THE UNIVERSITY of ADELAIDE

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

SENT BY E-MAIL TO RegOrds.Sen@aph.gov.au

Dear Committee Secretary:

Re: Parliamentary Scrutiny of Delegated Legislation Inquiry

I would like to thank you for the opportunity to make a written submission in connection with the Senate Standing Committee on Regulations and Ordinances' (the "Committee") inquiry into the parliamentary scrutiny of delegated legislation.

By way of introduction, I am the Deputy Dean and Associate Professor of Law at Adelaide Law School, University of Adelaide. I am also a member of the Public Law & Policy Research Unit at Adelaide Law School.

I am presently engaged in a multi-year research study on the parliamentary scrutiny of delegated legislation. The project examines and compares the various scrutiny mechanisms that exist in Australia, Canada, New Zealand and the United Kingdom. Funding for the project is provided by an Insight Development Grant from the Social Sciences and Humanities Research Council of Canada. The goal is to map the formal and informal ways in which these parliaments scrutinise delegated legislation and to strengthen existing scrutiny processes by learning from innovations and best practices.

The project involves field work at each of the four national parliaments, which includes interviews of parliamentarians and officials. Over the past 18 months, I have visited the Parliament of Canada in Ottawa and the Westminster Parliament in London. Visits to the Parliaments of Australia and New Zealand are being planned for later this year. (I would very much welcome the opportunity to discuss the work of the Committee during my forthcoming visit to Canberra. I also look forward to the Committee's findings and report in relation to this inquiry.)

Given that my research is ongoing, my written submission will focus on some preliminary observations and lessons that can be learned from Canada and the United Kingdom. I hope that the Committee will find these observations useful in considering their application to the Australian context.

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Background

It is difficult to overstate the importance of delegated legislation in the modern legal landscape. Nearly all bills introduced in Parliament delegate some lawmaking authority to the executive branch of government, typically to individual ministers or collectively to the cabinet. Delegated legislation is a major source of law in Australia that touches on nearly every area of legal practice.

Delegated legislation fills the statute book at a volume that exceeds that of primary legislation. For example, in 2018, the Commonwealth Parliament enacted 170 primary statutes amounting to 3831 pages of statutory text. During the same time, the federal executive made 353 regulations amounting to 4605 pages of statutory text. In other words, by page count, delegated legislation made up 54.5% of all federal law that was made last year.

There are good reasons to explain the proliferation of delegated legislation: delegation offers practical benefits and its appropriate use complements Parliament's role as lawmaker in chief. Delegated legislation can help make the lawmaking process more efficient and effective. The ability of Parliament to delegate its legislative powers to the executive branch frees Parliament from having to deal with the minutia and trivial aspects of detailed statutory schemes. Delegation therefore saves precious time, allowing Parliament to focus its energies on broader, more substantial policy issues of national interest. In addition, subordinate legislation can be made more expeditiously than primary legislation, which offers a superior degree of flexibility that allows the law to quickly adapt to new circumstances as they arise.

There are, however, legitimate concerns about Parliament delegating its lawmaking powers to others. Legislative power exercised directly by the executive can challenge the fundamental values of a free and democratic society in relation to the exercise of public power.[1]

Concerns that have been expressed about delegated legislation relate to:

- the appropriate constitutional roles of Parliament and the executive branch of government in relation to legislative power;
- the appropriate degree of lawmaking discretion delegated by Parliament to the executive;
- the appropriate use of delegated lawmaking authority by the executive including the principles that should guide the subordinate lawmaking process;
- the accountability, transparency and quality of delegated legislation which is made outside the well-developed accountability mechanisms of the traditional parliamentary process (e.g., three readings and detailed committee study of proposed legislation, open and public debate and voting, media and public attention).

These concerns must be adequately addressed in order to maintain public confidence and the legitimacy of the legislative process.

One safeguard against the inappropriate use of delegated legislative power is the availability of judicial review to quash unlawful delegated legislation. Judicial remedies, however, are limited. Judicial review is not a comprehensive, robust scrutiny mechanism for delegated legislation. A court challenge to a particular regulation depends upon an aggrieved party initiating and funding litigation. Courts, moreover, may provide the executive with considerable lawmaking latitude in light of the language used in the relevant delegation

[1] Professor Jeremy Waldron has identified seven principles of legislation that provide legitimacy to the lawmaking process. These include explicit lawmaking, a duty to take care when legislating, representation, respect for disagreement, responsive deliberation, legislative formality and political equality. See Jeremy Waldron, "Principles of Legislation" in Richard W. Bauman & Tsvi Kahana, eds, *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge University Press, 2006) 15.

provision.[2] Furthermore, it appears that there are few enforceable constitutional limits on Parliament's capacity to delegate its lawmaking powers to others.[3]

It is worth reiterating that Parliament is constitutionally vested with legislative power and could at any time amend the scope or terms of any statutory provision delegating legislative power to the executive. It could also override or revoke any subordinate legislation that has already been made. The executive branch exercises legislative power by permission of Parliament. In other words, the executive's legislative power is borrowed power, on loan from Parliament.

As the source of legislative power, Parliament clearly has an appropriate oversight role in holding its chosen delegate, the executive, to account in the exercise of those powers. I would go further and argue that Parliament bears a special responsibility to actively supervise the executive in making subordinate legislation to keep it within the bounds intended by Parliament. A failure by Parliament to scrutinise subordinate lawmaking could be seen as an abdication of the lawmaking functions that are constitutionally vested in Parliament, a democratic and representative institution established by the Australian Constitution for the express purpose of making federal law.

While the parliamentary scrutiny of delegated legislation must be meaningful, it must also be efficient in order to maintain the benefits of delegation, namely saving Parliament's time and providing flexibility through a more expeditious lawmaking process.

What is the best model of parliamentary scrutiny to ensure that the executive exercises delegated legislative power appropriately? There is not likely to be one 'correct' model of parliamentary scrutiny. Different approaches are used in different jurisdictions and each must be adapted to suit local legal and political contexts. Nevertheless, I believe there is much to be learned from the experience and innovations of other similarly situated countries. I applaud the Committee for taking the initiative to learn about practices that have developed elsewhere as part of ensuring that its scrutiny processes are working as effectively and efficiently as possible.

Canada[4]

There are few constitutional constraints that would limit the capacity of Parliament to delegate its lawmaking powers to others because of a Supreme Court of Canada precedent established at the time of World War I.[5] I have, however, recently concluded in a peer reviewed journal article[6] that certain safeguards should be recognised as a constitutional obligation to better protect the role of Parliament as lawmaker in chief and maintain a constitutional balance.

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[2] The lawmaking discretion that is enjoyed by the executive varies. In each case, the available discretion depends upon the language that is used in the specific delegation provision. Some delegation provisions are tightly circumscribed (e.g., establishing a fee) while others are broad and sweeping (e.g., 'generally for carrying out the purposes and provisions of the Act'). It is for Parliament in each case to define the scope and terms of the lawmaking powers that it wishes to delegate to the executive, although there should be meaningful constraints to delegated legislative power imposed by the enabling legislation and a clear policy orientation to guide the exercise of delegated legislative power.

[3] For a discussion of the constitutionality of delegation in Australia see Gabrielle Appleby & Joanna Howe, "Scrutinising Parliament's Scrutiny of Delegated Legislative Power" (2015) 15 *Oxford University Commonwealth Law Journal* 3.

[4] This summary is adapted from my forthcoming article in the *Dalhousie Law Journal*, *infra* note 6. See also, Lorne Neudorf, "Rule by Regulation: Revitalizing Parliament's Supervisory Role in the Making of Subordinate Legislation" (2016) *Canadian Parliamentary Review* 29.

[5] *In Re Gray*, (1918) 57 SCR 150 (Supreme Court of Canada).

[6] Forthcoming in the *Dalhousie Law Journal*. A draft of this article is available online: Lorne Neudorf, "Reassessing the Constitutional Foundation of Delegated Legislation in Canada" (2018) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3256560.

The Canadian Parliament delegates considerable legislative powers to the executive, in some cases with sweeping provisions that the federal cabinet may make any regulation "generally for carrying out the purposes and provisions of the Act".[7]

Aside from the ordinary committee study of bills in Parliament, there is no specialist scrutiny of delegation provisions that are included in primary legislation.

The Standing Joint Committee for the Scrutiny of Regulations is the sole parliamentary committee tasked with the scrutiny of delegated legislation. As a joint committee, the Committee includes members of both the House of Commons and the Senate.

Every regulation that has been made on or after January 1, 1972 is permanently referred to the Committee, which gives it an exceptionally broad mandate to inquire into nearly all regulations on an ongoing basis.

The Committee does not review the policies or merits of delegated legislation, but instead carries out a technical review based on a list of criteria. These include that the regulation:

1. is not authorised by the terms of the enabling legislation or has not complied with any condition set forth in the legislation;
2. is not in conformity with the Canadian Charter of Rights and Freedoms or the Canadian Bill of Rights;
3. purports to have retroactive effect without express authority having been provided for in the enabling legislation;
4. imposes a charge on the public revenues or requires payment to be made to the Crown or to any other authority, or prescribes the amount of any such charge or payment, without express authority having been provided for in the enabling legislation;
5. imposes a fine, imprisonment or other penalty without express authority having been provided for in the enabling legislation;
6. tends directly or indirectly to exclude the jurisdiction of the courts without express authority having been provided for in the enabling legislation;
7. has not complied with the Statutory Instruments Act with respect to transmission, registration or publication;
8. appears for any reason to infringe the rule of law;
9. trespasses unduly on rights and liberties;
10. makes the rights and liberties of the person unduly dependent on administrative discretion or is not consistent with the rules of natural justice;
11. makes some unusual or unexpected use of the powers conferred by the enabling legislation;
12. amounts to the exercise of a substantive legislative power properly the subject of direct parliamentary enactment;
13. is defective in its drafting or for any other reason requires elucidation as to its form or purport.[8]

The Committee reports to both Houses. It is also empowered to make a resolution to revoke a regulation. In such a case, 30 days' notice must be given to the regulation-making authority to provide it with an opportunity to remedy the problem. If the Committee nevertheless resolves to revoke the regulation, the revocation resolution is deemed to be adopted after 15 sitting days, unless a minister makes a motion which will then trigger a debate and vote. If a resolution to revoke a regulation is adopted, the regulation-making authority must revoke the resolution within 30 days.

[7] See, for example, *Transportation of Dangerous Goods Act, 1992* SC 1996, c 34, s 27(1) (Canada).
[8] Standing Joint Committee for the Scrutiny of Regulations, "About" https://www.parl.ca/Committees/en/REGS/About.

The Committee is well-resourced. It benefits from support staff, including clerks, assistants, analysts, research librarians and the resources of the Parliamentary Budget Officer. Despite these resources, evidence of the scrutiny of regulations by parliamentarians on the Committee is disappointing. Between 2004 and 2015, for example, the Committee issued 22 reports, two of which received responses from the government. Only 11 reports were made in relation to a particular regulation, with some reports examining the same regulation. Therefore, in more than 10 years, the Committee reported on only 7 unique regulations.

The Committee has recommended the revocation of a regulation on less than 20 occasions since 1986.

Committee reports tend to focus on broader, thematic issues, such as questions relating to the interpretation of legislation. A comprehensive screen for each regulation is instead performed behind the scenes by Committee staff who draw problematic regulations to the attention of the Committee.

When a problem is discovered, Committee staff or members typically communicate directly with the regulation-making agency or minister instead of reporting on the matter. An advantage of this informal approach is that it allows the government to save face and resolve the problem. It also avoids the situation where the Committee would have to put forward a formal revocation resolution and risk its defeat (which could undermine the Committee's standing).

There are also shortcomings to this informal approach. First, communication between the Committee and the government to resolve problems behind closed doors is hard to reconcile with the principle of transparency. Second, because communications are not published in the Committee's reports, there is a missed opportunity to draw attention to potential abuses of power and important policy questions that are increasingly decided by regulations, which would better hold the government to account. Third, there is little opportunity for those outside the Committee to identify and resolve systemic issues that could strengthen the subordinate lawmaking process. Fourth, there is a risk of the Committee adopting a government-friendly approach when it carries out most of its work behind closed doors, particularly when the Committee is comprised of a majority of members from the governing party. Fifth, there is little incentive for the government to take the Committee seriously or to be responsive to its concerns if there is no real risk of public exposure, censure or revocation of a regulation.

The Committee has recently expressed an interest in using its formal powers, including revocation, more frequently to encourage greater departmental responsiveness to its concerns.

United Kingdom

There are no constitutional constraints that would effectively limit the capacity of Parliament to delegate its lawmaking powers to others because of the foundational constitutional principle of parliamentary sovereignty and the absence of a written constitution that includes a supremacy clause.[9]

Recent criticism of delegated legislation in the United Kingdom has focused on the increasing use of 'Henry VIII clauses' that allow regulations to amend primary legislation, enabling legislation that fails to establish a clear policy orientation ('skeleton bills'), broad or vague delegation provisions, delegation of the power to create new criminal offences through

[9] Although a recent report of the House of Lords referred to constitutional standards in relation to the delegation of legislative power by Parliament to the executive: House of Lords, Committee on the Constitution, "The Legislative Process: The Delegation of Powers" (2018) https://www.parliament.uk/business/committees/committees-a-z/lords-select/constitution-committee/news-parliament-2017/legislative-process-delegation-of-powers/.

regulations, and the use of non-binding legal 'guidance' created by departments to avoid the scrutiny process that would otherwise apply to formal regulations.[10]

In addition to the ordinary committee study of bills in Parliament, there is specialist scrutiny of delegation provisions included in primary legislation through the House of Lords Delegated Powers and Regulatory Reform Committee. The Committee examines provisions in bills that delegate powers at the time the bill is introduced in the House of Lords. The government does not have a majority on the Committee. In connection with the Committee's work, the government provides a detailed memorandum to the Committee setting out the rationale for each delegation provision. The Committee examines whether the delegation of legislative power in the bill is 'inappropriate' and whether subordinate legislation that could be made thereunder would be subject to an 'inappropriate' degree of parliamentary scrutiny. The Committee can recommend the application of a more rigorous scrutiny process to the future regulations. While the Committee has no power to amend or reject a delegation provision, it makes recommendations in published reports to the House of Lords (typically prior to the ordinary clause-by-clause committee review in the House of Lords). It reports frequently: for example, there were 28 reports published in 2018. The government typically adopts the Committee's recommendations, which can be seen in the reports that include correspondence between the Committee and departments.

In terms of the parliamentary scrutiny of regulations that have been made (or proposed), there are a number of processes that exist. While there are several variations and subtleties to these processes, this section summaries the main scrutiny mechanisms.[11]

First, each House considers draft regulations laid before Parliament that are subject by their enabling legislation to the 'affirmative procedure' before they can be made. Each House also considers regulations that have been made which are subject to the 'negative procedure' if requested by a member. Regulations made under enabling legislation that does not specify either the affirmative or negative procedure are not scrutinised in this way by either House.

At this stage of review, any concern of a member may be raised in relation to the regulation. In the House of Commons, this takes place through an *ad hoc* Delegated Legislation Committee while this would take place on the floor of the House of Lords. Either House could block a regulation laid before Parliament, although the process is viewed as ineffective: only 16 regulations since 1950 have been rejected (0.01%).[12] It appears that the process is a largely a formality with little time available for a discussion of the technical aspects or merits of a regulation.

Second, the Joint Committee on Statutory Instruments reviews all subordinate legislation that is made, whether or not it was required to be laid before Parliament. As a joint committee, the Committee includes members of both the House of Commons and the House of Lords. The government does not have a majority on the Committee. The Committee's legal counsel plays a critical role in scrutinising regulations against a series of technical criteria, which include:

1. that it imposes, or sets the amount of, a charge on public revenue or that it requires payment for a licence, consent or service to be made to the Exchequer, a government department or a public or local authority, or sets the amount of the payment;
2. that its parent legislation says that it cannot be challenged in the courts;
3. that it appears to have retrospective effect without the express authority of the parent legislation;

[10] See the report of the House of Lords, *ibid.*
[11] For a detailed overview of the various scrutiny mechanisms in the United Kingdom see Ruth Fox and Joel Blackwell, *The Devil is in the Detail: Parliament and Delegated Legislation* (2014, Hansard Society).
[12] Report of the House of Lords, *supra* note 9 at 30.

4. that there appears to have been unjustifiable delay in publishing it or laying it before Parliament;
5. that there appears to have been unjustifiable delay in sending a notification under the proviso to section 4(1) of the Statutory Instruments Act 1946, where the instrument has come into force before it has been laid;
6. that there appears to be doubt about whether there is power to make it or that it appears to make an unusual or unexpected use of the power to make;
7. that its form or meaning needs to be explained;
8. that its drafting appears to be defective; and
9. any other ground which does not go to its merits or the policy behind it.[13]

The Committee has no power of revocation but makes recommendations in its published reports. It reports frequently: for example, there were 30 reports published in 2018. The government tends to adopt the Committee's recommendations, which can be seen in the reports that include correspondence between the Committee and departments.

Third, the House of Lords Secondary Legislation Scrutiny Committee reviews all regulations that are required to be laid before Parliament. There is no equivalent committee in the House of Commons. The government does not have a majority on the Committee. This Committee is unique in that it examines the broader policy implications of subordinate legislation based on the following criteria:

1. that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;
2. that it may be inappropriate in view of changed circumstances since the enactment of the parent Act;
3. that it may inappropriately implement European Union legislation;
4. that it may imperfectly achieve its policy objectives;
5. that the explanatory material laid in support provides insufficient information to gain a clear understanding about the instrument's policy objective and intended implementation;
6. that there appear to be inadequacies in the consultation process which relates to the instrument.
7. that the instrument appears to deal inappropriately with deficiencies in retained EU law.[14]

The Committee has no power of revocation or disallowance but makes recommendations in its published reports. It reports frequently: for example, there were 27 reports published in 2018. The work of this Committee is more contentious given its policy-oriented scrutiny of delegated legislation. Nevertheless, the Committee operates on a consensus basis and its reports are usually unanimous. Although the government may or may not adopt the Committee's recommendations, its reports are a highly valuable source of critical perspectives on government policy.

Fourth, there are special scrutiny processes for certain other kinds of delegated legislation where this is specified by the enabling legislation. For example, Legislative Reform Orders, which are special de-regulation orders made by the executive that can amend primary legislation, are subject to a unique scrutiny process.[15]

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[13] See House of Lords & House of Commons, Joint Committee on Statutory Instruments, "Transparency and Accountability in Subordinate Legislation" (2018) https://publications.parliament.uk/pa/jt201719/jtselect/jtstatin/151/151.pdf ("Remit").
[14] House of Lords, Secondary Legislation Scrutiny Committee, "Terms of Reference" https://www.parliament.uk/business/committees/committees-a-z/lords-select/secondary-legislation-scrutiny-committee/role/tofref/.
[15] For more details of the Legislative Reform Order scrutiny process, and a recent example of how it works in practice, see Lorne Neudorf, "Scrutinising Legislative Reform Orders: The Case of the Horserace Betting Levy"

Conclusion

The comparison of the parliamentary scrutiny of delegated legislation in other jurisdictions shows that there are a variety of models, each with its own strengths and limitations. The goal should be to develop a model that is efficient and effective that can best ensure the appropriate use of delegated legislative power.

There are a variety of design choices that can be made in relation to a parliamentary scrutiny committee, including:

- *when* the scrutiny is applied by the committee (delegation provisions in draft legislation, draft regulations, promulgated regulations);
- *scope* of the scrutiny in terms of what can be scrutinised by the committee (only regulations subject to a certain procedure, all regulations one time, all regulations on an ongoing basis);
- *criteria* of the scrutiny to be applied (technical considerations, broader policy questions);
- *resourcing* of the committee including budget, staff and the number of members;
- *powers* of the committee (reporting, calling witnesses, revocation);
- *composition* of the committee (joint committee, expertise of members, government representation); and
- *procedures* of the committee (public or private hearings, decision-making process by consensus or majority).

The legal and political contexts will also affect the operation of a scrutiny committee, which can include committee leadership, the influence of individual members and informal interactions and relationships with the government and departments.

I would make the following concluding observations:

- specialist review of delegation provisions in a bill by a scrutiny committee is a useful check to ensure that each delegation is appropriately calibrated in light of the requirements of the enabling legislation (as opposed to the use of general boilerplate language) and that subordinate legislation made thereunder will not be exempt from the ordinary scrutiny processes – this scrutiny at the front-end can prevent problems from arising later;
- establishing clear criteria to be applied by a scrutiny committee is useful to ensure a focused, consistent approach and to assist departments in drafting regulations that meet the requirements;
- establishing more general criteria (such as an 'appropriateness' test) to be applied by a scrutiny committee might also be useful to prevent an abuse of delegated powers provided there are clear guiding principles for how the test will be applied;
- a scrutiny committee can function effectively either with or without the power of revocation although having such a power provides an additional or more powerful incentive for government responsiveness;
- just because a scrutiny committee enjoys certain powers does not mean that it will actually use those powers in practice;
- the political context, leadership and membership of a scrutiny committee can result in the committee taking a larger or smaller role than what might be expected from its terms of reference and powers alone;
- the review of a draft regulation by a scrutiny committee as opposed to a promulgated regulation *ex post facto* may be more effective as the government is likely to be more open and responsive to the committee's suggested changes at the earlier draft stage;

(2018) https://ukconstitutionallaw.org/2018/12/05/lorne-neudorf-scrutinising-legislative-reform-orders-the-case-of-the-horserace-betting-levy/.

- while there are different views on whether a merits or policy-oriented scrutiny should be applied by a scrutiny committee, there are clear benefits to reviewing broader policy questions but care should be taken to avoid the politicisation of the committee's work – if a decision is made to engage in a policy review, it may be best to split technical and policy scrutiny functions among different committees (like in the United Kingdom);
- adequate resourcing, including the recruitment and retention of competent staff, is critical to the success of a scrutiny committee given the high volume of work and its importance as a key legal and constitutional safeguard;
- while a scrutiny committee will carry out different aspects of its work formally and informally, the committee should not hesitate to use formal mechanisms to establish a precedent that will encourage the appropriate and responsible exercise of delegated legislative power in the future; and
- reporting is one of the most important tools available to a scrutiny committee – frequently published reports can be used to encourage departmental responsiveness and identify systemic issues.

Finally, I also note that the question of using artificial intelligence to help scrutinise regulations has come up several times during my research. It may be worthwhile to consider whether the use of such technology would assist the Committee in its work for example by identifying problematic regulations that can then be reviewed by the Committee in more detail. Artificial intelligence is now used in private practice for contract analysis and other document reviews.

I would be happy to clarify or expand upon any aspect of my written submission.

Thank you again for the opportunity to contribute to the Committee's important work in relation to this inquiry.

Yours sincerely,

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