



Australian Government

Australian Government response to the
Senate Standing Committee on Regulations and Ordinances report:
Parliamentary Scrutiny of delegated legislation

NOVEMBER 2019

Overview

The Australian Government notes the report by the Senate Standing Committee on Regulations and Ordinances into Parliamentary Scrutiny of Delegated Legislation released 3 June 2019.

The report contained a range of recommendations, with only a subset to the Australian Government. This Government response intends to only address these recommendations. This response has been developed through input from the following Departments:

- The Department of the Prime Minister and Cabinet
- The Attorney-General's Department
- Office of Parliamentary Counsel
- Department of Finance
- Department of Industry

Recommendation 8: *The committee recommends that the government give consideration to developing an expert advisory body to assist departments in appropriately developing proposals for bills that seek to delegate legislative power.*

Response: The Government does not support this recommendation.

The Government notes that the implementation of this recommendation has the potential to unnecessarily extend and increase the complexity of the drafting process unless there is a wholesale shift in the manner in which scrutiny is provided across Government.

The Government also notes that the Office of Parliamentary Counsel (OPC) is the principal provider of legislative drafting and publishing of the Commonwealth's laws, including primary and subordinate legislation. OPC also provides a range of advisory services to Government departments to assist in developing Commonwealth legislation, including in training in understanding the legislative process and in drafting legislative and other instruments¹.

The Government notes that the appropriate balance between primary and delegated legislation is best determined by the responsible department and that a range of support is already available to instructors. Notably, instructors currently receive advice from sources including the Office of Constitutional Law and the Administrative Law Section of the Attorney General's Department (AGD), as well as the Australian Government Solicitor. Instructors are able to consult with drafters from OPC, who are well positioned to provide guidance and information on the legislative process and potential issues. The Department of the Prime Minister and Cabinet, AGD, Department of Finance, and OPC have also published a range of formal resources to assist agencies in the legislative drafting and other processes, and these resources should be familiar to instructors.

The creation of an advisory body in *addition* to existing functions may result in an overlap in scrutiny roles and delays in the drafting of legislation and, ultimately, introduction into the Parliament.

Recommendation 11: *The committee recommends that the Office of Parliamentary Counsel give consideration to reviewing its Drafting Direction 3.8 and its practice of recommending that all delegated legislation should be made in the form of legislative instruments, rather than regulations, unless there is good reason not to do so.*

Response: The Government does not support this recommendation.

The Government notes that Drafting Direction 3.8 (DD3.8) sets out the Office of Parliamentary Counsel's (OPC) approach to instrument making powers, including the cases in which it is appropriate to use legislative instruments (as distinct from regulations). DD3.8 represents OPC's considered view on this question and outlines the material that should (in the absence of a strong justification to the contrary) be included in regulations and so be drafted by OPC and considered by the Federal Executive Council.

The approach set out in DD3.8 aims to ensure that OPC's limited resources are used to draft the subordinate legislation that will have the most significant impacts on the community (that is, the narrower band of regulations as specified in DD3.8, which only OPC has the expertise to draft and which would also receive the highest level of executive scrutiny because of the special nature of the

¹ www.opc.gov.au

matters dealt with, as well as a range of other more significant instruments for which instructing agencies engage OPC's services for drafting or assistance).

Recommendation 14: *The committee recommends that the Financial Framework (Supplementary Powers) Act 1997 and the Industry Research and Development Act 1986 be amended to provide for an affirmative resolution procedure for legislative instruments which specify expenditure.*

Response: The Government does not support this recommendation.

The Government is satisfied that the existing scrutiny provides sufficient oversight without the addition of affirmative resolution.

Affirmative resolution would significantly hinder the government's ability to respond promptly to issues, and have sufficient time to develop robust policy and deliver initiatives. Long lead times before the commencement of legislative instruments would condense the development and settling of policy into more compressed timeframes. This poses a risk to the development of effective and evidence based policy. Delays to implementing legislative authority specifying expenditure, through either instrument, could risk the Government not meeting its own policy objectives. For example, delays may occur for government spending in response to urgent issues such as funding for flood or drought relief, which rely on the legislative authority provided by instruments under the *Financial Framework (Supplementary Powers) Act 1997*. Similarly, delays could adversely affect the Government's ability to respond to issues for activities that rely on instruments under the *Industry Research and Development Act 1986*, which could jeopardise Australian industry's ability to progress in a manner that is competitive in an increasingly globalised, international market. A timely policy response in these circumstances is often critical to maintain economic stability and prevent job loss, particularly in regional Australia.

The Government notes that the purpose of instruments made under the *Industry Research and Development Act 1986*, and the insertion of an item under the *Financial Framework (Supplementary Powers) Regulations 1997*, is to provide legislative authority for government spending using expenditure the Parliament has previously authorised. Noting this, an affirmative resolution process would be excessive and provide little benefit beyond satisfying the committee's recommendation.

Recommendation 15: *The committee recommends that the government: (a) review existing provisions exempting legislative instruments from disallowance, to determine whether such exemptions remain appropriate, and amend the Legislation Act 2003 to ensure all such exemptions are contained in primary legislation; and (b) publish guidance as to the limited circumstances in which it may be appropriate to exempt instruments from disallowance.*

Response: The Government supports in part with this recommendation.

Part A

The Government does not support the recommendation to amend the Legislation Act to ensure exemptions are contained in primary legislation. Transferring exemptions currently contained in the *Legislation (Exemptions and Other Matters) Regulation 2015 (Exemption Regulation)* to the Legislation Act or primary legislation would undo the changes effected by the *Acts and Instruments (Framework Reform) Act 2015*. It is also impractical given the substantial time and resources required to redraft existing delegated legislation and primary legislation.

Part B

The Government supports that legislative instruments should only be exempted from disallowance in very limited circumstances and will publish guidance regarding circumstances where it is appropriate for instruments to be exempted. Grounds for exemptions from disallowance are subject to regular review and the Administrative Law Section of the Attorney-General's Department routinely provides scrutiny comments on any proposed exemptions.

Recommendation 16: *The committee recommends that the Office of Parliamentary Counsel modify the Federal Register of Legislation to enable instruments which are exempt from disallowance to be readily identified.*

Response: The Government supports this recommendation.

The Government notes that while the Register does not currently enable instruments that are exempt from disallowance to be readily identified, the Register is undergoing redevelopment. When the redevelopment provides an opportunity, OPC will modify the Register to enable instruments that are exempt from disallowance to be readily identified (estimated delivery late 2020).

Recommendation 17: *The committee recommends that, as a general rule, provisions in bills delegating legislative power should not prescribe an affirmative resolution procedure, as there is a risk that this may promote the inclusion of significant matters in delegated legislation which are more appropriate for parliamentary enactment.*

Response: The Government does not support this recommendation.

Affirmative resolution procedure provision appear to be rare, and such provisions are a legislative solution that is available to the Parliament to use when appropriate in the circumstances. Given the apparent rarity of such provisions, and the expected or actual content of the resulting instruments, there seems little risk that the mere availability of an affirmative resolution mechanism may promote the inclusion of significant matters in delegated legislation which are more appropriate for parliamentary enactment.

The two examples of affirmative resolution provisions on the statute book are as follows:

- section 60 of the *Defence Act 1903* provides that in time of war, the Governor-General may, by proclamation, call on persons to serve in the Defence Force, in the order in which they are included in classes established by the regulations. Subsection 60(5) then provides that such a proclamation does not come into effect unless it is approved by resolution of each House of the Parliament— thereby providing parliamentary scrutiny of action undertaken by the Governor-General. It appears that no such proclamations (or regulations establishing classes) have been made since section 60 has been in its current form (that is, since 1992). However the expected content of such a proclamation would appear to be appropriate for inclusion in delegated legislation as its scope is limited to calling on classes of persons in the order established by the regulations. The involvement of the Governor-General (as the commander in chief of the defence forces under the Constitution) also seems appropriate, and the use of proclamations for call out purposes appears to be an approach of long standing. In the absence of such a legislative solution, it would appear necessary for Parliament to enact fresh legislative provisions to achieve the same result.
- Subsection 10B(1) of the *Health Insurance Act 1973* allows the Minister, by legislative instrument, to determine which Medicare items subsections 10ACA(7A) and 10ADA(8A) of that Act apply to, and the maximum increases in Medicare benefit payable for those items under the Extended Medicare Safety Net. Subsection 10B(2) then provides that such determinations do not come into effect until approved by resolution of each House of the Parliament, again providing parliamentary scrutiny of the action. The *Health Insurance (Extended Medicare Safety Net) Determination 2017* is currently in force under subsection 10B(1) of the Act. The content of the determination consists of lists of Medicare items and corresponding amounts of maximum increases in Medicare benefit payable for those items. This level of detail is appropriate for inclusion in delegated rather than primary legislation.

In both of these cases the Parliament has decided that the making of a legislative instrument, with the additional requirement of Parliamentary approval before the instrument can commence, is the appropriate legislative solution for the matter being dealt with.

The Report also notes the combination of affirmative and negative procedures provided for in the *Australian Charities and Not-for-profits Commission Act 2012* (sections 45-20 and 50-20), which relate to regulations specifying standards for governance and external conduct that not for profit entities must meet to become and remain registered under that Act. The *Australian Charities and Not-for-profits Commission Regulation 2013* sets out governance and external conduct standards and the content of those standards is appropriate for inclusion in delegated rather than primary legislation.

The Government's view is that to deny the use of affirmative resolution provisions is to limit Parliament's powers to decide on the most appropriate approach in a particular situation.

Recommendation 18: *The committee recommends that the government amend the Legislation Act 2003 to provide that, subject to limited exceptions, legislative instruments commence 28 days after registration, and that the government develop guidance as to the limited circumstances in which an instrument may commence earlier.*

Response: The Government does not support this recommendation.

The Government does not support this recommendation as it reduces the Government's capacity to implement its policy agenda in an effective and agile manner.

The Government acknowledges that delayed commencement is desirable in certain circumstances as it provides individuals with advance notice of the rights and obligations they are subject to. However, the Government notes that it is often inappropriate or impractical for instruments to be registered well in advance of their commencement date. It is not appropriate, for example, for commencement to be delayed when the operation of the instrument is urgent or time sensitive, which is often the case for instruments enabling budget measures or sunseting processes. Delayed commencement is also impractical in circumstances where the subject matter of the instruments is sensitive, and providing advanced awareness of the instrument's commencement would undermine the Government's policy intent. Therefore, the Government considers that delayed commencement should continue to be treated as an option rather than the default position.

Recommendation 19: *The committee recommends that the government amend the Legislation Act 2003 to specify the criteria for granting exemptions from sunseting and ensure all exemptions from sunseting for classes of legislative instruments are contained in primary legislation.*

Response: The Government does not support this recommendation.

Section 54 of the Legislation Act provides for classes of instruments that are not subject to sunseting, including those instruments prescribed by the Exemption Regulation. Part 5 of the Exemption Regulation prescribes both classes of instruments (at section 11) and particular instruments (at section 12) that are not subject to sunseting.

The Legislation Act does not specify any criteria for granting new exemptions from sunseting, however there are well established policy criteria that have been used to consider whether an exemption is appropriate. These policy criteria allow the Government to flexibly consider applications for exemptions from sunseting. If the criteria was specified in the Legislation Act, the Government would have reduced capacity to consider each application on a case by case basis and deliver an appropriate outcome.

Further, the Government notes that this recommendation directly conflicts with recommendation 29 of the *Report on the Operation of the Sunseting Provisions in the Legislation Act 2003*. Recommendation 29 was that all exemptions from sunseting, other than those set out in section 54 of the Legislation Act, should be prescribed in the Exemption Regulation.

Recommendation 21: *The committee recommends that the government provide departmental officers with more extensive training about delegated legislation, the Senate's role with respect to delegated legislation and the committee's role, functions and expectations.*

Response: The Government does not support this recommendation.

There is a significant range of training and guidance (including written material that is available electronically) provided by the Committee, the Parliament, OPC, PM&C and departments with responsibility for particular areas of policy (such as AGD). For example:

- A range of Guidelines are published on the Committee's website.
- The Parliament offers a number of seminars for public servants including a specific session on Senate scrutiny of delegated legislation.
- OPC delivers courses for instructors that address legislative processes (including parliamentary scrutiny) and drafting simple instruments that include information on Parliamentary Committees with an interest in legislative instruments. In addition, OPC has published the Instruments Handbook which includes material about the Committee's requirements.
- PM&C publishes the Legislation Handbook and the Cabinet Handbook.
- AGD publishes guidance material relating to administrative law, criminal law and human rights, which refer to the Committee's role.