The Senate

Standing Committee on Regulations and Ordinances

Delegated legislation monitor

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Introduction

Terms of reference

The Senate Standing Committee on Regulations and Ordinances (the committee) was established in 1932. The role of the committee is to examine the technical qualities of all disallowable instruments of delegated legislation and decide whether they comply with the committee's non-partisan scrutiny principles of personal rights and parliamentary propriety.

Senate Standing Order 23(3) requires the committee to scrutinise each instrument referred to it 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 unduly make the rights and liberties of citizens dependent upon 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.

Nature of the committee's scrutiny

The committee's longstanding practice is to interpret its scrutiny principles broadly, but as relating primarily to technical legislative scrutiny. The committee therefore does not generally examine or consider the policy merits of delegated legislation. In cases where an instrument is considered not to comply with the committee's scrutiny principles, the committee's usual approach is to correspond with the responsible minister or instrument-maker seeking further explanation or clarification of the matter at issue, or seeking an undertaking for specific action to address the committee's concern.

The committee's work is supported by processes for the registration, tabling and disallowance of legislative instruments under the *Legislative Instruments Act 2003*.[1]

Publications

The committee's usual practice is to table a report, the *Delegated legislation monitor* (the monitor), each sitting week of the Senate. The monitor provides an overview of the committee's scrutiny of disallowable instruments of delegated legislation for the preceding period. Disallowable instruments of delegated legislation detailed in the monitor are also listed in the 'Index of instruments' on the committee's website.[2]

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1 For further information on the disallowance process and the work of the committee see *Odger's Australian Senate Practice*, 13th Edition (2012), Chapter 15.

2 Parliament of Australia, Senate Standing Committee on Regulations and Ordinances, *Index of instruments*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Index.

Structure of the monitor

The monitor is comprised of the following parts:

- **Chapter 1 New and continuing matters**: identifies disallowable instruments of delegated legislation about which the committee has raised a concern and agreed to write to the relevant minister or instrument-maker:
  - (a) seeking an explanation/information; or
  - (b) seeking further explanation/information subsequent to a response; or
  - (c) on an advice only basis.
- **Chapter 2 Concluded matters**: sets out matters which have been concluded to the satisfaction of the committee, including by the giving of an undertaking to review, amend or remake a given instrument at a future date.
- **Appendix 1 Correspondence**: contains the correspondence relevant to the matters raised in Chapters 1 and 2.
- **Appendix 2 Consultation**: includes the committee's guideline on addressing the consultation requirements of the *Legislative Instruments Act 2003*.

Acknowledgement

The committee wishes to acknowledge the cooperation of the ministers, instrument-makers and departments who assisted the committee with its consideration of the issues raised in this monitor.

General information

The Federal Register of Legislative Instruments (FRLI) should be consulted for the text of instruments, explanatory statements, and associated information.[3]

The Senate Disallowable Instruments List provides an informal listing of tabled instruments for which disallowance motions may be moved in the Senate.[4]

The Disallowance Alert records all notices of motion for the disallowance of instruments in the Senate, and their progress and eventual outcome.[5]

Senator John Williams (Chair)

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3 The FRLI database is part of ComLaw, see Australian Government, ComLaw, https://www.comlaw.gov.au/.

4 Parliament of Australia, *Senate Disallowable Instruments List*, http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/leginstruments/Senate_Disallowable_Instruments_List.

5 Parliament of Australia, Senate Standing Committee on Regulations and Ordinances, *Disallowance Alert 2015*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts.

Chapter 1

New and continuing matters

There are no new or continuing matters.

Chapter 2
Concluded matters

This chapter sets out matters which have been concluded to the satisfaction of the committee based on responses received from ministers or relevant instrument-makers.

Correspondence relating to these matters is included at Appendix 1.

Instrument	**Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 3) Regulation 2015 [F2015L00572]**
Purpose	Amends the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for spending activities administered by the Department of Education and Training and the Department of Social Services
Last day to disallow	14 October 2015
Authorising legislation	*Financial Framework (Supplementary Powers) Act 1997*
Department	Finance
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitors* No. 6, 8, 10 and 12 of 2015

Previously unauthorised expenditure

The committee commented as follows: Scrutiny principle 23(3)(a) of the committee's terms of reference requires the committee to ensure that an instrument is made in accordance with statute. This principle is interpreted broadly as a requirement to ensure that instruments are made in accordance with their authorising Act as well as any constitutional or other applicable legal requirements.

The committee notes that, in *Williams No. 1*,[1] the High Court confirmed that executive authority to spend appropriated monies is not unlimited and therefore generally requires legislative authority. As a result of the subsequent High Court decision in *Williams No. 2*,[2] the committee requires that the ES for all instruments specifying programs for the purposes of section 32B of the *Financial Framework (Supplementary Powers) Act 1997* explicitly state, for each new program, the constitutional authority for the expenditure.

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1 *Williams v Commonwealth* (2012) 248 CLR 156.

2 *Williams v Commonwealth* (2014) 252 CLR 416.

In this regard, the committee notes that the ES states that the objective of the Mathematics by Inquiry program is:

> To create and improve mathematics curriculum resources for primary and secondary school students:
>
> (a) to meet Australia's international obligations under the Convention on the Rights of the Child and the International Covenant on Economic, Social and Cultural Rights; and
>
> (b) as activities that are peculiarly adapted to the government of a nation and cannot otherwise be carried on for the benefit of the nation.

The objective of the Coding Across the Curriculum program is:

> To encourage the introduction of computer coding and programming across different year levels in Australian schools:
>
> (a) to meet Australia's international obligations under the Convention on the Rights of the Child and the International Covenant on Economic, Social and Cultural Rights; and
>
> (b) as an activity that is peculiarly adapted to the government of a nation and cannot otherwise be carried on for the benefit of the nation.

The committee notes that the ES identifies the consititutional basis for expenditure in relation to both the Mathematics by Inquiry and the Coding Across the Curriculum programs as follows:

> Noting that it is not a comprehensive statement of relevant constitutional considerations, the objective of the item references the following powers of the Constitution:
>
> - the external affairs power (section 51(xxix))
> - Commonwealth executive power and the express incidental power (sections 61 and 51(xxxix)).

Therefore, the instrument appears to rely on the external affairs power and the executive nationhood power (coupled with the express incidental power) as the relevant heads of legislative power to authorise the making of these provisions (and therefore the spending of public money under them).

However, in relation to the external affairs power, the committee understands that, in order to rely on the power in connection with obligations under international treaties, legislation must be appropriately adapted to implement relatively precise obligations arising under that treaty.

In relation to the executive nationhood power and the express incidental power, the committee understands that the nationhood power provides the Commonwealth executive with a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried out for the benefit of the nation.

The committee therefore sought the minister's advice as to:

- ***how the obligations under the Convention on the Rights of the Child and the International Covenant on Economic, Social and Cultural Rights are sufficiently specific to support the Mathematics by Inquiry and the Coding Across the Curriculum programs; and***

- ***how the Mathematics by Inquiry and the Coding Across the Curriculum programs are supported by the executive nationhood power and the express incidental power to the extent that they are enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried out for the benefit of the nation.***

Minister's first response

The Minister for Finance advised that:

> The Committee may be aware that successive governments have been careful to avoid action that might effectively waive legal privilege in advice and thereby potentially prejudice the Commonwealth's legal position. Accordingly, governments have maintained a position of not disclosing the legal advice they rely on except in circumstances where there are special reasons for doing so. The drafting of legislation, including subordinate legislation, is routinely undertaken having regard to a range of constitutional and other legal considerations. In some cases, basic constitutional underpinnings will be evident in provisions that describe the objective scope of legislation.
>
> The items for Mathematics by Inquiry and Coding across the Curriculum in the Regulation are a case in point. As indicated in the explanatory statement accompanying the Regulation, the objective for each of these items references the external affairs power, the Commonwealth executive power and the express incidental power.
>
> The Government will continue to draft amendments for legislative authority under the section 32B mechanism in the *Financial Framework (Supplementary Powers) Act 1997* having due regard to constitutional limits. Consistent with this approach to law-making more generally, the Government will continue to work on maximising clarity in its approach to drafting.

Committee's first response

The committee commented as follows: ***The committee thanked the minister for his response.*** However, the minister's response has not addressed the specific questions asked by the committee, namely:

- how the obligations under the Convention on the Rights of the Child and the International Covenant on Economic, Social and Cultural Rights are sufficiently specific to support the Mathematics by Inquiry and the Coding Across the Curriculum programs; and

- how the Mathematics by Inquiry and the Coding Across the Curriculum programs are supported by the executive nationhood power and the express incidental power to the extent that they are enterprises and activities

> peculiarly adapted to the government of a nation and which cannot otherwise be carried out for the benefit of the nation.

First, the committee notes that these questions are asked of the minister in his capacity as the instrument-maker. In this respect, the committee seeks the minister's advice as to whether he regards the referenced constitutional powers as providing a basis for the making of the instrument.

The committee therefore sought further advice from the minister in relation to this matter.

Second, the committee notes that the minister's response suggests that legal advice may have been obtained in relation to the constitutional support for the Mathematics by Inquiry and the Coding Across the Curriculum programs. The minister states:

> …successive governments have been careful to avoid action that might effectively waive legal privilege in advice and thereby potentially prejudice the Commonwealth's legal position. Accordingly, governments have maintained a position of not disclosing the legal advice they rely on except in circumstances where there are special reasons for doing so.

While the Senate has indicated some measure of acceptance of certain public interest immunity grounds for refusals to disclose information (in cases where a particular harm is identified), the committee does not understand the minister's response to be explicitly advancing a public interest immunity claim on a recognised ground in this case.

In relation to the stated position of governments not to disclose legal advice, the committee has noted previously that it is not aware of any general government policy or practice which prevents ministers or departments from providing information containing legal (or any other) advice to the Senate and its committees (absent a valid public interest immunity claim); and the Senate has consistently rejected refusals made simply on the basis that the requested information would disclose legal or other advice to government or a department.[3] To underline this point, the committee notes that it has been provided with legal advice on a number of occasions.[4]

The committee therefore requested from the minister a copy of any legal advice obtained in relation to this matter, and particularly the question of whether the referenced constitutional powers support the inclusion of the programs in question in the regulation.

Minister's second response

The Minister for Finance advised that:

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3 A full account of the Senate's approach to such matters may be found in *Odgers' Australian Senate Practice* (13th ed.) pp 595–625.

4 See for example *Delegated legislation monitor* No. 2 of 2014, entries on Veterans' Entitlements (Actuarial Certificate – Life Expectancy Income Stream Guidelines) Determination 2013 [F2013L00671] and Veterans' Entitlements (Actuarial Certificate – Lifetime Income Stream Guidelines) Determination 2013 [F2013L00670], pp 6–9.

> The Government does not consider it would be appropriate to disclose the content of its legal advice. Disclosure of legal advice must always be carefully considered, including whether there is a risk that disclosure will prejudice the Commonwealth's legal position.
>
> The formulation of programmes and the drafting of legislation often involves complex issues and is routinely undertaken having regard to a range of constitutional and other legal considerations. In relation to the items for the Mathematics by Inquiry and the Coding Across the Currciculum Programmes, legal advice was obtained and carefully considered, including Australia's international obligations under the Convention on the Rights of the Child, particularly Articles 28 and 29, and under the International Covenant on Economic, Social and Cultural Rights, particularly Article 13.

Committee's second response

The committee commented as follows: ***The committee thanked the minister for his response.*** However, scrutiny principle (a) of the committee's terms of reference requires the committee to ensure that the exercise of the Parliament's delegated legislative powers is done in accordance with the law, including the Constitution of Australia.

In this regard, the committee's request to the minister effectively sought an explicit and positive assurance that, in exercising the Parliament's delegated powers in the making of the regulation, the minister was satisfied that there was sufficient constitutional authority for the exercise of that power. The committee sought that assurance in the context of specific questions pertaining to the character of the powers referenced in the ES for the regulation, being the external affairs power and the executive nationhood power and the express incidental power.

First, while the minister's response advises that legal advice was obtained in relation to articles 28 and 29 of the Convention on the Rights of the Child and article 13 of the International Covenant on Economic, Social and Cultural Rights, the minister does not address the question of how the articles cited are sufficiently specific to support the Mathematics by Inquiry and the Coding Across the Curriculum programs.

Second, the minister has not addressed the question of how the Mathematics by Inquiry and the Coding Across the Curriculum programs are supported by the executive nationhood power and the express incidental power to the extent that they are enterprises and activities peculiarly adapted to the government of a nation and which *cannot otherwise be carried out for the benefit of the nation.*

In light of the above comments, the committee therefore sought the minister's further advice as to:

- ***how the obligations under the Convention on the Rights of the Child and the International Covenant on Economic, Social and Cultural Rights are sufficiently specific to support the Mathematics by Inquiry and the Coding Across the Curriculum programs; and***

- ***how the Mathematics by Inquiry and the Coding Across the Curriculum programs are supported by the executive nationhood power and the express incidental power to the extent that they are enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried out for the benefit of the nation.***

In addition, the committee notes the minister's refusal to provide the committee with the legal advice obtained in relation to the Mathematics by Inquiry and the Coding Across the Curriculum programs:

> The Government does not consider it would be appropriate to disclose the content of its legal advice. Disclosure of legal advice must always be carefully considered, including whether there is a risk that disclosure will prejudice the Commonwealth's legal position.

The committee notes that the Senate has indicated some measure of acceptance of certain public interest immunity grounds for refusals to disclose information (in cases where a particular harm is clearly identified). However, it is important to note that the Senate's requirements and the process for the making of public interest immunity claims (as set out in an Order of the Senate of 13 May 2009 ('Public interest immunity claims'))[5] do not specify recognised grounds for making such claims. This is because whether any of the grounds are justified in a particular case depends on the circumstances of that case.[6]

The committee notes that the minister's response does not advance a public interest immunity claim that addresses the requirements of the Order of the Senate of 13 May 2009 ('Public interest immunity claims'), particularly in relation to (a) the need to specify the harm to the public interest that could result from the disclosure of the information or document and (b) the need to indicate whether any specified harm to the public interest from the disclosure of the information or document could result equally or in part from the disclosure of the information or document to the committee as in camera evidence.

The committee therefore reiterated its request to the minister for a copy of the legal advice obtained in relation to this matter, and particularly the question of whether the referenced constitutional powers support the inclusion of the programs in question in the regulation.

Minister's third response

The Minister for Finance advised that:

> I can assure the Committee that the Government has obtained legal advice and has considered the constitutional position very carefully. This has included consideration of the constitutional powers identified in the explanatory statement accompanying the Regulation and the provisions of

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5 *Journals of the Senate*, 13 May 2009, 'Public interest immunity claims', p. 1941.

6 Senate Standing Committee on Procedure, *Second report*, June 2015, p. 8.

> international instruments as advised in my letter to the Committee of 1 September 2015.
>
> Access by government to confidential legal advice is, in practical terms, central to the development of sound Commonwealth policy and robust legislative instruments. It is important to note the long-standing practice of successive governments not to publish or provide legal advice obtained in the course of developing policy and legislation. The Government considers that it is not in the public interest to depart from a position established and maintained over many years in the interests of conserving the Commonwealth's broader legal and constitutional interests.
>
> This practice was most recently outlined by the Attorney-General, Senator the Hon George Brandis QC, in his letter of 27 August 2015 to the Joint Intelligence and Security Committee (see Appendix D of the *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*):
>
> It has been the practice of successive governments not to publish or provide legal advice that has been obtained for the purposes of drafting legislation.
>
> It has been stated on other occasions previous to that. As outlined by the Hon Gareth Evans QC:
>
> ... [n]or is it the practice or has it been the practice over the years for any government to make available legal advice from its legal advisers made in the course of the normal decision making process of government, for good practical reasons associated with good government and also as a matter of fundamental principle ... (*Senate Hansard*, 28 August 1995, page 466);
>
> the Hon Daryl Williams QC:
>
> ... I am going to offer the traditional response. I am not going to speculate about advice that the government may or may not have received nor am I going to provide any of that advice ... (*House of Representatives Hansard*, 25 November 1997, page 11165);
>
> the Hon Philip Ruddock MP:
>
> ... It is not the practice of the Attorney to comment on matters of legal advice to the Government. Any advice given, if it is given, is given to the Government ... (*House of Representatives Hansard*, 29 March 2004, page 27405); and
>
> Senator the Hon Joe Ludwig:
>
> To the extent that we are now going to go to the content of the advice, can I say that it has been a longstanding practice of both this government and successive governments not to disclose the content of advice. (Senate Legal and Constitutional Affairs Legislation Committee, *Hansard* of Estimates hearing, 26 May 2011, page 161).

Committee's third response

The committee commented as follows: ***The committee thanks the minister for his response.***

First, the committee notes the minister's advice that the Government 'has considered the constitutional position carefully'. The minister also reiterates his previous advice

that legal advice was obtained; and that the government considers that it is not in the public interest to depart from the 'longstanding practice' of successive governments not to provide legal advice obtained in the course of developing policy and legislation 'in the interests of conserving the Commonwealth's broader legal and constitutional interests'.

However, the committee again notes that it is not aware of any general government policy or practice which prevents ministers or departments from providing information containing legal (or any other advice) to the Senate and its committees (absent a valid public interest immunity claim); and the Senate has consistently rejected refusals made simply on the basis that the requested information would disclose legal or other advice to government or a department.

In this respect, the committee notes that the minister has not advanced a public interest immunity claim that addresses the requirements of the Order of the Senate of 13 May 2009 ('Public interest immunity claims'), particularly in relation to (a) the need to specify the harm to the public interest that could result from the disclosure of the information or document and (b) the need to indicate whether any specified harm to the public interest from the disclosure of the information or document could result equally or in part from the disclosure of the information or document to the committee as in camera evidence.

Similarly, the examples cited by the minister do not accord with the procedure for making public interest immunity claims as set out in the Order of the Senate of 13 May 2009. The committee notes that such assertions of a general government practice in relation to legal advice reflect a lack of understanding of 'the principle that claims to withhold information from Senate committees require a statement of public interest grounds that can be considered by the committee and the Senate'.[7] On this point, *Odgers' Australian Senate Practice* states:

> Although governments have generally abandoned claims that documents should not be produced simply because they belong to a class of documents, this claim has continued in residual forms.
>
> …Governments have also claimed that there is a long-established practice of not disclosing their advice, or of not doing so except in exceptional circumstances. These claims are contradicted by the occasions on which advice is voluntarily disclosed when it supports a government position. The actual position was stated in a letter produced in 2008 by the Secretary of the Department of Prime Minister and Cabinet: the government discloses its legal advice when it chooses to do so [references omitted].[8]

In light of the above, the committee notes that the minister has failed to advance a public interest immunity claim in accordance with the Order of the Senate of 13 May 2009 ('Public interest immunity claims') so as to allow the committee and the

7 *Odgers' Australian Senate Practice* (13th ed.) pp 621-622.

8 *Odgers' Australian Senate Practice* (13th ed.) p. 622.

Senate to judge whether the refusal to provide the legal advice in question is justified in this case.

Second, the committee notes that the minister has not provided an explicit and positive assurance that, in exercising the Parliament's delegated powers in the making of the regulation, he was satisfied that there was sufficient constitutional authority for the exercise of that power. The committee sought that assurance in the context of specific questions pertaining to the character of the powers referenced in the ES for the regulation, being the external affairs power and the executive nationhood power and the express incidental power.

The committee notes that Standing Order 23(3)(a) requires the committee to '*ensure* that…[an instrument of delegated legislation] is in accordance with statute', which includes the question of whether an instrument is constitutionally valid [emphasis added]. In this regard, the committee considers that there is no more fundamental issue than the question of whether the purported making of an instrument is supported by a constitutional head of power. It is therefore incumbent on the minister to provide an assurance to the committee and the Parliament of his satisfaction that such authority exists for his purported exercise of the Parliament's delegated power to make legislation.

In this respect, the committee notes that the minister's responses have failed to provide any assurance that the specifying of the programs in question for the purposes of section 32B of the *Financial Framework (Supplementary Powers) Act 1997* is in fact supported by the external affairs power and/or the executive nationhood power (coupled with the express incidental power). Further, the minister has responded in only general terms that do not address the committee's specific questions regarding the basis on which it is claimed these powers support the specification of the Mathematics by Inquiry and the Coding Across the Curriculum programs for the purposes of section 32B.

Noting that the last day for disallowance is 14 October 2015, and in light of the minister's failure to provide supporting legal advice or positive assurance that the specification of the Mathematics by Inquiry and the Coding Across the Curriculum programs for the purposes of section 32B of the Financial Framework (Supplementary Powers) Act 1997 is supported by the external affairs power and/or the executive nationhood power (coupled with the express incidental power), the committee again requests that the minister provide:

- ***legal advice received on the question of whether the specification of the Mathematics by Inquiry and the Coding Across the Curriculum programs for the purposes of section 32B of the Financial Framework (Supplementary Powers) Act 1997 is supported by the external affairs power and/or the executive nationhood power (coupled with the express incidental power); or***

- ***in the event that a valid public interest immunity claim is advanced in relation to the requested legal advice, positive assurance to the committee that the minister regards the specification of the Mathematics by Inquiry and the Coding Across the Curriculum programs for the purposes of section 32B of the Financial Framework (Supplementary Powers) Act 1997 as***

authorised by the external affairs power and/or the executive nationhood power (coupled with the express incidental power).

Minister's fourth response

The Minister for Finance advised that:

> I understand the Committee is scheduled to consider this matter at a special meeting on 13 October 2015. I note, however, that this is the day before the disallowance motion must be put to the Senate for determination, or on which the Regulation would otherwise be deemed to be disallowed. Although a motion may be withdrawn by leave on the day, if any outstanding concerns of the Committee are not resolved to the Committee's satisfaction prior to that date then there will be a risk to the continuity of the programmes affected by this resolution.
>
> I can assure the committee that the Government's legal advice confirms that the specification of the Mathematics by Inquiry and the Coding Across the Curriculum programmes in section 32B of the *Financial Framework (Supplementary Powers) Act 1997* are supported by the external affairs power and/or the executive nationhood power(coupled with the express incidental power).
>
> In relation to the request for the legal advice that supports the Commonwealth's position, it is quite contrary to the public interest to provide Commonwealth legal advice in this instance. In this case, the legal advice is nuanced and assesses the risks of different legal approaches. Such information can be taken out of context to support legal action to threaten the continuity and stability of collaborative activities, including, in this case, between the Commonwealth, the states and the territories. Successive governments have also been careful to avoid action that might effectively waive legal privilege in advice and thereby potentially prejudice the Commonwealth's legal position. I therefore consider that a public interest immunity claim is therefore valid in this instance.
>
> Further, and as noted in my letter of 16 September 2015, access by government to confidential legal advice is, in practical terms, central to the development of sound Commonwealth policy and robust legislative instruments. A public interest immunity claim in these circumstances is therefore appropriate and consistent with the practice of successive governments.
>
> The most recent practice of this Government of routinely advising the parliament of which constitutional powers we rely upon when authorising spending for new programmes, provides a level of disclosure far above the practice of any earlier government.
>
> Finally, I am advised that a national curriculum solution developed in collaboration with the states is necessary for certain maths and computing curriculum content, because the smaller jurisdictions do not have the expertise or resources to design highly specialist parts of the curriculum.

Committee's fourth response

The committee thanks the minister for his prompt response and has concluded its examination of the instrument.

However, the committee notes that it has concluded its examination on the basis of the minister's assurance that the 'Government's legal advice confirms that that the specification of the Mathematics by Inquiry and the Coding Across the Curriculum programmes…[under] section 32B of the *Financial Framework (Supplementary Powers) Act 1997* are supported by the external affairs power and/or the executive nationhood power (coupled with the express incidental power)'.

Given this assurance, the committee emphasises that it has not been necessary in this case to make a determination in respect of whether the minister has advanced a valid public interest immunity claim to support his refusal to provide the legal advice requested.

Appendix 1
Correspondence

SENATOR THE HON MATHIAS CORMANN
Minister for Finance
Deputy Leader of the Government in the Senate

REF: MS15-001783

Senator John Williams
Chair
Senate Standing Committee
on Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

Dear Senator Williams

I refer to the Committee's latest request for information on the *Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 3) Regulation 2015* (the Regulation).

In the *Delegated legislation monitor* No. 12 of 2015, 12 October 2015, the Committee requested further information about the items included in the Regulation. This follows my responses on 22 July 2015, 1 September 2015 and 16 September 2015.

I understand the Committee is scheduled to consider this matter at a special meeting on 13 October 2015. I note, however, that this is the day before the disallowance motion must be put to the Senate for determination, or on which the Regulation would otherwise be deemed to be disallowed. Although a motion may be withdrawn by leave on the day, if any outstanding concerns of the Committee are *not* resolved to the Committee's satisfaction prior to that date then there will be a risk to the continuity of the programmes affected by this resolution.

I can assure the committee that the Government's legal advice confirms that the specification of the Mathematics by Inquiry and the Coding Across the Curriculum programmes in section 32B of the *Financial Framework (Supplementary Powers) Act 1997* are supported by the external affairs power and/or the executive nationhood power (coupled with the express incidental power).

In relation to the request for the legal advice that supports the Commonwealth's position, it is quite contrary to the public interest to provide Commonwealth legal advice in this instance. In this case, the legal advice is nuanced and assesses the risks of different legal

approaches. Such information can be taken out of context to support legal action to threaten the continuity and stability of collaborative activities, including, in this case, between the Commonwealth, the states and the territories. Successive governments have also been careful to avoid action that might effectively waive legal privilege in advice and thereby potentially prejudice the Commonwealth's legal position. I therefore consider that a public interest immunity claim is therefore valid in this instance.

Further, and as noted in my letter of 16 September 2015, access by government to confidential legal advice is, in practical terms, central to the development of sound Commonwealth policy and robust legislative instruments. A public interest immunity claim in these circumstances is therefore appropriate and consistent with the practice of successive governments.

The most recent practice of this Government of routinely advising the parliament of which constitutional powers we rely upon when authorising spending for new programmes, provides a level of disclosure far above the practice of any earlier government.

Finally, I am advised that a national curriculum solution developed in collaboration with the states is necessary for certain maths and computing curriculum content, because the smaller jurisdictions do not have the expertise or resources to design highly specialist parts of the curriculum.

I trust this information will assist the Committee with its consideration of this matter.

I have copied this letter to the Attorney-General, Senator the Hon George Brandis QC, and the Minister for Education and Training, Senator the Hon Simon Birmingham.

Kind regards

Mathias Cormann
Minister for Finance

13 October 2015

Appendix 2
Guideline on consultation

Purpose

This guideline provides information on preparing an explanatory statement (ES) to accompany a legislative instrument, specifically in relation to the requirement that such statements must describe the nature of any consultation undertaken or explain why no such consultation was undertaken.

The committee scrutinises instruments to ensure, inter alia, that they meet the technical requirements of the *Legislative Instruments Act 2003* (the Act) regarding the description of the nature of consultation or the explanation as to why no consultation was undertaken. Where an ES does not meet these technical requirements, the committee generally corresponds with the relevant minister or instrument-maker seeking further information and appropriate amendment of the ES.

Ensuring that the technical requirements of the Act are met in the first instance will negate the need for the committee to write to the relevant minister or instrument-maker seeking compliance, and ensure that an instrument is not potentially subject to disallowance.

It is important to note that the committee's concern in this area is to ensure only that an ES is technically compliant with the descriptive requirements of the Act regarding consultation, and that the question of whether consultation that has been undertaken is appropriate is a matter decided by the instrument-maker at the time an instrument is made.

However, the nature of any consultation undertaken may be separately relevant to issues arising from the committee's scrutiny principles, and in such cases the committee may consider the character and scope of any consultation undertaken more broadly.

Requirements of the *Legislative Instruments Act 2003*

Section 17 of the 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, particularly where that instrument is likely to have an effect on business.

Section 18 of the Act, however, provides that in some circumstances such consultation may be 'unnecessary or inappropriate'.

It is important to note that section 26 of the Act requires that ESs describe the nature of any consultation that has been undertaken or, if no such consultation has been undertaken, to explain why none was undertaken.

It is also important to note that requirements regarding the preparation of a Regulation Impact Statement (RIS) are separate to the requirements of the Act in relation to consultation. This means that, although a RIS may not be required in relation to a certain instrument, the requirements of the Act regarding a description of the nature of consultation undertaken, or an explanation of why consultation has not occurred, must still be met. However, consultation that has been undertaken under a RIS process will generally satisfy the requirements of the Act, provided that that consultation is adequately described (see below).

If a RIS or similar assessment has been prepared, it should be provided to the committee along with the ES.

Describing the nature of consultation

To meet the requirements of section 26 of the Act, an ES must describe the nature of any consultation that has been undertaken. The committee does not usually interpret this as requiring a highly detailed description of any consultation undertaken. However, a bare or very generalised statement of the fact that consultation has taken place may be considered insufficient to meet the requirements of the Act.

Where consultation has taken place, the ES to an instrument should set out the following information:

- **Method and purpose of consultation**: An ES should state who and/or which bodies or groups were targeted for consultation and set out the purpose and parameters of the consultation. An ES should avoid bare statements such as 'Consultation was undertaken'.
- **Bodies/groups/individuals consulted**: An ES should specify the actual names of departments, bodies, agencies, groups et cetera that were consulted. An ES should avoid overly generalised statements such as 'Relevant stakeholders were consulted'.
- **Issues raised in consultations and outcomes**: An ES should identify the nature of any issues raised in consultations, as well as the outcome of the consultation process. For example, an ES could state: 'A number of submissions raised concerns in relation to the effect of the instrument on retirees. An exemption for retirees was introduced in response to these concerns'.

Explaining why consultation has not been undertaken

To meet the requirements of section 26 of the Act, an ES must explain why no consultation was undertaken. The committee does not usually interpret this as requiring a highly detailed explanation of why consultation was not undertaken. However, a bare statement that consultation has not taken place may be considered insufficient to meet the requirements of the Act.

In explaining why no consultation has taken place, it is important to note the following considerations:

- **Specific examples listed in the Act**: Section 18 lists a number of examples where an instrument-maker may be satisfied that consultation is unnecessary or inappropriate in relation to a specific instrument. This list is not exhaustive of the grounds which may be advanced as to why consultation was not undertaken in a given case. The ES should state why consultation was unnecessary or inappropriate, and explain the reasoning in support of this conclusion. An ES should avoid bare assertions such as 'Consultation was not undertaken because the instrument is beneficial in nature'.
- **Timing of consultation**: The Act requires that consultation regarding an instrument must take place before the instrument is made. This means that, where consultation is planned for the implementation or post-operative phase of changes introduced by a given instrument, that consultation cannot generally be cited to satisfy the requirements of sections 17 and 26 of the Act.

In some cases, consultation is conducted in relation to the primary legislation which authorises the making of an instrument of delegated legislation, and this consultation is cited for the purposes of satisfying the requirements of the Act. The committee may regard this as acceptable provided that (a) the primary legislation and the instrument are made at or about the same time and (b) the consultation addresses the matters dealt with in the delegated legislation.

Seeking further advice or information

Further information is available through the committee's website at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances or by contacting the committee secretariat at:

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