Expanding Parliamentary Scrutiny: Considering a Pre-introduction Approach

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Abstract: This article argues that the Senate Standing Committee for the Scrutiny of Bills should adopt a 'pre-introduction' scrutiny approach, focused on the scrutiny of draft bills before their introduction into the Parliament. Pre-introduction scrutiny would operate alongside the Committee's existing scrutiny model, offering a pragmatic way to improve the committee's ability to contribute to the deliberative process and to secure improvements to the technical quality of legislation. Significantly, this approach would also assist in the promotion of a key set of parliamentary norms within the executive. Embracing pre-introduction scrutiny would also shift the focus of the committee away from a narrow view of bills before the Parliament towards a wider view of the legislative process as a whole. This would be a welcome change in light of calls for increased involvement from the democratic branch of government within the legislative process.

INTRODUCTION

In recent years there have been increasing calls for Parliament to re-assert its constitutional position as lawmaker-in-chief. In particular, commentators have called on Parliament to more rigorously engage in the legislative scrutiny process.[2]

This has stemmed from a number of fronts. For instance, the High Court's insistence on the constitutional importance of parliamentary scrutiny over executive action in *Williams v*

[1] My thanks to Toni Matulick and Glenn Ryall for their comments and advice. The views in this article are my own, as are any mistakes.

[2] See e.g: The Centre for Public Integrity, *Law-making with Integrity: Enhancing the quality of laws and public trust in law-making* (21 February 2026).

Commonwealth [No. 1] has prompted a growing body of literature on parliamentary accountability.[3] In addition, there have been increasing concerns about the trend towards the delegation of law-making power from Parliament to the executive. While this trend is longstanding,[4] it was both exacerbated and highlighted by the COVID-19 pandemic.[5] Finally, increased complexity, alongside shortened timeframes for legislative development, has led to concerns about the technical quality of legislation.[6]

This article argues that a shift in the focus of the Senate Standing Committee for the Scrutiny of Bills (the 'committee') towards a systematic 'pre-introduction' scrutiny approach offers one pragmatic way for Parliament to strengthen its legislative scrutiny processes. This approach would focus on the scrutiny of draft bills before their introduction into Parliament. As well as improving technical legislative outcomes, it is argued that a key benefit of this would be embedding a set of parliamentary norms focused on deliberation, democratic decision-making, and rights protection into the very earliest stages of the legislative process.

The article begins by outlining the structure and practices of the committee, before moving on to a discussion of the committee's purpose, including its role as a norm-builder and a facilitator in the deliberative process. The article then provides a definition of pre-introduction scrutiny, before discussing the benefits and drawbacks of a pre-introduction scrutiny approach.

BACKGROUND AND PRACTICES OF THE SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

As will be shown, the committee's existing practices are both well-established and highly systematised. The model of pre-introduction scrutiny that is proposed below is intended to fit within and extend these practices rather than overturn them, a suggestion that also

[3] *Williams v Commonwealth [No. 1]* (2012) 248 CLR 156; Gabrielle Appleby and Joanna Howe, 'Scrutinising Parliament's Scrutiny of Delegated Legislative Power'. *Oxford University Commonwealth Law Journal* 15(1) 2015, 3; Glenn Ryall, 'Williams v. Commonwealth—A Turning Point for Parliamentary Accountability and Federalism in Australia?'. *Papers on Parliament* 60 2014.

[4] See e.g: Lord Gordan Hewart, *The New Despotism,* United Kingdom, Ernst Benn Ltd, 1929.

[5] Leighton McDonald, Kristen Rundle and Emily Hammond 'Delegated Legislation', in Leighton McDonald, Kristen Rundle, Emily Hammond (eds), *Principles of Administrative Law*, Oxford University Press Australia and New Zealand, 2023, 349-350; 373-374.

[6] For example, this was raised as a concern in the 2021-22 Review of the *Legislation Act 2003*, see: Attorney-General's Department, Commonwealth, *Report – 2021-22 Review of the Legislation Act 2003.* Accessed at: https://www.ag.gov.au/legal-system/publications/report-2021-2022-review-legislation-act-2003.

consciously takes account of the committee's precedent-based and cautious approach to change. It is therefore important to understand how the committee currently operates, as well as its historical background, before proceeding to a discussion of pre-introduction scrutiny.

Background

The Scrutiny of Bills Committee is one of three legislative scrutiny committees within the Commonwealth Parliament, sitting alongside the Senate Standing Committee for the Scrutiny of Delegated Legislation and the Parliamentary Joint Committee on Human Rights. As the committee itself has noted, the work of all three committees is complementary, and they routinely draw on each other's work.[7]

Established in 1981, the committee's structure and practices are modelled on the older Delegated Legislation Committee.[8] Both committees operate on a nonpartisan basis to scrutinise legislation against a set of 'scrutiny principles' focusing on individual rights, liberties and obligations, and on parliamentary scrutiny. These principles, alongside other orders relating to the committee's scrutiny function, membership and powers, are set out in Senate standing order 24 which derives its authority from section 50 of the Constitution.[9]

The committee's membership comprises three government and three non-government senators, including a non-government Chair.[10] Although the Chair holds a casting vote, the committee's longstanding practice is to operate on a consensual basis.[11] The consensual nature of the committee's work is demonstrated by the fact that, in over forty years, the committee has never tabled a dissenting or minority report.

The committee is supported in its work by a secretariat and a legal adviser.[12]

[7] Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Annual Report 2024.* Canberra: Department of the Senate, February 2025, 4.

[8] Rosemary Laing (ed), *Annotated Standing Orders of the Australian Senate*, Canberra: Department of the Senate, 1st ed, 2009, 116, 575.

[9] Rosemary Laing (ed), *Odgers' Australian Senate Practice,* Canberra: Department of the Senate, 14th ed, 2016, 34.

[10] Senate standing order 24(2)(a); 24(4).

[11] Senate Standing Committee for the Scrutiny of Bills, above n 7, 3.

[12] Senate Standing Committee for the Scrutiny of Bills, above n 7, 6.

Practices

The committee scrutinises all bills introduced into Parliament, including private bills. The scrutiny process begins once a bill is introduced into either House of Parliament and ends, where possible, before Parliament's consideration of the bill has concluded. For this reason, the scrutiny process often takes place under extreme time pressure.[13]

The committee describes the form of scrutiny it undertakes as 'technical' in nature. While the appropriateness of this term has been questioned,[14] its use does draw attention to a key difference between the form of analysis undertaken by the committee and that undertaken by other parliamentary committees. Most significantly, the policy intent of a bill is not explicitly considered, except insofar as that intent may justify a potential inconsistency with the scrutiny principles.[15] Also unlike other legislative committees, analysis often takes place based on precedent. For example, the committee is empowered to consider whether a bill unduly trespasses on rights and liberties.[16] However, the committee's consistent interpretation of this potentially wide-ranging principle has been narrowed by the decades-long practice of focusing on a limited number of clearly defined civil and common law rights.[17]

The committee addresses potential scrutiny concerns through what Moulds terms a 'dialogue model'.[18] Where the committee has identified inconsistencies with its scrutiny principles, it raises those concerns directly with the bill proponent, providing an analysis and typically requesting further information. This correspondence continues until the committee concludes

[13] In rare cases scrutiny will continue long after consideration by Parliament has ended. This practice appears to have been adopted in the case of legislation that is expected to be introduced in a similar form in the future, such as Appropriation Bills, see e.g: Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest 8 of 2021.* Canberra: Department of the Senate, 16 June 2021, 5; Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest 13 of 2021.* Canberra: Department of the Senate, 25 August 2021, 5; Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest 16 of 2021.* Canberra: Department of the Senate, 21 October 2021, 47; Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest 18 of 2021.* Canberra: Department of the Senate, 36.

[14] Sarah Moulds, 'Reconceptualising Australian Parliamentary Scrutiny Committees as Norm Builders and Pre-Deliberation Facilitators'. *International Journal of Parliamentary Studies* 5(2) 2025, 271-302.

[15] Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Guidelines.* Canberra: Department of the Senate, July 2022, 4.

[16] Senate standing order 24(1)(a)(i).

[17] Carolyn Evans and Simon Evans 'Legislative Scrutiny Committees and Parliamentary Conceptions of Human Rights'. *Public Law Review* 785 2006, 795; These are largely set out in the committee's *Guidelines*: Senate Standing Committee for the Scrutiny of Bills above n 15, 6-10.

[18] Moulds above n 14, 277.

its consideration of the bill, either by drawing its concerns to the attention of the Senate, making recommendations, or noting that concerns have been addressed. Recommendations commonly consist of requests for updates to explanatory materials but also include recommendations for textual amendments to legislation or, on occasion, are non-legislative in nature.[19] The committee rarely uses direct language to make recommendations, instead preferring to rely on a continuation of the dialogue model by requesting advice as to whether a particular amendment can or should be made.[20] Committee dialogue is published in the Scrutiny Digest and generally only takes place in relation to government bills.[21]

Alongside bills, the standing orders also allow for the consideration of Acts and exposure drafts. However, in practice, this rarely occurs. The committee published its first ever commentary on an exposure draft only recently, in response to proposed legislation in the wake of the Bondi terror attack.[22] Meanwhile, the committee's technical scrutiny of Acts has taken place under equally unusual circumstances, with the committee publishing an analysis of the *Biosecurity Act 2015* (Cth) during the COVID-19 pandemic.[23]

[19] For example, in concluding its examination of coercive powers in the Customs Amendment Strengthening and Modernising Licensing and Other Measures) Bill 2024, the committee did not recommend amendments, but noted its view that the entry and search powers in the *Customs Act 1901* should be reviewed, see: Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest 11 of 2024.* Canberra: Department of the Senate, 28 February 2024, 42.

[20] For example, the committee recently noted that it 'recommends that consideration be given' to amending a power within the Health Legislation Amendment (Improving Choice and Transparency for Private Health Consumers) Bill 2026 that allows fees to be set in delegated legislation, while in relation to a similar power in the Australian Criminal Intelligence Commission (National Policing Information Charges) Bill 2026 the committee requested advice as to 'whether the bill could be amended': Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest 5 of 2026.* Canberra: Department of the Senate, 25 March 2026, 40; *Scrutiny Digest 6 of 2026.* Canberra: Department of the Senate, 6 May 2026) 23.

[21] From the beginning of the 47th Parliament, the committee has adopted a practice of addressing scrutiny concerns raised by private bills in a summarised form, rather than through the dialogue process. See Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest 4 of 22.* Canberra: Department of the Senate, 7 September 2022, 20.

[22] Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest 1 of 2026.* Canberra: Department of the Senate, 19 January 2026, 4.

[23] This occurred on recommendation of the Delegated Legislation Committee: Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest 7 of 2021.* Canberra: Department of the Senate, 12 May 2021, 4; *Scrutiny Digest 1 of 2022.* Canberra: Department of the Senate, 4 Feb 2022.

ROLE AND INSTITUTIONAL VIEW OF THE SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

Beyond practical considerations relating to the background and practices of the committee, a clear view of the committee's role is critical in determining whether it is the appropriate vehicle to pursue a pre-introduction scrutiny approach and what such an approach may hope to achieve.

Meanwhile, noting that any changes would need to be pursued by committee members themselves, it is important to consider how the committee is viewed by senators, and how this view has evolved over time. This is also relevant to a secondary question: whether the committee's scrutiny analysis can be validly represented as expressing an institutional view of the Senate. This secondary question goes directly to the potential scope of the pre-introduction approach and to its legitimacy as a vehicle for parliamentary scrutiny.

The multi-faceted role of the committee and its expression in the committee's dialogue process

A primary purpose of the committee is to provide legal analysis of bills to assist senators in their deliberations while the bill is before Parliament, including by seeking and publishing further explanatory information from the executive. The importance of this purpose is evidenced by comments made by senators reflecting on the committee's establishment, which emphasise the need for assistance in analysing an increasingly high volume of increasingly complex legislation.[24] The committee's practice of undertaking a truncated scrutiny process in order to publish its analysis while a bill is before Parliament, and therefore while this analysis may be of direct use to senators in debate, demonstrates the importance of this purpose in the eyes of the committee. Where the scrutiny process has been delayed because of slow ministerial responses, the committee has publicly expressed its frustration at this fact, including by drawing attention to the effect of delayed responses on parliamentary debate. For example, the committee concluded its examination of the Migration Amendment (Bridging Visa Conditions) Bill 2023 with the following comments:

[24] See, e.g. Fred Chaney, 'The Operation of the Senate Standing Committee for the Scrutiny of Bills: 1981-1991' *Seminar to mark the tenth anniversary of the Senate Standing Committee for the Scrutiny of Bills*. Canberra: Department of the Senate, 25 November 1991, 23.

> *The committee notes with significant disappointment that the minister was over one year late in responding to the committee's queries, and in that time the law under consideration was declared unconstitutional and has since been amended. The delay in the minister's response has frustrated the committee's scrutiny process which is intended to be contemporaneous with parliamentary debate. The committee reiterates its consistent scrutiny view that legislation, particularly legislation that may trespass on personal rights and liberties, should be subject to a high level of parliamentary scrutiny. This includes ensuring the scrutiny committees can engage in a meaningful and timely dialogue with the executive.*[25]

A secondary purpose is to directly improve the quality of legislation through recommendations to the executive made unilaterally by the committee. Earlier iterations of the committee appear to have considered that direct intervention in the legislative process in this way was a matter more appropriately left to the Senate as a whole.[26] However, direct recommendations have become increasingly common. For example, the committee made one hundred and ten recommendations for textual amendments to bills during the 47th Parliament, while only fifteen recommendations were made over the course of the 40th Parliament.[27]

The committee's growing confidence in making recommendations may reflect a view that decades of consistent analysis, based on precedent and an unchanging set of scrutiny principles, has placed the committee in a position to express 'standard' or 'routine' scrutiny views that will be accepted as such by the Senate as a whole. That is, the scrutiny principles and, crucially, the consistent way in which those principles are applied, have evolved into a set of accepted parliamentary norms.

[25] Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest 1 of 2025* Canberra: Department of the Senate, 5 February 2025, 52.

[26] Barney Cooney, 'The Operation of the Senate Standing Committee for the Scrutiny of Bills: 1981-1991' *Seminar to mark the tenth anniversary of the Senate Standing Committee for the Scrutiny of Bills*. Canberra: Department of the Senate, 25 November 1991, 11, 18; Laing above n 8, 117; Laing above n 9, 323.

[27] This figure was determined through a direct examination of each *Scrutiny Digest* and *Report* tabled in the Senate during the relevant periods. As noted under footnote 19, the committee does not use consistent language to frame its comments and, therefore, whether a comment is considered a recommendation is necessarily a subjective assessment that is open to interpretation.

This situation is reinforced by the apparent confidence of senators that the nonpartisan, consensual, and technical basis of the committee's work will continue to be upheld. This confidence is reflected in commentary in *Odgers' Australian Senate Practice* which notes 'the question of which party has a majority has been of no significance to the operation of the committee'.[28]

Taking these two purposes into account, the committee's dialogue process can be conceived of as taking place simultaneously between both:

- the *committee membership* and the *Senate*, where the primary purpose is to assist senators in their legislative deliberations; and
- the *Senate* and the *executive*, where the primary purpose is to reinforce a set of established parliamentary norms.

In this way, the dialogue model both directly improves parliamentary processes and seeks to entrench the norms that underpin those processes within the executive branch of government.

A third more indirect effect of the dialogue process is also significant here: that of providing analysis for the benefit of the public and of generating public discussion that is informed by parliamentary norms and processes. It is apparent that the parliamentary scrutiny committees were intended to take up this role from their earliest conception. For instance, during parliamentary debate on the establishment of the committee's sister Delegated Legislation Committee it was noted that one key task of the committee would be to 'give information to the Senate, and, through the Senate to the public'.[29] One practical expression of this indirect impact is that committee analysis is regularly reflected in commentary made by civil society groups and academics.[30]

The non-technical impact of the committee is therefore potentially substantial despite its relative invisibility compared to the technical aspects of the committee's work, as has recently been highlighted by Moulds.[31]

[28] Laing, above n 9, 322.

[29] Senator Hal Colebatch, Commonwealth, *Parliamentary Debates*, Senate, 28 September 1932, 787.

[30] For example, the Law Council of Australia lists the committee's *Guidelines* on its 'Best Practice Legislative Development Checklist', see: Law Council of Australia, *Best Practice Legislative Development Checklist.* Accessed at: https://lawcouncil.au/resources/policies-and-guidelines/best-practice-legislative-development-checklist.

[31] Moulds, above n 14.

The committee as a norm-builder and pre-deliberation facilitator

Commenting on the work of the parliamentary scrutiny committees as a whole, Moulds draws a distinction between the technical function of the committees and their role as 'norm-builders' and 'pre-deliberation facilitators'.[32] Emphasising the unseen role of the committees in indirectly influencing the legislative process through the integration of the scrutiny principles into the daily work of public servants, as well as the committees' focus on dialogue, Moulds characterises the scrutiny committees as 'norm builders'.[33] Moreover, noting the committees' influence on the deliberative function of Parliament, Moulds argues that the committees also take on an important role as 'pre-deliberation facilitators'.[34] This understanding contrasts with a narrower conception of the scrutiny committees as playing merely a technical or 'remedial' role, concerned only with direct legislative outputs. This aligns with how the committee itself describes the impact of its work, with an elaboration of the 'unseen influence' of the committee forming a regular part of the committee's annual reports, alongside references to the more direct technical impact of the committee.[35]

Rather than focusing only on direct technical impacts, conceptualising the committees as norm-builders and pre-deliberation facilitators instead highlights their importance in building a 'culture of rights compliance',[36] and a 'culture of justification',[37] and of reinforcing a set of norms based on parliamentary notions of deliberation and democratic decision-making.[38] These norms link directly to the committee's scrutiny principles and the dialogue model the committee has adopted to promote those principles. The committee's influence in reinforcing

[32] Ibid.

[33] Ibid, 282-285.

[34] Ibid, 285-287.

[35] Senate Standing Committee for the Scrutiny of Bills, above n 7, 13.

[36] Moulds, above n 14, 294, 295. In adopting this term, Moulds draws on the work of Kinley, see: David Kinley, 'Parliamentary Scrutiny of Human Rights: A Duty Neglected' in Philip Alston (ed), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives.* Oxford University Press, 1999, 158.

[37] Ibid, 284, 294. In adopting this term, Moulds draws on the work of Hunt and Hiebert, see: Murray Hunt, Hayley Jane Cooper and Paul Yowell, *Parliament and Human Rights: Redressing the Democratic Deficit.* Hart Publishing 2015, 39; Janet Hiebert 'Legislative Rights Review: Addressing the Gap Between Ideals and Constraints' in Murray Hunt, Hayley Jane Cooper and Paul Yowell, *Parliament and Human Rights: Redressing the Democratic Deficit*. Hart Publishing 2015, 39.

[38] Moulds, above n 14.

other parliamentary norms could perhaps also be added here, most notably the committee's role in reinforcing Australian notions of federalism.[39]

A pre-introduction scrutiny approach would strengthen the committee's role in enforcing these norms and provide new opportunities to improve deliberative processes and the committee's technical output.

PRE-INTRODUCTION SCRUTINY

Suggested approach

As noted above, the committee currently adopts a highly systematised approach to its work. Given the benefits of consistency in embedding the committee's role as a norm-builder, a pre-introduction scrutiny process would benefit from a similarly systematic approach.

The approach suggested here is one in which the committee scrutinises all draft bills for which exposure drafts have been published and public submissions sought. Rather than publishing commentary in the *Scrutiny Digest*, which is appropriately limited to commentary on bills and Acts, scrutiny analysis would be presented in the form of a publicly available submission. This would complement, rather than replace, existing scrutiny practices leading to a two-pronged approach in which bills are scrutinised both before and after introduction.

While a focus on exposure drafts would not capture all bills under development, it would have the practical benefit of requiring no change to existing executive practices and of aligning with the Senate standing orders which already allow for the consideration of exposure drafts by the committee.[40] Moreover, this approach recognises that it is appropriate for the committee to provide analysis where the executive has actively sought public comment.

Noting that explanatory materials would not always be available during the exposure draft stage, the nature of the committee's analysis would also be different. When identifying a scrutiny concern, the committee places significant weight on the explanation provided.[41] Inconsistencies with the scrutiny principles can often be overridden by a clear justification

[39] Glenn Ryall and Jessica Strout, 'Scrutiny committees: a vehicle to safeguarding Federalism and the constitutional rights of Parliament'. *Papers on Parliament* 67 2017.

[40] Senate standing order 24(1)(b).

[41] Hence every scrutiny issue identified in the committee's *Guidelines* is accompanied by high-level commentary on what matters should be addressed in the accompanying explanatory memorandum: Senate Standing Committee for the Scrutiny of Bills, above, n 11.

found in the explanatory materials. At the pre-introduction stage, the committee's analysis would therefore centre on identifying *potential* scrutiny issues and providing advice on what manner of explanation may, or may not, be appropriate to justify those issues. The committee would also provide advice on options for ameliorating scrutiny concerns if no such justification exists, such as through amendments to the text of the bill.

Potential benefits

One of the most significant issues currently faced by the committee is the speed with which bills are considered by Parliament.[42] This reduces the time available for the committee to scrutinise a bill, for quality responses to be provided to committee questions, for committee recommendations to be considered and implemented, and for senators to consider and respond to committee reports. Undertaking scrutiny at an earlier stage of the legislative process directly addresses all four of these issues by reducing the time pressure to which the scrutiny process is currently subjected. In addition, the committee's scrutiny analysis would be available to senators from a much earlier stage. This has the added benefit of recognising that the engagement of senators with legislation is not limited to the parliamentary debate stage, but also includes consideration of draft legislation, often driven by lobbying from constituents.

In addition, the politically charged nature of legislative debate once a bill is before the Parliament can make it difficult for committee recommendations to be accepted by the executive even where those recommendations are otherwise non-controversial. Accepting a committee recommendation at this stage may be seen as a tacit admission that the bill proponent had 'got it wrong' in their initial presentation of the bill and may provide ammunition for political rivals.[43] Similarly, the committee's practice of undertaking dialogue directly and publicly with the minister's office, while appropriate in a parliamentary context, can lead to an equally heightened atmosphere.

[42] Senate Standing Committee for the Scrutiny of Bills, above n 7, 39. This is also a longstanding issue for the Senate as a whole, see: Harry Evans, 'Role of the Senate'. *Reform* 78 2001, 99.

[43] For example, where ministers have accepted committee recommendations for amendment this has highlighted the initial scrutiny issue for senators, with the result that the circulation of such an amendment has led to criticism over the legislative process from non-government senators. See e.g. debate on the Private Health Insurance Legislation Amendment (Medical Device and Human Tissue Product List and Cost Recovery) Bill 2022: Senator Jordon Steele-John, Commonwealth, *Parliamentary Debates*, Senate, 7 March 2023, 540; debate on the Therapeutic Goods Amendment (2022 Measures No. 1) Bill 2022: Senator Malcolm Roberts, *Parliamentary Debates*, Senate, 8 March 2023, 647-648.

Raising scrutiny issues directly with the responsible legislation team at the exposure draft stage would reduce the politically charged nature of the dialogue, leading to an increased number of accepted committee recommendations. This is borne out by the experience of the Delegated Legislation Committee, which engages in a significant level of correspondence directly with agencies in relation to minor and routine issues, only engaging directly with the minister's office in relation to novel, legislatively significant or politically controversial issues.[44]

Pre-introduction scrutiny would also assist on the rare but significant occasions on which Parliament is considering the enactment of uniform laws. Uniform laws are those laws that seek to standardise a particular legislative framework across multiple jurisdictions.[45] In Australia, this process is typically driven by inter-governmental councils comprising representatives of the various executive governments of the Commonwealth, states and territories, with little parliamentary involvement.[46] Many uniform laws cover matters that directly interact with the scrutiny principles, such as matters of criminal law or civil rights.[47] However, because they often require the enactment of identical legislation across every participating jurisdiction, the ability of the Parliament and the committee to undertake effective scrutiny of uniform laws is severely curtailed.[48] The committee directly considered this issue in its 2011 'Inquiry into the future direction and role of the Scrutiny of Bills Committee' and recommended that scrutiny of exposure drafts be considered as one way of maintaining an element of parliamentary scrutiny over the text of uniform laws.[49] Unfortunately, it appears that the committee's recommendation that copies of exposure drafts for uniform laws be sent to the committee for analysis has not been taken up. The implementation of pre-introduction scrutiny would overcome executive reluctance to adopt

[44] For example, of the 254 scrutiny issues identified by the Delegated Legislation Committee in 2024, 69% were raised at the agency level. In 2023, 72% of total scrutiny issues were raised at the agency level: Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Annual Report. Canberra: Department of the Senate* 2024, 9.

[45] See e.g: Australasian Parliamentary Counsel's Committee, *National Uniform Legislation.* Accessed at: https://pcc.gov.au/uniform_legislation_official_versions.html.

[46] Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Inquiry into the future direction and role of the Scrutiny of Bills Committee*. Canberra: Department of the Senate, May 2012, 40.

[47] For example, the *Australian Crime Commission Act 2002* has implications for civil rights and criminal procedure and has been enacted in every Australian jurisdiction.

[48] Senate Standing Committee for the Scrutiny of Bills, above n 46, 43.

[49] Ibid.

this recommendation by placing the initiative on the committee to make the practical changes necessary to facilitate regular analysis of exposure drafts.

In addition, beginning the scrutiny process at the exposure draft stage would reinforce the committee's status as a norm-builder, embedding the scrutiny principles as a routine consideration for public servants and stakeholders at the very earliest stages of legislative development. As Moulds notes, the type of norm-building engaged in by the committee is vulnerable if public servants have a low awareness of the committee's scrutiny principles.[50] Directly engaging public servants at multiple stages of the legislative process would help build this understanding. The committee has done much in recent years in this regard, including by publishing a set of *Scrutiny Guidelines*,[51] distributing a *Scrutiny News* publication,[52] and running regular training sessions for public servants.[53] The inclusion of the scrutiny principles in executive produced guidance documents, such as the *Legislation Handbook,*[54] the Attorney-General's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, [55] and the various Office of Parliamentary Counsel Drafting Directions,[56] also indicates the committee's success in embedding its principles into the legislation process. Pre-introduction scrutiny would represent a valuable extension of this work.

For similar reasons, a pre-introduction scrutiny approach would assist the committee's work in building a culture of justification within the public service.[57] Most significantly, it would provide

[50] Moulds, above n 14.

[51] Senate Standing Committee for the Scrutiny of Bills, above n 15.

[52] Senate Standing Committee for the Scrutiny of Bills, *Scrutiny News*. Accessed at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills/Scrutiny_new.

[53] Senate, *Senate Training Programs.* Accessed at: https://www.aph.gov.au/About_Parliament/Senate/News_and_events/Senate_training_and_lectures/Senate_training_programs.

[54] Department of the Prime Minister and Cabinet, *Legislation handbook.* Accessed at: https://www.pmc.gov.au/resource-centre/government/legislation-handbook.

[55] Attorney-General's Department, *Guide to framing Commonwealth offences, infringement notices and enforcement powers.* Accessed at: https://www.ag.gov .au/publications/guide-framing-commonwealth-offences-infringement-notices -and-enforcement-powers.

[56] Office of Parliamentary Counsel, *Drafting Directions*. Accessed at: https://www.opc.gov.au/drafting-resources/drafting-directions.

[57] Hunt and Hiebert, above n 37. See also: Daniel Reynolds, Winsome Hall and George Williams, 'Australia's Human Rights Scrutiny Regime'. *Monash University Law Review* 46(1) 2020, 256, 289-290.

an opportunity for the committee to clearly state its expectation that a justification is given for identified provisions at a point in time in which the explanatory materials for those provisions are still under development. Crucially, it would also provide an opportunity to articulate the committee's view as to what may, or may not, constitute an appropriate justification beyond the high-level guidance set out in the committee *Guidelines*. Where an appropriate justification was still not forthcoming after this process, the committee's final analysis in the *Scrutiny Digest* would be free to express its disappointment directly to the minister from the first round of correspondence. The committee may also feel emboldened to question why an exposure draft process had not been undertaken in relation to particular bills, promoting an ethos of public consultation within the executive.

Potential concerns

There are three possible concerns related to the adoption of a pre-introduction scrutiny approach.

The first is that this approach may be perceived as an inappropriate extension of the committee's role, moving it away from its initial conception as a body designed to provide technical analysis for the benefit of Senate deliberations. This could lead to a perception that the committee was inappropriately influencing the content of legislation before its consideration by the Senate as a whole.[58] As noted above, there has been a longstanding trend towards the committee providing direct input into the legislative process through the making of recommendations. As this trend has developed, the Senate has demonstrated a high level of confidence in the nonpartisan and norm-driven nature of the committee's work and has not commented adversely on the committee providing direct input on bills. If pre-introduction scrutiny is seen as a continuation of this longstanding trend, then this first potential concern will not present as an issue. For this to occur, the committee may see a need to limit its analysis to the set of accepted norms which it has developed over the last four decades and to focus its pre-introduction analysis on routine scrutiny issues.

Secondly, there are practical considerations preventing the adoption of pre-introduction scrutiny. In particular, this approach could lead to an increased workload for the committee. Although in the long term it is hoped that pre-introduction scrutiny would reduce the number of scrutiny issues presented to Parliament, it would also require the committee to undertake

[58] Similar concerns were raised when the committee was first established. See Dennis Pearce, 'Opening Address: Ten Years of Scrutiny' *Seminar to mark the tenth anniversary of the Senate Standing Committee for the Scrutiny of Bills*. Canberra: Department of the Senate, 25 November 1991.

two rounds of analysis on many of the bills put before Parliament and would also require the analysis of exposure drafts that are never introduced. Addressing this issue would require increased resources, including additional secretariat staff.

An increased workload and an approach focused on identifying routine scrutiny issues before their consideration by Parliament also risks rendering scrutiny as a formalistic checklist process, dominated by dialogue between two areas of the bureaucracy – parliamentary servants and public servants – in which the only expectation is that standard responses are provided to standard questions. Although the committee is tasked with promoting scrutiny from the democratic branch of government, bureaucratisation of the committee's scrutiny process in this way could ironically lead to a democratic deficit built into the scrutiny process itself. Both this issue and the issue of appropriate resourcing can only be addressed if senators see the value of an expanded role for the committee and actively engage in that expanded role. The fact that this expanded scrutiny process would represent a continuation of existing trends may increase the likelihood of this occurring. Moreover, the ability of the Senate to unilaterally enact these changes, without input from the executive-dominated House of Representatives, also increases the likelihood of their adoption. For this reason, locating improvements to parliamentary accountability in the work of the Senate scrutiny committees is a significantly more pragmatic approach than other possibilities, such as amendments to the *Legislation Act 2003.* For example, it is notable that the only fully implemented recommendations from the Delegated Legislation Committee's *Exemption of delegated legislation from parliamentary oversight* report are those that were capable of being implemented unilaterally by the Senate.[59] Nonetheless, these three concerns represent a significant impediment to the implementation of a pre-introduction scrutiny approach.

CONCLUSION

Adopting a pre-introduction scrutiny approach, alongside the committee's existing scrutiny processes, would help to embed a key set of parliamentary norms into the earliest stages of the legislation process. These norms include a focus on parliamentary democracy and accountability, federalism, and a culture of justification and rights compliance. This would be a welcome development in light of recent calls to restore Parliament's constitutional role as

[59] Senate Standing Committee for Delegated Legislation Committee, Parliament of Australia, *Exemption of delegated legislation from parliamentary oversight.* Canberra: Department of the Senate*,* 16 March 2021.

lawmaker-in-chief. In addition, a pre-introduction approach would improve technical legislative outcomes by making it more straightforward for the executive to accept committee recommendations without attendant political risks and by reducing the time pressure to which the scrutiny process is currently subject.

While the benefits are potentially significant, there are practical and principled considerations relating to the role and resourcing of the committee that may prevent moves to a pre-introduction approach. Ultimately, whether these concerns can be overcome depends on the political will of the Senate.

Finally, many of the arguments advanced in this article would also support the adoption of a post-enactment scrutiny approach, focused on the technical scrutiny of Acts. Equally, many of the same arguments would support the scrutiny of exposure drafts by the Delegated Legislation Committee. If adopted, this would represent a shift in the focus of the Senate scrutiny committees towards the legislative process as a whole, with a 'Scrutiny of Primary Legislation Committee' sitting alongside a renewed Scrutiny of Delegated Legislation Committee. This is an idea worth exploring in more detail elsewhere.