

Parliament of the Commonwealth of Australia

Legislative Scrutiny Unit

Jurisdiction Report July 2016

The Commonwealth Parliament has three committees dedicated to the scrutiny of bills, acts and delegated legislation:

- Senate Standing Committee on Regulations and Ordinances Committee
- Senate Standing Committee for the Scrutiny of Bills
- Parliamentary Joint Committee on Human Rights

Since 2013 the secretariats for all three committees have been based in the Legislative Scrutiny Unit in the Procedure Office of the Department of the Senate. The work of these committees is complementary, but distinct, from each other and it is proving extremely effective to have the secretariats work in proximity and flexibly as needed to support the scrutiny committees.

A brief description of key aspects of the work of each of these committees, including developments in recent years and links to additional information, are provided below.

Regulations and Ordinances Committee

Overview

The Senate Standing Committee on Regulations and Ordinances (the committee) scrutinises all disallowable instruments of delegated legislation, such as regulations and ordinances, to ensure their compliance with non-partisan principles of personal rights and parliamentary propriety.

In most years, thousands of instruments of delegated legislation are made, relating to many aspects of the lives of Australians. Instruments of delegated legislation have the same force in law as primary legislation, and may form as much as half of the law of the Commonwealth of Australia.¹

The committee's work may be broadly described as technical legislative scrutiny, as it does not generally extend to the examination or consideration of the policy merits of delegated legislation. The scope of the committee's scrutiny function is formally defined by Senate Standing Order 23, which requires the committee to scrutinise each instrument to ensure:

- that it is in accordance with the statute;

¹ *Odgers' Australian Senate Practice*, 13th Edition (2012), p. 416.

- that it does not trespass unduly on personal rights and liberties;
- 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
- that it does not contain matter more appropriate for parliamentary enactment.

The committee's work is supported by processes for the registration, tabling and potential disallowance of legislative instruments, which are established by the *Legislation Act 2003*.²

Scrutiny of instruments

Instruments tabled in Parliament are scrutinised by the committee secretariat and legal adviser with reference to the committee's scrutiny principles.

The committee meets regularly, during sittings of Parliament, to consider any instruments that may breach its scrutiny principles, and to determine the appropriate course of action.

Where an instrument raises a concern referable to the committee's scrutiny principles, the committee's usual approach is to write to the responsible minister seeking further explanation or information, or seeking an undertaking for specific action to address the issue of concern.

Committee's use of the disallowance process

The committee's scrutiny of instruments is generally conducted within the timeframes that apply to the disallowance process. Working within these timeframes ensures that the committee is able, if necessary, to seek disallowance of an instrument about which it has concerns. Such disallowance motions based on the recommendation of the committee have, without exception, been adopted by the Senate.³

In cases where the 15 sitting days available for giving a notice of motion for disallowance is likely to expire before a matter is resolved, the committee may give a notice of motion for disallowance in order to protect the Senate's ability to subsequently disallow the instrument in question. Such notices are referred to as 'protective notices'.⁴

² On 5 March 2016 the *Legislative Instruments Act 2003* became the *Legislation Act 2003* due to amendments made by the *Acts and Instruments (Framework Reform) Act 2015*. The *Legislation Act 2003* and the disallowance process are discussed in Chapter 2.

³ *Odgers' Australian Senate Practice*, 13th Edition (2012), p. 424.

⁴ *Odgers' Australian Senate Practice*, 13th Edition (2012), p. 432.

Undertakings

In many cases, ministers and other instrument makers provide an undertaking to address the committee's concern through the taking of steps at some point in the future. Typically, an undertaking will relate to the making of amendments to primary or delegated legislation. The acceptance of such undertakings has the benefit of securing an outcome agreeable to the committee, without interrupting the administration and implementation of policy by disallowance of the instrument in question.

Committee publications and resources

1.2 The following committee publications and resources may be accessed

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

Senate disallowable instruments list

The 'Senate disallowable instruments list' (SDIL) is a list of all disallowable instruments tabled in the Senate.⁵ 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 SDIL is updated after each sitting day.

Delegated legislation monitor

The *Delegated legislation monitor* (the monitor) is the regular report on the work of the committee, and is published in each sitting week of the Senate. The monitor details matters raised in relation to disallowable instruments of delegated legislation that are tabled in the Senate and subsequently scrutinised by the committee.

Prior to 2013, the monitor provided only statistical and technical information on instruments scrutinised by the committee in a given period.

'Index of matters' webpage

The 'Index of matters' webpage (formerly the 'Scrutiny of Disallowable Instruments' list) is a list, by meeting date and monitor number, of all the disallowable instruments about which the committee has raised a concern. Full comments on individual matters are contained in the relevant monitor.

⁵ As instruments may be tabled on different dates in the Senate and the House of Representatives respectively (and hence have different disallowance timeframes), there is also a House of Representatives disallowable instruments list. This list is available at http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/leginstruments.

'Disallowance Alert' webpage

The 'Disallowance Alert' webpage (the alert) is a list of all instruments subject to a notice of motion for disallowance (whether at the instigation of the committee or an individual senator or member). The progress and outcome of any such notice is also recorded.

Senate Procedure Office seminar on delegated legislation and the Senate

The Senate Procedure Office conducts half-day seminars on the Senate's 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.

Information on seminar dates and booking inquiries may be accessed through the Senate website.

Developments

- Public reporting via the *Delegated legislation monitor* and changes to website (see above)
- Implementation of the general-instrument making power
- Impact of the *Williams* cases on the committee's work (merits review, constitutional authority and addition of programs that would previously have been included in an amendable appropriations bill (not for the ordinary annual services of government))
- Regulations anticipating primary legislation
- Changes to sunseting and introduction of automatic repeal of spent and redundant instruments and provisions

Scrutiny of Bills

Overview

Since 1981, the committee has scrutinised all bills against a set of non-partisan accountability standards that focus on the effect of proposed legislation on individual rights, liberties and obligations, and on parliamentary scrutiny. The scope of the committee's scrutiny function is formally defined by Senate standing order 24, which requires the

committee to scrutinise each bill introduced into the Parliament in relation to:

- undue trespass on personal rights and liberties;
- whether administrative powers are described with sufficient precision;
- whether appropriate review of decisions is available;
- whether any delegation of legislative powers is appropriate; and
- whether the exercise of legislative powers is subject to sufficient parliamentary scrutiny.

In the usual scrutiny process, after the introduction of bills into either the Senate or the House of Representatives, the committee analyses each bill against its scrutiny principles and reports its views by tabling them in the Senate. In this way the committee regularly publishes two documents: its *Alert Digest* and its *Report*, which can be accessed online from the committee's website once they have been presented to the Senate.⁶

An *Alert Digest* contains a brief outline of each of the bills introduced in the previous week and any comments the committee wishes to make after considering its legal adviser's report and the secretariat's examination of the bills and any amendments. If it identifies a concern with a bill, the committee regularly seeks further information and when the minister or other proposer responds to a concern raised in an *Alert Digest*, the committee considers this further information and provides its view in a *Report*.

The committee requests that any response from a minister be received in sufficient time for it to be scrutinised and circulated to members for consideration before the next committee meeting. The committee expects to be able to report to the Senate prior to the Senate's detailed consideration of bills so that its views can be taken into account prior to passage, but it does not have a mechanism to require this. The committee has been reporting on the responsiveness of ministers to its requests for information on a quarterly basis. Generally ministers were timely and responsive to its requests for information during 2014, though there were a couple of significant examples in which this did not occur and the committee is looking at procedural amendments to support its scrutiny process.

⁶ The committee's website is available at http://www.aph.gov.au/senate_scrutiny.

Developments

The committee secretariat now prepares a brief *Scrutiny News* email each sitting week, which is sent to all senators, their staff and committee office staff. *Scrutiny News* highlights recent comments drawn from material in the committee's Alert Digest and Report, with a particular focus on information that may be useful when bills are debated and to raise awareness about the committee's scrutiny principles.

Amendments to standing orders relating to, and initiated by, the committee came into effect on 16 July 2014 for:

- a permanent public inquiry power;
- the ability to report on *provisions* of bills (even if the bill has not been formally introduced into the Senate);
- a standing reference of committee comments to legislation committees undertaking bill inquiries;
- the election of the deputy chair (adopting standard committee provisions);
- authority to print documents and evidence;
- power to authorise broadcasting of public proceedings;
- providing an explicit reference in standing orders to framework bills (i.e. bills that rely 'excessively' on delegated legislation); and
- scrutiny of national scheme legislation (providing an explicit reference in standing orders to exposure drafts of proposed legislation).

For 2014 the scrutiny of bills committee moved to annual reporting on the work of the committee rather than reporting at the end of each parliament. The 2014 report can be found on the committee's website at www.aph.gov.au/senate/scrutiny/ and the 2015 report is expected to be available later this year. These documents provide additional detail about practices, challenges and success of the committee's work.

Parliamentary Joint Committee on Human Rights

Overview

The committee examines and reports on the human rights compatibility of all bills and legislative instruments that come before the Parliament. Since its inception, and in keeping with the longstanding conventions of the Senate scrutiny committees, the committee has sought to adopt a non-partisan, technical approach to its scrutiny of legislation.

The committee generally meets when both the House of Representatives and the Senate are sitting, and has a regular reporting cycle around these

meetings. The committee's reports are tabled after each meeting, and deal with the bills and instruments of delegated legislation introduced or tabled in the preceding period.

The committee seeks to conclude and report on its examination of bills while they are still before the Parliament, so that its findings may inform the legislative deliberations of the Parliament. The committee's ability to do so is, however, dependent on the legislative program of the government of the day and the timeliness of ministers' responses to the committee's inquiries. Where a bill is passed before the committee has been able to conclude its examination, the committee nevertheless completes its examination of the legislation and reports its findings to the Parliament.

The committee examines all legislative instruments tabled in the Parliament, including legislative instruments that are exempt from the disallowance process under the *Legislation Act 2003* (LA).⁷ The committee seeks to conclude and report on its examination of legislative instruments within the timeframe for disallowance prescribed by the LA (15 sitting days).

The committee's analytical framework

Australia has voluntarily accepted obligations under the seven core United Nations (UN) human rights treaties. It is a general principle of international human rights law that the rights protected by the human rights treaties are to be interpreted generously and any limitations on human rights are to be interpreted narrowly. Accordingly, the primary focus of the committee's reports is determining whether any identified limitation of a human right is justifiable.

International human rights law recognises that reasonable limits may be placed on most rights and freedoms—there are few absolute rights (that is, rights which cannot be limited in any circumstances).⁸ All other rights may be limited as long as the limitation meets certain standards. In general, any measure that limits a human right must comply with the following criteria (the limitation criteria):

- be prescribed by law;

⁷ The LA provides that certain instruments are exempt from disallowance by providing either that a type of instrument is not a legislative instrument for the purposes of the LA (section 9) or is otherwise not subject to disallowance (section 42). Prior to March 2016, the LA was called the *Legislative Instruments Act 2003*. References in this report are generally to the current provisions of the LA.

⁸ Absolute rights are: the right not to be subjected to torture, cruel, inhuman or degrading treatment; the right not to be subjected to slavery; the right not to be imprisoned for inability to fulfil a contract; the right not to be subject to retrospective criminal laws; the right to recognition as a person before the law; and the right to non-refoulement.

- be in pursuit of a legitimate objective;
- be rationally connected to its stated objective; and
- be a proportionate way to achieve that objective.

Where a bill or instrument limits a human right, the committee requires that the statement of compatibility provide a detailed and evidence-based assessment of the measures against these limitation criteria.

As required, the committee takes into account the views of human rights treaty bodies, as well as international and comparative human rights jurisprudence. These sources are relevant to the interpretation of the human rights against which the committee is required to assess legislation.

Statements of compatibility

The Act requires that each bill and disallowable legislative instrument be accompanied by a statement of compatibility.⁹ The statement of compatibility serves as the starting point for the application of the committee's analytical framework, and sets out an assessment of the extent to which the legislation engages human rights.

The committee sets out its expectations in relation to statements of compatibility in its Guidance Note 1 (available on the committee's website).

Developments

- Commenced work in 2012 and housed within the Senate Procedure Office with the other two scrutiny committees (Legislative Scrutiny Unit)
- Particular character of the committee as a statutory joint committee and challenges of conducting 'traditional' scrutiny within the human rights discourse
- Focus in the first Parliament on building awareness of and compliance with the Act and the committee's expectations in relation to statements of compatibility with human rights
- Significant areas of interest in the last Parliament to do with national security legislation, budget measures (social security),

⁹ See Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

and migration (non-refoulement, interpretation of international obligations)

- Past and continuing efforts to streamline the work of the committee and its approach to reporting, informed by experiences to date