



COMMONWEALTH OF AUSTRALIA

# Official Committee Hansard

## SENATE

STANDING COMMITTEE ON REGULATIONS AND  
ORDINANCES

**Reference: Legislative Instruments Bill 2003**

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**SENATE**

**STANDING COMMITTEE ON REGULATIONS AND ORDINANCES**

**Wednesday, 10 September 2003**

**Members:** Senator Tchen (*Chairman*), Senators Bartlett, Marshall, Mason, Moore and Santoro

**Senators in attendance:** Senators Bartlett, Marshall, Moore and Tchen

**Terms of reference for the inquiry:**

Legislative Instruments Bill 2003

**WITNESSES**

**BUGEIA, Mr Noel William, Director, Legislative Services and Publication, Office of Legislative Drafting, Attorney-General’s Department ..... 1**

**GRAHAM, Mr James Howard, Acting Principal Legislative Counsel, Office of Legislative Drafting, Attorney-General’s Department ..... 1**

**SELLICK, Ms Suesan Maree, Acting Assistant Secretary, Civil Justice Division, Attorney-General’s Department ..... 1**

**SELWOOD, Ms Jane, Acting Principal Legal Officer, Civil Justice Division, Attorney-General’s Department ..... 1**



**Committee met at 3.34 p.m.**

**BUGEIA, Mr Noel William, Director, Legislative Services and Publication, Office of Legislative Drafting, Attorney-General's Department**

**GRAHAM, Mr James Howard, Acting Principal Legislative Counsel, Office of Legislative Drafting, Attorney-General's Department**

**SELLICK, Ms Suesan Maree, Acting Assistant Secretary, Civil Justice Division, Attorney-General's Department**

**SELWOOD, Ms Jane, Acting Principal Legal Officer, Civil Justice Division, Attorney-General's Department**

**CHAIR**—Good afternoon, ladies and gentlemen. I call to order this public hearing in the inquiry of the Senate Standing Committee on Regulations and Ordinances into the [Legislative Instruments Bill 2003](#) and the [Legislative Instruments \(Transitional Provisions and Consequential Amendments\) Bill 2003](#). These bills were referred to the committee for inquiry by the Senate on 13 August 2003. I welcome to the table officers of the Attorney-General's Department. I also welcome the committee's legal adviser, Professor Stephen Bottomley. The committee does not require the witnesses to take an oath. However, parliamentary privilege and all that that implies applies to the committee hearing. I will not go through the details, but you have been properly advised. Do you have an opening statement to make?

**Ms Sellick**—Yes, we do intend to make an opening statement, if that is all right with the committee.

**CHAIR**—Yes. Please go on.

**Ms Sellick**—First of all, we would like to thank the committee for the opportunity to appear before it and to answer any questions that committee members have on these bills. We hope that that will be of assistance to the committee in its inquiry. I do not think that anyone would disagree that this legislation is well and truly overdue. There is certainly clear support from all quarters for a bill of this nature. It has had a somewhat chequered past, and our written submission briefly sets out its history. We noticed today that the *Bills Digest* on the Internet says the bill has had 'a long and tortuous history'. I intend neither to revisit that history nor to address in detail any of the issues that we raise in our written submission, but it is certainly time, as the *Bills Digest* has indicated, that the Commonwealth had a system where legislative instruments were readily accessible to the public, with a consistent system for registering, tabling, scrutinising and sunsetting those instruments.

By way of opening, I would like to make a few general remarks and address a couple of areas which were previously of concern. First of all, the bill has been substantially revised and simplified to take advantage of changes in technology. We have worked hard, with the Office of Parliamentary Counsel, to try to produce a more modern and easy to read piece of legislation. Again, the *Bills Digest* notes this. We have tried to remove potentially adverse impacts on efficient and effective administration. For example, the overly prescriptive and cumbersome consultation regime has been replaced with a regime that emphasises the importance of

consultation. A rule maker must be satisfied that appropriate consultation has taken place before any legislative instrument is made. The explanatory statement for each legislative instrument must set out what consultation has or has not taken place, allowing the parliament and the public to oversee the process.

The bill contains a descriptive definition of what is a legislative instrument, and, as in previous versions of the bill, the Attorney-General may issue a certificate if there is any doubt. Those certificates will be reviewable by the courts and, as in the past, will not be subject to parliamentary disallowance. There certainly has been a lot of debate on this issue. I think it is worth making the point that there is a difference between a certificate itself being subject to disallowance and parliament being able to disallow the instrument to which the certificate relates. Parliament can decide at any time whether a particular instrument should be subject to parliamentary scrutiny at the time that the enabling legislation is being made. Parliament has that power now, by being able to declare that instruments are disallowable for the purposes of the Acts Interpretation Act or by enacting a stand-alone disallowance regime. The Legislative Instruments Bill will not change this. A legislative instrument will be disallowable unless it is expressly exempt from the bill by the enabling legislation, placing the decision with parliament as to whether something should or should not be disallowable.

That brings me to exemptions. As the annex to our submission sets out, there are a limited number of exemptions from the bill itself, as well as a limited number of exemptions from the disallowance regime and sunseting regime. The *Bills Digest* lists the number of instruments and statutory rules that have come before parliament in recent years. It notes the number of items in those tables, but they are small in comparison to the number of actual legislative instruments. We have set out the general reasons for these exemptions, and we hope that that will assist the committee. I would like to emphasise that the exemptions from the disallowance regime are maintaining the status quo for those instruments.

The bill is not intended to exempt from disallowance anything that is currently disallowable. For example, the items listed in the table in clause 44 will not be exempt from disallowance if the enabling provision says that they are disallowable. The *Bills Digest* notes a couple of instruments for reference on page 13 that indicate that we may have got that slightly wrong. The instruments that the *Bills Digest* notes are disallowable under their enabling legislation, so that is maintaining the status quo for them—they will be subject to disallowance under their enabling legislation.

In relation to sunseting, some concern has been expressed that the executive could simply let an instrument cease to exist rather than allow parliament to decide whether this is appropriate or not. The bill now includes a provision whereby either house may, by resolution, effectively defer the sunseting of an instrument. We believe this addresses the previous concern. Increasing the sunset period from five to 10 years also removes any adverse impact on business that a shorter period might have introduced.

Finally, I would like to emphasise that the bill is about improving the statute books and public access to the law. We believe that drafting standards will improve over time through consultation with the Office of Legislative Drafting. Only those existing instruments that are needed will be registered, and the imposed review mechanism will ensure that only legislation that continues to be needed remains on the books. We also believe that the bill will make drafters and instructors

fully consider the scope of enabling legislation and the nature of instruments made under it at the time of developing that legislation. Commonwealth delegated legislation will become a considered process rather than the current somewhat unstructured approach.

**CHAIR**—Mr Graham, do you have any comments to make?

**Mr Graham**—We do not have any particular comments.

**CHAIR**—In that case, perhaps you will answer some questions which the committee members may have.

**Senator MOORE**—I have some general questions in terms of the intent and how it is going to actually do the things that it is claimed it should do. There is agreement that there is a need to get some consistency and some openness. I am interested in the register and the statement that it will be available and accessible to all, and I am interested in having some discussion about exactly what that means, particularly in relation to people who do not have access to the Internet. The preamble sets out that it is taking advantage of modern technologies, which is a clear difference between this bill and previous ones but, in an environment where not everybody does have online access, what process will be in place to ensure everybody will have access to this very valuable register of legislation?

**Mr Graham**—The proposal will probably be to rely on the fact that making it available over the Internet to libraries and all sorts of other institutions will give much greater access through those mechanisms to people who do not have access to the Internet directly or do not wish to access the Internet directly. There will probably be publication mechanisms for paper publication of things for which there is a demand, but these have not been worked out in detail. We would expect to continue to be available anything of the kind that is presently available as a paper publication. What will happen with the register is that a great number of instruments that previously were effectively not easily available to the public at all will now be made available through this mechanism. Some mechanism for printing off on demand on a phone order or mail request will certainly be set up, but we do not have the details at present.

**Senator MOORE**—But there is an understanding. The submission and the general discussion around it have been focused on this wonderful access to the Internet—which we share. But there is an awareness by the people promoting this process that there could well be the need to have some access to print copy for people as required. Is that built into the expectation of the costings on this process?

**Mr Bugeia**—The Attorney-General's Department administers a fund to print legislation at the moment. There are no plans to change any of that. That money is appropriated separately to this project.

**Mr Graham**—That covers present acts, regulations and all the reprints and so on associated with them. It does not at present cover the extra instruments that are going to be caught, and that is where the doubt occurs. Certainly we will be looking at that and we do not expect there to be much difficulty in making them available. It is just that the details have to be worked out.

**Mr Bugeia**—The Statutory Rules Publication Act is repealed by this act. That means the statutory rules series, which was set up by the act, does not exist any longer. The instruments that are covered by this act are probably much more extensive than that particular series. It is not certain whether we would print the whole series. It would depend, and that is still being looked at.

**Mr Graham**—It is not certain that we would print them as a series that is automatically made available and which people can buy on subscription as they can with the present statutory rules series. It is likely that there will be a large number of instruments for which there is really no demand—certainly not demand that makes it worth while paying the setup costs for a large print run. But with the thing being available electronically, it is very easy to print copies on demand to meet small demands when they are made. I think that we can be confident that a mechanism will be around for that if it is needed.

**Senator MARSHALL**—You mentioned the history of the bill and the fact that there have been a lot of players before we got here who are interested in progress in this matter. If we overlap a little bit, bear with us and we will go on. Some of these questions are not just jumping out of my head at the moment so we have some prepared. Firstly, I just want to talk about the scope of the exemptions. The issue that has been raised is that instruments made under air navigation, corporations and superannuation acts will be treated differently depending on whether they were made before or after the commencement of the bill. A new instrument created after the commencement will either not be a legislative instrument or not be subject to disallowance. The question resulting from the issue is: what justification have the relevant agencies given to exempt new instruments if the existing instruments are subject to parliamentary scrutiny?

**Ms Sellick**—In terms of the Air Navigation Act the instruments are exempt from the definition of ‘legislative instrument’ under clause 7. The words in the brackets ‘other than regulations and other instruments that, immediately before the commencing day, are disallowable’ is recognising that those instruments made under the Air Navigation Act that are currently subject to parliamentary scrutiny will continue to be. They will continue to be registered as legislative instruments and continue to be subject to parliamentary disallowance. The remaining instruments that are exempt from the definition have been taken out because they are not currently in the public domain for security considerations and we see a reason to keep those relating to aviation security out of the public domain. And the other ones were?

**Senator MARSHALL**—The others were corporations and superannuation acts.

**Ms Sellick**—The superannuation instruments also say ‘other than regulations’. Superannuation is exempt from the disallowance regime in clause 44. Again, it says, ‘Instruments (other than regulations) relating to superannuation’. The instruments that are exempt from disallowance are not currently subject to disallowance—again, the words in brackets—‘other than regulations’ are saying only those instruments that are currently exempt from disallowance will continue to be exempt from disallowance. Regulations are subject to disallowance and will continue to be so.

The Corporations Act is a Commonwealth scheme now and I think it is recognising that regulations and instruments made under the Commonwealth Corporations Act will be subject to

the normal Commonwealth legislation-making processes. Again, I do not think there is a distinction being made between instruments made before and after. It is recognising whether they are disallowable before or disallowable after and continuing the status quo.

**Senator MARSHALL**—Another issue is the exemption from consultation. The bill does set out circumstances that the rule maker may, when appropriate, be satisfied that consultation may be unnecessary. The issue that has been raised is that there is no impediment in the 2003 bill on rule makers citing the circumstances to avoid consultation. Amendments were also passed in the Senate for the 1996 bill providing that urgent instruments only had a period of operation of 12 months. Concern was expressed at that time that rule makers would cite this circumstance to avoid consultation. The question arising from that is: will anyone be responsible for monitoring the consultation process to ensure that the reasons for non-compliance are justified? What impediments would there be to imposing a 12-month period of operation on urgent instruments?

**Ms Sellick**—To take the first part of your question, the explanatory statement that must be tabled with each legislative instrument to which the bill applies must set out the consultation that has taken place or, if no consultation has taken place, why. We believe that places the issue of consultation in the hands of the parliament to consider whether the rule maker did undertake appropriate consultation or not. Even in the circumstances in clause 18, which lists where consultation may not be necessary or may be inappropriate, even if the rule maker considers they fall under one of those heads, they must still set out in the explanatory statement why consultation was or was not undertaken. I am sorry, I missed the second part of your question.

**Senator MARSHALL**—The second part of the question was: what impediment would there be to imposing a 12-month period of operation on urgent instruments?

**Ms Sellick**—The government has not considered that in the context of this revised bill. It is something that we can take on board.

**Senator MARSHALL**—Is it something that you are locked into, or something you just have not considered and would be prepared to consider?

**Ms Sellick**—We have not considered it in my time with the revision of this bill. It is something that we can look into.

**Senator MOORE**—Just to clarify the steps process: if the regulation or document comes forward and there is not an explanatory statement to it, or there is one to which people have questions about whether it is a fully justified reason or whether the consultation process has met the needs, what happens then? There are all these reasons why consultation may or may not have occurred, but, in the question that Senator Marshall raised, there could be some question about whether it has been one with which people agree and whether this particular issue was, in fact, so urgent that it did not need to have consultation. What happens then? You get an explanatory document that says, 'This clause is being used. It is too urgent. It cannot have consultation at that stage.' That is one case. In another case, which is quite similar, there is just no explanatory document with it. I know it says there should be one, but I also think in another clause it says that it is not enough not to have that one to knock it off—in legal words to that effect.

**Ms Sellick**—Yes, it does not invalidate the instruments if one is not there. The answer is normal parliamentary debate, parliamentary scrutiny and asking the minister particular questions as to why—particularly if the public were able to see the explanatory statement. I imagine that, if there were stakeholders or lobby groups who were not satisfied, if the consultation was or was not adequate, very shortly the rule maker would be held up to public accountability as to why.

**Senator MOORE**—If the document was sitting there and there were questions about either the reason given for non-consultation or questions about whether the consultation was wide or effective enough, as spelt out in the explanatory document, or there was not one given, would that be cause to disallow?

**Ms Sellick**—I leave disallowance in the hands of the Senate as to when it is or is not appropriate.

**Senator MARSHALL**—Very wise.

**Ms Sellick**—If the instrument is disallowable, I imagine that is something that the Senate would be taking into account.

**Senator MOORE**—It could be something that could be used in the parliamentary debate to which you refer.

**Ms Sellick**—Yes.

**Senator MARSHALL**—Are you familiar with the term ‘Henry VIII clauses’?

**Ms Sellick**—With respect, Senator, I know I should be.

**Senator MARSHALL**—I know I should be too. I was hoping you were going to be able to explain it to me first.

**Ms Sellick**—I might defer to Mr Bottomley.

**Senator MARSHALL**—On that basis, I will not raise that issue—unless, Mr Graham, you are familiar with it?

**Mr Graham**—I am.

**Senator MARSHALL**—I will ask the question as it has been put to me and hopefully in the context of you knowing what Henry VIII clauses are you might be able to answer it. Regulations or Henry VIII clauses will be used to extend exemptions rather than providing for the parliament to debate the matter. The issue raised is that the use of regulations for this purpose has been a matter of concern to both the Regulations and Ordinances Committee and to the Scrutiny of Bills Committee. The question arising is: would it be more appropriate to provide for an amendment to the act to extend exemptions? If not, who will monitor the regulations to ensure that they are not used to undermine the intent of the new regime?

**Mr Graham**—Perhaps I should explain what a Henry VIII clause is. The term ‘Henry VIII clause’ is used to describe a provision in a bill which allows subordinate legislation to change the scope of the act. It goes back to the time of Henry VIII when he put forward bills to parliament which basically said, ‘Trust us. We will make some regulations that will do everything needed under the act.’ It is always possible to put a provision in an act—a regulation-making power—that does that. But it is one of the things that your committee has in its terms of reference to watch over. As to whether this is an appropriate case for such provisions, I do not know.

**Ms Sellick**—Where the question is headed is that the three tables that are exemption tables under the bill are able to be expanded by regulation. Is that it?

**Senator MARSHALL**—Yes.

**Ms Sellick**—The regulations themselves will be normal legislative instruments, which will then be subject to the regime of the bill, including disallowance. So in regard to your question as to whether it is appropriate, the regulation that attempts to add an instrument to the exemption from legislative instruments will be subject to the same degree of scrutiny that this bill is going through. It will be a disallowable instrument itself. We are not trying to get in anything that would not be subject to parliamentary scrutiny or exempt anything further from it.

At the moment you are considering whether the exemptions are appropriate in terms of the primary legislation. The regulations will allow exemptions in new situations as they arise. Those regulations will then be subject to the normal scrutiny that is occurring for regulations. In working with the Office of Parliamentary Counsel we are envisaging that in new enabling legislation the nature of the instrument and whether it should be a legislative instrument for the purpose of this bill or exempt from disallowance or exempt from sunseting will be addressed at the time of the enabling legislation. We are aiming to make it such that in future it will be primary legislation that will focus on the nature of the instrument. These regulation-making powers are almost to catch those just in case. That was something we were working out with the Office of Parliamentary Counsel now. So in fact exemptions will be added by primary legislation in the new situations.

**Senator MARSHALL**—On the topic of exemption of national scheme legislation from disallowance, an issue has been raised. The committee has consistently argued that these instruments should be subject to parliamentary scrutiny. The committee is able to scrutinise national scheme regulations—for example, the road transport regulations made by the Commonwealth—but not the other forms of delegated legislation made for intergovernmental schemes. The question arising from that is: if the parliament is able to scrutinise national scheme regulations, why should the other forms of national scheme delegated legislation be exempted from that scrutiny?

**Ms Sellick**—Again, we come back to the ability for the enabling legislation to determine whether the instruments were disallowable instruments for the purposes of the existing Acts Interpretation Act. If there is an intergovernmental scheme currently in place which enables instruments to be made under it and those instruments were not declared to be disallowable by the enabling legislation, then this exemption is simply maintaining the status quo of what parliament has already decided. If enabling legislation does have the effect of making the

instruments disallowable then, notwithstanding that they are part of an intergovernmental or multijurisdictional scheme, they will continue to be subject to disallowance.

**Senator MOORE**—Then the only way to change that would be to change the enabling legislation—that is, to go through a process of putting up an amendment or changing the primary legislation?

**Ms Sellick**—Yes.

**Senator MARSHALL**—There has been a substantial extension to the list of instruments exempted from sunset. This increase has not been clearly explained in the explanatory memorandum. What justification has been given to increase the number of instruments exempt from sunset?

**Ms Sellick**—During the revision of the bill that has occurred in the last couple of years, there has been extensive consultation with the agencies to ensure that we are properly focused on which instruments should or should not sunset. The annex to the written submission that was prepared by the Attorney-General's Department sets out the general policy considerations that we took into account in deciding whether an instrument should or should not be subject to sunset. The primary reason is that they are enduring. That is the overarching consideration. Yes, they should be reviewed and most agencies do regularly review them, but it is the imposed review regime that for certain categories of instruments it was considered to be not appropriate.

**Senator MOORE**—One of the issues that our committee looks at when we are looking at current regulations that come before us is the quality of the work that is involved in the process we have. It takes a degree of the time of the committee to question the way the regulations have been formed. There are some very straightforward errors in terms of data that is put in incorrectly, and sometimes it takes time just to see where it fits in the whole process of drafting. The intent of this legislation is to raise the standard across the board. That is one of the clear stated aspects. Has there been consideration of the budgetary implications of ensuring that there is appropriate staffing, training and discussion between groups? I think that kind of interaction between groups is a really important element of raising standards of process. Has that been considered and in fact budgeted for in the process around this legislation?

Secondly, I would like to hear from the Office of Legislative Drafting—and your acronym, OLD, always cracks me up and I promise I will not use it again!—as to exactly where you will fit in the ongoing process. Our experience in the committee is that we receive processes from all ranges of departments. My expectation was that they were going through individual departmental processes. I would like to first find out about the budgetary processes and your plan for how the Attorney-General will be taking the steps referred to in the draft legislation. Secondly, I would like to hear from the Office of Legislative Drafting about exactly where your organisation fits in the future process of deliberations.

**Mr Graham**—I understand that our office before I joined it actually adopted the acronym itself. It was not foisted on us.

**Senator MOORE**—Is that going to make us feel more confident—that you actually wanted that title?

**Mr Graham**—It is just a curiosity! As you have guessed, the OLD will have the responsibility for achieving the measures for higher drafting standards that are mentioned in section 16. So the secretary has a certain amount of power—and there are various steps that are mentioned. Some of the budgeting steps will not take a great deal of money; they will be done within the existing budget or a slightly larger one. We are already planning things like discussions with all the user groups. Encouraging agencies that have drafting instruments to pay close attention to the drafting standards is something we can do without a great deal of cost. As for education, again, we are looking at ways of offering education and limited training in drafting. That will take a little more in the way of resources, but we think we can cover that.

What we are hoping is that, first of all, the very fact that these instruments are being placed together on an easily accessible database will draw the attention of the agencies making them to the deficiencies in the drafting, simply by comparing them with other instruments, and that that will have an educative effect. We expect that there will be an increase in the amount of drafting work that OLD is asked to do. At present—and we expect this to continue—OLD is directly funded to draft regulations and some other statutory rules. We draft other material on a user pays basis. If that arrangement continues—and we are not aware of any plans to change that—then any extra drafting that we are called upon to do will be paid for through our charges. Any limitation, then, on what OLD is able to do would be due to the time it takes to recruit and train new drafters to the standard required to produce high-quality work. That is a fairly severe limitation, but we are looking at our processes of recruitment and training to see whether we can streamline things.

**Senator MOORE**—I would like to put a question on notice. Can we get figures on how many people are employed in your area and what the current budget is?

**Mr Bugeia**—The whole office?

**Senator MOORE**—Yes, the whole Office of Legislative Drafting. It is an area critical to the success of this whole process.

**Mr Graham**—The office has two principal functions: one is drafting instruments and the other is doing all the things that the FRLI—the Federal Register of Legislative Instruments—will be a part of, which presently includes making compilations of instruments, preparing things for the SCALEplus database and so on. They are quite disjointed functions in some ways. But we can provide you with the information you want.

**Senator MOORE**—I think it is important for our purposes that we also see these functions separately. There are the people with responsibility for the drafting, and my expectation is that your role will be enhanced by this process. Specifically, there is the development of the register, which we have had some preliminary discussions about through our committee. That is a huge task—setting up the register. And then there is—I cannot remember the term that was used; the one to do with getting all the back legislation on the register.

**Mr Bugeia**—Back capturing.

**Senator MOORE**—Yes, back capturing. That is a major task. I am interested in the committee seeing the plans—over what period of time you have planned to do that. I know the

process is set out in the legislation in two-year and a five-year periods, but do you expect to be able to meet those goals? I would also like to know the process for the massive task of data entry and just what plans you have in place in your part of the organisation to do that.

**Mr Bugeia**—Yes, we can do that. In relation to drafting standards, there is one other thing: we are responsible for the SCALEplus database. That contains acts and statutory rules and quite a few instruments as well that agencies like us to put up there now. I must say that the glare of public scrutiny is a very powerful thing, and as soon as anything goes on that database, if there is anything wrong with any of the instruments or anything that goes on there, we very quickly get emails that tell us.

**Senator MOORE**—Do you keep a record of how quickly they come? Do you have a record of the quickest response you have had for an error and that kind of thing?

**Mr Bugeia**—I have not got figures on that but I am sure it would be somewhere in the region of five or six minutes. I would suggest that when the register comes on line, agencies, when they see their instruments up there, will be very careful to make sure that they are not exposed to criticism on the quality of their instruments, because they will be there for everyone to see.

**Senator MOORE**—So does the responsibility for putting pre-existing legislation on the register lie with you? I understand that from the time this bill will or may be passed, the ownership will be with the register—from any new process or anything that goes up through a standard process. But there is also the back capturing, to ensure that people do have confidence that everything they need to know about anything in legislation in Australia will be on this database. Is the expectation that your group will do that—through the Office of Legislative Drafting, the new section—or is the onus on, say, Transport, to make sure that they give you all the information from their database and carry that across. How exactly is that going to work?

**Mr Bugeia**—We do not know what instruments are out there.

**Senator MOORE**—And it will be their responsibility to hand that across to you in accurate form?

**Mr Bugeia**—Yes.

**Senator MOORE**—So that kind of sign off of responsibility will be theirs? I am using Transport not because I have a particular issue with Transport but because the civil aviation area in particular seems to be responsible for a large percentage of the work that comes before our committee at the moment. So is the expectation that that organisation will be responsible for giving you accurate data to put on the register for your ownership from then on?

**Ms Sellick**—That is correct. It is up to the rule maker to lodge by the due date the instrument in electronic form with us, so that we may then register it onto the database. As Noel said, that is their responsibility, yes.

**Mr Graham**—The responsibility, if I might add, is to provide the instrument in electronic form and also either the original or, in some circumstances where that is not available, a certified copy. So we—OLD—will be keeping both the original copies and the electronic versions.

**Mr Bugeia**—If that instrument has a history or a life—if, for example, it was made many years ago and has been amended subsequently—all the instruments that form part of that life will have to be sourced and placed on the register.

**Senator MOORE**—So what happens if there is something there that is wrong? What happens if there is something that is wrong on the database?

**Mr Bugeia**—In what way would it be wrong?

**Senator MOORE**—It might have the wrong date. There might be a wrong date that is registered on the base, in terms of things that come up in terms of a date. A long fee schedule happens sometimes—a lot of the regulations we see relate to changes in fees. What happens if there is an inaccurate figure placed on the database?

**Ms Sellick**—If the error is in the instrument itself—if that has been made incorrectly, as with the current case—the situation would not change. It would be up to the rule maker to issue a new one. The register is not in a position to change the law; it can only record the law. We are thinking about original instruments that might have been signed by ministers and that then include some sort of hand amendments or something, which means that they do not actually reflect the typed or electronic versions—and that is why we will be asking for the original instruments or certified true copies to also be lodged so that we can compare them. In those circumstances we can make sure that the register reflects the original instruments and not just the electronic versions.

**Senator MOORE**—Is Attorney-General's responsible for that comparison?

**Ms Sellick**—The Office of Legislative Drafting is, yes.

**Senator MOORE**—And is there something in the draft legislation that says that if there is an error no-one is to be damaged by anything they did due to that error. Is that right? Is that in the process?

**Mr Graham**—There is something there.

**Senator MOORE**—So if someone acts on the basis of something that they have seen on the register that was wrong and then it is found to be wrong, then that person will not be damaged by any action taken on the basis of what they saw—until it is changed?

**Ms Sellick**—That would not be an error in the law. If the original instrument itself is inaccurate then that is not going to save what the law was until it is changed. It might have a retrospective effect to correct any error in the law. Certainly if what is registered is not an accurate reflection of the law then anyone who has relied on what is registered is saved by that provision.

**Senator MOORE**—So for any citizen who takes action based on something that they have read on the register that is going to be protection in law to any action that they took?

**Ms Sellick**—We imagine that the number of times that an electronic version of an instrument will differ from the original has to be few and far between. In my experience, I have not seen many ministers making alterations. They send it back to get it redone. But if there is a difference between the original instrument as made and that which appears, this provision does say that it does not affect the rights and does not impose any increased obligations.

**Senator MOORE**—So that the authoritative nature of the register is then protected?

**Ms Sellick**—Yes.

**Senator MOORE**—It is my understanding that the 1996 bill included a provision that required the processes done about the drafting to be included in the explanatory statement. I will read it directly from the notes. The notes say:

The 1996 bills included a provision that required a statement to be included in the explanatory statement explaining how the instrument was drafted and describing any steps that were taken under the drafting standards section to ensure that the instrument would be of a high standard.

And that is not in the 2003 bill.

**Ms Sellick**—That is correct, Senator. It is not in the 2003 bill.

**Senator MOORE**—Is there any reason for that or is it simply that the process has been so refined that the expectation is that the drafting is of a high standard?

**Ms Sellick**—The provision that you read out—and I must admit, I apologise, that I am not familiar with it—does seem to be overprescriptive about what should or should not be in the explanatory statement. I think the instrument should speak for itself as to whether it has been appropriately drafted rather than there being a need to set out how it got to the stage it is at.

**Senator MOORE**—It should be a given?

**Ms Sellick**—It should be.

**Senator MOORE**—I am interested in the issue of transparency in terms of the budget. The explanatory memorandum said there was a budget allocated to this particular process when it was being put up for passage earlier and that a large number of steps had already been taken along that way in terms of getting things ready. I am interested in terms of the budget allocation and what your expected process is in implementing that budget for work involved in setting up the register in particular. That is to clarify my previous question. That can be on notice—we can get the answer to that at a future time. Secondly, Mr Graham, I am interested in particular in the training and how you would be seeing that the training and education components will be done.

**Ms Sellick**—We will certainly take that on notice.

**Senator MARSHALL**—I will move onto the topic of parliamentary scrutiny. In terms of transparency, if there are things we have not covered we might put them on notice, depending on how we go for time today. I am advised that it has been more than 20 years since the Senate has

required motions to have a seconder. Which of your OLD officers drafted that bit? You do not have to answer that. I just thought I would get that old bit in, seeing as it has been a topic as we have been moving forward. I suspect that that is simply a drafting error and that that will be corrected—you will not be suggesting that the Senate should revert to seconding motions.

**Ms Sellick**—Again I apologise for not being familiar with the provision. I will certainly read *Hansard* and have the government consider that the provision does not revert to something that was a 20-year-old scheme which the Senate did not require.

**Senator MARSHALL**—Thank you.

**CHAIR**—If we can simply change it to say that parliament can make a disallowance motion, that will do, rather than explicitly saying how the parliament should make the motion.

**Senator MARSHALL**—Indeed. The 2003 bill has addressed a substantial number of concerns raised about the 1996 bill. It does not, however, address a concern raised in the Senate that the disallowance provision should be extended to allow for the disallowance of part of a provision, be it a word, number, paragraph or subparagraph. While the Senate can do this, it is by leave of the Senate for it to be done. There have been instances where senators have had difficulty in achieving their aim of disallowing a specific matter in an instrument. Often they must move a motion to remove the whole regulation or part. An extension of the disallowance provisions may give senators greater flexibility in addressing concerns in instruments. The question out of that issue is: why was a Senate amendment to provide for the disallowance of part of a provision of an instrument not adopted in this bill?

**Ms Sellick**—One of the difficulties with the existing Acts Interpretation Act is when it refers to regulations and a regulation within a series of regulations. One is always confused about whether you are talking about regulation 3 in a set of regulations or the regulations themselves. At the moment the Senate is able to disallow a regulation within a series of regulations and it has in fact done so on limited occasions.

**Senator MARSHALL**—But has it done so by right or by leave of the Senate to do so? There was a recent issue where the Senate did disallow part of a regulation but it required leave of the Senate to do so.

**Ms Sellick**—When you are saying ‘part of a regulation’ are you saying: if the regulation is, say, regulation 3 within a set of regulations, and then it is just part of—

**Senator MARSHALL**—No. I am saying it is potentially a word, a number, a paragraph or subparagraph within a regulation.

**Ms Sellick**—The Legislative Instruments Bill 2003 maintains the same provision as the Acts Interpretation Act and it does not go down to within a part of a provision. This was not the mechanism seen to be doing that.

**Senator MARSHALL**—But the Senate has expressed a wish to be able to do that. The question really is: given the Senate has expressed that wish, why has that not been picked up in this bill?

**Ms Sellick**—We can take that on notice and consider looking at the provisions again.

**Senator MARSHALL**—Is there a policy objection to dealing with that issue or is it just something that was not considered during the drafting of the bill?

**Ms Sellick**—With the disallowance we attempted to maintain the status quo in terms of only going down to a regulation or a provision within a legislative instrument and not further down into a part of a provision within a legislative instrument.

**Senator MARSHALL**—The bill appears to change the provisions concerning the deferral of a notice of disallowance. This change has not been explained. The issue arising from that is that it appears that the bill does not deal with the deferred notice but requires another notice of motion to be given the day after the end of the deferral period. The question arising is: why has the deferral provision been changed from that prescribed in the 1994 and 1996 bills?

**Ms Sellick**—I might take that one on notice.

**Senator MARSHALL**—Sure. There are a small number of acts that provide for different tabling and disallowance procedures. They generally provide for shorter periods than those provided for in the Acts Interpretation Act. The issue is that it is not clear what status these instruments will have under the new regime nor is it clear who will be responsible for ensuring the instruments are provided to the parliament in time to meet their own tabling and disallowance statutory obligations. The question arising is: will these instruments be registered? If so, will the Office of Legislative Drafting be responsible for ensuring that they are tabled in the parliament if they have a different tabling period to that provided for in the Legislative Instruments Bill 2003?

**Ms Sellick**—If they are legislative instruments then, yes, they will be required to be registered under this bill and will be subject to the tabling mechanism under this bill. If there is a special disallowance regime that needs to be preserved, we have a regulation-making power that will enable us to preserve the special disallowance regime—and I thank the Senate committee for its web site that lists the unusual tabling and disallowance provisions. To the extent that tabling is different, I might take a moment and think about that. The six-day rule is included under the Legislative Instruments Bill 2003 and that certainly will continue this requirement for instruments to be tabled within that six-day period. I will take the part about it maintaining a separate tabling regime on notice—whether it is envisaged—but certainly if there is a special disallowance regime that needs to be preserved that can be done.

**Senator MARSHALL**—Under this bill?

**Ms Sellick**—Yes.

**Mr Graham**—I would like to add something about the way that it is likely to be done in practice. Because all these instruments will be registered through OLD, the proposed practice is for OLD to undertake the tabling unless the agency concerned has a particular reason for wanting to do things differently. At present, we maintain a very rapid tabling of instruments that we perform this function for, from the Executive Council, and I would imagine that that would continue. The normal process is likely to meet any deadlines that might be imposed.

**Senator MOORE**—Mr Graham, does your office currently provide the drafting for all Commonwealth agencies or do they have the freedom, as in most devolved environments, to choose to use you or not?

**Mr Graham**—There is a difference between regulations and a small group of other statutory rules for which they are required to use OLD for drafting—unless OLD agrees to some other arrangement, which happens extremely rarely. For other instruments—drafting is a contestable activity—they can come to us, they can do it themselves or they can take it to other drafters.

**CHAIR**—To follow up on some of the other questions, and related to the transparency of the legislation, the bill provides for an electronic register for all legislative instruments. That appears to be the only portal for public access to these legislative instruments after the bill is enacted. There is no provision in the bill for public access to the register or access to printed copies of the legislative instruments. Provision was made in the 1996 bill for public access to the register at the Principal Legislative Counsel's office, Commonwealth government bookshops and via the Internet. We know that the government bookshop is going out, but the Principal Legislative Counsel's office in the 1996 bill was still an access point. This bill does not provide for that, so how will a member of the public who is not computer literate, does not have access to a computer or to the network, or who would prefer, like someone of my vintage, to see things in hard copy, get access to the legislation? It seems to me that, once this bill is enacted, while on the one hand it opens access, it closes another door that a lot of people went through.

**Mr Graham**—One point that Noel has just made to me is that the access that was to be provided in these places under the old bill was, in fact, access through a computer. It was simply the provision of a terminal. I think the view is that these days there are so many terminals around that special access to computer terminals to view the database is not necessary. As to the availability of printed versions, I think the answer covers very much of the ground that was covered in the answer to Senator Moore's question. The bill does not require printing of these things.

We expect that there will be formal printing of a fair proportion of them. Certainly, we expect to be making printed copies available of anything that is required, but we do not expect the demand to be particularly high for a very large number of instruments because people will be able to get them very easily over the Internet. Any residual demand is something that we expect to be able to meet without trouble.

**CHAIR**—This comes down to the question of what happens if only one person does not get access. I suppose that is still a failure of openness, isn't it? We cannot say, 'Everybody in the community knows about it, except one person who cannot get access; therefore, bad luck.' That is not how natural justice works.

**Mr Bugeia**—It is a much better situation under the register. It is much wider now. It is very hard to get access to legislation these days. This has to be an advance on the current situation.

**CHAIR**—This bill also does not provide for copies of incorporated material to be placed on the register. I understand that there could be a limitation to that, but a problem might arise where incorporated material that might be germane to the interpretation of the legislation is not available. It might be difficult for people to interpret the content of the law if such incorporated

material is not available. It is not clear whether all organisations are obliged to publish incorporated materials. Section 20 of the Victorian Subordinate Legislation Act 1994 provides a defence against conviction if a person can neither purchase nor inspect the rule. No defence is provided in this bill. The question is then: if an incorporated instrument is too large for the register, is there any impediment to placing a link on the register so that people may access the instrument electronically? If a document is difficult to access, why should it be incorporated in the first place?

**Mr Graham**—Before Suesan answers on the law, I will just make the point that in practice we will probably be publishing most of the incorporated material. There is not a requirement that we do so, but there is a requirement that we publish as much useful ancillary material as we can.

**CHAIR**—The third point is: should there be any provision in this bill to protect persons who are unable to access or can prove that they are unable to access incorporated material?

**Ms Sellick**—The Criminal Code Act 1995 currently contains a provision that says that a person is not criminally responsible if there is a mistake or ignorance of subordinate legislation. The transitional provisions and consequential amendments bill is amending that provision to take into account the LIB, so if there is something that is registered on the legislative instruments register, then they will be criminally responsible for it; but if the instrument is not available to the public by means of the register, and they could not otherwise be made known, then they will still not be criminally responsible. So the defence which the Criminal Code currently sets up will continue to apply to instruments that are not in the public domain. That would extend to the Victorian situation of something that is incorporated by reference, if the public simply cannot get hold of it. The equivalent provision to the Victorian provision is in our Commonwealth Criminal Code.

**CHAIR**—Clause 29 of the bill provides for registration of legislative instruments made before the commencement of the act. Instruments which are not lodged in the period specified in the bill will be taken to have been repealed. Given that repeal of an act is also a fairly important part of parliament's work, what steps will be taken to inform the parliament and the general public that an existing instrument has been repealed in this way? Just reading over it, it seems that it is possible for the department to make a unilateral decision and say, 'This particular instrument has passed its use-by date; we're just not going to put it up.' The first anybody, including the parliament, will know about the fact that the regulation is no longer in existence will be when it comes to light that it is no longer on the register.

**Ms Sellick**—Sections 28 and 29 both require the rule maker to lodge. We have inserted the word 'must' so that they must lodge for registration the instrument. The question of accountability, the integrity of the rule makers, the responsibility of government: we are relying on those to ensure that the 'must' becomes a must. The government can certainly consider making sure that that provision operates as intended.

**Senator MARSHALL**—How do you propose that that happens?

**CHAIR**—Is there a penalty clause?

**Ms Sellick**—We had a discussion this morning about inserting a penalty clause into this provision, and we decided that we have enough problems—no; I take that back!

**Senator MOORE**—You could probably do it by regulation.

**Ms Sellick**—The government can certainly consider reviewing this provision to ensure that it does operate as it intended. We do not know what instruments are out there, so we are relying on the integrity, responsibility and accountability of rule makers to ensure that instruments that currently exist and that are needed as part of the law are registered.

**CHAIR**—I see. So an instrument cannot be repealed simply by the fact that it has not been registered.

**Ms Sellick**—No, that will be the effect: if it is not registered by the due date, it will be taken to have been repealed.

**CHAIR**—But it has to be a conscious decision, rather than someone arbitrarily saying, ‘We don’t have to register this one’?

**Ms Sellick**—We would assume that it is a conscious decision, that the instruments that are not registered are those which the rule maker considers are no longer operative or are redundant.

**Senator MOORE**—Once this legislation is passed we will go into the brave new world. Has any consideration been given to the issue Senator Tchen is referring to? Perhaps every agency should be responsible for tabling every single piece of legislation it has as a first step. Then, and only then, should there be a process for getting rid of the many pieces of legislation that one would expect are already defunct or should be defunct. In terms of the openness of the process, has consideration been given to the idea that, as a first step, we get them to give us everything? That is the real issue. It is about trying to find out whether in fact Transport, for example, have found every single piece of legislation and every regulation within their ambit. Otherwise, it could happen that they may or may not find all the legislation but they give you what they think should be continued and should be on the register. We are trying to find out whether, somehow, everything can be captured.

**CHAIR**—Also, if there is something which the community may no longer need, the judgment should be made by the parliament rather than by someone in the department.

**Ms Sellick**—It is certainly the intention of the bill that all legislative instruments which are currently required are registered. All I can say is the government can consider reviewing the provision to ensure that that policy intent is reflected in the bill. The suggestion has not been made to date that someone might intentionally not lodge for registration an existing instrument. Even our dealings with Transport have been quite open in that regard.

**Senator MOORE**—I will use primary industries next!

**Ms Sellick**—I could pick a department too. We are anticipating that the period between the passage and commencement of this legislation and then the additional period within which the agencies must find these existing instruments will be the period within which they will consider

consciously the decision as to whether they are or are not part of the requirement for the existing law.

**Senator MARSHALL**—I do not think it is an issue of anyone's integrity being questioned. It is simply that if there is no process of monitoring that what should be done is actually being done, then things inevitably do not get done. If we are moving to this system which is crucial there needs to be some sort of mechanism to ensure that when things are required to be done we are not just relying on someone's integrity, because often it is then a question of whether they are empowered to do those things or to take the next step or to follow up themselves. So I am interested to know what sort of quality control process you have to ensure that the bill is actually implemented and things end up on the register where they belong.

**Senator MOORE**—There is also the point of the legal history of what has happened to a particular piece of legislation, and the issue of how a member of the community knows exactly what has happened. In this field there are people who are absolute zealots, who have a complete and absolute passion about a particular area. To be true to them, there needs to be absolute clarity that something was there, now it is not there and this is the process as to why it is not there—that there has been a formal repeal, so anything they had on that particular piece of legislation or regulation is now defunct. But they have to have that put in front of them, because that is the issue we have got now: that you just cannot find things and you could be operating in a haze.

We had a particular issue about how we are to know that a change has been made. That gets back to a previous issue: if we do find there is an error, that a date has been wrong and someone has that, how are we going to find out that a change has been made? And that gets back to a really technical matter of whether on the register for a period of time there will be a box when you open up that says, 'The following things have been changed ...' so that that would draw them to people's attention. That is a specific detail. But the wider point is that unless there can be some acceptance historically that this was on the law books and this is what has happened to it, we are actually starting off not in the way I would have hoped we would be able to.

**Ms Sellick**—The senators have certainly raised an issue that we will need to take away to consider to ensure that there is integrity in the register—as well as in the individual officers, of course—so that it is reflective of the law. But your comments are reflecting our current poor state of the law—we do not know what is out there and the Attorney-General's Department is not going to be in a position to know what is out there, to know what is being received and whether it is accurate or not. So it is something that we will need to take back to government.

**Senator MARSHALL**—I do not think you should take any of these comments as a criticism.

**Senator MOORE**—It is just that the Attorney-General under this legislation must take steps, and these are some of the steps we think should be taken.

**CHAIR**—Currently there is a regulation impact statement process associated with instrument making. This does not seem to have been provided for in the bill. Is it intended that it should continue?

**Ms Sellick**—Yes. The two are running side by side. The requirements for consultation under the Legislative Instruments Bill supplement the requirements for the regulation impact

statement. A regulation impact statement might satisfy the requirements for consultation under the Legislative Instruments Bill but it might not operate in reverse. The two are to run in parallel.

**CHAIR**—Should the regulation impact statement process be recognised or specified in the bill?

**Ms Sellick**—The two are quite separate. The regulation impact statement exists now as a matter of government policy without being reflected in legislation. I think we drew attention to it in the second reading speech. The Office of Regulation Review and the Productivity Commission will continue to monitor the regulation impact statement as quite a separate requirement for the consultation under the Legislative Instruments Bill. It is not currently reflected in legislation.

**CHAIR**—Thank you very much.

**Senator MARSHALL**—We expect that the work of this committee will increase with the introduction of this new regime. In particular, there is an expected increase in the number of instruments that will be subject to parliamentary scrutiny, and the level of concerns with instruments should also rise in proportion to the number of instruments considered by the committee. I have a number of questions that arise out of that. In your view, what is the expected increase in the legislative and disallowable non-legislative instruments under the bill? And we will hold you to that figure.

**Senator MOORE**—And we will review it regularly.

**Ms Sellick**—That is a very good question. How long is a piece of string? Parliament has been enacting enabling provisions ever since Federation. There are many legislative instruments described in many and various ways under that enabling legislation. It is time we found out what is out there and where it is. We look forward to finding out what is out there and what we have not exempted from disallowance to excuse it from the committee.

**Senator MARSHALL**—So do we. The 1996 bill proposed that there be an index. How is a committee going to find out what is placed on the register? Is this bill going to pick that up in some form?

**Mr Bugeia**—The 1996 bill was very similar to the 1994 bill. Those bills were drafted well before there was much computer awareness and literacy in the office.

**Senator MOORE**—Has it changed that much in less than 10 years?

**Mr Bugeia**—Yes.

**Senator MARSHALL**—In 1996—really?

**Mr Bugeia**—The index was an attempt by non computer people to explain how a database works. The index will be replaced by a modern relational database system which will be part of the register. All those fields—all that information—will be put into the register, but we are not

going to say exactly what those fields will be because we want to be able to change it, improve it and put different fields in at certain times. If you put it in legislation it is very hard to change it.

**CHAIR**—Do you mean to say that you have learned not to try to explain to people how a computer works?

**Ms Sellick**—He has given up with the lawyers in the Civil Justice Division, yes.

**Senator MARSHALL**—What procedures will be adopted to ensure that the committee receives instruments in a timely manner?

**Mr Graham**—Are you talking about tabling?

**Senator MARSHALL**—In a timely manner.

**Mr Graham**—As at present, OLD practice—

**Senator MARSHALL**—That was bad start—as at present. You are not suggesting no change?

**Mr Graham**—No. I think you will find that all the instruments that are drafted by OLD and a few others—OLD offers a tabling service to agencies—are tabled in a very timely way, normally within the next sitting day. Since under the bill all of the legislative instruments would be coming through OLD—and I think we are actually obliged to do the tabling of them under section 38, which says that tabling is now the responsibility of the department in all cases—we would expect that tabling on the next sitting day would be the norm.

**Senator MARSHALL**—The bill provides for explanatory statements to be included with the instruments. If an explanatory statement is not provided when the instrument is registered and before it is sent to parliament for tabling, the rule maker is required to provide parliament with a copy, along with a statement giving reasons for the delay in presenting the explanatory statement. The issue arising from that is that the explanatory statement provisions may impede the work of the committee if explanatory statements are not available at the time when the instrument is registered. The committee receives instruments on a regular basis and often scrutinises them before they are tabled. Delaying presenting an explanatory statement to the parliament will affect the committee's ability to effectively scrutinise the instruments. At the moment, 98 per cent of instruments arrive at parliament with an explanatory statement. The questions arising are what steps the Office of Legislative Drafting will take to ensure that the explanatory statements are available at the time when the instruments are sent to parliament and whether the responsibility will fall on the committee to chase rule makers if your department has not received an explanatory statement.

**Mr Bugeia**—The explanatory statement is lodged at the same time as the instrument, or it is supposed to be.

**Senator MOORE**—It is supposed to be. There is provision in sections 38 and 39 for what happens if it is not.

**Ms Sellick**—The requirement is that it is lodged as soon as practicable.

**Senator MARSHALL**—But that goes to the issue we have raised: who is going to be responsible for chasing that up? We really cannot do the work of this committee effectively if we do not have that information. We can probably still do it, but it is extra work that we ought not be doing.

**Mr Bugeia**—We were planning on expecting this from agencies, and part of our handbook will explain how it is to be done. We would expect explanatory statements to come with the instrument when it is lodged. We would be delivering the instrument for tabling as soon as it is registered. If the explanatory statement is not there at the time, we will be telling the agency that we are tabling the instrument and they will be expected to provide it. They will very quickly get sick of having to provide statements saying that they could not provide it on time, I would suggest.

**Senator MOORE**—We have not noticed that in the committee so far.

**Senator MARSHALL**—And we are not sure that really helps us.

**Senator MOORE**—What power do you have? This comes back to the whole aspect of devolution, with each agency having its own total ownership. Under this provision the Attorney-General has the right to take steps, but can the Office of Legislative Drafting, up through the Attorney-General, direct an agency to provide the appropriate material or can you only encourage them?

**Ms Sellick**—Might I approach that from another direction? If the instrument itself is subject to disallowance and there is not an explanatory statement therewith—and I have never made a disallowable instrument that does not have an explanatory statement, so your 98 per cent is there—the power seems to rest with the Senate rather than our administrative or compellable mechanisms.

**Senator MOORE**—Just disallow it.

**Senator MARSHALL**—So if the committee took a policy position, for want of a better phrase, to recommend disallowance of any regulation that did not come with an explanatory memorandum, that would be something that would not cause your department any concern?

**Ms Sellick**—There goes the remainder of my friends in the Public Service!

**Senator MOORE**—It has already happened to the Public Service Commission.

**Senator MARSHALL**—On the tabling of legislative instruments, my understanding is that the bill provides for regulations to determine the manner in which instruments will be tabled in the parliament, including by electronic means. The Clerk of the Senate has identified the following problems with the electronic lodgment of instruments. It is a necessity for a document to be tabled in hard copy as it is not feasible to preserve a document in electronic form. Certainty of content and future reference requires a hard copy and it will be more effective for senators and staff who support them to consult legislative instruments in hard copy. Secondly, the committee

currently receives 11 copies of every instrument and its explanatory material. It would impose a serious burden on the resources of the secretariat if it were required to copy numerous instruments. If the parliament were not to accept the electronic lodgment of legislative instruments, what processes would you put in place to ensure that the committee and the parliament received the required number of copies of instruments to meet their needs?

**Ms Sellick**—The provision is to enable us to change in the future after consultation and working out these practical steps. At the moment I do not believe it is envisaged that it will be changed from a hard copy.

**Senator MARSHALL**—‘In consultation’ always worries me. If it was with the agreement of the parliament or the Senate, that is fine. Who knows what the future will hold?

**Ms Sellick**—It is a regulation-making power. Again, if you did not like the regulation that we made that prescribed the way in which you received the instruments, I am sure we would hear about it.

**Senator MARSHALL**—Remind us of this issue when you put that regulation up!

**Mr Bugeia**—The provision is not for electronic tabling; it is for electronic delivery to the parliament.

**Senator MARSHALL**—So you will still be delivering the required number of copies—

**Mr Bugeia**—In hard copy.

**Senator MARSHALL**—You do not see any reason to change that?

**Mr Bugeia**—We inserted the clause on the basis that, were we to start bringing up the truckloads of instruments for hard copy delivery, parliament might want to receive them electronically instead. We are worried about the volume.

**Senator MARSHALL**—We are more interested in the current practice.

**Mr Bugeia**—We do not intend to change from hard copy.

**Senator BARTLETT**—Has anyone asked about gender specific language? I am told, having sadly missed the 1996 debate on the bill, that the Senate passed an amendment which prohibited the legislative council from knowingly registering any legislative instrument containing gender specific language where it was not necessary to identify people by their sex. I gather that in the current incarnation the approach has been to adopt a less stringent requirement—that the department’s secretary cause steps to be taken to prevent the inappropriate use of gender specific language. Why is that slightly watered-down approach preferred?

**Ms Sellick**—The provision reflects current drafting standards. There may still be some instruments where the use of gender specific language is or is not appropriate. It is not something that should determine the enforceability of a legislative instrument. Current drafting practice does not have gender specific references unless it is totally unavoidable. Where

instruments have already been made there is a notification requirement, but it is not something that we see should result in an instrument being struck down.

**Senator BARTLETT**—A notification of existing instruments or a notification when somebody does in the future?

**Ms Sellick**—We are trying to avoid it in the future. Where instruments already exist, the legislation requires the secretary to take steps to notify parliament that that has occurred.

**Senator BARTLETT**—Parliament cannot necessarily do anything about it, I suppose, other than be aware?

**Ms Sellick**—Parliament can ask questions, be aware and bring it to people's attention. We hope they are few and far between. Certainly in my experience in legislative drafting and instructing on it, it has changed over the years.

**Senator BARTLETT**—What is the anticipated commencement date of the bill were the parliament to pass it? It has been suggested that the commencement date is a bit unclear and that it could be postponed. A fair bit of postponement has already occurred.

**Ms Sellick**—Not on my watch. If parliament does pass the bill this year, the commencement provision provides that commencement will be 1 January 2005 unless proclaimed earlier. We are certainly not anticipating proclaiming earlier so we have that lead time (1) to give agencies more time to find their instruments, as we have already discussed, and (2) to get the system up and running, to have the education campaign for other agencies to advise on their responsibilities and obligations under the bill but mainly to give the Office of Legislative Drafting and my friends to my left here the time to get the system in place.

**Senator MOORE**—Is that long enough?

**Ms Sellick**—Our IT people say they can deliver on time.

**Senator BARTLETT**—The provisions concerning the prejudicial retrospective commencement of a legislative instrument have also been changed in this bill, as I understand it. Instead of requiring a rule maker to remake an adverse instrument, now you only cease the instrument for the period between the commencement and the registration. Why has that provision been changed?

**Ms Sellick**—Sorry, Senator; I am not quite following you.

**Senator BARTLETT**—As I understand the current scenario, if there is a prejudicial retrospective commencement then the regulation is automatically void.

**Ms Sellick**—Do you mind if we take that one on notice rather than delay the committee?

**Senator BARTLETT**—Okay. I guess, as part of doing that, you might tell us whether you are again anticipating that this committee would be the mechanism to ensure that parliament is made

aware that an instrument has adversely affected a person for a specific period and how a person might know that the instrument has no effect for a specific period.

**Ms Sellick**—Instruments now can have a retrospective adverse effect if the enabling legislation so provides. That is reflected again in this bill where there can be adverse retrospective commencement, provided that the enabling legislation allows that to occur.

**Senator BARTLETT**—One of the issues in terms of the consultation requirements, which I think came up last time as well, is the scope of those consultation requirements, which is currently limited to instruments affecting business or competition, as I understand it. I believe last time around some amendments were put forward—I think they were passed by the Senate—to extend this to other areas of the community. That could obviously go to quite a wide range—for example, civil liberties. Why aren't some things like civil liberties and some of the things that are reflected in our terms of reference put in as part of the consultation requirements?

**Ms Sellick**—As senators will have noticed—and we discussed this a little earlier—the consultation regime has changed considerably from the prescriptive mandatory regime which existed in the earlier versions of the bill and the need to list when consultation was required. The debate has focused on the number of exemptions to the prescriptive regime that were needed. With this revised version of the bill, that legislation says that it is consultation particularly where the proposed instruments:

- (a) have a direct, or a substantial indirect, effect on business; or
- (b) restrict competition ...

It is not saying that they are the only circumstances in which consultation could take place. Again, the explanatory statement is required to indicate what consultation has taken place or, if no consultation has taken place, why it has not. So issues such as civil liberties and the environmental factors which came up last time are matters which I am sure the explanatory statement should address, otherwise they will be of interest to the committee and the Senate.

**Senator BARTLETT**—What is going to trigger the consultation requirements now?

**Ms Sellick**—Before any rule maker makes an instrument, they must be satisfied that the appropriate consultation has taken place. It is part of the rule-making process.

**Senator BARTLETT**—How do we ascertain whether that has occurred or whether the rule maker's judgment is any good?

**Ms Sellick**—Again in the explanatory statement you will be testing the rule maker's decision as to what consultation has or has not taken place. I imagine that, if you are not satisfied, you will be asking questions.

**Senator BARTLETT**—So it would be a requirement in the explanatory statement.

**Ms Sellick**—The definition of the explanatory statement asks that the consultation is set out in the explanatory statement.

**Senator BARTLETT**—One other thing that this bill sets out is future procedures to determine regulations. Have any regulations attached to this legislation been drafted or planned as yet?

**Ms Sellick**—I have not issued any drafting instructions yet in relation to the regulation making powers under the bill.

**Senator MARSHALL**—Does this demonstrate a lack of confidence that it is going to get through?

**Ms Sellick**—Definitely not, Senator! The regulation making powers are all ‘may’; there is no requirement for us to do anything at this stage.

**Senator BARTLETT**—Just on that fairly broad topic—I am not quite sure how to bring it within the scope of this particular bill but I would love to if I could—that question I just asked is one that is coming up more and more frequently as quite substantial pieces of legislation are set up with quite sparse skeletons now with huge amounts to be filled in by regulation at an indeterminate time in the future. This leads to, as some of the questions have gone to today, the inability of the parliament to amend and even to disallow certain components. To some extent, this is another example—although this bill has got a lot more flesh on it than some of the others—that I am thinking of where we are passing a regime where procedures will be then put in place by a future regulation somewhere down the track. How can we avoid that becoming an ability for the executive to circumvent the powers of the parliament particularly with new regulations where it is very problematic to disallow them and to leave a vacuum?

**Ms Sellick**—We did touch on this a little earlier in terms of the regulation making power under this bill. Particularly with the ability to expand exemptions, we are anticipating that in future it will be done by primary legislation at the time that the enabling provisions are being enacted and debated and not rely on the regulation making power to expand, say, the exemptions from the bill, which are the main focus. Apart from that we come back to the normal role of parliamentary scrutiny in scrutinising the enabling legislation in the first place to ensure that it is not a skeleton one relying more and more on the executive or in making sure that the instruments that are able to be made under that enabling legislation are disallowable and then looking at the role of parliament in disallowing those instruments.

**Senator BARTLETT**—Apologies if this was covered before when I was unavoidably absent. In terms of the general standard of regulation drafting and all the things around it now, is one of the goals of this bill to improve the standards?

**Ms Sellick**—Yes, it certainly is.

**Senator BARTLETT**—From your experience you would have some knowledge of the work that this committee has done over a period of time. Are you able to give us any commentary on whether or not this committee has been of assistance in improving the standard of drafting around the place or whether we need to improve our performance to help you with your job—apart from agreeing to pass this legislation?

**Ms Sellick**—The committee is most valuable in assisting the Commonwealth in ensuring that the delegated legislation, certainly within power, does not impact on rights in the terms of reference.

**Senator BARTLETT**—You do not think we should be more hardline in disallowing things to make the message stronger to certain recalcitrant departments?

**Mr Graham**—I do not think that is for us to comment on.

**Senator BARTLETT**—I was just seeking the opportunity for feedback on what might assist you in doing your job better—but that is okay.

**Mr Graham**—From the point of view of the Office of Legislative Drafting this committee performs a very valuable role in restraining departments from putting forward legislation that is unacceptable in various ways because we are able to point to the scrutiny that their instruments will undergo by this committee.

**CHAIR**—We will take that as your answer as a professional person in answer to Senator Bartlett's question rather than as an officer of the department.

**Senator MOORE**—Could someone explain division 6(36) of the 2003 bill. It refers to the issue we were talking about—early back-capturing. In terms of reading it through and getting my head around the issue of how it works; we have the benefit here of the people who drafted it to find out exactly what this means.

**Mr Bugeia**—We already have most of the regulations that are in force on the SCALEplus and legislative instrument databases. The initial computer system was bought to implement this bill back in 1996.

**Senator MOORE**—Is it going to be the same computer system that you are going to continue using?

**Mr Bugeia**—No. That system is now very old and needs to be replaced. But a lot of that work has already been done, and we would expect this provision to allow us to transfer that data to the new system.

**Senator MOORE**—I was interested in your earlier comments about the fact that the computer process has moved on so much. Is it an intrinsic skill of people working in your area now to be very computer literate?

**Mr Bugeia**—In a user sense, yes. We do not have any computer systems people as part of the office, but we have a very good relationship with Information and Knowledge Services in the department. They have considerable expertise in the computer area—it is their job. We have very good relationships with them. We deal with them on a day-to-day basis. I have a qualification in computer science, but that is by the by: it is not essential for my job, but it is a very useful thing to have.

**Senator MOORE**—But it is not an essential component or expectation of the job.

**Mr Bugeia**—No, but it is a very useful thing to have. That is why we were able to change the bill to take out a lot of misconceptions inherent in the previous bills about how computers worked. You can almost say they were reflective of a paper based register, which was just going to be picked up and put on a computer. That is not the way computers work these days. They are much more sophisticated. Many more tools are available, and that is where the bill now sits. We can improve the register without being prescriptive.

**Senator MOORE**—Do you have the computer system in place now that you expect to use?

**Mr Bugeia**—No, we do not.

**Senator MOORE**—That is not there.

**Mr Bugeia**—No, that is part of the reason that we need a year and a half or 15 months to do it. Pass the bill tomorrow, and give us more time!

**Senator MOORE**—I just have one more question. The explanatory notes and a submission—I am not sure whether it was yours—talked about the fact that this particular legislation will bring the Commonwealth in line with what is already in place in a lot of the states. Because this particular process is an industry in terms of the way that legislation is reviewed and how it is actually drafted, to a large extent, I would not mind hearing some comment about how this particular legislation compares with the various processes already in existence in the states and whether, in fact, there will be an ability to cross-reference. For instance, we heard from Senator Marshall's questions about legislation that crosses jurisdictions and that it is a kind of COAG process. Will there be very easy cross-referencing in the system?

I am from Queensland. If people are looking up state legislation on whatever system Queensland has got—it is my understanding that they have got a computerised process up there—they will be able to find the legislation that they are looking at and be able to, when ours is in place, press a button and get the complementary legislation from the federal level. If you, as a member of the community, are seeking something to do with—a different example—an environmental piece of legislation, I am hoping that, through this process, we will be able to have people being able to see everything that relates to an issue such as, perhaps, tree clearing. That is something that would be having an impact both at the state and at the federal level. Does that question make sense? What I am trying to find out is how that will work.

**Mr Graham**—The question does make sense, but I do not think we are really qualified to answer it. The only thing to say is that what is contemplated here at the moment would not be integrated with the state systems. Each of the state systems has had its own development and its own political history. Although all of them will have links to each other, that is really a fairly low-level connection. The kind of connection that you have been describing will be well into the future.

**Senator MOORE**—So, using Mr Bugeia's previous example that you would be able to key in a certain instruction—for example, 'environment'—and then, hopefully in 2005, you would be able to scroll through all legislation and components of legislation that relate to the environment at the federal level to find out what you want, there will not be the ability to then cross-reference that with the Queensland system and scroll through all the legislation from Queensland?

**Mr Bugeia**—Not using this system itself. There is another application being developed by the department called the law and justice portal, but we really could not comment on that. I can take that on notice and get the information and knowledge services people to give an answer to the committee on exactly how that will work.

**Senator MOORE**—That would be useful.

**Mr Bugeia**—Basically it becomes an index page, in general terms. If the different sites around the nation—or internationally even—allow access to the department, they will be able to bring indexed information back to a central source and you would then be able to do that search. But you would have to go into each individual site after you had got the result. I need to get information and knowledge services to answer that so I will take it on notice.

**CHAIR**—Ms Sellick, I will take you back to your submission at pages 6 and 7 where you are talking about the sunset provisions. The issue actually extends beyond just the sunset clause—it is a much more general one—but, as you noted, the sunset clause is a very important component of this legislation because embedded in it is the idea of regular reviews of regulations. On page 7 you talk about a number of targeted exemptions from the sunset regime that the bill provides and you list four reasons there. The second one of those reasons is where the instrument is designed for enduring matters such as the national flag—and obviously I can understand that the sunset clause should not apply there. In the last item you talk about the instrument being related to cross-jurisdiction legislation—again, that is an issue which Senator Moore has mentioned. Another reason you gave was to do with commercial certainty. I wonder why, in terms of sunset, in that particular regulation you cannot provide for that period rather than exempt it from sunset altogether. For example, if you need commercial certainty for 20 years then the sunset should kick in after 20 years.

**Senator MOORE**—Automatically.

**CHAIR**—Yes, or something like that—some form of review could come in. More concerning to me is the first reason you gave where the rule maker has an independent statutory rule. You may recall that when you came to give the committee a briefing I raised a similar issue with you—although at that time I was talking about the obligation for discoveries—particularly in terms of government services being privatised or outsourced in commercial areas, the separation of the licensing or the standard-setting regime and the service regime. The government, on behalf of the community, has the right to set standards—in other words, regulations for operation. However, as the entities become more independent, as you said here, they become independent in making their rules. Does that erode the government's rule-making abilities? In here you actually say that an independent entity can make rules independently in the future.

**Ms Sellick**—The dot points on page 7 are reasons for exempting the instruments from sunset, not from disallowance. The concept of the independence of the organisation relates to things like the Australian National University. It is not saying the instruments should not be reviewed and regularly remade; it is saying the organisation itself should determine when that occurs, not an automatic process imposed by the government. It is not actually removing them from parliamentary control; it is simply saying that the nature of the organisation itself is something that should decide when, say, the statutes made under the Australian National University Act should sunset.

**Senator TCHEN**—Doesn't that represent a de facto erosion of parliament's power?

**Ms Sellick**—Parliament still has the disallowance function. This is just not taking on the imposed review function; it is leaving it to the organisation itself to determine whether its instruments should cease to exist or continue.

**Senator TCHEN**—That is in the case of sunseting.

**Ms Sellick**—Yes.

**Senator TCHEN**—Let us extend our consideration to the making of rules and regulations more broadly. Does it increase the tendency or the ability of independent statutory bodies or entities to escape parliamentary scrutiny?

**Ms Sellick**—I come back to what I said before: it is the scope of the enabling legislation itself which will dictate the scope of the power of parliament to continue to review the legislative instruments made under it, and the power of parliament itself to continue to disallow regulations.

**Senator TCHEN**—I was not asking for a definitive answer from you. I just wanted to test your views on this because you are working professionally in this area and it is something we need to think about. I thank the witnesses from the Attorney-General's Department for your attendance and for the evidence you have given to the committee.

Resolved (on motion by **Senator Marshall**):

That this committee authorises publication of the submissions received today.

**Committee adjourned at 5.22 p.m.**