

The Senate

Standing
Committee on
Regulations and
Ordinances

Parliamentary scrutiny of delegated
legislation

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Membership of the Committee

45th Parliament

Senator John Williams (Chair)	New South Wales, NAT
Senator Gavin Marshall (Deputy Chair)	Victoria, ALP
Senator Anthony Chisholm	Queensland, ALP
Senator Steve Martin	Tasmania, NAT
Senator the Hon Lisa Singh	Tasmania, ALP
Senator Amanda Stoker	Queensland, LP

Secretariat

Ms Anita Coles, Secretary
Ms Laura Sweeney, Principal Research Officer
Mr Andrew McIntyre, Senior Research Officer
Ms Katie Helme, Legislative Research Officer

Committee legal adviser

Associate Professor Andrew Edgar

Committee contacts

PO Box 6100
Parliament House
Canberra ACT 2600
Ph: 02 6277 3066
Email: regords.sen@aph.gov.au
Website: http://www.aph.gov.au/senate_regord_ctte

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Chair and Deputy Chair's foreword

A fundamental principle of parliamentary democracy is that the law should be made by the elected representatives of the people in Parliament. However, despite this, around half the law of the Commonwealth is delegated legislation; that is, law made by or on behalf of the executive government. Too little is known about the role delegated legislation plays in the Australian legal landscape. Parliament routinely delegates its law making powers to ministers, agency heads and senior public servants. While it is often necessary for Parliament to delegate these powers, as it doesn't always have the time or expertise to deal with the technical details underpinning the law, it is essential that Parliament scrutinise such legislation to guard against the inappropriate exercise of executive power.

The Senate Standing Committee on Regulations and Ordinances (the committee) has performed this role on behalf of the Parliament for almost 90 years. It is one of the oldest standing committees in the Australian Parliament and has spawned numerous similar parliamentary scrutiny committees across Australia and internationally. The committee has always adopted a non-partisan commitment to principles of technical scrutiny, setting aside party politics and policy considerations to focus on issues of general principle affecting the rights of people and Parliament.

While the committee has been one of the Commonwealth Parliament's most active and important committees, after almost 90 years of operation it is important to inquire into the committee's continuing effectiveness and future direction. The significant work of the committee can be undermined by a lack of understanding of the role Parliament plays in exercising control over delegated legislation and the essential role the committee plays. When the committee draws its concerns about delegated legislation to the Senate's attention it is high time that all parliamentarians and the government of the day listen to those concerns and take action to resolve them.

Part II of this report makes a number of recommendations to improve the committee's existing scrutiny practices – including updating its terms of reference, bringing its powers in line with other standing committees and updating and expanding the principles by which it scrutinises delegated legislation. Currently around three-quarters of the committee's comments fall under one of its scrutiny principles – whether delegated legislation 'is in accordance with the statute'. This general description does not indicate the vast range of matters the committee considers. Additional principles should be adopted to clarify the scope of the committee's existing scrutiny functions and to provide clearer guidance as to its role. Additionally, the committee's current approach to reporting to the Senate may not be the most effective way of highlighting its scrutiny concerns. The report therefore sets out a number of actions the committee will take to improve its work practices and highlight its important work.

Part III of the report considers the adequacy of the existing framework for parliamentary control and scrutiny of delegated legislation. Unlike many other parliaments, the Australian Parliament has considerable control over delegated legislation (through its power to veto, or disallow, legislative instruments made by the executive). Yet, in practice, it is difficult for parliamentarians to keep abreast of the hundreds of instruments tabled each year, and all too often significant matters of policy are left to be determined by delegated legislation (despite the warnings of the Senate Standing Committee for the Scrutiny of Bills). While the committee draws its technical scrutiny concerns about delegated legislation to the Senate's attention, there is no consistent scrutiny of its policy implications. Therefore, where delegated legislation gives rise to significant issues, policy committees should be notified and consider whether to conduct an inquiry into its policy merits.

In addition, parliamentary control over delegated legislation is undermined when delegated legislation is exempted from disallowance or sunseting. It is particularly concerning when this exemption is itself provided for in delegated legislation. There should be strict limits on when delegated legislation can be exempted from disallowance or sunseting, to ensure adequate parliamentary control. In addition, the law should be publicly available and understood before it comes into force. As a general rule, delegated legislation should commence 28 days after registration (rather than the day after registration), to allow people affected by the law to foresee the legal consequences of their actions.

As parliamentarians, we owe it to the Australian people to act independently, and to remove from the statute book delegated legislation which does not respect individual rights and liberties or the right of Parliament to control the content of the law. The committee will continue to maintain its non-partisan commitment to scrutinising delegated legislation on behalf of the Parliament. It is up to all parliamentarians and the government to ensure that significant matters are not left to be determined by delegated legislation, and to listen and act on the concerns raised by the committee.

Recommendations

Recommendation 1

2.10 The committee recommends that the Senate amend standing order 23 to change the committee's name to the Senate Standing Committee for the Scrutiny of Delegated Legislation, to accurately reflect the committee's scrutiny role.

Recommendation 2

2.18 The committee recommends that the Senate amend standing order 23(2) to provide that all legislative instruments subject to disallowance, disapproval or affirmative resolution stand referred to the committee for consideration and, if necessary, report.

Recommendation 3

2.25 The committee recommends that the Senate amend standing order 23 to provide that the Deputy Chair of the committee is a member appointed on the nomination of the Leader of the Opposition in the Senate and elected as Deputy Chair by the committee (rather than appointed by the Chair).

Recommendation 4

2.35 The committee recommends that the Senate amend standing order 23 to permit the committee to consider proposed delegated legislation, including exposure drafts of delegated legislation, in accordance with its scrutiny principles.

Recommendation 5

2.45 The committee recommends that the Senate amend standing order 23 to provide the committee with permanent inquiry and reporting powers, consistent with the powers of the Senate Standing Committee for the Scrutiny of Bills.

Recommendation 6

2.58 The committee recommends that the Senate amend standing order 23 to empower it to inquire into and report on any matter relating to the technical scrutiny of delegated legislation and, consistent with other Senate standing committees, to appoint sub-committees to consider matters within its terms of reference.

Recommendation 7

3.112 The committee recommends that the Senate replace standing order 23(3), which sets out the principles by which the committee scrutinises instruments of delegated legislation, with the following:

- (3) The committee shall scrutinise each instrument as to whether:
- (a) it is in accordance with its enabling Act and otherwise complies with all legislative requirements;
 - (b) it appears to be supported by a constitutional head of legislative power and is otherwise constitutionally valid;
 - (c) it makes rights, liberties, obligations or interests unduly dependent on insufficiently defined administrative powers;
 - (d) those likely to be affected by the instrument were adequately consulted in relation to it;
 - (e) its drafting is defective or unclear;
 - (f) it, and any document it incorporates, may be freely accessed and used;
 - (g) the accompanying explanatory material provides sufficient information to gain a clear understanding of the instrument;
 - (h) it trespasses unduly on personal rights and liberties;
 - (i) it unduly excludes, limits or fails to provide for independent review of decisions affecting rights, liberties, obligations or interests;
 - (j) it contains matters more appropriate for parliamentary enactment; and
 - (k) it complies with any other ground relating to the technical scrutiny of delegated legislation that the committee considers appropriate.

Recommendation 8

5.40 The committee recommends that the government give consideration to developing an expert advisory body to assist departments in appropriately developing proposals for bills that seek to delegate legislative power.

Recommendation 9

5.41 The committee recommends that the Senate Standing Committee for the Scrutiny of Bills consider whether the standing orders should be amended to prevent the passage of a bill after its second reading if the Scrutiny of Bills committee has not yet tabled a report in relation to the bill, noting the Scrutiny of Bills committee's ongoing concerns that significant matters are left to delegated legislation.

Recommendation 10

5.42 The committee recommends that where the Senate Standing Committee for the Scrutiny of Bills has drawn the Senate's attention to provisions in a bill that may inappropriately delegate legislative power, the government, relevant legislation committees and individual senators should give substantive consideration to that report when considering the bill.

Recommendation 11

5.43 The committee recommends that the Office of Parliamentary Counsel give consideration to reviewing its Drafting Direction 3.8 and its practice of recommending that all delegated legislation should be made in the form of legislative instruments, rather than regulations, unless there is good reason not to do so.

Recommendation 12

6.37 The committee recommends that the Senate amend standing order 23 to enable the committee to additionally scrutinise each instrument to determine whether the Senate's attention should be drawn to it on the ground that it raises significant issues or otherwise gives rise to issues likely to be of interest to the Senate.

Recommendation 13

6.39 The committee recommends that the Senate amend standing order 25(2) to explicitly provide that the legislation committees may inquire into and report on legislative instruments made by the departments and agencies allocated to them.

Recommendation 14

7.16 The committee recommends that the *Financial Framework (Supplementary Powers) Act 1997* and the *Industry Research and Development Act 1986* be amended to provide for an affirmative resolution procedure for legislative instruments which specify expenditure.

Recommendation 15

8.40 The committee recommends that the government:

- (a) review existing provisions exempting legislative instruments from disallowance, to determine whether such exemptions remain appropriate, and amend the *Legislation Act 2003* to ensure all such exemptions are contained in primary legislation; and
- (b) publish guidance as to the limited circumstances in which it may be appropriate to exempt instruments from disallowance.

Recommendation 16

8.41 The committee recommends that the Office of Parliamentary Counsel modify the Federal Register of Legislation to enable instruments which are exempt from disallowance to be readily identified.

Recommendation 17

8.68 The committee recommends that, as a general rule, provisions in bills delegating legislative power should not prescribe an affirmative resolution procedure, as there is a risk that this may promote the inclusion of significant matters in delegated legislation which are more appropriate for parliamentary enactment.

Recommendation 18

8.81 The committee recommends that the government amend the *Legislation Act 2003* to provide that, subject to limited exceptions, legislative instruments commence 28 days after registration, and that the government develop guidance as to the limited circumstances in which an instrument may commence earlier.

Recommendation 19

8.105 The committee recommends that the government amend the *Legislation Act 2003* to specify the criteria for granting exemptions from sunseting and ensure all exemptions from sunseting for classes of legislative instruments are contained in primary legislation.

Recommendation 20

9.15 The committee recommends that senators and their staff actively seek training about delegated legislation, the Senate's role with respect to delegated legislation and the committee's role and functions.

Recommendation 21

9.16 The committee recommends that the government provide departmental officers with more extensive training about delegated legislation, the Senate's role with respect to delegated legislation and the committee's role, functions and expectations.

Recommendation 22

9.25 The committee recommends that the parliamentary departments consider the most effective method of providing consolidated and searchable information about the status of disallowable legislative instruments, and the committee's scrutiny concerns relating to such instruments.

Committee actions

Committee action 1

2.69 The committee will further consider the merits of enabling it to inquire into and report on complaints from interested parties about disallowable legislative instruments which raise technical scrutiny concerns.

Committee action 2

4.19 The committee secretariat will liaise directly with relevant departments and agencies to attempt to resolve minor, technical scrutiny issues to assist the committee in determining whether to raise such matters with the responsible minister.

Committee action 3

4.20 In the interests of transparency, the committee will list instruments about which it is continuing to engage with the minister or relevant agency, or has satisfactorily concluded its examination, in its reports to the Senate.

Committee action 4

4.32 The committee will amend its reports to the Senate to focus on delegated legislation which the committee considers should be drawn to the attention of the Senate.

Committee action 5

4.33 The committee will lodge protective notices of motion to disallow every legislative instrument which it considers should be drawn to the attention of the Senate, to give the Senate sufficient time to consider the instrument.

Committee action 6

4.41 The committee will resume its past practice of calling on departmental officers or ministers to appear before it, where the committee considers this would assist in resolving its technical scrutiny concerns.

Committee action 7

4.48 The committee will resume its past practice of regularly reporting to the Senate on outstanding undertakings made by the relevant agency or minister to address the committee's concerns.

Committee action 8

4.52 In general, the Chair of the committee will make a tabling statement each time the committee reports to the Senate, drawing matters in the report to the attention of the Senate.

Committee action 9

6.38 Where the committee reports under amended standing order 23 on legislative instruments which raise significant issues or give rise to issues of interest, the committee will write to the relevant legislation committee or joint committee to alert that committee to the instrument, and will keep a public record of such correspondence.

Committee action 10

7.15 The committee will list in its reports to the Senate information about the nature and, where possible, the extent of expenditure specified by delegated legislation.

Committee action 11

9.33 The committee will issue further guidelines in relation to each of its scrutiny principles (including any new principles arising out of this inquiry), and any other matter relating to its role, functions and expectations that may be useful.

Abbreviations

ACT	Australian Capital Territory
APS	Australian Public Service
Monitor	<i>Delegated Legislation Monitor</i>
Legislation Act	<i>Legislation Act 2003</i>
NSW	New South Wales
NT	Northern Territory
NZ	New Zealand
PJCHR	Parliamentary Joint Committee on Human Rights
Qld	Queensland
SA	South Australia
Tas	Tasmania
UK	United Kingdom
Vic	Victoria
WA	Western Australia

Part I — Background

Chapter 1

Introduction and background

1.1 In late 2018, the Senate Standing Committee on Regulations and Ordinances (the committee) formed the view that it would be appropriate to conduct an inquiry into its role and future direction and, more broadly, into the adequacy of the existing framework for parliamentary scrutiny and control of delegated legislation.

1.2 The committee's decision to seek a referral for the inquiry was informed by a range of matters. These included the lack of substantive change to the committee's scrutiny principles since 1979, the increasing volume and complexity of delegated legislation, and developments relating to the parliamentary scrutiny and control of delegated legislation in other jurisdictions (both in Australia and overseas).

Referral of the inquiry

1.3 On 29 November 2018, the Senate referred the following matter to the committee for inquiry and report by 3 April 2019:

1. The continuing effectiveness, role and future direction of the Senate Standing Committee on Regulations and Ordinances, including:
 - (a) whether the committee's powers remain appropriate;
 - (b) the adequacy of the principles by which the committee scrutinises delegated legislation, including the committee's ability to fully consider:
 - (i) the constitutional authority for delegated legislation;
 - (ii) administrative law principles; and
 - (iii) principles of democratic accountability.
2. The adequacy of the existing framework for parliamentary control and scrutiny of delegated legislation, and whether this framework should be enhanced;
3. In undertaking this inquiry, the committee should have regard to the role, powers and practices of similar parliamentary committees, including those in other jurisdictions.
4. The committee be authorised to hold public hearings in relation to this inquiry and to move from place to place.¹

1.4 On 2 April 2019, the Senate extended the reporting deadline to 3 June 2019.²

1 *Journals of the Senate*, No. 133, 29 November 2018, pp. 4327-4328.

2 *Journals of the Senate*, No.141, 2 April 2019, p. 4797.

Conduct of the inquiry

Submissions

1.5 The committee invited submissions directly from scrutiny committees in other jurisdictions, Commonwealth departments and agencies, academics and other relevant experts and organisations. The committee also distributed information about the inquiry via:

- the Department of the Senate website, Twitter account and Facebook page;
- *Scrutiny News*;
- the Australian Public Law Blog;
- Australian Institute of Administrative Law Forum;
- Australian Association of Constitutional Law Newsletter; and
- Australasian Study of Parliament Group Newsletter.

1.6 The committee received 14 public submissions, listed at Appendix A. The public submissions are also available on the committee's website.³

1.7 The committee did not hold any public hearings as part of the inquiry.

Delegation

1.8 Between 2 and 14 March 2019, the Chair and Deputy Chair of the committee formed a delegation to travel to the United Kingdom (UK) and New Zealand to inform the committee's inquiry.

Report structure

1.9 The report is divided into three parts as follows:

Part I - Background

- Chapter 1 – Introduction and background

Part II – Future direction and effectiveness of the committee

- Chapter 2 – Committee powers and functions
- Chapter 3 – Scrutiny principles
- Chapter 4 – Committee work practices

Part III – Framework for scrutiny and control of delegated legislation

- Chapter 5 – Parliamentary scrutiny of bills delegating legislative power
- Chapter 6 – Parliamentary scrutiny of delegated legislation

3 https://www.apf.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/DelegatedLegislation/Submissions.

- Chapter 7 – Parliamentary scrutiny of Commonwealth expenditure
 - Chapter 8 – Procedural mechanisms for parliamentary control
 - Chapter 9 – Awareness and education
-

Acknowledgements

1.10 The committee acknowledges and thanks all those who assisted with and contributed to the inquiry by making submissions and providing additional information and those that the Chair and Deputy Chair met with as part of the delegation to the United Kingdom and New Zealand.

Background

Role and significance of delegated legislation

1.11 The power to enact laws is a primary power of Parliament. However, Parliament may also delegate certain law-making powers to the executive branch of government. Laws made under delegated powers are referred to as delegated legislation (or subordinate legislation or secondary legislation). Delegated legislation may be made by the executive branch without parliamentary enactment. However, it has the same legal effect as primary legislation (that is, Acts of Parliament).⁴

1.12 There are a number of reasons for delegating powers to the executive to make delegated legislation. First, there is often limited time for essential legislation to be passed by Parliament. As such, Parliament may set broad parameters for legislative activity in an empowering Act, leaving technical or administrative details to delegated legislation. Second, some legislative matters are necessarily technical or scientific. Parliament may lack the requisite time or expertise to deal with such matters, and may delegate law-making powers to those with the relevant expertise.⁵ Third, delegated legislation may be more appropriate to address issues that are subject to rapid or continuous change (for example, in relation to developments in science and technology),⁶ given that the process of amending primary legislation may be time-consuming.

4 Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia*, 5th edition, LexisNexis Butterworths, Australia, 2017, p. 1; see also Adam Tucker, 'Parliamentary Scrutiny of Delegated Legislation', in Alexander Horne and Gavin Drewry, eds., *Parliament and the Law*, 1st edition, Hart Publishing, London, 2013, p. 349.

5 A key example is highly technical civil aviation orders dealing with aviation safety.

6 This is particularly relevant for instruments that address medication and the regulation of online industries.

1.13 Delegated legislation was originally intended to deal solely with technical and administrative matters. However, it has become increasingly common for delegated legislation to be used to enact substantive policy.

1.14 As noted in *Odgers' Australian Senate Practice*, the making of delegated legislation 'has the appearance of a considerable violation of the principle of separation of powers' (that is, that laws should be made by the elected representatives of the people in Parliament and not by the executive government).⁷ Therefore, to ensure that Parliament retains effective oversight of delegated legislation, legislative instruments are usually:

- required to be registered on the Federal Register of Legislation;⁸
- required to be tabled in Parliament; and
- subject to disallowance (that is, parliamentary veto) by either House of Parliament under a process set out in the *Legislation Act 2003* (Legislation Act).⁹ The disallowance process is discussed in detail in Chapter 8.

Types and volume of delegated legislation

1.15 Generally speaking, about half of the law of the Commonwealth by volume consists of delegated legislation (as opposed to Acts of Parliament). The volume of delegated legislation made each year has increased over time. For example, in the mid-1980s there were around 850 disallowable instruments tabled each year. By contrast, around 1,700 disallowable instruments are now made annually.¹⁰

1.16 The Legislation Act provides that a legislative instrument is any instrument declared as such by the law under which it is made, as well as any instrument registered as a legislative instrument on the Federal Register of Legislation.¹¹ More generally, the Legislation Act also provides that an instrument is a legislative instrument if:

- the instrument is made under a power delegated by the Parliament; and

7 Harry Evans and Rosemary Laing, eds., *Odgers' Australian Senate Practice*, 14th edition, Department of the Senate, 2016, p. 429.

8 <https://www.legislation.gov.au> (accessed 16 May 2019).

9 The disallowance process is discussed in more detail in Chapter 8.

10 Harry Evans and Rosemary Laing, eds., *Odgers' Australian Senate Practice*, 14th edition, Department of the Senate, 2016, p. 432; see also Senate Standing Committee for the Regulations and Ordinances, *Annual and other reports*, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Reports (accessed 16 May 2019). Between 2013 and 2018, an average of 1691 disallowable instruments were tabled each year.

11 *Legislation Act 2003*, subsections 8(2) and (3).

- any provision of the instrument determines the law or alters the content of the law; and
- it has the direct or indirect effect of affecting or imposing rights, privileges, obligations or interests.¹²

1.17 Instruments made in exercise of a power delegated by the Parliament, which are not legislative in character, are classified as notifiable instruments. Notifiable instruments must be registered on the Federal Register of Legislation, but are not subject to disallowance or sunseting.¹³

1.18 Historically, most instruments of delegated legislation were classified as regulations. However, delegated legislation is now known by many names, including regulations, rules, determinations, ordinances, declarations, directives, guidelines, and standards. The name given to an instrument will typically depend on the framing of the delegated power,¹⁴ and the discretion of the rule-maker (for example, a minister or senior government official).

Regulations and Ordinances committee

1.19 The committee was established on 11 March 1932, on the recommendation of the Senate Select Committee on the Standing Committee System that 'all Regulations and Ordinances laid on the Table of the Senate be referred to such Committee for consideration and report'.¹⁵

Role and operation of the committee

1.20 The role of the committee is to examine 'all regulations, ordinances and other instruments made under the authority of Acts of the Parliament, which are subject to disallowance or disapproval by the Senate and which are of a legislative character',¹⁶ and to determine whether those instruments comply with the committee's non-partisan, technical scrutiny principles.

1.21 The committee's work may be broadly described as technical legislative scrutiny. In this respect, the committee does not generally consider the policy merits of delegated legislation, although the policy content of an instrument may provide

12 *Legislation Act 2003*, subsection 8(4).

13 Sunseting is discussed in further detail in Chapter 8.

14 For example, a provision in an enabling Act might state that a minister may 'determine' a particular matter by legislative instrument. Instruments made under such a provision would likely be registered as 'determinations'.

15 Senate Select Committee on the Standing Committee System, *Second Report*, July 1930, p. 3.

16 The Senate, *Standing Orders and other orders of the Senate*, August 2018, SO 23(2).

context for the committee's scrutiny.¹⁷ The committee's technical scrutiny role is discussed in further detail in Chapter 6.

1.22 The principles by which the committee scrutinises delegated legislation are formally defined by Senate standing order 23(3), and require the committee to scrutinise each disallowable instrument that is tabled in Parliament to ensure:

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

1.23 The committee's current work practices, and proposals for improvement, are set out in detail in Chapter 4.

Committee membership

1.24 Senate standing order 23(4) provides for the committee to be appointed at the commencement of each Parliament. The committee must comprise six members: three government senators and three non-government or independent senators.¹⁸ The Chair of the committee is a member of the government.

Secretariat and Legal Adviser

1.25 The committee is supported by a secretariat comprising a Secretary, a Principal Research Officer, a Senior Research Officer and a Legislative Research Officer. Other parliamentary officers may also assist the committee as necessary.¹⁹

1.26 The committee is also assisted by a legal adviser who is appointed by the President of the Senate.²⁰ The legal adviser assists the committee to identify instruments which may offend against the committee's scrutiny principles. The Legal

17 Senate Standing Committee on Regulations and Ordinances, *First Report*, 18 May 1932, p. 1.

18 Further information on committee membership is available on the committee's website: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances (accessed 14 May 2019).

19 The secretariat is staffed by parliamentary officers drawn from the Department of the Senate Legislative Scrutiny Unit. These officers regularly work across multiple committee secretariats.

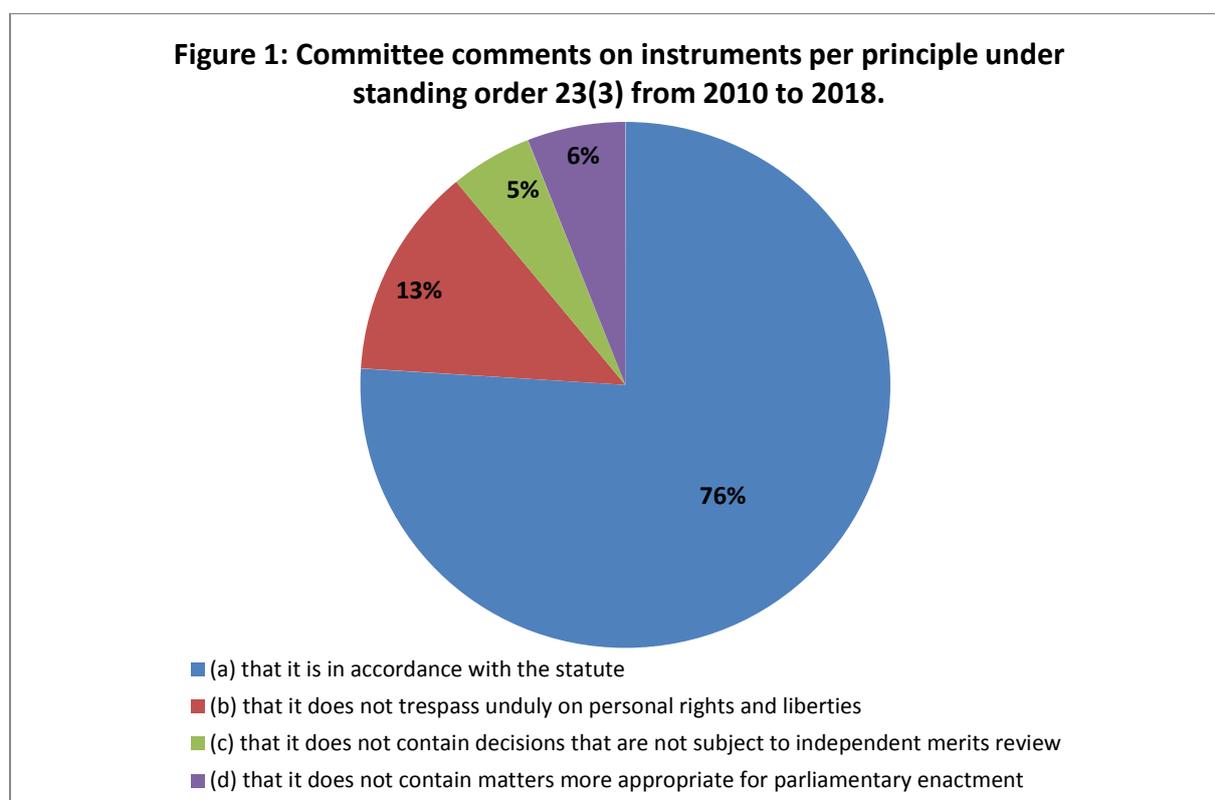
20 The Senate, *Standing Orders and other orders of the Senate*, August 2018, SO 23(9).

Adviser during the committee's inquiry was Associate Professor Andrew Edgar from the University of Sydney.²¹

Indicative workload of the committee²²

1.27 From 2010 to 2018, the committee scrutinised a total of 14,862 legislative instruments, and commented on 1,947 of these (approximately 13 per cent).

1.28 As outlined above, the committee examines all disallowable instruments tabled in Parliament against four scrutiny principles set out in Senate standing order 23(3). Figure 1 below outlines the comments made by the committee on instruments tabled from 2010 to 2018 by principle.²³



21 Since the creation of the role, the committee has employed eleven legal advisers. Initially, the committee had a practice of employing senior barristers. From the mid-1980s the committee transitioned to employing academics specialising in delegated legislation or other legal areas relevant to the committee's scrutiny functions. Further information, is available on the committee's website: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances (accessed 14 May 2019).

22 Further information regarding the committee's scrutiny work can be found in its annual reports: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Reports (accessed 14 May 2019).

23 This figure only captures instances where the committee initially sought advice from the minister in relation to a scrutiny concern, or drew a scrutiny concern to the attention of the Senate. It does not capture instances where the committee sought additional advice following a ministerial response, or where the committee concluded its examination of an instrument.

Interaction with other legislative scrutiny committees

1.29 The committee is one of three legislative scrutiny committees in the Commonwealth Parliament. The other two committees are the Parliamentary Joint Committee on Human Rights (PJCHR) and the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee). Together, the secretariats for these three committees make up the Legislative Scrutiny Unit.

1.30 The work of the three committees is complementary. The committee monitors the work of the PJCHR and the Scrutiny of Bills committee and, where appropriate, may consider matters raised by those committees or refer matters to them.

Committee publications

1.31 The committee produces a number of publications, which are updated each sitting week or periodically as appropriate.²⁴ These include:

- The *Delegated Legislation Monitor* (Monitor): the committee's regular scrutiny report which is produced each sitting week;²⁵
- *Scrutiny News*: an email sent to all senators, their staff and subscribers, which contains highlights of the committee's comments in the Monitor;²⁶
- guidelines on a number of matters relevant to the committee's scrutiny work;²⁷ and
- The *Disallowance Alert*: a webpage listing all instruments for which a notice of motion for disallowance has been lodged in either House of Parliament.²⁸

24 All of the committee's publications are available on the committee's website: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances (accessed 14 May 2019).

25 Monitors published during the 2019 calendar year, as well as for previous years, are available on the committee's website at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Monitor (accessed 14 May 2019).

26 Current and previous editions of *Scrutiny News*, as well as information about subscribing to the scrutiny mailing list, are available online: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills/Scrutiny_News (accessed 14 May 2019).

27 These guidelines are available on the committee's website: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines (accessed 14 May 2019).

28 The *Disallowance Alert* is available on the committee's website: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts (accessed 14 May 2019). The *Alert* also contains relevant information about the status of disallowance motions; for example, whether a motion has been postponed or withdrawn.

Effectiveness of the committee

1.32 The effectiveness of the committee is hard to accurately quantify. However, it can be broadly evaluated in several different ways, and the committee considers it is having a positive effect in each. The various indicators of the committee's effectiveness include:

- the number of instruments commented on, and ministerial responses received. In this respect, the committee has observed that, over the past five years, the number and speed of return of ministerial responses has substantially increased;²⁹
- the frequency of instruments and explanatory statements being amended as a result of the committee's comments;³⁰
- 'unseen' impacts on the drafting of instruments and explanatory statements. Legislative drafters have, over time, increasingly referred to the reports, guidance and long-standing scrutiny concerns of the committee; and³¹
- more informed consideration of relevant issues in the reports of other parliamentary committees, and more informed debate relating to delegated legislation in the Senate, the House of Representatives and committees.³²

1.33 The majority of submitters to this inquiry commended the committee for its effectiveness, and emphasised the committee's enduring importance to the parliamentary scrutiny and control of delegated legislation.

1.34 For example, in support of the committee's work, Mr Peter Quiggin PSM, the First Parliamentary Counsel, stated on behalf of the Office of Parliamentary Counsel that:

While the impact of comments on individual instruments are important, [the Office of Parliamentary Counsel] considers that the broader impact of the Committee's work is much more important. We consider that the

29 For example, the committee received 22 ministerial responses in 2013. This number increased annually until 2018 when the committee received 124 responses. The proportion of outstanding responses in each reporting period has also decreased over time.

30 The number of ministerial undertakings to amend instruments and explanatory statements has increased steadily from 23 in 2010-2011 to 39 in 2018. Further information on ministerial undertakings is available in the committee's annual reports.

31 See, for example, the Office of Parliamentary Counsel, *OPC's drafting services: a guide for clients*, 2016, p. 37, <https://www.opc.gov.au/publications/opcs-drafting-services-guide-clients> (accessed 15 May 2019).

32 See, for example, Senator Kitching, *Senate Hansard*, 16 November 2017, p. 8669; The Hon. Barnaby Joyce MP, *House of Representatives Hansard*, 1 December 2016, p. 5108.

existence of the Committee and its work has a substantial influence on the content of instruments as they are developed and drafted.³³

1.35 A number of other submitters to the inquiry similarly noted the committee's continued effectiveness. For example:

- Professor Gabrielle Appleby, Emeritus Professor Mark Aronson and Dr Janina Boughey stated that they 'applaud the Committee for its proactive embrace of its role as a responsible constitutional agent of the legislature';³⁴
- the Department of Education and Training noted that the committee's 'current role and powers are integral for the maintenance of Government accountability to Parliament and the protection of individual rights and liberties';³⁵
- Professor Anne Twomey observed that the committee 'fulfils an important constitutional role in providing scrutiny of delegated legislation and drawing [concerns] to the attention of the Senate';³⁶ and
- the Department of Home Affairs considered that the committee 'effectively fulfils its role and function in providing important oversight in relation to the making of delegated legislation'.³⁷

1.36 However, it is also clear from submissions to the inquiry, as well as from the Chair and Deputy Chair's delegation to the UK and New Zealand, that there is scope to clarify, rationalise and improve the committee's scrutiny functions, and to enhance the broader framework for parliamentary scrutiny and control of delegated legislation.

33 Mr Peter Quiggin PSM, Office of Parliamentary Counsel, *Submission 3*, p. 2.

34 Professor Gabrielle Appleby, Professor Mark Aronson and Dr Janina Boughey, *Submission 2*, p. 10. Professor Appleby is the Co-Director of the Judiciary Project at the Gilbert + Tobin Centre of Public Law at the University of New South Wales (UNSW). Emeritus Professor Aronson is an academic in the Faculty of Law at UNSW. Dr Boughey is the Director of the Administrative Law and Statutes Projects at the Gilbert + Tobin Centre of Public Law at UNSW.

35 Department of Education and Training, *Submission 6*, p. 1.

36 Professor Anne Twomey, *Submission 1*, p. 1. Professor Twomey is a Professor of Constitutional Law at the University of Sydney.

37 Department of Home Affairs, *Submission 10*, p. 1.

Part II — Future direction and effectiveness of the committee

Chapter 2

Committee powers and functions

Introduction

2.1 This chapter discusses the committee's existing powers and functions, and considers whether they could be clarified, rationalised or improved. The matters considered include:

- the name of the committee;
- the scope of the committee's scrutiny functions;
- appointment of the committee's Deputy Chair;
- consideration of draft legislation (for example, exposure drafts) and other relevant information;
- permanent general inquiry powers;
- powers to self-initiate inquiries; and
- complaints-handling functions.

Committee name

Overview

2.2 The committee was established in 1932 following a recommendation that 'all regulations and ordinances laid on the Table of the Senate be referred to a standing committee'.¹ The name of the committee—the Standing Committee on Regulations and Ordinances—reflected the committee's scrutiny role at that time.

2.3 However, the committee has a longstanding practice of scrutinising not only regulations and ordinances, but all disallowable instruments, noting in 1978:

The Committee has not confined itself to considering regulations and ordinances properly so called. In practice it has considered all instruments which are subject to disallowance by either House of Parliament and which are legislative in character...

The Senate has...accepted the Committee's practice of considering instruments other than regulations and ordinances, by accepting reports from the Committee on such instruments, and so have Ministers, by giving to the Committee undertakings to amend such instruments.²

1 Senate Select Committee on the Standing Committee System, *Second Report*, July 1930, p. 3.

2 Senate Standing Committee on Regulations and Ordinances, *Sixty-Second Report*, September 1978, p. 4.

2.4 Recognising that the committee's scrutiny functions had expanded since its establishment, on 23 August 1979 the Senate amended its standing orders to formally empower the committee to examine all delegated legislation which is subject to disallowance or disapproval.³ This is reflected in the current standing orders, which provide that the committee may consider 'all regulations, ordinances and other instruments made under the authority of Acts of the Parliament'.⁴

2.5 In accordance with the current standing orders, the committee considers a variety of types of delegated legislation, including rules, directions, determinations and guidelines.

Approach in other jurisdictions

2.6 A number of Australian scrutiny committees are named in accordance with the nature and scope of the instruments they consider. For example, the New South Wales (NSW) Legislation Review Committee, the Tasmanian Subordinate Legislation Committee, the Western Australian Joint Delegated Legislation Committee and the South Australian Legislative Review Committee. Other Australian scrutiny committees are not named for their legislative scrutiny functions. However, this is often because they also undertake broader policy inquiries, not just technical scrutiny.⁵

2.7 The names of scrutiny committees in comparable Westminster jurisdictions similarly reflect their scrutiny functions. For example, in the United Kingdom (UK), there is the Joint Standing Committee on Statutory Instruments, the Secondary Legislation Scrutiny Committee, and the Scottish Delegated Powers and Law Reform Committee. Scrutiny committees that perform broader policy inquiries are named accordingly.⁶

3 *Journals of the Senate*, No.115, 23 August 1979, p. 883; see also Senate Standing Committee on Regulations and Ordinances, *Sixty-Eighth Report*, November 1979, p. 2.

4 The Senate, *Standing Orders and other orders of the Senate*, August 2018, SO 23(2).

5 For example, the ACT Standing Committee on Justice and Community Safety performs a legislative scrutiny role, and examines matters including consumer rights, courts, police and emergency services, corrections, administrative law, human rights, censorship and regulatory services. See Standing Committee on Justice and Community Safety (ACT), *Resolution establishing the committee*, <https://www.parliament.act.gov.au/in-committees/standing-committees-current-assembly/standing-committee-on-justice-and-community-safety> (accessed 16 May 2019).

6 For example, the Welsh Constitutional and Legislative Affairs Committee performs a legislative scrutiny role, as well as examining 'any other constitutional, legislative or governmental matter within or relating to the competence of the Assembly'. See Constitutional and Legislative Affairs Committee (Wales), *Remit*, <https://www.assembly.wales/en/bus-home/committees/Pages/Committee-Profile.aspx?cid=434> (accessed 15 May 2019).

Committee view

2.8 As outlined in Chapter 1, delegated legislation take various forms, including regulations, ordinances, directions, rules, determinations, and guidelines. The committee has a longstanding practice of scrutinising all forms of delegated legislation subject to disallowance. This is directly reflected in the standing orders of the Senate which establish the committee and set out its powers and functions.

2.9 However, the committee's name reflects the role envisaged for the committee at the time of its original establishment in 1932. It does not reflect the committee's scrutiny practice over the past 40 years. The committee considers that the name of the committee should be amended to more accurately reflect its scrutiny role. The committee considers this would also have a useful educational role in informing senators and the broader public of the work undertaken by the committee.

Recommendation 1

2.10 The committee recommends that the Senate amend standing order 23 to change the committee's name to the Senate Standing Committee for the Scrutiny of Delegated Legislation, to accurately reflect the committee's scrutiny role.

Scope of instruments considered by the committee

Overview

2.11 Currently, the scope of the committee's scrutiny role is set out in the Senate standing orders, which provide that:

All regulations, ordinances and other instruments made under the authority of Acts of the Parliament, which are subject to disallowance or disapproval by the Senate and which are of a legislative character, shall stand referred to the committee for consideration and, if necessary, report.⁷

2.12 The current standing orders capture all instruments that are subject to some form of 'negative' resolution process (that is, instruments that take effect after they are made and registered, but which may be subject to parliamentary veto). However, they do not capture instruments that are subject to 'affirmative' resolution (that is, instruments requiring the positive approval of the Parliament to take effect). This is despite the fact that some Acts of Parliament may apply an affirmative resolution

7 The Senate, *Standing Orders and other orders of the Senate*, August 2018, SO 23(2).

procedure to instruments, including those which contain significant policy matters.⁸ This issue is discussed further in Chapter 8.

2.13 Additionally, the standing orders refer specifically to 'regulations' and 'ordinances'. This is despite the fact that committee's established practice is to consider all disallowable legislative instruments. As outlined at paragraph [2.4], the Senate has reflected this practice in the standing orders by adding a reference to 'other instruments'.

Approach in other jurisdictions

2.14 In general, Australian parliamentary scrutiny committees are not restricted to considering instruments that are subject to disallowance or disapproval. Moreover, the rules that set out the functions of such committees (for example, statutory provisions and standing orders) do not tend to refer to specific types of instruments. For example, the Victorian Scrutiny of Acts and Regulations Committee is empowered to consider 'any legislative instrument laid before Parliament'.⁹ The standing orders of the Western Australian Legislative Council provide that, on publication, 'an instrument' is referred to the relevant committee for consideration.¹⁰

2.15 Similarly, scrutiny committees in comparable Westminster jurisdictions are not restricted to considering specific kinds of legislative instruments subject to disallowance or disapproval.¹¹ For example, the UK Joint Committee on Statutory Instruments must consider whether Parliament's attention should be drawn to 'delegated legislation'.¹² The Scottish Delegated Powers and Law Reform Committee may consider and report on 'any subordinate legislation laid before the Parliament'.¹³

Committee view

2.16 The committee considers that there is a gap in the framework for parliamentary scrutiny of delegated legislation, as the standing orders do not

8 For example, subsection 10B(1) of the *Health Insurance Act 1973* provides that the minister may, by legislative instrument, determine how the 'extended safety net' (which provides increased rebates for certain Medicare expenses) is to apply in particular circumstances. Subsection 10B(2) of that Act provides that a determination does not come into effect until it has been approved by resolution of both Houses of Parliament.

9 *Subordinate Legislation Act 1994* (Vic), subsection 25A(1).

10 Legislative Council (WA), *Standing Orders*, January 2019, Schedule 1, SO 10.5.

11 It is noted that this may also reflect differences in the framework for the parliamentary control of delegated legislation. For example, UK Parliaments (including the Scottish Parliament and the Welsh Assembly) routinely make use of 'affirmative' and 'negative' resolution procedures. These are discussed further in Chapter 8.

12 House of Commons (UK), *Standing Orders of the House of Commons*, May 2018, SO 151; House of Lords (UK), *Standing Orders of the House of Lords*, May 2016, SO 73.

13 The Scottish Parliament, *Standing Orders of the Scottish Parliament*, May 2018, SO 6.11(a)(i).

currently empower the committee to scrutinise instruments subject to an affirmative resolution process. Such instruments may not be subject to disallowance or disapproval,¹⁴ and consequently cannot be scrutinised by the committee.¹⁵ As such, the committee considers that the standing orders should be amended to expressly provide that legislative instruments which are subject to disallowance, disapproval or affirmative resolution be referred to the committee for consideration.

2.17 Additionally, given the variety of legislative instruments that are considered by the committee, the committee does not consider it necessary to refer expressly to 'regulations' or 'ordinances' in standing order 23(2). Rather, it would be more appropriate for the standing orders to refer more broadly to 'all legislative instruments' that are subject to disallowance, disapproval or affirmative resolution. This would clarify the committee's scrutiny role.

Recommendation 2

2.18 The committee recommends that the Senate amend standing order 23(2) to provide that all legislative instruments subject to disallowance, disapproval or affirmative resolution stand referred to the committee for consideration and, if necessary, report.

Appointment of Deputy Chair

Overview

2.19 The Senate standing orders provide for the membership of the committee, including for the appointment of the Chair and Deputy Chair. The committee must elect as Chair 'a member appointed to the committee on the appointment of the Leader of the Government in the Senate'.¹⁶

2.20 The standing orders also provide that the Chair may appoint a member of the committee to be Deputy Chair.¹⁷ By convention, the Deputy Chair has been a non-government senator¹⁸ (although this is not required by the standing orders).

14 Certain instruments are subject to both affirmative resolution and disallowance (for example, instruments made under subsection 45-10(1) of the *Australian Charities and Not-for-profits Commission Act 2012*). However, Acts may also require affirmative resolution as an alternative to disallowance.

15 The instruments would be considered by the Parliamentary Joint Committee on Human Rights (PJCHR) for compatibility with international human rights law. Section 7 of the *Human Rights (Parliamentary Scrutiny) Act 2011* provides that the PJCHR is to assess 'legislative instruments' that come before either House of Parliament for compatibility with human rights.

16 The Senate, *Standing Orders and other orders of the Senate*, August 2018, SO 23(6).

17 The Senate, *Standing Orders and other orders of the Senate*, August 2018, SO 23(7).

18 Harry Evans and Rosemary Laing, eds., *Odgers' Australian Senate Practice*, 14th edition, Department of the Senate, 2016, p. 435.

2.21 By contrast, the standing orders provide that the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee) is to elect as its Chair a member appointed to the committee on the nomination of the Leader of the Opposition in the Senate,¹⁹ and elect as Deputy Chair a member appointed to the committee on the nomination of the Leader of the Government in the Senate.²⁰ Corresponding requirements apply to general purposes references and legislation committees.²¹

Evidence before the committee

2.22 In his submission to the inquiry, the Clerk of the Senate noted the inconsistencies with the process for the appointment of the Deputy Chair with other Senate committees and with the corresponding process for the election of the Chair. The Clerk noted that, in light of these matters, the committee may consider that standing order 23(7) should be amended so that the Deputy Chair is elected by the committee and is required to be a member appointed on the nomination of the Leader of the Opposition in the Senate.²²

Committee view

2.23 The committee considers it would be appropriate to amend the standing orders to provide for the committee to elect as Deputy Chair a member of the committee appointed on the nomination of the Leader of the Opposition in the Senate. This would be consistent with the Scrutiny of Bills committee and with other Senate standing committees.

2.24 Further, as noted at paragraph [2.20], it is an established convention for the Chair to appoint a non-government Senator as Deputy Chair. This is consistent with the committee's longstanding commitment to non-partisan scrutiny. In this regard, the recommended amendments to the standing orders would merely formalise existing practice.

Recommendation 3

2.25 The committee recommends that the Senate amend standing order 23 to provide that the Deputy Chair of the committee is a member appointed on the nomination of the Leader of the Opposition in the Senate and elected as Deputy Chair by the committee (rather than appointed by the Chair).

19 The Senate, *Standing Orders and other orders of the Senate*, August 2018, SO 24(4).

20 The Senate, *Standing Orders and other orders of the Senate*, August 2019, SO 24(5). The requirement to elect, rather than appoint, the Deputy Chair was added to the standing orders following the Scrutiny of Bills committee's 2012 inquiry into its future role and direction.

21 The Senate, *Standing Orders and other orders of the Senate*, August 2018, SO 25(9)(a) and (b).

22 Clerk of the Senate, *Submission 7*, p. 2.

Review of draft delegated legislation

Overview

2.26 The committee is not expressly empowered to consider draft delegated legislation, and there is currently no established process by which draft instruments are considered. However, the committee is not prohibited from considering draft instruments if it considers it appropriate to do so.

2.27 From time to time the committee secretariat may provide informal advice in relation to draft delegated legislation. However, such advice does not reflect the committee's official view on the relevant instrument, and is provided on the basis that the committee may make its own comments at a later date.

2.28 By contrast, the Scrutiny of Bills committee is expressly empowered to consider 'any proposed law or other document or information available to it, including an exposure draft of proposed legislation'. This is notwithstanding the proposed law, document or information is not before Senate.²³

2.29 This power was conferred in July 2014, following an inquiry by the Scrutiny of Bills committee into its future role and direction.²⁴ In that inquiry, the Scrutiny of Bills committee noted that it was able to provide advice in relation to draft legislation.²⁵ However, it raised concerns that there was no established process for considering draft instruments—either by the Scrutiny of Bills committee or by this committee.²⁶ Ultimately, the Scrutiny of Bills committee suggested that further consideration be given to the scrutiny of draft delegated legislation.²⁷

Evidence before the committee

2.30 In his submission to the inquiry, the Clerk of the Senate noted that the committee lacks an express power to examine draft instruments and suggested that the committee may wish to consider such a power—at least insofar as this would allow the committee to examine draft instruments that are published by the government.²⁸

23 The Senate, *Standing Orders and other orders of the Senate*, August 2018, SO 24(1)(b).

24 *Journals of the Senate*, No. 43, 15 July 2014, p. 1175.

25 Senate Standing Committee for the Scrutiny of Bills, *Final Report: Inquiry into the future role and direction of the Senate Scrutiny of Bills Committee*, May 2012, p. 29.

26 Senate Standing Committee for the Scrutiny of Bills, *Final Report: Inquiry into the future role and direction of the Senate Scrutiny of Bills Committee* May 2012, p. 37.

27 Senate Standing Committee for the Scrutiny of Bills, *Final Report: Inquiry into the future role and direction of the Senate Scrutiny of Bills Committee*, May 2012, pp. 37-38.

28 Clerk of the Senate, *Submission 7*, pp. 1-2.

Committee view

2.31 The committee considers there is merit in amending the standing orders to expressly empower it to consider draft delegated legislation (for example, exposure drafts and instruments that have not yet been registered), as well as other relevant information. This would be consistent with the powers currently conferred on the Scrutiny of Bills committee. The committee also notes its longstanding interest in being able to consider draft delegated legislation, reflecting its ongoing commitment to improving its scrutiny functions.²⁹

2.32 The committee does not envisage that it would adopt a general practice of considering draft delegated legislation. In most cases, the committee would continue to scrutinise instruments after they are tabled. However, an express power would clarify that the committee may consider draft legislation as appropriate.

2.33 Additionally, when the Senate is considering 'framework' bills (that is, bills that leave key elements of a regulatory scheme to legislative instruments), it rarely has the advantage of considering relevant instruments while the bill is before the Parliament. However, such instruments may be in draft form when the bill is introduced. The ability for the committee to consider draft instruments may therefore improve the Senate's scrutiny of framework legislation.³⁰

2.34 The committee also notes that it would be good practice for departments and agencies to send exposure drafts of significant legislative instruments to the committee as part of their consultation processes. This may assist in resolving potential scrutiny issues before the relevant instrument is finalised.

Recommendation 4

2.35 The committee recommends that the Senate amend standing order 23 to permit the committee to consider proposed delegated legislation, including exposure drafts of delegated legislation, in accordance with its scrutiny principles.

29 See, for example, Senate Standing Committee on Regulations and Ordinances, *Seventy-First Report*, March 1982, p. 6.

30 Standing order 24(1)(c) expressly requires the Scrutiny of Bills committee to take into account 'the extent to which a proposed law relies on delegated legislation and whether a draft of that legislation is available to the Senate at the time the bill is considered'. Empowering this committee to consider draft delegated legislation may complement the Scrutiny of Bills committee to consider framework legislation under standing order 24(1)(c).

Permanent general inquiry powers

Overview

2.36 The Senate standing orders currently provide that the committee has 'power to send for persons and documents, and to sit during recess'.³¹ However, it lacks the express power to take evidence in public, to meet outside Parliament House, or to conduct inquiries where the Parliament has been dissolved or prorogued. Where the committee requires such powers, it must seek that they be conferred by resolution of the Senate.

2.37 By contrast, the Scrutiny of Bills committee is expressly empowered to 'send for persons and documents, to move from place to place, and to meet and transact business in public or private sessions'. This is notwithstanding any prorogation of the Parliament or dissolution of the House of Representatives.³² Corresponding powers are conferred on Senate general purpose references and legislation committees.³³

2.38 The committee rarely seeks that the Senate confer inquiry powers,³⁴ and rarely makes use of its existing inquiry powers (for example, to send for persons and documents) as part of its routine scrutiny work. Nevertheless, the committee's lack of inquiry powers is inconsistent with other Senate standing committees, and reflects a potential gap in the committee's scrutiny functions.

2.39 While the committee does not call for submissions, any interested person can bring to the committee's attention matters that are relevant to its technical scrutiny function. If interested parties make submissions to the committee about instruments, these are considered as correspondence at the committee's regular private meetings.

Approach in other jurisdictions

2.40 A number of Australian state and territory parliamentary scrutiny committees are empowered to conduct business outside of parliamentary sittings, and may take evidence in public if they deem it appropriate to do so. For example,

31 The Senate, *Standing Orders and other orders of the Senate*, August 2018, SO 23(5).

32 The Senate, *Standing Orders and other orders of the Senate*, August 2018, SO 24(7). These powers were conferred on the Scrutiny of Bills committee following an inquiry into its future role and direction. See Senate Standing Committee for the Scrutiny of Bills, *Final Report: Inquiry into the future role and direction of the Senate Scrutiny of Bills Committee*, May 2012, pp. 28-29.

33 The Senate, *Standing Orders and other orders of the Senate*, August 2018, SO 25(14).

34 Other than the current inquiry, the Senate has only conducted three inquiries over the last in its history: an inquiry into the Legislative Instruments Bill 1994, an inquiry into the Legislative Instruments Bill 2003 and the Legislative Instruments (Transitional Provisions and Consequential Amendments) Bill 2003, and an inquiry on consultation under the *Legislative Instruments Act 2003*.

the NSW Legislation Review Committee may 'sit and transact business despite any prorogation of the Houses of Parliament or any adjournment of either House of Parliament'.³⁵ The Tasmanian Subordinate Legislation Committee may sit or transact business during adjournment or recess, and may sit at such times and in such places as it thinks proper.³⁶ The Subordinate Legislation Committee may also summon witnesses to appear before it to give evidence,³⁷ and when taking evidence must 'sit with open doors'.³⁸

Evidence before the committee

2.41 In his submission to the inquiry, the Clerk of the Senate observed that the committee currently lacks 'general' inquiry powers, and suggested that, while such powers may not be needed frequently, the committee may consider that they would add flexibility to its proceedings. He also noted that the Scrutiny of Bills committee was imbued with general inquiry powers following its 2012 inquiry into its role and future direction.³⁹

2.42 The joint submission by Professor Gabrielle Appleby, Emeritus Professor Mark Aronson and Dr Janina Boughey noted that the committee must rely on the views of the executive as to the appropriateness and adequacy of the consultation undertaken in relation to an instrument—despite the fact that instruments increasingly contain matters of substantive policy.⁴⁰ To address this issue, Professor Appleby, Emeritus Professor Aronson and Dr Boughey recommended that the committee seek public comment on instruments where the committee deems it appropriate to do so. They suggested that this might include where an instrument would have a significant impact on rights, interests or obligations, where the instrument reflects substantive policy choices, or where the committee is not satisfied that appropriate consultation has been undertaken.⁴¹

Committee view

2.43 The committee considers that there would be merit in amending the standing orders to confer permanent general inquiry powers on the committee. These would include powers to take evidence in public hearings, to meet where and when it sees fit, and to conduct business when Parliament has been adjourned,

35 *Legislation Review Act 1987* (NSW), subsection 8(8).

36 *Subordinate Legislation Committee Act 1969* (Tas), subsection 6(1).

37 *Subordinate Legislation Committee Act 1969* (Tas), section 10.

38 *Subordinate Legislation Committee Act 1969* (Tas), subsection 6(2).

39 Clerk of the Senate, *Submission 7*, p. 2.

40 Professor Gabrielle Appleby, Emeritus Professor Mark Aronson and Dr Janina Boughey, *Submission 2*, p. 5.

41 Professor Gabrielle Appleby, Emeritus Professor Mark Aronson and Dr Janina Boughey, *Submission 2*, p. 5. The committee notes that it has also considered this issue in Chapter 6.

prorogued or dissolved. The committee also considers that it should be able to print from day to day any of its documents and evidence, report from time to time any proceedings, documents and recommendations, and make regular progress reports to the Senate. This would be consistent with the Scrutiny of Bills committee, other Senate standing committees and other Australian parliamentary scrutiny committees.

2.44 The committee does not intend to hold public hearings or to call for submissions as part of its routine scrutiny work (although it may do so if it considers this would substantially assist with the scrutiny of a particular instrument). In this regard, the committee notes that the timeframes in which the committee scrutinises legislative instruments are often insufficient for the committee to conduct an inquiry.

Recommendation 5

2.45 The committee recommends that the Senate amend standing order 23 to provide the committee with permanent inquiry and reporting powers, consistent with the powers of the Senate Standing Committee for the Scrutiny of Bills.

'Own motion' inquiry power

Overview

2.46 At present, the committee lacks the power to self-initiate inquiries. Where the committee wishes to conduct an inquiry (for example, into more general matters associated with its scrutiny functions), it must seek a referral by the Senate. Additionally, and unlike other Senate standing committees, this committee lacks the power to appoint a sub-committee to consider matters within its terms of reference.

2.47 Other Senate standing committees (including the Scrutiny of Bills committee) similarly lack powers to self-initiate inquiries and must seek a referral by the Senate. However, legislative and general purpose committees have the power to self-initiate inquiries into the performance of departments and agencies allocated to them.⁴²

2.48 Certain House committees are also empowered to conduct inquiries on their own initiative. For example, the House Standing Committee on Petitions may 'inquire into and report to the House on any matter relating to petitions and the petitions system'.⁴³ The House Standing Committee on Procedure has a similar power to 'inquire into and report on the practices and procedures of the House and its committees'.⁴⁴

42 The Senate, *Standing Orders and other orders of the Senate*, August 2018, SO 25(2)(a).

43 The House of Representatives, *House of Representatives Standing Orders*, December 2017, SO 220(a).

44 The House of Representatives, *House of Representatives Standing Orders*, December 2017, SO 221(a).

2.49 In addition, some statutory committees of the Commonwealth Parliament have the power to self-initiate inquiries.⁴⁵ For example, the Parliamentary Joint Committee on Human Rights has the power 'to examine Acts for compatibility with human rights, and to report to both Houses of the Parliament on that matter'.⁴⁶ The Parliamentary Joint Committee on Intelligence and Security may report to the Parliament on 'any matter appertaining to the [Australian Federal Police] or connected with the performance of its functions under Part 5.3 of the *Criminal Code*'.⁴⁷

Approach in other jurisdictions

2.50 Some Australian state and territory parliamentary scrutiny committees are expressly empowered to inquire into general matters connected to the scrutiny of delegated legislation.⁴⁸ In particular, the Western Australian Delegated Legislation Committee may consider 'any systemic issue identified in 2 or more instruments of delegated legislation', as well as 'the statutory and administrative procedures for the making of subsidiary legislation generally'.⁴⁹ Under these principles, the Delegated Legislation Committee has reported on a number of systemic issues, including the availability of incorporated standards⁵⁰ and issues related to court fees and charges.⁵¹

2.51 Some scrutiny committees in comparable Westminster jurisdictions are also empowered to self-initiate inquiries. In particular, the New Zealand Regulations Review Committee 'may consider any matter relating to regulations and report on it

45 See, for example, of the *Parliamentary Joint Committee on Law Enforcement Act 2010*, paragraphs 7(1)(b), (e) and (g); *Australian Securities and Investments Commission Act 2001*, paragraph 243(a); *Public Accounts and Audit Committee Act 1951*, paragraphs 8(1)(d) and (h); *Law Enforcement Integrity Commissioner Act 2006*, paragraph 215(1)(b).

46 *Human Rights (Parliamentary Scrutiny) Act 2011*, paragraph 7(c).

47 *Intelligence Services Act 2001*, paragraph 29(1)(bab).

48 For example, a standing committee of the ACT Legislative Assembly may 'inquire into and report on any matter it considers merits investigation', provided the matter is supported by the committee's resolution of appointment. See ACT Legislative Assembly, *Standing Orders*, 2019, SO 216.

49 Legislative Council (WA), *Standing Orders*, January 2019, Schedule 1, SO 10.7(a) and (b).

50 Joint Standing Committee on Delegated Legislation (WA), *Report 84: Access to Australian standards adopted in delegated legislation*, June 2016, [http://www.parliament.wa.gov.au/publications/tailedpapers.nsf/displaypaper/3914263a663fa6312f3c877948257fdb00358426/\\$file/4263.pdf](http://www.parliament.wa.gov.au/publications/tailedpapers.nsf/displaypaper/3914263a663fa6312f3c877948257fdb00358426/$file/4263.pdf) (accessed 16 May 2019).

51 Joint Standing Committee on Delegated Legislation (WA), *Report 75: Identifying a systemic issue arising out of nine court and tribunal instruments*, September 2014, [http://www.parliament.wa.gov.au/parliament/commit.nsf/\(Report+Lookup+by+Com+ID\)/572460D2DEC0D9C948257D57001456B2/\\$file/dg.ctf.140915.rpf.075.xx.pdf](http://www.parliament.wa.gov.au/parliament/commit.nsf/(Report+Lookup+by+Com+ID)/572460D2DEC0D9C948257D57001456B2/$file/dg.ctf.140915.rpf.075.xx.pdf) (accessed 16 May 2019).

to the House'.⁵² The Regulations Review Committee has conducted inquiries into a range of issues associated with the scrutiny of delegated legislation, including:

- oversight of disallowable instruments that are not legislative instruments;⁵³
- the use of instruments of exemptions in primary legislation;⁵⁴
- material incorporated by reference;⁵⁵
- affirmative resolution procedures;⁵⁶
- the principles which determine whether delegated legislation is given the status of regulations;⁵⁷ and
- empowering provisions in bills.⁵⁸

2.52 Many experts with whom the Chair and Deputy Chair met during the committee's New Zealand delegation⁵⁹ emphasised the value of this 'own motion' inquiry power, noting that it provides an additional means by which the Parliament can raise and, in some instances, resolve recurring or systemic scrutiny concerns.

52 House of Representatives (NZ), *Standing Orders of the House of Representatives*, August 2017, SO 318(4).

53 Regulations Review Committee (NZ), *Inquiry into the oversight of disallowable instruments that are not legislative instruments*, July 2014, https://www.parliament.nz/resource/enNZ/50DBSCH_SCR56729_1/2dd6b5922847c918b02457adfb7e83f055a20f35 (accessed 16 May 2019).

54 Regulations Review Committee (NZ), *Inquiry into the use of instruments of exemptions in primary legislation*, September 2008, https://www.parliament.nz/resource/enNZ/48DBSCH_SCR4226_1/513c4acc31a68afa6b5fd65810568e1342f9f022 (accessed 16 May 2019).

55 Regulations Review Committee (NZ), *Inquiry into material incorporated by reference*, July 2004, https://www.parliament.nz/resource/miNZ/47DBSCH_SCR2794_1/fa349b1c81f369bef6395cf6bcdcd0e4e211a2ec (accessed 16 May 2019); *Further inquiry into material incorporated by reference*, September 2008, https://www.parliament.nz/resource/miNZ/48DBSCH_SCR4207_1/cbc14804f6cb0c1004c10c3822205cb9657a4140 (accessed 16 May 2019).

56 Regulations Review Committee (NZ), *Inquiry into affirmative resolution procedures*, May 2007, https://www.parliament.nz/resource/enNZ/48DBSCH_SCR3775_1/ae65b7626d0e20f686a79830dac460e7315157c3 (accessed 16 May 2019).

57 Regulations Review Committee (NZ), *Inquiry into the principles determining whether delegated legislation is given the status of regulations*, June 2004, https://www.parliament.nz/resource/mi-NZ/47DBSCH_SCR2789_1/d5fb59d64fe22d60da7bb69cc66516a085556eb0 (accessed 16 May 2019).

58 Regulations Review Committee (NZ), *Inquiry into the drafting of empowering provisions in bills*, July 1990.

59 See Appendix C (Delegation Report).

Evidence before the committee

2.53 In his submission to the inquiry, the Clerk of the Senate observed that the committee lacks a power to self-refer inquiries, and noted that the committee may wish to consider that such a power would add flexibility to its proceedings.⁶⁰

Committee view

2.54 The committee considers that there would be substantial merit in providing the committee with permanent powers to self-initiate inquiries into matters related to its existing technical scrutiny role. This would allow the committee to investigate, and potentially resolve, concerns associated with the scrutiny of delegated legislation. Such a power may also assist in clarifying the committee's expectations for ministers, agencies and other relevant stakeholders. The committee also considers that it may be useful to enable it to appoint sub-committees, who may conduct such inquiries on the committee's behalf.

2.55 The committee does not envisage that it would inquire into matters that are not connected with the technical scrutiny of delegated legislation. For example, it would not inquire into policy matters.⁶¹ Rather, it is anticipated that the committee would inquire into systemic issues identified through its routine scrutiny work (similar to the approach taken by the New Zealand Regulations Review Committee).

2.56 The committee appreciates it may currently undertake such inquiries if they are referred to it by the Senate. However, the committee considers that the referral process may not be appropriately adapted to the committee's role. For example, the committee may wish to conduct a lengthy inquiry into a systemic issue associated with the scrutiny of delegated legislation—for example, to inform its core scrutiny work on an ongoing basis. The specific reporting deadlines typically imposed by the Senate may interfere with this process. Alternatively, the committee may wish to conduct a shorter, time-sensitive inquiry into a novel, yet technical, scrutiny issue. In these circumstances, a requirement to seek a referral from the Senate may result in delays which limit the value of the inquiry.

2.57 In light of these issues, the committee considers that it would be appropriate to provide the committee with permanent powers to self-refer inquiries, rather than relying on referral by the Senate. The committee reiterates that it would not use such a power to inquire into matters beyond the technical scrutiny of delegated legislation. If the committee wished to inquire into a more significant or controversial matter, it would seek the Senate's approval to do so.

60 Clerk of the Senate, *Submission 7*, p. 2.

61 Policy matters are left to general purpose references and legislation committees. As outlined in Chapter 6, the committee intends to bring instruments raising significant issues to the attention of these committees for consideration.

Recommendation 6

2.58 The committee recommends that the Senate amend standing order 23 to empower it to inquire into and report on any matter relating to the technical scrutiny of delegated legislation and, consistent with other Senate standing committees, to appoint sub-committees to consider matters within its terms of reference.

Complaints-handling function

Overview

2.59 At present, there is no formal mechanism by which the committee considers or investigates complaints about specific instruments of delegated legislation.

2.60 From time to time, the committee secretariat receives complaints about a particular legislative instrument, or about a matter related to the committee's scrutiny functions. These are typically considered as correspondence at the committee's regular private meetings.

Approach in other jurisdictions

2.61 The New Zealand Regulations Review Committee has an express complaints-handling function. In this regard, the standing orders of the New Zealand Parliament provide that the Regulations Review Committee 'investigates complaints about the operation of regulations, in accordance with Standing Order 320, and may report on the complaints to the House'.⁶²

2.62 Each complaint must be placed before the Regulations Review Committee for consideration at the first meeting after it is received. The complaint must relate to that committee's scrutiny principles.⁶³ The Regulations Review Committee then assesses the complaint, and may formally resolve to accept it and proceed with an investigation or, by unanimous resolution, agree not to proceed with the complaint.

2.63 As part of its investigation, the Regulations Review Committee will typically seek additional, written information from the complainant, as well as from the agency responsible for the relevant instrument. It will also conduct an oral hearing, in which it asks questions of both the complainant and the responsible department. At the conclusion of the investigation, the committee may report its findings to the House of Representatives.⁶⁴ The Clerk of the House has explained that, in its report:

62 House of Representatives (NZ), *Standing Orders of the House of Representatives*, August 2017, SO 318(5).

63 These are set out in standing order 319(2) of the House of Representatives (NZ).

64 Office of the Clerk of House of Representatives (NZ), *Complaining about regulations: what you need to know*, <https://www.parliament.nz/media/4554/making-a-complaint-to-the-regulations-review-committee.pdf> (accessed 13 May 2019).

the [Regulations Review Committee] draws the House's attention to any matters it sees fit, including whether the regulation breaches one or more of the Standing Orders grounds. It may make recommendations to the Government. The committee's report is made public, and [the complainant] will be notified...when this occurs.⁶⁵

2.64 Many of the people with whom the Chair and Deputy Chair met on the delegation to New Zealand⁶⁶ commended the complaints-handling function as a low-cost alternative to the courts, which enables citizens to access a forum in which they can express their concerns to lawmakers and, in some instances, results in changes to the relevant provisions.

Committee view

2.65 The committee sees merit in a low-cost forum for individuals to raise concerns in relation to specific instruments of delegated legislation, and to resolve technical issues in dialogue with lawmakers. However, the committee is mindful of the potential resource implications of such a complaints-handling function.

2.66 As set out in Chapter 1, the committee considers a significant number of disallowable legislative instruments as part of its routine scrutiny work. Expanding the committee's functions to include complaints handling may increase the committee's workload beyond what it, and its secretariat and legal adviser, are currently able to undertake. Moreover, the committee anticipates that many complaints may relate to policy matters outside the committee's terms of reference.

2.67 The committee also notes that delegated legislation in New Zealand may be disallowed at any time.⁶⁷ In this regard, the New Zealand Parliament may take meaningful action in relation to the recommendations of the Regulations Review Committee irrespective of when an investigation is finalised. However, members and senators of the Australian Parliament may only lodge a motion to disallow an instrument within 15 sitting days after the instrument is tabled.⁶⁸ Consequently, while the committee could conduct an investigation in relation to a complaint at any time, under current arrangements the Parliament's ability to take action in relation to a committee recommendation may be confined to the disallowance period.

65 Office of the Clerk of House of Representatives (NZ), *Complaining about regulations: what you need to know*, p. 6.

66 See Appendix C (Delegation Report).

67 Section 42 of the *Legislation Act 2012* (NZ) provides that the House of Representatives may, by resolution, disallow any disallowable instrument or provisions of a disallowable instrument. This power is not limited by time. See also David McGee, *Parliamentary Practice in New Zealand*, 4th edition, Oratia Books, Auckland, 2017, p. 476, <https://www.parliament.nz/en/visit-and-learn/how-parliament-works/parliamentary-practice-in-new-zealand/> (accessed 14 May 2019).

68 *Legislation Act 2003*, section 42.

2.68 Ultimately, the committee considers that further consideration should be given to whether it is appropriate (or indeed, possible) for the committee to undertake complaints-handling functions in addition to its current scrutiny role.

Committee action 1

2.69 The committee will further consider the merits of enabling it to inquire into and report on complaints from interested parties about disallowable legislative instruments which raise technical scrutiny concerns.

Chapter 3

Scrutiny principles

Introduction

3.1 This chapter discusses the effectiveness of the principles against which the committee scrutinises delegated legislation. In particular, it considers whether the principles remain clear and effective in ensuring the committee is fully able to consider:

- compliance with legislation (including the requirements of the enabling Act and other relevant Commonwealth laws);
- constitutional validity;
- whether administrative powers are defined with sufficient precision;
- consultation;
- the quality of drafting;
- access to the law (including instruments and any material incorporated by reference);
- the adequacy of explanatory materials;
- whether an instrument trespasses unduly on personal rights and liberties;
- the availability of independent review of decisions;
- whether an instrument contains matters more appropriate for parliamentary enactment; and
- any other relevant matters associated with the technical scrutiny of delegated legislation.

3.2 In the main, the committee already scrutinises legislative instruments in accordance with the matters listed above (mostly under its scrutiny principle 23(3)(a)).¹ This chapter proposes separately identifying such principles, to clarify the scope of the committee's existing scrutiny functions and to provide clearer guidance as to the committee's role.

Current principles

3.3 The committee currently assesses delegated legislation against a set of principles focused on compliance with statutory requirements, the protection of

1 See Figure 1 in Chapter 1 which provides that from 2010-2018, 76.4% of the committee's comments were made under scrutiny principle 23(3)(a) – that the instrument 'is in accordance with the statute'.

personal rights and liberties, and principles of parliamentary oversight. The principles are set out in Senate standing order 23(3), and require the committee to scrutinise each instrument to ensure:

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

3.4 The principles were established on 11 March 1932 (with the establishment of the committee) and have largely remained unchanged since that time.²

Compliance with legislation

Overview

3.5 Scrutiny principle 23(3)(a) of the committee's terms of reference requires the committee to ensure that instruments are 'in accordance with the statute'. The committee has historically approached this principle as 'expressing something wider than...legal validity',³ including 'unusual or unexpected' uses of delegated powers.⁴ The committee has consistently interpreted the principle as requiring it to consider whether an instrument accords with its enabling Act, including whether:

- the instrument is within the powers conferred by the enabling Act;
- the instrument accords with the object and purpose of the enabling Act; and

2 Principles 23(3)(a) and (b) have not been amended since the committee's establishment. Principles 23(3)(c) and (d) were amended in 1979, following the establishment of the Administrative Appeals Tribunal. The amendments recognised the proliferation of administrative decisions affecting rights and liberties, as well as the increased use of delegated legislation to deal with substantive matters of policy. See Senate Standing Committee on Regulations and Ordinances, *Sixty-Fourth Report*, 20 March 1979, p. 2. No further amendments to principles 23(3)(c) and (d) have since been made.

3 Senate Standing Committee on Regulations and Ordinances, *Thirty-Ninth Report*, March 1972, p. 3.

4 Senate Standing Committee on Regulations and Ordinances, *Third Report*, October 1935, pp. 1-2.

- any statutory preconditions to making the instrument have been satisfied.⁵

3.6 The committee also interprets principle 23(3)(a) as requiring it to consider whether instruments comply with requirements in other Commonwealth legislation. For example, since its inception the committee has been concerned with compliance with the *Acts Interpretation Act 1901*.⁶ More recently, the committee has been concerned to ensure that instruments comply with the *Legislation Act 2003* (Legislation Act)—including compliance with requirements relating to consultation, the incorporation of documents by reference, and the information to be included in an explanatory statement.

3.7 The committee also interprets principle 23(3)(a) as requiring it to consider whether an instrument is supported by a constitutional head of legislative power, and is otherwise constitutionally valid. This matter is considered further below at paragraphs [3.15] to [3.25].

Approach in other jurisdictions

3.8 Comparable Australian state and territory parliamentary scrutiny committees are required to consider whether instruments are made in accordance with enabling Acts, although there are differences in how the relevant principles are formulated.⁷ For example, the Australian Capital Territory (ACT) Committee on Justice and Community Safety is required to consider whether an instrument 'accord[s] with the general objects of the Act under which it is made'.⁸ The Victorian Scrutiny of Acts and Regulations Committee must consider whether an instrument 'does not appear to be within the powers conferred by the authorising Act', or 'appears to be inconsistent with the general objects of its authorising Act'.⁹

5 Since at least 1969, the committee has expressly asserted that it will refrain from delivering determinative legal opinions on whether an instrument is validly made, noting that this function is appropriately performed by the courts. See, for example, Senate Standing Committee on Regulations and Ordinances, *Twenty-Seventh Report*, September 1969, p. 3.

6 See, for example, Senate Standing Committee on Regulations and Ordinances, *Third Report* October 1935, pp. 2-5; *Sixty-Sixth Report*, June 1979 (throughout); *Eightieth Report* October 1986, pp. 9-18.

7 See, for example, *Legislation Review Act 1987* (NSW), paragraphs 9(1)(b)(iii) and (iv); *Subordinate Legislation Committee Act 1969* (Tas), sub-paragraph 8(1)(a)(i); *Legislative Standards Act 1992* (Qld), paragraphs 4(5)(a) and (b); Legislative Council (WA), *Standing Orders*, 2019, Schedule 1, SO 10.6(a); Legislative Council (NT), *Sessional Orders of the Thirteenth Assembly*, 2018, SO 14(1)(g)(ii)(A) and (B).

8 Standing Committee on Justice and Community Safety (ACT) (Legislative Scrutiny Role), *Resolution of Appointment*, paragraph (1)(a), <https://www.parliament.act.gov.au/in-committees/standing-committees-current-assembly/standing-committee-on-justice-and-community-safety-legislative-scrutiny-role> (accessed 14 May 2019).

9 *Subordinate Legislation Act 1994* (Vic), paragraphs 21(1)(a) and (c).

3.9 Additionally, some Australian scrutiny committees are expressly required to consider whether an instrument is made in accordance with other laws. For example, the Tasmanian Subordinate Legislation Committee must consider compliance with the *Subordinate Legislation Act 1992*.¹⁰ The New South Wales (NSW) Legislation Review Committee is required to consider compliance with the *Subordinate Legislation Act 1989*.¹¹

3.10 Parliamentary scrutiny committees in comparable Westminster jurisdictions are similarly required to consider whether instruments are made in accordance with enabling Acts. For example, the Canadian Standing Joint Committee for the Scrutiny of Regulations is required to consider whether an instrument 'is not authorised by the terms of the enabling legislation or has not complied with any condition set forth in the legislation'.¹² The New Zealand Regulations Review Committee must consider whether an instrument 'is not in accordance with the general objects and intentions of the statute under which it is made'.¹³

3.11 A number of committees must also consider whether an instrument makes 'unusual or unexpected' use of powers conferred by its enabling Act.¹⁴ The United Kingdom (UK) Joint Committee on Statutory Instruments must consider whether there is 'doubt whether [an instrument] is *intra vires* or that it appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made'.¹⁵

Committee view

3.12 The committee considers that existing scrutiny principle 23(3)(a) provides sufficient scope for it to consider whether instruments are made in accordance with enabling legislation, as well as to consider whether other applicable legislative requirements have been satisfied.

3.13 However, as presently drafted principle 23(3)(a) requires the committee to ensure that instruments are in accordance with 'the' statute. This may suggest that

10 *Subordinate Legislation Committee Act 1969* (Tas), paragraph 8(1)(ab).

11 *Legislation Review Act 1987* (NSW), sub-paragraph 9(1)(b)(viii).

12 Standing Joint Committee for the Scrutiny of Regulations (Canada), *Mandate*, subsection (1), <https://www.parl.ca/Committees/en/REGS/About> (accessed 14 May 2019).

13 House of Representatives (NZ), *Standing Orders of the House of Representatives*, August 2017, SO 319(1)(a).

14 National Assembly for Wales, *Standing Orders of the National Assembly for Wales*, January 2019, SO 21.2(ii); Scottish Parliament, *Standing Orders of the Scottish Parliament*, May 2018, SO 10.3(1)(g).

15 House of Commons (UK), *Standing Orders of the House of Commons*, May 2018, SO 151(1)(B)(vi); House of Lords (UK), *Standing Orders of the House of Lords*, May 2016, SO 7(2)(f).

the committee is only required to ensure that an instrument accords with its enabling Act, rather than also considering other applicable laws. There may therefore be value in making minor amendments to the principle to:

- reinforce that the committee may consider whether an instrument accords with its enabling Act (including the Act's objects and purpose, and whether all preconditions to making the instrument have been satisfied); and
- clarify that the committee may consider whether there has been compliance with other Commonwealth laws (for example, the Legislation Act and the *Acts Interpretation Act 1901*).¹⁶

3.14 The committee considers these amendments would clarify the approach the committee has always taken under its scrutiny principle 23(3)(a).

Constitutional validity

Overview

3.15 As noted above, scrutiny principle 23(3)(a) requires the committee to ensure that legislative instruments are made in accordance with the statute. The committee has interpreted this principle as applying to 'all aspects of legal conformity,' including with the Commonwealth Constitution.¹⁷

3.16 The committee generally takes the view that where an instrument is made in accordance with its enabling Act, it is likely to be supported by a constitutional head of legislative power (as the Act should itself be constitutionally valid). Where an instrument does not appear to accord with its enabling Act, the committee may seek advice in relation to that matter. However, advice is generally sought on the basis that the instrument may exceed the power conferred by the Parliament, rather than on the basis of an apparent lack of constitutional authority.

3.17 The committee may raise concerns in relation to whether an instrument is supported by a head of legislative power, notwithstanding that it accords with its enabling Act. For example, and as set out in Chapter 7, the committee routinely seeks advice in relation to instruments that specify policies and programs on which

16 It is also proposed that the committee would no longer consider constitutional issues under this principle. As discussed in more detail in paragraphs [3.15] to [3.25] below, these matters would be considered under a separate principle relating expressly to constitutional authority.

17 See Harry Evans and Rosemary Laing, eds, *Odgers' Australian Senate Practice*, 14th edition, Department of the Senate, 2016, p. 436; Senate Standing Committee on Regulations and Ordinances, *Guideline on regulations that amend Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997*, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/FFSP_Regulations_1997 (accessed 14 May 2019).

expenditure is authorised.¹⁸ This follows the High Court's decision in *Williams v Commonwealth (No. 2)*,¹⁹ which confirmed that a constitutional head of legislative power is required to support Commonwealth spending programs.

3.18 The committee may also raise concerns in relation to legislative instruments that may breach express or implied constitutional guarantees—separately from the issue of whether the instrument is supported by a head of legislative power. For example, in 2018 the committee raised concerns that an instrument may have conferred non-judicial functions on judicial officers. The committee noted that the constitutional separation of powers doctrine generally prohibits judicial officers from exercising non-judicial powers, unless the officer is acting in their personal capacity.²⁰

Evidence before the committee

3.19 A number of submitters to the inquiry recommended that the committee be expressly empowered to consider the constitutional validity of instruments, in addition to considering whether instruments are made in accordance with statute.²¹ Professor Anne Twomey observed:

It is possible for a statute to be supported by a head of legislative power, but for a legislative instrument that it authorises to go beyond the scope of that power. For example, in *Williams v Commonwealth (No. 2)* (2014) 252 CLR 416, the High Court was prepared to uphold the validity of s 32B of the *Financial Management and Accountability Act 1997* (Cth) on the basis that it only conferred power to authorise grants that fell within Commonwealth legislative power, but hold invalid a grant authorised by the *Financial Management and Accountability Regulations 1997* (Cth) that was not supported by a head of legislative power.

It is therefore imperative that legislative instruments, especially those that authorise the expenditure of money, are examined to ensure that they fall within one or more legislative heads of power.²²

3.20 Submitters further noted the importance of ensuring that instruments do not contravene express or implied constitutional guarantees (such as the requirement

18 The majority of these are made under the *Financial Framework (Supplementary Powers) Act 1997* and the *Industry Research and Development Act 1986*. See, for example, Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 4 of 2017*, March 2017, pp. 8-9; *Delegated Legislation Monitor 15 of 2018*, December 2018, pp. 7-9.

19 (2014) 252 CLR 416.

20 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 13 of 2018*, November 2018, pp. 28-29.

21 Professor Anne Twomey, *Submission 1*, p. 2; Professor Gabrielle Appleby, Emeritus Professor Mark Aronson and Dr Janina Boughey, *Submission 2*, pp. 10-11; Clerk of the Senate, *Submission 7*, p. 3; Law Society of New South Wales, *Submission 13*, p. 1.

22 Professor Anne Twomey, *Submission 1*, p. 2.

for compensation on just terms for compulsory acquisition of property, and the implied right to freedom of political communication).²³

3.21 The joint submission by Professor Gabrielle Appleby, Emeritus Professor Mark Aronson and Dr Janina Boughey similarly recommended that the committee be expressly required to consider the constitutional validity of instruments, noting that this may help clarify the scope of the committee's scrutiny role.²⁴ The submitters also recommended that the committee issue guidelines to clarify the information relating to constitutional validity that should be included in explanatory statements.²⁵

3.22 In response to these submissions, the Attorney General's Department argued strongly against an express power to consider the constitutional validity of delegated legislation, recommending that the committee confine itself to ensuring that the executive does not overstep the legislative function conferred on it by Parliament.²⁶

Committee view

3.23 The committee considers that there would be benefit in expressly requiring it to consider whether an instrument is supported by a constitutional head of legislative power and is otherwise constitutionally valid. Such a principle would clarify the scope of the committee's existing scrutiny functions, and provide clearer guidance to ministers, departments and agencies as to the committee's role.²⁷

3.24 The committee notes that it does not intend to seek advice in relation to, or report substantively on, the constitutional validity of every legislative instrument it scrutinises. As outlined above, while the committee generally takes the view that instruments are constitutionally valid if made in accordance with their enabling Acts, there may be circumstances where constitutional issues arise despite the instrument according with the powers conferred by the Parliament.

3.25 The committee's consistent view is that questions of legal validity—including constitutional validity—are ultimately for the courts to determine.²⁸ The committee

23 Professor Anne Twomey, *Submission 1*, p. 2; Professor Gabrielle Appleby, Emeritus Professor Mark Aronson and Dr Janina Boughey, *Submission 2*, pp. 10-11.

24 Professor Gabrielle Appleby, Emeritus Professor Mark Aronson and Dr Janina Boughey, *Submission 2*, pp. 10-11.

25 Professor Gabrielle Appleby, Emeritus Professor Mark Aronson and Dr Janina Boughey, *Submission 2*, p. 11.

26 Attorney-General's Department, *Submission 14*, p. 5.

27 The committee considers there would also be considerable benefit in developing guidelines in relation to this matter (see Chapter 9 and committee action 10).

28 The committee notes that it has commented to this effect on multiple occasions. See, for example, Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 3 of 2018*, March 2018, p. 56; *Delegated Legislation Monitor 1 of 2019*, February 2019, p. 111.

does not intend to make determinative statements about legal validity under any new scrutiny principle.

Sufficiently defined administrative powers

Overview

3.26 Currently, the committee is not expressly required to consider whether administrative powers affecting rights, liberties and obligations are defined with sufficient precision. However, the committee has consistently interpreted its existing scrutiny principles as allowing it to consider this matter. For example, under scrutiny principle 23(3)(a) the committee has raised concerns in relation to instruments that sub-delegate powers to a broad range of persons, with little or no specificity as to their attributes or expertise.²⁹ Under principles 23(3)(b) and (d), the committee has also expressed concerns in relation to instruments that:

- confer broad discretionary powers;³⁰ or
- allow persons to assist in the exercise of coercive powers, with little or no specificity as to who may assist or as to any required training.³¹

3.27 This approach reflects the longstanding practice of the committee, which has consistently raised concerns in relation to broad delegations of administrative power under principle 23(3)(a) on the basis that such delegations may breach standards of parliamentary propriety.³²

3.28 The Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee) is required to consider whether a bill or an Act may 'make rights, liberties or obligations unduly dependent on insufficiently defined administrative powers'.³³ The Scrutiny of Bills committee has considered matters such as:

- delegations of administrative power, in the absence of requirements relating to the seniority of delegates, or their qualifications or expertise;³⁴

29 See, for example, Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 3 of 2016*, March 2016, p. 4; *Delegated Legislation Monitor 5 of 2018*, May 2018, pp. 7-8.

30 See, for example, *Delegated Legislation Monitor 1 of 2019*, February 2019, pp. 7-9.

31 See, for example, Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 10 of 2018*, September 2018, pp. 8-10.

32 See, in particular, Senate Standing Committee on Regulations and Ordinances, *Eighty-Seventh Report: Special Report on Subdelegation of Powers*, November 1992.

33 The Senate, *Standing Orders and other orders of the Senate*, August 2018, SO 24(1)(a)(ii) and (iv).

34 See, for example, Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2018*, May 2018, pp. 9-10.

- broad discretionary powers (for example, to disclose information);³⁵ and
- the conferral of coercive powers on 'persons assisting' authorised officers.³⁶

Approach in other jurisdictions

3.29 Some Australian state and territory parliamentary scrutiny committees are required to consider matters related to whether an instrument makes rights, liberties, obligations or interests unduly dependent on insufficiently defined administrative powers. For example, the Victorian Scrutiny of Acts and Regulations Committee considers whether, 'without clear and express authority...[in] the authorising Act...[a provision] provides for the sub-delegation of powers delegated by the authorising Act'.³⁷ The Northern Territory Public Accounts Committee and committees of the Queensland Parliament also consider whether instruments delegate powers only in appropriate cases and to appropriate persons.³⁸

3.30 A similar approach is taken in some comparable Westminster jurisdictions. For example, the Canadian Standing Joint Committee for the Scrutiny of Regulations is required to consider whether an instrument 'makes the rights and liberties of the person unduly dependent on administrative discretion'.³⁹

Committee view

3.31 The committee considers there would be value in expressly requiring it to consider whether an instrument makes rights, liberties, obligations or interests unduly dependent on insufficiently defined administrative powers (similar to the principle applied by the Scrutiny of Bills committee). This would help clarify the scope of the committee's scrutiny role, and provide additional guidance to ministers, agencies and other concerned stakeholders.

3.32 The committee notes that it occasionally experiences difficulty aligning concerns related to broad delegations of power with its existing scrutiny framework. For example, an instrument that permits the delegation of administrative powers may not be inconsistent with its enabling Act, and the powers delegated may not be relevant to personal rights and liberties or should be more appropriately enacted in primary legislation.

35 See, for example, Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2017*, June 2017, pp. 50-51.

36 See, for example, Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 1 of 2018*, February 2018, pp. 43-45.

37 *Subordinate Legislation Act 1994* (Vic), sub-paragraph 21(1)(b)(iv).

38 Legislative Council (NT), *Sessional Orders of the Thirteenth Assembly*, March 2018, SO 14(1)(g)(ii)(A) and (B); *Legislative Standards Act 1992* (Qld), paragraph 4(5)(e).

39 Standing Joint Committee for the Scrutiny of Regulations (Canada), *Mandate*, subsection (10).

3.33 The committee interprets its principles broadly, and will raise concerns about broad delegations of power when it considers it appropriate to do so. Nevertheless, the committee considers that expressly requiring it to consider these matters would assist in resolving uncertainties in the application of the existing scrutiny principles. As the committee already considers broadly defined administrative powers under its existing scrutiny principles 23(a), (b) and (d), the committee does not envisage that such a principle would significantly expand its scrutiny functions.

Consultation

Overview

3.34 Scrutiny principle 23(3)(a) of the committee's terms of reference requires the committee to ensure that instruments are in accordance with the statute. Historically, the committee has interpreted this principle as requiring it to consider whether adequate consultation had occurred before an instrument was made, on the basis that a failure to adequately consult may mean that the relevant instrument 'may not have been made in accordance with the spirit or intent of the Parliament'.⁴⁰ More recently, the committee has interpreted its scrutiny principle as requiring that the instrument comply with the consultation requirements in the Legislation Act, which provide that:

- before an instrument is made, the rule-maker must conduct any consultation that they consider appropriate and reasonably practicable;⁴¹ and
- the explanatory statement must contain a description of the nature of any consultation, or an explanation of why no consultation was undertaken.⁴²

3.35 The Legislation Act also provides that, in determining if consultation is appropriate, a rule-maker may consider the extent to which consultation drew on the knowledge of persons having expertise in relevant fields, as well as whether those who may be affected by the instrument were given an adequate opportunity to comment.⁴³ The Act further provides that consultation may involve notifying persons, bodies or organisations likely to be affected by an instrument—including by inviting submissions or encouraging participation in public hearings.⁴⁴ However, these are matters to which a rule-maker *may* have regard in determining if appropriate consultation has been undertaken. There is no requirement that these

40 Senate Standing Committee on Regulations and Ordinances, *Eighty-Fifth Report*, June 1989, p. 14.

41 *Legislation Act 2003*, section 17.

42 *Legislation Act 2003*, paragraphs 15J(2)(d) and (e).

43 *Legislation Act 2003*, subsection 17(2).

44 *Legislation Act 2003*, subsection 17(3).

matters be taken into account. In addition, where consultation does not occur, this will not affect the validity of an instrument.⁴⁵

3.36 As set out in the committee's *Guideline on consultation*, the committee is concerned to ensure that an explanatory statement is 'technically compliant with the descriptive requirements of the [Legislation] Act regarding consultation'.⁴⁶ Accordingly, the committee takes the view that whether any consultation that has been undertaken is appropriate is a matter for the rule-maker to determine.

3.37 However, the committee is cognisant of its role in ensuring transparency and accountability, and consequently takes as broad an approach as possible to determining whether the requirements of the Legislation Act have been satisfied. The committee does not consider only whether the explanatory statement indicates whether consultation has been undertaken, but also whether sufficient information is provided, noting that it:

does not interpret [section 15J of the Legislation Act] as requiring a highly detailed description of any consultation undertaken. However, a bare or very generalised statement...may be considered insufficient to meet the requirements of the [Legislation Act].⁴⁷

3.38 The committee has raised concerns where an explanatory statement only indicates that the rule-maker 'notified' relevant stakeholders,⁴⁸ where only historic consultation (that may no longer be relevant) is covered.⁴⁹

3.39 The committee has longstanding concerns regarding the consultation requirements in the Legislation Act,⁵⁰ and has questioned the extent to which those requirements are observed by ministers, departments and agencies. For example, in

45 *Legislation Act 2003*, section 19.

46 Senate Standing Committee on Regulations and Ordinances, *Guideline on consultation*, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/consultation (accessed 14 May 2019).

47 Senate Standing Committee on Regulations and Ordinances, *Guideline on consultation*, p. 2.

48 See Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 13 of 2018*, November 2018, pp. 5-7.

49 See Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 8 of 2018*, August 2018, pp. 1-3.

50 For example, the committee conducted an inquiry into the Legislative Instruments Bill 2003, which initially introduced the consultation requirements in the Legislation Act. The committee noted that the consultation requirements in the bill were weaker than those previously proposed, but ultimately recommended that the consultation requirements be given an 'opportunity to work', with a review to be undertaken three years after their enactment. See Senate Standing Committee on Regulations and Ordinances, *111th Report: Legislative Instruments Bill 2003; Legislative Instruments Bill (Transitional Provisions and Consequential Amendments) Bill 2003*, October 2003.

its 2007 inquiry into consultation requirements in the (then) *Legislative Instruments Act 2003*, the committee raised concerns in relation to:

- an apparent lack of familiarity with the consultation requirements, leading to inconsistency between agencies in relation to levels of compliance;⁵¹
- the provision of 'cursory, generic and unhelpful' information in explanatory statements;⁵² and
- over-reliance on exceptions to the consultation requirements in the Legislation Act.⁵³

3.40 The committee has also recommended strengthening consultation provisions in the Legislation Act, including by requiring rule-makers to have regard to particular matters (rather than only listing the matters that may be considered).⁵⁴

3.41 The Scrutiny of Bills committee has similarly noted inadequacies in the consultation requirements in the Legislation Act, stating that:

[W]here the Parliament delegates its legislative power in relation to significant regulatory schemes, it is appropriate that specific consultation obligations (beyond those in section 17 of the Legislation Act) are included in the bill and that compliance with those obligations is a condition of the validity of the relevant legislative instrument.

Where the standard consultation requirements in the Legislation Act are relied on...it is possible for no consultation to be undertaken if a rule-maker considers it to be unnecessary or inappropriate. Further, the fact that consultation does not occur cannot affect the validity or enforceability of an instrument.⁵⁵

51 Senate Standing Committee on Regulations and Ordinances, *Consultation under the Legislative Instruments Act 2003: Interim Report*, June 2007, pp. 5-6. The committee did not table a final report.

52 Senate Standing Committee on Regulations and Ordinances, *Consultation under the Legislative Instruments Act 2003: Interim Report*, June 2007, pp. 6-7.

53 Senate Standing Committee on Regulations and Ordinances, *Consultation under the Legislative Instruments Act 2003: Interim Report*, June 2007, pp. 7-8. Section 18 of the (then) *Legislative Instruments Act 2003* set out circumstances in which consultation may be unnecessary or inappropriate. That section was not carried over into the Legislation Act.

54 See Submission 33 to the 2010 *Inquiry into the future direction and role of the Scrutiny of Bills Committee*, as highlighted in Senate Standing Committee for the Scrutiny of Bills, *Final Report: The future direction and role of the Scrutiny of Bills Committee* (10 May 2012), p. 38.

55 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 3 of 2018*, March 2018, p. 72. The Scrutiny of Bills committee has frequently made similar comments in relation to bills that propose to leave significant matters to delegated legislation, in the absence of specific, mandatory consultation requirements.

Approach in other jurisdictions

3.42 Some comparable Westminster parliamentary scrutiny committees are expressly required to consider whether adequate consultation has been carried out. For example, the UK Secondary Legislation Scrutiny Committee is empowered to draw the special attention of the House of Lords to an instrument on the basis that 'there appear to be inadequacies in the consultation process which relates to the instrument'.⁵⁶ The New Zealand Regulations Review Committee is required to consider whether an instrument complies with particular notice and consultation requirements prescribed by applicable enactments.⁵⁷

3.43 Australian state and territory parliamentary scrutiny committees are not expressly required to consider the quality of any consultation that has been carried out in relation to an instrument. However, a number may consider any consultation that has taken place as part of their scrutiny role. For example, the Tasmanian Subordinate Legislation Committee must consider compliance with the *Subordinate Legislation Act 1992* (which contains requirements for consultation).⁵⁸

3.44 Further, some committees must consider whether the interests of particular stakeholder groups are represented. The Northern Territory Public Accounts Committee must consider whether an instrument 'has sufficient regard to Aboriginal Tradition',⁵⁹ while committees of the Queensland Parliament must consider whether an instrument has 'sufficient regard to Aboriginal Tradition and Island custom'.⁶⁰

Evidence before the committee

3.45 Professor Appleby, Emeritus Professor Aronson and Dr Boughey noted that while delegated legislation is often a key source of individual legal rights, interests and obligations, the executive usually has no judicially enforceable duty to consult

56 Secondary Legislation Scrutiny Committee (UK), *Terms of Reference*, paragraph (4)(f), <https://www.parliament.uk/business/committees/committees-a-z/lords-select/secondary-legislation-scrutiny-committee/role/tofref/> (accessed 15 May 2019).

57 House of Representatives (NZ), *Standing Orders of the House of Representatives*, August 2017, SO 319(2)(h). While relevant, this standing order appears to require the Regulations Review Committee to consider compliance with specific consultation requirements in primarily legislation. The committee could consider compliance with such requirements under principle 23(3)(a), particularly if they were expressed as preconditions to the making of an instrument.

58 *Subordinate Legislation Committee Act 1969* (Tas), paragraph 1(ab). Consultation requirements in relation to legislative instruments are set out in Schedule 1 to the *Subordinate Legislation Act 1992* (Tas).

59 Legislative Council (NT), *Sessional Orders of the Thirteenth Assembly*, March 2018, SO 14(2)(g)(i)(J).

60 *Parliamentary Standards Act 1992* (Qld), paragraph 4(3)(j).

affected persons.⁶¹ They further noted that while the committee frequently requests further information from rule-makers in relation to an instrument, it must rely on the views of the executive as to the appropriateness and adequacy of any consultation that has occurred.⁶²

3.46 Professor Appleby, Emeritus Professor Aronson and Dr Boughey recommended that the committee's scrutiny principles be amended to expressly empower the committee to seek public comment on instruments of delegated legislation. They suggested that this principle might be enlivened where an instrument has a significant impact on rights, obligations or interests, contains significant matters of policy, or when the committee is not satisfied that sufficient consultation was undertaken with affected stakeholders.⁶³

3.47 The South Australian Legislative Review Committee observed that it 'continues to receive some reports from government agencies advising no more than that consultation has taken place with...organisations or bodies affected by a particular regulation'.⁶⁴ It also noted that it is reviewing whether to strengthen information requirements relating to consultation, including whether to stipulate the form in which information must be provided.⁶⁵

3.48 The Clerk of the Senate also submitted that:

in light of the committee's recent focus on issues surrounding the adequacy of consultation undertaken before instruments are made, the committee may wish to recommend an amendment to its scrutiny principles to refer specifically to ensuring that an instrument is not made without adequate consultation of those affected by the proposed law.⁶⁶

61 Professor Gabrielle Appleby, Emeritus Professor Mark Aronson and Dr Janina Boughey, *Submission 2*, pp. 4-5.

62 Professor Gabrielle Appleby, Emeritus Professor Mark Aronson and Dr Janina Boughey, *Submission 2*, p. 5.

63 Professor Gabrielle Appleby, Emeritus Professor Mark Aronson and Dr Janina Boughey, *Submission 2*, pp. 5-6.

64 Legislative Review Committee of the Parliament of South Australia, *Submission 12*, p. 5.

65 Legislative Review Committee of the Parliament of South Australia, *Submission 12*, p. 5. Each instrument of delegated legislation that is referred to the SA Committee under the *Subordinate Legislation Act 1978* must be accompanied by a report prepared by the responsible agency. The report is required to outline in detail the specifics of the relevant instrument, any consultation undertaken, and detailed reasoning regarding commencement, if relevant. See Department of the Premier and Cabinet (South Australia), *PC034 Procedures in relation to the referral of subordinate legislation to the Legislative Review Committee*, 2012, p. 5, <https://dpc.sa.gov.au/resources-and-publications/premier-and-cabinet-circulars/DPC-Circular-Procedures-in-Relation-to-the-Referral-of-Subordinate-Legislation-to-the-Legislative-Review-Committee.pdf> (accessed 14 May 2019).

66 Clerk of the Senate, *Submission 7*, p. 3.

Committee view

3.49 The committee's consideration of whether appropriate consultation has been undertaken is presently confined to considering whether the consultation requirements of the Legislation Act have been met. However, while the requirements under the Legislation Act may be capable of ensuring that adequate consultation is conducted, the committee is concerned that reliance on those requirements may not allow it to appropriately assess whether those likely to be affected by the instrument were adequately consulted in relation to it. This is because the Legislation Act leaves the decision to consult within the discretion of the rule-maker, who must only consult to the extent that they consider appropriate and reasonably practicable. Consequently, if the rule-maker considers it appropriate not to consult (even where particular individuals would be affected), and states so in the explanatory statement, the committee has limited scope to raise scrutiny concerns. As noted above at paragraph [3.35], while rule-makers may consider various matters in determining if consultation is appropriate, they are not required to have regard to these matters.

3.50 Further and as noted above, the Legislation Act requires an explanatory statement to contain a description of the nature of any consultation undertaken or, if no such consultation was undertaken, to explain why it was not undertaken.⁶⁷ From a purely technical standpoint, these requirements may be satisfied where an explanatory statement contains only very limited information (for example, noting only that consultation was undertaken with government agencies and other relevant stakeholders, without explaining who these stakeholders are or how consultation was conducted).

3.51 As noted above at paragraphs [3.37] to [3.38], the committee interprets its scrutiny principles broadly, and will often raise concerns where an explanatory statement contains overly bare or general information relating to consultation. However, the committee often has difficulty raising concerns in relation to explanatory statements that contain limited information about consultation, given that they may still satisfy the (relatively weak) requirements in the Legislation Act.

3.52 In light of these matters, the committee considers that there would be substantial benefit in expressly requiring it to consider whether persons or entities likely to be affected by an instrument were adequately consulted. This would assist in resolving concerns relating to the committee's ability to consider the quality of consultation (beyond considering whether the requirements of the Legislation Act have been satisfied), as well as uncertainties relating to the level of information that should be included in an explanatory statement.

3.53 The committee does not anticipate that adding such an express principle would result in it inquiring into matters beyond those contemplated by the

67 *Legislation Act 2003*, paragraphs 15J(2)(d) and (e).

Legislation Act. The Act provides examples of matters a rule-maker may consider in determining whether consultation is appropriate.⁶⁸ The committee envisages that these are the types of matters the committee would consider in determining whether to raise concerns. However, a new principle would allow the committee to inquire into matters beyond the technical *requirements* of the Legislation Act.

3.54 The committee does not consider it necessary or appropriate to seek public comment in relation to legislative instruments. The committee is concerned to ensure that adequate consultation is undertaken *before* an instrument is made (that is, while there is scope to alter the instrument in response to stakeholder feedback). The committee considers it more appropriate to correspond with the executive in relation to this matter, rather than to seek comments from interested or affected parties. Additionally, a substantial proportion of submissions to a public comment process would likely relate to policy matters beyond the scope of the committee's technical scrutiny role. Such matters may be more appropriately considered by legislation standing committees.⁶⁹

Unclear or defective drafting

Overview

3.55 The committee interprets scrutiny principle 23(3)(a) as requiring it to consider whether instruments have certainty of meaning and operation,⁷⁰ and considers that the drafting of legislative instruments and Acts of Parliaments should be undertaken to an equivalent standard.

3.56 The committee has drawn attention under principle 23(3)(a) to minor drafting errors, discrepancies between instruments and explanatory statements, references to obsolete legislation and errors that may substantively affect the operation of an instrument.⁷¹ More recently, the committee has also considered matters such as uncertainty as to penalties that may be imposed, the effect of potential drafting errors, and references to spent or repealed provisions.⁷²

68 *Legislation Act 2003*, subsections 17(2) and (3). See also discussion at paragraph [3.35].

69 This matter is discussed in further detail in Chapter 6.

70 Senate Standing Committee on Regulations and Ordinances, *Application of the committee's scrutiny principles*, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/principles (accessed 14 March 2019).

71 See, for example, Senate Standing Committee on Regulations and Ordinances, *Eighty-Fifth Report*, June 1989, p. 22; *40th Parliament Report*, June 2005, pp. 19-22.

72 See, for example, Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 1 of 2018*, February 2018, pp. 1-2; *Delegated Legislation Monitor 8 of 2017*, August 2017, pp. 9-10; *Delegated Legislation Monitor 4 of 2018*, March 2018, pp. 7-8.

3.57 Historically, the committee has raised concerns in relation to instruments that do not appear to enact the intent expressed in their explanatory statements, vague and subjective expressions, and gender-specific language.⁷³

Approach in other jurisdictions

3.58 The majority of state and territory parliamentary scrutiny committees are required or permitted to inquire into potential drafting defects, or to consider whether instruments are drafted in a clear and precise manner.⁷⁴ For example, the Northern Territory Public Accounts Committee must consider whether an instrument 'is unambiguous and drafted in a sufficiently clear and precise way'.⁷⁵

3.59 Scrutiny committees of comparable Westminster jurisdictions are similarly required to consider deficiencies in drafting. For example, the UK Joint Committee on Statutory Instruments must consider whether to draw Parliament's attention to an instrument on the basis that 'its drafting appears to be defective', or 'for any special reason its form or purport calls for elucidation'.⁷⁶ The Welsh Constitutional and Legislative Affairs Committee and the Scottish Delegated Powers and Law Reform Committee must consider whether the drafting of an instrument may be defective, and whether an instrument's form or meaning may require further clarification.⁷⁷

3.60 Similarly, the New Zealand Regulations Review Committee must consider whether the 'form or purport' of an instrument calls for elucidation.⁷⁸ The Canadian Joint Committee for the Scrutiny of Regulations is also required to consider whether an instrument 'is defective in its drafting or for any other reason requires elucidation as to its form or purport'.⁷⁹

73 Senate Standing Committee on Regulations and Ordinances, *Annual Report 1996-97*, June 1998, p. 12.

74 See, for example, *Legislation Review Act 1987* (NSW), sub-paragraph 9(1)(b)(vii); *Subordinate Legislation Committee Act 1969* (Tas) sub-paragraph 8(1)(a)(ii); *Legislative Standards Act 1992* (Qld), paragraph 4(3)(k).

75 Legislative Council (NT), *Sessional Orders of the Thirteenth Assembly*, March 2018, SO 14(2)(g)(i)(K).

76 House of Commons (UK), *Standing Orders of the House of Commons*, May 2018, SO 151(1)(B)(viii); House of Lords (UK), *Standing Orders of the House of Lords*, May 2016, SO 73(2)(h).

77 See Scottish Parliament, *Standing Orders of the Scottish Parliament*, May 2018, SO 10.3.1(h) and (i); National Assembly for Wales, *Standing Orders of the National Assembly for Wales*, January 2019, SO 21.2(v) and (vi).

78 House of Representatives (NZ), *Standing Orders of the House of Representatives*, August 2017, SO 319(2)(i).

79 Standing Joint Committee for the Scrutiny of Regulations (Canada), *Mandate*, subsection (13).

Evidence before the committee

3.61 The submission by the Department of Education and Training suggested that, in light of the increased volume of delegated legislation and the variable quality of drafting, there may be merit in expressly allowing the committee to consider whether an instrument is 'defective in its drafting or for any other reason requires elucidation as to its form or purport'. The submission noted that such a principle is included in the mandate of Canadian and New Zealand scrutiny committees.⁸⁰

Committee view

3.62 The committee considers that it would be useful to expressly require it to consider whether the drafting of an instrument is defective. This would clarify the scope of the committee's scrutiny role, and provide additional guidance to ministers, agencies and other concerned stakeholders.

3.63 Noting the committee already considers issues of defective drafting under existing principle 23(3)(a), the committee does not envisage that this proposed principle would significantly expand the scope of its scrutiny functions.

Incorporation of documents and access to the law

Overview

3.64 Scrutiny principle 23(3)(a) requires the committee to consider whether instruments accord with the statute. Where a legislative instrument incorporates material by reference, that material becomes part of the law. The committee considers it important that persons interested in or affected by the law understand how any material is incorporated, and are able to readily and freely access its terms.

3.65 The incorporation of material by reference (particularly where that material is not publicly available) has been a longstanding concern for the committee. In this respect, the committee has noted that incorporated documents 'take on a legislative character', and that 'formal parliamentary oversight [of incorporated documents] is as necessary as the scrutiny of the incorporating instrument itself'.⁸¹ The committee has consistently raised concerns about incorporated documents both by reference to applicable statutory requirements⁸² and by reference to the broader principle that 'the law should not be open to change that is indirect and undisclosed'.⁸³

80 Department of Education and Training, *Submission 6*, p. 3.

81 See, for example, Senate Standing Committee on Regulations and Ordinances, *Eighty-Fifth Report*, June 1989, p. 27.

82 For example, the *Legislation Act 2003*, the (previous) *Legislative Instruments Act 2003*, and the *Acts Interpretation Act 1901*.

83 See, for example, Senate Standing Committee on Regulations and Ordinances, *40th Parliament Report*, June 2005, pp. 29-32.

3.66 The Legislation Act provides that instruments may incorporate other documents,⁸⁴ and requires the explanatory statement to provide a description of any incorporated document and to indicate where the document may be obtained.⁸⁵ The committee's expectations regarding the incorporation of documents are broader than the express requirements of the Legislation Act. In this respect, the committee expects an instrument or its explanatory statement to specify the manner in which any documents are incorporated and, where a document is incorporated as in force from time to time, the authority relied upon to incorporate the document in that manner.⁸⁶

3.67 The committee also expects the explanatory statement to indicate where any incorporated document may be accessed free of charge, noting that:

A fundamental principle of the rule of law is that every person subject to the law should be able to access its terms readily and freely. Including information about incorporated documents in the [explanatory statement] to an instrument enables persons interested in or affected by an instrument to readily understand and access its terms.⁸⁷

3.68 Additionally, the committee is concerned to ensure that instruments themselves may be readily accessed by the public. In this regard, the committee has raised concerns under principle 23(3)(b) about an instrument subject to a copyright notice prohibiting its unauthorised reproduction (as the instrument included material from a copyrighted international standard), stating that:

The committee shares the view of the Copyright Law Review Committee that copyright should not exist in legislative instruments, because it may inhibit the capacity of people to access and use the law, and therefore potentially restrict access to justice.⁸⁸

84 *Legislation Act 2003*, section 14.

85 *Legislation Act 2003*, paragraph 15J(2)(c). Section 41 of that Act further provides that a House of Parliament may, at any time while an instrument is subject to disallowance, require any document incorporated by reference to be made available for inspection.

86 In this respect, section 14(2) of the Legislation Act provides that, unless the contrary intention appears, an instrument may not make provision in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time.

87 Senate Standing Committee on Regulations and Ordinances, *Guideline on Incorporation of documents*, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents (accessed 14 May 2019).

88 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 15 of 2018*, December 2018, p. 5.

Approach in other jurisdictions

3.69 Other Australian state and territory parliamentary scrutiny committees are not expressly required to consider whether incorporated documents may be freely accessed and used. However, they are generally able to consider this issue under their existing scrutiny frameworks. For example, the ACT Standing Committee on Justice and Community Safety has stated that 'so far as possible, legislation should be freely available to the general public', noting that this goal can be undermined where legislation incorporates material by reference.⁸⁹

3.70 Parliamentary scrutiny committees in Australia and in comparable overseas jurisdictions have also continued to raise more general concerns about material incorporated by reference in delegated legislation, and the associated implications for parliamentary oversight and public access to the law.⁹⁰

Evidence before the committee

3.71 The Department of Infrastructure, Regional Development and Cities expressed concerns that the committee's general expectation that incorporated documents be freely available may not be appropriate for certain industry standards. The Department queried whether certain technical standards could be recognised for their small and specialised audiences, rather than for use by the public or general industry. It suggested that the committee allow for certain standards to be accessed at a cost as part of professional libraries, with the expectation that any costs incurred would contribute towards the standards' further review and development. The Department indicated that this could be an interim measure until further work on making standards publicly accessible is progressed by government.⁹¹

Committee view

3.72 The committee considers that its terms of reference should be amended to expressly require it to consider whether an instrument, and any documents it

89 Standing Committee on Justice and Community Safety (ACT), *Subordinate Legislation—Technical and Stylistic Standards*, p. 2, https://www.parliament.act.gov.au/_data/assets/pdf_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards.pdf (accessed 14 May 2019). The ACT committee has also recommended that legislation provide that the general public may inspect a copy of any incorporated material (for example, at government offices). See ACT Standing Committee on Justice and Community Safety, *Scrutiny Report 9*, September 2017, pp. 9-10.

90 See, for example, Regulations Review Committee (NZ), *Inquiry into material incorporated by reference*, July 2004, https://www.parliament.nz/resource/miNZ/47DBSCH_SCR2794_1/fa349b1c81f369bef6395cf6bcdcd0e4e211a2ec (accessed 14 May 2019); Joint Standing Committee on Delegated Legislation (WA), Report 84, *Access to Australian Standards Adopted in Delegated Legislation* (June 2016), [http://www.parliament.wa.gov.au/publications/tabledpapers.nsf/displaypaper/3914263a663fa6312f3c877948257fdb00358426/\\$file/4263.pdf](http://www.parliament.wa.gov.au/publications/tabledpapers.nsf/displaypaper/3914263a663fa6312f3c877948257fdb00358426/$file/4263.pdf) (accessed 14 May 2019).

91 Department of Infrastructure, Regional Development and Cities, *Submission 4*, p. 2.

incorporates, may be freely accessed and used. Such a principle would assist in clarifying the scope of the committee's scrutiny functions, and would provide additional guidance to ministers, agencies and other interested stakeholders.

3.73 In particular, the committee considers that such a principle would usefully clarify that its scrutiny is not restricted to the technical requirements of the Legislation Act. The committee notes that ministers and agencies have previously attempted to justify a lack of free access to incorporated material on the basis that the Legislation Act only requires an explanatory statement to indicate where material may be obtained (which may be at a cost).⁹² In such cases, the committee has emphasised that it is not only concerned with the technical requirements of the Legislation Act but also with more fundamental legal principles – including that all persons subject to or interested in the law should be able to readily access its terms.

3.74 The committee also considers that there would be value in requiring it to consider whether the instrument *itself* is readily and freely available. In this respect, the committee is concerned that its principles may not be sufficiently broad to readily allow it to raise all relevant scrutiny concerns about the accessibility of legislation. While the Federal Register of Legislation is generally sufficient to ensure that instruments are publicly available, as noted at paragraph [3.68] there have been instances where the committee has raised concerns about restrictions on public access and sharing. Such concerns do not fit neatly into the committee's existing scrutiny framework.⁹³ Requiring the committee to consider whether instruments are readily and freely accessible may also assist in resolving such uncertainties.

3.75 The committee appreciates that it may in some cases be costly to provide free, public access to all incorporated Australian and international standards. Nevertheless, the committee reiterates that one of its core functions is to ensure that all persons subject to or interested in the law may readily and freely access its terms. It intends to continue to monitor this issue. Any justification for a failure to provide for public access to incorporated documents, and any action the committee takes in relation to this matter, will be determined on a case-by-case basis.

92 See, for example, Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 3 of 2018*, March 2018, p. 81.

93 For example, the committee ultimately raised concerns about the unauthorised reproduction of an instrument under principle 23(3)(b), on the basis that this would appear to restrict the right to access to justice. However, this is not how the committee has generally interpreted its scrutiny principle 23(3)(b).

Adequacy of explanatory material

Overview

3.76 The committee has consistently interpreted scrutiny principle 23(3)(a) of its terms of reference as requiring it to consider whether instruments have certainty of meaning and operation.⁹⁴ This includes whether explanatory statements are drafted with sufficient care and precision.

3.77 The quality of explanatory statements has been an ongoing issue for the committee.⁹⁵ For example, in 2000 the committee noted that a significant amount of its work during the previous year had focussed on the quality of explanatory statements. Key issues included failures to provide an explanatory statement, and the inclusion of only bare or cursory information.⁹⁶ The committee has continued to raise similar issues under this principle.⁹⁷

3.78 As noted above, scrutiny principle 23(3)(a) is interpreted as also requiring the committee to consider whether an instrument complies with the Legislation Act. This includes requirements as to the form and content of explanatory statements.⁹⁸

Approach in other jurisdictions

3.79 Some comparable parliamentary scrutiny committees are required to consider the quality of explanatory materials. For example, the ACT Standing Committee on Justice and Community Safety must consider whether an explanatory statement 'meets the technical or stylistic standards expected by the Committee'.⁹⁹ The UK Secondary Legislation Scrutiny Committee is required to consider whether 'the explanatory material laid in support [of an instrument] provides insufficient

94 Senate Standing Committee on Regulations and Ordinances, *Application of the committee's scrutiny principles*.

95 The committee has previously included a standard description of the interpretation of its principles in a number of its general and special reports, becoming standard practice between 1989 and 1999. The quality of explanatory statements has been consistently cited as a key issue. See, for example, Senate Standing Committee on Regulations and Ordinances, *102nd Report*, November 1995, p. 7.

96 Senate Standing Committee on Regulations and Ordinances, *109th Report: Annual Report 1999-2000*, October 2000, p. 11.

97 See, for example, Senate Standing Committee on Regulations and Ordinances, *40th Parliament Report*, June 2005, pp. 19-22.

98 *Legislation Act 2003*, subsection 15J(2). In particular, paragraph 15J(2)(b) requires an explanatory statement to explain the purpose and operation of the relevant instrument.

99 Standing Committee on Justice and Community Safety (ACT) (Legislative Scrutiny Role), *Resolution of Appointment*, subsection (2). This committee's expectations in relation to explanatory statements are set out in its *Guide to writing an explanatory statement*, https://www.parliament.act.gov.au/data/assets/pdf_file/0006/434346/Guide-to-writing-an-explanatory-statement.pdf (accessed 14 May 2019).

information to gain a clear understanding of the instrument's policy objective and intended implementation'.¹⁰⁰

Committee view

3.80 The committee considers that it should be expressly required to consider whether explanatory material contains sufficient information to gain a clear understanding of the instrument. This would assist in clarifying the scope of the committee's scrutiny role (including that the committee may separately consider the adequacy of explanatory material), and provide additional guidance to ministers, agencies and other interested stakeholders.

3.81 As outlined above, the committee may already consider the quality of explanatory materials under its existing scrutiny framework (at least insofar as any deficiencies may cause uncertainty as to the operation or effect of the relevant instrument or result in non-compliance with the Legislation Act). As such, the committee does not envisage that such a principle would significantly expand its scrutiny functions. Rather, it would provide additional clarity, and encourage rule-makers to give greater consideration to the adequacy of the explanatory materials accompanying an instrument.

Personal rights and liberties

Overview

3.82 Scrutiny principle 23(3)(b) of the committee's terms of reference requires the committee to ensure that instruments of delegated legislation do not trespass unduly on personal rights and liberties. The committee interprets this principle as extending to a range of matters, including:

- the right to privacy (for example, the disclosure of personal information);¹⁰¹
- coercive powers (for example, the use of force, powers to detain persons, and powers of search and seizure);¹⁰²
- offences that apply strict or absolute liability;¹⁰³
- provisions that reverse the evidential or legal burden of proof;¹⁰⁴

100 Secondary Legislation Scrutiny Committee (UK), *Terms of Reference*, paragraph 4(d).

101 See, for example, Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 14 of 2018*, November 2018, pp. 4-5.

102 See, for example, Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 1 of 2019*, February 2019, pp. 29-32.

103 See, for example, Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 1 of 2017*, February 2017, pp. 31-33, *Delegated Legislation Monitor 14 of 2017*, November 2017, pp. 22-23.

- abrogation of privileges (for example, the privilege against self-incrimination and legal professional privilege);¹⁰⁵
- instruments, or provisions of instruments, with retrospective effect;¹⁰⁶ and
- interference with property rights (for example, provisions that appear to authorise the arbitrary disposal of personal property).¹⁰⁷

3.83 Generally, the committee will raise concerns where an instrument appears to limit or abrogate personal rights and liberties, and this has not been adequately justified in the explanatory materials.

3.84 Historically, the committee has interpreted this principle as extending to all rights conferred under the common law (including, for example, the rights of creditors in bankruptcy proceedings and the rights of consumers to receive particular subsidies).¹⁰⁸ The committee has also interpreted the principle as extending to measures that place unreasonable burdens on business.¹⁰⁹

3.85 The committee has issued multiple reports on its expectations with regard to principle 23(3)(b), including in relation to retrospectivity¹¹⁰ and burdens of proof.¹¹¹

3.86 Similarly, the Commonwealth Scrutiny of Bills committee is required to consider whether a bill trespasses unduly on personal rights and liberties.¹¹²

Approach in other jurisdictions

3.87 Each Australian state and territory parliamentary scrutiny committee is required to consider whether instruments trespass unduly on personal rights and

104 See, for example, Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 14 of 2017*, November 2017.

105 See, for example, Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 5 of 2018*, May 2018, pp. 17-19.

106 See, for example, Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 9 of 2018*, August 2018, pp. 9-10.

107 See, for example, Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 10 of 2018*, September 2018, pp. 10-12.

108 See, for example, Senate Standing Committee on Regulations and Ordinances, *Eighty-Fifth Report*, June 1989, pp. 41, 46;

109 See, for example, Senate Standing Committee on Regulations and Ordinances, *40th Parliament Report*, June 2005, pp. 44-45.

110 See, for example, Senate Standing Committee on Regulations and Ordinances, *Twenty-Fifth Report*, November 1968; *Forty-Second Report*, October 1972; *Fifty-Sixth Report*, November 1976.

111 See, for example, Senate Standing Committee on Regulations and Ordinances, *Sixty-Seventh Report*, August 1979.

112 The Senate, *Standing Orders and other orders of the Senate*, August 2018, SO 24(1)(a)(i).

liberties, although there are slight differences in how the relevant principles are formulated.¹¹³ For example, the South Australian Legislative Review committee is required to consider whether an instrument 'unduly trespasses on rights previously established by law, [or] is inconsistent with the principles of natural justice'.¹¹⁴ The Victorian Scrutiny of Acts and Regulations Committee is required to consider whether instruments 'unduly trespass on rights and liberties of the person previously established by law'.¹¹⁵

3.88 The Canadian Standing Joint Committee for the Scrutiny of Regulations and the New Zealand Regulations Review Committee are expressly required to consider whether an instrument trespasses unduly on personal rights and liberties.¹¹⁶ By contrast, UK scrutiny committees are not expressly required to consider whether an instrument trespasses on personal rights and liberties. However, they are required to consider some matters that relate to this principle, for example, each committee is required to consider whether an instrument may have a retrospective effect.¹¹⁷

Evidence before the committee

3.89 The Law Society of New South Wales recommended that instruments be reviewed against common-law rights and privileges. It also recommended that instruments be reviewed against the seven core human rights treaties set out in the *Human Rights (Parliamentary Scrutiny) Act 2011*.¹¹⁸

Committee view

3.90 In the committee's view, scrutiny principle 23(3)(b) is functioning effectively and does not require amendment. The existing principle provides sufficient scope to enable the committee to consider whether an instrument may cause undue

113 See, for example, *Legislation Review Act 1987* (NSW), sub-paragraph 9(1)(b)(i); *Subordinate Legislation Committee Act 1969* (Tas), sub-paragraphs 8(1)(a)(iii) *Legislative Standards Act 1992* (Qld), subsection 4(2); Legislative Council (WA), *Standing Orders*, January 2019, Schedule 1, SO 10.6(b); Legislative Council (NT), *Sessional Orders of the Thirteenth Assembly*, March 2018, SO 14(1)(g)(i). A number of these committees must also consider specific matters (for example, burdens of proof) under the general heading of 'rights and liberties'.

114 Legislative Review Committee of the Parliament of South Australia, *Submission 12*, pp. 2-3.

115 *Subordinate Legislation Act 1994* (Vic), paragraph 21(1)(f).

116 House of Representatives (NZ), *Standing Orders of the House of Representatives*, August 2017, SO 319(2)(b); Standing Joint Committee for the Scrutiny of Regulations (Canada), *Mandate*, subsection (9).

117 House of Commons (UK), *Standing Orders of the House of Commons*, May 2018, SO 151(1)(B)(iii); House of Lords (UK), *Standing Orders of the House of Lords*, May 2016, SO 73(2)(c); Scottish Parliament, *Standing Orders of the Scottish Parliament*, May 2018, SO 10.3(1)(c); National Assembly for Wales, *Standing Orders of the National Assembly for Wales*, January 2019, SO 21.2(iv).

118 Law Society of New South Wales, *Submission 13*, p. 1.

interference with common-law rights, liberties and privileges, and the committee has not identified any gaps or unintended consequences associated with this element of its scrutiny role. The existing principle is also consistent with the approach taken in other jurisdictions, and with the principles applied by the Scrutiny of Bills committee.

Independent review

Overview

3.91 Scrutiny principle 23(3)(c) of the committee's terms of reference requires it to ensure that legislative instruments do not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal.¹¹⁹ The committee interprets this principle as requiring it to consider matters such as:

- the availability of independent merits review in relation to discretionary decisions which may affect rights, interests or obligations;
- whether adverse decisions are notified to affected persons in a timely and appropriate manner (including whether statements of reasons are provided and review rights are explained);
- the breadth of discretionary decisions, including whether clear and objective decision-making criteria are set out in the instrument or its enabling Act.¹²⁰

3.92 In contrast, the Scrutiny of Bills committee is required to consider, in relation to bills before the Parliament, whether provisions of such bills 'make rights, liberties or obligations unduly dependent upon non-reviewable decisions'.¹²¹ This is interpreted as extending to both merits review and judicial review.¹²²

3.93 The majority of concerns raised by the committee under this principle relate to the availability of merits review. The committee routinely seeks information as to whether independent merits review is available and, where it is not, whether the

119 Principle 23(3)(c) originally required the committee to consider whether instruments 'do not unduly make the rights and liberties of citizens dependent upon administrative rather than judicial decisions'. However, the principle was revised to its current form in 1979, following the establishment of the Administrative Appeals Tribunal. The amendments were based primarily on the proliferation of significant administrative decisions affecting rights and liberties. See Senate Standing Committee on Regulations and Ordinances, *Sixty-Fourth Report: Principles of the Committee*, March 1979, p. 2.

120 See Senate Standing Committee on Regulations and Ordinances, *Application of the committee's scrutiny principles*.

121 The Senate, *Standing Orders and other orders of the Senate*, August 2018, SO 24(1)(a)(iii).

122 See, for example, *Scrutiny Digest 1 of 2018*, February 2018, pp. 10-11; *Scrutiny Digest 6 of 2018*, June 2018, pp. 44-45.

exclusion of, or failure to provide for, review is based on established grounds.¹²³ The committee has stressed the importance of independent review since at least 1957.¹²⁴

3.94 The committee also raises concerns where an instrument appears to limit opportunities to seek merits review – for example by restricting the extent to which adverse decisions and review rights must be notified. For example, the committee has raised concerns in relation to 'no-invalidity' clauses, which may provide that failures to notify applicants in relation to certain adverse decisions do not affect the validity of those decisions. The committee has noted that these clauses may result in an applicant remaining unaware of their review rights, and consequently losing the opportunity to have a decision reconsidered by a court or tribunal.¹²⁵

3.95 As set out in *Odgers' Australian Senate Practice*, the committee interprets scrutiny principle 23(3)(c) as 'encompassing the full range of natural justice and due process considerations'.¹²⁶ In this respect, it is open to the committee to consider the availability of judicial review as well as merits review, although in practice the availability of judicial review is rarely an issue in delegated legislation.¹²⁷

Approach in other jurisdictions

3.96 A number of Australian state and territory parliamentary scrutiny committees are required to consider the availability of independent review in

123 That is, the grounds set out in the Administrative Review Council's (ARC) guidance document, *What decisions should be subject to merit review?*, <https://www.arc.ag.gov.au/Publications/Reports/Pages/Downloads/Whatdecisionsshouldbesubjecttomeritreview1999.aspx> (accessed 14 May 2019). The committee notes that the Department of Infrastructure, Regional Development and Cities (*Submission 4*, p. 1) noted that the committee should review older reference material that it uses to assess adherence to the committee's scrutiny principles. However, the committee notes that the 1999 version of this guidance document is the latest available, and continues to be listed as a 'key resource' by government. See, for example, Attorney-General's Department, *Australian Administrative Law Policy Guide* (2011), p. 11, <https://www.ag.gov.au/LegalSystem/AdministrativeLaw/Documents/Australian-administrative-law-policy-guide.pdf> (accessed 14 May 2019).

124 See, for example, Senate Standing Committee on Regulations and Ordinances, *Eleventh Report* May 1957, pp. 3-5.

125 See, for example, Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 12 of 2018*, October 2018, pp. 22-23; *Delegated Legislation Monitor 1 of 2019*, February 2019, pp. 19-20.

126 Harry Evans and Rosemary Laing, eds., *Odgers' Australian Senate Practice*, 14th edition, Department of the Senate, 2016, p. 436.

127 The committee rarely raises concerns about the availability of judicial review, as judicial review is available unless expressly excluded. However, the committee has raised concerns where an instrument may limit judicial review's standard remedies. See, for example, Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 2 of 2019*, April 2019, pp. 51-53. The committee noted that a 'no-invalidity' clause in that instrument meant that judicial review on the grounds of jurisdictional error is less likely to be available.

relation to decisions made under instruments.¹²⁸ The relevant principles are often broader than current principle 23(3)(c). For example, the ACT Justice and Community Safety Committee must consider whether an instrument 'makes rights, liberties and/or obligations unduly dependent on non-reviewable decisions'.¹²⁹ The WA Delegated Legislation Committee is required to consider whether an instrument 'provides an effective mechanism for the review of administrative decisions'.¹³⁰

Committee view

3.97 The committee considers there would be value in expressly requiring it to consider whether an instrument unduly excludes, limits or fails to provide for independent review of decisions affecting rights, liberties, obligations or interests. This would clarify the scope of the committee's scrutiny functions and provide additional guidance to ministers, agencies and other stakeholders. It would also be consistent with the scrutiny functions of other Australian parliamentary scrutiny committees and the Scrutiny of Bills committee.

3.98 Such a principle would clarify that the committee is able to consider issues related to judicial review, as well as considering whether decisions are subject to 'review of their merits'. Additionally, the committee notes that principle 23(3)(c) currently requires the committee to consider whether an instrument may make 'rights and liberties' unduly dependent on certain administrative decisions. In accordance with its broad interpretation of the scrutiny principles, the committee has raised concerns relating to the availability of review in relation to matters such as licensing arrangements and reporting requirements.¹³¹ This is notwithstanding that such decisions not affect 'rights and liberties' but more accurately affect obligations or interests. The committee therefore considers it appropriate to clarify that the committee may consider decisions that affect 'obligations and interests', as well as those which affect 'rights and liberties'.

3.99 Scrutiny principle 23(3)(c) as presently drafted could also suggest that the committee is only required to consider administrative decisions affecting 'citizens'. However, the committee has consistently interpreted this principle as extending to non-citizens (for example, temporary or permanent residents) and to businesses.¹³²

128 See, for example, *Legislative Standards Act 1992* (Qld), paragraph 4(3)(a); Legislative Council (NT), *Sessional Orders of the Thirteenth Assembly*, March 2018, SO 14(1)(g)(i)(A).

129 Standing Committee on justice and Community Safety (Legislative Scrutiny Role), *Resolution of Appointment*, paragraph (1)(c).

130 Legislative Council (WA), *Standing Orders*, January 2019, Schedule 1, SO 10.6(c).

131 See, for example, Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 14 of 2018*, November 2018, pp. 18-19.

132 See, for example, Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 5 of 2018*, May 2018, pp. 40-41.

The committee therefore considers that there would be value in clarifying that the committee may consider all decisions that affect anyone's rights, liberties, obligations or interests that are made under legislative instruments.

Matters more appropriate for parliamentary enactment

Overview

3.100 Scrutiny principle 23(3)(d) of the committee's terms of reference requires it to ensure that instruments do not contain matters more appropriate for parliamentary enactment (that is, matters that would be more appropriate for enactment in primary rather than delegated legislation).¹³³

3.101 Whether a matter is more appropriate for parliamentary enactment is determined on a case-by-case basis. However, the committee has noted that a matter is likely to be more appropriate for parliamentary enactment where it:

- manifests as a fundamental change in the law;
- substantially alters rights, obligations or liabilities;
- is lengthy or complex;
- impinges in a major way on the community;
- intends to bring about radical changes in relationships or attitudes of people in a particular aspect of the life of the community;
- is a core element of a regulatory scheme; or
- is part of a major uniform, or partially uniform, scheme involving the states or territories.¹³⁴

3.102 The committee has also considered matters to be more appropriate for parliamentary enactment where they subvert the appropriate relationship between Parliament and the executive. In this respect, the committee has commented on

133 Principle 23(3)(d) originally required the committee to consider whether instruments 'are concerned with administrative detail and do not amount to substantive legislation which should be a matter for Parliamentary enactment'. However, the principle was revised to its current form in 1979, in recognition of the fact that delegated legislative was no longer restricted to purely administrative matters. See Senate Standing Committee on Regulations and Ordinances, *Sixty-Fourth Report: Principles of the Committee*, March 1979, pp 1-2.

134 See Senate Standing Committee on Regulations and Ordinances, *40th Parliament Report*, June 2005, p. 59. See also Senate Standing Committee on Regulations and Ordinances, *Application of the committee's scrutiny principles*.

instruments that create or extend exemptions to, or modify the operation of, primary legislation, or mirror provisions in bills before the Parliament.¹³⁵

3.103 Principle 23(3)(d) dovetails with the terms of reference of the Scrutiny of Bills committee, which requires that committee to consider whether a bill inappropriately delegates legislative power¹³⁶ or insufficiently subjects such power to parliamentary scrutiny.¹³⁷ The Scrutiny of Bills committee frequently comments on bills that leave significant matters to delegated legislation, and this committee often refers to these comments when raising concerns under its principle 23(3)(d).

Approach in other jurisdictions

3.104 The majority of Australian state and territory parliamentary scrutiny committees are required to consider whether instruments contain matters more appropriate for parliamentary enactment, although there are differences in how the relevant principles are formulated.¹³⁸ For example, committees of the Queensland Parliament are required to consider whether an instrument 'contains only matter appropriate to subordinate legislation'.¹³⁹ The ACT Standing Committee on Justice and Community Safety considers whether an instrument 'contains matter which in the opinion of the committee should properly be dealt with in an Act of the Legislative Assembly'.¹⁴⁰

3.105 Parliamentary scrutiny committees of comparable Westminster jurisdictions are also required to consider whether matters in delegated legislation may be more appropriate for parliamentary enactment. For example, the New Zealand Regulations Review Committee is required to consider whether an instrument 'contains matters more appropriate for parliamentary enactment'.¹⁴¹ The Canadian Standing Joint Committee for the Scrutiny of Regulations must consider whether an instrument

135 See, for example, Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 12 of 2018*, October 2017, pp. 56-57; *Delegated Legislation Monitor 14 of 2017* (15 November 2017), pp. 5-6.

136 The Senate, *Standing orders and other orders of the Senate*, August 2018, SO 23(4)(a)(iv).

137 The Senate, *Standing orders and other orders of the Senate*, August 2018, SO 23(4)(a)(v).

138 See, for example, *Subordinate Legislation Act 1994* (Vic), paragraph 21(1)(e); *Subordinate Legislation Committee Act 1969* (Tas), sub-paragraph 8(1)(a)(v); Legislative Council (WA), *Standing Orders*, January 2019, Schedule 1, SO 10.6(d); Legislative Council (NT), *Sessional Orders of the Thirteenth Assembly*, March 2018, SO 14(1)(g)(ii)(C).

139 *Legislative Standards Act 1992* (Qld), paragraph 8(5)(c).

140 Standing Committee on Justice and Community Safety (ACT) (Legislative Scrutiny Role), *Resolution of Appointment*, paragraph (1)(d).

141 House of Representatives (NZ), *Standing Orders of the House of Representatives*, August 2017, SO 319(2)(f).

'amounts to the exercise of a substantive legislative power properly the subject of direct parliamentary enactment'.¹⁴²

Committee view

3.106 The committee considers that scrutiny principle 23(3)(d) is functioning effectively and does not require amendment. The current principle is sufficiently broad to enable the committee to consider whether matters in delegated legislation should instead be provided for in primary legislation, and the committee has not identified any gaps or unintended consequences associated with this element of its scrutiny role. Existing principle 23(3)(d) is also consistent with the principles used by other Australian parliamentary scrutiny committees, and by scrutiny committees in Canada and New Zealand.

Other relevant matters

Overview

3.107 At present, the committee is not expressly empowered to inquire into matters beyond those captured by its existing scrutiny principles. However, the committee interprets its principles broadly to include 'every possible deficiency in delegated legislation affecting parliamentary propriety and personal rights'.¹⁴³ In this respect, the committee has previously raised concerns in relation to matters outside the express scope of its scrutiny framework (so long as these matters relate to the technical scrutiny of delegated legislation). This is consistent with the committee's role in scrutinising delegated legislation on behalf of the Parliament.

Approach in other jurisdictions

3.108 Some comparable parliamentary scrutiny committees considered as part of the inquiry make use of a 'catch-all' scrutiny principle. For example, the UK Joint Committee on Statutory Instruments must consider whether the attention of Parliament should be drawn to an instrument on 'any...ground which does not impinge on its merits or on the policy behind it'.¹⁴⁴ The Scottish Delegated Powers and Law Reform Committee must similarly consider whether the attention of Parliament should be drawn to an instrument on 'any...ground which does not impinge upon [its] substance or policy intent'.¹⁴⁵

142 Standing Joint Committee for the Scrutiny of Regulations (Canada), *Mandate*, subsection (12).

143 Harry Evans and Rosemary Laing, eds., *Odgers' Australian Senate Practice*, 14th edition, Department of the Senate, 2016, p. 436.

144 House of Commons (UK), *Standing Orders of the House of Commons*, May 2018, SO 151(1)(B); House of Lords (UK), *Standing Orders of the House of Lords*, May 2016, SO 73(2).

145 Scottish Parliament, *Standing Orders of the Scottish Parliament*, May 2018, SO 10.3(1).

Committee view

3.109 The committee considers that expressly empowering it to consider whether an instrument complies with any ground relating to the technical scrutiny of delegated legislation would assist in resolving uncertainties associated with the committee's existing scrutiny framework, and clarify that the committee is able to comment where appropriate on technical scrutiny matters that do not fit neatly with its other principles.

3.110 The committee does not envisage that such a principle would significantly broaden the scope of the committee's scrutiny functions, particularly noting that the committee is already able to consider the majority of matters relating to the technical scrutiny of instruments. Rather, the principle would likely be used to address any difficulties associated with the application of the committee's scrutiny principles to novel issues.

3.111 The committee also notes that the principle would be confined to any other ground 'relating to the technical scrutiny of delegated legislation'. The committee does not intend to examine the policy merits of an instrument under this principle.

Recommendation 7

3.112 The committee recommends that Senate standing order 23(3), which sets out the principles by which the committee scrutinises instruments of delegated legislation, be replaced with the following:

- (3) The committee shall scrutinise each instrument as to whether:**
- (a) it is in accordance with its enabling Act and otherwise complies with all legislative requirements;**
 - (b) it appears to be supported by a constitutional head of legislative power and is otherwise constitutionally valid;**
 - (c) it makes rights, liberties, obligations or interests unduly dependent on insufficiently defined administrative powers;**
 - (d) those likely to be affected by the instrument were adequately consulted in relation to it;**
 - (e) its drafting is defective or unclear;**
 - (f) it, and any document it incorporates, may be freely accessed and used;**
 - (g) the accompanying explanatory material provides sufficient information to gain a clear understanding of the instrument;**
 - (h) it trespasses unduly on personal rights and liberties;**
 - (i) it unduly excludes, limits or fails to provide for independent review of decisions affecting rights, liberties, obligations or interests;**

- (j) it contains matters more appropriate for parliamentary enactment;
and**
- (k) it complies with any other ground relating to the technical scrutiny of
delegated legislation that the committee considers appropriate.**

3.113 As set out in Chapter 9, the committee proposes to publish guidance on each of its principles, to clarify the committee's expectations for ministers, agencies and other concerned stakeholders.

Chapter 4

Committee work practices

Introduction

4.1 This chapter sets out the committee's current work practices, including how the committee communicates with ministers and departments and how it draws matters to the attention of the Senate. The chapter draws on the committee's current and previous approaches to its work, as well as the work practices of scrutiny committees in comparable jurisdictions. It also sets out areas where the committee intends to:

- simplify and expedite its current processes, particularly where these relate to minor or technical scrutiny issues; and
- enhance its capacity to draw significant scrutiny concerns to the Senate's attention.

Ministerial and departmental correspondence

Overview

4.2 The committee carries out a significant proportion of its work through formal mechanisms, including correspondence with ministers. Currently, the committee writes to the minister responsible for a specific instrument that raises scrutiny concerns, after first setting out these concerns in its *Delegated Legislation Monitor* (Monitor). The committee may request information from the minister, alert the minister to the committee's advice, or advise the minister that the committee has concluded its examination of the relevant instrument.

4.3 Since its establishment in 1932, the committee has adopted a number of approaches to corresponding with ministers and departments—both formally and informally. In the past, the committee has either included formal correspondence with ministers in tabled reports, or sought to incorporate ministerial correspondence in the *Senate Hansard*. Since 2013, the committee has published extracts of all ministerial correspondence relating to instruments raising scrutiny concerns in its Monitor, with the full text of the correspondence published on the committee's website.

4.4 A long-standing concern for the committee is that formal correspondence with ministers may be inefficient and slow.¹ For example, the committee noted in 1947 that formal correspondence may inhibit or delay undertakings to amend

1 See, for example, discussion in Senate Standing Committee on Regulations and Ordinances, *Eighty-Third Report*, April 1988, p. 163.

instruments or explanatory material.² It also observed in 1986 that it had been particularly frustrated by the need to write to ministers to repeat points that have already been made, noting that:

Although the committee has adopted the practice of being as open as it can be about its work, making statements in the Senate and incorporating or tabling its correspondence, it still seems to take a very long time before particular flaws in delegated legislation are dealt with or weeded out.³

4.5 Both the Parliamentary Joint Committee on Human Rights (PJCHR) and the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee) follow this committee's practice of writing directly to relevant ministers to request further information.

Approach in other jurisdictions

4.6 Australian state and territory parliamentary scrutiny committees appear to engage in formal ministerial correspondence, and it is general practice for them to publish ministerial correspondence (or a record thereof) on their websites.⁴ Notably, the Northern Territory Subordinate Legislation and Publications Committee has published a regular report on ministerial correspondence, in which it asserted that all formal correspondence should be publicly available to provide clarification about the status of ministerial undertakings.⁵

4.7 In the Westminster Parliament, it is more common for parliamentary scrutiny committees to undertake informal correspondence alongside formal mechanisms. For example, the secretariats for both the United Kingdom (UK) House of Lords Secondary Legislation Scrutiny Committee and the Joint Committee on Statutory Instruments engage directly with relevant departmental officials via phone and

2 Senate Standing Committee on Regulations and Ordinances, *Sixth Report*, April 1947.

3 Senator Vanstone, *Senate Hansard*, 15 October 1986, p. 1342.

4 Most Australian committees publish full correspondence. However, the Victoria Regulation Review Subcommittee is a notable exception to this as it only includes a list of its correspondence. See Scrutiny of Acts and Regulations Committee, *Annual Review 2017, Regulations and Legislative Instruments*, https://www.parliament.vic.gov.au/images/stories/committees/sarc/annual_reports/Annual_Review_2017_Regulations_and_Legislative_Instruments.pdf (accessed 15 May 2019).

5 Subordinate Legislation and Publications Committee, *Report of Ministerial Correspondence on Subordinate Legislation and Publications, October 2016 – May 2017*, https://parliament.nt.gov.au/_data/assets/pdf_file/0016/424123/Report-of-Ministerial-Correspondence-on-Subordinate-Legislation-and-Publications-October-2016-May-2017.pdf (accessed 15 May 2019). It is noted that the functions of the Subordinate Legislation and Publications Committee were taken over by the Public Accounts Committee in August 2018.

email.⁶ Each committee provides a short deadline for departmental responses (typically a few days). If an issue cannot be resolved at the departmental level, the relevant committee may send a formal letter to the minister requesting a response.⁷ A similar approach is taken by the Scottish Delegated Powers and Regulatory Reform Committee and the Welsh Constitutional and Legislative Affairs Committee.⁸

4.8 In Canada, the Standing Joint Committee for the Scrutiny of Regulations conducts correspondence with the relevant minister or agency without formally reporting to the Houses of Parliament.⁹

4.9 By contrast, the New Zealand Regulations Review Committee takes a formal approach to corresponding with ministers, especially with regard to more significant scrutiny issues. Where a response is not viewed as sufficient, the Regulations Review Committee will investigate the instrument further.

Evidence before the committee

4.10 A number of submitters to the inquiry commented on the committee's current practice of formal ministerial correspondence. Submitters identified a need to broaden the committee's approach to allow for informal correspondence directly with departmental officers prior to any formal ministerial action.

4.11 The Department of Infrastructure, Regional Development and Cities queried whether there may be scope for some minor, non-controversial queries and requests to be raised directly with departmental officers in the first instance. The department suggested that this may be done through the committee secretariat, and contended that this process would minimise the time taken to resolve scrutiny issues and the need to place 'protective' disallowance notices.¹⁰

4.12 Associate Professor Lorne Neudorf observed that formal processes for addressing scrutiny concerns may be complemented and supplemented by informal

6 House of Lords Select Committee on Secondary Legislation Committee, *Guidance for Departments*, <https://www.parliament.uk/documents/lords-committees/Secondary-Legislation-Scrutiny-Committee/SLSC-Guidance-for-Departments-July-2016.pdf> (accessed 15 May 2019).

7 The Secondary Legislation Scrutiny Committee published a report in January 2019 regarding the quality of formal ministerial responses. See <https://publications.parliament.uk/pa/ld201719/ldselect/ldsecleg/266/26602.htm> (accessed 15 May 2019).

8 The work practices of all of the UK parliamentary scrutiny committees were discussed as part of the delegation by the Chair and Deputy Chair. See Appendix C (Delegation Report).

9 Associate Professor Lorne Neudorf, *Submission 8*, p. 5.

10 Department of Infrastructure, Regional Development and Cities, *Submission 4*, p. 2. A 'protective' disallowance notice is a notice placed by the Chair of the committee to preserve the Senate's ability to consider an instrument while it is still subject to disallowance. This matter is discussed in more detail in Chapter 7.

procedures (rather than necessarily superseding them).¹¹ However, he also identified a number of shortcomings (in the Canadian context) associated with over-reliance on informal correspondence. These included concerns about transparency, limited opportunity for those outside the committee to identify and resolve systemic issues, and little incentive for government to respond to the committee's concerns if there is no real risk of public exposure.¹²

4.13 Submitters also addressed issues associated with the timeliness of ministerial responses. For example, the Department of Home Affairs suggested that the usual two week timeframe for undertaking ministerial correspondence may be too short, given the need to carefully consider the committee's concerns, coordinate with various areas within the department, and obtain all necessary clearances.¹³

4.14 By contrast, a number of submitters emphasised the importance of ministerial responses being provided within short and efficient timeframes. For example, with regard to the Scrutiny of Bills committee's work, Assistant Professor Jacinta Dharmananda contended that 'the issue here lies not in the failure of a minister to respond...but in the timing of that response'.¹⁴

Committee view

4.15 In the committee's experience, a substantial proportion of the scrutiny issues that the committee identifies are minor or technical. In particular, the committee frequently raises concerns relating to:

- technical compliance with the *Legislation Act 2003* (for example, failures to include a description of consultation, include a statement of compatibility with human rights, or adequately describe and provide for access to any incorporated documents);
- the drafting of an instrument or its explanatory statement;
- failures to adequately justify the reversal of a burden of proof, or the application of strict liability to a criminal offence;
- inappropriate sub-delegation of administrative powers; and
- the basis for determining fees.

4.16 The committee's current approach is to attempt to resolve all scrutiny concerns by formal correspondence with ministers, and to publish all ministerial

11 Associate Professor Lorne Neudorf, *Submission 8*, p 9.

12 Associate Professor Lorne Neudorf, *Submission 8*, p. 5.

13 Department of Home Affairs, *Submission 10*, p. 2.

14 Assistant Professor Jacinta Dharmananda, *Submission 11*, p. 3. Concerns associated with the timing of ministerial responses and associated implications for parliamentary scrutiny are discussed in further detail in Chapter 5.

correspondence in its Monitor. This approach can result in lengthy Monitors which are often concerned primarily with minor, technical scrutiny issues. These include issues in relation to which the committee has concluded its inquiries ('concluded' entries), as well as concerns which, in the view of the committee, are likely to be resolved following a ministerial response ('response required' entries). Consequently, it can be difficult to identify and distinguish more significant matters which should be drawn to the attention of the Senate. The current model can also lead to significant delays in assessing legislative instruments, which may limit the committee's ability to resolve its concerns during the applicable disallowance period. For example, the committee usually waits until its regular private meeting, held during each Senate sitting week, to consider an issue. It will then write to the relevant minister. Once the committee has written to the minister, the minister's office must forward the committee's letter to the department to prepare a response. The response may require coordination across numerous areas within the department, and must be cleared internally before being returned to the minister's office for signature. The process of securing the minister's signature may also be delayed, particularly while the minister is travelling or attending to urgent matters.

4.17 While the current approach of corresponding directly with ministers may remain appropriate for significant scrutiny concerns (which require consideration by the minister), it is not the most efficient manner in which to resolve minor, technical scrutiny issues. The committee considers it would be appropriate to expedite and simplify the processes by which it resolves such issues, by enabling its secretariat to engage on the committee's behalf directly with departments and agencies immediately after the secretariat and legal adviser have identified scrutiny concerns in relation to a legislative instrument. The committee expects that departments and agencies would provide a timely response to the secretariat's inquiries (noting that this new method is likely to require less coordination and fewer clearance processes). If adequate responses are not received in a timely manner, it may then be necessary for the committee to formally write to the minister to seek a response.

4.18 In the interests of transparency, the committee considers it appropriate that the Monitor list in an Appendix all instruments about which the committee has engaged, or is engaging, with the relevant agency.

Committee action 2

4.19 The committee secretariat, on behalf of the committee, will liaise directly with relevant departments and agencies to attempt to resolve minor, technical scrutiny issues to assist the committee in determining whether to raise such matters with the responsible minister.

Committee action 3

4.20 In the interests of transparency, the committee will list instruments about which it is continuing to engage with the minister or relevant agency, or has satisfactorily concluded its examination, in its reports to the Senate.

Reporting to the Senate

Overview

4.21 The committee has developed a structured and systematic approach to reporting to the Senate. Since 2013 the committee has, in its *Delegated Legislation Monitor* (tabled each Senate sitting week), substantively reported on all disallowable legislative instruments which have been tabled between set reporting dates and which raise scrutiny concerns.¹⁵ As noted above, each Monitor entry may request a response (or a further response) from the relevant minister, or draw a matter to the attention of the Senate. Once ministerial responses are received, the Monitor includes an extract of the response and the committee's comment on it.¹⁶

4.22 Historically, the committee took a more ad hoc approach to reporting to the Senate, with only 123 annual, general or special reports tabled since the committee's inception.¹⁷ In these reports, the committee focused on the scrutiny of particular instruments and classes of instruments, reassessed its principles, powers and work practices, and explored broad thematic issues. The committee began systematically reporting to the Senate through its Monitor in 1998. However, between 1998 and 2013, the Monitor did not include specific comments on instruments, but rather, contained a list of all instruments tabled in the relevant period.¹⁸

4.23 In addition to making comments on specific instruments, previous reports have also listed correspondence with ministers, as well as any relevant ministerial undertakings (for example, a commitment to amend an instrument or an explanatory statement) that were outstanding at the time of reporting (see paragraphs [4.42] to [4.48]).

Approach in other jurisdictions

4.24 A number of Australian state and territory parliamentary scrutiny committees that scrutinise both primary and delegated legislation report regularly.¹⁹

15 The Monitor may also contain comments on instruments that have been misclassified as exempt from disallowance, or misclassified as disallowable.

16 The committee also produces annual reports, which outline the work of the committee and any significant issues that it encountered during the reporting year.

17 This figure only refers to special reports and does not include Monitor reports that were tabled since 1998. For a full list of these reports, see https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Reports (accessed 15 May 2019).

18 Correspondence that the committee had with ministers was tabled annually and was separate to the Monitor.

19 Including the ACT Standing Committee of Justice and Community Safety (in its legislative scrutiny role) and the NSW Legislation Review Committee. The Victorian Scrutiny of Acts and Regulations Committee is an exception to this as it generally only reports on delegated legislation in its annual reports.

Those with the single function of scrutinising delegated legislation do not report regularly, but report as required.²⁰ It is general practice among Australian parliamentary scrutiny committees to make specific comments on legislative instruments that raise concerns. These reports generally include extracts from ministerial responses.

4.25 In the UK, parliamentary scrutiny committees report regularly,²¹ and may include in their reports extracts of correspondence between the committees and departments. However, the committees focus their reports on specific instruments or matters that they have finally determined raise scrutiny concerns, after having first entered into correspondence with relevant departments or ministers seeking to resolve initial concerns.

4.26 The New Zealand Regulations Review Committee regularly reports to Parliament on instruments that raise scrutiny concerns. The reports do not include extracts from ministerial correspondence, but may paraphrase the minister's answer.

4.27 In Canada, the Standing Joint Committee for the Scrutiny of Regulations reports to both Houses of Parliament. The committee's reports are focused on broad thematic issues, rather than on specific legislative instruments.²² These reports are published intermittently; in the past three years, the Canadian committee has reported four times.²³ The Canadian committee also relies heavily on informal correspondence and private meetings (as opposed to formal reporting).

Committee view

4.28 The current reporting model can result in lengthy Monitors, in which the majority of entries relate to minor, technical scrutiny issues or set out questions for ministers which are likely to be resolved following the receipt of further information. This approach may make it difficult for senators to identify and consider more significant scrutiny matters. The committee considers that, in order to enhance its capacity to draw significant scrutiny concerns to the Senate's attention, the Monitor should only include substantive reports on matters that the committee has finally resolved should be drawn to the Senate's attention.

4.29 For these reasons, the committee has resolved not to include substantive entries in its Monitor in relation to legislative instruments:

20 That is, the Northern Public Accounts Committee, the Tasmanian Subordinate Legislation Committee, and the Western Australian Joint Standing Committee on Delegated Legislation.

21 In 2018, the House of Lords and Joint scrutiny committees in the UK published between 27 and 30 reports each.

22 Associate Professor Lorne Neudorf, *Submission 8*, p. 5.

23 Standing Joint Committee for the Scrutiny of Regulations (Canada), *Work*, <https://www.parl.ca/Committees/en/REGS/Work?show=reports> (accessed 15 May 2019).

- where the secretariat is still liaising with departments or agencies or has received a satisfactory response; and
- where the committee has formally written to the minister but is awaiting a response or has received a satisfactory response.

4.30 Instead, the Monitor will only include finalised substantive entries (with a list in the Appendix as to other instruments considered). These will relate to instruments about which the committee has scrutiny concerns, where those concerns are unable to be resolved by correspondence with ministers or departments, and other scrutiny concerns that may be drawn to the Senate's attention in the first instance. The committee considers that this approach should highlight the instruments the committee considers raise more significant scrutiny concerns, and ensure that the Senate's attention is not divided between these issues and more minor or technical matters. In the interests of transparency, the committee will also continue to publish all ministerial correspondence on its website.

4.31 The committee also considers the potential to disallow an instrument to be the most effective procedural tools available to the committee, through which to draw the Senate's attention to its scrutiny concerns. The committee considers that it would be useful for it to lodge a notice of motion to disallow any instrument in the Monitor that is drawn to the attention of the Senate. Consistent with the committee's existing practice of using 'protective' disallowance notices, this would give the Senate up to 15 additional sitting days in which to consider the committee's concerns, and based on its past practice, the committee Chair is likely to withdraw the motion at the end of this 15-day period, unless significant concerns remain.

Committee action 4

4.32 The committee will change its reporting practices to the Senate to focus on delegated legislation which the committee considers should be drawn to the attention of the Senate.

Committee action 5

4.33 The committee will lodge protective notices of motion to disallow every legislative instrument which it considers should be drawn to the attention of the Senate, to give the Senate sufficient time to consider the instrument.

Private hearings

Overview

4.34 The committee does not generally hold private hearings to consult with ministers or their delegates in order to resolve scrutiny concerns. However, on a case-by-case basis the committee secretariat may agree to meet with departmental

officers to clarify the committee's expectations in relation to certain classes of legislative instruments.²⁴

4.35 In the past, the committee has been more active in seeking private hearings with departmental officials, particularly when serious technical scrutiny issues have arisen in relation to specific instruments. The committee has used these hearings to encourage departments to address the committee's scrutiny concerns by undertaking to amend instruments or explanatory statements. It noted in 1989:

The kind of hearings referred to...reflect the fact that the committee has never been merely reactive, but has always emphasised the preventative and pre-emptive aspect of its activities. The committee believes that effective managerial control of the process of making delegated legislation could and should eliminate those technical flaws and lapses reported by the committee as undesirable.²⁵

4.36 In previous private hearings, the committee has met with ministers or senior officials from relevant departments nominated by the minister. In one instance in 1993, the committee commended a minister for nominating both a senior departmental official and member of his personal staff, noting that 'this is a good example of the willingness of Ministers to cooperate with the committee to ensure that delegated legislation is of the highest quality'.²⁶

Approach in other jurisdictions

4.37 The use of private hearings does not appear to be common practice amongst Australian state and territory parliamentary scrutiny committees. In contrast, committees in comparable Westminster jurisdictions place greater emphasis on informal procedures to perform their scrutiny functions. For example, in the UK both the Secondary Legislation Scrutiny Committee and the Joint Committee on Statutory Instruments have called ministers or departmental officials to appear before the committees in relation to specific instruments or particular areas of ongoing scrutiny concern.²⁷

4.38 In New Zealand, the Regulations Review Committee undertakes regular private hearings to obtain further information about instruments that raise scrutiny

24 For example, in late 2018 the committee met with representatives from the Department of Industry, Innovation and Science to discuss the committee's expectations for explanatory statements to instruments that authorise expenditure. See Senate Standing Committee on Regulations and Ordinance, *Annual Report 2018*, February 2019, p. 20.

25 Senate Standing Committee on Regulations and Ordinances, *Eighty-Fifth Report*, June 1989, p. 13.

26 Senate Standing Committee on Regulations and Ordinances, *Ninety-Fourth Report*, May 1993, p.11.

27 Based on discussions conducted during the committee's delegation to the UK. See Appendix C (Delegation Report).

concerns, generally holding at least one private hearing per sitting week. It meets with senior departmental officials rather than engaging directly with relevant ministers (delegated legislation in New Zealand is generally driven by the departments).²⁸

4.39 In Canada, the Standing Joint Committee for the Scrutiny of Regulations generally conducts informal meetings or hearings with relevant ministers or departmental officials in tandem with informal correspondence.²⁹

Committee view

4.40 The committee considers that there may be circumstances in which it may be useful for the committee to resume its former practice of undertaking informal private hearings with ministers, their staff or senior departmental officers in order to obtain further information about particular legislative instruments that raise scrutiny concerns.

Committee action 6

4.41 The committee will resume its past practice of calling on departmental officers or ministers to appear before it, where the committee considers this would assist in resolving its technical scrutiny concerns.

Monitoring and reporting on ministerial undertakings

Overview

4.42 As a result of the committee's scrutiny of delegated legislation, ministers often undertake to amend a legislative instrument or its explanatory statement to satisfy the committee's concerns. The committee generally notes in its Monitor where a minister has made such an undertaking when concluding its examination of an instrument. However, the committee does not currently keep a public list recording all outstanding undertakings.

4.43 Historically, the committee brought outstanding ministerial undertakings to the Senate's attention by attaching a list to its reports. This was done intermittently from 1977 to 1990, with lists categorised by portfolio and names of the instruments.³⁰ The annual reports published by the committee between 2000 and 2016 also included a list of outstanding ministerial undertakings.

28 Based on discussions conducted during the committee's delegation to New Zealand, see Appendix C (Delegation Report).

29 Standing Joint Committee for the Scrutiny of Regulations (Canada), *Past work*, <https://www.parl.ca/Committees/en/REGS/About> (accessed 22 May 2019).

30 See, for example Senate Standing Committee for Regulations and Ordinances, *Report 58*, October 1977 to *Report 77*, March 1977. It was common practice for the committee between 1981

4.44 Timely compliance with ministerial undertakings has been a long-standing issue of concern for the committee. In 1988 the committee noted:

The committee is concerned that it could undermine the whole basis of parliamentary honour on which the undertaking convention is based, if the implementation of undertakings is not expedited as quickly as possible after a Minister has given his or her word to act. To countenance excessive delay is not only a discourtesy to the Senate but it is also a continuing affront to principles of freedom, justice, fairness and propriety if objectionable provisions are left on the delegated statute book in spite of parliamentary requests for amendments and in contravention of ministerial commitments to make amendments.³¹

Approach in other jurisdictions

4.45 While Australian state and territory parliamentary scrutiny committees monitor and report on outstanding ministerial undertakings, this is generally done throughout the committees' formal reports. A stand-alone record of undertakings is rarely kept. A notable exception is the Western Australian Joint Standing Committee on Delegated Legislation, which publishes a list of outstanding ministerial undertakings on its website.³² Other comparable Westminster parliamentary scrutiny committees do not appear to separately report on outstanding undertakings.

Committee view

4.46 The committee expects that, when a minister has undertaken to amend a legislative instrument or explanatory statement, or to review an Act or departmental practice, this is done in a timely manner. This is essential to parliamentary control over delegated legislation, particularly where the committee's concerns with respect to a particular instrument may only be resolved on the basis of such an undertaking. If an undertaking is not carried out, the committee's concerns remain unresolved. This can undermine parliamentary control when the applicable disallowance period passes without the minister's undertaking being implemented.

4.47 The committee considers that it would be appropriate for the committee to resume its past practice of reporting to the Senate on undertakings made by agencies and ministers. The committee intends to do this on a regular basis by listing outstanding undertakings in its Monitor. The committee considers that drawing the Senate's attention to outstanding undertakings may provide a stimulus to ensure greater compliance with its requests.

31 Senate Standing Committee on Regulations and Ordinances, *83rd Report*, April 1988, p. 131.

32 Joint Standing Committee on Delegated Legislation (WA), *Undertakings*, <http://www.parliament.wa.gov.au/Parliament/commit.nsf/WCurrentNameNew/6E77EC1BF4A466A0482581B500317E70?OpenDocument#undertakings> (accessed 15 May 2019).

Committee action 7

4.48 The committee will resume its past practice of regularly reporting to the Senate on outstanding undertakings made by the relevant agency or minister to address the committee's concerns.

Statements to Parliament

Overview

4.49 The committee's oral statements to Parliament are typically limited to where the Chair withdraws a notice of motion to disallow a legislative instrument. In this context, the Chair speaks briefly to the motion to have it be taken as formal. The committee does not issue tabling statements every time it tables its Monitor or its annual report. However, it may issue such a statement where there are significant matters that it wishes to draw to the attention of the Senate.³³

4.50 The committee's sporadic approach to issuing tabling statements contrasts with the practices of other scrutiny committees in the Commonwealth Parliament. For example, the general practice of the PJCHR is for the Chair to make a tabling statement on tabling each of its scrutiny reports.³⁴

Committee view

4.51 The committee considers tabling statements to be a useful tool by which the committee can draw the Senate's attention to specific scrutiny concerns about delegated legislation. To enhance the committee's capacity to draw issues to the Senate's attention, the committee intends that, as a general rule, the Chair will make a tabling statement each time the committee reports to the Senate.

Committee action 8

4.52 In general, the Chair of the committee will make a tabling statement each time the committee reports to the Senate, drawing matters in the report to the attention of the Senate.

33 For example, on 15 August 2018, the committee Chair made a statement upon tabling *Delegated Legislation Monitor 8 of 2018*, drawing the Senate's attention to concerns regarding Migration (IMMI 18/019: Fast Track Applicant Class) Instrument 2018. See Senator Williams, *Senate Hansard*, 15 August 2018, p. 4918. Other examples of tabling statements by the Chair of the committee include Senator Sir Hal Colebatch, *Senate Hansard*, 28 September 1932, p. 1; Senator Collins, *Senate Hansard*, 21 December 1989, p. 4978; and Senator O'Chee, *Senate Hansard*, 21 November 1996, p. 5744.

34 Parliamentary Joint Committee on Human Rights, *Statements and speeches*, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Statements (accessed 15 May 2019).

Part III — Framework for scrutiny and control of delegated legislation

Chapter 5

Parliamentary scrutiny of bills delegating legislative power

Introduction

5.1 This Chapter considers the current framework for parliamentary scrutiny and control of bills which contain delegations of legislative power, noting that Parliament has much greater control over the bills that prescribe the type of matters that should be left to delegated legislation than over the use of delegated powers once they are enacted.

Overview

5.2 In the Commonwealth Parliament, Senate committees are the primary means by which Parliament scrutinises bills delegating legislative power. This includes technical scrutiny by the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee)¹ and consideration of a bill's underpinning policy by specific legislation committees (where a bill is referred to a committee for inquiry).

5.3 Additionally, where the Senate wishes to consider a bill in more detail, it may resolve itself into a committee in which all senators are members (committee of the whole). In committee of the whole, provisions of the bill are considered in detail, and amendments may be moved to any part of its text, including to insert new clauses.²

Senate Standing Committee for the Scrutiny of Bills

5.4 Since 1981, the Scrutiny of Bills committee has assessed all bills before the Parliament against principles focussed on individual rights and liberties, independent review and parliamentary oversight.³ In particular, standing order 24(1)(a)(iv) requires the Scrutiny of Bills committee to consider whether any delegation of legislative powers is appropriate. The issue of whether a bill appropriately delegates legislative powers is a perennial concern for the Scrutiny of Bills committee, with approximately one quarter of that committee's concerns over the last five years

1 The Parliamentary Joint Committee on Human Rights also examines all bills and assesses them for compatibility with seven international human rights treaties, see *Human Rights (Parliamentary Scrutiny) Act 2011*.

2 It is noted that consideration by committee of the whole is not undertaken in relation to the majority of bills, for example, of the 639 bills passed by the Senate from 1 January 2014 to 30 June 2018, only 171 had amendments moved in committee of the whole. Data aggregated from Senate Statsnet, *Legislation*, at https://www.aph.gov.au/Parliamentary_Business/Statistics/Senate_StatsNet/legislation (accessed 16 May 2019).

3 The Senate, *Standing Order and other orders of the Senate*, August 2018, SO 24(1)(a).

being made under this scrutiny principle.⁴ Prior to the establishment of the Scrutiny of Bills committee, this committee sought on occasion to raise concerns regarding wide regulation-making powers, given its role in supervising delegated legislation.⁵

5.5 The Scrutiny of Bills committee regularly draws the attention of the Senate to provisions in bills that it considers to inappropriately delegate legislative powers (for example, by leaving significant matters to delegated legislation). However, in contrast to the legislation committees, where a bill is under consideration by the Scrutiny of Bills committee the standing orders do not prevent the passage of the bill before that committee has reported.⁶ As a result, around 11 per cent of bills in the past four years have passed the Senate before the Scrutiny of Bills committee has finally reported on the bill.⁷

5.6 Examples of issues raised by the Scrutiny of Bills committee relating to delegated legislation are set out below, with examples also provided of where this committee has raised similar concerns.

Significant matters in delegated legislation

5.7 Perhaps the most common concern raised by the Scrutiny of Bills committee under principle 24(1)(a)(iv) is the inclusion of significant matters in delegated legislation. The Scrutiny of Bills committee is concerned to ensure that major policy matters, or core elements of a regulatory scheme, are enacted through primary legislation (and therefore subject to adequate parliamentary scrutiny), rather than left to delegated legislation.⁸ A longstanding concern in this regard is the use of

4 Concerns raised under principle 24(1)(a)(iv) accounted for 24 per cent of the Scrutiny of Bills committee's comments in 2014, 22 per cent in 2015, 27 per cent in 2016, 26 per cent in 2017 and 23 per cent in 2018. See Senate Standing Committee for the Scrutiny of Bills, *The work of the committee in 2014*, March 2015, p. 12; *The work of the committee in 2015*, October 2016, p. 22; *Annual Report 2016*, March 2017, p. 10; *Annual Report 2017*, March 2018, p. 14; *Annual Report 2018*, February 2019, p. 12.

5 For example, in 1959 the committee expressed concerns about a 'particularly wide regulation-making power', which would enable the modification of an Act by regulation (a Henry VIII clause), in the Civil Aviation (Carriers' Liability) Bill. See Senate Standing Committee on Regulations and Ordinances, *Fourteenth Report*, March 1959, p. 1; *Fifteenth Report*, September 1959, p. 5.

6 The Senate, *Standing orders and other orders of the Senate*, August 2018, SO 115. That standing order prevents the passage of a bill that has been referred to a legislation committee before that committee has reported.

7 The percentage of bills that passed both Houses before the Scrutiny of Bills committee received a response was: 18 per cent in 2015; 14 per cent in 2016, 5 per cent in 2017; 6 per cent in 2018. See Senate Standing Committee for the Scrutiny of Bills, *The work of the committee in 2015*, October 2016, p. 4; *Annual Report 2016*, March 2017, p. 4; *Annual Report 2017* (March 2018), p. 6; *Annual Report 2018*, February 2019, p. 5.

8 See, for example, Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 9 of 2017* October 2017, pp. 12-14; *Scrutiny Digest 1 of 2018*, February 2018, pp. 21-23.

'skeleton' or 'framework' bills. These are bills containing only broad principles of a legislative scheme, leaving the scope and operational details of the scheme to delegated legislation.⁹

5.8 The Scrutiny of Bills committee also considers whether matters which may have significant implications for personal rights and freedoms are inappropriately left to delegated legislation. For example, the Scrutiny of Bills committee has noted, in relation to a bill enabling the sharing of personal information with persons specified in rules, that:

The committee's view is that significant matters, such as the kinds of persons to whom protected information may be disclosed and the purposes for which such a disclosure may be made, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided.¹⁰

5.9 This committee is similarly concerned to ensure that significant matters are not included in delegated legislation. It routinely raises such concerns under scrutiny principle 23(3)(d)—which relates to whether matters are more appropriate for parliamentary enactment. In doing so, the committee often refers to relevant comments by the Scrutiny of Bills committee.¹¹

Henry VIII clauses

5.10 A Henry VIII clause is a provision in an Act of Parliament that authorises delegated legislation to amend primary legislation. Since its inception, the Scrutiny of Bills committee has drawn attention to Henry VIII clauses, as well as to provisions that permit delegated legislation to amend or modify the operation of primary legislation. The Scrutiny of Bills committee explains that:

there are significant scrutiny concerns with enabling delegated legislation to override the operation of legislation which has been passed by Parliament as such clauses impact on the level of parliamentary scrutiny and may subvert the appropriate relationship between the Parliament and the executive.¹²

5.11 The Scrutiny of Bills committee has similar concerns in relation to bills that enable delegated legislation to exempt persons or entities from the operation of

9 Senate Standing Committee for the Scrutiny of Bills, *Final Report: Inquiry into the future role and direction of the Senate Scrutiny of Bills Committee*, May 2012, pp. 33-36.

10 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 11 of 2018*, September 2018, p. 5. The committee raised its concerns under the headings of 'broad discretionary powers', 'significant matters in delegated legislation' and 'privacy'.

11 See, for example, Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 1 of 2018*, February 2018, pp. 65-66.

12 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 2 of 2018*, February 2018, p. 48.

primary legislation (particularly where the exemptions apply to a broad range of persons or entities). The Scrutiny of Bills committee has noted that such provisions 'have the effect of limiting, or in some cases excluding, parliamentary scrutiny'.¹³

5.12 This committee often refers to comments by the Scrutiny of Bills committee in relation to Henry VIII clauses when raising concerns as to the potential impact of such clauses on effective parliamentary oversight.¹⁴

Significant matters in 'rules' rather than 'regulations'

5.13 The Scrutiny of Bills committee has also expressed specific concerns about the inclusion of significant matters in 'rules' rather than 'regulations', noting that:

regulations are subject to a higher level of executive scrutiny than other instruments as regulations must be approved by the Federal Executive Council and must also be drafted by the Office of Parliamentary Counsel. Therefore, if significant matters are to be provided for in delegated legislation...the committee considers they should at least be provided for in regulations, rather than other forms of delegated legislation that are subject to a lower level of executive scrutiny.¹⁵

5.14 This committee has expressed similar concerns regarding the inclusion of matters more appropriate for parliamentary enactment in rules rather than regulations. In doing so, it has routinely drawn attention to comments by the Scrutiny of Bills committee.¹⁶

Rates of tax in delegated legislation

5.15 The Scrutiny of Bills committee has consistently drawn attention to bills that allow for rates of tax to be set in delegated legislation, emphasising that:

One of the most fundamental functions of the Parliament is to impose taxation (including duties of customs and excise). The [Scrutiny of Bills] committee's consistent scrutiny view is that it is for the Parliament, rather than the makers of delegated legislation, to set a rate of tax.¹⁷

13 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2018*, May 2018, p. 20.

14 See, for example, Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 12 of 2018*, October 2018, pp. 56-57.

15 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 1 of 2018*, February 2018, p. 67.

16 See, for example, Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 14 of 2017*, November 2017, pp. 36-37. For a more comprehensive overview of the committee's concerns regarding instrument-making powers (including powers to make 'rules' as opposed to 'regulations'), see *Delegated Legislation Monitor 17 of 2014*, December 2014, pp 6–24.

17 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 3 of 2018*, March 2018, pp. 45-46.

5.16 The Scrutiny of Bills committee has stated that if charges are prescribed in delegated legislation, there should be, at a minimum, some guidance in relation to the method of calculation of the charge or a maximum charge should be provided on the face of the primary legislation, to enable greater parliamentary scrutiny.¹⁸

5.17 This committee often raises concerns regarding instruments that appear to impose taxation (particularly where the enabling Act does not place a cap on the amount of tax that may be imposed).¹⁹ In doing so, it routinely refers to comments by the Scrutiny of Bills committee, and signals its agreement that rates of tax are more appropriate for parliamentary enactment.²⁰

Consultation prior to making delegated legislation

5.18 The Scrutiny of Bills committee routinely raises concerns about the lack of specific consultation requirements in bills which leave significant matters to delegated legislation, noting that where Parliament delegates its legislative power in relation to a significant matter:

the committee considers that it is appropriate that specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) are included in the bill and that compliance with these obligations is a condition of the validity of the legislative instrument.²¹

5.19 This committee similarly has concerns regarding the nature and quality of consultation undertaken in relation to legislative instruments. It also has concerns regarding its ability to consider whether appropriate consultation has been undertaken as part of its own scrutiny functions.²²

18 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 1 of 2018*, February 2018, pp. 75-76.

19 The committee is also concerned with the issue of whether fees in delegated legislation are limited to cost recovery. See, for example, Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 14 of 2017*, November 2017, pp. 19-20.

20 See, for example, Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 8 of 2018*, August 2018, pp. 73-74.

21 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2018*, June 2018, p. 25.

22 This matter is discussed in further detail in Chapter 3.

Exemptions from disallowance and sunseting

5.20 The Scrutiny of Bills committee routinely raises concerns in relation to bills that propose to exempt instruments from disallowance or sunseting.²³ Its consistent view is that exempting delegated legislation from disallowance is a serious matter, as this may remove or undermine parliamentary oversight.²⁴ The Scrutiny of Bills committee has particular concerns where significant matters are to be included in non-disallowable instruments or instruments that are not subject to sunseting.²⁵

Other Senate committees

5.21 Senate standing order 25 sets out the powers, functions and procedures of the Senate legislation and references committees. Under that standing order, legislation committees are required to inquire into and report on bills or draft bills referred by the Senate.²⁶ When conducting their inquiries, these committees must take into account any comments published by the Scrutiny of Bills committee.²⁷

5.22 The Senate Standing Committee for the Selection of Bills (Selection of Bills committee) considers all bills before the Senate and makes recommendations about which bills should be referred to legislation committees.²⁸ The Selection of Bills committee takes note of the general view among senators as to which bills should be referred. The referral of a bill to a legislation committee may take place at any stage. However, recent trends indicate that most referrals take place as early as possible (often soon after the bill is introduced in either House of Parliament).²⁹

5.23 Consideration of bills by legislation committees allow for more detailed scrutiny of legislation than is possible in the Senate as a whole. In this respect, legislation committees will consider the policy merits of a bill, and may directly question ministers and officials responsible for framing bills and hear evidence from interested stakeholders. This opens the legislative process to public participation.

23 See, for example, Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2017*, May 2018, pp. 39-40; *Scrutiny Digest 6 of 2018*, pp. 59-62; *Scrutiny Digest 6 of 2018*, June 2018, pp. 29-31; *Scrutiny Digest 7 of 2018*, June 2018, pp. 5-6; *Scrutiny Digest 8 of 2018*, August 2018, pp. 61-63; *Scrutiny Digest 15 of 2018*, December 2018, pp. 25-28; *Scrutiny Digest 1 of 2019*, February 2019, pp. 57-61. The Scrutiny of Bills committee raises such concerns under both principles 24(1)(a)(iv) and (v).

24 See, for example, Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2018*, June 2018, p. 6.

25 Disallowance and sunseting are discussed in further detail in Chapter 8.

26 The Senate, *Standing Orders and other orders of the Senate*, August 2018, SO 25(2)(a).

27 The Senate, *Standing Orders and other orders of the Senate*, August 2018, SO 25(2A).

28 The Senate, *Standing Orders and other orders of the Senate*, August 2018, SO 24A.

29 Harry Evans and Rosemary Laing, eds., *Odgers' Australian Senate Practice*, 14th edition, Department of the Senate, 2016, p. 319.

5.24 The Senate standing orders also provide that a bill referred to a legislation committee may not proceed to further stages of consideration until that committee has reported on the bill.³⁰ This is particularly important in terms of parliamentary oversight, and encourages members and senators to take full account of the relevant committee's findings.

Approach in other jurisdictions

5.25 A number of Australian state and territory parliamentary scrutiny committees are required to consider instrument-making powers in bills, particularly in relation to whether a bill may inappropriately delegate legislative powers or fail to subject legislative power to appropriate parliamentary scrutiny. Some of these committees are responsible for undertaking technical scrutiny of both primary and delegated legislation, and there is considerable overlap between the scrutiny roles.³¹ The principles by which those committees scrutinise delegated legislation are discussed in more detail in Chapter 3.

5.26 In New Zealand, the Regulations Review Committee may, in addition to reporting on matters relating to regulations, consider 'any regulation-making power' and 'any matter relating to regulations' in a bill before another committee, and report on that matter to the relevant committee.³² The New Zealand Legislation Design and Advisory Committee also provides advice to departments in the initial stages of developing legislation to support the development of quality legislation. This includes providing advice to departments on delegated legislative powers and on the allocation of provisions between primary and secondary legislation.³³ A number of persons with whom the Chair and Deputy Chair met as part of the New Zealand delegation commended the work of this body in improving the quality and effectiveness of legislation, and in helping to ensure matters are not inappropriately left to delegated legislation.³⁴

30 The Senate, *Standing Orders and other orders of the Senate*, August 2018, SO 115.

31 See, for example, Standing Committee on Justice and Community Safety (ACT) (Legislative Scrutiny Role), *Resolution of Appointment*, paragraphs (3)(d) and (e), <https://www.parliament.act.gov.au/in-committees/standing-committees-current-assembly/standing-committee-on-justice-and-community-safety-legislative-scrutiny-role> (accessed 16 May 2019); *Parliamentary Committees Act 2003* (Vic), sub-paragraphs 17(a)(vi) and (vii); *Legislation Review Act 1987* (NSW), sub-paragraphs 8A(1)(b)(iv) and (v); *Parliament of Queensland Act 2017* (Qld), paragraph 91(1)(b). Relevant legislative principles are also set out in section 4 of that Act.

32 House of Representatives (NZ), *Standing Orders of the House of Representatives*, August 2017, SO 318(3). Between 16 November 2017 and 12 December 2018, that committee raised concerns in relation to regulation-making powers in 17 bills. See Regulations Review Committee, *Activities of the Regulations Review Committee in 2018*, March 2019, p. 3.

33 Legislation Design and Advisory Committee (NZ), *Terms of Reference*, <http://www.ldac.org.nz/about/terms-of-reference/> (accessed 16 May 2019).

34 See Appendix C (Delegation Report).

5.27 In the United Kingdom (UK) Parliament, the Delegated Powers and Regulatory Reform Committee is expressly required to report on 'whether the provisions of any bill inappropriately delegate legislative power, or whether they subject to exercise of power to an inappropriate degree of parliamentary scrutiny'.³⁵ Delegations of legislative power are scrutinised separately from legislative instruments, which are scrutinised by the Joint Committee on Statutory Instruments and the Secondary Legislation Scrutiny Committee. In Wales and Scotland, respectively, the Constitutional and Legal Affairs Committee and the Delegated Powers and Law Reform Committee consider both primary and delegated legislation. Both committees may consider delegations of legislative power in bills.³⁶

Evidence before the committee

5.28 Submitters to the inquiry expressed concern about the need for stronger parliamentary scrutiny of bills which delegate legislative power to the executive. Associate Professor Lorne Neudorf emphasised that the Parliament bears a 'special responsibility' in supervising the executive in making subordinate legislation, asserting that:

A failure by Parliament to scrutinise subordinate lawmaking could be seen as an abdication of the lawmaking functions that are constitutionally vested in Parliament, a democratic institution established by the Australian Constitution for the express purpose of making federal law.³⁷

5.29 Assistant Professor Jacinta Dharmananda highlighted the critical role played by the Scrutiny of Bills committee, noting that the scrutiny process makes departments aware that bills which inappropriately delegate legislative power are likely to attract criticism from the Parliament.³⁸ However, she also raised concerns about the lack of any procedural mechanism to prevent a bill proceeding to enactment before the Scrutiny of Bills committee has finalised its report, noting that parliamentarians may not always have the advantage of a finalised report when

35 Delegated Powers and Regulatory Reform Committee, *Guidance for Departments*, July 2014, p. 4, <https://www.parliament.uk/documents/DPRR/2014-15/Guidance%20for%20Departments/Guidance-for-Departments.pdf> (accessed 16 May 2019).

36 The Constitutional and Legal Affairs Committee may consider 'the appropriateness of provisions in Assembly Bills and in Bills for Acts of the United Kingdom Parliament that grant powers to make subordinate legislation to the Welsh Ministers, the First Minister of the Counsel General'. National Assembly for Wales, *Standing Orders of the National Assembly for Wales*, January 2019, SO 21.7(ii). The Delegated Powers and Law Reform Committee may consider 'proposed powers to make subordinate legislation in particular Bills or other proposed legislation', and 'general questions relating to powers to make subordinate legislation'. Scottish Parliament, *Standing Orders of the Scottish Parliament*, May 2018, SO 6.1.

37 Associate Professor Lorne Neudorf, *Submission 8*, p. 3.

38 Assistant Professor Jacinta Dharmananda, *Submission 11*, p. 3.

considering the relevant bill.³⁹ Assistant Professor Dharmananda suggested that consideration be given to adopting:

- an affirmative resolution process, by each House of Parliament, in relation to enabling provisions in a bill. This might be undertaken prior to a motion that the bill be read a second time; or
- a procedural rule, similar to that which exists for Senate select or standing legislation committees, providing that the passage of a bill is delayed until the Scrutiny of Bills committee has reported on the enabling provision.⁴⁰

5.30 Assistant Professor Dharmananda further suggested that, instead of applying to all enabling provisions, either of those two procedures could be adopted for specific provisions; for example, those containing a Henry VIII clause or those declaring that a legislative instrument is not subject to disallowance.⁴¹

5.31 In their joint submission, Professor Appleby, Emeritus Professor Aronson and Dr Boughey, raised concerns in relation to the inclusion of significant matters in delegated legislation, and the use of 'skeleton' legislation.⁴² They noted that the current practice of drawing these matters to the attention of the Senate may be insufficient to address this issue, and recommended that:

- this committee be empowered to report on substantive policy issues, while maintaining its commitment to non-partisanship;
- a more formalised and better-resourced procedure for public comment be introduced; and
- an affirmative resolution procedure be required in relation to broadly framed delegations of legislative power, along with a requirement for the Scrutiny of Bills committee to consider whether such delegations are accompanied by a requirement for affirmative resolution.⁴³

5.32 The joint submitters also raised concerns in relation to the use of 'rules' rather than 'regulations' to enact substantive policy matters, noting that rules (and other forms of delegated legislation) are subject to a lower level of executive scrutiny than regulations. They noted that rules are not drafted by the Office of Parliamentary

39 Assistant Professor Jacinta Dharmananda, *Submission 11*, pp. 3-4.

40 Assistant Professor Jacinta Dharmananda, *Submission 11*, p. 4.

41 Assistant Professor Jacinta Dharmananda, *Submission 11*, p. 4.

42 Professor Gabrielle Appleby, Emeritus Professor Mark Aronson and Dr Janina Boughey, *Submission 2*, pp. 2-4. The joint submission was endorsed by the Law Society of New South Wales. See Law Society of New South Wales, *Submission 13*, p. 1.

43 Professor Gabrielle Appleby, Emeritus Professor Mark Aronson and Dr Janina Boughey, *Submission 2*, pp. 4-7. These matters are discussed in further detail in Chapters 6 and 8.

Counsel and that, consequently, drafting standards may vary.⁴⁴ The joint submitters therefore recommended:

- amendments be made to the Office of Parliamentary Counsel's Drafting Directions on Subordinate Legislation, to require that all instruments containing substantive policy be in the form of regulations; and
- the terms of reference of this committee and the Scrutiny of Bills committee, be amended to explicitly require the committees to consider the form of legislative instruments (that is, whether or not they are in the form of regulations or otherwise).⁴⁵

Committee view

5.33 As set out in Chapter 1, the power to enact laws is a primary power of Parliament. Nevertheless, the Parliament frequently delegates its law-making powers to the executive government or specified bodies or office-holders. The committee considers it essential that the Parliament does not delegate legislative powers that should be exercised by the Parliament itself.

5.34 The committee is particularly concerned that bills all too often leave significant matters of policy to delegated legislation. The committee considers that the Scrutiny of Bills committee plays an essential role in drawing bills which inappropriately delegate legislative power to the Senate's attention. However, despite the Scrutiny of Bills committee's best efforts, warnings regarding the inappropriate delegation of legislative powers are routinely ignored, and legislation is enacted that leaves significant matters to delegated legislation, or allows delegated legislation to amend primary legislation. Once enacted, these powers are used to make legislative instruments which this committee considers contain matters more appropriate for parliamentary enactment. However, by the time this committee alerts the Senate to its concerns, it is effectively too late: the relevant primary legislation has already passed both Houses of Parliament.

5.35 The committee considers that when government is developing primary legislation which seeks to delegate legislative power, it should pay close attention to the importance of ensuring adequate parliamentary oversight. In particular, government officials should consider the advice issued by this committee and by the Scrutiny of Bills committee as to when matters would be more appropriately included in primary legislation.

5.36 During the delegation to New Zealand, the Chair and the Deputy Chair took note of the important role played by the New Zealand Legislation Design and

44 Professor Gabrielle Appleby, Emeritus Professor Mark Aronson and Dr Janina Boughey, *Submission 2*, pp. 6-7.

45 Professor Gabrielle Appleby, Emeritus Professor Mark Aronson and Dr Janina Boughey, *Submission 2*, p. 7.

Advisory Committee in promoting quality legislation.⁴⁶ The functions of that committee include providing advice to departments on delegated legislative powers, and on the allocation of provisions between primary and secondary legislation. The committee considers that the Commonwealth government should give consideration to developing a similar model, whereby departments could receive expert advice as to the appropriateness of delegating legislative powers. This may assist in resolving issues associated with inappropriate delegations of legislative power at the policy development and drafting stages, rather than raising these issues when the relevant bill is before the Parliament.

5.37 The committee also considers it imperative that the Senate pay close attention to the advice of the Scrutiny of Bills committee in relation to bills that seek to inappropriately delegate legislative power. The committee considers it incumbent on the government and individual senators to properly take into account the work of the Scrutiny of Bills committee to better preserve the important principle of parliamentary control of law-making. In addition, while the standing orders require Senate legislation committees to consider any comments made by the Scrutiny of Bills committee,⁴⁷ such committees (focused as they are on policy matters) often fail to consider whether a bill inappropriately delegates legislative powers. The committee encourages the Senate legislation committees to substantively consider the Scrutiny of Bills committee's comments in relation to the delegation of legislative powers (as well as other matters where appropriate), noting that legislation committees have an important role to play in highlighting the technical scrutiny concerns raised by the Scrutiny of Bills committee.⁴⁸

5.38 The committee also has significant concerns that legislation which delegates legislative power often passes both Houses of Parliament before the Scrutiny of Bills committee has finally concluded its examination of the relevant bill.⁴⁹ Given the implications for delegated legislation in enacting such legislation, the committee

46 See Appendix C (Delegation Report).

47 The Senate, *Standing Orders and other orders of the Senate*, August 2018, SO 25(2A).

48 For example, the Scrutiny of Bills committee raised concerns in relation to a proposal to modify disallowance procedure in the Legislation Act, to provide that where a disallowance motion was lodged, but not brought on for debate during the applicable disallowance period, the relevant instrument would remain in force by default. The Senate Standing Committee on Environment and Communications supported the Scrutiny of Bills committee's comments. See Environment and Communications Legislation Committee, *Telecommunications Legislation Amendment (Competition and Consumer) Bill 2017 [Provisions]; Telecommunications (Regional Broadband Scheme) Charge Bill 2017 [Provisions]*, September 2017, pp. 40-41. Subsequently, amendments were moved to the relevant bills which reinstated the usual disallowance procedure. The Scrutiny of Bills committee welcomed these amendments in *Scrutiny Digest 6 of 2018*, June 2018, p. 56.

49 As noted at paragraph [5.5], approximately 11 per cent of bills in the past four years have passed the Senate before the Scrutiny of Bills committee has finally commented on the bill.

considers that the Scrutiny of Bills committee should consider whether the standing orders should be amended to provide that a bill cannot progress to further stages of consideration (for example, beyond the second reading stage) until the Scrutiny of Bills committee has at least tabled its initial report on the bill.

5.39 Finally, the committee considers that if significant matters continue to be left to delegated legislation, such matters should be included in regulations, rather than other forms of legislative instruments (such as rules). This is to ensure that these matters are at least subject to heightened executive oversight. The committee considers that the Office of Parliamentary Counsel should consider reviewing its drafting direction that states that all subordinate instruments should be made in the form of legislative instruments (as distinct from regulations) unless there is good reason not to do so.⁵⁰ The committee considers that the Office of Parliamentary Counsel should also review its practice of recommending that bills enable the makers of delegated legislation to make 'rules' rather than 'regulations'.⁵¹ While the committee acknowledges there may be resourcing implications in having the Office of Parliamentary Counsel draft more legislative instruments (as it is currently only required to draft regulations),⁵² it considers that there may be merit in such a review in light of the concerns raised by this committee and the Scrutiny of Bills committee.

Recommendation 8

5.40 The committee recommends that the government give consideration to developing an expert advisory body to assist departments in appropriately developing proposals for bills that seek to delegate legislative power.

Recommendation 9

5.41 The committee recommends that the Senate Standing Committee for the Scrutiny of Bills consider whether the standing orders should be amended to prevent the passage of a bill after its second reading if the Scrutiny of Bills committee has not yet tabled a report in relation to the bill, noting the Scrutiny of Bills committee's ongoing concerns that significant matters are left to delegated legislation.

50 Office of Parliamentary Counsel, Drafting Direction 3.8, *Subordinate Legislation*, p. 3, <https://www.opc.gov.au/drafting-resources/drafting-directions> (accessed 15 May 2019).

51 In this regard, it is noted that ministers have occasionally asserted that they have included matters in rules (or other instruments) rather than in regulations, based on the information in drafting directions. See, for example, Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 3 of 2018*, March 2018, p. 220; *Scrutiny Digest 5 of 2018*, May 2018, p. 112.

52 Legal Services Directions 2017, section 3. The drafting of government bills, government amendments of bills, regulations, ordinances and regulations of external territories and Jervis Bay Territory, and other legislative instruments made or approved by the Governor-General is 'tied work', and may only be undertaken by the Office of Parliamentary Counsel.

Recommendation 10

5.42 The committee recommends that where the Senate Standing Committee for the Scrutiny of Bills has drawn the Senate's attention to provisions in a bill that may inappropriately delegate legislative power, the government, relevant legislation committees and individual senators should give substantive consideration to that report when considering the bill.

Recommendation 11

5.43 The committee recommends that the Office of Parliamentary Counsel give consideration to reviewing its Drafting Direction 3.8 and its practice of recommending that all delegated legislation should be made in the form of legislative instruments, rather than regulations, unless there is good reason not to do so.

Chapter 6

Parliamentary scrutiny of delegated legislation

Introduction

6.1 This chapter assesses the contribution of parliamentary committees to the broader framework for parliamentary control and scrutiny of delegated legislation. It gives particular consideration to the lack of an ordinary procedure by which Commonwealth parliamentary committees consider policy matters in delegated legislation, in contrast to the established procedures for the technical scrutiny of delegated legislation.

Technical scrutiny of delegated legislation

Overview

6.2 This committee is the primary mechanism by which the Australian Parliament scrutinises the technical aspects of delegated legislation. The Senate standing orders require the committee to consider, and, if necessary, report on all instruments 'made under the authority of Acts of the Parliament, which are subject to disallowance or disapproval by the Senate and which are of a legislative character'.¹ The committee currently scrutinises each instrument by reference to four scrutiny principles, which are focused on compliance with statutory requirements, the protection of individual rights and liberties, and parliamentary oversight.²

6.3 Since its inception, the committee has taken a technical approach to the scrutiny of delegated legislation, and has chosen not to consider substantive policy matters. The fourth report of the committee, published in 1938, explained that:

It was inevitable that many regulations would come before the Committee which, while quite correct in form, gave effect to some item of Government policy of a controversial nature. After careful consideration of this aspect, the Committee agreed that questions involving Government policy in Regulations and Ordinances fell outside the scope of the committee.³

1 The Senate, *Standing Orders and other orders of the Senate*, August 2018, SO 23(2). See Chapter 1 for further detail.

2 The committee's scrutiny principles are discussed in further detail in Chapter 3.

3 Standing Committee on Regulations and Ordinances, *Fourth Report from the Standing Committee on Regulations and Ordinances*, June 1938, p. 2.

6.4 Emeritus Professor Dennis Pearce has observed that the choice to consider only technical matters rather than matters of policy has:

shield[ed] the Committee from party political differences and has produced an uncommon level of bi-partisanship in its work. It is this that has made the Committee so successful and which has persuaded the Senate to support it when there has been a show-down with the executive.⁴

6.5 In addition to this committee, the Parliamentary Joint Committee on Human Rights (PJCHR) engages in technical scrutiny of delegated legislation to determine its compatibility with international human rights law.⁵ The PJCHR undertakes its scrutiny function as a technical inquiry relating to Australia's international human rights obligations and does not consider the broader policy merits of legislation.⁶

Approach in other jurisdictions

6.6 All states and territories in Australia have parliamentary committees responsible for scrutinising delegated legislation.⁷ With the exception of Queensland, these committees consider delegated legislation only on technical scrutiny grounds, many of which are identical or similar to the principles used by this committee.⁸

6.7 In the Canadian Parliament, the Standing Joint Committee for the Scrutiny of Regulations directs its scrutiny to technical and procedural aspects of delegated legislation. These include whether an instrument is properly authorised, is in

4 Dennis Pearce, 'Rules, Regulations and Red Tape: Parliamentary Scrutiny of Delegated Legislation', *Papers on Parliament* No. 42, December 2004, p. 88, <https://www.aph.gov.au/binaries/senate/pubs/pops/pop42/pearce.pdf> (accessed 16 May 2019).

5 *Human Rights (Parliamentary Scrutiny) Act 2011*, section 7. The PJCHR considers all legislative instruments (both disallowable and non-disallowable) against the seven core human rights treaties set out in that Act. These include the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination against Women; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Rights of the Child; and the Convention on the Rights of Persons with Disabilities.

6 Parliamentary Joint Committee on Human Rights, *Guide to human rights*, June 2015, p. ii. Similar to this committee, the underpinning policy for an instrument may provide context for PJCHR's technical scrutiny.

7 ACT: Standing Committee on Justice and Community Safety; NSW: Legislation Review Committee; NT: Public Accounts Committee; Victoria: Scrutiny of Acts and Regulations Committee; South Australia: Legislative Review Committee; Western Australia: Joint Standing Committee on Delegated Legislation; Tasmania: Joint Standing Committee on Subordinate Legislation; and Queensland: undertaken by portfolio committees.

8 See Chapter 3 for further information.

conformity with the Canadian Charter of Rights and Freedoms, trespasses unduly on rights and liberties, limits judicial or merits review or has defective drafting.⁹

6.8 Scrutiny committees in the United Kingdom (UK) (including the Westminster Parliament, the Scottish Parliament and the Welsh Assembly) perform similar technical scrutiny functions.¹⁰ For example, in the Westminster Parliament, the Joint Committee on Statutory Instruments is required to consider whether the special attention of the House of Lords should be drawn to an instrument on a number of technical scrutiny grounds, including:

- whether an instrument imposes or prescribes the amount of a charge or payment;
- may operate retrospectively;
- may be ultra vires;
- is excluded from challenge in the courts; and
- has drafting defects.

6.9 The committee may also consider any other ground that does not impinge on the merits of an instrument or its underpinning policy.¹¹ Other UK parliamentary committees may also examine delegated legislation on technical grounds, depending on the type of instrument.¹²

6.10 In New Zealand, the Regulations Review Committee is responsible for the technical scrutiny of delegated legislation. The standing orders require it to consider if it should draw delegated legislation to the attention of the House on nine scrutiny grounds, including that the instrument:

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- 9 Parliament of Canada, *Standing Joint Committee for the Scrutiny of Regulations, Mandate*, <https://www.parl.ca/Committees/en/REGS/About> (accessed 15 May 2019). The review criteria are set out in that committee's first report to both Houses of Parliament at the beginning of each session. The review criteria are not set out in legislation or in the standing orders of the Canadian Parliament.
- 10 For example, in the Scottish Parliament, instruments are reviewed by the Delegated Powers and Law Reform Committee, which assesses the instrument against 10 technical scrutiny grounds. Scottish Parliament, *Standing Orders of the Scottish Parliament*, May 2018, SO 10.2. In Wales, instruments are reviewed by the Constitutional and Legislative Affairs Committee against 11 technical scrutiny grounds. National Assembly for Wales, *Standing Orders of the National Assembly for Wales*, January 2019, SO 21.2.
- 11 House of Commons (UK), *Standing Orders of the House of Commons*, May 2018, SO 151; House of Lords (UK), *Standing Orders of the House of Lords*, May 2016, SO 73.
- 12 For example, legislative reform orders may be considered on technical grounds by the Regulatory Reform Committee (House of Commons) and the Delegated Powers and Regulatory Reform Committee (House of Lords); remedial orders may be considered on technical grounds by the Joint Committee on Human Rights.

- is not made in accordance with the general objects and intentions of the enabling Act;
- trespasses unduly on personal rights and liberties;
- excludes or limits merits review or judicial review;
- contains matters more appropriate for parliamentary enactment;
- was not made with compliance with consultation procedures; and
- is retrospective.¹³

Evidence before the committee

6.11 A number of submitters to the inquiry commented on the important technical scrutiny work undertaken by the committee. For example, the Department of Home Affairs commended the committee for 'examin[ing] and oversee[ing] delegated legislation, in accordance with scrutiny principles', noting that this forms 'an essential part of the framework for parliamentary control of legislation'.¹⁴

6.12 A number of submitters focused on the influence of the committee's technical scrutiny on drafting practices. For example, Mr Peter Quiggin PSM observed that the committee's technical scrutiny has brought about significant changes to drafting practices within the Office of Parliamentary Counsel. Mr Quiggin contended that this has 'contributed to greater consistency in the form and content of legislation'.¹⁵ Similarly the Department of Education and Training noted that:

The committee has an established record of consistently drawing attention to provisions which it perceives to be inconsistent with its scrutiny principles, which helps to improve the quality of the drafting of legislation instruments.¹⁶

6.13 While commending the committee's technical scrutiny work, the Department of Education and Training also suggested that the committee's current approach would be enhanced by a comprehensive understanding of the policy objectives contained in instruments.¹⁷ The department suggested that the committee could engage with an instrument's intentions without necessarily scrutinising its policy merits.

13 House of Representatives (NZ), *Standing Orders of the House of Representatives*, August 2017, SO 318.

14 Department of Home Affairs, *Submission 10*, p. 1.

15 Mr Peter Quiggin PSM, *Submission 3*, p. 2.

16 Department of Education and Training, *Submission 6*, p. 1.

17 Department of Education and Training, *Submission 6*, pp. 2-3.

Committee view

6.14 The committee maintains, as it has since it was first established almost 90 years ago, that its technical, non-partisan approach to scrutinising delegated legislation is essential to its role. As the 17th Chair to the committee, Senator Lewis, said in the committee's 50th anniversary report in 1982:

As the principles indicate, the Committee has always been concerned to ensure that the policy aspects of delegated legislation do not intrude upon its primary task of protecting the individual. To that end, the Committee's evaluation of delegated legislation has never touched upon the merits of the parent legislation passed by the Parliament. The Committee's continuing concern, rather, is to achieve a balance between necessary executive functions, on the one hand, and the individual rights and liberties of citizens, on the other. Throughout its history, therefore, the Committee has concentrated on those provisions which have given administrators discretionary, unacceptable control over the day-to-day concerns of the people or which have attempted to remove personal liberties...¹⁸

6.15 The committee considers it vitally important to continue its non-partisan commitment to holding the executive to account on behalf of the Parliament, and to protecting individual rights and liberties. As such, and as noted further below, the committee intends to maintain its technical scrutiny role, and to leave questions regarding the policy merits of delegated legislation to parliamentary committees which do not need to maintain bipartisan unity.

Policy scrutiny of delegated legislation

Overview

6.16 There is currently no ordinary procedure by which standing committees consider policy matters in delegated legislation. By contrast, the Senate standing orders set out the powers and procedures of legislation and general purpose standing committees in relation to bills and broader policy matters:

- (a) The legislation committees shall inquire into and report upon estimates of expenditure in accordance with standing order 26, bills or draft bills referred to them by the Senate, annual reports in accordance with paragraph (20), and the performance of departments and agencies allocated to them.
- (b) The references committee shall inquire into and report upon other matters referred to them by the Senate.¹⁹

18 Senate Standing Committee on Regulations and Ordinances, *Seventy-First report*, March 1982, p. 4.

19 The Senate, *Standing orders and other orders of the Senate*, August 2018, SO 25(2).

6.17 The inquiry powers relating to the performance of departments and agencies may be sufficiently broad to enable legislation committees to, on their own initiative, inquire into and report on delegated legislation made by departments and agencies. However, in practice, inquiries into delegated legislation have typically been undertaken by references committees on referral by the Senate, in accordance with standing order 25(2)(b). For example, in September 2016, the Senate referred an inquiry to the Legal and Constitutional Affairs References Committee into the nature and scope of the consultations prior to the making of the Legal Services Amendment (Solicitor-General Opinions) Direction 2016.²⁰

6.18 Inquiries examining policy questions relating to delegated legislation are also relatively rare. The Clerk of the Senate has observed:

There is no ordinary process by which the large volume of delegated legislation produced each year is tested to see whether policy considerations exist which might appropriately become the subject of committee investigation. When policy defects are identified in particular documents they may become the subject of inquiry by legislation committees, or by references committees, if referred by the Senate; however, this is an ad hoc process.²¹

6.19 Some joint parliamentary committees have the power to examine the policy underpinning delegated legislation. For example:

- the Parliamentary Joint Committee on Corporations and Financial Services is empowered to inquire into 'the operation of the corporations legislation', which includes rules and regulations made under the *Corporations Act 2001*;²²
- the Parliamentary Joint Committee on Intelligence and Security may review any regulations made for the listing (or re-listing) of a 'terrorist organisation',²³ and
- the Joint Standing Committee on Migration has previously been empowered to inquire and report on regulations made or proposed to be made under the *Migration Act 1958*.²⁴

20 *Journals of the Senate*, No. 7, 15 September 2016, pp. 214-215.

21 Clerk of the Senate, *Submission 7*, p. 4.

22 *Australian Securities and Investments Commission Act 2001*, sub-paragraphs 243(a)(ii) and (iii). It is noted that 'corporations legislation' is defined in section 5 as meaning the *Australian Securities and Investments Commission Act 2001* and the *Corporations Act 2001*, including 'and regulations and rules made under [those Acts]'. The joint committee also has the power to inquire into any law of the Commonwealth (including delegated legislation) that appears to affect significantly the operation of the corporations legislation.

23 *Criminal Code Act 1995*, section 102.1A.

6.20 However, the powers of these committees cover only a small or discrete class of delegated legislation. Moreover, these committees do not have an ordinary process by which they review all such delegated legislation and, apart from reports on the listing of terrorist organisations, they have rarely inquired into legislative instruments within the applicable disallowance timeframes.

6.21 The absence of an ordinary process by which the policy merits of delegated legislation are scrutinised is an issue of ongoing concern. For example, submitters to the Senate Standing Committee for the Scrutiny of Bills' (Scrutiny of Bills committee) 2010-2012 inquiry into its future role and direction, observed that there is no ordinary process by which the large volume of delegated legislation produced each year is tested to determine whether policy considerations might appropriately be investigated by parliamentary committees. In its submission to that inquiry, this committee suggested the role of the Selection of Bills committee could be expanded to consider referring delegated legislation to policy committees (in the same manner as the Selection of Bills committee refers bills).²⁵

6.22 The Scrutiny of Bills committee noted that this issue was beyond the scope of its inquiry. However, it recommended that both this committee and the Scrutiny of Bills committee consider issues relating to the scrutiny of delegated legislation (including whether policy scrutiny would be appropriate), and develop a response.²⁶

Approach in other jurisdictions

6.23 In Queensland, the *Parliament of Queensland Act 2001* provides that a portfolio committee is responsible for examining each item of subordinate legislation in its portfolio to consider both technical matters relating to the lawfulness of the legislation, the application of legislative principles and the policy to be given effect by the legislation.²⁷ No other Australian state or territory parliamentary committee that is established to examine delegated legislation examines the policy merits of legislative instruments.

6.24 The Canadian Parliament does not consider the policy merits of delegated legislation. The Canadian Standing Joint Committee for the Scrutiny of Regulations directs its scrutiny to 'matters of legality and the procedural aspects of regulations,

24 See resolutions of appointment passed by the House of Representatives on 1 September 2016 and the Senate on 12 September 2016, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Migration/Resolution (accessed 15 May 2019).

25 Senate Standing Committee for the Scrutiny of Bills, *Final Report: Inquiry into the future role and direction of the Senate Scrutiny of Bills Committee*, May 2012, pp. 36-37.

26 Senate Standing Committee for the Scrutiny of Bills, *Final Report: Inquiry into the future role and direction of the Senate Scrutiny of Bills Committee*, May 2012, p. 38.

27 *Parliament of Queensland Act 2001* (Qld), section 93. The Queensland Parliament does not have a dedicated legislative scrutiny committee. Rather, each portfolio committee conducts legislative scrutiny and undertake policy inquiries into matters within their remit.

as opposed to the merits of particular regulations or the policy they reflect'.²⁸ The New Zealand Regulations Review Committee's scrutiny role is also limited to technical scrutiny of regulations. It does not consider matters of policy.²⁹

6.25 However, in the UK Parliament, the Secondary Legislation Scrutiny Committee³⁰ considers the policy merits and implications of all statutory instruments subject to parliamentary scrutiny. In addition to determining if proposed negative instruments should be upgraded to the affirmative procedure,³¹ the Secondary Legislation Scrutiny Committee considers whether to draw an instrument to the attention of the House of Lords on grounds that include:

- (a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;
- (b) that it may be inappropriate in view of changed circumstances since the enactment of the parent Act;
- (c) that it may imperfectly achieve its policy objectives;
- (d) that the explanatory material laid in support provides insufficient information to gain a clear understanding about the instrument's policy objective and intended implementation;
- (e) that there appear to be inadequacies in the consultation process which relates to the instrument.³²

6.26 In the Scottish Parliament, statutory instruments are reviewed by a lead committee, which considers any policy issues raised by the instrument. The lead committee makes a recommendation to Parliament about whether the instrument

28 Standing Joint Committee for the Scrutiny of Regulations, *Mandate*,

29 Dr Ryan Malone and Tim Miller, *Regulations Review Committee Digest*, 4th edition, New Zealand Centre for Public Law, Wellington, 2012, p. 20, <https://www.victoria.ac.nz/law/centres/nzcpl/pdfs/RRC-Digest-4th-ed.pdf> (accessed 20 May 2019).

30 Formerly known as the Merits of Statutory Instruments Committee.

31 Known as a 'sifting process'. The affirmative resolution procedure, and other procedures of the UK Parliament, is discussed further in Chapter 8.

32 Secondary Legislation Scrutiny Committee, *Terms of Reference*, <https://www.parliament.uk/business/committees/committees-a-z/lords-select/secondary-legislation-scrutiny-committee/role/tofref/> (accessed 15 May 2019). In Wales, the Constitutional and Legislative Affairs Committee similarly considers statutory instruments on five 'merits reporting grounds'. National Assembly for Wales, *Standing Orders of the National Assembly for Wales*, January 2019, SO 21.3.

should become law, informed by both policy considerations and the report of the technical scrutiny committee.³³

Evidence before the committee

6.27 In their joint submission, Professor Gabrielle Appleby, Emeritus Professor Mark Aronson and Dr Janina Boughey considered that both the Scrutiny of Bills Committee and this committee 'operate best in a non-partisan spirit'. However, they also noted that 'serious scrutiny of policy and substance is unlikely to be achieved in that spirit'.³⁴ Consequently, they emphasised the need to:

develop a framework that prompts the Regulations and Ordinances Committee to report policy and substantive concerns to the chamber, whilst not embroiling them in party-political divisions.³⁵

6.28 To facilitate this process, they recommended that:

there be an additional term of reference in the Regulations and Ordinances Committee to report, in a neutral and non-partisan manner, the substantive policy choices that are evident in instruments made under broadly framed delegations.³⁶

6.29 As noted above at paragraph [6.18], the Clerk of the Senate also highlighted the absence of an ordinary parliamentary process by which policy considerations in delegated legislation may be considered. To address this issue, he suggested that:

The committee might consider whether a process could be developed for the referral of delegated legislation to legislative and general purpose standing committees to ensure that instruments which raise policy questions do not slip under the radar.³⁷

6.30 Assistant Professor Jacinta Dharmananda referred the committee to a related suggestion made by Emeritus Professor Dennis Pearce in his 2004 paper,

33 The technical committee is the Delegated Powers and Law Reform Committee. Scottish Parliament, *Standing Orders of the Scottish Parliament*, May 2018, SO 10.2. Lead committee reports may inform, for example, whether the Parliament approves an instrument subject to affirmative resolution, or annuls an instrument subject to negative resolution.

34 Dr Gabrielle Appleby, Emeritus Professor Mark Aronson and Dr Janina Boughey, *Submission 2*, p. 4. The joint submission was endorsed by the Law Society of New South Wales. See Law Society of New South Wales, *Submission 13*, p. 1.

35 Dr Gabrielle Appleby, Emeritus Professor Mark Aronson and Dr Janina Boughey, *Submission 2*, p. 4.

36 Dr Gabrielle Appleby, Emeritus Professor Mark Aronson and Dr Janina Boughey, *Submission 2*, p. 4.

37 Clerk of the Senate, *Submission 7*, p. 4.

'Rules, Regulations and Red Tape: Parliamentary Scrutiny of Delegated Legislation'.³⁸
In that paper, Emeritus Professor Pearce observed:

the major weakness in the oversight by the Parliament of delegated legislation is that the Parliament seldom reviews the policy embodied in the legislation.³⁹

6.31 To address this concern, Emeritus Professor Pearce suggested that this committee could be divided into two divisions:

One division would continue to perform the valuable role that it presently carries out. The other would be a references committee to which could be referred delegated legislation that involves government policy issues of a significant kind that warrant investigation. This committee would be able to take evidence. It could make recommendations. It might well divide on party lines as do the standing committees now. However, the additional information that would emerge should it conduct an inquiry would provide a basis for informing the Senate whether it seemed appropriate for a Senator to move a disallowance motion.⁴⁰

6.32 As part of the delegation to the United Kingdom, the Chair and Deputy Chair met with Dr Adam Tucker, an academic specialising in the parliamentary scrutiny of delegated legislation.⁴¹ Dr Tucker has previously published his opinion that:

within the institutional limitations of Parliament...the merits of delegated legislation must be subject to at least a minimal level of meaningful scrutiny in Parliament. Meaningful scrutiny has two components: public justification; and vulnerability to defeat. So procedures must be put in place which require the Government to publicly defend the merits of its delegated legislative proposals, and run a genuine, even if only small, risk of them being voted down. However...it is not realistic to demand that *all* exercises of delegated legislative power are publicly debated and voted on. Rather, the best we can demand is that *some* delegated legislation be scrutinised in this way.⁴²

Committee view

6.33 The committee is alert to the absence of consistent policy scrutiny of delegated legislation at the Commonwealth level, and the potentially serious

38 Assistant Professor Jacinta Dharmananda, *Submission 11*, p. 2.

39 Dennis Pearce, 'Rules, Regulations and Red Tape: Parliamentary Scrutiny of Delegated Legislation', *Papers on Parliament* No. 42, December 2004, p.93.

40 Pearce, 'Rules, Regulations and Red Tape', p. 93.

41 See Appendix C (Delegation Report).

42 Dr Adam Tucker, 'Parliamentary Scrutiny of Delegated Legislation' in Alexander Horne, Gavin Drewry and Dawn Oliver (eds), *Parliament and the law*, 2013, p. 363.

consequences this may have for the relationship between the Parliament and the executive. As Emeritus Professor Pearce has observed:

The abandonment by the Parliament of a role in relation to the policy of delegated legislation has empowered the executive in a manner that the great settlements between the Crown and the Parliament that occurred in England in the seventeenth century were intended to prevent. It seems incongruous that political argument and possible division along party lines is accepted as appropriate for legislation in the form of bills but not for legislation made by the executive. This is particularly the case in relation to legislation that imposes obligations on persons and businesses to which the term red tape can be applied. The Parliament has opted out of any responsibility for these sorts of provisions.⁴³

6.34 At the same time, the committee is committed to preserving the genuinely non-partisan spirit in which it conducts its technical scrutiny functions, and is concerned that this could be compromised if the committee itself were to consider the policy merits of delegated legislation, or made the final decision to refer the matter to another committee for consideration.

6.35 After reviewing the approach to the policy scrutiny of delegated legislation in other jurisdictions and the proposals by leading experts, the committee considers it would be appropriate to develop a consistent process by which delegated legislation could be assessed to determine whether it includes matters 'which might appropriately become the subject of committee investigation',⁴⁴ in a manner that does not compromise the committee's non-partisan scrutiny function.

6.36 This process could be achieved by enabling the committee to draw the attention of relevant legislation committees or joint committees to delegated legislation that contains matters which, in the committee's view, raise significant issues or otherwise give rise to issues likely to be of interest to the Senate. Such a process would encourage the policy scrutiny of delegated legislation by the Australian Parliament while preserving the committee's commitment to technical, non-partisan scrutiny. In order to facilitate this process, the inquiry functions of the legislation standing committees might be expanded to make it explicit that those committees have the power to inquire into and report on delegated legislation that falls within the portfolios allocated to them.

Recommendation 12

6.37 The committee recommends that the Senate amend standing order 23 to enable the committee to additionally scrutinise each instrument to determine whether the Senate's attention should be drawn to it on the ground that it raises

43 Pearce, 'Rules, Regulations and Red Tape', p. 94.

44 Clerk of the Senate, *Submission 7*, p. 4.

significant issues or otherwise gives rise to issues likely to be of interest to the Senate.

Committee action 9

6.38 Where the committee reports under amended standing order 23 on legislative instruments which raise significant issues or give rise to issues of interest, the committee will write to the relevant legislation committee or joint committee to alert that committee to the instrument, and will keep a public record of such correspondence.

Recommendation 13

6.39 The committee recommends that the Senate amend standing order 25(2) to explicitly provide that the legislation committees may inquire into and report on legislative instruments made by the departments and agencies allocated to them.

Chapter 7

Parliamentary scrutiny of Commonwealth expenditure

Introduction

7.1 This chapter discusses the nature and effectiveness of the current framework for parliamentary control and scrutiny of delegated legislation which specifies expenditure on government programs or grants.

Overview

7.2 In *Williams v Commonwealth (No. 1)*,¹ the High Court held that the Commonwealth executive did not have the power to enter into funding agreements without express legislative authority to do so. In making this decision, the High Court relied to a large extent on principles underpinning parliamentary accountability and federalism. Chief Justice French noted that:

A Commonwealth Executive with a general power to deal with matters of Commonwealth legislative competence is in tension with the federal conception which informed the function of the Senate as a necessary organ of Commonwealth legislative power. It would undermine parliamentary control of the executive branch and weaken the role of the Senate.²

7.3 The Commonwealth's response to this decision was to introduce legislation in 2012³ that retrospectively provided legislative support for over 400 non-statutory funding schemes. That legislation also empowered the executive to authorise expenditure on future grants or programs by specifying the program in delegated legislation. Specifically, section 32B of the *Financial Framework (Supplementary Powers) Act 1997* authorises expenditure on grants or programs which are specified in regulations made under that Act.

7.4 The *Industry Research and Development Act 1986* similarly provides authority for Commonwealth expenditure in relation to industry, innovation, science and research programs. The programs on which expenditure is authorised are prescribed by legislative instruments made under that Act.⁴ The *Industry Research and Development Act 1986* also allows the Commonwealth to make and vary arrangements in relation to such programs, including arrangements for the payment of Commonwealth funds.⁵

1 (2012) 248 CLR 156.

2 *Williams v Commonwealth (No. 1)* (2012) 248 CLR 156, p. 205 [60] per French CJ.

3 *Financial Framework Legislation Amendment Act (No. 3) 2012* (assented to 28 June 2012).

4 *Industry Research and Development Act 1986*, section 33.

5 *Industry Research and Development Act 1986*, section 34.

7.5 New programs for expenditure are routinely added to the Financial Framework (Supplementary Powers) Regulations 1997 and prescribed by instruments made under the *Industry Research and Development Act 1986*. These instruments are subject to the standard disallowance processes in the *Legislation Act 2003*, and are scrutinised by the committee. The committee considers, in particular:

- whether decisions made under the programs (for example, decisions to grant or not to grant funding) are subject to independent merits review;
- the constitutional authority for the expenditure (that is, the constitutional head of power relied on to support the program or policy); and⁶
- whether the instrument appears to specify or prescribe a new program or policy and, if so, whether the initial appropriation for the program or policy was inappropriately included in an Appropriation Act relating to the ordinary annual services of the government.⁷

7.6 This third matter has been considered and reported on by the committee since 2014, following a request from the Senate Standing Committee on Appropriations and Staffing (Appropriations and Staffing committee) that the committee begin to monitor Commonwealth expenditure and report on any such expenditure to the Senate.⁸ The Senate has resolved that ordinary annual services should not include spending on new policies not previously authorised by special legislation. This is because the Senate's constitutional right to amend proposed laws appropriating revenue or moneys for expenditure extends to all matters not involving the ordinary annual services of the government.⁹ As such, the committee

6 This follows the decision of the High Court in *Williams v Commonwealth (No. 2)* (2014) 252 CLR 416, which confirmed that a constitutional head of power is required to support Commonwealth spending programs.

7 In this respect, 'odd numbered' Appropriation Acts (for example, *Appropriation Act (No. 1) 2018-2019* and *Appropriation Act (No. 3) 2018-19*) appropriate money from the Consolidated Revenue Fund for expenditure on the ordinary annual services of the government. These Acts are not amendable by the Senate.

8 See correspondence from the Chair of the Senate Standing Committee on Appropriations and Staffing to the Chair of the Standing Committee on Regulations and Ordinances, 17 March 2014, contained in Appendix 3, *Delegated Legislation Monitor 5 of 2014*, May 2014.

9 Under section 53 of the Constitution, the Senate cannot amend proposed laws appropriating revenue or moneys for the ordinary annual services of the government. Further, section 54 of the Constitution provides that any proposed law which appropriates revenue or moneys for the ordinary annual services of the government shall be limited to dealing only with such appropriation. In order to comply with the terms of a 2010 Senate resolution relating to the classification of appropriations for expenditure, new policies which are not previously authorised by special legislation and for which no money has been appropriated in previous years should be included in an appropriation bill that is not for the ordinary annual services of the government (and which is therefore subject to amendment by the Senate). The complete resolution is contained in *Journals of the Senate*, No. 127—22 June 2010, pp. 3642-3643.

scrutinises instruments made under the *Financial Framework (Supplementary Powers) Act 1997* and the *Industry Research and Development Act 1986* to assess whether measures may have been included in the appropriation bills as an 'ordinary annual service of the government', despite being spending on new policy. However, the committee generally comments on such matters after the relevant appropriation bills have passed the Senate. Moreover, the Senate has not pursued the apparent misclassification of funding as ordinary annual services when this issue has been raised in relation to the appropriation bills by the Senate Standing Committee for the Scrutiny of Bill (Scrutiny of Bills committee).¹⁰

Evidence before the committee

7.7 In their joint submission to the committee, Professor Gabrielle Appleby, Emeritus Professor Mark Aronson and Dr Janina Boughey observed that 'Parliament exercises important supervisory, or accountability roles in giving effect to the principle of responsible government', particularly in relation to taxation and expenditure.¹¹ They recommended that an affirmative resolution procedure be introduced in legislation that delegates the power to authorise expenditure under section 32B of the *Financial Framework (Supplementary Powers) Act 1997*.¹²

Committee view

7.8 The committee considers that Parliament has an essential role to play under the Constitution in authorising the expenditure of public money. In this regard, the committee considers that the authorisation of expenditure is more appropriately enacted via primary legislation, rather than delegated to the executive.

7.9 The Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee) has raised similar concerns. For example, when commenting on the bill which sought to establish the system by which government programs would be specified in delegated legislation, the Scrutiny of Bills committee expressed concerns as to the appropriateness of delegating to the executive (through the use of

10 See debate in the Senate in relation to amendments proposed by Senator Leyonhjelm to Appropriation Bill (No. 3) 2017-18, in *Senate Hansard*, 19 March 2018, pp. 1487-1490.

11 Professor Gabrielle Appleby, Emeritus Professor Mark Aronson and Dr Janina Boughey, *Submission 2*, pp. 7-8. The joint submission was endorsed by the Law Society of New South Wales. See Law Society of New South Wales, *Submission 13*, p. 1.

12 Professor Gabrielle Appleby, Emeritus Professor Mark Aronson and Dr Janina Boughey *Submission 2*, p. 9.

regulations) how its powers to contract and to spend were to be expanded.¹³ The Scrutiny of Bills committee also raised these concerns in relation to the bill which sought to establish the framework for authorising spending on industry, innovation, science and research programs.¹⁴

7.10 As discussed in Chapter 10, the committee does not generally consider that instruments of delegated legislation should be subject to an affirmative resolution procedure (that is, a procedure by which delegated legislation must be approved by Parliament in order to take effect). This is because the committee is concerned that such an approach could encourage the inclusion of significant matters in delegated legislation, rather than including such matters in primary legislation. However, successive governments since 2012¹⁵ have considered it appropriate to provide legislative authority for expenditure through delegated legislation, notwithstanding that it may be more appropriate for such authority to be provided through parliamentary enactment. In light of this, and given the importance of parliamentary control over Commonwealth expenditure, the committee considers it would be preferable that delegated legislation that specifies Commonwealth expenditure to be subject to an affirmative resolution procedure.

7.11 The committee considers that its role in scrutinising regulations that effectively authorise expenditure is an important aspect of parliamentary control and scrutiny over such expenditure. It intends to continue to examine delegated legislation that specifies Commonwealth expenditure to ensure it is supported by a constitutional head of legislative power, and to ensure that decisions are subject to independent merits review. However, the committee has determined that it will refocus the manner in which it will monitor expenditure specified in delegated legislation, away from considering whether programs or policies specified in such instruments appear to be new expenditure, which was inappropriately included in the appropriation bill relating to the ordinary annual services of government.

7.12 The committee notes that when the then Appropriations and Staffing committee requested that the committee scrutinise expenditure which appears to have been inappropriately classified as funding for the ordinary annual services of government,¹⁶ no other Senate committee was regularly reviewing legislation on this

13 Senate Standing Committee for the Scrutiny of Bills, *Report 11 of 2012*, September 2012, pp. 376-377. The *Financial Framework Legislation Amendment Act (No. 3) 2012* amended the *Financial Management and Accountability Act 1997* (FMA Act) to allow the Commonwealth to make, vary or administer arrangements relating to expenditure. Following the enactment of the *Public Governance, Performance and Accountability Act 2013*, relevant provisions of the FMA Act now appear in the *Financial Framework (Supplementary Powers) Act 1997*.

14 Senate Standing Committee for the Scrutiny of Bills, *Report 9 of 2016*, November 2016, pp. 571-572.

15 Following the decision in *Williams v Commonwealth (No 1)* (2012) 248 CLR 156.

16 The letter from the Chair was dated 17 March 2014.

basis. However, since June 2014 the Scrutiny of Bills committee has considered this issue when scrutinising appropriation bills.¹⁷

7.13 In the view of the committee, whether a measure has been inappropriately classified as for the ordinary annual services of the government is most appropriately considered at the time an appropriation bill is being scrutinised, rather than at the time a policy or program is specified in a legislative instrument. By the time such legislative instruments are made and the committee reports on them, the Senate has usually passed the relevant appropriation bills so; that is, the horse has already bolted.

7.14 The committee considers that, in reviewing regulations that specify programs or policies on which Commonwealth money is to be spent, the committee could more usefully draw the Senate's attention to the nature and extent of expenditure that is specified by delegated legislation. This would assist in making senators aware of the specific programs in relation to which the government is authorising expenditure and, where possible, of the amount of money allocated to such programs (which may have previously been appropriated under a broad departmental outcome). For example, the committee's *Delegated Legislation Monitor* could list the name of the instrument, the program or grant being specified and, if the information is readily available, the amount of funding allocated. In this way, senators would be provided with a readily accessible list of government expenditure that is being authorised through delegated legislation.

Committee action 10

7.15 The committee will list in its reports to the Senate information about the nature and, where possible, the extent of expenditure specified by delegated legislation.

Recommendation 14

7.16 The committee recommends that the *Financial Framework (Supplementary Powers) Act 1997* and the *Industry Research and Development Act 1986* be amended to provide for an affirmative resolution procedure for legislative instruments which specify expenditure.

17 See, for example, Senate Standing Committee for the Scrutiny of Bills, *Alert Digest 7 of 2014*, June 2014, pp. 1-4; *Scrutiny Digest 2 of 2017*, February 2017, pp 1-5.

Chapter 8

Procedural mechanisms for parliamentary control

Introduction

8.1 This chapter considers the effectiveness of procedural mechanisms, both in Australia and in other jurisdictions, which facilitate parliamentary scrutiny and control of delegated legislation. In particular, the chapter focusses on:

- disallowance procedures;
- affirmative resolution procedures;
- commencement provisions;
- amendment of delegated legislation by the Parliament; and
- sunseting (the automatic repeal of legislative instruments after 10 years).

Disallowance

Overview

8.2 At the Commonwealth level, the disallowance procedure is the primary mechanism by which the Parliament may exercise control over delegated legislation. The *Legislation Act 2003* (Legislation Act) provides that any member of the Senate or the House of Representatives may, within 15 sitting days of a disallowable legislative instrument being tabled in the relevant House of Parliament, give notice that they intend to move a motion to disallow the instrument or a provision of the instrument. The period within which a member or senator may move a motion to disallow an instrument begins on the first sitting day after the instrument is tabled.¹

8.3 Once a notice of motion to disallow an instrument is given, there are 15 further sitting days in which the motion may be resolved, commencing on the first sitting day after the notice is given. During that period, if the House in which the motion was given resolves to disallow the instrument or provision, the instrument or provision is repealed immediately after the passing of the resolution.² 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 resolution of the motion).

8.4 The Legislation Act further provides that, if a notice of motion to disallow a legislative instrument or a provision of an instrument remains unresolved at the end of 15 sitting days after the notice was given, the relevant instrument or provision is

1 *Legislation Act 2003*, paragraph 42(1)(a).

2 *Legislation Act 2003*, paragraph 42(1)(b).

deemed to have been disallowed and is repealed at that time.³ This ensures that the disallowance process cannot be frustrated by not making time to consider a motion for disallowance within the applicable 15 sitting day period.

8.5 Disallowance does not remove the legal effect of the instrument, or acts done under it, between the time the instrument commenced and the time it was disallowed. Further, if the disallowed instrument or provision repealed all or part of an earlier instrument, the earlier instrument or part is revived.⁴

8.6 In the Senate's history up to the end of the 45th Parliament, there have been 181 successful motions to disallow or disapprove a legislative instrument.⁵ Thirteen of these successful motions did not proceed to a vote; the instruments were instead deemed to be disallowed as the motions were not called on, or called on but not resolved, within the time limit for disallowance.⁶

Modifications to the disallowance procedure

8.7 In some cases, the usual disallowance procedure under the Legislation Act may be modified by the legislation under which an instrument is made. For example, the *Public Governance, Performance and Accountability Act 2013* provides that certain determinations may be disallowed within five sitting days of the relevant instrument being tabled in the House, rather than the usual 15 sitting days.⁷

8.8 Another example is the *Commercial Broadcasting (Tax) Act 2017* (CB Tax Act), which overrides the usual process by which an instrument would be deemed to be disallowed. It provides that certain determinations can only be disallowed if Parliament positively passes a resolution to disallow within the 15 sitting day disallowance period.⁸ This means if a motion is unresolved at the end of the applicable disallowance period, the determination remains in effect. Both the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee) and this committee have expressed serious concerns about modifications to the disallowance procedure in the CB Tax Act, on the basis that the modifications would 'undermine

3 *Legislation Act 2003*, subsection 42(2).

4 *Legislation Act 2003*, subsection 45(2).

5 There have been 172 successful disallowance motions and nine successful disapproval motions (relating to determinations of the Remuneration Tribunal). The first successful disallowance motion was on 29 May 1914 and the latest was on 3 April 2019. Based on research undertaken for the committee by Dr Michael Sloane, Parliamentary Library.

6 Based on research undertaken for the committee by Dr Michael Sloane, Parliamentary Library.

7 *Public Governance, Performance and Accountability Act 2013*, section 79 (relating to determinations made under subsection 78(1) or (3) of that Act).

8 *Commercial Broadcasting (Tax) Act 2017*, section 13.

the Senate's oversight of delegated legislation in cases where time is not made available to consider a motion to disallow within 15 sitting days'.⁹

Exemptions from disallowance

8.9 All legislative instruments are subject to the disallowance process unless exempted by law. The Legislation Act provides that the following legislative instruments are exempt from disallowance:

- instruments expressly exempted by another Act from the disallowance provisions of the Legislation Act;
- instruments listed in regulations made under the Legislation Act; and
- instruments (except regulations) made under an Act which facilitates the establishment or operation of an intergovernmental body or scheme, and which authorises instruments to be made for those purposes.¹⁰

8.10 Numerous individual Acts exempt delegated legislation made under them from disallowance. In addition, Part 4 of the Legislation (Exemptions and Other Matters) Regulation 2015 prescribes classes of instruments, as well as specific instruments, which are not subject to disallowance. These include:

- directions by a minister to any person or body;
- instruments, other than regulations, that relate to superannuation;
- instruments made under an annual Appropriation Act;
- instruments, other than regulations, made under prescribed provisions of the *Migration Act 1958* and the Migration Regulations 1994;
- determinations made under subsection 5(2) of the *Australian Citizenship Act 2007*;
- certain determinations made under section 4A of the *Australian Federal Police Act 1979*; and
- instruments made under subsection 203AH(1) of the *Native Title Act 1993*.¹¹

9 See Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 15 of 2017*, November 2017, p. 5. See also Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2017*, June 2017, pp. 23-24 and *Scrutiny Digest 9 of 2017*, August 2017, pp. 39-42. A very similar provision was included in the Telecommunications (Regional Broadband Scheme) Charge Bill 2017 and the Telecommunications (Competition and Consumer) Bill 2017. However, following concerns raised by the Scrutiny of Bills committee and the Senate Environment and Communications Legislation Committee, the Senate amended the bill to reinstate the usual disallowance procedures under the Legislation Act. See discussion in Senate Standing Committee for the Scrutiny of Bills, *Annual Report 2018*, February 2019 pp. 19-21.

10 *Legislation Act 2003*, section 44.

11 Legislation (Exemptions and Other Matters) Regulation 2015, sections 9 and 10.

8.11 There is no formal requirement that explanatory memoranda to bills that provide exemptions from disallowance explain or justify those exemptions, nor is there any guidance as to when it may be appropriate to include such exemptions in a bill. However, the Office of Parliamentary Counsel recommends:

To assist the Senate Scrutiny of Bills Committee to understand the reasons for an instrument being exempted from the disallowance regime, Bill drafters should provide some guidance to instructors about including an appropriate explanation in the explanatory memorandum.¹²

8.12 In addition, the Legislation Act does not require the explanatory statement to an instrument which has been exempted from disallowance to explain or justify the exemption.

8.13 The Federal Register of Legislation, administered by the Office of Parliamentary Counsel, contains the full text of all disallowable legislative instruments, as well as all legislative instruments that are exempt from disallowance. However, it is not currently possible to conduct a search of the register to specifically identify instruments which are exempt from disallowance.¹³

8.14 Other than the information contained on the Federal Register of Legislation, there is no public record of exempt legislative instruments. By contrast, the Table Offices of the House of Representatives and the Senate publish online records of all disallowable legislative instruments and the date on which they were tabled.¹⁴ In addition, this committee records all disallowable legislative instruments subject to a notice of motion to disallow, whether at the instigation of the committee or an individual senator.¹⁵

12 Office of Parliamentary Counsel, Drafting Direction 3.8, *Subordinate Legislation*, p. 17, <https://www.opc.gov.au/drafting-resources/drafting-directions> (accessed 15 May 2019). See also Department of the Prime Minister and Cabinet, *Legislation Handbook*, February 2017, p. 34, <https://www.pmc.gov.au/resource-centre/government/legislation-handbook> (accessed 15 May 2019).

13 The Federal Register of Legislation also contains a list of legislative instruments which are (at a particular time) currently open to disallowance. See <https://www.legislation.gov.au/Browse/ByTitle/LegislativeInstruments/OpenToDisallowance> (accessed 16 May 2019). However, this only lists disallowable instruments in relation to which the disallowance period has not expired. It does not separately list all disallowable or exempt instruments.

14 Parliament of Australia, *House Disallowable Instruments List*, https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/leginstruments/house-dissallowable-instruments (accessed 10 April 2019); Parliament of Australia, *Senate Disallowable Instruments List*, https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/leginstruments/senate-dissallowable-instruments (accessed 10 May 2019).

15 Parliament of Australia, *Disallowance Alert*, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts (accessed 10 May 2019). The *Alert* also lists actions taken in relation to the relevant notice of motion – for example whether the notice has been withdrawn or resolved.

Restrictions on re-making legislative instruments

8.15 In order to ensure that Parliament's power of disallowance may not be circumvented, and to preserve Parliament's intention where a House has disallowed an instrument, the Legislation Act imposes restrictions on the re-making of legislative instruments that are the 'same in substance' as an existing or recently disallowed instrument.¹⁶

Committee scrutiny

8.16 The committee typically conducts its scrutiny function within the timeframes that apply to the disallowance process. Working within these timeframes ensures that the committee is able, if necessary, to place a notice of motion to disallow an instrument about which it has concerns.¹⁷ These notices (referred to as 'protective' notices) are typically placed in order to preserve the Senate's ability to consider an instrument while it is still subject to disallowance. In practice, in the vast majority of cases the committee's Chair withdraws these 'protective' notices on the committee's behalf following receipt of a satisfactory response from the minister.

8.17 There have been seven instances in the committee's history where a notice of motion moved by the Chair of the committee resulted in the disallowance of an instrument on the recommendation of the committee, with the first successful motion moved in 1960 and the latest in 1988.¹⁸ The Senate has never rejected a committee recommendation that an instrument should be disallowed.¹⁹

16 *Legislation Act 2003*, sections 46 to 48. It is noted that there are some uncertainties as to the correct interpretation of the 'same in substance' rule, following the judgement of the Federal Court in *Perrett v Attorney General of the Commonwealth of Australia* [2015] FCA 834. However, it has been contended that it remains open to the committee to interpret the 'same in substance' rule in such a way as preserves the effectiveness of the disallowance power and promotes effective parliamentary oversight. See Ivan Powell, *The Concept of 'The Same in Substance': What Does the Perrett Judgement Mean for Parliamentary Scrutiny*, in *Papers on Parliament* no. 67, https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/pops/Papers_on_Parliament_67/The_Concept_of_The_Same_in_Substance (accessed 16 May 2019).

17 In circumstances in which the disallowance period is likely to expire before a matter is resolved, the committee may lodge a notice of motion to disallow the instrument, to protect the Senate's ability to subsequently disallow it. This extends the applicable disallowance period by a further 15 sitting days. The committee refers informally to these notices as 'protective' notices. See Harry Evans and Rosemary Laing, eds., *Odgers' Australian Senate Practice*, 14th edition, Department of the Senate, 2016, p. 438.

18 Based on research undertaken for the committee by Dr Michael Sloane, Parliamentary Library.

19 Harry Evans and Rosemary Laing, eds., *Odgers' Australian Senate Practice*, 14th edition, Department of the Senate, 2016, p. 437.

8.18 The Parliamentary Joint Committee on Human Rights (PJCHR) also examines all legislative instruments for compatibility with international human rights law. It is not restricted to examining instruments that are subject to disallowance.²⁰

8.19 In addition, the Scrutiny of Bills committee considers provisions in bills which seek to exempt instruments made under the relevant Act (once enacted) from the disallowance procedures in the Legislation Act, and expects a sound justification for any exemption to be set out in the explanatory memorandum.²¹

Approach in other jurisdictions

8.20 All Australian states and territories apply some form of disallowance process to delegated legislation. The period within which a relevant motion can be moved varies from six sitting days to 18 sitting days.²²

8.21 Whether an instrument will be deemed to be disallowed if a motion seeking its disallowance is not resolved within the applicable timeframe varies between jurisdictions. For example, in the Australian Capital Territory (ACT) and Queensland an instrument will be deemed to be disallowed if the motion has not been resolved.²³ In Western Australia, there is no timeframe in which a motion to disallow must be considered; however, a notice of motion to disallow a regulation will have precedence over other notices of motion, and requires that the motion be resolved within 17 sitting days of its being moved.²⁴ In contrast, in New South Wales (NSW), the Northern Territory, South Australia, Tasmania and Victoria there is no timeframe in which a motion to disallow must be considered. If parliamentary time is not made available to debate the motion, the relevant instrument will continue in existence.

8.22 Disallowance procedures also apply in comparable Westminster jurisdictions. For example, the Canadian Joint Committee for the Scrutiny of Regulations is responsible for initiating disallowance, although the procedure is not in frequent use. That committee must make a report to each House of Parliament containing a resolution that a regulation or provision be revoked.²⁵ If no minister files a motion to

20 *Human Rights (Parliamentary Scrutiny) Act 2011*, section 7.

21 The Senate, *Standing Orders and other orders of the Senate*, August 2018, SO 24(1)(a)(iv). For further discussion of this issue, see Chapter 5.

22 Six sitting days in the ACT: *Legislation Act 2011* (ACT), section 65; 15 sitting days in NSW: *Interpretation Act 1987* (NSW), section 41; 12 sitting days in the NT: *Interpretation Act 2011* (NT), section 63; 14 sitting days in Queensland: *Statutory Instruments Act 1992* (Qld), section 50; 14 sitting days in SA: *Subordinate Legislation Act 1978* (SA), section 10; 14 sitting days in Tasmania: *Acts Interpretation Act 1931* (Tas), subsection 47(4); 12-18 sitting days in Victoria: *Subordinate Legislation Act 1994* (Vic), section 23; 14 sitting days in Western Australia: *Interpretation Act 1984* (WA), section 42.

23 *Legislation Act 2011* (ACT), section 65; *Statutory Instruments Act 1992* (Qld), subsection 50(4).

24 Legislative Council (WA), *Standing Orders*, January 2019, SO 67.

25 *Statutory Instruments Act 1985* (Canada), subsection 19.1(1).

the contrary, the resolution is deemed to have been adopted by each House on the 15th sitting day after the report is presented.²⁶ Adoption (or deemed adoption) of a resolution requires the authority responsible for making the relevant instrument to revoke it within 30 days after the resolution is adopted.²⁷

8.23 In New Zealand, there is both a general disallowance procedure and a disallowance procedure for members of the Regulations Review Committee. The general disallowance procedure allows any member of the House of Representatives to bring a notice of motion to disallow an instrument (in whole or in part) at any time.²⁸ However, if the motion to disallow is not disposed of within the relevant timeframe, it has no effect and the instrument continues to exist as made.²⁹ In addition, any member of the Regulations Review Committee may give a notice of a motion to wholly or partially disallow any disallowable instrument. Unless the motion is withdrawn or Parliament disposes of the motion within 21 sitting days of the instrument being made, the instrument is treated as having been disallowed at the end of the 21st sitting day after the disallowance notice is given or the date specified in the disallowance motion. This is similar to the disallowance process that applies to Commonwealth legislative instruments.

8.24 In the United Kingdom (UK), approximately three quarters of instruments laid before the Westminster Parliament come into force immediately but may be annulled by either House of Parliament (similar to the disallowance process in

26 *Statutory Instruments Act 1985* (Canada), subsection 19.1(5).

27 See Marc Bosc and Andre Gagnon, eds., *House of Commons Procedure and Practice*, 3rd edition, 2017, Chapter 17, https://www.ourcommons.ca/About/ProcedureAndPractice3rdEdition/ch_17_3-e.html (accessed 7 May 2019). It is more common for the committee to recommend that regulations be revoked without invoking binding disallowance procedure. Standing Joint Committee for the Scrutiny of Regulations (Canada), *About: 42nd Parliament, 1st Session*, 2015, <https://www.parl.ca/Committees/en/REGS/About> (accessed 7 May 2019).

28 *Legislation Act 2012* (NZ), section 42. It is important to note that, unlike the Australian Parliament, the New Zealand House of Representatives has the power to disallow an instrument at any time. The rationale for this power is that 'the Parliament has such power over Acts, so surely it should over regulations'. See David Hamer, *Can Responsible Government Survive in Australia?* 2nd edition., Department of the Senate, 2004, p. 319, https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/hamer (accessed 17 May 2019).

29 The timeframe will depend on the Act under which the relevant instrument is made.

Australia).³⁰ If an instrument is annulled, it ceases to have effect, but otherwise continues in force.³¹ Each House has 40 days in which to pass a motion to annul.³²

8.25 Further, approximately 10 to 20 per cent of instruments (often those considered significant or contentious) are subject to the 'affirmative procedure' which requires positive approval of the instrument by both Houses.³³ A very similar disallowance procedure applies in the Scottish Parliament and the Welsh Assembly.³⁴ This is discussed further below at paragraphs [8.54] to [8.55].

Evidence before the committee

8.26 Submitters focused primarily on the issue of exempting instruments from disallowance. For example, Professor Anne Twomey described the exclusion of legislative instruments from disallowance as 'a very serious limitation upon the scrutiny role of the Senate'.³⁵ In this respect, she noted that the Advance to the Finance Minister Determination (No 1 of 2017-2018), which was not subject to disallowance, ensured that the Australian Bureau of Statistics was provided with \$122 million to conduct a voluntary postal plebiscite.³⁶ In Professor Twomey's view, this exemption meant that:

even though the Senate had twice rejected a bill that provided for a special appropriation to fund a plebiscite on same-sex marriage, the Senate was

30 Or the House of Commons only, for instruments dealing with financial matters. See *Statutory Instruments Act 1946* (UK), section 5. See also House of Lords, Select Committee on the Constitution, *Delegated Legislation and Parliament: A response to the Strathclyde Review*, March 2016, p. 8, <https://publications.parliament.uk/pa/ld201516/ldselect/ldconst/116/116.pdf> (accessed 14 May 2019).

31 *Statutory Instruments Act 1946* (UK), section 5. As with New Zealand, such instruments are said to be subject to the 'negative resolution procedure'. House of Commons (UK), *Standing Orders of the House of Commons*, 2018, SO 17

32 This time period is generally 40 days including the day on which the relevant instrument was laid. No account of any time during which Parliament is dissolved or prorogued, or during which both Houses of Parliament are adjourned for more than four days, is included in the 40 day period.

33 Richard Kelly, House of Commons Briefing Paper 06509, *Statutory Instruments*, December 2016, p. 9 <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06509> (accessed 7 May 2019); Select Committee on the Constitution, *Delegated Legislation and Parliament: A response to the Strathclyde Review*, March 2016, p. 8.

34 *Interpretation and Legislative Reform (Scotland) Act 2010*, section 28; *Statutory Instruments Act 1946* (UK), section 11A.

35 Professor Anne Twomey, *Submission 1*, p. 2.

36 The Determination was made under section 10 of the *Appropriation Act (No. 1) 2017-2018*, which provides that while such determinations are legislative instruments, they are not subject to the disallowance or sunset provisions of the Legislation Act.

impotent when it came to scrutinising the funding of a similar proposal by way of a legislative instrument made by the Minister for Finance.³⁷

8.27 Professor Twomey suggested that it would be appropriate for this committee to have the function of scrutinising provisions in primary legislation that create exemptions from disallowance.³⁸

8.28 Assistant Professor Jacinta Dharmananda expressed particular concern about the lack of transparency in relation to which instruments are exempt from disallowance, noting that:

There are no doubt valid reasons, which vary, for the executive's use of an exemption from time to time. But there is no readily apparent rationale that underpins the use of this exemption, nor any clear notification of when an exempted instrument is created. This undermines the transparency sought by the legislative scheme. The opaque use of exemptions creates a perception, real or not, that there is a 'gap' in the scrutiny of instruments that affect the law. This is not assisted when there is no readily available information about the proportion of legislative instruments that are subject to exemption each year. Statistics available focus on disallowable instruments.³⁹

8.29 Assistant Professor Dharmananda suggested that this issue could be addressed 'by the provision of more readily available public information about the rate of, and reasons for, exemption' (for example, through a webpage similar to the committee's *Disallowance Alert*).⁴⁰

Committee view

8.30 The committee considers that the disallowance procedure is one of the most effective procedural mechanisms by which the Parliament exercises control over delegated legislation and the Senate, through its power to disallow instruments, plays a vital role in preserving the principle of the separation of powers by ensuring there is appropriate control over the executive branch of government.

8.31 The committee also notes the importance of the Legislation Act in providing that, if a disallowance motion is not resolved or withdrawn within the disallowance period, the relevant legislative instrument will be deemed to be disallowed.⁴¹ The committee agrees with the Scrutiny of Bills committee that any modification of the usual disallowance procedure could undermine the Senate's oversight of delegated

37 Professor Anne Twomey, *Submission 1*, p. 2.

38 Professor Anne Twomey, *Submission 1*, p. 2.

39 Assistant Professor Jacinta Dharmananda, *Submission 11*, p. 7.

40 Assistant Professor Jacinta Dharmananda, *Submission 11*, p. 7.

41 *Legislation Act 2003*, section 42(2).

legislation,⁴² and considers that any future proposals to make such modifications should be avoided.

8.32 The committee also considers the disallowance procedure is essential to its own scrutiny and supervision of delegated legislation. As noted by a previous Chair of the committee:

An indispensable attribute of the maturity of any political institution, and indeed of any political individual, is the capacity to act independently, without fear or favour, to remove from the delegated statute book subordinate laws which do not respect the traditional and evolving rights and liberties of individuals or the expectations of parliamentarians to retain control over subordinate laws.⁴³

8.33 While in practice the committee has only sparingly moved the disallowance of an instrument, it considers the potential for it to do so encourages the executive to seek to address the committee's concerns. In this respect, the committee agrees with Emeritus Professor Dennis Pearce, who wrote in 2004:

The Senate has not had to disallow a regulation on the initiative of the committee since 1988. This is simply because, over the many years of its existence, the Senate has always supported a disallowance motion when moved by the committee. The executive knows that it must reach an accommodation with the committee or lose its legislation.⁴⁴

8.34 As set out in Chapter 4, the committee considers it may even more effectively draw the Senate's attention to delegated legislation that raises particular scrutiny concerns by changing the way it currently reports. The committee also intends to make greater use, where appropriate, of the disallowance procedures to provide the Senate with additional time to consider the committee's scrutiny concerns.

Exemptions from disallowance

8.35 The committee considers that exempting instruments from disallowance raises significant scrutiny concerns. This is because such exemptions effectively

42 As noted by the Scrutiny of Bills committee, in practice the executive has considerable control over the conduct of business in the Senate and if the instrument is not deemed to be disallowed if not resolved there may be occasions where no time is available to consider the disallowance motion within the disallowance period. See Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 10 of 2017*, September 2017, p. 107.

43 Senate Standing Committee on Regulations and Ordinances, *Eighty-Fifth Report*, June 1989, Appendix 2, p. 138.

44 Dennis Pearce, 'Rules, regulations and red tape: Parliamentary scrutiny of delegated legislation', in *Papers on Parliament*, No. 42, December 2004, https://www.aph.gov.au/About_Parliament/Senate/Research_and_Education/~/~/~link.aspx?id=A82D5061FA5C4BFABD5701538EF7E86B&z=z (accessed 14 May 2019).

remove Parliament's control of delegated legislation, leaving it to the executive to determine (albeit within the confines of the enabling legislation and the Constitution) the content of the law. The committee acknowledges there may be circumstances in which it is appropriate to exempt delegated legislation from disallowance—for example, where it is clear that the instrument relates solely to the internal affairs of government. However, the committee considers that the circumstances in which instruments are exempted from disallowance should be strictly limited, with a justification for any exemption clearly articulated in explanatory materials.⁴⁵

8.36 The committee is also concerned that bills frequently seek to exempt instruments made under them from disallowance without giving adequate justification for doing so. In this respect, the committee notes that while the Scrutiny of Bills committee routinely raises concerns about proposed exemptions from disallowance,⁴⁶ the exemptions are nevertheless enacted. Consequently, instruments are made that are exempt from disallowance and thereby not subject to sufficient parliamentary control or oversight. The committee has made recommendations in Chapter 5 regarding the scrutiny of bills that delegate legislative power.

8.37 The committee has particular concerns that a vast range of exemptions from disallowance are set out in delegated legislation (namely the Legislation (Exemptions and Other Matters) Regulation 2015). The committee considers that decisions as to whether certain classes of delegated legislation or particular instruments should be exempted from any form of parliamentary control should be contained in primary legislation rather than delegated to the executive. The committee is of the view that all current exemptions in the Legislation (Exemptions and Other Matters) Regulation 2015 should be reviewed to determine whether such exemptions remain appropriate. Any exemptions that remain appropriate should be moved into primary legislation, with a full justification provided in the explanatory materials to the relevant bill as to why each exemption continues to be necessary.⁴⁷

8.38 The committee is also concerned that there does not appear to be any publicly accessible government guidance as to the circumstances in which it may be appropriate to exempt instruments from disallowance. The committee considers that the government should develop such guidance and make it publicly available, to ensure there is a framework by which government officials can determine the appropriateness of making certain instruments non-disallowable. Once such

45 That is, both in the explanatory memorandum to the bill permitting the exemption, and in the explanatory material to the exempt instrument.

46 See Chapter 5 for further detail, in particular paragraphs [5.21] and [5.22]. A more general overview of the Scrutiny of Bills committee's concerns may be found in its annual reports.

47 This is likely to require an amendment to section 44(2)(b) of the *Legislation Act 2003*, to remove the power for regulations to prescribe instruments and classes of instruments that are exempt from disallowance. It may also require that Part 4 of the Legislation (Exemptions and Other Matters) Regulation 2015 be repealed.

guidance is established, the committee would expect that any future proposals to exempt instruments from disallowance should be justified, in relevant explanatory memoranda, by reference to such guidance.

8.39 Finally, the committee is concerned about the difficulties in identifying instruments that are exempted from disallowance by their empowering legislation. The committee considers that the Office of Parliamentary Counsel should consider a mechanism by which the Federal Register of Legislation may be easily searched to identify legislative instruments that are not subject to disallowance. The committee considers that this would significantly improve parliamentary scrutiny of and public access to the law, as well as providing valuable assistance to researchers and other interested stakeholders.

Recommendation 15

8.40 The committee recommends that the government:

- (a) review existing provisions exempting legislative instruments from disallowance, to determine whether such exemptions remain appropriate, and amend the *Legislation Act 2003* to ensure all such exemptions are contained in primary legislation; and**
- (b) publish guidance as to the limited circumstances in which it may be appropriate to exempt instruments from disallowance.**

Recommendation 16

8.41 The committee recommends that the Office of Parliamentary Counsel modify the Federal Register of Legislation to enable instruments which are exempt from disallowance to be readily identified.

Affirmative resolution procedure

Overview

8.42 The 'affirmative resolution procedure' refers to the process by which delegated legislation comes into force (or remains in force) only with the explicit approval of both Houses of the Parliament. As the *House of Representatives Practice* explains, '[t]he conditions for approval vary and depend on the requirement of the particular Act' which prescribes the particular procedure.⁴⁸

8.43 The affirmative resolution procedure is rarely used at the Commonwealth level. One notable example is section 10B of the *Health Insurance Act 1973*, which provides that certain determinations do not come into effect until they are approved

48 D R Elder, ed., *House of Representatives Practice*, 7th edition, Department of the House of Representatives, 2018, p. 413.

by resolution of each House of Parliament.⁴⁹ The affirmative resolution procedure was inserted into the Act in 2009, following late amendments to the Health Insurance Amendment (Extended Medicare Safety Net) Bill 2009.⁵⁰

8.44 During debate in the Senate on this bill, proponents of the amendments asserted that affirmative resolution would:

- enable both Houses to review the determinations and express a view before they took effect;⁵¹
- ensure sufficient scrutiny of significant policy matters;⁵² and
- promote certainty in the community about the legal status of the determination.⁵³

8.45 Opponents of the affirmative resolution procedure were concerned that it would create a procedural vacuum, without the requisite timelines or processes necessary to facilitate the operation of the enabling legislation.⁵⁴

8.46 Other Acts may prescribe a combination of affirmative and negative procedures. For example, the *Australian Charities and Not-for-profits Commission Act 2012* provides that certain provisions of a regulation do not commence until the day after both Houses of Parliament pass a resolution approving the provision, or the last day on which the regulations could be disallowed in either House, assuming the provision has not be disallowed or disapproved, whichever occurs earlier.⁵⁵

8.47 In 1980, the committee examined the desirability of increasing the use of affirmative resolution procedures in relation to delegated legislation, following the conference of Commonwealth delegated legislation committees. The committee sought the advice of the Attorney-General about this matter at that time. The Attorney-General expressed a number of reservations, relating variously to potential increases in the legislative workload for Parliament, potential barriers to the speedy

49 *Health Insurance Act 1973*, subsection 10B(1).

50 Health Insurance Amendment (Extended Medicare Safety Net) Bill 2009, Schedule of Amendments made by the Senate, Opposition Amendment No. 2, agreed 16 September 2009.

51 Senator Siewert, *Senate Hansard*, 16 September 2009, p. 6685; Senator Cormann, *Senate Hansard*, 16 September 2009, p. 6689.

52 Senator Cormann, *Senate Hansard*, 16 September 2009, p. 6684, 6691.

53 Senator Siewert, *Senate Hansard*, 16 September 2009, p. 6692.

54 Senator Ludwig, *Senate Hansard*, 16 September 2009, pp. 6687 to 6689.

55 *Australian Charities and Not-for-profits Commission Act 2012*, sections 45-20. See also *Migration Act 1958*, subsection 198AB(1).

implementation of reforms, and practical constraints (particularly during parliamentary recess).⁵⁶

8.48 The committee noted these reservations, and acknowledged that it was ultimately a matter for government to decide whether to introduce affirmative resolution procedures for delegated legislation (via enabling legislation). It drew this matter to the attention of the Scrutiny of Bills Committee.⁵⁷

Approach in other jurisdictions

8.49 Affirmative resolution procedures are relatively common in Westminster-style jurisdictions outside Australia. For example, a type of affirmative resolution procedure operates in relation to delegated legislation in Canada, although it is rarely used.⁵⁸ Regulations subject to affirmative resolution must be laid before the Parliament within 15 days after being made, or within 15 days after Parliament recommences sitting. They do not come into force unless or until they are affirmed by Parliament (or by the House of Commons only in certain cases).⁵⁹ It has been observed that this procedure can result in delay in regulations taking effect, particularly during non-sitting periods.⁶⁰

8.50 Some New Zealand Acts also provide that instruments may only commence on approval by resolution of the House of Representatives.⁶¹ The standing orders of the New Zealand House of Representatives provide that any motion that the House approve an instrument stands referred to a select committee for consideration. The committee is required to report on the notice of motion no later than 28 days after the notice of motion is lodged. The motion to approve the instrument cannot be

56 Standing Committee on Regulations and Ordinances, *Seventy-Third Report*, December 1982, p. 1.

57 Standing Committee on Regulations and Ordinances, *Seventy-Third Report*, December 1982, p. 2.

58 Peter Bernhart and Paul Salembier, 'Understanding the Regulation Making Process', *Canadian Parliamentary Review*, vol. 25, no. 1, 2002, p. 16, http://www.revparl.ca/25/1/25n1_02e_Salembier.pdf (accessed 16 May 2019).

59 Peter Bernhart and Paul Salembier, 'Understanding the Regulation Making Process', *Canadian Parliamentary Review*, vol. 25, no. 1, 2002, p. 16.

60 Peter Bernhart and Paul Salembier, 'Understanding the Regulation Making Process', *Canadian Parliamentary Review*, vol. 25, no. 1, 2002, p. 16.

61 Dean R Knight and Edward Clark, *Regulations Review Committee Digest*, 6th edition, New Zealand Centre for Public Law, 2016, p. 108, <https://www.victoria.ac.nz/law/centres/nzcp/publications/regulations-review-committee-digest> (accessed 16 May 2019). See, for example, *Misuse of Drugs Amendment Act 2005* (NZ), *Public Finance Amendment Act 2004* (NZ).

moved until after the committee has reported, or on the first working day after 28 days have passed since the notice was lodged, whichever is earlier.⁶²

8.51 In practice, this procedure has typically been used to approve delegated legislation that directly affects the offices of Parliament, or which amends primary legislation via Henry VIII clauses.⁶³

8.52 In the mid-2000s, the New Zealand Regulations Review Committee conducted an inquiry into the increasing use of the affirmative resolution procedure, expressing the view that affirmative resolution has significant drawbacks:

the procedure raises serious constitutional issues about parliamentary control over delegated legislation. The recent use of the procedure allows delegated legislation to amend primary legislation, with the effect that delegated legislation may deal with significant policy matters. The use of the procedure to amend lists and numbers can mask the true policy nature of the changes.

The traditional process of enacting primary legislation contains well-established checks and balances. That process allows time for the public to become informed about issues and the opportunity for reflection and refinement necessary for making good law. We are concerned that the lack of time for substantive select committee consideration, and the absence of public involvement, means that the current process does not contain the checks and balances that were originally anticipated. Overall, our initial view is that the affirmative resolution procedure has significant drawbacks, and the present procedure may not allow meaningful select committee scrutiny.⁶⁴

8.53 In its final report, the New Zealand Regulations Review Committee recommended that the affirmative resolution procedure:

- should not be used in conjunction with provisions that allow the amendment of primary legislation by delegated legislation; and
- is appropriate for regulations that specifically regulate the administration and governance of Offices of Parliament and parliamentary agencies.⁶⁵

62 House of Representatives (NZ), *Standing Orders of the House of Representatives*, August 2017, SO 233(2).

63 Dean R Knight and Edward Clark, *Regulations Review Committee Digest*, 6th ed, New Zealand Centre for Public Law, 2016, pp. 108-109. For a discussion of Henry VIII clauses see Chapter 5.

64 Regulations Review Committee, *Report on the Inquiry into the Affirmative Resolution Procedure*, May 2007, p. 10. These remarks were initially included in its concluding remarks to the interim report, subsequently reproduced and endorsed in the final report.

65 Regulations Review Committee, *Report on the Inquiry into the Affirmative Resolution Procedure*, May 2007, p. 3.

8.54 The affirmative resolution procedure is also a well-established component of the legislative process in the UK (including in the Westminster Parliament, the Scottish Parliament and the Welsh Assembly). Between 10 and 20 per cent of all instruments laid before the Westminster Parliament are subject to the affirmative procedure.⁶⁶ The majority of these are laid in draft, and are made and added to the statute book following parliamentary approval.⁶⁷ In the House of Lords, the minister or department responsible for an instrument subject to the affirmative procedure is generally responsible for moving a motion to approve the instrument. Such a motion may not be moved until the committee responsible for considering the instrument has made its report. In most cases, this will be the Joint Committee on Statutory Instruments.⁶⁸ However, other committees will be responsible for specific types of instrument (such as legislative reform orders and remedial orders).⁶⁹

8.55 In the House of Commons, the majority of instruments subject to the affirmative procedure are referred to a special-purpose committee for consideration and debate.⁷⁰ These committees are established on an ad-hoc basis, and only exist to consider instruments that are subject to the affirmative procedure.⁷¹ Following consideration by the committee, a motion for approval will be put to the House of Commons. Such motions are generally not debated on the floor of the House.⁷²

Evidence before the committee

8.56 A number of submitters recommended applying affirmative resolution procedures at the Commonwealth level to particular classes of delegated legislation.

66 Richard Kelly, House of Commons Briefing Paper 06509, *Statutory Instruments*, p. 9; see also Select Committee on the Constitution, *Delegated Legislation and Parliament: A response to the Strathclyde Review*, March 2016, p. 8.

67 In some cases, a statutory instrument may be subject to additional requirements set out in the enabling Act. For example, formal consultation on a draft, followed by approval by a vote in Parliament, may be required before an instrument can be made. Such instruments are considered to be subject to 'super-affirmative' or enhanced procedure. These procedures are generally reserved for instruments requiring a particularly high level of scrutiny. Examples of instruments that may be subject to such procedures include legislative reform orders, remedial orders and public bodies orders.

68 House of Lords (UK), *Standing Orders of the House of Lords*, May 2016, SO 72(1)(a).

69 For example, a motion to approve a legislative reform order may not be moved until there has been laid before the House of Lords a report on the order by the Delegated Powers and Regulatory Reform Committee. See House of Lords, *Standing Orders of the House of Lords*, 2016, SO 72(1)(b).

70 See House of Commons (UK), *Standing Orders of the House of Commons*, May 2018, SO 118.

71 See House of Lords Select Committee on the Constitution, *Delegated Legislation and Parliament: A response to the Strathclyde Review*, March 2016, p. 9.

72 A notable exception to this practice is regulations relating to terrorism and security, which are always considered on the floor of the House of Commons.

8.57 For example, in their joint submission, Professor Appleby, Emeritus Professor Aronson and Dr Boughey recommended that affirmative resolution procedures be used more often in two circumstances. First, they suggested that they be used 'for some Commonwealth skeleton Acts that require substantive policy decision-making, and in particular, where the delegated instrument will have an immediate effect on the substantive rights or obligations of individuals'.⁷³ To implement this proposal, they recommended that:

- the *Legislation Handbook* be amended to recommend that an affirmative resolution procedure be included in primary legislation that contains 'broadly framed delegation with the capacity to have immediate effects on the substa[n]tive rights or obligations of individuals'; and
- the Terms of Reference for the Scrutiny of Bills committee be amended to include 'that, where it contains a broadly framed delegation with the capacity to have immediate effects on the substantive rights or obligations of individuals, it contains an affirmative resolution procedure'.⁷⁴

8.58 Second, the joint submitters recommended that affirmative resolution be required for legislation that authorises expenditure (for example, instruments made under the *Financial Framework (Supplementary Powers) Act 1997*).⁷⁵ This issue is considered in greater detail in Chapter 7.

8.59 Assistant Professor Dharmananda also suggested that consideration be given to greater use of the affirmative resolution procedure, recommending that 'Parliament should be required to provide a positive affirmation' in relation to legislative instruments which contain policy issues.⁷⁶

73 Professor Gabrielle Appleby, Emeritus Professor Mark Aronson and Dr Janina Boughey, *Submission 2*, p. 6. The joint submission was endorsed by the Law Society of New South Wales. See Law Society of New South Wales, *Submission 13*, p. 1.

74 Professor Gabrielle Appleby, Emeritus Professor Mark Aronson and Dr Janina Boughey, *Submission 2*, p. 6.

75 Professor Gabrielle Appleby, Emeritus Professor Mark Aronson and Dr Janina Boughey, *Submission 2*, p. 9.

76 Professor Dharmananda also recommended the adoption of an affirmative resolution procedure 'for each enabling provision in a bill prior to, for example, the motion that the bill be read a second time'. Assistant Professor Jacinta Dharmananda, *Submission 11*, p. 4.

Committee view

8.60 The committee has considered the arguments that have been put forward in support of a procedure to require the positive approval of Parliament for certain types of delegated legislation before it can come into force. For example, it has been argued that an affirmative resolution procedure might usefully be applied to instruments that:

- contain significant policy matters;⁷⁷
- require parliamentary scrutiny prior to taking effect;⁷⁸
- amend primary legislation;⁷⁹
- specify expenditure;⁸⁰
- require legal certainty,⁸¹ or
- regulate the administration and governance of offices of Parliament and parliamentary agencies.⁸²

8.61 Reasons offered in support of affirmative resolution procedures are largely underpinned by concerns that instruments may receive insufficient parliamentary scrutiny, at least relative to the significant matters which they contain.⁸³

8.62 The committee shares these underlying concerns. However, with the notable exception of instruments authorising Commonwealth expenditure,⁸⁴ the committee remains unconvinced that the increased use of the affirmative resolution procedure would promote greater parliamentary scrutiny and control of such delegated legislation. Indeed, the committee is concerned that an increased use of the affirmative resolution procedure may have the reverse effect of promoting the inclusion of significant policy matters in delegated legislation.

77 See, for example, Professor Gabrielle Appleby, Emeritus Professor Mark Aronson and Dr Janina Boughey, *Submission 2*, p. 6.

78 See, for example, Senator Cormann, *Senate Hansard*, 16 September 2009, p. 6684, 6691.

79 See, for example, Assistant Professor Jacinta Dharmananda, *Submission 11*, p. 4.

80 See, for example, Professor Gabrielle Appleby, Emeritus Professor Mark Aronson and Dr Janina Boughey, *Submission 2*, pp. 7-9.

81 See, for example, Senator Siewert, *Senate Hansard*, 16 September 2009, p. 6692.

82 See, for example, Regulations Review Committee (NZ), *Inquiry into the Affirmative Resolution Procedure*, May 2007, https://www.parliament.nz/resource/en-nz/48DBSCH_SCR3775_1/ae65b7626d0e20f686a79830dac460e7315157c3 (accessed 15 May 2019).

83 See, for example, Harry Evans and Rosemary Laing, eds., *Odgers' Australian Senate Practice*, 14th edition, Department of the Senate, 2016, p. 448; D R Elder, ed., *House of Representatives Practice*, 7th edition, Department of the House of Representatives, 2018, p. 413.

84 See the discussion of delegated legislation specifying Commonwealth expenditure in Chapter 7.

8.63 The experiences of the UK and, to a lesser extent, New Zealand, lend weight to these concerns. For example, after hearing from parliamentarians and experts in the UK,⁸⁵ it appears that much of the discussion regarding parliamentary control over delegated legislation in that jurisdiction focuses on whether an instrument should be subject to the affirmative resolution procedure rather than the negative resolution procedure. The committee notes that, in practice, the UK Parliament is limited in its control over delegated legislation. This is largely because the House of Commons, being generally government dominated, is unlikely to overturn delegated legislation made by the government, while the unelected House of Lords rarely exercises its power to refuse to approve an instrument.⁸⁶ The affirmative resolution procedure, with its (somewhat) higher level of parliamentary scrutiny,⁸⁷ is considered to be one way to provide Parliament with greater control over delegated legislation.

8.64 The committee has observed that, with the increased use of the affirmative resolution procedure, many significant matters are left to delegated legislation in the UK. For example, the last time the House of Lords failed to approve an instrument, related to regulations containing £4.4 billion worth of spending cuts.⁸⁸ This was described as an instrument 'of very considerable importance relating to a matter contained in the budget which was central to the Government's fiscal policy'.⁸⁹ The committee considers that such significant policy matters are entirely inappropriate for inclusion in delegated legislation, and is concerned that the decision to include such matters in a statutory instrument may have resulted from the UK's increased use of the affirmative resolution procedure. The committee also notes the concerns

85 See Appendix C (Delegation Report).

86 Only 17 statutory instruments have been rejected by the two Houses over the last 65 years. See House of Lords Select Committee on the Constitution, *Delegated Legislation and Parliament: A response to the Strathclyde Review*, March 2016, p. 9. The House of Lords as determined by convention that, as it is an unelected House, should not regularly reject statutory instruments, and may only do so in exceptional circumstances. See Joint Committee on Conventions, *Conventions of the UK Parliament*, (Report, Session 2005-06, HL Paper 265, HC 1212), [227]-[229], <https://publications.parliament.uk/pa/jt200506/jtselect/jtconv/265/265.pdf> (accessed 22 May 2019).

87 As many experts informed the delegation, even scrutiny under the affirmative resolution process may be limited, see Appendix C (Delegation Report). For further detail, see Ruth Fox and Joel Blackwell, *The Devil is in the Detail: Parliament and Delegated Legislation*, Hansard Society, London, 2014, pp. 171-218.

88 See Draft Tax Credits (Income Thresholds and Determination of Rates) (Amendment) Regulations 2015 (UK).

89 Lord Strathclyde, *Strathclyde Review: Secondary Legislation and the primacy of the House of Commons*, December 2015, p. 14, <https://www.gov.uk/government/publications/strathclyde-review-secondary-legislation-and-the-primacy-of-the-house-of-commons> (accessed 22 May 2019).

expressed by the New Zealand Regulations Review Committee in relation to the affirmative resolution procedure (noted at paragraphs [8.52] to [8.53] above).

8.65 As outlined in Chapter 2, the committee currently lacks the capacity to scrutinise instruments subject to the affirmative resolution process, and has recommended that such a power be conferred. However, the committee is mindful that bills which attach an affirmative resolution procedure to delegated legislation typically provide shorter timeframes in which the relevant instruments may be affirmed.⁹⁰ In practice, these short timeframes could potentially inhibit the committee's capacity to undertake effective technical scrutiny of the instrument, particularly if the use of the affirmative resolution procedure were to be increased.

8.66 Consequently, with the exception of instruments that authorise expenditure on government programs (as discussed in Chapter 7), the committee considers that concerns regarding the lack of parliamentary scrutiny and control of delegated legislation containing significant matters would be more appropriately addressed by:

- limiting the type of matters that are left to delegated legislation to ensure significant policy details are included in primary legislation not delegated legislation (see Chapter 5 and recommendations 8, 9 and 10); and
- establishing an ordinary procedure by which the committee notifies the Senate and relevant legislation committees of legislative instruments which raise significant issues and ensuring legislation committees can inquire into such instruments (see Chapter 6, recommendation 12 and committee action 9).

8.67 The committee considers this would result in substantial improvements to parliamentary scrutiny and control of delegated legislation, without the risk of encouraging rule-makers to include significant policy matters in legislative instruments.

Recommendation 17

8.68 The committee recommends that, as a general rule, provisions in bills delegating legislative power should not prescribe an affirmative resolution procedure, as there is a risk that this may promote the inclusion of significant matters in delegated legislation which are more appropriate for parliamentary enactment.

90 Compared to the usual 15 sitting day period in which instruments may be disallowed.

Commencement

Overview

8.69 Under the Legislation Act, the maker of a legislative instrument must lodge the instrument for registration 'as soon as practicable after [it] is made'.⁹¹ All registered instruments must be contained in the Federal Register of Legislation, maintained by the First Parliamentary Counsel.⁹²

8.70 The Legislation Act further provides that a legislative instrument commences at the start of the day after it is registered, unless the instrument itself provides otherwise. However, a legislative instrument, or a provision of the instrument, may commence before registration, provided the retrospective commencement does not disadvantage any person (other than the Commonwealth or a Commonwealth authority), or impose liability on a person for anything done or omitted to be done before the instrument is registered.⁹³

8.71 The majority of instruments commence the day after they are registered.⁹⁴ However, there are some exceptions. These may be specified either in the enabling legislation,⁹⁵ or in the relevant instrument.⁹⁶

8.72 The Legislation Act provides that a registered instrument must be laid before each House of Parliament (that is, tabled) within six sitting days of registration. Otherwise, the instrument is repealed.⁹⁷

Approach in other jurisdictions

8.73 All Australian states and territories require that delegated legislation be made publicly available and tabled in their respective Houses of Parliament, although

91 *Legislation Act 2003*, subsection 15G(1).

92 Section 15A of the *Legislation Act 2003* provides for the establishment, maintenance and content of the Federal Register of Legislation. The Federal Register of Legislation may be accessed at <http://www.legislation.gov.au>.

93 *Legislation Act 2003*, section 12. Where an instrument commences retrospectively, the committee expects the explanatory statement to explicitly address whether the retrospective commencement would disadvantage any person other than the Commonwealth.

94 Instruments routinely specify a commencement date. However, in most cases this will be for clarification and the commencement date specified will be the day after the instrument is registered on the Federal Register of Legislation.

95 For example, section 198AB of the *Migration Act 1958* provides that certain instruments may commence five sitting days after they are tabled, unless the Parliament disapproves the instrument before this period expires.

96 For example, section 2 of the Civil Aviation Safety Amendment (Part 139) Regulations 2019 provides that the instrument commences on 22 August 2020. The explanatory statement indicates that this is to provide sufficient time for to transition to a new regulatory scheme.

97 *Legislation Act 2003*, section 38.

the procedures for publication and tabling vary between jurisdictions.⁹⁸ Generally, delegated legislation takes effect on the day it is published, or at a later date if specified in the relevant instrument.⁹⁹ However, there are some exceptions. For example, in the ACT an instrument comes into effect the day after notification is published.¹⁰⁰ In Victoria, instruments commence on the day they are made,¹⁰¹ and must be published in the government *Gazette*.¹⁰² South Australia differs significantly from other states and territories, in that delegated legislation does not commence until four months after it is made. However, instruments may come into operation earlier if authorised by the parent Act, or if the relevant minister considers it necessary or appropriate.¹⁰³

8.74 In Canada, instruments generally come into force on the day they are registered. Where an instrument is expressed to come into force on an earlier date, the instrument-maker must advise why it is not practical for the instrument to commence on registration.¹⁰⁴ Instruments must generally be published in the *Canada Gazette* within 23 days of registration.¹⁰⁵

8.75 Other comparable Westminster jurisdictions often require a delay between the making or registration of an instrument and its commencement. For example, in New Zealand, there is a Cabinet requirement that 'regulations must not come into

98 For example, in NSW and Queensland, legislation must be published on an online register: *Interpretation Act 1987* (NSW), paragraph 39(1)(a); *Statutory Instruments Act 1992* (Qld), subsection 47(1). See also www.legislation.nsw.gov.au and www.legislation.qld.gov.au (accessed 15 May 2019). In the ACT, the parliamentary counsel may notify the making of an instrument in an online register or in such other place as the parliamentary counsel considers appropriate: *Legislation Act 2001* (ACT), section 61. The online register may be accessed at <https://www.legislation.act.gov.au> (accessed 16 May 2019). 'Other places' include government websites and outside the ACT Legislative Assembly. Notification may be, for example, by publishing the text of an instrument, or by publishing a notice that the instrument has been made, with directions as to where it may be obtained.

99 See, for example, *Interpretation Act 1987* (NSW), paragraph 39(1)(b); *Interpretation Act 1978* (NT), paragraph 63(1)(b); *Statutory Instruments Act 1992* (Qld), subsection 32(1); *Acts Interpretation Act 1931* (Tas), paragraph 47(3)(d)(i)-(ii); *Interpretation Act 1984* (WA), paragraph 41(1)(b).

100 *Legislation Act 2001* (ACT), subsection 73(2).

101 *Subordinate Legislation Act 1994* (Vic), section 16.

102 *Subordinate Legislation Act 1994* (Vic), section 17. Instruments must be published in the next general edition of the *Gazette* published after the instrument is made, or in a special edition of the *Gazette* published within 10 working days after the instrument is made.

103 *Subordinate Legislation Act 1978* (SA), section 10AA.

104 *Statutory Instruments Act 1985* (Canada), section 9.

105 Instruments are not invalid only because they are not published in the *Gazette*; however, a person cannot be convicted of an offence resulting from the contravention of an unpublished instrument. See *Statutory Instruments Act 1985* (Canada), section 11.

force until at least 28 days after they have been notified in the *New Zealand Gazette*' (the '28-day rule').¹⁰⁶ The Manual explains that the 28-day rule 'reflects the principle that the law should be publicly available and capable of being ascertained before it comes into force'.¹⁰⁷ However, in practice the 28-day rule 'is often departed from without any question being raised about the legal effect of such instruments before their presentation to the House'.¹⁰⁸

8.76 In the UK, statutory instruments that must be laid before the Parliament generally do not take effect until they are so laid.¹⁰⁹ This requirement applies to the majority of instruments subject to affirmative and negative resolution procedures.¹¹⁰ The UK Joint Committee on Statutory Instruments has observed:

Laying before the Parliament is not a meaningless formality, but an important part of access to justice and the rule of law. The statutory requirements for laying before Parliament are part of the required formal measures by which publicity is assured...Even if the instrument comes into force some months after being made, Parliament and the general public are entitled to as much notice of the prospective law as the Government has itself, and the legal and practical effects of an instrument may be felt long before the date on which it comes into force.¹¹¹

106 Cabinet Office, Department of the Prime Minister and Cabinet (NZ), *Cabinet Manual*, 2017, p. 114, <https://dpmc.govt.nz/sites/default/files/2017-06/cabinet-manual-2017.pdf> (accessed 15 May 2019).

107 Cabinet Office, Department of the Prime Minister and Cabinet (NZ), *Cabinet Manual*, 2017, p. 114.

108 Mary Harris and David Wilson, eds., *Parliamentary Practice in New Zealand*, 4th edition, Oratia Books, Auckland, 2017, p. 471, <https://www.parliament.nz/en/visit-and-learn/how-parliament-works/parliamentary-practice-in-new-zealand/> (accessed 15 May 2019).

109 *Statutory Instruments Act 1946* (UK), subsection 4(1).

110 Some instruments subject to negative resolution must be laid before Parliament in draft, and cannot be made if the draft is disapproved within 40 days. However, instruments subject to the 'negative procedure' are rarely laid in draft. They are typically laid as made, with the Parliament given 40 days within which to pass a resolution (a 'prayer') to annul them. Also, a substantial number of instruments (typically those dealing with non-controversial matters) are not required to be laid at all, and may come into force despite not being subject to any parliamentary scrutiny, see Richard Kelly, House of Commons Briefing Paper 06509, *Statutory Instruments*, December 2016, pp. 7-8.

111 Joint Standing Committee on Statutory Instruments, *Transparency and Accountability in Subordinate Legislation: First Special Report of Session 2017-19*, June 2018, p. 5, <https://publications.parliament.uk/pa/jt201719/jtselect/jtstatin/151/151.pdf> (accessed 15 May 2019) (emphasis removed).

8.77 Generally, instruments subject to negative resolution are laid before the Parliament at least 21 days before they come into force (the '21-day rule').¹¹² If an instrument is not laid before the Parliament at least 21 days before coming into force, notification must be sent to the Parliament explaining the delay.¹¹³ The UK Joint Standing Committee on Statutory Instruments notes that the 21-day rule is:

designed to protect those affected by changes to the law made by subordinate legislation from being subject to the effect of the changes before they have had a reasonable opportunity to understand the effects and what they must do to satisfy any requirements.¹¹⁴

Committee view

8.78 The majority of legislative instruments commence the day after they are registered on the Federal Register of Legislation. This is despite the fact that persons affected by an instrument may not be aware that it has been made, and may have limited (if any) opportunity to familiarise themselves with any rights, obligations or liabilities created or altered by the instrument before it takes effect. This issue is compounded by the fact that persons affected by an instrument may not be adequately consulted before an instrument is made.¹¹⁵

8.79 The committee agrees that 'the law should be publicly available and capable of being ascertained before it comes into force',¹¹⁶ and considers that as a general rule, there should be a delay between the registration of a legislative instrument and its commencement. This accords with the fundamental rule of law principle that persons affected by the law should be able to foresee the legal consequences of their actions and plan their affairs accordingly. Consistent with comparable Westminster

112 The 21-day rule is established as a convention of the Westminster Parliament. See National Archives (UK), *Statutory Instruments Practice*, 2017, p. 37, http://www.legislation.gov.uk/pdfs/StatutoryInstrumentPractice_5th_Edition.pdf (accessed 15 May 2019). In relation to the National Assembly for Wales, the rule is enshrined in section 11A of the *Statutory Instruments Act 1946* (UK). The Scottish Parliament observes a modified version of the 21-day rule, which requires instruments to be laid before the Parliament at least 28 days before coming into force. See *Interpretation and Legislative Reform (Scotland) Act 2010* (UK), section 28.

113 The Joint Standing Committee on Statutory Instruments (UK) notes that it will generally not accept matters such as administrative oversight, failure to settle policy sufficiently early, insufficient time to consider consultation responses, or desire to cut down on government expenditure as acceptable reasons for breaching the 21-day rule. See Joint Standing Committee on Statutory Instruments (UK), *Transparency and Accountability in Subordinate Legislation: First Special Report of Session 2017-19*, June 2018, p. 7.

114 Joint Standing Committee on Statutory Instruments (UK), *Transparency and Accountability in Subordinate Legislation: First Special Report of Session 2017-19*, June 2018, p. 6

115 This issue is discussed further in Chapter 3.

116 Cabinet Office, Department of the Prime Minister and Cabinet (NZ), *Cabinet Manual*, 2017, p. 114.

jurisdictions, the committee considers that 28 days would be an appropriate period between the registration of a legislative instrument on the Federal Register of Legislation and its commencement.

8.80 The committee acknowledges that there may be circumstances in which it is necessary for an instrument to take effect sooner than 28 days after it is registered (up to and including immediately after registration). In such circumstances, the committee considers that the explanatory statement to the instrument should set out the reasons why an exception to the general principle is necessary. The committee also considers that government should develop guidelines in relation to this matter.

Recommendation 18

8.81 The committee recommends that the government amend the *Legislation Act 2003* to provide that, subject to limited exceptions, legislative instruments commence 28 days after registration, and that the government develop guidance as to the limited circumstances in which an instrument may commence earlier.

Amendment of delegated legislation by Parliament

Overview

8.82 There is currently no provision in the Legislation Act enabling Parliament to directly amend delegated legislation. While a legislative instrument may be disallowed either in whole or in part, there is no opportunity for a senator or member to seek to directly amend an instrument to achieve a desired change.

8.83 The *House of Representatives Practice* indicates that if an instrument is subject to an affirmative resolution procedure it may be amended by the Parliament during the approval process:

An Act may provide for the Houses to be able to amend the instrument in question during the process of approving it. If one House amends such an instrument the other House is informed by message, and when the message is considered, the motion put, for example, 'That the House approves the form of agreement. . . as amended by the Senate and conveyed in Senate Message No. . . .'. The motion can be amended to amend the amendments or make further amendments.¹¹⁷

8.84 In practice, the enabling legislation of a disallowable legislative instrument could similarly provide that the instrument may be amended by Parliament prior to the expiry of the applicable disallowance period. However, to date it appears that no primary legislation has been enacted that sets out such a process.

117 D R Elder, ed., *House of Representatives Practice*, 7th edition, Department of the House of Representatives, 2018, p. 413.

8.85 In the early 1980s, the committee expressed concerns about 'the difficulty involved, for both the Committee itself and the executive, in giving effect to the Committee's suggestions without the requirement to make a new instrument'. The committee explained that, 'for convenience, the Committee generally accepts a Government's undertaking to make the required amendment at a later time, without proceeding to disallowance'. However, it also noted 'substantial delays in giving effect to the Committee's recommendations'.¹¹⁸

8.86 In light of these concerns, the committee decided to consider 'the advantages of formally recommending amendments to delegated legislation, to be made immediately by the Parliament'. In the committee's view:

This would obviate the necessity of recommending disallowance of the entire instrument, for want of agreement on one small but significant section, and should prevent the delays in the Government's making new instruments, at a much later time, to accord with the Committee's proposals.¹¹⁹

8.87 However, the committee acknowledged that there would likely be 'significant disadvantages to this procedure', including 'the extension of Parliament's legislative authority to amend executive rules made under powers delegated to government by Parliament'.¹²⁰ Following advice from the Attorney-General, the committee did not take any further steps to recommend the implementation of the proposal at that time.

Approach in other jurisdictions

8.88 Some Australian jurisdictions permit the amendment of delegated legislation by Parliament. In the ACT and Western Australia an instrument can be amended or substituted if a resolution is passed by Parliament (which, in the case of Western Australia, requires both Houses of Parliament to pass the resolution).¹²¹ In Tasmania, if the Subordinate Legislation Committee considers that a regulation should be amended or rescinded, and its report is adopted during an adjournment or recess of the Parliament, that committee may send a copy of the report to the authority by whom the regulation was made. On receipt of this report, the relevant authority must amend or rescind the regulation in accordance with the committee's

118 Senate Standing Committee on Regulations and Ordinances, *Seventy-First Report*, March 1982, p. 6.

119 Senate Standing Committee on Regulations and Ordinances, *Seventy-First Report*, March 1982, p. 6.

120 Senate Standing Committee on Regulations and Ordinances, *Seventy-First Report*, March 1982, p. 6.

121 *Legislation Act 2011* (ACT), section 68; Legislative Council (WA), *Standing Orders*, January 2019, SO 67.

recommendation, or suspend the regulation until the Parliament has considered the committee's report.¹²²

8.89 In New Zealand, the House of Representatives may amend any disallowable instrument, or revoke any disallowable instrument and substitute it with another.¹²³ The government retains a financial veto power in instances in which the proposed amendment or revocation and substitution would have more than a minor impact on the government's fiscal aggregates.¹²⁴ The House has only exercised this power to amend an instrument once in its history.¹²⁵

8.90 In the United Kingdom, statutory instruments cannot, except in very rare circumstances, be amended by the Parliament. Rather, each 'House of Parliament simply expresses its wish for the instrument to be annulled or approved, as appropriate, in its entirety'.¹²⁶ Exceptions include where the enabling Act expressly allows for amendment by the Parliament.¹²⁷

Expert commentary

8.91 Emeritus Professor Pearce briefly addressed amendments to delegated legislation in a 2004 Senate Occasional Lecture on parliamentary scrutiny of delegated legislation, stating that:

I have always been ambivalent about whether Parliament should have this power. In theory there is no reason why they shouldn't. One would have to be wary that whatever body was going to deal with it—and normally it would be just the Senate—was fully apprised of what the likely implications were of making such a change. So I lean against amendment,

122 *Subordinate Legislation Committee Act 1969* (Tas), section 9.

123 *Legislation Act 2012* (NZ), section 46.

124 House of Representatives (NZ), *Standing Orders of the House of Representatives*, August 2017, SO 326.

125 Mary Harris and David Wilson, eds., *Parliamentary Practice in New Zealand*, 4th edition, Oratia Books, Auckland, 2017, p. 474. The power was exercised in 2008, when the House resolved to revoke a clause of notice relating to the scope of practice of enrolled nurses, and to substitute it with another clause.

126 House of Commons Information Office, *Factsheet L7: Statutory Instruments*, May 2008, p. 5.

127 For example, the *Civil Contingencies Act 2004* (UK). Section 27 of that Act provides for the amendment of emergency regulations by resolution of the Parliament. Similarly, in Scotland and Wales delegated legislation cannot be amended by the Parliament during the scrutiny process, see Delegated Powers and Law Reform Committee, Scottish Parliament, *Guide to Scottish Statutory Instruments*, http://www.parliament.scot/S5_Delegated_Powers/Guide_to_SSIs.pdf (accessed 15 May 2019); National Assembly for Wales, *Standing Orders of the National Assembly for Wales*, January 2019, SO 27.10.

and more toward the capacity to be able to disallow individual items or parts of an instrument.¹²⁸

Committee view

8.92 The committee is generally supportive of initiatives to improve parliamentary scrutiny and control of delegated legislation. However, the committee considers that, in practical terms, permitting Parliament to directly amend delegated legislation during the disallowance period, or prior to affirmative resolution, is unlikely to facilitate greater parliamentary scrutiny.

8.93 The committee considers that if there was the political will to disallow an instrument unless amended, the government would be likely to amend the instrument to address the Senate's concerns. The committee also shares Emeritus Professor Pearce's concerns that the Senate lacks the expertise to know how an instrument, if amended, would operate in practice (noting that delegated legislation is often made following a lengthy policy development process conducted by government agencies). As such, the committee does not consider it appropriate to recommend that Parliament be enabled to directly amend delegated legislation.

Sunsetting

Overview

8.94 All legislative instruments registered on the Federal Register of Legislation after 1 January 2005 are automatically repealed ten years after registration.¹²⁹ This process is called 'sunsetting'. Sunsetting provides the opportunity for Parliament (as well as ministers and agencies) to ensure that the content of delegated legislation remains appropriate, and for Parliament to maintain effective, regular oversight of delegated powers.¹³⁰

128 Dennis Pearce, 'Rules, regulations and red tape: Parliamentary scrutiny of delegated legislation', in *Papers on Parliament*, No. 42, December 2004, p. 96.

129 *Legislation Act 2003*, section 50. Instruments are repealed on the first 1 April or 1 October that falls on or after their tenth anniversary of registration. The sunseting of legislative instruments registered on 1 January 2005 (that is, all instruments made before that date) is staggered, with the sunset date of determined by the table set out in subsection 50(2).

130 In 2017, the government reviewed the sunseting provisions in the *Legislation Act*, see *Sunseting Review Committee, Report on the Operation of the Sunseting Provisions of the Legislation Act 2003*, September 2017. The committee made a joint submission to this inquiry. See Senate Standing Committee for the Scrutiny of Bills, Senate Standing Committee on Regulations and Ordinances, Parliamentary Joint Committee on Human Rights, *Submission to the Review of the Sunseting Framework under the Legislation Act 2003*, August 2017. Following the review amendments were made to the *Legislation Act 2003* by Schedule 1 to the *Legislation Amendment (Sunsetting Review and Other Measures) Act 2018*.

8.95 The Legislation Act provides that sunseting does not apply to certain classes of, or specified legislative instruments, including:

- certain instruments relating to intergovernmental bodies or schemes which involve the Commonwealth and one or more state or territory;¹³¹
- instruments exempted from sunseting by their enabling legislation or by regulations made under the Legislation Act;¹³² and
- instruments which are not legislative instruments and instruments that are exempt from disallowance.¹³³

8.96 In practice, legislative instruments are typically exempted from sunseting by amendments to the exemption regulations.¹³⁴ The Legislation Act does not specify any conditions or criteria that must be satisfied before new exemptions are made. Instead, there is a general principle that sunseting exemptions should only be granted where the instrument is not suitable for regular review under the Legislation Act, underpinned by criteria set out in the *Guide to Managing Sunseting of Legislative Instruments*.¹³⁵

8.97 The Attorney-General may, by certificate, defer the sunset date of an instrument for up to two years. The certificate is not a disallowable instrument (unless the deferral goes for more than one year).¹³⁶ Additionally, the

131 *Legislation Act 2003*, subsection 54(1).

132 *Legislation Act 2003*, paragraphs 54(2)(a) and (b). The relevant regulations are the Legislation (Exemptions and Other Matters) Regulation 2015.

133 *Legislation Act 2003*, paragraph 54(2)(c). These include regulations made under paragraphs 8(6)(b), 10(1)(c), 11(2)(b), 44(2)(b) and 54(2)(b) of the Legislation Act, relating to matters such as whether an instrument is a legislative instrument or a notifiable instrument, and whether an instrument is subject to disallowance.

134 Legislation (Exemption and Other Matters) Amendment (2018 Measures No. 2) Regulations 2018, sections 11 and 12. Those provisions, respectively, specify classes of instruments and specific instruments that are exempt from sunseting.

135 The criteria are that the rule-maker has been given a statutory role independent of the Government, or the rule maker is operating in competition with the private sector; the instrument is designed to be enduring and not subject to regular review; commercial certainty would be undermined by sunseting; the instrument is part of an intergovernmental scheme; and the instrument is subject to a more rigorous statutory review process, see Attorney-General's Department, *Guide to Managing Sunseting of Legislative Instruments*, 2016, <https://www.ag.gov.au/LegalSystem/AdministrativeLaw/Documents/guide-to-managing-sunseting-of-legislative-instruments-december-2016.pdf> (accessed 15 May 2019).

136 *Legislation Act 2003*, section 51.

Attorney-General may, by disallowable legislative instrument, align the sunset date of multiple instruments to facilitate a thematic review.¹³⁷

8.98 Legislative instruments that exempt other instruments from sunset are disallowable, and are subject to scrutiny by the committee.¹³⁸ The committee has previously expressed concerns about legislative instruments which create additional exemptions from sunset,¹³⁹ as well as instruments which defer the sunset date of multiple instruments.¹⁴⁰

Approach in other jurisdictions

8.99 As at the Commonwealth level, delegated legislation in Queensland, South Australia, Tasmania and Victoria sunsets after a period of ten years.¹⁴¹ In New South Wales, a shorter sunset period of five years applies.¹⁴² In Western Australia, the ACT and the Northern Territory, delegated legislation is not subject to sunset.

8.100 There is no directly equivalent sunset regime in comparable Westminster jurisdictions. However, there are parallels between the Commonwealth sunset regime and the New Zealand 'confirmation' process.¹⁴³ The New Zealand Regulations

137 *Legislation Act 2003*, section 51A. The deferred sunset date must not be more than five years after the earliest day on which any of the instruments covered by the instrument of deferral would otherwise have sunset under the Legislation Act.

138 These instruments are also subject to scrutiny by the PJCHR.

139 See, in particular, Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 1 of 2017*, February 2017, pp. 38-39; *Delegated Legislation Monitor 3 of 2017*, March 2017, pp. 32-36; *Delegated Legislation Monitor 7 of 2017*, June 2017, pp. 14-20; *Delegated Legislation Monitor 8 of 2017*, August 2017, pp. 38-47; *Delegated Legislation Monitor 9 of 2017*, August 2017, pp. 1-18; *Delegated Legislation Monitor 13 of 2017*, October 2017, pp. 25-38; and *Delegated Legislation Monitor 15 of 2017*, November 2017, pp. 25-38.

140 See, for example, Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 13 of 2017*, October 2017, pp. 41-42.

141 *Statutory Instruments Act 1992* (Qld) subsection 54(1); *Subordinate Legislation Act 1978* (SA), paragraph 16B(1)(g); *Subordinate Legislation Act 1992* (Tas), subsection 11(2); *Subordinate Legislation Act 1994* (Vic) subsection 5(1).

142 *Subordinate Legislation Act 1989* (NSW), subsection 10(2).

143 Some New Zealand Acts contain 'confirmation provisions', which provide that the instrument lapses, expires, or is revoked within a timeframe set by the *Legislation Act 2012* (NZ) unless it has been confirmed by Parliament before the relevant deadline. In practice, confirmation is usually achieved through enactment of an annual Subordinate Legislation Confirmation and Validation Bill.

Review Committee has recommended that New Zealand develop a sunseting regime,¹⁴⁴ although this recommendation has not been implemented.

8.101 The United Kingdom does not have an overarching sunseting framework. However, the *Interpretation Act 1978* (UK) provides that sunset and review provisions may be included in subordinate legislation on an ad hoc basis.¹⁴⁵

Committee view

8.102 The committee considers that the current 10-year sunseting framework provides an essential opportunity for Parliament to ensure that the content of legislative instruments remains current and that Parliament maintains effective and regular oversight of delegated legislative powers.

8.103 The committee acknowledges that it may be appropriate to exempt an instrument from sunseting in limited circumstances. However, given the potential implications of such exemptions for parliamentary oversight, the basis on which exemptions are granted should be fully justified in any explanatory material. The committee also considers that the criteria for granting exemptions from sunseting should be set out in the Legislation Act (rather than left to policy guidelines).

8.104 Further, the committee considers that any exemptions from the sunseting framework should be granted on a case-by-case basis, rather than exempting whole classes of instruments from sunseting. If classes of instruments are proposed to be exempted from sunseting, such an exemption should be provided for in primary legislation rather than left to delegated legislation.¹⁴⁶

Recommendation 19

8.105 The committee recommends that the government amend the *Legislation Act 2003* to specify the criteria for granting exemptions from sunseting and ensure all exemptions from sunseting for classes of legislative instruments are contained in primary legislation.

144 Regulations Review Committee (NZ), *Inquiry into the ongoing requirement for individual regulations and their impact*, December 2007, https://www.parliament.nz/resource/miNZ/48DBSCH_SCR3940_1/9c3c3e21e3ea058731a14bd2d183a370f589fb36 (accessed 20 May 2019).

145 *Interpretation Act 1978* (UK), section 14A.

146 See views set out in Senate Standing Committee for the Scrutiny of Bills, Senate Standing Committee on Regulations and Ordinances, Parliamentary Joint Committee on Human Rights, *Submission to the Review of the Sunseting Framework under the Legislation Act 2003*, August 2017.

Chapter 9

Awareness and Education

Introduction

9.1 This chapter discusses the level of awareness and understanding of delegated legislation among parliamentarians, their staff, and officers of the Australian Public Service (APS). It reviews the educational and informative resources about delegated legislation that are currently available, and considers options to increase education and awareness. Key issues include:

- the adequacy of current training opportunities on delegated legislation;
- the accessibility of information on the status of disallowable instruments; and
- the relevance and effectiveness of the committee's guidance materials.

Understanding of delegated legislation

Overview

9.2 As set out in Chapter 1, Parliament delegates legislative powers to the executive to help alleviate pressures on parliamentary time, ensure that particularly technical or detailed matters are considered by subject-matter experts, and respond effectively to rapidly changing or uncertain situations.¹

9.3 In practice, around 1,700 disallowable legislative instruments are tabled each year in the Commonwealth Parliament.² It is not possible for parliamentarians to individually scrutinise all delegated legislation. As the Select Committee on Standing Committees (which recommended establishing this committee) stated in 1931:

The power to make regulations is necessarily used very freely by Governments and as a result a very large number are submitted to Parliament every Session. They are so numerous, technical and

1 See Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia*, 5th edition, LexisNexis Butterworths, Australia, 2017, p. 6.

2 For the number of instruments made from 1985 – 2015, see Harry Evans and Rosemary Laing, eds., *Odgers' Australian Senate Practice*, 14th edition, Department of the Senate, 2016, p. 429. For the number of instruments scrutinised by the committee from 2016 – 2018, see the committee's annual reports, available at https://www.apf.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Reports (accessed 15 May 2019).

voluminous that it is practically impossible for Senators to study them in detail and to become acquainted with their exact purpose and effect.³

9.4 The key role of the committee is to ensure that the Parliament maintains a level of oversight over an increasing volume of delegated legislation. However, the committee also has an educative function. It has been a long-standing concern of the committee that there is a lack of understanding among parliamentarians and their staff, and within the APS, regarding the role of delegated legislation and the functions of the committee. In 1992, committee members noted that 'it goes to show that we still need to educate many people about the work of the Regulations and Ordinances Committee', and criticised the lack of understanding by ministers and departmental officers of the implications of placing a notice of motion to disallow an instrument.⁴

9.5 In undertaking this inquiry, the committee has considered whether parliamentarians, their staff and APS officers have an appropriate understanding of what delegated legislation is and the role Parliament plays in scrutinising and ultimately exercising control over it.

9.6 At present, the Department of the Senate (Senate Department) provides general training on delegated legislation as part of the program to induct new senators at the commencement of each Parliament. The Senate Department also provides advice and training to senators and their staff on a rolling basis, with senators able to seek advice and training on any aspect of procedure (including delegated legislation) at any time. However, there is not currently any specific training provided to senators on the role and functions of the committee (other than the training provided by the secretariat to new committee members).

9.7 Senators' staff do not receive specific training on delegated legislation; however, delegated legislation is covered as part of a training program for senators' staff, which the Senate Department runs each year. Senators' staff can also participate in the Senate Department's *Legislative process* training session. The role and functions of the committee, along with the other committees within the Legislative Scrutiny Unit, are explained in this session.

9.8 The Senate Department also provides training to APS officers through various seminars, including *The work of the parliamentary scrutiny committees* and *Senate*

3 Select Committee on the Standing Committee System, *The Advisability of Otherwise of Establishing Committees of the Senate upon – (a) statutory rules and ordinances; (b) international relations; (c) finances; (d) private members' bills*, December 1929, p. ix.

4 Senator Patterson, *Senate Hansard*, 24 March 1992, p. 948; see also Senate Standing Committee on Regulations and Ordinances, *Eighty-Fourth Report*, August 1988.

*scrutiny of delegated legislation.*⁵ These training sessions are available once a year, with tailored programs delivered on request, however only limited numbers of APS officers attend each year.

9.9 The Department of the House of Representatives (House Department) also conducts 'House Briefings' on topics of interest to members and their staff. Generally, these sessions are performed by senior members of the House Department. However, while delegated legislation has previously been covered in these briefings, there is no specific training on the topic. The House Department also covers delegated legislation within its annual *About Legislation* seminar, targeted at APS officers and staff of parliamentary departments. In recent years, the House Department has begun to liaise with other departments to arrange custom seminars to be delivered to APS officers.

9.10 The Office of Parliamentary Counsel provides a number of training courses on delegated legislation and the legislative process; however, this training is largely focused on legislative drafting.⁶

Committee view

9.11 The committee considers that while there are some notable exceptions, parliamentarians and their staff have limited understanding of the nature and role of delegated legislation in the Commonwealth Parliament. This is understandable given the complexity and technicality of delegated legislation and the other demands on parliamentarians' time. However, particularly as delegated legislation no longer solely deals with technical administrative detail and often contains matters of substantive policy, the committee considers it is imperative that parliamentarians are better informed of the role and operation of delegated legislation, the importance of parliamentary scrutiny and the role and functions of this committee.

9.12 Given the particularly important role of the Senate in the control and scrutiny of delegated legislation, training should be provided to senators and their staff – in particular around the making of delegated legislation and the disallowance process. While the training provided by the Senate Department may be adequate to address the needs of senators and their staff, attendance at training specifically on delegated legislation is largely undertaken on an ad hoc basis, with the majority of senators and staff not attending any training during their time in the Senate (other than the brief overview the senators receive when first elected). The committee strongly encourages all senators and their staff to seek training in relation to delegated legislation and to utilise the resources available to them.

5 Department of the Senate, *Seminars for public servants*, https://www.aph.gov.au/About/Parliament/Senate/Whats_On/Seminars_and_Lectures/Seminars_for_public_servants (accessed 15 May 2019).

6 Office of Parliamentary Counsel, *Training*, <https://www.opc.gov.au/opc-services/training> (accessed 15 May 2019).

9.13 The committee also notes that while training is available to senators' staff and APS officers on the committee's role and functions, no equivalent training is available to senators themselves. The committee recommends that senators be provided with, and undertake, training in relation to the role and functions of the committee, to ensure that all senators understand the vital role the committee plays as a responsible agent of the legislature, and more generally to emphasise the importance of parliamentary scrutiny and control of delegated legislation.

9.14 Finally, the committee is concerned that understanding of delegated legislation (including how it is made and rules governing its operation and use) varies considerably among APS officers, as does understanding of the role of Parliament and the committee in scrutinising and exercising control over delegated legislation. In this respect, while seminars on the committee's role and function are provided to APS officers by the Senate Department, these seminars are only available once per year and few APS officers attend. It is the committee's opinion that this training could be supplemented by other sources, including internal training sessions run by Commonwealth departments.

Recommendation 20

9.15 The committee recommends that senators and their staff actively seek training about delegated legislation, the Senate's role with respect to delegated legislation and the committee's role and functions.

Recommendation 21

9.16 The committee recommends that the government provide departmental officers with more extensive training about delegated legislation, the Senate's role with respect to delegated legislation and the committee's role, functions and expectations.

Sources of information on the status of disallowable instruments

Overview

9.17 Another key issue that the committee identified during the course of its inquiry is the accessibility of information regarding the status of disallowable instruments. At present, there are three resources available on the Australian Parliament House website relating to legislative instruments that are subject to disallowance, as outlined below.

9.18 The *Disallowance Alert* is a webpage administered by the committee's secretariat.⁷ It lists all instruments for which a notice of motion for disallowance has

7 Senate Standing Committee on Regulations and Ordinances, *Disallowance Alert*, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts (accessed 15 May 2019).

been lodged in either House of Parliament by a senator or member, including the Chair on behalf of the committee. The progress and outcome of all disallowance notices is also recorded, including whether a motion has been voted on, postponed or withdrawn. The *Disallowance Alert* does not list the tabling dates of disallowable instruments, nor does it list the expiration dates of a disallowance period or the Act under which the relevant instrument was made. In addition, the *Disallowance Alert* does not provide a hyperlink to the instrument on the Federal Register of Legislation, or to any relevant comments in the *Delegated Legislation Monitor*.

9.19 The Senate also maintains on its website a consolidated list (*Disallowable Instrument List*) of all legislative instruments that have been tabled in the Senate by the relevant Clerk and which remain open to disallowance.⁸ The list is categorised by tabling date and subdivided by the Act under which the relevant instrument was made. However, it does not indicate whether a notice of motion has been placed to disallow an instrument, nor does it provide a hyperlink to the instrument on the Federal Register of Legislation. Additionally, the list cannot be filtered by portfolio areas or subject matter areas. The House of Representatives maintains a similar list (*House Disallowable Instrument List*) on its own website.⁹

9.20 Additionally, the Federal Register of Legislation includes a list of all legislative instruments that are currently open to disallowance.¹⁰

Approach in other jurisdictions

9.21 In the United Kingdom (UK), there are a number of different resources for accessing information about the status of statutory instruments. The House of Lords Business and Minutes of Proceedings includes a section on motions relating to delegated legislation. Each entry includes a link to relevant scrutiny reports published by the Secondary Legislation Scrutiny Committee.¹¹

9.22 In addition, the UK Parliament is testing a webpage that lists the current procedural activity for statutory instruments. Instruments may be searched by name or portfolio. The page outlines the procedural timeframes for instruments that follow both affirmative and negative procedures, as well as scrutiny committees' findings

8 Department of the Senate, *Senate Disallowable Instruments List*, https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/leginstruments/senate-dissallowable-instruments (accessed 15 May 2019).

9 Department of the House of Representatives, *House Disallowable Instruments List*, https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/leginstruments/house-dissallowable-instruments (accessed 15 May 2019).

10 Federal Register of Legislation, <https://www.legislation.gov.au/Browse/ByTitle/LegislativeInstruments/OpenToDisallowance> (accessed 15 May 2019).

11 See, for example, *House of Lords Business & Minutes of Proceedings*, No. 140, April 2017, p. 4, <https://publications.parliament.uk/pa/ld201617/minutes/170427/ldordpap.pdf> (accessed 15 May 2019).

regarding the instruments.¹² The webpage largely mirrors the *Statutory Instruments Tracker* (created by the Hansard Society), which enables users to track statutory instruments in Parliament—including through the consultation and scrutiny stages.¹³

Committee view

9.23 The committee has observed that parliamentarians are often unaware of the parliamentary processes associated with delegated legislation. This is due, in part, to the complexity and inaccessibility of information regarding the disallowance process. The committee considers that there is a need for a simple and effective resource where parliamentarians can search for disallowable instruments that may interest them—particularly in portfolios about which they are concerned.

9.24 Further, the committee considers that a resource to track the progress of disallowable instruments through Parliament would aid parliamentarians in remaining informed and engaged with the disallowance process. The committee's scrutiny comments and information on the notices of motion to disallow placed by the committee are also valuable resources for parliamentarians that could be incorporated. The committee considers that relevant resources should include a link to any action the committee has taken regarding disallowable legislative instruments.

Recommendation 22

9.25 The committee recommends that the parliamentary departments consider the most effective method of providing consolidated and searchable information about the status of disallowable legislative instruments, and the committee's scrutiny concerns relating to such instruments.

Guidelines and expectations of the committee

Overview

9.26 The committee has published guidelines on a number of matters relevant to its scrutiny work.¹⁴ These are designed to increase awareness of scrutiny concerns, encourage compliance with the committee's scrutiny principles, and foster improved drafting practices. The matters on which guidelines are currently available include:

- the application of the committee's scrutiny principles;

12 UK Parliament, *Find a statutory instrument*, <https://beta.parliament.uk/find-a-statutory-instrument> (accessed 15 May 2019).

13 Hansard Society (UK), *Statutory Instrument Tracker*, <https://www.hansardsociety.org.uk/services/statutory-instrument-tracker> (accessed 15 May 2019).

14 Senate Standing Committee on Regulations and Ordinances, *Guidelines*, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines (accessed 15 May 2019).

- general requirements for preparing explanatory statements;
- addressing consultation in explanatory statements;
- incorporation of documents;
- regulations that amend Schedule 1A to the Financial Framework (Supplementary Powers) Regulations 1997; and
- instruments that amend or repeal other instruments.

Evidence before the committee

9.27 Evidence submitted to the committee indicated that there was substantial interest in the committee's guidelines. The committee received five submissions that addressed the impact of the committee's existing guidelines or the need for clear guidelines more broadly.¹⁵ For example, the Clerk of the Senate observed:

The committee may wish to consider expanding these resources by outlining the committee's principles and priorities and providing practical advice about the committee's expectations with respect to the content of explanatory statements.¹⁶

9.28 Professor Appleby, Emeritus Professor Aronson and Dr Boughey encouraged the committee to 'introduce more guidelines that explain the relevance of constitutional authority and limitations in its scrutiny of delegated legislation'.¹⁷

9.29 The South Australian Legislative Review Committee noted that:

compliance with a scrutiny committee's content requirements for reports or explanatory material, which are provided to the scrutiny committee in connection with instruments it reviews, is also an important aid to the work of a scrutiny committee.¹⁸

Committee view

9.30 Over time, the committee has observed ongoing improvements in terms of compliance with its guidelines, evidenced by the quality of instruments and explanatory statements. The committee also notes that the Office of Parliamentary

15 See, for example, Professor Gabrielle Appleby, Emeritus Professor Mark Aronson and Dr Janina Boughey, *Submission 2*; Mr Peter Quiggin PSM, Office of Parliamentary Counsel, *Submission 3*; Department of Infrastructure, Regional Development and Cities, *Submission 4*; Legislative Review Committee of the Parliament of South Australia, *Submission 12*; The Law Society of New South Wales, *Submission 13*.

16 Clerk of the Senate, *Submission 7*, p. 1.

17 Professor Gabrielle Appleby, Emeritus Professor Mark Aronson and Dr Janina Boughey, *Submission 2*, p. 11.

18 Legislative Review Committee of the Parliament of South Australia, *Submission 12*, p. 4.

Counsel, as well as other government agencies, increasingly refer to the committee's guidance materials in their public documents.¹⁹

9.31 The committee's guidelines are a valuable resource for stakeholders to understand the committee's expectations. The committee considers that there would be considerable value in updating its existing guidelines and issuing new guidelines to encourage greater compliance and awareness of the committee's scrutiny principles.

9.32 The committee also notes that it has recommended a number of changes to its existing scrutiny principles, as discussed in Chapter 3. Any changes would necessitate the publication of new guidelines, to clarify the committee's interpretation of its new scrutiny principles as well as its associated expectations for legislative instruments and their explanatory material.

Committee action 11

9.33 The committee will issue further guidelines in relation to each of its scrutiny principles (including any new principles arising out of this inquiry), and any other matter relating to its role, functions and expectations that may be useful.

Senator John Williams

Chair

19 See, for example, Office of Parliamentary Counsel, *OPC's drafting services: a guide for clients*, 2016, p. 37, <https://www.opc.gov.au/publications/opcs-drafting-services-guide-clients> (accessed 15 May 2019).

APPENDIX A

List of public submissions

1. Professor Anne Twomey
2. Professor Gabrielle Appleby, Emeritus Professor Mark Aronson and Dr Janina Boughey
3. Mr Peter Quiggin PSM, Office of Parliamentary Counsel
4. The Department of Infrastructure, Regional Development and Cities
5. Mr Melville Miranda
6. Department of Education and Training
7. Clerk of the Senate
8. Associate Professor Lorne Neudorf
9. NSW Legislative Council
10. Department of Home Affairs
11. Assistant Professor Jacinta Dharmananda
12. Legislative Review Committee of the Parliament of South Australia
13. Law Society of New South Wales
14. Attorney-General's Department

APPENDIX B

Proposed amendments to Senate standing order 23

Current standing order 23

23 Regulations and Ordinances

- (1) A Standing Committee on Regulations and Ordinances shall be appointed at the commencement of each Parliament.
- (2) All regulations, ordinances and other instruments made under the authority of Acts of the Parliament, which are subject to disallowance or disapproval by the Senate and which are of a legislative character, shall stand referred to the committee for consideration and, if necessary, report.
- (3) The committee shall scrutinise each instrument to ensure:
 - (a) that it is in accordance with the statute;
 - (b) that it does not trespass unduly on personal rights and liberties;
 - (c) that it does not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal; and
 - (d) that it does not contain matter more appropriate for parliamentary enactment.
- (4)
 - (a) The committee shall consist of 6 senators, 3 being members of the government party nominated by the Leader of the Government in the Senate, and 3 being senators who are not members of the government party, nominated by the Leader of the Opposition in the Senate or by any minority groups or independent senators.
 - (b) The nominations of the opposition or any minority groups or independent senators shall be determined by agreement between the opposition and the minority groups or independent senators, and, in the absence of agreement duly notified to the President, the question of the representation on the committee shall be determined by the Senate.
- (5) The committee shall have power to send for persons and documents, and to sit during recess.
- (6) The committee shall elect as chair a member appointed to the committee on the nomination of the Leader of the Government in the Senate.
- (7) The chair may from time to time appoint a member of the committee to be deputy chair, and the member so appointed shall act as chair of the

committee when there is no chair or the chair is not present at a meeting of the committee.

- (8) Where votes on a question before the committee are equally divided, the chair, or the deputy chair when acting as chair, shall have a casting vote.
- (9) The committee may appoint with the approval of the President counsel to advise the committee.

Proposed standing order 23

23 Scrutiny of Delegated Legislation

- (1) A Standing Committee for the Scrutiny of Delegated Legislation shall be appointed at the commencement of each Parliament.
- (2) All instruments made under the authority of Acts of the Parliament, which are subject to disallowance, disapproval or affirmative resolution by the Senate and which are of a legislative character, shall stand referred to the committee for consideration and, if necessary, report.
- (3) The committee shall scrutinise each instrument as to whether:
 - (a) it is in accordance with its enabling Act and otherwise complies with all legislative requirements;
 - (b) it appears to be supported by a constitutional head of legislative power and is otherwise constitutionally valid;
 - (c) it makes rights, liberties, obligations or interests unduly dependent on insufficiently defined administrative powers;
 - (d) those likely to be affected by the instrument were adequately consulted in relation to it;
 - (e) its drafting is defective or unclear;
 - (f) it, and any document it incorporates, may be freely accessed and used;
 - (g) the accompanying explanatory material provides sufficient information to gain a clear understanding of the instrument;
 - (h) it trespasses unduly on personal rights and liberties;
 - (i) it unduly excludes, limits or fails to provide for independent review of decisions affecting rights, liberties, obligations or interests;
 - (j) it contains matters more appropriate for parliamentary enactment; and
 - (k) it complies with any other ground relating to the technical scrutiny of delegated legislation that the committee considers appropriate.
- (4) The committee shall additionally scrutinise each instrument to determine whether the attention of the Senate should be drawn to the instrument on

the ground that it raises significant issues, or otherwise gives rise to issues that are likely to be of interest to the Senate.¹

- (5) The committee may, for the purpose of reporting on its terms of reference, consider any proposed or draft legislative instrument or information available to it, including an exposure draft of such an instrument, whether or not the instrument has been made or registered.
- (6)
 - (a) The committee shall consist of 6 senators, 3 being members of the government party nominated by the Leader of the Government in the Senate, and 3 being senators who are not members of the government party, nominated by the Leader of the Opposition in the Senate or by any minority groups or independent senators.
 - (b) The nominations of the opposition or any minority groups or independent senators shall be determined by agreement between the opposition and the minority groups or independent senators, and, in the absence of agreement duly notified to the President, the question of the representation on the committee shall be determined by the Senate.
- (7) The committee may appoint sub-committees consisting of 3 or more of its members, and refer to any such sub-committee any matters which the committee is empowered to consider.
- (8) The committee shall elect as chair a member appointed to the committee on the nomination of the Leader of the Government in the Senate.
- (9) The committee shall elect as deputy chair a member appointed to the committee on the nomination of the Leader of the Opposition in the Senate, and the member so elected shall act as chair of the committee when there is no chair or the chair is not present at a meeting of the committee.
- (10) Where votes on a question before the committee are equally divided, the chair, or the deputy chair when acting as chair, shall have a casting vote.
- (11) The committee and any sub-committee shall have power to send for persons and documents, to move from place to place, and to meet and transact business in public or private session and notwithstanding any prorogation of the Parliament or dissolution of the House of Representatives.

1 The committee has also recommended that the Senate amend standing order 25(2) to provide that legislation committees may inquire into and report on legislative instruments made by the departments and agencies allocated to them (see recommendation 13). Additionally, where the committee reports under amended standing order 23 on an instrument which raises significant issues or give rise to issues of interest, the committee will write to the relevant legislation committee or joint committee to alert that committee to the instrument, and will keep a public record of such correspondence (see committee action 9).

- (12) The committee may inquire into and report on any matter related to the technical scrutiny of delegated legislation.
- (13) The committee may appoint with the approval of the President a legal adviser to the committee.
- (14) The committee shall be empowered to print from day to day any of its documents and evidence. A daily Hansard shall be published of public proceedings of the committee.
- (15) The committee may report from time to time its proceedings and evidence and any recommendations, and shall make regular reports of the progress of the proceedings of the committee.

APPENDIX C

Delegation Report

Introduction

Between 2 and 14 March 2019, the Chair and Deputy Chair of the committee travelled to the United Kingdom (UK) and New Zealand to inform the committee's inquiry into parliamentary scrutiny and control of delegated legislation. This report provides a detailed account of that delegation.

Background

The committee has long taken an interest in the work of delegated legislation scrutiny committees in other jurisdictions, with a view to informing and enhancing its own practices and procedures.¹ For example, between 1979 and 1980, the committee organised and hosted the inaugural Commonwealth Conference of Delegated Legislation Committees.² Since then, committee members have continued to actively participate in conferences relevant to parliamentary scrutiny of delegated legislation in both Australia and overseas.

In addition to participating in relevant international conferences, the committee has undertaken one other delegation since its establishment in 1932. In June 1971, members of the committee travelled to Norfolk Island to develop their understanding of the work of the Norfolk Island Council and the broader governance arrangements in the territory. This was to assist the committee in scrutinising Norfolk Island ordinances.³

Delegation members

The committee Chair, Senator John Williams, was the Delegation Leader. Senator Williams was accompanied by the Deputy Chair of the committee, Senator Gavin

1 Senate Standing Committee on Regulations and Ordinances, *Seventy-First Report – 50th Anniversary of the Committee*, March 1982, p.5.

2 See Senate Standing Committee on Regulations and Ordinances, *Seventy-First Report – 50th Anniversary of the Committee*, March 1982 p.5. The conference included representatives from the parliaments of the United Kingdom, Canada, Zambia, Ghana, India, Papua New Guinea and all Australian states, and prompted the committee to consider a number of reform proposals. Key areas for reform related to the scrutiny of draft delegated legislation, parliamentary powers to amend delegated legislation and committee powers during recess.

3 See Senate Standing Committee on Regulations and Ordinances, *Thirty-Seventh Report*, August 1971.

Marshall. Ms Anita Coles acted as Delegation Secretary for the UK delegation, and Ms Laura Sweeney acted as Delegation Secretary for the New Zealand delegation.⁴

Acknowledgements

The delegation was accompanied by embassy and consulate officials at each location, who provided the delegation with comprehensive support and impeccable logistical assistance. The delegation also wishes to acknowledge the assistance of the International Parliamentary Relations Office in organising the delegation. The delegation greatly appreciated the effort that went into creating such a productive and seamless program. It was a credit to the competence and professionalism of officials at all levels.

United Kingdom

Monday 4 March 2019 (Wales)

National Assembly for Wales

The delegation travelled to Cardiff to the National Assembly for Wales (Welsh Assembly). It first met with Ms Siwan Davies, Director of Assembly Business. Ms Davies explained the approach of the Welsh Assembly and its committees in considering delegated legislation.

Meeting with the Constitutional and Legislative Affairs Committee

The delegation met with Mr Mick Antoniw AM, Chair of the Constitutional and Legislative Affairs Committee, and Mr Gareth Williams, the committee Clerk. The Constitutional and Legislative Affairs Committee considers all constitutional, legislative or governmental matters within the competence of the Welsh Assembly or Welsh ministers, including the quality of delegated legislation

The discussion focused on the role of the Constitutional and Legislative Affairs Committee in scrutinising delegated legislation, how the committee works (including how it reports on its scrutiny principles), and the powers of the Welsh Assembly to exercise control over delegated legislation.

Meeting with Mr Jeremy Miles AM

The delegation met with Mr Jeremy Miles AM, Counsel General and Brexit Minister in the Welsh Assembly, to discuss the use of delegated legislation to implement changes arising from Brexit, and the challenges inherent in this process.

4 Ms Coles and Ms Sweeney are members of the committee secretariat. Ms Coles is the Secretary, and Ms Sweeney is the Principal Research Officer.

Tuesday 5 March 2019 (Westminster, London)***Meeting with the Rt Hon Lord Trefgarne, Lord Haskell and Ms Christine Salmon Percival***

The delegation met with the Rt Hon Lord Trefgarne, Chair of the Secondary Legislation Scrutiny Committee in the House of Lords and Lord Haskell, member of the committee, together with Ms Salmon Percival, committee Clerk.

The Secondary Legislation Scrutiny Committee examines the policy merits of statutory instruments and other types of secondary legislation that are subject to parliamentary procedure. Discussions focused on the role of that committee, the application of its scrutiny principles, the success of the committee in achieving changes, and the powers of the House of Lords over delegated legislation.

Meeting with the Rt Hon Lord Strathclyde CH

The delegation met with Lord Strathclyde, a conservative peer in the House of Lords.⁵ The discussion focused on the role of Parliament in overseeing delegated legislation, and the role of parliamentary scrutiny committees.

Meeting with Professor the Lord Norton of Louth

The delegation met with Lord Norton of Louth, a conservative peer in the House of Lords and a member of the Lords Select Committee on the Constitution. The Select Committee on the Constitution examines all public bills for constitutional implications and investigates broad constitutional issues. The discussion focused on parliamentary control of delegated legislation, the effectiveness of parliamentary scrutiny mechanisms, and how parliamentary committees in the House of Lords undertake their role.

Meeting with members of Sub-committee B of the Secondary Legislation Scrutiny Committee

The delegation was fortunate to be invited to view a meeting of Sub-committee B of the Secondary Legislation Scrutiny Committee, to see first-hand how that sub-committee operates. Subsequently, the committee held discussions with the sub-committee, led by the Chairman, the Rt Hon Lord Cunningham of Felling DL. The discussion focused on the role of the committee in scrutinising delegated legislation and the role of Parliament in exercising control over delegated legislation.

5 In 2015, Lord Strathclyde published the Strathclyde Review, a report on delegated legislation and the relationship between the Houses of Parliament. Among other matters, the review recommended that the House of Commons should have primacy over delegated legislation.

Wednesday 6 March 2019 (Westminster, London)***Meeting with members of the Delegated Powers and Regulatory Reform Committee***

The delegation was fortunate to be invited to view a meeting of the Delegated Powers and Regulatory Reform Committee, to see first-hand how that committee operates. The Delegated Powers and Regulatory Reform Committee scrutinises all bills laid before the House of Lords that delegate legislative power.

The viewing was followed by discussions with members of the committee, led by the Chairman, the Rt Hon Lord Blencathra. Discussions focused on how the Delegated Powers and Regulatory Reform committee undertakes its role, its success in arguing that significant matters of policy should not be left to delegated legislation, and the role of the affirmative resolution process.

Meeting with Dr Adam Tucker

The delegation met with Dr Adam Tucker at the Australian High Commission in London. Dr Tucker is a Senior Lecturer in Law at the University of Liverpool, and specialises in the parliamentary scrutiny of delegated legislation and the separation of powers in the UK. The discussion focused on the deficiencies in the power of the UK Parliament to exercise control over delegated legislation, and the role of parliamentary scrutiny committees. Dr Tucker noted that the number of parliamentary committees undertaking technical scrutiny obscures the need to scrutinise the policy contained in delegated legislation.

Meeting with Ms Jessica Morden MP and members of the Joint Committee on Statutory Instruments

The delegation met with Ms Jessica Morden MP, Chair of the Joint Committee on Statutory Instruments, as well as other members of that committee. The Joint Committee on Statutory Instruments is a joint select committee that performs technical scrutiny of statutory instruments. Discussions focused on the role of the Joint Committee on Statutory Instruments and how, in practice, that committee undertakes its technical scrutiny functions. The discussion also covered parliamentary control over delegated legislation—including through the affirmative resolution process.

Thursday 7 March 2019 (Westminster, London)***Meeting with Dr Constantin Stefanou, Sir William Dale Centre for Legislative Studies***

The delegation met with Dr Constantin Stefanou, Director of the Sir William Dale Centre for Legislative Studies, and discussed the role and importance of post-legislative scrutiny of delegated legislation and the role of parliamentary committees.

Meeting with representatives of the Institute for Government and Clerks of the European Statutory Instruments Committee

The delegation met with Dr Hannah White, Deputy Director, Dr Alice Lilly, Senior Researcher, and Mr Joe Marshall, Researcher, from the Institute for Government. The delegation also met with Mr Mike Winter and Ms Yohanna Sallberg, Clerks of the new House of Commons European Statutory Instruments Committee (ESCI), and Mr Jack Dent from the House of Commons Table Office.

The ESCI was established by the House of Commons to 'sift' instruments that are proposed to be subject to the negative, rather than affirmative, procedure following the passing of the *EU (Withdrawal) Act 2018*. The discussion focused on concerns regarding the type of matters that are left to delegated legislation, the effectiveness of parliamentary scrutiny and control over delegated legislation, and the engagement of parliamentarians with delegated legislation.

Hansard Society

The delegation met with Dr Ruth Fox, Director, and Mr Joel Blackwell, Senior Researcher, of the Hansard Society. In 2014, Dr Fox and Mr Blackwell co-authored *The Devil is in the Detail: Parliament and Delegated Legislation*,⁶ which made a number of recommendations to reform and improve the process of parliamentary scrutiny of delegated legislation.

The discussions focused on the effectiveness of parliamentary control over delegated legislation, including the process by which instruments which are subject to the affirmative procedure are debated, and the effectiveness of parliamentary scrutiny of delegated legislation, including the level of understanding of delegated legislation by parliamentarians, civil servants and the broader community.

Friday 8 March 2019 (Scotland)

Scottish Parliament

The delegation travelled to Edinburgh to view the Scottish Parliament. The delegation toured the Parliament, led by Mr Andrew Proudfoot.

Meeting with Clerks of the Delegated Powers and Law Reform Committee

The delegation met with Clerks and one of the legal advisers to the Delegated Powers and Law Reform Committee. That committee considers and reports on various matters relating to delegated legislation, including all subordinate legislation laid before Parliament and proposed powers in bills to make subordinate legislation. The discussion focused on the role and functions of the Delegated Powers and Law

6 Ruth Fox and Joel Blackwell, *The Devil is in the Detail: Parliament and Delegated Legislation*, Hansard Society, London, 2014.

Reform Committee, the process by which the committee and its secretariat scrutinise delegated legislation, control by the Scottish Parliament over delegated legislation, and the role of policy committees in examining delegated legislation.

Saturday 9 March 2019

The delegation departed Edinburgh on Saturday 9 March 2019 to continue its delegation in Wellington, New Zealand.

New Zealand

Tuesday 12 March 2019 (Wellington)

Meeting with Ross Carter and Jason McHerron

The delegation met with Mr Ross Carter, Principal Counsel at the New Zealand Counsel Office and Secretary of the Commonwealth Association of Legislative Counsel, and Mr Jason McHerron, a Wellington barrister who specialises in advice and litigation on statutory interpretation and the interpretation of subordinate legislation.⁷

Discussions focused on the mechanisms available to the New Zealand Parliament to scrutinise and control delegated legislation, and the functions and operation of the Regulations Review Committee.

Meeting with Dr Dean Knight and Mr Eddie Clarke

The delegation met with Dr Dean Knight and Mr Eddie Clarke. Dr Knight is an Associate Professor in the Faculty of Law at Victoria University of Wellington and Co-Director of the New Zealand Centre for Public Law. Mr Clarke is a Lecturer at the Faculty of Law at Victoria University of Wellington.⁸

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- 7 Mr McHerron acted as counsel to the New Zealand Regulations Review Committee in its inquiry into Parliament's legislative response to future national emergencies. Mr Carter and Mr McHerron also co-authored an authoritative book on New Zealand delegated legislation, *Subordinate Legislation in New Zealand*, with Dr Ryan Malone. See Ross Carter, Jason McHerron and Ryan Malone, *Subordinate Legislation in New Zealand*, LexisNexis, Wellington, 2013.
- 8 Dr Knight and Mr Clarke co-edited the current edition of the Regulations Review Committee Digest, which explains the role and functions of the Regulations Review Committee. See Dean R Knight and Edward Clarke, *Regulations Review Committee Digest*, 6th edition, New Zealand Centre for Public Law, 2016.

Discussions focused on the powers, functions and effectiveness of the Regulations Review Committee, and possible areas for reform.

Meeting with Advisers to the Regulations Review Committee

The delegation met with Ms Linda McIver and Ms Sarah Gwynn, Legislative Counsel in the Parliamentary Law and Policy Team of the Office of the Clerk of the New Zealand House of Representatives. Amongst other functions, this team provides legal advice to the Regulations Review Committee in its scrutiny of delegated legislation.

Discussions focused on the role of the Regulations Review Committee and how, in practice, it undertakes its technical scrutiny and complaints-handling functions.

Wednesday 13 March 2019 (Wellington)

Meeting with Ms Debra Angus

The delegation met with Ms Debra Angus, a former Deputy Clerk of the House of Representatives and legal adviser to multiple parliamentary committees, including the Regulations Review Committee. Ms Angus is currently a public law barrister. Discussions focused on the avenues available to the Regulations Review Committee to identify and resolve technical concerns about delegated legislation.

Lunch with New Zealand – Australia Pacific Parliamentary Friendship Group

The delegation had the opportunity to attend a lunch function hosted by Ms Poto Williams MP, Co-Chair of the New Zealand–Australia Pacific Parliamentary Friendship Group. The delegation met members of the group and its secretariat. Guests included parliamentarians Mr Andrew Falloon and Mr David Bennett, and parliamentary officer Ms Venessa Steele. The lunch provided the delegation with an opportunity to gain a better understanding of the New Zealand parliamentary system and the work of its committees.

Meeting with the Regulations Review Committee

The delegation met with the members of the New Zealand House of Representatives Regulations Review Committee. The committee is responsible for the technical scrutiny of delegated legislation, including legislative instruments and disallowable instruments. The committee also has broader powers to consider and report on any matter relating to regulations, and investigate and report on complaints about the operation of regulations (provided such complaints fall within the scope of the committee's scrutiny principles).⁹

9 House of Representatives (NZ), *Standing Orders of the House of Representatives*, 2017, SO 318.

Discussions focused on the Regulations Review Committee's practices and powers with respect to investigating and reporting on complaints and inquiring into matters of ongoing concern to the committee.

Thursday 14 March 2019

The delegation departed Wellington on Thursday 14 March 2019 to return to Australia.