

## **The *Williams* Decisions and the Implications for the Senate and its Scrutiny Committees\***

Patrick Hodder

This paper focuses on the principal response of parliament to the High Court's decision in the case of *Williams v Commonwealth* (2012) which is referred to as *Williams (No. 1)*.<sup>1</sup> The response was the enactment of a regulation-making mechanism as a means to authorise Commonwealth expenditure on a range of programs, and has had implications for the work of the Senate Standing Committee on Regulations and Ordinances (the committee). The broader implications for the parliament of the High Court decisions in the two *Williams*<sup>2</sup> cases were considered in the Glenn Ryall paper 'Commonwealth Executive Power and Accountability Following *Williams (No. 2)*'.<sup>3</sup>

Beginning with some background and context, the paper notes the key differences between primary and delegated legislation and the factors that led to the establishment of the committee, and briefly outlines how the parliament has maintained control over delegated legislation via the role of the committee. This context provides the basis for an examination of how the committee has interpreted its scrutiny principles in its examination of the regulations giving effect to the parliament's legislative response to *Williams (No. 1)*, and to thereby apply a measure of accountability to the executive. The final part of the paper explores a number of issues related to the sufficiency of parliamentary scrutiny of the executive, including the ramifications for parliamentary scrutiny of greater executive reliance on intergovernmental agreements, criticism of the parliament's response to *Williams (No. 1)*, and the practicality of remedies to improve parliamentary and committee scrutiny of the executive.

### **Establishment of the committee**

The parliamentary enactment of a statute has various stages that allow for detailed consideration and amendment of a bill by elected representatives. By contrast, delegated legislation is essentially law made by the executive—usually ministers and other executive office holders (unelected public officials)—without parliamentary enactment. As noted in *Odgers' Australian Senate Practice*, delegated legislation therefore has fundamental implications for parliamentary sovereignty and democratic

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<sup>1</sup> *Williams v Commonwealth* (2012) 248 CLR 156 (*Williams (No.1)*).

<sup>2</sup> *Williams v Commonwealth* (2012) 248 CLR 156 (*Williams (No.1)*); *Williams v Commonwealth (No. 2)* (2014) 309 ALR 41 (*Williams (No.2)*).

<sup>3</sup> *Papers on Parliament*, no. 63, July 2015, pp. 109–34.

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accountability because it appears to violate the constitutional principle of the separation of powers: that is, the principle that laws should be made by parliament and administered or enforced by the executive.<sup>4</sup>

It is important to note that while the use and acceptance of delegated legislation is ubiquitous today, historically this apparent diminution of parliamentary sovereignty and accountability has excited powerful concerns. A signal example of these concerns, and one which forms the backdrop to the establishment of the committee in March 1932,<sup>5</sup> was the 1929 book by the Lord Chief Justice of England, Lord Hewart, *The New Despotism*, a title which clearly equates the delegation of the parliament's legislative powers to a return of sorts to the prerogative excesses of monarchs prior to the English constitutional settlement. Meanwhile, in Australia, the Select Committee on the Standing Committee System established by the Senate to inquire into delegated legislation (among other matters) proposed a committee to review regulations and ordinances. This proposal was doubtless informed by the repeated remaking of regulations under the *Transport Workers Act 1928* that had been disallowed by the Senate and which, despite Address by the Senate, were subsequently approved by the Governor-General. Against this backdrop, the Senate resolved in 1931 to require the appointment of a dedicated Standing Committee on Regulations and Ordinances at the commencement of each parliament.<sup>6</sup> Thus it may be seen that it is the Senate that has principally developed the parliamentary mechanisms required to ensure oversight of executive law-making via delegated legislation, and to thereby effectively preserve the principle of the separation of powers.

### **The committee's role and mode of operation**

The scope of the committee's scrutiny function is formally defined by Senate standing order 23,<sup>7</sup> which requires it to scrutinise each disallowable instrument of delegated legislation to ensure:

- (a) that it is in accordance with the statute
- (b) that it does not trespass unduly on personal rights and liberties

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<sup>4</sup> Harry Evans and Rosemary Laing (eds), *Odgers' Australian Senate Practice*, 13th edn, Department of the Senate, Canberra, 2012, p. 413.

<sup>5</sup> Rosemary Laing (ed.), *Annotated Standing Orders of the Australian Senate*, Department of the Senate, Canberra, 2009, Chapter 5—Standing and Select Committees, p. 110.

<sup>6</sup> Evans and Laing, *op. cit.*, pp. 416–17.

<sup>7</sup> Parliament of Australia, *Standing Orders and Other Orders of the Senate*, [www.aph.gov.au/Parliamentary\\_Business/Chamber\\_documents/Senate\\_chamber\\_documents/standingorders](http://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/standingorders) (accessed 14 January 2016). The standing orders of the Senate derive their authority from sections 49 and 50 of the Constitution, which provide, respectively, for the powers, privileges, and immunities of the Senate and House of Representatives; and that each house may make rules and orders for the exercise of those powers, privileges, and immunities, and the order and conduct of business.

- (c) that it does not make the rights and liberties of citizens unduly dependent on administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal and
- (d) that it does not contain matter more appropriate for parliamentary enactment.

The committee's work may be broadly described as technical legislative scrutiny as, by convention, it does not extend to the examination or consideration of the merits of the policy underpinning an instrument of delegated legislation.

While today there are numerous formalities and legislative requirements attendant upon the making of delegated legislation (principally through the *Legislative Instruments Act 2003*)<sup>8</sup>, the foundation of parliamentary control of executive law-making resides in the ability of parliament to move to disallow (in effect, to veto) instruments of delegated legislation.<sup>9</sup> Such disallowance motions based on the recommendation of the committee, while infrequent, have without exception been agreed to by the Senate.<sup>10</sup>

Where an instrument raises a concern referable to the committee's scrutiny principles, the committee usually writes to the responsible minister seeking an explanation, or seeking an undertaking for specific action to address its concern. This dialogue is generally conducted within the period that the instrument is open to the possibility of disallowance, which ensures that the committee is able, if necessary, to recommend to the Senate the disallowance of an instrument about which it has concerns. If the 15 sitting days available for giving a notice of motion for disallowance is likely to expire before a matter is resolved, the committee may give such a notice in order to protect the Senate's ability to disallow the instrument (the notice has the effect of providing a further 15 sitting days in which the motion can be moved). Such motions are therefore referred to as 'protective notices'.

As noted above, disallowance is an uncommon end to a committee inquiry into a particular instrument of delegated legislation. In most cases, the relevant instrument maker (usually a minister) provides sufficient information to address the committee's concern, but instrument makers may also provide an undertaking to address the committee's concern through the taking of steps at some point in the future

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<sup>8</sup> The *Legislative Instruments Act 2003* will become the *Legislation Act 2003* on 5 March 2016 with the commencement of the *Acts and Instruments (Framework Reform) Act 2015*.

<sup>9</sup> See Evans and Laing, op. cit., p. 413. The disallowance process is prescribed by section 42 of the *Legislative Instruments Act 2003*. Although both houses have the ability to disallow certain instruments of delegated legislation, the power is more commonly exercised in the Senate (where the government of the day generally does not have a majority).

<sup>10</sup> Evans and Laing, op. cit., p. 424.

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(undertakings typically relate to the making of changes to primary or delegated legislation). The acceptance of such undertakings has the benefit of securing an outcome agreeable to the committee, without the significant interruption of the executive's implementation and administration of policy that would be caused by disallowance.<sup>11</sup>

### **Committee scrutiny of regulations following the *Williams* case**

As noted, the response of parliament to *Williams (No. 1)* was the enactment of a regulation-making mechanism as a means to authorise Commonwealth expenditure on a range of programs. Several aspects of the committee's work described above are demonstrated in the committee's scrutiny of these regulations, which were initially made under the *Financial Management and Accountability Act 1997* (FMA Act) and subsequently under the *Financial Framework (Supplementary Powers) Act 1997* (FFSP Act).

The decision in *Williams (No. 1)* cast doubt on the validity of government expenditure involving direct payments to persons other than a state or territory, the only authority for which being an item of appropriation in an appropriation Act. In response, on 27 June 2012 parliament passed the *Financial Framework Legislation Amendment Act (No. 3) 2012* (FFLA Act), which added section 32B to the FMA Act. Section 32B gave legislative authority to the executive to make, vary or administer any arrangement under which public money is paid out by the Commonwealth, and to grant financial assistance to any person, provided that the arrangement or grant is specified in the FMA Act regulations.<sup>12</sup> In simple terms, this has since allowed the executive to authorise expenditure on programs and grants by making regulations adding the particulars of those programs and grants to Schedule 1AB of the FFSP Act regulations,<sup>13</sup> rather than including those matters in primary legislation.<sup>14</sup> An inescapable consequence of the use of regulations in response to the decision in *Williams (No. 1)* was that any such instruments would be subject to scrutiny by the

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<sup>11</sup> *ibid.*, pp. 432–3.

<sup>12</sup> The FFLA Act initially added over 400 items to Schedule 1AA of the FMA regulations. However, because these items were added by the FFLA Act (that is, by primary legislation) they fell outside the scope of the committee's scrutiny.

<sup>13</sup> Programs were initially added to Schedule 1AA, but this was effectively superseded by Schedule 1AB, which, for technical reasons, was added to the FMA regulations in December 2013 (see the *Financial Management and Accountability Amendment (2013 Measures No. 1) Regulation 2013* [F2013L02089]).

<sup>14</sup> Programs were initially added to a schedule of the FMA Act. However, the *Public Governance, Performance and Accountability Act 2013* repealed most of the FMA Act and renamed it the *Financial Framework (Supplementary Powers) Act 1997* (FFSP Act). The FFSP Act retained section 32B to authorise the Commonwealth to make, vary and administer arrangements and grants specified in the FFSP regulations (which had previously been specified in the FMA regulations (see previous note)).

committee in accordance with Senate standing order 23 and the scrutiny principles set out above.

### **Matters raised by the committee**

The committee first reported on Financial Management and Accountability Amendment Regulation 2012 (No. 8) [F2012L02091] on 7 February 2013.<sup>15</sup> Since that time, the committee has identified the following three issues referable to its scrutiny principles in the FMA/FFSP regulations (henceforth referred to just as the FFSP regulations).<sup>16</sup>

#### *Absence of review of decisions*

The first issue raised by the committee relates to scrutiny principle (c), requiring the committee to ensure that delegated legislation does not make rights and liberties unduly dependent on administrative decisions which are not subject to review. In simple terms, the question for the committee was whether decisions made in connection with authorised programs would be subject to review.

The committee's analysis on this front drew on the examination of the FFLA Act by the Senate Standing Committee for the Scrutiny of Bills, which questioned the appropriateness of, and limited justification for, the wholesale exclusion from judicial review of all decisions made pursuant to programs and grants authorised by addition to Schedule 1AA (now Schedule 1AB) from the *Administrative Decisions (Judicial Review) Act 1997* (ADJR Act). The committee pursued this line of inquiry by seeking advice from the Minister for Finance on whether the characteristics of specific programs and grants justified the exclusion of decisions from merits review. The committee ultimately reported its expectation that explanatory statements include a description of the policy considerations and program or grant characteristics relevant to the question of whether or not decisions should be subject to merits review.<sup>17</sup> The minister advised in response that future explanatory statements would include such information,<sup>18</sup> which has since been consistently provided.

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<sup>15</sup> Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor*, no. 1 of 2013, 7 February 2013, pp. 36–7.

<sup>16</sup> The committee's findings are reported in its main publication, the *Delegated Legislation Monitor* (the monitor), available at [www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Regulations\\_and\\_Ordinances/Monitor](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Monitor). The monitor is generally published each Senate sitting week.

<sup>17</sup> Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor*, no. 1 of 2014, 12 February 2014, pp. 5–6.

<sup>18</sup> Senator the Hon. Mathias Cormann, Minister for Finance, letter to Senator Sean Edwards, Chair, Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor*, no. 4 of 2014, 26 March 2014, Appendix 3.

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*Authorising of certain expenditure by regulation*

The second issue raised by the committee relates broadly to scrutiny principle (d), requiring the committee to ensure that delegated legislation does not contain matters more appropriate for parliamentary enactment. The committee interprets its scrutiny principles broadly, and this principle may therefore be understood as pertaining more generally to questions related to the legislative form used. This matter was taken up by the committee at the request of the then Committee on Appropriations and Staffing. The Chair of that committee, the President of the Senate, wrote to the committee in March 2014 and requested that the committee begin to monitor executive expenditure being authorised by the *Williams* ‘solution’, and report on any such expenditure to the Senate.

In making this request, it was noted that the authorising of expenditure via regulation in this way had effectively reduced the scope of the Senate’s scrutiny of government expenditure, and in particular the constitutional ability of the Senate to examine and, if desired, to amend certain expenditure proposals. Some irony may be seen in this outcome due to the fact that the decision in *Williams (No. 1)* had effectively reaffirmed the fundamental role of the parliament and the Senate in authorising revenue and expenditure proposals of the executive, reflecting as it does the terms of the federal settlement as expressed in the relationship between the two houses of the parliament.

Specifically, section 83 of the Constitution provides that no money shall be drawn from consolidated revenue ‘except under appropriation made by law’; and that, while the Senate may not amend proposed laws appropriating revenue or moneys for the ordinary annual services of the government (that is, for the maintenance of the administrative departments and continuing programs of the Commonwealth),<sup>19</sup> the Senate may directly amend an appropriation bill not for the ordinary annual services of the government.<sup>20</sup> Because an appropriation bill for ordinary annual services must contain only those appropriations,<sup>21</sup> the executive is effectively prevented from ‘tacking on’ to the non-amendable appropriation bill items of new expenditure. By thus ensuring that expenditure on new works and programs is kept separate from ordinary annual services, and permitting the Senate to amend new expenditure proposals, the Senate has the means to prevent the inequitable or disproportionate distribution of new expenditure between the states.<sup>22</sup>

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<sup>19</sup> Expenditure on ordinary annual services is contained in appropriation bills no. 1 (budget estimates) and no. 3 (additional estimates).

<sup>20</sup> Section 53 of the Constitution.

<sup>21</sup> Section 54 of the Constitution.

<sup>22</sup> In June 2010, the Senate restated by resolution its constitutional right to amend proposed laws appropriating revenue or monies for expenditure on all matters not involving the ordinary annual

In light of this, a concern arising from the regulation-making mechanism under section 32B of the FFSP Act is that items of expenditure, which previously should properly have been contained within an appropriation bill not for the ordinary annual services of the government (and subject to direct amendment by the Senate), may now be authorised by regulation without being subject to amendment or direct approval by the Senate.<sup>23</sup> For example, new expenditure could be purportedly authorised by a program previously listed in the regulations (and perhaps in relatively broad or imprecise terms) and thus contained in an appropriation bill for the ordinary annual services of government. Given that it appears this arrangement is now occurring, there is, therefore, a risk that the use of the regulations in this way could undermine the constitutional rights of the Senate.<sup>24</sup>

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services of the government. In particular, it stated that appropriations for expenditure on new policies not previously authorised by special legislation, and grants under section 96 of the Constitution, are not appropriations for the ordinary annual services of the government, and shall be presented to the Senate in a separate appropriation bill subject to amendment by the Senate. A core function of the Senate is therefore to monitor the allocation of matters between the appropriation bills, and the President of the Senate, as Chair of the Senate Standing Committee on Appropriations and Staffing, accordingly draws to the attention of the Minister for Finance any apparently incorrectly classified expenditure following both budget and additional estimates (see Senate Standing Committee on Appropriations and Staffing, *50th Report: Ordinary Annual Services of the Government*, June 2010, [www.aph.gov.au/~media/wopapub/senate/committee/app\\_ctte/completed\\_inquiries/2008\\_10/50th\\_report/report\\_pdf.ashx](http://www.aph.gov.au/~media/wopapub/senate/committee/app_ctte/completed_inquiries/2008_10/50th_report/report_pdf.ashx) (accessed 31 March 2015)). A form of the Senate's June 2010 resolution was first enunciated in the Compact of 1965 following a refusal by the Senate to accept the government's decision to roll the appropriation bills into one appropriation bill: see Evans and Laing, *op. cit.*, p. 369 and J.R. Odgers, *Australian Senate Practice*, 6th edn, Royal Australian Institute of Public Administration (ACT Division), Canberra, 1991, pp. 580–3).

<sup>23</sup> Appropriation bills no. 1 (budget estimates) and no. 3 (additional estimates) contain the expenditure on ordinary annual services. Appropriation bills no. 2 (budget estimates) and no. 4 (additional estimates) contain the expenditure not for the ordinary annual services (new money).

<sup>24</sup> For example, on 16 November 2014, the Group of Twenty (G20) Leaders agreed to establish a Global Infrastructure Hub (the Hub) in Sydney to help implement the G20 multi-year infrastructure initiative. The Financial Framework (Supplementary Powers) Amendment (2014 Measures No. 3) Regulation 2014 [F2014L01697] (the Regulation) added one new item to Part 4 of Schedule 1AB to the FF(SP) regulations to establish legislative authority for expenditure on the Hub. The Commonwealth government will contribute \$30 million over four years to the establishment and operation of the Hub to be administered by Treasury (see *Mid-Year Economic and Fiscal Outlook 2014–15*, Appendix A: Policy decisions taken since the 2014–15 Budget, Global Infrastructure Hub (December 2014), p. 199). For the 2014–15 budget year, Treasury sought \$4.1 million (comprised of departmental expenses of \$0.7 million and administered funding of \$3.4 million) in the 2014–15 additional estimates. There were no funds for the Department of Treasury in Appropriation Bill No. 4 2014–2015 (see *Particulars of Certain Proposed Additional Expenditure in Respect of the Year Ending on 30 June 2015*, p. 38). The *Treasury Portfolio Additional Estimates Statements 2014–15* (p. 11) stated that the departmental and administered funding for this measure was included in Appropriation Bill No. 3 2014–2015 (that is, in the non-amendable appropriation bill for the ordinary annual services of government) (see also *Particulars of Proposed Additional Expenditure in Respect of the Year Ending on 30 June 2015*, p. 70). Several elements of the arrangements in this case merit consideration. First, given the Hub is a new initiative and not an ongoing activity, it appears the expenditure was inappropriately included in Appropriation Bill No. 3 (and should instead have been included in Appropriation Bill No. 4). Second, it appears that the only legislative base for the expenditure on the Hub was through the Regulation. Third, the Regulation was registered on 12 December 2014, some two months before the appropriation bills were introduced in the House of Representatives on 12 February 2015. The legislative authority for

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The committee's response to the Appropriations and Staffing Committee's request was therefore to commence examining the arrangements, grants and programs specified in the FFSP regulations to ascertain whether expenditure has been previously authorised or appears to be new expenditure. In this task, the committee's work complements that of the eight Senate legislative and general purpose standing committees, which are similarly tasked with examining the allocation of proposed expenditure between the appropriation bills. However, it is important to note that in both cases the allocation of expenditure can be difficult to determine with any certainty, because budget papers and portfolio budget statements do not allow a 'clear read' between appropriations and specific items of expenditure. Typically, money is appropriated for broad and even vague outcomes, rather than for specific programs and purposes, which means that money may be reallocated between programs within the same broad statement of outcomes. The lack of sufficiently specific outcomes can make it difficult to determine whether the allocation actually involves 'new' money and indeed which bill contains the appropriated funds.

Notwithstanding the inherent difficulties of the task, the committee has since reported on several occasions that certain programs authorised by regulation have appeared to involve new expenditure,<sup>25</sup> and noted that, prior to the enactment of the FFLA Act, such items of new expenditure should properly have been contained within an appropriation bill not for the ordinary annual services of the government (and thus subject to direct amendment by the Senate).<sup>26</sup>

### *Constitutional authority for expenditure*

The third issue examined by the committee relates to scrutiny principle (a), requiring the committee to ensure that an instrument is made in accordance with statute (again, interpreted broadly by the committee as applying to all possible legal formalities).

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the expenditure (in this case, the Regulation) was therefore in place before the appropriation bills were laid before parliament. Given this timeline, it could be argued that the Regulation signified that the expenditure on the Hub had been previously approved by the parliament and therefore could legitimately be included in Appropriation Bill No. 3. However, it should be noted that, although it was registered on 12 December 2014 (and therefore entered into force on 13 December 2014), the Regulation was not tabled in parliament until 9 February 2015 (the first sitting day of 2015). The Regulation was therefore still open to disallowance up until and including 26 March 2015. Given the disallowance period extended beyond both the date upon which the appropriation bills were introduced in the House of Representatives and the date (17 March 2015) upon which the bills were passed by both houses, it seems reasonable to question any assumption that the expenditure on the Hub had been previously approved by the parliament, and therefore reasonable to question why the expenditure on the Hub was included in the non-amendable appropriation bill.

<sup>25</sup> Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor*, nos 5, 6, 10 and 17 of 2014 and no. 1 of 2015.

<sup>26</sup> See, for example, *Delegated Legislation Monitor*, no. 10 of 2014 (27 August 2014), Financial Management and Accountability Amendment (2014 Measures No. 6) Regulation 2014 [F2014L00841], pp. 5–10, in which the committee drew attention to 34 schemes that appeared to involve previously unauthorised expenditure.



This issue relates to the question of whether constitutional authority exists for the expenditure on programs being authorised by regulation under section 32B.

The committee's attention to this particular line of inquiry was galvanised by the High Court's findings in *Williams (No. 2)*, and particularly its reinforcement of the notion that Commonwealth expenditure is restricted to those areas where there is explicit constitutional authority. Notably, the High Court insisted that section 32B cannot validly authorise programs or grants in the absence of relevant constitutional authority:

... [section] 32B should be read as providing power to the Commonwealth to make, vary or administer arrangements or grants *only where it is within the power of the Parliament* to authorise the making, variation or administration of those arrangements or grants [emphasis added].<sup>27</sup>

The first example of this inquiry was the Financial Management and Accountability Amendment (2014 Measures No. 6) Regulation 2014 [F2014L00841], registered on 27 June 2014,<sup>28</sup> which specified 54 arrangements, grants or programs across eleven portfolios. Citing *Williams (No. 2)*, the committee stated its view that explanatory statements for instruments specifying programs for the purposes of section 32B of the FFSP Act should explicitly state, for each new program, the constitutional head of power that supported the expenditure, and accordingly requested this information from the Minister for Finance. On 3 September 2014, the committee placed a protective notice on the instrument in order to preserve the Senate's ability to subsequently disallow the instrument in the event that the minister's response proved unsatisfactory (thereby extending by 15 Senate sitting days the time for the matter to be resolved). In his response of 11 November 2014, the minister provided the committee with the requested information, but with the significant rider that in referencing the constitutional authority or head(s) of power for each of the items in the regulation, the government was 'not purporting to provide any comprehensive statement of relevant constitutional considerations'. Further, the minister noted that there was no strict legal requirement for explanatory statements to identify the constitutional basis for expenditure, and advised that the government did not intend to provide such information in relation to future regulations.<sup>29</sup>

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<sup>27</sup> *Williams v Commonwealth (No. 2)* (2014) 252 CLR 416, 457 [36].

<sup>28</sup> The instrument was made on 26 June 2014 following the High Court's judgment in *Williams (No. 2)*.

<sup>29</sup> Senator the Hon. Mathias Cormann, Minister for Finance, letter to Senator John Williams, Chair, Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor*, no. 15 of 2014 (19 November 2014) Appendix 1.

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In response, the committee acknowledged the substantial effort of the minister and department in providing what was a comprehensive and informative response to the committee's inquiry. However, in respect of the minister's perhaps unfortunate intimation that the committee could insist only on that which is prescribed by law, the committee took the opportunity to point out that its expectation that explanatory statements identify a constitutional head of power for expenditure on programs and grants was, in fact, derived from the Senate standing orders, as well as the committee's own determinations as to what is required to faithfully fulfil the function delegated to it by the Senate.<sup>30</sup>

The committee noted that in the regulation and inquiry at hand, it appeared a case had been made that each of the 54 programs was supported by a relevant constitutional head or heads of power.<sup>31</sup> On this basis, the committee concluded its examination of the instrument and withdrew the protective notice of motion to disallow the instrument (on 19 November 2014). The committee's language could perhaps be taken as some indication that it did not necessarily reach a definitive conclusion about the constitutional validity of the expenditure on the basis of the information provided by the minister, and it is germane to note that the constitutional validity or otherwise of expenditure could only be determined as a result of a challenge in the High Court. Equally, it should be said that the extent to which section 32B of the FFSP Act is a valid delegation of legislative power to authorise the expenditure of monies remains an open question; at this stage, the High Court has determined only that there exists a requirement for government expenditure to have constitutional authority, and that the National School Chaplaincy Program was not supported by any of the constitutional heads of power.

### **Broader ramifications of the parliament's response to the *Williams* cases**

The final part of this paper draws on the preceding description of parliament's response to the *Williams* cases to explore a number of issues related to the sufficiency of parliamentary scrutiny of the executive.

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<sup>30</sup> Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor*, no. 15 of 2014 (19 November 2014), p. 6. See also 'Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 3) Regulation 2015 [F2015L00572]', *Delegated Legislation Monitor*, no. 13 of 2015 (13 October 2015), pp. 3–14.

<sup>31</sup> *ibid.*

*Executive reliance on intergovernmental agreements to secure funding for particular programs in areas of state competence*

In the paper ‘*Williams v Commonwealth—A Turning Point for Parliamentary Accountability and Federalism in Australia?*’,<sup>32</sup> Glenn Ryall notes that, in reaching its decision in *Williams (No. 1)*, the High Court pointed to both the centrality of federalism and the distinctive role of the Senate as a necessary part of the Commonwealth’s legislative power. The High Court noted that the system of responsible and representative government underpinned by the Constitution gives rise to the principle that the executive should be accountable to the parliament for both the supply *and* expenditure of public money, and that the passage of a bill through parliament enables the Senate to be engaged in the formulation, amendment and termination of a spending program. This level of parliamentary involvement in oversight of expenditure is to be contrasted with previous assumptions that an appropriation bill was a sufficient basis for the executive to spend public money in reliance on a broad executive power. The High Court also noted that, considered alone, the appropriation of revenue is a process that provides for only limited involvement of the Senate (particularly where, as with the National School Chaplaincy Program, an appropriation is included in the non-amendable Appropriation Bill No. 1).

Drawing on these considerations, the High Court’s key conclusions were that the executive power to contract and spend is necessarily constrained<sup>33</sup> and that executive expenditure typically requires a statutory or constitutional basis.<sup>34</sup> The government’s response to *Williams (No. 2)* was simply to re-establish the chaplaincy program under an intergovernmental agreement effectively authorised by the power of the Commonwealth to make tied grants to the states under section 96 of the Constitution. This response demonstrates a clear alternative to the authorising of expenditure via section 32B, and one that is undoubtedly supported by the Constitution.

During 2008 and 2009, the Commonwealth’s power to disburse monies to the states and territories under section 96 of the Constitution was formalised (and simplified) by the Intergovernmental Agreement on Federal Financial Relations, agreed to by the Commonwealth and all state and territory governments at the Council of Australian Governments. The intergovernmental agreement took effect from 1 January 2009 and was augmented by the *Federal Financial Relations Act 2009* (FFR Act), which commenced on 1 April 2009. Under these two instruments, various mechanisms were

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<sup>32</sup> Glenn Ryall, ‘*Williams v Commonwealth—a turning point for parliamentary accountability and federalism in Australia?*’, *Papers on Parliament*, no. 60, March 2014, pp 131–48.

<sup>33</sup> *Williams v. Commonwealth* (2012) 248 CLR 156, 351–2 [516].

<sup>34</sup> *Williams v. Commonwealth* (2012) 248 CLR 156, 232–3 [136] and 355 [534].

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established to transfer Commonwealth money to the states and territories, including national partnership payments (NPPs), national specific purpose payments (National SPPs), and general purpose financial assistance (GPFA) payments.<sup>35</sup>

Clearly, while securing the funding for the National School Chaplaincy Program in this way (via NPPs) satisfies the requirement for due legal (constitutional) authorisation, it is apparent that it does not reflect a level of parliamentary control of executive expenditure that accords with the importance of the principle as expounded by the High Court in *Williams (No. 1)* and *(No. 2)*. It has become commonplace that the use of NPPs and National SPPs has enabled the Commonwealth to become involved in areas beyond those heads of power enumerated in the Constitution, raising concerns about accountability and duplication of administration, as well as arguments about the benefits of such arrangements. There is also an apparent lack of parliamentary scrutiny of the expenditure negotiated via intergovernmental agreements of this type. Although constitutionally valid, such expenditure has been for most practical purposes immune to parliamentary control because typically it is negotiated between federal and state executives without the need for parliamentary imprimatur (or, where legislation is required, it is effectively presented as pre-agreed, uniform legislation that resists amendment). NPPs and National SPPs therefore represent a deficit in executive accountability for expenditure (and one compounded by the fact that the vast majority of total Commonwealth expenditure (over 80 per cent) is already contained within special appropriations not subject to annual parliamentary scrutiny and approval in the annual appropriation bills).<sup>36</sup>

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<sup>35</sup> Such intergovernmental mechanisms provide for the payment of considerable funds to the states and territories. The drawing limits for GPFA payments and NPPs are specified in Appropriation Bill No. 2 (see *Federal Financial Relations Act 2009*, sections 9 and 16 respectively) and for 2014–15 were \$5 billion and \$25 billion respectively (see *Appropriation Act (No. 2) 2014–2015* (Cth), subsections 13(4) and 13(5)). National SPPs have a standing appropriation established under section 22 of the FFR Act, which also sets the total expenditure for each category of National SPP (see *Federal Financial Relations Act 2009*, sections 10–14). A standing appropriation is a special appropriation contained within a bill that, once enacted, authorises the expenditure of money for a defined period or until it is repealed. The Commonwealth currently makes payments through three National SPPs: the National Skills and Workforce Development SPP, the National Disability Services SPP and the National Affordable Housing SPP. The indexation, total amount and allocation amongst the states and territories are determined by disallowable legislative instrument (see, for example, Federal Financial Relations (National Specific Purpose Payments) Determination 2012–13 [F2014L00323]).

<sup>36</sup> Special appropriations were already identified as a serious problem over twenty years ago, when 70 per cent of Commonwealth government expenditure was not subject to annual parliamentary scrutiny and approval in the annual appropriation bills (see, for example, Harry Evans, ‘Constitution, section 53—amendments and requests—disagreements between the houses’, *Papers on Parliament*, no. 19, May 1993, p. 12). In 2002–03, special appropriations accounted for more than 80 per cent of all appropriations (see Senate Standing Committee on Finance and Public Administration, *Transparency and Accountability of Commonwealth Public Funding and Expenditure* (March 2007), p. 15). The current Clerk of the Senate has also noted that the extensive use of special appropriations has eroded parliamentary control of executive expenditure (see Rosemary Laing, ‘Is less more? Towards better Commonwealth performance’, Commonwealth

In bare terms, despite the High Court having twice declared the Commonwealth's direct funding of the National School Chaplaincy Program as beyond power, section 96 has allowed the Commonwealth to validly use an NPP to indirectly continue that funding. Such a use of special appropriations via the FFR Act has seen the parliament's control of executive expenditure further eroded by its own actions in passing the enabling legislation, and further compounded the irony of the response to the High Court's emphasis on the importance of parliamentary oversight in this regard. In light of section 96 of the Constitution, it is not clear that any significantly greater level of parliamentary scrutiny will flow from the court's more restrictive view of the scope of the executive power, and more exacting interpretation of the parliament's constitutional role in the oversight of executive expenditure.

*Criticism of the parliament's response to Williams (No. 1)*

In discussing the constitutional implications of the executive government's response to *Williams (No. 1)*, the then Shadow Attorney-General, Senator the Hon. George Brandis QC, appeared to express significant concerns about the section 32B mechanism for authorising expenditure via regulation, including that the response was 'inept' and insufficient to meet the test of constitutional validity. Despite these serious reservations, Senator Brandis noted that the then opposition would vote in favour of the legislation.<sup>37</sup>

Criticism of the parliament's response also came from further afield, and included concerns that the parliament had failed to engage critically with the constitutionality of the legislation, that party discipline had restrained parliamentary oversight, and that the parliament had surrendered its powers of financial scrutiny to the executive.<sup>38</sup>

Professor Anne Twomey, for example, noted that the authorising of expenditure by regulation under section 32B had reduced the level of parliamentary scrutiny in two key ways. First, the FFLA Act had retrospectively validated over 400 programs by adding them to Schedule 1AA of the regulations without any real scrutiny of whether they were supported by constitutional authority—indeed, Twomey noted that there was 'no opportunity at all for prior consideration or scrutiny' before the bill entered the House of Representatives and parliamentarians had appeared ignorant of the full

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Financial Accountability Review Discussion Paper (March 2012), *Submission no. 7*, [pp. 5–6], [www.pmra.finance.gov.au/files/2012/03/No.07-Clerk-of-the-Senate.pdf](http://www.pmra.finance.gov.au/files/2012/03/No.07-Clerk-of-the-Senate.pdf) (accessed 31 March 2015).

<sup>37</sup> Senator the Hon. George Brandis, *Parliamentary Debates*, Senate, 27 June 2012, pp. 4651–4.

<sup>38</sup> Anne Twomey, 'Bringing down the House? Keeping school chaplains means a surrender to the executive', *The Conversation*, 27 June 2012, <http://theconversation.com/bringing-down-the-house-keeping-school-chaplains-means-a-surrender-to-the-executive-7926> (accessed 31 March 2015); Gabrielle Appleby and Adam Webster, 'Parliament's role in constitutional interpretation', *Melbourne University Law Review*, vol. 37, 2013.

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effects of the legislation.<sup>39</sup> Second, section 32B had provided the executive with ‘carte-blanche’ to henceforth expend monies on programs without parliamentary scrutiny (if the expenditure could be ascribed to one of the existing (broadly described) programs in the schedule to the regulations), or with only limited oversight (via the scrutiny process and possibility of disallowance) through the addition by regulation of new programs to the schedule.<sup>40</sup>

In a similar vein, Gabrielle Appleby and Adam Webster have noted the parliament’s apparent failure to engage critically with the question of the constitutionality of the FFLA bill, which they ascribe to the rigid party discipline that, in place of objective and informed consideration, commonly dictates the fate of legislation in the Commonwealth Parliament. To address this, Appleby and Webster suggest that either party discipline should be relaxed to allow dissenting opinions on constitutional matters to be expressed and voted accordingly, or political parties should adopt best practice approaches to consideration of legislation, including robust assessments of the constitutionality of proposed laws.<sup>41</sup>

Such an approach would require parliamentarians to be provided with both the time and means to acquire a rigorous understanding of the key elements of a bill, and in this respect the support for the FFLA bill from the independent Member for Lyne, Mr Rob Oakeshott, is instructive. As noted by Twomey,<sup>42</sup> Mr Oakeshott, while commending the *Williams (No. 1)* decision as re-establishing the primacy of parliament over the executive and recognising the service-delivery role of the states within the federation,<sup>43</sup> promptly voted for legislation that could be said to further erode parliamentary scrutiny, cede financial power to the executive and ignore the role of the states in program and service delivery. That is no individual criticism as such when one considers that the bill’s expedited passage is but an instance of the often extremely short timeframes provided for the scrutiny of proposed legislation. This broader question of whether the parliament is generally afforded sufficient time to adequately consider legislation is ultimately relevant to any proposal for improved legislative outcomes, and the procedural and political factors that dictate such timeframes are certainly deserving of closer inspection.

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<sup>39</sup> Twomey, op. cit.

<sup>40</sup> *ibid.*

<sup>41</sup> Appleby and Webster, op. cit., p. 294.

<sup>42</sup> Twomey, op. cit.

<sup>43</sup> Mr Rob Oakeshott, *Parliamentary Debates*, House of Representatives, 26 June 2012, pp. 8073–4.

*The role of the Senate Standing Committee on Regulations and Ordinances*

In light of the renewed attention paid to parliamentary responsibility following the High Court decision in *Williams (No. 1)*, Professor Geoffrey Lindell has explored ways to enhance the role of parliament in authorising ‘certain executive activities and transactions’.<sup>44</sup> Pointing to the ability of either house to disallow regulations made under the FFSP Act, Lindell has considered the question of whether there is a need to provide for ‘systematic guidance and advice’ on such matters to either or both houses,<sup>45</sup> or for explicit consideration of such issues to be added to the existing functions of the committee, or else given to a new committee specifically established for that purpose.<sup>46</sup>

Recalling the earlier discussion of the committee’s character, mode of operation and scrutiny of FFSP regulations, it would appear that the committee’s scrutiny work already provides a useful but sometimes overlooked vehicle for parliamentary scrutiny. Lindell’s suggestion provides a useful platform from which to consider the extent to which the committee’s scrutiny of regulations made under the FFSP Act may be regarded as affording a sufficient level of parliamentary oversight and control of executive expenditure following *Williams (No. 1)* and *(No. 2)*, and whether there is any potential to enhance its operation in this regard. To summarise, the committee has raised three particular issues arising from its examination of regulations effecting the parliament’s response to the *Williams* cases: the availability of review of decisions made pursuant to authorised programs, the question of whether expenditure in relation to such programs may be properly classified as ‘new’, and whether constitutional authority exists for any such programs or grants, as the case may be. All of these issues have been and continue to be pursued by the committee within the surrounding context of the initial, and apparently continuing, bipartisan support for the enactment of section 32B in response to the *Williams* cases.

Taking the issue of constitutional authority as an illustration, it could be asked: in what circumstances might the committee utilise the full extent of its power and recommend the disallowance of an instrument on the basis that a program or arrangement specified in a regulation appeared to lack a constitutional basis or authority? That situation loomed over the horizon at the end of the 2015 sitting year when the dialogue between the Minister for Finance and the committee continued over the 15 sitting days that the protective disallowance motion remained before the Senate. The matter was ultimately never tested in the Senate, as a last minute reprieve

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<sup>44</sup> Geoffrey Lindell, ‘The changed landscape of the executive power of the Commonwealth after the *Williams* case’, *Monash University Law Review*, vol. 39, no. 2, 2013, p. 383.

<sup>45</sup> *ibid.*

<sup>46</sup> *ibid.*, p. 384.

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and a special meeting of the committee ensured that the assurances required by the committee were considered and the Senate was informed of its deliberations, allowing the notice of disallowance to be withdrawn.<sup>47</sup>

The first point to make is that the issue is one that demonstrates the committee's ability to flexibly encompass new issues and developments in the legal and parliamentary landscape, by applying its existing scrutiny principles (in this case the requirement to ensure that delegated legislation is made 'in accordance with statute') to the evolving circumstances. In pursuing the matters the committee, on behalf of the Senate, is working to establish the new boundaries within which it will accept the executive's new actions in the expenditure of public money. While it may be true that the power to recommend disallowance is best used to encourage the executive to engage and co-operate with the committee, the Senate's ability to disallow remains a

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<sup>47</sup> The Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 3) Regulation 2015 [F2015L00572] added new programs to the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for those programs. These included the Mathematics by Inquiry program (to provide mathematics curriculum resources for primary and secondary schools) and the Coding across the Curriculum program (to support the introduction of algorithmic thinking and computer coding across different year levels in Australian schools and the implementation and teaching of the Australian Curriculum: Technologies in classrooms). The constitutional authority for these programs was identified as the external affairs power (namely, implementing obligations under the Convention on the Rights of the Child (CRC) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)) as well as the executive nationhood power and the express incidental power. However, the committee queried whether these were valid grounds, noting that (a) to rely on the external affairs power the programs would need to implement relatively precise obligations under the CRC and ICESCR; and (b) the nationhood power provided for the executive to engage only in enterprises and activities peculiarly adapted to the government of a nation, and which could not otherwise be carried out for the benefit of the nation (see Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor* no. 6 of 2015 (17 June 2015), pp. 10–14). The minister's response merely advised that legal advice had been obtained in relation to the constitutional authority for the programs, prompting the committee to request that the minister provide a copy of that legal advice, or respond to its initial request for the minister's assurance that the programs were in fact supported by the constitutional grounds cited (see *Delegated Legislation Monitor* no. 8 of 2015 (12 August 2015), pp. 19–23). On 13 August 2015, the Chair of the committee (Senator Williams) placed a protective notice of motion on the regulation to extend the last day for disallowance to 14 October 2015. In his second response, the minister again did not directly address the committee's concerns, and rejected the committee's request for the legal advice on the matter, prompting the committee to repeat its requests (*Delegated Legislation Monitor* no. 8 of 2015 (10 September 2015), pp. 8–14). The minister's third response again did not address the committee's concerns or provide the requested legal advice, prompting the committee, on 12 October 2015, to issue a final request that the minister provide either the legal advice obtained or his personal assurance that the programs were in fact supported by the constitutional grounds cited. Noting that the last day for disallowance was 14 October 2015, the committee took the unusual step of requesting the minister's response within 24 hours (see *Delegated Legislation Monitor* no. 12 of 2015 (12 October 2015), pp. 4–14). The response was duly provided within this timeframe, and enabled the committee to conclude its examination of the regulation on the basis of the minister's assurance that the government's legal advice was that the programs were 'supported by the external affairs power and/or the executive nationhood power (coupled with the express incidental power)'. The committee left aside the question of whether the minister's refusal to provide the requested legal advice was based on a valid public interest immunity claim (see *Delegated Legislation Monitor*, no. 13 of 2015 (13 October 2015) pp. 3–14). The committee Chair subsequently withdraw the notice of motion to disallow the regulation on 14 October 2015.



powerful sanction. The ‘carte-blanche’ that was seemingly granted with the passage of section 32B could still be curtailed by a successful disallowance motion, but is certainly being defined by the continuing dialogue between the executive and the committee over the regulations.

## **Conclusion**

Together, the High Court’s judgements in *Williams (No. 1)* and *(No. 2)* have affirmed the constitutional importance of the parliament’s oversight of executive expenditure. The parliament’s legislative response to these judgments has illuminated the complexities of this principle. The parliament, in facilitating by enactment the executive’s use of the constitutional power of the Commonwealth to make section 96 grants, has seemingly stepped away from the High Court’s<sup>48</sup> view of the involvement of the parliament in the ‘formulation, amendment or termination’ of spending programs. However, this action was argued as a necessary correction<sup>49</sup> and has revealed some of the internal workings of the relationship between the executive and the Senate in the realm of the work of the committee in its scrutiny of delegated legislation.

Notwithstanding the areas of concern identified both in relation to both the committee’s scrutiny of regulations emanating from the parliament’s response to *Williams (No. 1)* and more generally, the work of the committee on the FFSP regulations demonstrates the value of the legislative scrutiny committees within the wider Senate committee system, particularly in instances where rigorous, critical and effective scrutiny in the chambers is either largely circumvented (such as by the use of intergovernmental agreements) or compromised by political pressures and inimical timeframes.

This suggests that the committee remains well placed to tackle these challenges, in reliance on its track record of exacting a measure of accountability from the executive, and both drawing and building upon its established culture of bipartisan technical inquiry. While there is clearly merit in seeking to foster best practice approaches amongst legislators, and to seek to innovate where this provides the better response, the factors outlined in this paper support the conclusion that the committee does and should continue to provide effective and practical scrutiny of executive expenditure authorised via section 32B and, more generally, of the vast volume of instruments made by the executive exercising the parliament’s delegated legislative powers.

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<sup>48</sup> *Williams v. Commonwealth* (2012) 248 CLR 156, 235 [145].

<sup>49</sup> Minister for Finance (Senator Penny Wong), *Parliamentary Debates*, Senate, 27 June 2012, p. 4648.