

INQUIRY INTO THE REVIEW OF HISTORICAL REGULATIONS

INTRODUCTION

Thank you for the opportunity to provide a submission to this inquiry. The Senate Standing Committee for the Scrutiny of Delegated Legislation has considered the terms of references and provided the comments and responses below to select issues.

Role of the committee

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee), formerly the Senate Standing Committee on Regulations and Ordinances, was established in 1932. The role of the committee is to examine the technical qualities of all Commonwealth legislative instruments against the committee's scrutiny principles.

The committee's work may be broadly described as technical legislative scrutiny. The committee operates on a non-partisan basis and does not consider the policy merits of delegated legislation, although the policy content of an instrument may provide context for the committee's scrutiny.

The scope of the committee's scrutiny function is formally defined by Senate standing order 23(3), which requires the committee to scrutinise each legislative instrument as to whether:

- (a) it is in accordance with its enabling Act and otherwise complies with all legislative requirements;
- (b) it appears to be supported by a constitutional head of legislative power and is otherwise constitutionally valid;
- (c) it makes rights, liberties, obligations or interests unduly dependent on insufficiently defined administrative powers;
- (d) those likely to be affected by the instrument were adequately consulted in relation to it;
- (e) its drafting is defective or unclear;
- (f) it, and any document it incorporates, may be freely accessed and used;
- (g) the accompanying explanatory material provides sufficient information to gain a clear understanding of the instrument;
- (h) it trespasses unduly on personal rights and liberties;
- (i) it unduly excludes, limits or fails to provide for independent review of decisions affecting rights, liberties, obligations or interests;
- (j) it contains matters more appropriate for parliamentary enactment;

(k) in the case of an instrument exempt from sunseting, it is appropriate for the instrument to be exempt from sunseting;

(l) in the case of an instrument that amends or modifies the operation of primary legislation, or exempts persons or entities from the operation of primary legislation, the instrument is in force only for as long as is strictly necessary; and

(m) it complies with any other ground relating to the technical scrutiny of delegated legislation that the committee considers appropriate.

In addition, standing order 23(4) empowers the committee to scrutinise instruments to determine whether the attention of the Senate should be drawn to the instrument on the ground that it raises significant issues, or otherwise gives rise to issues that are likely to be of interest to the Senate.

Further, standing order 23(4A) empowers the committee to consider instruments made under authority of Acts of the Parliament that are not subject to disallowance, including whether it is appropriate for them to be exempt from disallowance.

Contacting the committee

Queries in relation to this submission should, in the first instance, be directed to the committee secretariat. The secretariat can be contacted by email at sdlc.sen@aph.gov.au or by phone on +61 2 6277 3066.

KEY THEMES

A fundamental principle of parliamentary democracy is that the law should be made by the elected representatives of the people in Parliament, who should maintain control over the law once it is made.

It is therefore the committee's strong view that all Commonwealth instruments of a legislative character should be classified as legislative instruments. Subject to rare exceptions, it is also the committee's strong view that all such instruments should be subject to the full remit of parliamentary scrutiny processes. This includes sunseting.

In rare cases where it is appropriate to exempt a legislative instrument from the sunseting process, the justification for the exemption should be included in the instrument's explanatory materials and alternative forms of parliamentary scrutiny should nonetheless be available.

Any justification for an exemption from sunseting should be based on the particular context of the instrument in question. Accordingly, broad exemptions of entire classes of instruments are inappropriate.

This position reflects the importance of maintaining Parliament as the constitutionally appointed law-maker-in-chief, the need to maintain democratic accountability over delegated law-making, and the numerous technical and normative benefits associated with parliamentary scrutiny processes.

COMMONWEALTH SUNSETTING REGIME

In the Commonwealth context, the *Legislation Act 2003* (the Legislation Act) is intended to provide a comprehensive regime for the management of delegated legislation.¹

The Legislation Act provides for a number of functions relating to the oversight, publishing and maintenance of legislation. This includes establishing the Federal Register of Legislation, which provides a complete and accessible record of legislation, compilations and explanatory statements. The Legislation Act also sets out a statutory definition of legislative instrument which applies across Commonwealth law.

Key processes intended to facilitate opportunities for parliamentary oversight of delegated legislation are included within the Legislation Act. These include the sunseting process, mandating that instruments are automatically repealed after a defined period, subject to defined exemptions that are outlined in the Act and the Legislation (Exemptions and Other Matters) Regulation 2015.

The Legislation Act also requires all legislative instruments, and accompanying explanatory materials, to be tabled in both Houses of the Parliament and registered on the Federal Register of Legislation. Specifically, the maker of a legislative instrument is required to lodge the instrument for registration 'as soon as practicable after [it] is made'.² A registered instrument must be tabled in each House of the Parliament within six sitting days of registration. Otherwise, the instrument is repealed.³

When an instrument sunsets and is remade, the mandated registration and tabling process alerts the Parliament to the new instrument and facilitates parliamentary scrutiny processes. The committee supports these requirements on the basis that they promote both accessibility of the law and parliamentary scrutiny over delegated legislation.

The 2008 review of the Legislation Act by the Commonwealth Attorney-General's Department found that the Act had significantly improved public access to legislative instruments and had facilitated proper parliamentary scrutiny of legislative instruments.⁴

¹ See commentary in the Attorney-General's Department, *2021-22 Review of the Legislation Act 2003* (Government report, June 2022) p. 12.

² *Legislation Act 2003*, subsection 15G(1).

³ *Legislation Act 2003*, section 38.

⁴ Attorney-General's Department, *2008 Review of the Legislative Instruments Act 2003* (Government report, 31 March 2009) p.3.

DEFINITION OF LEGISLATIVE INSTRUMENT

Sunsetting provisions in the Legislation Act apply only to legislative instruments. They do not apply to other instruments that are not considered to be legislative, such as notifiable instruments.

In December 2021, the committee made a joint submission with the Senate Standing Committee for the Scrutiny of Bills and the Parliamentary Joint Committee on Human Rights to the 2021-22 Review of the Legislation Act conducted by the Attorney-General's Department (the Legislation Act review). In that submission the committee expressed the view that the definition of legislative instrument should cover all instruments of a legislative character to allow for proper and full parliamentary scrutiny.⁵ For example, the committee raised concerns about the inappropriate classification of notifiable instruments. Instruments made in exercise of a power delegated by the Parliament, that are not legislative in character, may be classified as 'notifiable' instruments. However, certain provisions of the Legislation Act permit instruments that are legislative in character to be registered as notifiable instruments. The committee noted its concern with this approach and recommended that these provisions be removed from the Act.

The committee also raised this issue in its interim report into the exemption of delegated legislation from parliamentary oversight.⁶ In its final report into the same inquiry, the committee noted that it had examined "a growing issue of instruments being classified as notifiable instruments, despite their demonstrably legislative nature" and recommended that section 11 of the Legislation Act be amended to clarify that notifiable instruments must not be legislative in character.⁷

⁵ Submission from the Parliamentary Joint Committee on Human Rights, Senate Standing Committee for the Scrutiny of Bills and Senate Standing Committee for the Scrutiny of Delegated Legislation to the 2021-22 Review of the Legislation Act 2003, December 2021, pp. 7-8.

⁶ Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight*, Interim Report, 2 December 2020, p. 76.

⁷ Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight*, Final Report, 16 March 2021, pp. 56; 123.

EXEMPTIONS FROM SUNSETTING

Part 4 of Chapter 3 of the Legislation Act provides that Commonwealth legislative instruments are automatically repealed after a fixed period of time, unless subject to an exemption. The Act provides for sunseting to be waived or deferred by the Attorney-General in certain circumstances and allows either House of the Parliament to resolve that a legislative instrument which is due for sunseting continues in force despite Part 4 of the Act. The Act also requires the Attorney-General to present lists of legislative instruments due for sunseting before each House of the Parliament.

Senate Standing Order 23(3)(k) requires the committee to scrutinise each instrument as to whether it is exempt from the sunseting process and evaluate whether that exemption is appropriately justified. The committee will also scrutinise instruments which defer the sunseting date of another instrument.

The committee is of the view that the sunseting framework in Part 4 of the Legislation Act provides an important opportunity for the Commonwealth Parliament to maintain effective and regular oversight of its delegated legislative powers and ensures that the content of legislative instruments remains current and fit for purpose. At the Commonwealth level, the committee expects that delegated legislation should be subject to sunseting unless there are exceptional circumstances justifying an exemption.

It is the committee's longstanding scrutiny view that an exemption from sunseting will not be justified, from a technical scrutiny perspective, merely because the instrument falls within one of the broad categories of exemptions set out in the Legislation Act and the Legislation (Exemptions and Other Matters) Regulation 2015. Rather, the committee's expectation is that the explanatory materials for each individual instrument outline the particular exceptional circumstances that are said to justify any exemption.

In its joint submission to the Legislation Act review, the committee recommended that the government amend the Legislation Act to specify the criteria for granting exemptions from sunseting and ensure all exemptions from sunseting for classes of legislative instruments are contained in primary legislation.⁸

The committee is of the view that instruments which override or modify primary legislation, trigger the imposition of significant penalties and restrict or limit individuals rights and liberties should not be exempt from the sunseting process. It is also the practice of the committee to closely scrutinise exempt instruments which facilitate the expenditure of public money on an ongoing basis or otherwise contains another matter requiring parliamentary oversight.

To this end, the committee will expect the explanatory statement for an exempt instrument to identify the specific legislative authority for the exemption and outline the exceptional circumstances which justify the exemption. Further, where the Attorney-General has deferred

⁸ Submission from the Parliamentary Joint Committee on Human Rights, Senate Standing Committee for the Scrutiny of Bills and Senate Standing Committee for the Scrutiny of Delegated Legislation to the 2021-22 Review of the Legislation Act 2003, December 2021, p. 11.

sunsetting, the committee expects that the explanatory statement will set out how the deferral of sunsetting meets the requirements of section 51 of the Legislation Act and explain why the deferral is both necessary and appropriate.

The committee lists instruments that are exempt from sunsetting, and which do not meet the committee's scrutiny expectations, in Chapter 6 of the committee's Delegated Legislation Monitor. It is the practice of the committee to list the name of the exempt instrument as well as the source of the exemption in Commonwealth legislation.

OTHER OPPORTUNITIES FOR PARLIAMENTARY SCRUTINY

Senate standing order 25(1) has the effect of appointing a number of legislative and general purpose standing committees at the commencement of each Parliament. These committees cover the following portfolios:

- Community Affairs;
- Economics;
- Education and Employment;
- Environment and Communications;
- Finance and Public Administration;
- Foreign Affairs, Defence and Trade;
- Legal and Constitutional Affairs; and
- Rural and Regional Affairs and Transport.

Senate standing order 25(2)(a)(iii) provides that each legislation committee appointed under standing order 25(1) may inquire into and report upon legislative instruments made in their respective portfolios.

Noting that this committee does not consider the policy merits of delegated legislation while undertaking its technical scrutiny work, Senate standing order 25(2)(a)(iii) provides an additional opportunity for parliamentary scrutiny over delegated legislation that is able to directly consider such policy questions.

As noted above, the sunset, registration and tabling requirements set out in the Legislation Act alert parliamentarians to the existence of new or remade instruments and therefore help facilitate this additional form of parliamentary scrutiny over delegated legislation.