

The Senate

Standing
Committee for the Scrutiny of
Delegated Legislation

Guidelines

2nd Edition

February 2022

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ISBN: 978-1-76093-362-3

Printed by the Senate Printing Unit, Parliament House, Canberra.

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Introduction

On 16 June 2021 the Senate adopted three recommendations of the [final report](#) of the committee's inquiry into the exemption of delegated legislation from parliamentary oversight that were directed to the Senate. As a result, from 1 July 2021, the standing orders of the Senate were [amended](#) to clarify the committee's scrutiny principles in relation to exemptions from sunseting and instruments that amend or modify the operation of primary legislation, and to allow the committee to scrutinise instruments that are exempt from disallowance.

This second edition of the committee's guidelines provides updated guidance for stakeholders in light of these changes. It is divided into five parts:

- **Part I:** guidelines on the committee's work practices;
- **Part II:** guidelines on the committee's technical scrutiny principles;
- **Part III:** guidelines on matters of interest to the Senate;
- **Part IV:** guidelines on instruments exempt from disallowance; and
- **Part V:** guidelines on scrutiny of Commonwealth expenditure.

These guidelines are intended as a guide only and are not meant to be definitive. If you have any feedback or questions relating to the committee's role, expectations or functions please contact the committee secretariat on (02) 6277 3066 or by email at sdlc.sen@aph.gov.au.

Part I —Committee Work Practices

Working with the Scrutiny of Delegated Legislation Committee: Guidance for Agencies and Departmental Liaison Officers

This document provides a general overview of the work practices of the Senate Standing Committee for the Scrutiny of Delegated Legislation to assist agencies and departmental liaison officers.

Agency correspondence

The committee secretariat, acting on the committee's behalf, will often seek additional information or clarification from agencies directly before the committee escalates a matter to the relevant minister. The committee will not publish the content of any correspondence received from an agency. However, the committee will publish a concise record of the instruments in relation to which it is engaging with an agency in its regular report to the Senate, known as the Delegated Legislation Monitor. This record includes the name of the instrument and the relevant scrutiny principles. The committee will also record any undertakings that an agency makes to address committee scrutiny concerns in the Monitor.

Ministerial correspondence

The committee will typically write to the responsible minister to seek advice where it considers that the information provided by the agency is not sufficient to address its concerns, or where the instrument raises significant scrutiny concerns which require ministerial involvement. In contrast to agency correspondence, both the committee's request, and any ministerial response received, will be published on the committee's [website](#).

Timeframes for responses

Generally, a one week timeframe is provided for agencies to respond and a two week timeframe for ministers to respond. The committee's timeframes for responses are designed to enable it to conclude its consideration of an instrument before the instrument's disallowance period expires or, in the case of instruments exempt from disallowance, to allow the committee to report to the Senate in a timely manner. If you require further time to respond, please email the secretariat at sdlc.sen@aph.gov.au to request an extension.

If the committee is unable to conclude its consideration of a disallowable instrument before the original disallowance period expires, it will give a 'protective' notice of motion to disallow the instrument. This extends the disallowance period by another 15 sitting days from the sitting day after the notice is given.

Briefings

Where appropriate, the committee may invite officials to attend a private briefing to enable the committee to further explore its scrutiny concerns. The committee has found this to be a useful process to assist it in resolving its scrutiny concerns.

Disallowance

As noted above, the committee will give a 'protective' notice of motion to disallow an instrument where it is unable to conclude its consideration of a disallowable instrument before the original disallowance period expires. In addition, the committee may give such a notice where the committee requires an undertaking to be implemented before it can conclude its consideration of the instrument. The committee will usually withdraw a 'protective' notice where it receives a satisfactory response or confirmation that any outstanding undertakings have been implemented.

The committee may also give a notice of motion to disallow an instrument where it considers that the instrument raises significant, unresolved scrutiny concerns and the committee has therefore resolved to recommend to the Senate that the instrument be disallowed. In these circumstances, the committee will advise the relevant minister in writing of its recommendation and will publish a summary of its scrutiny concerns in the Monitor.

All notices of motion to disallow are recorded on the [Disallowance Alert](#).

For more information on the disallowance process see [Odgers' Australian Senate Practice](#) and [Guide to Senate Procedure No. 19 - Disallowance](#).

Undertakings

The committee regularly asks the responsible minister or agency to make an undertaking to address the committee's scrutiny concerns. For example, the committee may ask the minister or agency to amend an instrument or an explanatory statement. Often agencies or ministers will make an undertaking to address the committee's scrutiny concerns in order to pre-empt a formal committee request.

The Monitor lists all outstanding undertakings and undertakings that the committee is aware have been implemented since the tabling of the previous Monitor. To ensure that the Monitor is accurate, please notify the committee secretariat when an undertaking has been implemented (for example, when an amending instrument or replacement explanatory statement has been registered). The committee expects undertakings to be implemented in a timely manner and generally before the relevant instrument's disallowance period expires. Where an undertaking is not implemented in a timely manner the committee will contact the agency to seek advice as to why this is the case.

Contact details

If you have any questions, please do not hesitate to contact the committee secretariat by phone on (02) 6277 3066 or by email to sdlc.sen@aph.gov.au. Further information is also available on the committee's [website](#).

Agency and ministerial responses should be sent by email to sdlc.sen@aph.gov.au. Ministerial responses should be signed by the relevant minister and addressed to:

Chair
Senate Scrutiny of Delegated Legislation Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600

Part II — Technical Scrutiny Principles

Guidelines on technical scrutiny principles

The committee examines the technical qualities of all instruments subject to disallowance, disapproval or affirmative resolution by the Senate to assess whether they comply with the committee's scrutiny principles, which are set out in Senate standing order 23(3). These guidelines provide information on the committee's approach to applying the following technical scrutiny principles:

- Principle (a): compliance with legislative requirements;
- Principle (b): constitutional validity;
- Principle (c): scope of administrative powers;
- Principle (d): adequacy of consultation;
- Principle (e): drafting;
- Principle (f): access and use;
- Principle (g): adequacy of explanatory materials;
- Principle (h): personal rights and liberties;
- Principle (i): availability of independent review;
- Principle (j): matters more appropriate for parliamentary enactment;
- Principle (k): exemption and deferral from sunseting;
- Principle (l): modification of primary legislation; and
- Principle (m): other technical scrutiny grounds.

Principle (a): Compliance with legislative requirements

Overview

Senate standing order 23(3)(a) requires the committee to scrutinise each instrument as to whether it is in accordance with its enabling Act and otherwise complies with all legislative requirements. Under this principle, the committee is typically concerned with:

- whether the instrument is within the powers conferred by its enabling Act;
- whether any statutory preconditions to the making of the instrument have been satisfied; and
- whether the instrument complies with all other legislative requirements.

Requirements of the enabling Act

A legislative instrument must be made in accordance with the powers conferred by its enabling Act. This may include any express limitations or preconditions which must be satisfied for the instrument to be lawfully made. The explanatory statement to the instrument should address the following matters:

- the source of legislative authority for the instrument, including its enabling provisions; and
- whether there are any statutory preconditions that must be satisfied for the instrument to be lawfully made, and whether these were satisfied.

Where an instrument has been made in anticipation of the commencement of its enabling provision, the explanatory statement should indicate that the instrument relies on section 4 of the *Acts Interpretation Act 1901* (Interpretation Act). Similarly, when an instrument repeals or amends another instrument, and there is no express power in the enabling legislation to do so, the explanatory statement should indicate that the instrument relies on subsection 33(3) of the Interpretation Act for its authority.

Other legislative requirements

An instrument and its accompanying explanatory statement must comply with all applicable legislative requirements—in particular the requirements of the *Legislation Act 2003* (Legislation Act). The explanatory statement to an instrument should address the following matters:

- **documents incorporated by reference** – Paragraph 15J(2)(c) of the Legislation Act requires the explanatory statement to an instrument that incorporates a document to contain a description of that document, the manner in which it is incorporated, and indicate how it may be obtained. Further information about these requirements can be found in the committee's [guideline on principle \(f\)](#);
- **consultation** – Paragraphs 15J(2)(d) and (e) of the Legislation Act require the explanatory statement to an instrument to describe the nature of any consultation that was undertaken in relation to an instrument. If no consultation was undertaken, the explanatory statement should explain why no consultation was undertaken. Further information about these requirements can be found in the committee's [guideline on principle \(d\)](#);
- **purpose and operation of the instrument** – Paragraph 15J(2)(b) of the Legislation Act requires the explanatory statement to an instrument to explain the instrument's purpose and operation;
- **statement of compatibility with human rights** – Paragraph 15J(2)(f) of the Legislation Act requires that a statement of compatibility be included in the explanatory statement. The Parliamentary Joint Committee on Human Rights has published a [guidance note on drafting](#)

[statements of compatibility](#) and further information is also available on the Attorney-General's Department's [website](#); and

- **retrospective commencement** – Subsection 12(2) of the Legislation Act provides that the retrospective commencement of an instrument is of no effect if the retrospective commencement would disadvantage the rights of a person (other than the Commonwealth). If an instrument commences retrospectively, the explanatory statement should explicitly address whether the retrospective commencement would disadvantage any person other than the Commonwealth.

Explanatory statement checklist

The following checklist summarises the types of information which should be included in an explanatory statement.

- | | |
|--|---|
| <input type="checkbox"/> Legislative authority | The explanatory statement should: <ul style="list-style-type: none">• identify the specific provision/s which provide the legal authority for the instrument;• note that the instrument relies on section 4 of the Interpretation Act, if it is made in anticipation of its authorising provisions;• note that the instrument relies on subsection 33(3) of the Interpretation Act for its authority when the instrument repeals or amends another instrument and there is no express power in the enabling legislation to do so. |
| <input type="checkbox"/> Compliance with legislative preconditions | Where the enabling legislation prescribes any conditions which must be satisfied in making the instrument, the explanatory statement should explain how those conditions have been satisfied. |
| <input type="checkbox"/> Incorporation of documents | Where an instrument incorporates a document, the explanatory statement should address the manner of incorporation; the legislative authority relied upon to incorporate documents from time to time (if applicable); how the incorporated documents may be obtained; and whether they can be freely accessed and used. |
| <input type="checkbox"/> Consultation | The explanatory statement should address the following matters relating to consultation: <ul style="list-style-type: none">• whether any consultation occurred in relation to the specific instrument;• whether persons likely to be affected by the instrument, or with expertise in fields relevant to the instrument, were consulted;• or if no consultation occurred, why no consultation occurred. |
| <input type="checkbox"/> Explanation of purpose | The explanatory statement should include a description of the purpose and operation of the instrument. |
| <input type="checkbox"/> Statement of compatibility with human rights | The explanatory statement should contain a 'standalone' statement of compatibility with human rights. |
| <input type="checkbox"/> Explanation of retrospective commencement | The explanatory statement should explicitly address whether retrospective commencement would disadvantage any person other than the Commonwealth. |

Principle (b): Constitutional validity

Overview

Senate standing order 23(3)(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.

The committee's consistent view is that questions of legal validity—including constitutional validity—are ultimately for the courts to determine, and that it is therefore not the committee's role to make determinative statements about legal validity.

In light of this, the committee generally takes the view that instruments are constitutionally valid if they are made in accordance with their enabling Act. However, there may be circumstances where it is appropriate to draw constitutional questions to the attention of the Senate despite the instrument according with the powers conferred by the Parliament.

Under this principle, the committee will typically be concerned with:

- whether grants and programs specified in instruments made under the *Financial Framework (Supplementary Powers) Act 1997* and the *Industry Research and Development Act 1986* are supported by a constitutional head of legislative power; and
- instruments which raise questions as to whether they:
 - may breach the separation of powers doctrine embodied in the Constitution; or
 - may restrict the implied freedom of political communication.

Supported by a constitutional head of legislative power

Instruments specifying expenditure

Explanatory statements 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*) 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.

Further information about the committee's expectations regarding instruments specifying Commonwealth expenditure is contained in the guideline on [Scrutiny of Commonwealth expenditure](#).

Otherwise constitutionally valid

The matters below are provided as examples of other matters that the committee may raise under scrutiny principle (b).

Separation of powers—Chapter III issues

Where there is a question as to whether an instrument may infringe the separation of powers doctrine embodied in the Constitution, the committee will look to the explanatory statement to the instrument for an explanation of how the instrument complies with the doctrine. For example, where an instrument confers non-judicial functions or powers on a court or judicial officer, the explanatory statement should set out whether the functions or powers are to be exercised by the court or judicial officer acting in a non-judicial (e.g. personal) capacity.

Implied freedom of political communication

Where an instrument raises a question as to whether it may restrict the implied freedom of political communication, the committee expects the explanatory statement to the instrument to address how the instrument does not impermissibly restrict the implied freedom.

Explanatory statement checklist

The following checklist summarises the types of information which should be included in an explanatory statement.

- | | |
|--|--|
| <input type="checkbox"/> Instruments specifying expenditure | Where an instrument specifies expenditure, the explanatory statement should: <ul style="list-style-type: none">• clearly identify each constitutional head of power that is relied on to support expenditure on the relevant grant or program;• explain how each identified head of legislative 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. |
| <input type="checkbox"/> Separation of powers—Chapter III issues | Where an instrument confers non-judicial functions or powers on a court or judicial officer, the explanatory statement should include an explanation of how the instrument complies with the separation of powers doctrine embodied in the Constitution. |
| <input type="checkbox"/> Implied freedom of political communication | Where an instrument raises a question as to whether it may restrict the implied freedom of political communication, the explanatory statement should address how the instrument does not impermissibly restrict the implied freedom. |

Principle (c): Scope of administrative powers

Overview

Senate standing order 23(3)(c) requires the committee to scrutinise each instrument as to whether it makes rights, liberties, obligations or interests unduly dependent on insufficiently defined administrative powers. Under this principle, the committee will typically be concerned with provisions in instruments which:

- broadly delegate administrative powers and functions;
- confer broad discretionary powers; or
- confer coercive powers on 'persons assisting' authorised officers.

Delegation of administrative powers and functions

Where an instrument delegates administrative powers or functions, the explanatory statement should address the following matters:

- the purpose and scope of the delegation, including why it is considered necessary;
- an explanation of who will be exercising the delegated powers and functions, including whether they possess the appropriate qualifications and necessary skills; and
- the nature and source of any limitations and safeguards relevant to the delegation, including whether they are contained in law or policy.

In addition, where the instrument delegates administrative powers or functions to a member of the Australian Public Service, the committee expects that the delegation will be limited to members of the Senior Executive Service (SES) or equivalent. Consequently, the explanatory statement should provide a thorough justification for any delegation of powers to officers below the SES level.

Conferral of discretionary powers

Where an instrument confers discretionary powers on a person, the instrument should set out the factors which the person must consider in exercising the discretion. The explanatory statement should also address the following matters:

- the purpose and scope of the discretion, including why it is considered necessary;
- an explanation of who will be exercising the discretion, including whether they possess the appropriate qualifications and necessary skills; and
- the nature and source of any limitations and safeguards relevant to the exercise of the discretionary powers, including whether they are contained in law or policy.

Conferral of coercive powers

Where an instrument confers coercive powers on a person or class of persons, the committee will be concerned to ensure that the instrument does not unduly trespass on personal rights and liberties. In particular, the committee will consider whether there are appropriate limits and safeguards in place, and whether the persons on whom the powers are conferred possess the appropriate qualifications or experience necessary to exercise the powers. Accordingly, the explanatory statement to an instrument containing such a provision should address the following:

- the purpose and scope of the conferral, including why it is considered necessary;
- an explanation of who will be exercising the power, including whether they possess the appropriate qualifications and necessary skills; and
- the nature and source of any limitations and safeguards relevant to the exercise of the coercive powers, including whether they are contained in law or policy.

Explanatory statement checklist

The following checklist summarises the types of information which should be included in an explanatory statement.

- | | | |
|--------------------------|--|---|
| <input type="checkbox"/> | Purpose, scope and necessity of the provisions | The explanatory statement should explain the purpose, scope and necessity of including provisions which delegate administrative powers, or confer discretionary or coercive powers, in the instrument. |
| <input type="checkbox"/> | Qualifications and skills of the persons exercising the power | The explanatory statement should explain why it is appropriate for the person or class of persons to whom delegations may be made to exercise the relevant powers or perform the relevant functions, including whether delegates would possess the appropriate qualifications and necessary skills. |
| <input type="checkbox"/> | Limitations and safeguards | The explanatory statement should explain the nature and source of any limitations or safeguards relevant to the exercise of the power, including whether those safeguards or limitations are included in law or policy. |

Principle (d): Adequacy of consultation

Overview

Senate standing order 23(3)(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. Under this principle, the committee will typically be concerned with:

- whether consultation occurred in relation to the specific instrument;
- whether persons likely to be affected by the instrument were consulted; and
- whether persons with expertise were consulted.

Consultation on the specific instrument

The committee expects the explanatory statement to an instrument to address consultation that was undertaken in relation to the **specific instrument**, including any issues raised during the consultation and the outcomes of the consultation (for example, any action taken based on comments or submissions received).

Where consultation has previously been undertaken in relation a broader issue, set of legislative reforms, or enabling legislation, and no further consultation was undertaken in relation to the specific instrument, the explanatory statement should address the following matters:

- what consultation was previously undertaken; and
- why it was considered unnecessary to undertake additional consultation in relation to the specific instrument.

Consultation with persons affected by the instrument

Section 17 of the *Legislation Act 2003* (Legislation Act) requires that, prior to an instrument being made, the rule-maker must be satisfied that appropriate consultation was undertaken. In determining whether any consultation that was undertaken is appropriate, the rule-maker may have regard to the extent to which the consultation ensured that persons likely to be affected by the proposed instrument had an adequate opportunity to comment on its proposed content (paragraph 17(2)(b)). The explanatory statement to an instrument should address the following matters:

- details of any consultation that was undertaken with persons likely to be affected by the instrument; or
- if no consultation was undertaken with persons likely to be affected by the instrument, the reasons for not consulting such persons.

Consultation with experts

Section 17 of the Legislation Act requires that prior to an instrument being made, the rule-maker must be satisfied that appropriate consultation was undertaken, and that in determining whether any consultation that was undertaken is appropriate, the rule-maker may have regard to the extent to which the consultation drew on the knowledge of persons with expertise in fields relevant to the proposed instrument (paragraph 17(2)(a)). The explanatory statement to an instrument should address the following matters:

- details of any consultation that was undertaken with persons with expertise in fields relevant to the proposed instrument; or
- if no consultation with experts was undertaken, the reasons for not consulting such persons.

Consultation with the Office of Best Practice Regulation

The committee does not consider consultation with the Office of Best Practice Regulation (OBPR) to be an adequate substitute to consulting with individuals affected by the instrument or relevant experts. Further, any requirements for consultation with the OBPR are separate to the requirements of the Legislation Act. As such, information related to consultation with the OBPR alone is unlikely to satisfy the committee's concerns under this principle.

Explanatory statement checklist

The following checklist summarises the types of information which should be included in an explanatory statement.

- | | |
|---|---|
| <input type="checkbox"/> Consultation on specific instrument | The explanatory statement should address: <ul style="list-style-type: none">• what consultation was undertaken in relation to the specific instrument;• any issues raised during the consultation, and any outcomes or action taken as a result of the consultation; and• if the rule-maker is relying on previous broader consultation, why it was considered unnecessary to undertake additional consultation in relation to the specific instrument. |
| <input type="checkbox"/> Consultation with affected persons | The explanatory statement should address who was consulted in relation to the specific instrument, and how they could potentially be affected by the content of the instrument, or, if no consultation with affected persons was undertaken, the reasons for not consulting such persons. |
| <input type="checkbox"/> Consultation with experts | The explanatory statement should address who was consulted in relation to the specific instrument, and the relevance of their expertise, or, if no consultation with experts was undertaken, the reasons for not consulting such persons. |
| <input type="checkbox"/> No consultation undertaken | If no consultation was undertaken, the explanatory statement should explain why no consultation was undertaken. |

Principle (e): Drafting

Overview

Senate standing order 23(3)(e) requires the committee to scrutinise each instrument as to whether its drafting is defective or unclear. Under this principle, the committee will typically be concerned with instruments which:

- contain unclear drafting or errors which affect the meaning or interpretation of the instrument; or
- do not clearly define key terms.

Drafting errors

Where an instrument contains a drafting error which may affect the meaning or interpretation of the instrument, the committee will raise the matter with the relevant agency and would generally expect such errors to be corrected as soon as practicable.

Clarity of drafting

Instruments and their explanatory statements should be clear and intelligible to all persons interested in or affected by them, not only those with particular knowledge or expertise. Key terms should be clearly defined to remove any potential confusion or misunderstanding. Where the definition of a key term is sourced from the instrument's enabling legislation or another source of legislation, the relevant source provision should be cited in the instrument and its explanatory statement. This is particularly important where a term has a specific meaning within the context of a statutory scheme.

Explanatory statement checklist

The following checklist summarises the type of information which should be included in an explanatory statement.

- | | |
|--|--|
| <input type="checkbox"/> Clearly define key terms | Key terms should be clearly defined in the instrument and its explanatory statement. Where the definition of a key term is sourced from other legislation, the relevant source provision should be cited in the explanatory statement. |
|--|--|

Principle (f): Access and use

Overview

Senate standing order 23(3)(f) requires the committee to scrutinise each instrument as to whether it, and any document it incorporates, may be freely accessed and used. Under this principle, the committee will typically be concerned with instruments which incorporate documents into their text which:

- are not freely accessible; or
- are subject to copyright.

Incorporation by reference

In some cases, legislative instruments may incorporate other documents by reference. Examples of documents which are frequently incorporated include guidelines, standards and codes of practice. A document is likely to be incorporated by a legislative instrument where that document is necessary to interpret, apply or otherwise use that instrument. Where an instrument incorporates a document by reference, the explanatory statement to the instrument should:

- describe the document;
- indicate the manner in which the document has been incorporated (that is, as in force at a particular date, or as in force from time to time);
- identify the legislative authority to incorporate documents as in force from time to time (if applicable);
- indicate how the document may be obtained; and
- indicate where the document may be freely accessed and used by members of the public.

Free access

All documents incorporated by reference should be available free of charge to all persons affected by or interested in the law. Where an instrument incorporates a document, the explanatory statement should identify where the document is freely available. This may be by:

- identifying a website where the document may be viewed or downloaded free of charge;
- noting that the document may be accessed free of charge at specified public libraries; or
- noting that the instrument may be made available for viewing at specified offices (e.g. departmental or agency offices).

Free use

Legislative instruments or any incorporated documents should not be subject to copyright because it may inhibit the capacity of people to access and use the law. However, if it is considered necessary for copyright to apply to an instrument or incorporated document, the committee expects that every person interested in or affected by the law should be able to readily and freely access and use its full terms, without the risk of breaching copyright. Accordingly, the explanatory statement to the instrument should address the following matters:

- why it is considered necessary to use copyrighted material in a legislative instrument or incorporated document;

- how the use of copyrighted material may impact individuals' ability to access the terms of the law; and
- whether any alternative approaches were considered that do not require copyrighted material to be reproduced in the instrument or incorporated documents.

Explanatory statement checklist

The following checklist summarises the types of information which should be included in an explanatory statement.

- Incorporation of documents** Where an instrument incorporates a document, the explanatory statement should:
 - describe the document;
 - identify the manner of incorporation (at a fixed date, or as in force from time to time);
 - identify the legislative authority for incorporating documents from time to time (if applicable);
 - indicate how the document may be obtained; and
 - indicate where the document may be freely accessed and used by members of the public.

- Free access** The explanatory statement should explain whether the document can be accessed free of charge at certain public libraries or be made available for viewing at specified offices.

- Free use** If the instrument or any incorporated document is subject to copyright, the explanatory statement should explain the necessity of using copyrighted material in an instrument, how this could impact individuals, and any alternative approaches that were considered.

Principle (g): Adequacy of explanatory materials

Overview

Senate standing order 23(3)(g) requires the committee to scrutinise each instrument as to whether the accompanying explanatory material provides sufficient information to gain a clear understanding of the instrument.

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. The checklists below identify the types of information which the committee typically considers should be included in explanatory statements. They are indicative, rather than exhaustive, and the committee's expectations may differ depending on the purpose and scope of the instrument.

General matters

- Purpose and operation** The explanatory statement should clearly describe the purpose and operation of the instrument.
- Provision by provision explanation** The explanatory statement should contain a brief explanation of the purpose and scope of each clause in the instrument, with sufficient detail for a reader to understand how each clause will function. It should not simply repeat the text of the clauses.
- Legislative authority** The explanatory statement should:
 - identify the specific provision/s which provide the legal authority for the instrument;
 - note that the instrument relies on section 4 of the *Acts Interpretation Act 1901*, if it is made in anticipation of its authorising provisions; and
 - note that the instrument relies on subsection 33(3) of the *Acts Interpretation Act 1901* for its authority when the instrument repeals or amends another instrument and there is no express power in the enabling legislation to do so.
- Compliance with legislative preconditions** Where the enabling legislation prescribes any conditions which must be satisfied in making the instrument, the explanatory statement should explain how those conditions have been satisfied.
- Constitutional validity** The explanatory statement does not ordinarily need to explain why the instrument is constitutionally valid, unless:
 - the instrument is made under *the Financial Framework (Supplementary Powers) Act 1997* or the *Industry Research and Development Act 1986*; or
 - the instrument is likely to engage an express or implied constitutional principle or guarantee, such that it is necessary to explain why such terms are not breached.
- Consultation** The explanatory statement should address the following matters relating to consultation:
 - whether any consultation occurred in relation to the **specific instrument**;
 - whether persons likely to be affected by the instrument, or with expertise in fields relevant to the instrument, were consulted;
 - or if no consultation occurred, why no consultation occurred.

- **Statement of compatibility with human rights** The explanatory statement to all instruments should contain a 'standalone' statement of compatibility with human rights. Further information about drafting statements of compatibility is available on the Attorney-General's Department's [website](#), and the Parliamentary Joint Committee on Human Rights' [website](#).

Common instrument-specific matters

- **Collection, use and disclosure of personal information (privacy)** Where an instrument provides for the collection, use or disclosure of personal information, the explanatory statement should explain:
 - the nature and scope of the provisions (including the nature and extent of the information that maybe disclosed and the persons and/or entities to whom disclosure is permitted);
 - why the provisions are considered necessary and appropriate; and
 - what safeguards are in place to protect the personal information, and whether these are set out in law or in policy (including whether the *Privacy Act 1988* applies).

- **Availability of independent merits review** Where an instrument empowers a decision-maker to make discretionary decisions with capacity to affect rights, liberties, obligations or interests, the explanatory statement should explain:
 - whether independent merits review 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 merit review?](#)

- **Delegated and discretionary powers** Where an instrument delegates administrative powers or functions, the explanatory statement should explain:
 - the purpose, scope and necessity of the delegation,
 - who will be exercising the powers and functions, including whether they possess appropriate qualifications and skills; and
 - the nature and source of any limitations and safeguards.

- **Amendment or modification of, or exemptions from, primary legislation** Where an instrument includes a provision which amends or modifies primary legislation, or exempts persons or entities from the operation of primary legislation, the explanatory statement should explain:
 - the legislative authority relied upon to amend or modify primary legislation, or exempt persons or entities from the operation of primary legislation, by delegated legislation;
 - the scope of the relevant amendment, modification or exemption, including the persons, entities or classes of persons or entities to which it applies;
 - why it is considered necessary and appropriate to modify primary legislation, or exempt persons or entities from the operation of primary legislation, by delegated legislation (instead of amending primary legislation);
 - the duration of the relevant amendment, modification or exemption, and if this is longer than three years, the reason this is necessary;
 - whether there is any intention to conduct a review of the relevant provisions to determine if they remain necessary and appropriate (including whether it is appropriate to include the provisions in delegated legislation).

- Exemption from sunseting** Where an instrument is exempt from sunseting, or contains measures that will remain in force within a principal instrument that is exempt from sunseting, the explanatory statement should:

 - set out the source of the exemption from sunseting; and
 - justify the exemption, noting the effect of the exemption on parliamentary oversight.

- Imposition of taxes and levies** Where an instrument imposes a charge, fee or levy, the explanatory statement should explain the purpose of the imposition (e.g., fee for services rendered). Where the amount does constitute a tax or levy, the explanatory statement should explain:

 - the legislative authority relied upon for using delegated legislation to set the levy or tax (e.g. a charges Act);
 - whether the enabling Act sets any limits on the imposition of tax (for example, a statutory cap on the amount that may be imposed); and
 - why it is considered necessary and appropriate to use delegated legislation to set the levy or tax, rather than primary legislation.

- Incorporation of documents** Where an instrument incorporates a document into its text, other than a law of the Commonwealth, the explanatory statement should:

 - describe the document;
 - identify the manner of incorporation (at a fixed date, or as in force from time to time);
 - identify the legislative authority for incorporating documents from time to time (if applicable);
 - indicate how the document may be obtained; and
 - indicate where the document may be freely accessed and used by members of the public.

- Reverse burden of proof** Where an instrument includes an offence which reverses the legal or evidential burden of proof, the explanatory statement should justify the reversal by reference to the Attorney-General's Department's [Guide to Framing Commonwealth Offences](#) (see section 4.3).

- Retrospective commencement or effect** Where an instrument commences retrospectively, or commences prospectively but has a retrospective effect, the explanatory statement should explain:

 - the nature and scope of the relevant provisions;
 - why the retrospectivity is considered necessary and appropriate; and
 - whether any person has been, or may be disadvantaged by the retrospectivity and, if so, what steps have been or will be taken to avoid such disadvantage.

Principle (h): Personal rights and liberties

Overview

Senate standing order 23(3)(h) requires the committee to scrutinise each instrument as to whether it trespasses unduly on personal rights and liberties. Under this principle, the committee will typically be concerned with instruments which:

- abrogate the privilege against self-incrimination;
- apply retrospectively or have a retrospective effect;
- confer immunity from liability;
- contain offences of strict or absolute liability;
- contain coercive powers (for example, use of force or entry, search and seizure powers);
- exclude or limit procedural fairness;
- provide for the collection, use and disclosure of personal information; and
- reverse the legal or evidential burden of proof.

The following discussion summarises the committee's expectations regarding key issues arising under principle (h).

Abrogation of privilege against self-incrimination

The common law privilege against self-incrimination provides that a person cannot be required to answer questions or produce material which may incriminate them. This is a key component of the common law right to be presumed innocent. Accordingly, where an instrument abrogates the privilege against self-incrimination, the committee generally expects the following safeguards:

- 'use' and 'derivative use' immunity, to prevent information obtained directly or indirectly from being used in criminal proceedings against them; and
- restrictions on the sharing of information obtained with law enforcement agencies.

The explanatory statement to the instrument should also justify the abrogation of the privilege, and explain the scope of any safeguards provided for by the instrument.

Privacy: collection, use and disclosure of personal information

Provisions which enable the collection, use and disclosure of personal information may trespass on an individual's right to privacy, and should generally be included in primary legislation, rather than delegated legislation. Where an instrument nevertheless contains such provisions, the explanatory statement should explain:

- the nature and scope of the provisions (including the nature and extent of the information that maybe disclosed and the persons and/or entities to whom disclosure is permitted);
- why the provisions are considered necessary and appropriate; and
- what safeguards are in place to protect the personal information, and whether these are set out in law or in policy (including whether the *Privacy Act 1988* applies).

Coercive powers

Provisions which contain coercive powers have the potential to seriously trespass on personal rights and liberties and should not be included in delegated legislation. These include provisions which authorise persons to enter, search, seize or destroy property or to use force against others. Where an instrument nevertheless contains such provisions, the explanatory statement to the instrument should explain:

- why the provisions are necessary and appropriate, including how the public interest is served by their inclusion in the instrument;
- the nature and scope of the provisions, including any constraints or conditions on the grant and exercise of the powers, and the circumstances in which the powers will be exercised;
- who may exercise the powers, and whether they are required to possess specific skills or qualifications;
- whether compensation is available for any property seized or destroyed in the exercise of the powers;
- whether independent review is available of decisions made, and actions taken, in connection with the exercise of the powers; and
- whether the provisions comply with Chapters 7 and 8 of the *Guide to Framing Commonwealth Offences*.

Immunity from liability

Provisions which confer immunity from liability or extend existing immunities (for example, by providing that criminal or civil proceedings cannot be brought against specified persons or bodies) limit the common law right to bring an action to enforce legal rights. Accordingly, where an instrument includes such provisions, the explanatory statement to the instrument should explain:

- the nature and scope of the immunity;
- why the breadth of the immunity is considered necessary; and
- why the immunity is necessary for each specific class of person to whom it applies.

Procedural fairness

The common law right to procedural fairness is underpinned by the fair hearing rule and the rule against bias. The fair hearing rule requires a person who is adversely affected by a decision to be given an adequate opportunity to put their case before the decision is made. Under the no bias rule decision-makers must not be biased and must not appear to be biased. Where an instrument limits or denies the right to procedural fairness (for example, by restricting or excluding disclosure of adverse information to the person affected by a decision), the explanatory statement should provide a comprehensive justification for the relevant exclusion or limitation.

Retrospective commencement or effect

The common law has long recognised the right to protection against retrospective laws. Such laws undermine legal clarity and certainty. Retrospectivity will arise where an instrument commences retrospectively or commences prospectively but has a retrospective effect. For example, an instrument may have a retrospective effect where it attaches new conditions or requirements to processes which had commenced under a previous legal framework, via the application of transitional provisions. Where an instrument commences retrospectively, or has a retrospective effect, the explanatory statement to the instrument should explain:

- the nature and scope of the relevant provisions;
- why the retrospectivity is considered necessary and appropriate; and
- whether any person has been, or may be disadvantaged by the retrospectivity and, if so, what steps have been taken or will be taken to avoid such disadvantage and ensure procedural fairness for affected persons.

The committee may also raise retrospective commencement under scrutiny principle (a), compliance with legislative requirements, in ascertaining whether the instrument complies with section 12 of the [Legislation Act 2003](#).

Reverse burden of proof

The right to be presumed innocent is a fundamental principle of the Australian legal system. Normally, the right to be presumed innocent requires the prosecution to prove all elements of an offence. Consequently, this right is undermined by provisions which require the defendant to raise evidence about a matter (reverse evidential burden), or positively prove a matter (reverse legal burden). In practice, this issue usually arises in the context of 'offence-specific defence' provisions, which establish a defence to an offence by requiring the defendant to raise evidence about a matter, or prove a matter. If an instrument contains such provisions, the explanatory statement should explain:

- the nature and scope of the relevant provisions;
- why it is considered necessary and appropriate to reverse the burden of proof, noting that a much stronger justification is necessary to justify reversing the legal burden;
- whether the provisions satisfy the following two-limbed test set out in the Attorney-General's Department's [Guide to Framing Commonwealth Offences](#) [4.3]:
 - whether the relevant matter is peculiarly within the knowledge of the defendant; and
 - whether it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter; and
- if the provision reverses the legal burden of proof (requires the defendant to prove or disprove a matter), why this is considered necessary, rather than reversing the evidential burden.

Strict and absolute liability

The requirement for the prosecution to prove fault on the part of a defendant is an important aspect of the common law right to be presumed innocent. The application of strict and absolute liability undermines this right by removing the requirement to prove fault in relation to one or more physical elements of an offence. Accordingly, where an instrument includes offences of strict or absolute liability, the explanatory statement should explain:

- the nature and scope of each offence, including what penalty attaches to each offence; and
- why it is considered necessary and appropriate to apply strict or absolute liability to the offence, by reference to the principles set out in the Attorney-General's Department's [Guide to Framing Commonwealth Offences](#) [2.2.6].

The explanatory statement should include a particularly robust justification for imposing absolute liability, as this not only removes the fault element but also excludes the defence of honest and reasonable mistake of fact.

Explanatory statement checklist

The following checklist summarises the types of information which should be included in an explanatory statement.

- Abrogation of privilege against self-incrimination** Where an instrument abrogates this privilege, the explanatory statement should justify the abrogation and explain the nature and scope of all relevant safeguards, including the availability of 'use' and 'derivative use' immunity.
- Collection, use and disclosure of personal information (privacy)** Where an instrument provides for the collection, use or disclosure of personal information, the explanatory statement should explain:
 - the nature and scope of the provisions (including the nature and extent of the information that maybe disclosed and the persons and/or entities to whom disclosure is permitted);
 - why the provisions are considered necessary and appropriate; and
 - what safeguards are in place to protect the personal information, and whether these are set out in law or in policy (including whether the Privacy Act 1988 applies).
- Coercive powers** Where an instrument includes entry, search and seizure powers, provides for the confiscation or destruction of personal property, or authorises the use of force, the explanatory statement should explain:
 - why the provisions are necessary and appropriate, including how the public interest is served by their inclusion in the instrument;
 - the nature and scope of the provisions, including any constraints or conditions on the grant and exercise of the power, and the circumstances in which it is envisaged that the power will be exercised;
 - who may exercise the power, including whether they are required to possess specific skills or qualifications;
 - whether compensation is available for the confiscation or destruction of property; and
 - the availability of independent review of decisions made and actions taken in connection with the exercise of the power.
- Immunity from liability** Where an instrument confers immunity from liability, the explanatory statement should explain the nature and scope of the immunity, justify the breadth of the immunity, and explain why the immunity is necessary for each class of person to whom it applies.
- Procedural fairness** Where an instrument excludes or limits the right to procedural fairness, for example, by breaching the fair hearing rule or no bias rule, the explanatory statement should comprehensively explain why it is necessary to limit procedural fairness.
- Retrospective commencement or effect** Where an instrument commences retrospectively, or commences prospectively but has a retrospective effect, the explanatory statement should explain:
 - the nature and scope of the relevant provisions;
 - why the retrospectivity is considered necessary and appropriate; and
 - whether any person has been, or may be disadvantaged by the retrospectivity and, if so, what steps have been or will be taken to avoid such disadvantage.

- Reverse burden of proof**

Where an instrument reverses the evidential or legal burden of proof by requiring the defendant to raise evidence about a matter (evidential burden) or to positively prove a matter (legal burden), the explanatory statement should explain:

 - the nature and scope of the relevant provisions; and
 - why it is necessary and appropriate to reverse the burden of proof;
 - whether the provisions satisfy the following two-limbed test set out in the Attorney-General's Department's [Guide to Framing Commonwealth Offences](#):
 - whether the relevant matter is peculiarly within the knowledge of the defendant; and
 - whether it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish; and
 - if applicable, why it is considered necessary to reverse the legal burden of proof, rather than only the evidential burden of proof.

- Strict and absolute liability**

Where an instrument contains offences of strict or absolute liability, the explanatory statement should explain:

 - the nature and scope of each offence, including what penalty attaches to each offence; and
 - why it is considered necessary and appropriate to apply strict or absolute liability to the offence, by reference to the principles set out in the Attorney-General's Department's [Guide to Framing Commonwealth Offences](#) [2.2.6].

Principle (i): Availability of independent review

Overview

Senate standing order 23(3)(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. Under this principle, the committee will typically be concerned with instruments which:

- exclude, limit or fail to provide for independent merits review;
- exclude or limit judicial review; or
- contain a no-invalidity clause.

Availability of independent merits review

Where an instrument empowers a decision-maker to make discretionary decisions which have the capacity to affect rights, liberties, obligations or interests, those decisions should ordinarily be subject to independent merits review. Accordingly, the explanatory statement to any instrument including such powers should explain:

- whether independent merits review 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 merit review?*](#)

The committee considers that the following factors will not, of themselves, constitute a sufficient justification for excluding independent merits review:

- the enabling legislation does not provide for merits review under the *Administrative Appeals Tribunal Act 1975* (AAT Act);
- the relevant decisions do not fall within the scope of the AAT Act because they are not made 'under an enactment';
- the availability of judicial review; and
- the availability of internal review (for example, review by a departmental officer) or review by the Ombudsman.

Availability of judicial review

The exclusion of judicial review of administrative action removes a fundamental right of persons who are affected by administrative decisions to challenge them in the courts. Any such exclusion requires a clear and substantial justification.

Limiting judicial review is also a serious matter. Such limitations are sometimes provided by no-invalidity clauses. No-invalidity clauses typically provide that the breach of a particular statutory requirement attached to a particular decision or act (for example, a requirement to provide reasons for a decision) does not result in the invalidity of that act or decision. Such clauses potentially restrict an applicant's capacity to seek independent review of the relevant act or decision.

Accordingly, where an instrument contains a 'no-invalidity' clause, the explanatory statement to the instrument should explain:

- the nature and scope of the no-invalidity clause; and
- why it is necessary and appropriate to potentially restrict a person's access to independent review through the inclusion of the no-invalidity clause.

Explanatory statement checklist

The following checklist summarises the types of information which should be included in an explanatory statement.

- Availability of independent merits review** Where an instrument empowers a decision-maker to make discretionary decisions with capacity to affect rights, liberties, obligations or interests, the explanatory statement should explain:
 - whether independent merits review 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 merit review?*](#)

- Availability of judicial review** Where an instrument excludes or limits the availability of judicial review in relation to a decision, the explanatory statement should explain:
 - why it is necessary and appropriate to deny or restrict access to judicial review; and
 - the nature and scope of any relevant statutory safeguards in the absence of judicial review.

- No-invalidity clauses** Where an instrument contains a 'no-invalidity' clause, the explanatory statement should explain:
 - the nature and scope of the no-invalidity clause; and
 - why it is necessary and appropriate to potentially restrict a person's access to external independent review by including the no-invalidity clause.

Principle (j): Matters more appropriate for parliamentary enactment

Overview

Senate standing order 23(3)(j) requires the committee to scrutinise each instrument as to whether it contains matters more appropriate for parliamentary enactment. This principle is underpinned by the concern that significant matters should be included in primary legislation, which is subject to a greater level of parliamentary oversight than delegated legislation. Under this principle, the committee will typically be concerned with instruments which:

- establish significant elements of a regulatory scheme;
- impose significant penalties;
- impose taxes or levies; and
- have a significant impact on personal rights and liberties.

Significant elements of a regulatory scheme

Significant elements of a regulatory scheme should ordinarily be included in primary legislation, rather than delegated legislation, due to the additional level of parliamentary scrutiny attached to the legislative process for primary legislation. Such elements could include:

- key definitions central to the operation of the regulatory scheme;
- significant elements of how the scheme is to operate (for example, whether a scheme is to be 'opt in' or 'opt out');
- principles underpinning the scope and exercise of significant discretionary powers;
- the availability of independent review of administrative decisions made under the scheme;
- safeguards to protect against undue trespass on personal rights and liberties in the administration of the scheme; and
- significant penalties for regulatory breaches.

However, where an instrument nevertheless contains significant elements of a regulatory scheme, explanatory statement should explain:

- the legislative authority relied upon for including significant elements of the regulatory scheme in the instrument; and
- why it is considered necessary and appropriate to include significant elements of a regulatory scheme in delegated legislation, rather than primary legislation.

The committee does not generally consider operational flexibility, on its own, to constitute a sufficient justification for including significant elements of a regulatory scheme in delegated legislation.

Imposition of taxes or levies

The levying of taxation is one of the most fundamental functions of the Parliament. Accordingly, the committee considers that taxes should generally be imposed by primary rather than delegated legislation. Where an instrument imposes a charge, fee or levy, the explanatory statement should explain the purpose of the imposition (e.g., fee for services rendered) to make it clear that the amount does not constitute a tax.

Where an instrument *does* impose a tax or levy, the instrument should solely deal with that matter. In addition, the explanatory statement to the instrument should explain:

- the legislative authority relied upon for using delegated legislation to set the levy or tax (e.g. a charges Act);
- whether the enabling Act sets any limits on the imposition of tax (for example, a cap on the amount that may be imposed); and
- why it is considered necessary and appropriate to use delegated legislation to set the levy or tax, rather than primary legislation.

Significant penalties

Serious criminal offences and significant penalties should ordinarily be included in primary, rather than delegated, legislation. This is to ensure appropriate parliamentary oversight of the scope of the offence and penalty. Generally, delegated legislation should not contain custodial penalties, or penalties exceeding a maximum penalty of 50 penalty units for individuals and 250 penalty units for body corporates. Where an instrument includes more significant penalties, the explanatory statement to the instrument should explain:

- the nature and scope of the offence and what penalties apply;
- why the penalty is appropriate to the relevant offence;
- why it is considered necessary and appropriate to include such penalties in delegated legislation; and
- whether the Attorney-General was consulted in relation to the inclusion of custodial penalties, in accordance with the Attorney-General's Department's [Guide to Framing Commonwealth Offences](#) [3.3].

Significant trespass on personal rights and liberties

Matters which have a significant impact on personal rights and liberties are more appropriately enacted via primary legislation rather than delegated legislation, irrespective of whether that impact is positive or negative. Such matters may include coercive powers or powers to disclose personal information. The committee's expectations with regard to instruments that contain such provisions are set out in its [guidance on principle \(h\)](#).

Explanatory statement checklist

The following checklist summarises the types of information which should be included in an explanatory statement.

- Significant elements of a regulatory scheme** Where an instrument contains significant elements of a regulatory scheme, the explanatory statement should explain:
 - the legislative authority relied upon for including significant elements of the regulatory scheme in the instrument; and
 - why it is considered necessary and appropriate to include significant elements of a regulatory scheme in delegated legislation, rather than primary legislation.

- Imposition of taxes and levies** Where an instrument imposes a charge, fee or levy, the explanatory statement should explain the purpose of the imposition (e.g., fee for services rendered). Where the amount does constitute a tax or levy, the explanatory statement should explain:
 - the legislative authority relied upon for using delegated legislation to set the levy or tax (e.g., a charges Act);
 - whether the enabling Act imposes any limitations on the imposition of taxation (for example, a statutory cap on the amount that may be imposed); and
 - why it is considered necessary and appropriate to use delegated legislation to set the levy or tax, rather than primary legislation.

- Significant penalties** Where an instrument imposes a penalty for individuals above 50 penalty units, or imposes a custodial penalty, the explanatory statement should explain:
 - why it is considered necessary and appropriate to include such penalties in delegated legislation;
 - why the penalty is appropriate to the relevant offence; and
 - whether the Attorney-General was consulted in relation to the inclusion of custodial penalties.

- Significant trespass on personal rights and liberties** Where an instrument has a significant impact on personal rights and liberties, the explanatory statement should address the matters outlined in the [guideline on principle \(h\)](#).

Principle (k): Exemption and deferral from sunseting

Overview

Senate standing order 23(3)(k) requires the committee to scrutinise each instrument as to whether it is exempt from the sunseting provisions of the *Legislation Act 2003* (Legislation Act). Under this scrutiny principle, the committee also scrutinises instruments that are automatically repealed by the operation of Division 1 of Part 3 of Chapter 3 of the Legislation Act where such an instrument amends a principal instrument that is exempt from sunseting. In addition, the committee will scrutinise those instruments which defer the sunseting date of another instrument. Under this principle, the committee will typically be concerned with instruments which:

- are exempt from the sunseting provisions of the Legislation Act;
- contain measures that will remain in force within a principal instrument that is exempt from sunseting; and
- defer the sunseting date of another instrument.

The following sections provide additional guidance on key issues which the committee may raise under scrutiny principle (k). This guideline will be updated regularly to reflect any developments in committee practices under this principle.

Exemption from sunseting

Section 50 of the Legislation Act provides that all legislative instruments registered on the Federal Register of Legislation after 1 January 2005 are automatically repealed ten years after registration. This process is called 'sunseting'. The committee considers that the current sunseting framework provides an important opportunity for the Parliament to maintain effective and regular oversight of its delegated legislative powers and ensures that the content of legislative instruments remains current and appropriate. In this way, the regime promotes parliamentary supremacy.

The committee considers that delegated legislation should be subject to sunseting to permit appropriate parliamentary scrutiny and oversight unless there are exceptional circumstances.

Where an instrument is exempt from sunseting, or contains measures that will remain in force within a principal instrument that is exempt from sunseting, the explanatory statement to the instrument should provide a thorough justification for the exemption, noting the effect of the exemption on parliamentary oversight.

Deferral of sunseting date

Section 51 of the Legislation Act provides that the Attorney-General may defer the sunseting of an instrument in certain circumstances.

Where an instrument defers the sunseting date of another instrument, the explanatory statement to the instrument should set out how the deferral of sunseting meets the requirements of section 51 of the Legislation Act and should provide a thorough explanation of the appropriateness of the deferral.

Explanatory statement checklist

The following checklist summarises the types of information which should be included in an explanatory statement.

- Exemption from sunseting** Where an instrument is exempt from sunseting, or contains measures that will remain in force within a principal instrument that is exempt from sunseting, the explanatory statement should:
 - set out the source of the exemption from sunseting; and
 - justify the exemption, noting the effect of the exemption on parliamentary oversight.

- Deferral of sunseting date** Where an instrument defers the sunseting date of another instrument, the explanatory statement should:
 - explain how the deferral of sunseting meets the requirements of section 51 of the Legislation Act; and
 - provide a thorough explanation of the appropriateness of the deferral.

Principle (I): Modification of primary legislation

Overview

Senate standing order 23(3)(I) requires the committee to scrutinise each instrument as to whether it contains amendments or modifications to primary legislation, or it exempts persons or entities from the operation of primary legislation. Under this principle, the committee will typically be concerned with instruments which:

- amend primary legislation;
- modify the operation of primary legislation; and
- exempt persons or entities from the operation of primary legislation.

Senate standing order 23(3)(I) also requires the committee to consider whether such an instrument is in force only for as long as is strictly necessary.

Amendment or modification of, or exemptions from, primary legislation

Provisions in delegated legislation which amend or modify 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. Such provisions should not ordinarily be included in delegated legislation and the committee will take a strong view on the inclusion of these provisions in executive-made law.

Where an instrument nevertheless includes such provisions, the committee generally considers that it should cease to operate no more than three years after the commencement date for the instrument. This is to ensure a minimum degree of parliamentary oversight.

In addition, the explanatory statement to the instrument should explain:

- the legislative authority relied upon to amend or modify primary legislation, or exempt persons or entities from the operation of primary legislation, by delegated legislation;
- the scope of the relevant amendment, modification or exemption, including the persons, entities or classes of persons or entities to which it applies;
- why it is considered necessary and appropriate to modify primary legislation, or exempt persons or entities from the operation of primary legislation, by delegated legislation (instead of amending primary legislation);
- the duration of the relevant amendment, modification or exemption, and if this is longer than three years, the reason this is necessary; and
- whether there is any intention to conduct a review of the relevant provisions to determine if they remain necessary and appropriate (including whether it is appropriate to include the provisions in delegated legislation).

Explanatory statement checklist

The following checklist summarises the types of information which should be included in an explanatory statement.

- Amendment or modification of, or exemptions from, primary legislation** Where an instrument includes a provision which amends or modifies primary legislation, or exempts persons or entities from the operation of primary legislation, the explanatory statement should explain:
 - the legislative authority relied upon to amend or modify primary legislation, or exempt persons or entities from the operation of primary legislation, by delegated legislation;
 - the scope of the relevant amendment, modification or exemption, including the persons, entities or classes of persons or entities to which it applies;
 - why it is considered necessary and appropriate to modify primary legislation, or exempt persons or entities from the operation of primary legislation, by delegated legislation (instead of amending primary legislation);
 - the duration of the relevant amendment, modification or exemption, and if this is longer than three years, the reason this is necessary; and
 - whether there is any intention to conduct a review of the relevant provisions to determine if they remain necessary and appropriate (including whether it is appropriate to include the provisions in delegated legislation).

Principle (m): Other technical scrutiny grounds

Overview

Senate standing order 23(3)(m) 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. The matters raised by the committee under this principle will vary from instrument to instrument; however, they will be underpinned by the committee's concern to protect and promote fundamental rule of law principles, including but not limited to:

- access to justice;
- equality before the law;
- legal certainty;
- parliamentary sovereignty;
- procedural fairness;
- protection of personal rights and liberties;
- separation of powers; and
- transparency and accountability.

The following sections provide additional guidance on key issues which the committee may raise under scrutiny principle (m). This guideline will be updated regularly to reflect any developments in committee practices under this principle.

Parliamentary oversight

Tabling of review reports

Tabling documents in Parliament is important to parliamentary scrutiny, as it alerts parliamentarians to the existence of the documents and provides opportunities for debate that are not available where documents are not tabled. Accordingly, instruments which provide for the review of significant matters should also require the review report to be tabled in Parliament. Such reports should also be published online, in the interests of promoting transparency and accountability. Where an instrument does not require the tabling or publication of a review report, the explanatory statement should justify this omission.

Automated assistance in decision-making

Provisions which facilitate automated assistance in administrative decision-making engage a number of administrative law and rule of law principles. For example, such provisions may reduce transparency in decision-making and fetter the exercise of discretionary power by inflexibly applying predetermined criteria to decisions that should be made on the merits of the individual case. Accordingly, whilst technology may be used to assist in the decision-making process, instruments should not provide for significant or discretionary decisions to be made by computers.

Automated decision-making also raises concerns about the quality and accessibility of independent merits review, as digital decisions may not be accompanied with a robust statement of reasons for the decision.

Where an instrument provides for automated assistance in a decision-making process, the explanatory statement should explain:

- the nature of the automated assistance, including the extent to which discretion is involved;

- why it is considered necessary and appropriate to provide for automated decision making in the decision-making process;
- what safeguards are in place to ensure that the decision-maker exercises their discretionary powers personally and without fetter;
- whether the automated assistance in the decision-making process complies with the best practice principles set out in the Administrative Review Council's report on [Automated Assistance in Administrative Decision Making](#), and, if not, why not; and
- any additional safeguards in place to ensure appropriate review rights are available (for example, whether there are mechanisms in place to ensure that errors can be corrected).

Further guidance about provisions which facilitate automated assistance in decision-making is contained in the Commonwealth Ombudsman's [Better Practice Guide on Automated Decision-Making](#).

Explanatory statement checklist

The following checklist summarises the types of information which should be included in an explanatory statement.

- | | | |
|--------------------------|--|---|
| <input type="checkbox"/> | Tabling of review reports in Parliament | Where an instrument provides for a review of significant matters but fails to require the review report to be tabled in Parliament the explanatory statement should justify this omission. |
| <input type="checkbox"/> | Automated assistance in decision-making | <p>Where an instrument provides for automated assistance in a decision-making process, the explanatory statement should explain:</p> <ul style="list-style-type: none"> • the nature of the automated assistance, including the level of discretion involved; • why it is considered necessary and appropriate to provide for automated assistance in the decision-making process; • what safeguards are in place to ensure the decision-maker exercises their discretionary powers personally and without fetter; • whether the automated assistance in the decision-making process complies with the best practice principles set out in the Administrative Review Council's report on Automated Assistance in Administrative Decision Making, and, if not, why not; and • any additional safeguards in place to ensure appropriate review rights are available (for example, whether there are mechanisms in place to ensure that errors can be corrected). |

Part III — Matters of Interest to the Senate

Standing order 23(4): Matters of interest to the Senate

Overview

Senate standing order 23(4) requires the committee to 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. The instruments raised by the committee under standing order 23(4) will necessarily vary; however, the committee may raise instruments which:

- set out significant elements of a regulatory scheme;
- have a significant, negative impact on personal rights and liberties;
- amend primary legislation;
- contain significant policy matters; or
- specify Commonwealth expenditure.

Where the committee considers that an instrument engages standing order 23(4), the committee will draw the Senate's attention to the instrument by one or more of the following means:

- highlighting the instrument in the *Delegated Legislation Monitor*;
- citing the instrument in a statement in the Senate chamber;
- writing to the relevant Senate or joint committee to alert that committee to the instrument.

The committee may also write to the responsible minister to advise the minister of its views.

Significant elements of a regulatory scheme

Significant elements of a regulatory scheme should ordinarily be included in primary legislation, rather than delegated legislation, due to the additional level of parliamentary scrutiny attached to the legislative process for primary legislation. Significant elements may include:

- key definitions central to the operation of the regulatory scheme;
- principles underpinning the scope and exercise of discretionary powers;
- the availability of independent review of administrative decisions made under the scheme;
- safeguards to protect against undue trespass on personal rights and liberties in the administration of the scheme; and
- significant penalties for regulatory breaches.

Depending on the significance of the matters contained in the instrument, the committee may raise scrutiny concerns about the instrument under [scrutiny principle \(j\) – matters more appropriate for parliamentary enactment](#), and draw it to the Senate's attention under standing order 23(4).

Significant trespass on personal rights and liberties

Matters which have a significant impact on personal rights and liberties are more appropriately enacted via primary legislation rather than delegated legislation, due to the additional level of parliamentary scrutiny attached to the legislative process for primary legislation. Such matters may include:

- coercive powers;
- disclosure of personal information; and
- abrogation of the privilege against self-incrimination.

Further information about the committee's approach to scrutinising instruments which contain such matters is included in the guideline on [principle \(h\) – personal rights and liberties](#).

Instruments which amend primary legislation

Henry VIII clauses are provisions in primary legislation which authorise delegated legislation to amend primary legislation. Such clauses raise significant scrutiny concerns because they reduce the level of parliamentary oversight over primary legislation and may subvert the appropriate relationship between the Parliament and the executive. Accordingly, the committee will raise instruments which amend primary legislation under standing order 23(4).

Commonwealth expenditure

Noting the importance of ensuring appropriate parliamentary oversight of the expenditure of public money, the committee will raise instruments which specify Commonwealth expenditure under Senate standing order 23(4) by:

- highlighting the instrument in the *Delegated Legislation Monitor*; and
- writing to relevant Senate committees to alert those committee to the instrument.

Further information about the committee's expectations regarding such instruments is contained in the guideline on [Scrutiny of Commonwealth expenditure](#).

Significant policy matters

Whether a matter in delegated legislation constitutes a 'significant policy matter' will depend on a variety of factors, including the nature and purpose of the specific instrument and the legislative framework in which it operates. An instrument may contain significant policy matters where:

- it is made under a framework bill that leaves the scope and details of a regulatory scheme to be set out in delegated legislation;
- it includes matters significantly affecting the public interest; or
- it relates to issues of national significance.

Part IV — Instruments Exempt from Disallowance

Standing order 23(4A): Instruments exempt from disallowance

Overview

Standing order 23(4A) empowers the committee to scrutinise instruments which are exempt from disallowance to determine whether the exemption from disallowance is appropriate.

The Senate recognised in June 2021 that if the Parliament is to satisfy its constitutionally mandated law-making role, it must have the ability to scrutinise legislation made by the executive. In this regard, the Senate resolved that:

- delegated legislation should be subject to disallowance and sunseting to permit appropriate parliamentary scrutiny and oversight unless there are exceptional circumstances; and
- any claim that circumstances justify exemption from disallowance and sunseting will be subjected to rigorous scrutiny with the expectation that the claim will only be justified in rare cases.¹

In practice, this means that the committee considers most of the existing exemptions from disallowance are not justified.

The committee expects explanatory statements to all exempt instruments to identify the source of the instrument's exemption from disallowance. In addition, the explanatory statement should set out in detail the exceptional circumstances that are said to justify the exemption of the instrument.

Standing order 23(4A) also empowers the committee to consider exempt instruments against the scrutiny principles set out in standing order 23(3). The committee's scrutiny concerns under standing order 23(4A) will be heightened where an instrument also engages the committee's scrutiny concerns under principles (a) to (m) of standing order 23(3).

Identification of the source of the exemption from disallowance

The committee expects explanatory statements to exempt instruments to identify the source of the instrument's exemption from disallowance. This includes identifying the specific provision of the Act or instrument which provides for the exemption (including the relevant table item, where applicable). The committee does not consider general statements identifying that an exemption is provided under the *Legislation Act 2003* or under the *Legislation (Exemptions and Other Matters) Regulation 2015* to be sufficient.

Justification for exemption from disallowance

The committee considers that delegated legislation should be subject to disallowance unless there are exceptional circumstances. Any claim that circumstances justify an exemption from disallowance will be subjected to rigorous scrutiny with the expectation that the claim will only be justified in rare cases. This is in recognition of the important role that the disallowance process plays in maintaining parliamentary oversight of delegated legislation made by the executive.

Exemptions from disallowance are not appropriate where instruments adversely affect rights, liberties, duties and obligations, and should not be made unless there is an alternative form of parliamentary oversight, such as a requirement that the instrument does not come into effect until it has been approved by resolution of each House of the Parliament. The committee does not consider

1 Senate resolution 53B: Delegated legislation—disallowance and sunseting, 16 June 2021, https://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/standingorders/d00/Resolutions_expressing_opinions_of_the_Senate/.

other accountability mechanisms, such as the ability of senators to ask questions on notice or at Senate estimates in relation to an instrument, to be a sufficient alternative form of parliamentary oversight.

The committee expects explanatory statements to exempt instruments should set out in detail the exceptional circumstances that are said to justify the exemption of the instrument.

Common justifications likely to be insufficient

The instrument is made for the purpose of an intergovernmental scheme

The committee does not generally consider the fact that an instrument is made for the purpose of an intergovernmental scheme to be a sufficient justification to exempt an instrument from disallowance. While, in some instances, such an instrument may be a product of significant negotiation in the process of obtaining agreement from all government parties, this is not necessarily the case. Moreover, the committee does not consider the fact that a number of executive governments have reached an agreement in relation to a particular matter precludes the need for parliamentary oversight of the laws resulting from such an agreement.

The need to take urgent and decisive action

The committee does not generally consider that the need for urgent and decisive action to be a sufficient justification to exempt an instrument from disallowance. This is because the disallowable status of delegated legislation does not prevent the executive from acting quickly and decisively as it does not impede the immediate commencement and enforceability of an instrument. Moreover, the subsequent disallowance of a legislative instrument (which may only occur after the instrument has been tabled in the Parliament) does not invalidate actions taken under the instrument prior to the time of disallowance.

The potential for the disallowance process to create uncertainty

The committee does not generally consider that the potential for the disallowance process to create uncertainty to be a sufficient justification to exempt an instrument from disallowance. While the disallowance process does introduce the possibility that relevant measures will be disallowed during the disallowance period, it is well established that the instance of instruments being disallowed by the Parliament is very rare. Moreover, senators and members, as elected representatives, would be well aware of any impact that disallowance would have and would consider such matters as part of their deliberations and their accountability to their electors.

The committee considers that, instead, the disallowance process is an opportunity to work in a constructive manner with the executive to enhance delegated legislation to ensure that it operates and functions within the boundaries placed upon it by the Parliament. In relation to instruments made during times of emergency, the committee considers that the disallowance process would facilitate appropriate debate and scrutiny of the use of emergency powers and would operate to ensure that such powers are not misused.

While, as noted above, the committee does not consider that arguments against providing for disallowance on the basis that it may undermine certainty are persuasive, the committee considers that in many contexts any uncertainty can be overcome by having delegated legislation commence after the disallowance period has passed, or by providing that an instrument does not come into effect until it has been approved by resolution of each House of the Parliament.

Explanatory statement checklist

The following checklist summarises the types of information which should be included in an explanatory statement.

- Identification of source of exemption from disallowance** Where an instrument is exempt from disallowance the explanatory statement should identify the specific source of the exemption.

- Justification for exemption from disallowance** Where an instrument is exempt from disallowance, the explanatory statement should set out in detail the exceptional circumstances that are said to justify the exemption of the instrument.

Part V — Commonwealth Expenditure

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

Senate standing order 23(3)(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 Commonwealth 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

Senate standing order 23(3)(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.

Availability of independent merits review

Senate standing order 23(3)(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 their exclusion from merits review, by reference to the Administrative Review Council's guide, [What decisions should be subject to merit review?](#).

Ensuring appropriate parliamentary oversight

Senate standing order 23(3)(g) requires the committee to scrutinise each instrument as to whether the accompanying explanatory material provides sufficient information to gain a clear understanding of the instrument.

In addition, Senate standing order 23(3)(m) 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 Senate committees to alert those committees to the relevant expenditure. This will allow those committees to consider whether Commonwealth expenditure specified in delegated legislation warrants further inquiry or monitoring.

Explanatory statement checklist

The following checklist summarises the types of information which should be included in an explanatory statement.

- Constitutional authority for expenditure** The explanatory statement should:
 - clearly identify each constitutional head of power that is relied on to support expenditure on the relevant 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 merit 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.