Chapter 3

Key issues and committee view

Introduction

3.1 This chapter discusses the key issues raised during the inquiry and contains the committee's view and recommendations. Key issues raised during the inquiry include:

- the definition of 'legislative instrument' and general rule-making powers;
- the correction and editorial change powers of the FPC;
- exemptions from disallowance;
- consultation requirements; and
- notifiable instruments.

Legislative instrument definition and rule-making

3.2 Existing subsection 5(1) of the *Legislative Instrument Act 2003* (LIA), provides that (subject to some exceptions) a legislative instrument is an instrument in writing:

> (a) that is of a legislative character; and
>
> (b) that is or was made in the exercise of a power delegated by the Parliament.[1]

3.3 The 2008 review described the LIA definition of 'legislative instrument' as 'workable', but considered 'that improvements should be made'. It stated:

> There is an unhelpful circularity in paragraph 5(1)(a) of the definition, which defines a legislative instrument as an instrument 'that is of a legislative character'. It is difficult to see that this adds anything to the definition. The concept of 'legislative character' is defined in non-exclusive terms in subsection 5(2), and the Committee is not aware of any legislative instrument that is caught by paragraph 5(1)(a), but not subsection 5(2).
>
> Moreover, as noted above, the practice has developed since the commencement of the LIA of explicitly declaring in the enabling legislation whether or not instruments are legislative instruments. The Committee is therefore of the view that the circular reference in paragraph 5(1)(a) could be removed without altering the intended operation of the definition.[2]

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1 Subsection 5(1), *Legislative Instruments Act 2003*.

2 Attorney-General's Department, *2008 Review of the Legislative Instruments Act 2003*, 2008, p. 15.

3.4 Pearce and Argument's *Delegated Legislation in Australia*, referring to the 2008 review's criticism of the definition of 'legislative instrument', commented:

> While the definition has its difficulties, it must be remembered that those issues have largely been addressed by the express designation of instruments, as legislative or not, in Commonwealth legislation. However, there is a residual danger of a court deciding…that an instrument previously thought to be administrative – and, as a result, not registered – is, in fact legislative.[3]

3.5 The EM sets out that the bill 'more clearly defines legislative instruments and legislative character' but that '[t]hese concepts are not to be substantially changed':

> However, the amendments address the circularity in the existing definition of legislative instrument, bring together the disparate strands of the definition (currently spread between section 15AE of the Acts Interpretation Act and a number of sections of the Legislative Instruments Act) into a single section and clarify the inter-relationship between the different aspects of the definition.[4]

3.6 The Clerk of the Senate, Dr Rosemary Laing, drew the committee's attention to an issue which has been considered by the Senate Regulations and Ordinances Committee (R&O Committee). She considered it was 'relevant to the bill because it involves a problematic policy change made without parliamentary scrutiny, apparently in connection with the organisational change that consolidated the functions of OLDP and OPC, a major reason for the development of this bill'.[5]

3.7 The updated OPC Drafting Directions on subordinate legislation summarise the change at issue:

> It has long been the practice to include general regulation-making powers in Acts.
>
> More recently, an approach has been taken to adapt that practice for other legislative instruments. (For examples of this approach, see the 'rules' in the *Public Governance, Performance and Accountability Act 2013* and the 'PPL rules' in the *Paid Parental Leave Act 2010*.)
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> As with the current practice for regulations (which includes a general regulation-making power in the Act), this approach involves including a general legislative instrument-making power. However, instead of authorising the Governor-General to make regulations when 'required or permitted' or 'necessary or convenient', it authorises another person (e.g. a Minister) to make another type of legislative instrument (e.g. rules) in those circumstances.[6]

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3 Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia*, 2014, p. 33.

4 EM, p. 10.

5 *Submission 2*, p. 5.

6 Office of Parliamentary Counsel, *Subordinate legislation*, Drafting Direction No. 3.8, 6 March 2014, p. 5.

3.8 Dr Laing outlined that the R&O Committee has established that:

- the broad rule-making power has only been used in Acts since 2013, after the consolidation of OPC and OLDP;
- it is a practical response to the need for OPC to concentrate its resources on drafting regulations, a class of instruments with sensitivities or risks appropriate to a higher level of oversight;
- it also provides scope for OPC to establish a revenue stream from drafting rules or other types of instrument on a fee for service basis.[7]

3.9 Dr Laing noted that the R&O Committee has 'pursued a number of concerns with OPC and agencies about rules made pursuant to the new type of broad rule-making power'. These concerns included:

- lack of consultation over the implementation of what the R&O Committee regarded as a new type of delegated legislation;
- potential diminution in the quality of rule drafting and in quality-control mechanisms generally, from a lower level of executive oversight;
- the impact of potentially lower quality instruments on the workload of the committee;
- how to ensure that particularly sensitive matters involving rights, obligations, liabilities and penalties (including offences, powers of arrest, entry, search or seizure) will continue to be dealt with by regulation; and
- whether a rule-making power should be able to be delegated.[8]

3.10 She suggested that '[w]hile the new broad rule-making power is in the process of being deployed more widely across Commonwealth legislation, the committee may wish to consider whether there is a need to include in the definition of "legislative instruments" in the Legislative Instruments Act (as amended), these types of legislative rules made under the new broad power, rather than leaving them to be dealt with on a case by case basis'. She noted there would be arguments for and against this 'all-encompassing' approach which, if adopted, would mean the R&O Committee would be required to scrutinise all rules. However, Dr Laing also observed that the terms of reference of the Senate Scrutiny of Bills Committee ensure that the case-by-case approach can be monitored in any event.[9]

3.11 In response to these concerns, the Attorney-General stated:

> It is not practicable or desirable to provide a provision in new section 8 for a categorical declaration that rules made under a broad rule-making power are legislative instruments. This is because it would be difficult to formulate such a provision, and because it is preferable to determine the status of

7 *Submission 2*, p. 6.

8 *Submission 2*, p. 6.

9 *Submission 2*, p. 7.

> instruments in enabling legislation on a case-by-case basis, and to express that status clearly on the face of the enabling legislation.[10]

3.12 In particular, the Attorney-General suggested that changing the 'definition of a legislative instrument to include all rules by default could have significant unintended consequences' such as for rules of court which are declared not to be legislative instruments.[11]

3.13 Both Dr Laing and the Attorney-General highlighted the differences between the more restrictive rule-making power to make rules 'as required or permitted' by the relevant Act, and the broader power to make rules 'necessary or convenient' for carrying or giving effect to a relevant Act.[12]

3.14 Dr Laing pointed out that the bill itself inserts a rule-making power in new section 61A which provides that the FPC may, by legislative instrument, make rules prescribing all matters required or permitted by the Act to be prescribed by the rules. She stated:

> The rule-making power does not extend to making rules 'necessary or convenient to be prescribed for carrying out or giving effect to this Act', so it is not as broad as the general rule-making power that has made an appearance in Commonwealth legislation since 2013.
>
> The narrower scope of the rule-making power in this case means that the power is limited to making rules authorised by specific provisions in the legislation and not otherwise…
>
> The bill thus provides an example of how the new broad-ranging rule-making power can be modified to keep it within definite and appropriate limits.[13]

3.15 In relation to the broader ruling-making power, the Attorney-General outlined:

> If there is a power to make rules that are 'necessary or convenient' for carrying out or giving effect to the Act, it is true that such rules are generally legislative in character, and in accordance with established government policy and drafting practice, the enabling legislation is required to declare such rules to be legislative instruments.[14]

3.16 However, the Attorney-General emphasised that legislative instruments are described differently in different legislative contexts and could be legislative instruments under the various tests in new section 8 (but need not be). He argued:

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10 Attorney-General's responses to questions on notice, Attachment A, p. 10.

11 Attorney-General's responses to questions on notice, Attachment A, p. 10.

12 *Submission 2*, pp 7-8. Attorney-General's responses to questions on notice, Attachment A, p. 10.

13 *Submission 2*, pp 7-8.

14 Attorney-General's responses to questions on notice, Attachment A, p. 10.

> It is considered that the greatest degree of transparency is achieved by including individual declarations of legislative instrument status in each enabling law, to ensure that users of the enabling law have greater certainty about the status of instruments under that law. Accordingly, the status of such instruments will be clear in the immediate context of the enabling law, without requiring users to be familiar with a generic provision in another Act (the Legislation Act).[15]

Correction and editorial change powers

3.17 Currently under the LIA, the FPC must rectify the Federal Register of Legislative Instruments (FRLI) as soon as possible if he/she becomes 'aware that the Register is erroneous because of a mistake or omission'. The FPC must also 'annotate the [FRLI] as so rectified to explain the nature of the rectification, the date and time it was made and the reason for it'.[16]

3.18 Similarly, the Acts Publication Act provides that the FPC must 'arrange for an Acts database to be altered to rectify an error as soon as possible after the [FPC] becomes aware of the error'.[17] The FPC must be satisfied that the error has the result that:

(a) for an error concerning an Act—the electronic text of the Act as it appears in the database does not represent the text of the Act as assented to; or

(b) for an error concerning a compilation of an Act—the electronic text of the compilation as it appears in the database does not represent the state of the law that the text purports to represent.[18]

3.19 As with the FRLI rectification power, the FPC must arrange for the Acts database (as rectified) to be annotated to explain: the nature, day and time of the rectification; and the reason for the rectification.[19]

3.20 The amendments of the bill would provide for corrections and editorial changes to the Register to be made by the FPC in certain circumstances. Proposed new subsection 15D(1) would provide that, if the FPC is satisfied there is a mistake, omission or other error in the Register consisting of an error in the text of an Act, legislative instrument or notifiable instrument, or compilation of an Act, the FPC must:

(a) correct the error in the Register as soon as possible; and

(b) include in the Register a statement that the correction has been made, and a brief outline of the correction in general terms.

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15 Attorney-General's responses to questions on notice, Attachment A, p. 11.

16 Subsection 23(1), LIA.

17 Subsection 8(1), Acts Publication Act.

18 Subsection 8(2), Acts Publication Act.

19 Subsection 8(2), Acts Publication Act.

3.21 New subsection 15D(2) reflects existing provisions in the Acts Publication Act and LIA that a correction of the Register does not affect any right or privilege that was acquired, or that accrued, because of reliance on registered text of any Act, instrument or compilation before they were corrected; and does not impose or increase any obligation or liability that was incurred before the correction. New subsection 15D(3) provides the FPC may correct any other documents on the Register, subject to any rules. New subsection 15D(4) clarifies that a formal correction cannot be made if the error was made at law as part of enacting, making or amending a law.

3.22 New section 15V enables the FPC to make editorial and presentational changes to a compilation of an Act or an instrument. However, under new subsection 15V(2) the FPC may only make an editorial change if he or she considers the change desirable to bring the Act or instrument that has been compiled into line with, or closer to, current legislative drafting practice, or to correct an error or a misdescribed amendment where the intended effect of the amendment is clear.[20] New subsection 15V(6) also provides the FPC 'must not make a change to an Act or instrument under this section that would change the effect of the Act or instrument'. Editorial changes made by the FPC are treated the same way as an amendment to the Act or instrument (new section 15W).

3.23 New section 15X outlines the kinds of editorial changes that the FPC may make to an Act, legislative instrument or notifiable instrument under section 15V in preparing a compilation of the Act or instrument. New subsection 15X(2) lists a number of changes which could be made as editorial changes. Some of these editorial changes are narrow and specific, such as changing the order of definitions or other provisions of an Act or instrument. Others could be viewed as very broad. For example, new paragraph 15X(2)(g) provides that an editorial change could change 'the way of referring to or expressing a number, year, date, time, amount of money or other amount, penalty, quantity, measurement or other matter, idea or concept'.

3.24 In particular, new paragraph 15X(2)(p) provides that an editorial change could be one which 'corrects an error covered by subsection (4)'. New subsection 15X(4) covers a number of errors such as 'typographical and clerical errors' and 'errors in or arising out of an amendment of an Act or instrument, including errors relating to the number of times such an amendment is expressed to be made'. Further, new paragraph 15X(4)(f) covers 'any other error of a nature similar to those mentioned' in the subsection.

3.25 The EM to the bill notes that editorial powers in the publication of legislation have been used in other comparable jurisdictions for over four decades and that currently the Commonwealth and the Northern Territory are the only Australian jurisdictions which do not have legislative editorial powers of some kind.[21] It states that the 'power to make editorial changes is intended to reduce the time needed for

20 EM, p. 46.

21 EM, p. 45.

parliamentary consideration of these matters and ensure that readers of legislation can clearly see the law as in effect in the Act or instrument':

> In addition, some presentational and other non-substantive changes may be made in preparing compilations to update the layout or style of an Act or legislative or notifiable instrument, or to insert or make changes to text in the compilation that is not formally a part of the Act or instrument. This provides a statutory basis for longstanding Commonwealth practice.[22]

3.26 Differing views were expressed in relation to the correction and editorial changes power granted to the FPC under the bill. The Clerk of the House, Mr David Elder noted that '[p]roposed new section 15V(6) specifically prohibits the First Parliamentary Counsel from making a change to an Act or instrument that would change the effect of the Act or instrument, and proposed new section 15X clearly defines editorial change'. He stated '[t]hese provisions would appear to ensure that no changes of a substantive nature could be effected to legislation without passing through the established parliamentary processes'.[23]

3.27 However, the Clerk of the Senate, Dr Laing, raised several concerns regarding the scope of the correction and editorial change powers granted to the FPC under the bill. She stated:

> It is clearly stated that the editorial power cannot be used to change the effect of a law, resolve an ambiguity or rewrite legislation. However, section 15V and the definition of editorial change in section 15X would appear to permit a wide range of editorial and presentational changes and there is no mechanism – as there is in section 15D – for transparency, let alone oversight…[24]

> Given that 'current legislative drafting practice' is not a defined or regulated concept and, in practice, is a set of directions and practices determined by First Parliamentary Counsel without necessary reference to the Parliament itself, the committee may wish to be reassured that these provisions do not diminish the legislative authority of the Parliament and increase - beyond what is appropriate - the power of First Parliamentary Counsel to make changes to legislation after it has been approved by the Parliament.[25]

Scope of the FPC's discretion

3.28 The Attorney-General made a number of comments regarding the scope of the FPC's discretion to make corrections and editorial changes in his responses to the committee's questions on notice. In particular, the Attorney-General stated that the intention was that the editorial change power would be exercised carefully and with 'due conservatism':

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22 EM, p. 13.

23 *Submission 1*, p. 1.

24 *Submission 2*, p. 2.

25 *Submission 2*, p. 3.

> This is the same approach that is taken to the decision about whether to include a formal amendment of a law in the regular Statute Law Revision Bills. Disputes about whether amendments made by Statute Law Revision Acts have changed the intended effect of the law are almost unheard of. The same rigorous oversight will be extended to editorial changes in compilations to ensure that there is no perceived or actual change to the intended effect of the law concerned.[26]

3.29 The Attorney-General noted that the FPC has 'the responsibility of providing the public with improved access to law by improvements in drafting practices and by the vigilant maintenance of the Register to maximise its usefulness'. He stated that having regard to this principle, appropriate editorial changes will only be made by the FPC if it is clear that they will make the law easier to use and to understand.[27] The Attorney-General also highlighted that an editorial change is not authorised unless it meets the specific criteria in new subsection 15V(2).

3.30 The Attorney-General advised that the FPC will issue further guidance (in the form of a Drafting Direction or other publically available document) about cases in which it would be appropriate to use the power.[28]

Recording corrections and editorial changes

3.31 Dr Laing noted that where a correction is made to the Register, new paragraph 15D(l)(b) provides that the FPC must include in the Register a statement that the correction has been made and a brief outline of the correction in general terms. She stated:

> On the one hand this provision provides transparency in relation to the correction. On the other hand, it begs the question why the requirement is for an explanation only in general rather than specific terms.[29]

3.32 In responding to this issue, the Attorney-General argued that '[h]ighly specific explanations of corrections are unlikely to significantly assist users of the Register':

> The detail involved may actually impede users from finding more relevant information about the law. It is considered that a brief outline in general terms is sufficient, and will alert interested users to investigate further. OPC is always ready to respond to user queries.
>
> The existing provisions require the Federal Register of Legislative Instruments or Acts database to be annotated with the nature, day and time of the rectification and the reason for the rectification. The highly detailed nature of the corrections involved, however, makes such specific annotation redundant and overly pedantic, particularly given the additional requirement to state the reason for the rectification…

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26 Attorney-General's responses to questions on notice, Attachment A, p. 8.

27 Attorney-General's responses to questions on notice, Attachment A, p. 7.

28 Attorney-General's responses to questions on notice, Attachment A, p. 7.

29 *Submission 2*, p. 2.

> The requirement to include 'a brief outline of the correction in general terms' is not intended to provide less information than is currently provided but to make it easier to provide a clear explanation of the correction in one place. To provide additional transparency, the incorrect version of the law is never removed from the Federal Register of Legislative Instruments or the Acts database. It will also never be removed from the new Federal Register of Legislation.[30]

3.33 Further, the Attorney-General noted that the amended Legislation Act 2003 will require the FPC to record the use of editorial powers in a statement in the registered compilation concerned:

> Public notice of editorial change will be required by the proposed Commonwealth Legislation Act under new section l5P(l)(b). A registered compilation that incorporates editorial changes will be required to include a statement that editorial changes have been, and a brief outline of the changes in general terms. The proposed Commonwealth requirement will require as much, if not more, transparency as is required by any other comparable scheme...[31]

3.34 The Attorney-General also noted that the FPC and OPC are subject to the normal annual reporting requirements applicable to other government agencies. He advised that OPC would publish a section in its annual report summarising the use of the correction and editorial powers in each financial year.[32]

Consultation

3.35 The 2008 Review recommended that the 'regulation-making power in the LIA be amended to authorise the Attorney-General to formally revoke registered instruments that are spent or invalid and to amend them to correct typographical errors'. However, it also stated that '[t]his should occur only after appropriate consultation with the responsible Minister or rule-maker'.[33]

3.36 The Attorney-General commented that it was 'not considered appropriate to undertake any consultation about the correction (rectification) of errors in the [Register], although [OPC] is always responsive to comments from members of the public about the accuracy of the Register'. He noted that 'in no other comparable jurisdiction is there any requirement for prior consultation with a particular person or body before a correction is made'. Further:

> The FPC only corrects the existing Federal Register of Legislative Instruments in very clear cases, for example, the removal or insertion of text to correct an obvious oversight in the compilation process. In such cases it is considered imperative to act swiftly after the identification of an error to preserve the integrity of the Federal Register of Legislative

30 Attorney-General's responses to questions on notice, Attachment A, p. 1.

31 Attorney-General's responses to questions on notice, Attachment A, p. 4.

32 Attorney-General's responses to questions on notice, Attachment A, pp 3, 6.

33 Attorney-General's Department, *2008 Review of the Legislative Instruments Act 2003*, p. 26.

> Instruments and ensure proper access to a correct statement of the law. It is also unclear what public benefit would be achieved by consultation about the correction of such errors.[34]

Parliamentary correction processes

3.37 The potential interaction between the parliamentary mechanisms for corrections to proposed legislation and the proposed correction and editorial powers granted to the FPC under the bill was also raised. The standing orders of both Houses allow for corrections to be made to bills. In the Senate, Standing Order 124—Corrections provides:

> Amendments of a formal nature may be made, and clerical or typographical errors may be corrected, in any part of a bill by the Chairman of Committees.

3.38 Similarly, in the House of Representatives, Standing Order 156—Corrections to a bill provides:

> Under the authority of the Deputy Speaker, the Clerk may correct clerical or typographical errors in a bill.

3.39 These corrections to bills are often made at the request of the OPC or OPC advice may be obtained on the correction before it is made.[35]

3.40 The Clerk of the House, Mr David Elder noted that as 'the bill gives the First Parliamentary Counsel authority to make editorial changes only to Acts and compilations of Acts and not to bills before the Parliament, the role of the Parliament and the parliamentary departments would appear to remain unchanged'. He stated:

> In terms of the Parliament's role in correcting errors in bills before the bills are presented for assent, the bill does not appear to have any effect on current practice. At present, if an error is discovered in a bill before Parliament the usual practice is first to determine whether the required correction is editorial or substantive. In the case of editorial changes the Deputy Speaker or Deputy President authorises the responsible department to make the necessary change in preparing the bill for transmission to the other House or for assent by the Governor-General. In the case of errors of a substantive nature corrections can be made by an amendment during passage of the bill or by a subsequent amending Act.[36]

3.41 The Clerk of the Senate, Dr Laing explained that '[a]ny proposals for corrections of this type, so far as Senate practice is concerned, are assessed against the standing order and the following guidance in *Odgers' Australian Senate Practice*':

> This procedure is used to make changes to a bill which are clearly required by any amendments which have been agreed to, and to correct any clear

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34 Attorney-General's responses to questions on notice, Attachment A, p. 1.

35 Department of House of Representative, *House of Representatives Practice*, 6th edition, 2012, p. 401.

36 *Submission 1*, p. 1.

> errors. The citation of a bill which originated in one year and passed in another may be altered by this means. The procedure may not be used to make changes of substance, which should be made only by amendment in committee of the whole.[37]

3.42 However, she observed that an '[e]xamination of Senate records shows that Senate officers have been very conservative in agreeing to recommend corrections to the Chair of Committees and have often knocked back requests from OPC which were considered to have exceeded the parameters of what the standing order permits, judgements made on the basis of practice and precedent, and on the principle that legislators should have the final say on the substance of legislation'.[38]

3.43 Dr Laing continued:

> There is no question that the discretion proposed for First Parliamentary Counsel is both practical and necessary, and subject to detailed constraints, but it is not clear how the proposed new discretion would operate in practice, including in conjunction with the existing process for Chair's amendments. The majority of bills now introduced into Parliament amend existing law and on enactment will be incorporated into existing law by means of a compilation, a process which this bill seeks editorial powers to facilitate. If a Chair's amendment on such a bill were sought by OPC but declined, could that amendment then be made pursuant to these new provisions? If OPC considered that a request for a Chair's amendment was unlikely to be acceptable to officers of the relevant House, would the availability of these new provisions provide a reason to bypass the process authorised by standing orders and go straight to the new editorial powers for authorisation when the compilation is made?
>
> Such questions are unlikely to arise frequently, but they will arise. The lack of visibility on the exercise of the proposed discretion means that we may never know the extent to which the editorial power is being used.[39]

3.44 In relation to the interaction of the parliamentary processes for the correction of bills and the FPC's powers, the Attorney-General commented:

> In practice, it is rare for an OPC request for a Clerk's or Chair's correction of a Bill to be refused. In any case, the FPC would not seek to achieve by editorial amendment what could not be achieved by a parliamentary correction. On the other hand, while a Bill is before the Parliament, if a clear formal error is found, the OPC would seek to make the requisite correction by the established parliamentary process, to ensure that the Bill as enacted is correct.
>
> The power to make editorial changes is designed to correct formal errors in the law after the time for making parliamentary corrections has passed, that

37 Department of the Senate, *Odgers' Australian Senate Practice*, 13th edition, p. 321.

38 *Submission 2*, p. 3.

39 *Submission 2*, p. 4.

> is, after enactment. It is not considered that there would be any necessary interaction between the two processes.[40]

Review of corrections and editorial changes

3.45 The Attorney-General acknowledged that 'the decision to make an editorial change to the law would not be subject to administrative challenge' as an editorial change to a law has the status of an amendment of a law in the bill (new section 15W). However, the Attorney-General outlined that an individual affected by 'an editorial change to the law may have a right to challenge the validity or effectiveness of the law as changed in a court':

> This may be possible by seeking judicial review of the change under section 39B of the *Judiciary Act 1903* or under section 75(v) of the Constitution. In addition, any individual concerned by an editorial change could raise the matter with the FPC who would take any such concerns very seriously.[41]

Exemptions from disallowance

3.46 Existing section 42 of the LIA contains the process for the disallowance of legislative instruments by either House of the Parliament. Existing section 44 of the LIA includes a list of legislative instruments that are not subject to the disallowance process. Under the bill, existing section 44 would be repealed and replaced. The EM to the bill notes:

> New paragraph 44(2)(a) provides that an Act may declare or have the effect of exempting a legislative instrument or a provision of a legislative instrument from disallowance under section 42. A number of enabling Acts already provide for exemptions from disallowance…
>
> New paragraph 44(2)(b) provides that regulations may be made that exempt a legislative instrument from disallowance. This paragraph preserves the effect of existing subsection 44(2). The table of exemptions in existing section 44 will be transferred to the new Regulations and consolidated with other exemptions from disallowance already prescribed by regulation, making it easier for users to find exemptions.[42]

3.47 The EM to the bill notes '[a]dditional disallowance exemptions can be prescribed by regulation, and it will continue to be possible to declare in the enabling Act that an instrument is not subject to disallowance'.[43]

3.48 Dr Laing described the removal from section 44 of the table of instruments exempt from disallowance as a significant amendment but noted that 'exemptions may be made in future by declarations in Acts, or in regulations made for the purposes of paragraph 44(2)(b)'.[44] She cautioned that, while the rationale 'to consolidate prescribed

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40 Attorney-General's responses to questions on notice, Attachment A, p. 8.

41 Attorney-General's responses to questions on notice, Attachment A, pp 6-7.

42 EM, p. 54.

43 EM, p. 14.

44 *Submission 2*, p. 4.

exemptions for greater accessibility' was commendable, the rights of the Parliament should not be affected.[45]

3.49 Dr Laing noted that 'the new regulations will be subject to examination by the Regulations and Ordinances Committee, and will also be subject to disallowance' but also suggested the committee could seek the draft regulations which would contain the consolidated list of legislative instruments exempt from disallowance. The committee sought the draft regulations from the Attorney-General and these were provided as part of the responses to questions on notice.[46] The Attorney-General stated the exposure draft regulations do 'no more than consolidate all existing exemptions under the Act and the regulations'.[47]

Notifiable instruments

3.50 The Migration Institution of Australia (MIA) raised its concern that 'notifiable instruments' could potentially be used to prevent parliamentary scrutiny and disallowance of legislative instruments:

> It is not clear from the Bill or from the Explanatory Memorandum under what circumstances an instrument would be classified as 'legislative' or 'notifiable' or what use can be made of notifiable instruments.
>
> This does not provide any assurance that notifiable instruments would not or could not be used to evade the disallowance of legislation.[48]

3.51 The Attorney-General provided a response to this concern, noting that under the bill notifiable instruments are administrative in character rather than legislative:

> Any instrument that has a legislative character will be, by definition, a legislative instrument (s8(4)), and therefore subject to disallowance unless exempted (either by the enabling Act, or by regulation made under the Legislation Act). The Bill will prevent an instrument that is a legislative instrument from being registered as a notifiable instrument (s11(2)).
>
> Accordingly, the Bill ensures the new category of notifiable instruments will not be able to be used to avoid parliamentary scrutiny. Further, any provision in a Bill or legislative instrument specifying that an instrument is to be a notifiable instrument will be subject to Parliamentary scrutiny. This scrutiny should ensure instruments that should be legislative instruments are not specified to be notifiable instruments.
>
> In addition, the Act also continues to provide a powerful incentive for rule-makers to identify legislative instruments correctly: a legislative instrument is not enforceable by or against any person unless it is registered as a legislative instrument (new section l5K). As such, any attempt to 'evade' consultation and disallowance processes by lodging a legislative instrument

45 *Submission 2*, p. 4.

46 Attorney-General's responses to questions on notice, Attachment B.

47 Attorney-General's responses to questions on notice, Attachment A, p. 9.

48 *Submission 3*, p. 3.

> as something else would have substantial legal and other consequences for the rule-maker.[49]

Consultation

3.52 Existing subsection 17(1) of the LIA includes a requirement that rule-makers should consult before making legislative instruments:

> Before a rule-maker makes a legislative instrument, and particularly where the proposed instrument is likely to:
>
> (a) have a direct, or a substantial indirect, effect on business; or
>
> (b) restrict competition;
>
> the rule-maker must be satisfied that any consultation that is considered by the rule-maker to be appropriate and that is reasonably practicable to undertake, has been undertaken.

3.53 Pearce and Argument have observed that under these provisions of the LIA 'consultation is at the discretion of the rule-maker' and described compliance with the consultation requirements as 'patchy at best'.[50]

3.54 The existing consultation requirements are maintained but amended in the bill. The EM to the bill states:

> The consultation requirements are amended so that the requirement to undertake appropriate consultation (which can include no consultation) applies equally to instruments that affect business and/or competition and those that do not. The list of circumstances in which consultation may be unnecessary or inappropriate is removed. The consultation requirements for legislative instruments do not apply to notifiable instruments.[51]

3.55 The MIA raised its concern that 'the use of notifiable instruments may have the possibility of being used to circumvent requirements for consultation'. It highlighted that the consultation requirements for legislative instruments do not apply to notifiable instruments. It stated:

> The process of proper and genuine consultation is an essential feature of our democratic system and should not be removed as a requirement for notifiable instruments in cases where the effect of those instruments could adversely affect individuals or businesses.[52]

3.56 The Attorney-General provided a response to this concern:

> Many Acts require certain instruments to be published or notified in the Gazette, and in some cases they also require consultation before such instruments can be made. However, imposing a blanket requirement for

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49 Attorney-General's responses to questions on notice, Attachment A, p. 12.

50 Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia*, 2014, pp 34-35.

51 EM, p. 14.

52 *Submission 3*, p. 4.

> consultation may be excessive considering the nature and volume of the instruments in question.
>
> To illustrate, and as explained in new section 11 of the Legislation Act as amended by the Bill, examples of notifiable instruments may include notices of appointments and of approved forms. Based on recent Gazette notices, additional examples could include factual notices of Royal Assent to Acts, of bond or exchange rates, and of consultation opportunities linked to an application or intention to do something under an Act.
>
> Commonwealth agencies will consult when developing notifiable instruments if it is appropriate to do so.[53]

3.57 The Attorney-General noted that guidance on when consultation is appropriate is available in the Australian Government Guide to Regulation (Guide). The Guide provides that most regulatory impact statements must include evidence of appropriate public consultation and full public consultation is the default approach.[54]

Committee view

3.58 It is a fundamental principle that those who are subject to the law should be able to access the law. In the view of the committee, the single register to be established by the bill which will include all legislation, Acts and instruments, as well as other relevant documents, will clearly be beneficial reform. As Minister Keenan noted in introducing the bill, reforms which enhance the accessibility of Commonwealth law will promote the principle of access to justice.[55]

3.59 The bill implements a number of sensible recommendations for reform made by the 2008 review, as well as making other amendments to improve the operation of the legislative frameworks for the Commonwealth Acts and instruments. In particular, the amendments to simplify and align the processes for the registration, compilation and editorial changes and authorised versions of Acts and instruments will produce long-term efficiencies.

3.60 The committee acknowledges the significant issues raised by the Clerk of the Senate and the Senate Regulations & Ordinances Committee in relation to the recent inclusion of 'general ruling-making powers' in recent legislation.[56] The committee shares the Senate Regulations & Ordinances Committee's concern that the use of this general rule-making power appears to have been introduced without notification or consultation to parliamentary stakeholders.[57] The Clerk of the Senate has also

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53 Attorney-General's responses to questions on notice, Attachment A, p. 12.

54 Department of the Prime Minister and Cabinet, *The Australian Government Guide to Regulation*, 2014, pp 39-45.

55 The Hon Michael Keenan MP, Minister for Justice, *House of Representatives Hansard*, 22 October 2014, p. 78.

56 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor*, No. 10 of 2014, 27 August 2014, pp 18-43.

57 Senate Standing Committee on Regulations and Ordinances, Delegated legislation monitor, No. 10 of 2014, 27 August 2014, p. 21.

suggested the committee considers the need to include in the definition of 'legislative instrument' the types of legislative rules made under the general rule-making power.

3.61 The Attorney-General has argued that there may be 'significant unintended consequences' in relation to such a proposal. However, the committee is not convinced these consequences could not be avoided through an appropriately drafted amendment. The Attorney-General's stronger argument for the new approach is that greater transparency is achieved through including 'individual declarations of legislative instrument status in each enabling law'.

3.62 The committee notes this issue has also been raised in relation to the bill by the Senate Scrutiny of Bills Committee.[58] In particular, the Senate Scrutiny of Bills Committee has sought the Attorney-General's advice regarding:

> [W]hy all instruments made on the basis of the general instrument making powers should not be included in the definition of instruments and so deemed to be legislative instruments (so that disallowance and sunsetting requirements apply unless they are explicitly excluded).[59]

3.63 Noting that the Senate Regulation and Ordinances Committee and the Senate Scrutiny of Bills Committee have ongoing processes in relation to this matter, the committee considers it would be premature to recommend an amendment to the definition of 'legislative instrument' at this time. This specific issue may be best considered as the subject of a discrete inquiry once the operation of the 'Legislation Act 2003' is commenced and the practice of using general rule-making powers in legislation is clarified over time.

3.64 The committee was interested in how the discretion of the FPC to change the Register has been framed within the bill. It is appropriate that the FPC, as the person responsible of the accuracy and completeness of the Register, should have correction and editorial powers in relation to its contents. As the EM notes, making changes in this way, rather than through legislation, has a number of advantages including conserving limited parliamentary time and other resources.[60] This reform will also bring the Commonwealth into line with editorial powers for legislation used in other jurisdictions.

3.65 However, the committee agrees there should be clearly articulated principles for the use of the FPC's the correction and editorial powers. In this respect, the committee welcomes the Attorney-General's advice that the FPC will issue guidance on the use of the editorial powers proposed in the bill.[61] In the view of the committee, this guidance should be released at the earliest opportunity.

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58 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 15 of 2014*, 19 November 2014, pp 1-2.

59 Senate Standing Committee for the Scrutiny of Bills, Alert Digest No. 15 of 2014, 19 November 2014, p. 2.

60 EM, p. 46.

61 Attorney-General's responses to questions on notice, Attachment A, p. 7.

3.66 Consultation by the FPC with relevant persons or organisations to ensure that a correction or editorial change to the Register is being properly made may be appropriate in a limited number of cases. The FPC's guidance on the use of the correction and editorial change powers should include consideration regarding when, in exceptional circumstances, notification or consultation may be required (for example, with the responsible Minister).

3.67 The Register is intended to be an accurate and authoritative legal resource. Accordingly, adequate transparency mechanisms should also be attached to the exercise of the FPC's powers. The committee notes that new sections 15D and 15P require that statements be included in the Register or the compilation regarding changes made, including brief outlines of the change in general terms. Further, the committee notes that incorrect versions will not be removed from the Register.[62] The committee is satisfied that sufficient information will exist on the Register for users to track corrections and editorial changes made by the FPC.

3.68 The Clerk of the Senate appropriately highlighted the potential for tension to exist between the correction and editorial powers granted to FPC under the bill and the existing parliamentary mechanisms for corrections to bills. Given that the some discretion must be exercised by the FPC in administering the Register, this issue can only be resolved through increased parliamentary scrutiny. The committee welcomes the Attorney-General's commitments that OPC will include a section in its annual reports summarising the use of the correction power and the editorial change power in each financial year.[63] This reporting will facilitate scrutiny and oversight of these powers by the Parliament, including through the Senate estimates process. The committee notes that should the correction or editorial change powers be inappropriately utilised the potential consequences are likely to be significant.

3.69 The committee appreciates the detailed responses to questions on notice provided by the Attorney-General during the inquiry. However, some ambiguity remains in relation to how the new regime will operate in practice. This is not surprising given the large number of technical amendments contained in the bill. The bill repeals existing section 59 of the LIA which provided for the 2008 statutory review of the operation of the LIA. The committee considers it would be prudent to include a provision for a similar statutory review of the 'Legislation Act 2003' to be conducted five years after commencement. As with the 2008 review, the report of this review should be provided initially to the Attorney-General and then the Parliament.

3.70 The committee notes that the bill, and its associated regulations, may impact on the work of the scrutiny committees of the Parliament: the Senate Scrutiny of Bills Committee; the Senate Regulations and Ordinances Committee; and the Parliamentary Joint Committee on Human Rights. Clearly, if these scrutiny committees have concerns in relation to the provisions of the bill, they should be given immediate consideration by the Senate.

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62 Attorney-General's responses to questions on notice, Attachment A, p. 2.

63 Attorney-General's responses to questions on notice, Attachment A, pp 3, 6.

Recommendation 1

3.71 The committee recommends that item 83 of Schedule 1 of the bill be amended to require a review of the operation of the proposed Legislation Act 2003, in similar terms to existing section 59 of the *Legislative Instruments Act 2003,* to be conducted five years after commencement.

Recommendation 2

3.72 Subject to recommendation 1, the committee recommends that the Senate pass the Acts and Instruments (Framework Reform) Bill 2014.

Senator the Hon Ian Macdonald
Chair