

The Senate

Standing
Committee for the
Scrutiny of Delegated
Legislation

Annual Report 2019

17 June 2020

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ISSN: 2206-3730 (Print)

ISSN: 2206-3749 (Online)

This document was prepared by the Senate Standing Committee for the Scrutiny of Delegated Legislation and printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

Committee information

Current members

Senator the Hon Concetta Fierravanti-Wells (Chair)	New South Wales, LP
Senator the Hon Kim Carr (Deputy Chair)	Victoria, ALP
Senator Raff Ciccone	Victoria, ALP
Senator Perin Davey	New South Wales, NAT
Senator Nita Green	Queensland, ALP
Senator Paul Scarr	Queensland, LP

Members in 2019

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

Current secretariat

Mr Glenn Ryall, Secretary

Ms Laura Sweeney, Principal Research Officer

Ms Katie Helme, Senior Research Officer (A/g)

Mr Alex Paton, Legislative Research Officer

Secretariat in 2019

Ms Anita Coles, Secretary

Mr Glenn Ryall, Secretary

Ms Laura Sweeney, Secretary (A/g)

Ms Katie Helme, Senior Research Officer (A/g)

Mr Andrew McIntyre, Senior Research Officer

Ms Kate Morris, Legislative Research Officer (A/g)

Mr Alex Paton, 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: sdlc.sen@aph.gov.au

Website: http://www.aph.gov.au/senate_sdlc

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Chapter 1

Introduction

Work of the committee

1.1 The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) (formerly the Senate Standing Committee on Regulations and Ordinances) was established in 1932. Its role is to examine all disallowable instruments of delegated legislation,¹ and to decide whether those instruments comply with the committee's non-partisan scrutiny principles, which focus on statutory requirements, the protection of individual rights and liberties, and ensuring appropriate parliamentary oversight.

1.2 In most years, thousands of instruments of delegated legislation are made, which have the same force in law as primary legislation and may form as much as half of the statutory law of the Commonwealth of Australia.²

1.3 The committee's work may be broadly described as technical legislative scrutiny. The committee does not generally consider the policy merits of delegated legislation (although the policy content of an instrument may provide context for the committee's scrutiny).

1.4 The scope of the committee's scrutiny function is formally defined by Senate standing order 23(3) which, in 2019, required the committee to scrutinise each disallowable instrument of delegated legislation to ensure:

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

1.5 The committee's work is supported by processes for the registration, tabling and disallowance of legislative instruments set out in the *Legislation Act 2003* (Legislation Act).

1.6 This annual report covers the period from 1 January to 31 December 2019.

1 The committee also scrutinises instruments that are not subject to disallowance. However, it only comments on such instruments if they have been misclassified as non-disallowable. From 4 December 2019, the committee has also been empowered to examine instruments subject to affirmative resolution by the Senate.

2 *Odgers' Australian Senate Practice*, 14th Edition (2016), p. 432.

Changes to the committee's powers and practices

1.7 On 27 November 2019, the Senate agreed to amend Senate standing orders 23 and 25(2)(a).³ The amendments accord with the recommendations of the committee's bipartisan report of its inquiry into parliamentary scrutiny of delegated legislation and took effect on 4 December 2019.

1.8 The amendments alter the committee's powers, procedures and scrutiny principles. The committee's inquiry and subsequent changes to its powers and practices are discussed in Chapter 2.

Committee membership

1.9 Senate standing order 23 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. The committee is to be chaired by a government senator.

1.10 The current committee members, as well as a list of members for 2019, can be found at the beginning of this report. A list of current committee members can also be found on the committee's website.⁴

The committee's mode of operation

1.11 In undertaking its work, the committee is supported by a secretariat usually comprising a secretary, principal research officer, senior research officer and legislative research officer.⁵

1.12 The committee also obtains advice from an external legal adviser, who is appointed by the committee with the approval of the President of the Senate. Associate Professor Andrew Edgar served as the committee's legal adviser during the reporting period.

3 The Senate agreed to General Business Notice of Motion No. 84, standing in the name of the Chair of the Standing Committee on Regulations and Ordinances on 27 November 2019. The notice may be accessed at: <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fjournals%2Fcc444f08-d21e-4eb4-b9d0-2c9151c72bd2%2F0015%22>.

4 https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Committee_Membership.

5 The secretariat is staffed by parliamentary officers drawn from the Department of the Senate's Legislative Scrutiny Unit, who regularly work across multiple scrutiny committee secretariats. The secretariat usually comprises three to four staff.

Delivery of instruments

1.13 Under the Legislation Act, all legislative instruments must be registered on the Federal Register of Legislation as soon as practicable after they are made, and must be tabled in both Houses of the Parliament within six sitting days of registration.⁶ Once registered, instruments are delivered by the Office of Parliamentary Counsel to Parliament for tabling, and to the committee secretariat.

Scrutiny of instruments

1.14 Each instrument is scrutinised by the committee secretariat and the legal adviser against the committee's scrutiny principles. The committee meets regularly during Senate sitting weeks to consider any instruments that may give rise to a scrutiny issue.

1.15 Where an instrument raises such a scrutiny concern, the committee's usual approach is to include the instrument in its *Delegated Legislation Monitor* (the Monitor) and write to the responsible minister or agency seeking further explanation or requesting specific action to address the relevant issue.

The committee's use of the disallowance process

1.16 The committee's scrutiny of instruments is generally conducted within the timeframes that apply to the disallowance process. Working within these timeframes ensures that the committee is able, if necessary, to seek disallowance of an instrument about which it has concerns. The Senate has never rejected a recommendation from the committee that an instrument should be disallowed.⁷

1.17 In cases where the 15 sitting days available for giving a notice of motion for disallowance are likely to expire before a matter is resolved, the committee may lodge a notice of motion for disallowance in order to protect the Senate's ability to subsequently disallow the instrument in question.⁸ This extends the applicable disallowance period by a further 15 sitting days. The committee refers informally to these notices as 'protective' notices.

1.18 The committee may otherwise place a notice of motion to disallow an instrument where it considers that the instrument raises serious, unresolved scrutiny concerns, and should be drawn to the Senate's attention or disallowed. In these circumstances, the committee will advise the relevant minister in writing of its intention to move to disallow the instrument, and will publish a summary of its scrutiny concerns in Chapter 1 of its *Delegated Legislation Monitor*.⁹

6 *Legislation Act 2003*, sections 15G, 15H and 38.

7 *Odgers' Australian Senate Practice*, 14th Edition (2016), p. 437.

8 *Odgers' Australian Senate Practice*, 14th Edition (2016), p. 438.

9 The committee commenced this practice after 1 July 2019.

1.19 In the vast majority of cases, these notices are withdrawn when the committee receives a satisfactory response from the relevant minister or agency, for example providing information that addresses the committee's concerns or undertaking to amend the instrument or its explanatory statement. Where a satisfactory response is received, the committee's usual process is for the Chair to withdraw the notice of motion, having first notified the Senate of the intention to do so.¹⁰

Undertakings

1.20 Ministers or agencies may provide an undertaking to address the committee's concerns by taking steps at some point in the future. Typically, they will undertake to amend the instrument, its explanatory statement or its enabling legislation. The acceptance of such undertakings by the committee has the benefit of securing an acceptable outcome in relation to the committee's scrutiny concerns without interrupting the administration of government by disallowing the instrument in question.

Interaction with other legislative scrutiny committees

1.21 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)¹¹ and the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee).¹² The secretariats supporting the three committees together make up the Legislative Scrutiny Unit.

1.22 The work of the three committees is complementary in many respects. The committee therefore monitors the work of the PJCHR and the Scrutiny of Bills committee and, where appropriate, considers relevant matters raised by these committees or refers matters to them.

Committee publications

1.23 Committee publications may be accessed on the committee's website.¹³ A brief overview of these publications is provided below.

10 Senate Standing Order 78 provides that any other senator may take over a notice of motion for disallowance once the intention to withdraw is advised to the chamber, and before the notice is withdrawn. A senator who does so may then pursue the disallowance motion on any grounds he or she wishes.

11 www.aph.gov.au/joint_humanrights.

12 www.aph.gov.au/senate_scrutiny.

13 www.aph.gov.au/senate_sdjc.

Delegated Legislation Monitor¹⁴

1.24 The Monitor is the regular scrutiny report on the work of the committee. It is published in each sitting week of the Senate. It identifies instruments in relation to which the committee is continuing to engage with the relevant minister or agency, or has concluded its examination. The Monitor also lists all the instruments which specify government expenditure that have been registered during the reporting period, and records undertakings have been made or implemented to address the committee's scrutiny concerns.

Scrutiny News

1.25 The committee secretariat prepares a brief *Scrutiny News* publication each sitting week which is sent to all senators and their staff, committee office staff, and interested external individuals and organisations that have subscribed to the scrutiny mailing list. *Scrutiny News* highlights recent comments drawn from material in the committee's Monitor and the Scrutiny of Bills committee's *Scrutiny Digest*, with a particular focus on complex issues. *Scrutiny News* is also used to raise awareness about the committees and their functions.

1.26 Past editions of *Scrutiny News*, as well as information about subscribing to the mailing list, are available on the Scrutiny of Bills committee's website.¹⁵

Guidelines

1.27 In 2019, the committee had published guidelines on a number of matters relevant to its scrutiny work. These matters included:

- the application of the committee's scrutiny principles;
- general requirements for preparing explanatory statements;
- addressing consultation in explanatory statements;
- incorporation of documents;
- regulations that amend the Financial Framework (Supplementary Powers) Regulations 1997; and
- instruments that amend or repeal other instruments.

1.28 The committee's guidelines are regularly reviewed by the committee's secretariat, and will be replaced in 2020 with new guidelines that reflect the changes to the committee's powers, procedures and scrutiny principles that took effect on 4 December 2019.

14 Monitors for 2018, and for previous years, may be accessed via the committee's webpage.

15 https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills/Scrutiny_News.

Index of instruments

1.29 The *Index of Instruments* is an alphabetical list of all instruments about which the committee has raised a scrutiny concern in a particular year.

Disallowance Alert

1.30 The *Disallowance Alert* is a webpage listing all instruments for which a notice of motion for disallowance has been lodged in either House (whether by the committee or by an individual senator or member). The progress and outcome of all disallowance notices is also recorded.

Other resources

1.31 A number of other resources relevant to the committee can be accessed on the Senate website.¹⁶ A brief overview of these resources is provided below.

Senate Disallowable Instruments List

1.32 The Senate Disallowable Instruments List is a list of all disallowable instruments tabled in the Senate.¹⁷ This online resource may be used to ascertain whether or when an instrument has been tabled in the Senate, and how many sitting days remain in which a notice of motion for disallowance may be given. The list is updated after each sitting day.

Senate seminars on scrutiny of delegated legislation

1.33 The Senate Procedure and Research Section organises half-day seminars on the scrutiny of delegated legislation. These are tailored to parliamentary staff, government officers and other stakeholders whose work or interests intersect with the work of the committee.

Guides to Senate Procedure

1.34 The Guides to Senate Procedure are a series of guidance notes designed to provide a practical understanding of the procedures governing the work of the Senate. Of particular relevance to the work of the committee is Brief No. 19 on disallowance.

Odgers' Australian Senate Practice

1.35 *Odgers' Australian Senate Practice* is an authoritative reference work on all aspects of the Senate's powers, procedures and practices.

16 http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/leginstruments.

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

Acknowledgements

1.36 The committee greatly appreciates the assistance of its secretariat and legal adviser, Associate Professor Andrew Edgar, during the reporting period.

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

Chapter 2

2019 inquiry into parliamentary scrutiny of delegated legislation

Overview

2.1 In late 2018, 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. The committee's decision was informed by a range of matters, including the lack of substantive changes to the committee's scrutiny principles since the committee's establishment, the increased volume and complexity of delegated legislation, and developments in other jurisdictions.

2.2 This chapter provides an overview of the committee's inquiry, and the progress towards the implementation of the inquiry report recommendations in 2019.

Referral of the inquiry

2.3 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

2.4 On 2 April 2019, the Senate extended the reporting deadline to 3 June 2019.² The committee presented its final report on 3 June 2019.

Conduct of the inquiry

Delegation

2.5 Between 2 and 14 March 2019, the Chair and Deputy Chair of the committee formed a delegation to travel to the United Kingdom and New Zealand to inform the inquiry. The delegation met with a number of scrutiny committees and subject matter experts.

Submissions

2.6 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 and Twitter account;
- *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.

2.7 The committee received 14 public submissions. The committee did not hold any public hearings as part of the inquiry.

Inquiry report

2.8 The committee presented its report to the Senate on 3 June 2019. The committee's report is divided into three parts:

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.

-
- **Part I – Background**, which includes a background to the inquiry and into the committee's role;
 - **Part II – Future direction and effectiveness of the committee**, which provides an overview of the committee's powers and functions, its scrutiny principles and its work practices; and
 - **Part III – Framework for scrutiny and control of delegated legislation**, which considers the adequacy of the existing framework for parliamentary control and scrutiny of delegated legislation.

Recommendations

2.9 In its report the committee made 22 recommendations, related to the committee's powers, procedures, scrutiny principles and work practices, and to the broader framework of parliamentary scrutiny of delegated legislation. The recommendations made by the committee include:

- **Recommendations to the Senate** to change the Senate standing orders relating to the committee's powers, functions and scrutiny principles and take greater note of the committee's concerns. These include giving the committee an own-motion inquiry power to inquire into technical scrutiny issues;
- **Recommendations to the government** to improve the manner in which instruments commence and are exempted from disallowance and sunseting, the process by which executive expenditure is specified by delegated legislation, and the training provided to departmental officers about delegated legislation;
- **Recommendations to the Office of Parliamentary Counsel** to request revisions to their drafting directions, to encourage delegated legislation to be in the form of regulations, rather than instruments, and to amend the Federal Register of Legislation to make it easier to identify instruments which are exempt from disallowance;
- **Recommendations to the Scrutiny of Bills committee** to consider proposing an amendment to the standing orders to defer the consideration of bills if the Scrutiny of Bills committee has not yet tabled a report on the relevant bill; and
- **Recommendations to the parliamentary departments** to consider how they can best provide consolidated and searchable information about the status of disallowable legislative instruments, and the committee's scrutiny concerns relating to such instruments.

Committee actions

2.10 The committee also identified a number of actions that it would implement in order to simplify and expedite its work processes and to enhance its capacity to draw significant scrutiny concerns to the attention of the Senate. Key features include:

- lodging a protective notice of motion to disallow every legislative instrument which the committee considers raises significant technical scrutiny concerns that should be drawn to the attention of the Senate;
- making a statement to the chamber to accompany the tabling of a Monitor, to highlight significant scrutiny concerns;
- where appropriate, calling on departmental officers or ministers to appear before it, where this would assist in resolving scrutiny concerns;
- reporting on outstanding undertakings made by government ministers;
- listing expenditure specified by delegated legislation in the Monitor; and
- engaging directly with agencies, via the committee secretariat, to seek further information or clarification, before the committee escalates technical scrutiny matters to the relevant minister.

Government response

2.11 The government responded to the inquiry report on 8 November 2019. The response addressed the recommendations directly made to the government, and can be viewed on the committee's website.³

Implementation of inquiry recommendations

2.12 Since its inquiry report was tabled, the committee has been progressively working towards implementing its recommendations and committee actions. The section below outlines the most significant steps that have been taken to implement the committee's recommendations in 2019.

3 Australian Government, *Australian Government response to the Senate Standing Committee on Regulations and Ordinances: Parliamentary Scrutiny of delegated legislation*, November 2019. Available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/DelegatedLegislation/Government_Response.

Amendments to Senate standing orders 23 and 25(2)(a)

2.13 On 31 July 2019, the Chair lodged a notice of motion to amend Senate standing orders 23 and 25(2)(a) to accord with the recommendations made in the committee's inquiry report.⁴

2.14 The amendments were aimed at clarifying the scope of the committee's scrutiny principles and provide clearer guidance to senators, ministers and departmental officials as to the committee's role and expectations. In summary, the changes aimed to:

- modernise language and procedures;
- clarify the standing orders to reflect existing practices; and
- promote consistency with other Senate standing committees and scrutiny committees in other Westminster jurisdictions.

2.15 On 27 November 2019, the Senate agreed to the notice of motion to amend the standing orders. The amendments took effect on 4 December 2019. As the amendments took effect outside of the committee's reporting period, the committee did not scrutinise any instruments according to the updated scrutiny principles in 2019. The committee subsequently published an explanatory note on its website, outlining the amendments.⁵

Changes to committee work practices

2.16 In accordance with the committee actions set out in the inquiry report, the committee has implemented a number of changes to its work practices since 30 June 2019. These committee actions are summarised at paragraph 2.10.

Correspondence with the Scrutiny of Bills committee

2.17 On 1 August 2019, the committee wrote to the Scrutiny of Bills committee to draw that committee's attention to recommendations 9 and 10 of the inquiry report. The relevant recommendations relate to the passage of bills prior to reporting by the Scrutiny of Bills committee and bills which may inappropriately delegated legislative powers.

4 General Business Notice of Motion No. 84,
<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query%3DId%3A%22chamber%2Fjournals%2Fcc444f08-d21e-4eb4-b9d0-2c9151c72bd2%2F0015%22>.

5 See https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Changes_to_committee_standing_orders.

Chapter 3

Scrutiny work of the committee in 2019

Overview

3.1 This chapter provides information about the work of the committee in 2019, including relevant statistics. It also assesses the impact of the committee's work during this period.

Instruments considered by the committee

3.2 The committee held 13 private meetings in 2019,¹ at which it considered 1434 disallowable legislative instruments.²

3.3 The number of disallowable instruments received and scrutinised in 2019 was slightly lower than for the previous reporting period (the committee considered 1570 disallowable instruments in 2018), but consistent with other recent reporting periods (1472 disallowable instruments were scrutinised in 2017).

3.4 The committee also examined 136 replacement or supplementary explanatory statements to instruments in 2019. This was higher than for the 2018 and 2017 reporting period, during which the committee examined 121 and 74 replacement or supplementary explanatory statements, respectively.

Delegated Legislation Monitors and related correspondence

3.5 In 2019, the committee tabled 10 scrutiny reports. The scrutiny report is called the *Delegated Legislation Monitor* (Monitor).³

3.6 From 1 July 2019, the committee changed the way it reported in its Monitor in line with the recommendations of its inquiry into parliamentary scrutiny of delegated legislation. The changes were aimed at highlighting the most significant scrutiny issues identified by the committee and drawing those matters to the attention of the Senate.⁴

1 This includes 12 meetings relating to the scrutiny of instruments and other routine business of the committee, and one extraordinary private meeting for the appointment of a legal adviser.

2 Any instruments that were initially misclassified as disallowable but that were actually exempt from disallowance are not counted in this figure.

3 No. 1 of 2019, tabled on 13 February 2019 to No. 10 of 2019, tabled on 4 December 2019. See https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Monitor.

4 Further information on the changes to the committee's work practices can be found in Chapter 2 of this report.

3.7 To enable the committee to focus its attention on the most significant scrutiny issues, the committee began seeking information from agencies directly to assess whether it was necessary to address the issue with the relevant minister.

3.8 In total, the committee raised initial concerns and sought responses from the relevant agency or minister in relation to 206 instruments. The committee also drew 26 instruments to the attention of the Senate in its Monitor and concluded its examination of 172 instruments.⁵

3.9 The Chair gave six tabling statements when tabling Monitors in 2019 to draw the Senate's attention to particular instruments or issues that raised significant scrutiny concerns.⁶

Instruments of concern

3.10 Of the disallowable instruments examined by the committee in the reporting period,⁷ 232 were identified as raising one or more concerns which required a response from the relevant agency or minister, or else were drawn to the attention of the Senate.⁸ The issues raised in relation to the instruments correspond with the committee's four scrutiny principles,⁹ as shown in **Table 1** below.

Table 1: Issues identified by the committee in 2019

Type of correspondence	Issues raised against scrutiny principles under Senate standing order 23(3) ¹⁰				Total
	(a)	(b)	(c)	(d)	
Ministerial	34	26	17	47	124
Agency	93	21	31	7	152
TOTAL	127	47	48	54	276

5 The discrepancy between the number of responses and the number of concluded entries arises because some instruments were initially commented on in the previous reporting period, while others will have been concluded in the next reporting period.

6 The Chair made tabling statements for Monitors 3, 4, 6, 7, 8 and 9 of 2019.

7 The committee scrutinises all Commonwealth disallowable legislative instruments. The Monitor may also include comment on instruments which are exempt from disallowance in cases where these were initially misclassified as disallowable.

8 Details of these instruments may be found on the 'Index of Instruments' webpage at https://www.apf.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Index.

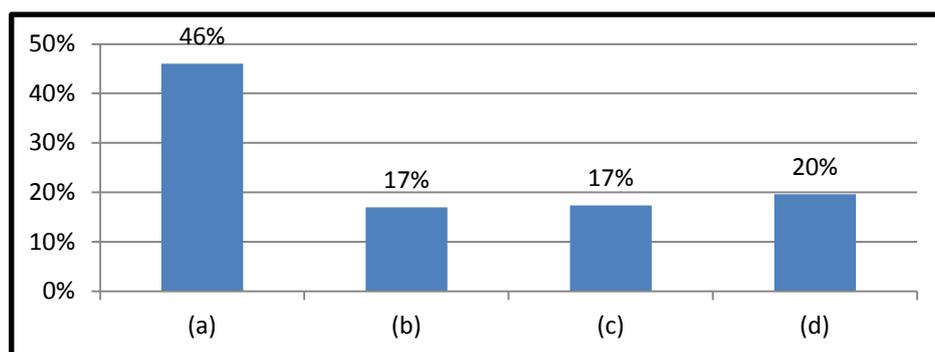
9 The committee's scrutiny principles changed on 4 December 2019. All instruments during the relevant reporting period were scrutinised against the committee's old principles. Further information on committee's new principles can be found on the committee's website at: https://www.apf.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Guidelines.

10 On occasion, a comment may refer to more than one scrutiny principle.

3.11 As **Table 1** demonstrates, the majority of issues that the committee identified were related to scrutiny principle (a), which requires that instruments of delegated legislation be made in accordance with statute (including the requirements of the Legislation Act, the *Acts Interpretation Act 1901* (Interpretation Act), the Constitution, and the instrument's enabling Act). While most issues were raised under principle (a), the committee observed a continued decline in number of issues raised under principle (a) during 2019 from previous years.¹¹ Most of the issues raised under principle (a) were addressed with the relevant agency rather than the minister.

3.12 The spread of issues across the committee's remaining scrutiny principles reflects a general increase of issues raised from the previous years. In particular, in 2019 there was a substantial increase in the proportion of concerns raised under scrutiny principle (d), which relates to matters more appropriate for parliamentary enactment.¹² **Figure 1** below shows the breakdown of issues against the committee's principles as recorded in the reporting period.

Figure 1: Issues raised against committee's scrutiny principles



Ministerial and agency responses

3.13 In the 2019 reporting period, the committee received 90 responses from ministers. Ministerial correspondence is published alongside the relevant Monitor on the committee's website.¹³

3.14 In addition, the committee received 106 responses from agencies. The committee does not publish the content of any correspondence received from an agency. However, the committee publishes a concise record of the instruments in

11 In 2018 the committee raised 149 issues raised under scrutiny principle (a), while in 2017 it raised 184 issues under that principle.

12 In 2017 the committee raised 22 issues under principle (d), while in 2018 it raised 42. Similarly, the issues raised under principle (c) increased from 11 in 2017 and 32 in 2018.

13 See https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Monitor. This follows a decision taken in August 2017 not to include ministerial correspondence in printed copies of the monitor.

relation to which it is engaging with an agency in its Monitor. This record includes the name of the instrument and the relevant scrutiny principle. The committee also records any undertakings that an agency makes to address committee concerns in the Monitor.

Disallowance notices

3.15 The Chair, on behalf of the committee, gave 19 notices of motion to disallow an instrument in the 2019 reporting period.

3.16 From 30 June 2019, the committee recommenced its past practice of placing notices of intention to disallow instruments that raised issues which it had been unable to address with the relevant minister, and which it considered should be drawn to the attention of the Senate. Of the notices placed by the Chair, two were placed to draw the attention of the Senate to the committee's scrutiny concerns.

3.17 All but five of the notices placed by the committee Chair in 2019 were subsequently withdrawn, generally following the receipt of a satisfactory ministerial or agency response or an undertaking that addressed the committee's concerns.¹⁴

3.18 Aside from the committee's notices, during the reporting period individual senators lodged 14 notices of motion to disallow instruments. Of these, one instrument was disallowed in part by the Senate. Seven motions were debated in the Senate but did not result in disallowance. Two notices were withdrawn. As three notices were not resolved prior to the prorogation of the 45th Parliament on 11 April 2019, the instruments were deemed to be tabled again in the Senate on the first sitting day of the 46th Parliament on 2 July 2019.¹⁵ One notice remained unresolved at the end of 2019.

3.19 The Parliamentary Joint Committee on Human Rights lodged one notice of motion to disallow an instrument in the Senate. The notice was subsequently withdrawn.

3.20 In addition, two notices were placed in the House of Representatives. As neither of the notices was resolved prior to the prorogation of the 45th Parliament, the relevant instruments were deemed to be tabled again in the House of Representatives on the first sitting day of the 46th Parliament.

3.21 Details of all disallowance motions given during the reporting period are available on the committee's *Disallowance Alert* webpage for 2019.¹⁶

14 These five notices of motion were pending at the end of 2019, and may be withdrawn in 2020 on receipt of satisfactory responses or implemented undertakings.

15 Pursuant to subsection 42(3) of the *Legislation Act 2003*.

16 See Parliament of Australia, *Disallowance Alert 2019*, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Alerts/alert2019.

Impact of the committee's work

3.22 In 2019, the committee continued its engagement on matters of significant concern arising from its scrutiny of legislative instruments. In general terms, the committee has observed that its regular and consistent public commentary and engagement with rule-makers and their agencies has had a positive impact on the number of instruments that raised scrutiny concerns,¹⁷ and on the number of undertakings that have been implemented to address the committee's concerns.

Undertakings

3.23 From 30 June 2019, the committee recommenced its past practice of reporting on outstanding undertakings that had been made in response to its concerns. The committee observed a significant increase in the number of implemented undertakings after recommencing this practice.¹⁸ Notably, of the replacement explanatory statements that were scrutinised by the committee in 2019, 75% were registered to address the committee's concerns.¹⁹

3.24 The committee also noted an increased number of undertakings to amend instruments or their enabling legislation.²⁰ In 2019, the committee began placing notices of motion to disallow instruments for which the relevant agency or minister had made an undertaking to amend or revoke the instrument, in order to ensure that

17 In 2019, the committee identified and raised concerns relating to 190 instruments. In 2018, the committee raised concerns about 262 instruments which raised one or more concerns.

18 Between 1 January and 30 June 2019, the committee noted 8 implemented undertakings. By contrast, after 1 July 2019 the committee has recorded 100 implemented undertakings in its Monitors.

19 Of the 136 replacement or supplementary explanatory statements that the committee scrutinised during 2019, 102 were for instruments that the committee had raised concerns with the relevant agency or minister.

20 For example, on 11 September 2019 the Minister for Water Resources, Drought, Rural Finance, Natural Disaster and Emergency Management undertook to progress amends to the *Water Act 2007* in response to the concerns the committee had raised regarding the incorporation of certain documents by the Water Amendment (Murray Darling Basin Agreement—Basin Salinity Management) Regulations 2018 [F2018L01674]. For further information see Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 6 of 2019*, pp. 1-4.

the undertaking was implemented.²¹ The committee noted an increased responsiveness and timeliness in implementing undertakings following the commencement of this practice.

3.25 **Table 2** below outlines the proportion of undertakings that remain outstanding compared to those that have been implemented during 2019.

Table 2: Undertakings addressing the committee's concerns

Status	Type of undertaking			Total
	Amend ES	Amend/revoke instrument	Amend Act or enabling legislation	
Implemented	102	5	1	108
Outstanding	12	2	2	16
TOTAL	114	7	3	124

Private briefings

3.26 In 2019, the committee observed an increased interest by ministers and agencies in engaging with the committee through a variety of mechanisms to resolve technical scrutiny issues. From 30 June 2019, the committee recommenced its past practice of holding private briefings. The committee held three private briefings with the relevant minister or rule-maker, or senior departmental officers, in order to address scrutiny concerns related to three instruments.²² It was the first time in 19 years that the committee held a private briefing with departmental officers,²³ and the first time that the committee has ever held a private briefing with a minister.

Other impacts

3.27 In addition to the committee's influence in the legislative drafting process and in engagement with scrutiny issues, the committee's work also contributed to more informed consideration of relevant issues in other parliamentary committees'

21 The committee used this approach with regard to the: Air Services Regulations 2019 [F2019L00371]; CASA EX101/19 — Helicopter Aerial Application Endorsements Exemption 2019 [F2019L01132]; Health Insurance (Diagnostic Imaging Services Table) Regulations 2019 [F2019L00563]; Migration (Fast Track Applicant Class – Temporary Protection and Safe Haven Enterprise Visas) Instrument 2019 [F2019L00506]; Road Vehicle Standards Rules 2018 [F2019L00198]; Southern and Eastern Scalefish and Shark Fishery (Closures Variation) Direction 2019 [F2019L00650].

22 Further information regarding each of these private briefings can be found on the committee's website at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Private_briefings/2019.

23 See Senate Standing Committee on Regulations and Ordinances, *109th Report, Annual Report 1999-2000*, pp. 27-29.

reports, and more informed debate relating to delegated legislation in Parliament more broadly.

3.28 In order to foster further improvements, the committee continued to engage directly with agencies by providing targeted or requested advice on legislative requirements and the committee's expectations relevant to the drafting of various instruments and their explanatory materials. In 2019, the committee developed or amended the following guidance materials, available on the committee's website:

- Guide to working with the committee – Guidance for Agencies and Departmental Liaison Officers;²⁴
- Changes to committee standing orders;²⁵ and
- Application of the committee's scrutiny principles.²⁶

3.29 The committee's influence is also reflected in formal guidance available to departments and agencies as part of the legislative drafting process. In particular, the Office of Parliament Counsel's *Instruments Handbook* draws attention to the committee's long-standing scrutiny concerns.²⁷

3.30 As one of the oldest technical scrutiny committees in the world, the committee was invited to participate in a UNDP program on Strengthening Myanmar Machinery of Government. As part of the program, on 17 October 2019, the Chair and a committee member met with a delegation of officials from Myanmar to discuss the committee's history and approach to technical legislative scrutiny.

24 See https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Guidelines/Guide_to_working_with_the_committee.

25 See https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Changes_to_committee_standing_orders.

26 See https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Guidelines.

27 Office of Parliamentary Counsel, *Instruments Handbook*, reissued May 2019, available from <http://www.opc.gov.au/about/documents.htm>.

Chapter 4

Significant scrutiny issues

Overview

4.1 This chapter outlines the most significant scrutiny issues that the committee identified in 2019. It focuses on:

- significant case studies related to the committee's role in promoting compliance with its scrutiny principles; and
- key ongoing scrutiny concerns that the committee will continue to monitor in the future.

Significant case studies and undertakings

4.2 The following section outlines the most significant undertakings implemented during 2019 to address the committee's scrutiny concerns. The examples provided illustrate the committee's approach to its scrutiny role and identify significant issues as assessed against the scrutiny principles outlined in Senate standing order 23(3).

Significant matters in delegated legislation

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

4.4 In 2019, the committee raised concerns regarding 54 issues related to instruments that appeared to include matters that it considered would more appropriately be enacted via primary legislation. This reflected a substantial increase from previous years.¹ The committee also noted an increase in the number of undertakings made and implemented by the relevant agency or minister in response to the concerns it raised under principle (d).²

4.5 The committee continued to raise scrutiny concerns about instruments which include matters with a significant impact on personal rights and liberties in 2019. The committee's longstanding view is that significant matters, including those with a substantial impact on personal rights and liberties, whether negative or positive, are more appropriately enacted via primary legislation. This is to ensure

1 In 2017 the committee raised 22 issues under principle (d), while in 2018 it raised 42.

2 Agencies and ministers made 9 undertakings in 2019 in response to concerns raised by the committee under principle (d). Of these, 8 were implemented by the end of 2019.

that such matters are subject to the full range of parliamentary scrutiny inherent in the passage of an Act of Parliament.

4.6 In response to these scrutiny concerns, the committee drew two instruments, which contained significant matters with the potential to affect personal rights and liberties, to the attention of the Senate in Chapter 1 of its *Delegated Legislation Monitor* (Monitor). The committee also resolved to place (or keep in place) two notices of motion to disallow these instruments to highlight its scrutiny concerns and provide the Senate more time to consider the instrument with the benefit of the committee's comments.

Immigration (Guardianship of Children) Regulations 2018 [F2018L01708]

4.7 The committee corresponded with the Minister for Immigration, Citizenship, Migration Services and Multicultural Affairs between February and November 2019 regarding its concerns about the effect of an instrument which prescribed the grounds on which a non-citizen child may become the ward of the minister. The committee was concerned that matters relating to the circumstances in which a child could be made a ward of the minister, which could be said to affect the rights and interests of a non-citizen child in a significant way, would be more appropriately enacted through primary, rather than delegated, legislation.

4.8 The committee subsequently drew the instrument to the attention of the Senate in *Delegated Legislation Monitor 4 of 2019* and placed a notice of motion to disallow the instrument on 1 August 2019.³

4.9 At the request of the minister, on 14 October 2019 the committee held a private briefing with senior departmental officers from the Department of Home Affairs to attempt to resolve the committee's scrutiny concerns.⁴ This was the first private briefing that the committee had held with departmental officials since June 2000.⁵

4.10 Following the private briefing and further correspondence with the committee, the minister undertook to conduct a review of the instrument and the regulation-making powers in the *Immigration (Guardianship of Children) Act 1946*. Based on the minister's undertaking, the committee concluded its examination of the instrument in Chapter 1 of *Delegated Legislation Monitor 8 of 2019* and resolved to

3 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 4 of 2019*, pp. 1-6.

4 For further information of the private briefing, see https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Private_briefings.

5 See Senate Standing Committee on Regulations and Ordinances, *109th Report, Annual Report 1999-2000*, pp. 27-29.

withdraw the notice of motion to disallow the instrument on 13 November 2019.⁶ In her tabling statement for the Monitor, the Chair noted:

The satisfactory resolution of this matter provides a model for how ministers and agencies can engage with the committee in the future, to ensure that delegated legislation is made in a manner that complies with the principles of parliamentary oversight.⁷

Quality of Care Amendment (Minimising Use of Restraints) Principles 2019
[F2019L00511]

4.11 Between July and September 2019, the committee also sought advice from the Minister for Aged Care and Senior Australians about the appropriateness of regulating the use of physical and chemical restraints in aged care facilities in a legislative instrument. The committee was concerned that there was insufficient justification for the inclusion of matters with the potential to significantly affect the rights and liberties of individuals in residential aged care in delegated legislation.

4.12 On 16 September 2019, the committee resolved to place a 'protective' notice of motion to disallow the instrument in order to provide the committee with additional time to resolve the matter with the minister. Following further correspondence, the committee resolved to draw its concerns to the attention of the Senate in Chapter 1 of *Delegated Legislation Monitor 7 of 2019*.⁸ The committee also resolved not to withdraw the notice of motion it had placed to disallow the instrument to highlight its scrutiny concerns.

4.13 At the minister's request, the committee held a private briefing with the minister and senior departmental officers on 12 November 2019.⁹ It was the first briefing that the committee has ever held with a minister.

4.14 Following constructive discussions at the private briefing, the minister undertook to amend Part 4A of the Quality of Care Principles 2014 to provide for a review of the operation of the provisions inserted by the instrument after 12 months, and to repeal the provisions after two years. The undertaking was subsequently implemented on 25 November 2019.¹⁰ The committee welcomed this

6 See Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 8 of 2019*, pp. 1-5.

7 See the Chair's tabling statement for Monitor 8 at https://www.aph.gov.au/-/media/Committees/Senate/committee/regord_ctte/tabling_statements/2019/mon_08.pdf?a=en&hash=20BF2C43BBA70D59BEA39592B3708E644EBBE06D.

8 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 7 of 2019*, pp. 1-6.

9 For further information of the private briefing, see https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Private_briefings.

10 The undertaking was implemented by the registration of the Quality of Care Amendment (Reviewing Restraints Principles) Principles 2019 [F2019L01505].

undertaking in *Delegated Legislation Monitor 9 of 2019* and withdrew the notice of motion to disallow the instrument on 28 November 2019.¹¹

Personal rights and liberties

4.15 Scrutiny principle (b) of the committee's terms of reference requires the committee to scrutinise instruments to ensure that they do not unduly trespass on individual rights and liberties. In 2019, the committee raised 47 issues under principle (b), which related to a range of issues, including:

- the abrogation of the privilege against self-incrimination;
- retrospective application;
- immunity from liability;
- strict or absolute liability offences;
- the exercise of coercive powers;
- the limitation or denial of procedural fairness;
- the collection, use or disclosure of personal information; or
- the reversal of the evidential or legal burden of proof.

4.16 In 2019, the committee noted an increased willingness of agencies and ministers to make significant undertakings in response to the committee's concerns regarding personal rights and liberties.

4.17 For example, from July to November 2019, the committee corresponded with the Minister for Infrastructure, Transport and Regional Development regarding an instrument which conferred immunity from civil liability on a range of persons and entities.¹² The immunity applied to acts done or omitted to be done in good faith, in the exercise or purported exercise of powers and functions conferred by the *Air Services Act 1995* or the instrument.

4.18 The committee was concerned that the instrument conferred immunity from liability on a broad class of persons and entities, which would result in the removal of any common law right to bring an action to enforce legal rights unless it could be demonstrated that the person or entity was not acting in good faith.

4.19 In general, the committee expects that, if an instrument confers immunity from civil liability (particularly where this could affect individual rights), the immunity should be soundly justified. This is particularly important where an instrument confers such immunity from liability on a broad range of persons and entities.

11 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 9 of 2019*, pp. 1-4.

12 The committee raised concerns regarding the Air Services Regulations 2019 [F2019L00371].

4.20 In response to the committee's scrutiny concerns, the minister undertook to amend the instrument to limit immunity from civil liability to Airservices Australia and its employees. The committee placed a 'protective' notice of motion to disallow the instrument on 11 September 2019 to ensure that the undertaking was implemented. The undertaking was implemented on 5 November 2019,¹³ and the committee subsequently withdrew the notice of motion on 14 November 2019.

Incorporation of documents by reference

4.21 Scrutiny principle (a) of the committee's terms of reference requires the committee to scrutinise each instrument to determine whether it accords with statute, including the requirements of the *Legislation Act 2003* (Legislation Act) with regard to the incorporation of documents by reference.¹⁴

4.22 In 2019, the committee identified concerns regarding, sought advice on or drew to the attention of the Senate to 41 instruments which raised issues related to the incorporation of documents by reference. The committee was concerned with instruments which incorporated documents without containing a description of the documents, the manner in which they were incorporated (at a particular time or as in force from time to time) or how they may be obtained free of charge. The committee concluded its examination of the majority of these instruments following responses and undertakings from the relevant agency.¹⁵

4.23 The committee was particularly concerned about three instruments which appeared to incorporate documents as in force from time to time, without including an explanation of the source of authority to do so in their explanatory materials.¹⁶

4.24 Between February and September 2019, the committee corresponded with the Minister for Water Resources, Drought, Rural Finance, Natural Disaster and Emergency Management regarding an instrument which appeared to incorporate a document as in force from time to time without authority to do so in its enabling legislation.¹⁷

13 The undertaking was implemented by the registration of the Air Services Amendment Regulations 2019 [F2020L01424].

14 *Legislation Act 2003*, section 14.

15 The committee raised 17 instruments with the relevant minister that raised issues related to incorporation. By contrast, the committee raised 25 instruments with the relevant agency.

16 The committee raised concerns regarding the Telecommunications (Carrier Licence Conditions – Telstra Corporation Limited) Declaration 2019 [F2019L00443], Fisheries Management Regulations 2019 [F2019L00383], and Water Amendment (Murray Darling Basin Agreement—Basin Salinity Management) Regulations 2018 [F2018L01674].

17 The committee raised concerns about the Water Amendment (Murray Darling Basin Agreement—Basin Salinity Management) Regulations 2018 [F2018L01674]. See Monitors 1, 2, 4 and 6 of 2019.

4.25 The minister advised that the instrument did not incorporate the document. However, the committee remained concerned that the instrument did appear to incorporate the document from time to time and its enabling legislation, the *Water Act 2007* (Water Act), did not provide legislative authority to do so. The committee considered that it would be appropriate to amend the Water Act to expressly authorise the incorporation of documents in this manner.

4.26 The committee drew its concerns to the attention of the Senate in Chapter 1 of *Delegated Legislation Monitor 4 of 2019* and placed a notice of motion to disallow the instrument on 1 August 2019.¹⁸

4.27 Following consideration of the committee's comments, the minister undertook to progress amendments to the Water Act to remove doubt about whether the document could be incorporated as in force for time to time. The committee concluded its examination of the instrument in *Delegated Legislation Monitor 6 of 2019* and resolved to withdraw the notice of motion to disallow the instrument on 18 September 2019.¹⁹ In a statement made when tabling the Monitor, the Deputy Chair noted:

This matter highlights the effectiveness of the committee in promoting transparency and accountability in relation to delegated legislation. The committee thanks the minister and the department for the respect they have shown the committee, and for their willingness to engage constructively with the committee's scrutiny concerns.²⁰

Sub-delegation

4.28 When delegated legislation purports to sub-delegate statutory powers without express or implied authorisation in the enabling legislation, powers will be exercised in a manner that Parliament never intended. The committee's expectations in relation to sub-delegation accord with the approach of the Senate Standing Committee for the Scrutiny of Bills, which has consistently drawn attention to legislation that allows delegation to a relatively large class of persons, with little or no specificity as to their qualifications or attributes.

4.29 Generally, the committee considers that a limit should be set in legislation on either the sorts of powers that might be delegated or on the categories of people to whom powers might be delegated; and delegates should be confined to the holders

18 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 4 of 2019*, pp. 7-13.

19 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 6 of 2019*, pp. 1-4.

20 See the Deputy Chair's tabling statement for Monitor 6 at https://www.aph.gov.au/-/media/Committees/Senate/committee/regord_ctte/tabling_statements/2019/mon_06.pdf?l a=en&hash=2B694E0E8A09F236ABFF1542F53D367C86F610AE.

of nominated offices, to those who possess appropriate qualifications or attributes, or to members of the senior executive service.

4.30 From July to September 2019, the committee corresponded with the Department of Agriculture and the Australian Fisheries Management Authority (AFMA) regarding an instrument which appeared to sub-delegate the power to determine the circumstances in which fishing is prohibited at a certain fishery without the authority to do so in the enabling Act.²¹

4.31 The Department of Agriculture initially responded to the committee's concerns, to advise that the AFMA did not consider that any powers were being delegated by the instrument. While noting AFMA's advice, the committee remained concerned that the instrument unlawfully sub-delegated power.

4.32 Following greater consideration of the committee's concerns, AFMA agreed that the instrument appeared to sub-delegate power without the legislative authority to do so. AFMA subsequently, undertook to revoke the instrument on 3 September 2019.

4.33 The committee welcomed this undertaking and resolved to place a 'protective' notice of motion to disallow the instrument to ensure that the undertaking was implemented. The committee wrote to the Assistant Minister for Regional Tourism, Forestry and Fisheries to advise him of the ongoing correspondence with the agency and the committee's resolution to place a 'protective' notice to disallow the instrument. The instrument was revoked on 18 September 2019,²² and the committee subsequently withdrew the notice of motion.

Significant ongoing scrutiny concerns

4.34 In 2019, the committee noted a number of ongoing issues which it has resolved to continue to monitor in the future. The following sections outline the most significant ongoing issues that the committee has identified.

Exemptions and modifications to primary legislation

4.35 In 2019, the committee continued to raise scrutiny concerns about matters more appropriate for parliamentary enactment, including instruments which grant or extend exemptions from compliance with their principal or enabling legislation. The committee raised concerns with the relevant minister with regard to seven instruments which provided for exemptions or modifications to primary legislation.

21 The committee raised concerns about the Southern and Eastern Scalefish and Shark Fishery (Closures Variation) Direction 2019 [F2019L00650].

22 The instrument was revoked by Southern and Eastern Scalefish and Shark Fishery (Closures Variation) Direction (No.2) 2019 [F2019L01200].

4.36 Provisions in delegated legislation which modify the operation of primary legislation, or exempt persons or entities from the operation of primary legislation, may limit parliamentary oversight and subvert the appropriate relationship between Parliament and the executive.

4.37 It is the committee's general preference that exemptions from primary legislation by delegated legislation do not continue in force for such a time as to operate as de facto amendments to primary legislation. Where a lawmaker intends to make exemptions or modifications to primary legislation by delegated legislation, rather than amending primary legislation, the committee expects a sound explanation to be included in the explanatory materials. Noting the additional parliamentary scrutiny inherent in amending primary legislation, the committee is concerned about the impact of such instruments on principles of parliamentary propriety.

4.38 In 2019, the committee corresponded with the Assistant Minister for Superannuation, Financial Services and Financial Technology regarding the powers of the Australian Securities and Investment Commission (ASIC) to use delegated legislation to make exemptions to the *Corporations Act 2001* (Corporations Act).²³ Instruments setting out exemptions to the Corporations Act made up the vast majority of instruments with scrutiny concerns raised under this issue.²⁴ As a result, exemptions to many sections of the Corporations Act do not appear in the primary legislation itself, and will therefore not be easily apparent to readers of the legislation. The committee will continue to monitor this issue in the future.

Governance arrangements of Australian territories

4.39 In 2019, the committee noted a number of instruments which contained matters related to the governance arrangements of Australia's external territories and the Jervis Bay Territory. The committee's most significant concerns related to instruments which contained significant matters such as:

- the imposition of significant penalties, including custodial penalties;²⁵
- matters with a potentially significant impact on personal rights and liberties; and

23 For example, the committee raised concerns about the: ASIC Corporations (Unclaimed Superannuation—Former Temporary Residents) Instrument 2019/873 [F2019L01213]; ASIC Corporations (Whistleblower Policies) Instrument 2019/1146 [F2019L01457]; ASIC Corporations (Changing Scheme Constitutions) Instrument 2019/700 [F2019L01185]; ASIC Corporations (Warrants: Out-of-use notices) Instrument 2019/148 [F2019L00290].

24 For example, the committee raised concerns about exemptions made to sections 601QA, 765A, 992B, 926A, 951B, 1020F and 1317AJ of the Corporations Act.

25 See for example, Norfolk Island Legislation Amendment (Criminal Justice Measures) Ordinance 2019 [F2019L00546].

- the levying of taxation.

4.40 The use of delegated legislation to legislate on such matters in the Australian territories is a longstanding issue of concern to the committee.²⁶ The committee's concerns with regard to these instruments is underpinned by the principle that significant matters should be included in primary legislation, which is subject to a greater level of parliamentary oversight than delegated legislation. In this regard, the committee is concerned that the exercise of plenary legislative powers to legislate on significant matters, such as criminal law or taxation,²⁷ may undermine principles of parliamentary propriety.

4.41 Whilst noting the special legislative framework in which these instruments operate, the committee considers that such instruments should be subject to appropriate parliamentary oversight. In this regard, the committee has also previously noted concerns about the clarity of the scope of powers authorised by the enabling Acts, including the capacity to subdelegate such powers.

4.42 Noting the significance of these issues, the committee will continue to monitor instruments which relate to the governance arrangements of the external territories and the Jervis Bay Territory in the future, with a view to seeking more detailed advice from the government at a later date.

Free access to incorporated documents

4.43 The committee has consistently expressed concern about the accessibility of documents incorporated in delegated legislation, particularly industry standards. The committee's longstanding view is that all incorporated materials should be available free of charge. This accords with fundamental principles of the rule of law, and ensures that persons interested in or affected by the law are able to understand and access its terms.

4.44 In 2019, the committee raised concerns relating to the free access of documents incorporated by 37 instruments. The committee was particularly concerned about an instrument which contained a copyright notice,²⁸ with the potential to inhibit individuals' capacity to access and use the law. The committee correspondence with the Minister for Energy from December 2018 to April 2019 to resolve the issue.

26 See for example, Senate Standing Committee on Regulations and Ordinances, *37th Report*; *50th Report*; *64th Report*; *81st Report*. Available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Reports.

27 See for example, section 19A of the *Norfolk Island Act 1979*, section 12 of the *Cocos (Keeling) Islands Act 1955*, section 9 of the *Christmas Island Act 1958*, and section 4F of the *Jervis Bay Territory Acceptance Act 1915*.

28 The committee sought further advice on the Greenhouse and Energy Minimum Standards (Three Phase Cage Induction Motors) Determination 2018 [F2018L01572].

4.45 On 25 July 2019, the committee made a joint submission with the Senate Standing Committee for the Scrutiny of Bills to Standards Australia's discussion paper, *Distribution and Licensing Policy Framework*. The committees outlined their shared concerns regarding the incorporation of material that is not freely accessible or useable.

4.46 The committee noted Standards Australia's finalised distribution and licensing policy framework, published in November 2019. The committee welcomed Standards Australia's aspiration to expand accessibility of standards for non-commercial purposes at no cost to individuals, and commitment to fund a project to make the standards available online by no later than December 2023.²⁹

4.47 Whilst noting Standards Australia's commitment, the committee remains concerned about the incorporation of standards, which are not freely accessible, into delegated legislation. The committee will continue to monitor the issue in the future.

Consultation

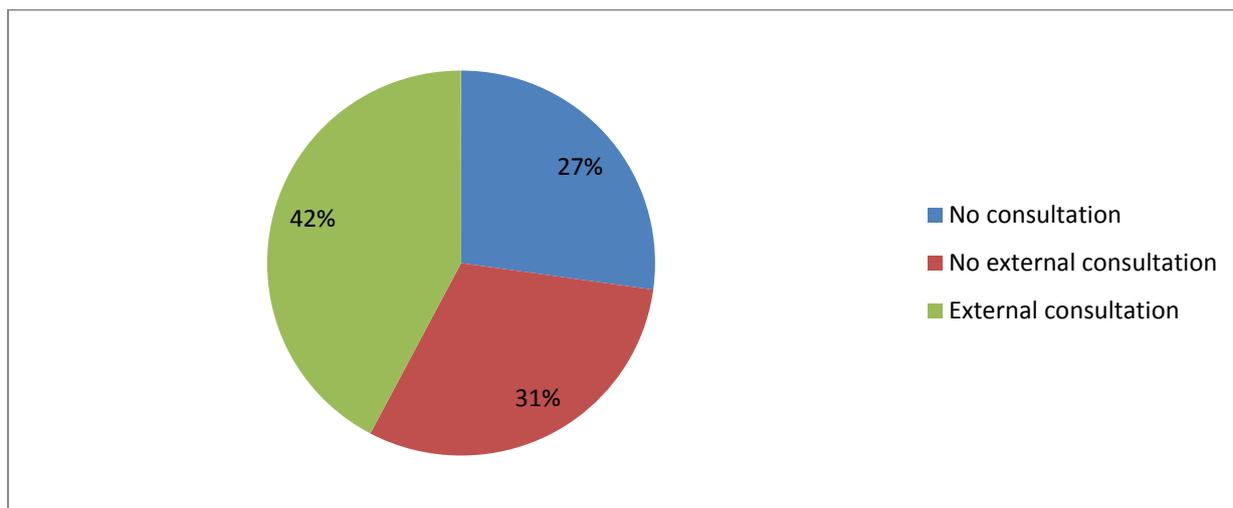
4.48 Section 17 of the Legislation Act requires that, before making a legislative instrument, the instrument-maker must be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument. Section 15J of the Act requires that explanatory statements describe the nature of any consultation that was undertaken or, if no such consultation has been undertaken, explain why none was undertaken.

4.49 The committee raised concerns regarding consultation in relation to 30 instruments in 2019. In 2019, the committee noted a large number of instruments for which either no consultation was undertaken at all or no external consultation (beyond government consultation) was undertaken with individuals likely to be affected by the instrument or individuals with expertise in fields relevant to the instrument. External consultation was not undertaken in relation to approximately 57% of instruments registered between 1 January 2019 and 31 December 2019.

4.50 **Figure 2** below shows the breakdown of consultation undertaken over this period, including consultation undertaken with government, undertaken with experts and affected persons, and where no consultation was undertaken.

29 See Standards Australia, *Distribution and Licensing Policy Framework*, pp. 8-9, available at <https://www.standards.org.au/StandardAU/Media/attachment/media%20release/Standards-Australia-Distribution-and-Licensing-Policy.pdf>.

Figure 2: Consultation between January and December 2019



4.51 Noting that no external consultation was undertaken with regard to the majority of instruments registered within this time period, the committee will continue to monitor this issue in the future to ensure that appropriate consultation is undertaken in the making of delegated legislation.

Exemptions of delegated legislation from parliamentary oversight

4.52 During the course of its inquiry into parliamentary scrutiny of delegated legislation, the committee raised significant concerns about exempting instruments from disallowance. The committee noted that such exemptions effectively remove Parliament's control of delegated legislation and leaves it to the executive to determine (albeit within the confines of the enabling legislation and the Constitution) the content of the law. The committee is particularly concerned that:

- there is no formal requirement that explanatory memoranda to bills that provide exemptions from disallowance explain or justify those exemptions;
- a vast range of exemptions from disallowance are set out in delegated legislation;³⁰ and
- there is no publicly accessible government guidance as to the circumstances in which it may be appropriate to exempt instruments from disallowance.

4.53 On average, approximately 16% of instruments registered every year are exempt from disallowance. During 2019, however, the committee noted that the proportion of exempt instruments was significantly above this average.³¹ **Table 3** below outlines the proportion of legislative instrument which are exempt from disallowance from 2013 to 2019.

30 See Legislation (Exemptions and Other Matters) Regulation 2015.

31 In 2019, approximately 20% of instruments were exempt from disallowance. This marked a significant increase from 2018 in which approximately 13% of instruments were exempt.

Table 3: Instruments exempt from disallowance 2013-2019

Year	Exempt	Disallowable	Total	Percentage exempt
2019	330	1345	1675	19.7%
2018	256	1630	1886	13.6%
2017	265	1436	1701	15.6%
2016	347	1698	2045	17.0%
2015	361	1840	2201	16.4%
2014	277	1609	1886	14.7%
2013	639	3086	3725	17.2%

4.54 Noting the significantly increased number of exempt instruments in 2019, the committee will continue to monitor this issue in the future.

Amendments to explanatory materials after disallowance periods

4.55 The committee has long emphasised the importance of explanatory statements as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation. Explanatory statements are a particularly important resource for this committee and the Senate in exercising parliamentary control and oversight of legislative instruments while they are subject to disallowance.

4.56 The committee considers that the tabling of amendments to explanatory statements which substantively alter how an instrument may be interpreted after the expiry of the relevant disallowance period has the potential to undermine the effectiveness of the Parliament's oversight of the legislative power that it has delegated to the executive.

4.57 The committee noted in October 2019 that a number of changes to explanatory statements had been made after the disallowance period had ended for the relevant instruments.³² These amendments to the explanatory statements contradicted previous information that had been provided to the committee regarding the availability of independent merits review and an undertaking made by the Australian Prudential Regulation Authority on an unrelated issue, on the basis of which the committee had concluded of its examination of the instruments.

32 Financial sector (Collection of Data) (reporting standard) determinations – various instruments [F2019L00730] [F2019L00731] [F2019L00738] [F2019L00739] [F2019L00766] [F2019L00769] [F2019L00754] [F2019L00756] [F2019L00780] [F2019L00782] [F2019L00733] [F2019L00735].

4.58 The committee wrote to the Assistant Minister for Superannuation, Financial Services and Financial Technology on 14 November 2019 to express its concerns about the effect of altering the explanatory statements outside of the disallowance period.

4.59 The committee will continue to monitor this issue in the future.

Senator the Hon Concetta Fierravanti-Wells
Chair

Appendix A

Recommendations of the committee's inquiry into parliamentary scrutiny of delegated legislation

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
- 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.