

## USING PARLIAMENTARY MATERIALS IN INTERPRETATION: INSIGHTS FROM PARLIAMENTARY PROCESS

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*It is orthodoxy in Australia that when interpreting statutory text, attention turns to the words 'in context'. This context is taken to include extrinsic context, including extrinsic materials. Parliamentary materials represent a significant category of such extrinsic matter. These are materials produced as part of the enactment of the statute in Parliament, such as second reading speeches, explanatory memoranda, and committee reports. But although readers of statutes regularly refer to parliamentary materials and attribute weight to them for the interpretative task, most readers know little about them. This article examines parliamentary materials for federal legislation. The aim of this examination is to highlight factors that may be considered when assessing such materials as interpretative aids. The article reflects preliminary research done as part of a wider research project on the relationship between the legislative process and statutory interpretation.*

### I INTRODUCTION

The process of making statutes and the task of interpreting statutes are more often than not considered in isolation. This perhaps is a reflection of the importance that the separation of powers doctrine is given in Australia. One of the consequences is that the laws and principles that govern statutory interpretation make many assumptions about how the legislative process works.<sup>1</sup>

Some years ago, the well-known statutory interpretation scholar, Francis Bennion, said that '[t]he nature of an Act as the product of a complex democratic

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1 One example is the way courts approach statutes affecting fundamental rights (the principle of legality).

process must carry weight with the interpreter'.<sup>2</sup> Although this statement was primarily referring to the importance of understanding the constitutional and drafting aspects of making legislation, the principle appears equally compelling when applied to the parliamentary process component of statute making. It seems logical that the statute making process might have some relationship with the interpretation of that statute.

The relationship between the making of statutes and their interpretation has been the subject of some commentary in recent years in other jurisdictions, and this raises some ideas that resonate with the research results reflected in this article.<sup>3</sup> However, while we can benefit from the ideas in that literature, the many differences that exist between the federal parliamentary process and the processes of other jurisdictions mean that the value of that commentary may be limited for federal statutes.

This article is a product of a larger research project of the author that examines the relationship between the legislative process and statutory interpretation for federal legislation in Australia.<sup>4</sup> It presents the preliminary findings of research on the parliamentary process component of the federal legislative process, in so far as it relates to parliamentary materials.

The utility and wisdom of using parliamentary materials in statutory interpretation has been the subject of debate for many years. It continues to be so in some jurisdictions. In Australia, that debate has been largely resolved with legislative and common law developments. Courts, lawyers and government officials in Australia often refer to parliamentary materials when attempting to determine the meaning of statutory text.

It is not the aim of this article to engage in a debate about the wisdom or otherwise of recourse to parliamentary materials. Nor is it the aim to provide a comprehensive study of the parliamentary process for the enactment of Bills, nor comprehensive statements about assessing parliamentary materials. The aim of this article is to alert users of federal legislation to factors affecting the nature of those materials. Its objective is to provide the reader of statutes with 'signs'<sup>5</sup> that contribute to a greater understanding of them.

Why? Because before we use them, we need to understand them. Knowledge provides direction and enables meaningful choices. One of the challenges of using parliamentary material is that it can be like, as former US Supreme Court

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2 Oliver Jones, *Bennion on Statutory Interpretation: A Code* (LexisNexis, 6<sup>th</sup> ed, 2013) 447.

3 In particular, the United States: see, eg, Abbe R Gluck and Lisa Schultz Bressman, 'Statutory Interpretation from the Inside – An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I' (2013) 65 *Stanford Law Review* 901; Lisa Schultz Bressman and Abbe R Gluck, 'Statutory Interpretation from the Inside – An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II' (2014) 66 *Stanford Law Review* 725; Victoria Nourse, *Misreading Law, Misreading Democracy* (Harvard University Press, 2016). For United Kingdom, see Daniel Greenberg, 'Judicial Ignorance of the Parliamentary Process: Implications for Statutory Interpretation' (Report, Judicial Power Project, March 2017) <<http://judicialpowerproject.org.uk/wp-content/uploads/2017/03/Judicial-Ignorance-of-the-Parliamentary-Process.pdf>>.

4 The research project is a PhD doctorate by the author on the relationship between the legislative process and statutory interpretation.

5 The idea of 'signs' in statutory interpretation has been in existence since William Blackstone's *Commentaries on the Laws of England* in the 1700s.

Justice Breyer has famously said, ‘looking ... over the cocktail party to identify your friends’.<sup>6</sup> Arguably, having information about parliamentary material and their origin provides a foundation for informed and persuasive choices and assessments about their probative value.

A useful analogy is when witnesses give evidence in court. In that instance, various aspects of the witness’ testimony are assessed to determine the weight that can be attributed to their evidence. Factors such as character, reliability, competency and credibility are considered.<sup>7</sup> Examining parliamentary materials as an aid to interpretation has been likened to examining evidence in a legal proceeding.<sup>8</sup> Using that analogy of parliamentary material as ‘evidence’, this article presents information by examining four aspects of that material: their source (who), their purpose (why), related procedure (how) and their timing (when).

To do so, this article focuses on procedural rules and established practices of the House of Representatives and Senate.<sup>9</sup> Parliamentary committee reports, publically available manuals and administrative documents produced by key players (such as the Department of the Prime Minister and Cabinet and Parliament House departments), as well as Australian secondary sources about the federal parliamentary process, have also been examined.<sup>10</sup>

Of course, legislating is not only complex but is ‘nearly always an inescapably political activity’.<sup>11</sup> There is the general backdrop of the changing political balance inside Parliament from election to election, as well as the day-to-day political machinations. Consequently, what we can see and read about the enactment of a Bill in Parliament is subject to imperatives, negotiations, compromise, and tactics among the political parties, within the political parties and among other key political players that the average reader of statutes will never be privy to.

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6 Norman Dorsen, US Association of Constitutional Law, Interview with Antonin Scalia and Stephen Breyer (American University, Discussion, 13 January 2005) <[www.freerepublic.com/focus/news/1352357/posts](http://www.freerepublic.com/focus/news/1352357/posts)>. Justice Breyer was re-wording comments made by former Justice Leventhal.

7 See generally J D Heydon, *Cross on Evidence* (LexisNexis Butterworths, 10<sup>th</sup> ed, 2015) chs 7–10.

8 That parliamentary material is essentially ‘evidence’ for the task of statutory interpretation has been the subject of discussion: Nourse, *Misreading Law*, above n 3, 156–9.

9 For rules and practices, the following have been critical sources: House of Representatives, Parliament of Australia, *House of Representatives Standing Orders*, 13 September 2016 <[https://www.aph.gov.au/About\\_Parliament/House\\_of\\_Representatives/Powers\\_practice\\_and\\_procedure/House\\_of\\_Representatives\\_Standing\\_Orders](https://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/House_of_Representatives_Standing_Orders)> (*‘House SO’*); Senate, Parliament of Australia, *Standing Orders and Other Orders of the Senate*, August 2015 <[https://www.aph.gov.au/Parliamentary\\_Business/Chamber\\_documents/Senate\\_chamber\\_documents/standingorders](https://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/standingorders)> (*‘Senate SO’*); Rosemary Laing (ed), *Odgers’ Australian Senate Practice – As Revised by Harry Evans* (Department of the Senate, 14<sup>th</sup> ed, 2016) (*‘Senate Practice Book’*); B C Wright (ed), *House of Representatives Practice* (Department of the House of Representatives, 6<sup>th</sup> ed, 2012) (*‘House Practice Book’*).

10 See especially, Australian Government, *Legislation Handbook* (Department of Prime Minister and Cabinet, 2017) <<https://www.pmc.gov.au/sites/default/files/publications/legislation-handbook-2017.pdf>> (*‘Legislation Handbook’*). The *Legislation Handbook* is produced by the Department of Prime Minister and Cabinet to provide guidance on the requirements for enacting Commonwealth legislation.

11 David Feldman, ‘Beginning at the Beginning: The Relationships between Politics and Law’ in David Feldman (ed), *Law in Politics, Politics in Law* (Hart Publishing, 2015) 12.

It is for this reason that this article focuses on the factors of source, purpose, procedure and timing. It is hoped that they provide a framework that assists meaningful inquiry about parliamentary materials intended to be used as interpretative aids.

## II PARLIAMENTARY MATERIALS

The term ‘parliamentary materials’ refers to those parliamentary and executive materials generated from ‘the internal institutional progress of a [B]ill to enactment and the deliberation accompanying that progress’.<sup>12</sup> Many materials, such as the second reading speech, explanatory memoranda, parliamentary debates, and parliamentary committee reports, will be familiar.

The journey of a Bill through Parliament has established pathways but potentially unlimited permutations. This means that the range of possible materials generated by the enactment of any one statute by Parliament may, or may not, be extensive. It is, however, possible to identify materials that are always or commonly produced. This research focuses on those materials, which are summarised in Table A at the end of this article.

This article is about parliamentary materials produced from the enactment of federal statutes.<sup>13</sup> As the vast majority of Bills that become federal Acts are ordinary government Bills introduced into the House of Representatives,<sup>14</sup> it focuses on those Bills to illustrate its points. Private member Bills, Bills initiated in the Senate or Bills subject to special procedures (such as appropriation and tax Bills) are not specifically covered.<sup>15</sup> Nor does it specifically cover Bills referred from the House to the Federation Chamber.<sup>16</sup> In recent years, very few Bills have been referred to the Chamber.<sup>17</sup> Secondly, proceedings in the Chamber are substantially similar to those in the House.<sup>18</sup>

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12 William N Eskridge Jr, Abbe R Gluck and Victoria F Nourse, *Statutes, Regulation, and Interpretation: Legislation and Administration in the Republic of Statutes* (West Academic Publishing, 2014) 601.

13 It does not address delegated legislation. The legislative process and parliamentary scrutiny of delegated legislation is different to a Bill.

14 See, eg, Department of the House of Representatives, ‘Work of the Session: 45<sup>th</sup> Parliament – 1<sup>st</sup> Session’ (Report, July 2017) 5: for the Spring sittings in 2016 (30 August – 1 December 2016), of 116 Bills introduced, 96 Bills (82.75 per cent) were government Bills introduced in the House. See also Department of the House of Representatives, ‘Work of the Session: 44<sup>th</sup> Parliament – 2<sup>nd</sup> Session’ (Report, May 2016) 5: for all of the 44<sup>th</sup> Parliament, of 547 Bills introduced, 490 (89.57 per cent) were government Bills introduced in the House.

15 See Department of the House of Representatives, *Guide to Procedures* (Commonwealth of Australia, 5<sup>th</sup> ed, 2014) 59, for a list of Bills with special procedures which includes appropriation and supply Bills, Bills imposing a tax or charge, Bills received from the Senate and Bills altering the Constitution.

16 The Federation Chamber is a ‘committee’ that conducts House business concurrently with the House. Bills can be referred to the Federation Chamber by the House for debate; the Federation Chamber then reports back to the House with its recommendations: see, *House Practice Book*, above n 9, 358–9, 381–2; B C Wright (ed), *House of Representatives Practice* (Department of the House of Representatives, 6<sup>th</sup> ed, updated information, 2015) ch 10.

17 See, eg, Department of the House of Representatives, ‘Work of the Session: 45<sup>th</sup> Parliament – 1<sup>st</sup> Session’, above n 14, 5: of 116 Bills introduced, only seven Bills referred to Federation Chamber. See

The focus on ordinary government Bills is illustrative. It is used as the basis to explore the four factors. The inquiries that those factors encourage are equally applicable to other Bills.

### III THE LAW IN AUSTRALIA ABOUT USING PARLIAMENTARY MATERIALS – A BRIEF SUMMARY

The law in Australia is clear that the process of construing words in a statute begins with ‘the ordinary and grammatical meaning of the words of the provision having regard to their context and legislative purpose’.<sup>19</sup> The outcome of this construction process gives the reader a meaning that can be *attributed* to the legislature. This outcome is the ‘legislative intention’.<sup>20</sup> The notion of ‘legislative intent’ is therefore a construct or metaphor for the outcome of the process.<sup>21</sup>

To assist the construction process, the reader is entitled to refer to parliamentary materials. For federal legislation, this recourse has two possible legal bases.

The first authority is legislative and is contained in section 15AB of the *Acts Interpretation Act 1901* (Cth) (*‘AIA’*).<sup>22</sup> Since 1984, section 15AB(1) has provided that ‘if any material not forming part of the Act’ is capable of assisting in ascertaining the meaning of a provision, then it may be considered if any one of three limbs are satisfied. These three are, in summary, to either confirm the ordinary meaning of text, to determine the meaning if the text is ambiguous, or to determine the meaning when the ordinary meaning leads to a result that is manifestly absurd or is unreasonable.

Section 15AB(2) provides a list of some of the materials that ‘may’ be considered, but it is clearly not intended to be an exhaustive list.<sup>23</sup> Indeed, the wording of section 15AB(1) clearly refers to ‘any’ material. However, it has been recognised by the courts that the need to satisfy one of the three limbs means that recourse pursuant to section 15AB is not unlimited.<sup>24</sup>

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also Department of the House of Representatives, ‘Work of the Session: 44<sup>th</sup> Parliament – 2<sup>nd</sup> Session’, above n 14, 5: of 547 Bills introduced, only 46 referred to Federation Chamber.

18 *House SO*, O 185.

19 *Australian Education Union v Department of Education and Children’s Services* (2012) 248 CLR 1, 13 [26] (French CJ, Hayne, Kiefel and Bell JJ).

20 *Lacey v A-G (Qld)* (2011) 242 CLR 573, 592 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

21 *Certain Lloyd’s Underwriters v Cross* (2012) 248 CLR 378, 389–90 [25] (French CJ and Hayne J).

22 Each state and territory also has its own legislation about interpreting statutes. All but South Australia have a legislative provision permitting recourse to extrinsic materials. South Australia continues to rely solely on the common law.

23 The introductory words to the *AIA* s 15AB(2) are ‘[w]ithout limiting the generality of subsection (1)’.

24 For example, *Momcilovic v The Queen* (2011) 245 CLR 1, 154 [389] n 692 (Heydon J); *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 521–2 [52] (French CJ) (comparing the common law); *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85, 112 (McHugh J); *Re Australian Federation of Construction Contractors; Ex parte Billing* (1986) 68 ALR 416, 420 (The Court).

The second legal authority is based on common law principles, which mitigate the limitations of section 15AB(1). In a ‘passage ... cited too often to be doubted’<sup>25</sup> the High Court has said that:

the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses ‘context’ in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy ...<sup>26</sup>

This principle has been taken to mean that ‘context’ is to be considered from the outset of the construction task – it does not require an ambiguity or other threshold.<sup>27</sup> Secondly, context in its ‘widest sense’ has been taken to include parliamentary materials generally (as well as the state of the law when the statute was enacted).<sup>28</sup>

It is well established that these statutory and common law authorities operate in parallel. Both are a legitimate basis for recourse to parliamentary materials.<sup>29</sup> The outcome is that extrinsic materials are one of the legitimate means of identifying the policy or purpose of a statute<sup>30</sup> in order to better understand the language and intended operation,<sup>31</sup> and so assist in fixing the meaning of statutory text.<sup>32</sup>

The importance of identifying the purpose of a provision or statute derives from the legislative requirement<sup>33</sup> in section 15AA of the *AIA* to prefer an

25 *Federal Commissioner of Taxation v Jaysinghe* (2016) 247 FCR 40, 43 [7] (Allsop CJ). In August 2017, the High Court allowed an appeal against the majority decision: *Commissioner of Taxation v Jaysinghe* (2017) 345 ALR 357. There was no suggestion that the principle referred to by Allsop CJ is doubted.

26 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ). Recent examples of acknowledgement of the principle are *SZTAL v Minister for Immigration and Border Protection* (2017) 91 ALJR 936, 940–1 [14] (Kiefel CJ, Nettle and Gordon JJ); *Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1, 28 [57] (French CJ, Hayne, Kiefel and Nettle JJ); *Certain Lloyd’s Underwriters v Cross* (2012) 248 CLR 378, 391 [28] (French CJ and Hayne J); *Alphapharm Pty Ltd v H Lundbeck A/S* (2014) 254 CLR 247, 264 [39] (Crennan, Bell and Gageler JJ).

27 See, eg, *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 521–2 [52] (French CJ); *Monis v The Queen* (2013) 249 CLR 92, 202 [309] (Crennan, Kiefel and Bell JJ).

28 *Certain Lloyd’s Underwriters v Cross* (2012) 248 CLR 378, 389–90 [25] (French CJ and Hayne J);

*Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193, 230 [124] (McHugh J).

29 *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (2004) 218 CLR 273, 280 [11] (McHugh ACJ, Gummow and Hayne JJ); *Burns v Minister for Health* (2012) 45 WAR 276, 284 [27]–[28]. Also, extra-judicially: R S Geddes, ‘Purpose and Context in Statutory Interpretation’ (2005) 2 *University of New England Law Journal* 5, 17–25; Justice Susan Kenny, ‘Current Issues in the Interpretation of Federal Legislation’ (Speech delivered at National Commercial Law Seminar Series, 3 September 2013) <<http://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-kenny/kenny-j-20130903>>.

30 *Alphapharm Pty Ltd v H Lundbeck A/S* (2014) 254 CLR 247, 264 [39] (Crennan, Bell and Gageler JJ); *Certain Lloyd’s Underwriters v Cross* (2012) 248 CLR 378, 389–90 [25] (French CJ and Hayne J), 405 [70] (Crennan and Bell JJ); *Australian Maritime Officers’ Union v Assistant Minister for Immigration and Border Protection* (2015) 230 FCR 523, 541 [70] (The Court).

31 *Certain Lloyd’s Underwriters v Cross* (2012) 248 CLR 378, 412 [89] (Kiefel J).

32 *Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ).

33 For recognition of it as a ‘requirement’: see *SZTAL v Minister for Immigration and Border Protection* (2017) 91 ALJR 936, 944–5 [39] (Gageler J); *Firebird Global Master Fund II Ltd v Republic of Nauru*

interpretation that ‘would best achieve the purpose or object of the Act’. It is that ‘systematic principle’<sup>34</sup> which essentially underpins not only the rationale for considering extrinsic material, but the objective for doing so.

There have been some indications that Australian courts implicitly recognise a distinction between the credibility of different parliamentary materials.<sup>35</sup> However, judicial commentary is uncommon<sup>36</sup> and, in some instances, unclear.<sup>37</sup>

## IV ONE: THE SOURCE – WHO PRODUCED THE MATERIAL?

When we think of ‘parliament’ we tend to think of it as a single body made up of the aggregate of the parliamentarians in the House of Representatives and the Senate. But the process of enacting a Bill involves the participation of an array of people extending far beyond the elected representatives. There are three broad groups.

### A Partisan and Quasi-Partisan Authors

These are sources identified by political party partisanship, whether the government, the opposition<sup>38</sup> or minority parties (or independents).

‘Government’ can have numerous meanings.<sup>39</sup> Here, it refers to the politicians of the party or parties that constitute the government of the day, in particular those who hold offices as ministers.

A minister’s office has at least some staff who share with the minister ‘a common political philosophy and party commitments’.<sup>40</sup> Most of these staff are not members of the Australian Public Service, but are regulated under separate legislation.<sup>41</sup>

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- (2015) 258 CLR 31, 56–7 [69] (French CJ and Kiefel J); *Thiess v Collector of Customs* (2014) 250 CLR 664, 672 [23] (French CJ, Hayne, Kiefel, Gageler and Keane JJ).
- 34 *Thiess v Collector of Customs* (2014) 250 CLR 664, 672 [23] (French CJ, Hayne, Kiefel, Gageler and Keane JJ).
- 35 *National Rugby League Investments Pty Ltd v Singtel Optus Pty Ltd* (2012) 201 FCR 147, 168 [81] (The Court); *Harrison v Melhem* (2008) 72 NSWLR 380, 384 [12]–[13] (Spigelman CJ); *Mills v Meeking* (1990) 169 CLR 214, 236 (Dawson J).
- 36 For a discussion of the extent to which there has been judicial comment on the probative value, see D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8<sup>th</sup> ed, 2014) 114–18.
- 37 See the comments of Basten JA in *Shorten v David Hurst Constructions Pty Ltd* (2008) 72 NSWLR 211, 217 [27]; and of Ward JA in *Power Rental Op Co Australia, LLC v Forge Group Power Pty Ltd (in liq)* (2017) 93 NSWLR 765, 785 [87].
- 38 Commonly recognised as the largest minority party which is prepared, in the event of resignation of the government, to assume office: Sir Malcolm Jack (ed), *Erskine May’s Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (LexisNexis, 24<sup>th</sup> ed, 2011) 49.
- 39 Alan J Ward, *Parliamentary Government in Australia* (Australian Scholarly Publishing, revised ed, 2013) 12.
- 40 John Howard, ‘A Healthy Public Service is a Vital Part of Australia’s Democratic System of Government’ (1998) 57(1) *Australian Journal of Public Administration* 3, 10.
- 41 *Members of Parliament (Staff) Act 1984* (Cth) regulates the employment of staff by senators and members. For greater detail, see Nicholas Horne, ‘The *Members of Parliament (Staff) Act 1984*

The minister and her office are separate from the public service departments that serve them.<sup>42</sup> This distinction is an important one. The departments that serve the ministers constitute the Australian Public Service (‘APS’). Consequently, they must abide by the ‘APS Values’, which include impartiality, in order to provide non-partisan, relevant, and comprehensive advice to the government.<sup>43</sup> On the other hand, the APS is also required to serve the government of the day and to assist in delivering that government’s policy agenda,<sup>44</sup> which includes legislation.

Reconciling these two functions and aspirations is a contemporary issue,<sup>45</sup> and no doubt the demarcation changes from government to government. But the parliamentary materials covered in this article created by the serving departments for federal Bills must ultimately have the approval of their ministers, as discussed further below. On the basis of this limited extent at least, the departments are categorised as ‘quasi-partisan’ authors here.

For the sake of completeness, it is worth mentioning the Office of Parliamentary Counsel (‘OPC’). This statutory agency is responsible for the drafting of all Commonwealth government Bills to be introduced into parliament. OPC drafters, all of whom have legal qualifications,<sup>46</sup> are the only people permitted to do this drafting.<sup>47</sup>

But the days of an OPC drafter routinely attending federal Parliament during a Bill’s passage have long gone,<sup>48</sup> and the OPC has a minimal role in the drafting of parliamentary materials. The main exception is that the OPC is responsible for drafting government amendments to Bills that are proposed during the course of the Bill being considered by either the House or the Senate.<sup>49</sup> For the OPC, its

Framework and Employment Issues’ (Research Paper No 3, Parliamentary Library, Parliament of Australia, 4 August 2009).

- 42 See Patrick Weller, *Cabinet Government in Australia, 1901–2006: Practice, Principles, Performance* (University of New South Wales Press, 2007) 209–11; Department of Prime Minister and Cabinet, *A Guide on Key Elements of Ministerial Responsibility* (Australian Government, December 1998) pt 6.
- 43 *Public Service Act 1999* (Cth) s 10; Australian Public Service Commission, ‘APS Values and Code of Conduct in Practice’ (Guide, Australian Government, August 2017) 8 [1.2.18]–[1.2.22] <<http://www.apsc.gov.au/publications-and-media/current-publications/aps-values-and-code-of-conduct-in-practice>>.
- 44 Australian Public Service Commission, above n 43, 9 [1.3.5], 10 [1.5.2].
- 45 See Patrick Weller and Catherine Haddon, ‘Westminster Traditions: Continuity and Change’ (2016) 29 *Governance: An International Journal of Policy, Administration and Institutions* 483, 490, 492; Meredith Edwards ‘Ministerial Advisers and the Search for Accountability’ (2002) 34 *Australian Institute of Administrative Law Forum* 1, 3–4.
- 46 Office of Parliamentary Counsel, ‘OPC’s Drafting Services: A Guide for Clients’ (Australian Government, 6<sup>th</sup> ed, July 2016) 7.
- 47 The OPC is established under the *Parliamentary Counsel Act 1970* (Cth) s 2. For the OPC’s drafting responsibilities: see *Parliamentary Counsel Act 1970* (Cth) s 3; Attorney-General (Cth), *Legal Services Directions 2017*, OPC62320-F, 29 March 2017, sch 1, r 2.1, app A r 3. Appendix A r 3 also ties the OPC to drafting regulations, ordinances of territories and certain legislative instruments.
- 48 Carmel Meiklejohn, *Fitting the Bill: A History of Commonwealth Parliamentary Drafting* (Office of Parliamentary Counsel, 2012) 165.
- 49 Attorney-General (Cth), *Legal Services Directions 2017*, OPC62320-F, 29 March 2017, app A, r 3.



‘client’ is the government as a whole, not the individual department it may be dealing with to draft the Bill.<sup>50</sup>

The minister’s office and their public service departments are responsible for the preparation of two of the most familiar parliamentary materials – the explanatory memorandum for the Bill and the minister’s second reading speech given upon the introduction of the Bill into parliament.

Once a legislative proposal has been approved by Cabinet and has been given a place on the government’s legislative program, the department responsible for that proposal (the ‘sponsoring department’) prepares instructions for the drafting of the Bill, which they provide to the OPC.

Except for statute revision Bills, the sponsoring department will also prepare the Bill’s explanatory memorandum.<sup>51</sup> This includes the financial impact statement, the Regulation Impact Statement (‘RIS’) (if one is required) and the statement of compatibility with human rights (‘Statement of Compatibility’), each of which must be included.<sup>52</sup> Once drafted and approved by the sponsoring department, the memorandum is submitted to the relevant minister’s office for approval at the same time as the draft Bill.<sup>53</sup>

In the preparation of the explanatory memorandum, there is an additional layer of approval for the RIS. The sponsoring department must consult with the Office of Best Practice Regulation, a division of the Department of the Prime Minister and Cabinet (‘DPMC’), about the need for a RIS and, if required, the RIS must be assessed by that office.<sup>54</sup> In contrast, there is no additional vetting of the Statement of Compatibility, although the Attorney-General’s Office and the Parliamentary Joint Committee on Human Rights (‘JCHR’) provide some guidance and templates.<sup>55</sup>

Unlike in some other Australian jurisdictions,<sup>56</sup> the drafters of the Bill itself, the OPC, have a negligible role in relation to explanatory memoranda. The OPC expressly states that it is ‘not responsible for preparing or settling’ explanatory

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50 Office of Parliamentary Counsel, ‘OPC Drafting Manual’ (Australian Government, ed 3.1, February 2016) 23.

51 *Legislation Handbook*, above n 10, 37 [7.4]. For this exception, see Office of Parliamentary Counsel, *Drafting Direction No 4.4: Changes Using FPC’s Editorial Powers and Statute Law Revision Amendments*, 29 February 2016, [25].

52 *Legislation Handbook*, above n 10, 38 [7.5]. For non-government Bills, see Commonwealth, *Preparing Private Senators Bills, Explanatory Memoranda and Second Reading Speeches: A Guide for Senators 2004*, Tabled Paper No 19571 (2007).

53 *Legislation Handbook*, above n 10, 35 [6.7], 38 [7.6], 41 [7.24].

54 *Ibid* 87; see also Office of Best Practice Regulation, ‘User Guide to the Australian Government Guide to Regulation’ (Australian Government, February 2016) 5, 8.

55 Attorney-General’s Department, *Statements of Compatibility* <<https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/Pages/Statements-of-Compatibility.aspx>>; Parliamentary Joint Committee on Human Rights, *Guidance Notes and Resources*, Parliament of Australia <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Guidance\\_Notes\\_and\\_Resources](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources)>.

56 Such as Victoria, where the drafter of the Bill is responsible for reviewing the explanatory memorandum: Office of the Chief Parliamentary Counsel, ‘Guide to Preparing an Explanatory Memorandum and Template’ (Victorian Government, July 2014) 5.

memoranda or statements of compatibility.<sup>57</sup> The extent of their involvement is suggestions and ‘quick informal advice’.<sup>58</sup>

One consequence of these arrangements is that the quality of memoranda ‘cannot be expected to be uniform either at any period or across all departments’<sup>59</sup> given the variations in resources, experience, skill and knowledge between federal departments. Although attempts have been made to improve consistency and quality,<sup>60</sup> both appear to remain ongoing issues.<sup>61</sup>

The source of the minister’s second reading speech is similar, though its genesis is a ‘further step removed’<sup>62</sup> from the memorandum and the work of the OPC. The sponsoring department may be involved in drafting the speech, but the main responsibility lies with the minister’s office.<sup>63</sup>

Aside from the minister’s second reading speech, there is very little information about the process for the speeches made by other members or senators during the second reading debates. Given the ‘extremely high degrees of party discipline and cohesion’ in Australia,<sup>64</sup> it would not be implausible to assume that there is some degree of control exercised by the relevant minister, governing party or (in the case of the opposition) the shadow ministry about the talking points for each speaker, to at least some degree.<sup>65</sup>

## B Non-Partisan Authors

This category refers to a source independent of political partisanship. For federal Bill materials, most important are the Department of the House of

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57 Office of Parliamentary Counsel, ‘OPC’s Drafting Services’, above n 46, 11 [39]. See also Office of Parliamentary Counsel, *Drafting Direction 4.1: Dealing with Instructors*, 29 February 2016, 2 [4]; Office of Parliamentary Counsel, *Drafting Direction No 4.2: Referral of Drafts to Agencies*, 29 August 2016, 5 [23]–[26].

58 Office of Parliamentary Counsel, ‘OPC’s Drafting Services’, above n 46, 13, 37.

59 Patrick O’Neill, ‘Was there an EM? Explanatory Memoranda and Explanatory Statements in the Commonwealth Parliament’ (Research Brief No 15, Parliamentary Library, Parliament of Australia, 23 May 2005) 14.

60 See Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *The Quality of Explanatory Memoranda Accompanying Bills*, No 3 of 2004, 24 March 2004; Government Response to that report: Commonwealth, *Government Response to the Senate Standing Committee for the Scrutiny of Bills Third Report of 2004: The Quality of Explanatory Memoranda Accompanying Bills*, Tabled Paper No 19566 (2007).

61 O’Neill, above n 59, 14–15. For comments on the statements of compatibility, see Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Annual Report 2013–14* (2016) 18. See also Alex Hickman, ‘Explanatory Memorandums for Proposed Legislation in Australia: Are They Fulfilling Their Purpose?’ (2014) 29(2) *Australasian Parliamentary Review* 116; Sue Taylor, Julie-Anne Tarr and Anthony Asher, ‘Australia’s Flawed Regulatory Impact Statement (RIS) Process’ (2016) 44 *Australian Business Law Review* 361.

62 Hilary Penfold, ‘The Genesis of Laws’ (Paper delivered at the AIJA, LCA and CCF ‘Courts in a Representative Democracy’ National Conference, Canberra, November 1994) 10 [50] <<http://www.opc.gov.au/plain/docs/genesis.pdf>>.

63 *Legislation Handbook*, above n 10, 47 [7.49], 47 [7.53].

64 Ward, above n 39, 186. See also John Halligan and Richard Reid, ‘Conflict and Consensus in Committees of the Australian Parliament’ (2016) 69 *Parliamentary Affairs* 230, 231; J R Nethercote, ‘Parliament’ in Brian Galligan and Scott Brenton (eds), *Constitutional Conventions in Westminster Systems: Controversies, Changes and Challenges* (Cambridge University Press, 2015) 137, 147.

65 Specific empirical research is needed on this point.

Representatives, the Department of the Senate and the Department of Parliamentary Services; all are parts of the Australian Parliamentary Service.<sup>66</sup> Their role is to provide support, advice and facilities to each House of the Parliament, parliamentary committees and to all senators and members ‘independently of the Executive Government’.<sup>67</sup> While of course the nature of the service they provide will be dependent on the senator or member who seeks that advice, the values they must adhere to when providing that service include objectivity and non-partisanship.<sup>68</sup>

The Department of Parliamentary Services or, more specifically, the Research Branch of the Parliamentary Library in that Department, is responsible for an important document: the Bills Digest, a written analysis of a Bill, discussed further below (in Part V(B)).

### C Multi-Partisan Authors

The term ‘multi-partisan’ is used in this article to describe a group consisting of individuals from more than one political party – the parliamentary committees. To avoid misleading the reader, it should be noted that this term is not used to suggest that the political affiliations of committee members inform the terms of reference of those committees. Indeed, as is discussed below, the committees’ roles vary. Instead, the term ‘multi-partisan’ is used to reflect the reality of the committee membership itself, which, after all, consists primarily of members and senators operating in a political domain.

Although their use for Bills was ‘rare’<sup>69</sup> until the 1970s, since then parliamentary committees have increasingly become a critical aspect of enactment of a Bill.<sup>70</sup>

There are two main categories of committees that examine Bills:

- (a) Scrutiny Committees – these are standing committees that examine every Bill introduced into the House:<sup>71</sup> the Senate Standing Committee for Selection of Bills, the Senate Standing Committee for the Scrutiny of Bills and the JCHR (the ‘Scrutiny Committees’).<sup>72</sup>

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66 There is a fourth department, the Parliamentary Budget Office, but it is not relevant to this article. The departments are established under the *Parliamentary Service Act 1999* (Cth) s 54.

67 *Parliamentary Service Act 1999* (Cth) s 9.

68 *Parliamentary Service Act 1999* (Cth) s 10.

69 John Halligan, Robin Miller and John Power, *Parliament in the Twenty-First Century: Institutional Reform and Emerging Roles* (Melbourne University Press, 2007) 155.

70 For a brief history of Senate committees, see John Vander Wyk and Angie Lilley, ‘Reference of Bills to Australian Senate Committees: With Particular Reference to the Role of the Selection of Bills Committee’ (Papers on Parliament No 43, Parliamentary Library, Parliament of Australia, June 2005) 4–11.

71 And the Senate but, as established in the introduction, this article is confined to ordinary government Bills introduced into the House.

72 There is a fourth standing scrutiny committee – the Senate Standing Committee on Regulations and Ordinances established by *Senate SO*, O 23. This committee scrutinises delegated legislation, which is beyond the scope of this article.

(b) Senate General Purpose Legislation Committees – these are the ‘legislation’ side of pairs of subject area Senate standing committees.<sup>73</sup> There are currently eight pairs required under the Senate standing orders.<sup>74</sup> Each pair consists of a legislation committee and a general purpose (‘reference’) committee. The legislation committees (‘Senate Legislation Committees’) only examine Bills referred to them, usually by the Senate Standing Committee for Selection of Bills.

Except for the JCHR, these committees are ‘creatures of the Senate standing orders’<sup>75</sup> and, therefore, derive their authority from parliament.<sup>76</sup> As Senate committees, all members are senators. The JCHR is the only statutory committee, established under the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) (‘*HR Scrutiny Act*’). It consists, as its name suggests, half of senators and half of members.

There are also general purpose standing committees established by the House for each Parliament that may, among other things, inquire into a Bill.<sup>77</sup> Referral of a Bill by the House to a House standing committee is currently uncommon. If the House does refer a Bill, it is more commonly to a subject specific joint committee, such as the Joint Standing Committee on Treaties.<sup>78</sup> Accordingly, this article focuses on referral to the Senate Legislation Committees.

The Senate standing orders, and the *HR Scrutiny Act*, provide for a ‘multi-partisan composition’ across the Senate committee system.<sup>79</sup> Senate Legislation Committees must allocate places to the government and opposition and provide places ‘as nearly as practicable proportional to the numbers of those minority groups and independent senators in the Senate’.<sup>80</sup> Members of all the Scrutiny Committees are also drawn from government, opposition and other parties.<sup>81</sup> All have varying degrees of government dominance.<sup>82</sup>

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73 Except for a brief period from 2006–09 when the standing committee system reverted to single committees.

74 *Senate SO*, O 25(1). The names and number of pairs may vary from parliament to parliament.

75 Department of the Senate, *Senate Committees and Government Accountability: Proceedings of the Conference to Mark the 40th Anniversary of the Senate’s Legislative and General Purpose Standing Committee System* (Papers on Parliament No 54, Parliamentary Library, Parliament of Australia, December 2010) 3.

76 And ultimately, the *Australian Constitution* ss 49, 50.

77 *House SO*, O 215. See also *House SO*, O 222.

78 Ward, above n 39, 182. For the period since 2013: see Chamber Research Office, ‘Bills Referred to Committees of the House of Representatives and Joint Committees for Report’ (Department of the House of Representatives, 26 October 2017) <[http://www.aph.gov.au/Parliamentary\\_Business/Statistics/House\\_of\\_Representatives\\_Statistics](http://www.aph.gov.au/Parliamentary_Business/Statistics/House_of_Representatives_Statistics)>: from 1 January 2014 to 22 June 2017, only 13 Bills were referred by the House (all but one to joint committees). An exceptional period was the 2010–13 hung parliament when there was a substantial increase in referrals of Bills to House committees: see Bernard Wright, ‘Committee Work in a Hung Parliament: A House of Representatives Perspective’ (Paper presented at 44th Presiding Officers and Clerks Conference, Canberra, July 2013).

79 *Senate Practice Book*, above n 9, 462.

80 *Senate SO*, O 25(6)(b).

81 *HR Scrutiny Act* s 5; Commonwealth, *Votes and Proceedings No 3*, House of Representatives, 1 September 2016, 70–2; *Senate SO*, OO 24(2), 24A(2).

82 For details, see below Table A. In contrast to the Senate Legislation Committees, the reference committees (whose role is to enquire into subject areas, issues or any ‘other matters’ referred to them by

Given each committee is comprised of different compositions of individuals, they cannot be regarded as homogeneous groups.<sup>83</sup> The fact that Senate Legislation Committees may also have ‘participating members’ emphasises this point. This is a category that allows any senator who is not a member to participate in all aspects of the committee inquiry, including hearings of evidence and deliberations, except for the right to vote.<sup>84</sup>

The Scrutiny Committees do not allow participating membership, but each of the Scrutiny of Bills Committee and the JCHR engage a legal advisor, and research officers, who have central roles in drafting their respective reports.<sup>85</sup>

## V TWO: THE PURPOSE – WHY IS IT PRODUCED?

Some parliamentary materials are produced because they are required under standing orders. Others are generated as a matter of established practice, for convenience, for political purposes or to provide assistance to parliamentarians, or a combination of any of these reasons.

### A Government Intent – Explanatory Memoranda and the Second Reading Speech

Explanatory memoranda, optional until 1994,<sup>86</sup> are now required by the House standing orders at the first reading of an ordinary government Bill.<sup>87</sup> Explanatory memoranda started out principally as aids for parliamentarians in the *legislative* process.<sup>88</sup> The current official statement of their purpose is wider – to ‘assist members of the Parliament, officials and the public to understand the objectives and detailed operation of the clauses of the Bill’.<sup>89</sup>

A minister’s speech is not strictly required under the House standing orders, but it is an established practice and administrative requirement.<sup>90</sup> The official purpose of the speech is to explain the Bill’s ‘background and its key policy objectives’; it should not engage in detail. Appropriate content includes the

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resolution of the Senate) have a non-Government majority with a non-Government Chair having the casting vote: *Senate SO*, O 25.

83 That all committees are not the same has been noted in two studies: Ian Holland, ‘Senate Committees and the Legislative Process’ (Parliamentary Studies Paper No 7, Crawford School of Economics and Government, Australian National University, 2009) 7–8, 13; Richard Grant, ‘Can We Account for Parliamentary Committees? A Survey of Committee Secretaries’ (Parliamentary Studies Paper No 9, Crawford School of Economics and Government, Australian National University, 2009) 11, 16.

84 *Senate SO*, O 25(7).

85 *Senate SO*, O 24(8); *Senate Practice Book*, above n 9, 322, 325.

86 *House Practice Book*, above n 9, 349.

87 *House SO*, O 141(b). It is still optional for Appropriation and Supply Bills and private member Bills, but has become common practice to present one for these Bills as well. See *Legislation Handbook*, above n 10, 37 [7.3]; Commonwealth, *Guide for Senators*, above n 52, 23.

88 O’Neill, above n 59, 2.

89 *Legislation Handbook*, above n 10, 37 [7.1].

90 *Ibid* 46 [7.47]. Once given, the speech is recorded in Hansard and so becomes written material.

‘minister’s objectives ... political considerations and intentions, and broader policy strategies which may span areas beyond the specifics of the Bill’.<sup>91</sup>

Both the memorandum and the speech are prepared with an awareness of their potential interpretative value. This is expressly recognised in numerous materials, including those that guide sponsoring departments.<sup>92</sup> Indeed, recognition of this potential use of the minister’s speech has even influenced committee proposals for procedural reform on House debate as the speech is needed to be ‘authoritative and able to be relied on by a court as a statement of the policy behind a Bill’.<sup>93</sup>

Authors of the explanatory memorandum have a further audience in mind – the Scrutiny Committees, which examine the memorandum and the Bill. The critical role of these committees for the smooth passage of the Bill is expressly noted in official documents.<sup>94</sup>

Two points can be drawn from the multifaceted considerations about the purpose of these materials. The first is that these materials are tools of the government of the day and are representative of *government* intent. Second, concerns have been expressed in other jurisdictions that awareness of interpretative potential affects the quality of minister’s speeches.<sup>95</sup> The same caution may be applicable in Australia.

## B Independent Analysis – Bills Digests

A Bills Digest is a publically available written analysis of a Bill produced by the Research Branch of the Parliamentary Library. Bills Digests have been produced by the Parliamentary Library since the 1970s with coverage of nearly all government Bills since 1993.<sup>96</sup>

Preparation of the Digest is subject to considerable quality control. Authors are often legally trained individuals, and subject matter specialists and ‘readers’ will review and analyse drafts of the Digest. The Laws and Bills Digest section of the Research Branch manages the Bills Digest publication process.

The Parliamentary Library, as part of the Department of Parliamentary Services, is not connected to the executive or sponsoring department.

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91 Ibid 46 [7.48]. Also, drafts are often revised by minister’s staff for ‘appropriate political content’: Penfold, above n 62, 10.

92 *Legislation Handbook*, above n 10, 37 [7.1]–[7.2], 46 [7.45]; Commonwealth, *Guide for Senators*, above n 52, 24; *House Practice Book*, above n 9, 349, 362, 409–10.

93 House of Representatives Standing Committee on Procedure, Parliament of Australia, *Arrangements for Second Reading Speeches* (2003) 6. See also House of Representatives Standing Committee on Procedure, Parliament of Australia, *Encouraging an Interactive Chamber* (2006) 12. See also *House Practice Book*, above n 9, 526.

94 *Legislation Handbook*, above n 10, 42–5; Office of Parliamentary Counsel, ‘OPC’s Drafting Services’, above n 46, 35.

95 Ruth Fox and Matt Korris, *Making Better Law: Reform of the Legislative Process from Policy to Act* (The Hansard Society, 2010) 97–8; Antonin Scalia and Bryan A Garner, *Reading Law: The Interpretation of Legal Texts* (Thomson/West, 2012) 377.

96 O’Neill, above n 59, 15. In limited circumstances, sometimes the decision is made not to produce a Bills Digest: Department of Parliamentary Services, ‘Library-Policy – Preparing and Publishing Bills Digests’ (Governance Paper No 5.13, Parliament of Australia, 26 September 2014) 2–3 (copy on file with author).

Accordingly, Digest authors are not provided with a copy of the Bill for preparation of the Digest until it is presented to Parliament.

The objective of a Bills Digest is to provide:

an independent perspective on and analysis of legislation before the Parliament ... to support the work of the Australian Parliament – specifically, to assist all Senators and Members in their consideration of legislation and preparation of responses and speeches relating to the legislation and associated policy. They complement the legislative material provided by the Executive (such as Explanatory Memoranda and second reading speeches).<sup>97</sup>

Parliamentary Library policy governs the form and structure of the Digests. The template provides that the Digest will address the purpose of the Bill, its structure, background, policy positions of non-government parties, committee involvement, and key issues for the Bill.<sup>98</sup>

The Digests are not ‘official’ documents.<sup>99</sup> They are produced as a service by the Library for senators and members. That they are regularly used by senators and members is evident from information recently gathered by the Department of Parliamentary Services about the use of Library publications,<sup>100</sup> noting that, ‘[o]f all Library publications, the most heavily used, and most keenly awaited, remain Bills Digests’ and every effort is made to produce a Digest that provides ‘information that is important for parliamentarians to be able to contribute effectively to debate’.<sup>101</sup>

### C Terms of Reference – Committees Reports

The two types of committees, the Scrutiny Committees (Scrutiny of Bills Committee, JCHR and Selection of Bills Committee) and the Senate Legislation Committees, have very different roles. Each of the Scrutiny Committees has standing terms of reference for every Bill that is introduced into Parliament.<sup>102</sup> In contrast, Senate Legislation Committees only examine Bills referred to them and the terms of reference may vary. But one common factor is that none of these committees can amend Bills or require action. They can only make recommendations with the aim of being influential with respect to the decisions made in Parliament.<sup>103</sup>

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97 Department of Parliamentary Services, ‘Library-Policy – Preparing and Publishing Bills Digests’, above n 96, 1.

98 Ibid Attachment A.

99 Ibid Template Disclaimer for a Bills Digest.

100 A 2015 client evaluation of library services found that 89 per cent of senators, members and their staff and 80 per cent of departmental staff make use of research publications, particularly Bills Digests (and the Monthly Statistical Bulletin): Department of Parliamentary Services, Parliament of Australia, *Annual Report 2015–16* (2016) 103.

101 Ibid 131.

102 *Senate SO*, OO 24, 24A; *HR Scrutiny Act* s 7.

103 Geoffrey Lindell, ‘How (and Whether) to Evaluate Parliamentary Committees – From a Lawyer’s Perspective’ (Paper presented at Canberra Evaluation Forum, 18 November 2004) 2.

## 1 *Scrutiny Committees*

The Scrutiny of Bills Committee, established in 1981, has very specific terms of reference. It assesses each Bill by reference to five principles set out in Senate standing order 24. Its report will only comment on those Bills (or amendments) it considers have an impact on one or more of those principles. In the last three years, this has ranged between 35 per cent and 42 per cent of the Bills it has examined.<sup>104</sup>

The Scrutiny of Bills Committee describes itself as examining Bills on a ‘non-partisan, apolitical and consensual basis to consider whether a Bill complies with the scrutiny principles’.<sup>105</sup> Indeed (like the even longer established Senate Standing Committee on Regulation and Ordinances) it has a long history of consensus.

The JCHR’s role is to examine Bills for compatibility with ‘human rights’, as defined in the *HR Scrutiny Act*.<sup>106</sup> Dissent among the JCHR members when reporting on Bills has occurred.<sup>107</sup>

The Selection of Bills Committee’s brief is more amorphous. Its role is to examine all Bills and recommend whether a Bill should be referred to a Senate Legislation Committee (or sometimes another committee) and, if so, which one, when and the reporting date.<sup>108</sup> Unlike the Scrutiny of Bills Committee and the JCHR, this committee has no express power to examine Bills until they are introduced into the Senate. To overcome this delay and ‘maximise the time available for the committee inquiry’<sup>109</sup> the Selection Committee has adopted the practice of examining and reporting on the ‘provisions’ of the Bill (rather than the Bill itself). This construct allows it to consider the Bill as soon as it is introduced in the House.

There are no established criteria for the Selection of Bills Committee to consider Bills. The whips assess the views among senators, taking into account numerous factors such as the Bill’s political significance, party interest, community interest and existing workload of each committee,<sup>110</sup> and then make proposals to the Committee. It is not unknown for the Selection of Bills Committee to be unable to reach a consensus on whether a Bill should be referred or, even if referral is agreed, the reporting date for the relevant committee.<sup>111</sup> In

104 Figures calculated from Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Annual Report 2016* (22 March 2017) 9. The five principles are summarised in below Table A.

105 *Ibid* 3.

106 ‘Human rights’ is defined by reference to seven international treaties or covenants: *HR Scrutiny Act* s 3.

107 For example, the Parliamentary Joint Committee on Human Rights Report contained a dissenting report on the Marriage Legislation Amendment Bill 2015 (Cth): Parliament of Australia, *Human Rights Scrutiny Report: Thirtieth Report of the 44<sup>th</sup> Parliament* (2015) 151–79.

108 *Senate SO*, O 24A(1).

109 Senate Table Office, Parliament of Australia, *Business of the Senate: 1 January to 30 June 2016* (2016) 25.

110 Halligan, Miller and Power, above n 69, 159; Richard Pye, ‘Consideration of Legislation by Australian Senate Committees and the Selection of Bills Committee’ (2008) 76 *The Table: The Journal of the Society of Clerks-at-the-Table in Commonwealth Parliaments* 34, 39.

111 For example, the Senate Selection of Bills Committee could not agree on the appropriate course for the Social Services Legislation Amendment (Omnibus Savings and Child Care Reform) Bill 2017: Parliament of Australia, *Report No 1 of 2017* (2017) [5].



that instance, the committee tables its report in the Senate, noting the lack of agreement, and leaves it to the Senate to decide.

Unlike the Senate Legislation Committees, neither the Selection nor Scrutiny of Bills Committees take public submissions. The JCHR ‘does not generally’ seek them for Bills either.<sup>112</sup>

## 2 Senate Legislation Committees

As mentioned, there are currently eight Senate Legislation Committees – ‘Community Affairs’, ‘Economics’, ‘Education and Employment’, ‘Environment and Communications’, ‘Finance and Public Administration’, ‘Foreign Affairs, Defence and Trade’, ‘Legal and Constitutional Affairs’ and ‘Rural and Regional Affairs and Transport’. These, with their general-purpose committee pair, are the ‘engines of the Senate’s committee system’<sup>113</sup> and constitute a significant proportion of senators’ work.<sup>114</sup> Recent statistics indicate that between about 34 per cent and 40 per cent of all Bills are referred to Senate committees.<sup>115</sup> Most are referred by the Senate adopting the recommendations of the Selection of Bills Committee.<sup>116</sup>

The terms of referral will direct the parameters of a committee’s examination. The Senate may instruct the Senate Legislation Committee on how it should examine a Bill, including what should be examined and the nature of the inquiry.<sup>117</sup> But, absent any specific instructions about the inquiry, the committee is free to determine the appropriate method of dealing with particular Bills, although they must consider any comments on the Bill made by the Scrutiny of Bills Committee.<sup>118</sup>

While there used to be a ‘tradition of consensus’<sup>119</sup> in the committee system this is ‘no longer typical’.<sup>120</sup> A 2016 study found that Senate Legislation Committees are more likely to generate a minority or dissenting report than other types of committees.<sup>121</sup>

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112 Parliamentary Joint Committee on Human Rights, *Annual Report 2013–14*, above n 61, 7 [2.13].

113 *Senate Practice Book*, above n 9, 475.

114 Scott Brenton, ‘What Lies Beneath: The Work of Senators and Members in the Australian Parliament’ (Australian Parliamentary Fellow Monographs, Parliamentary Library, Parliament of Australia, 2009) 60.

115 Department of the Senate, Parliament of Australia, *Annual Report 2015–16* (2016) 53. Note that the Annual Report figures refer to ‘packages of bills’ so the percentage of individual Bills could be even higher. Statistics for calendar years for individual Bills are available at: Department of the Senate, *Bills, or Provisions of Bills, Referred to Committees*, Parliament of Australia <[http://www.aph.gov.au/Parliamentary\\_Business/Statistics/Senate\\_StatsNet/legislation/referredcommittees](http://www.aph.gov.au/Parliamentary_Business/Statistics/Senate_StatsNet/legislation/referredcommittees)>.

116 *Senate Practice Book*, above n 9, 313.

117 The standing orders of both the House and the Senate also permit their committees to report on draft or ‘exposure’ Bills: *Senate SO*, O 25(2)(a); *House SO*, O 215(b). However, to date this capacity has rarely been used. It is more common for an exposure draft to be referred to a joint committee.

118 *Senate SO*, O 25(2A); *Senate Practice Book*, above n 9, 319.

119 Halligan and Reid, above n 64, 236.

120 *Ibid* 243.

121 *Ibid* 243.

### D Purpose of Debate – Principle or Detail?

A substantial volume of written material is produced as a result of the spoken word. All verbal statements in Chambers are recorded and transcribed by the Hansard Office of the Parliamentary Recording and Reporting Branch of the Department of Parliamentary Services,<sup>122</sup> thereby becoming written material.

In general, parliamentarians have three main opportunities in each Chamber to speak to a Bill. The first is during the debate on the second reading motion. The second, if it occurs,<sup>123</sup> is the Consideration in Detail in the House ('CID') and the Committee of the Whole stage in the Senate ('CW'). The third is when a committee report is tabled; its recommendations may be debated at that point or adjourned for attention when the Bill is being debated.

There are two points to be made here about the first and second opportunities.

The purpose of the second reading debate in each Chamber is primarily to focus on the whole principle, or policy, of the Bill. Debate about the detail of the Bill is not permitted (this is for the next stage), although reference to amendments proposed to be moved at the next stage may be permitted.<sup>124</sup> It is at this stage that the principle of the Bill is either 'affirmed or denied'.<sup>125</sup>

Successful passage through the second reading means that the principle of the Bill is taken to have been agreed. Assuming that occurs, a Bill may move to the CID in the House, or the CW, if in the Senate.

The function of both the CID and the CW is to consider the detail, or *text*, of the Bill. As discussed further below, it is the stage at which amendments to the Bill are proposed. Consequently, amendments during these stages and accompanying debate should not be directed to the principle of the whole Bill, but rather particular clauses. They are pertinent to the purpose of individual provisions or the detail of how the Bill is seeking to achieve its policy objective.<sup>126</sup>

The third opportunity will be discussed more fully in Part VII. It is sufficient to note at this point that this third opportunity for debate is not available to all parliamentarians as part of the formal enactment of the Bill. It is available to both members and senators in relation to the JCHR reports (being a joint committee, the report is presented to both Chambers), but only to senators in relation to reports of the other Scrutiny Committees and the Senate Legislation Committees. While Senate committee reports might be the subject of comment in the House,

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122 The Senate standing orders specifically authorise Hansard (*Senate SO*, O 43(3)) whereas the authority for Hansard from the House is pursuant to a House resolution dated 5 May 1993 (reproduced in *House SO*, 112).

123 To be discussed further in Part VI.

124 *House Practice Book*, above n 9, 364.

125 *Ibid* 361; *Senate Practice Book*, above n 9, 301, 311. Debate on the wording of the second reading motion itself is permitted and a motion to amend the second reading motion is sometimes used by non-government members to make a political statement: *House Practice Book*, above n 9, 366; *Senate Practice Book*, above n 9, 312–13.

126 This is useful as it is well accepted in statutory interpretation law that individual clauses of a Bill may have their own 'subsidiary' or specific purpose.

they are not tabled in the House and so are not debated or scrutinised in that Chamber.<sup>127</sup>

## VI THREE: PROCEDURE – HOW ARE THE MATERIALS AFFECTED BY RULES AND PRACTICES?

In a recent US book examining the links between Congress and statutory interpretation, it was observed that ‘actions taken within an organisation like Congress cannot be understood without understanding their procedural context’.<sup>128</sup> The extent to which rules and practices affect our understanding of federal parliamentary materials is worth examining. They provide context and so may assist the interpreter to understand the relevance of parliamentary material. For example, judicial decisions have queried the implications that may be drawn from parliamentary ‘silence’.<sup>129</sup> Understanding the procedural context, such as devices to limit debate, may assist in determining the implications to be attributed to that absence.

### A Nature of Debate

In a report on federal legislation affecting human rights, the Australian Law Reform Commission Report stated that ‘[p]arliamentary debate is the ultimate forum for the scrutiny of, and judgments about’,<sup>130</sup> such legislation. In this context, the conventional wisdom is that, given the focus on ‘principle’, the second reading is ‘arguably the most important stage through which a Bill has to pass’.<sup>131</sup> In contrast, Griffiths has referred to this as a ‘highly formalistic view’.<sup>132</sup> There may be merit in the latter view given the structured nature of the second reading speech and subsequent debate stages.

First, the speech of the minister, usually given immediately following the motion for the second reading,<sup>133</sup> is typically read out in the House,<sup>134</sup> while the usual practice in the Senate is to incorporate the speech by reference into

127 This is because the Scrutiny of Bills Committee, the Selection of Bills Committee and the Senate Legislation Committees are all Senate committees, and so their reports are only tabled in the Senate. If a House committee were presenting a report on a Bill, it would be presented in the House.

128 Nourse, *Misreading Law*, above n 3, 147.

129 Legislative silence referred to in: *Alphapharm Pty Ltd v H Lundbeck A/S* (2014) 254 CLR 247, 274 [71] (Kiefel and Keane JJ); *Apotex Pty Limited v Sanofi-Aventis Australia Pty Ltd* (2013) 253 CLR 284, 302 [19], 318 [47], 319 [49] (French CJ).

130 Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Report 129 (2015) 58 [3.21].

131 *House Practice Book*, above n 9, 361, echoing the words in C J Boulton (ed), *Erskine May’s Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (Butterworths, 21<sup>st</sup> ed, 1989) 472. Note that this wording was modified in the most recent edition which now says ‘it is the first important stage’: Jack, above n 38, 548. See also *Senate Practice Book*, above n 9, 311 stating it is the ‘most significant’ stage.

132 J A G Griffith, *Parliamentary Scrutiny of Government Bills* (George Allen & Unwin, 1974) 30.

133 *House Practice Book*, above n 9, 362; *Senate Practice Book*, above n 9, 311.

134 Permitted since 1965: *House Practice Book*, above n 9, 505. A senator is not to read a speech: *Senate SO*, O 187. However, a ‘well-established’ exception is where a minister delivers a second reading speech on a Bill: *Senate Practice Book*, above n 9, 254.

Hansard.<sup>135</sup> Departmental officers who, as noted, may be involved in drafting the speech, are required to keep the House practice ‘in mind’ with emphasis on ‘readability’.<sup>136</sup> The speech can be for up to 30 minutes long in the House and 20 minutes in the Senate.<sup>137</sup> Questions, or ‘interventions’, by others are considered to be inappropriate during the speech.<sup>138</sup>

Next, the order of speakers in the second reading debate is largely pre-determined. The practice is for the Opposition spokesperson on the Bill to speak first.<sup>139</sup> After that, the Speaker or President adopts the practice of calling individuals from each side of the Chamber alternately, with parties sharing the ‘call’ in approximate proportion to their numbers.<sup>140</sup> Often, this is done in accordance with a list containing an order of speakers that has been compiled prior to the debate by the whips for the government, opposition and minor parties.<sup>141</sup> There are time limits for each speaker<sup>142</sup> and, apart from limited exceptions, no person may speak more than once.<sup>143</sup>

Third, speeches must be relevant to the subject matter of the Bill but there is some latitude about what constitutes relevance. For example, debate may extend to alternative means of achieving the Bill’s objective and reasons why the Bill should or should not be supported.<sup>144</sup> This provides speakers with opportunities to speak on related matters that do not necessarily contribute to understanding the merits or otherwise of the Bill. Indeed, there ‘are no doubt a range of audiences that members have in mind for various parliamentary speeches, and an equal variety of purposes for addressing those audiences’.<sup>145</sup> Apart from stating a policy position, reasons may be as diverse as influencing public opinion, encouraging party supporters or party leaders, seeking to impress with a view to advancement, to occupy time (as a political strategy) and so on.<sup>146</sup>

There is another reality of these ‘set piece’ speeches<sup>147</sup> worth noting. As a casual observer of Parliament will quickly note, a member making a speech during the second reading may sometimes be speaking to a near empty chamber.

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135 *Legislation Handbook*, above n 10, 74 [13.11].

136 *Ibid* 47 [7.49].

137 *House SO*, O 1; *Senate SO*, O 189(1). Time limits may be different for appropriation or non-government bills.

138 *House Practice Book*, above n 9, 526; Wright, *House of Representatives Practice*, above n 16, ch 14. Though interventions during debate generally may be permitted in limited circumstances: *House SO*, O 66A; *Senate SO*, O 197(1).

139 *House SO*, O 1; *Senate Practice Book*, above n 9, 249.

140 *House SO*, O 65; *Senate SO*, O 186; Department of the House of Representatives, *Guide to Procedures*, above n 15, 29–30; *House Practice Book*, above n 9, 502–3; *Senate Practice Book*, above n 9, 248–51.

141 *Arrangements for Second Reading Speeches*, above n 93, 10–1; *Legislation Handbook*, above n 10, 66 [12.28]; *House Practice Book*, above n 9, 56.

142 *House SO*, O 1; *Senate SO*, O 189. Although there is no time limit on the overall time that may be spent in the second reading stage.

143 *House SO*, O 69; *Senate SO*, O 188(1).

144 *House Practice Book*, above n 9, 364; *Senate Practice Book*, above n 9, 258, 312.

145 David Blunt, ‘Parliamentary Speech and the Location of Decision-Making’ (2015) 30(1) *Australasian Parliamentary Review* 83, 97.

146 *Ibid* 97–8.

147 David W Lovell, ‘The Sausage-Makers? Parliamentarians as Legislators’ (Political Studies Fellow Monograph No 1, Parliamentary Library, Parliament of Australia, 1994) 10, 53.

Many members come to the Chamber just in time to give their speeches and after giving their speech may leave the Chamber.<sup>148</sup> This situation is not assisted in the House by quorum rules that require a quorum for the House to commence, but not always to continue.<sup>149</sup>

No doubt, there are various reasons why members leave the Chamber. Parliamentarians have many other commitments, such as committee participation, during sittings. And even with physical absence, the availability of live broadcasting and up-to-date Chamber minutes online, enables members and senators (and their staff) to observe debate proceedings without being present. But, observation does not equate to participation in, or contribution to, parliamentary debate on a Bill.

The House Standing Committee on Procedure has recognised the limitations of ‘debate’ in the House and has encouraged more interactive debate.<sup>150</sup> It has suggested new procedures from time-to-time and encouraged greater use of existing procedures conducive to interaction.<sup>151</sup>

Of all the second reading material, the speech that might be regarded as most responsive is the minister’s speech in reply. This is given at the end of all second reading speeches and closes the debate. At this stage, the minister is entitled to ‘reply’ to matters raised during the debate.<sup>152</sup> During that time, the minister ‘typically comments on other Members’ speeches, including answering questions they may have raised’ using where needed the advice of departmental officers sitting in the advisor’s box in the Chamber.<sup>153</sup>

Given this format for the second reading, it has been suggested that the second reading stage may be ‘much less important’<sup>154</sup> than the next potential stage of the Bill in terms of impact. For the House, this next stage is the CID and for the Senate, the CW.<sup>155</sup>

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148 *Arrangements for Second Reading Speeches*, above n 93, 2, 4. See also the ‘Chair’s Tabling Statement for the Reports on Arrangements for Second Reading Speeches/Trial of Additional Tellers’ (House of Representatives, 1 December 2003) <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/House\\_of\\_Representatives\\_Committees?url=proc/reports/seconddreadingspeeches/tablingstatement.pdf](https://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=proc/reports/seconddreadingspeeches/tablingstatement.pdf)>.

149 *House SO*, O 54. See also *House of Representatives (Quorum) Act 1989* (Cth). Exceptions include a ‘division’ or if a member draws the Speaker’s attention to the ‘state of the House’: *House SO*, OO 55, 58.

150 House of Representatives Standing Committee on Procedure, *Encouraging an Interactive Chamber*, above n 93, 1–4. For example, the maximum time for second reading speeches (except for the Minister and opposition spokesperson) was reduced to the current time in the 43<sup>rd</sup> Parliament: *House SO*, O 1; Politics and Public Administration, Parliamentary Library, ‘The Hung Parliament: Procedural Changes in the House of Representatives’ (Research Paper Series, 2013–2014, 22 November 2013–14) 46. The ability to ask questions at the end of these speeches in the House was introduced by sessional (temporary) order 142A in 2010, but the order was rarely used and was not continued: Commonwealth, *Parliamentary Debates*, House of Representatives, 29 September 2010, 142 (Anthony Albanese); Joanne Townner, ‘From Minority to Majority Government: the Impact on Standing Orders’ (ANZACATT Professional Development Seminar, Workshop 1A: Standing Orders, Sydney, January 2015) 8, 11.

151 House of Representatives Standing Committee on Procedure, Parliament of Australia, *Role of the Federation Chamber: Celebrating 20 Years of Operation* (2015) 29, 36.

152 *House SO*, OO 1, 69(c), 71; *Senate SO*, OO 189(2), 192.

153 *Arrangements for Second Reading Speeches*, above n 93, 7.

154 Griffith, above n 132, 30.

155 Proceeding to these next steps may be delayed if the Bill has been referred to a committee. Referral of the Bill to a House or joint committee delays the CID: *House SO*, O 148. As previously noted, currently this

The CID and CW are when proposals for amendments to the text are debated.<sup>156</sup> The standing orders for each Chamber provide for the Bill to be considered clause by clause.<sup>157</sup> However, this has become an ‘exceptional’ circumstance.<sup>158</sup> Most Bills are considered, in both the House and Senate, by leave, ‘as a whole’.<sup>159</sup>

In the CID, the House continues to sit as the House. In the CW, the Senate continues the ‘parliamentary device’<sup>160</sup> of forming itself into a committee consisting of all the members of the Senate (hence the name, Committee of the Whole).<sup>161</sup> The Senate may instruct the CW on the Bill but such instructions are ‘relatively rare’.<sup>162</sup> More often, the CW is left to examine the Bill in the manner it desires.

Despite the different constructs, both the CID and CW are governed by processes that allow more flexibility and greater chances for interactive participation than the second reading stage. For example, the speaking time limits are shorter but may be for an unlimited number of turns.<sup>163</sup> No notice is required for proposed amendments<sup>164</sup> and motions need not be seconded.<sup>165</sup> These more flexible rules mean that something close to a ‘question and answer’ format between the minister and other speakers sometimes develops.<sup>166</sup>

Despite the potential for the CID and the CW to provide more interactive debate and therefore arguably more meaningful information about a Bill, most Bills bypass both these stages. This can be done with leave or if certain circumstances are met.<sup>167</sup> In the House, approximately 75 per cent of Bills bypass this stage and go straight to the third reading.<sup>168</sup> Specific statistics are not

only occurs for a minority of Bills. Referral of a Bill in the Senate to a Senate committee delays the CW. This is discussed further in Part VII.

156 *House Practice Book*, above n 9, 374; *Senate Practice Book*, above n 9, 328; *House SO*, O 150; *Senate SO*, O 118.

157 *House SO*, O 149; *Senate SO*, O 117.

158 *House Practice Book*, above n 9, 377. For the Senate, see Rosemary Laing (ed), *Annotated Standing Orders of the Australian Senate* (Department of the Senate, 2009) 379; *Senate Practice Book*, above n 9, 330.

159 *Ibid.*

160 Stanley Bach, *Platypus and Parliament: The Australian Senate in Theory and Practice* (Department of the Senate, 2003) 202. *Senate SO*, OO 143–8 govern the procedure for committees.

161 In practice, this simply means that the President vacates the President’s Chair, and the Chair of Committees (often the Deputy President) moves to the chair that is ‘at the table’ between the two clerks: Laing, *Annotated Standing Orders*, above n 158, 77.

162 *Senate Practice Book*, above n 9, 326.

163 *House SO*, O 1; *Senate SO*, OO 188(2), 189.

164 *House Practice Book*, above n 9, 375; *Senate Practice Book*, above n 9, 425.

165 *House SO*, O 151. Seconding of motions is not required in the Senate: *Senate Practice Book*, above n 9, 235.

166 Note that an *expectation* of a question and answer format has developed for the main appropriation Bill. As noted, this article focuses on ordinary government Bills – consideration in detail of the main appropriation Bill has a ‘unique style and format’: House of Representatives Standing Committee on Procedure, Parliament of Australia, *Consideration in Detail of the Main Appropriation Bill* (2016) 2, 6.

167 *House SO*, O 148; *Senate SO*, O 115(1).

168 *House Practice Book*, above n 9, 373. For many Parliaments the percentage has been much higher.

available for the Senate, but statistics for Bills subject to amendment proposals in the CW indicate that only a minority of Bills go to this stage.<sup>169</sup>

There are undoubtedly a variety of reasons why most Bills bypass this ‘detail’ stage, such as urgency, being non-controversial or due to the government of the day having sufficient numbers to do so. Whatever the reason, Bills that bypass this process fail to generate what might be significant explanations or inquiries about the Bills’ details.

## B Political Strategy and Debate Procedure

It is a reality that the ‘case for or against legislation is made in a political context’.<sup>170</sup> Implications about a Bill from the volume, or absence, of parliamentary debate should therefore be made with caution. The nature of the Bill may be particularly important here.<sup>171</sup>

The standing orders in the House and Senate are drafted so that a Bill will be considered over several days, at the minimum.<sup>172</sup> However, the standing orders ‘ought not be seen as a strait-jacket’.<sup>173</sup> A variety of procedures may be used to suspend or overcome them to expedite legislation.

To curtail debate on a Bill, measures that may be used include motions of ‘closure’ of the member (a motion that a member who is speaking no longer be heard),<sup>174</sup> a ‘gag’ motion (that the question in issue, such as a second reading motion, be put without further debate)<sup>175</sup> and a ‘guillotine’ motion (a motion that the Bill be considered urgent which imposes limits on debate for all stages of the Bill).<sup>176</sup> In the House, where the government has a majority, this can be an extremely effective way to control and limit debate on a Bill.

Another mechanism is the contingent notice. Contingent notices are not recognised in the standing orders, but are nevertheless often used, particularly to facilitate the quick passage of legislation.<sup>177</sup> A contingent notice, as the name would suggest, is a notice stating that, if a certain event happens, then a motion will be moved to suspend certain standing orders.<sup>178</sup> A set of contingent notices is

169 See Senate statistics: Department of the Senate, *Committee of the Whole – Consideration*, Parliament of Australia <[http://www.aph.gov.au/Parliamentary\\_Business/Statistics/Senate\\_StatsNet/legislation/cowamendments](http://www.aph.gov.au/Parliamentary_Business/Statistics/Senate_StatsNet/legislation/cowamendments)>.

170 Stephen Laws, ‘Legislation and Politics’ in David Feldman (ed), *Law in Politics, Politics in Law* (Hart Publishing, 2015) 87, 90.

171 For example, it is not uncommon for appropriation Bills (for the Annual Budget) to be expedited: Parliament of Australia, *Government Bills Considered Under a Limitation of Time (‘Guillotine’) 1983–2016* <[http://www.aph.gov.au/Parliamentary\\_Business/Statistics/Senate\\_StatsNet/legislation/urgentbills](http://www.aph.gov.au/Parliamentary_Business/Statistics/Senate_StatsNet/legislation/urgentbills)>.

172 Laing, *Annotated Standing Orders*, above n 158, 367.

173 Nethercote, above n 64, 139.

174 *House SO*, O 80. There is no equivalent of a motion that a senator no longer be heard in the *Senate SO*.

175 *House SO*, O 81; *Senate SO*, O 199.

176 *House SO*, OO 82–5; *Senate SO*, O 142. Devices limiting debate have a long history: see G S Reid and Martyn Forrest, *Australia’s Commonwealth Parliament 1901–1988: Ten Perspectives* (Melbourne University Press, 1989) 192–4.

177 *House Practice Book*, above n 9, 294, 391–2; *Senate Practice Book*, above n 9, 220, 233, 353.

178 Therefore, overcoming the need for the absolute majority needed for the suspension of standing orders moved without notice: *Senate SO*, O 209; *House SO*, O 47.

usually included in the first Notice Paper of each session of parliament. An example is a notice ‘contingent’ on the motion for the second reading of any Bill, that the standing order requiring resumption of debate on the Bill at a later day be suspended to permit the debate on the same day.

In the Senate, there is no equivalent of a ‘closure’ motion to cut off the speech of a particular senator in the Senate,<sup>179</sup> and rather than using the ‘guillotine’ to limit debate, the Senate has more frequently adopted a ‘benign guillotine’.<sup>180</sup> The latter is where the Senate, in response to a notice from the government, agrees to a motion to vary its sitting hours and routine, focusing on Bills that need to be finalised.

The Senate also has two other relevant procedures.

The first is the procedure that allows a motion, without notice, to be put that a Bill progress ‘without formalities’.<sup>181</sup> Agreement to this means that the requirement in the standing orders ‘for different stages of a [B]ill to be dealt with on separate days is suspended’.<sup>182</sup>

The second procedure overcomes standing orders that impose a ‘double deadline’ for when the Senate can receive Bills from the House, known as the ‘cut-off’.<sup>183</sup> This is done by a minister adopting a procedure ‘familiarily known as “an exemption from the cut-off”’<sup>184</sup> where the minister seeks the leave of the Senate for exemption from the deadlines. Statistics for the last five years show that most exemptions sought are granted.<sup>185</sup>

Procedural rules may also be used to delay a Bill. An example is the ‘filibuster’. While individual parliamentarians have time limits, the standing orders do not impose a time limit on the total amount of time that may be spent debating a Bill. The ‘filibuster’ involves a party arranging for numerous speeches (using the maximum individual time limit) to delay a Bill or to permit time for negotiating matters outside the Chamber, rather than to reflect considered debate.<sup>186</sup> Consequently, care should be taken making implications about the volume of debate on a particular Bill.

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179 Commonwealth, *Parliamentary Debates*, Senate, 12 November 1959, 1475 (Alister McMullin, President of the Senate) cited in *Senate Practice Book*, above n 9, 273.

180 Note, ‘Comparative Study: Timetabling Bills and Closure Motions’ (2011) 79 *The Table: Journal of the Society of Clerks-at-the-Table in Commonwealth Parliaments* 100, 108. Also called a ‘civilised’ guillotine because for it to work, the Senate must agree: *Senate Practice Book*, above n 9, 354.

181 *Senate SO*, O 113(2)(a). This standing order also allows Bills to be considered together.

182 Laing, *Annotated Standing Orders*, above n 158, 369.

183 *Senate SO*, OO 111(5)–(6).

184 Laing, *Annotated Standing Orders*, above n 158, 362.

185 See Department of the Senate, *Bills Exempted from the Cut-Off*, Parliament of Australia <[http://www.aph.gov.au/Parliamentary\\_Business/Statistics/Senate\\_StatsNet/legislation/cutoff](http://www.aph.gov.au/Parliamentary_Business/Statistics/Senate_StatsNet/legislation/cutoff)>.

186 For example, it was alleged that the Government filibustered its own Human Rights Legislation Amendment Bill 2017 (Cth) in the Senate on 30 March 2017 to allow time to negotiate amendments to the Treasury Laws Amendment (Enterprise Tax Plan) Bill 2016 (Cth) with the Nick Xenophon Team political party: see Ashlynn McGhee, ‘18C: Proposed Changes to *Racial Discrimination Act* Defeated in Senate’, *ABC News* (online), 31 March 2017 <<http://www.abc.net.au/news/2017-03-30/18c-racial-discrimination-act-changes-defeated-in-senate/8402792>>. Although this was short compared to some marathon debates: *Bills Debated for Longer than 20 Hours 1990–2017*, Parliament of Australia <[http://www.aph.gov.au/Parliamentary\\_Business/Statistics/Senate\\_StatsNet/legislation/longestdebate](http://www.aph.gov.au/Parliamentary_Business/Statistics/Senate_StatsNet/legislation/longestdebate)>.



### C The Little Things

As well as the substantive materials discussed, the parliamentary process results in a multitude of less well-known materials that may assist in understanding the more familiar ones. Some examples follow:

1. As previously noted, proposals to the Selection of Bills Committee for referral of a Bill to a Senate Legislation Committee are made by individual senators. These proposals, which are annexed to the Selection Committee's report, are made on a 'pro forma' through a Committee member or through a whip. The information required on this form is minimal, but there is a section requiring 'reasons for referral/principal issues for consideration'. These forms are the genesis of a Bill referral recommendation to the Committee (although the Committee is not bound by them in making their final decision about referral).<sup>187</sup>
2. Referrals to committees, their reporting dates and the report itself can be subject to debate (and therefore will be found in Hansard). The debate may be for any number of substantive, political or strategic reasons. Further, when a committee member, usually the Chair, tables a Committee's report to the Senate (or House), she will often make an explanatory statement about the report.
3. A Senate Legislation Committee may decide to conduct a public or more focused enquiry on a referred Bill. In this case, written submissions from a variety of groups with varying political or ideological views (interested parties, stakeholders, academics, private organisations, charities and so on) may be produced. Public hearings lead to a transcript of witness evidence. These materials can be voluminous.<sup>188</sup> While of themselves they may appear to be too remote to be of value as interpretative aids, they may acquire contextual significance if referred to, or relied on, in the final committee report.
4. As noted, disagreement within a committee is not uncommon, particularly for the Senate Legislation Committees. Minority reports by members of the Committee are 'one device' for expressing parliamentary dissent.<sup>189</sup> Minority, or dissenting, reports appear at the end of the Committee report. Other labels are 'additional', 'supplementary' or 'further comments' reports which, arguably, are a form of dissent, 'if a somewhat milder version'.<sup>190</sup> Although the impact of a dissenting report on the scrutiny process might be questionable, at the least these 'extra' reports may provide a clear party position.

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187 Wyk and Lilley, above n 70, 16. See also Pye, above n 110, 39. The pro forma can be found at: Senate Standing Committee for Selection of Bills, *Proforma*, Parliament of Australia <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Selection\\_of\\_Bills/Proforma](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Selection_of_Bills/Proforma)>.

188 For example, the Senate Legislation Committees heard 529 witnesses and received 2033 submissions: Department of the Senate, Parliament of Australia, *Work of Committees: Financial Year Statistics: 1 July 2015–30 June 2016* (2016) 7.

189 Halligan and Reid, above n 64, 235.

190 *Ibid* 236.

5. When giving notice of a motion to seek ‘exemption from the cut-off’, the minister must table a ‘statement of reasons’ in the Senate. This statement is a formal document drafted by sponsoring department officials,<sup>191</sup> which must be cleared by both the minister and Prime Minister’s office.<sup>192</sup> The statement must include the purpose of the Bill and the reasons for the urgency.
6. Although expressly identified in the *AIA* as extrinsic materials, there are two materials often neglected.<sup>193</sup> These are the Votes and Proceedings for the House (including the Federation Chamber) and the Journals for the Senate, which are the official records of what is actually done (or deemed to be done) by the Chamber.<sup>194</sup> Each records decisions of the Chamber, including words of motions, amendments, divisions, documents presented (or deemed to have been presented), reference to ministerial statements,<sup>195</sup> and committee reports presented. The Votes and Proceedings are compiled in the Table Office of the Department of the House of Representatives. Responsibility for preparation of the Journals lies with the Clerk of the Senate, in the Department of the Senate.

Both the Votes and Proceedings and the Journals are to be distinguished from the better-known material, Hansard, which is the official record of what is *said*.<sup>196</sup> So, for example, the instance of a minister being granted leave to make a ‘ministerial statement’ in the House announcing a significant policy development will be noted in the Votes and Proceedings, but the content of that statement will be recorded in Hansard. As noted, Hansard is produced by the Hansard Office in the Department of Parliamentary Services.

Contrary to what is often thought, Hansard is not an exact replication of what is said in the proceedings of parliament, but a ‘substantially verbatim account’.<sup>197</sup> It is ‘substantially verbatim’ because the Hansard Office’s editing policies provide that ‘obvious mistakes’ should be corrected, although the corrections should not add to or detract from the meaning of the speech.<sup>198</sup> Proofs are subject to review by the individuals who spoke, with final approval of the Speaker or President required.

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191 For a template, structure and outline for departmental officials, see: *Legislation Handbook*, above n 10, 12–13 [2.45]–[2.47].

192 *Ibid* 12–13 [2.45].

193 *AIA* s 15AB(2)(h).

194 *House SO*, O 27; *Senate SO*, O 43(1).

195 Ministerial statements may be used by the government to announce significant policy developments: Politics and Public Administration Section, Parliamentary Library, ‘44<sup>th</sup> Parliament in Review’ (Research Paper Series, 2016–17, 24 November 2016) 25–6. Sometimes this will be relevant to a Bill.

196 Regarding authority for Hansard, see above n 122: *Senate SO*, O 43(3); *House SO*, O 112.

197 Department of Parliamentary Services, *Mission Statement of Hansard*, Parliament of Australia <[http://www.aph.gov.au/Parliamentary\\_Business/Hansard](http://www.aph.gov.au/Parliamentary_Business/Hansard)>. Though written speeches or statements presented in the Chamber may be used as an aid in the transcription.

198 *Ibid*.

Others have discussed the potential consequences of this correction policy.<sup>199</sup>

As potential interpretative aids, the distinction between Hansard and the Votes and Proceedings, and Journals, is important. When looking for statements of purpose or objective in relation to a Bill, it is logical to look at what is *said* during debate in the Chamber. But to fully understand the effect of statements or documents presented, they must be put in the context of the decision actually made, which is clearly found in the Journals and Votes and Proceedings. Reading Hansard alone will not provide that contextual picture.

## VII FOUR: TIMING – WHEN IS THE MATERIAL PRODUCED?

The importance of timing in explaining the parliamentary process is not new. Timing concepts such as veto players,<sup>200</sup> veto gates,<sup>201</sup> and decision-making points,<sup>202</sup> to name a few, have been articulated. For parliamentary materials, timing is critical. It will assist in determining the currency and relevance of material. One scholar goes so far as to suggest that, in assessing parliamentary materials, timing may trump typology.<sup>203</sup>

This article focuses on two timing issues relevant to parliamentary materials.

### A Amendments

Amendments proposed to a Bill during the CID or CW may be proposed by the Government or private members or senators. As explained earlier, government parliamentary amendments are drafted by the OPC and they are subject to the same departmental and ministerial approvals as a Bill.<sup>204</sup> Given that amendments can delay the passage of the Bill, the department and ministers are directed to proceed with them only if they are ‘essential’.<sup>205</sup>

Non-government amendments are drafted by the party proposing them, with the assistance of offices within the Department of the House or Senate.<sup>206</sup> No notice is required of either government or non-government amendments.<sup>207</sup>

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- 199 Greenberg, above n 3, 4–6. See generally Cecilia Edwards, ‘The Political Consequences of Hansard Editorial Policies: The Case for Greater Transparency’ (2016) 31(2) *Australasian Parliamentary Review* 145.
- 200 See generally George Tsebelis, ‘Decision Making in Political Systems: Veto Players in Presidentialism, Parliamentarism, Multicameralism and Multipartyism’ (1995) 25 *British Journal of Political Science* 289.
- 201 See generally William N Eskridge Jr, ‘Vetogates and American Public Law’ (2015) 31 *The Journal of Law, Economics, and Organization* 756.
- 202 See generally Victoria F Nourse, ‘A Decision Theory of Statutory Interpretation: Legislative History by the Rules’ (2012) 122 *The Yale Law Journal* 70.
- 203 Nourse, *Misreading Law*, above n 3, 88–91.
- 204 *Legislation Handbook*, above n 10, 54–5 [9.22].
- 205 *Ibid* 52 [9.2].
- 206 Department of the Senate, *Annual Report 2015–16*, above n 115, 40–2; Department of the House of Representatives, Parliament of Australia, *Annual Report 2016–17* (2017) 31–2.
- 207 *House Practice Book*, above n 9, 375; *Senate Practice Book*, above n 9, 425.

There are two categories of amendments for the purposes of extrinsic materials. One is amendments that are proposed but not agreed. These amendments and the proposer's explanatory statements and subsequent debate, again forming part of Hansard, will be extrinsic material. In addition, the record of reasons as to why it failed to pass may explain an aspect of the Bill.

The other category is amendments that are proposed and agreed by both Chambers, and therefore become part of the agreed Bill and the subsequently enacted statute. These amendments are not 'extrinsic' in the true sense (as they become part of the enacted statute), although the Bill versions they replace and the debate they may generate (recorded in Hansard) will be.

The timing of agreed amendments may affect the volume and reliability of other parliamentary materials. Some examples follow.

The first is the explanatory memorandum for the Bill.

It has become routine for a supplementary explanatory memorandum to be prepared for government amendments to Bills, whether moved in the House or Senate.<sup>208</sup>

Further, if a House initiated Bill is amended in the House, then it is also established practice for the sponsoring department to prepare a revised explanatory memorandum, to be tabled with the Bill in the Senate. (Sometimes, in that instance, the second reading speech will also be amended for the Senate).<sup>209</sup> The government may also prepare an addendum or replacement memorandum, if time permits, in response to parliamentary committee recommendations, especially if the committee reports before the Bill is received by the Senate.<sup>210</sup>

The situation for revised memoranda is different if a House-initiated Bill is amended in the Senate. In that instance, the practice is for the Senate to send back the Bill to the House with a message and a schedule of the agreed amendments. The House is only required to consider those amendments (not the whole Bill). As the Bill is not reprinted, no revisions to the explanatory memorandum are made. Consequently, it may not be an accurate reflection of the final agreed Bill.<sup>211</sup>

The timing of amendments made on the floor may also affect the relevance of Scrutiny Committee reports.

The Scrutiny of Bills Committee is required to report not just on the Bill as introduced, but on any amendments made in a Chamber. But the Bill as introduced and the parliamentary amendments are typically examined in separate scrutiny reports, and therefore are tabled in the Senate at different times. That is, the report that examines the amendments is likely to be in a separate, subsequent

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208 *Legislation Handbook*, above n 10, 54 [9.17]; Wright, *House of Representatives Practice*, above n 16, ch 10.

209 *Legislation Handbook*, above n 10, 48 [7.55], 56 [9.28].

210 *Ibid* 45 [7.42], 46 [7.43]; *Senate Practice Book*, above n 9, 314.

211 *Legislation Handbook*, above n 10, 56 [9.29], 69 [12.48]. A recent example of this situation was the Corporations Amendment (Crowd-Sourced Funding) Bill 2016 (Cth). Note that if the government disagrees with the Senate amendments, the minister must present 'written reasons' and a motion is made for the House to adopt those reasons (thus producing further extrinsic material): *House SO*, OO 161(c), 170(b). See also Pearce and Geddes, above n 36, 118.

report to the one on the introduced Bill. Depending upon the timing of amendments, it is possible that the report on the amendments will not be available until after the Bill has been enacted, and so does not inform debate or decisions made in Parliament on the Bill.

Conversely, the JCHR report does not examine amendments. Its report is only on the Bill as introduced. The same is true for the Bills Digests produced by the Parliamentary Library. A Digest will not be amended if the Bill is amended in Parliament after the Digest is published.<sup>212</sup> Consequently, both the JCHR report and Digest must be read subject to any amendments made in Parliament.

## **B Scrutiny and Senate Legislation Committee Reports**

Like a Bill, parliamentary reports are confidential until tabled, or deemed tabled, in the Chamber.<sup>213</sup> One result of this is that, until the report is tabled and available to parliamentarians, it does not inform debate in the Chamber. Timing of the tabling of the report is therefore a matter relevant to assessing other parliamentary materials. This can manifest in several ways.

### **1 Scrutiny Committees**

There is nothing in the standing orders that prevents the passage of a Bill if one of the Scrutiny Committees has not presented its report on that Bill.

The Scrutiny of Bills and the Selection of Bills Committees each present their report on a weekly basis when the Senate is sitting. This will usually cover Bills introduced into the House in the previous sitting week of the House.<sup>214</sup> This tight time frame means that there is a strong likelihood that most parliamentarians (unless it is an expedited Bill) will have access to these reports when the time for debate and voting arises.

The JCHR reports on a regular basis, usually each joint sitting week. Its heavier workload (as it must examine Bills and delegated legislation) means that it does not usually report as frequently as the other Scrutiny Committees.

A more significant timing issue arises when the Scrutiny of Bills Committee or the JCHR have only been able to provide an ‘initial’ report on a Bill as they have sought further explanation or information from the minister about the Bill or explanatory memorandum. The issue here lies not in the failure of the minister to respond (although there is no formal requirement for him to do so), but in the timing of that response. The urgency of the government’s legislative program and the timeliness of the minister’s response will affect whether the Committee’s finalised comments are available during the passage of a Bill.<sup>215</sup> Ministerial responses, which are publicly available, can provide important clarifications about the Bill.<sup>216</sup>

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212 Template disclaimer for each Bills Digest: Department of Parliamentary Services, ‘Library-Policy – Preparing and Publishing Bills Digests’, above n 96.

213 Senate Legislation Committee reports are permitted to be tabled to the President when the Senate is not sitting and this is ‘deemed’ to be tabled: *Senate SO*, O 38(7).

214 Unless consideration of a Bill is deferred.

215 Senate Standing Committee for the Scrutiny of Bills, *Annual Report 2016*, above n 104, 4.

216 The minister’s responses, usually in the form of a letter, are annexed to the Committee’s report.

Both the Scrutiny of Bills Committee and the JCHR have highlighted timeliness of minister responses as an issue in their annual reports.<sup>217</sup> The significance of the issue has been recognised by the Senate as reflected in a temporary amendment made to the Senate standing orders in late 2016. That amendment allows any senator to seek an explanation from a minister about his delayed response to a Scrutiny of Bills Committee's inquiry on a Bill.<sup>218</sup>

## 2 Senate Legislation Committees

Unlike the Scrutiny Committees, the passage of a Bill will be delayed in the Senate if the Bill has been referred to a Senate Legislation Committee. The Senate standing orders provide that the Bill may not proceed into the CW (or the next stage if that is to be bypassed) until the Senate Legislation Committee has reported.<sup>219</sup> This means that senators will have the benefit of the report for the detailed examination of the Bill, though not necessarily for the second reading. In contrast, the passage of a Bill in the House is not delayed if a Senate Legislation Committee has not reported on the Bill.<sup>220</sup> Consequently, parliamentary material from the House needs to be considered bearing in mind the possibility that it has not been produced with the benefit of the report.

Second, unlike the Scrutiny of Bills Committee and JCHR, which correspond directly with the minister, if a Senate Legislation Committee has made recommendations in its report then the government is required to provide a formal response in the Senate within three months.<sup>221</sup> This formal response must be prepared in accordance with DPMC guidelines and must be approved by either Cabinet or the Prime Minister (depending on the subject matter). Dissenting or minority reports must also be addressed.<sup>222</sup>

There are various measures encouraging a timely response.<sup>223</sup> Despite this, responses beyond the three-month period occur regularly.<sup>224</sup> Further, even if the

217 During 2016, 44 per cent of responses were not provided within the timeframe requested by the Scrutiny of Bills Committee: Senate Standing Committee for the Scrutiny of Bills, *Annual Report 2016*, above n 104, 4; Parliamentary Joint Committee on Human Rights, *Annual Report 2013–14*, above n 61, 16–17.

218 Amendment to *Senate SO*, O 24 agreed to by Senate on 29 November 2016 (Commonwealth, *Journals of the Senate No 21*, Senate, 29 November 2016, 656–7). On its current terms, it will operate until the last sitting day of March 2018.

219 *Senate SO*, OO 115(1)–(3). There are some exceptions such as when the 'provisions' of a Bill are referred after the Bill has been received by the Senate. In that case, the Bill may proceed before the committee reports: *Senate Practice Book*, above n 9, 317.

220 Only referral to a House standing or select committee can delay a Bill in the House: *House SO*, O 148. Holland found in his study that 48 per cent of Senate Bill inquiries do not report until the Bill has already passed through the House: Holland, above n 83, 15.

221 Commonwealth, *Journals of the Senate No 8*, Senate, 14 March 1973, 51. It is six months for House and joint committee reports: Commonwealth, *Votes and Proceedings No 2*, House of Representatives, 29 September 2010, 44.

222 Department of the Prime Minister and Cabinet, Parliament of Australia, *Guidelines for the Presentation of Documents to the Parliament (Including Government Documents, Government Responses to Committee Reports, Ministerial Statements, Annual Reports and Other Instruments)* (2017) 9. Note this only applies for Senate and joint committees.

223 The President of the Senate provides a report twice a year on the status of government responses. It is also established practice for the government to regularly report in the Senate on the status of its responses. Regular status updates are available at: Department of the Senate, *Government Responses to*

three-month limit is adhered to, the response still may not be received until well after the Bill is enacted. Referring to the Government response to determine the policy of a Bill must therefore take into account this likely post-enactment timing.

## VIII CONCLUSION

The parliamentary process is labyrinthine. The rules, procedures, and practices are numerous and detailed. More, there is a wider political context that is a permanent and dynamic framework for the enactment of legislation. So, it would be ambitious to expect even an experienced reader of statutes to readily comprehend the Parliament's Bill enactment process, beyond a rudimentary level, without engaging in some focused study.

This article recognises that. Instead, this analysis attempts to provide a framework for critical consideration of parliamentary materials. As noted, this research represents work done as part of a larger project about the relationship between the legislative process and statutory interpretation that is not confined to parliamentary procedure. Further work on that larger project may well provide additional context and nuance to the views expressed in this article. But, from the analysis represented here, it is possible to make some preliminary observations in conclusion.

Foremost, the materials that constitute 'parliamentary materials' should not be regarded as a homogenous group when it comes to considering them as extrinsic aids to interpretation. They differ widely in their source, purpose, procedural context, and time of creation. To treat each genre of material on an equal basis in the interpretative task therefore seems incongruous and unprincipled.

Next, even for a particular genre of material, the factors of source, purpose, procedural context, and time of creation should cause the user to pause in their assessment of the weight to be given to that material. These factors constitute a composite of 'signs' that may affect the probative value not only of a particular type of material, but also of that material from Bill to Bill.

Source and purpose, which appear inextricably linked, may affect reliability and relevance. Two materials often referred to, the explanatory memorandum and the second reading speech, are prime examples. The source and purpose of these documents invites the available implication that these materials are more reflective of 'government intent', rather than being representative of the purpose of a statute as approved by a 'holistic' parliament. At the least, the reader should consider developments that occur within Parliament after these documents are presented.

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*Committee Report*, Parliament of Australia <[http://www.aph.gov.au/Parliamentary\\_Business/Statistics/Senate\\_StatsNet/documents/governmentresponses](http://www.aph.gov.au/Parliamentary_Business/Statistics/Senate_StatsNet/documents/governmentresponses)>.

224 See, eg, President of the Senate, 'President's Report to the Senate on the Status of Government Responses to Parliamentary Committee Reports' (Parliament of Australia, 30 June 2017).

This is a neat segue into the critical factor of timing. It would be imprudent to consider parliamentary materials related to a Bill in isolation from their place in the parliamentary passage of that Bill. The time of creation or presentation of a document affects the relevance of that material, whether it is an explanatory memorandum, committee report, a debate in Hansard or a proposed amendment, as it alerts the reader to assess what has eventuated in Parliament to that point.

Linked with timing are matters of procedure. The procedural rules not only provide, like timing, context for materials, but also explanatory clues about a Bill's passage. A truncated or extended debate, expedited passage or other aspects of a Bill's journey may be the consequence of use of procedural devices, and may help to explain materials.

This leads to a last observation. The examination of the Bill enactment process reveals other materials worth examining. For example, the Votes and Proceedings and Journals, long neglected by interpreters, officially reflect the decisions made by the House and Senate. The Bills Digest can provide an objective and useful explanation of the background to a Bill.

It might be expected that suggesting that interpreters assess parliamentary materials more rigorously by addressing these factors will result in the contention that the burden of determining statutory meaning by the courts and legal profession will be increased. While a legitimate concern, I make two points in response.

The first is the practical point that collating information about the parliamentary story of a federal Bill is no longer an arduous process. The parliamentary materials referred to in this article are publically available on the Australian Parliament website and much of it is collected or referenced on each Bill's home page. Access is likely only to get easier with time and further advances in information systems.

The second is a point of principle. Both the legislature and the courts opened the door to refer to parliamentary materials some decades ago through the legal developments summarised at the beginning of this article. Many are routinely referred to by courts and lawyers for a statutory interpretation task. If that is to remain the case, then rather than merely 'identifying one's friends' among the crowd of papers, it seems appropriate to improve our knowledge and understanding of those materials in order to, eventually, create and adopt a more principled and disciplined approach to their use. That can only aid and advance the critical pursuit of the ascertainment of meaning from the words on a page.



Table A – Summary – Ordinary Government Bills

Material	Who	When	How	Why
Explanatory Memorandum ('EM')	Sponsoring Department; subject to Minister's office approval.	Tabled during introduction of Bill into House.	Required for House ordinary government Bills under House SO, O 141, though in practice provided for all Bills DPMC Legislation Handbook.	To assist members of the Parliament, officials and the public to understand the objectives and detailed operation of the clauses of the Bill.
Revised EM or Supplementary EM	Sponsoring Department; subject to Minister's office approval.	If amendments made to Bill before House/Senate, usually tabled when amendment proposed or Bill introduced in Senate Otherwise, timing variable.	DPMC Legislation Handbook. Same requirements as initial EM.	To reflect amendments to Bill made in Chambers from proposals or committee recommendations.
Financial Impact Statement	Sponsoring Department; subject to Minister's Office approval as part of EM.	Tabled as part of EM or revised EM.	DPMC Legislation Handbook.	Describes the direct and indirect financial impact for the Commonwealth of the proposed Bill.
Regulatory Impact Statement ('RIS')	(If required) Sponsoring Department; subject to the Minister's Office approval as part of EM and reviewed by Office of Best Practice Regulation ('OBPR').	Tabled as part of EM or revised EM.	DPMC Legislation Handbook; Australian Government User Guide to the Australian Government Guide to Regulation. Also, numerous DPMC 'guidance notes'.	To ensure that departments and agencies fully consider the costs and benefits of all viable options, with a view to choosing the options with the 'highest net benefit'. <sup>225</sup>
Statement of Compatibility	Sponsoring Department will prepare for approval by Minister.	Tabled as part of EM or Revised EM.	HR Scrutiny Act s 8. No prescribed form but templates and guidance notes available.	To assess whether the Bill is compatible with human rights (as defined in the <i>HR Scrutiny Act</i> ).
Second Reading Speech of Minister ('SRS')	Sponsoring Department/Minister's Office, subject to approval by Minister.	When read (House) or incorporated into Hansard (Senate) after the second reading or a Bill is moved.	House SO, OO 1, 142. Senate SO, OO 114, 189(1). DPMC Legislation Handbook.	To explain the purpose and policy objectives of a Bill.
Second reading debates – First Speech after SRS	Leader of Opposition (or member representing).	During second reading motion debate on Bill.	Established practice. House SO, O 1. Senate SO, O 189(1).	To explain Opposition position on the policy of the Bill.
Other second reading speeches	Varies.	During second reading motion debate on Bill.	House SO, O 65. Senate SO, O 186. Informal whip arrangements.	For other members or senators to speak on the Bill in principle.

225 *Legislation Handbook*, above n 10, 8 [2.12].

Material	Who	When	How	Why
Minister's Reply	The Minister of the sponsoring department.	At the end of all second reading speeches.	House SO, OO 1, 69(c), 71. Senate SO, OO 189(2), 192.	To reply to matters raised in second reading debate.
Bills Digest	Research Branch, Parliamentary Library (part of Department of Parliamentary Services, Parliament House).	Bills received by Library after tabled in Parliament. Aim is to complete in time for committee consideration and parliamentary debate.	No formal requirement but Research Branch has developed internal templates and guidelines (Governance Paper No. 5.13—Library—Policy—Preparing and publishing Bills Digests)	To provide an independent perspective and analysis of legislation before the Parliament to assist parliamentarians.
Senate Standing Committee for Scrutiny of Bills Report (from January 2017; Report is known as 'Scrutiny Digest') <sup>226</sup>	Six senators – three government, three non-government (typically proportionate between Opposition and minority senators). Chair elected by Opposition; Chair has casting vote. Legal advisor appointed.	Examines Bill after introduced in either Chamber. Weekly report when Senate is sitting.	Senate SO, O 24.	To consider all Bills and report whether Bill provisions: (a) trespass unduly on personal rights and liberties; (b) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers; (c) make rights, liberties or obligations unduly dependent upon non-reviewable decisions; (d) inappropriately delegate legislative powers; or (e) insufficiently subject the exercise of legislative power to parliamentary scrutiny.
Minister/Department correspondence in response to Scrutiny Committee request for information on Bill or EM	Minister responsible for Bill.	Annexed to Scrutiny of Bills Report (Scrutiny Digest) once committee receives response.	None, although temporary amendment to Senate SO, O24 encourages responses.	To respond to inquiries made by Scrutiny of Bills Committee on a bill or the EM.
Senate Standing Committee for Selection of Bills Report ('Report')	Government whip in Senate and two other government senators. Opposition whip in Senate and two other opposition senators, whips of minority groups in Senate; Chair elected by Government; Chair has casting vote.	Examines Bill or Bill 'provisions' after introduced in either Chamber Weekly report when Senate is sitting.	Senate SO, O24A. No specified form of report but typically minimal (Bill, details of referral (if any) and suggested reporting date).	To consider all Bills (except where provisions only on revenue or money) and recommend to Senate whether the Bill should be referred to a legislative or general purpose standing committee and, if so, which committee, when and reporting date.

<sup>226</sup> Prior to 2017, there were two separate reports produced by the Committee: the Alert Digest (initial scrutiny of a Bill) and the Report (final scrutiny of a Bill) if amendments, or minister response provided). These two documents have now been combined into the Scrutiny Digest.

Material	Who	When	How	Why
Statement of Reasons for Referral to Committee (attached to Selection of Bills Committee Report)	Senator or whip requesting referral of Bill to committee.	Available as part of report when Selection of Bills Report is tabled.	None – established practice. Pro forma used.	To assist the Selection of Bills Committee in their deliberations.
Parliamentary Joint Committee on Human Rights Report ('Human Rights Scrutiny Report')	10 members: (1) Five members of Senate (two Government); and (2) Five members of the House (three Government). Chair elected by Government; Chair has casting vote. Legal advisor appointed.	Reports approximately monthly depending on when Parliament is sitting.	<i>HR Scrutiny Act</i> ss 4–7; House of Representatives, <i>Votes and Proceedings</i> No 3, above n 81, 70–2.	To examine Bills (and legislative instruments) that come before either Chamber for compatibility with human rights (as defined in <i>HR Scrutiny Act</i> ).
Minister/ Department correspondence in response to JCHR request	Minister responsible for Bill. Legal advisor appointed.	Annexed to Human Rights Scrutiny Report when tabled in Chamber.	None.	To respond to inquiries made by JCHR on a Bill or EM.
Senate Legislation Committees – Reports	Committee membership – majority government, government Chair.	Reporting date is fixed when referred but can be extended. Available when tabled.	<i>Senate SO, O 25</i> .	To report on the Bill referred to it; sometimes terms of reference given.
Government Response to Senate Legislation Committee Report	Usually sponsoring department, subject to approval by Cabinet or the PM depending on subject matter.	Senate has directed that response be tabled within three months of committee report, but not uncommon for response to be past deadline.	Senate resolution of continuing effect adopted 14 March 1973. Some guidelines in <i>DPMC Guidelines for the Presentation of Documents to the Parliament</i> . <sup>227</sup>	To outline the Government's policy position and to address the Report recommendations, including dissenting reports.
Proposed Amendments to Bill text	Various – OPC (government amendments), or Department of Senate/Department of the House assistance (private member/senator).	In CID or CW.	<i>House SO, OO 148–150</i> . <i>Senate SO, OO 115–120</i> . For government amendments: <i>DPMC Legislation Handbook</i> .	To propose changes to the text of the Bill before the parliament.
Votes and Proceedings (House)	Table Office (as approved by the Clerk), Department of House of Representatives, Parliament House.	Proof issue published daily while House is sitting; final version produced after any necessary corrections.	<i>House SO, O 27</i> .	To be the official record of the proceedings of the House.

<sup>227</sup> Above n 222.

Material	Who	When	How	Why
Journals (Senate)	Clerk of the Senate, Department of the Senate, Parliament House.	Proof available day after the relevant sitting day; final version produced after any necessary corrections.	Senate SO, O 43(1).	To be the official record of the proceedings of the Senate.
Hansard	Speaker is member or senator; transcribed by Hansard Office, Department of Parliamentary Services, Parliament House.	Proofs available daily; reviewed by members/senators and editors; two days later revised proof published on internet; proofs checked and further corrections made as needed; official version published on internet 2–3 weeks later.	House: Resolution 5 May 1993 Senate: Senate SO, O 43(3). Internal Hansard editing guidelines- editors correct obvious mistakes; clarify ambiguous or confusing passages and ensure that the meaning is understandable/coherent but edits should neither add to nor detract from meaning or argument. House SO, O 36.	To provide an accurate, substantially verbatim account of the proceedings in Chambers and committees (Hansard Mission Statement). <sup>228</sup> (Includes, for example, second reading debates, ministerial statements, debates about proposed amendments and debates about committee reports)
House Notice Paper	Table Office, Department of the House of Representatives.	Each sitting day.		Shows proposed business of House and Federation Chamber for that sitting day; includes contingent notices.
Senate Notice Paper	Table Office, Department of the Senate.	Each sitting day.	Senate SO, O 43(2).	Shows proposed business of Senate for that sitting day; includes contingent notices.

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228 Above n 197.