THE UNIVERSITY OF WESTERN AUSTRALIA

Asst. Prof. Jacinta Dharmananda
Law School

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Committee Secretary
Senate Standing Committee on Regulations and Ordinances
PO Box 6100
Parliament House
Canberra
ACT 2600

By email: RegOrds.Sen@aph.gov.au

Attention: Ms Anita Coles

Dear Ms Coles,

Thank you for the opportunity to make a written submission in relation to the inquiry by the Senate Standing Committee on Regulations and Ordinances (the "Committee") to examine parliamentary scrutiny of delegated legislation. I am an academic at the Law School of the University of Western Australia. My primary research area is the legislative process and statutory interpretation. The views expressed in this submission are my own.

I have had the advantage of reading some of the earlier submissions made to the Committee and offer the following brief comments. In that context, I acknowledge that the legislative process and the parliamentary scrutiny of delegated legislation is a complex and multi-layered process given its political context. My comments are made as a matter of principle and generality.

a) The Legislative Landscape

The Federal Parliament process for scrutinizing delegated legislation has remained fundamentally unchanged for many decades. The four key concepts that define that process are pre-parliamentary publication of the instrument, tabling of the instrument in Parliament, a disallowance process within Parliament and scrutiny by the Committee. The substantive aspects of the disallowance process are much as they were in 1904. The role and terms of reference of the Committee, focussing on technical matters, has only slightly changed (in 1979) since its establishment in 1932.[1] Granted, the manner of publication, with the advent of the Federal Register of Legislation, has changed to take advantage of technological advances and this has vastly broadened public accessibility. Further, the breadth of the category of

[1] History from GS Reid and Martyn Forrest, *Australia's Commonwealth Parliament: Ten Perspectives 1901-1988* (Melbourne University Press, 1989) 219-230.

The University of Western Australia
M253, Perth WA 6009 Australia
T +61 8 6488 3955
E jacinta.dharmananda@uwa.edu.au
CRICOS Provider Code 00126G

instruments subject to this process has broadened. In the early days confined to regulations, it now extends to a more broadly defined concept of "legislative instruments" under the *Legislation Act 2003* (Cth). But the fundamental tenets of the process have changed little.

In contrast, the legislative landscape has significantly changed. First, there is more legislation, primary and delegated. The increased volume of delegated legislation, which is well documented,[2] has included a 'proliferation' of myriad categories of delegated legislation (regulations, determinations, rules, notices, guidelines, codes, schemes, rules, orders, plans, by-laws, etc). Second, delegated legislation has taken on increasing importance as a source of substantive law. It is now not uncommon for substantive or policy issues to be addressed in delegated legislation.[3] This has likely been compounded by the more frequent use of 'skeleton' legislation and the not infrequent use of Henry VIII enabling statutory provisions. This legislative landscape leads me to make 4 points for the Committee's consideration.

b) Scrutiny by the Committee - Terms of Reference

The increased and increasingly important work being done as a component of the legislative landscape by delegated legislation and the largely unchanged terms of reference of the Committee despite those developments have arguably left a "large hole in the oversight of delegated legislation."[4] Mr Dennis Pearce addressed this gap over a decade ago when he referred to how the Committee's strict terms of reference were, among others, one of the reasons why policy issues underlying delegated instruments were not subject to scrutiny by the Committee.

In agreement with Mr Pearce, I would like *to refer the Committee* to a suggestion made by Mr Dennis Pearce in his 2004 paper. His suggestion has the benefit of being consistent with existing Senate subject committee structures.[5] Senate subject area committees are divided into "pairs" of committees, one a legislation committee and one a reference committee. The legislation committees look at legislation referred to them from time to time and the reference committees consider select substantive issues referred to them from time to time. This structure could be adopted so that all legislative instruments continue to be the subject of technical assessment by the Committee, but that substantive or broader policy issues are referred by the Senate from time to time to a separate reference committee. If the conclusion of the Committee's inquiry is that the terms of reference of the Committee should be expanded to include substantive issues, then this structure would have the advantage of maintaining the operation and workload of the current committee (which would become the legislation side of the pair). The separate 'reference' committee would take on the additional role, which would be confined by its references from the Senate.

[2] See statistics in Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Annual Reports*; Rosemary Laing (ed), *Odgers' Australian Senate Practice – As Revised by Harry Evans*, (Department of the Senate, 14th ed, 2016) Chapter 15; Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (LexisNexis, 5th ed, 2017) 14 -18.
[3] I note that earlier submissions have addressed this in more detail.
[4] Dennis Pearce, 'Rules, Regulations and Red Tape: Parliamentary Scrutiny of Delegated Legislation' (Papers on Parliament No 42, Parliamentary Library, December 2004) 93.
https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/pops
[5] Ibid 94.

c) Scrutiny by Parliament – the Empowering Provision

To some extent to talk about the parliamentary scrutiny of delegated legislation is to discuss the topic in the context of the horse having already bolted. Delegated legislation is made pursuant to an enabling provision in a statute. That enabling provision sets the parameters for the scope of the delegated body to make the delegated instrument that affect laws. If the enabling statute provides for the delegation of policy matters or for a wide range of substantive matters or for matters beyond the scope or inconsistent with the statute, then the scope of the Committee to raise concerns or recommend change to that instrument is limited if not non-existent.

The enabling provision, being a provision of a statute, is the subject of the parliamentary scrutiny required for the passage of a bill. Accordingly, that bill is subject to scrutiny by the Senate Standing Committee for the Scrutiny of Bills ("Scrutiny of Bills Committee"). It is therefore incomplete to consider parliamentary scrutiny of delegated legislation without considering this critical stage in the process of delegated legislation being created.

It is a reality of the legislative process in Federal Parliament that most bills are only scrutinised in the second reading stage for policy considerations and that only a minority proceed to the stage of being scrutinised in detail (consideration in detail in the House and committee of the whole in the Senate.)[6] Even those bills that do pass through this detail stage are considered 'as a whole' and not clause by clause.[7] The Scrutiny of Bills Committee therefore has a critical role in scrutinising proposed enabling provisions. Departments are made aware that bills that inappropriately delegate legislative powers are likely to attract criticism in the Parliament, particularly from the Scrutiny of Bills Committee.[8]

There is nothing in the Senate standing orders that prevents the passage of a bill that includes an enabling provision if the Scrutiny of Bills Committee has not presented its report on that bill. In practice, the Scrutiny of Bills Committee presents their initial report on a bill on a weekly basis when the Senate is sitting. If that Committee identifies any problematic issue with an enabling provision or requires further information about the bill or the explanatory memorandum, the practice appears to be to engage in correspondence with the relevant minister.

The issue here lies not in the failure of the minister to respond (although there is no formal requirement for the minister to do so), but in the timing of that response. Timeliness of the response and the legislative programme timeframes will impact whether the Scrutiny of Bills Committee's finalised report on a bill (that is, taking advantage of the minister's response) are available during the passage of that bill.[9] This issue seems to have been ameliorated to some extent recently following an amendment to the Senate Standing Orders requiring a minister to

[6] Jacinta Dharmananda, 'Using Parliamentary Materials in Interpretation: Insights from Parliamentary Process' (2018) 41 *University of New South Wales Law Journa*l 4, 25-26.
[7] Ibid 25 citing, among other resources, the House Practice Book and the Senate Practice Book.
[8] Australian Government, *Legislation Handbook* (Department of Prime Minister and Cabinet, 2017) 33.
[9] Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Annual Report 2017* (March 2018) 4.

explain a delay in response.[10] But, even accepting a response has been provided, there are no procedural constraints to prevent the bill proceeding to enactment before the Scrutiny of Bills Committee has finalised its report with the advantage of the minister's response. This means that Senators may not always have the benefit of a finalised report when considering a bill.

Given the important ramifications of an enabling provision for the content and scope of delegated legislation, the *Committee may wish to consider* in its inquiry additional scrutiny arrangements that might be made for enactment of an enabling provision.

Some suggestions for consideration are:

- the adoption of an approval process, by affirmative resolution, by each House for each enabling provision in a bill prior to, for example, the motion that the bill be read a second time; this mechanism is already familiar to the Parliament;[11]
- the adoption of a procedural rule, similar to the rule that exists for Senate select or standing legislation committees, that the passage of a bill is delayed at a certain point until the Scrutiny of Bills Committee has reported (initially or finally) on the enabling provision;[12] this would ensure that Senators have the benefit of the report on the enabling provision while the bill is still before Parliament;
- instead of applying to all enabling provisions, either of the above procedures being adopted for certain categories of enabling provision, such as those containing a Henry VIII clause or those declaring that the delegable instrument is not disallowable (see below).

d) Scrutiny by Parliament: the Instrument

There are very few procedural constraints in the parliamentary scrutiny of a legislative instrument and it is a "negative" process. Under the *Legislation Act* (and subject to specific provisions being made in relation to the instrument), a registered instrument commences prior to being tabled in the Parliament and then once it is tabled it will continue to be operative unless Parliament expresses a negative sentiment (such as a notice of motion to disallow or a resolution to disallow).[13]

In the House, "[O]f the hundreds of pieces of delegated legislation presented each year very few are ever formally considered, let alone disallowed, by the House."[14] There is no doubt therefore that meaningful scrutiny primarily falls upon the Senate through the Committee.

[10] Amendment to Senate Standing Order 24.
[11] See DR Elder (ed) *House of Representatives Practice* (Department of the House of Representatives, 7th ed, 2018) 413.
[12] Senate, Parliament of Australia, *Standing Orders and Other Orders of the Senate*, August 2018, SO 115 which prevents a bill in the Senate proceeding to the committee of the whole stage. There are some exceptions.
[13] *Legislation Act 2003* (Cth) s12, s42.
[14] DR Elder (ed) *House of Representatives Practice* (Department of the House of Representatives, 7th ed, 2018) 411.

Accordingly, the Committee performs a critical role by reporting on the tabled instrument. Despite this, there is no standing order or other practice which requires that the Committee's report be available to the Senate before the period for disallowance has expired. (This is a similar point to that made above about the Scrutiny of Bills Committee's reports.)

In practice, the Committee's scrutiny of instruments is generally conducted within the timeframes that apply to the disallowance process.[15] But that outcome is a result of the dedication of the Committee. There is no procedural safeguard to ensure that the Parliament has the benefit of the Committee's scrutiny, either in its initial or final report, prior to the time for disallowance passing.

Moreover, it is clear that, like the Scrutiny of Bills Committee, concerns raised by the Committee about legislative instruments are largely dealt with outside of Parliament through the exchange of correspondence with ministers.[16] The Committee gives few notices of motion of disallowance itself.[17] To the extent it does, recent figures indicate that these are withdrawn following a satisfactory ministerial response or an undertaking by the minister to address the Committee's concerns.[18]

While these arrangements are meaningful and of considerable value, if the Committee is considering expanding its terms of reference to broader issues (see above) then the *Committee may wish to consider* more robust procedures that enforce consideration by the Senate. If legislative instruments contain policy issues, then, just as with bills, Parliament should be required to provide a positive affirmation about the instrument. For example, an extension of time could be provided for a notice of disallowance until the Committee's policy report is tabled in the Senate. Or, if a legislative instrument has been referred to the Committee for policy issues, then an affirmative resolution of the Senate be required for that instrument (rather than the absence of a disallowance motion).

e) Non-Disallowable Instruments - Transparency

The Legislation Handbook states that the process in the *Legislation Act* is important as it "ensures access to, and parliamentary scrutiny of, laws affecting the public. It also improves the transparency and integrity of the making of legislative instruments."[19]

[15] Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Annual Report 2017* (9 May 2018) 2.
[16] Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Annual Report 2017* (9 May 2018) 2, Chapter 3.
[17] According to the Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Annual Report 2017* (9 May 2018), 14-15: of the 1472 instruments examined by the Committee, the Committee gave 19 notices; according to the Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Annual Report 2015-2016*, 14-15: of the 2904 instruments examined by the Committee in 2015-2016, the Committee gave 32 notices.
[18] Ibid.
[19] Australian Government, *Legislation Handbook* (Department of Prime Minister and Cabinet, 2017) 34. See also *Legislation Act 2003* (Cth) s3.

The concept of a "legislative instrument" has expanded the scope of instruments the subject of the parliamentary scrutiny regime provided by the *Legislation Act*. But the concepts of "disallowable" and "non-disallowable" instruments have meant that there is a category of legislative instruments that are not subject to disallowance, with the consequence that they are not subject to meaningful scrutiny or veto by Parliament. [20]

Section 42 of the *Legislation Act* provides that all legislative instruments are subject to disallowance by either House. Section 44 provides that s 42 does not apply in relation to a legislative instrument if (in summary form):

> (a) **the enabling legislation** for the instrument **facilitates the establishment or operation of an intergovernmental body or scheme** involving the Commonwealth and one or more States or Territories **and** authorises the instrument to be made by the body or the purposes of the body or scheme; **unless the instrument is a regulation**, or the enabling legislation or some other Act has the effect that the instrument is disallowable; or
>
> (a) **an Act declares, or has the effect**, that section 42 does not apply in relation to the instrument or provision; or
>
> (c) the legislative instrument is **prescribed by regulation for the purposes of** this section.

The Legislation (Exemptions and Other Matters) Regulation 2015 sets out classes of instruments and particular instruments that are not subject to disallowance.

Exempting an instrument from disallowance requires "special reasons."[21] Legislative guides indicate that the OPC and the Scrutiny of Bills Committee take opportunities to seek information from departments about the reasons for a proposed exemption from disallowance.[22] Departments are directed that the explanatory memorandum should state clearly why the exemption is necessary and what will be the effect.[23] The Instruments Handbook provides that "When an instrument is lodged for registration, the lodging agency is asked to certify a range of information including whether an exemption from disallowance applies and, if so, what legislation authorises the exemption."[24] The Committee's terms of reference do not, strictly speaking, include the scrutiny of exempted instruments,[25] but it

[20] This assumes that an Act or regulation has not provided for another type of scrutiny such as approval.
[21] Office of Parliamentary Counsel, 'Drafting Direction 3.8: Subordinate Legislation' (Australian Government, July 2017) 11.
[22] Office of Parliamentary Counsel, 'Drafting Direction 3.8: Subordinate Legislation' (Australian Government, July 2017) 12-15; Australian Government, *Legislation Handbook* (Department of Prime Minister and Cabinet, 2017) 34.
[23] Australian Government, *Legislation Handbook* (Department of Prime Minister and Cabinet, 2017) 34.
[24] Office of Parliamentary Counsel, *Instruments Handbook* (Australian Government, November 2018) 67.
[25] The Committee under Senate Standing Order 23 is to consider "All regulations, ordinances and other instruments made under the authority of Acts of the Parliament, **which are subject to disallowance or disapproval"** by the Senate and which have legislative character. See also Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Annual Report 2017* (9 May 2018) 9, 13.

seems that the Committee has had substantial influence in questioning purportedly exempted instruments.[26]

There are no doubt valid reasons, which vary, for the executive's use of an exemption from time to time. But there is no readily apparent rationale that underpins the use of this exemption, nor any clear notification of when an exempted instrument is created. This undermines the transparency sought by the legislative scheme. The opaque use of exemptions creates a perception, real or not, that there is a 'gap' in the scrutiny of instruments that affect the law. This is not assisted when there is no readily available information about the proportion of legislative instruments that are subject to exemption each year. Statistics available focus on disallowable instruments.[27]

None of this is to suggest that the exemption is being used inappropriately or without sound rationale. The *purpose of raising this point in this submission* is to highlight the lack of transparency about the instruments the subject of exemption from disallowance, in a situation where disallowance is the primary procedural mechanism for Parliament to exercise judgment. Perhaps this issue may be solved simply by the provision of more readily available public information about the rate of, and reasons for, exemption (such as through a webpage similar to the Disallowance Alert). While it may be that many exempted instruments are of little interest to the public, there are occasions when an instrument exempted from disallowance has substantial effect.[28]

Thank you for your consideration.

Your sincerely,

Jacinta Dharmananda
Assistant Professor, Law School, UWA

[26] For example, see Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Annual Report 2017* (9 May 2018) 19-20; Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Annual Report 2015-2016*, 18-21.
[27] For example, see Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Annual Report 2017* (9 May 2018) 13; Rosemary Laing (ed), *Odgers' Australian Senate Practice – As Revised by Harry Evans*, (Department of the Senate, 14th ed, 2016) 432.
[28] For example, see *Maritime Union of Australia v Minister for Immigration and Border Protection* (2016) 259 CLR 431, 440-441 [12]-[17].