

**INQUIRY INTO MAKING OF DELEGATED LEGISLATION
IN NEW SOUTH WALES**

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Dear Regulation Committee:

Re: Inquiry Into the Making of Delegated Legislation in New South Wales

I would like to thank you for the opportunity to make a written submission in connection with your inquiry into the making of delegated legislation in New South Wales.

By way of introduction, I am an Associate Professor at Adelaide Law School, University of Adelaide and a member of the Public Law and Policy Research Unit.

For the past two years, I have been the Chief Investigator of a comparative study on the parliamentary scrutiny of delegated legislation. The project examines parliamentary controls on delegated legislation in Australia, Canada, New Zealand and the United Kingdom. Funding is provided by the Social Sciences and Humanities Research Council of Canada. The goal of the project is to map the formal and informal ways in which national parliaments scrutinise delegated legislation through their committee systems, and to offer reform suggestions with a view to strengthening the scrutiny process. The project has involved field work at each of the four parliaments, which included interviews of parliamentarians and officials.

I am presently writing up the results of the project for publication, but am happy to provide a brief written submission that includes some preliminary observations from the project. I hope that the Regulation Committee will find these comments useful.

This submission incorporates and builds upon a written submission that I previously made to the Commonwealth Senate Standing Committee on Regulations and Ordinances for that Committee's inquiry into the parliamentary scrutiny of delegated legislation. Following the Commonwealth inquiry, I published an article entitled 'Strengthening the Parliamentary Scrutiny of Delegated Legislation: Lessons from Australia' in the *Canadian Parliamentary Review*, a copy of which is enclosed below.

The Importance of Delegated Legislation

It is hard to overstate the importance of delegated legislation in a modern legal system. Nearly all bills introduced in Parliament delegate powers to the executive government, and they often include legislative powers. These lawmaking powers are typically conferred on individual ministers or the Executive Council.

Delegated legislation is a major source of law that touches on nearly every area of legal practice. There are good reasons to explain the proliferation of delegated legislation: delegation offers practical benefits, and its appropriate use complements Parliament's lawmaking role. Delegated legislation can make the lawmaking process more efficient and effective. It frees Parliament from having to deal with certain (sometimes trivial) aspects of statutory schemes. Delegation therefore saves time, allowing Parliament to focus its legislative energies on more substantial policy matters. Delegated legislation can also be made more expeditiously than primary legislation, offering speed and flexibility that allows the law to adapt to new circumstances.

There are, however, concerns about Parliament delegating its powers. Legislative power that is exercised by the executive can challenge notions of the separation of powers, and if lacking in accountability, the values of a democratic society.¹

Concerns that have been expressed about delegated legislation tend to relate to:

- the appropriate roles of Parliament and the executive in relation to legislative power;
- the appropriate degree of discretion delegated by Parliament to the executive;
- the appropriate use of delegated authority by the executive, including principles that should guide the delegated lawmaking process; and
- the accountability, transparency and quality of delegated legislation that is made outside the ordinary accountability mechanisms of the parliamentary process (e.g., readings and detailed committee study of proposed legislation, open and public debate and voting, media and public attention).

These concerns must be addressed in order to maintain public confidence in the legislative process, and ultimately its legitimacy. How can they be addressed?

One safeguard in relation to delegated legislation is judicial review. Judicial remedies in such cases are, however, limited. Judicial review cannot be relied upon as a comprehensive, robust scrutiny mechanism for delegated legislation. A court challenge to delegated legislation depends upon an aggrieved party initiating (and funding) litigation. In reviewing the legal validity of subordinate legislation, courts may provide the executive with considerable latitude in light of the relevant statutory

¹ Professor Jeremy Waldron identifies principles of legislation that include explicit lawmaking, a duty to take care when legislating, representation, respect for disagreement, responsive deliberation, legislative formality and political equality: Jeremy Waldron, 'Principles of Legislation' in Richard W Bauman & Tsvi Kahana (eds) *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge University Press, 2006) 15.

language.² There are also few enforceable constitutional limits on Parliament's capacity to delegate its lawmaking powers.³

The main safeguard lies with Parliament itself. It is worth reiterating that Parliament is firmly placed at the centre of lawmaking. The *Constitution Act 1902* provides that it 'shall ... have power to make laws for the peace, welfare, and good government of New South Wales in all cases whatsoever'.⁴ The *Constitution Act 1902* makes no mention of delegation. Being constitutionally vested with legislative power, Parliament could at any time amend or revoke any delegation or delegated legislation that has already been made.

The important role that Parliament plays in holding the executive to account was recently recognised by a unanimous UK Supreme Court as a fundamental constitutional principle. In *Cherry/Miller (No 2)*,⁵ the Supreme Court held that the government is 'accountable to Parliament through such mechanisms as ... scrutiny of the delegated legislation which ministers make'.⁶ I have argued in the Canadian context that Parliament bears a constitutional responsibility to supervise the executive in making delegated legislation.⁷ A failure by Parliament to oversee delegated lawmaking could be seen as a neglect of its functions.

In order for Parliament to provide oversight and accountability, it needs an effective and well-functioning committee system to scrutinise delegated legislation and provide it with information about the executive's use of delegated powers. The scrutiny of delegated legislation by parliamentary committees plays an indispensable role in upholding constitutional principle and ensuring parliamentary accountability.

Existing Committee Scrutiny Processes

(a) Legislation Review Committee

The systematic scrutiny of all delegated legislation in New South Wales falls to the Legislation Review Committee. The Committee is required by statute to scrutinise and report on bills introduced in Parliament, and also disallowable delegated legislation that has been made.⁸

In relation to bills, the Committee considers whether a conferral of authority:

- inappropriately delegates legislative powers; or

² Lawmaking discretion varies. In each case, the available discretion depends upon statutory language used in the grant of authority. Some provisions are tightly circumscribed (e.g., establishing a fee) while others are broad (e.g., 'for carrying out the purposes and provisions of the Act'). It is for Parliament to establish the scope and limitations on powers that are conferred on the executive. To promote accountability, there should be meaningful constraints and a clear policy orientation to guide the exercise of delegated powers.

³ For a discussion of the constitutionality of delegation in Australia see Gabrielle Appleby & Joanna Howe, 'Scrutinising Parliament's Scrutiny of Delegated Legislative Power' (2015) 15 *Oxford University Commonwealth Law Journal* 3.

⁴ *Constitution Act 1902* (NSW), s 5.

⁵ *R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland*, [2019] UKSC 41.

⁶ *R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland*, [2019] UKSC 41, [46]. See also Lorne Neudorf, 'The Constitutional Position of Delegated Legislation after *Cherry/Miller* (No 2)' (27 September 2019) UK Constitutional Law Association, online: <https://ukconstitutionallaw.org/2019/09/27/lorne-neudorf-the-constitutional-position-of-delegated-legislation-after-cherry-miller-no-2/>.

⁷ Lorne Neudorf, 'Reassessing the Constitutional Foundation of Delegated Legislation in Canada' (2019) 41(2) *Dalhousie Law Journal* 519.

⁸ *Legislation Review Act 1987* (NSW).

- insufficiently subjects the exercise of legislative powers to parliamentary scrutiny.⁹

With respect to disallowable delegated legislation, the Committee is authorised to consider whether ‘the special attention of Parliament should be drawn’ to delegated legislation on the basis of ‘any ground’, which can include that:

- it trespasses unduly on personal rights and liberties;
- it may have an adverse impact on the business community;
- it may not have been within the general objects of the legislation under which it was made;
- it may not accord with the spirit of the legislation under which it was made, even though it may have been legally made;
- its objective could have been achieved by alternative and more effective means;
- it duplicates, overlaps or conflicts with any other law;
- its form or intention requires elucidation; or
- it is not compliant with the relevant provisions of the *Subordinate Legislation Act 1989*.¹⁰

The Committee is also empowered to recommend disallowance of subordinate legislation,¹¹ and to conduct a ‘systematic review’ of sunseting subordinate legislation.¹² Notably, the Committee is precluded from considering the underlying policy (or merits) of delegated legislation in most circumstances.¹³

The principal publication of the Committee is the *Legislation Review Digest*, which includes the Committee’s reports and comments on bills and delegated legislation. *Digests* are published regularly, providing a critical source of information to Parliament in considering bills and delegated legislation. The Committee, however, only reports on delegated legislation when it wishes to raise a concern. The overall proportion of delegated legislation that is reported on by the Committee therefore varies significantly from year-to-year.¹⁴ In some cases, delegated legislation is scrutinised months after it has become legally effective – even after a judicial proceeding that has found the delegated legislation to be legally invalid.¹⁵

The Committee’s recent report on the *COVID-19 Legislation (Emergency Measures) Bill 2020* provides an important case study of the work it carries out.¹⁶ In its report, the Committee discusses numerous instances of delegations that have the potential to interfere with personal rights and liberties. In the vast majority of cases, however, the Committee found the delegation provisions justified because of sunseting provisions or the extraordinary circumstances of the pandemic.

⁹ *Legislation Review Act 1987* (NSW), s 8A(1)(b).

¹⁰ *Legislation Review Act 1987* (NSW), s 9(1)(b).

¹¹ *Legislation Review Act 1987* (NSW), s 9(1)(c).

¹² *Legislation Review Act 1987* (NSW), s 9(2)(a).

¹³ *Legislation Review Act 1987* (NSW), s 9(3).

¹⁴ Chris Angus, ‘Delegated Legislation: Flexibility at the Cost of Scrutiny?’ (2019) e-Brief NSW Parliamentary Research Service, Figures 2, 4.

¹⁵ See, e.g., the discussion of *Evans v New South Wales* [2008] FCAFC 130 in Chris Angus, ‘Delegated Legislation: Flexibility at the Cost of Scrutiny?’ (2019) e-Brief NSW Parliamentary Research Service, 18.

¹⁶ Legislation Review Committee, *Legislation Review Digest* (No 12/57), 22 April 2020.

The Committee has also carried out inquiries relating to the operation of its enabling legislation, public interest and the rule of law, strict and absolute liability and the right to silence.¹⁷

In terms of the impact of its work, the Committee's scrutiny and reports have resulted in changes to the law. In many cases this takes place through an amendment to a bill or delegated legislation to resolve concerns that have been raised. In a handful of other cases, Parliament has disallowed delegated legislation. The Committee's reports are also occasionally discussed in relevant cases by courts and other decision-makers.¹⁸

(b) Regulation Committee

In addition to the Legislation Review Committee, the Regulation Committee of the Legislative Council was initially appointed on a trial basis to scrutinise delegated legislation, including policy questions. Following the trial period, Parliament resolved on 8 May 2019 to appoint the Regulation Committee to carry out inquiries and publish reports in relation to:

- any regulation, including the policy or substantive content of a regulation; and
- trends or issues that relate to regulations.¹⁹

Delegated legislation can also be referred to the Regulation Committee.²⁰ During the time the Committee considers referred delegated legislation, any disallowance process underway with respect to that legislation is temporarily paused.²¹

As the Regulation Committee is still fairly new, it is not yet possible to offer a comprehensive assessment of its work. Nevertheless, it appears that the Committee is able to take a much closer look at particular regulations as compared to the Legislation Review Committee. In particular, the Committee is authorised to consider policy questions, something that the Legislation Review Committee is prevented from considering.

One recent example suggests that the Regulation Committee has the potential to play an important role in holding the executive to account. On 30 May 2019, the *Liquor Amendment (Music Festivals) Regulation 2019* and the *Gaming and Liquor Administration Amendment (Music Festivals) Regulation 2019* were referred to the Committee. Concerns were also expressed about these regulations by the Legislation Review Committee in its *Legislation Review Digest* published 6 August 2019.²² In its final report, tabled on 28 August 2019, the Regulation Committee detailed its concerns

¹⁷ Legislation Review Committee, 'Inquiries', online: <https://www.parliament.nsw.gov.au/committees/listofcommittees/Pages/committee-details.aspx?pk=245#tab-inquiries>.

¹⁸ See, e.g., *Precision Products (NSW) Pty Ltd v Hawkesbury City Council* [2008] NSWCA 278, [168]; *Quest Rose Hill Pty Ltd v White* [2010] NSWSC 939, [117]; Ombudsman New South Wales, *Review of Police Use of Powers under the Crimes (Criminal Organisations Control) Act 2012* (November 2016), 13.

¹⁹ Parliament of New South Wales, Regulation Committee (resolved 7 May 2019, Minutes No 2, Item 128, 100-103), s 2.

²⁰ Parliament of New South Wales, Regulation Committee (resolved 7 May 2019, Minutes No 2, Item 128, 100-103), s 3.

²¹ Parliament of New South Wales, Regulation Committee (resolved 7 May 2019, Minutes No 2, Item 128, 100-103), s 4.

²² Legislation Review Committee, *Legislation Review Digest* (No 1/57), 6 August 2019.

with the regulations and recommended their disallowance.²³ The regulations were later disallowed by the Legislative Council.

Recommendations

(a) Reconceptualise parliamentary scrutiny as part of the lawmaking process

Parliamentary committee scrutiny of delegated legislation plays a critical constitutional role in holding the government to account. It is the principal mechanism by which Parliament supervises the exercise of its legislative power that is on loan to the executive. Committee scrutiny should not be seen as an add-on, but rather as an integral part of the process of making of delegated legislation.

(b) Coordinate the scrutiny work of the Committees

The Legislation Review Committee and the Regulation Committee should seek to coordinate their work in scrutinising delegated legislation as they play complementary roles. For instance, through its systematic scrutiny of all delegated legislation, the Legislation Review Committee can alert the Regulation Committee to problematic regulations. The Regulation Committee can in turn explore these concerns by carrying out an inquiry into the relevant delegated legislation.

(c) Clarify scrutiny criteria applied by the Committees

The scrutiny criteria applied by the Legislation Review Committee and the Regulation Committee are drafted in broad terms. It would be useful for all stakeholders, and in the interest of accountability, for both Committees to publish a statement on how the scrutiny criteria is interpreted. It would also improve consistency for the Committees to establish and publish a summary of the jurisprudence contained in past reports, like New Zealand's *Regulations Review Committee Digest*.

(d) Expand scrutiny criteria applied by the Committees

In order to provide more robust accountability of the executive, the scrutiny criteria applied by the Legislation Review Committee and the Regulation Committee should be expanded to include questions of constitutional validity. This scrutiny criterion has recently been made available to the Commonwealth Senate Standing Committee for the Scrutiny of Delegated Legislation. In addition, the Regulation Committee should consider whether delegated legislation is proportional as required by the *Subordinate Legislation Act 1989* and any other applicable proportionality requirements.

(e) Ensure adequate Committee resources

Timely scrutiny and reporting is essential due to statutory constraints on the time available for the parliamentary disallowance of delegated legislation. An assessment of the resources available to both the Legislation Review Committee and the Regulation Committee should be carried out with a view to ensuring adequate resources that allow for more timely scrutiny and reporting.

(f) Create a new public complaints process for delegated legislation

It is often the case that the implications of new law cannot be fully anticipated until it is applied in practice. Both the Legislation Review Committee and the Regulation Committee should establish a process for accepting public complaints in relation to existing delegated legislation. Standing orders and the relevant legislation should be

²³ Regulation Committee, *Liquor Amendment (Music Festivals) Regulation 2019* and *Gaming and Liquor Administration Amendment (Music Festivals) Regulation 2019* (Report 4) August 2019.

amended as needed to provide the Committees with the authority to scrutinise and report upon delegated legislation referred by members of the public. Parliamentary disallowance should also be made available in relation to such delegated legislation.

(g) Establish a special scrutiny process for Henry VIII powers

Henry VIII powers allow the executive to alter the legal effect of primary legislation. Such powers are exceptional and engage constitutional principle including the separation of powers. The availability of Henry VIII powers should be tightly circumscribed and their use should be subject to special scrutiny by the Legislation Review Committee and the Regulation Committee. The Committee should insist on greater accountability controls in bills that include Henry VIII powers, such as an affirmative procedure and sunseting to ensure the powers are not available for longer than necessary.

(h) Establish a special scrutiny process for emergency powers

Emergency powers are often conferred on the executive government by legislation in sweeping terms. Such powers should be subject to special scrutiny. The Legislation Review Committee and the Regulation Committee should insist on greater accountability controls on emergency powers, including reviewing proportionality assessments of emergency measures adopted by the executive and sunseting to ensure the powers are not available for any longer than is necessary.

(i) Provide for the scrutiny of draft bills and delegated legislation

Scrutiny of draft bills and delegated legislation provides an opportunity for problems to be corrected before the legislation progresses. It can be much more effective than *ex post facto* review. The Legislation Review Committee and the Regulation Committee should be empowered to scrutinise draft bills and delegated legislation.

(j) Limit the use of exemptions to disallowance and scrutiny

Significant quantities of delegated legislation may be exempted from the disallowance procedure and scrutiny by the Legislation Review Committee. The use of exemptions from disallowance should be truly exceptional. The Regulation Committee should itself scrutinise exempted delegated legislation to minimise the incentive for the executive to use exemptions to inappropriately avoid parliamentary scrutiny. A listing of exempted delegated legislation should be maintained by the Committees in the interest of transparency.

(k) Publish guidance for legislative drafters

The Legislation Review Committee and the Regulation Committee should publish plain-language guidance to help legislative drafters and others better understand the scrutiny process and how problems can be avoided in the first place.

(l) Publish reports and updates more frequently

The Legislation Review Committee and the Regulation Committee should publish reports more frequently and include updates on concerns that have been identified, including governmental responses and undertakings. The Committees should also consider adding a tracking feature to make following the current status of delegated legislation and any actions taken in relation thereto easy to follow.

(m) Delay commencement of delegated legislation

The rule of law requires that laws be made known to those who may be affected by them. The Regulation Committee should consider calling for new legislation to require a delay in the commencement of delegated legislation after it is made, as is the case in New Zealand.

I would be happy to clarify or expand upon any aspect of my written submission.

Thank you again for the opportunity to contribute to this inquiry.

Yours sincerely,

Lorne Neudorf, BSc, JD, LL.M, PhD
Associate Professor

Strengthening the Parliamentary Scrutiny of Delegated Legislation: Lessons From Australia

Delegated legislation involves Parliament lending its legislative powers to the executive branch of government, such as to the cabinet or an individual minister. As the ultimate source of legislative power, Parliament has a special responsibility to keep an eye on executive lawmaking. The Australian federal scrutiny committee – formerly called the Senate Standing Committee on Regulations and Ordinances, and now rebadged as the Senate Standing Committee for the Scrutiny of Delegated Legislation – recently carried out an inquiry to consider how it could improve its scrutiny process. In 2019 it published a unanimous report that was endorsed by the Australian Senate in November when it amended its Standing Orders in line with the committee’s proposed changes. This article provides an overview of the Australian scrutiny committee and its inquiry. It then considers the committee’s report and recommendations, which present an opportunity to consider changes to the parliamentary scrutiny of delegated legislation in other jurisdictions such as Canada.

Lorne Neudorf

Introduction

There exists a tremendous volume of delegated legislation in Canada, which can be seen in the 500-plus pages of the *Consolidated Index of Statutory Instruments* that lists the thousands of federal orders and regulations that have been made over the years.¹ Canada is hardly alone in relying on delegated legislation as a major source of law. In the United Kingdom, delegated legislation has recently been described as the “central form of legislation in the contemporary constitution.”² In Australia, delegated legislation makes up at least half of all federal law.³

Delegated legislation involves Parliament lending its legislative powers to the executive branch of

government, such as to the cabinet or an individual minister. As the ultimate source of legislative power, Parliament has a special responsibility to keep an eye on executive lawmaking.⁴ Legislative scrutiny helps to maintain important standards of accountability and transparency in lawmaking, essential features of a democratic society founded on the rule of law. Parliamentary oversight is especially critical in the context of delegated legislation, as it is made outside the safeguards of the ordinary parliamentary process. Moreover, broad language is often used in delegation provisions, which have become a routine part of most new bills.⁵ In some cases, incomplete legislative schemes are pushed through Parliament with significant matters to be worked out later by way of delegated legislation. The parliamentary scrutiny of delegated legislation therefore provides a vital check on one of the principal sources of executive power. It can identify drafting flaws, infringements of civil and constitutional rights, and the inappropriate use of delegated powers by the executive. Parliamentary scrutiny can also provide powerful incentives for the government to remedy any problems discovered, and to take care in making delegated legislation in the first place.

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The question is how Parliament can effectively scrutinise all new delegated legislation within the constraints of limited time and resources. In common law jurisdictions, this scrutiny work often takes place through one or more parliamentary committees. Over the past two years, I have carried out a comparative study on how such committees scrutinise delegated legislation, which included site visits to the national parliaments of Canada, Australia, New Zealand and the United Kingdom. The research shows that there is a variety of different scrutiny models. While each approach has its own benefits and limitations, there are valuable lessons to be learned from the experience of others that can be applied at home to reform and strengthen existing scrutiny processes.

The Australian federal scrutiny committee – formerly called the Senate Standing Committee on Regulations and Ordinances, and now rebadged as the Senate Standing Committee for the Scrutiny of Delegated Legislation⁶ – recently carried out an inquiry to consider how it could improve its scrutiny process. This past June, it published a unanimous report that included 22 recommendations and 11 action items. The report was endorsed by the Australian Senate in November when it amended its Standing Orders in line with the committee’s proposed changes. This article provides an overview of the Australian scrutiny committee and its inquiry. It then considers the committee’s report and recommendations, which present an opportunity to consider changes to the parliamentary scrutiny of delegated legislation in other jurisdictions such as Canada.

Overview of the Australian Scrutiny Committee

Established in 1932, the Australian scrutiny committee is one of the oldest parliamentary scrutiny committees that examines delegated legislation in the common law world. It is comprised of six Senators, three from the government and three from opposition parties or independents. Its role is to scrutinise all ‘legislative instruments’ that are tabled in Parliament and which are subject to disallowance.⁷

Under the Australian *Legislation Act 2003*,⁸ legislative instruments are those described or registered as such, or which have been made under primary legislation delegating power to determine or alter the content of the law (as opposed to determining cases or circumstances where the law applies).⁹ In the latter case, the instrument must also affect a privilege, interest, obligation or right.¹⁰ The idea is that a legislative instrument must be truly *legislative* in character, in the sense of creating or

changing the general law, as opposed to the essentially administrative act of making an order or designation. Several exemptions exist.¹¹

Disallowable legislative instruments are legislative instruments that are subject to the *Legislation Act 2003*’s disallowance procedure.¹² The procedure allows either House of Parliament to disallow an instrument where a Senator or Member of the House of Representatives places a notice of motion to that effect within 15 sitting days of the instrument first being laid before that House.¹³ If the motion is adopted or not taken up within an additional 15 sitting day period, the instrument is repealed and ceases to have any further legal effect.¹⁴ In addition to disallowance, all legislative instruments are subject to sunset, being automatically repealed after a period of 10 years, unless exempted.¹⁵

The Australian scrutiny committee reviews each disallowable legislative instrument on the basis of specified criteria that includes whether it is consistent with applicable legislation, whether it unduly interferes with personal rights or liberties, whether it inappropriately excludes the availability of merits review from important administrative decisions, and whether it includes subject matter that is more appropriate for primary legislation.¹⁶ In practice, the criteria has been applied more broadly than what would be expected from a reading of the relevant Standing Orders alone, although the committee remains focused on scrutinising the technical aspects of instruments as opposed to their underlying policy to maintain the non-partisan nature of its work.

As there is only a 15 sitting day period during which a notice of motion can be placed to disallow a legislative instrument, the committee must complete its work fairly quickly so that it can report back to the Senate and provide it with a meaningful opportunity to consider disallowance. The committee also raises its concerns directly with ministers, agencies and departments, which may be resolved within the disallowance period – in which case, any notice of motion placed by the chair will normally be withdrawn. In cases where there remain significant unresolved concerns and limited time remaining for disallowance, the chair has adopted the practice of placing a ‘protective notice of motion’ for disallowance, which triggers the additional 15 sitting days for the motion to be considered. The practice can effectively double the time available for the Senate to disallow an instrument and maintains an incentive for concerns to be addressed by the minister, agency or department (as the case may be) as the possibility of disallowance is preserved for this further period.¹⁷

While the Senate last disallowed an instrument on the recommendation of the committee in 1988, it has always backed its advice.¹⁸ The Senate's consistent support of the committee's work is likely due to its well-deserved reputation as a non-partisan committee that works to maintain the integrity of the delegated lawmaking process and promote quality legislative outcomes.¹⁹ As a parliamentary committee, it also represents the legitimate interests of parliamentarians in maintaining ultimate oversight and control of legislation. Notably, the Houses of Parliament more frequently debate (and occasionally disallow) instruments on a notice of motion for disallowance placed by other Senators or Members of the House of Representatives.²⁰

In terms of resourcing, the committee is supported in its work by a secretariat of four staff members in addition to a legal advisor (in recent times, a legal academic has been engaged by the committee). In terms of its productivity, the committee meets each sitting week of the Senate, usually in private. It is to be commended for the quality and frequency of its reporting. First, the committee publishes the *Delegated Legislation Monitor*,²¹ a weekly report to the Senate. The *Monitor* provides detailed information on the status of legislative instruments, highlighting concerns identified by the committee and actions that may be required or that have already been taken. Issues of the *Monitor* now focus on instruments with significant scrutiny concerns for which the chair intends to place a notice of motion for disallowance as discussed further below. Formal correspondence between the committee and ministers and agencies is published on the committee's website, which provides considerable transparency.

Second, the committee publishes the online *Disallowance Alert*,²² which provides an updated status on all legislative instruments subject to a notice of motion for disallowance placed by any Senator or Member of the House of Representatives. The *Alert* facilitates the easy tracking of such instruments. It can also be used to quickly generate insightful information about the disallowance procedure more generally, such as statistical information.

Third, the committee publishes the annual *Index of Instruments*,²³ providing a consolidated list of all legislative instruments for which the committee identified concerns. The *Index* notes what action was taken by the committee and cross-references the list with past issues of the *Monitor* that provide more detailed information on particular instruments.

Fourth, the committee publishes several guidance documents, which provide plain language information to agencies and departments. For instance, the committee's guideline on consultation²⁴ explains what the committee looks for in each instrument's explanatory statement in relation to consultation – a requirement of the *Legislation Act 2003*.²⁵ The guidance provides that the explanatory statement should set out the method and purpose of the consultation, include a full list of the names of groups and individuals consulted, describe the issues identified through the consultation process and summarise any changes made in response thereto.

Finally, the committee publishes an annual report, which provides a snapshot of its activities over the year and a statistical overview. The 2018 annual report²⁶ noted that the committee met 16 times and examined 1570 legislative instruments.²⁷ The committee raised scrutiny concerns with 262 instruments, mainly under the principle of ensuring that the instrument was consistent with applicable legislation (which is interpreted broadly as including all statutory and constitutional requirements).²⁸ The chair placed 37 notices of motion to disallow an instrument, all of which were withdrawn except for 2 pending at the end of the year.²⁹ The report also provides a discussion and thematic overview of the work carried out by the committee, which is a valuable resource to identify persistent scrutiny problems and trends in the making of delegated legislation.

The Inquiry and Subsequent Reforms

The Australian Senate referred an inquiry to the scrutiny committee on November 29, 2018. Under the inquiry terms, the committee was charged with examining its "continuing effectiveness, role and future direction," and reviewing its powers and scrutiny criteria.³⁰ It was also tasked with considering the framework for the parliamentary control and scrutiny of delegated legislation more generally.³¹ Notably, the reference provided that the committee should engage in comparative research by considering "the role, powers and practices of similar parliamentary committees, including those in other jurisdictions."³² In seeking the inquiry, the committee observed that its scrutiny criteria had not been changed in nearly 40 years, while the volume and complexity of delegated legislation had grown significantly over that time.³³ The committee also noted that other jurisdictions had adopted new practices and innovations that it could learn from.³⁴

During a period of consultation, the committee invited written submissions.³⁵ Fourteen were received, all of which are published in full on the committee's website.³⁶ Submissions were made by administrative and constitutional law scholars, the Commonwealth Parliamentary Counsel, government agencies and departments, state legislative bodies and committees, a law society and the Attorney-General. The submissions highlighted the importance of the scrutiny work carried out by the committee and included various suggestions to improve or streamline it. During the inquiry period, the chair and deputy chair travelled to New Zealand and the United Kingdom to inform themselves about the scrutiny processes in those jurisdictions.

The inquiry report was published on June 3, 2019. The report begins by providing a brief overview of the scrutiny committee's work.³⁷ It then considers the future of the committee.³⁸ Several of the committee's recommendations seek to enlarge the scope of its scrutiny jurisdiction and powers. For instance, the committee recommended that it be permitted to scrutinise other legislative instruments tabled in the Senate, not just those subject to disallowance.³⁹ In addition, it recommended explicit authorisation for examining draft delegated legislation.⁴⁰ Greater inquiry and reporting powers were also recommended.⁴¹ A major part of the report then focuses on the committee's scrutiny criteria.⁴² Over the years, the criteria gradually became out of step with the actual scrutiny work carried out by the committee. The report therefore recommends a series of new criteria to capture the committee's actual practice and to respond to different kinds of scrutiny concerns that have since been identified. The report recommends new criteria that includes compliance with relevant legislation, constitutional validity, sufficient delineation of administrative powers, adequate consultation, quality drafting, adequate access, availability of independent review, adequate explanatory materials, and the examination of "any other ground relating to the technical scrutiny of delegated legislation that the committee considers appropriate."⁴³ Notably, the report considers but ultimately rejects extending scrutiny to policy matters on the basis of maintaining its operation as a non-partisan committee.⁴⁴

As part of the inquiry, the committee reviewed its current work practices to try and make them simpler, quicker and more effective.⁴⁵ To resolve the challenge of delayed correspondence with ministers, the committee authorised its secretariat

to communicate directly with agencies on minor issues.⁴⁶ When necessary, the committee will also call on government officials or ministers to appear before it.⁴⁷ In terms of its publications, the committee resolved to streamline its *Delegated Legislation Monitor* to focus on instruments with significant scrutiny concerns.⁴⁸ It will also report to the Senate regularly on undertakings given to resolve concerns.⁴⁹ Recent issues of the *Monitor* include a list of ministerial undertakings, providing an important record of such commitments by the government and greater accountability.⁵⁰ In tabling reports in the Senate, the chair will now make a statement to highlight important matters.⁵¹ In addition, the chair will establish a practice of placing notices of motion to disallow all legislative instruments with significant scrutiny concerns to trigger additional time for the Senate to consider the issues raised.⁵²

The report then turns to the framework for parliamentary scrutiny and control of delegated legislation. In relation to bills that delegate legislative power, the report discusses the appropriate scrutiny role of Parliament, the trend of broad delegations and the use of Henry VIII clauses that allow primary legislation to be amended by delegated legislation.⁵³ Its recommendations include calling on the government to develop an expert advisory body to assist in drafting bills that delegate legislative power⁵⁴ and ensuring that bills are not permitted to progress in the Senate before having their delegation provisions scrutinised and reported upon.⁵⁵ The report also discusses the use of exemptions to prevent delegated legislation from parliamentary scrutiny and the disallowance procedure.⁵⁶ It recommends that the government review the exemption regime to ensure adequate safeguards are in place, along with the development of guidance for when its use is appropriate.⁵⁷ In terms of commencement, the report recommends that the government enact a delayed start for legislative instruments from the day after registration to 28 days after registration with exceptions available only in limited circumstances.⁵⁸ In relation to sunset, the report recommends the establishment of criteria and new limits around exemptions.⁵⁹

Finally, the report discusses how to increase awareness and education of the issues around delegated legislation. It recommends training of Senators and their staff, and other governmental officials, in relation to delegated legislation and the scrutiny roles of the Senate and committee.⁶⁰ The report also recommends the creation of new systems to make it easier for parliamentarians to

locate updated and consolidated information about legislative instruments, including concerns raised by the committee.⁶¹ In concluding, the committee also resolved to continue to issue new guidelines to help others better understand its work.⁶²

On November 27, 2019, the Senate adopted most of the reforms recommended by the committee that required changes to the Standing Orders. The limited media attention focused on the scrutiny committee's new express power to consider the constitutionality of delegated legislation. The sole ABC report was headlined 'Senate committee goes rogue and gets powers to question constitutional validity of regulations'. It stated that the changes had been "pushed through the Senate" and that they "could prevent ... or bring on ... a constitutional crisis".⁶³ The article also repeatedly noted that the expansion of the committee's role to look at constitutional issues was "opposed by the Government".⁶⁴ In a recently published academic article, Stephen Argument – a former legal advisor to the committee – points out that the newly expanded scrutiny criteria "would require additional resourcing", which is not discussed in the report.⁶⁵

Lessons To Be Learned

There is much to admire in the Australian scrutiny context. It is clear that the Australian scrutiny committee takes its work seriously because it understands the importance of delegated legislation in the contemporary legal system. For decades, it has carried out high quality scrutiny of delegated legislation that is essential to the integrity of lawmaking in a democratic society founded on the rule of law. Its reports have provided regular and easily accessible information on legislative instruments, highlighting scrutiny concerns and what has been done by agencies, departments and ministers to address them. The committee is not afraid to flex its muscle. It uses its ability to place notices of motion for disallowance of legislative instruments in the Senate to apply pressure to the executive to fix problems. It has created an effective system of incentives and can justify its work by using the requirements of the disallowance procedure to its benefit. There is much that scrutiny committees elsewhere, including Canada's Standing Joint Committee for the Scrutiny of Regulations, can learn from the Australian experience.⁶⁶

The Australian scrutiny committee's recent inquiry is precisely the kind of reflective work that

parliamentary committees should engage in from time-to-time. Its published report is the end product of a deliberate and considered process. While one can always find fault with details and identify risks and challenges when it comes to change, the report represents a genuine and bold attempt to strengthen the parliamentary scrutiny of delegated legislation in Australia. It never loses sight of the core principles of accountability and transparency in lawmaking, and the appropriate role that Parliament must play in relation to all forms of legislation. These guiding principles were a touchstone for the committee to assess different potential reforms. The report demonstrates that the committee *wants* to be better and has creatively searched for ways to make that happen. It should also be applauded for considering the work of committees in other jurisdictions, which allowed it to engage in a comparative benchmarking of its effectiveness and learn from both the successes and failures of others. While it remains to be seen how the committee will develop in the future with its greater prominence and expanded mandate, especially in light of pressures from the increasing volume and complexity of delegated legislation, it rests on a solid foundation.

Notes

- 1 Privy Council Office, *Canada Gazette Part II: Consolidated Index* (vol 153, no 3) <<http://www.gazette.gc.ca/rp-pr/p2/2019/2019-09-30-c3/pdf/g2-153c3-eng.pdf>>, providing a list of the names and registration numbers of regulations and statutory instruments made from January 1, 1955 to September 30, 2019 (in size eight font with a two column layout).
- 2 Adam Tucker, "Parliamentary Scrutiny of Delegated Legislation" in Alexander Horne & Gavin Drewry, eds, *Parliament and the Law* (Oxford: Hart, 2018) 347 at 357.
- 3 Senate Standing Committee on Regulations and Ordinances, *Parliamentary Scrutiny of Delegated Legislation* (Commonwealth of Australia, 2019) <https://www.aph.gov.au/~media/Committees/Senate/committee/regord_ctte/DelegatedLegislation/report.pdf> at ix ["Inquiry Report"].
- 4 The availability of parliamentary supervision and scrutiny of the executive in exercising delegated powers has provided a foundation for courts to uphold the constitutionality of delegated legislation: see, e.g., early jurisprudence in *Hodge v The Queen* (1883), 9 App Cas 117 and *In Re Gray*, [1918] SCR 150. I have taken this position further by recently arguing that there should be a constitutional obligation in this regard: Lorne Neudorf, "Reassessing the Constitutional Foundation of Delegated Legislation in Canada" (2018) 41(2) *Dalhousie Law Journal* 519.
- 5 There are a number of reasons for delegation provisions to be drafted broadly, which include the influence of the executive over Parliament, the desire for legislative drafters to provide maximum flexibility for later circumstances, and the desire for

- legislative drafters or policy officers to reduce the risk of judicial review that finds a regulation made thereunder to be declared *ultra vires*.
- 6 References to the 'Australian scrutiny committee' the 'scrutiny committee' or just the 'committee' are to the Senate Standing Committee on Regulations and Ordinances prior to December 4, 2019 and the Senate Standing Committee for the Scrutiny of Delegated Legislation thereafter.
 - 7 Senate of Australia, *Standing Orders*, s 23(2) (as it read prior to recent reforms discussed below) ["*Standing Orders*"].
 - 8 *Legislation Act 2003* (Cth).
 - 9 *Ibid*, ss 4 "legislative instrument", 7-8.
 - 10 *Ibid*, s 8(4)(b)(ii).
 - 11 See, e.g., *ibid*, ss 8(6)-(8) and 11.
 - 12 *Ibid*, s 42. Note that there are exemptions in s 44. The Australian scrutiny committee has written that such exemptions can undermine the effective parliamentary control of delegated legislation: Inquiry Report, *supra* note 3 at x and 122-24.
 - 13 *Legislation Act 2003*, *supra* note 8, s 42. A notice of motion to disallow a legislative instrument triggers an additional 15 day sitting period in which the motion can be called on and disposed of. If an instrument is disallowed, it cannot be remade for six months unless by consent of the House that disallowed it: see *Legislation Act 2003*, *supra* note 8, s 48.
 - 14 By default, legislative instruments come into force the day after their registration: *ibid*, s 12(1).
 - 15 *Ibid*, Part 4. The Australian scrutiny committee has criticised exemptions: *supra*, note 12.
 - 16 *Standing Orders*, *supra* note 7, s 23(3).
 - 17 The Australian scrutiny committee is a committee of the Senate but as earlier noted, disallowance provisions in the *Legislation Act 2003* provide for a notice of motion for the disallowance of a legislative instrument to be placed by any Senator or a Member of the House of Representatives. In the case of a notice of motion placed by the committee chair, it will normally be withdrawn if the scrutiny concerns raised have been address satisfactorily.
 - 18 Inquiry Report, *supra* note 3 at 117.
 - 19 See also Dennis Pearce, "Rules, Regulations and Red Tape: Parliamentary Scrutiny of Delegated Legislation", *Papers on Parliament* (No 42) December 2004 <www.aph.gov.au/binaries/senate/pubs/pops/pop42/pearce.pdf> at 88, cited in Inquiry Report, *ibid* at 96.
 - 20 All such notice of motions can be seen in the committee's *Disallowance Alert*, discussed below.
 - 21 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitors* <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Monitor>.
 - 22 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Disallowance Alert 2019* <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts>.
 - 23 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Index of Instruments* <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Index>.
 - 24 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Guideline on Consultation: Addressing Consultation in Explanatory Statements* <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/consultation>.
 - 25 See, e.g., *Legislation Act 2003*, *supra* note 8, ss 15J, 17, 19.
 - 26 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Annual Report 2018* (Commonwealth of Australia, 2019) <https://www.aph.gov.au/~media/Committees/Senate/committee/regord_ctte/annual/2018_Annual_report.pdf>.
 - 27 *Ibid* at 15.
 - 28 *Ibid* at 16.
 - 29 *Ibid* at 18.
 - 30 Parliament of the Commonwealth of Australia, *Journals of the Senate* vol 113 (November 29, 2018) at 4327.
 - 31 *Ibid* at 4328.
 - 32 *Ibid*.
 - 33 Inquiry Report, *supra* note 3 at 3.
 - 34 *Ibid*.
 - 35 *Ibid* at 4.
 - 36 *Ibid*, listed in Appendix A of the report at 153. Note that the author also made a submission.
 - 37 *Ibid* at 3-12.
 - 38 This section discusses the most salient parts of the report: other aspects include changing the name of the committee (*ibid* at 15-17, Recommendation 1), changes to the appointment of the deputy chair (*ibid* at 19-20, Recommendation 3), further study of a complaints-handling function (*ibid* 29-31, Committee Action 1), changing drafting instructions for using the form of 'regulations' (*ibid* at 93, Recommendation 11), effective scrutiny of Commonwealth expenditure (*ibid* at 107-111, Recommendation 14, Committee Action 10), the usefulness of the disallowance procedure (*ibid* at 113-24), rejection of the affirmative resolution procedure (*ibid* at 124-32, Recommendation 17) and the rejection of direct amendment of delegated legislation by Parliament (*ibid* at 137-140).
 - 39 *Ibid* at 17-19 (Recommendation 2)
 - 40 *Ibid* at 21-2 (Recommendation 4). See also *ibid* at 22 noting its usefulness in the context of 'framework bills' where draft regulations are often made available.
 - 41 *Ibid* at 23-25 (Recommendations 5 & 6)
 - 42 *Ibid*, ch 3 at 33-65.
 - 43 *Ibid* at 33, 64-65 (Recommendation 7). This summary is in addition to, or replaces, the criteria earlier mentioned.
 - 44 *Ibid* at 95-99. See also *ibid* at 99-106 (Recommendations 12-13 and Committee Action 9) for details on how the committee

- proposes to deal with “significant issues” or “issues that are likely to be of interest to the Senate”: refer them to the Senate and relevant legislation committees for scrutiny.
- 45 *Ibid* at 67.
 - 46 *Ibid* at 67-71 (Committee Action 2). The committee *ibid* at 71 (Committee Action 3) resolved to list instruments in which it is engaging with the agency or department in its reports in the interest of transparency.
 - 47 *Ibid* at 74-76 (Committee Action 6) (a past practice of the committee).
 - 48 *Ibid* at 72-74 (Committee Action 4).
 - 49 *Ibid* at 76-77 (Committee Action 7).
 - 50 Ministerial undertakings to amend an instrument are often used in the Australian context to avoid disallowance of an instrument, which can provide an efficient resolution of the committee’s concerns.
 - 51 Inquiry Report, *supra* note 3 at 78 (Committee Action 8).
 - 52 *Ibid* at 74 (Committee Action 5).
 - 53 *Ibid* at 81-93.
 - 54 *Ibid* at 92 (Recommendation 8).
 - 55 *Ibid* at 92 (Recommendation 9). See also *ibid* at 93 (Recommendation 10).
 - 56 *Ibid* at 122-24.
 - 57 *Ibid* at 124 (Recommendation 15). The committee also seeks better information on which instruments are exempt: *ibid* (Recommendation 16).
 - 58 *Ibid* at 133-37 (Recommendation 18).
 - 59 *Ibid* at 140-43 (Recommendation 19).
 - 60 *Ibid* at 145-48 (Recommendations 20-21).
 - 61 *Ibid* at 148-50 (Recommendation 22).
 - 62 *Ibid* at 150-52 (Committee Action 11).
 - 63 Jack Snape, “Senate committee goes rogue and gets powers to question constitutional validity of regulations” ABC News (28 November 2019) <<https://www.abc.net.au/news/2019-11-28/delegated-legislation-committee-blowtorch-ministers-bureaucrats/11744768>>.
 - 64 *Ibid*.
 - 65 Stephen Argument, “Senate Committee Report on Parliamentary Scrutiny of Delegated Legislation” (2019) 30 Public Law Review 178 at 180. In light of recent reforms, it would be entirely appropriate for the committee to request additional resourcing.
 - 66 Although it should be noted that other committees operate under their own procedural and legislative frameworks. Each scrutiny process must therefore be appropriately contextualised. But like the Australian inquiry, it is worth considering whether more holistic change is needed.