



Senate Standing Committee on Regulations and Ordinances Amendments to Senate standing orders 23 and 25(2)(a)

Overview

On 27 November 2019, the Senate agreed to General Business Notice of Motion No. 84 standing in the name of the Chair of the Senate Standing Committee on Regulations and Ordinances. The motion implements recommendations 1–7, 12 and 13 of the committee's inquiry [report](#), *Parliamentary scrutiny of delegated legislation*, to amend Senate standing orders 23 and 25(2)(a) with effect from 4 December 2019.

This briefing paper outlines the purpose, background and nature of the amendments, and cites the corresponding discussion and recommendation of the inquiry [report](#). A copy of the amended standing orders is reproduced in Appendix A to this document. Further information is contained in Chapters 2, 3 and 6 of that report, available on the committee's [website](#).

Purpose

The amendments to standing orders 23 and 25(2)(a) implement the unanimous recommendations of the committee's bipartisan [report](#) of its [inquiry](#) into parliamentary scrutiny of delegated legislation. Specifically, they clarify the committee's powers and functions, and address gaps in the broader framework of parliamentary scrutiny of delegated legislation, by:

- changing the committee's name;
- amending the scope of the instruments that can be considered by the committee;
- providing for the election, rather than appointment, of a Deputy Chair;
- clarifying that the committee may review draft delegated legislation in accordance with its scrutiny principles;
- providing the committee with permanent general inquiry powers;
- enabling the committee to self-initiate inquiries into matters exclusively related to the technical scrutiny of delegated legislation;
- clarifying the scope of the committee's scrutiny principles;
- enabling the committee to identify, but not assess, issues in delegated legislation likely to be of interest to the Senate; and
- clarifying the power of the legislation standing committees to inquire into and report on delegated legislation made in the portfolios allocated to them.

Background

In late 2018, the committee unanimously resolved to seek a referral from the Senate to inquire into its own role and future direction and, more broadly, the adequacy of the existing framework for parliamentary scrutiny and control of delegated legislation. The committee's decision to seek the referral was informed by a range of matters, including the increasing volume and complexity of delegated legislation, coupled with the lack of substantive changes to the committee's scrutiny principles since 1979.

On 29 November 2018, the Senate referred the following matters to the committee for inquiry and report:

- (1) The continuing effectiveness, role and future direction of the Senate Standing Committee on Regulations and Ordinances, including:
 - (a) whether the committee's powers remain appropriate;
 - (b) the adequacy of the principles by which the committee scrutinises delegated legislation, including the committee's ability to fully consider:
 - (i) the constitutional authority for delegated legislation,
 - (ii) administrative law principles, and
 - (iii) principles of democratic accountability; and
 - (c) the adequacy of the existing framework for parliamentary control and scrutiny of delegated legislation, and whether this framework should be enhanced.
- (2) In undertaking this inquiry, the committee should have regard to the role, powers and practices of similar parliamentary committees, including those in other jurisdictions.
- (3) The committee be authorised to hold public hearings in relation to this inquiry and to move from place to place.

The committee received 14 public submissions from government departments, academics, scrutiny committees in other Australian jurisdictions and other interested parties. In addition, between 2 and 14 March 2019, the (then) committee Chair, Senator John Williams, and Deputy Chair, Senator Gavin Marshall, formed a delegation to travel to the United Kingdom and New Zealand to inform the work of the inquiry. The delegation met with a number of scrutiny committees and subject matter experts who provided important insights into matters relating to the terms of reference.

The committee presented its report to the Senate on 3 June 2019. It was subsequently tabled on 2 July 2019. The report makes 22 recommendations, regarding the committee's powers and scrutiny principles, and the broader parliamentary framework for the scrutiny of delegated legislation. Recommendations 1–7, 12 and 13 relate to the Senate standing orders. These are summarised below.

Amendments to standing order 23 (Inquiry Report Chapters 2 & 3)

Committee name

Standing order 23(1); Inquiry Report Rec 1, pp. 15–17

When the committee was established in 1932, its scrutiny functions were limited to regulations and ordinances, as reflected by the committee's name. However, in 1979, the committee's powers were formally expanded to enable the committee to consider 'all regulations, ordinances and other instruments made under the authority of the Acts of the Parliament'. The committee considered that its name should be amended to the 'Senate Standing Committee for the Scrutiny of Delegated Legislation', to accurately reflect the committee's scrutiny practices over the last 40 years, promote consistency with the naming of the Scrutiny of Bills committee, and inform senators and members of the public of the work it undertakes.

Scope of instruments that can be considered by the committee

Standing order 23(2); Inquiry Report Rec 2, pp. 17–19

The committee did not previously have the power to scrutinise instruments which are subject to affirmative resolution procedures. This contrasted with the approach in other Westminster-style jurisdictions in Australia and overseas, in which scrutiny committees are required to consider all legislative instruments laid before the Parliament. To address this gap in the framework for parliamentary scrutiny of delegated legislation, the committee considered that the standing orders should be amended to enable the committee to consider, and, if necessary, report on all legislative instruments subject to disallowance, disapproval or affirmative resolution.

Election of a Deputy Chair

Standing order 23(9); Inquiry Report Rec 3, pp. 19–20

Prior to the amendment, the standing orders provided the Chair may appoint a member of the committee to be Deputy Chair. By convention, the Deputy Chair has been a non-government senator; however, this was not required by the standing orders. In contrast, the Scrutiny of Bills committee and general purposes references and legislation committees provide for the election of the Deputy Chair. Accordingly, in the interests of consistency, the committee considered that it would be appropriate to amend the standing orders to provide for the committee to elect as Deputy Chair a committee member appointed on the nomination of the Leader of the Opposition in the Senate.

Review of draft delegated legislation in accordance with the committee's scrutiny principles

Standing order 23(5); Inquiry Report Rec 4, pp. 21–22

The committee was previously not expressly empowered to consider draft delegated legislation, and there was no established process by which draft instruments are considered. By contrast, the Scrutiny of Bills committee is expressly empowered to consider 'any proposed law or other document or information available to it, including an exposure draft of proposed legislation'. The committee considered there is merit in amending the standing orders to expressly empower it to consider draft delegated legislation (for example, exposure drafts and instruments that have not yet been registered), as well as other relevant information. This is consistent with the powers currently conferred on the Scrutiny of Bills committee.

Permanent general inquiry and reporting powers

Standing order 23(11); Inquiry Report Rec 5, pp. 23–25

The committee had the power to send for persons and documents, and to sit during recess; however, in contrast to the Scrutiny of Bills committee, it lacked the express power to take evidence in public, to meet outside Parliament House, or to conduct inquiries where the Parliament has been dissolved or prorogued. Where the committee requires such powers, it had to seek that they be conferred by resolution of the Senate.

The committee rarely seeks that the Senate confer inquiry powers, and rarely makes use of its existing inquiry powers (for example, to send for persons and documents) as part of its routine scrutiny work. Nevertheless, the committee's lack of inquiry powers was inconsistent with other Senate standing committees, and reflected a potential gap in the committee's scrutiny functions. Consequently, the committee considered that the standing orders should be amended to provide the committee with permanent inquiry and reporting powers.

Self-initiated inquiry power into matters exclusively related to the technical scrutiny of delegated legislation

Standing order 23(12); Inquiry Report Rec 6, pp. 25–29

Prior to the amendments, the committee could only conduct an inquiry with referral by the Senate. The committee was concerned that this process did not appropriately adapt to its unique, non-partisan, technical scrutiny role. For example, the committee may wish to conduct a shorter, time-sensitive inquiry into a novel, yet technical, scrutiny issue. In these circumstances, a requirement to seek a referral from the Senate may result in delays which limit the value of the inquiry. Alternatively, the committee may wish to conduct a lengthy inquiry into a systemic issue associated with the scrutiny of delegated legislation—for example, to inform its core scrutiny work on an ongoing basis. The specific reporting deadlines typically imposed by the Senate may interfere with this process.

Equivalent scrutiny committees in the ACT, Western Australia and New Zealand have the power to self-initiate inquiries into issues relating to their technical scrutiny functions. The committee considered that there would be substantial merit in providing it with permanent powers to self-initiate inquiries exclusively into matters related to its existing technical scrutiny role. This will allow the committee to investigate, and potentially resolve, recurring or systemic concerns associated with the scrutiny of delegated legislation. Such a power may also assist in clarifying the committee's expectations for ministers, agencies and other relevant stakeholders. The committee also considered that it may be useful to enable it to appoint sub-committees, who may conduct such inquiries on the committee's behalf.

The committee reiterates that it could **not** use such a power to inquire into matters beyond the technical scrutiny of delegated legislation. If the committee wanted to inquire into a more significant matter, it would still need to seek the Senate's approval to do so.

Scope of the committee's scrutiny principles

Standing order 23(3); Inquiry Report Rec 7, pp. 33–63

The amendments to the committee's scrutiny principles clarify that the committee is fully able to consider the following matters:

- compliance with legislation;
- constitutional validity;
- whether administrative powers are defined with sufficient precision;
- consultation;
- the clarity of drafting and information in the explanatory materials;
- accessibility of the law (including any materials incorporated into it);
- whether an instrument unduly trespasses on personal rights and liberties;
- availability of independent review of decisions;
- whether an instrument contains matters more appropriate for parliamentary enactment; and
- any other relevant matters relating to the technical scrutiny of delegated legislation only.

The committee has traditionally interpreted its scrutiny principles broadly. Consequently, it already scrutinised disallowable legislative instruments in accordance with the majority of the matters listed above (mostly under its scrutiny principle (a), 'in accordance with the statute'). These amendments separately identify these matters, to clarify the scope of the committee's scrutiny functions and to provide clearer guidance to senators, ministers and departmental officials as to the committee's role and expectations.

Enabling the committee to identify (but not assess) significant issues in delegated legislation likely to be of interest to the Senate

Standing order 23(4); Inquiry Report Rec 12, pp. 99–106

The amendments to standing order 23 also permit the committee to draw the Senate's attention to matters in delegated legislation which the committee considers may raise significant issues, or otherwise give rise to issues likely to be of interest to the Senate. Importantly, the amendment does **not** permit the committee to assess the policy merits of such issues. The amendment simply facilitates the identification of matters in delegated legislation which might appropriately become the subject of investigation by other relevant legislation or joint committees, while preserving this committee's commitment to technical, non-partisan scrutiny.

Amendments to Standing Order 25 (Inquiry Report Chapter 6)

Power of legislation standing committees to inquire into and report on delegated legislation made in the portfolios allocated to them

Standing order 25(2)(a); Inquiry Report Rec 13, pp. 99–106

The amendment to standing order 25 clarifies that the powers of the legislation standing committees include the power to inquire into and report on delegated legislation made in the portfolios allocated to the relevant committee, in addition to the primary legislation for which those portfolios have responsibility. The purpose of this amendment is to promote the policy scrutiny of delegated legislation by the Parliament, without compromising this particular committee's strong and longstanding commitment to technical, non-partisan scrutiny.

The amendment to standing order 25(2)(a) does not require the legislation committees to inquire into and report on all delegated legislation made in the portfolios allocated to them. This is consistent with the interpretation of existing standing order 25(2)(a), which does not require the legislation committees to report separately on the performance of government agencies, although they may do so (*Odgers*, [Chapter 16](#), under 'Performance of government agencies'). In practice, if the Scrutiny of Delegated Legislation committee considers an instrument may raise significant issues, or otherwise give rise to issues likely to be of interest to the Senate, the committee will advise the relevant legislation committee of its view. The legislation committee can then decide whether to inquire into and report on the instrument.

Transitional arrangements

To avoid confusion, the notice of motion to amend the standing orders clarified that the initial members of the Standing Committee for the Scrutiny of Delegated Legislation would be the members of the Standing Committee on Regulations and Ordinances, and would have the power to consider and use the records of the standing Committee on Regulations and Ordinances.

Appendix A: Senate standing orders 23 and 25(2)(a)

23 Scrutiny of Delegated Legislation

- (1) A Standing Committee for the Scrutiny of Delegated Legislation shall be appointed at the commencement of each Parliament.
- (2) All instruments made under the authority of Acts of the Parliament, which are subject to disallowance, disapproval or affirmative resolution by the Senate and which are of a legislative character, shall stand referred to the committee for consideration and, if necessary, report.
- (3) The committee shall scrutinise each instrument as to whether:
 - (a) it is in accordance with its enabling Act and otherwise complies with all legislative requirements;
 - (b) it appears to be supported by a constitutional head of legislative power and is otherwise constitutionally valid;
 - (c) it makes rights, liberties, obligations or interests unduly dependent on insufficiently defined administrative powers;
 - (d) those likely to be affected by the instrument were adequately consulted in relation to it;
 - (e) its drafting is defective or unclear;
 - (f) it, and any document it incorporates, may be freely accessed and used;
 - (g) the accompanying explanatory material provides sufficient information to gain a clear understanding of the instrument;
 - (h) it trespasses unduly on personal rights and liberties;
 - (i) it unduly excludes, limits or fails to provide for independent review of decisions affecting rights, liberties, obligations or interests;
 - (j) it contains matters more appropriate for parliamentary enactment; and
 - (k) it complies with any other ground relating to the technical scrutiny of delegated legislation that the committee considers appropriate.
- (4) The committee shall also scrutinise each instrument to determine whether the attention of the Senate should be drawn to the instrument on the ground that it raises significant issues, or otherwise gives rise to issues that are likely to be of interest to the Senate.
- (5) The committee may, for the purpose of reporting on its terms of reference, consider any proposed or draft legislative instrument, including an exposure draft of such an instrument.
- (6)
 - (a) The committee shall consist of 6 senators, 3 being members of the government party nominated by the Leader of the Government in the Senate, and 3 being senators who are not members of the government party, nominated by the Leader of the Opposition in the Senate or by any minority groups or independent senators.

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- (b) The nominations of the opposition or any minority groups or independent senators shall be determined by agreement between the opposition and the minority groups or independent senators, and, in the absence of agreement duly notified to the President, the question of the representation on the committee shall be determined by the Senate.
- (7) The committee may appoint sub-committees consisting of 3 or more of its members, and refer to any such sub-committee any matters which the committee is empowered to consider.
- (8) The committee shall elect as chair a member appointed to the committee on the nomination of the Leader of the Government in the Senate.
- (9) The committee shall elect as deputy chair a member appointed to the committee on the nomination of the Leader of the Opposition in the Senate, and the member so elected shall act as chair of the committee when there is no chair or the chair is not present at a meeting of the committee.
- (10) Where votes on a question before the committee are equally divided, the chair, or the deputy chair when acting as chair, shall have a casting vote.
- (11) The committee and any sub-committee shall have power to send for persons and documents, to move from place to place, and to meet and transact business in public or private session and notwithstanding any prorogation of the Parliament or dissolution of the House of Representatives.
- (12) The committee may inquire into and report on any matter related to the technical scrutiny of delegated legislation.
- (13) The committee may appoint with the approval of the President a legal adviser to the committee.
- (14) The committee shall be empowered to print from day to day any of its documents and evidence. A daily Hansard shall be published of public proceedings of the committee.
- (15) The committee may report from time to time its proceedings and evidence and any recommendations, and shall make regular reports of the progress of the proceedings of the committee.

25 Legislative and general purpose

- (2) (a) The legislation committees shall inquire into and report upon:
- (i) estimates of expenditure in accordance with standing order 26,
 - (ii) bills or draft bills referred to them by the Senate,
 - (iii) legislative instruments made in the portfolios allocated to them,
 - (iv) annual reports in accordance with paragraph (20), and
 - (v) the performance of departments and agencies allocated to them.