offences; standing appropriations and national scheme legislation in the publication. The committee finalises each *Digest* at its regular meeting on a Wednesday of each Senate sitting week and it is tabled in the Senate on the Wednesday afternoon or the Thursday morning of that sitting week.

Report

2.13 Correspondence received from a Minister, Member or Senator responding to a concern raised in an *Alert Digest* is considered by the Committee at its regular meeting every sitting week. The response and the relevant *Alert Digest* extracts are included in the committee's *Report* and are tabled either on the Wednesday afternoon or the Thursday morning of each sitting week.

2.14 The committee wishes to place on the record its thanks to Ministers, Parliamentary Secretaries, Members, and Senators for their cooperation and goodwill shown over the years in responding to the committee's concerns. Responding to the committee provides important material which the committee needs for the effective performance of its duties. This issue is discussed further in *Chapter 4, Powers and Sanctions*.

Other reports

2.15 On occasions the committee produces reports on matters which have been referred to it by the Senate. In addition to this inquiry, an example is the *Report into Entry, Search and Seizure Provisions in Commonwealth Legislation*, tabled on 4 December 2006.

2.16 Since October 1993, the committee has also produced *The Work of the Committee Report* which provides an account of the operation of the committee during a particular parliamentary period. The report includes examples of issues that have arisen under each of the five criteria against which the committee tests legislation. This document is discussed further in *Chapter 7, Communication*.

Publication on the internet

2.17 The committee's website is updated immediately following the tabling of the committee's *Alert Digest* and *Report* in the Senate each sitting week. These publications are available <http://www.aph.gov.au/Senate/committee/scrutiny/index.htm> to anyone interested in the work of the committee, such as ministerial or departmental staff.

2.18 When an inquiry is referred to the committee by the Senate it is loaded onto the committee's website. A webpage is established where all relevant information concerning the inquiry is loaded. During the course of the inquiry, further information such as submissions, hearing programs and the report are progressively loaded onto the site.

Committee's monitoring role

2.19 At various stages since its inception the committee has, within its terms of reference, added depth to its role by monitoring and reporting on the following:

Monitoring of penalty provisions for 'information' offences

2.20 During the 38th Parliament the committee tabled its *Eighth Report of 1998* which 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 following debate in the Senate about the appropriateness of specifying a penalty of imprisonment for failing to provide information to the Productivity Commission.⁴

2.21 In the *Eighth Report of 1998*, 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*.

2.22 Since the publication of this report the committee has continued to identify penalties imposed for these offences and details them in its *Alert Digests*.

Monitoring of national scheme legislation

2.23 During the 39th Parliament the committee began monitoring and reporting in its *Alert Digest* on the introduction of Commonwealth bills which 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

4 *Journals of the Senate*, No.122, 3 September 1997, p. 2419.

jurisdiction). National scheme (uniform) legislation is discussed in more detail in *Chapter 6, Uniform legislation*.

Monitoring of standing appropriations

2.24 Following the publication of the committee's *Fourteenth Report of 2005*, which examined accountability and standing appropriations, the committee determined that as part of its standard procedures it would draw the attention of senators' to the presence in bills of standing appropriations. The committee does so under the principles (1)(a)(iv) and (1)(a)(v) of its terms of reference.

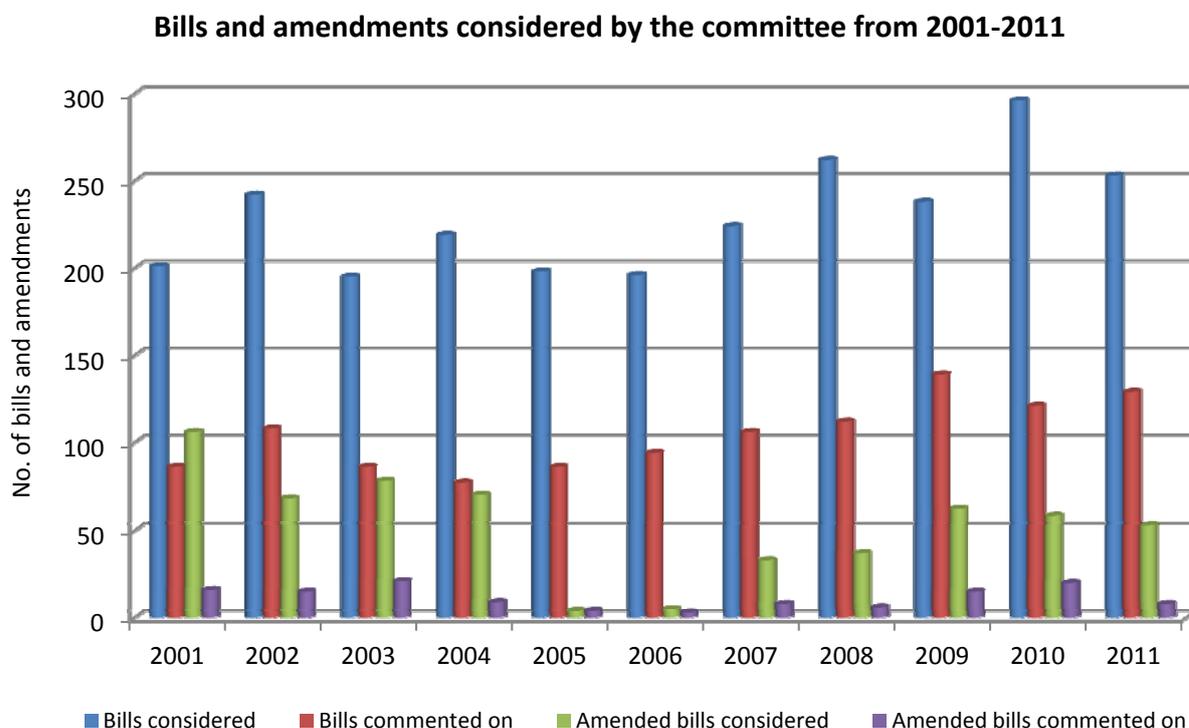
Workload of the committee

Scrutiny of legislation

2.25 From 2001 to 2011 the committee considered a total of 2524 bills and commented on 1144 or 45.3 per cent of these bills. During the same period 574 bills or 22.7 per cent all bills were amended. Of the amended bills the committee commented on 125 amendments or 21.8 per cent of these.

2.26 Figure 1 below provides a yearly overview from 2001 to 2011 of all bills and amendments considered, and of these, the number on which the committee made a specific comment.

Figure 1

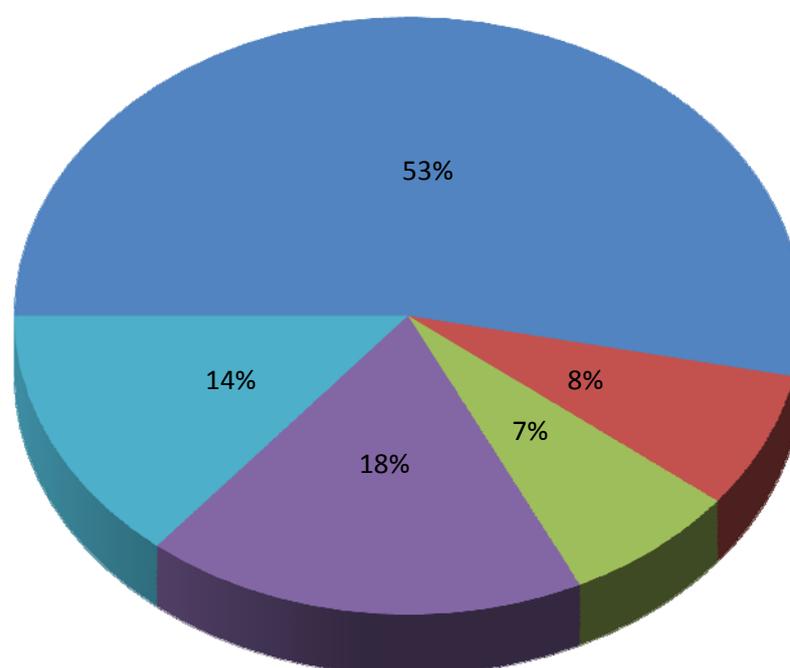


Comments on bills per principle under Standing Order 24(1)(a)

2.27 As noted earlier, the committee examines all bills which come before the Parliament against five principles under Standing Order 24(1)(a). Figure 2 below provides a breakdown, by principle, on comments made by the committee on bills introduced from 2000 to 2011 inclusive.

Figure 2

Scrutiny comments on bills per principle under Standing Order 24(1)(a) from 2000 - 2011



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

Source: Compiled from *Alert Digests 2000 – 2011*.

Inquiries conducted

2.28 Although the main function of the committee is to scrutinise legislation, another key aspect of the committee's work, which supplements its primary scrutiny role, is the ability to conduct inquiries into matters of importance. The committee has over the years conducted several inquiries, which include:

- *The Appropriate Basis for Penalty Provisions in Legislation Comparable to the Productivity Commission Bill 1996* – report tabled on 25 June 1998;

- *Inquiry into Entry and Search Provisions in Commonwealth Legislation* – reports tabled on 6 April 2000 and 4 December 2006;
- *Inquiry into absolute and strict liability offences in Commonwealth Legislation* – report tabled 26 June 2002; and
- *The Quality of Explanatory Memoranda Accompanying Bills* – report tabled 24 March 2004.

2.29 The Government has recognised the importance of these inquiries by providing responses to four reports and adopting several of the committee's recommendations. For example, in the 2006 inquiry into *Entry and Search Provisions in Commonwealth Legislation* the committee made 14 recommendations, the Government accepted 10 recommendations fully and two in part. As a consequence of the recommendations in the report, amendments were made to the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. The amendments addressed many of the areas specified in the report.

Effectiveness of the committee

2.30 The committee's effectiveness can be broadly evaluated in several different ways, and the committee believes it is having a positive effect in each. The various indicators include:

- the number of bills and amendments commented on, and the ministerial responses received (quantitatively);
- the frequency of explanatory memoranda and bills being amended as a result of the committee's comments (remedial impact);
- having an impact on future legislation, whereby the committee raises awareness of scrutiny issues by bringing matters to the attention of Ministers or departments (preventative effect); and
- by the committee's views on certain issues and topics being included in documents which departmental instructing officers and legislative drafters are obliged to consider (educational impact). For example, the *Legislation Handbook* (issued by the Department of Prime Minister and Cabinet); the Office of Parliamentary Counsel's *Drafting Directions*; and *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (first issued by the Minister for Justice and Customs in 2004).

2.31 In support of the impact the committee's work has in shaping future compliance with minimum standards for legislation, the Clerk of the Senate observes that:

Arguably, however, the committee's most effective work has been in influencing approaches to, and standards in, the drafting of legislation and the provision of supporting documentation (such as, explanatory memoranda). Although some of the committee's work in this area might be characterised as formulaic, there is a risk that, if the committee stepped

away from this work, it would not take long for drafting standards to reflect the absence of a watch dog.⁵

2.32 In addition, people who have experienced the committee's work in different ways have made comments indicating the importance of the committee and its effectiveness. Mr Andrew Murray, a former senator and committee member, stated that the effectiveness of the committee is attested to as 'four in every ten bills is still attracting Committee comment, three decades after its inception'.⁶ Mr Murray also commented that:

...some ministers now value the Senate Scrutiny Committee as a safeguard – as a means to help keep their own Departments up to the mark.⁷

2.33 In its submission the Rule of Law Institute of Australia's (RoLIA) stated that it 'has been a very strong supporter and interested observer of the Scrutiny of Bills Committee, so much so that we have issued a media press release congratulating them on their work in ensuring that our laws uphold the rule of law'.⁸ In RoLIA's press release of 8 March 2008 it commented that it:

...applauds Senate Standing Committee for the Scrutiny of Bills on its assiduous reporting of potential breaches of important rule of law principles, bringing them to the attention of the Senate and relevant Ministers.⁹

2.34 Other comments made to the committee in the course of this inquiry include:

- the Queensland Law Society noted that it 'considers the committee performs an invaluable role in objectively reviewing new bills';¹⁰
- the Law Council of Australia stated that it 'greatly values the scrutiny function currently undertaken by the Committee';¹¹ and
- Professor Cheryl Saunders argued 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'.¹²

5 *Submission 20* [2011], p. 3.

6 *Submission 12* [2010], p. 2.

7 *Submission 12* [2010], p. 3.

8 *Submission 7* [2011], p.1.

9 Rule of Law Institute of Australia, 'ROLIA commends Senate Scrutiny of Bills Committee for upholding the rule of law', Press Release, 8 March 2011, available at: http://www.ruleoflawaustralia.com.au/Downloads/Press_release_vocation_education_bill.pdf >

10 *Submission 21* [2011] p. 1.

11 *Submission 6* [2011], paragraph 8.

12 *Submission 9* [2011], p. 1.

2.35 However, it is also clear from submissions that there is a view that there is scope for the committee to improve its efficacy. This is primarily apparent from the extent and nature of the suggestions for amendments to the committee's terms of reference, to its approach to its work, and to its other processes.

Comment

2.36 Since its inception 30 years ago, the committee believes that it has played a valuable and vital role in the scrutiny of legislation in the Parliament. The committee has included the positive comments to this effect in the above paragraphs in order to demonstrate that key stakeholders believe that it is working effectively on the basis of its current terms of reference. In assessing bills against the principles outlined in standing order 24 and reaching a position about compliance with them, the committee is of the view that its strictly non-partisan approach to its work enables it to work effectively and productively.

2.37 However, as is evident from the fact of this inquiry, the committee is also committed to actively reflecting on its current circumstances (terms of reference and powers) and its philosophy (approach to its work and other processes it adopts). The committee is seeking to identify whether change is needed to modify or supplement the existing terms of reference and to continually review and reinvigorate its philosophy and processes to ensure that it remains relevant and valuable.

2.38 The combination of general support for the committee's work and an interest in improving its ability to scrutinise bills successfully underpin this consideration of the committee's future role and direction. In particular, the committee has examined the general scope of its work, its approach to its work and the technical detail of its terms of reference. The committee's conclusions about changes which are intended to assist it to remain effective and appropriate in years to come are outlined in the remainder of this report.

CHAPTER 3

The Committee's approach to its work

3.1 In framing the terms of reference for this inquiry the committee was interested to explore not only practical and technical changes to its terms of reference, but also:

- conceptual issues of relevance to its work; and
- process issues that do not relate directly to the content of the committee's terms of reference in standing order 24.

3.2 The issues the committee considers falls into these categories that it has selected to discuss in this chapter are:

- whether the committee's role in considering whether bills 'trespass unduly on personal rights and liberties' should be widened;
- the committee's approach to its work; and
- the timing of its reports.

Scrutiny of Bills and human rights

Introduction

3.3 A particular issue of interest to a number of submitters relates to the scrutiny of legislation for compliance with human rights. Many of the submissions address the question of whether the committee should be taking a different approach to considering human rights.

3.4 Standing order 24, which describes the criteria against which the committee scrutinises bills includes a requirement that the committee assess bills as to whether they 'trespass unduly on personal rights and liberties' (standing order 24(1)(a)(i)). The provision is based on a broad statement that does not specify particular rights, but which allows a range of rights falling within that description to be considered. Professor Bryan Horrigan's analysis of the scope of 24(1)(a)(i) is that it encompasses some international human rights standards, but also includes other scrutiny principles that go beyond this category and are not components of human rights, such as:

...all other aspects of legislative scrutiny that are equally important – legislation's proper respect of democracy, the institution of Parliament, and requirements of the rule of law in law-making...¹

3.5 Some examples of the types of issues the committee has commented on under this provision as a result of its scrutiny of bills include:

1 *Submission 11* [2011], p. 2.

- the use of coercive powers;²
- breaches of the privacy of individuals;³
- the right to vote;⁴
- the use of strict liability provisions;⁵ and
- the abrogation of the privilege against self-incrimination.⁶

3.6 There are, of course, numerous other examples, all of which are primarily considered to fall into the category of 'personal and political' rights, though standing order 24(1)(a)(i) does not cover all rights in this category. In the context of this inquiry, the question has therefore arisen as to whether the committee's terms of reference should be broadened or otherwise changed to articulate a detailed framework for the assessment of bills against human rights standards.

The First Inquiry

3.7 The first inquiry sought to directly address this issue. One topic the inquiry was to consider was 'what, if any, additional role the committee should undertake in relation to human rights obligations applying to the Commonwealth'.

3.8 However, in April 2010, before the committee could significantly progress the inquiry, the Commonwealth Attorney-General announced as part of the government's *Australia's Human Rights Framework Policy* the establishment, by legislation, of a new Parliamentary Joint Committee on Human Rights (PJCHR) to review legislation against human rights obligations. This decision arose in the wake of the National Human Rights Consultation.⁷

3.9 As a result, it was apparent to the committee that:

The work of the Parliamentary Joint Committee on Human Rights is likely to have an impact on the remit of the work of the Scrutiny of Bills Committee. It will be relevant for the Scrutiny of Bills Committee to

2 For example, see *Alert Digest No. 2 of 2011*, Combating the Financing of People Smuggling and Other Measures Bill 2011 and *Alert Digest No. 1 of 2006*, Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005.

3 For example, see *Alert Digest No. 1 of 2011*, Human Services Legislation Amendment Bill 2010.

4 For example, see *Alert Digest No. 1 of 2011*, Electoral and Referendum Amendment (Enrolment and Prisoner Voting) Bill 2010.

5 For example, see *Alert Digest No. 1 of 2011*, Stronger Futures in the Northern Territory Bill 2011.

6 For example, see *Alert Digest No. 14 of 2011*, Defence Trade Controls Bill 2011.

7 The Committee presented its report to the Australian Government on 30 September 2009. See <http://www.humanrightsconsultation.gov.au/> for details.

consider the content of the enabling legislation before it can develop an informed view of its own future role and direction.⁸

3.10 The committee therefore deferred its 2010 inquiry pending the introduction of the relevant bills.

Parliamentary Joint Committee on Human Rights

3.11 The two bills that, among other things, sought to establish the PJCHR were introduced into Parliament in June 2010. They were the subject of a Senate Legal and Constitutional Affairs Legislation Committee Report, tabled on 28 January 2011, and they were passed and received the Royal Assent in November 2011. The joint resolution of both Houses of Parliament establishing the details of operation for the committee was passed in March 2012 and that committee now has in place all of the necessary legal and procedural foundations for its operation.

3.12 For the purpose of this report it is sufficient to note that in the scope of operation for both committees there are significant areas of overlap and significant areas of difference. Professor Horrigan has expressed his view of this as follows:

One committee (ie the Joint Committee) has a scrutinising role that is solely concerned with human rights and confined largely at present...to what I have termed the ‘international consistency’ dimension of compatibility in the earlier submission. The other committee (ie the Senate Committee) has a scrutinising role that includes but extends beyond the subject matter of human rights. This extension in the Senate Committee’s role operates on two levels. First, it covers individual rights and liberties that might not strictly be conceived in international human rights terms. Secondly, it covers other non-rights-based aspects of scrutiny too, such as legislation’s fidelity to other aspects of the rule of law in a parliamentary democracy.⁹

3.13 In light of the (then) proposed PJCHR, the committee made a submission to the Senate Legal and Constitutional Affairs Committee inquiry into the Human Rights (Parliamentary Scrutiny) Bills about its continued operation:

The [Scrutiny] Committee envisages that it wouldn't simply repeat the work that was being undertaken by a Parliamentary Joint Committee on Human Rights, but it would continue to be a decision for the Scrutiny Committee, on a case by case basis, whether it also needed to comment on bills and to determine the content of those comments....I also note that, while some of the remit for each committee has the potential to overlap, the committees will also have some very different areas of responsibility.¹⁰

8 http://www.aph.gov.au/Senate/committee/scrutiny/future_direction_2010/interim_report/index.htm, p.1.

9 *Submission 11* [2011], p. 4.

10 Submission made by letter from Senator Helen Coonan, then chair of the Scrutiny of Bills Committee, to Senator Trish Crossin, chair of the Senate Legal and Constitutional Affairs Committee, dated 28 October 2010, p. 3.

3.14 In its report into the bills, the Senate Legal and Constitutional Affairs Committee expressed the view that:

...the new joint committee should not prevent existing Senate scrutiny committees from continuing to perform their valuable roles. While there may be some overlap between the role of the new joint committee and these existing committees, the committee is confident that the committees will identify and develop constructive means of operating in tandem, and effectively managing any such interaction.¹¹

Comment

3.15 The committee wholeheartedly agrees that it is 'politically and legally desirable to avoid a situation in which the committee and the PJCHR are ever covering the same ground on questions of how human rights matter for scrutiny purposes'.¹² The committee endorses the Senate Legal and Constitutional Affairs Legislation Committee view that:

...there are many circumstances where Senate, House and joint committees have overlapping responsibilities: parliamentary committees are often required to perform their functions in a manner that prevents unnecessary duplication and accords comity to the activities of other committees.¹³

3.16 Some time is needed to determine how the work of each committee unfolds. The scrutiny committee is of the view that the work of the two committees will complement each other, but that each has its place. In this regard, the committee endorses the view of the Clerk of the Senate that:

What enhancement [the PJCHR] may bring to the process of considering legislation it ought not be seen as a substitute for the work of the Scrutiny of Bills Committee.¹⁴

3.17 In relation to the scope of standing order 24, the committee notes the view expressed that it is open to the committee to consider the scope of the existing terms of standing order 24(1)(a)(i) ('trespass unduly on personal rights and liberties') more broadly. Calls have also been made for its scope to be defined more clearly. For example, former senator and former committee member, Mr Andrew Murray, argues that he has 'long thought scrutiny committees unnecessarily limit themselves as to the rights they report on' and that it is time for 24(1)(a)(i) '...to be interpreted a little more liberally'. Mr Murray also suggests that the committee should 'list those rights the

11 Senate Legal and Constitutional Affairs Standing Legislation Committee report of 28 January 2011 into the Human Rights (Parliamentary Scrutiny) Bills, p. 112.

12 *Submission 11* [2011], *2012 Supplementary submission*, p. 5.

13 Senate Legal and Constitutional Affairs Standing Legislation Committee report of 28 January 2011 into the Human Rights (Parliamentary Scrutiny) Bills, p. 112.

14 *Submission. 15* [2011], p. 2.

Committee agrees they should routinely check legislation against and report on.¹⁵ Numerous other submissions called for changes to the standing order itself.¹⁶

3.18 The committee considered and noted these views. However, the committee is not persuaded at this time that change of this type is warranted. Given the committee's role and its commitment to taking a non-partisan approach to its work, the committee is generally satisfied with the terms of standing order 24(1)(a)(i) and is of the opinion that its current scope is appropriate.

3.19 In addition, it is inherent in the view expressed by Mr Murray above that the existing terms of reference already allow some flexibility for the committee to consider emerging issues and to reconsider existing ones. With this in mind, the committee believes that it, with the assistance of its legal adviser, approaches the scrutiny of bills as to whether they 'trespass unduly on personal rights and liberties' appropriately.

3.20 In relation to the second issue raised by Mr Murray the committee does not, at this time, agree that a list of rights should be included in standing order 24(1)(a)(i). However, the committee is taking steps to improve awareness of matters of concern to it from a scrutiny perspective and this is discussed further in *Chapter 7, Communication*.

Committee's approach to its work

Introduction

3.21 Another key issue considered by the committee relates to a fundamental aspect of the committee's effectiveness: how it approaches its work. As the Clerk of the Senate has observed:

The committee's present inquiry provides an opportunity for it to examine and challenge...assumptions and to determine whether its traditional practices and approaches remain appropriate.¹⁷

3.22 More particularly, the Clerk of the Senate articulates the position as follows:

Since its inception, the committee has interpreted its role as being one of technical scrutiny. This is a self-imposed interpretation and there is considerable latitude for the committee to reinterpret its role within the existing terms of standing order 24.

...

15 *Submission 12* [2010], p. 11. See also the views of the Law Council of Australia *Submission 19* [2010], the Rule of Law Association of Australia *Submission 7* [2011], former senator Mr Michael Tate *Submission 2* [2010] and Uniting Justice Australia *Submission 8* [2010].

16 See for example, Law Council of Australia, *Submission 6* [2011], paragraphs 133 and 134, p. 27 and Australian Lawyers for Human Rights, *Submission 24a* [2011], p. 5.

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

The committee's existing terms of reference in standing order 24 would allow it to develop new approaches to its work, should the committee wish to do so.¹⁸

3.23 It is correct that the committee's method when scrutinising bills involves focusing primarily on technical scrutiny issues: the detail of the policy of any particular bill is primarily relevant only to the extent that it provides context for each provision. Taking this approach the committee has, over the years, articulated case-by-case (through its *Alert Digests* and *Reports*) a wide range of scrutiny principles. The approach allows the committee to focus on its commitment to taking a non-partisan approach to the scrutiny of individual bills, but this does not require that a policy vacuum exists. A former member of the committee and former Senator, Mr Andrew Murray, described the committee's approach this way:

Except in giving legislation context, the Senate Scrutiny of Bills Committee largely eschews consideration of the policy lying behind legislation. Instead it focuses on those policy measures that affect rights, as when it is government policy to curtail or advance rights; or it focuses on those policy measures that might allow the abuse of executive power.¹⁹

Questions for the committee

3.24 A number of questions have been raised for the committee's consideration in relation to its approach to its work. The Clerk of the Senate has suggested that the committee may consider whether a reinterpretation of its role might involve the committee:

- (a) undertaking forays into particular areas of policy concern (as it did, for instance, in the area of entry, search and seizure);
- (b) developing its own legislative policy, drawing particular 'lines in the sand' on matters of concern, as it has done, for example, in relation to the reversal of the onus of proof or the use of strict liability offences;
- (c) recommending particular amendments addressing matters of concern in legislation.²⁰

3.25 Other comments on this topic relate to a perceived timidity by the committee, and to questioning whether the committee should focus more on the policy aspects when undertaking its work. On the first of these two points former Senator Murray

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

19 *Submission 15* [2011], p. 2.

20 *Submission 20* [2010], p. 2. The view in relation to inquiries is echoed by others, including Mr Andrew Murray, who suggests that more inquiries should be undertaken, and that recommendations for topics could be invited: *submission 12* [2010], p. 2. In relation to suggesting amendments the Rule of Law Association of Australia also supports former Senator Murray's view that amendments could be proposed by the committee: *submission 7* [2011], p. 3.

observed that 'scrutiny is not always welcomed...' and noted that 'scrutiny committees need to be more of a nuisance and less of a paper tiger'.²¹ The Castan Centre for Human Rights Law has suggested that:

The Committee should be much braver in making such decisions, rather than deferring to the whole of the Senate on most occasions, if it takes action at all.²²

3.26 In relation to the second point (about the role of policy), while noting the importance of the bi-partisan nature of technical scrutiny, Professor Horrigan has observed that he supports the:

...possibility of broadening the Committee's approach beyond technical scrutiny to include more policy orientated approaches...at the same time, the distinction between technical and policy-based approaches to scrutiny is often more blurry than bright, because many scrutiny issues have their own policy dimensions too. So, the way ahead lies in recognising that scrutiny raises its own policy-orientated questions and that this can and should be addressed more explicitly, without jeopardising in any way the trust that has developed between the various organs of government involved in legislative scrutiny.²³

Comment

3.27 The committee notes the above comments and agrees that it is relevant to consider its approach to its work. The committee agrees with the Clerk of the Senate that this inquiry provides an opportunity for it to consider utilising the scope it has already (and has, at times, exercised in the past) to continue developing an appropriately robust approach to its work.

3.28 In this context, the committee notes that it has, over the past few years, moved on from the committee's initial approach of raising issues but not expressing a view on them. For example, when it is warranted it is now common for the committee to directly identify its concern and to broadly request an amendment to a provision.²⁴ This is consistent with the requests for the committee to take a more robust approach

21 *Submission 1*, [2010] p. 3.

22 *Submission 9* [2010] pp. 3 and 4. The primary focus of this submission was on whether the committee should have a wider remit to consider human rights issues, but this was a comment which was made in relation to the committee's work more generally.

23 *Submission 11* [2011], *2012 Supplementary submission*, p. 2.

24 See, for example, *First Report of 2012*, Customs Amendment (Military End-Use) Bill 2011 in relation to merits review and parliamentary scrutiny, pp. 5 and 6. In relation to this bill the committee had 'request[ed] that the bill be amended to require annual reporting to Parliament on the exercise of the discretionary power in paragraph 112BA and [sought] the Minister's advice as to whether the bill can be amended to this effect'. The Minister replied to the committee that: 'I have written to the Minister for Home Affairs to seek his agreement with your recommendation...'

to its work. Insofar as the issue of sanctions for non-compliance with the principles in standing order 24 relates to this issue, these are discussed in *Chapter 4, Powers and sanctions*.

3.29 Another related aspect of the committee's approach to its work raised for consideration is whether it is much of a step further for the committee to recommend amendments to provisions of concern. This is one of the ways in which the committee could offer a stronger view about potentially unsuitable provisions. The committee agrees that, in appropriate instances, it could extend its current approach of broadly suggesting the scope of an amendment to providing detailed wording for an amendment. The committee envisages that a practical issue may arise as a result of the sometimes extremely tight timeframes for the provision of its comments. However, in principle the committee endorses this suggestion. No amendment to the terms of reference is needed to implement this suggestion.

3.30 The committee also endorses the other specific matters mentioned by the Clerk of the Senate: undertaking forays into particular areas of policy concern through appropriate inquiries (as it has done in the past) and developing its own legislative policy on scrutiny issues (this is also an approach the committee has used in the past). In relation to inquiries, the committee is open to undertaking further inquiries, and to facilitate this it discusses powers relating to inquiries in the next chapter (*Chapter 4, Powers and sanctions*). In relation to developing its own legislative policy, the committee intends to explore this further in the context of consolidating and reviewing its statements of principle and issuing guides to its work, discussed in *Chapter 7, Communication*.

3.31 The final issue to consider in this section is the question of whether the committee should alter its current approach to increase its consideration of policy issues. In the committee's view, the fact that it has a highly technical focus to its work is appropriate, but it does not mean policy considerations are completely irrelevant or totally ignored. Nonetheless, the committee notes the Clerk of the Senate's observation that 'Recommendations about the content and operation of proposed legislation are now commonplace, and often made by Senate legislation committees on a non-partisan basis.'²⁵ In that context, the committee acknowledges the Clerk of the Senate's point that:

...it is time to ask whether taking a more robust approach, or exploring policy areas of concern to the committee, would pose the same threat to the committee's existence as was apprehended in 1981.²⁶

3.32 In this regard the committee notes the way in which the directness of its comments on provisions of concern have evolved and believes that it is appropriate

25 *Submission 20* [2010] p. 2.

26 *Submission 20* [2010] p. 2.

for it to continue to cautiously develop its approach to its work, in line with its non-partisan tradition.

Timing of reports

3.33 A practical issue has been raised by the Clerk of the Senate in relation to:

...whether there are ways of bringing forward, in appropriate cases, the publication of ministerial responses and the committee's concluding comments. This might be done by:

- increased use of supplementary meetings outside of the committee's usual timetable...;
- pre-authorising publication of ministerial responses...; and
- settling and finalising reports by 'electronic' meetings or means during non-sitting periods (for instance, to give another committee inquiry the benefit of the Scrutiny Committee's views).²⁷

3.34 The committee is keen for its comments to be as useful as possible in the legislative process and endorses the suggestion to implement ways in which to bring forward the publication of its comments when this would assist in the consideration of legislative proposals.

Recommendation 1

3.35 That the committee should consider and publish its comments during non-sitting periods in appropriate cases.

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

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'.

CHAPTER 5

Framework bills

Overview

5.1 A significant area of concern for the committee is an increase in the number of 'framework bills' being introduced into the Parliament. Framework bills primarily contain only the broad principles of a legislative scheme and rely heavily on delegated legislation to determine the scope and operation of the scheme: usually, the detail of the delegated legislation is not publicly available when Parliament is considering the bill. As noted by the Law Council of Australia: 'increasingly the power to make regulations is featuring as a key component of new legislative schemes.'¹ This is inherently problematic from the point of view of effective parliamentary scrutiny,² and avoids detailed parliamentary debate of the content of important provisions.³

5.2 On occasion the Senate has sought to delay the consideration of legislation until draft regulations are available, or has sought to amend legislation to insert provisions constraining the scope of such legislation.⁴ For example, the Senate amended the Health Insurance Amendment (Extended Medicare Safety Net) Bill 2009 to require that determinations made under the bill could not commence until they are approved by each House of the Parliament.⁵

Leaving the detail to regulations

5.3 Peak groups, such as the Law Council of Australia, have expressed concern in relation to bills which leave the main legislative detail to regulations:

...the Law Council has concerns when the power to make regulations extends beyond areas of detail or ancillary matters and concerns the substantive aspects of the legislative scheme. The Law Council has raised concerns, for example, when 'framework' legislation is introduced which provides only a broad outline or platform for the intended legislative scheme and then invests significant power in the Executive to make regulations to give effect to the scheme.⁶

5.4 The Law Council cited the AusCheck scheme as one example where the executive should not have been given broad delegation power. The AusCheck scheme

1 *Submission 19* [2010], p. 29.

2 Senate Procedure Committee, *First report of 2010*, April 2010, p. 1.

3 An idea reflected in *Submission 3A* [2011], p. 1.

4 *Submission 20* [2010], p. 7.

5 *Journals of the Senate*, No. 91, 16 September 2009, p. 2505.

6 *Submission 19* [2010], p. 29.

established the administrative machinery for gathering personal information to conduct 'background checking'. In 2009 a bill to amend the scheme was introduced which:

...allowed for AusCheck regulations to be promulgated which, in themselves, would create new screening regimes independent of any other legislation. There was no explicit limit to the purposes for which these regimes could be developed, outside of the legislative and executive powers of the Commonwealth.⁷

5.5 The Senate Legal and Constitutional Affairs Committee agreed with the Law Council that the bill should be amended so that no new background checking scheme could be established without the passage of other primary legislation. The Government subsequently moved amendments to this effect which were passed by the Senate and agreed to by the House of Representatives.

5.6 The Law Council suggested that:

The experience with this legislation underlines the importance of robust scrutiny of Bills, including whether the legislation seeks to inappropriately delegate matters which should be subject to full parliamentary debate. It also underlines the importance of robust scrutiny of delegated legislation, particularly where the delegation may be...inappropriate.⁸

5.7 Similarly, the Administrative Review Council (ARC) noted the importance of the committee's role in identifying legislative clauses which inappropriately delegate legislative power. The ARC therefore supported the development of guidelines to assist agencies in understanding the committee's concerns about framework bills.⁹ The topic of guidelines generally is discussed in more detail in *Chapter 7, Communication*.

5.8 The Clerk of the Senate has also expressed significant concerns about managing delegated legislation, including relating to framework bills:

Questions about appropriate mechanisms for the control of delegated legislation continue to arise. Increasing volumes of delegated legislation, and increasingly broad provisions authorising such legislation, provide challenges to both [the Regulations and Ordinances Committee and the Scrutiny of Bills Committee] and to the Senate as a whole.¹⁰

Comment

5.9 The committee's position is that it prefers that important information is included in the primary legislation unless there is a principled reason for including it in delegated legislation. To this end, the committee has regularly highlighted

7 *Submission 19* [2010], pp. 29–30.

8 *Submission 19* [2010], p. 30.

9 *Submission 19A* [2011], p. 1.

10 *Submission 20* [2010], p. 7.

instances in which primary legislation may excessively rely on delegated legislation for its operation.¹¹ The committee has done so under the general principle 1(a)(iv) – 'inappropriately delegated legislative powers'. The committee also notes that it considers whether the parliamentary scrutiny afforded to proposed legislation is appropriate under principle 1(a)(v) – 'insufficiently subject the exercise of legislative power to parliamentary scrutiny'.

5.10 The committee notes that the Procedure Committee has stated that it:

...sees merit in encouraging legislation committees in their examination of bills to be alert for cases in which the absence of draft regulations hinders adequate scrutiny of a bill, and to frame recommendations accordingly.¹²

5.11 This accords with the suggestion of the Clerk of the Senate that:

...one new area in which the committee may be able to assist the Senate is in identifying bills which appear to rely significantly for their operation on the making of regulations, the detail of which is not available for the Senate's consideration while the bill is before it.¹³

5.12 The committee endorses this proposal. It can readily include this information, as necessary, in a separate section of its *Alert Digest*. Of course, this would be in addition to any more detailed comments made in the usual course in an *Alert Digest* or *Report*. In addition to general awareness of the issue, this process could assist legislation committees in considering whether to recommend deferral of consideration of a bill in the absence of draft regulations.¹⁴

5.13 Given the increasing prevalence of framework bills and the importance of ensuring they are subject to effective scrutiny it is recommended that the committee's terms of reference be amended to include specific reference to this task. The committee also intends to formulate guidelines to assist those involved in this type of approach to avoid potential scrutiny issues of concern.

5.14 The committee notes that its intention to implement a process for bringing forward its comments during non-sitting periods will complement this recommendation (see *Chapter 3, Committee approach to its work*). In addition, the committee's recommendation to formalise an existing arrangement for informing

11 See, for example, consideration of the Carbon Credits (Carbon Farming Initiative) Bill 2011 in Senate Scrutiny of Bills Committee, *Sixth Report of 2011*, 22 June 2011, pp. 274–276, and the Renewable Energy (Electricity) Amendment Bill 2009 in Senate Scrutiny of Bills Committee, *Ninth Report of 2009*, 19 August 2009, pp. 326–327.

12 Senate Procedure Committee, *First report of 2010*, April 2010, p. 1.

13 *Submission 20* [2010], p. 7, and confirmed in the Clerk's 2011 comments, *Submission 15* [2011], p. 2.

14 The Procedure Committee has encouraged legislation committees, on a case-by-case basis, to consider whether deferral of a bill in the absence of draft regulations is warranted (Senate Procedure Committee, *First report of 2010*, April 2010, p. 1).

legislative and general purpose standing committees of its views on bills that have been referred to another committee will also assist to ensure that communication is appropriate and timely (see *Chapter 7, Communication*).

Recommendation 8

5.15 That Senate standing order 24 be amended to specifically include the scrutiny of bills which excessively rely on delegated legislation for their operation.

Recommendation 9

5.16 That the Scrutiny of Bills Committee develops guidelines in relation to the appropriate level of detail required in primary legislation.

Cooperation with Regulations and Ordinances Committee

5.17 On occasion, the relationship between provisions in primary and delegated legislation has also concerned the Regulations and Ordinances Committee. In particular, the Regulations and Ordinances Committee has noted that it has difficulty in objecting to provisions which are 'authorised' by primary legislation which has been passed by the Parliament. The Regulations and Ordinances Committee suggested that if this committee has doubts or concerns about a provision which involves delegated legislation, the committee could seek advice from the Regulations and Ordinances Committee – either formally or informally. As noted by the Regulations and Ordinances Committee, 'where the work of the committees overlaps, each committee would benefit from the perspective of the other'.¹⁵

5.18 The Scrutiny of Bills Committee agrees that it is useful for the scrutiny committees to communicate and thanks the Regulations and Ordinances Committee for the offer to provide formal or informal advice if this is useful. The Scrutiny of Bills Committee intends to utilise this option as needed.

Other issues relating to delegated legislation

5.19 A number of other issues were also raised in relation to delegated legislation, particularly in submissions addressing a term of reference for the 2010 inquiry about whether parliamentary mechanisms for the scrutiny and control of delegated legislation are optimal. Many of these issues seem to be beyond the direct scope of the Scrutiny of Bills Committee, however, the committee would like to mention the issues raised for the benefit of readers who are interested in this aspect of the terms of reference from the 2010 inquiry.

Inadequate scrutiny of delegated legislation from a policy perspective

5.20 The Clerk of the Senate noted that:

15 *Submission 33* [2010], p. 3.

...there is no ordinary process by which the large volume of delegated legislation produced each year is tested to see whether policy considerations exist which might appropriately become the subject of committee investigation.¹⁶

5.21 The Law Council also expressed concern about the absence of consideration of policy aspects of delegated legislation.¹⁷

5.22 The Regulations and Ordinances Committee suggested that the role of the Selection of Bills Committee, which currently reports to the Senate on whether bills should stand referred to committees, could be expanded to consider the reference of delegated legislation in similar terms. The Regulations and Ordinances Committee also highlighted the approach taken by the House of Lords which established a Select Committee on the Merits of Statutory Instruments in 2003.¹⁸ To ensure that every statutory instrument receives a degree of scrutiny, the committee draws to the 'special attention of the House' any instrument laid in the previous week which it considers may be 'interesting, flawed or inadequately explained by the Government'.¹⁹ In particular, the grounds on which an instrument, draft or proposal may be drawn to the special attention of the House are—

- that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;
- that it may be inappropriate in view of changed circumstances since the enactment of the parent Act;
- that it may inappropriately implement European Union legislation;
- that it may imperfectly achieve its policy objectives.²⁰

No process for the consideration of draft delegated legislation

5.23 The Clerk of the Senate also highlighted the fact that there is currently no process for the consideration of draft regulations by either this committee or the Regulations and Ordinances Committee.²¹ As noted by the Clerk, this means that there is no guarantee that the concerns of either committee will be raised in relation to draft regulations.²²

16 *Submission 20* [2010], p. 7.

17 *Submission 19* [2010], p. 29.

18 *Submission 33 [2010]*, p. 2. In relation to the Selection of Bills Committee suggestion, see also the submission of Ms Janice Paull, *Submission 25* [2010], p. 7.

19 <http://www.parliament.uk/business/committees/committees-a-z/lords-select/merits-of-statutory-instruments-committee/role/>

20 <http://www.parliament.uk/business/committees/committees-a-z/lords-select/merits-of-statutory-instruments-committee/role/tofref/>

21 *Submission 20* [2010], p. 7.

22 *Submission 20* [2010], p. 7.

Inadequate consultation in the making of delegated legislation

5.24 The Regulations and Ordinances Committee also raised the issue of consultation in the making of delegated legislation. The *Legislative Instruments Act 2003* requires that a rule-maker 'must be satisfied that any consultation that is considered by the rule-maker to be appropriate and that is reasonably practicable to undertake, has been undertaken'.²³ In determining whether consultation has been appropriate, a rule-maker 'may have regard to any relevant matter' including the extent to which the consultation drew on the knowledge of those with expertise in the field, and ensured that those affected has an adequate opportunity to comment.²⁴

5.25 The Regulations and Ordinances Committee has highlighted some difficulties with these provisions and suggested that they may be able to be strengthened. At the very least, the committee has suggested that the word 'may' could be replaced with the 'must'. The Regulations and Ordinances Committee recognised that it is difficult for it (and the Senate as a whole) to determine what action is appropriate where consultation is deficient.²⁵

Conclusion

5.26 The committee notes that there is no forum dedicated to discussing these issues about delegated legislation, which are of relevance to both of the Senate scrutiny committees. The committee suggests that it may be useful for further consideration to be given to the matters outlined above in this section.

Recommendation 10

5.27 That the Senate Committee for the Scrutiny of Bills and the Regulations and Ordinances Committee consider issues relating to the scrutiny of delegated legislation discussed in this report, including the scrutiny of draft delegated legislation, to develop a response to these matters.

23 s 17(1), *Legislative Instruments Act 2003*

24 s 17(2), *Legislative Instruments Act 2003*

25 *Submission 33* [2010], p. 2. See also Senate Regulations and Ordinances Committee, *Consultation under the Legislative Instruments Act 2003 – Interim Report*, 113th Report, June 2007.

CHAPTER 6

Uniform legislation

Overview

6.1 Uniform legislation refers to those bills that seek to harmonise legislation across a number of jurisdictions. This structure requires cooperation between different bodies where it is considered appropriate to take a nationally consistent legislative approach to an issue or matter.¹ In Australia, such legislation arises from the federal structure of government, which provides a constitutional division of power between the State and Commonwealth governments. For this reason it is also often described in Australia as 'national scheme legislation'.

6.2 The Western Australian Legislative Council Standing Committee on Uniform Legislation and Statutes Review (the WA Uniform Legislation Committee) has identified the following purposes of uniform legislation:

- achieving consistency in a common functional area (for example, criminal law);
- avoiding duplication of services between the Commonwealth and the States/Territories;
- pooling resources (for example, the administration of the First Home Owner's Grant Scheme);
- applying uniform laws to mobile resources (for example, rivers which cross State borders);
- achieving nationally consistent legislation in those areas where the Commonwealth Government has limited or no constitutional power;
- or some other harmonising purpose.²

6.3 The WA Uniform Legislation Committee has also noted that since the 1990s there has been an increased incidence of uniform legislation, primarily arising from globalisation of the economy.

6.4 The scrutiny committee's consideration of uniform laws in this inquiry has proceeded without reference to the policy details of any proposed or actual uniform laws. However, even without exploring policy specifics it is apparent that the approach has advantages and disadvantages. The use of uniform laws can be seen to

1 Western Australian Legislative Council Standing Committee on Uniform Legislation and Statutes Review, *Information report: scrutiny of uniform legislation*, June 2011, p. 4.

2 Western Australian Legislative Council Standing Committee on Uniform Legislation and Statutes Review, *Information report: scrutiny of uniform legislation*, June 2011, p. 4.

deliver benefits such as the removal of duplication of administration and compliance costs, increased efficiency, and economies of scale. However, uniform legislation can also have disadvantages, particularly in respect of parliamentary (and State) sovereignty.³

Process of formulating uniform legislation

6.5 Uniform legislation emerges primarily from the work of ministerial councils, comprising State and Commonwealth ministers responsible for particular portfolios. In some cases, ministerial councils also involve ministers from the New Zealand Government. There are currently over 40 State-Commonwealth ministerial councils and fora. The most well known are the Council of Australian Governments (COAG) and the Standing Committee of the Attorneys General.⁴

6.6 Once a ministerial council has approved a proposal for a scheme, the matter is generally referred to COAG for approval. In the event an intergovernmental agreement or uniform scheme requires legislation to give it effect, the various Ministers are responsible for sponsoring bills through individual Parliaments.⁵

Concerns about uniform legislation

Lack of information

6.7 The WA Uniform Legislation Committee has noted the difficulty in accessing information concerning the decisions of ministerial councils. Where information that a decision has been made is available, there may not be any publicly available written record of the content of the agreement beyond a statement of intention to jointly address an agreed problem. While there has been a trend in recent years for more formality, some intergovernmental agreements to implement uniform legislation are not supported by a formal document executed by the participating jurisdictions. Ministerial councils usually meet only once or twice a year and so they may settle issues by correspondence. This correspondence may constitute the only documentation supporting a proposal for uniform legislation. Even where there is a written intergovernmental agreement it is often primarily concerned with principle and provides no detail on implementation.⁶

3 Western Australian Legislative Council Standing Committee on Uniform Legislation and Statutes Review, *Information report: scrutiny of uniform legislation*, June 2011, pp 4–5.

4 Western Australian Legislative Council Standing Committee on Uniform Legislation and Statutes Review, *Information report: scrutiny of uniform legislation*, June 2011, p. 5.

5 Western Australian Legislative Council Standing Committee on Uniform Legislation and Statutes Review, *Information report: scrutiny of uniform legislation*, June 2011, p. 5.

6 Western Australian Legislative Council Standing Committee on Uniform Legislation and Statutes Review, *Information report: scrutiny of uniform legislation*, June 2011, pp 6 and 9–10.

Curtailment of parliamentary scrutiny

6.8 Further difficulty arises where intergovernmental agreements require that legislation in each jurisdiction is identical, or where identical provisions may be necessary to give practical effect to a national scheme. In these cases the ability of the Senate and its committees to effectively scrutinise and amend bills is curtailed.

6.9 An illustration of the difficulties can be found in the passage of the National Vocational Education and Training Regulator Bill 2010 (and related bills) through the Commonwealth Parliament in March 2011. The bills were the result of a referral of powers from New South Wales under section 51(xxxvii) of the Constitution. The government argued that the bills could not be amended because the referral of powers was based on the specific text of the bill as it was introduced, and any alteration of the text would result in the failure of the agreement to establish the Vocational Education and Training Regulator altogether.

6.10 This committee made several comments on the bills in its *Alert Digest No. 1 of 2011*.⁷ In addition, the Education, Employment and Workplace Relations Legislation Committee (EEWR Committee) recommended changes to the explanatory memoranda and that certain provisions of the legislation be amended once they had been enacted (and the text-based referral of powers had been effected).⁸ The EEWR Committee also specifically supported the provision of exposure drafts of such legislation in the future to enable examination of proposals by parliamentary committees *before* they were locked into the terms of intergovernmental agreements.

6.11 During debate on the bills several senators expressed concern about the curtailment of parliamentary scrutiny when bills such as these are presented to the Parliament as a *fait accompli*.⁹

6.12 The Chair of the Senate Economics Legislation Committee, Senator Mark Bishop,¹⁰ also made a submission to this inquiry about uniform legislation.¹¹ Senator Bishop described his committee's similar recent experience with uniform legislation when it was inquiring into the Business Names Registration Bill 2011 and related bills. In his submission, Senator Bishop referred to concern expressed by other Senate committees relating to national scheme legislation, including the National Vocational Education and Training Regulator Bill 2010. Senator Bishop expressed his committee's support for the EEWR committee recommendation and stated:

7 The Rule of Law Institute of Australia issued a media release dated 8 March 2011 commending the committee for its 'assiduous reporting' of rule of law concerns about provisions of the bill.

8 In response, a remedial bill was introduced in the Senate on 24 August 2011.

9 Department of the Senate, *Procedural Information Bulletin*, No. 249, 28 March 2011, p. 1.

10 Senator Bishop is also a member of the Scrutiny of Bills Committee.

11 Senate Economics Legislation Committee, *Submission 22* [2011].

...the committee suggests that for future national scheme legislation bills requiring the coordination of their passage through the various federal, state and territory legislatures, the exposure draft of the bill(s) should not be introduced into state or territory legislatures before federal parliamentary committees have had the opportunity to examine its provisions and make recommendations.¹²

6.13 A submission from the Chair of the Community Affairs Legislation Committee, Senator Claire Moore, also provides insight into that committee's experience with the National Health Reform Amendment (National Health Performance Authority) Bill 2011.¹³ The legislation was the product of a COAG decision which generally attracted broad support, although a few concerns were apparent. Senator Moore states:

Late in the committee's inquiry, the government prepared proposed amendments to the Bill and a draft supplementary Explanatory Memorandum, and provided them to the committee, following discussions between the government and a number of stakeholders, but particularly some State governments.

The committee believes that such cases demonstrate the importance of ensuring that exposure drafts are subject to consultation, including through the scrutiny committees and legislative and general purpose standing committees. The committee suggests that significant improvements in policy implementation and technical design of framework legislation and national schemes could be achieved through such a process.¹⁴

Comment

6.14 This committee shares the concerns outlined above and notes that they are not new: a Working Party of the Chairs of Scrutiny of Legislation Committees throughout Australia identified similar issues in a discussion paper issued in July 1995. The discussion paper, titled *Scrutiny of National Scheme Legislation and the Desirability of Uniform Scrutiny Principles*, stated the issues from a scrutiny perspective clearly:

...in relation to uniform legislation no changes are permitted. Committees are often told that the legislation cannot be varied because it has been carefully worked out by the relevant Ministerial Council and has national significance....This is also the case with subordinate legislation.

As a result, Scrutiny Committees are restricted from carrying out their roles in relation to uniform legislation. Practically speaking, it is fair to say that

12 *Submission 22* [2011], pp. 4 and 5.

13 *Submission 23* [2011].

14 *Submission 23* [2011], p. 2.

there is effectively no parliamentary scrutiny of national scheme legislation.¹⁵

6.15 The discussion paper goes on to state:

In a nutshell, the problems with national scheme legislation may be summarised as follows: -

- Insufficient scrutiny – there is no mechanism for scrutiny either by Parliaments or Parliamentary Committees;
- Lack of Governmental accountability at both State and Federal levels.¹⁶

6.16 Although this was written many years ago, the views expressed are still apposite today. In fact, it is arguable that the issues have a sharper resonance due to the noted increase in the use of uniform legislation.

6.17 In addition to agreeing with the concerns of the three legislation committees outlined above, the Scrutiny of Bills committee suggests that to encourage the practice of providing exposure drafts the Senate could consider deferring the passage of any uniform or national scheme legislation unless adequate opportunity to scrutinise it and negotiate amendments, if they are considered necessary, is provided.

Recommendation 11

6.18 The committee recommends that where there is a proposal for uniform legislation, amendments to uniform legislation or delegated legislation and the nature of the proposal means that the ability of the Senate and its committees to effectively scrutinise and amend the relevant proposal is limited, exposure drafts should be provided as soon as practicable to this committee, the relevant legislative and general purpose standing committee, and the Senate Regulations and Ordinances Committee if the proposal includes delegated legislation. All relevant information about the proposal, including any formal agreements or correspondence should also be provided to the committees to assist in their consideration of the exposure drafts.

Recommendation 12

6.19 That standing order 24 be examined to confirm whether the Scrutiny of Bills Committee is empowered to consider, advise and report on exposure drafts and associated information and, if it is not, that standing order 24 be amended to allow the committee to do so.

15 Under the auspices of the Senate Standing Committee on Regulations and Ordinances and the Senate Standing Committee for the Scrutiny of Bills, the Working Party of the Chairs of Scrutiny of Legislation Committees published the *Scrutiny of National Scheme Legislation and the Desirability of Uniform Scrutiny Principles* July 1995, paragraph 2.18, p. 22.

16 *Scrutiny of National Scheme Legislation and the Desirability of Uniform Scrutiny Principles* July 1995, paragraph 2.25, p. 24.

CHAPTER 7

Communication

Introduction

7.1 In recent years the committee has developed a renewed interest in improving its communication. The committee recognises that its expertise in legislative scrutiny is likely to be useful to other participants in the legislative process. It is therefore seeking to identify ways in which to make this information more accessible and useful. The committee would like to create as much opportunity as it can to have a preventive impact (for scrutiny concerns to be avoided) and to reduce the necessity for a remedial impact (identifying and fixing problems once proposed legislation has already been introduced). In an effort to progress this goal, this chapter is dedicated to considering options for the committee to expand on, and improve, its communication.

7.2 A number of executive publications, such as the *Legislation Handbook* and the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, already exist to provide guidance for those involved in the preparation of proposed legislation, amendments and supporting documents. The Clerk of the Senate has noted:

The appearance of the committee's views in these documents, and in advice given by [relevant] agencies in developing legislation, marks an important ongoing contribution to better standards in the drafting of legislation and better explanation of the proposed operation of new and amended laws.¹

7.3 The committee welcomes the attention given to scrutiny matters in these documents and proposes later in this chapter that it will provide additional resources to those who would like further information and assistance about the technical scrutiny of legislation.

Traditional communication methods

7.4 The committee has traditionally communicated through the publication of its:

- *Alert Digests* and *Reports* during each Senate sitting week;
- *The Work of the Committee Report* at the end of each Parliament; and
- inquiry reports tabled in the Senate at the conclusion of an inquiry.

7.5 Notice of the tabling of the *Alert Digest* and *Report* is now communicated each sitting week through Twitter, the documents are loaded onto the committee's website once they have been tabled, and they are also sent to various interested parties in hard copy. The format of these documents was updated relatively recently and the

¹ *Submission 20* [2010], p. 4.

committee is of the view that they remain a useful contribution to understanding the committee's work. The Chair of the Senate Community Affairs Legislation Committee, Senator Claire Moore, in a submission to this inquiry, noted that:

The committee is grateful for the work of the Scrutiny of Bills committee, which it believes is vitally important in ensuring effective scrutiny of legislation and the protection of individuals' rights. It supports the committee's two stage process of reporting, with the Alert Digests and Reports, because this helps ensure Senators and committees are advised as early as possible of issues that might warrant consideration during inquiries by legislative and general purpose standing committees.²

7.6 The committee intends to retain its *Alert Digests* and *Reports* as the primary vehicles for notifying the Senate and others of the committee's assessment of legislative proposals against the scrutiny principles outlined in standing order 24.

7.7 In addition to these documents which the committee publishes, the committee's secretariat is regularly involved in providing material for educational events, such as the *Getting bills through the Senate* seminars. The seminar is designed to provide public servants who advise ministers in the Senate chamber on the passage of bills a detailed understanding of the legislative process and skills needed to monitor and facilitate the progress of bills through the Parliament.

Recent innovations

Interaction with Senate legislative committees

7.8 One of the recent steps the committee has taken is to increase communication with Senate legislation committees. This interaction alerts the legislation committee in a timely manner about issues raised by the committee during a particular sitting week. This is especially helpful when a bill has been referred to a legislative committee by the Senate Selection of Bills Committee for inquiry and there is a tight reporting timeframe. The response from Senate legislation committee secretariats to this approach has been very positive.³

7.9 The practice was noted by the Clerk of the Senate who made a practical suggestion for the committee to seek to arrange for the practice to become part of the committee's operating framework:

I note the recent innovation of the committee in forwarding its initial comments on bills to legislation committees examining those bills. The committee may wish to formalise this arrangement by seeking a change

2 *Submission 23* [2011], p.1.

3 Most advice to this effect has been received informally, however, note that the Chair of the Community Affairs Legislation Committee, Senator Claire Moore, made a submission to the inquiry, which noted that her committee '...also supports the distribution of Alert Digests and Reports to committees when they contain comments on bills in those committees' portfolios of interest': *Submission No. 23* [2011], p. 1.

in standing order 24 (or standing order 25 covering the legislation committees) to provide that the committee's comments on bills stand referred to legislation committees inquiring into those bills. This is an issue that could be referred to the Procedure Committee to follow up should the committee see merit in it.⁴

7.10 The committee endorses this proposal from the Clerk of the Senate and accordingly the committee recommends that this matter be referred to the Procedure Committee for consideration.

Recommendation 13

7.11 That the Senate refers to the Procedure Committee the Scrutiny of Bills committee's request that standing order 24 be amended to provide that the committee's comments on bills stand referred to legislation committees inquiring into those bills.

7.12 The committee notes that it also has informal, but effective, communication channels with the Senate Regulations and Ordinances Committee (discussed in *Chapter 5, Framework bills*) and it intends to extend this approach to include the new scrutiny committee, the Parliamentary Joint Committee on Human Rights.

Use of technology

Communication

7.13 The committee, through its secretariat, has been updating its use of technology to improve its efficiency and communication. The key items that have already been implemented in relation to communication are:

- updating the website: additional information is being included on the committee's homepage and some features are regularly updated (within technology constraints). For example, the date of the committee's next scheduled meeting is now available; and
- the Senate's Twitter account is used to notify subscribers when the committee's *Alert Digests* and *Reports* have been tabled each sitting week and the message provides a link to access the documents online.

7.14 Utilising technology to improve the committee's communication is a continual process and the committee plans to implement further ideas, both shortly and into the future.

4 *Submission 20* [2010], p.5. In her 2011 submission to the current inquiry the Clerk added to this with the view that: 'I commented on some of the committee's recent innovations in its increased interaction with legislation committees...and it is pleasing to see that those innovations have taken root': *Submission 15* [2011], p. 1.

Internal database

7.15 Another recent innovation has been the establishment of an internal database which captures the committee's comments on bills. Currently, comments on all bills introduced into the Parliament from 2000 to the present have been entered into the database, and it is being kept up-to-date. The database has the capacity to be easily searched and records filtered according to the information sought and it has become a very useful tool and resource for the committee secretariat.

7.16 It is hoped that in the future the database can be made publicly accessible so that it is available as a research tool to others. This may be especially useful to those who are involved in developing and drafting legislation. In the meantime, the database will facilitate the secretariat's ability to create additional support and education resources for these purposes. The database may also provide a foundation for the committee to communicate the information traditionally contained in its *Work of the Committee* report differently. Both of these items are discussed further below.

Next steps

7.17 The Clerk of the Senate has noted that:

After years of lamenting the failure of explanatory memoranda to provide sufficient explanations of important matters of legal policy (and an inquiry on the topic), the committee adopted the practice of requesting that explanatory memoranda be revised to incorporate better explanations.⁵

7.18 This has led to an improvement in the quality of explanatory memoranda, but only through remedial means.⁶

7.19 Earlier in this report the committee considered that an appropriate further step on from requesting changes to explanatory memoranda is for it to recommend textual amendments to bills on a case-by-case basis in response to scrutiny concerns (see *Chapter 3, Committee approach to its work*). A related issue, which has also been canvassed elsewhere in this report, is that the committee is interested in increasing its preventative impact. One way to assist those writing explanatory memoranda to meet the committee's expectations is to provide information about the standards required. This is related to an idea raised with the committee by the Clerk of the Senate, who observed that:

Another way in which the committee might enhance its effectiveness would be to bring greater awareness to its concerns by publishing its positions differently...Greater awareness might be gained by developing a comprehensive document outlining the committee's priorities and principles. Such a document could be updated regularly and published on

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

6 See the discussion at *Submission 20* [2010], p. 4

the committee's web pages, providing those who need it direct information about the committee's expectations.

A model for this kind of publication exists in the regular 'work of the committee' reports of the Senate Committee of Privileges...Reports are cumulative and provide an opportunity to assemble and comment on the committee's 'case law'.⁷

7.20 The Administrative Review Council has a similar view (though restricted to a specific topic) to the extent that it:

...considers that agencies may be assisted in developing legislation and explanatory memoranda by clearer guidelines about what the Committee considers appropriate in terms of review, including describing key considerations and providing examples of best practice in explanatory memoranda.⁸

7.21 The Clerk of the Senate also noted that an additional benefit of compiling a comprehensive document is that it generates the opportunity for the committee to review and reflect on its statements of principle and how they may be improved:

Development and publication of such a document might also give the committee an opportunity to consider the usefulness of its precedents and whether they continue to be effective in reflecting the committee's approach to each of its five principles. Should the committee decide to adjust its stance on particular matters, either because of this inquiry or otherwise, a comprehensive document of this nature would provide a useful means of raising awareness of those changes.⁹

7.22 The committee fully endorses these suggestions and the related options outlined in its 2011 interim report.¹⁰ The specific ideas the committee intends to implement are to:

- create a checklist for drafters and others to use in the development of legislation. The list will include issues the committee could raise which breach any of the principles encapsulated in standing order 24;
- enhancing online indexes with hyperlinks to the *Digest* and *Reports* containing the committee's comments;¹¹
- publish short guides and a consolidated document of priorities and principles to assist when drafting explanatory memorandums for bills, which could

7 *Submission 20* [2010], p. 5.

8 *Submission 19* [2011], p. 2.

9 *Submission 20* [2010], p. 5.

10 23 November 2011, paragraphs 1.15 and 1.16, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/future_direction_2011/interim_report/index.htm.

11 *Submission 20* [2010], p. 5.

include model clauses to demonstrate the scrutiny issues which need to be considered and addressed; and

- seek to include a link from the Parliament's home page for a bill to any relevant *Alert Digest* or *Report* which comments on that bill. This will readily indicate, and provide easy access to, any comments made by the committee.

7.23 All of the documents mentioned above will be accessible from the committee's homepage. The committee also intends to advise key stakeholders when the documents become available and when they are updated.

7.24 In response to the committee's 2011 interim report, which refers to the possibility of creating a checklist, Professor Bryan Horrigan provided a supplementary submission. The committee agrees that depending on their content, checklists can be useful, useless or counterproductive. In this context, the view Professor Horrigan expresses is apposite when he observes that 'How the checklists are framed and their ancillary explanation therefore matter.'¹² In relation to this, the committee envisages that it will proceed cautiously with the production of a checklist, concentrating on technical matters and cataloguing issues that have been commented on by the committee in the past and directing readers to further sources of information.

Recommendation 14

7.25 That the committee develop checklists, guidelines and other supporting documents as appropriate and continues to implement improvements to its use of technology in raising awareness of the committee's work.

Senator the Hon Ian Macdonald
Chair

APPENDIX 1

List of public submissions and additional information authorised for publication by the committee

2011 Inquiry

- 1** Murray, Mr Andrew (WA) (*previously received in 2010*)
- 2** Tate AO, Reverend Professor Michael (TAS)
- 3** Oliver, Mr Andrew (VIC) (*previously received in 2010*)
Supplementary information
 - Supplementary comments relating to the committee's interim report, dated 15.1.12
- 4** Western Australian Department of the Attorney-General (WA)
- 5** UnitingJustice Australia (NSW) (*previously received in 2010*)
- 6** Law Council of Australia (ACT)
- 7** Rule of Law Association of Australia (NSW)
- 8** Human Rights Law Centre (VIC)
- 9** Saunders, Professor Cheryl (VIC)
- 10** Cooney, Mr Bernard Cornelius (VIC)
- 11** Horrigan, Professor Bryan (VIC)
Supplementary information
 - Supplementary submission relating to the committee's interim report, dated 19.1.12
- 12** Public Interest Advocacy Centre (NSW)
- 13** Victorian Council of Social Services (VCOSS) (VIC)
- 14** Liberty Victoria (VIC)
- 15** Clerk of the Senate (ACT)
- 16** Aboriginal Legal Service WA (ALSWA) (WA)
- 17** Office of the Australian Information Commissioner (OAIC) (ACT)
- 18** NSW Young Lawyers Human Rights Committee (NSW)
- 19** Administrative Review Council (ACT)
Supplementary information
 - Supplementary comments relating to the committee's interim report, dated 15.1.12
- 20** Queensland Government (QLD)
- 21** Queensland Law Society (QLD)
- 22** Senate Economics Legislation Committee (ACT)

2010 Inquiry

- 1 Foskey, Dr Deb
- 2 Tate AO, Reverend Professor Michael
- 3 Commonwealth Ombudsman
- 4 Williams, Professor George
- 5 Human Rights Law Resource Centre Ltd
Supplementary information
 - Additional information relating to a UK Joint Committee Report - *Enhancing Parliament's Role in Relation to Human Rights Judgments*, received 30.3.10
- 6 Cooney, Mr Bernard Cornelius
Supplementary information
 - Supplementary submission received 5.7.10
- 7 Civil Liberties Australia Inc
- 8 UnitingJustice Australia
- 9 Castan Centre for Human Rights Law
- 10 Santow, Mr Edward
- 11 Australian Human Rights Commission
- 12 Murray, Mr Andrew
- 13 Allan, Professor James
Supplementary information
 - Additional comments including article *McClelland smuggles UN rights standards in the back door*, received 18.6.10
- 14 Kingsford Legal Centre
- 15 Office of the Victorian Privacy Commissioner
- 16 Combined Community Legal Centres NSW
- 17 Oliver, Mr Andrew
- 18 Amnesty International
- 19 Law Council of Australia
- 20 Clerk of the Senate
- 21 Australian Privacy Foundation
- 22 NSW Young Lawyers Human Rights Committee
- 23 Office of the Privacy Commissioner

- 24** Australian Lawyers for Human Rights
Supplementary information
 - Supplementary submission dated 9.7.10
- 25** Paull, Ms Janice
- 26** Australian Lawyers Alliance
- 27** National Association of Community Legal Centres Inc
- 28** Rule of Law Association of Australia
Supplementary information
 - Supplementary submission dated 24.6.10
- 29** St Vincent de Paul Society National Council
- 30** Australian Christian Lobby
- 31** Women's Legal Services NSW
- 32** Australian Law Reform Commission
- 33** Senate Standing Committee on Regulations and Ordinances Committee
- 34** Aboriginal Legal Service WA (ALSWA)
- 35** Sydney Centre for International Law
- 36** NSW Council of Civil Liberties

APPENDIX 2

Terms of reference for 2010 Inquiry

The Senate has referred the following matter to the Standing Committee for the Scrutiny of Bills for inquiry and report by 12 May 2010:

- (1) 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.
- (2) In undertaking this inquiry, the committee should have regard to the role, powers and practices of similar committees in other jurisdictions.
- (3) The committee be authorised to hold public hearings in relation to this inquiry.

