AUSTRALIAN SENATE

Senate Standing Committee for the Scrutiny of Delegated Legislation
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Scrutiny of Commonwealth expenditure

Overview

This guideline provides information on the Senate Scrutiny of Delegated Legislation Committee's approach to instruments that specify grants and programs on which expenditure is authorised (usually made under the *Financial Framework (Supplementary Powers) Act 1997* or the *Industry Research and Development Act 1986*). In relation to these instruments the committee will typically be concerned with:

- constitutional authority for the expenditure;
- whether those likely to be affected by the instrument were adequately consulted;
- availability of independent merits review; and
- ensuring appropriate parliamentary oversight.

Constitutional authority for expenditure

Scrutiny principle (b) requires the committee to scrutinise each instrument as to whether it appears to be supported by a constitutional head of legislative power and is otherwise constitutionally valid.

Accordingly, explanatory statements to instruments specifying expenditure should:

- clearly identify each constitutional head of power that is relied on to support expenditure on the relevant grant or program; and
- explain how each identified head of legislative power supports the grant or program, drawing on relevant jurisprudence where appropriate.

Where numerous heads of power are relied upon, the explanatory statement should include sufficient information to establish how the identified heads of legislative power provide authority for the whole of the relevant grant or program.

Consultation

Scrutiny principle (d) requires the committee to scrutinise each instrument as to whether those likely to be affected by the instrument were adequately consulted in relation to it.

In relation to instruments specifying Commonwealth expenditure, explanatory statements should explain:

- whether consultation occurred in relation to each relevant grant or program;
- whether persons with expertise were consulted; and
- whether persons likely to be affected by each relevant grant or program were consulted.

If consultation only occurred within government, the explanatory statement should explain the reasons for not consulting more broadly.

For further information see the committee's guideline on principle (d): consultation.

Availability of independent merits review

Scrutiny principle (i) requires the committee to scrutinise each instrument as to whether it unduly excludes, limits or fails to provide for the independent review of decisions affecting rights, liberties, obligations or interests.

In relation to instruments specifying Commonwealth expenditure, explanatory statements should explain:

- whether independent merits review of decisions made in connection with each grant or program is available;
- if merits review is not available, the characteristics of the relevant decisions which justify excluding merits review, by reference to the Administrative Review Council's guide, *What decisions should be subject to merits review?*.

For further information see the committee's guideline on principle (i): availability of independent review.

Ensuring appropriate parliamentary oversight

Scrutiny principle (g) requires the committee to consider whether the explanatory materials accompanying an instrument provide sufficient information to gain a clear understanding of the instrument.

In addition, scrutiny principle (k) requires the committee to scrutinise each instrument as to whether it complies with any other ground relating to the technical scrutiny of delegated legislation that the committee considers appropriate. This includes whether instruments protect fundamental rule of law principles and promote parliamentary accountability. The accountability of the executive to Parliament, particularly in relation to the expenditure of public money, is an essential component of the system of responsible and representative government embodied in the Constitution.

Amount and source of expenditure

To ensure that there is sufficient parliamentary oversight of specified grants and programs, explanatory statements to instruments specifying expenditure should detail the amount of funds that has been, or will be, allocated to each grant or program, and the source of the funds (e.g. from within existing resources or the relevant appropriation Act or bill).

Standing order 23(4)

Senate standing order 23(4) requires the committee to determine whether the attention of the Senate should be drawn to instruments on the ground that they raise significant issues, or otherwise give rise to issues that are likely to be of interest to the Senate.

Noting the importance of ensuring appropriate parliamentary oversight of the expenditure of public money, the committee will write to relevant legislation committees to alert those committees to the relevant expenditure. This will allow legislation committees to consider whether Commonwealth expenditure specified in delegated legislation warrants further inquiry or monitoring.

Explanatory statement checklist

The checklist on the following page summarises the types of information which should be included in explanatory statements to instruments specifying expenditure.

Explanatory statement checklist

☐ **Constitutional authority for expenditure**

The explanatory statement should:

- identify each head of legislative power relied on to support each grant or program;
- explain how each identified head of power supports the grant or program, drawing on relevant jurisprudence where appropriate; and
- where numerous heads of power are relied on, explain how the identified heads of power provide authority for the whole of the grant or program.

☐ **Consultation**

The explanatory statement should explain whether those likely to be affected by the instrument were consulted in relation to it. If consultation only occurred within government, the explanatory statement should explain the reasons for not consulting more broadly.

☐ **Availability of independent merits review**

The explanatory statement should explain:

- whether independent merits review of decisions made in connection with the authorised grant or program is available; and
- if merits review is not available, the characteristics of the relevant decisions which justify their exclusion from merits review, by reference to the Administrative Review Council's guide, *What decisions should be subject to merits review?*.

☐ **Amount and source of expenditure**

The explanatory statement should detail the amount of funds that has been, or will be, allocated to each grant or program, and the source of the funds.