The Senate

Standing Committee on Regulations and Ordinances

Report on the work of the committee in 2014-15

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Committee information

Current members

Senator John Williams (Chair)	New South Wales, NAT
Senator Gavin Marshall (Deputy Chair)	Victoria, ALP
Senator Claire Moore	Queensland, ALP
Senator Nova Peris OAM	Northern Territory, ALP
Senator Linda Reynolds	Western Australia, LP
Senator Zed Seselja	Australian Capital Territory, LP

Former members 2014-15

Senator Sam Dastyari (12.11.13 – 12.11.15)	New South Wales, ALP
Senator Sean Edwards (Chair) (13.11.13 – 01.07.14)	South Australia, LP

Secretariat

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Chapter 1
Introduction

Work of the committee

1.1 The Senate Standing Committee on Regulations and Ordinances (the committee) scrutinises all disallowable instruments of delegated legislation, such as regulations and ordinances, to ensure their compliance with non-partisan principles of personal rights and parliamentary propriety.

1.2 In most years, thousands of instruments of delegated legislation are made, relating to many aspects of the lives of Australians. Instruments of delegated legislation have the same force in law as primary legislation, and may form as much as half of the law of the Commonwealth of Australia.[1]

1.3 The committee's work may be broadly described as technical legislative scrutiny, as it does not generally extend to the examination or consideration of the policy merits of delegated legislation. The scope of the committee's scrutiny function is formally defined by Senate Standing Order 23, which requires the committee to scrutinise each instrument to ensure:

- that it is in accordance with the statute;
- that it does not trespass unduly on personal rights and liberties;
- 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
- that it does not contain matter more appropriate for parliamentary enactment.

1.4 The committee's work is supported by processes for the registration, tabling and potential disallowance of legislative instruments, which are established by the *Legislation Act 2003*.[2]

1.5 This report on the work of the committee covers the 2014-15 financial year period.

Committee membership

1.6 Senate Standing Order 23(1) provides that the committee is appointed at the commencement of each Parliament. The committee has six members: three senators drawn from the government party and three senators drawn from non-government parties. The committee is chaired by a government senator.

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1 *Odgers' Australian Senate Practice*, 13th Edition (2012), p. 416.

2 On 5 March 2016 the *Legislative Instruments Act 2003* became the *Legislation Act 2003* due to amendments made by the *Acts and Instruments (Framework Reform) Act 2015*. The *Legislation Act 2003* and the disallowance process are discussed in Chapter 2.

1.7 Current members at May 2016 are as follows:

- Senator John Williams (Chair);[3]
- Senator Gavin Marshall (Deputy Chair);[4]
- Senator Claire Moore;[5]
- Senator Nova Peris OAM;[6]
- Senator Linda Reynolds CSC;[7] and
- Senator Zed Seselja.[8]

1.8 The following senators were also members of the committee during the reporting period:

- Senator Sam Dastyari;[9] and
- Senator Sean Edwards (Chair).[10]

Independent legal adviser

1.9 The committee is assisted by an external legal adviser, who reports on each instrument that comes before the committee. The committee's legal adviser during the reporting period was Mr Stephen Argument.

The committee's mode of operation

Delivery of instruments

1.10 Legislative instruments must be registered and, within six sitting days of registration, tabled in both Houses of Parliament.[11] Once registered, the instruments are delivered to the two Houses for tabling, and to the committee secretariat.

1.11 In relation to non-legislative disallowable instruments, the individual department administering the authorising Act under which any such instrument is made is responsible for delivering copies to both Houses for tabling, as well as to the committee secretariat.

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3 Appointed 01.07.14 (elected Chair on 09.07.14).

4 Appointed 12.11.13 (appointed Deputy Chair on 14.11.13).

5 Member from 14.2.08 to 11.11.11; and appointed 12.11.15.

6 Appointed 12.11.13.

7 Appointed 01.07.14.

8 Appointed 13.11.13.

9 Member from 12.11.13 to 12.11.15.

10 Member from 13.11.13 to 01.07.14.

11 *Legislation Act 2003*, sections 15G and 38 (previously *Legislative Instruments Act 2003*, sections 30, 38 and 39).

Scrutiny of instruments

1.12 Instruments tabled in Parliament are scrutinised by the committee secretariat and legal adviser with reference to the committee's scrutiny principles.

1.13 The committee meets regularly, during sittings of Parliament, to consider any instruments that may breach its scrutiny principles, and to determine the appropriate course of action.

1.14 Where an instrument raises a concern referable to the committee's scrutiny principles, the committee's usual approach is to write to the responsible minister seeking further explanation or information, or seeking an undertaking for specific action to address the issue of concern.

Committee's use of the disallowance process

1.15 The committee's scrutiny of instruments is generally conducted within the timeframes that apply to the disallowance process, as set out in chapter 2. Working within these timeframes ensures that the committee is able, if necessary, to seek disallowance of an instrument about which it has concerns. Such disallowance motions based on the recommendation of the committee have, without exception, been adopted by the Senate.[12]

1.16 In cases where 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 a notice of motion for disallowance in order to protect the Senate's ability to subsequently disallow the instrument in question. Such notices are referred to as 'protective notices'.[13]

Undertakings

1.17 In many cases, ministers and other instrument makers provide an undertaking to address the committee's concern through the taking of steps at some point in the future. Typically, an undertaking will relate to the making of amendments to primary or delegated legislation. The acceptance of such undertakings has the benefit of securing an outcome agreeable to the committee, without interrupting the administration and implementation of policy by disallowance of the instrument in question.

Committee publications and resources

1.18 The following committee publications and resources may be accessed at http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/leginstruments.

12 *Odgers' Australian Senate Practice*, 13th Edition (2012), p. 424.

13 *Odgers' Australian Senate Practice*, 13th Edition (2012), p. 432.

Senate disallowable instruments list

1.19 The 'Senate disallowable instruments list' (SDIL) is a list of all disallowable instruments tabled in the Senate.[14] This online resource may be used to ascertain whether or when an instrument has been tabled in the Senate, and how many sitting days remain in which a notice of motion for disallowance may be given.

1.20 The SDIL is updated after each sitting day.

Delegated legislation monitor

1.21 The *Delegated legislation monitor* (the monitor) is the regular report on the work of the committee, and is published in each sitting week of the Senate. The monitor details matters raised in relation to disallowable instruments of delegated legislation that are tabled in the Senate and subsequently scrutinised by the committee.

1.22 Prior to 2013, the monitor provided only statistical and technical information on instruments scrutinised by the committee in a given period.

'Index of matters' webpage

1.23 The 'Index of matters' webpage (formerly the 'Scrutiny of Disallowable Instruments' list) is a list, by meeting date and monitor number, of all the disallowable instruments about which the committee has raised a concern. Full comments on individual matters are contained in the relevant monitor.

'Disallowance Alert' webpage

1.23 The 'Disallowance Alert' webpage (the alert) is a list of all instruments subject to a notice of motion for disallowance (whether at the instigation of the committee or an individual senator or member). The progress and outcome of any such notice is also recorded.

Senate Procedure Office seminar on delegated legislation and the Senate

1.24 The Senate Procedure Office conducts half-day seminars on the Senate's scrutiny of delegated legislation. These are tailored to parliamentary staff, government officers and other stakeholders whose work or interests intersect with the work of the committee.

1.25 Information on seminar dates and booking inquiries may be accessed through the Senate website.[15]

Structure of the report

1.26 Chapter 2 provides an overview of delegated legislation and the disallowance process, including discussion of the *Legislation Act 2003*.

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14 As instruments may be tabled on different dates in the Senate and the House of Representatives respectively (and hence have different disallowance timeframes), there is also a House of Representatives disallowable instruments list. This list is available at http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/leginstruments.

15 See Parliament of Australia website, 'Seminars for public servants' http://www.aph.gov.au/About_Parliament/Senate/Whats_On/Seminars_and_Lectures/Seminars_for_public_servants.

1.27 Chapter 3 reports on the work of the committee during 2014-15.

Acknowledgements

1.28 The committee wishes to acknowledge the work and assistance of its legal adviser in the reporting period, Mr Stephen Argument.

1.29 The committee also wishes to acknowledge the assistance of ministers and associated departments and agencies during the reporting period. The responsiveness of ministers, departments and agencies to the committee's inquiries is critical to ensuring that the committee can perform its scrutiny function effectively.

Chapter 2

Delegated legislation and the disallowance process

Introduction

2.1 This chapter provides an overview of delegated legislation, the disallowance process and the *Legislation Act 2003* (LA).[1]

What is delegated legislation?

2.2 Many Acts of Parliament delegate to executive government the power to make regulations, ordinances, rules and other instruments (such as determinations, notices, orders and guidelines). Such instruments supplement their authorising Act, and have the same force in law. 'Delegated legislation' is a collective term referring to such instruments.

2.3 Because they are made under a delegated power, instruments of delegated legislation are not directly enacted by the Parliament, as must happen for a bill to become an Act with the force of law. Therefore, to ensure that Parliament retains effective oversight, any such instrument is usually: (a) required to be registered on the Federal Register of Legislation;[2] (b) required to be tabled in the Parliament; and (c) subject to a disallowance process prescribed by the LA, which may be initiated by any member of either the Senate or the House of Representatives.

What is a disallowable instrument?

2.4 A 'disallowable instrument' is an instrument of delegated legislation that is subject to the disallowance process prescribed by the LA (see below for a description of the disallowance process).

Legislative instruments

2.5 Subsection 8(4) of the LA states that an instrument is a legislative instrument if:

> (a) the instrument is made under a power delegated by the Parliament; and
>
> (b) any provision of the instrument:
>
> > (i) determines the law or alters the content of the law, rather than determining particular cases or particular circumstances in which the law, as set out in an Act or another legislative instrument or provision, is to apply, or is not to apply; and

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1 On 5 March 2016 the *Legislative Instruments Act 2003* (LIA) became the *Legislation Act 2003* due to amendments made by the *Acts and Instruments (Framework Reform) Act 2015*.

2 Following the changes to the LIA (see previous note), the Federal Register of Legislative Instruments (FRLI) is now called the Federal Register of Legislation and may be accessed at http://www.comlaw.gov.au/.

(ii) has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right.

2.6 Specifically, subsection 8(3) provides that an instrument made under a power delegated by the Parliament is a legislative instrument if it is registered on the Federal Register of Legislation; and subsection 10 provides that particular types of instruments, such as regulations and ordinances, are to be classed as legislative instruments.

Exemptions from disallowance

2.7 Paragraph 44(2)(b) of the LA provides that regulations may be made that exempt a legislative instrument from disallowance.[3] Such instruments are not subject to the committee's scrutiny.

Legislation Act 2003

2.8 Prior to 2005, the committee's scrutiny of delegated legislation was wholly governed by the *Acts Interpretation Act 1901* (AIA), which contained the scheme requiring regulations and other disallowable instruments to be tabled in Parliament and subject to the disallowance regime.

2.9 On 1 January 2005, the AIA scheme was replaced by the scheme set out in the LIA. While the LIA largely replicated the previous scheme, it included a number of important innovations, such as the requirement for the registration of instruments on FRLI.

2.10 The main elements of the scheme contained in the LIA (and now in the LA) are:

- instruments of delegated legislation that are of a legislative character are subject to the disallowance process outlined in the Act;
- such instruments must be registered on the Federal Register of Legislation, along with an explanatory statement;
- once registered, such instruments must be delivered within six sitting days to each House of Parliament for tabling;[4] and
- any member of the Senate or the House of Representatives may initiate the process to disallow any such instrument within 15 sitting days of it being tabled. Once such a notice has been given, a further period of 15 sitting days is available to resolve the motion.

3 Legislation (Exemptions and Other Matters) Regulation 2015 [F2015L01475].

4 Under section 38, an instrument that is not tabled in each House within six sitting days of registration ceases to have effect immediately after the sixth day.

Disallowance

Purpose

2.11 The ability of the executive—usually ministers and other executive office holders—to make delegated legislation without parliamentary enactment is a 'considerable violation of the principle of the separation of powers, [and] the principle that laws should be made by the elected representatives of the people in Parliament and not by the executive government'.[5]

2.12 The ability of a member of either the Senate or the House of Representatives to seek disallowance of legislative instruments is therefore critical to ensuring that Parliament retains effective oversight of delegated legislation.

The disallowance process

2.13 The disallowance process is set out in subsection 42(1) of the LA, which provides:

> (1) If:
>
> (a) notice of a motion to disallow a legislative instrument or a provision of a legislative instrument is given in a House of the Parliament within 15 sitting days of that House after a copy of the instrument was laid before that House; and
>
> (b) within 15 sitting days of that House after the giving of that notice, the House passes a resolution, in pursuance of the motion, disallowing the instrument or provision;
>
> the instrument or provision so disallowed then ceases to have effect.

2.14 In summary, subsection 42(1) provides that any member of the Senate or House of Representatives may, within 15 sitting days of a disallowable legislative instrument being tabled, give notice that they intend to move a motion to disallow the instrument or a provision of that instrument. There is then a further 15 sitting days in which the motion may be resolved.

2.15 The maximum time for the entire disallowance process to run its course is therefore 30 sitting days (assuming the maximum available period elapses for both the giving of notice and the resolution of the motion to disallow the instrument or provision).

Unusual disallowance processes

2.16 In some cases, the disallowance process may be modified by the authorising legislation under which an instrument is made, affecting the period available for giving or resolving a notice of motion for disallowance.

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5 *Odgers' Australian Senate Practice*, 13th Edition (2012), p. 413.

2.17 For example, for a determination made under subsections 20(1) or (2) of the *Financial Management and Accountability Act 1997*, the time available for both giving and resolving a notice of motion for disallowance is only five sitting days.[6]

Effect of disallowance

2.18 Subsections 42(1) and 45(1) of the LA provide that, where a motion is passed to disallow a legislative instrument or a provision of an instrument, that instrument or provision ceases to have effect from the time the motion was passed.

2.19 If the disallowed instrument or provision repealed all or part of an earlier instrument, then that earlier instrument or part is revived.[7]

2.20 Subsection 42(2) of the LA provides that, where a notice of motion to disallow a legislative instrument or a provision of an instrument remains unresolved after 15 sitting days of being given (for example, where it has not been withdrawn or put to the question), the instrument or provision is deemed to have been disallowed and therefore ceases to have effect from that time. This provision ensures that the disallowance process cannot be frustrated by allowing a motion for disallowance to be adjourned indefinitely.

Restrictions on re-making legislative instruments

2.21 In order to ensure that Parliament's power of disallowance may not be circumvented, and to preserve the Parliament's intention in any case where a House has disallowed an instrument, the LA imposes restrictions on the re-making of legislative instruments that are the 'same in substance' as an existing or recently disallowed instrument. These are:

- for a period of seven days, unless approved by resolution by both Houses of Parliament, an instrument may not be made that is the same in substance as a registered instrument that has been laid before both Houses of Parliament (or, if it was tabled on different days, seven days after it was last tabled). This prevents the disallowance provisions from being circumvented by an instrument being successively repealed and remade;[8]
- an instrument may not be made that is the same in substance as an existing instrument that is subject to a notice of motion for disallowance (unless the notice is withdrawn; the instrument is deemed to have been disallowed under subsection 42(2); or the motion is withdrawn, otherwise disposed of or subject to the effect of subsection 42(3)). This prevents an instrument simply being remade in response to notice of a motion for disallowance;[9] and

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6 *Financial Management and Accountability Act 1997*, section 22 (this provision was preserved by Schedule 4 to the Legislative Instruments Regulations 2004).

7 LA, subsection 45(2).

8 LA, section 46.

9 LA, section 47.

- for a period of six months, an instrument may not be made that is the same in substance as an instrument that has been disallowed under section 42 (unless the House which disallowed the instrument, or in which the instrument was deemed to have been disallowed, rescinds the resolution that disallowed the instrument or approves it being made). This prevents an instrument that has been disallowed, or deemed to have been disallowed, from simply being remade.[10]

Senate procedures relating to the disallowance process

2.22 A number of the Senate's procedures are relevant to the disallowance process in the LA.

2.23 Standing Order 78(3) is a significant example of one such procedure, whereby any senator has the opportunity to take over a motion for disallowance if the original mover seeks to withdraw that motion. This ensures that the Senate is not denied the right to disallow an instrument where the time for giving notice has passed; and that the right of individual senators to move for disallowance is not lost by the withdrawal of the notice.[11]

2.24 Another example is Standing Order 86, which prevents the proposing of a question that is the same in substance as any question that has been determined during the same session (the same question rule). This order is qualified by the proviso that it shall not prevent a motion for the disallowance of an instrument substantially the same in effect as one previously disallowed.

2.25 For further detail on Senate procedures relevant to delegated legislation and disallowance, see *Odgers' Australian Senate Practice*, 13th Edition (2012), Chapter 15.

10 LA, section 48. For more detail see *Odgers' Australian Senate Practice*, 13th Edition (2012), pp 420, 434-435.

11 *Odgers' Australian Senate Practice*, 13th Edition (2012), p. 430.

Chapter 3

Work of the committee in 2014-15

3.1 This chapter discusses the work of the committee and matters of note in the reporting period.

Number of instruments considered

3.2 The committee held a total of 17 private meetings in 2014-15, at which it considered 1656 instruments.

3.3 The number of instruments examined was broadly comparable with the number examined in 2013-14 (1614) and 2012-13 (2084).

Instruments of concern and notices

3.4 Of the 1656 instruments examined by the committee during 2014-15, 333 instruments were identified as raising a concern.[1]

3.5 The issues raised by those instruments were referable to the committee's scrutiny principles as shown in Table 1, with the previous year's figures provided as a comparison.

Table 1: Issues identified by the committee in 2014-15 and 2013-14

Year	Instruments commented on	Issues against committee's principles			
		(a)	(b)	(c)	(d)
2014-15	333	309 (92%)	9 (3%)	0 (0%)	15 (5%)
2013-14	241	219 (90%)	14 (6%)	2 (1%)	6 (3%)

3.6 As Table 1 shows, the majority of issues raised by the committee were referable to scrutiny principle (a), which requires that instruments of delegated legislation are made in accordance with statute, such as the *Legislative Instruments Act 2003* (LIA);[2] and the *Acts Interpretation Act 1901* (AIA)—the broad nature of this principle generally captures a wide variety of issues. The spread of issues across the committee's remaining scrutiny principles is broadly comparable with the previous year.

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1 Details of these instruments may be found on the 'Index of Instruments' webpage at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Index. The 238 instances in which the committee raised the failure to identify the relevance of subsection 33(3) of the *Acts Interpretation Act 1901* are not included in the index (see *Delegated legislation monitor* No. 3 of 2013 (14 March 2013)).

2 On 5 March 2016 the *Legislative Instruments Act 2003* was renamed the *Legislation Act 2003* (due to amendments made by the *Acts and Instruments (Framework Reform) Act 2015*). References in this chapter are generally to the *Legislative Instruments Act 2003*, which was the applicable Act in the reporting period.

Notices

3.7 The committee gave three notices of motion for disallowance in the reporting period. All of these were subsequently withdrawn following a satisfactory response or undertaking from the instrument-maker in relation to the concerns raised by the committee.

3.8 Seventeen notices of motion for disallowance were given by individual members and senators in their own capacity. Details of these are provided on the committee's 'Disallowance Alert' webpage.[3]

Undertakings

3.9 During the reporting period:

- two undertakings were implemented (see Appendix 1).
- four undertakings to amend legislation were provided to address concerns raised by the committee (see Appendix 1); and
- seven undertakings remained outstanding at 30 June 2014 (see Appendix 1).

3.10 The committee continues to monitor the status of outstanding undertakings and, where necessary, to correspond with relevant ministers and instrument-makers regarding their implementation.

Delegated legislation monitors

3.11 In the reporting period the committee tabled 17 *Delegated legislation monitors* (No. 8 of 2014 (9 July 2014) to No. 7 of 2015 (24 June 2015)).

Acts and Instruments (Framework Reform) Bill 2014

3.12 On 22 October 2014 the Minister for Justice, the Hon Mr Michael Keenan, introduced the Acts and Instruments (Framework Reform) Bill 2014 (the bill) to the House of Representatives. The bill was intended to make a number of significant amendments to the *Legislative Instruments Act 2003* (LIA), including to change the short title of that Act to the *Legislation Act 2003*. The bill finally passed both Houses on 23 February 2015 and received Royal Assent on 5 March 2015. The *Legislation Act 2003* commenced on 5 March 2016.

3.13 The explanatory memorandum (EM) for the bill states that its purpose was to 'improve the operation and clarity of legislative frameworks for Commonwealth Acts and instruments and contribute to the Government's deregulation agenda by creating administrative efficiencies across government and enhancing the public accessibility of Commonwealth law'. A number of the changes were identified as implementing outstanding recommendations of the 2008 statutory review of the LIA, conducted by Mr Anthony Blunn AO, Mr Ian Govey and Professor John McMillan.

3.14 Key changes introduced by the bill include:

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3 The Disallowance Alert is found at http://www.aph.gov.au/Parliamentary_Business/Committees/ Senate/Regulations_and_Ordinances/Alerts.

- amending the short title of the LIA to the '*Legislation Act 2003*' to reflect the consolidation of the legislative frameworks;
- clarifying the definitions of 'legislative instrument' and 'legislative character';
- providing that certain instruments are notifiable instruments which are registrable but not subject to parliamentary scrutiny or sun-setting processes;
- establishing the Federal Register of Legislation (the register) (thereby integrating the current Acts database and the Federal Register of Legislative Instruments (FRLI));
- empowering the First Parliamentary Counsel (FPC) to make corrections and editorial changes to Acts and instruments on the register;
- amending the *Acts Interpretation Act 1901* to clarify references to ministers, departments and other government authorities; and confirm the continued validity of the exercise of powers, functions and duties under Commonwealth agreements following machinery of government changes; and
- making consequential amendments to a large number of Acts and repealing another four Acts, including the *Acts Publication Act 1905*.

3.15 On 2 December 2014, the Senate Standing Committee on Legal and Constitutional Affairs tabled a report on the provisions of the bill, which recommended that the bill be passed (subject to the introduction of a mandatory review of the operation of the changes five years after the bill's commencement).

3.16 Key issues raised during the inquiry included:

- the definition of 'legislative instrument' and general rule-making powers;
- the correction and editorial change powers of the FPC;
- exemptions from disallowance;
- consultation requirements; and
- potential use of notifiable instruments to avoid parliamentary scrutiny.

3.17 The committee extends its thanks to FPC for the high level of engagement with the Senate scrutiny committees in relation to the introduction of the bill and the proposed changes.

Impact of the *Williams* cases on the work of the committee

3.18 In June 2012, the High Court delivered its judgement in in *Williams v Commonwealth* ([2012] HCA 23) (*Williams*).

3.19 In brief, the High Court held that the Commonwealth executive did not have the power to enter into a funding agreement with a private company that provided chaplaincy services to a Queensland government school under the National School Chaplaincy Program (NSCP). The decision was based on a narrower view of the scope of the executive power to enter into contracts with private parties and spend public

monies without statutory authority, and had the effect of casting doubt over the constitutional validity of a significant proportion of Commonwealth expenditure.[4]

3.20 The government's response was to propose section 32B of the *Financial Management and Accountability Act 1997*, to provide legislative authority for the government to spend monies on programs listed in Schedule 1AA to Financial Management and Accountability Regulations 1997 (FMA regulations). On enactment, this allowed for the authorisation of expenditure on such programs via the making of regulations adding the particulars of those programs to Schedule 1AA of the FMA regulations.[5]

3.21 With effect from 1 July 2014, the *Financial Management and Accountability Act 1997* was amended and renamed the *Financial Framework (Supplementary Powers) Act 1997*. The Financial Management and Accountability Regulations 1997 were renamed the Financial Framework (Supplementary Powers) Regulations 1997 (FF(SP) regulations).

3.22 The committee has since scrutinised any such regulations in accordance with Senate Standing Orders and with reference to its scrutiny principles.

Availability of independent review of decisions

3.23 In *Delegated legislation monitor* No. 1 of 2013 (7 February 2013), the committee reported on its examination of the Financial Management and Accountability Amendment Regulation 2012 (No. 7) [F2012L01988] and the Financial Management and Accountability Amendment Regulation 2012 (No. 8) [F2012L02091].[6] These regulations, respectively, added a program to Schedule 1AA of the FMA regulations to allow for the provision of financial assistance to persons acquiring Commonwealth property; and amended a program that provides a number of payment arrangements in relation to the Mature-Age Participation-Assistance Program.

3.24 The committee noted that the new and amended programs appeared to provide for decisions to be made in relation to the allocation of financial assistance and payments. However, the committee noted that no further information was supplied about the nature of the programs—such as the process and criteria for decision-

4 For a fuller account of the decision, see Ryall, Glenn, 'Williams v. Commonwealth—A Turning Point for Parliamentary Accountability and Federalism in Australia?', Department of the Senate, Papers on Parliament No. 60, March 2014.

5 On 20 December 2013 the Financial Management and Accountability Amendment (2013 Measures No. 1) Regulation 2013 [F2013L02089] added Schedule 1AB to the FMA regulations. After this date arrangements, grants and programs have been specified under Schedule 1AB rather than Schedule 1AA. This was a technical change to avoid the need to group items under the administering department (as required under Schedule 1AA). See Financial Management and Accountability Amendment (2013 Measures No. 1) Regulation 2013 [F2013L02089], explanatory statement, pp 1-2.

6 See *Delegated legislation monitor* No. 1 of 2013 (7 February 2013).

making under the programs and the availability of independent review of such decisions.

3.25 The committee therefore sought further information from the Minister for Finance and Deregulation (the minister) in relation to scrutiny principle (d), which requires the committee to ensure that instruments of delegated legislate do 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.

3.26 In response, the minister provided the committee with detailed information about the purpose of, and decision-making criteria relevant to, each of the programs. The minister advised that decisions made under the programs would not be subject to merits review, because they involved the allocation of finite resources and the re-making of such decisions under merits review would necessarily affect allocations made to other parties (such decisions being recognised as being generally unsuitable for merits review).[7]

3.27 In addition, in correspondence to the Senate Standing Committee for the Scrutiny of Bills the minister advised that decisions made under the programs were also not subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1997* (ADJR Act); and noted that the policy reasons for excluding ADJR Act review of decisions made under items listed in Schedule 1AA of the FMA regulations had been set out in the explanatory memorandum (EM) to the *Financial Framework Legislation Amendment Act (No. 3) 2012*.[8] Those reasons included that the exclusion of ADJR Act review maintained the 'status quo' in relation to similar decisions prior to the outcome in the *Williams* case, and that limited review of decisions was still possible under the *Judiciary Act 1903* and section 75(v) of the Constitution.

3.28 The minister also advised the committee of further protections and mechanisms available to persons affected by spending decisions, including the rules governing financial decision making under the *Commonwealth Procurement Rules* and *Commonwealth Grants Guidelines* (as applicable) and recourse to the Commonwealth Ombudsman and the scheme for Compensation for Detriment Caused by Defective Administration.

3.29 The committee concluded its examination of the regulations on the basis of the information provided. However, the committee noted that the Scrutiny of Bills Committee remained concerned about the justification put forward for the exclusion of ADJR Act review, and drew the concerns of that committee to the attention of the Senate.

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7 For further information on the availability of merits review in relation to particular classes of decision-making see Administrative Review Council, *What decisions should be subject to merits review?* (1999).

8 See Senate Standing Committee for the Scrutiny of Bills, *Eleventh Report of 2012* (19 September 2012), 'Financial Framework Legislation Amendment Act (No. 3) 2012', pp 373-375.

3.30 In the reporting period, the committee subsequently drew attention to the issue of independent review of decisions under programs authorised by inclusion in Schedules 1AA and 1AB of the FMA regulations in relation to the Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 3) Regulation 2015 [F2015L00572].[9]

***Addition of matters to Schedule 1AB of the FMA regulations—previously unauthorised expenditure*[10]**

3.31 In March 2014, the then Chair of the Senate Standing Committee on Appropriations and Staffing, Senator the Hon. John Hogg (President of the Senate), requested that the committee monitor executive expenditure authorised by regulation under the *Financial Framework Legislation Amendment Act (No 3) 2012*, and report on such expenditure to the Senate.[11]

3.32 In making this request, the Chair noted that it is a fundamental role of Parliament to approve appropriations and authorise revenue and expenditure proposals.

3.33 Section 83 of the Constitution provides that no money shall be drawn from consolidated revenue 'except under appropriation made by law'. While the Senate may not amend proposed laws appropriating revenue or moneys for the ordinary annual services of the government, it may directly amend an appropriation bill not for the ordinary annual services of the government (section 53 of the Constitution). Such bills must contain only appropriations for that purpose (section 54 of the Constitution). In June 2010, the Senate reaffirmed this constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the government. It stated that appropriations for expenditure on new policies not previously authorised by special legislation are not appropriations for the ordinary annual services of the government, and that proposed laws for the appropriation of revenue or moneys for expenditure on matters such as new expenditure shall be presented to the Senate in a separate appropriation bill subject to amendment by the Senate.[12]

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9 See *Delegated legislation monitor* No. 6 of 2015 (17 June 2015) (the matter remained under examination at the end of the reporting period and was concluded in *Delegated legislation monitor* No. 13 of 2015 (13 October 2015).

10 Schedule 1AB was added to the Financial Management and Accountability (FMA) Regulations on 20 December 2013 by the FMA Amendment (2013 Measures No. 1) Regulation 2013. Prior to this, section 32B of the FMA Act authorised arrangements, grants and programs to be listed in Schedule 1AA of the FMA Regulations. See Financial Management and Accountability Amendment (2013 Measures No. 1) Regulation 2013 [F2013L02089], explanatory statement, pp 1-2.

11 Correspondence from the Chair of the Senate Standing Committee on Appropriations and Staffing, Senator the Hon. John Hogg (President of the Senate), to the Standing Committee on Regulations and Ordinances, 17 March 2014. See Appendix 3, *Delegated legislation monitor* No. 5 2014 (14 May 2014).

12 See *Odgers' Australian Senate Practice*, 13th ed. (2012), p. 372.

3.34 In the context of these provisions of the Constitution, the Chair identified a deficiency in the Senate's scrutiny of executive expenditure authorised via the making of regulations to add items (programs) to Schedule 1AB of the FMA regulations (the response of the executive to the *Williams* judgment as described above at paragraph 3.19), specifically in relation to items of expenditure inappropriately classified as the ordinary annual services of the government. The Chair noted that previously such items were drawn to the attention of the Senate Standing Committee on Appropriations and Staffing Committee and legislation committees examining estimates of expenditure; and a list of such items was also drawn to the attention of the Minister for Finance. However, post *Williams*, it was possible for items inappropriately classified as ordinary annual services of the government to be included in FMA regulations without direct parliamentary approval, effectively reducing the scope of the Senate's scrutiny of government expenditure.

3.35 The Chair therefore proposed that the committee's scrutiny of legislative instruments include a specific assessment of the nature of executive expenditure (in accordance with the committee's scrutiny principle (d)).

3.36 The committee has since routinely examined regulations authorising expenditure via the addition of items (authorised arrangements, grants and programs) to Schedules 1AA and 1AB of the FMA regulations. Where the committee identifies items of expenditure that may have been inappropriately classified as the ordinary annual services of the government, the committee draws this fact to the attention of the Senate and the relevant standing committee.

3.37 In the reporting period, the committee drew the attention of the Senate and relevant standing committees to the following regulations in relation to this matter:

- Financial Management and Accountability Amendment (2014 Measures No. 6) Regulation 2014 [F2014L00841];[13]
- Financial Framework (Supplementary Powers) Amendment (2014 Measures No. 1) Regulation 2014 [F2014L01464];[14]
- Financial Framework (Supplementary Powers) Amendment (2014 Measures No. 2) Regulation 2014 [F2014L01721];[15]
- Financial Framework (Supplementary Powers) Amendment (2014 Measures No. 3) Regulation 2014 [F2014L01697];[16]

13 See *Delegated legislation monitor* No. 10 of 2014 (27 August 2014) (having drawn the matter to the attention of the Senate and relevant committees, the committee did not require a response from the minister).

14 See *Delegated legislation monitor* No. 17 of 2014 (3 December 2014) (having drawn the matter to the attention of the Senate and relevant committees, the committee did not require a response from the minister).

15 See *Delegated legislation monitor* No. 1 of 2015 (11 February 2015) (having drawn the matter to the attention of the Senate and relevant committees, the committee did not require a response from the minister).

- Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 2) Regulation 2015 [F2015L00370];[17]
- Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 3) Regulation 2015 [F2015L00572];and [18]
- Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 4) Regulation 2015 [F2015L00634].[19]

3.38 The committee's examination of this issue provides an informative example of the Parliament's role in approving appropriations and authorising revenue and expenditure. Accordingly, the initial monitor entry in relation to this regulation is reproduced in full at Appendix 2.[20]

Addition of matters to Schedule 1AB of the FMA regulations—constitutional authority for expenditure

3.39 In June 2014, the High Court delivered its judgment in *Williams (No. 2)* [2014] HCA 23 (19 June 2014) (*Williams No. 2*).

3.40 As noted above, in the first *Williams* case the High Court held that the Commonwealth executive did not have the power to enter into a funding agreement with a private company that provided chaplaincy services in a Queensland government school under the NSCP. In response, section 32B of the *Financial Management and Accountability Act 1997* was amended, to allow for the authorisation of expenditure on such programs via the making of regulations adding a program (item) to Schedule 1AA of the FMA regulations.[21]

3.41 In *Williams No. 2*, this purported authorisation of government expenditure was challenged on the basis of two submissions: first, there was no Commonwealth

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16 See *Delegated legislation monitor* No. 1 of 2015 (11 February 2015) (having noted that the regulation appeared to authorise the redirection of exiting expenditure, the committee did not require a response from the minister).

17 See *Delegated legislation monitor* No. 5 of 2015 (13 May 2015) (having drawn the matter to the attention of the Senate and relevant committees, the committee did not require a response from the minister).

18 See *Delegated legislation monitor* No. 6 of 2015 (17 June 2015) (having drawn the matter to the attention of the Senate and relevant committees, the committee did not require a response from the minister).

19 See *Delegated legislation monitor* No. 7 of 2015 (24 June 2015) (having drawn the matter to the attention of the Senate and relevant committees, the committee did not require a response from the minister).

20 For further information on the role of the Senate in dealing with financial legislation see *Odgers' Australian Senate Practice*, 13th ed. (2012), Chapter 13 ('Financial legislation'), pp 343-407.

21 With effect from 1 July 2014, the Financial Management and Accountability Act 1997 was amended and renamed the Financial Framework (Supplementary Powers) Act 1997. The Financial Management and Accountability Regulations 1997 were renamed the Financial Framework (Supplementary Powers) Regulations 1997 (FF(SP) regulations).

head of legislative power to support the authorisation of expenditure on the chaplaincy program; and, second, that section 32B, via the regulation making power, impermissibly delegated to the executive authorisation of expenditure. In brief, the High Court agreed with the first submission, that section 32B did not authorise expenditure on the NSCP because it did not fall within a Commonwealth head of power. The High Court thus held that a Constitutional head of power is required to support spending programs (the second submission was left undecided).

Financial Management and Accountability Amendment (2014 Measures No. 6) Regulation 2014 [F2014L00841]

3.42 In *Delegated legislation monitor* No. 10 of 2014 (27 August 2014), the committee reported on its examination of the Financial Management and Accountability Amendment (2014 Measures No. 6) Regulation 2014 [F2014L00841],[22] which purported to authorise expenditure on a number of programs, grants and arrangements via additions to parts 2, 3 and 4 of Schedule 1AB to the FF(SP) regulations.[23]

3.43 The committee noted that scrutiny principle (a) of its terms of reference requires the committee to ensure that an instrument is made in accordance with statute; and that this principle requires instruments to be made in accordance with their authorising Act as well as any other applicable laws or legal requirements, including the Constitution.

3.44 Taking account of the High Court's decision in *Williams No. 2*, the committee observed that items of expenditure purportedly authorised for by the addition of items via regulation to Schedule 1AB of the FMA regulations must be supported by a head of power under section 51 of the Constitution. The committee therefore stated its expectation that the ES for all such regulations explicitly state, for each new or amended item, the constitutional head of power that supports the expenditure; and requested this information from the minister in relation to the items added to Schedule 1AB by the regulation.

3.45 The committee's final report on this matter was published in *Delegated legislation monitor* No. 15 of 2014. In relation to the information provided by the Minister for Finance and Acting Assistant Treasurer, the committee concluded its examination of the instrument on the basis that the minister had identified in each case a constitutional head of power that appeared to support each of the programs or items added to Schedule 1AB by the regulation.

3.46 However, the committee noted its concern at the statement that information regarding the constitutional authority for programs or items added to Schedule 1AB

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22 See *Delegated legislation monitor* No. 10 of 2014 (27 August 2014) (concluded in *Delegated legislation monitor* No. 15 of 2014).

23 This regulation was the first to add items under Part 3 of the FMA regulation (Grants of financial assistance to persons other than a State or Territory). All previous regulations under Schedule 1AB allocated funds under Part 4 (Programs) or Part 2 (Grants of financial assistance to a state or territory).

would not generally be provided, as the government did not consider this to be a requirement for explanatory statements. The committee therefore provided a clear statement of how its expectations arise from the scrutiny principles outlined in Senate Standing Order 23; and reiterated its expectation that explanatory statements for regulations adding programs or items to Schedule 1AB include information regarding the Constitutional authority for each item. Such information has since been provided.

Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 3) Regulation 2015 [F2015L00572]

3.47 In *Delegated legislation monitor* No. 6 of 2015 (17 June 2015), the committee examined the Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 3) Regulation 2015 [F2015L00572], which purported to authorise expenditure in relation to five new items added to Part 4 of Schedule 1AB of the FF(SP) regulations.

3.48 The committee noted that the constitutional basis for expenditure in relation to two programs, the Mathematics by Inquiry and Coding Across the Curriculum programs, was identified as being the external affairs power (section 51) and the Commonwealth executive power and express incidental power (sections 61 and 51).

3.49 However, in relation to the external affairs power, the committee questioned whether the regulation could be regarded 'as appropriately adapted to implement relatively precise obligations arising under' the International Covenant on Economic, Social and Cultural Rights, as is required to rely on the power in connection with international treaty obligations.

3.50 In relation to the executive nationhood power and the express incidental power, the committee questioned whether the funding of the programs by the Commonwealth represented an enterprise or activity peculiarly adapted to the government of a nation, and which could not otherwise be carried out for the benefit of the nation, as is required to rely on these powers.

3.51 While the subsequent correspondence with the minister on these questions did not result in the provision of any definitive legal advice or argument confirming the constitutionality of the purported authorisation of expenditure on these programs, the committee ultimately concluded its examination of the regulation on the basis of the minister's personal assurance that he regarded the regulation as validly made.

3.52 The committee's correspondence with the minister also highlighted the important issue of the proper process for the making of public interest immunity claims in relation to refusals to provide information or documents to the Senate and its committees. This issue arose due to the minister maintaining a refusal to provide the committee with the legal advice received on the matters raised by the committee. However, because it concluded its examination of the regulation on the basis of the minister's personal assurance that the regulation was validly made, the committee did not ultimately make a judgement as to whether the minister had in fact advanced a

valid public interest immunity claim in accordance with the Senate's requirements for the making of such claims.[24]

3.53 The committee's examination of this instrument provides an informative example of the way in which its scrutiny principles encompass evolving circumstances such as the High Court's judgements in the *Williams* cases; the character of the scrutiny dialogue which the committee pursues with ministers; and the procedure for the making of public interest immunity claims relating to refusals to provide documents or information to the Senate and its committees. Accordingly, the concluding monitor entry in relation to this regulation is reproduced in full at Appendix 3.

3.54 In the reporting period, the committee also reported on the following regulations in relation to the constitutional authority for expenditure:

- Financial Framework (Supplementary Powers) Amendment (2014 Measures No. 1) Regulation 2014 [F2014L01464],[25]
- Financial Framework (Supplementary Powers) Amendment (2014 Measures No. 2) Regulation 2014 [F2014L01721];[26]
- Financial Framework (Supplementary Powers) Amendment (2014 Measures No. 3) Regulation 2014 [F2014L01697];[27]
- Financial Management and Accountability Amendment (2014 Measures No. 6) Regulation 2014 [F2014L00841];[28] and
- Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 3) Regulation 2015 [F2015L00572].[29]

Regulations anticipating primary legislation

3.55 In *Delegated legislation monitor* No. 10 of 2014 (27 August 2014), the committee reported on the Corporations Amendment (Streamlining Future of

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24 See *Odgers' Australian Senate Practice*, 13th ed. (2012), Chapter 19, pp 595-626.

25 See *Delegated legislation monitor* No. 17 of 2014 (3 December 2014) (concluded in *Delegated legislation monitor* No. 1 of 2015 (11 February 2015).

26 See *Delegated legislation monitor* No. 1 of 2015 (11 February 2015) (having noted that, in accordance with the committee's expectations, the explanatory statement for the instrument had identified the constitutional authority for the addition of the new programs to Schedule 1AB, the committee did not require a response from the minister).

27 See *Delegated legislation monitor* No. 1 of 2015 (having noted that, in accordance with the committee's expectations, the explanatory statement for the instrument had identified the constitutional authority for the addition of the new programs to Schedule 1AB, the committee did not require a response from the minister).

28 See *Delegated legislation monitor* No. 10 of 2014 (27 August 2014) (concluded in *Delegated legislation monitor* No. 15 of 2014 (19 November 2014).

29 See *Delegated legislation monitor* No. 6 of 2015 (17 June 2015) (the matter remained under examination at the end of the reporting period and was concluded in *Delegated legislation monitor* No. 13 of 2015 (13 October 2015).

Financial Advice) Regulation 2014 [F2014L00891].[30] This regulation made a number of amendments to the Corporations Regulations 2001 to change the arrangements relating to the giving of financial advice.

3.56 The committee noted that scrutiny principle (d) of its terms of reference requires consideration of whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via primary rather than delegated legislation). This includes legislation which fundamentally changes the law.

3.57 The committee noted that key elements of the regulation introduced 'fundamental change' to the primary legislative scheme regulating the giving of financial advice; and that the changes 'mirrored' proposed amendments in the Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014, which had been introduced on 19 March 2014.

3.58 The reason advanced for anticipating, via the regulation, the measures sought to be introduced through the bill was to provide 'certainty to industry' and to allow industry to 'benefit from the cost savings of the changes as soon as possible'. However, the committee expressed doubt as to whether industry certainty and benefit amounted to a sufficient justification for effecting significant policy change via regulation and, accordingly, sought the advice of the minister.

3.59 The subsequent correspondence with the minister on this issue highlighted the committee's concern over the potential consequences of the pre-emptive use of regulation to implement fundamental changes that anticipate a particular legislative outcome. In particular, the committee noted that this approach could 'permit a temporary mechanism [that is, the measures introduced by regulation] to turn into a permanent legislative artefact', or to continue in operation despite the clearly expressed will of the Parliament (for example, if the bill were passed with an amendment to remove one of the measures in the regulation). The committee made clear that this concern was not outweighed by the policy imperatives cited to justify the use of regulation (industry certainty and benefit), because these could not be distinguished from any case in which, in view of the anticipated timeframes and uncertainty applying to the full legislative process, governments might regard it as preferable or convenient to effect policy change via delegated legislation. However, noting the end-dating of the regulation, the committee ultimately drew the matter to the attention of senators and left the question of the regulation's appropriateness to the Senate as a whole.

3.60 The committee's examination of this instrument in relation to this issue provides an informative example of the way in which the principles of parliamentary accountability and sovereignty inform the committee's interpretation of its scrutiny principles. Accordingly, the concluding monitor entry in relation to this regulation is reproduced in full at Appendix 4.

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30 See *Delegated legislation monitor* No. 10 of 2014 (27 August 2014) (concluded in *Delegated legislation monitor* No. 14 of 2014 (29 October 2014)).

3.61 In the reporting period, the committee subsequently drew attention to the issue of delegated legislation anticipating primary legislation in relation to the following instruments:

- Occupational Health and Safety (Maritime Industry) (Prescribed Ship or Unit — Intra-State Trade) Declaration 2015 [F2015L00335];[31] and
- Seafarers Rehabilitation and Compensation (Prescribed Ship — Intra-State Trade) Declaration 2015 [F2015L00336].[32]

Implementation of a general instrument making power (prescribing of matters by 'legislative rules')

3.62 In *Delegated legislation monitor* No. 2 of 2014 (5 March 2014), the committee reported on the Australian Jobs (Australian Industry Participation) Rule 2014 [F2014L00125] (industry rules).[33] The committee noted that the instrument relied on section 128 of the *Australian Jobs Act 2013*, which allowed for various matters in relation to that Act to be prescribed, by the minister, by legislative rules.

3.63 In its initial comment, the committee noted that the general instrument-making power under which the rules had been made had not previously been seen by the committee. Subsequent inquiries to the Minister for Industry and First Parliamentary Counsel (FPC) established that the Office of Parliamentary Counsel (OPC) had been including the new general instrument-making power in Acts since 2013.[34] Prior to this, Acts usually contained a general regulation-making power for the purposes of facilitating and augmenting the operation of primary legislation through the making of delegated legislation.

3.64 The implementation of the new general instrument making power raised the following scrutiny issues:

- scope of the general power;
- consequences of the general instrument-making power for the quality of drafting;
- assessing whether instruments contain matters more appropriate for regulations;
- regulations to prevail in the event of conflict;
- delegation of the general instrument-making power; and

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31 See *Delegated legislation monitor* No. 15 of 2015 (13 May 2015) (concluded in *Delegated legislation monitor* No. 6 of 2015 (17 June 2015).

32 See *Delegated legislation monitor* No. 15 of 2015 (13 May 2015) (concluded in *Delegated legislation monitor* No. 6 of 2015 (17 June 2015).

33 See *Delegated legislation monitor* No. 2 of 2014 (5 March 2014), pp 1-2.

34 The *Parliamentary Counsel Act 1970* gives OPC a broad range of functions in relation to the drafting and publishing of legislation. Since the transfer of functions of the former Office of Legislative Drafting and Publishing (OLDP) to OPC in October 2012, these functions have included the drafting of delegated legislation.

- consultation in relation to the implementation of the general instrument-making power.

3.65 These matters were pursued via extensive correspondence with the minister and FPC, as reported in *Delegated legislation monitors* Nos 5, 6, 8, 9 10, 12, 13 and 17 of 2014.

3.66 The committee's investigation of these matters was undertaken in collaboration with the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee), including a briefing held on 3 September 2014 with two officers from OPC, Mr Peter Quiggin PSM, FPC, and Mr John Leahy SC PSM, Principal Legislative Counsel. Matters still outstanding from the briefing were placed as questions on notice by the committees.[35]

3.67 The committee's examination of these matters provides an informative example of the way in which the principles of parliamentary accountability and sovereignty inform the committee's interpretation of its scrutiny principles. Accordingly, the committee's concluding remarks in relation to these matters are reproduced in full at Appendix 5.

Sunsetting of instruments

3.68 The *Legislative Instruments Amendment (Sunsetting Measures) Act 2012* (the amending Act) amended the LIA (now the *Legislation Act 2003*) to provide greater certainty about what instruments sunset and when they sunset, as well as incentives for rule-makers to review instruments thematically.[36]

3.69 To help government agencies and stakeholders deal with the large number of sunsetting instruments, the amending Act was intended to:

- make provision for the automatic repeal of spent instruments and provisions;
- clarify the sunsetting dates of repeal for particular categories of instruments; and
- enable thematic reviews of instruments by enabling the Attorney-General to align sunsetting dates of instruments.[37]

3.70 Subsection 50(1) was inserted into the LIA to introduce a new default rule for calculating sunsetting dates: the sunsetting date for all instruments registered after 1 January 2005 is determined by their date of registration. Subsection 50(2) provided for all instruments made before 1 January 2005, and registered in bulk on that day (the

35 Correspondence from FPC including letters and answers to questions on notice, 13 March 2014. See Appendix 1, *Delegated legislation monitor* No. 17 2014 (3 December 2014).

36 Legislative Instruments Amendment (Sunsetting Measures) Bill 2012, explanatory memorandum, p. 8.

37 Legislative Instruments Amendment (Sunsetting Measures) Bill 2012, *Bills Digest*, No. 177, Parliamentary Library, 27 June 2012, p. 2.

day the LIA came into effect), to sunset over a range of dates based on their year of making, with the oldest sunsetting first.[38]

3.71 The amending Act also introduced changes to allow the Attorney-General to declare a common sunsetting date—including a possible extension of up to five years—for instruments that are subject to a single thematic review.[39] Introducing the flexibility to align sunsetting dates and cluster instruments thematically was intended to encourage a more efficient and effective review process for instruments, 'and enable departments and agencies to comprehensively engage with stakeholders prior to the remaking of any instrument'.[40]

3.72 The committee notes that the changes to the sunsetting regime provided more orderly and manageable arrangements for the sunsetting of instruments. The sunsetting of instruments under these provisions commenced in 2015.[41]

Automatic repeal of spent and redundant instruments and provisions

3.73 As noted above at 3.68, the amending Act provided for the automatic repeal of new instruments and provisions that are wholly commencing, amending or repealing.[42] In other words, rather than waiting for sunsetting arrangements to come into effect, an instrument that has done its job is automatically repealed. Importantly, however, that instrument is still subject to the disallowance process.[43]

3.74 From 8 November 2013, the committee commenced tracking the number of instruments automatically repealed under Part 5A of the *Legislative Instruments Act 2003*.[44] In this reporting period approximately 33 per cent of instruments registered on FRLI were repealed under this part.[45]

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38 Since the changes to the LIA that commenced in March 2016, the relevant provisions are now contained in Part 4 of the *Legislation Act 2003*.

39 Since the changes to the LIA that commenced in March 2016, the relevant provisions are now contained in Part 4 of the *Legislation Act 2003*.

40 Legislative Instruments Amendment (Sunsetting Measures) Bill 2012, explanatory memorandum, p. 8.

41 The first such list was tabled on 11 May 2015: see *Journals of the Senate*, No. 91, 11 May 2015, p. 2506.

42 Legislative Instruments Amendment (Sunsetting Measures) Bill 2012, *Explanatory Memorandum*, p. 4.

43 These instruments are designated on FRLI (following the changes to the LIA that commenced in March 2016, FRLI is now called the Federal Register of Legislation) as 'Repealed/Ceased', with the reason for ceasing given as 'Repealed under Division 1 of Part 5A of the *Legislative Instruments Act 2003*'. Any such instrument still open to disallowance will be listed on the Senate and House of Representatives Disallowable Instruments Lists, available at http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/leginstruments.

44 Following the changes to the LIA that commenced in March 2016, the relevant provisions are now contained in Part 3 of the *Legislation Act 2003*.

45 Following the changes to the LIA that commenced in March 2016, FRLI is now called the Federal Register of Legislation'.

3.75 The amending Act also provided for the repeal by regulation of existing instruments and provisions that are no longer required. Section 48E was inserted into the LIA to support the maintenance of the FRLI by allowing such spent instruments to be repealed en masse by regulation.

3.76 In the reporting period, the following instruments repealed spent and redundant instruments under section 48E:

- Communications Legislation (Spent and Redundant Instruments) Instrument of Repeal (No. 1) 2014 [F2014L00953];[46] and
- Spent and Redundant Instruments Repeal Regulation 2015 (No. 1) [F2015L00297].[47]

3.77 The committee notes that the power to effect mass repeal of redundant instruments of delegated legislation improves the utility of FRLI by making clear which instruments have no continuing effect. Such mass repeals do not generally contribute to the reduction of 'red tape' due to the fact that the instruments are already spent.

3.78 However, in relation to the listing on FRLI of instruments repealed under Part 5A as 'Repealed/Ceased', the committee is aware of some instances of confusion as to whether such instruments remain subject to disallowance. The committee would be concerned if parliamentarians or citizens were deterred from making objections to an instrument of delegated legislation because of a mistaken belief that it was no longer subject to disallowance.

3.79 Accordingly, the committee considers that any future review of FRLI should consider the addition of a note to the current entry for instruments repealed under Part 5A (now under Part 3 of the *Legislation Act 2003*), to make clear that, notwithstanding the fact that such instruments are repealed or ceased, they remain subject to disallowance for the full 15 sitting days from the date of tabling.

Explanatory statements: describing consultation

3.80 Under section 26 of the LIA instruments of delegated legislation must be accompanied by an ES that contains certain, prescribed information.[48] This includes a description of the nature of consultation undertaken or an explanation as to why consultation was considered unnecessary or inappropriate.

3.81 The failure to adequately address the issue of consultation and inadequate descriptions and explanations in relation to consultation has been a persistent shortcoming in ESs since the commencement of the LIA in 2005. This continued

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46 See *Delegated legislation monitor* No. 10 of 2014 (27 August 2014) (reported on an advice-only basis that did not require a response from the minister).

47 See *Delegated legislation monitor* No. 5 of 2015 (13 May 2015) (reported on an advice-only basis that did not require a response from the minister).

48 LIA, section 26 (previously LIA section 4). See also sections 17 and 18 regarding consultation requirements. Following the changes to the LIA that commenced in March 2016, the relevant provisions are now sections 15J and 17 of the *Legislation Act 2003*.

throughout 2013-14, with the committee seeking further information regarding consultation in relation to a significant number of instruments.[49]

3.82 The first main deficiency in this regard was ESs that made no reference whatsoever to consultation. Correspondence with relevant ministers generally indicated that this was due to administrative oversight in the preparation of explanatory material, rather than a lack of awareness about the requirements of the LIA. In all such cases, the committee requested from the rule-maker the relevant information regarding consultation, required that the ES for the instrument be updated and sought an assurance that future explanatory material would be prepared in accordance with the requirements of the LIA.

3.83 The second main deficiency was ESs that did address the question of consultation but contained overly bare or general descriptions of the nature of consultation undertaken, or similarly inadequate explanations as to why consultation was considered unnecessary or inappropriate. While the committee does not usually interpret section 26 of the LIA (now section 15J of the *Legislation Act 2003*) as requiring a highly detailed description of consultation undertaken, it considers that a bare or very general statement of the fact that consultation has or has not taken place, is not sufficient to satisfy the requirement that an ES describe the nature of consultation undertaken or explain why it was considered unnecessary or inappropriate. In all such cases during the reporting period, the committee sought from the relevant rule-maker a fuller description or explanation, and generally required that the ES in question be amended to include such further information as was subsequently provided.

Senator John Williams
Chair

49 For further information see the committee's guideline on consultation (Appendix 3).

Appendix 1
Undertakings 2014-15

Instrument	Date of undertaking	Undertaking
Department of Agriculture		
Farm Household Support Secretary's Rule 2014 [F2014L00614]	30 September 2014	Amend the *Farm Household Support Act 2014* to specifically exclude the delegation of the secretary's general rule-making power.
Attorney-General's Department		
AusCheck Regulations 2007 [Select Legislative Instrument 2007 No. 137] [F2007L01570]	4 October 2007	Amend the note to regulation 11 to include a reference to the Cost Recovery Impact Statement that was prepared during the making of the regulations
Department of Defence		
Defence Determination 2013/19, Class of travel, remote location leave travel, aide-de-camp allowance and compulsory tuition fees – amendment	15 July 2013	Amend the determination to remove the term 'major portion of the night' from the travel provision wording, and that entitlement to a sleeper berth would be provided if any part of an overnight rail journey occurred after midnight
Defence Determination 2011/34, Financial support for legal or financial advice on death of a member under section 58B of the *Defence Act 1903*	29 November 2011	Amend the determination to specify as a mandatory requirement that the Defence Community Organisation (DCO) social worker be required to inform a potential recipient that this assistance may be accessed if they meet the relevant criteria; to clarify that submissions are to be submitted through the DCO social worker; and to specify an inclusive list of conditions which may cause difficulty with financial literacy
Department Infrastructure and Regional Development		
Civil Aviation Order (Flight Crew Licensing) Repeal and Amendment Instrument 2014 (No. 1) [F2014L01177]	1 October 2014	Amend the explanatory statement to reflect that Civil Aviation Legislation Amendment (Flight Crew Licensing Suite) Regulation 2013 changed the commencement date of the licensing suite of regulations from 4 December 2013 to 1 September 2014

Instrument	Date of undertaking	Undertaking
Jervis Bay Territory Rural Fires Ordinance 2014 [F2014L00443]	2 July 2014	Amend the Ordinance to expressly create a regulation-making power, amending the Rule to remove all offence provisions and drafting Regulations with the offence provisions Implemented by Jervis Bay Territory Rural Fires Amendment (Offences and Other Measures) Ordinance 2015 [10 September 2015]
Jervis Bay Territory Rural Fires Rule 2014 [F2014L00533]	2 July 2014	Amend the Ordinance to expressly create a regulation-making power, amending the Rule to remove all offence provisions and drafting Regulations with the offence provisions Implemented by Jervis Bay Territory Rural Fires Amendment (Scope of Rules) Rule 2015 [10 September 2015]
Department of Veterans' Affairs		
Military Rehabilitation and Compensation (Weekly Payments - Class of Persons) Specification 2011 [F2011L00238]	17 May 2011	Amend the instrument to include examples in a note explaining the term 'financially vulnerable and significantly disadvantaged' when it is next amended; and consider at that time the suitability of the phrase
Veterans' Entitlements (Weekly Payments – Class of Persons) Specification 2011 [F2011L00240]	17 May 2011	Amend the instrument to include examples in a note explaining the term 'financially vulnerable and significantly disadvantaged' when it is next amended; and consider at that time the suitability of the phrase

Appendix 2

Addition of matters to Schedule 1AB of the FMA regulations—previously unauthorised expenditure

Financial Management and Accountability Amendment (2014 Measures No. 1) Regulation 2014 [F2014L00160][1]

Purpose	Amends the Financial Management and Accountability Regulations 1997 to add two items to Schedule 1AB to establish legislative authority for certain spending activities in the Department of Education and the Department of Employment
Last day to disallow	16 June 2014
Authorising legislation	*Financial Management and Accountability Act 1997*
Department	Finance

Background:

In March 2014, the committee received a letter from the President of the Senate and Chair of the Senate Standing Committee on Appropriations and Staffing (Appropriations and Staffing Committee), Senator the Hon. John Hogg.[2] As Chair of the Appropriations and Staffing Committee, the President requested that the committee monitor executive expenditure made by regulation under the *Financial Framework Legislation Amendment Act (No 3) 2012* (Financial Framework Amendment Act), and report on such expenditure to the Senate.

The President noted that it is a fundamental role of Parliament to approve appropriations and authorise revenue and expenditure proposals. The committee notes that section 83 of the Constitution provides that no money shall be drawn from consolidated revenue 'except under appropriation made by law'. Under section 53 of the Constitution, the Senate may not amend proposed laws appropriating revenue or moneys for the ordinary annual services of the government. However, an appropriation bill not for the ordinary annual services of the government may be

1 This entry was originally published in See *Delegated legislation monitor* No. 5 of 2014 (14 May 2014), pp 16-18.

2 Correspondence from the President of the Senate and Chair of the Senate Standing Committee on Appropriations and Staffing, Senator the Hon. John Hogg, to the Standing Committee on Regulations and Ordinances, 17 March 2014. See Appendix 3, *Delegated legislation monitor* No. 5 2014 (14 May 2014).

directly amended by the Senate. Section 54 of the Constitution provides that an appropriation bill for ordinary annual services must contain only those appropriations.

The committee notes that, in June 2010, the Senate reaffirmed its constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the government. The resolution stated, amongst other things, that appropriations for expenditure on new policies not previously authorised by special legislation are not appropriations for the ordinary annual services of the government, and that proposed laws for the appropriation of revenue or moneys for expenditure on matters such as new expenditure shall be presented to the Senate in a separate appropriation bill subject to amendment by the Senate.[3]

The importance of adequate parliamentary control of executive government was a key theme of the High Court's judgment in *Williams v Commonwealth* (2012) 248 CLR 156. The decision cast doubt on the validity of government expenditure involving direct payments to persons other than a state or territory, the only authority for which was the appropriation acts. In response to the High Court decision, the Financial Framework Amendment Act added section 32B to the *Financial Management and Accountability Act 1997*. Section 32B established a regulation-making mechanism whereby the executive can authorise expenditure on programs by amending Schedule 1AB of the Financial Management and Accountability (FMA) Regulations, rather than including those matters in primary legislation.[4]

In light of the above considerations, the President drew the committee's attention to the need to monitor a deficiency in the process of scrutinising items of expenditure which appear to have been inappropriately classified as the ordinary annual services of the government. The President noted that previously, such items were drawn to the attention of the Appropriations and Staffing Committee, and to legislation committees examining estimates of expenditure, and a list of such items was also drawn to the attention of the Minister for Finance. However, since the passage of the Financial Framework Amendment Act, items that previously may have been inappropriately classified as ordinary annual services of the government may now be included in FMA Regulations without direct parliamentary approval. The President pointed out that the authorising of expenditure in this way has effectively reduced the scope of the Senate's scrutiny of government expenditure, and therefore proposed that the committee's scrutiny of legislative instruments specifically include an assessment of the nature of executive expenditure (in accordance with the committee's scrutiny principle (d)).

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3 The complete resolution is contained in *Journals of the Senate*, No. 127—22 June 2010, pp 3642-3643.

4 Schedule 1AB was added to the Financial Management and Accountability (FMA) Regulations on 20 December 2013 by the FMA Amendment (2013 Measures No. 1) Regulation 2013. Prior to this, section 32B of the FMA Act authorised arrangements, grants and programs to be listed in Schedule 1AA of the FMA Regulations. See Financial Management and Accountability Amendment (2013 Measures No. 1) Regulation 2013 [F2013L02089], explanatory statement, pp 1–2.

Issue:

Addition of matters to Schedule 1AB of the FMA Regulations—previously unauthorised expenditure

Scrutiny principle (d) of the committee's terms of reference requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via principal rather than delegated legislation).

Financial Management and Accountability Amendment (2014 Measures No. 1) Regulation 2014 [F2014L00160] adds two items to Schedule 1AB to establish legislative authority for spending activities related to two programs in the Department of Employment and the Department of Education respectively. The first item allocates $6.9 million over three years to the Tasmanian Jobs program to establish a 'wage subsidy pilot for Tasmanian job seekers'.[5] The second item allocates $2.0 million over two years to the Students First—Agriculture in Education program to develop resources to help teachers better understand food and fibre production.[6]

In the committee's view, both items appear to be expenditure not previously authorised by legislation. The committee considers that, prior to the enactment of the Financial Framework Amendment Act, both items 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. The committee will draw this matter to the attention of the relevant portfolio committee.

The committee therefore draws the attention of the Senate to the expenditure authorised by this instrument relating to the Tasmanian Jobs program and the Students First—Agriculture in Education program.

5 *Mid-Year Economic and Fiscal Outlook 2013-14,* Appendix A: Policy decisions taken since the 2013-14 Budget, Tasmanian Jobs programme — pilot, p. 139.

6 *Mid-Year Economic and Fiscal Outlook 2013-14,* Appendix A: Policy decisions taken since the 2013-14 Budget, Students First — Agriculture in Education, p. 132.

Appendix 3

Addition of matters to Schedule 1AB of the FMA regulations—constitutional authority for expenditure

Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 3) Regulation 2015 [F2015L00572][1]

Instrument	**Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 3) Regulation 2015 [F2015L00572]**
Purpose	Amends the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for spending activities administered by the Department of Education and Training and the Department of Social Services
Last day to disallow	14 October 2015
Authorising legislation	*Financial Framework (Supplementary Powers) Act 1997*
Department	Finance
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitors* No. 6, 8, 10 and 12 of 2015

The committee commented as follows: Scrutiny principle 23(3)(a) of the committee's terms of reference requires the committee to ensure that an instrument is made in accordance with statute. This principle is interpreted broadly as a requirement to ensure that instruments are made in accordance with their authorising Act as well as any constitutional or other applicable legal requirements.

The committee notes that, in *Williams No. 1*,[2] the High Court confirmed that executive authority to spend appropriated monies is not unlimited and therefore generally requires legislative authority. As a result of the subsequent High Court decision in *Williams No. 2*,[3] the committee requires that the ES for all instruments specifying programs for the purposes of section 32B of the *Financial Framework*

1 This entry was originally published in *Delegated legislation monitor* No. 6 of 2015 (17 June 2015), pp 10-14 (the matter remained under examination at the end of the reporting period and was concluded in *Delegated legislation monitor* No. 13 of 2015 (13 October 2015).

2 *Williams v Commonwealth* (2012) 248 CLR 156.

3 *Williams v Commonwealth* (2014) 252 CLR 416.

(Supplementary Powers) Act 1997 explicitly state, for each new program, the constitutional authority for the expenditure.

In this regard, the committee notes that the ES states that the objective of the Mathematics by Inquiry program is:

> To create and improve mathematics curriculum resources for primary and secondary school students:
>
> (a) to meet Australia's international obligations under the Convention on the Rights of the Child and the International Covenant on Economic, Social and Cultural Rights; and
>
> (b) as activities that are peculiarly adapted to the government of a nation and cannot otherwise be carried on for the benefit of the nation.

The objective of the Coding Across the Curriculum program is:

> To encourage the introduction of computer coding and programming across different year levels in Australian schools:
>
> (a) to meet Australia's international obligations under the Convention on the Rights of the Child and the International Covenant on Economic, Social and Cultural Rights; and
>
> (b) as an activity that is peculiarly adapted to the government of a nation and cannot otherwise be carried on for the benefit of the nation.

The committee notes that the ES identifies the consititutional basis for expenditure in relation to both the Mathematics by Inquiry and the Coding Across the Curriculum programs as follows:

> Noting that it is not a comprehensive statement of relevant constitutional considerations, the objective of the item references the following powers of the Constitution:
>
> - the external affairs power (section 51(xxix))
> - Commonwealth executive power and the express incidental power (sections 61 and 51(xxxix)).

Therefore, the instrument appears to rely on the external affairs power and the executive nationhood power (coupled with the express incidental power) as the relevant heads of legislative power to authorise the making of these provisions (and therefore the spending of public money under them).

However, in relation to the external affairs power, the committee understands that, in order to rely on the power in connection with obligations under international treaties, legislation must be appropriately adapted to implement relatively precise obligations arising under that treaty.

In relation to the executive nationhood power and the express incidental power, the committee understands that the nationhood power provides the Commonwealth executive with a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried out for the benefit of the nation.

The committee therefore sought the minister's advice as to:

- ***how the obligations under the Convention on the Rights of the Child and the International Covenant on Economic, Social and Cultural Rights are sufficiently specific to support the Mathematics by Inquiry and the Coding Across the Curriculum programs; and***

- ***how the Mathematics by Inquiry and the Coding Across the Curriculum programs are supported by the executive nationhood power and the express incidental power to the extent that they are enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried out for the benefit of the nation.***

Minister's first response

The Minister for Finance advised that:

> The Committee may be aware that successive governments have been careful to avoid action that might effectively waive legal privilege in advice and thereby potentially prejudice the Commonwealth's legal position. Accordingly, governments have maintained a position of not disclosing the legal advice they rely on except in circumstances where there are special reasons for doing so. The drafting of legislation, including subordinate legislation, is routinely undertaken having regard to a range of constitutional and other legal considerations. In some cases, basic constitutional underpinnings will be evident in provisions that describe the objective scope of legislation.
>
> The items for Mathematics by Inquiry and Coding across the Curriculum in the Regulation are a case in point. As indicated in the explanatory statement accompanying the Regulation, the objective for each of these items references the external affairs power, the Commonwealth executive power and the express incidental power.
>
> The Government will continue to draft amendments for legislative authority under the section 32B mechanism in the *Financial Framework (Supplementary Powers) Act 1997* having due regard to constitutional limits. Consistent with this approach to law-making more generally, the Government will continue to work on maximising clarity in its approach to drafting.

Committee's first response

The committee commented as follows: ***The committee thanked the minister for his response.*** However, the minister's response has not addressed the specific questions asked by the committee, namely:

- how the obligations under the Convention on the Rights of the Child and the International Covenant on Economic, Social and Cultural Rights are sufficiently specific to support the Mathematics by Inquiry and the Coding Across the Curriculum programs; and

- how the Mathematics by Inquiry and the Coding Across the Curriculum programs are supported by the executive nationhood power and the express

> incidental power to the extent that they are enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried out for the benefit of the nation.

First, the committee notes that these questions are asked of the minister in his capacity as the instrument-maker. In this respect, the committee seeks the minister's advice as to whether he regards the referenced constitutional powers as providing a basis for the making of the instrument.

The committee therefore sought further advice from the minister in relation to this matter.

Second, the committee notes that the minister's response suggests that legal advice may have been obtained in relation to the constitutional support for the Mathematics by Inquiry and the Coding Across the Curriculum programs. The minister states:

> …successive governments have been careful to avoid action that might effectively waive legal privilege in advice and thereby potentially prejudice the Commonwealth's legal position. Accordingly, governments have maintained a position of not disclosing the legal advice they rely on except in circumstances where there are special reasons for doing so.

While the Senate has indicated some measure of acceptance of certain public interest immunity grounds for refusals to disclose information (in cases where a particular harm is identified), the committee does not understand the minister's response to be explicitly advancing a public interest immunity claim on a recognised ground in this case.

In relation to the stated position of governments not to disclose legal advice, the committee has noted previously that it is not aware of any general government policy or practice which prevents ministers or departments from providing information containing legal (or any other) advice to the Senate and its committees (absent a valid public interest immunity claim); and the Senate has consistently rejected refusals made simply on the basis that the requested information would disclose legal or other advice to government or a department.[4] To underline this point, the committee notes that it has been provided with legal advice on a number of occasions.[5]

The committee therefore requested from the minister a copy of any legal advice obtained in relation to this matter, and particularly the question of whether the referenced constitutional powers support the inclusion of the programs in question in the regulation.

Minister's second response

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4 A full account of the Senate's approach to such matters may be found in *Odgers' Australian Senate Practice* (13th ed.) pp 595–625.

5 See for example *Delegated legislation monitor* No. 2 of 2014, entries on Veterans' Entitlements (Actuarial Certificate – Life Expectancy Income Stream Guidelines) Determination 2013 [F2013L00671] and Veterans' Entitlements (Actuarial Certificate – Lifetime Income Stream Guidelines) Determination 2013 [F2013L00670], pp 6–9.

The Minister for Finance advised that:

> The Government does not consider it would be appropriate to disclose the content of its legal advice. Disclosure of legal advice must always be carefully considered, including whether there is a risk that disclosure will prejudice the Commonwealth's legal position.
>
> The formulation of programmes and the drafting of legislation often involves complex issues and is routinely undertaken having regard to a range of constitutional and other legal considerations. In relation to the items for the Mathematics by Inquiry and the Coding Across the Currciculum Programmes, legal advice was obtained and carefully considered, including Australia's international obligations under the Convention on the Rights of the Child, particularly Articles 28 and 29, and under the International Covenant on Economic, Social and Cultural Rights, particularly Article 13.

Committee's second response

The committee commented as follows: ***The committee thanked the minister for his response.*** However, scrutiny principle (a) of the committee's terms of reference requires the committee to ensure that the exercise of the Parliament's delegated legislative powers is done in accordance with the law, including the Constitution of Australia.

In this regard, the committee's request to the minister effectively sought an explicit and positive assurance that, in exercising the Parliament's delegated powers in the making of the regulation, the minister was satisfied that there was sufficient constitutional authority for the exercise of that power. The committee sought that assurance in the context of specific questions pertaining to the character of the powers referenced in the ES for the regulation, being the external affairs power and the executive nationhood power and the express incidental power.

First, while the minister's response advises that legal advice was obtained in relation to articles 28 and 29 of the Convention on the Rights of the Child and article 13 of the International Covenant on Economic, Social and Cultural Rights, the minister does not address the question of how the articles cited are sufficiently specific to support the Mathematics by Inquiry and the Coding Across the Curriculum programs.

Second, the minister has not addressed the question of how the Mathematics by Inquiry and the Coding Across the Curriculum programs are supported by the executive nationhood power and the express incidental power to the extent that they are enterprises and activities peculiarly adapted to the government of a nation and which *cannot otherwise be carried out for the benefit of the nation.*

In light of the above comments, the committee therefore sought the minister's further advice as to:

- ***how the obligations under the Convention on the Rights of the Child and the International Covenant on Economic, Social and Cultural Rights are sufficiently specific to support the Mathematics by Inquiry and the Coding Across the Curriculum programs; and***

- ***how the Mathematics by Inquiry and the Coding Across the Curriculum programs are supported by the executive nationhood power and the express incidental power to the extent that they are enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried out for the benefit of the nation.***

In addition, the committee notes the minister's refusal to provide the committee with the legal advice obtained in relation to the Mathematics by Inquiry and the Coding Across the Curriculum programs:

> The Government does not consider it would be appropriate to disclose the content of its legal advice. Disclosure of legal advice must always be carefully considered, including whether there is a risk that disclosure will prejudice the Commonwealth's legal position.

The committee notes that the Senate has indicated some measure of acceptance of certain public interest immunity grounds for refusals to disclose information (in cases where a particular harm is clearly identified). However, it is important to note that the Senate's requirements and the process for the making of public interest immunity claims (as set out in an Order of the Senate of 13 May 2009 ('Public interest immunity claims'))[6] do not specify recognised grounds for making such claims. This is because whether any of the grounds are justified in a particular case depends on the circumstances of that case.[7]

The committee notes that the minister's response does not advance a public interest immunity claim that addresses the requirements of the Order of the Senate of 13 May 2009 ('Public interest immunity claims'), particularly in relation to (a) the need to specify the harm to the public interest that could result from the disclosure of the information or document and (b) the need to indicate whether any specified harm to the public interest from the disclosure of the information or document could result equally or in part from the disclosure of the information or document to the committee as in camera evidence.

The committee therefore reiterated its request to the minister for a copy of the legal advice obtained in relation to this matter, and particularly the question of whether the referenced constitutional powers support the inclusion of the programs in question in the regulation.

Minister's third response

The Minister for Finance advised that:

> I can assure the Committee that the Government has obtained legal advice and has considered the constitutional position very carefully. This has included consideration of the constitutional powers identified in the explanatory statement accompanying the Regulation and the provisions of

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6 *Journals of the Senate*, 13 May 2009, 'Public interest immunity claims', p. 1941.

7 Senate Standing Committee on Procedure, *Second report*, June 2015, p. 8.

> international instruments as advised in my letter to the Committee of 1 September 2015.
>
> Access by government to confidential legal advice is, in practical terms, central to the development of sound Commonwealth policy and robust legislative instruments. It is important to note the long-standing practice of successive governments not to publish or provide legal advice obtained in the course of developing policy and legislation. The Government considers that it is not in the public interest to depart from a position established and maintained over many years in the interests of conserving the Commonwealth's broader legal and constitutional interests.
>
> This practice was most recently outlined by the Attorney-General, Senator the Hon George Brandis QC, in his letter of 27 August 2015 to the Joint Intelligence and Security Committee (see Appendix D of the *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*):
>
> It has been the practice of successive governments not to publish or provide legal advice that has been obtained for the purposes of drafting legislation.
>
> It has been stated on other occasions previous to that. As outlined by the Hon Gareth Evans QC:
>
> ... [n]or is it the practice or has it been the practice over the years for any government to make available legal advice from its legal advisers made in the course of the normal decision making process of government, for good practical reasons associated with good government and also as a matter of fundamental principle ... (*Senate Hansard*, 28 August 1995, page 466);
>
> the Hon Daryl Williams QC:
>
> ... I am going to offer the traditional response. I am not going to speculate about advice that the government may or may not have received nor am I going to provide any of that advice ... (*House of Representatives Hansard*, 25 November 1997, page 11165);
>
> the Hon Philip Ruddock MP:
>
> ... It is not the practice of the Attorney to comment on matters of legal advice to the Government. Any advice given, if it is given, is given to the Government ... (*House of Representatives Hansard*, 29 March 2004, page 27405); and
>
> Senator the Hon Joe Ludwig:
>
> To the extent that we are now going to go to the content of the advice, can I say that it has been a longstanding practice of both this government and successive governments not to disclose the content of advice. (Senate Legal and Constitutional Affairs Legislation Committee, *Hansard* of Estimates hearing, 26 May 2011, page 161).

Committee's third response

The committee commented as follows: ***The committee thanks the minister for his response.***

First, the committee notes the minister's advice that the Government 'has considered the constitutional position carefully'. The minister also reiterates his previous advice that legal advice was obtained; and that the government considers that it is not in the

public interest to depart from the 'longstanding practice' of successive governments not to provide legal advice obtained in the course of developing policy and legislation 'in the interests of conserving the Commonwealth's broader legal and constitutional interests'.

However, the committee again notes that it is not aware of any general government policy or practice which prevents ministers or departments from providing information containing legal (or any other advice) to the Senate and its committees (absent a valid public interest immunity claim); and the Senate has consistently rejected refusals made simply on the basis that the requested information would disclose legal or other advice to government or a department.

In this respect, the committee notes that the minister has not advanced a public interest immunity claim that addresses the requirements of the Order of the Senate of 13 May 2009 ('Public interest immunity claims'), particularly in relation to (a) the need to specify the harm to the public interest that could result from the disclosure of the information or document and (b) the need to indicate whether any specified harm to the public interest from the disclosure of the information or document could result equally or in part from the disclosure of the information or document to the committee as in camera evidence.

Similarly, the examples cited by the minister do not accord with the procedure for making public interest immunity claims as set out in the Order of the Senate of 13 May 2009. The committee notes that such assertions of a general government practice in relation to legal advice reflect a lack of understanding of 'the principle that claims to withhold information from Senate committees require a statement of public interest grounds that can be considered by the committee and the Senate'.[8] On this point, *Odgers' Australian Senate Practice* states:

> Although governments have generally abandoned claims that documents should not be produced simply because they belong to a class of documents, this claim has continued in residual forms.
>
> …Governments have also claimed that there is a long-established practice of not disclosing their advice, or of not doing so except in exceptional circumstances. These claims are contradicted by the occasions on which advice is voluntarily disclosed when it supports a government position. The actual position was stated in a letter produced in 2008 by the Secretary of the Department of Prime Minister and Cabinet: the government discloses its legal advice when it chooses to do so [references omitted].[9]

In light of the above, the committee notes that the minister has failed to advance a public interest immunity claim in accordance with the Order of the Senate of 13 May 2009 ('Public interest immunity claims') so as to allow the committee and the Senate to judge whether the refusal to provide the legal advice in question is justified in this case.

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8 *Odgers' Australian Senate Practice* (13th ed.) pp 621-622.

9 *Odgers' Australian Senate Practice* (13th ed.) p. 622.

Second, the committee notes that the minister has not provided an explicit and positive assurance that, in exercising the Parliament's delegated powers in the making of the regulation, he was satisfied that there was sufficient constitutional authority for the exercise of that power. The committee sought that assurance in the context of specific questions pertaining to the character of the powers referenced in the ES for the regulation, being the external affairs power and the executive nationhood power and the express incidental power.

The committee notes that Standing Order 23(3)(a) requires the committee to '*ensure* that…[an instrument of delegated legislation] is in accordance with statute', which includes the question of whether an instrument is constitutionally valid [emphasis added]. In this regard, the committee considers that there is no more fundamental issue than the question of whether the purported making of an instrument is supported by a constitutional head of power. It is therefore incumbent on the minister to provide an assurance to the committee and the Parliament of his satisfaction that such authority exists for his purported exercise of the Parliament's delegated power to make legislation.

In this respect, the committee notes that the minister's responses have failed to provide any assurance that the specifying of the programs in question for the purposes of section 32B of the *Financial Framework (Supplementary Powers) Act 1997* is in fact supported by the external affairs power and/or the executive nationhood power (coupled with the express incidental power). Further, the minister has responded in only general terms that do not address the committee's specific questions regarding the basis on which it is claimed these powers support the specification of the Mathematics by Inquiry and the Coding Across the Curriculum programs for the purposes of section 32B.

Noting that the last day for disallowance is 14 October 2015, and in light of the minister's failure to provide supporting legal advice or positive assurance that the specification of the Mathematics by Inquiry and the Coding Across the Curriculum programs for the purposes of section 32B of the Financial Framework (Supplementary Powers) Act 1997 is supported by the external affairs power and/or the executive nationhood power (coupled with the express incidental power), the committee again requests that the minister provide:

- ***legal advice received on the question of whether the specification of the Mathematics by Inquiry and the Coding Across the Curriculum programs for the purposes of section 32B of the Financial Framework (Supplementary Powers) Act 1997 is supported by the external affairs power and/or the executive nationhood power (coupled with the express incidental power); or***

- ***in the event that a valid public interest immunity claim is advanced in relation to the requested legal advice, positive assurance to the committee that the minister regards the specification of the Mathematics by Inquiry and the Coding Across the Curriculum programs for the purposes of section 32B of the Financial Framework (Supplementary Powers) Act 1997 as authorised by the external affairs power and/or the executive nationhood power (coupled with the express incidental power).***

Minister's fourth response

The Minister for Finance advised that:

> I understand the Committee is scheduled to consider this matter at a special meeting on 13 October 2015. I note, however, that this is the day before the disallowance motion must be put to the Senate for determination, or on which the Regulation would otherwise be deemed to be disallowed. Although a motion may be withdrawn by leave on the day, if any outstanding concerns of the Committee are not resolved to the Committee's satisfaction prior to that date then there will be a risk to the continuity of the programmes affected by this resolution.
>
> I can assure the committee that the Government's legal advice confirms that the specification of the Mathematics by Inquiry and the Coding Across the Curriculum programmes in section 32B of the *Financial Framework (Supplementary Powers) Act 1997* are supported by the external affairs power and/or the executive nationhood power(coupled with the express incidental power).
>
> In relation to the request for the legal advice that supports the Commonwealth's position, it is quite contrary to the public interest to provide Commonwealth legal advice in this instance. In this case, the legal advice is nuanced and assesses the risks of different legal approaches. Such information can be taken out of context to support legal action to threaten the continuity and stability of collaborative activities, including, in this case, between the Commonwealth, the states and the territories. Successive governments have also been careful to avoid action that might effectively waive legal privilege in advice and thereby potentially prejudice the Commonwealth's legal position. I therefore consider that a public interest immunity claim is therefore valid in this instance.
>
> Further, and as noted in my letter of 16 September 2015, access by government to confidential legal advice is, in practical terms, central to the development of sound Commonwealth policy and robust legislative instruments. A public interest immunity claim in these circumstances is therefore appropriate and consistent with the practice of successive governments.
>
> The most recent practice of this Government of routinely advising the parliament of which constitutional powers we rely upon when authorising spending for new programmes, provides a level of disclosure far above the practice of any earlier government.
>
> Finally, I am advised that a national curriculum solution developed in collaboration with the states is necessary for certain maths and computing curriculum content, because the smaller jurisdictions do not have the expertise or resources to design highly specialist parts of the curriculum.

Committee's fourth response

The committee thanks the minister for his prompt response and has concluded its examination of the instrument.

However, the committee notes that it has concluded its examination on the basis of the minister's assurance that the 'Government's legal advice confirms that that the specification of the Mathematics by Inquiry and the Coding Across the Curriculum programmes…[under] section 32B of the *Financial Framework (Supplementary Powers) Act 1997* are supported by the external affairs power and/or the executive nationhood power (coupled with the express incidental power)'.

Given this assurance, the committee emphasises that it has not been necessary in this case to make a determination in respect of whether the minister has advanced a valid public interest immunity claim to support his refusal to provide the legal advice requested.

Appendix 4

Regulations anticipating primary legislation

Corporations Amendment (Streamlining Future of Financial Advice) Regulation 2014 [F2014L00891][1]

Purpose	Amends the Corporations Regulations 2001 to implement various amendments relating to Part 7.7A of the regulations
Last day to disallow	24 September 2014
Authorising legislation	*Corporations Act 2001*
Department	Treasury

[The committee first reported on this instrument in *Delegated legislation monitor* No. 10 of 2014, and subsequently in *Delegated legislation monitor* No. 12 of 2014].

Issue:

Matters more appropriate for parliamentary enactment

The ES for the instrument states that the instrument is intended to 'provide clarity to stakeholders' by amending the regulations for the purpose of:

- facilitating scaled advice (applying from the time the regulation commences until 31 December 2015);
- removing the 'catch-all' provision from the list of steps an advice provider may take to satisfy the best interests obligation (applying from the time the Regulation commences until 31 December 2015);
- making consequential amendments to the modified best interests duty;
- providing that non-cash payment facilities that are not related to a basic deposit product are included in the definition of a 'basic banking product';
- removing the need for clients to renew their ongoing fee arrangement with their adviser every two years (also known as the 'opt-in' requirement) (applying from the time the regulation commences until 31 December 2015); and

1 This entry was originally published in *Delegated legislation monitor* No. 10 of 2014 (27 August 2014) (concluded in *Delegated legislation monitor* No. 14 of 2014 (29 October 2014).

- removing the requirement to provide an annual fee disclosure statement to clients in ongoing fee arrangements prior to 1 July 2013 (applying from the time the regulation commences until 31 December 2015).

Scrutiny principle (d) of the committee's terms of reference requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via primary rather than delegated legislation). This includes legislation which fundamentally changes the law.

The ES for the instrument provides the following reason for introducing the changes via regulation rather than primary legislation:

> …time sensitive FOFA amendments will be dealt with through regulations and then put into legislation. This approach provides certainty to industry and allows industry to benefit from the cost savings of the changes as soon as possible.

However, the committee notes that the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee) has expressed doubt as to whether industry certainty (and benefit) amounts to a sufficient justification for effecting significant policy change via regulation. That committee has stated:

> …enabling a regulated industry to benefit from legislative change 'as soon as possible' is not a sufficient justification to achieve policy change through regulations rather than Parliamentary enactment as this justification could be claimed with respect to any proposal. The fact that the changes may subsequently be enacted in primary legislation does not moderate the scrutiny concerns in this regard.[2]

In light of these comments, the committee notes that key elements of the regulation (item 7) may be described as involving 'fundamental change' to the primary legislative scheme, and as 'mirroring' the proposed amendments in the Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014.

Given this, the committee considers that the changes effected by the regulation may be regarded as more appropriate for parliamentary enactment, in respect of both their substantive effect and temporary or interim character **[the committee therefore requested the advice of the minister in relation to this matter (*Delegated legislation monitor* No. 10 of 2014)].**

MINISTER'S RESPONSE:

The Minister for Finance and Acting Assistant Treasurer advised:

> My response to the first issue raised in *Delegated Legislation Monitor* No. 10 of 2014 (the monitor) is that the magnitude of the burden on the financial advice industry by Labor's reforms warranted swift action. In the lead up to the 2013 federal election, I outlined how Labor's Future of Financial Advice (FOFA) reforms had been too costly to implement and

2 Senate Standing Committee for the Scrutiny of Bills, *Ninth Report of 2014*, 16 July 2014, p. 348.

> failed to strike the right balance between consumer protection and the need to ensure the ongoing availability, accessibility and affordability of high quality financial advice. From speaking with numerous industry stakeholders, it was clear that the financial services industry was being significantly affected by Labor's FOFA reforms. As such, I stated that we would move quickly to implement changes to FOFA if the Coalition were elected.
>
> It should be noted that Treasury's estimates of the ongoing cost savings of the Regulation are approximately $190 million per year, with one-off implementation savings of approximately $90 million; these estimates represent just over half of the estimated $375 million ongoing costs of complying with FOFA. Further, the Australian Securities and Investments Commission's facilitative compliance approach to FOFA was scheduled to end on 30 June 2014; this provided additional impetus to ensure industry received certainty through legislative change.
>
> As the Committee noted, the Regulation is largely mirrored in the Bill. Those provisions in the Bill have been—and will continue to be—subject to full parliamentary scrutiny. The Bill passed the House of Representatives on 28 August 2014 and was introduced in the Senate on 1 September2014. The interim Regulations will be repealed once the Bill receives Royal Assent. I note that both the Senate Economics Legislation Committee and the Senate Economics Reference Committee are—respectively—conducting inquiries into the Bill and financial advice reforms.

COMMITTEE RESPONSE:

[The committee made the following comments and requested the minister's response to the matters outlined below (*Delegated legislation Monitor* No. 12 of 2014)].

The committee thanks the Minister for Finance and Acting Assistant Treasurer for his response.

However, the minister's response has not satisfactorily addressed the key scrutiny concern raised by both the Scrutiny of Bills committee and this committee—namely, that the regulation makes fundamental legislative change that may be more appropriate for parliamentary enactment (that is, via primary rather than delegated legislation). While the minister cites both the need for 'swift action' and the estimated savings or benefit to industry, the minister has not addressed the committee's concern that such imperatives may not amount to sufficient justification for effecting significant policy change via regulation (and therefore without the full scrutiny and approval of the parliament). The committee notes that the minister's advice as to the scale of the intended effect of the regulation, and the existence and significance of the bill currently being considered by other Senate committees, could be equally taken as supporting a conclusion that the measures are more appropriately subject to the Senate's full deliberative processes. The committee is particularly concerned that the policy imperatives cited to justify the use of regulation in this case do not appear to be distinguishable from any case in which, in view of the anticipated timeframes and uncertainty applying to the full legislative process, the government might regard it as preferable or convenient to effect policy change via delegated legislation. **The**

committee therefore seeks further advice from the minister as to whether the legislative changes made by the regulation should be considered appropriate for delegated legislation.

The committee further notes that, notwithstanding the minister's assurance that the regulation will be repealed once the bill receives Royal Assent, the nature of the full legislative process is such that there remains significant uncertainty as to whether and in what form the bill may eventually be passed. **Given this, the committee also seeks the minister's advice as to whether all or part of the instrument will be repealed in the event that the bill is not passed by the parliament, or is passed with substantive amendments to matters currently provided for in the regulation.**

MINISTER'S RESPONSE:

The Minister for Finance and Acting Assistant Treasurer advised:

> I previously outlined to the Committee the magnitude of the burden imposed on the financial advice industry by Labor's Future of Financial Advice (FOFA) changes, and I indicated that the burden warranted swift action. In my discussions with industry stakeholders since the commencement of the Regulation on 1July2014, it has become clear that the Regulation has provided much needed clarity and certainty to the financial advice industry. Importantly, the Regulation has reduced costs in the financial advice industry by removing costly and burdensome red-tape such as requiring clients to resign contracts with their advisers at least every two years to continue an ongoing advice relationship. As such, the Regulation has been a crucial first step in ensuring the ongoing availability, accessibility and affordability of high-quality financial advice; further improvements will ensue from the accompanying legislative amendments.
>
> I would like to bring to the Committee's attention the fact that some of the amendments contained in the Regulation have always been considered an interim solution. The Government has consistently stated that time-sensitive changes would initially be made through regulations and then reflected through legislative amendments. Indeed, as far back as 7 November 2013, the Assistant Treasurer, Senator the Hon Arthur Sinodinos AO, indicated that "time sensitive amendments will be dealt with through regulations and then locked in to legislation". The Government has not wavered from this commitment. Indeed I again confirmed this approach in a comprehensive statement on improvements to Labor's regulations on 20 June 2014 (attached).
>
> The Committee should note that parts of the Regulation arc designed to only have effect from 1 July 2014 to 31 December 2015. This arrangement appropriately reflects the differential treatment of primary and secondary law. It also demonstrates the bone fides of the Government that it would not permit a temporary mechanism to turn into a permanent legislative artefact.
>
> As I indicated in my 13 September 2014 letter to the Committee, the financial impacts of Labor's FOFA reforms compelled an urgent response. Treasury's estimates of the ongoing cost savings of the Government's Regulation to improve FOFA are approximately $190 million per year, with one-off implementation savings of approximately $90 million. These

estimates represent just over half of the estimated $375 million ongoing costs to industry—and ultimately to consumers—of complying with Labor's FOFA.

Further, the Australian Securities and Investments Commission's facilitative compliance approach to FOFA was scheduled to end on 30 June 2014. This provided an interim period where the compliance emphasis was on education and assistance, before the regulator moved to a stricter enforcement approach. This provided additional impetus to ensure industry received certainty through legislative change before businesses incurred substantial costs implementing Labor's FOFA reforms in an unamended form in the 2014-15 financial year. It would be evidently less disruptive for this significant industry and for Australians saving for their retirement and managing financial risks through life, to avoid the costs of implementing short-lived changes and then incur costs to unwind them. Given this urgency, making amendments through regulations provided the most effective mechanism to ensure certainty to industry and to investors alike.

As the Committee previously noted, many of the amendments made in the Regulation are to be reflected in legislation: specifically, the Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014 (the FOFA Bill). Those provisions in the FOFA Bill have been—and will continue to be—subject to full parliamentary scrutiny.

Although Senate scrutiny processes for regulations arc different to that for principal legislation, the deliberative processes of the Senate have provided for extensive scrutiny of this Regulation. I draw the Committee's attention to the considerable Senate debate on two motions for disallowance of the Regulation: the first was a full disallowance motion, which was resolved in the negative on 15 July 2014; the second was a partial disallowance motion—on items 1 to 27 and 30 of the Regulation—which was resolved in the negative on 1 October 2014. Disallowance had been scheduled for debate and deferred on an almost daily basis for most of the Spring sittings to date.

The FOFA Bill has also been subject to two comprehensive Senate Economics Legislation Committee inquiries, which reported on 16 June 2014 and 22 September 2014 respectively, as well as consideration by the Senate Standing Committee on the Scrutiny of Hills. The Senate Economics Legislation Committee recommended that the Senate pass the FOFA Bill in both its reports. It should be noted that the FOFA Bill, which is endorsed by the Senate Economics Legislation Committee, creates entrenchment of some bridging reforms that are reflected in the Regulation.

Regarding the Committee's question as to whether all or part of the Regulation will be repealed in the event the FOF A Bill is not passed by the Parliament, the Government is committed to working with the Senate to deliver our election commitment. I do not presume to pre-empt the outcome of this process.

Having provided clarity and certainty to industry through the Regulation, the Government can now turn its attention to additional efforts to improve the accessibility, affordability and quality of financial advice. This work includes progressing an enhanced public register of financial advisers and

> supporting efforts to raise professional, ethical and educational standards in the industry.

COMMITTEE RESPONSE:

The committee thanks the Minister for Finance and Acting Assistant Treasurer for his response.

The committee notes the minister's reiteration of the claim to the urgency of the measures in question, arising from the minister's assessment of the 'magnitude of the burden imposed on the financial advice industry by Labor's Future of Financial Advice (FOFA) changes'. The minister also reiterates his previous advice regarding the financial benefit of the changes to industry. However, the committee notes that the considerations raised are not in the nature of exigencies (intrinsically requiring the measures in question) but are in fact political and policy considerations falling outside the scope of the committee's technical scrutiny of delegated legislation. The appropriateness, desirability and cost-benefit implications of particular measures for regulating a specific industry are not matters which go to the substance of the key concern raised by this (and the Scrutiny of Bills) committee, which is that the regulation makes fundamental legislative change that may be more appropriate for parliamentary enactment (that is, via primary rather than delegated legislation).

In this respect, the committee notes the minister's view that the 'deliberative processes of the Senate have provided for extensive scrutiny' of the regulation. However, while the technical matters flagged by the committee have been referenced in debates on the regulation, those debates have centred on the policy aspects of the regulation. The scrutiny concerns and principles relevant to this matter have not yet been the primary subject of any motion debated by the Senate.

Simply stated, the committee remains concerned that the minister's position is capable of forming a precedent for the use of delegated legislation in favour of primary legislation on the basis that, due to the inherent uncertainty of the Parliament's full legislative processes, it is the most convenient or preferred means to effect policy change. While the committee acknowledges the minister's advice that the end-dating of some measures 'demonstrates the bona fides of the Government that it would not permit a temporary mechanism to turn into a permanent legislative artefact', the committee considers that questions of duration are secondary to the fundamental question of whether the Parliament approves of the legislative approach.

Finally, the committee notes the minister's advice regarding the government's intentions in the event that the bill is amended or not passed by the Parliament:

> Regarding the Committee's question as to whether all or part of the Regulation will be repealed in the event the FOFA Bill is not passed by the Parliament, the Government is committed to working with the Senate to deliver our election commitment. I do not presume to pre-empt the outcome of this process.

The committee does not view consideration of the potential consequences of using regulation to implement fundamental changes that anticipate a particular legislative outcome on a bill as pre-emptive. As the committee has previously noted, it is in fact the pre-emptive character of the use of regulation in this case that gives rise to the

committee's inquiries. The committee's questions on this issue point to the significant possibility that the bill is not passed in a form which contains all the measures in the regulation. The committee considers that the potential for this approach, in this and future cases, to 'permit a temporary mechanism to turn into a permanent legislative artefact', or to continue in operation despite the clearly expressed will of the Parliament (for example, if the bill were passed with an amendment to remove one of the measures in the regulation), is critical to the assessment of whether the legislative approach offends the committee's scrutiny principle (d).

In light of these concerns about the potential inclusion of matters more appropriate for parliamentary enactment in primary legislation (scrutiny principle (d)), the committee draws this matter to the attention of senators. Noting the end-dating of the regulation, the committee leaves the question of whether the use of regulation is appropriate in this case to the Senate as a whole.

Accordingly, the committee has determined to withdraw the 'protective' notice of motion on the Corporations Amendment (Streamlining Future of Financial Advice) Regulation 2014 [F2014L00891].[3]

Issue:

Whether instrument is made in accordance with statute

Scrutiny principle (a) of the committee's terms of reference requires the committee to consider whether an instrument is in accordance with the statute. This principle is interpreted broadly as a requirement to ensure that instruments are made in accordance with their authorising Act as well as any constitutional or other applicable legal requirements.

The regulation is made under subsection 1364(1) of the *Corporations Act 2001* (the Act), which provides:

> The Governor-General may make regulations prescribing matters:
>
> (a) required or permitted by this Act to be prescribed by regulations; or
> (b) necessary or convenient to be prescribed by such regulations for carrying out or giving effect to this Act.

Without limiting subsection 1364(1), subsection 1364(2) of the Act specifies a number of purposes for which the regulations may make provision.

The ES for the instrument states that the regulation is intended to effect 'interim changes' until the Corporations Amendment (Streamlining of Future of Advice) Bill 2014 passes the Australian Parliament and receives Royal Assent, and that the interim changes will be repealed (to the extent appropriate) following the commencement of the Corporations Amendment (Streamlining of Future of Advice) Bill 2014.

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3 For details on the disallowance of instruments, see the Disallowance Alert at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts

In the committee's view, given that the regulation has been made as an interim measure until the passage of primary legislation, a question arises as to whether the regulation is permitted under subsections 1364(1) and (2) of the Act **[the committee therefore requested the advice of the minister in relation to this matter (*Delegated legislation monitor* No. 10 of 2014)].**

MINISTER'S RESPONSE:

The Minister for Finance and Acting Assistant Treasurer advised:

> In response to the second issue raised in the monitor, the Regulation is made under a number of different regulation-making powers within the Corporations Act, not just subsections 1364(1) and 1364(2). Specific regulation-making powers are included throughout Part 7.7 A of the Act, including: Division 2, the best interests obligation; Division 3, charging ongoing fees to clients; and Division 4, conflicted remuneration. The Australian Government Solicitor has advised that the Regulation has been made in accordance with the specific regulation-making powers in the Corporations Act; importantly, the Regulation is clearly related to the operation of the relevant provisions in the Corporations Act.

COMMITTEE RESPONSE:

[The committee made the following comments and requested the minister's response to the matters outlined below (*Delegated legislation Monitor* No. 12 of 2014)].

The committee thanks the minister for his response.

The committee notes the minister's advice that the regulation 'is made under a number of different regulation-making powers within the Corporations Act, not just subsections 1364(1) and 1364(2)'. Given the minister has referred to other enabling provisions in the Act, the committee understands that in this instance the regulation (which is made under subsection 1364(1) of the Act) is relying on the 'required or permitted' limb of the general regulation-making power rather than the 'necessary or convenient' limb of the power.

In relation to the best interests duty, the committee notes that section 961B(5) provides that regulations may prescribe:

> (a) a step, in addition to or substitution for the steps mentioned in subsection (2), that the provider must, in prescribed circumstances, prove that the provider has taken, to satisfy the duty in subsection (1); or
>
> (b) that the provider is not required, in prescribed circumstances, to prove that the provider has taken a step mentioned in subsection (2), to satisfy the duty in subsection (1); or
>
> (c) circumstances in which the duty in subsection (1) does not apply.

The regulation removes the 'catch-all' provision from the list of steps an advice provider may take to satisfy the best interests obligation. Given that removing the 'catch-all' provision is not 'required' by the Act, the committee understands the regulation is relying on the 'permitted' element of the power. However, a question arises as to whether removing the 'catch-all' provision in its entirety, so that it does not

apply in any circumstances, is 'permitted' under the apparently more limited 'prescribed circumstances' in which a step may be altered in section 961B(5) of the Act. Nor is it clear that the power in paragraph 961B(5)(c) to prescribe circumstances in which the duty in subsection (1) does not apply would authorise regulations which, in practical effect, amount to the repeal of that duty. **The committee therefore seeks further advice from the minister on this matter.**

In addition, it is not clear from the minister's response which regulation-making powers 'throughout Part 7.7A of the Act' are being relied on. **The committee therefore requests the minister's advice as to which specific provisions are being relied on in relation to each of the changes made by the regulation.**

Further, the committee notes the minister refers to legal advice obtained from the Australian Government Solicitor. On past occasions, the committee has sought and been provided with legal advice on matters of relevance to the application of the committee's scrutiny principles. **The committee therefore requests from the minister a copy of the legal advice obtained in relation to this matter.**

MINISTER'S RESPONSE:

Regarding the removal of the 'catch-all' provision, the Minister for Finance and Acting Assistant Treasurer advised:

> The Committee has sought further advice on the regulation-making powers in the Corporations Act 2001(the Corporations Act) under which the Regulation has been made. In particular, the Committee has queried Regulation 7.7A.3, which removes what is commonly referred to as the "catch-all" provision in the list of steps an advice provider may take to satisfy the best interests obligation.
>
> As identified in paragraph 7.7A.3(1)(a) of the Regulation, Regulation 7.7A.3 has been made pursuant to paragraph 961B(5)(b) in the Corporations Act. Paragraph 961 (5)(b) specifics that the regulations may prescribe "that the provider is not required, in prescribed circumstances, to prove that the provider has taken a step mentioned in subsection (2), to satisfy the duty in subsection (1)". I can advise the Committee that the relevant prescribed circumstance for the Regulation is when advice is provided in the time period between the commencement of the Regulation on 1 July 2014 and the end of 31 December 2015. As the catch-all provision will still apply to advice providers outside of the prescribed time period, Regulation 7.7A.3 does not remove the catch-all provision in its entirety.

The minister also provided details in relation to other regulation-making powers used to support the Regulation (see the minister's letter in Appendix 2).

Regarding the committee's request for legal advice from the Australian Government Solicitor, the minister advised:

> the Government does not generally disclose the content of legal advice received. It is a long-standing bipartisan position for the content of legal advice to not be made public because of its nature and the principles of legal professional privilege. In particular, it is important for any

> government to be able to make fully informed decisions based on comprehensive and confidential legal advice. This applies whether the legal advice is given in the context of litigation or otherwise.
>
> In the present case, the regulatory framework affects legal and commercial relationships between financial advisers and their clients and is an area that can give rise to legal disagreements—including contractual, equitable and statutory questions. Were it to be made public, internal government advice on the design of laws could misinform industry and community understanding, with a risk of influencing the course of commercial disputes. Financial advice is a commercial product that gives rise to a number of legal issues, so the risk is greater than speculative and the consequences can be significant. The nature of such legal advice to Government, provided for a public policy purpose, could—if taken out of its proper context—fuel misrepresentations about the actual state of the law, notwithstanding that such advice usually precedes legislative drafting work. Although such advice could not be presented as evidence in court cases, it could be used to misinform decision making by parties to disputes.
>
> Having consulted with the Attorney-General, and taking into account the Government's long-standing position regarding disclosing legal advice, I am of the view that disclosing legal advice from the Australian Government Solicitor would potentially prejudice the Commonwealth's interests. I have therefore decided to not provide the legal advice to the Committee on the grounds of public interest immunity. I advise the Committee that the grounds are that the material would disclose Cabinet deliberations, as well as material that is protected by legal professional privilege.

COMMITTEE RESPONSE:

The committee thanks the Minister for Finance and Acting Assistant Treasurer for his response.

The committee notes the minister's advice that the period between 1 July 2014 and 31 December 2015 is the relevant prescribed circumstance under paragraph 961(5)(b) of the Corporations Act; and that the regulation 'does not remove the catch-all provision in its entirety' as it 'will still apply…outside of the prescribed time period'. However, prescribing a time period as the relevant circumstance has the effect that, in this case, the catch-all provision does not apply in its entirety for the duration of the specified time. It follows that the practical outcome of prescribing a period of time as a 'prescribed circumstance' is to suspend the law for that period. In the committee's view, it may be doubted that the power to prescribe circumstances was intended to allow the law to be suspended for defined (and potentially lengthy) periods of time, particularly where a suspended provision may be defined as beneficial in character.

With regard to the provision of the legal advice from the Australian Government Solicitor, the committee notes the minister has advanced a claim of public interest immunity, essentially citing commercial damage to industry and Cabinet in-confidence as grounds for not disclosing that advice to the committee. While the committee does not necessarily regard the minister's claim as convincingly identifying

a specific harm in respect of these recognised public interest grounds, the committee will not press its request further in this case.[4]

The committee notes that the question of whether the regulation is authorised in this case remains open.

The committee therefore draws this matter to the attention of senators, and leaves the question of whether the regulation is made in accordance with statute (scrutiny principle (a)) to the Senate as a whole.

4 However, the committee does not accept the notion put forward by the minister that the non-disclosure of legal advice 'is a long-standing bipartisan position'. As the committee has noted on previous occasions, there exists no general government policy or practice which prevents departments from providing information containing legal (or any other) advice to the Senate and its committees. While the Senate has indicated some measure of acceptance of certain public interest immunity grounds for refusals to disclose information (in cases where a particular harm to the public interest is identified), it has consistently rejected any such refusals made simply on the basis that the requested information would disclose legal or other advice to government or a department. A full account of the Senate's approach to such matters may be found in *Odgers' Australian Senate Practice* (13th ed.) 595–625.

Appendix 5

Implementation of a general instrument-making power (previously 'Prescribing of matters by legislative rules')[1]

Introduction

The appropriateness and consequences of prescribing matters by instruments under a general instrument-making power recently introduced by the Office of Parliamentary Counsel (OPC) goes to the heart of the committee's institutional role and the principles which inform its operation.

As noted in *Odgers' Australian Senate Practice*, the delegation of the Parliament's legislative power to executive government 'has the appearance of a considerable violation of the principle of the separation of powers, the principle that laws should be made by the elected representatives of the people in Parliament and not by the executive government'.[2] This principle is effectively preserved through the committee's work scrutinising delegated legislation, and the Parliament's power to disallow delegated legislation.

In accordance with this critical role, the committee interprets its scrutiny principles 'broadly to include every possible deficiency in delegated legislation affecting parliamentary propriety and personal rights'.[3]

The matters raised by the general instrument-making power are significant and the scope of the change is likely to involve a wide range of legislative instruments. It is important to note therefore that, any one instrument aside, it is the principles engaged by the new power that are of concern to the committee. The issues raised so far have been canvassed through a series of instrument-based entries spread over numerous committee reports, and were also discussed at a private briefing with OPC (see the next section on 'background').

Background

The committee first raised concerns about prescribing matters by instruments under a general instrument-making power in relation to the Australian Jobs (Australian Industry Participation) Rule 2014 [F2014L00125] (industry rules) in *Delegated legislation monitor* No. 2 of 2014.[4] The committee noted the instrument relied on section 128 of the *Australian Jobs Act 2013*, which allowed for various matters in relation to that Act to be prescribed, by the minister, by legislative rules.

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1 The entry was originally published in *Delegated legislation monitor* No. 5 of 2014 (14 May 2014) (concluded in *Delegated legislation monitor* No. 17 (3 December 2014).

2 *Odgers' Australian Senate Practice*, 13th edn (2012) 413.

3 *Odgers' Australian Senate Practice*, 13th edn (2012) 438.

4 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor* No. 2 of 2014 (5 March 2014) 1–2.

In its initial comment, the committee noted the industry rules were made on the basis of a general instrument-making power not previously seen by the committee. Subsequent inquiries to the Minister for Industry and First Parliamentary Counsel (FPC) established that OPC had been implementing the general instrument-making power in Acts since 2013.[5] As other delegated legislation made under the general instrument-making power came to light, the committee reported on a range of matters arising from the introduction of the general instrument-making power in *Delegated legislation monitors* Nos 5, 6, 8, 9 10, 12 and 13 of 2014.[6]

To support consideration of the matter, the committee, in collaboration with the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee), convened a briefing on 3 September with two officers from OPC, Mr Peter Quiggin PSM, FPC, and Mr John Leahy SC PSM, Principal Legislative Counsel. Matters still outstanding from the briefing were placed as questions on notice by the committees.[7]

The general instrument-making power

Prior to 2013, the general instrument-making power under an Act was usually confined to regulations. The general power to make regulations is a broad delegation of the Parliament's law-making power. For example, section 62 of the *Legislative Instruments Act 2003* provides:

> The Governor-General may make regulations prescribing all matters:
>
> (a) required or permitted by this Act to be prescribed; or
>
> (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

Since 2013, however, a new general instrument-making power has been introduced that allows the instrument-maker to make instruments in relation to any matter as long as that matter is 'required or permitted' by the relevant provisions in the Act, or

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5 The *Parliamentary Counsel Act 1970* gives OPC a broad range of functions in relation to the drafting and publishing of legislation. Since the transfer of functions of the former Office of Legislative Drafting and Publishing (OLDP) to OPC in October 2012, these functions have included the drafting of delegated legislation.

6 In the course of its inquiries into the general instrument-making power, the committee has twice given notices of motion to disallow an instrument (see Senate Standing Committee on Regulations and Ordinances, Disallowance Alert 2014, Australian Jobs (Australian Industry Participation) Rule 2014 [F2014L00125] and Farm Household Support Secretary's Rule 2014, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts (accessed 20 October 2014)). Giving such a notice within the prescribed period for disallowance indicates committee concern about the instrument and is commonly referred to as a 'protective' notice. It preserves the right of the committee to move disallowance if the committee subsequently decides this is appropriate, and extends for a further 15 sitting days the period during which the committee has to resolve outstanding matters to its satisfaction (see *Odgers' Australian Senate Practice*,13th edn (2012) 432).

7 Correspondence from FPC including letters and answers to questions on notice is included in Appendix 1.

'necessary or convenient' for carrying out or giving effect to the Act. For example, section 128 of the *Australian Jobs Act 2013* provides:

> The Minister may, by legislative instrument, make rules (***legislative rules***) prescribing matters:
>
> (a) required or permitted by this Act to be prescribed by the legislative rules; or
>
> (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

It can be seen, therefore, that the general instrument-making power was created by simply substituting the making of 'rules' rather than 'regulations' within the standard form of the general power.

General instrument-making power as a new form of delegated legislation

In light of the above, the committee sought the advice of the minister as to the use of the general instrument-making power, noting that it appeared to be a new or 'novel' type of delegated legislation.

In correspondence on 13 March 2014, FPC stated that 'the approach taken in section 128 of the *Australian Jobs Act 2013* is not novel'. FPC provided several examples to support the claim that 'Commonwealth Acts have provided for the making of instruments rather than regulations for many years'.[8]

However, FPC's response appeared to misunderstand the essential distinction in classifying the general power to make 'legislative rules' as 'novel', insofar as it addressed generally the ability to make instruments other than regulations under Acts, rather than the particular case of providing for general instrument-making powers other than as a general power to make regulations. The committee noted that the examples cited by FPC in fact confirmed that the general instrument-making power was an innovation implemented only since 2013. This was also confirmed by revised Drafting Direction 3.8 (circulated on 6 March 2014 subsequent to the committee's inquiry), which stated:

> It has long been the practice to include general regulation making powers in Acts.
>
> More recently, an approach has been taken to adapt that practice for other legislative instruments.[9]

A further essential distinction in relation to the committee's inquiries on the matter is between this general power to make instruments (previously as regulations and now as rules) and the longstanding use of powers to make legislative instruments under Acts (usually) for more narrow specified purposes. The following are examples of such specific powers:

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8 First Parliamentary Counsel, letter (13 March 2014).

9 Office of Parliamentary Counsel, Drafting Direction No. 3.8 (6 March 2014) 4, http://www.opc.gov.au/about/docs/drafting_series/DD3.8.pdf (accessed 14 November 2014).

> The Minister may, by legislative instrument, determine vehicle standards for road vehicles or vehicle components;[10]
>
> The respite supplement for a particular day is the amount determined by the Minister by legislative instrument;[11]
>
> The Minister may, by legislative instrument, determine the weighted average disclosed price of a brand of a pharmaceutical item in accordance with the regulations.[12]

The general power to make instruments may also be distinguished from powers to make legislative instruments in relation to a subdivision or a part of an Act:

> The Minister may, by legislative instrument, make rules (the infrastructure project designation rules) prescribing matters:
>
> required or permitted by this Subdivision to be prescribed by the rules; or
>
> necessary or convenient to be prescribed for carrying out or giving effect to this Subdivision.[13]
>
> The Minister may, by legislative instrument, make Orders prescribing matters required or permitted by this Part to be prescribed.[14]

Consequences of providing for a general instrument-making power

The committee notes that regulations are subject to a number of requirements which effectively provide a higher level of executive oversight than applies to the making of other types of delegated legislation. These are:

- regulations must be made by the Governor-General;
- regulations must be approved by the Executive Council (ExCo); and
- regulations must be drafted cost-free by the OPC (referred to as 'tied work').

These requirements do not apply to the making of rules and other types of delegated legislation, including any that are made under the new general instrument-making power, which means:

- such instruments may be made by ministers, secretaries and other designated persons;
- such instruments do not need to be approved by ExCo (or any other body); and

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10 *Motor Vehicle Standards Act 1989*, section 7.

11 *Aged Care Act 1997*, subsection 44-12(3).

12 *National Health Act 1953*, subsection 99ADB(4).

13 *Income Tax Assessment Act 1997*, section 415-100.

14 *Superannuation Act 1976*, section 146MH.

- departments and agencies have responsibility for drafting such instruments (and may choose to draft them in-house or pay to have them drafted by OPC or another professional drafter).

In answer to the committee's specific inquiries as to the fundamental or original reason for requiring regulations to be drafted by OPC and made by the Governor-General, FPC responded as follows:

> The reason that the drafting of these instruments is tied to OPC under the Legal Services Direction is that they are made or approved by the Governor-General and not by another rule-maker, rather than because of their content.[15]

By contrast, the committee considers that, given the broad delegation on which the general regulation-making is usually based, and the critical role of regulations in fleshing out the operation of primary legislation, the longstanding procedural and drafting arrangements that apply to regulations may be seen (from a parliamentary scrutiny perspective) as a necessary accompaniment to the exercise of Parliament's broadly delegated legislative power.

The committee regards it as significant that, up until the implementation of a general instrument-making power in 2013, the executive exercise of the Parliament's delegated legislative power via a broadly expressed regulation-making power has been accompanied by the concomitant responsibility of close executive oversight. The requirements for such instruments to be made by the Governor-General, and the tying of the drafting of such instruments to OPC, may be seen as a necessary accompaniment to the exercise of a broadly expressed delegated power to make legislation, taking into account its nature, critical role in informing the operation of primary legislation and potential to include material that of itself or cumulatively may be both important and complex.

The committee's view stands in contrast to the proposition that the requirement for OPC to draft regulations is a mere consequence of their being made by the Governor-General.

Reasons for implementing the general instrument-making power

In simple terms, the general instrument-making power has been implemented to be used in place of regulations, so that OPC is required to draft fewer regulations. FPC provided the following justifications for implementing the general instrument-making power:

- OPC does not have the resources to draft all Commonwealth legislation, nor is it appropriate to do so; OPC should therefore concentrate its resources on drafting only a narrow band of regulations, being those with (a) particular sensitivities or risks and (b) that are especially 'bound to the work of the executive'; and

15 First Parliamentary Counsel, letter (23 May 2014) 3.

- the general instrument-making power will enable a rationalisation of the many different types of delegated legislation made under Acts.[16]

In correspondence to the committee dated 2 July 2014, FPC noted his view that the use of regulations for the prescribing of matters has previously been done without consideration of the nature of the material itself, with the result that OPC has been required to draft regulations dealing with 'less important matters':

> In the past there has been no clear guidance about the appropriate division of material between regulations and other legislative instruments. As a result, material seems to have been allocated between regulations and other legislative instruments without any consideration of the nature of the material itself. Less important matters of detail have sometimes been included in regulations while more important matters have been included in a wide range of other types of legislative instruments.[17]

Issues

The committee's inquiries into the use of the general instrument-making power have focused on the following general and more specific issues:

- scope of the general power;
- consequences of the general instrument-making power for the quality of drafting;
- assessing whether instruments contain matters more appropriate for regulations;
- regulations to prevail in the event of conflict;
- delegation of the general instrument-making power; and
- consultation over the implementation of the general instrument-making power.

Scope of the general power

In his responses, FPC generally characterised the general instrument-making power as typically constrained in its application by the authorising provisions in the Act.

In particular, FPC observed that the "required or permitted' instrument-making power in an Act gives no power to make rules beyond that authorised by the other provisions of the Act', and therefore it 'does not add to the powers provided by other provisions of the Act, but merely provides a single source for the exercise of those powers'.[18]

Regarding the 'necessary or convenient' limb of the general power, FPC observed:

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16 First Parliamentary Counsel, letters (13 March 2014) 3 and (23 May 2014) 3.

17 First Parliamentary Counsel, letter (2 July 2014) 3.

18 First Parliamentary Counsel, letter (6 August 2014) 3.

> A 'necessary or convenient' power is a limited power. It is not an open-ended power nor necessarily an extensive power. The rules for the interpretation of a 'necessary or convenient' power are well established. In particular, the fact that a matter might be regarded as necessary or convenient does not necessarily mean that provision can be made about the matter under the power. A rule cannot *supplement* the Act. It can only *complement* the Act and prescribe matters that are confined to the same field of operation of the Act.[19]

FPC noted that only a very small percentage of delegated legislation (less than one per cent) relies on the 'necessary or convenient' limb of the broadly expressed power.[20] By extension, this means that the vast majority of the prescribing of matters relies on the 'required or permitted' limb of the power, which operates in conjunction with the provisions in the enabling Act. He concluded:

> It follows that I do not agree there is anything intrinsic in the standard general rulemaking power that represents a real threat to the quality of Commonwealth subordinate legislation.

However, the committee considers that by making provision for non-professional drafters to draft instruments in reliance on the 'necessary or convenient' power represents a risk that misjudgements about whether matters specified in an instrument are in fact complementary and confined to the same field of operation as the Act under which they are made. The committee therefore intends to closely monitor this particular aspect of drafting of instruments and, accordingly, expects that ESs will henceforth indicate where an instrument is made in reliance on the 'necessary or convenient' power.

In this respect, the committee notes OPC's view that:

> …it would be appropriate for the Regulations and Ordinances Committee to require that the explanatory statement should state when the necessary or convenient power has been relied on for the making of an instrument.[21]

The committee therefore notes its expectation that ESs indicate when the 'necessary or convenient' power has been relied on for the making of an instrument.

Consequences of the general instrument-making power for the quality of drafting

The committee's key concern throughout its inquiries has been the potential for the general instrument-making power to adversely impact on drafting quality, due to the lower level of executive oversight (compared to regulations), and the absence of a requirement that such instruments be drafted by OPC (meaning that departments and agencies may elect to have drafting performed by non-expert drafters).

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19 First Parliamentary Counsel, letter (6 August 2014) 3.

20 First Parliamentary Counsel, answer to question on notice no. 21 (23 September 2014).

21 First Parliamentary Counsel, answer to question on notice no. 22 (23 September 2014).

The committee's concern arises from the fact that, as with regulations previously, the general instrument-making power will be used to provide much of the legislative detail for the operation of Acts. Such instruments may therefore be lengthy and complex, covering all manner of subject matter within the field of operation of an Act (for example, Acts often provide the skeleton of a legislative scheme that is then substantially 'fleshed out' by regulations)

Any appreciable lowering of drafting standards arising from more widespread non-expert drafting of instruments could impact adversely on the committee, particularly to the extent that this would effectively transfer the task of policing drafting standards from OPC to the committee (in respect of those instruments). In this regard, the committee does not have sufficient expertise and resources to perform this task as effectively as the expert and professional drafters and officers in OPC.

Further, because the committee only examines instruments that are already in force, the committee has only limited options for dealing with problematic instruments, which is to either request they be remade or to disallow them.

Given the above, the committee regards it as unclear whether and how the high standards achieved by OPC drafters will be maintained in the drafting of instruments based on the general power, where departments and agencies elect to draft these in-house.

In response to the committee's concerns regarding drafting quality, FPC submitted that OPC did not foresee particular risks in legislative schemes being filled out by rules rather than regulations.[22] In his letter of 23 May 2014, FPC stated that the innovation would 'contribute to raise the standards of legislative instruments overall' through departments and agencies recognising the quality of OPC's drafting work, and therefore electing to pay OPC for the drafting of work that would previously have been included in regulations (and thus drafted by OPC on a cost-free basis).

FPC further submitted that the anticipated increase in billable work would put 'OPC…in a better position to increase its overall drafting resources and to take further steps to raise the standards of instruments that it does not draft'.[23]

Beyond this, the committee notes OPC's advice that it was 'not planning to systematically monitor the quality of rules drafted by departments or agencies' to assess the impacts of the general instrument-making power.

However, OPC submitted that it had 'commenced substantial work to try to improve the general standard of legislative instruments',[24] including the reissued Legislative Instruments Handbook, an increase in billable settling services provided on request to agencies, and an increase in the drafting of untied instruments (including rules) for

22 First Parliamentary Counsel, answer to question on notice no. 3 (23 September 2014).

23 First Parliamentary Counsel, letter (23 May 2014) 4.

24 First Parliamentary Counsel, answers to questions on notice, nos 9 and 23 (23 September 2014).

other agencies.[25] In a document provided subsequent to the briefing, FPC listed the following measures taken to enhance the quality of legislative instruments and the Commonwealth statute book generally:

- harmonisation of drafting standards and style;
- development of broader instrument drafting expertise and active engagement with agencies in relation to untied instruments;
- development of further guidance to agencies in relation to managing and drafting legislative instruments;
- rationalisation of legislative instrument making powers and limiting the proliferation of the types of legislative instruments;
- rationalisation of legislative instruments and working with agencies to manage sunsetting; and
- legislative instrument framework reform.[26]

In the committee's view, the question of OPC's efforts to monitor the impact of the general instrument-making power on the quality of drafting of instruments, and more generally to promote higher standards of drafting in instruments, is best viewed through the prism of FPC's responsibility under section 16 of the *Legislative Instruments Act 2003*,[27] which provides:

> To encourage high standards in the drafting of legislative instruments, the First Parliamentary Counsel must cause steps to be taken to promote the legal effectiveness, clarity, and intelligibility to anticipated users, of legislative instruments.

In light of FPC's obligations in this regard, the committee is concerned that it is unable, on the basis of the information provided, to properly assess what impacts the general instrument-making power may have on drafting quality overall. In particular, the committee notes that the apparent mechanism by which OPC hopes for increased billable work to fund its drafting and drafting support services will fundamentally rely on decisions of departments and agencies as to whether to use OPC's drafting services. Given that such decisions may be influenced by factors outside of OPC's control (such as budgetary considerations), the committee remains concerned that drafting standards will suffer under the move to the general instrument-making power.

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25 First Parliamentary Counsel, answers to questions on notice, nos 23 and 24 (23 September 2014).

26 Office of Parliamentary Counsel, Measures taken to enhance the quality of legislative instruments (23 September 2014).

27 These responsibilities remain effectively unchanged by the Acts and Instruments (Framework Reform) Bill 2014.

More generally, the committee notes that the furtherance of FPC's obligations under section 16 of the LIA is important to ensure that any potential adverse impacts on implementing the general instrument-making power are avoided.

The committee therefore recommends that OPC annual reports include reporting on the steps that FPC has taken to fulfil his statutory obligations under section 16 of the *Legislative Instruments Act 2003*.

The committee considers that the effectiveness of OPC's intended mechanism for achieving higher drafting standards following the implementation of the general instrument making power is likely to be highly contingent on the effectiveness of OPC in presenting itself as an engaged, responsive and competitive provider of drafting services. The committee's remarks below in relation to consultation are relevant in this regard.

Assessing whether instruments contain matters more appropriate for regulations

As noted above, FPC's justification for the implementation of the general instrument-making power includes the view that, as many regulations contain matters that do not have particular sensitivities or risks, they should not be required to be drafted by OPC (known as 'tied work').

The committee's inquiries have clarified that the use of the general instrument-making power is dependent on the initial assessment of the character or quality of matters to be prescribed. This is because, as confirmed by FPC in his letter of 13 March 2014, certain matters are not, without 'strong justification', regarded as appropriate for inclusion in instruments and should therefore be included in regulations and drafted by OPC (that is, should be subject to the higher level of executive oversight). These matters were set out as follows in Drafting Direction 3.8 (dated 6 March 2014):

- offence provisions;
- powers of arrest or detention;
- entry provisions;
- search provisions; and
- seizure provisions.[28]

In addition, Drafting Direction 3.8 advises that drafters should 'see FPC to discuss whether any of the following matters should also be dealt with by regulation or another type of instrument':

- civil penalties;
- imposition of taxes;

28 Office of Parliamentary Counsel, Drafting Direction 3.8 (6 March 2014) 3.

- setting the amount to be appropriated where the Act provides the appropriation and authority to set the amount; and
- politically sensitive provisions.[29]

In this regard, it is important to note that Drafting Direction 3.8 is a policy statement and not a mandatory requirement. The committee therefore sought clarification from OPC as to who will make decisions about whether there is a 'strong justification' to include such matters in rules; whether consultation with OPC will be mandatory or at the discretion of departments; and whether OPC's view in such cases will be decisive or merely advisory.

In response, FPC advised that OPC will initially make the decision about the inclusion of significant matters in regulations. Further, 'OPC would be closely involved' given that the matter would generally 'be determined at the time of drafting the Bill'.[30] However, in the event of an unresolved difference of view between a department or agency and OPC as to whether there is a 'strong justification' for including significant matters in rules, 'the Government (generally through the Prime Minister) would need to decide the matter'.[31]

In light of FPC's advice that certain provisions (noted above) should be included in regulations and drafted by OPC unless there is a strong justification for prescribing those provisions in another type of instrument, the committee questioned how those provisions would be introduced in the absence of a regulation-making power. This question appears particularly pertinent given that several recent Acts that have the general instrument-making power do not actually contain a regulation-making power. FPC advised:

> If such provisions are required for an Act that includes only a general rule-making power, it would be necessary to amend the Act to include a regulation-making power that expressly authorises the provisions.[32]

In light of these matters, the committee's consideration of the Jervis Bay Territory Rural Fires Ordinance 2014 [F2014L00443] and the Jervis Bay Territory Rural Fires Rule 2014 [F2014L00533] is instructive.[33] The ordinance contained the standard form of the new general instrument-making power (in this case, 'rules'), and provided for the prescribing of offences by rule in subsection 98(3). Noting that the ESs for the ordinance and the rule contained no justification for the authorising of offence provisions via rules rather than regulation, the committee sought further information

29 Office of Parliamentary Counsel, Drafting Direction 3.8 (6 March 2014) 3–4.

30 First Parliamentary Counsel, answer to question on notice no. 13 (23 September 2014).

31 First Parliamentary Counsel, answer to question on notice no. 14 (23 September 2014).

32 First Parliamentary Counsel, letter (23 May 2014) 7.

33 See *Delegated legislation monitor* No. 6 of 2014.

from the minister.[34] The Assistant Minister for Infrastructure and Regional Development subsequently advised that the drafting of the ordinance:

> …ran in parallel to the Office of Parliamentary Counsel's development of its formal policy on the preparation of subordinate legislative instruments, including in relation to regulation-making powers and the appropriateness of offence provisions to be included under a rule-making power.
>
> The Department of Infrastructure and Regional Development will work with the Office of Parliamentary Counsel to address the comments made by the Committee, including amending the Ordinance to expressly create a regulation-making power, amending the Rule to remove all offence provisions and drafting Regulations with the offence provisions.[35]

The committee concluded its examination of the instruments on the basis of the information provided. However, the committee noted that the assistant minister's advice raised a number of questions in relation to the committee's inquiries into the new approach:

> In particular, the committee notes the assistant minister's advice that the drafting of the Ordinance, and the inclusion of offences in the rules (authorised by express provision), ran 'in parallel' to OPC's development of its formal policy on the appropriateness of offence provisions to be included under a rule-making power.
>
> As the committee has previously noted, on 6 March 2014 (subsequent to the committee's initial comments on the matter), OPC circulated revised Drafting Direction No. 3.8, which included the addition of extensive instruction on the use of 'general instrument-making powers' of this kind. The direction included the guidance that 'some types of provisions should be included in regulations and be drafted by OPC [without] strong justification for prescribing those provisions in another type of legislative instrument'. The committee understood this to be a settled statement of the policy on the use of the general rule-making power.
>
> With reference to these points, the committee notes that the assistant minister's undertaking appears to suggest that, while the inclusion of offence provisions in the rules satisfied legal criteria for validity, there was not a sufficiently 'strong justification' for making provision for the prescribing of offences by rules in this case. This is of particular interest to the committee because, as noted above, the committee's inquiries to date have shed little light on what would constitute a 'strong justification' for the inclusion of such matters in rules or, indeed, who will be responsible for the making of such judgements.
>
> The assistant minister's advice also gives rise to questions regarding the policy development process in relation to the general-rule making power,

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34 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor* No. 6 of 2014 (18 June 2014) 22–24.

35 The Hon Jamie Briggs MP, Assistant Minister for Infrastructure and Regional Development, letter (2 July 2014).

> and whether the implementation of the power has been done on the basis of a sufficiently well developed and articulated policy on its use.[36]

FPC also responded to this particular matter in his letter of 6 August 2014:

> Instructions for the drafting of this Ordinance were received in April 2013. By the time DD3.8 was reissued in March 2014 the then draft Ordinance had been the subject of extensive consultation by the administering Department and the drafting of the Ordinance was substantially complete. The Ordinance was made on 24 April 2014. In this case, I agree that it may have been better to have applied DD3.8 to the Ordinance before it was made, even though drafting of the Ordinance started before, and was substantially complete, when DD3.8 was reissued. This will be done if any similar transitional cases arise in the future.[37]

The committee thanked FPC for his response and concluded its interest in the ordinance and the rule subject to the undertakings given by the assistant minister.[38]

In response to the committee's further inquiries as to whether other Acts should be amended to reflect the policy statement that certain provisions (such as civil penalties) should not be included in instruments other than regulations without strong justification, FPC advised:

> As Drafting Direction 3.8 states, OPC believes that this part of the Drafting Direction reflects the law. That is, without an explicit power to include such provisions, they could not be included in a legislative instrument (including a rule or a regulation).
>
> OPC is currently working with the Attorney-General's Department on the best way of implementing the position set out in the Drafting Direction.
>
> As mentioned above, it is a matter for Government whether to amend existing legislation. However, once the long term approach that will be adopted to this issue is completely settled, OPC will discuss with agencies who are responsible for recent legislation whether they would support amending the legislation to bring it into line.[39]

The committee acknowledges that any new policy may have unintended consequences. Nevertheless, in light of the above, the committee is concerned that it has been unable, on the basis of the information provided, to reach a definitive understanding of the basis on which matters which would otherwise be considered suitable only for regulations are able to be included in other types of instruments—that is, what factors or criteria are or may be relevant to establishing that there is a 'strong justification' for not prescribing certain matters in regulations.

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36 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor* No. 9 of 2014 (16 July 2014) 26–27.

37 First Parliamentary Counsel, letter (6 August 2014) 5.

38 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor* No. 10 of 2014 (27 August 2014) 55–60.

39 First Parliamentary Counsel, answer to question on notice no. 20 (23 September 2014).

The committee therefore intends to closely monitor this particular aspect of drafting of instruments and, accordingly, expects that ESs will henceforth indicate what is considered to be the 'strong justification' in support of such an approach.

The committee therefore notes its expectation that ESs identify a 'strong justification' for not prescribing certain matters in regulations, and set out the factors or criteria relevant to that justification.

The committee's consideration of this aspect of the implementation of the general instrument-making power draws into particular focus significant concerns over the timing and implementation of the new policy direction, and particularly the apparent implantation of the general instrument-making power in the absence of any policy statement governing its use.

As noted above, revised Drafting Direction 3.8 (containing guidance on the new general instrument-making power) was reissued in March 2014 subsequent to the committee's initial inquiries on the matter,[40] and approximately 12 months after the new general instrument-making power had already been implemented in numerous Acts made in 2013.

Indeed, notwithstanding the committee's inquiries, the committee notes that the policy guidance on the use of the general instrument-making power remains unsettled nearly two years since OPC commenced its implementation.

The committee's concerns about the implementation of an innovation of this kind in the absence of any settled policy or policy guidance aside, the committee has significant concerns about whether and how Acts containing the general instrument-making power will be reviewed to ensure consistency with the policy guidance once it is settled. Where Acts or instruments (such as the Jervis Bay Territory Rural Fires Ordinance 2014 discussed above) are not in accordance with the policy guidance (once settled), the committee considers that such Acts and instruments should be brought into conformity with that guidance.

The committee therefore recommends that the Attorney-General take steps to ensure that Drafting Direction 3.8 be settled as soon as possible; and subsequently to identify and correct any instances of legislation inconsistent with the settled statement of policy on the use of the general instrument-making power.

Regulations to prevail in the event of conflict

The Scrutiny of Bills committee raised a question as to which instrument would prevail in the event of a conflict between a rule and an instrument made on the basis of the general instrument-making power. The committee notes that FPC indicated at the briefing that OPC was considering whether to amend Drafting Direction 3.8 to require that instruments include a provision to specify that, in the event of a conflict, regulations will prevail over rules.

40 First Parliamentary Counsel, letter (6 August 2014) 5.

The committee seeks the advice of FPC as to the progress of consideration of whether to amend Drafting Direction 3.8 to require that instruments include a provision to specify that, in the event of a conflict, regulations will prevail over rules.

Delegation of the general instrument-making power

In *Delegated legislation monitor* No. 8 of 2014 the committee drew attention to a potential delegation of the general instrument-making power (in this case a general power to make 'rules') with regard to the Farm Household Support Secretary's Rule 2014 [F2014L00614].

The committee noted that section 101 of the *Farm Household Support Act 2014* provided for the secretary to delegate their powers to officers below the Senior Executive Officer level. The committee also noted that the EM for the Farm Household Support Bill 2014 stated that the delegation powers were 'intentionally broad' for operational reasons. Noting the operational reasons cited in the EM, the committee questioned whether the secretary's general rule-making powers under section 106(2) may be delegated under section 101 and, if so, what considerations might apply in that case.[41]

The Minister for Agriculture confirmed there was 'no legal impediment' to the secretary delegating their general rule-making power, but noted that he did not 'foresee any circumstances' where this might be necessary.[42]

The Minister for Infrastructure and Regional Development subsequently advised that the departmental secretary had 'no intention of delegating his rule making powers' and did not consider it to be necessary at present.[43]

The committee noted the minister's advice that the delegation of the general rule-making power was neither intended nor necessary. The committee also pointed to the scrutiny preference, as expressed by the Scrutiny of Bills committee, that the delegation of legislative power be only as broad as strictly required. The committee therefore requested that the *Farm Household Support Act 2014* be amended to specifically exclude the delegation of the general rule-making power.[44]

The Minister for Agriculture advised that the *Farm Household Support Act 2014* would be amended 'as the opportunity arises' to specifically exclude the delegation of the secretary's general rule-making power.[45] The committee thanked the minister for

41 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor* No. 8 of 2014 (9 July 2014) 1–4.

42 The Hon Barnaby Joyce MP, Minister for Agriculture, letter (5 August 2014) 3.

43 The Hon Warren Truss MP, Minister for Infrastructure and Regional Development, letter (16 September 2014) 2.

44 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor* No. 12 of 2014 (24 September 2014) 16.

45 The Hon Barnaby Joyce MP, Minister for Agriculture, letter (30 September) 1.

his undertaking to amend the legislation[46] (and accordingly withdrew the notice of motion to disallow the instrument).[47]

The committee notes that other recent Acts might have unnecessarily authorised the broad delegation of the general instrument-making power. Accordingly, the committee sought clarification as to whether those Acts should also be amended. FPC advised:

> It is a matter for Government whether to amend existing legislation. However, once the long term approach that will be adopted to this issue is completely settled, OPC will discuss with agencies who are responsible for recent legislation whether they would support amending the legislation to bring it into line.
>
> It is however noted that there are a very large number of existing Acts, many of which have been in force for many years, which provide for the making of instruments and provisions in these limiting delegation are rare (assuming that there are any). It is not proposed to address this at this time.[48]

The committee is concerned by this response because it appears recent Acts may have been drafted in a manner that does not prevent the inappropriate delegation of the general rule-making power, thereby offending against the scrutiny principle that the delegation of power be only as broad as strictly required.

The committee therefore notes its expectation that the delegation of power provided for in instruments be only as broad as strictly required.

The committee notes that the above recommendation is also relevant to addressing this concern, insofar as it asks the Attorney-General to take steps to ensure that Drafting Direction 3.8 be settled as soon as possible, and to subsequently identify and correct any instances of legislation inconsistent with the settled statement of policy on the use of the general instrument-making power.

Consultation over the implementation of the general instrument-making power

The committee thanks FPC and the responsible ministers for their engagement and cooperation on this issue, and notes the various ministerial undertakings to amend Acts, ordinances and rules. These positive developments are to be understood as, in one sense, a corrective to the severe shortcomings of the policy development and implementation process of the general instrument-making power.

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46 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor* No. 13 of 2014 (1 October 2014) 6–14.

47 Senate Standing Committee on Regulations and Ordinances, Disallowance Alert 2014, Farm Household Support Secretary's Rule 2014, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts (accessed 20 October 2014).

48 First Parliamentary Counsel, answer to question on notice no. 18 (23 September 2014).

The committee considers that significant changes in agency policy regarding the making of primary and delegated legislation should be the subject of substantial consultation with the Parliament. In this regard, the committee notes that consultation did not occur in this instance and, further, that the treatment of the legislative changes in various EMs was either absent or inadequate.[49]

The committee's inquiries into this matter have revealed the apparently inappropriate inclusion of significant matters in rules, and the potential for the inappropriate delegation of a broad power, and both cases strongly suggest that the general instrument-making power was implemented at a time prior to the settling of established policy guidance on the new power. The committee considers that, had appropriate consultation been undertaken early in the development of the new policy, matters of particular concern could have been discussed, and potentially inconsistent practices could have been avoided.

In light of the outstanding matters of concern identified above, the committee notes its intention to continue to monitor the general instrument-making power and the settling of the policy guidance on its use.

49 For a full discussion of the identification of the general instrument-making power in EMs, see Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor* No. 5 of 2014 (14 May 2014) 4.

Appendix 6

Guideline on consultation

Purpose

This guideline provides information on preparing an explanatory statement (ES) to accompany a legislative instrument, specifically in relation to the requirement that such statements must describe the nature of any consultation undertaken or explain why no such consultation was undertaken.

The committee scrutinises instruments to ensure, inter alia, that they meet the technical requirements of the *Legislation Act 2003* (the Act)[1] regarding the description of the nature of consultation or the explanation as to why no consultation was undertaken. Where an ES does not meet these technical requirements, the committee generally corresponds with the relevant minister or instrument-maker seeking further information and appropriate amendment of the ES.

Ensuring that the technical requirements of the Act are met in the first instance will negate the need for the committee to write to the relevant minister or instrument-maker seeking compliance, and ensure that an instrument is not potentially subject to disallowance.

It is important to note that the committee's concern in this area is to ensure only that an ES is technically compliant with the descriptive requirements of the Act regarding consultation, and that the question of whether consultation that has been undertaken is appropriate is a matter decided by the instrument-maker at the time an instrument is made.

However, the nature of any consultation undertaken may be separately relevant to issues arising from the committee's scrutiny principles, and in such cases the committee may consider the character and scope of any consultation undertaken more broadly.

Requirements of the *Legislation Act 2003*

Section 17 of the Act requires that, before making a legislative instrument, the instrument-maker must be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument.

It is important to note that section 15J of the Act requires that ESs describe the nature of any consultation that has been undertaken or, if no such consultation has been undertaken, to explain why none was undertaken.

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1 On 5 March 2016 the *Legislative Instruments Act 2003* became the *Legislation Act 2003* due to amendments made by the *Acts and Instruments (Framework Reform) Act 2015*.

It is also important to note that requirements regarding the preparation of a Regulation Impact Statement (RIS) are separate to the requirements of the Act in relation to consultation. This means that, although a RIS may not be required in relation to a certain instrument, the requirements of the Act regarding a description of the nature of consultation undertaken, or an explanation of why consultation has not occurred, must still be met. However, consultation that has been undertaken under a RIS process will generally satisfy the requirements of the Act, provided that that consultation is adequately described (see below).

If a RIS or similar assessment has been prepared, it should be provided to the committee along with the ES.

Describing the nature of consultation

To meet the requirements of section 15J of the Act, an ES must describe the nature of any consultation that has been undertaken. The committee does not usually interpret this as requiring a highly detailed description of any consultation undertaken. However, a bare or very generalised statement of the fact that consultation has taken place may be considered insufficient to meet the requirements of the Act.

Where consultation has taken place, the ES to an instrument should set out the following information:

- **Method and purpose of consultation**: An ES should state who and/or which bodies or groups were targeted for consultation and set out the purpose and parameters of the consultation. An ES should avoid bare statements such as 'Consultation was undertaken'.
- **Bodies/groups/individuals consulted**: An ES should specify the actual names of departments, bodies, agencies, groups et cetera that were consulted. An ES should avoid overly generalised statements such as 'Relevant stakeholders were consulted'.
- **Issues raised in consultations and outcomes**: An ES should identify the nature of any issues raised in consultations, as well as the outcome of the consultation process. For example, an ES could state: 'A number of submissions raised concerns in relation to the effect of the instrument on retirees. An exemption for retirees was introduced in response to these concerns'.

Explaining why consultation has not been undertaken

To meet the requirements of section 15J of the Act, an ES must explain why no consultation was undertaken. The committee does not usually interpret this as requiring a highly detailed explanation of why consultation was not undertaken. However, a bare statement that consultation has not taken place may be considered insufficient to meet the requirements of the Act.

In explaining why no consultation has taken place, it is important to note the following considerations:

- **Absence of consultation**: Where no consultation was undertaken the Act requires an explanation for its absence. The ES should state why consultation was unnecessary or inappropriate, and explain the reasoning in support of this conclusion. An ES should avoid bare assertions such as 'Consultation was not undertaken because the instrument is beneficial in nature'.
- **Timing of consultation**: The Act requires that consultation regarding an instrument must take place before the instrument is made. This means that, where consultation is planned for the implementation or post-operative phase of changes introduced by a given instrument, that consultation cannot generally be cited to satisfy the requirements of sections 17 and 15J of the Act.

In some cases, consultation is conducted in relation to the primary legislation which authorises the making of an instrument of delegated legislation, and this consultation is cited for the purposes of satisfying the requirements of the Act. The committee may regard this as acceptable provided that (a) the primary legislation and the instrument are made at or about the same time and (b) the consultation addresses the matters dealt with in the delegated legislation.