

The Senate

Standing
Committee on
Regulations and
Ordinances

Annual Report 2018

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Senator John Williams (Chair)	New South Wales, NAT
Senator Gavin Marshall (Deputy Chair)	Victoria, ALP
Senator Anthony Chisholm	Queensland, ALP
Senator Steve Martin	Tasmania, NAT
Senator the Hon Lisa Singh	Tasmania, ALP
Senator Amanda Stoker	Queensland, LP

Members in 2018

Senator John Williams (Chair)	New South Wales, NAT
Senator Gavin Marshall (Deputy Chair)	Victoria, ALP
Senator Anthony Chisholm	Queensland, ALP
Senator Jane Hume	Victoria, LP
Senator Linda Reynolds CSC	Western Australia, LP
Senator the Hon Lisa Singh	Tasmania, ALP
Senator Steve Martin	Tasmania, NAT
Senator Amanda Stoker	Queensland, LP

Secretariat in 2018¹

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1 The secretariat is staffed by parliamentary officers drawn from the Department of the Senate's Legislative Scrutiny Unit, who regularly work across multiple scrutiny committee secretariats. The secretariat usually comprises three to four staff.

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Chapter 1

Introduction

Work of the committee

1.1 The Senate Standing Committee on Regulations and Ordinances (the committee) was established in 1932. Its role is to examine all disallowable instruments of delegated legislation,¹ and to decide whether those instruments comply with the committee's non-partisan scrutiny principles, which focus on statutory requirements, the protection of individual rights and liberties, and ensuring appropriate parliamentary oversight. In most years, hundreds if not thousands of instruments of delegated legislation are made, relating to many aspects of the lives of people living in, trading with, or seeking to live or work in Australia. Instruments of delegated legislation have the same force in law as primary legislation, and may form as much as half of the statutory law of the Commonwealth of Australia.²

1.2 The committee's work may be broadly described as technical legislative scrutiny. The committee does not generally consider the policy merits of delegated legislation (although the policy content of an instrument may provide context for the committee's scrutiny). The scope of the committee's scrutiny function is formally defined by Senate standing order 23(3), which requires the committee to scrutinise each disallowable instrument of delegated legislation to ensure:

- (a) that it is in accordance with the statute;
- (b) that it does not trespass unduly on personal rights and liberties;
- (c) that it does not make the rights and liberties of citizens unduly dependent on administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal; and
- (d) that it does not contain matter more appropriate for parliamentary enactment.

1.3 The committee's work is supported by processes for the registration, tabling and disallowance of legislative instruments set out in the *Legislation Act 2003* (Legislation Act). These matters are discussed further in Chapter 2.

1.4 This annual report covers the period from 1 January to 31 December 2018.

1 The committee also scrutinises instruments that are not subject to disallowance. However, it only comments on such instruments if they have been misclassified as non-disallowable.

2 *Odgers' Australian Senate Practice*, 14th Edition (2016), p. 432.

Committee membership

1.5 Senate standing order 23 provides for the committee to be appointed at the commencement of each Parliament. The committee must comprise six members: three government senators and three non-government or independent senators. The committee is to be chaired by a government senator.

1.6 The current committee members, as well as a list of members for 2018, can be found at the beginning of this report. A list of current committee members, updated from time to time, can also be found on the committee's website.³

The committee's mode of operation

1.7 In undertaking its work, the committee is supported by a secretariat usually comprising a secretary, principal research officer, senior research officer and legislative research officer.

1.8 The committee also obtains advice from an external legal adviser, who is appointed by the committee with the approval of the President of the Senate. Mr Stephen Argument and Associate Professor Andrew Edgar served as the committee's legal advisers during the reporting period.⁴

Delivery of instruments

1.9 Under the Legislation Act, all legislative instruments must be registered on the Federal Register of Legislation as soon as practicable after they are made, and must be tabled in both Houses of Parliament within six sitting days of registration.⁵ Once registered, instruments are delivered by the Office of Parliamentary Counsel to Parliament for tabling, and to the committee secretariat.

Scrutiny of instruments

1.10 Instruments tabled in Parliament are scrutinised by the committee secretariat and the legal adviser against the committee's scrutiny principles.

1.11 The committee meets regularly during sittings of Parliament to consider any instruments that may give rise to concern in relation to its scrutiny principles. Where an instrument raises such a concern, the committee's usual approach is to comment

3 https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Committee_Membership.

4 Within the reporting period, Mr Stephen Argument served as the committee's legal adviser from 1 January 2018 to 30 June 2018. Associate Professor Edgar served as the committee's legal adviser from 1 July 2018 onwards.

5 *Legislation Act 2003*, sections 15G, 15H and 38.

on it in the *Delegated Legislation Monitor* (Monitor), then write to the responsible minister seeking further explanation or information or requesting specific action to address the relevant issue.

The committee's use of the disallowance process

1.12 The committee's scrutiny of instruments is generally conducted within the timeframes that apply to the disallowance process (discussed further in Chapter 2). Working within these timeframes ensures that the committee is able, if necessary, to seek disallowance of an instrument about which it has concerns. The Senate has never rejected a recommendation from the committee that an instrument should be disallowed.⁶

1.13 In cases where the 15 sitting days available for giving a notice of motion for disallowance are likely to expire before a matter is resolved, the committee may lodge a notice of motion for disallowance in order to protect the Senate's ability to subsequently disallow the instrument in question.⁷ This extends the applicable disallowance period by a further 15 sitting days. The committee refers informally to these notices as 'protective' notices.

1.14 In the vast majority of cases, these 'protective' notices are withdrawn when the committee receives a satisfactory response from the minister, for example providing information that addresses the committee's concerns or undertaking to amend the instrument or its explanatory statement. Where a satisfactory response is received, the committee's usual process is for the chair to withdraw the notice of motion, having first notified the Senate of the intention to do so.⁸

Undertakings

1.15 In many cases, ministers provide an undertaking to address the committee's concerns by taking steps at some point in the future. Typically, ministers will undertake to amend the instrument or its explanatory statement. The acceptance of such undertakings by the committee has the benefit of securing an acceptable outcome in relation to the committee's scrutiny concerns without interrupting the administration of government by disallowing the instrument in question.

6 *Odgers' Australian Senate Practice*, 14th Edition (2016), p. 437.

7 *Odgers' Australian Senate Practice*, 14th Edition (2016), p. 438.

8 Senate Standing Order 78 provides that any other senator may take over a notice of motion for disallowance once the intention to withdraw is advised to the chamber, and before the notice is withdrawn. A senator who does so may then pursue the disallowance motion on any grounds he or she wishes.

Interaction with other legislative scrutiny committees

1.16 The committee is one of three legislative scrutiny committees in the Commonwealth Parliament. The other two committees are the Parliamentary Joint Committee on Human Rights (PJCHR)⁹ and the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee).¹⁰ The three committees together make up the Legislative Scrutiny Unit.

1.17 The work of these three committees is complementary in many respects. The committee therefore monitors the work of the PJCHR and the Scrutiny of Bills committee and, where appropriate, considers relevant matters raised by these committees or refers matters to them.

Committee publications

1.18 Committee publications may be accessed on the committee's home page.¹¹ A brief overview of these publications is provided below.

Delegated Legislation Monitor¹²

1.19 The Monitor is the regular scrutiny report on the work of the committee. It is published in each sitting week of the Senate. The Monitor details matters of concern in relation to disallowable instruments of delegated legislation that are tabled in the Senate and scrutinised by the committee. It also contains comments on any instruments that have been misclassified as exempt from disallowance, or misclassified as disallowable.

1.20 Once responses are received from ministers in relation to instruments of concern, the Monitor sets out details of the responses, the committee's comment on them, and any relevant action taken.

1.21 The 'concluded' entries in the Monitor formerly included the full text of the committee's initial comments. However, in the interests of shortening the Monitor and increasing accessibility for readers, since September 2018 the full text is no longer included. Instead, each 'concluded' entry now provides a hyperlink to the associated 'response required' or 'further response required' entry, and sets out the committee's questions to the relevant minister in full.

9 www.aph.gov.au/joint_humanrights.

10 www.aph.gov.au/senate_scrutiny.

11 www.aph.gov.au/senate_regord_ctte.

12 Monitors for 2018, and for previous years, may be accessed via the committee's webpage.

Scrutiny News

1.22 The committee secretariat prepares a brief *Scrutiny News* publication each sitting week which is sent to all senators and their staff, committee office staff, and interested external individuals and organisations that have subscribed to the scrutiny mailing list. *Scrutiny News* highlights recent comments drawn from material in the committee's Monitor and the Scrutiny of Bills committee's *Scrutiny Digest*, with a particular focus on complex issues. *Scrutiny News* is also used to raise awareness about the committees and their functions.

1.23 *Scrutiny News* formerly included only information about bills considered by the Scrutiny of Bills committee. Information regarding the committee's consideration of delegated legislation was added to *Scrutiny News* from February 2018.

1.24 Editions of *Scrutiny News*, as well as information about subscribing to the mailing list, are available on the Scrutiny of Bills committee's website.¹³

Guidelines

1.25 The committee has published guidelines on a number of matters relevant to its scrutiny work. These matters include:

- the application of the committee's scrutiny principles;
- general requirements for preparing explanatory statements;
- addressing consultation in explanatory statements;
- incorporation of documents;
- regulations that amend the Financial Framework (Supplementary Powers) Regulations 1997; and
- instruments that amend or repeal other instruments.

1.26 The guidelines are regularly reviewed by the committee's secretariat, and are amended as necessary.

Index of instruments

1.27 The index of instruments is an alphabetical list of all instruments about which the committee has raised a concern in a particular year. Full comments on individual matters are contained in the relevant Monitor referenced in the index.

13 https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills/Scrutiny_News.

Disallowance Alert

1.28 The Disallowance Alert is a webpage listing all instruments for which a notice of motion for disallowance has been lodged in either House (whether by the committee or by an individual senator or member). The progress and outcome of all disallowance notices is also recorded.

Other resources

1.29 A number of other resources relevant to the committee can be accessed on the Senate website.¹⁴ A brief overview of these resources is provided below.

Senate Disallowable Instruments List

1.30 The Senate Disallowable Instruments List is a list of all disallowable instruments tabled in the Senate.¹⁵ This online resource may be used to ascertain whether or when an instrument has been tabled in the Senate, and how many sitting days remain in which a notice of motion for disallowance may be given. The list is updated after each sitting day.

Senate seminars on scrutiny of delegated legislation

1.31 The Senate Procedure and Research Section organises half-day seminars on the scrutiny of delegated legislation. These are tailored to parliamentary staff, government officers and other stakeholders whose work or interests intersect with the work of the committee.

Brief Guides to Senate Procedure

1.32 The Brief Guides to Senate Procedure are a series of guidance notes designed to provide a practical understanding of the procedures governing the work of the Senate. Of particular relevance to the work of the committee is Brief No. 19 on Disallowance.

Odgers' Australian Senate Practice

1.33 *Odgers' Australian Senate Practice* is an authoritative reference work on all aspects of the Senate's powers, procedures and practices.

14 http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/leginstruments.

15 As instruments may be tabled on different dates in the Senate and the House of Representatives respectively (and hence have different disallowance timeframes in each House), there is also a House of Representatives disallowable instruments list, available at https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/leginstruments/house-dissallowable-instruments.

Acknowledgements

1.34 The committee greatly appreciates the assistance of its legal advisers during the reporting period, Mr Stephen Argument and Associate Professor Andrew Edgar.

1.35 The committee also wishes to acknowledge the assistance of ministers, departments and agencies during the reporting period. The responsiveness of ministers, departments and agencies to the committee's inquiries is critical to ensuring that the committee can perform its scrutiny function effectively.

Chapter 2

Delegated legislation and the disallowance process

Introduction

2.1 This chapter provides an overview of delegated legislation, the disallowance process and the *Legislation Act 2003* (Legislation Act).

What is delegated legislation?

2.2 Many Acts of Parliament delegate to the executive government (for example, ministers, senior officials and government agencies) the power to make regulations, ordinances, rules and other instruments. Such instruments supplement their authorising Acts and have the same force of law. 'Delegated legislation' (sometimes also referred to as 'subordinate legislation' or 'secondary legislation') is a collective term referring to all such instruments.

2.3 Because they are made under a delegated power, instruments of delegated legislation are not directly enacted by Parliament (as must happen for a bill to become an Act). Therefore, to ensure that Parliament retains effective oversight of delegated legislation, legislative instruments are usually:

- required to be registered on the Federal Register of Legislation (FRL);¹
- required to be tabled in Parliament; and
- subject to disallowance by either House of Parliament under a process set out in the Legislation Act.

What is a legislative instrument?

2.4 Section 8 of the Legislation Act defines a legislative instrument. The section provides that a legislative instrument is any instrument declared as such by the law under which it is made, as well as any instrument registered as a legislative instrument on the FRL. More generally, subsection 8(4) of the Legislation Act states that an instrument is a legislative instrument if:

- (a) the instrument is made under a power delegated by the Parliament; and
- (b) any provision of the instrument:
 - (i) determines the law or alters the content of the law, rather than determining particular cases or particular circumstances in which the

1 See <https://www.legislation.gov.au>.

law, as set out in an Act or another legislative instrument or provision, is to apply, or is not to apply; and

(ii) has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right.

2.5 The Legislation Act also specifies that certain types of instruments are legislative instruments. These include regulations, proclamations (other than commencement proclamations), territory ordinances, instruments made under such ordinances, instruments prescribed by particular regulations, and instruments that amend or repeal other legislative instruments.²

2.6 In addition, the Legislation Act provides that particular instruments are not legislative instruments. These include notifiable and commencement instruments, rules of court, and other instruments declared by an Act or particular regulations not to be legislative instruments.³

Requirements of the *Legislation Act 2003*

2.7 The Legislation Act sets out various requirements that apply to legislative instruments and their explanatory statements. The main elements of the scheme in the Legislation Act for the enactment of legislative instruments are:

- legislative instruments must be registered on the FRL, along with an accompanying explanatory statement;
- instruments commence (that is, take legal effect) on the day after their registration, or as otherwise provided by the instrument;
- once registered, all legislative instruments must be delivered within six sitting days to each House of Parliament for tabling;⁴ and
- any member of the Senate or the House of Representatives may initiate the process to disallow a legislative instrument within 15 sitting days of it being tabled.⁵ Once the process has been initiated (by notice of motion in the relevant House of Parliament) has been given, a period of 15 sitting days is available in which to decide whether to disallow the instrument.

2 *Legislation Act 2003*, section 10.

3 *Legislation Act 2003*, subsection 8(6) and 8(8).

4 Under section 38 of the *Legislation Act 2003*, an instrument that is not tabled in each House within six sitting days of registration ceases to have effect immediately after the sixth day.

5 While all legislative instruments are required to be tabled in Parliament, some instruments are not subject to disallowance in accordance with section 44 of the *Legislation Act 2003*. Further and as noted in paragraph [2.14], the disallowance process may in some cases be modified by other legislation.

Disallowance

2.8 The ability for the executive to make delegated legislation without parliamentary enactment may be considered a 'violation of the principle of the separation of powers, the principle that laws should be made by the elected representatives of the people in Parliament and not by the executive government'.⁶

2.9 The ability of either the Senate or the House of Representatives to disallow legislative instruments is therefore critical to ensuring that Parliament retains effective oversight of delegated legislation. All legislative instruments are subject to disallowance unless they are exempted by law. In this respect, section 44 of the Legislation Act provides that certain legislative instruments are exempt from disallowance. These include:

- instruments made under an Act which facilitates the establishment or operation of an intergovernmental body or scheme, and which authorises the instrument to be made for those purposes;⁷
- instruments listed in regulations made under the Legislation Act;⁸ and
- instruments expressly exempted by another Act from the disallowance provisions of the Legislation Act.

The disallowance process

2.10 The disallowance process is set out in subsection 42(1) of the Legislation Act, which provides that any member of the Senate or House of Representatives may, within 15 sitting days of a disallowable legislative instrument being tabled in the relevant House of Parliament, give notice that they intend to move a motion to disallow the instrument or a provision of the instrument. The period begins on the first sitting day after the relevant instrument is tabled.⁹

2.11 There is then a period of 15 sitting days from the date on which the notice of motion is given in which that motion may be resolved. This period similarly begins on the first sitting day after the motion is given. During that period, if the House in

6 *Odgers' Australian Senate Practice*, 14th Edition (2016), p. 429.

7 This exemption does not apply to regulations, to instruments made under the *Corporations Act 2001*, or in cases where the enabling legislation or another Act of Parliament provides that the relevant instrument is disallowable.

8 See Legislation (Exemptions and Other Matters) Regulation 2015. Sections 9 and 10 of those regulations, respectively, exempt classes of legislative instruments and particular legislative instruments from disallowance.

9 *Legislation Act 2003*, paragraph 42(1)(a).

which the motion was given resolves to disallow the instrument or provision, the instrument is repealed immediately after the passing of the resolution.¹⁰

2.12 The maximum time for the entire disallowance process to run its course is therefore 30 sitting days (assuming the maximum available period elapses for both the giving of notice and the resolution of the motion).

2.13 Subsection 42(2) of the Legislation Act further provides that, if a notice of motion to disallow a legislative instrument or a provision of an instrument remains unresolved at the end of 15 sitting days after it was given, the instrument or provision is deemed to have been disallowed and is repealed at that time. This provision ensures that the disallowance process cannot be frustrated by allowing a motion for disallowance to be adjourned indefinitely.

Unusual disallowance processes

2.14 In some cases, the disallowance process may be modified by the authorising legislation under which an instrument is made. This affects the period available for giving or resolving a notice of motion for disallowance. For example, for determinations made under subsections 78(1) or (3) of the *Public Governance, Performance and Accountability Act 2013*, the time available for both giving and resolving a notice of motion for disallowance is five sitting days.¹¹

Effect of disallowance

2.15 Where a legislative instrument or a provision of an instrument is disallowed, that instrument or provision is repealed at the time the disallowance motion was passed or was deemed to have passed.¹² Disallowance does not remove the legal effect of the instrument, or acts done under it, between the time it commenced and the time it was disallowed.

2.16 Further, if the disallowed instrument or provision repealed all or part of an earlier instrument, then that earlier instrument or part is revived.¹³

Restrictions on re-making legislative instruments

2.17 In order to ensure that Parliament's power of disallowance may not be circumvented, and to preserve Parliament's intention where a House has disallowed an instrument, the Legislation Act imposes restrictions on the re-making of legislative instruments that are the 'same in substance' as an existing or recently disallowed instrument. These are:

10 *Legislation Act 2003*, paragraph 42(1)(b).

11 *Public Governance, Performance and Accountability Act 2013*, section 79.

12 *Legislation Act 2003*, subsections 42(1) and 42(2).

13 *Legislation Act 2003*, subsection 45(2).

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- for a period of seven days, unless approved by resolution by both Houses of Parliament, an instrument may not be made that is the same in substance as a registered instrument that has been tabled before Parliament;¹⁴
 - an instrument may not be made that is the same in substance as an existing instrument subject to an unresolved notice of motion for disallowance;¹⁵ and
 - for a period of six months after an instrument is disallowed under section 42 of the Legislation Act, an instrument may not be made that is the same in substance as the disallowed instrument (unless the House in which the instrument was disallowed rescinds the resolution that disallowed the instrument, or approves it being made).¹⁶

Senate procedures relating to the disallowance process

2.18 A number of the Senate's procedures are relevant to the disallowance process in the Legislation Act.

2.19 Senate standing order 78 is a significant example of a relevant procedure. That order requires any senator who wishes to withdraw a notice of motion to disallow an instrument to first give notice to the Senate of their intention to withdraw the motion. Any other senator may then indicate to the Senate an objection to the withdrawal of the notice, and put their name to the relevant notice. This ensures that the Senate is not denied the right to disallow an instrument where the time for giving notice has passed; and that the right of individual senators to move for disallowance is not lost by the withdrawal of the notice.

2.20 Another example is Senate standing order 86, which prohibits proposing a question that is the same in substance as any question that has been determined during the same session (the 'same question' rule).¹⁷ This order is qualified by the proviso that it shall not prevent a motion for the disallowance of an instrument substantially the same in effect as one previously disallowed.

2.21 For further detail on Senate procedures relevant to delegated legislation and disallowance, see *Odgers' Australian Senate Practice*, 14th Edition (2016), Chapter 15.

14 *Legislation Act 2003*, section 46.

15 *Legislation Act 2003*, section 47.

16 *Legislation Act 2003*, section 48.

17 *Odgers' Australian Senate Practice* notes, however, that 'the same question rule is seldom applied, because it seldom occurs that a motion is exactly the same as a motion moved previously. Even if the terms of a motion are the same as one previously determined, the motion almost invariably has a different effect because of changed circumstances and therefore is not the same motion. There may also be different grounds for moving the same motion again'. *Odgers' Australian Senate Practice*, 14th Edition (2016), p. 449.

Chapter 3

Work of the committee in 2018

3.1 This chapter provides information about the work of the committee in 2018, including statistics, matters of note and some routine matters. Examples provided in the 'matters of note' and 'routine matters' sections illustrate the committee's approach to its scrutiny role and identify more significant, complex or interesting matters of concern assessed against the committee's scrutiny principles.

Statistics

Number of instruments considered

3.2 The committee held 16 private meetings in 2018,¹ at which it considered 1570 disallowable legislative instruments.²

3.3 The number of disallowable instruments received and scrutinised in 2018 was slightly higher than for the previous reporting period (the committee considered 1472 disallowable instruments in 2017), and broadly consistent with other recent reporting periods (1656 disallowable instruments were scrutinised in the 2014–15 financial year, and 1614 in the 2013–14 financial year). A notable exception was that the committee scrutinised 2904 instruments between July 2015 and December 2016. However, this reporting period covered 18 months, rather than the usual 12 months.

3.4 The committee also examined 121 replacement or supplementary explanatory statements to instruments in 2018. This was substantially higher than for the 2017 reporting period, during which the committee examined 74 replacement or supplementary explanatory statements.

Delegated Legislation Monitors

3.5 In 2018, the committee tabled 15 scrutiny reports. The scrutiny report is called the *Delegated Legislation Monitor* (Monitor).³

3.6 In total, the committee made 456 comments in its reports, including initial, further and concluding comments. In some cases, more than one initial comment was made about a single instrument or a single comment was made with reference

1 This includes 15 meetings relating to the scrutiny of instruments and other routine business of the committee, and one extraordinary private meeting for the appointment of a legal adviser.

2 Any instruments that were initially misclassified as disallowable but that were actually exempt from disallowance are not counted in this figure.

3 No. 1 of 2018, tabled on 7 February 2018 to No. 15 of 2018, tabled on 5 December 2018. See https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Monitor/mon2017/index.

to multiple instruments (for example, where multiple instruments within the same portfolio raised the same scrutiny issue).

3.7 Initial concerns were raised and responses requested on 171 instruments, further responses were requested in relation to 16 instruments, 'advice only' comments (drawing an issue to the attention of the minister or the Senate) were made on 91 instruments, and concluding comments were made on 163 instruments.⁴

Instruments of concern

3.8 Of the 1570 disallowable instruments examined by the committee in the reporting period,⁵ 262 were identified as raising one or more concerns (either requiring a response from the relevant minister or written as 'advice only').⁶ The issues raised in relation to the instruments correspond with the committee's four scrutiny principles, as shown in **Table 1** below.

Table 1: Issues identified by the committee in 2018

Type of comment	Issues raised against scrutiny principles under Senate standing order 23(3) ⁷				Total
	(a)	(b)	(c)	(d)	
Response required	111	42	30	14	197
Further response required	8	6	8	1	23
Advice only	38	0	2	25	65
Concluded	107	34	26	4	171
TOTAL	264	82	66	44	456

4 The discrepancy between the number of response required entries and the number of concluded entries arises because some instruments were initially commented on in the previous reporting period, while others will have been concluded in the next reporting period.

5 The committee scrutinises all Commonwealth disallowable legislative instruments. The Monitor may also include comment on instruments which are exempt from disallowance in cases where these were initially misclassified as disallowable.

6 Details of these instruments may be found on the 'Index of Instruments' webpage at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Index.

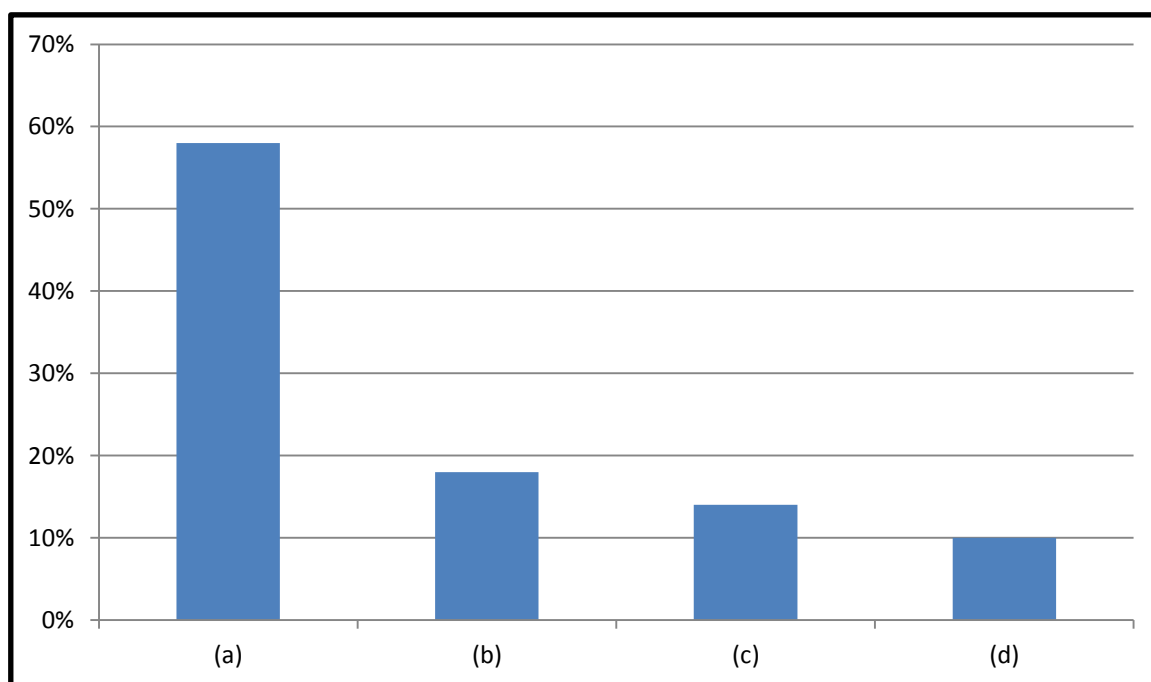
7 On occasion, a comment may refer to more than one scrutiny principle.

3.9 As **Table 1** demonstrates, the large majority of issues related to scrutiny principle (a), which requires that instruments of delegated legislation be made in accordance with statute (including the Legislation Act, the *Acts Interpretation Act 1901* (Interpretation Act), the Constitution, and the Act (or regulations) under which the instrument is made). This was to be expected given that the broad nature of principle (a) captures a wide variety of issues. However, it is noted that there were substantially fewer issues raised under scrutiny principle (a) in 2018 than in 2017.⁸

3.10 The spread of issues across the committee's remaining scrutiny principles also reflects a change from the previous years. In particular, in 2018 there was a substantial increase in the proportion of concerns raised under scrutiny principle (b), which relates to personal rights and liberties, and (c), relating to the availability of independent merits review, on the 2017 reporting period.⁹

3.11 **Figure 3.1** below shows the breakdown of issues against the committee's principles as recorded in the reporting period. 'Issues raised' reflects the 'response required' and 'advice only' entries in the Monitors.

Figure 3.1: Issues raised against committee's scrutiny principles



8 In 2017 the committee raised 184 issues under scrutiny principle (a), while in 2018 it raised 149 issues under that principle.

9 In 2017 the committee raised 22 issues under principle (b), while in 2018 it raised 42. Similarly, the issues raised under principle (c) have increased from 11 in 2017 to 32 in 2018.

Ministerial responses

3.12 In the 2018 reporting period, the committee received 124 responses from ministers. Ministerial correspondence is published alongside the relevant Monitor on the committee's website.¹⁰

Disallowance notices

3.13 The committee chair, on behalf of the committee, gave 37 notices of motion to disallow an instrument in the 2018 reporting period. All but two of these were subsequently withdrawn, generally following the receipt of a satisfactory ministerial response or a minister's undertaking to address the committee's concerns.¹¹

3.14 Aside from the committee's notices, during the reporting period individual senators lodged 24 notices of motion to disallow instruments. Of these, three notices resulted in three instruments being disallowed in full by the Senate. 17 motions were debated in the Senate but did not result in disallowance. Four were withdrawn.

3.15 One of these notices of motion, covering five instruments, was debated and negatived by the Senate. Subsequently, notices were placed on the same five instruments separately. The Senate debated and negatived each notice.

3.16 Details of all disallowance motions given during the reporting period are available on the committee's 'Disallowance Alert' webpage for 2018.¹²

Impact of the committee's work

3.17 In 2018, the committee continued work undertaken in recent years to consolidate and articulate consistent lines of commentary on recurring and long-standing matters of concern arising from its scrutiny of legislative instruments. In general terms, the committee has observed that its regular and consistent public commentary and engagement with rule-makers has had a positive impact on the number of instruments introduced that raise scrutiny concerns.

3.18 The long-standing concerns of the committee relate to a number of matters, including but not limited to:

- the manner of incorporation of documents by reference, and free access to incorporated documents;
- insufficient description of consultation undertaken in making instruments;

10 See https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Monitor/mon2017/index. This follows a decision taken in August 2017 not to include ministerial correspondence in printed copies of the monitor.

11 These two notices of motion were pending at the end of 2018, and may be withdrawn in 2019 on receipt of satisfactory ministerial responses.

12 See Parliament of Australia, *Disallowance Alert 2018*, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts.

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- omission of a statement of compatibility with human rights;
 - unclear basis for determining fees;
 - trespassing unduly on personal rights and liberties, including privacy;
 - disadvantage to persons caused by the retrospective effect of instruments;
 - offence and penalty provisions in delegated legislation;
 - failure to provide for independent merits review of discretionary decisions;
 - broad sub-delegation of legislative or administrative powers;
 - authorisation of Commonwealth expenditure via delegated legislation; and
 - misclassification of instruments.

3.19 The committee's work in 2018 also resulted in specific amendments to explanatory statements (often to include information requested by the committee) and, in some cases, amendments to instruments to rectify identified concerns.¹³

3.20 While difficult to quantify, the committee has also had an apparent 'unseen influence' on the drafting of instruments. For example, legislative drafters in both the Office of Parliamentary Counsel (OPC) and government agencies increasingly refer to the committee's reports, guidance and long-standing scrutiny concerns.

3.21 Further, the committee has observed ongoing improvement regarding the compliance of instruments and their explanatory statements with the requirements of the Legislation Act, to which the committee has frequently drawn the attention of rule-makers over recent years. Relevant compliance outcomes include increased information about consultation and about documents incorporated by reference. This is reflected in the overview of routine matters considered by the committee, included at the end of this report.

3.22 In addition to the committee's influence on the legislative drafting process, and the quality of legislative instruments and explanatory material, the committee's work contributes to more informed consideration of relevant issues in other parliamentary committees' reports, and to more informed debate relating to delegated legislation in the Senate, the House of Representatives and committees.

3.23 The committee's secretariat also continued to engage directly with government departments, including by providing advice on legislative requirements applicable to instruments and their explanatory statements, and advice on the role,

13 For example, in *Delegated Legislation Monitor 13 of 2018* (14 November 2018), the committee welcomed the Assistant Treasurer's undertaking to amend ASIC Corporations (Group Purchasing Bodies) Instrument 2018/751 [F2018L01313] to provide for independent merits review. On 5 December 2018, the ASIC Corporations (Amendment) Instrument 2018/1098 [F2018L01667] was registered. That instrument implements the undertaking.

functions and expectations of the committee. In some cases the secretariat also worked proactively toward finding longer-term solutions to particular scrutiny concerns. For example, and as discussed further below, in late 2018 the secretariat met with representatives of the Department of Industry, Innovation and Science to discuss the committee's expectations for explanatory statements to instruments which authorise expenditure on government programs and policies. The committee's secretariat also continued to engage with the government to discuss the accessibility of standards incorporated in delegated legislation, which informed the government's ongoing work toward improving the public accessibility of Australian standards.

3.24 The committee's influence is also reflected in formal guidance available to departments and agencies as part of their legislative drafting process. In particular, the OPC's *Instruments Handbook*,¹⁴ and the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*,¹⁵ draw attention to the committee's long-standing scrutiny concerns.

14 Office of Parliamentary Counsel, Document release 3.4, reissued November 2018, available from <http://www.opc.gov.au/about/documents.htm>.

15 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, available at <https://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf>.

Matters of note

3.25 The following section discusses some more significant developments relevant to the committee's mandate during 2018.

Inquiry into parliamentary scrutiny of delegated legislation

3.26 After 86 years of operation, the committee considered that it would be appropriate to inquire into the adequacy of the parliamentary oversight of delegated legislation. The committee considered that such an inquiry would provide it with an opportunity to enhance and rationalise the committee's functions and ensure that the committee remains well placed to continue its work into the future. An inquiry would also allow the committee to consider how comparable jurisdictions scrutinise delegated legislation, and to canvass the views of stakeholders.

3.27 On 29 November 2018, the Senate referred an inquiry into parliamentary scrutiny of delegated legislation to the committee. The terms of reference for the inquiry ask the committee to consider:

- the continuing effectiveness, role and future direction of the Senate Standing Committee on Regulations and Ordinances, including:
 - whether the committee's powers remain appropriate;
 - the adequacy of the principles by which the committee scrutinises delegated legislation, including the committee's ability to fully consider:
 - the constitutional authority for delegated legislation;
 - administrative law principles; and
 - principles of democratic accountability; and
- the adequacy of the existing framework for parliamentary control and scrutiny of delegated legislation, and whether this framework should be enhanced.

3.28 The terms of reference also provided that the committee should have regard to the role, powers and practices of similar parliamentary committees, including those in other jurisdictions.

3.29 The inquiry was ongoing at the time of publication of this report. Further information about the inquiry can be found on the committee's website.¹⁶

16 https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/DelegatedLegislation.

Correcting legislative instruments after registration and tabling

3.30 During 2018 the committee raised some significant concerns regarding the power under section 15D of the Legislation Act to 'correct' legislative instruments on the Federal Register of Legislation (FRL) after they have been registered and tabled.

3.31 Section 15D of the Legislation Act currently provides that, if the First Parliamentary Council (FPC) is satisfied there is an error on the FRL consisting of an error in the text of an Act or legislative instrument, or a compilation of an Act or an instrument, the FPC must correct the error as soon as possible and include on the FRL a statement outlining the correction in general terms.¹⁷

3.32 In 2018 the committee raised concerns in two instances about the use of section 15D to make substantive changes to legislative instruments after they had been tabled in Parliament.¹⁸ In doing so, the committee emphasised that using an administrative power to make changes to a tabled instrument has the potential to seriously undermine parliamentary scrutiny.

3.33 In *Delegated Legislation Monitor 1 of 2018*, the committee raised concerns about the use of section 15D to make substantive changes to the Private Health Insurance (Prostheses) Amendment Rules 2017 (No. 6) (Prostheses Rules)¹⁹ (that is, adding a new schedule to the instrument) after it had been tabled in Parliament. The committee noted that the use of section 15D to add an entirely new schedule to an instrument did not appear to accord with the intended purpose of that provision. The committee also noted that while a replacement explanatory statement was registered, it contained no information regarding the corrections.

3.34 The committee emphasised that using section 15D to make substantive changes to an instrument after it has been tabled in Parliament had the potential to seriously undermine effective parliamentary scrutiny, particularly in the absence of any requirement that instruments corrected using section 15D be re-tabled. The committee explained that this is because, in the period between the tabling of the original instrument and its subsequent correction, members and senators did not have the opportunity to consider the correct version of the instrument. Further, after considering the original version of the instrument, parliamentarians might not be

17 The *Legislation Amendment (Sunsetting Review and Other Measures) Act 2018* amends section 15D and adds a new section 15DA. These amendments are outlined at [3.39]-[3.42] below. However, at the end of 2018, the amendments had not commenced.

18 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 1 of 2018* (5 February 2018) and *3 of 2018* (21 March 2018) in relation to Private Health Insurance (Prostheses) Rules 2018 [F2017L01513]; *Delegated Legislation Monitor 5 of 2018* (9 May 2018) and *6 of 2018* (20 June 2018) in relation to List of Specimens Taken to be Suitable for Live Import Amendment 2018 (No. 2) [F2018L00402].

19 [F2017L01513].

made aware of the correction. In this regard, the committee also noted that, where an instrument was corrected using section 15D after it is tabled, members and senators might lose the opportunity to lodge a disallowance notice during the period between the tabling of the instrument and its subsequent correction.

3.35 The committee therefore recommended that, where an error in the text of an instrument requires substantive changes, consideration should be given to making such changes by re-making or amending the instrument, to ensure that the correct version of the instrument is subject to the full parliamentary scrutiny and disallowance process. The committee further recommended that, in cases where section 15D is used to correct an instrument which has already been tabled, the revised version of the instrument should be tabled in Parliament, the explanatory statement should expressly state what changes have occurred and why, and a process should be put in place to ensure that parliamentarians are alerted to the change in the originally tabled instrument. The committee also emphasised that the process of making and registering instruments should be undertaken with sufficient care to ensure that incorrect versions of instruments are not registered and tabled.²⁰

3.36 The committee made similar comments in relation to the use of section 15D to add a new section to the List of Specimens Taken to be Suitable for Live Import Amendment 2018 (No. 2) (Live Import List Amendment).²¹

3.37 In each case, the committee recommended that any future review of the Legislation Act should address the concerns raised by the committee. In particular, the committee considered that there would be value in amending section 15D to:

- place limits or guidance on the use of 15D (noting the detailed limitations placed on the FPC's editorial powers under sections 15V, 15W and 15X); and
- require that instruments corrected by the FPC under section 15D after they have been tabled in Parliament, be tabled anew.²²

3.38 On 21 June 2018, when tabling *Delegated Legislation Monitor 6 of 2018*, the committee chair raised in the Senate chamber the committee's concerns about the impact of section 15D on parliamentary scrutiny.²³

20 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 1 of 2018* (7 February 2018), pp. 23-26.

21 [F2018L00402]. See Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 5 of 2018* (9 May 2018), pp. 35-37.

22 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 3 of 2018* (21 March 2018), p. 72; *Delegated Legislation Monitor 6 of 2018* (20 June 2018), pp. 97-98.

23 Senator John Williams, *Senate Hansard*, 21 June 2018, p. 3631.

Legislative reform

3.39 On 28 June 2018, the Legislation Amendment (Review and Other Measures) Bill 2018 was introduced. It received Royal Assent on 24 August 2018. Item 11 of Schedule 2 to the *Legislation Amendment (Sunsetting Review and Other Measures) Act 2018* (Review Act) repeals section 15D of the Legislation Act and substitutes new sections 15D and 15DA. The explanatory memorandum states that the amendments:

clarify the limits of the [FPC's] power to rectify errors on the [FRL]. The power to rectify errors ensures that the text of the law on the Register accurately reflects the law as passed by the Parliament or as made by a rule-maker. It does not give the [FPC] any power to correct errors that are in the original text of the law.²⁴

3.40 New section 15DA introduces relatively significant changes to the manner in which legislative instruments are to be treated after they are rectified under section 15D. In particular, the new section provides that:

- where the FPC rectifies an instrument under section 15D, the FPC must arrange for the correct version of the instrument to be tabled in each House of Parliament within six sitting days after the rectification;
- where an instrument is re-tabled following rectification by the FPC, the instrument becomes subject to disallowance under the Legislation Act from the date on which the rectified version of the instrument is tabled; and
- where a notice to disallow an instrument has been given at the time the rectified version of the instrument is tabled, and the notice has not been withdrawn or otherwise disposed of, the notice is taken to have been given on the sitting day after the correct version of the instrument is tabled.

3.41 The amendments make welcome improvements to the parliamentary oversight of delegated legislation, and appear to address the majority of the committee's concerns and recommendations. In particular, the amendments ensure that parliamentarians are made aware of any rectifications to a previously tabled instrument, and preserve parliament's capacity to consider the full text of an instrument during the applicable disallowance period. The Scrutiny of Bills committee made similar comments when it considered the bill.²⁵

3.42 The amendments relating to section 15D had not yet commenced at the end of the 2018 reporting period.

24 Explanatory memorandum, Legislation Amendment (Sunsetting Review and Other Measures) Bill 2018, p. 32.

25 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 8 of 2018* (15 August 2018), pp. 20-23.

Instruments authorising government expenditure

3.43 The judgments of the High Court in the two *Williams* cases²⁶ had the effect of casting doubt over the constitutional validity of a significant proportion of Commonwealth expenditure and requiring a constitutional head of power to support Commonwealth spending programs. The government's response to these judgments led to a new legal framework for authorising expenditure on government programs, by making regulations under the *Financial Framework (Supplementary Powers Act) 1997* (FF(SP) Act) to add items to Schedule 1AB of the *Financial Framework (Supplementary Powers) Regulations 1997* (FF(SP) regulations).

3.44 A similar framework appears in the *Industry Research and Development Act 1986* (Industry Act). In this regard, section 33 of the Industry Act provides for the authorisation of executive spending on industry research and development programs by specifying such programs in legislative instruments.

3.45 The committee scrutinises instruments made under the FF(SP) Act and the Industry Act in accordance with its scrutiny principles. The committee's consideration has focused on the following three matters:

- availability of independent merits review of funding decisions
- constitutional authority for the expenditure;
- expenditure that has been improperly classified as being for the ordinary annual services of the government.

3.46 During 2018, the committee made a number of comments on instruments made under the FF(SP) Act and the Industry Act which raised concerns in relation to those matters, and in relation to the committee's scrutiny principles more generally. The committee's expectations in relation to instruments that authorise government expenditure are set out in its *Guideline on regulations that amend Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997*.²⁷

Independent merits review

3.47 In 2018, the committee raised concerns regarding the availability of independent merits review in relation to nine instruments made under the FF(SP) Act, and sought information from relevant ministers. The committee did not raise any concerns regarding independent merits review in relation to instruments made

26 *Williams v Commonwealth* [2012] HCA 23 and *Williams v Commonwealth* (No. 2) [2014] HCA 23.

27 Senate Standing Committee on Regulations and Ordinances, *Regulations that amend Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997*, available at https://www.apf.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/FFSP_Regulations_1997.

under the Industry Act. This represented an overall increase from the previous year.²⁸ In the majority of cases, the committee concluded its examination of the relevant instrument after the minister's first response, and either drew any outstanding concerns to the attention of the Senate or made no further comment.²⁹

3.48 The committee's concerns routinely related to a failure to identify an established ground for excluding merits review in the explanatory statement, by reference to the Administrative Review Council's guidance document, *What decisions should be subject to merit review?*³⁰ Where an established ground was identified in the minister's response, the committee generally concluded its examination of the instrument without further comment. In some cases, the committee also noted that it does not consider the fact that a particular decision would not be made under an enactment to be sufficient, on its own, to justify excluding merits review. In this regard, the committee emphasised that if merits review is appropriate, the necessary conferral of jurisdiction should be enacted in the relevant instrument or in the primary legislation. This was particularly relevant with regard to instruments authorising expenditure, as decisions under such instrument are often not made in accordance with specific legislation but on an ad hoc basis by an authorised officer.

3.49 For example, the committee engaged in an extensive correspondence process in relation to one instrument that established legislative authority for government spending on the Supporting Sustainable Access to Drinking Water

28 In 2017, the committee raised concerns in relation to four instruments made under the FF(SP) Act, and one instrument made under the Industry Act, on this basis.

29 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 1 of 2018* (7 February 2018) and *3 of 2018* (21 March 2018) in relation to Financial Framework (Supplementary Powers) Amendment (Education and Training Measures No. 6) Regulations 2017 [F2017L01667]; *Delegated Legislation Monitor 5 of 2018* (9 May 2018) and *6 of 2018* (20 June 2018) in relation to Financial Framework (Supplementary Powers) Amendment (Jobs and Small Business Measures No. 1) Regulations 2018 [F2018L00269]; Financial Framework (Supplementary Powers) Amendment (Communications and the Arts Measures No. 1) Regulations 2018 [F2018L00273]; *Delegated Legislation Monitor 8 of 2018* (15 August 2018), *10 of 2018* (12 September 2018) and *12 of 2018* (17 October 2018) in relation to Financial Framework (Supplementary Powers) Amendment (Education and Training Measures No. 2) Regulations 2018 [F2018L00839]; Financial Framework (Supplementary Powers) Amendment (Foreign Affairs and Trade Measures No. 1) Regulations 2018 [F2018L00841]; Financial Framework (Supplementary Powers) Amendment (Health Measures No. 2) Regulations 2018 [F2018L00842]; *Delegated Legislation Monitor 10 of 2018* (12 September 2018) and *13 of 2018* (14 November 2018) in relation to Financial Framework (Supplementary Powers) Amendment (Jobs and Small Business Measures No. 3) Regulations 2018 [F2018L01133].

30 Attorney-General's Department, Administrative Review Council, *What decisions should be subject to merit review* (1999) <https://www.arc.ag.gov.au/Publications/Reports/Pages/Downloads/Whatdecisionsshouldbesubjecttomeritreview1999.aspx>.

program, but made no provision for independent merits review of decisions about whether to provide grants under the program.³¹ In the first instance, the committee raised concerns that the explanatory statement did not identify any established grounds for excluding review. The committee also emphasised that it did not consider the fact that relevant decisions were not made under an enactment to be sufficient to justify this exclusion.³² The minister's first response suggested that the existing internal review process was broadly analogous to review by the Administrative Appeals Tribunal (AAT). It remained unclear why merits review should not be available, and the committee sought further advice on this matter.³³

3.50 The minister's second response provided further detail regarding the availability of alternative review mechanisms, and argued that it would not be possible to confer jurisdiction on the AAT as the program was not established under a statutory scheme. In response, the committee emphasised that it did not consider these review mechanisms to constitute sufficiently independent merits review, and requested further advice. The committee also requested advice as to whether it may be possible to engage an independent contractor to conduct merits review, noting that government agencies had in some cases engaged contractors as an alternative to providing for review by the AAT.³⁴

3.51 Following receipt of a third response from the minister, the committee concluded its examination of the instrument. However, it emphasised that decisions made under programs on which spending is authorised by the FF(SP) Regulations should generally be subject to independent merits review unless an established ground for excluding independent merits review is identified. It also strongly recommended that, in circumstances where it is not feasible to provide for review by the AAT, and no established grounds for excluding merits review can be identified, consideration be given to engaging an external contractor to conduct independent merits review.³⁵

31 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 10 of 2018* (12 September 2018), *12 of 2018* (17 October 2018), *13 of 2018* (14 November 2018) and *15 of 2018* (5 December 2018) in relation to Financial Framework (Supplementary Powers) Amendment (Defence Measures No. 1) Regulations 2017 [F2018L01128].

32 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 10 of 2018* (12 September 2018), pp. 26-27.

33 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 12 of 2018* (17 October 2018), pp. 52-55.

34 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 13 of 2018* (14 November 2018), pp. 50-53.

35 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 15 of 2018* (5 December 2018), pp. 40-44.

Constitutional authority for expenditure

3.52 In 2018, the committee reported on four instruments authorising government expenditure on the basis that it was unclear that the authority on which the instruments purported to rely would support the relevant programs. Generally, this was because the explanatory statement did not provide sufficient information about this issue. The instruments on which the committee made a comment regarding constitutional authority comprised one instrument made under the FF(SP) Act,³⁶ and three made under the Industry Act.³⁷ This is a significant decrease from the previous year in relation to instruments made under the FF(SP) Act, but an increase in relation to instruments made under the Industry Act.³⁸

3.53 In *Delegated Legislation Monitor 1 of 2018*, the committee raised concerns that the constitutional heads of power identified in the explanatory statement to the Financial Framework (Supplementary Powers) Amendment (Health Measures No. 7) Regulations 2017³⁹ did not appear to provide sufficient authority for the full scope of activities contemplated by the Water and Snow Safety program.⁴⁰ Following a first response from the minister, the committee concluded its examination of the instrument. However, the committee reiterated its concerns that there may not be sufficient constitutional authority for the full scope of the program, and drew this to the Senate's attention, though noting that questions of constitutional authority are ultimately for the High Court to determine.⁴¹

3.54 In *Delegated Legislation Monitor 13 of 2018*, the committee raised concerns regarding constitutional authority in relation to two instruments made under the

36 Financial Framework (Supplementary Powers) Amendment (Health Measures No. 7) Regulations 2017 [F2018L01669].

37 Industry Research and Development (Artificial Intelligence Capability Program) Instrument 2018 [F2018L01419]; Industry Research and Development (Automotive Engineering Graduate Program) Instrument 2018 [F2018L01451]; Industry Research and Development (Industry 4.0 Testlabs for Australia Program) Instrument 2018 [F2018L01573].

38 In 2017, the committee reported on 12 instruments made under the FF(SP) Act on this basis. The committee did not raise any concerns regarding constitutional authority in relation to instruments made under the Industry Act in 2017.

39 [F2017L01669].

40 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 1 of 2018* (7 February 2018), pp. 17-20.

41 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 3 of 2018* (21 March 2018), pp. 51-56.

Industry Act.⁴² In each case, the committee noted that the decisions in the two *Williams* cases suggested that the relevant programs may not be supported by the constitutional heads of power on which the instruments purported to rely.⁴³ The committee considered the minister's responses in *Delegated Legislation Monitor 15 of 2018* but requested further advice, noting that its consideration would be assisted if the response pointed to specific relevant jurisprudence.⁴⁴ The committee raised similar concerns in relation to the Industry Research and Development (Industry 4.0 Testlabs for Australia Program) Instrument 2018⁴⁵ in *Delegated Legislation Monitor 15 of 2018*.⁴⁶ At the end of 2018, responses were pending.

3.55 In addition to expressing its concerns and expectations in the Monitor and corresponding with relevant ministers, in December 2018 the committee's secretariat engaged directly with the Department of Industry, Innovation and Science to discuss how constitutional authority for expenditure authorised by instruments made under the Industry Act could be better explained in explanatory statements. The committee will monitor the quality of such explanatory statements in 2019.

Misclassification of expenditure as the ordinary annual services of the government

3.56 Where the committee identifies items of expenditure that may have been inappropriately classified as the ordinary annual services of the government, the committee draws this to the attention of the Senate and the relevant standing committee. The Senate has resolved that ordinary annual services should not include spending on new proposals because the Senate's constitutional right to amend proposed laws appropriating revenue or moneys for expenditure extends to all matters not involving the ordinary annual services of the government. In accordance with the committee's scrutiny principle 23(3)(d), the committee's scrutiny of regulations made under the FF(SP) Act therefore includes an assessment of whether measures may have been included in an appropriation bill as 'ordinary annual services of the government', despite being spending on new policy.

42 Industry Research and Development (Artificial Intelligence Capability Program) Instrument 2018 [F2018L01419]; Industry Research and Development (Automotive Engineering Graduate Program) Instrument 2018 [F2018L01451].

43 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 13 of 2018* (14 November 2018), pp. 18-27.

44 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 15 of 2018* (5 December 2018), pp. 10-16.

45 [F2018L01573].

46 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 15 of 2018* (5 December 2018), pp. 7-9.

3.57 In 2018, the committee drew attention to 10 instruments made under the FF(SP) Act which authorised expenditure on programs which may not constitute the ordinary annual services of the government.⁴⁷ The committee also drew attention to six instruments made under the Industry Act that raised similar concerns.⁴⁸ This represents a fairly substantial overall decrease on the previous year.⁴⁹

Misclassification of instruments

3.58 In 2018, the committee continued to raise concerns about instruments that had been incorrectly registered and/or tabled either as exempt from disallowance when they were in fact disallowable, or conversely as disallowable when they were in fact exempt from disallowance.

47 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 1 of 2018* (7 February 2018) in relation to Financial Framework (Supplementary Powers) Amendment (Infrastructure and Regional Development Measures No. 1) Regulations 2017 [F2017L01665]; *Delegated Legislation Monitor 5 of 2018* (9 May 2018) in relation to Financial Framework (Supplementary Powers) Amendment (Jobs and Small Business Measures No. 1) Regulations 2018 [F2018L00269]; Financial Framework (Supplementary Powers) Amendment (Social Services Measures No. 1) Regulations 2018 [F2018L00271]; Financial Framework (Supplementary Powers) Amendment (Communications and the Arts Measures No. 1) Regulations 2018 [F2018L00273]; *Delegated Legislation Monitor 7 of 2018* (27 June 2018) in relation to Financial Framework (Supplementary Powers) Amendment (Infrastructure, Regional Development and Cities Measures No. 1) Regulations 2018 [F2018L00609]; *Delegated Legislation Monitor 10 of 2018* (12 September 2018) in relation to Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 3) Regulations 2018 [F2018L01126]; Financial Framework (Supplementary Powers) Amendment (Communications and the Arts Measures No. 2) Regulations 2018 [F2018L01132]; Financial Framework (Supplementary Powers) Amendment (Jobs and Small Business Measures No. 2) Regulations 2018 [F2018L01133]; Financial Framework (Supplementary Powers) Amendment (Health Measures No. 3) Regulations 2018 [F2018L01136]; *Delegated Legislation Monitor 13 of 2018* (14 November 2018) in relation to Financial Framework (Supplementary Powers) Amendment (Health Measures No. 4) Regulations 2018 [F2018L01423].

48 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 1 of 2018* (7 February 2018) in relation to Industry Research and Development (Gas Acceleration Program) Instrument 2017 [F2017L01655]; *Delegated Legislation Monitor 8 of 2018* (15 August 2018) in relation to Industry Research and Development (High Performance Computing—Pawsey Program) Instrument 2018 [F2018L00801]; *Delegated Legislation Monitor 9 of 2018* (22 August 2018) in relation to Industry Research and Development (Satellite-Based Augmentation System Program) Instrument 2018 [F2018L01050]; Industry Research and Development (National Positioning Infrastructure Capability Program) Instrument 2018 [F2018L01051]; *Delegated Legislation Monitor 13 of 2018* (14 November 2018) in relation to Industry Research and Development (Artificial Intelligence Capability Program) Instrument 2018 [F2018L01419]; Industry Research and Development (Automotive Engineering Graduate Program) Instrument 2018 [F2018L01451].

49 In 2017, the committee drew attention to 24 instruments made under the FFSP Act, and six instruments made under the Industry Act, on this basis.

3.59 The committee raised concerns in relation to the misclassification of three instruments. This reflected a substantial 83 per cent decrease on the previous reporting period,⁵⁰ and suggests that the committee's work in drawing this issue to the attention of ministers and the OPC has had a positive impact on the drafting, registration and tabling of instruments.

Instruments misclassified as exempt from disallowance

3.60 The committee is concerned about all misclassification of legislative instruments. However, the misclassification of instruments as exempt from disallowance causes particular concerns due to its potential to hinder effective parliamentary oversight. In this respect, section 42 of the Legislation Act allows senators and members 15 sitting days, following the tabling of a disallowable instrument in the relevant House of Parliament, to lodge a notice of motion to disallow that instrument. Where an instrument is incorrectly tabled as exempt from disallowance, members and senators have no opportunity to lodge a notice of motion to disallow the instrument while it is incorrectly classified.

3.61 In 2018, the committee raised concerns about the misclassification of one instrument as exempt from disallowance.⁵¹ The committee's secretariat corresponded with OPC to confirm that the instrument was misclassified, and to seek that OPC take remedial action (for example, re-classifying the instrument) if necessary. The committee also requested information as to the misclassification from the relevant minister,⁵² and lodged a notice of motion to disallow the instrument to ensure the Senate was not disadvantaged by the misclassification.

3.62 In response to the committee's concerns, the minister advised that misclassification had occurred due to an administrative error, and that the department had implemented changes to its processes relating to the classification of instruments to avoid the reoccurrence of such an error in the future. The committee concluded its examination of the instrument, but reiterated its concerns regarding misclassification generally and noted that it would continue to monitor the issue.⁵³ The committee also withdrew the motion to disallow the instrument.

50 The committee raised concerns about the misclassification of 18 instruments in 2017.

51 National Vocational Education and Training Regulator Amendment (Enforcement and Other Measures) Regulations 2018 [F2018L01034].

52 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 9 of 2018* (22 August 2018), pp. 15-16.

53 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 10 of 2018* (12 September 2018), pp. 64-65.

Instruments misclassified as disallowable

3.63 In 2018 the committee raised concerns in relation to the misclassification of two instruments as disallowable.⁵⁴ In each case, the committee's secretariat corresponded with OPC in relation to the misclassification, and the instrument was subsequently reclassified as exempt from disallowance. The committee drew the attention of ministers to the issue on an 'advice only' basis.⁵⁵

3.64 Although the misclassification of instruments as disallowable does not necessarily reduce parliamentary oversight, the committee remains concerned about the process for the classification of instruments generally. The committee notes that bringing misclassification to the attention of the relevant minister and the Senate can reduce future misclassification.

Matters more appropriate for parliamentary enactment

3.65 Scrutiny principle 23(3)(d) of the committee's terms of reference requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via principal rather than delegated legislation). The key objective of this scrutiny principle is to ensure that more significant matters are included in primary legislation and therefore subject to a greater level of parliamentary oversight. By contrast, delegated legislation should include more technical matters. Matters which may be more appropriate for parliamentary enactment include:

- significant new policy and major changes to existing policy;
- procedural matters that go to the essence of a regulatory scheme;
- laws which have a significant impact on rights under the law;⁵⁶
- significant penalties, including custodial penalties and substantial fines;
- the imposition of taxes or levies; and
- provisions which modify or create exemptions to primary legislation.

54 ASIC Superannuation (Amendment) Instrument 2018/474 [F2018L00709]; Linkage Program – Special Research Initiative: PFAS (per- and poly-fluoroalkyl substances) Remediation Research Program Grants Guidelines [F2018L00020].

55 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 1 of 2018* (7 February 2018), p. 55; *Delegated Legislation Monitor 8 of 2018* (15 August 2018), p. 58.

56 The committee may also comment on these matters under scrutiny principle 23(3)(b), which relates to personal rights and liberties.

Concerns raised by the committee in 2018

3.66 In 2018, the committee commented on 31 instruments that appeared to include matters that would be more appropriate for parliamentary enactment. This was a relatively substantial 63 per cent increase on the 2017 reporting period, in which the committee commented on 19 instruments on this basis.⁵⁷

3.67 In the majority of cases, the committee commented on the instruments on an 'advice only' basis, and drew its concerns to the attention of the Senate.⁵⁸

57 This does not include instruments on which the committee made a comment under scrutiny principle 23(3)(d) on the basis that the instrument authorised expenditure on a program or policy that was not for the ordinary annual services of the government. This matter is addressed at [3.56]-[3.57] above.

58 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 1 of 2018* (7 February 2018) in relation to ASIC Market Integrity Rules (Futures Markets) 2017 [F2017L01475]; ASIC Market Integrity Rules (Securities Markets) 2017 [F2017L01474]; ASIC Market Integrity Rules (Futures Markets – Capital) 2017 [F2017L01478]; ASIC Market Integrity Rules (Securities Markets – Capital) 2017 [F2017L01476]; My Health Records (National Application) Rules 2017 [F2017L01558]; Norfolk Island Continued Laws Amendment (2017 Measures No. 3) Ordinance 2017 [F2017L01499]; Product Emissions Standards Rules 2017 [F2018L00021]; *Delegated Legislation Monitor 5 of 2018* (9 May 2018) in relation to Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018 [F2018L00262]; Wine Australia Regulations 2018 [F2018L00286]; *Delegated Legislation Monitor 8 of 2018* (15 August 2018) in relation to Migration (IMMI 18/019: Fast Track Applicant Class) Instrument 2018 [F2018L00672]; National Redress Scheme for Institutional Child Sexual Abuse Rules 2018 [F2018L00975]; Product Emissions Standards (Customs) Charges Regulations 2018 [F2018L00761]; Product Emissions Standards (Excise) Charges Regulations 2018 [F2018L00762]; Social Security (Administration) (Job Search Efforts) Determination 2018 [F2018L00776]; Social Security (Administration) (Non-Compliance) Determination 2018 (No. 1) [F2018L00795]; Social Security (Administration) (Reasonable Excuse – Participation Payments) Determination 2018 [F2018L00779]; Social Security (Declared Program Participant) Determination 2018 [F2018L00777]; *Delegated Legislation Monitor 10 of 2018* (12 September 2018) in relation to Biosecurity Charges Imposition (Customs) Amendment (Approved Arrangements) Regulations 2018 [F2018L01124]; Biosecurity Charges Imposition (General) Amendment (Approved Arrangements) Regulations 2018 [F2018L01125]; *Delegated Legislation Monitor 12 of 2018* (17 October 2018) in relation to National Health Security Regulations 2018 [F2018L01247]; ASIC Corporations (Amendment) Instrument 2018/697 [F2018L01281]; Australian Transaction Reports and Analysis Centre Industry Contribution Determination 2018 (No. 1) [F2018L01331]; *Delegated Legislation Monitor 13 of 2017* (14 November 2018) in relation to ASIC Corporations (Short Selling) Instrument 2018/745 [F2018L01356]; ASIC Corporations (Professional Standards—Transitional) Instrument 2018/894 [F2018L01413]; Corporations Amendment (Crowd-Sourced Funding) Regulations 2018 [F2018L01379]; National Health (Privacy) Rules 2018 [F2018L01427].

3.68 However, in some cases the committee requested advice from the relevant minister.⁵⁹ Often, this was because the explanatory statement did not include sufficient information regarding why a matter had been left to delegated legislation, and the committee considered that there was value in seeking further clarification.

3.69 The enactment of significant policy changes or significant changes to the law via delegated legislation was a key issue of concern to the committee. For example, in *Delegated Legislation Monitor 1 of 2018*, the committee drew to the Senate's attention its concerns about the use of delegated legislation to implement a national roll-out of an 'opt out' model for the My Health Records system. In this respect, the committee emphasised that a change from the (then) existing 'opt in' model to an 'opt out' model was central to the regulatory design of the My Health Records scheme, and would consequently be more appropriately made by the Parliament.⁶⁰

3.70 Similarly, in *Delegated Legislation Monitor 8 of 2018*, the committee drew the Senate's attention to its concerns about the use of delegated legislation to add a class of persons to the definition of 'fast track applicant' in the *Migration Act 1958*. In this respect, the committee noted that the instrument would have the effect of determining procedural and other rights of persons under Australian law, and emphasised that such significant changes to the law should be subject to the full legislative process and consideration by Parliament prior to their commencement.⁶¹

3.71 The committee also raised concerns regarding the imposition of taxes via delegated legislation. For example, in *Delegated Legislation Monitor 10 of 2018*, the committee drew to the Senate's attention its concerns regarding the introduction of new charges for the entry of biosecurity information into an automated entry processing system. It appeared to the committee that the charges amounted to taxation. The committee emphasised that the levying of taxation is a fundamental function of the Parliament, and consequently it is for Parliament, rather than the makers of delegated legislation to set rates of tax.⁶² In this respect, the committee

59 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 12 of 2018* (17 October 2018), *13 of 2018* (14 November 2018), *14 of 2018* (28 November 2018) and *15 of 2018* (5 December 2018) in relation to ASIC Corporations (Amendment) Instrument 2018/825 [F2018L01335]; CASA EX111/18 — English Language Proficiency Assessments Exemption 2018 [F2018L01214]; Historic Shipwrecks Regulations 2018 [F2018L01322]; Norfolk Island Legislation Amendment (Protecting Vulnerable People) Ordinance 2018 [F2018L01377]; ASIC Corporations (Amendment) Instrument 2018/752 [F2018L01566].

60 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 1 of 2018* (7 February 2018), pp. 56-57.

61 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 8 of 2018* (15 August 2018), pp. 64-68.

62 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 10 of 2018* (12 September 2018), pp. 36-38.

noted that fees or charges in delegated legislation should generally be limited to cost recovery, although some exceptions apply (for example, where the relevant charges or fees fall within a cap set by primary legislation).

3.72 The committee also commented on instruments that would create or extend exemptions from a parent statute (which may include primary or other delegated legislation), or that would modify the operation of primary legislation. For example, in *Delegated Legislation Monitor 13 of 2018*, the committee drew the Senate's attention to two instruments which included provisions that would modify the operation of the *Corporations Act 2001* (Corporations Act) in certain circumstances. It appeared to the committee that these provisions were akin to Henry VIII clauses, which enable delegated legislation to make amendments to primary legislation. The committee noted that it has significant concerns with Henry VIII-type clauses, as such clauses impact on levels of parliamentary scrutiny and may subvert the appropriate relationship between Parliament and the Executive.⁶³

3.73 The committee also commented on a number of instruments that would impose significant civil or criminal penalties. For example, in *Delegated Legislation Monitor 1 of 2018*, the committee drew to the Senate's attention its concerns about the imposition of significant penalties (up to \$1 million) in a number of statutory rules made under the Corporations Act. The committee acknowledged that such penalties were expressly authorised by the enabling statute. Nevertheless, it emphasised that the enactment of significant penalties is more appropriately undertaken via primary legislation than delegated legislation.⁶⁴

3.74 In *Delegated Legislation Monitor 12 of 2018*, the committee raised concerns in relation to the imposition of a penalty of one year's imprisonment in delegated legislation, noting that the *Guide to Framing Commonwealth Offences* states that regulations should not include custodial penalties.⁶⁵ The committee requested the minister's advice about this matter.⁶⁶ Following a response from the minister, in *Delegated Legislation Monitor 13 of 2018* the committee drew its concerns to the attention of the Senate.⁶⁷

63 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 13 of 2018* (14 November 2018), pp. 4-5; 59-60

64 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 1 of 2018* (7 February 2018), pp. 2-3; 5-6; 45-46.

65 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp. 44-45.

66 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 12 of 2018* (17 October 2018), pp. 28-30.

67 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 13 of 2018* (14 November 2018), pp. 104-105.

Interaction with the Senate Standing Committee for the Scrutiny of Bills

3.75 Scrutiny principle 23(3)(d) of the committee's terms of reference dovetails with the terms of reference of the Scrutiny of Bills committee, which require the Scrutiny of Bills Committee to consider whether a bill before the Parliament:

- inappropriately delegates legislative powers; or
- insufficiently subjects the exercise of legislative power to parliamentary scrutiny.⁶⁸

3.76 The Scrutiny of Bills committee frequently comments under these principles on bills that appear to leave significant matters to delegated legislation, and the committee routinely refers to these comments when raising concerns under scrutiny principle 23(3)(d).

3.77 For example, in *Delegated Legislation Monitor 1 of 2018*, the committee raised concerns about the specification of products as 'emissions controlled products' in delegated legislation. In doing so, the committee noted that the Scrutiny of Bills committee had expressed the view that the specification of products as 'emissions controlled products' was a core element of the product emissions standards regime, and would therefore be more appropriate for primary legislation.⁶⁹ The committee noted its agreement with the Scrutiny of Bills committee, and drew its concerns to the attention of the Senate.⁷⁰

3.78 In *Delegated Legislation Monitor 8 of 2018*, the committee raised concerns in relation to the specification in delegated legislation of a number of significant matters relevant to whether a person's social security payments could be reduced or cancelled. These included the circumstances in which a person has undertaken adequate job search efforts, when a person has a reasonable excuse for non-compliance with their obligations, and the circumstances in which a person has committed a 'persistent mutual obligation failure'. In raising these concerns, the committee referred to comments by the Scrutiny of Bills committee that matters such as principles and safeguards relating to social security payments should be enacted in primary legislation, as this allows for greater parliamentary oversight.⁷¹

68 Senate standing orders 24(1)(a)(iv) and (v).

69 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 10 of 2017* (12 September 2018), pp. 57-65.

70 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 1 of 2018* (7 February 2018), pp. 65-66.

71 Senate Standing committee for the Scrutiny of Bills, *Scrutiny Digest 10 of 2017* (12 September 2018), pp. 96-100.

The committee noted its agreement with the Scrutiny of Bills committee, and drew its concerns to the attention of the Senate.⁷²

3.79 The committee also referred to comments by the Scrutiny of Bills committee in a number of the instances outlined at [3.68]-[3.73] above.

Chair's tabling statement

3.80 On 15 August 2018, when tabling *Delegated Legislation Monitor 8 of 2018*, the committee chair addressed the Senate in relation to the committee's concerns regarding the inclusion in delegated legislation of matters would be more appropriate for parliamentary enactment. In particular, the chair drew attention to a number of instances in which delegated legislation had been used to enact significant policy matters or bring about substantial changes in the law.⁷³

3.81 The chair also referred to the ongoing relationship between the committee and the Scrutiny of Bills committee, stating that:

[T]he committee's comments are consistent with those of the Senate Scrutiny of Bills Committee. In each case [noted above], the Scrutiny of Bills Committee expressed concerns about the powers to delegate these matters to legislative instruments, which are not subject to the full parliamentary process of debate and consideration. The Senate Standing Committee on Regulations and Ordinances draws the attention of the Senate to its view that the significant change to the law should be made in primary rather than delegated legislation.⁷⁴

Access to Australian Standards incorporated in delegated legislation

3.82 The committee has consistently expressed concern about the accessibility of documents incorporated in delegated legislation, particularly industry standards. According to research conducted by the Department of Industry, Innovation and Science, more than one-third of some 5600 Australian Standards are currently referenced in legislation at all levels of Australian government.

3.83 Access to standards is hindered by distribution arrangements: under present contractual agreements, Australian and many international standards are not generally available for free but must be purchased from a commercial distributor.

3.84 Throughout 2018, the committee routinely commented on the accessibility of Australian and international standards incorporated by delegated legislation. For example, in *Delegated Legislation Monitor 5 of 2018*, the committee expressed concerns that the explanatory statement to the Defence Force Discipline Regulations

72 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 8 of 2018* (15 August 2018), pp. 77-80.

73 Senator John Williams, *Senate Hansard*, 15 August 2018, pp. 4918-4919.

74 Senator John Williams, *Senate Hansard*, 15 August 2018, p. 4919.

2018⁷⁵ did not appear to indicate where two incorporated Australian standards could be accessed. The committee secretariat's research indicated that the standards were available online, but only on payment of a fee. The committee therefore requested the minister's advice as to where the standards could be accessed free of charge.⁷⁶

3.85 In response, the minister advised that the relevant standards were available for free to members of the Australian Defence Force (ADF). While noting this advice, the committee remained concerned that the incorporated standards did not appear to be freely available to the public. In this respect, the committee noted that, beyond access for key users of the instrument, the committee is interested in the broader issue of access for other parties who might be affected by, or interested in, the law.⁷⁷

3.86 Where the committee raised concerns regarding free access to incorporated standards, as well as other documents incorporated by legislative instruments, the committee generally emphasised that a fundamental principle of the rule of law is that every person subject to the law should be able to access its terms readily and freely. In this respect, the committee expects the explanatory statement to an instrument that incorporates one or more documents to provide a description of each incorporated document and to indicate where it can be accessed without cost. The committee expects, at a minimum, that consideration be given to any means by which an incorporated document may be made freely available to interested or affected persons. The committee's expectations in this regard are set out in its *Guideline on incorporation of documents*.⁷⁸

3.87 The issue of access to material incorporated into law by reference to external documents, such as Australian and international standards, has been one of ongoing concern to the committee and other Australian parliamentary scrutiny committees. In this regard the committee has drawn attention to the 2016 report by the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament, which comprehensively outlined the significant scrutiny concerns associated with the

75 [F2018L00265]

76 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 5 of 2018* (9 May 2018), pp. 11-13.

77 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor 6 of 2018* (20 June 2018), pp. 53-55.

78 Senate Standing Committee on Regulations and Ordinances, *Guideline on incorporation of documents*, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulation_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents.

incorporation of standards by reference, particularly where the incorporated material is not freely available.⁷⁹

3.88 In 2018, the committee continued to engage with the Department of Industry, Innovation and Science and other relevant agencies regarding the issue of standards incorporated in delegated legislation. In July 2018, a representative from the committee secretariat attended a meeting of the Commonwealth Standards and Conformance Advisory Group. The committee was pleased to note that the government remains aware of the expectation that standards referenced in legislation should be made publicly available at no cost, and is continuing its work to improve public access. However, the committee has continued to note that contractual and licensing arrangements may present impediments to full public access in some cases.

3.89 The committee will continue to monitor the issue of access to standards (and other documents) incorporated in legislation, and to report on the issue in relation to specific instruments in its Monitor. The committee will also continue to engage with relevant agencies where appropriate.

79 Parliament of Western Australia, Joint Standing Committee on Delegated Legislation, *Access to Australian Standards Adopted in Delegated Legislation* (June 2016), 39th Parliament, Report 84, <http://www.parliament.wa.gov.au/Parliament/commit.nsf/%28EvidenceOnly%29/DF600B884DEC6B648257D570013D717?opendocument>.

Routine matters

3.90 The following section identifies some of the routine matters that the committee reported on during the relevant period.

3.91 The majority of routine matters relate to technical compliance with the requirements of the Legislation Act, and are raised under scrutiny principle (a). That principle requires the committee to ensure that instruments are made in accordance with statute, their authorising Acts, as well as any other applicable laws or legal requirements.

Incorporation of documents by reference

3.92 Paragraph 14(1)(b) of the Legislation Act allows a legislative instrument to incorporate any document in writing which exists at the time the instrument is made. Examples of these may include Commonwealth legislative instruments that are exempt from disallowance, state and territory legislative instruments, treaties, guidelines, or Australian and international standards. However, subsection 14(2) provides that such documents may only be incorporated as in force or existence at a date before or at the same time as the legislative instrument commences, and not as in force from time to time (unless a specific provision in the legislative instrument's authorising Act (or another Act of Parliament) overrides this).

3.93 In addition, paragraph 15J(2)(c) of the Legislation Act requires the explanatory statement to a legislative instrument that incorporates a document to contain a description of that document and indicate how it may be obtained.

3.94 The committee therefore expects instruments or their explanatory statements to set out the manner in which any Acts, legislative instruments and other documents are incorporated by reference: that is, either as in force from time to time or as in force at a particular time. The committee also expects the explanatory statement to provide a description of each incorporated document, and to indicate where it may be obtained free of charge. This enables persons interested in or affected by an instrument to readily understand and access its terms, including those contained in any document incorporated by reference. The committee's expectations in this regard are set out in its *Guideline on incorporation of documents*, available on the committee's website.⁸⁰

3.95 In 2018, the committee commented on 73 instruments that raised concerns relating to the incorporation of documents. This included instances where the relevant instrument or its explanatory statement did not specify the manner in which

80 Senate Standing Committee on Regulations and Ordinances, *Guideline on incorporation of documents*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents.

a document was incorporated or where a document could be accessed free of charge. This reflects a fairly substantial decrease from the 2017 reporting period, in which the committee commented on 98 instruments on this basis, and suggests that agencies may be improving compliance with the Legislation Act.

3.96 In the majority of cases, the committee wrote to ministers requesting information on the incorporation of documents, and/or requested that a replacement explanatory statement be registered containing the required information. In some cases, the committee drew its concerns to the relevant minister on an 'advice only' basis. This was most often done in cases where the committee secretariat had been able to locate an incorporated document online, but the explanatory statement did not specify where the document could be obtained.

Description of consultation

3.97 Section 17 of the Legislation Act requires that, before making a legislative instrument, the instrument-maker must be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument. Section 15J of the Act requires that explanatory statements describe the nature of any consultation that has been undertaken or, if no such consultation has been undertaken, explain why none was undertaken. The committee's expectations in this regard are set out in its *Guideline on consultation*, available on the committee's website.⁸¹

3.98 In 2018, the committee commented on 21 instruments on the basis of non-compliance or partial compliance with these requirements. This included instances where an explanatory statement contained no description of consultation, or where the description of consultation was overly bare or general. In each case where a concern regarding consultation was identified, the committee wrote to the relevant minister seeking further information and/or requesting that a replacement explanatory statement be registered containing the required information. This reflects a fairly substantial decrease from the 2017 reporting period, in which the committee commented on 34 instruments on this basis.

No statement of compatibility

3.99 Section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* requires the maker of a disallowable legislative instrument to prepare a statement of compatibility in relation to that instrument. The statement of compatibility must include an assessment of whether the instrument is compatible with human rights. Paragraph 15J(2)(f) of the Legislation Act requires that the statement of compatibility be included in the explanatory statement to the instrument.

81 Senate Standing Committee on Regulations and Ordinances, *Guideline on consultation*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/consultation.

3.100 In 2018, the committee commented on eight instruments on the basis that the explanatory statement did not include a statement of compatibility with human rights. In each case, the committee wrote to the relevant minister seeking further information and/or requesting that a replacement explanatory statement be registered containing the required information. This reflects a slight increase from the 2017 reporting period, in which the committee commented on six instruments on this basis.

Instruments made under anticipated legislative authority

3.101 Section 4 of the Interpretation Act allows, in certain circumstances, the making of a legislative instrument in anticipation of the commencement of the instrument's enabling provision. The ability of an instrument to confer powers or rights, or impose obligations, is limited by subsection 4(4) of the Interpretation Act.

3.102 The committee considers that, in the interests of promoting the clarity and intelligibility of an instrument to anticipated users, explanatory statements to instruments that rely on section 4 of the Interpretation Act should clearly identify that the making of the relevant instrument relies on that section.

3.103 In 2018, the committee commented on 25 instruments that were made in reliance on an empowering provision that had not yet commenced, in circumstances where this was not identified in the explanatory statement. In each case, the committee drew its concerns to the attention of the relevant minister. This is an increase on the 2017 reporting period, in which the committee commented on 19 instruments on this basis.

Unclear basis for determining fees

3.104 The committee's usual expectation, in cases where an instrument carries financial implications via the imposition of or a change to a charge, fee, levy, scale or rate of costs or payment, is that the explanatory statement will make clear the specific basis on which an individual imposition or change has been calculated: for example, on the basis of cost recovery, or on the basis of other factors. This is, in particular, to assess whether such fees are properly regarded as taxes, which require specific legislative authority.

3.105 In 2018, the committee commented on 15 instruments on the basis that the explanatory statement did not specify the basis on which fees or charges were imposed. In each case, the committee wrote to the relevant minister seeking further information. Generally, the committee then requested that the information provided by the minister be included in the explanatory statement. This represented a slight increase from the 2017 reporting period, in which the committee commented on 12 instruments on this basis.

Senator John Williams
Chair