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OF THE SENATE

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

Dear Senator Williams,

Inquiry into parliamentary scrutiny of delegated legislation

Thank you for your invitation to make a submission to the inquiry by the Senate Standing Committee on Regulations and Ordinances (the committee) into its continuing effectiveness, role and future direction, and the adequacy of the existing framework for parliamentary control and scrutiny of delegated legislation.

Background

The committee was established on 11 March 1932 with the adoption of Senate standing order 36A, on the recommendation of the select committee tasked with reviewing the Senate standing committee system in 1929.¹ The committee is widely and rightly regarded as a pioneering institution,² as the first committee within a Westminster-style system with the power to advise the parliamentary chamber whether instruments should be disallowed, and lodge disallowance motions (via the Chair). This model has subsequently been adopted by other parliaments in both Australia and overseas.

This inquiry provides an important opportunity to evaluate the ongoing effectiveness of the committee, by reference to the work of equivalent committees in other jurisdictions, and within the broader framework of the scrutiny of delegated legislation by the Australian Parliament.

Committee practice

Since its inception, the committee has provided information and advice to ministers and departmental officers about delegated legislation, by corresponding directly with the relevant minister and department, and publishing guidelines on matters relevant to the committee's work. The committee may wish to consider expanding these resources by outlining the committee's principles and priorities and providing practical advice about the committee's expectations with

1 Standing Committee on Regulations and Ordinances, *Fourth Report of the Committee*, 23 June 1938, pp. 1-3.

2 Commonwealth, *The Senate Committee System: Historical Perspectives*, Parl Paper No. 54 (2010).

respect to the content of explanatory statements. This is an approach which has proven successful for the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) and the Parliamentary Joint Committee on Human Rights.

If the committee adopted this approach, it could also consider whether there should be a positive onus on departments to state in the explanatory statements accompanying legislative instruments how the committee's concerns, as reflected in its guidance documents, have been addressed. One means of implementing this would be for the committee to propose a resolution of the Senate declaring the Senate's opinion that explanatory statements should explicitly address those matters. If agreed, such a resolution would provide an ongoing spotlight on issues the committee has consistently raised in its recent reports such as:

1. appropriate consultation occurring before instruments are made;
2. the content of the law being certain and freely available;
3. any trespass on personal rights and liberties being adequately explained; and
4. administrative decisions which affect the rights of individuals being subject to independent merits review unless there is an accepted, and articulated, ground for excluding review.

Committee powers

The committee's powers and functions are prescribed by Senate standing order 23. Some of the committee's powers are more limited than those of other Senate committees and the provisions establishing the committee are not entirely consistent with more recent standing committees. For example, unlike the Scrutiny of Bills Committee and other standing committees, standing order 23(7) provides that the Deputy Chair is an appointee of the committee Chair, rather than a member elected by the committee. In addition, there is no requirement for the Deputy Chair to be a member appointed on the nomination of the Leader of the Opposition in the Senate, though that has been the consistent practice of the committee. This contrasts with the appointment process for the Chair who is elected by the committee and is required to be a member appointed to the committee on the nomination of the Leader of the Government in the Senate (standing order 23(6)). The committee may consider that standing order 23(7) should be amended so that the Deputy Chair is elected by the committee and is required to be a member appointed on the nomination of the Leader of the Opposition.

The committee also lacks the power to self-initiate an inquiry, and general inquiry powers such as the ability to take evidence in public hearings or meet outside Canberra. Instead, where the committee requires such powers, it must ask for them to be conferred by resolution of the Senate. While such powers may not be needed frequently, the committee may consider that they would add some flexibility to its proceedings. The Scrutiny of Bills Committee was imbued with general inquiry powers following a similar inquiry into its role and future direction in 2012.

Additionally, neither the Regulations and Ordinances Committee nor the Scrutiny of Bills Committee has the express power to examine draft instruments. In the early 1980s, the committee expressed concern about its inability to review draft delegated legislation, and recommended that consideration be given to the desirability of formally tabling draft legislation in the Senate to facilitate such review.³ The committee may wish to consider whether it should

3 Senate Standing Committee on Regulations and Ordinances, *Seventy-first Report*, 11 March 1982, p. 6; Senate Standing Committee on Regulations and Ordinances, *Seventy-third Report*, 14 December 1982, pp. 2-4.

have the power to examine draft instruments at least where these have been published by the government.

Committee scrutiny principles

From its inception, the committee has scrutinised delegated legislation by reference to four scrutiny principles.⁴ The committee initially adopted the principles recommended by the 1929 Senate select committee in its review of the Senate committee system.⁵ In 1979, the committee revised principles (c) and (d), to reflect the establishment of the Administrative Appeals Tribunal and similar bodies (principle (c)), and account for the increasingly non-administrative content of delegated legislation (principle (d)).⁶

The revised principles were inserted into the Senate standing orders in 1989.⁷ Equivalent committees in other jurisdictions have since revised and expanded their scrutiny principles; however, the Regulations and Ordinances Committee has continued to apply the same principles as revised in 1979. Given the substantial time that has elapsed since then, the committee may wish to consider whether the four scrutiny principles provide it with sufficient scope and flexibility to adequately perform its functions. For example, in light of the committee's recent focus on issues surrounding the adequacy of consultation undertaken before instruments are made, the committee may wish to recommend an amendment to its scrutiny principles to refer specifically to ensuring that an instrument is not made without adequate consultation of those affected by the proposed law. Similarly, noting the committee's recent focus on the constitutional validity of delegated legislation, the committee may wish to recommend an amendment to its scrutiny principles to more explicitly address this matter, to provide clearer guidance to ministers and departments.

Parliamentary control over delegated legislation

Powers and procedures

The disallowance procedure is currently the most common and direct mechanism by which the Senate exercises parliamentary control over delegated legislation. The committee has previously considered the desirability of greater use of alternative scrutiny procedures and powers. These include the affirmative resolution procedure, by which delegated legislation does not come into effect until it is affirmed by a resolution of the Parliament, and the capacity of Parliament to directly amend delegated legislation.⁸ Such powers and procedures are more common in other

4 Standing Committee on Regulations and Ordinances, *Fourth Report of the Committee*, 23 June 1938, p. 2.

5 Standing Committee on Regulations and Ordinances, *Fourth Report of the Committee*, 23 June 1938, p. 2.

6 Standing Committee on Regulations and Ordinances, *Sixty-fifth Report of the Committee*, 20 March 1979, pp. 2-4.

7 Harry Evans and Rosemary Laing, eds, *Annotated Standing Orders of the Australian Senate*, Department of the Senate, 2009, p. 110.

8 Senate Standing Committee on Regulations and Ordinances, *Seventy-first Report*, 11 March 1982, pp. 5-6.

Westminster-style jurisdictions.⁹ This inquiry provides the committee with an opportunity to revisit these issues, by reference to the approaches taken in other jurisdictions.

Policy considerations

Both the Regulations and Ordinances Committee and the Parliamentary Joint Committee on Human Rights currently assess delegated legislation according to a set of technical principles or legislative criteria (respectively). There is no ordinary process by which the large volume of delegated legislation produced each year is tested to see whether policy considerations exist which might appropriately become the subject of committee investigation. When policy defects are identified in particular documents they may become the subject of inquiry by legislation committees,¹⁰ or by references committees, if referred by the Senate; however, this is an ad hoc process. The committee might consider whether a process could be developed for the referral of delegated legislation to legislative and general purpose standing committees to ensure that instruments which raise policy questions do not slip under the radar.

I trust this submission assists the committee in its deliberations. I would be happy to provide any further information or assistance the committee requests.

Yours sincerely,

Richard Pye
Clerk of the Senate

9 For example, the Parliament of Western Australia and the Australian Capital Territory Legislative Assembly currently have the power to amend instruments subject to disallowance. Regarding alternative parliamentary procedures, the affirmative resolution procedure is used more commonly in UK parliaments.

10 The Senate, *Standing Orders and other orders of the Senate*, August 2018, SO 25(2)(a).