

ATTACHMENT A



Australian Government

Department of Education and Training

Submission - Parliamentary Scrutiny of Delegated Legislation Inquiry 2018

General comments

The department notes that on 29 November 2018 the Senate referred an inquiry to the Senate Standing Committee on Regulations and Ordinances (the Committee) to examine parliamentary scrutiny of delegated legislation.

The department considers that the Committee continues to perform a valuable role in supporting the requirements of democratic governance through the exercise of its oversight role as currently formulated. The Committee has an established track record of consistently drawing attention to provisions which it perceives to be inconsistent with its scrutiny principles, which helps to improve the quality of the drafting of legislative instruments.

The role of the Committee in drawing attention to provisions which it considers infringe Standing Order 23, in particular the broader examination of whether delegated legislation is within power, is integral to safeguarding federalism and constitutional rights. This scrutiny function bolsters the accountability of the executive and administrative arms of government to Parliament by reducing the overreach of executive powers, and by curbing any inadvertent infringements of rights and liberties arising from delegated legislation.

The department also wishes to commend the guidance materials produced by the Committee, in particular the Scrutiny Digests and Delegated Legislation Monitors. These raise awareness about the scrutiny principles and identify key scrutiny issues which commonly arise. They also serve to highlight the Committee's expectations in terms of ensuring the content and form of legislative instruments are clear and comprehensible. This, in turn, helps to improve the overall quality of explanatory statements.

Committee's role and whether its powers remain appropriate

The Committee's website notes that its role is to assess delegated legislation against a set of scrutiny principles that focus on compliance with statutory requirements, the protection of individual rights and liberties, and principles of parliamentary oversight.

In the department's view, the Committee's current role and powers are integral for the maintenance of Government accountability to Parliament and the protection of individual rights and liberties and remain appropriate.

The Committee's role is buttressed by the *Legislation Act 2003* which sets out other requirements applying to the making of delegated legislation. These safeguards and transparency measures¹ aptly supplement the Committee's existing scrutiny functions.

¹ Such safeguards relevantly include: (1) the requirement that the instrument maker must be satisfied appropriate consultation has been undertaken (section 17 of the *Legislation Act 2003* (LA)); (2) that legislative instruments be published on the Federal Register of Legislation (subsection 15G(1) of the LA); (3) limitations placed upon the incorporation of documents by reference, unless subject to a ^{contrary}

Further, where the Committee has concerns about an instrument, the department notes the Committee's practice of inviting the relevant minister to provide further information or to take action in response to those concerns. This has the benefit of enabling the Committee's concerns to be allayed without impeding the administration and implementation of policy through actual disallowance of the instrument.

The Committee's scrutiny framework

In the department's view, the existing scrutiny principles set out in Senate Standing Order 23(2) enable the Committee to undertake a detailed assessment and evaluation of legislative instruments.

An examination of some comparative international jurisdictions and Australian state and territory scrutiny principles indicates that most have adopted the same cornerstone principles for the scrutiny of subordinate legislation, focusing on ensuring that it does not adversely affect personal rights and liberties and broadly complies with all aspects of parliamentary propriety.

Possible enhancements to the scrutiny framework

The department suggests the Committee may wish to consider whether the following suggestions could enhance the scrutiny framework.

Requirement for agencies to provide a minimal level of policy explanation in support of measures contained in legislative instruments, in particular where a scrutiny principle is engaged or may be engaged

The Committee's terms of reference concentrate on technical scrutiny, enabling it to operate in a bipartisan and apolitical manner. Further information about the policy elements of an instrument may, however, usefully assist in the Committee's legislative evaluation. For example, to determine whether an instrument is in accordance with the applicable authorising legislation, or whether its measures should more appropriately be the subject of primary legislation, consideration of the policy which the instrument implements could be of benefit.

Whilst noting the Instruments Handbook states that explanatory statements should contain sufficient information to enable readers to understand the need for an instrument, its objective and intended operation², the requirement to ensure policy objectives are clearly elucidated is only implicitly borne out in the scrutiny principles. Given that (a) the Committee's technical scrutiny capability is likely to be fortified by a comprehensive understanding of policy scope and intent and (b) the Committee's correspondence with ministers often takes the form of requests to elaborate upon or clarify the policy underpinnings for a proposed measure, such an enhancement may be worthy of preliminary consideration.

An enhancement of this type focusing on clear articulation of policy intent may further encourage agencies to ensure that, at the outset, explanatory statements address the overarching policy which supports the proposed measures. This could, in turn, reduce the need to seek supplementary information from ministers about such matters. Any such enhancement would

intention in the enabling act (section 14 of the LA); (4) that instruments are subject to disallowance by either House of Parliament during a disallowance period (section 42 of the LA); (5) tabling requirements (section 38 of the LA); (6) mandatory 10 year sunseting of instruments (section 48F of the LA); and (7) the ability of courts to read down a provision, declare delegated legislation to be ultra vires or identify impermissible sub-delegation of legislative power irrespective of whether a statute may so authorise (see also paragraphs 13(1)(a) and (c) and subsection 13(2) of the LA).

² Office of Parliamentary Counsel, Instruments Handbook (Document release 3.4, re-issued November 2018), paragraphs 232, 233 (page 58). See also paragraph 243 (pages 59-60).

<https://www.opc.gov.au/sites/default/files/m17jf142.v20.pdf>

need to be carefully crafted to be properly directed to ensuring there is sufficient policy explanation to assist the Committee in its assessment of the overall legality of an instrument as opposed to ostensibly inviting the Committee to assess its policy merits.

Proposed scrutiny principle targeting variable drafting quality

There is a large body of subordinate legislation, of varying nature and complexity. In part, this reflects the need for flexibility where it is not possible to foresee all contingencies during the enactment of primary legislation. It also accommodates the increasing technicality of subject matter, which may best be dealt with in delegated legislation (or in some other fashion, such as rules or administrative schemes).

The quality of drafting of delegated legislation, however, is of variable quality. In recognition of this, there may be merit in including an additional scrutiny principle allowing the Committee to consider whether any statutory instrument is 'defective in its drafting or for any other reason requires elucidation as to its form or purport'.³

This scrutiny principle is explicitly included in the mandate of the Canadian Standing Committee on the Scrutiny of Regulations (criteria 13)⁴ and a similar formulation is contained in Standing Order 319(1)(i) of the New Zealand Regulations Review Committee⁵. The principle is designed to ensure legislative instruments are clearly drafted to ensure certainty and that those affected can understand their requirements.

As would be necessary when considering the addition of any principle which potentially extends the Committee's remit, the experience in Canada and comparative common law jurisdictions which have incorporated such a requirement into their scrutiny frameworks should be considered. This would include the practical benefits that this principle may bring in light of the Committee's broader scrutiny objectives and whether it may narrow the focus of the Committee to matters of form rather than substance. Regard should also be had to the Committee's resources and time constraints.

³ Criteria 13, Canadian Standing Committee for the Scrutiny of Regulations Mandate - <https://www.parl.ca/Committees/en/REGS/About>

⁴ See generally the [Canadian Standing Committee for the Scrutiny of Regulations](https://www.parl.ca/Committees/en/REGS/About) criteria at <https://www.parl.ca/Committees/en/REGS/About>

⁵ [New Zealand Parliament Standing Orders of the House of Representatives: Chapter 5 Legislative Procedures](#)