



**Professor Anne Twomey**  
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Ms Anita Coles  
Secretary  
Senate Standing Committee on Regulations and Ordinances  
Parliament House  
CANBERRA, ACT, 2600

Dear Ms Coles,

I refer to your request for a submission to the Committee's inquiry into the Parliamentary Scrutiny of Delegated Legislation. Please accept the following submission.

My first observation is that this Committee performs an extremely important role in scrutinising delegated legislation. While primary legislation receives at least some scrutiny from political parties and the media, the volume of delegated legislation is such that it is not feasible for the Senate adequately to exercise its scrutiny and disallowance functions with respect to it unless it is the subject of systematic review by a committee which can alert the Senate to matters of concern. It should be noted that the Constitution confers legislative power on the Parliament, rather than the executive. The conferral of delegated legislative power on the executive is constitutionally permissible because the Parliament retains its supervisory and scrutiny roles to ensure that delegated legislation remains consistent with the intention of Parliament. This is a key element of the constitutional principle of responsible government.

Hence, the Committee fulfils an important constitutional role in providing scrutiny of delegated legislation and drawing to the attention of the Senate matters about which it may be concerned.

Senate Standing Order 23 currently gives the Committee the function of scrutinising each legislative instrument to ensure:

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

All these functions are important and appropriate. I would submit, however, that there should be added a further function:



(e) that it is validly supported by a head of Commonwealth legislative power and does not breach any express or implied term of the Constitution.

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

In addition, it is possible that a legislative instrument could breach an express constitutional prohibition, such as s 92 or s 99 of the Constitution, or constraints upon Commonwealth powers, such as the requirement for just terms compensation in s 51(xxxi) if property is compulsorily acquired. A legislative instrument might also breach a constitutional implication, such as the implied freedom of political communication.

In my view it would also be appropriate for the Committee to have the function of scrutinising any legislative provision that excluded legislative instruments from disallowance, as this is a very serious limitation upon the scrutiny role of the Senate. I note, for example, that the contentious use of the Advance to the Minister for Finance in relation to the same-sex marriage postal survey was authorised by the Finance Minister making a determination that there was an 'urgent need' for the expenditure and that it was 'unforeseen'. This determination was a legislative instrument, but not subject to disallowance. The consequence was that even though the Senate had twice rejected a bill that provided for a special appropriation to fund a plebiscite on same-sex marriage, the Senate was impotent when it came to scrutinising the funding of a similar proposal by way of a legislative instrument made by the Minister for Finance. Such a limitation undermines the powers of the Senate in relation to financial matters. Any future exclusions from disallowance that are included in bills should, in my view, be referred to the Committee for scrutiny.

Yours sincerely,

Anne Twomey  
Professor of Constitutional Law