

The Senate

Standing Committee for the
Scrutiny of Delegated Legislation

Annual Report 2024

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Chapter 1

Introduction

Overview

- 1.1 The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee), formerly the Senate Standing Committee on Regulations and Ordinances, was established in 1932. The role of the committee is to examine the technical qualities of all legislative instruments, and to decide whether they comply with the committee's non-partisan scrutiny principles set out in Senate standing order 23.
- 1.2 The executive branch of government makes over a thousand legislative instruments each year, known as 'delegated legislation'. Delegated legislation has the same force in law as Acts made by the Parliament and may form as much as half of the statutory law of the Commonwealth of Australia.¹
- 1.3 The committee's work may be broadly described as technical legislative scrutiny. The committee does not consider the policy merits of delegated legislation, although the policy content of an instrument may provide context for the committee's scrutiny.
- 1.4 The scope of the committee's scrutiny function is formally defined by Senate standing order 23(3) which requires the committee to scrutinise each legislative instrument as to whether:
 - (a) it is in accordance with its enabling Act and otherwise complies with all legislative requirements;
 - (b) it appears to be supported by a constitutional head of legislative power and is otherwise constitutionally valid;
 - (c) it makes rights, liberties, obligations or interests unduly dependent on insufficiently defined administrative powers;
 - (d) those likely to be affected by the instrument were adequately consulted in relation to it;
 - (e) its drafting is defective or unclear;
 - (f) it, and any document it incorporates, may be freely accessed and used;
 - (g) the accompanying explanatory material provides sufficient information to gain a clear understanding of the instrument;
 - (h) it trespasses unduly on personal rights and liberties;
 - (i) it unduly excludes, limits or fails to provide for independent review of decisions affecting rights, liberties, obligations or interests;
 - (j) it contains matters more appropriate for parliamentary enactment;

¹ [*Odgers' Australian Senate Practice*](#), 14th edition (2016), p. 432.

- (k) in the case of an instrument exempt from sunseting, it is appropriate for the instrument to be exempt from sunseting;
 - (l) in the case of an instrument that amends or modifies the operation of primary legislation, or exempts persons or entities from the operation of primary legislation, the instrument is in force only for as long as is strictly necessary; and
 - (m) it complies with any other ground relating to the technical scrutiny of delegated legislation that the committee considers appropriate.
- 1.5 In addition, standing order 23(4) empowers the committee to scrutinise instruments to determine whether the attention of the Senate should be drawn to the instrument on the ground that it raises significant issues, or otherwise gives rise to issues that are likely to be of interest to the Senate.
- 1.6 Further, standing order 23(4A) empowers the committee to consider instruments that are not subject to disallowance, including whether it is appropriate for them to be exempt from disallowance.
- 1.7 This Annual Report provides a summary of the committee's work for the period from 1 January to 31 December 2024. The annual report is divided into two chapters:
- Chapter 2 sets out statistics relating to the work of the committee in 2024; and
 - Chapter 3 highlights the most significant scrutiny issues that the committee identified in 2024 and provides a number of case-studies.

Committee membership

- 1.8 Senate standing order 23 provides for the committee to be appointed at the commencement of each Parliament. The committee shall comprise six members: three government senators and three non-government senators. The committee is to be chaired by a government senator.
- 1.9 A list of current committee members can be found at the beginning of this report.²

The committee processes

- 1.10 In undertaking its work during the reporting period, the committee was supported by a secretariat comprising a committee secretary, one principal research officer, one senior research officer and a legislative research officer.
- 1.11 The committee also obtains advice from an external legal adviser, who is appointed by the committee with the approval of the President of the Senate. Professor Lorne Neudorf served as the committee's legal adviser during 2024.

² This list is also available on the [Committee Membership](#) page on the committee's website.

- 1.12 The committee's work is also supported by the processes for the registration, tabling and disallowance of legislative instruments under the *Legislation Act 2003*.

Scrutiny of instruments

- 1.13 Each instrument is scrutinised against the committee's scrutiny principles. The committee meets regularly, including during sitting weeks, to consider instruments that give rise to potential scrutiny issues.
- 1.14 Where an instrument raises a scrutiny concern, the committee's usual approach is to include the instrument in its *Delegated Legislation Monitor* (the Monitor) and write to the responsible minister or agency seeking further explanation or requesting specific action to address the relevant issue.

The committee's use of the disallowance process

- 1.15 The committee's scrutiny of instruments is generally conducted within the timeframes that apply to the disallowance process. Working within these timeframes ensures that the committee is able, if necessary, to seek disallowance of an instrument about which it has concerns.³
- 1.16 In cases where the 15 sitting days available for giving a notice of motion for disallowance are likely to expire before a matter is resolved, the committee may give a notice in order to protect the Senate's ability to subsequently disallow the instrument in question.⁴ This can have the effect of extending the applicable disallowance period by a further 15 sitting days. The committee refers informally to these notices as 'protective' notices.
- 1.17 The committee may otherwise give a notice of motion to disallow an instrument where it considers that the instrument raises serious unresolved scrutiny concerns, and which should be drawn to the Senate's attention or disallowed.
- 1.18 In the vast majority of cases, these notices are withdrawn when the committee receives a satisfactory response from the relevant minister or agency which addresses the committee's concerns. For example, if the minister or agency provides information that addresses the committee's concerns or includes an undertaking to progress amendments to the instrument or its explanatory statement. Where a satisfactory response is received, the Chair will withdraw the notice of motion on behalf of the committee.
- 1.19 The committee stresses the importance of the disallowance process to its scrutiny role, and in facilitating a minimum level of parliamentary oversight. Accordingly, the committee maintains the view that exemptions from

³ [*Odgers' Australian Senate Practice*](#), 14th edition (2016), p. 437.

⁴ [*Odgers' Australian Senate Practice*](#), 14th edition (2016), p. 438.

disallowance should generally be set out in primary legislation, and only apply to instruments in exceptional circumstances.

Undertakings

1.20 Ministers or agencies may provide an undertaking to address the committee's concerns. Typically, they will undertake to progress amendments to the instrument or its explanatory statement, or to propose amendments to an instrument's enabling legislation. The acceptance of such undertakings by the committee has the benefit of securing a satisfactory outcome in relation to the committee's scrutiny concerns, without interrupting the administration of government by disallowing the instrument in question.

Interaction with other legislative scrutiny committees

1.21 The committee is one of three legislative scrutiny committees. The other two committees are the Parliamentary Joint Committee on Human Rights (PJCHR) and the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee).⁵

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

Committee publications

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

Delegated Legislation Monitor⁶

1.24 The Monitor is the regular scrutiny report on the work of the committee. It is generally published in each Senate sitting week. It identifies instruments in relation to which the committee is engaging with the relevant minister or agency, or has concluded its examination. The Monitor also lists all the instruments registered during the reporting period, which:

- specify Commonwealth government expenditure; and
- are exempt from disallowance and sunseting and whether they meet the committee's expectations under standing order 23(4A); and
- the committee is otherwise raising under standing order 23(4) as a matter of interest to the Senate because they raise significant issues, or otherwise give rise to issues that are likely to be of interest to the Senate.

⁵ More information about these committees can be found at the web pages for the [Parliamentary Joint Committee on Human Rights](#) and the [Senate Standing Committee for the Scrutiny of Bills](#).

⁶ Monitors for 2024 and for previous years may be accessed via the [committee's webpage](#).

- 1.25 The Monitor also records undertakings that have been made or implemented to address the committee's scrutiny concerns, as well as undertakings that remain outstanding.

Scrutiny News⁷

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

Guidelines⁸

- 1.27 The committee's guidelines provide detail on the committee's work practices and its technical scrutiny principles. The purpose of the guidelines is to assist people working with the committee to understand the committee's role and expectations, however, they are not intended to be definitive.
- 1.28 In 2024, the committee published the 3rd edition of the guidelines.

Index of Instruments⁹

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

Index of Undertakings¹⁰

- 1.30 The *Index of Undertakings* is an alphabetical list of all instruments in a particular year for which the committee has accepted an undertaking from a minister or agency to address its scrutiny concerns.

Other resources

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

Disallowance Alert¹¹

- 1.32 The *Disallowance Alert* is a webpage listing all instruments for which a notice of motion for disallowance has been given in either House (whether by the

⁷ Past editions of *Scrutiny News*, as well as information about subscribing to the mailing list, are available on the Scrutiny of Bills Committee's [website](#).

⁸ [Guidelines](#) relating to the committee's scrutiny principles are published on the committee's website.

⁹ The [Index of Instruments](#) can be accessed on the committee's website.

¹⁰ The [Index of Undertakings](#) can be accessed on the committee's website.

¹¹ The [Disallowance Alert](#) can be accessed via Parliament's website.

committee or by an individual senator or member). The progress and outcome of all disallowance notices are also recorded here.

Senate Disallowable Instruments List¹²

- 1.33 The *Senate Disallowable Instruments List* is a list of all disallowable instruments tabled in the Senate.¹³ This online resource may be used to ascertain whether and, if so, when an instrument has been tabled in the Senate, and how many sitting days remain in which a notice of motion for disallowance may be given. The list is updated after each sitting day.

Guides to Senate Procedure¹⁴

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

Odgers' Australian Senate Practice¹⁵

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

Acknowledgements

- 1.36 The committee greatly appreciated the assistance of its legal adviser, Professor Lorne Neudorf, as well as the committee secretariat, during 2024.
- 1.37 The committee also wishes to acknowledge the ongoing assistance of ministers and agencies. The responsiveness of ministers and agencies to the committee's inquiries is critical to ensuring that the committee can perform its scrutiny function effectively.

¹² The [Senate Disallowable Instruments](#) List can be accessed via Parliament's website.

¹³ As instruments may be tabled on different dates in the Senate and the House of Representatives respectively (and hence have different disallowance timeframes in each House), there is also a [House of Representatives Disallowable Instruments List](#).

¹⁴ The [Guides to Senate Procedure](#) can be accessed via Parliament's website.

¹⁵ [Odgers' Australian Senate Practice](#) can be accessed via Parliament's website.

Chapter 2

Scrutiny work of the committee in 2024

Overview

- 2.1 This chapter provides information about the work of the committee in 2024, including relevant statistics relating to the instruments it considered during this reporting period.

Meetings and Delegated Legislation Monitors

- 2.2 In 2024, the committee held 15 private meetings. Of these, 14 private meetings related to the regular scrutiny of instruments included in the committee's 14 *Delegated Legislation Monitors* tabled in 2024.
- 2.3 The remaining meeting was a private briefing held by the committee. Such briefings are informal meetings with ministers or senior departmental officials, which enable the committee to obtain further information about certain legislative instruments that raise scrutiny concerns or to discuss and seek to resolve ongoing systemic scrutiny concerns.
- 2.4 Specifically, the committee met with officials from the Attorney-General's Department and the Office of the Commonwealth Ombudsman on 24 June 2024. The purpose of this briefing was for departmental officials to provide advice on the progress of their work to support implementation of the Government Response to the Royal Commission into the Robodebt Scheme, and to provide an update on their progress developing and implementing a consistent legislative approach to automated decision-making across the Commonwealth.
- 2.5 Across the 14 Monitors tabled in 2024, the committee considered 1500 legislative instruments, registered between 17 November 2023 and 28 October 2024. The Chair, or the Deputy Chair on the Chair's behalf, gave 8 tabling statements in tabling the Monitors, to draw the Senate's attention to particular instruments or systemic issues raising significant scrutiny concerns.¹
- 2.6 The statistics in this chapter relate to the scrutiny of these 1500 legislative instruments. This includes the scrutiny of 1279 disallowable instruments, and 221 instruments exempt from disallowance. This is comparatively lower than the 1885 legislative instruments scrutinised in 2023 (comprising 1607 disallowable instruments and 278 instruments exempt from disallowance).

¹ The Chair, or the Deputy Chair on the Chair's behalf, made tabling statements for Monitors 6, 7, 8, 9, 10, 11, 12, and 14 of 2024. These can be viewed on the [Senate Hansard website](#).

Scrutiny of instruments

- 2.7 Of the 1500 legislative instruments that the committee examined in the 2024 reporting period, it identified 348 instruments (approximately 23 per cent) raising one or more scrutiny concerns which required a response from the relevant agency or minister, or which were drawn to the attention of the Senate or relevant minister.² This is a slightly higher percentage of instruments raising scrutiny concerns compared to 2023 when approximately 19 per cent of instruments examined by the committee raised scrutiny concerns.
- 2.8 The 348 instruments raising scrutiny concerns during the 2024 reporting period included:³
- 160 instruments which raised substantive technical scrutiny concerns under the committee's technical scrutiny principles, against which the committee is empowered to examine instruments under standing order 23(3);
 - 97 instruments exempt from disallowance that did not meet the committee's expectations as set out in its guidelines;⁴
 - 125 instruments exempt from sunseting that did not meet the committee's expectations as set out in its guidelines;⁵ and
 - 81 instruments drawn to the attention of the Senate because they provided for expenditure in delegated legislation.⁶ Of these, 62 related to Commonwealth expenditure on grants or programs, and 19 related to the levying of taxation in delegated legislation.
- 2.9 The committee concluded its examination of 119 instruments in the 2024 reporting period.⁷

² Details of these instruments may be found on the [Index of Instruments](#) page on the committee's website.

³ This breakdown of numbers at [2.8] shows a total of 463 instruments raised. However, some instruments were raised simultaneously due to scrutiny concerns under both standing order 23(4) and standing order 23(4A), and other scrutiny concerns. 347 is the total number of unique instruments raised by the committee.

⁴ The committee's expectations with respect to exemptions from disallowance are contained in Senate standing order 23(4A); Senate Standing Committee for the Scrutiny of Delegated Legislation, [Guidelines](#), 3rd edition (July 2024) p. 43. See also Chapter 2 for further discussion of the scrutiny of instruments exempt from disallowance.

⁵ The committee's expectations with respect to exemptions from sunseting are contained in Senate standing order 23(3)(k); Senate Standing Committee for the Scrutiny of Delegated Legislation, [Guidelines](#), 3rd edition (July 2024) p. 37.

⁶ Senate standing order 23(4).

⁷ The discrepancy between the number of instruments raising scrutiny concerns and the number of concluded entries arises partly because some instruments were initially commented on in the previous reporting period, while others will have been concluded in the next reporting period. This discrepancy also arises due to the committee's dialogue nature of communication, which mostly results in back and forth correspondence with a minister or agency to resolve an issue. Furthermore,

Scrutiny principles engaged

2.10 The following table provides an overview of the scrutiny issues identified in instruments considered by the committee in the 2024 reporting period.

Table 2.1 Issues raised by the committee in 2024

Type of correspondence	Issues raised against scrutiny principles under Senate standing order 23(3) ⁸													Total
	(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)	(j)	(k)	(l)	(m)	
Ministerial	2	0	17	4	5	2	10	16	8	9	0	4	2	79
Agency	10	0	15	55	2	8	7	22	11	4	38	1	2	175
Total	12	0	32	59	7	10	17	38	19	13	38	5	4	254

2.11 As shown in the Table 2.1, the committee raised more than twice as many scrutiny issues at agency than at ministerial level in 2024.

2.12 In 2024, the committee raised a significantly lower number of scrutiny issues with relevant agencies and ministers when compared to 2023.⁹ This can partially be attributed to the lower number of instruments scrutinised by the committee in 2024 compared to 2023. Relevantly, the proportion of scrutiny issues raised with relevant agencies compared to ministers remains consistent.

2.13 Issues raised with relevant agencies accounted for the majority of scrutiny issues raised in both 2024 and 2023. In 2024 scrutiny issues raised with agencies accounted for approximately 69 per cent of scrutiny issues raised and those raised with ministers accounted for 31 per cent. In 2023 they accounted for 72 per cent and 28 per cent respectively.

Scrutiny concerns raised at the ministerial level

2.14 Where the committee is unable to resolve its scrutiny concerns by informal engagement with agencies via its secretariat or an instrument raises a number of substantive scrutiny concerns, the committee will engage directly with the responsible minister to seek further information. In 2024, the committee raised 79 scrutiny issues with relevant ministers.

2.15 As indicated by Table 2.1, in 2024 the committee most frequently raised scrutiny concerns with ministers under principle (c).¹⁰ Principle (c) requires the committee to scrutinise instruments as to whether instruments make rights, liberties, obligations or interests unduly dependent on insufficiently defined

the committee does not include instruments where it wrote to the relevant minister or agency in an advice only capacity in the number of concluded instruments as a response was not expected.

⁸ As individual instruments often raise more than one scrutiny principle, the number of issues raised is greater than the 160 instruments raising substantive scrutiny concerns in this period.

⁹ A total of 363 scrutiny issues were raised in 2023.

¹⁰ Senate standing order 23(3)(c).

administrative powers. This includes where instruments broadly delegate administrative powers, allow for discretionary decision-making or provide for automated decision-making. This principle was raised 17 times and accounted for approximately 22 per cent of scrutiny issues raised with ministers by the committee, consistent with 2023 where principle (c) account for approximately 21 per cent of scrutiny issues raised with ministers.

- 2.16 The majority of issues raised under principle (c) related to the conferral of broad discretionary powers on an individual to make a decision. Where an instrument concerns broad discretionary powers on a person, the instrument should set out factors which the person must consider in exercising those powers. Of the 17 times principle (c) was raised, 12 of those, or 71 per cent, related the conferral of broad discretionary powers.
- 2.17 During the 2024 reporting period, scrutiny issues relating to the inclusion of automated decision-making in delegated legislation were also raised more frequently. This is partly due to the committee's growing concern over the inclusion of automated decision-making in legislative instruments which is discussed further at Chapter 3. In addition, following the issuing of the third edition of the committee's guidelines in July 2024, automated decision-making now falls more appropriately under principle (c), whereas it was previously considered as a general scrutiny concern under principle (m). While concerns over automated decision-making were not raised with a minister in 2023, they made up approximately 12 per cent of scrutiny issues raised under principle (c) in 2024.
- 2.18 Scrutiny concerns raised under principle (h)¹¹ relating to personal rights and liberties were raised 16 times and made up approximately 20 per cent of scrutiny issues raised by the committee with the relevant minister in the 2024 reporting period. This is slightly higher than in 2023 when the principle made up 17 per cent of scrutiny issues. The committee's concerns under principle (h) commonly related to instruments which provided for the collection, use and disclosure of personal information but the nature and scope of the relevant provisions and applicable safeguards were insufficiently explained in the explanatory statement.
- 2.19 Principle (g) requires the committee to scrutinise instruments as to whether the accompanying explanatory material provides sufficient information to gain a clear understating of the instrument.¹² This scrutiny principle is commonly raised in conjunction with another scrutiny principle where the explanatory statement does not meet the committee's expectation. Consequently, this was

¹¹ Senate standing order 23(3)(h).

¹² Senate standing order 23(3)(g).

the third most frequent scrutiny issue raised by the committee in 2024, accounting for 13 per cent of issues raised, a slight increase from 2023.

- 2.20 Under principle (j)¹³, the committee considers whether instruments contain matters which are more appropriate for parliamentary enactment, such as significant elements of a regulatory scheme or significant penalties for criminal offences. In 2024, this scrutiny principle accounted for 11 per cent of scrutiny issues raised with ministers, increasing from seven per cent in 2023. The increase in this scrutiny principle is a matter of ongoing concern for the committee and is discussed further in Chapter 3.
- 2.21 Principle (d), which considers the adequacy of the consultation process,¹⁴ was raised to a higher degree at both a ministerial and agency level when compared to the previous year. This accounted for five per cent of scrutiny issues raised with ministers in 2024 compared to approximately two per cent in 2023. This increase is partly due to amendments made to the committee's guidelines in July 2024 which clarified the committee's expectations that explanatory statements to instruments include a summary of the outcomes of the consultation process. This principle is discussed further in Chapter 3.
- 2.22 The remaining scrutiny principles made up approximately 29 per cent of all scrutiny concerns raised by the committee with the relevant minister. The committee also raised concerns with ministers about the clarity of drafting,¹⁵ and access and use of documents incorporated by reference,¹⁶ at a higher rate in 2024 than in 2023. Principles concerning compliance with legislative requirements,¹⁷ availability or merits review,¹⁸ the modification of primary legislation,¹⁹ and those scrutinised on other technical grounds,²⁰ were raised less frequently in 2024 compared to 2023. The committee raised no concerns on a ministerial level about constitutional validity²¹ or exemption and deferral from sunset²² in either 2024 or 2023.

¹³ Senate standing order 23(3)(j).

¹⁴ Senate standing order 23(3)(d).

¹⁵ Senate standing order 23(3)(e).

¹⁶ Senate standing order 23(3)(f).

¹⁷ Senate standing order 23(3)(a).

¹⁸ Senate standing order 23(3)(i).

¹⁹ Senate standing order 23(3)(l).

²⁰ Senate standing order 23(3)(m).

²¹ Senate standing order 23(3)(b).

²² Senate standing order 23(3)(k).

Scrutiny concerns raised at the agency level

- 2.23 The committee secretariat, acting on the committee's behalf, will often seek further information or clarification directly from an agency to resolve minor scrutiny concerns rather than escalating the request to the relevant minister. The committee does not publish the content of any correspondence with agencies, however, it does publish a concise record of the instruments in relation to which it is engaging at agency level in the relevant Monitor. Table 2.1 shows that the committee raised a total of 175 scrutiny issues with agencies in 2024.
- 2.24 Principle (d), which considers the adequacy of the consultation process,²³ was raised 55 times with agencies in 2024, accounting for approximately 31 per cent of all issues raised with agencies and was the most frequently raised scrutiny principle. This is significantly higher than in 2023, where the principle accounted for just two per cent of scrutiny issues raised with agencies. As previously mentioned, this significant increase is due partly to the amendments made to the committee's guidelines around the inclusion of the outcomes of the consultation process in explanatory statements. The committee secretariat took an educative approach to implementing the updates to the guidelines and routinely drew agencies' attention to the committee's expectations where it appeared they were not aware.
- 2.25 Principle (k) concerns an instrument's exemption or deferral from sunseting.²⁴ This scrutiny issue was raised 38 times, accounting for 22 per cent of scrutiny issues raised with agencies. Though this principle accounted for a larger proportion of scrutiny issues raised in 2024 when compared to the previous year, the principle has historically made up a significant proportion of scrutiny issues raised with agencies. Further information about the committee's engagement with agencies regarding exemptions from sunseting is outlined in Chapter 3.
- 2.26 Principle (h), relating to personal rights and liberties,²⁵ was raised with agencies 22 times. This represented approximately 13 per cent of concerns raised with agencies, significantly higher compared to approximately five per cent in 2023. This scrutiny issue was frequently raised with both agencies and ministers and continues to be a significant scrutiny concern for the committee.
- 2.27 Scrutiny issues raised under principle (g), which relates to the adequacy of explanatory materials,²⁶ have significantly decreased in 2024. The principle was raised seven times with agencies in 2024 compared to 103 times in 2023. Though this is a significant decrease, this substantive change does not necessarily reflect

²³ Senate standing order 23(3)(d).

²⁴ Senate standing order 23(3)(k).

²⁵ Senate standing order 23(3)(h).

²⁶ Senate standing order 23(3)(g).

an improvement in the adequacy of explanatory materials. Instead, it reflects a readjustment to previous committee practices in which the committee reserves raising this principle only for the most serious of cases, rather than routinely raising it in conjunction with other scrutiny principles where the explanatory statement does not meet the committee's expectation.

- 2.28 The remaining scrutiny principles made up approximately 30 per cent of all scrutiny concerns raised at the agency level. The committee raised concerns regarding the scope of administrative powers,²⁷ merits review,²⁸ and whether instruments are more appropriate for parliamentary enactment,²⁹ to a higher degree in 2024 than in 2023. Principles regarding compliance with legislative requirements,³⁰ and drafting,³¹ were raised less in 2024. Principles relating to access and use,³² modification of primary legislation,³³ and other technical grounds,³⁴ were raised at a similar level in both reporting periods. Issues relating to constitutional validity³⁵ were not raised with agencies in 2024.

Disallowance notices

- 2.29 The Chair, on behalf of the committee, gave nine 'protective' notices of motion to disallow an instrument in the 2024 reporting period. This is lower than the 14 notices given in 2023.
- 2.30 The committee generally gives a notice of motion to disallow an instrument where it is unable to conclude its consideration of a disallowable instrument before the original 15 sitting day disallowance period expires. The committee informally refers to these notices as 'protective' notices of motion to disallow as the intention of the notice is to protect the Senate's ability to subsequently disallow the instrument in question if the committee's scrutiny concerns cannot be resolved, rather than an intention to disallow the instrument at the time the notice is given.³⁶ If the committee's scrutiny concerns are resolved, this notice is withdrawn in accordance with standing order 78.

²⁷ Senate standing order 23(3)(c).

²⁸ Senate standing order 23(3)(i).

²⁹ Senate standing order 23(3)(j).

³⁰ Senate standing order 23(3)(a).

³¹ Senate standing order 23(3)(e).

³² Senate standing order 23(3)(f).

³³ Senate standing order 23(3)(l).

³⁴ Senate standing order 23(3)(m).

³⁵ Senate standing order 23(3)(b).

³⁶ [*Odgers' Australian Senate Practice*](#), 14th edition (2016), p. 438.

- 2.31 The committee may otherwise give notice of a motion to disallow an instrument where it considers that the instrument raises serious and/or unresolved scrutiny concerns and should be drawn to the Senate's attention or disallowed.
- 2.32 All but one³⁷ of the notices given by the Chair in 2024 were withdrawn, generally following the receipt of a satisfactory ministerial response or an undertaking that addressed the committee's concerns. The remaining notice was subsequently withdrawn in 2025.
- 2.33 The Deputy Chair, on behalf of the committee, also withdrew two notices in 2024 which were originally given in 2023.³⁸ Details of all disallowance motions given during the reporting period are available on the Disallowance Alert webpage for 2024.³⁹

Undertakings

- 2.34 The committee generally requests three types of undertakings from ministers and agencies. These include undertakings to make amendments to an explanatory statement, amend or revoke an instrument, or amend an Act. Occasionally the committee may accept an undertaking in relation to an additional matter, for example, to undertake a review into the legislation or to table a report.
- 2.35 The committee expects that such undertakings will be implemented in a timely manner. Accordingly, the committee records all ministerial and agency undertakings in an index available on the committee's webpage.⁴⁰
- 2.36 Table 2.2 below outlines the number and of undertakings that were made in 2024 as well as the status of their implementation. There was a small increase in the number of undertakings made in 2024, with the number rising from 81 in 2023 to 93 in 2024.
- 2.37 The majority of undertakings made in both 2024 and 2023 were to amend an instrument's explanatory statement in response to the committee's scrutiny concerns. In 2024, 91 per cent of undertakings made were to amend an instrument's explanatory statement, slightly higher than the 88 per cent in 2023.
- 2.38 The committee expects that undertakings will be implemented in a timely manner and requests that ministers and agencies provide the committee with an

³⁷ The remaining notice related to the disallowance of the Therapeutic Goods Legislation Amendment (Vaping Reforms) Regulations 2024 [F2024L00839].

³⁸ These two notices related to the Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 1) Regulations 2023 [F2023L01417] and the Migration Amendment (Biosecurity Contravention) Regulations 2023 [F2023L01443].

³⁹ Parliament of Australia, [Disallowance Alert 2024](#).

⁴⁰ Senate Standing Committee for the Scrutiny of Delegated Legislation, [Index of undertakings](#).

update every 30 days on progress made towards implementation until each undertaking is implemented.

- 2.39 In August of 2024, the committee introduced new practices regarding outstanding undertakings with a view to reduce the length of time that undertakings took to be implemented after being made. This was in response to the low rate of same-year implementation regarding undertakings made by agencies or ministers in 2023. From *Delegated Legislation Monitor 8 of 2024*, the committee began publishing a list of undertakings which were outstanding for more than 90 days in each Monitor. After each Monitor is tabled, the committee now writes to the relevant minister or agency responsible for each undertaking that has been outstanding for more than 90 days to draw their attention to the inclusion of the undertaking in the Monitor and to seek an update on progress made to implement the undertaking where one has not been received in the previous 30 days.
- 2.40 Of the 93 undertakings made in 2024, 65 were implemented by the end of the year. This equates to a rate of implementation of approximately 70 per cent which is comparably higher than in 2023 when only 48 per cent of undertakings made were implemented in the same year.
- 2.41 Additionally, 51 undertakings made prior to 2024 were implemented in 2024. Of these, 39 related to amendments to an explanatory statement, seven to amend or revoke an instrument, one to amend an Act, and four undertakings which do not fall under the previous categories.
- 2.42 The committee will closely monitor the implementation of undertakings which remain outstanding in 2025 and will continue to routinely request progress updates from the relevant agency or minister.

Table 2.2 Undertakings made in 2024 addressing the committee's concerns

Status	Type of undertaking				Total
	Amend ES	Amend/revoke instrument	Amend Act or enabling legislation	Other	
Made	85	7	0	1	93
Implemented	60	5	0	0	65
Outstanding	25	2	0	1 ⁴¹	28

⁴¹ This undertaking relates to the codification of relevant exemptions in an Act and time limiting other exemptions in delegated legislation.

Instruments exempt from disallowance

- 2.43 Senate standing order 23(4A) empowers the committee to consider instruments that are exempt from disallowance and determine whether such exemptions are appropriate. As part of this scrutiny, the committee tracks the total number of instruments exempt from disallowance each reporting period.
- 2.44 Table 2.3 below sets out the total number of instruments scrutinised in 2024 and 2023, including the proportion of instruments exempt from disallowance, which remains consistent.

Table 2.3 Instruments exempt from disallowance 2023-2024

Year	Exempt	Disallowable	Total	Percentage exempt
2024	221	1276	1500	15%
2023	278	1607	1885	15%

- 2.45 Of the 221 instruments exempt from disallowance in 2024, the committee considered that 97 instruments, representing 44 percent of exempt instruments, did not meet the committee's expectations in relation to appropriate exemptions from the disallowance process. This increased when compared to 2023, when 39 per cent of instruments exempt from disallowance did not meet the committee's expectations. The inappropriate exemption of instruments from disallowance continues to be an ongoing scrutiny concern for the committee.

Chapter 3

Significant scrutiny concerns

Overview

- 3.1 This chapter outlines the most significant scrutiny issues that the committee identified in 2024. It discusses case studies related to the committee's role in promoting compliance with its scrutiny principles, including the use of automated decision-making, the level of consultation undertaken, matters more appropriate for parliamentary enactment, and other ongoing scrutiny concerns that the committee will continue to monitor in future.
- 3.2 These ongoing concerns include:
- the inclusion of significant matters in delegated, rather than primary, legislation; and
 - the impact on parliamentary oversight of the exemption of instruments from disallowance and sunseting.

Principle (c): Automated decision-making and conferral of discretionary powers

- 3.3 In 2024, the committee became increasingly concerned about the use of automated decision-making in relation to discretionary decision-making under delegated legislation due to its capacity to operate as a fetter on discretionary powers. This issue was of particular concern to the committee as it appears that evolving technologies such as artificial intelligence, automated decision-making and algorithmic functions are increasingly being used for administrative functions, including those authorised by delegated legislation. In 2024, the committee raised concerns twice about automated decision-making, both times at ministerial level. This is in comparison to 2023 when the issue was not raised at either the agency or ministerial level. In addition, it may be difficult in some cases to detect where such automated systems are being used in decision-making which may also impede the committee's ability to identify all legislative instruments raising concerns under this principle. The committee therefore relies on agencies and ministers to be transparent in the use of automated decision-making and other technologies in administrative decision-making.
- 3.4 Under its guidelines, the committee's expectations are that, while technology may be used to assist in the decision-making process, instruments should not provide for the automation of discretionary decisions themselves. For this reason, the committee generally considers the use of automated systems to make decisions only suitable in relation to non-discretionary decisions, except where the scope of discretion is very narrow with objective criteria. Where an

instrument provides for automated assistance in a decision-making process, the committee's expectation is that the explanatory statement should explain:

- that automated assistance or decision-making is involved and the nature and extent of the automated element;
- 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; and
- whether rights are available for review of automated decisions by a human decision-maker, clear pathways to seek such review, and whether there are mechanisms in place to enable errors to be corrected.

3.5 The committee's concerns about automated decision-making were previously set out in principle (m). Following the issuing of the third edition of the committee's guidelines in July 2024,¹ automated decision-making now falls under principle (c). This reflects that the committee's concerns regarding this matter relate to the exercise of discretion in administrative decision-making. The guidelines were also amended to clarify that the use of automated processes is generally suitable to assist with, rather than to make, administrative decisions, except where the scope of the relevant decision is very narrow with objective criteria. Despite these amendments to the guidelines, the substance of the committee's approach to this matter remains the same. Under its guidelines for principle (c), the committee also scrutinises instruments as to whether they make rights, liberties, obligations or interests unduly dependent on insufficiently defined administrative powers, including provisions that broadly delegate administrative powers or functions.

3.6 The following two case studies demonstrate the committee's approach to the inclusion of automated decision-making in delegated legislation in 2024.

Biosecurity (Electronic Decisions) Determination 2023 [F2023L01672]

3.7 Pursuant to subsection 541A(1) of the *Biosecurity Act 2015* (the Biosecurity Act), this instrument specifies four provisions of the Act facilitating the provision of information or documents in relation to which the Director of Biosecurity may arrange for a computer program to make decisions. Specifically, these provisions enable a biosecurity officer to require a person, who the officer 'suspects on reasonable grounds' has information,² or custody or control³ of documents in relation to an aircraft or vessel that is the subject of a pre-arrival

¹ Senate Standing Committee for the Scrutiny of Delegated Legislation, [Guidelines](#), 3rd edition (July 2024), pp. 11-12.

² Subsection 195(2) of the *Biosecurity Act 2015*.

³ Subsection 195(3) of the *Biosecurity Act 2015*.

report under the Act;⁴ or has information,⁵ custody or control⁶ of documents in relation to a conveyance that is subject to a biosecurity control, to answer questions or provide information.

3.8 Accordingly, the committee raised concerns about the use of automated decision-making, under principles (m) and (c). These concerns included that, while the instrument's explanatory statement justified the appropriateness of providing for automated decision-making (including that relevant decisions are routine, facts are established without subjective assessment, and electronic decision-making will optimise the department's resources), and cited several safeguards applying to these decisions, it appeared unclear how these safeguards would operate in practice.

3.9 In *Delegated Legislation Monitors 1 and 4 of 2024*,⁷ the committee sought advice about the operation of these safeguards from the Minister for Agriculture, Fisheries and Forestry, including:

- the factors considered in exercising discretion under provisions of the Biosecurity Act, which require the Director to take 'reasonable steps' to ensure that electronic decisions are consistent with the Act's objects and are based on grounds on the basis of which a biosecurity officer could have made the decision, and enable a biosecurity officer to make a decision in place of the computer program if satisfied that the electronic decision is not consistent with the Act's objects or that another decision would be 'more appropriate in the circumstances';
- factors and weighting given to criteria in the business rules which underpin the computer program that assists with decision-making;
- mechanisms to identify and correct errors in automated decision-making, as well as safeguards on the various users of the program;
- whether consideration had been given to addressing recommendations made by the Royal Commission into the Robodebt Scheme regarding the use of automated decision-making across Government; and
- whether consideration had been given to the Commonwealth Ombudsman's Automated Decision-making Better Practice Guide in relation to providing for automated decision-making.

3.10 Over multiple rounds of correspondence, the minister provided further details as to these matters and ultimately undertook, in response to the committee's

⁴ Paragraphs 193(1)(a) and 193(1A) of the *Biosecurity Act 2015*.

⁵ Subsection 200(1) of the *Biosecurity Act 2015*.

⁶ Subsection 201(1) of the *Biosecurity Act 2015*.

⁷ Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 1 of 2024](#) (7 February 2024), p. 13; Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 4 of 2024](#) (28 March 2024), p. 26.

request, to amend the explanatory statement with the advice provided. The minister's advice outlined how reasonable steps were taken to ensure consistency with the Act's objects and electronic decisions on the grounds on which an officer could have made such a decision. This included through updates to the relevant system with technical and scientific criteria that was based on biosecurity risk, and to note the department's mandatory policy to satisfy the Director that the Act's objects are being met and that decisions conform with best practice principles of lawful administrative decision-making. Additionally, the minister detailed a feedback mechanism allowing affected persons to raise queries or concerns with an automated decision or the computer program and factors a biosecurity officer may consider, to enable them to determine whether to substitute a decision.

- 3.11 The minister also advised that the relevant computer program incorporates business rules to determine whether extra information or the production of documents is required, in order for further decisions to be made other than by a computer. Such rules are based on technical and scientific assessment of biosecurity risk. The minister provided two illustrative examples of the kind of technical and scientific information that may be included in the business rules, and when the computer program or officer may request additional information or answers to questions under subsections 195(2), 195(3), 200(1) or 201(1) of the Act. One such example was that when a pre-arrival report is submitted, the computer program uses a series of objective criteria to determine whether a questionnaire requiring additional information and/or documents is needed. That questionnaire and documentation will enable an accurate assessment by a biosecurity officer of the biosecurity risks before the vessel enters an Australian port.
- 3.12 The minister further advised that the business rules include rule parameters and safeguards, such as formulas that weigh different factors to assist with automated decision-making, the mechanisms to identify errors in such decision-making and measures to correct errors based on those safeguards, and processes in place to test the program's accuracy include routine reviews and audits of automated decisions and information provided by users. The minister also indicated that an audit trail of decisions can be made available to a biosecurity officer to assist in identifying and rectifying errors. Further, the department provides instructional and training material to ensure vessel masters and shipping agents understand the conditions of use of the program and requirement to comply with them, especially the need to ensure information is accurately entered.
- 3.13 Finally, the minister indicated that the business rules, departmental policy and instructional material were designed with consideration of the Ombudsman's Guide, and that the Australian Government has committed to considering

opportunities for legislative reform in response to recommendations 17.1 and 17.2 of the Royal Commission into the Robodebt Scheme.

- 3.14 The committee was pleased to conclude its examination of the instrument based on the now implemented undertakings to amend the explanatory statement with the above information provided, concerning the operation of automated decision-making and safeguards under the instrument. The committee considers that the explanatory statement to the instrument, as amended, now provides an example of a best-practice approach to explaining the use of, and safeguards around, automated decision-making under legislative instruments, in line with the committee's expectations as set out in its guidelines.

Migration (Designated Migration Law—Visa Condition 8208) Determination (LIN 24/009) 2024 [F2024L00183]

- 3.15 The committee also raised concerns about the use of automated decision-making under this instrument, which determines visa condition 8208 to be part of the 'designated migration law' for the purposes of subsection 495A(3) of the *Migration Act 1958* (the Migration Act). The effect of this is to enable the Minister for Home Affairs to arrange for the use, under their control, of a computer program, to make a decision, exercise 'any power', comply with 'any obligation' or 'do anything else related to' making a decision, exercising a power or complying with an obligation in relation to visa condition 8208. This visa condition prohibits a visa holder from undertaking critical technology-related study unless the minister is satisfied that there is not an unreasonable risk of an unwanted transfer of critical technology by the holder and the minister has provided approval.
- 3.16 In this instance, the committee raised concerns that the explanatory statement did not detail what aspects of a decision under visa condition 8208 would be made by the computer program and instead restated the effect of the instrument, namely to allow the minister to arrange for the use of computer programs to make a decision, exercise a power or comply with an obligation, or do anything else relating to a decision, power or obligation, in relation to critical technology related study under the visa condition.
- 3.17 As the entirety of visa condition 8208 is determined to be designated migration law, it appeared to the committee that the minister's discretion to disapply the visa condition by assessing the level of risk associated with a visa holder under the visa condition could be exercised by a computer program. This was of particular concern as it appeared that the instrument may therefore fetter the discretion of the minister. The explanatory statement also did not set out any justification as to why it was considered necessary and appropriate to use automated decision-making in this circumstance or what safeguards are applicable to discretionary decisions made by a computer program, for example, the application of merits review, the correction of errors, and sufficient oversight

of the automated decision-making process. Further, although the availability of review alone is not considered to be a sufficient safeguard, the committee noted that a decision not to approve a visa holder undertaking critical technology related study appeared to be a reviewable decision under paragraphs 4.02(4)(u) of the *Migration Regulations 1994* (the Migration Regulations) and the Migration Act, but was unclear how this operated in practice, as a safeguard on the relevant decision. Accordingly, the committee sought the minister's advice regarding the nature and scope of automated decision-making under the instrument, why automated decision-making was considered necessary and appropriate in this case and further detail on applicable safeguards, including the operation of independent merits review.

- 3.18 In response to the committee's request for advice, the minister provided general background about the operation of the visa condition and the legislative framework for automated decision-making under the Migration Act and Migration Regulations. The minister also noted that, while the legislative framework enables the minister to arrange for the use of a computer program in relation to relevant decisions, nothing in the Act compels him to do so.
- 3.19 Throughout ongoing correspondence, the minister advised the committee as to the use of business rules for the automation of decision-making, mechanisms to identify and correct errors identified in automated decision-making, the operation of merits review and other safeguards on visa condition 8208 decisions made by the minister or a computer. Specifically, the minister outlined factors to be taken into account in determining whether a decision was suitable for automation, including guidelines and business rules.
- 3.20 In his correspondence with the committee, the minister also outlined and subsequently provided clarification as to the operation of a number of safeguards. This included that the Act provides that a decision of a computer is taken to be a decision of the minister and to note the administrative law principle requiring decisions to be made without fetter. Additionally, the minister advised that IT capabilities for automated decision-making would be developed in line with documented business requirements, rules and specifications. The minister further advised that, while the content of business rules constitute sensitive information, they include rule parameters, characteristics and safeguards and complex or sensitive decisions or those requiring discretion are referred to a human decision-maker.
- 3.21 Importantly, the minister also noted that automation of decisions would only extend to application approval decisions and no refusal decisions would be automated. The committee considered that the advice that only approval decisions are automated and the use of governance, record keeping, quality assurance and oversight provided helpful clarification about the operation of these safeguards.

- 3.22 However, the committee remained unclear as to the details of a number of the matters it had raised scrutiny concerns about. Notably, it was not clear as to the factors or criteria that would be included in the business rules of a computer program for it to approve a visa application or if and how the guidance or information considered by the minister or their delegate would also inform a computer program to make a decision regarding visa condition 8208. The committee also noted its concern that the disclosure of the factors that may be taken into account under the business rules is important for transparency and clarity around decision-making.
- 3.23 While the minister also noted that currently no decisions were made under the instrument by a computer program, the committee was concerned that the instrument enables such decisions to be made by a computer. The committee was therefore concerned about the nature and scope of decisions that it was contemplated could be made under the instrument in future and any applicable safeguards. In this regard, the committee emphasised that it only has one opportunity to examine a legislative instrument, at the point of registration. Accordingly, the committee sought further detail as to what is contemplated for the future use of automated decision-making for the discretionary decision under visa condition 8208.
- 3.24 The committee ultimately concluded its examination of the instrument, in light of the minister's undertaking to amend the explanatory statement with the information provided about the use of business rules, correction of errors and safeguards on automated decision-making under the instrument. However, noting that automated decision-making was not enabled during the committee's consideration of the instrument, the committee resolved to draw its concerns about the authority for the use of automated decision-making for visa condition 8208 decision to the attention of the Senate under standing order 23(4).
- 3.25 The committee is particularly concerned about the use of evolving technologies such as artificial intelligence and automated decision-making in delegated legislation, noting that while some reform work in relation to development of a consistent framework for automated decision-making across government appears to be underway, there is currently no consistent framework. Accordingly, the committee will continue to monitor this issue in 2025 and will consider whether its scrutiny principles are sufficient to assess the use of evolving technologies and automated decision-making in relation to delegated legislation or whether an inquiry is warranted to consider these matters.

Principle (j): Matters more appropriate for parliamentary enactment - significant matters in delegated legislation

- 3.26 In 2024, the committee continued to raise scrutiny concerns in relation to the inclusion of significant matters in delegated legislation, under scrutiny principle (j). As set out in the committee's guidelines, the committee expects that

significant matters should ordinarily be included in primary rather than delegated legislation, due to the higher level of parliamentary scrutiny associated with the legislative process for primary legislation.⁸ If an instrument nevertheless contains significant matters, the explanatory statement should explain why it is considered necessary and appropriate to include these matters in delegated, rather than primary, legislation. Noting the significance of the committee's expectations under this principle the committee raised scrutiny concerns under principle (j) with agencies 4 times, compared to 9 times at the ministerial level.

- 3.27 In 2024, the types of significant matters the committee raised concerns with included the provision of offence content⁹ and visa arrangements in delegated legislation.¹⁰ The committee also raised broader concerns in relation to the use of framework legislation that contains broad principles of a legislative scheme and relies on delegated legislation to set out significant elements of its scope and operation.¹¹ Framework legislation is of particular concern to the committee as the premise of this legislative drafting approach is to include significant matters in delegated legislation which reduces the parliamentary oversight attached to those elements. The committee has reiterated its view in a number of *Delegated Legislation Monitors* throughout 2024 that this drafting approach is not best practice from a parliamentary oversight perspective.
- 3.28 Eight responses arising from the 12 requests for advice sought by the committee regarding significant matters in delegated legislation in 2024 included advice that it was considered necessary or appropriate to provide for significant matters in delegated legislation as the enabling legislation expressly provided for it. This reasoning was provided when the committee sought ministerial advice separately on two instruments within the Home Affairs portfolio that included significant matters relating to visa arrangements. While the committee acknowledges this reasoning, it nonetheless does not justify prescribing significant matters in delegated legislation and in turn impeding parliamentary oversight of the matters. The committee is particularly concerned about the inclusion of significant matters in delegated legislation where the matters relate to the rights, interests and liberties of individuals, as was the case in relation to the Home Affairs portfolio instruments.

⁸ Senate Standing Committee for the Scrutiny of Delegated Legislation, [Guidelines](#), 3rd edition (July 2024) pp. 35–36.

⁹ See monitor entry for the Explosives Regulations 2024 in Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 12 of 2024](#) (9 October 2024), pp. 3–9.

¹⁰ See monitor entry for the Migration Amendment (Bridging Visas) Regulations 2024 in Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 6 of 2024](#) (26 June 2024), pp. 13–14.

¹¹ Framework legislation is also commonly referred to as coat hanger or skeleton legislation.

- 3.29 The following three case studies provide an example of the committee's approach to its scrutiny concern under principle (j) in 2024.

Migration Amendment (Bridging Visas) Regulations 2024 [F2024L00441]

- 3.30 The Migration Amendment (Bridging Visas) Regulations 2024 (the instrument) amended the Migration Regulations 1994 (the Migration Regulations) to remove one of the two requirements for the Minister for Immigration, Citizenship and Multicultural Affairs to grant an eligible non-citizen a further Bridging R (Class WR) visa (BVR). In *Delegated Legislation Monitor 6 of 2024*,¹² the committee raised scrutiny concerns under principle (j) as the instrument amends the requirements for a non-citizen to be granted a visa under regulation 2.25AB of the Migration Regulations, which the committee considered to be significant matters more appropriate for parliamentary enactment.
- 3.31 The explanatory statement explains that it is appropriate for matters dealt with in the Migration Regulations to be implemented in regulations rather than parliamentary enactment, as it has been the consistent practice of the Government to provide for detailed matters of visa settings in the Migration Regulations, to enable adaptive and effective management of Australia's visa program. However, the committee did not consider this to be an adequate justification and highlighted that it has consistently raised similar concerns about the inclusion of significant migration and visa related matters in the Home Affairs portfolio delegated legislation due to the impact on parliamentary oversight.
- 3.32 In 2024, the committee brought scrutiny concerns regarding significant matters in Home Affairs portfolio legislation to the Senate's attention under standing order 23(4) twice, once for the Migration Amendment (Bridging Visa Conditions) Regulations 2023 and once for the instrument.¹³ Given the explanatory statement already included reasoning as to why these matters were provided for in delegated legislation and the enabling legislation provides the necessary legislative authority, the committee considered it would not be effective to seek further advice from the minister or request that the explanatory statement be amended. However, by drawing the inclusion of visa matters in delegated legislation to the attention of the Senate under standing order 23(4), the committee has attempted to strengthen the parliamentary oversight of these significant matters.

¹² Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 6 of 2024](#) (26 June 2024), pp. 13–14.

¹³ Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 5 of 2024](#) (17 May 2024), p. 12; Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 6 of 2024](#) (26 June 2024), p. 14.

Recycling and Waste Reduction (Export—Waste Paper and Cardboard) Rules 2024 [F2024L00491]

- 3.33 The Recycling and Waste Reduction (Export—Waste Paper and Cardboard) Rules 2024 (the instrument) regulate the export of mixed waste paper and cardboard from Australia. The instrument imposes requirements and obligations on exporters including to hold a waste paper and cardboard export licence. In *Delegated Legislation Monitor 6 of 2024*,¹⁴ the committee requested the minister's advice as to why it was considered necessary and appropriate to use delegated legislation, rather than primary legislation, to provide for matters relating to prescribing the kind of material that is 'regulated waste material', conditions for export of waste material, and requirements to make and retain records. The committee considered these matters significant, reiterating earlier scrutiny concerns raised by the Senate Standing Committee for the Scrutiny of Bills in relation to the Recycling and Waste Reduction Bill 2020, which became the Act under which the instrument is made.¹⁵
- 3.34 The minister advised that the enabling Act, the *Recycling and Waste Reduction Act 2020* (the Act), was designed to be framework legislation, supported by multiple pieces of subordinate legislation, and that the intention was for only waste material prescribed in rules made under the Act to be subject to the waste export regulatory framework. The minister also advised that this was to allow flexibility for different regulatory controls to be implemented for different kinds of regulated waste material and to allow the regulatory controls to adapt to changing circumstances.
- 3.35 In response, in *Delegated Legislation Monitor 9 of 2024* the committee reiterated that, while it considers it appropriate for delegated legislation to set out matters of detail,¹⁶ it appears that providing for regulated waste material, export conditions and record keeping requirements may go beyond mere matters of detail and constitute significant matters of the scheme. The committee also noted the minister's advice about operational flexibility and its view, as stated in the committee guidelines, that it does not generally consider operational flexibility, on its own, to constitute a sufficient justification for including significant matters in delegated legislation.¹⁷ However, in this case, the committee accepted the justification provided by the minister in relation to the need to adapt to changing

¹⁴ Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 6 of 2024](#) (26 June 2024), pp. 8–9.

¹⁵ Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 12 of 2020](#) (18 September 2020), pp. 20–22.

¹⁶ Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 9 of 2024](#) (21 August 2024), pp. 6–9.

¹⁷ Senate Standing Committee for the Scrutiny of Delegated Legislation, [Guidelines](#), 3rd edition (July 2024), p. 35.

circumstances including developments in technology and health challenges. The committee also acknowledged the minister's explanation of the appropriateness of consistency across a number of sets of rules which fit within the broader legislative framework that includes the instrument.

- 3.36 Further, contraventions of particular provisions of the instrument can trigger criminal and civil penalties under the Act. In *Delegated Legislation Monitor 6 of 2024*, the committee also sought the minister's advice as to why it is considered necessary and appropriate for delegated legislation to include the content of strict liability offences that carry significant criminal and civil penalties.¹⁸ The minister advised that strict liability for contravention of the relevant instrument provisions was appropriate because it applies to parts of the offences that do not concern conduct, and it does not affect the need to prove fault elements for other parts of the offences. In *Delegated Legislation Monitor 9 of 2024*,¹⁹ the committee noted this advice but reiterated its view that, as a matter of principle, significant matters, such as the detailed conditions and notification requirements relating to the three relevant offences, should ordinarily be included in primary legislation, rather than delegated legislation, to ensure appropriate parliamentary oversight of the scope of the relevant offence and penalty provisions. The committee again noted its ongoing concerns about the use of framework legislation in this context.
- 3.37 As the committee retained concerns that the instrument contains significant elements of offences under the Act, it resolved to draw its concerns about the inclusion of significant matters of a scheme and elements of strict liability offences in delegated legislation to the attention of the Senate under standing order 23(4).

Explosives Regulations 2024 [F2024L01086]

- 3.38 The Explosives Regulations 2024 (the instrument) prescribes matters relating to the handling of explosives, the control of Commonwealth explosives areas, the transport of explosives, and the powers, functions and duties of the statutory positions of the Competent Authority and compliance auditors.
- 3.39 Section 20 of the *Explosives Act 1961* (the Act) provides that a person who contravenes, or fails to comply with, a provision of the regulations or an order made under the regulations commits an offence against the Act. Accordingly, the instrument contains a number of provisions that, if not complied with, constitute an offence under section 20 of the Act. In *Delegated Legislation Monitor*

¹⁸ Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 6 of 2024](#) (26 June 2024), pp. 5–7.

¹⁹ Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 9 of 2024](#) (21 August 2024), pp. 8–9.

12 of 2024,²⁰ the committee noted that, while section 20 of the Act creates the framework of the offences, it would otherwise have no effect without the instrument, as the relevant provisions in the instrument provide the substantive content of the offences and in effect creates them. Therefore, the instrument appeared to be providing for significant content of offences in delegated legislation, amounting to significant matters which are more appropriate for inclusion in primary, rather than delegated, legislation. Accordingly, the committee requested the minister's advice as to why it is considered necessary and appropriate to provide for the content of offences in delegated legislation, rather than primary legislation.

- 3.40 The minister advised that the current structure of the Act is predicated on substantive obligations and prohibitions being prescribed by regulations, and that amendments to move substantive obligations from regulations into primary legislation are being considered as part of a review of the Act. On the basis of this advice, and further advice provided by the minister in relation to the review's scope and timeline, the committee concluded its examination of the instrument in relation to this issue in *Delegated Legislation Monitor 14 of 2024*.²¹ However, the committee reiterated its longstanding view that provisions containing significant matters are more appropriate for inclusion in primary legislation to ensure appropriate parliamentary oversight.
- 3.41 Given the significance of prescribing the content of criminal offences in the instrument, the committee will monitor the outcomes of the review of the Act and any subsequent reform relating to prescribing significant matters in delegated legislation in 2025.
- 3.42 The committee retains ongoing concerns about the inclusion of significant matters in delegated legislation. In 2025, the committee will continue to monitor this issue and draw particular instruments to the attention of the Senate under standing order 23(4) to enhance the parliamentary oversight afforded to instruments which nonetheless continue to include significant matters. In particular, the committee will continue to closely monitor the use of framework legislation, noting its fundamental impact on parliamentary oversight.

Principle (d): Consultation

- 3.43 2024 saw a significant increase in the number of times that the committee raised scrutiny concerns in relation to the adequacy of consultation under

²⁰ Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 12 of 2024](#) (9 October 2024), pp. 8–9.

²¹ Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 14 of 2024](#) (27 November 2024), pp. 9–11.

principle (d).²² Under this principle, the committee scrutinises instruments as to whether those likely to be affected by the instrument were adequately consulted. Under this principle, the committee will typically be concerned with whether consultation occurred in relation to the specific instrument, with experts and those likely to be affected by the instrument, and the outcomes of such consultation. This is in addition to its consideration under principle (a) as to whether consultation requirements under the *Legislation Act 2003* (the Legislation Act) were met. Further, under principle (g) the committee expects that explanatory statements will set out a detailed explanation in relation to consultation.

- 3.44 In 2023, consultation was raised as a scrutiny issue a total of six times (four at agency level and two at ministerial level); whereas in 2024, consultation was raised a total of 59 times (55 at agency level and four at ministerial level).
- 3.45 This significant increase can in part be attributed to an update to the committee's guidelines for principles (d) and (g) in July 2024,²³ which sought to clarify and strengthen the committee's expectations in relation to consultation in line with its current practice.²⁴ Principle (d) of the committee's guidelines was amended to specifically refer to an expectation that the explanatory statement contain a summary of the outcomes of the consultation process, such as any action taken based on comments or submissions received. Principle (g), concerning the adequacy of explanatory materials, was also amended to reflect these expectations. The committee secretariat took an educative approach to implementing the updates to the guidelines and routinely drew agencies' and ministers' attention to the committee's expectations where it appeared they were not aware.
- 3.46 While there was significant increase in the number of times principle (d) was raised overall, it is pleasing to note that the number of times consultation was raised at ministerial level represented only 5 per cent of the total number of scrutiny concerns raised with ministers during the year. This reflects that the majority of concerns under this principle were less serious in nature, noting the committee's practice of raising less serious concerns at agency level through its secretariat. Further, in a number of cases, particularly at agency level, concerns

²² Although concerns about consultation often may also involve principle (g) in relation to the adequacy of explanatory materials regarding consultation, it is not practical or instructive to include statistics in relation to principle (g). That is because principle (g) is often raised in combination with a number of other principles and every time that concerns arise with consultation, including in relation to the explanatory statement, they will also arise under principle (d).

²³ Senate Standing Committee for the Scrutiny of Delegated Legislation, [Guidelines](#), 3rd edition (July 2024), pp. 15-16.

²⁴ Senate Standing Committee for the Scrutiny of Delegated Legislation, [Guidelines](#), 3rd edition (July 2024), p. 22.

were raised about instruments because their explanatory statements did not set out the details or outcomes of the consultation that had occurred. In many of these instances, the committee was able to conclude its examination following advice about the consultation that had occurred and an undertaking by the responsible agency or minister to amend the explanatory materials accordingly.

- 3.47 However, although concerns at ministerial level were rare, the committee was particularly concerned that the instruments raising concerns under this principle introduced measures with the ability to have a significant impact on the rights and liberties of individuals. Three out of four of these instruments raised at ministerial level in 2024 fell within the Home Affairs portfolio and the committee's specific concerns were similar in nature, relating to the adequacy of consultation prior to the making of the instruments.

Migration Amendment (Biosecurity Contravention) Regulations 2023 [F2023L01443]

- 3.48 While the committee first raised concerns with this instrument in late 2023, it continued and ultimately concluded its consideration in 2024. This instrument expands the grounds for visa cancellation to include where the Minister for Immigration, Citizenship and Multicultural Affairs reasonably believes that a visa holder has contravened a provision of the *Biosecurity Act 2015* in relation to bringing or importing goods into Australia and a relevant condition has not been complied with.
- 3.49 While the explanatory statement indicated that the Department of Agriculture, Fisheries and Forestry had been consulted, the committee raised concerns as to why members of the public, including visa holders, relevant peak bodies and other experts, were not consulted, noting the potentially significant impact visa cancellation may have on these groups.
- 3.50 Following ongoing correspondence, the minister advised that the grounds for visa cancellation inserted by the instrument would only arise where there was a reasonable belief that the visa holder deliberately concealed conditionally non-prohibited goods to bring or import them into Australia. The minister also explained that it was not feasible or appropriate to engage in broader public consultation because temporary visa holders are not an easily identifiable group and, except for students, are not represented by peak bodies. For this reason, the minister advised that it is difficult to target consultations at specific sub-groups of temporary visa holders, and as the measures only target those who deliberately flout Australia's biosecurity laws, it is not possible to identify which sub-groups might be more or less affected by the amendments made by the instrument or how potential offenders may be identified so that their views may be sought.
- 3.51 The committee ultimately concluded its examination of the instrument, on the basis of this advice. However, it emphasised in its *Delegated Legislation*

*Monitors 2 and 3 of 2024*²⁵ that consultation with persons affected should occur before an instrument is made to ensure that it is fit for purpose and best suited to achieve the relevant objectives and that, where consultation is not undertaken with affected persons, the reason for not consulting such persons should be set out in the instrument's explanatory statement. Further, while noting the minister's initial advice about the development of public messaging and communication materials, the committee emphasised that making individuals aware of their legal obligations is not adequate consultation on changes to the law made by a particular instrument.

Migration Amendment (Bridging Visa Conditions) Regulations 2023 [F2023L01629] and Migration Amendment (Bridging Visas) Regulations 2024 [F2024L00441]

- 3.52 Similarly, the committee was particularly concerned about the lack of consultation that occurred in relation to the Migration Amendment (Bridging Visa Conditions) Regulations 2023 (the 2023 regulations) and Migration Amendment (Bridging Visas) Regulations 2024 (the 2024 regulations). The 2023 regulations make amendments setting out the application and operation of certain visa conditions, and accordingly have the potential to significantly impact rights and liberties. The committee was initially concerned as the explanatory statement did not refer to consultation with persons likely to be affected but noted only consultation with the Office of Impact Analysis²⁶ and other Commonwealth agencies. In response, the minister clarified that, following passage and commencement of the related Act and the instrument, roundtable discussions occurred with the Australian Human Rights Commission, the Commonwealth Ombudsman's Office and the Australia Red Cross.
- 3.53 Across *Delegated Legislation Monitors 1 and 6 of 2024*,²⁷ the committee emphasised the obligation in the Legislation Act, as reflected in its guidelines for principle (d), for rule makers to be satisfied that appropriate consultation was undertaken and those likely to be affected by the proposed instrument had the opportunity to comment on it prior to it being made. The committee also

²⁵ Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 2 of 2024](#) (28 February 2024), p. 8; Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 3 of 2024](#) (20 March 2024), p. 7.

²⁶ The committee noted in [Delegated Legislation Monitor 6 of 2024](#) (26 June 2024), p. 11, that it does not consider consultation with the Office of Impact Analysis to be an adequate substitution for consulting with individuals affected by the instrument or relevant experts. Further, any requirements to consult with the Office of Impact Analysis are separate to the requirements in relation to consultation under the *Legislation Act 2003*.

²⁷ Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 1 of 2024](#) (7 February 2024), pp. 7; 14; Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 6 of 2024](#) (26 June 2024), p. 11.

emphasised the importance of undertaking genuine consultation particularly with organisations representing the interests of those likely to be affected, at this point. It reiterated previous comments²⁸ in relation to the Migration Amendment (Biosecurity Contravention) Regulations 2023 (above) that this is crucial to ensure legislation is fit for purpose and that those affected have an adequate opportunity to comment on proposed legislation before it comes into effect.

- 3.54 On this occasion, the minister advised that roundtable discussions were held with key stakeholders with whom the department has established relationships and welcomes a forum for stakeholders to ask questions about immigration matters. However, as it appeared that there may be a range of other organisations representing the interests of those who may be affected by the instrument, the committee remained unclear as to why a broader range of organisations were not consulted or involved in those discussions including those representing the interests of individuals affected by the instrument. As the minister's correspondence indicated that the purpose of the discussions was information sharing, it also appeared to the committee that the nature of the discussions did not amount to consultation in line with its expectations.
- 3.55 On this basis, the committee drew its concerns about this matter to the attention of the Senate under standing order 23(4).
- 3.56 The committee was also concerned that, nearly two months after it raised concerns about consultation on the 2023 regulations, the 2024 regulations were registered raising the same matters. The instrument's explanatory statement also referred to consultation with the Office of Impact Analysis and other Commonwealth agencies and, in response to the committee's request for advice, the minister also referred to roundtable discussions on the legislative framework.
- 3.57 However, the minister also indicated that consultation was not undertaken because the instrument did not impact any 'client-facing' aspects of the legislative scheme, alter visa conditions, procedural fairness rights or the availability of merits review. The minister's advice therefore appeared to indicate a view that it would be appropriate to consult with an affected cohort where an instrument changed 'client-facing' elements. Noting this advice and the fact that the instrument made technical amendments (to remove an existing requirement for the granting of a visa) which did not appear to impact visa holders' rights or interests, the committee did not seek further advice. In particular, the committee welcomed the minister's advice as it suggested that

²⁸ See Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 2 of 2024](#) (28 February 2024), p. 8; Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 3 of 2024](#) (20 March 2024), p. 7.

consultation would occur where changes to visa arrangements impacted the rights, liberties and interests of individuals.

- 3.58 In 2025, the committee will continue to monitor the adequacy of consultation undertaken in relation to legislative instruments, particularly noting the changes to its guidelines in 2024, in terms of strengthening its practices and clarifying its expectations regarding consultation. The committee takes this opportunity to restate its expectations for explanatory materials to set out consultation that was undertaken and the importance of undertaking genuine consultation prior to an instrument being made to give those affected and experts an opportunity to comment and ensure the legislation is fit-for-purpose.

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

- 3.59 Standing order 23(4A) provides that the committee may scrutinise instruments that are not subject to disallowance, including whether it is appropriate for these instruments to be exempt from disallowance. Of the 1500 legislative instruments considered by the committee in 2024, 221 were exempt from disallowance. Accordingly, 15 per cent of instruments considered by the committee in 2024 were non-disallowable, the same proportion of non-disallowable instruments as the previous year.
- 3.60 The committee considers that all delegated legislation should be subject to disallowance unless there are exceptional circumstances. Where instruments are nonetheless exempt from disallowance, the committee expects the explanatory statement to identify the legislative source, including the specific provision of the Act or instrument, which provides for the exemption and include a thorough explanation of the exceptional circumstances which justify the exemption.²⁹ In 2024, the committee continued its focus on scrutinising explanatory statements to non-disallowable instruments to ensure they provide the specific source of the exemption as well as justification as to why the circumstances are exceptional to warrant the exemption.
- 3.61 The committee also continued to list in its *Delegated Legislation Monitors* instruments registered in the relevant reporting period which did not meet its expectations relating to exemptions from disallowance. This included instruments that:
- are exempt under one of the broad classes of exemptions in section 9 of the Legislation (Exemptions and Other Matters) Regulation 2015;
 - are exempt under the blanket exemption for instruments facilitating the establishment or operation of an intergovernmental body or scheme in section 44(1) of the Legislation Act;
 - override or modify primary legislation;

²⁹ Senate Standing Committee for the Scrutiny of Delegated Legislation, [Guidelines](#), 3rd edition (July 2024) pp. 43–45.

- trigger, or are a pre-condition to, the imposition of custodial penalties or significant pecuniary penalties;
 - restrict or limit individual rights and liberties;
 - facilitate the expenditure of public money, including Advance to the Finance Minister determinations; or
 - otherwise contains a matter requiring parliamentary oversight.
- 3.62 In 2024, the committee also identified a concerning lack of quality in some explanatory statements to non-disallowable instruments. This included a lengthy instrument that was accompanied by a single-page explanatory statement. The explanatory statement briefly addressed the instrument's legislative authority, purpose and reasoning for not undertaking consultation. However, it failed to provide any detailed information about the operation of the instrument, including by reference to specific provisions. This is particular of concern as it impacts the ability of users of the law to understand the instrument's operation and effect. The committee resolved to draw the explanatory statement's inadequacies to the attention of the Senate under standing order 23(4).
- 3.63 The committee's expectations in relation to the adequacy of explanatory materials apply regardless of whether the instrument is subject to the disallowance process. However, the committee's concerns are heightened where inadequate explanatory statements relate to non-disallowable instruments. As disallowance motions cannot be moved against such instruments, there is a lack of accountability for these poor explanatory materials.
- 3.64 The committee also experienced occasions of significant delay in receiving ministerial responses in relation to non-disallowable instruments. The committee emphasises the importance of agencies and ministers providing timely responses to its requests for advice, whether or not instruments are subject to disallowance. Lengthy delays in providing responses hinders the committee's ability to effectively scrutinise delegated legislation and potentially delays constructive outcomes, such as legislative or explanatory statement amendments.
- 3.65 In 2025, the committee will continue to scrutinise the quality of explanatory statements to both disallowable and non-disallowable instruments, including ensuring robust justification is provided for exempting instruments from disallowance. The committee will also continue to draw its scrutiny concerns to the attention of the Senate where necessary.

Principle (k): Instruments exempt from sunseting

- 3.66 Section 50 of the *Legislation Act 2003* provides that all legislative instruments registered on the Federal Register of Legislation after 1 January 2005 are automatically repealed ten years after registration, known as 'sunseting'. The committee considers that this framework provides an important opportunity for

the Parliament to maintain effective and regular oversight of delegated legislation and ensures the content of legislative instruments remains current and fit-for-purpose.

- 3.67 Under Senate standing order 23(3)(k), the committee scrutinises instruments as to whether they are exempt from the sunset provisions of the Legislation Act.³⁰ The committee considers that delegated legislation should be subject to sunset unless there are exceptional circumstances. Where an instrument is exempt from sunset, the committee expects the explanatory statement to identify the specific legislative authority for the exemption and explain the exceptional circumstances that justify the exemption. This includes instruments that contains measures which will remain in force within a principal instrument that is exempt from sunset. Where instruments are amending instruments that will self-repeal under section 48A of the Legislation Act, the committee's expectation is that the explanatory statement should nonetheless contain such an explanation, as the measures will remain ongoing due to the principal instrument's exemption from sunset.
- 3.68 In 2024, the committee identified numerous amending instruments that inserted measures into a principal instrument that is exempt from sunset where the accompanying explanatory statement did not identify that the instrument contains measures that will remain in force within the principal instrument. In these cases, the explanatory statements did not set out the source of the exemptions or justify why the measures are exempt from sunset. The committee continued to raise this issue directly with relevant agencies, most often as a matter of best practice to implement for future instruments within that portfolio.
- 3.69 The committee also continued to list in its *Delegated Legislation Monitors* instruments registered in the relevant reporting period which did not meet its expectations relating to exemptions from sunset. This includes instruments that:
- are exempt under one of the broad classes of exemptions in section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015;
 - are exempt under the blanket exemption of instruments facilitating the establishment or operation of an intergovernmental body or scheme in section 54(1) of the Legislation Act;
 - override or modify primary legislation;
 - that trigger, or is a pre-condition to, the imposition of custodial penalties or significant pecuniary penalties;
 - restrict or limit individual rights and liberties;
 - facilitate the expenditure of public money on an ongoing basis; or

³⁰ Senate Standing Committee for the Scrutiny of Delegated Legislation, [Guidelines](#), 3rd edition (July 2024) pp. 37–38.

- otherwise contains a matter requiring parliamentary oversight.
- 3.70 Of the 1500 instruments considered by the committee in 2024, the committee listed 125 instruments as containing inappropriate exemptions from sunseting. In 2025, the committee will continue to monitor legislative instruments as to whether they are exempt from sunseting and, if so, scrutinise explanatory statements to ensure a source and thorough justification for the exemption are provided. The committee will also continue to focus on amending instruments that insert measures into a principal instrument that is exempt from sunseting, to ensure the explanatory statement includes the necessary information in relation to the exemption from sunseting.

Senator Deborah O'Neill
Chair