Executive law-making in the 21st century: Delegation not subordination

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Introduction

There has been a remarkable growth in the volume of delegated legislation in Australia in the 115 years since Federation. It is through this delegated legislation that the Executive, under powers delegated to it by the Parliament, makes laws – hence the reference to "Executive law-making" in the title of this paper. Beyond pure volume, however, is the issue of the *content* of delegated legislation and the effect of delegated legislation on the Australian public (and on Australian democracy).

This can only make the role of the sorts of parliamentary scrutiny committees represented at this conference even more important.

In this paper, I state my views about the particular importance of the availability of disallowance mechanisms to the role of parliamentary committees engaged in scrutiny of delegated legislation. In short, it is my view that disallowance motions can be a way of making sure that the Executive is reminded of both the power of parliamentary scrutiny committees and also the significance of the role that parliamentary scrutiny committees perform.

I state my views in the context of various contemporary events that (in my view) support the arguments that I make, including examples that I have identified through my work with the ACT and Senate committees and also including my perception of the significance of the way that the WA Parliament has approached "National Scheme" legislation in recent years. I also offer my views in relation to the "Strathclyde Review" in the United Kingdom (**UK**) and, in particular, argue that the Strathclyde Review (and the response to it) demonstrates how much better we do things in Australia, in comparison to the UK.

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Delegation or subordination?

I should begin by explaining the after-the-colon title for this paper. In recent times have consciously used the term *delegated* legislation, in preference to *subordinate* legislation or *secondary* legislation, terms that are also routinely used to describe the legislative emanations of Executive law-making. While, clearly, delegated legislation is *subordinate* to primary legislation (ie Acts), the term "delegated" legislation is preferred for presentational reasons. This reflects a point recently made by the Hansard Society (UK), in its 2014 report, *The Devil is in the Detail: Parliament and Delegated Legislation*,[1] where "delegated legislation" was the preferred term. By way of explanation, the first footnote to the report states (in part):

> Throughout this report, for the purposes of simplicity, and in order to avoid confusion, we have chosen to use the term 'delegated' legislation (with 'secondary' legislation used when seeking to distinguish the balance with primary legislation). We do not use the term 'subordinate' legislation as such nomenclature might convey to the general reader that it is of lesser importance than primary legislation, a view this report seeks to dispel. However, we recognise that it is commonly used in a legal context.[2]

This is a significant point for the Society to make and reflects a general point that the report propounds – that delegated legislation …

> … is crucial to the effective operation of government and affects almost every aspect of both the public and private spheres: individuals, businesses, charities and public bodies are all affected by regulations it creates, often financially in terms of major new cost burdens.[3]

It is my firm view that these observations apply equally in Australia. It is my view that there is too little understanding, by the Australian public, of the extent to which their lives are affected by legislation that is made by the Executive and the extent to which the operation and effect of that delegated legislation may be beyond what an ordinary citizen might otherwise expect.

However, in this paper, I seek to make a further point, based on the delegated legislation vs subordinate legislation issue. The further point is that using the term "delegated legislation" can also serve as a reminder that the Parliament has merely *delegated* the relevant power to the Executive and, in doing so, should not be seen as in some way *subordinating* itself to the wishes of the Executive. This may be a subtle (even a trite) point but I believe that it goes to the importance of how parliamentary scrutiny committees interact with the Executive in scrutinising delegated legislation. This also goes to the argument that I make below, in relation to the importance of disallowance mechanisms and, in particular, the significance of disallowance motions actually being moved.

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1 An executive summary of the report is available here http://www.hansardsociety.org.uk/wp-content/uploads/2014/12/The-Devil-is-in-the-Detail-exec.-summary.pdf.

2 *The Devil is in the Detai*l (note 1), p 23.

3 *The Devil is in the Detail* (note 1), p 23.

Volume of delegated legislation

It is significant to note that the increasing volume of delegated legislation was a key factor in the establishment of the Senate Standing Committee on Regulations and Ordinances (**R and O Committee**). In 1929, the Senate appointed a select committee to consider, report and make recommendations on the advisability or otherwise of establishing a standing committee system and, in particular, on establishing standing committees on:

(a) regulations and ordinances;

(b) international relations;

(c) finance; and

(d) private members' bills.

The Senate Select Committee on Standing Committees (**Select Committee**) produced 2 reports. The first, tabled in 1930, duly recommended that a Standing Committee on Regulations and Ordinances be established. The basis of the recommendation appears primarily to have been the volume of regulations that were, at that time, being promulgated. The report referred to evidence before the Select Committee that "no fewer than 3,708 pages" of Commonwealth Acts had been passed between 1901 and 1927, compared to 11,263 pages of regulations, etc in the same period.[4]

The Select Committee stated:

> The power to make regulations is necessarily used very freely by Governments and as a result a very large number are submitted to Parliament every Session. They are so numerous, technical and voluminous that it is practically impossible for Senators to study them in detail and to become acquainted with their exact purport and effect. It is admitted that Senators receive copies of these regulations or Statutory rules, but the many calls upon their time render it almost impossible for them to make a detailed examination of every regulation.[5]

The Select Committee went on to state:

> A very strong case has been made out by various witnesses before the Committee in favour of some systematic check, in the interests of the public, on the power of making statutory rules and ordinances.[6]

The Select Committee went on to refer to a number of bills (6 are listed), "the chief effect of which was to give a regulation-making power".[7]

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4 See Parliamentary Paper S1/1929-31, at page ix.
5 See Parliamentary Paper S1/1929-31, at page ix.
6 See Parliamentary Paper S1/1929-31, at page x.
7 See Parliamentary Paper S1/1929-31, at page x.

It is interesting to note that one of the reasons canvassed for the establishment of the R and O Committee was the availability of such a committee to receive submissions critical of regulations. The Select Committee refers to the "probable usefulness" of affording the public such an opportunity, noting that this would be "both more timely and cheaper" than taking matters to the High Court, as had recently been required in relation to various regulations that the Select Committee listed in the report.[8]

The Select Committee recommended that a "proper and sufficient check" was required on the power to make regulations and that such a check could be provided by the establishment of a Regulations and Ordinances Committee.[9]

It is interesting to note that the Select Committee's recommendation was that the proposed R and O Committee "would be charged with the responsibility of seeing that the clause of each bill conferring a regulation-making power does not confer a power which ought to be exercised by Parliament".[10] The fascinating element of this recommendation is that what is, in fact, recommended here is a role (in relation to delegated legislation) similar to that performed (since 1981) by the Senate Standing Committee for the Scrutiny of Bills.

The Select Committee's recommendation as to the terms of reference of the proposed Regulations and Ordinances Committee was that the Committee scrutinise regulations to ascertain:

(a) that they are in accordance with the statute;

(b) that they do not trespass unduly on personal rights and liberties;

(c) that they do not unduly make the rights and liberties of citizens dependent upon administrative and not upon judicial decisions;

(d) that they are concerned with administrative detail and do not amount to substantive legislation which should be a matter for parliamentary enactment.

A final thing to note was the following observation about the proposed Regulations and Ordinances Committee's role in relation to "policy" issues:

> It is conceivable that occasions might arise in which it would be desirable for the Standing Committee [on Regulations and Ordinances] to direct the attention of Parliament to the merits of certain Regulations but, as a general rule, it should be recognized that the Standing Committee [on Regulations and Ordinances] would lose prestige if it set itself up as a critic of governmental policy or departmental practice apart from the terms [of reference] outlined above.[11]

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8 See Parliamentary Paper S1/1929-31, at page x.
9 See Parliamentary Paper S1/1929-31, at page x.
10 See Parliamentary Paper S1/1929-31, at page x.
11 See Parliamentary Paper S1/1929-31, at page x.

The issue of whether the R and O Committee should consider "policy" issues is not an issue that this paper will canvass. However, my views on this issue (and opposing views from Professor Dennis Pearce) are on the record.[12]

For completeness, it should be noted that the Select Committee's second report, tabled in 1930, again recommended that a Regulations and Ordinances Committee be established, though the recommendation did not, on this occasion, contain recommended terms of reference for the Committee. As is well-known by attendees of this conference, the R and O Committee was, in fact, established in 1932.

Volume of delegated legislation *now*

If the R and O Committee was, at least in part, set up in recognition of the volume of delegated legislation that was being made in the years leading up to 1930, what would the Senate Select Committee on Standing Committees find if it looked at more recent figures on volume of delegated legislation? As already indicated, the evidence before the Senate Select Committee was that "no fewer than 3,708 pages" of Commonwealth Acts had been passed between 1901 and 1927, compared to 11,263 pages of regulations, etc in the same period. The more recent figures are frightening in comparison. In its annual report for 2014-2015, the Commonwealth Office of Parliamentary Counsel (**OPC**) reported that, for that financial year, 172 Bills, totalling 6,395 pages, were introduced. OPC also reported that, in that same period, 253 Executive Council (**ExCo**) Legislative Instruments, totalling 8,091 pages, drafted by OPC were made and registered on the Federal Register of Legislation (**FRL** – formerly the Federal Register of Legislative Instruments or "FRLI"). On top of that, OPC reported that a further (approximately) 103 legislative instruments, totalling 1,647 pages, had been drafted by OPC. And the number of instruments drafted by OPC only tells a fraction of the story. Going purely by the highest FRL registration number for 2015 calendar year, it would appear that 2,141 "legislative instruments" (this being the common term for delegated legislation in the Commonwealth, since 2005) were registered on FRL in that calendar year.

Internal statistics of the R and O Committee indicate that, in the 2015 calendar year, the R and O Committee scrutinised 1,828 instruments that were disallowable by the Senate.

I am grateful for the assistance of the secretariat of the R and O Committee and the Senate Research section for preparing the following graphical representation of the number of disallowable instruments examined by the R and O Committee from 1983-84 to 2014-15:

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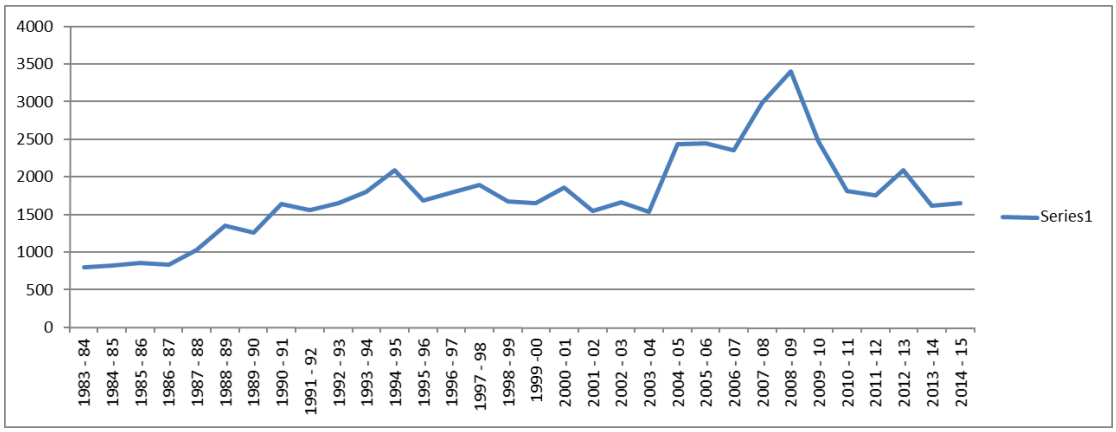
12 See Pearce, DC, "Legislative scrutiny: Are the ANZACS still the leaders?", paper delivered to Australia-New Zealand Scrutiny of Legislation Conference, "Scrutiny and Accountability in the 21st Century", 6-8 July 2009, Canberra (available at http://www.aph.gov.au/About_Parliament/Senate/Whats_On/Conferences/sl_conference/papers/pearce) and Argument, S, "'The Poms can't teach us nuthin'- Commentary on paper by Professor Dennis Pearce"(available at http://www.aph.gov.au/~/media/Committees/Senate/sl_conference/papers/argument.pdf).



The 1983-84 figure is 800 disallowable instruments. The 2008-09 figure is 3,404 disallowable instruments. While the more recent 1,828 disallowable instruments pales into insignificance, in comparison with the 2008-09 figure (which may, in fact, be attributable to the "backcapturing" process of existing instruments that the *Legislative Instruments Act 2003* – now the *Legislation Act 2003* – initially required[13]), it is surely the case that this sort of volume of delegated legislation carries with it challenges for the Parliament, if it is to maintain proper control over the content of delegated legislation. Clearly, scrutinising the content of such a volume of delegated legislation is a significant challenge, for the R and O Committee and for the Senate.

"Dignan's case"

The delegation vs subordination element of this paper prompts me to make some brief comments about some suggestions that various academics[14] have recently made about the potential for the scope of some recent delegated legislation to give rise to "Dignan" issues. In *Delegated Legislation in Australia*,[15] Professor Pearce and I refer to 2 High Court decisions as "Dignan's case". In chapter 13, the relevant decision is *Dignan v Australian Steamships Pty Ltd* ([1931] HCA 19; (1931) 45 CLR 188 (12 May 1931)).[16] That decision seems to be authority for 2 basic (and fundamental) propositions – that the tabling requirements in the *Acts Interpretation Act 1901* (which then applied to delegated legislation) are directory, rather than mandatory and that the High Court was not going to intervene in relation to matters that were procedural issues for the Parliament (which, in the particular

13 But see also Senate Standing Committee on Regulations and Ordinances, *Report on the work of the committee in the 42nd Parliament*, Report no.115 (available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Reports/report115/index), at paragraph 3.4 and Senate Standing Committee on Regulations and Ordinances, *Report on the work of the committee in 2010-11*, Report no. 116, (available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Reports/report116/index), at paragraph 3.3, for other explanations of the fluctuations in instrument numbers around that time.

14 See, eg, Appleby, G and Howe, J, "Scrutinising Parliament's Scrutiny of Delegated Legislative Power", *Oxford University Commonwealth Law Journal*, 15(1) 2015.

15 Pearce, DC and Argument, S, *Delegated Legislation in Australia* (4th edition), (2102, LexisNexis Butterworths, Australia).

16 See, eg, Pearce and Argument (note 15), at page 201.

case, operated to allow the Senate to disallow a regulation, even though the Government had not actually tabled it).

However, there is another High Court decision that is referred to as "Dignan's case", referred to in *Delegated Legislation in Australia* (see, for example, paragraph 25.16) as *Victorian Stevedoring & General Contracting Company Pty Ltd v Dignan;* sub nom *Meakes v Dignan* ([1931] HCA 34; (1931) 46 CLR 73 (2 November 1931) – ***Meakes v Dignan***). That decision (as I read it) is essentially about the separation of powers. In that decision, delegated legislation was challenged on the basis that it was contrary to the separation of powers. In particular, it was argued that the relevant regulations were *ultra vires*, on the basis that they were contrary to a constitutional principle that a legislative body cannot delegate its law-making powers. The High Court rejected the challenge.

In her recent Senate Occasional Lecture paper, Professor Cheryl Saunders (referring to *Meakes v Dignan*) stated:

> It is received wisdom that there are effectively no enforceable constitutional limits on the extent of the law-making authority that can be delegated to the executive government by the Commonwealth Parliament. This assessment stems from the 1931 decision of the High Court of Australia in *Dignan* and the lack of any significant case law to the contrary since, despite sometimes extravagant delegations. Without being too heretical, let me draw attention to some of the limits that were expressed or implied in *Dignan*, which could become relevant in an appropriate case, informed by other developments in understanding of the constitutional separation of powers over the intervening 85 years. One to which reference often is made is the warning in the judgement of Dixon J that it must be possible to characterise the law delegating authority to the executive as one that is supported by a head of legislative power. This warning goes both to the "width" and the certainty of the scope of the power that is delegated. Evatt J was broadly in agreement, but drew a difficult distinction between laws with respect to legislative power and laws with respect to a head of power. In the course of this he suggested that the repository of the law-making power and in particular the extent to which the rule maker was "removed…from continuous contact with Parliament" might affect the validity of a delegation in some (admittedly extreme) circumstances. Underlying both sets of reasons was the difficulty of overturning then established practice, with its advantages for the operations of government, coupled with assumptions drawn from the principle of parliamentary sovereignty and the practices of responsible government, both of which were inherited from the United Kingdom. Both Justices qualified the implications that might be drawn from these inherited practices by reference to the context of the Commonwealth Constitution, a technique that has since become considerably more refined. *Dignan* also confirms the constitutional separation of legislative and executive power, while denying its

> application in this context and acknowledging consequential "asymmetry".[17] [footnotes omitted]

Professor Saunders went on to state:

> Judicial review has more bite once delegated legislative power is exercised. Executive law-making is just another form of executive action. It falls to the judicial power, in the last resort, to ensure that it is exercised within lawful bounds. The respect due to Acts of the elected Parliament does not apply here, except at one remove. In the words of Dixon J in *Dignan*, the "statute is conceived to be…the expression of the continuing will of the Legislature" while "subordinate legislation" lacks "the independent and unqualified authority which is an attribute of true legislative power". The standard terms for conferring regulation–making power on the Governor-General has some inbuilt flexibility in the "necessary or convenient" formulation. This cannot, however, be used to "support attempts to widen [its] purposes…to add new and different means of carrying them out or to depart from or vary the plan which the legislature has adopted to attain its ends". Thus, for example, in 2012, a regulation that added an adverse security assessment to the criteria for granting a protection visa was held to be "inconsistent" with the scheme in the principal Act and beyond the law-making power conferred. An [Australian Government Solicitor] Briefing notes with some justification that the risk of invalidity on these grounds is greater in detailed legislation than (for example) in legislation that "merely sets out the skeleton of the proposed scheme". The latter is clearly contrary to constitutional principle, however, and runs a greater risk of invalidity on constitutional grounds, however remote the possibility might presently appear to be.
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> Whether in the absence of judicial constraints or as a complement to them, it falls to the legislature itself to scrutinise the practice of executive law-making and to keep it in appropriate bounds. The composition and powers of the Senate have been critical in this respect, given the impact of responsible government on the willingness of a majority in the House of Representatives to publically oppose any decision attributable to Ministers, no matter how principled the cause. The regime that applies at the Commonwealth level, for the publication, tabling, and disallowance of legislative instruments by either House derives its principal effect from the activities of the two Senate Scrutiny Committees and from the willingness of the Senate to take action to disallow.[18] [footnotes omitted]

While I am not any sort of constitutional lawyer, nor would I profess to be an expert commentator on the decisions of the High Court, I do keep an eye on

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17 See Saunders, C, "Australian democracy and Executive law-making: Practice and principle", (available at http://www.aph.gov.au/About_Parliament/Senate/Whats_On/Seminars_and_Lectures/~/~/media/2C5C8611D2D34C7A9D28E1FEE341D0AD.ashx), at pages 3-4.

18 See Saunders (note 17), at page 4.

High Court decisions that consider issues relevant to delegated legislation.[19] I have seen no indication that the High Court is likely to overturn *Meakes v Dignan*. I stand to be corrected on this.

In addition, however, I believe that there are elements of the Senate's recent approach to delegated legislation that actually address some of the fundamental issues that Justices Dixon and Evatt identified in *Meakes v Dignan*. In his judgment, Dixon J stated:

> Major consequences are suggested by the emphasis laid in *Powell's Case* and in *Hodge's Case* upon the retention by the Legislature of the whole of its power of control and of its capacity to take the matter back into its own hands. After the long history of parliamentary delegation in Britain and the British colonies, **it may be right to treat subordinate legislation which remains under parliamentary control as lacking the independent and unqualified authority which is an attribute of true legislative power**, at any rate when there has been an attempt to confer any very general legislative capacity.[20] [footnotes omitted, emphasis added]

In his judgment, Evatt J stated:

> On final analysis therefore, the Parliament of the Commonwealth is not competent to "abdicate" its powers of legislation. This is not because Parliament is bound to perform any or all of its legislative powers or functions, for it may elect not to do so; and not because the doctrine of separation of powers prevents Parliament from granting authority to other bodies to make laws or by-laws and thereby exercise legislative power, for it does so in almost every statute; but because **each and every one of the laws passed by Parliament must answer the description of a law upon one or more of the subject matters stated in the *Constitution***. A law by which Parliament gave all its law-making authority to another body would be bad merely because it would fail to pass the test last mentioned. [emphasis added]

While I do not propose, in this paper, to deal with the issues above in any greater detail, it is my view that the active scrutiny of delegated legislation by the Senate, assisted by the R and O Committee, demonstrates that delegated legislation "remains under parliamentary control", as required by Dixon J. The fact that the Senate routinely disallows delegated legislation (an issue that I discuss further below) only underlines that parliamentary control (in my view).

As to Evatt J's requirement that "each and every one of the laws passed by Parliament must answer the description of a law upon one or more of the subject matters stated in the *Constitution*", I note the vigorous approach that the R and O Committee has taken, over many years, in relation to ensuring

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19 For recent High Court consideration of *Meakes v Dignan*, see, for example, *Plaintiff S157/2002* [2003] HCA 2 at [101]-[102], which was endorsed in *Plaintiff M79/2012* [2013] HCA 24 at [88].

20 The decision can be found here http://www.austlii.edu.au/au/cases/cth/HCA/1931/34.html.

that delegated legislation is "in accordance with the statute". As I discuss further below (and as is also discussed, in more detail, in Glenn Ryall and Jessica Strout's paper for this conference – "Scrutiny committees-A vehicle to safeguarding Federalism and the constitutional rights of Parliament"), this includes the approach that the R and O Committee has taken post-*Williams (No. 2)*[21] to ensuring that delegated legislation made (in essence) in response to *Williams (No. 2)* is made by reference to an identified head of constitutional power.

In short, it is my view that the fact that the Senate consistently demonstrates that it is not *subordinate* to the Executive in relation to delegated legislation means that the sorts of issues raised by various academics, by reference to *Meakes v Dignan*, are unlikely to arise. Though, of course, I have already identified the limits on my capacity to offer definitive views on High Court jurisprudence.

The importance of disallowance – Possible lessons from the Strathclyde Review – *Secondary legislation and the primacy of the House of Commons*

At this point of the paper, I rely heavily on material that I originally presented as part of my recent Senate Occasional Lecture paper, given on 12 March 2016.[22]

Background

On 17 December 2015, the UK Government published the report of the "Strathclyde Review".[23] The review, led by Lord Strathclyde, had been commissioned, by the UK Government, the previous October (meaning that it was completed in a very short time-frame). The purpose of the review was "to examine how to protect the ability of elected governments to secure their business in Parliament in light of the operation of [relevant parliamentary] conventions" and to "consider in particular how to secure the decisive role of the elected House of Commons in relation to its primacy on financial matters, and secondary legislation".[24]

The stimulus for the review was a decision of the House of Lords, made on 26 October 2015, to "withhold agreement" to the Tax Credits (Income Thresholds and Determination of Rates) (Amendment) Regulations 2015. Those

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21 *Williams v Commonwealth (No. 2)* [2014] HCA 23 (19 June 2014).

22 Argument, S, "Australian democracy and Executive law-making: Practice and principle", (available at http://www.aph.gov.au/About_Parliament/Senate/Whats_On/Seminars_and_Lectures/~/~/media/A9C04FAB5BA64B1387BB74CB5A2BB144.ashx)

23 https://www.gov.uk/government/news/government-publishes-strathclyde-review. The report can be found at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/486790/53088_Cm_9177_Web_Accessible.pdf.

24 https://www.gov.uk/government/speeches/strathclyde-review-statement-by-baroness-stowell.

regulations were put to the House of Lords under section 66 of the *Tax Credits Act 2002* (UK), which provided (in part):

> **66 Parliamentary etc. control of instruments**
>
> This section has no associated Explanatory Notes
>
> (1) No regulations to which this subsection applies may be made unless a draft of the instrument containing them (whether or not together with other provisions) has been laid before, and approved by a resolution of, each House of Parliament.
>
> (2) Subsection (1) applies to—
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> (a) regulations prescribing monetary amounts that are required to be reviewed under section 41,
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> (b) regulations made by virtue of subsection (2) of section 12 prescribing the amount in excess of which charges are not taken into account for the purposes of that subsection, and
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> (c) the first regulations made under sections 7(8) and (9), 9, 11, 12 and 13(2).
>
> (3) A statutory instrument containing—
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> (a) regulations under this Act,
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> (b) a scheme made by the Secretary of State under section 12(5), or
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> (c) an Order in Council under section 52(7),
>
> is (unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament) subject to annulment in pursuance of a resolution of either House of Parliament.
>
> ……..

It appears that the regulations in question were “first regulations”, for the purposes of paragraph 66(2)(c) of the Tax Credits Act. As a result, a positive resolution of both Houses was required in relation to the regulations if they were to proceed into effect. As indicated, the House of Lords declined to make such a positive resolution.

The report notes that on the following day (ie 27 October 2015), a motion was moved and narrowly defeated which would have annulled the Electoral Registration and Administration Act 2013 (Transitional Provisions) Orders 2015.

These were obviously considered to be momentous events, leading the Prime Minister to invite Lord Strathclyde "to conduct a review of statutory instruments and to consider how more certainty and clarity could be brought to their passage through Parliament".[25]

In the foreword to the report, Lord Strathclyde stated:

> The Lords convention on statutory instruments has been fraying for some years and the combination of less collective memory, a misunderstanding of important constitutional principles, a House more willing to flex its political muscles, and some innovative drafting of motions against statutory instruments has made it imperative that we understand better the expectations of both Houses when it comes to secondary legislation and, in particular, whether the House of Lords should retain its veto.[26]

In some of the background information in the report, Lord Strathclyde referred to work previously done by a "Joint Committee on Conventions of the UK Parliament", noting:

> A third convention considered by the Joint Committee is central to the current review and relates to secondary legislation. The Committee noted that assertions had been made in debate in the Lords since the 1950s that it would be wrong for the Lords to reject delegated legislation. When the Committee considered the matter, there had only been two occasions on which the House of Lords had rejected [a Statutory Instrument] (in 1968 and 2000, in the cases mentioned below). The Committee concluded that "the House of Lords should not regularly reject Statutory Instruments, but that in exceptional circumstances it might be appropriate for it to do so". A number of specific circumstances were identified, for example, when the provisions of [a Statutory Instrument] were of the sort more normally found in primary legislation or in the case of certain specific orders. If these or other particular circumstances did not apply, then "opposition parties should not use their numbers in the House of Lords to defeat [a Statutory Instrument] simply because they disagree with it".
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> Since the Joint Committee reported in 2006, and the Lords and Commons noted the report with approval, the Lords have rejected [Statutory Instruments] on the three further occasions [that are discussed later in the report].[27]

The important thing to note here is the apparent rarity of the House of Lords challenging (for want of a better word) delegated legislation.

I do not propose to consider here the detail of the reasoning of the report of the Strathclyde Review. It is largely UK-Parliament-specific, referring both to

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25 Report of Strathclyde Review (note 23), at page 3.
26 Report of Strathclyde Review (note 23), at page 3.
27 Report of Strathclyde Review (note 23), at page 11 (footnotes omitted).

UK legislations, particular conventions (and history) of the UK Parliament and also the complex and confusing nature of legislative scrutiny in the UK Parliament.[28] What is important is the 3 options put forward by Lord Strathclyde, as a result of his review:

- One option would be to remove the House of Lords from statutory instrument procedure altogether. This has the benefit of simplicity and clarity. However, it would be controversial and would weaken parliamentary scrutiny of delegated legislation and could make the passage of some primary legislation more difficult.

- The second option would be to retain the present role of the House of Lords in relation to statutory instruments, but for that House, in a resolution or in standing orders, to set out and recognise, in a clear and unambiguous way, the restrictions on how its powers to withhold approval or to annul should be exercised in practice and to revert to a position where the veto is left unused. This option seeks to codify the convention. However, since a resolution of the House could be superseded, or standing orders could be suspended, by further decisions of the House, it would not provide certainty of application.

- A third option would be to create a new procedure - set out in statute - allowing the Lords to invite the Commons to think again when a disagreement exists and insist on its primacy. This would better fit with the established role of the House of Lords as regards primary legislation.[29]

Lord Strathclyde recommended the third option. To me, all of the options seem pretty extreme.

Why was the reaction indicated by the report of the Strathclyde Review so extreme?

Clearly, I do not know enough about the situation in the UK Parliament to be able to offer any informed analysis of the reasoning behind Lord Strathclyde's recommended options. However, I note that Professor Meg Russell, Constitution Unit at the University College London offered this contemporary analysis:

> The current argument concerns the Tax Credits (Income Thresholds and Determination of Rates) (Amendment) Regulations 2015 which significantly limit people's eligibility for tax credits. This is a piece of 'delegated legislation' (a 'statutory instrument') meaning that it is subject to an expedited parliamentary process, much less onerous than the process for passing a bill …. The government is seeking to use powers delegated to it under the *Tax Credits Act 2002*, which allows for regular updating of rates and bands. This kind of delegated power is commonplace, to ensure that a new bill is not required every time there

28 See, eg, *The Devil is in the Detail* (note 1), at pages 73-90.
29 Report of the Strathclyde Review (note 23), at page 5.

> are small changes to the implementation of policy. Notably, delegated legislation cannot be amended by the Lords, only rejected or agreed.[30]

The point to note about the above paragraph is the suggestion that delegated legislation is to be used for "small changes". Professor Russell goes on to discuss the role of the House of Lords in relation to delegated legislation:

> The House of Lords has a formal veto over delegated legislation.
>
> If the House of Lords used its veto power on a regular basis this could be very disruptive. In practice it has treated such matters with caution. The House of Lords Library have collated useful data on such motions. These show that in the period 1999-2012 the Lords voted on 27 fatal and 42 non-fatal motions, which resulted in 17 defeats – just three of them on fatal motions. Two occurred in 2000 over arrangements for the London mayoral elections, and another in 2007 over the Manchester 'supercasino'.
>
> Prior to this there had been only one such fatal defeat of a statutory instrument, in 1968, leading to claims of a convention that the Lords should not vote on such matters. It is hence not unprecedented for the Lords to use its veto power, but it is unusual.[31]

Professor Russell goes on to state:

> Two other political points are important. First, the threat of a Lords defeat on a statutory instrument can result in compromise. While they cannot be amended, the tabling of a motion, or even the threat to table a motion, occasionally results in an instrument being withdrawn by the government and replaced by an amended version. A vote, and possible defeat, only occurs when these informal processes fail. Second, it is a far greater threat to the government than it is to the Lords if the existing convention breaks down. If it became routine for statutory instruments to be rejected, a great deal of government business could grind to a halt. The maintenance of the system depends on some give and take on both sides.[32]

While I will go on to make some remarks about how *different* things are in the Senate, I note that the preceding paragraph suggests that compromise (and "informal processes") is as much a factor in the House of Lords as it is in the Senate (and, indeed, in other Australian jurisdictions).

Professor Russell offered some further insight in evidence that she gave to the Public Administration and Constitutional Affairs Committee of the House of

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30 See Russell, M, "Everything you ever wanted to know about tax credits and the House of Lords - but were afraid to ask, *The Telegraph*, 26 October 2015 (available at http://www.telegraph.co.uk/comment/11955288/Everything-you-ever-wanted-to-know-about-tax-credits-and-the-House-of-Lords-but-were-afraid-to-ask.html).

31 Russell (note 30).

32 Russell (note 30).

Commons on 19 January 2016, in oral evidence given to that committee's inquiry into the Strathclyde Review:

> **Q8 Mrs Cheryl Gillan:** In the same vein as "one swallow doesn't a summer make", were you surprised that one defeat triggered a whole review?
>
> ***Professor Russell***: Well, tempers had got very high. I was a little surprised at the way it was handled, although not entirely. One of the things that I commented on, which is another crucial piece of context for all of this, was when I published something immediately after the 2010 election saying, we are now in uncharted political waters. We have a majority Conservative Government, albeit a slender majority in the Commons, facing a House of Lords that is potentially politically hostile to it, in which the Labour Opposition can potentially join forces with others to outnumber the Conservative Government.
>
> This is a new situation, and I think it is taking Ministers some time to get used to that situation. I think it has also taken the Opposition some time to get used to that situation, and Lord Strathclyde acknowledged this in his speech in the debate last week. This is a new situation for the Conservatives. It is also a new situation for Labour, and indeed for the Liberal Democrats, who are very important voters in the Lords.
>
> In that sense it is not surprising, because this is new and people are finding their feet in this new situation, but I think what was potentially surprising was that Ministers raised the temperature so much on this issue so early, because this is not by any means the first time that there have been rumblings in the House of Lords that a statutory instrument is problematic and that it might be rejected. What has historically happened is that Ministers have thought about it before the vote and withdrawn the instrument, and sometimes relaid an amended instrument in order to defuse the situation, whereas the Government's approach here was that they wanted to have the fight. Once tempers had got that raised, perhaps it is not surprising that you end up with a review to see what is going on.
>
> **Q9 Mrs Cheryl Gillan:** It is fair to say that the drive came from Ministers, and it was surprising that the drive was quite so vociferous to move to a review. Is that what you are inclined to say?
>
> ***Professor Russell***: I do not have any difficulty with there being a review. I think it is a perfectly reasonable thing to do. It is an important area. It is a very thorough review. It presents us with some nice evidence that we can discuss. It is difficult to criticise Ministers for deciding that there should be a review, but the reason that this became such a contested topic was perhaps in the end because Ministers were not adequately aware of the risk of defeat and the fact that speaking out against the Lords publicly would not necessarily make the problem go away.

> **Q10 Mrs Cheryl Gillan:** They had not done their homework, is what you are saying?
>
> > ***Professor Russell***: It is the job of the business managers to advise Ministers as to what they can get through Parliament, and somehow Ministers seemed to have the impression that by pushing ahead very loudly they would be able to get this through, and it did not work.[33]

Perhaps it was all just a stuff-up.

Small changes??

An obvious point to make is that if delegated legislation is only for "small changes", how can it be that the rejection by the House of Lords of a piece of delegated legislation resulted in the British Prime Minister being reportedly "furious" with the House of Lords and threatening to take "rapid" action in response?[34] If only "small changes" were involved in the Tax Credits (Income Thresholds and Determination of Rates) (Amendment) Regulations 2015, why did their rejection result in the Strathclyde Review and, in turn, the 3 "reform" options suggested by Lord Strathclyde?

An obvious possibility is that, in fact, the relevant regulations did not contain "small changes" but, rather, *significant* changes. If that is the case, then why were the changes not implemented by way of primary legislation?

In Australia, in the Commonwealth jurisdiction, the *Legislation Handbook*, published by the Department of the Prime Minister and Cabinet, offers the following guidance in relation to what should go into primary, rather than delegated, legislation:

> **Primary or subordinate legislation**
>
> 1.12 While it is not possible or desirable to provide a prescriptive list of matters that should be included in primary legislation and matters that should be included in subordinate legislation, it is possible to provide some guidance. Matters of the following kinds should be implemented only through Acts of Parliament:
>
> (a) appropriations of money;
>
> (b) significant questions of policy including significant new policy or fundamental changes to existing policy;
>
> (c) rules which have a significant impact on individual rights and liberties;[35]

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33 Available at http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/public-administration-and-constitutional-affairs-committee/strathclyde-review/oral/27335.html.

34 See, eg, Watt, N, "Tax credits vote: PM accuses Lords of breaking constitutional convention", *The Guardian*, 27 October 2015 (available at http://www.theguardian.com/money/2015/oct/26/tax-credit-cuts-halted-as-lords-vote-to-protect-low-income-earners).

35 Available at http://www.dpmc.gov.au/pmc/publication/legislation-handbook.

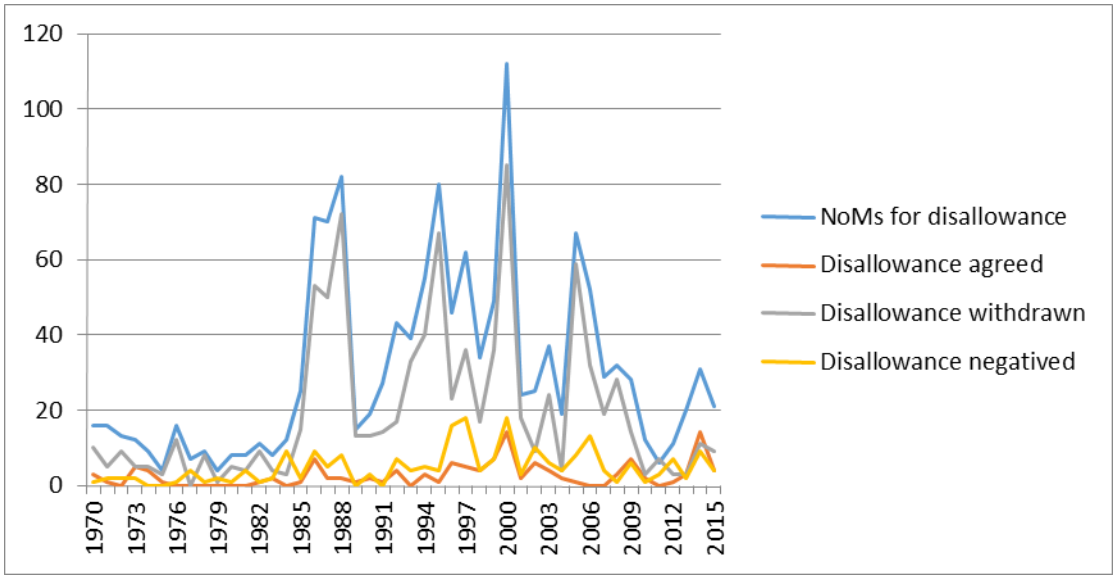
……

I suggest that (b) or (c) would probably apply if the legislation that led to the Strathclyde Review was to be implemented in the Commonwealth jurisdiction and that primary legislation would have been required, rather than delegated legislation.

An over-reaction perhaps?

My overwhelming initial reaction to reading the 3 options presented in the report of the Strathclyde Review is that the 3 options were so drastic that (in the absence of any other explanation) they represented an over-reaction. However, my initial reaction was tempered somewhat when I considered the statistics on how often delegated legislation had been stymied in the House of Lords over the past 50 years.

This caused me to look into the equivalent figures for the Senate. I am grateful for the assistance of the secretariat of the R and O Committee and the Senate Research section for preparing the following graphical representation of the number of disallowable motions for which notices were given, agreed, withdrawn and negatived in the Senate between 1970 and 2015:



The peak above is for 2000, when 112 notices were given. In more recent years, 20 notices were given in 2013, 31 in 2014 and 21 in 2015.

The table above does not separate out notices given on behalf of the R and O Committee. *Odgers' Australian Senate Practice* offers the following explanation in relation to the R and O Committee's role in relation to notices of motion for disallowance of delegated legislation:

> The Standing Committee on Regulations and Ordinances follows a practice of giving notices of motions to disallow regulations or other subordinate legislation within the prescribed period, and then

> withdrawing the notices after correspondence with the responsible minister satisfies the committee's concerns.
>
> Giving notices of motions to disallow indicates concern about the delegated legislation in question, and these are known colloquially as protective notices of motion, in that they protect the right of the committee, and of any senator, to move disallowance if it is subsequently decided that this is appropriate. Such concern is often allayed by further explanatory material from the minister or an undertaking to amend the legislation. Where the committee's concerns are met, the notice of motion to disallow is withdrawn (although it may be taken over by another senator). There are some occasions where the responsible minister does not satisfy the committee and the motion to disallow proceeds.
>
> Frequently a protective notice of motion is withdrawn on the basis of undertakings from a minister to take action addressing the matters causing concern, usually by amending the legislation in question.
>
> The practice of ministerial undertakings has the benefit of securing an outcome agreeable to the committee without necessarily interrupting administration and implementation of policy by disallowance of the instruments in question.[36]

It is an oft-quoted fact that in the over-80-year history of the R and O Committee, there has been no occasion on which the R and O Committee has proceeded to a Senate vote on a notice of motion to disallow and the vote was not passed by the Senate (though the last time that the Senate disallowed an instrument at the instigation of the R and O committee was in 1988).[37]

Of the 20 notices given in 2013, 2 were given on behalf of the R and O Committee. Both were later withdrawn (ie on the basis of the R and O Committee receiving a satisfactory response from the relevant Minister). Of the 31 notices given in 2014, 5 were given on behalf of the R and O Committee. All were later withdrawn (though one instrument was disallowed by the Senate in any event, on the motion of an individual Senator). Of the 21 motions given in 2015, 12 were given on behalf of the R and O Committee. All but 2 (on which the R and O Committee is still awaiting a satisfactory response from the Minister) were later withdrawn.

Two obvious points arise from the figures stated above. First, notices of motion for disallowance are routinely given (and without there being any obvious calamity or cause for fury). Second, the later withdrawal of the notices, on the R and O Committee receiving a satisfactory response from the relevant Minister, demonstrates that there is a high degree of co-operation (and possibly compromise) between the R and O Committee and Ministers.

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36 Available at http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/odgers13?file=chapter15&section=15&fullscreen=1.

37 See Pearce and Argument (note 15), at paragraph 3.12.

As to the effect of motions that actually result in disallowance, I note that 59 disallowance motions have been agreed to by the Senate since 2000. In 2000 and 2014 alone, 14 motions were agreed to in each of those years. The sky has not fallen in. I have seen no reports of Prime Ministerial fury in the press.

Some possible explanations for the Strathclyde Review and its recommended options

I now offer some further, fairly unstructured observations on the possible reasoning behind the Strathclyde Review and the options that it gives for the way forward. On 17 December 2015, in the debate in the House of Lords on the report of the Strathclyde Review, Baroness Smith of Basildon (a Labour peer) stated:

> At this point, most normal people's eyes will glaze over, but SIs [ie Statutory Instruments] are the Government's secret weapon. Traditionally, they were not used for issues that should be in primary legislation or for major policy changes where there should be full scrutiny and consideration. But their use has grown over a number of years and, more significantly, at a faster rate since 2010. The tax credits changes originally proposed were a major policy shift, and it would have been entirely appropriate for them to have been considered in primary legislation. But the Government chose to use an SI.
>
> We will want to consider the report from the noble Lord, Lord Strathclyde, in more detail, but I say to the noble Baroness that the process he recommends is a very significant change. First, it is a major departure to use legislation to address this issue. Secondly, in terms of procedure, a statutory instrument is not sent to your Lordships' House from the House of Commons but from the Executive—from the Government. It is not like legislation where proposals are considered and sent from one House to another.
>
> In terms of statutory instruments, both Houses separately consider measures proposed by the Government. Either House can accept or reject, and rejection by either House is in effect a veto. That is why this House has so rarely rejected a statutory instrument. Since 1999, it has happened just four times in 16 years—approximately once a Parliament. The noble Baroness referred to this, but let us be clear that in this Parliament three attempts at a so-called fatal Motion to reject an SI have failed.[38]

I was interested by the proposition that the use of Statutory Instruments had "grown over a number of years and, more significantly, at a faster rate since 2010". Appendix H to *The Devil is in the Detail* is a table of Statutory Instruments laid in the House of Commons, in accordance with scrutiny procedures between1997-98 and 2013-14, divided into instruments subject to "negative" procedures, instruments subject to "affirmative" procedures,

38 Available at http://www.publications.parliament.uk/pa/ld201516/ldhansrd/text/151217-0001.htm#15121733000919.

instruments subject to “strengthened” procedures (special procedures that apply to instruments that amend primary legislation) and instruments laid in the House but not subject to any formal scrutiny.[39] I reproduce the figures below:

Session	Negative	Affirmative	Strengthened	Laid (no scrutiny)
1997-98	1,591	225	5	35
1998-99	1,266	178	4	34
1999-00	1,241	180	0	32
2000-01	717	123	2	26
2001-02	1,468	262	10	57
2002-03	1,216	233	10	24
2003-04	1,038	207	4	34
2004-05	660	126	6	6
2005-06	1,583	271	4	31
2006-07	1,135	24	5	2
2007-08	1,049	257	6	13
2008-09	1,010	261	8	26
2009-10	631	179	3	10
2010-12	1,371	386	11	51
2012-13	742	214	26	37
2013-14	882	267	13	23

I do not discern in the above figures any particular increase since 2010. Further, in comparison to the number of disallowable legislative instruments that have come through the R and O Committee over the equivalent periods (and bearing in mind the disparities in populations), the delegated legislation workload of the UK Parliament seems positively benign.

I was also struck by this statement in Professor Russell’s article (quoted above):

39 *The Devil is in the Detail* (note 1), at page 236.

> The broader politics matter a great deal here as well. The House of Lords will rarely go out on a limb on a controversial policy matter where there is not widespread political concern elsewhere. Although unelected, peers are aware of the wider political mood, including public opinion and media responses. In particular, the chamber will tend to act with greater boldness where there is clear unhappiness on the government benches in the Commons.[40]

It has been suggested to me that part of the fury that has been directed at the rejection of the legislation by the House of Lords that prompted the Strathclyde Review might be explicable by the fact that the House of Lords is "unelected" and might be considered to be "unrepresentative". The point apparently being that an "unrepresentative" legislative body has no right to act in a way that obstructs the elected government.

On this point, I simply ask why would a legislative body be given powers on the (unstated) understanding that the legislative body will not actually exercise those powers? This simply makes no sense to me. I can see no point in a legislative body having powers if the body is not actually allowed to use them.

Comparison between Australia and the UK

In my Senate Occasional Lecture paper, I offered my view that the Strathclyde Review demonstrated that we do things so much better in Australia. Further, I stated my firm belief that the Strathclyde Review could not happen in Australia. I noted, for example, that I could not conceive of a situation where an option was put forward to remove the Senate's power to disallow delegated legislation. In my view, there is a maturity about the scrutiny of delegated legislation in Australia (particularly in the Senate but also, as I mention below, evidenced in other jurisdictions) that includes an acceptance by the Executive that delegated legislation will be scrutinised, questioned and, even, disallowed by the Senate. The fact that the Senate has routinely disallowed delegated legislation over the years, without provoking public "fury" from Prime Ministers and the like, and without the system grinding to a halt, is something of which (in my view) Australians can be proud.

Further reaction, from the House of Lords

I was comforted in relation to my published views on the Strathclyde Review by the findings of 3 subsequent reports by House of Lords committees. In a report published on 23 March 2016, the House of Lords Select Committee on the Constitution stated:

> Lord Strathclyde was asked "how to secure the decisive role of the elected House of Commons in the passage of legislation". This remit, set by the Government, cast the Strathclyde Review's consideration of secondary legislation procedure as concerning the balance of power between the two Houses of Parliament. The title of the Review,

40 Russell (note 30).

> *Secondary legislation and the primacy of the House of Commons*, echoes that emphasis on inter-House relations.[41]

The report went on state that ….

> … a focus on inter-House relations ignores the other, vital, balance of power that would be altered should changes be made to statutory instrument procedure in the House of Lords: the balance of power between Parliament and the Executive. By tasking Lord Strathclyde with considering the balance of power between the two Houses of Parliament, the Government focused his Review on the wrong questions. We believe that consequently it addressed the wrong issues.[42]

After discussing issues surrounding the proposition that the legislative scrutiny powers of the House of Lords might be weakened, the report stated:

> Given the increasing concerns we and others have in respect of broad or poorly-defined powers, and the key role played by the House of Lords in the scrutiny of delegated legislation, any diminution of the House's power to hold the Government to account over its use of delegated powers is of great concern. Weakening the House's power to hold the Government to account for delegated legislation—making it easier for "elected Governments to secure their business in Parliament"—would increase the incentives for Governments to widen the use of delegated legislation.[43]

In a "special" report also published on 23 March 2016, the House of Lords Delegated Powers and Regulatory Reform Committee also addressed the proposition from the Strathclyde Review that the issue was the relationship between the House of Lords and the House of Commons. The report stated:

> We do not agree. The relationship at issue is not between the two Houses but between the Government and Parliament.[44]

The special report goes on to state:

> The House of Lords' votes on the Tax Credits Regulations challenged the Government, not the House of Commons, and the effect of the options set out in the Strathclyde Review would be to tilt the balance of power away from Parliament generally and towards Government.

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41 House of Lords, Select Committee on the Constitution, 9th Report of Session 2015–16, *Delegated Legislation and Parliament: A response to the Strathclyde Review* (available at http://www.publications.parliament.uk/pa/ld201516/ldselect/ldconst/116/116.pdf), paragraph 35.

42 Select Committee on the Constitution report (note 41), at paragraph 36.

43 Select Committee on the Constitution report (note 41), at paragraph 44.

44 House of Lords, Delegated Powers and Regulatory Reform Committee, 25th Report of Session 2015–16, *Special Report: Response to the Strathclyde Review* (available at http://www.publications.parliament.uk/pa/ld201516/ldselect/lddelreg/119/119.pdf), at paragraph 74.

> These are very important issues which, as we say in our conclusion, warrant further investigation. Underlying this important constitutional debate is the fact, however, that if governments were to follow the guidance about the appropriate threshold between primary and delegated legislation, then the issue which the Strathclyde Review seeks to address might well never have arisen.[45]

The special report then went on to endorse comments made by the Strathclyde Review in relation to the quality of primary legislation and the use (or over-use) of delegated legislation, noting current concerns about the width of delegations, the use of "Henry VIII" powers and the use (and volume) of "skeleton" bills and provisions.[46]

Similar comments were made by the House of Lords Secondary Legislation Scrutiny Committee, in a report dated 14 April 2016.[47] That committee did not support any of the 3 Strathclyde Review options.[48] The committee also stated that the 3 options should not be regarded as "a definitive list from which a selection had to be made".[49]

The following comments and recommendation by the committee should be noted:

> 67. **The contentious issue is not how often the House of Lords defeats statutory instruments but when it is appropriate for the Lords to defeat an instrument. This is a matter of judgement. But it is a judgement that the House, as a self-regulating institution, can be expected to make. That the House makes this judgement reasonably is evidenced by the very small number of defeats since 1968. In asserting this view, we acknowledge that opinion in the House of Lords varies as to whether it was appropriate for the House to vote in favour of the deferral motions in respect of the Tax Credits Regulations.**
>
> 68. **We recommend that the House of Lords should retain the power to reject secondary legislation, albeit to be exercised in exceptional circumstances only, as an essential part of Parliament's power to scrutinise and, where appropriate, challenge Government legislation.**

In relation to "skeleton bills", the committee stated:

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45 Delegated Powers and Regulatory Reform Committee report (note 44), at paragraph 77.

46 Delegated Powers and Regulatory Reform Committee report (note 44), at paragraph 78.

47 House of Lords, Secondary Legislation Scrutiny Committee, *Response to the Strathclyde Review: Effective parliamentary scrutiny of secondary legislation - Report* - HL Paper 128 (available at http://www.publications.parliament.uk/pa/ld201516/ldselect/ldsecleg/128/12802.htm).

48 Secondary Legislation Scrutiny Committee report (note 47), at paragraphs 91, 98 and 111-4.

49 Secondary Legislation Scrutiny Committee report (note 47), at paragraph 24.

> 78. We support those who caution against the use of skeleton bills and skeleton provision in bills. In taking this view, we bear in mind, in particular, the fact that although the government which originally sought such wide powers might offer assurances as to their exercise, such assurances will not bind the actions of future governments. We welcome [the Leader of the House of Commons, Mr Grayling's] commitment to ensuring that the [Parliamentary Business and Legislation] Committee [a committee of the Executive Government] will be more rigorous about challenging the use of skeleton bills and skeleton provision in bills.

The importance of disallowance mechanisms

I find the reports of the 3 House of Lords committees in relation to the Strathclyde Review heartening, especially in their rejection of the proposition that the central issue concerned the relationship between the Government and the Parliament, rather than the relationship between the Houses. That is surely the key issue. In delegating legislative power to the Executive, the Parliament entrusts the Executive with the relevant powers. But it does so on the basis that a significant degree of supervision is retained by the Parliament. As I have already stated, the power to disallow delegated legislation is crucial to that supervision. As Starke J stated in *Dignan v Australian Steamships Pty Ltd* [1931] HCA 19, "the power of disallowance is to ensure the control and supervision of Parliament over regulations". In the same decision, Dixon J stated:

> The power [to disallow] may be considered as a substitute in the case of delegated legislation for the requisite of a prior assent in the case of direct legislation.

Any attempt to diminish that power (which was a necessary consequence of any of the options suggested by the Strathclyde Review) must be resisted, by the Parliament. As I have already indicated, I believe that any such suggestions would be strongly resisted by the Australian Parliament.

Challenges presented by issues arising from the High Court's *Williams* decisions

I now return to issues arising from *Williams (No. 2).*[50] It is trite to observe that the High Court's decisions in in *Williams (No. 1)*[51] and *Williams (No. 2)* present challenges for the Parliament and for the R and O Committee. In *Williams (No. 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 decision in *Williams (No. 2)*, which strengthened the requirements in relation to legislative authority, the R and O Committee started requiring that the explanatory statements for all instruments specifying new programs for the purposes of section 32B of the *Financial Framework (Supplementary Powers) Act 1997*

50 *Williams v Commonwealth* (2014) 252 CLR 416.
51 *Williams v Commonwealth* (2012) 248 CLR 156.

explicitly state, for each new program, the constitutional authority for the expenditure.

I do not propose to deal with the detail of the *Williams* decisions in any detail in this paper. As indicated above, I defer to the excellent analysis in Glenn Ryall and Jessica Strout's paper for this conference. I also defer to the analysis set out in Dr Patrick Hodder's excellent *Papers on Parliament* paper, titled "The *Williams* Decisions and the Implications for the Senate and its Scrutiny Committees".[52] However, I make the following, brief comments about the practical implications of (in particular) the *Williams (No. 2)* decision for the work of the R and O Committee that, in my view, also go to the potential *Meakes v Dignan* issues that I have already discussed above.

Since *Williams (No. 2)*, the R and O Committee has required that instruments that add new programs to the Financial Framework (Supplementary Powers) Regulations 1997, under the power set out in section 32B of the Financial Framework (Supplementary Powers) Act are specific about the constitutional authority for the new program. If a program cites the external affairs power of the *Constitution* (section 51(xxix)) as authority, the R and O Committee has sometimes required that the relevant instrument, or its explanatory statement, identify the international instrument whose obligations are relied upon and the particular obligations involved (ie by reference to specific articles of the relevant international instrument).[53] This is based on the R and O Committee's understanding 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 the relevant treaty.

Similarly, where the executive nationhood power (section 61) or the express incidental power (section 51(xxxix)) are relied upon, the R and O Committee has sometimes required that the relevant instrument, or its explanatory statement, identify the reasons why the relevant enterprises or activities are enterprises or activities that are peculiarly adapted to the government of a nation and cannot otherwise be carried out for the benefit of the nation. This is based on the R and O Committee's understanding that the relevant powers provide 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 R and O Committee's requirements in this regard are in accordance with principle (a) of the R and O Committee's terms of reference, which requires the R and O Committee scrutinise instruments to ensure that they are "in accordance with the statute".

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52 Available at http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/~/media/7D469B4A037244249054B09FEA72C34A.ashx. See also Lynch, A, "Commonwealth spending after *Williams (No. 2): Has the new dawn risen?"*, (2016) 26 *Public Law Review* 77, at page 83.

53 See, eg, *Delegated legislation monitor* No. 6 of 2015 (available at http://www.aph.gov.au/~/media/Committees/Senate/committee/regord_ctte/mon2015/word/no06.docx?la=en), at pages 11-3.

It is pleasing to observe that, despite questioning the appropriateness of responding to the R and O Committee's requirements,[54] and despite routinely qualifying any reference to constitutional authority (ie by prefacing any reference to constitutional athority with a statement to the effect of "[n]oting that it is not a comprehensive statement of the relevant constitutional considerations"[55]), the Executive has generally been quite co-operative in relation to the R and O Committee's requirements in this regard.

There was a not-insignificant hiccup in this approach when the R and O Committee considered the Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 3) Regulation 2015. The Minister for Finance, Senator Mathias Cormann, declined to provide the R and O Committee with legal advice in relation to the constitutional authority that supported the relevant new programs. However, the Minister also failed to advance a public interest immunity claim in relation to declining to provide the requested advice, leading the R and O Committee to pursue the issue (including by lodging a "protective" motion to disallow the relevant regulation). Finally, the R and O Committee effectively gave the Minister the option of providing the legal advice or assuring the R and O Committee that he was satisfied that the new programs were constitutionally supported by the relevant powers. The Minister eventually provided the R and O Committee with that assurance.[56]

As I have already stated, this insistence that the Executive demonstrate that delegated legislation is "in accordance with the statute", with the particular focus on requiring that constitutional authority be identified for Williams-type instruments, demonstrates (in my view) that at least some of the *Meakes v Dignan* issues simply do not arise.

Disallowance in other jurisdictions

In the course of preparing this paper, I sought and received some valuable assistance from State and Territory colleagues in relation to the use of disallowance motions in other jurisdictions. I am very grateful for that assistance. Much of the relevant information will, no doubt, be presented to the conference by way of jurisdiction reports. However, a brief summary of what I discovered in relation to the prevalence (or not) of disallowance motions is set out below.

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54 See, eg, letter from the Minister for Finance to the R and O Committee, dated 1 September 2015, in relation to the R and O Committee's comments on the Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 3) Regulation 2015, reproduced in *Delegated legislation monitor* No. 10 of 2015, at page 33 (available at http://www.aph.gov.au/~/media/Committees/Senate/committee/regord_ctte/mon2015/word/no10.docx?la=en).

55 See, eg, explanatory statement for Financial Framework (Supplementary Powers) Amendment (Education and Training Measures No. 1) Regulation 2016 [F2016L00163].

56 See, generally, *Delegated legislation monitor* No. 13 of 2015 (available at http://www.aph.gov.au/~/media/Committees/Senate/committee/regord_ctte/mon2015/word/no13.docx?la=en).

Australian Capital Territory

There has not been a notice of motion to disallow a piece of delegated legislation moved on behalf of the Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) of the ACT Legislative Assembly in the 11 years that I have advised the ACT Committee on delegated legislation. However, it is my view that that largely reflects the fact that, over this time, issues serious enough to warrant a disallowance motion simply have not arisen.

New South Wales

The secretariat of the Legislation Review Committee of the New South Wales Parliament advised that disallowance motions are rare but not unheard of in the Legislative Assembly and that the most recent instance was in 2013, when the (then) Premier moved to disallow a number of Statutory and Other Offices determinations, made under section 19A of the *Statutory and Other Offices Act 1975*. The secretariat advised that the disallowance motion was carried without division. A disallowance motion was also moved and passed (on a division) in 2011, in relation to the Marine Parks (Zoning Plans) Amendment (Solitary Islands and Jervis Bay Marine Parks) Regulation 2011, made under the *Marine Parks Act 1997*. This motion was debated and adjourned, and on 26 May 2011 the debate was resumed and the motion passed on division. Two disallowance motions were moved in 2003, in relation to the Supreme Court Rules (Amendment No. 380) 2003 (made under the *Supreme Court Act 1970*) and in relation to an item of the District Court Amendment (Court Fees) Regulation 2003 (made under the *District Court Act 1973*). The secretariat advised that both motions were defeated

The secretariat also provided details of approximately 100 disallowance motions in the Legislative Council since 1988, of which approximately 25% were passed and 75% negatived, withdrawn, etc.

Northern Territory

The secretariat of the Subordinate Legislation and Publications Committee of the Northern Territory Legislative Assembly advised that there have been only 2 instances of a notice of a motion to disallow a piece of delegated legislation in the over-40-year history of the Committee and both have been given in the last 18 months. The 2 instances related to the Ports Management Regulations and the Motor Accidents (Compensation) Amendment Regulations.[57] The secretariat advised that, in both cases, the relevant offending clauses were removed, prior to the motion of disallowance being put.

57 The relevant reports are available at http://www.nt.gov.au/lant/parliamentary-business/committees/subordinate%20legislation%20and%20publications/reports.shtml.

Queensland

The Queensland Parliamentary Service advised that, in the Queensland Parliament, disallowance motions are "relatively rare" (probably because it is a unicameral parliament and, by definition, the Executive can command the numbers on the floor of the House). However, they advised that there were 30 disallowance motions in the period from 1999 to 2008 and, in the period from February 2012 to June 2016, there were a total of 17. Of the 17, one remains on the notice paper, one lapsed and one was ruled out of order. Of the rest, 13 were negatived and one was agreed to. The disallowance motion that was agreed to related to the Sustainable Planning Amendment Regulation (No. 2) 2012, tabled in the last days of the ALP Government led by Premier Anna Bligh. The dissolution motion was moved and passed after the subsequent election and the resulting change of government.[58]

South Australia

The secretariat of the Legislative Review Committee of the South Australian Parliament advised that, in 2015, 5 notices of motion to disallow were moved in the Legislative Council, in relation to 5 different regulations. The secretariat advised that the basis of the notices of motion to disallow was, in effect, to give the Committee further time to consider the relevant regulations and that no regulations were actually disallowed.

Tasmania

The secretariat of the Parliamentary Standing Committee on Subordinate Legislation of the Tasmanian Parliament advised that there is "very limited published information on disallowance motions as the majority of issues identified by the Committee have historically been resolved between the Committee and the Government of the day without the need for such a motion". However, the secretariat also advised that there were "a few examples" of disallowance motions being moved.

Victoria

The secretariat of the Scrutiny of Acts and Regulations Committee of the Victorian Parliament advised that there has not been a notice of a motion to disallow a piece of delegated legislation for at least 20 years.

Western Australia

The secretariat of the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament advised that 23 notices of motion to disallow were moved in 2015 and that 5 resulted in the relevant delegated legislation being disallowed.

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58 See http://www.parliament.qld.gov.au/documents/hansard/2012/2012_07_11_WEEKLY.pdf.

What do these figures indicate?

I draw no particular conclusions from the above figures. It is clear that various committees operate effectively without actually having to exercise the power to move a disallowance motion.[59] However, my comparison of the relatively frequent exercise of the disallowance power (and the giving of notices of motion to disallow) in the Senate (and in various other jurisdictions), in contrast with the rarity of this occurring in the UK Parliament, makes me tend to think that there is something to be said for the disallowance power being exercised (or threatened) on a regular basis, if only to remind the Executive that the power is there (and, possibly, as a way of avoiding something like the options suggested by the Strathclyde Review).

"National Scheme" or "uniform" legislation

As attendees of this conference would be well aware "National Scheme" or "Uniform" legislation refers to the practice of the Commonwealth and State and Territory governments agreeing (usually at meetings of responsible ministers, often referred to as "Ministerial Councils") that a particular issue will be addressed by each individual jurisdiction passing legislation of a certain (agreed) form. Examples of the sort of forums in which these agreements are made are the Council of the Australian Governments (**COAG**) and the Standing Committee of Attorneys-General (**SCAG**). Significant examples of legislation that has resulted from agreements at such forums are the *Corporations Act 2001* and the legislation that gave effect to the Mutual Recognition Scheme.

Proposals for "National Scheme" or "uniform" legislation generally arise because there is agreement among the various jurisdictions that a common legislative approach is required on a particular issue, in circumstances where the Commonwealth lacks the constitutional power to enact legislation that would bind all the relevant jurisdictions. Sometimes, this lack of power is addressed by the States agreeing to refer the relevant power to the Commonwealth, as contemplated by s 51(xxxvii) of the *Constitution*. On other occasions, what is agreed is that the Commonwealth Government (or, indeed, one of the other jurisdictions) will draft legislation and then provide the draft to the other jurisdictions, on the assumption that each government will secure the passage of "mirror" legislation through its parliament. Other methods include the States and Territories only being allowed to participate in a national legislative scheme if they enact legislation that is consistent with that of other jurisdictions and also the concept of "mutual recognition", under which jurisdictions agree to recognise (and uphold) the laws of other jurisdictions.

As conference attendees would be well aware, from a parliamentary scrutiny perspective, the difficulty posed by this type of legislation is that the various

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59 See also Argument, S, "Of parliament, pigs and lipstick (Slight Return): A defence of the work of legislative scrutiny committees in human rights protection" (available at http://www.aial.org.au/NationalForum/webdocuments/2011/Stephen%20Argument.pdf) and the discussion of the "unseen effect" of parliamentary scrutiny committees, at pages 29-33.

governments have agreed to put legislation through their respective parliaments and the fact that the success of the whole approach is dependent on the legislatures of all the jurisdictions passing legislation in the form agreed. As a result, it is put to legislatures that they simply cannot amend the legislation because the legislation is in a form that has been agreed between the governments and amendment will undo that agreement. In the case of parliamentary review committees, they are told that, for the same reasons, they cannot press their concerns about legislation. The end result is that "[p]ractically speaking, it is fair to say that there is effectively no parliamentary scrutiny of national scheme legislation".[60]

Given that proposals for "National Scheme" or "uniform" legislation are, by definition, emanations of the various Executive governments, it is my view that the spread of such legislation, if not challenged, can be seen as another example of the legislature being subordinated to the will of Executive government.

In that regard, I suggest that an obvious answer is for the legislature (particularly in jurisdictions where the government does not control the upper house) to point out that the agreements that give rise to National Scheme legislation are not binding on the legislature and remind the Executive that the legislature has a duty to carry out its legislative function. However, this argument does not tend to have much impact on Executive governments, which tend to argue that it is desirable that legislation be uniform and point out that any jurisdiction-specific amendments or alterations threaten that uniformity.

For some time now, I have argued that the WA experience tends to disprove this latter point. Assisted by the excellent work of the Legislative Council's Uniform Legislation and Statutes Review Committee, the WA Parliament has, over a period of years, amended National Scheme legislation to provide for National Regulations to be disallowable by the WA Parliament, to delete provisions allowing for the amendment of primary legislation (and require that amendment be by way of primary legislation) and also to delete clauses permitting amendment of primary legislation by regulation. As the Uniform Legislation and Statutes Review Committee reported to the 2011 conference, in 2011, the Committee recommended that a Bill not be passed due to the skeletal and incomplete nature of the Bill (with the intention of the Bill being that the substance of the uniform legislation would be included in regulations, at a later date). The Uniform Legislation and Statutes Review Committee also reported to the 2011 conference that its recommendations have, over the years, "been largely endorsed by the Legislative Council".[61]

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60 Senate Standing Committee on Regulations and Ordinances, Senate Standing Committee for the Scrutiny of Bills, *Scrutiny of National Scheme Legislation and the Desirability of Uniform Scrutiny Principles, Discussion Paper No 1*, July 1995, p 22.

61 See, Uniform Legislation and Statutes Review Committee's "committee activity report" to the 2011 conference (available at https://www.parliament.qld.gov.au/documents/committees/SLC/2011/SLC_Conference/SLCConf-WA-SCoULaSRReport.pdf), at page 3.

And the sky has not fallen in. National Schemes of legislation have continued to operate, despite the (relatively minor) amendments made to suit the WA situation.

In my view, it is important that other jurisdictions bear this in mind when Executive governments argue that amendments, etc are simply not possible, because the relevant legislation is part of a "National Scheme".

The issue recently arose in legislation before the Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) of the ACT Legislative Assembly (**ACT Committee**).

The ACT Committee has a formal term of reference that requires the ACT Committee to consider whether an explanatory statement meets the technical or stylistic standards expected by the ACT Committee in relation to explanatory statements. In *Scrutiny Report No. 42* of the 8th Assembly,[62] the ACT Committee commented on the Education and Care Services National Amendment Regulations 2015 (2015 No. 804). The ACT Committee identified three issues in relation to which it sought a response from the Minister.

First, the ACT Committee drew the Legislative Assembly's attention to the National Regulation under principle (2) of the ACT Committee's terms of reference, on the basis that (in this case) the absence of an explanatory statement did not meet the technical or stylistic standards expected by the Committee in relation to explanatory statements. Second, the ACT Committee requested that the Minister provide the Legislative Assembly with an explanatory statement for this National Regulation. Third, the ACT Committee sought the Minister's assurance that the retrospective operation of this National Regulation did not involve prejudicial retrospectivity, for section 76 of the *Legislation Act 2001*.

The Minister for Education responded to the ACT Committee, in a letter dated 11 April 2016. In relation to the explanatory statements issue the Minister's response stated:

> … the Scrutiny Committees [sic] guidance would be appreciated with regard to the drafting of explanatory statements for amendments of regulations under national frameworks. The drafting jurisdiction, Victoria, does not routinely provide explanatory statements for the Ministerial Council on minor amendments. Instead supporting documentation is provided which serves a similar role, Attachment A provides guidance as to the last amendments adopted. It is my understanding that when comprehensive change is required, as with the original Bill of 2011 an explanatory statement is drafted for use by all participating jurisdictions. There is an intention for Victoria to

62 Available at http://www.parliament.act.gov.au/__data/assets/word_doc/0003/827004/Report-42.doc.

> consult with jurisdictions for the development of future explanatory statements for major amendments.
>
> Should jurisdictions independently draft individual statements there arises a real potential for inconsistent interpretation of the law. The usual requirement for explanatory statements creates a conflict with the intent of national consistency.[63]

The ACT Committee then commented on the Minister's response, noting that it was not relevant to the ACT Committee's role that "[t]he drafting jurisdiction, Victoria, does not routinely provide explanatory statements for the Ministerial Council on minor amendments". The ACT Committee pointed out that it has an explicit role, under principle (2) of the ACT Committee's terms of reference, to consider whether an explanatory statement meets the technical or stylistic standards expected by the ACT Committee in relation to explanatory statements. The ACT Committee stated that the fact that a particular piece of delegated legislation is made under a "national framework" does not in any way affect the ACT Committee's role in relation to principle (2) of its terms of reference. Further, the ACT Committee noted that the Minister's response also referred (in another context) to the fact that the particular requirements of the ACT jurisdiction, in relation to the *Human Rights Act 2004*, had previously been addressed, in relation to other legislation. The ACT Committee went on to state:

> The Committee can identify no reason why the Committee's role in relation to explanatory statements cannot also be addressed.
>
> While the Committee can understand that there may be an argument that the provision of explanatory material on a jurisdiction-by-jurisdiction basis may not be conducive to a consistent interpretation of National Laws, the Committee can identify no reason why, in the case of every piece of National Law, an explanatory memorandum/statement cannot be produced, for use by all jurisdictions. Indeed, the Committee notes that the Minister's response states that "[t]here is an intention for Victoria to consult with jurisdictions for the development of future explanatory statements for major amendments". Given everything that the Committee has stated above (and especially in relation to the Committee's role under principle (2) of its terms of reference), the Committee considers that an explanatory statement should be provided in relation to all amendments to National Regulations. Apart from anything else, the provision of such explanatory material would avoid the necessity of the Committee having to seek the advice of Ministers in relation to particular issues that have traditionally been a concern for the Committee, such as the retrospectivity issue discussed above.[64]

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63 The Minister's response, and the ACT Committee's comments on the response, are contained in *Scrutiny Report No. 45* of the 8th Assembly (available at http://www.parliament.act.gov.au/__data/assets/word_doc/0009/868419/Report-45.doc), at pages 25-7 and 29-32.

64 *Scrutiny Report No. 45* of the 8th Assembly (note 63), at page 27.

Leaving aside the "National Scheme" element of discussion, (as I have repeatedly said) the inclusion of explanatory material in explanatory statements can save an enormous amount of work for law-makers, in responding to potential comments from parliamentary scrutiny committees. The inclusion of a single sentence in an explanatory statement can often save hours of work in drafting ministerial letters to a committee, ministerial briefs, etc in response to comments from a parliamentary scrutiny committee. As a matter of pure practicality, it makes no sense to me that legislation be presented to a Parliament without an explanatory memorandum or statement, whether there is a formal requirement to provide one of not.

Concluding comments

I opened this paper by noting the remarkable growth in the volume of delegated legislation in Australia since Federation. If volume was an issue in 1930, such as to require the establishment of the R and O Committee, then it is so much more of an issue now. Beyond volume, there is also the challenges posed by *content* of delegated legislation and the effect of delegated legislation on the Australian public (and on Australian democracy).

As I said, this can only make the role of the sorts of parliamentary scrutiny committees represented at this conference even more important.

In considering the report of the Strathclyde Review and the responses to it, my views on the strengths of the Australian approach to delegated legislation have only been confirmed. But the Strathclyde Review has also made me realise how important disallowance mechanisms are to the role of parliamentary committees engaged in scrutiny of delegated legislation. If nothing else, they serve as a means by which the Executive can be reminded of both the power of parliamentary scrutiny committees and also the significance of the role that parliamentary scrutiny committees perform.

For me, one of the most important things to come out of the aftermath of the Strathclyde Review is the proposition that the Strathclyde Review focused on the wrong issue. What was important was not the relationship between the 2 Houses of Parliament but the relationship between the Executive Government and the Parliament. **This is the fundamental point.**

Further, it is important that all parties remember that what we are dealing with is *delegated* legislation, made under powers *delegated* to the Executive by the Parliament. There should be no suggestion that the Parliament is, in fact, subordinated by the Executive.