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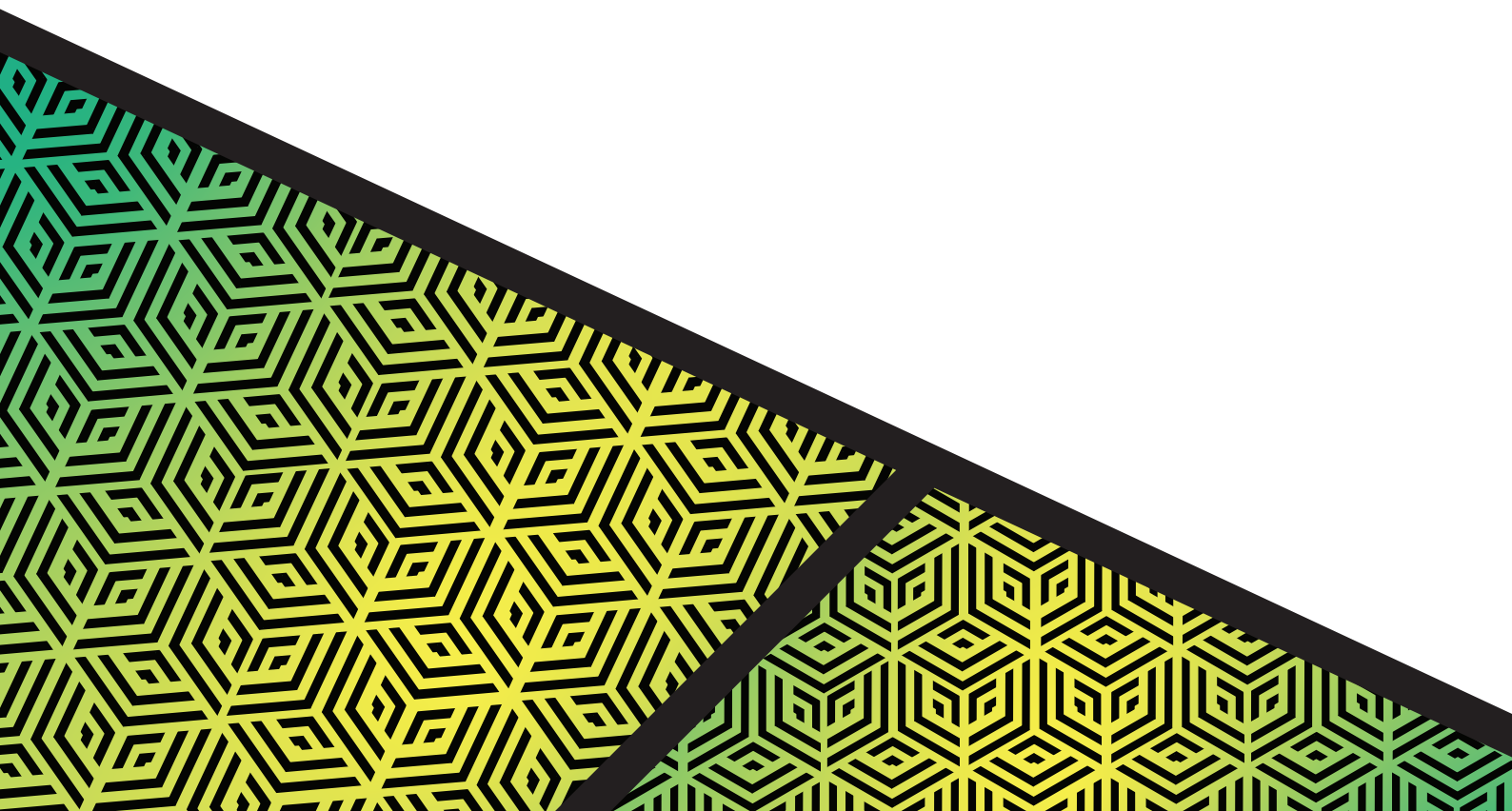
Australian Law Reform Commission

BACKGROUND PAPER FSL8

LEGISLATIVE FRAMEWORK FOR CORPORATIONS AND FINANCIAL SERVICES REGULATION

Post-Legislative Scrutiny

May 2023



This discussion of post-legislative scrutiny is the eighth in a series of background papers to be released by the Australian Law Reform Commission ('ALRC') as part of its Review of the Legislative Framework for Corporations and Financial Services Regulation ('the Inquiry').

These background papers are intended to provide a high-level overview of topics of relevance to the Inquiry. Further background papers will be released throughout the duration of the Inquiry, addressing key principles and areas of research that underpin the development of recommendations.

The ALRC is required to publish one further Interim Report during the Inquiry, and this Report will include specific questions and proposals for public comment. A call for further submissions will be made on the release of this Interim Report. In the meantime, feedback on the background papers is welcome at any time by email to financial.services@alrc.gov.au.

View the Financial Services Legislation Background Paper Series.

The Australian Law Reform Commission (ALRC) was established on 1 January 1975 and operates in accordance with the *Australian Law Reform Commission Act 1996* (Cth).

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Introduction

1. Managing legislative complexity and coherence over time is key to the ALRC's present Review of the Legislative Framework for Corporations and Financial Services Regulation (the 'Financial Services Legislation Inquiry').[1] As the ALRC observed in Interim Report B for the Financial Services Legislation Inquiry, a failure to revisit legislation can lead to redundant law accumulating in large, complex Acts.[2] If neither the legislature nor the executive government review existing legislation, redundant and outdated legislation can remain on the statute book indefinitely. The importance of clearing out old law and maintaining the currency of the statute book can be illustrated by the fact that the UK *Witchcraft Act* of 1735 was only repealed in the middle of the 20th century.[3]

2. Failure to review existing legislation may also erode its quality, leading to inconsistency and incoherence in design and substance. This is a particular problem in Acts that are subject to frequent amendments, which accumulate over time as approaches to legislative design and drafting change.[4]

3. In the absence of regular or entrenched review mechanisms, poor quality legislation only comes to the attention of parliamentarians after regulatory failures have occurred. This means that legislatures cannot promptly identify problems in existing legislation and cannot learn from earlier failures or successes. It is a cliché that those who ignore history are doomed to repeat it, but so too are we likely to miss hidden treasures of insight into making effective and lasting laws.

4. It is therefore relevant to the Financial Services Legislation Inquiry, as well as in the interest of good law-making generally, to examine how parliamentary and other processes may safeguard legislative quality over time. At present, the mechanisms for parliamentary review of primary legislation after it is enacted are limited, with greater scrutiny applied to delegated legislation. This Background Paper examines current post-legislative scrutiny ('PLS') procedures put in place by the Commonwealth Parliament and whether they may be enhanced so as to improve Commonwealth law-making more generally.

5. The Paper proceeds in five parts. Part One seeks to identify the scope of PLS as a concept. Part Two discusses the purpose of PLS. Part Three discusses the scrutiny of Acts of Parliament, also known as primary legislation. Part Four discusses PLS of delegated legislation, which is a more established feature of Australian law-making. Part Five discusses the benefits, risks, and opportunities for increased PLS in Australia.

1 Australian Law Reform Commission, 'Terms of Reference', *Review of the Legislative Framework for Corporations and Financial Services Regulation* (11 September 2020) <www.alrc.gov.au/inquiry/review-of-the-legislative-framework-for-corporations-and-financial-services-regulation/terms-of-reference/>.

2 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [7.4]–[7.11].

3 HLA Hart, *The Concept of Law* (Clarendon Press, 2nd ed, 1994) 64.

4 Australian Law Reform Commission, 'Risk and Reform in Australian Financial Services Law' (Background Paper FSL5, March 2022); Australian Law Reform Commission, 'Complexity and Legislative Design' (Background Paper FSL2, October 2021) [36]–[51]. See also Law Commission of England and Wales, *Post-Legislative Scrutiny* (Report No 302, 2006) [3.3]: 'Constant legislative change in a particular area by successive layers of new legislation and regulation may have a bewildering cumulative effect'.

Part I: What is post-legislative scrutiny?

6. PLS has no universally accepted definition. According to the Law Commission of England and Wales ('Law Commission'), PLS 'is a broad and undefined expression, which means different things to different people'.[5] Without a clear definition, PLS is one of a number of terms that are used to describe different types of post-enactment review of legislation. This part explains the definition of PLS adopted for the purposes of this Background Paper: post-enactment review of legislation mandated or undertaken by the legislature. PLS is distinguished from other forms of 'ex post' review.

Ex post review

7. Ex post review refers to all forms of post-enactment review of legislation.[6] There are many forms of ex post review undertaken by a range of bodies and organisations, including: government departments or other statutory bodies; commissions of inquiry; ad-hoc committees established by government; and law reform agencies, such as the ALRC.[7] Ex post review may also vary greatly in its scope or purpose, ranging from evaluations as to whether the substantive policy goals of legislation have been achieved to more technical or legalistic reviews that focus on the form or expression of legislation. The spectrum formed by different types of review is discussed further below.[8]

8. The growing attention given to ex post review in numerous jurisdictions can be traced to an increasing interest in rationalising law-making processes, ensuring that those processes improve the quality of legislation, and justifying the resources invested in them.[9] However, lack of structured ex post review is common throughout the world, and according to the OECD its member countries 'still underinvest in ex post evaluation, leaving the regulatory policy lifecycle incomplete'.[10] Compared to other OECD member countries, Australia has a strong record of adopting ex post review measures.[11]

9. PLS is a subset of ex-post review that deserves unique attention, due to its unique implications for parliamentary sovereignty and democratic accountability.

Parliamentary scrutiny

10. This Background Paper's focus is post-enactment scrutiny undertaken or instigated by the Commonwealth Parliament, and the processes that support parliamentary scrutiny. This Paper therefore adopts a narrower definition of PLS than some authors.[12]

11. Scrutiny by Parliament has been chosen for closer consideration because Parliament is the ultimate repository of Commonwealth legislative power. Parliament's legislative primacy is

5 Law Commission of England and Wales (n 4) [2.2]. According to De Vrieze and Norton, PLS 'has become something of an elastic term, the elasticity extending to both components of the term — scrutiny and legislation': Franklin De Vrieze and Philip Norton, 'The Significance of Post-Legislative Scrutiny' (2020) 26(3) *The Journal of Legislative Studies* 349, 353.

6 Other commonly used labels for ex post review include post-legislative oversight, post-enactment review, and ex post evaluation: see, eg, 'Championing Parliamentary Oversight: The London Declaration on Post-Legislative Scrutiny' (2019) 21(2) *European Journal of Law Reform* 210, 210–11; Franklin De Vrieze, 'Introduction' (2019) 21(2) *European Journal of Law Reform* 85; Jose Luis Rufas Quintana and Irmgard Anglmayer, 'Retrospective Policy Evaluation at the European Parliament' (2019) 21(2) *European Journal of Law Reform* 200; Law Commission of England and Wales (n 4) [3.29].

7 De Vrieze and Norton (n 5) 354.

8 See below [14]–[18].

9 See De Vrieze and Norton (n 5) 356.

10 Organisation for Economic Co-operation and Development, *Governance at a Glance 2019* (OECD Publishing, 2019) 130 <www.oecd-ilibrary.org/governance/government-at-a-glance-2019_8ccf5c38-en>.

11 Organisation for Economic Cooperation and Development, *OECD Regulatory Policy Outlook 2021* (OECD Publishing, 2021) <www.oecd.org/publications/oecd-regulatory-policy-outlook-2021-38b0fdb1-en.htm>.

12 See, eg, De Vrieze and Norton (n 5) 354–5. For a similar approach to one adopted in this Background Paper, see 'Championing Parliamentary Oversight: The London Declaration on Post-Legislative Scrutiny' (n 6).

enshrined in the first section of the *Australian Constitution*.[13] While other bodies and organisations perform significant and useful review functions, Parliament is ultimately responsible for the ongoing quality of Australia's legislation.[14] As noted by De Vrieze and Norton:

> While PLS can take the form of a separate mechanism within parliament, the process of evaluation is also the by-product of a parliament carrying out effective executive oversight, assessing the extent to which a government is managing the effective implementation of its policies and abiding by statutory obligations … However, the act of carrying out PLS on a primary basis is also one that extends beyond executive oversight, as an internal monitoring and evaluation system by which a parliament is also able to consider and reflect on the merits of its own democratic output and internal technical ability. Seen in this way, PLS also provides an approach that a parliament may take to its legislative role as one that is not only the maker of laws but also a country's legislative watchdog.[15]

Part II: What is the purpose of post-legislative scrutiny?

> *Post-legislative scrutiny appears to be similar to motherhood and apple pie in that everyone appears to be in favour of it. However, unlike motherhood and apple pie, it is not much in evidence*.[16]

12. At its core, PLS provides an opportunity to reflect upon existing laws to consider their quality, efficacy, and ongoing relevance. As noted above, PLS also 'enables a parliament to self-monitor and evaluate, as well as reflect on the merits of its own democratic output and internal technical ability'.[17] For delegated legislation, PLS allows Parliament to oversee the exercise of law-making powers it has delegated to the Executive, such as ministers or agencies.[18]

13. The main purpose of PLS is therefore to produce better laws, and to ensure that legislatures can play an active role in maintaining and enhancing the quality and efficacy of those laws over time. This is made possible by parliaments examining legislation after it is enacted, considering how problems may be rectified or the legislation otherwise improved, and using those insights to improve law-making more generally. PLS can help to 'keep older legislation, and the need to retain it, under review' and provide an 'opportunity to identify and address teething problems with, and unforeseen effects of, newer legislation'.[19]

14. Different objectives are targeted via differing approaches to PLS, which can be seen as forming a spectrum.[20] Ex post review may similarly be seen as forming a spectrum of different types of scrutiny, where the reviewing body further shapes the nature of the review.

15. At one end of the spectrum are technical or purely textual forms of review, which may focus on the expression of legislation or its legal effect.[21] Purely textual scrutiny may simply aim for clarity and consistency. A more intermediate scrutiny lens may consider whether appropriate

13 *Australian Constitution* s 1.
14 De Vrieze and Norton (n 5) 356. See also Law Commission of England and Wales (n 4) [3.4] which noted '[a] strong message that we have received from respondents is that Parliament should have ownership of the process of post-legislative scrutiny'.
15 De Vrieze and Norton (n 5) 356–7.
16 House of Lords Select Committee on the Constitution (UK), *Parliament and the Legislative Process* (14th Report of Session 2003–04, 29 October 2004) [165].
17 Franklin De Vrieze and Victoria Hasson, *Post-Legislative Scrutiny: Comparative Study of Practices of Post-Legislative Scrutiny in Selected Parliaments and the Rationale for Its Place in Democracy Assistance* (Westminster Foundation for Democracy, 2017) 11.
18 For further discussion, see Elena Griglio, 'Post-Legislative Scrutiny as a Form of Executive Oversight: Tools and Practices in Europe' (2019) 21(2) *European Journal of Law Reform* 118.
19 Oireachtas Library and Research Service, *Spotlight: Post-Enactment Scrutiny by Parliament* (Houses of the Oireachtas, 2017) 4.
20 See Law Commission of England and Wales (n 4) [2.3].
21 For example, the approach taken in Singapore, discussed below at [87]–[90]. See also Attorney-General's Chambers (Singapore), 'AGC Completes Univeral Revision of Acts – 2020 Revised Edition to Take Effect From 31 December 2021' (Media Release, 20 December 2021); Lydia Lam, 'Revised Edition of Singapore's Statute Book, with Simpler Language of the Laws, to Launch End-December', *Channel News Asia* (20 December 2021) <www.channelnewsasia.com/singapore/singapore-statute-book-laws-simpler-language-universal-revision-2388911>.

law-making processes were followed, such as consultation, or whether fundamental legislative principles have been met.

16. At the other end of the spectrum are broader forms of review 'which would address whether the intended policy objectives have been met by the legislation, and if so, how effectively'.[22] The broadest forms of review would consider all aspects of the law, including the continued relevance and appropriateness of policy choices, as well as assessing whether the regulatory design is fit for purpose. However, as the ALRC observed in Interim Reports A and B, there is no clear dividing line between matters of 'policy' and 'technical' aspects of legislation.[23] Professor Horrigan has also noted that 'the distinction between technical and policy-based approaches to scrutiny is often more blurry than bright, because many scrutiny issues have their own policy dimensions too'.[24]

17. Moreover, commentators have suggested that PLS can apply review criteria that extend beyond the objects of the reviewed legislation. For example, PLS has been identified as an important tool for states to assess their compliance with the United Nations' sustainable development goals,[25] or to reduce inequality suffered unintentionally by disadvantaged groups.[26]

18. The distinction between technical and policy-related scrutiny is reflected in the structure of Australian parliamentary committees. Technical scrutiny of Bills and legislative instruments by Parliament's three scrutiny committees occurs as of right.[27] For non-technical reviews, a Bill must be referred by the Senate Selection of Bills Committee, after which the Bill will be considered by one of the Senate's legislation or general purpose standing committees.[28] This means all Bills and legislative instruments are, formally at least, subject to technical scrutiny as a routine part of the law-making process. However, consideration of a Bill by the Senate does not automatically halt the passage of that Bill through Senate processes.[29] This means that a Bill can be passed before a scrutiny committee reports on it. In contrast, for non-technical Inquiries referred by the Senate Selection of Bills Committee, the Senate's consideration of a Bill is paused until the relevant committee tables its report.[30]

Part III: Post-legislative scrutiny of primary legislation

19. Well-established parliamentary practices ensure that Bills undergo systematic pre-legislative scrutiny before they can be enacted as law.[31] However, at present, there is no generally applicable procedure in place for Parliament or another body to review primary legislation after it is enacted.

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22 Law Commission of England and Wales (n 4) [2.3].

23 See, eg, Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [2.60]–[2.70]; Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [3.59]–[3.65].

24 Bryan Horrigan, Submission No 11 (Supplementary Submission) to Senate Standing Committee for the Scrutiny of Bills, *Inquiry into the Future Direction and Role of the Scrutiny of Bills Committee* (19 January 2012) 2.

25 See De Vrieze and Norton (n 5) 354; Fotios Fitsilis and Franklin De Vrieze, 'How Parliaments Monitor Sustainable Development Goals - a Ground for Application of Post Legislative Scrutiny' (2020) 26(3) *The Journal of Legislative Studies* 448.

26 'Championing Parliamentary Oversight: The London Declaration on Post-Legislative Scrutiny' (n 6) 212.

27 Senate, Parliament of Australia, *Standing Orders* (October 2022) ords 23–4; *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 7. The three committees are the Senate Standing Committee for the Scrutiny of Bills, the Senate Standing Committee for the Scrutiny of Delegated Legislation, and the Parliamentary Joint Committee on Human Rights.

28 Senate, Parliament of Australia, *Standing Orders* (October 2022) ord 115. For discussion of the scrutiny process see generally Rosemary Laing (ed), *Odgers' Australian Senate Practice* (Department of the Senate, 14th ed, 2016) 319–25.

29 Senate, Parliament of Australia, *Standing Orders* (October 2022) ords 24(1)(e)–(g). For further discussion, including consideration of whether passage of a Bill should be delayed pending completion of the scrutiny process, see Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Parliamentary Scrutiny of Delegated Legislation* (2019) rec 9, [5.33]–[5.41].

30 Senate, Parliament of Australia, *Standing Orders* (October 2022) ord 115(3).

31 This includes first and second reading speeches (although first reading speeches are rare in practice), debate and questioning as prescribed in 'Senate, Parliament of Australia, *Standing Orders* (October 2022) ch 20 (Bills) and House of Representatives, Parliament of Australia, *Standing Orders* (August 2022) ch 12 (Bills).

20. The theoretical underpinnings for parliamentary scrutiny differ as between primary and delegated legislation. When scrutinising delegated legislation Parliament is performing its oversight function under the doctrine of responsible government,[32] whereas scrutinising primary legislation is part of Parliament's primary legislative function.

21. This part will consider current approaches to scrutiny of Commonwealth primary legislation, complementary ex post review processes, and approaches in other comparable jurisdictions.

Parliamentary inquiries

22. The principal form of PLS in Australia is provided by ad hoc parliamentary inquiries, conducted by Senate committees, House of Representatives committees, or joint committees comprised of members of both the Senate and the House of Representatives. As at 16 February 2023, there were 66 parliamentary committees conducting 107 public inquiries.[33] Committees may be 'standing', as in they exist indefinitely, or 'select', because they are created to conduct a particular inquiry or set of inquiries. Most inquiries are conducted with the approval of the relevant house of Parliament or following a referral from a Minister. However, some inquiries occur due to an ongoing requirement in law, arise from standing orders, or may be initiated by a committee.

23. Committees generally include a diverse membership reflecting Parliament's composition, with members from the governing party, the opposition, and any crossbench. This makes Parliamentary inquires different from inquiries conducted by the Executive. Executive inquiries may involve members of Parliament, in their role as Ministers, but they ultimately represent only the Government and do not replicate the diversity of membership provided by Parliamentary inquiries. Reports of parliamentary inquiries may also contain 'dissenting reports' or additional comments by certain members, and the potential for such diverse views may enhance the benefits of PLS over other forms of ex post review. The possibility of diverse membership and dissent also underlines the democratic character of PLS compared to other forms of ex post review.

Standing committees

24. Standing committees are the core vehicle for Parliamentary scrutiny of legislation and its underlying policy settings, both before (pre-legislative scrutiny) and after (post-legislative scrutiny) legislation is enacted. There are several types of standing committees and each chamber takes a different approach to their composition. The following paragraphs briefly outline the committees of the current 46th Parliament.

25. The House of Representatives operates nine general purpose committees that cover certain subject matter, such as Economics or Communications and the Arts.[34]

26. The Senate also operates 10 general purpose committees that cover certain subject matter. However, each general purpose committee is paired with a legislation committee that provides pre-legislative scrutiny. For example, the Senate Standing Committees on Economics has both an Economics References Committee and an Economics Legislation Committee.[35] Additionally, the Senate operates a Standing Committees for the Scrutiny of Bills, discussed further below.

32 See, eg, Gabrielle Appleby and Joanna Howe, 'Scrutinising Parliament's Scrutiny of Delegated Legislative Power' (2015) 15(1) *Oxford University Commonwealth Law Journal* 3, 27–8; Griglio (n 18).
33 For current data, see Parliament of Australia, 'Committees' <www.aph.gov.au/Parliamentary_Business/Committees>.
34 There are other standing committees for running the business of the House of Representatives: see ibid.
35 There are other standing committees for running the business of the Senate: see ibid.

27. There are 16 Joint Standing Committees of the House of Representatives and the Senate, excluding those relating to the operation of Parliament.[36]

28. Standing committees may provide PLS by conducting inquires. Most inquires require a reference from a house of Parliament or from a Minister, with the terms of reference setting the parameters of each inquiry. For example, the Senate Legal and Constitutional Affairs References Committee is currently conducting an inquiry into current and proposed sexual consent laws in Australia, following a reference from the Senate on 29 November 2022. The Terms of Reference for that inquiry are relatively open-ended, as follows:

> Current and proposed sexual consent laws in Australia, with particular reference to:
>
> a. inconsistencies in consent laws across different jurisdictions;
> b. the operation of consent laws in each jurisdiction;
> c. any benefits of national harmonisation;
> d. how consent laws impact survivor experience of the justice system;
> e. the efficacy of jury directions about consent;
> f. impact of consent laws on consent education;
> g. the findings of any relevant state or territory law reform commission review or other inquiry; and
> h. any other relevant matters.[37]

29. In other cases, committees can conduct inquires without a reference. This is possible where the committee is empowered to undertake inquiries by legislation or a resolution of the relevant house or houses of Parliament. For example, the Joint Standing Committee on Implementation of the National Redress Scheme was appointed by resolutions of the House and Senate, and can conduct inquiries without a reference. The Committee is currently conducting an inquiry into the operation of the National Redress Scheme. Among other matters, the inquiry is considering whether the '*National Redress Scheme for Child Sexual Abuse Act 2018* (Cth) enables the Scheme to operate to its greatest potential'.[38]

30. Similarly, the Parliamentary Joint Committee on Corporations and Financial Services is established under Part 14 of the *Australian Securities and Investments Commission Act 2001* (Cth) ('*ASIC Act*'). The Joint Committee's duties under s 243 of the *ASIC Act* include conducting inquiries into 'the operation of the corporations legislation' and

> the operation of any other law of the Commonwealth, or any law of a State or Territory, that appears to the Parliamentary Committee to affect significantly the operation of the corporations legislation.

31. The Joint Committee can therefore commence inquires as it sees fit, in accordance with its duties and, under s 242 of the *ASIC Act*, the powers afforded to it by parliamentary resolutions. The Joint Committee is currently conducting an inquiry into corporate insolvency in Australia, which includes a review of the

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36 These are the Parliamentary Joint Committees on: Aboriginal and Torres Strait Islander Affairs; Australian Commission for Law Enforcement Integrity; Corporations and Financial Services; Electoral Matters; Foreign Affairs, Defence and Trade; Human Rights; Implementation of the National Redress Scheme (Standing); Intelligence and Security; Law Enforcement; Migration; National Capital and External Territories; National Disability Insurance Scheme; Public Accounts and Audit; Public Works; Trade and Investment Growth; and Treaties.

37 Parliament of Australia, Senate Standing Committees on Legal and Constitutional Affairs, 'Terms of Reference', *Current and Proposed Consent Laws in Australia* <www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/sexualcontentlaws/Terms_of_Reference>.

38 Parliament of Australia, Joint Standing Committee on Implementation of the National Redress Scheme, 'Terms of Reference', *Inquiry into the Operation of the National Redress Scheme* <www.aph.gov.au/Parliamentary_Business/Committees/Joint/National_Redress_Scheme_Standing/Redress47/Terms_of_Reference>.

operation of the existing legislation, common law, and regulatory arrangements, including:

a. the small business restructuring reforms (2021);
b. the simplified liquidation reforms (2021);
c. the unlawful phoenixing reforms (2019); and
d. the operation of the *Personal Property Securities Act 2009* in the context of corporate insolvency.[39]

32. The Joint Committee also maintains an ongoing inquiry into oversight of the Australian Securities and Investments Commission, the Takeovers Panel, and corporations legislation, consistent with its duties.

Select committees

33. Select committees provide an additional vehicle for PLS in Australia, offering the opportunity for Parliament to respond quickly to emerging issues where a standing committee may not be appropriate or sufficient.

34. For example, on 30 November 2022, the Senate established a Select Committee on Australia's Disaster Resilience, which was tasked to inquire into a range of matters. Most relevantly, the Committee is reviewing

> the practical, legislative, and administrative arrangements that would be required to support improving Australia's resilience and response to natural disasters.[40]

35. The Committee's Inquiry is therefore operating as a form of PLS, reviewing the adequacy and appropriateness of existing legislation with a view to making better law and ensuring parliamentary input in the maintenance of the law. The Inquiry's Terms of Reference also permit the Committee to consider substantive policy questions, such as how Australia should deliver disaster 'preparedness, response and recovery'. Findings in relation to these matters could affect the underlying policy settings to which the law gives effect.

36. The Parliament's website lists 69 Senate select committees convened between the 38th and 46th Parliaments,[41] along with six House select committees,[42] and 21 Joint Select Committees.[43]

Existing limitations of scrutiny by parliamentary committees

37. The main limitation of PLS within the existing parliamentary committee system is its generally ad hoc nature. This means that PLS is most likely to take place only after regulatory failure has occurred or there is another political imperative for legislation to be reviewed. While legislation may pre-emptively mandate that a committee conduct PLS, as discussed below,[44] this type of regular or systematic PLS is the exception rather than the norm.

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39 Parliament of Australia, Parliamentary Joint Committee on Corporations and Financial Services, 'Terms of Reference', *Corporate Insolvency in Australia* <www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/CorporateInsolvency/Terms_of_Reference>.

40 Parliament of Australia, Parliamentary Joint Committee on Corporations and Financial Services, Select Committee on Australia's Disaster Resilience, 'Terms of Reference' <www.aph.gov.au/Parliamentary_Business/Committees/Senate/Disaster_Resilience/DisasterResilience/Terms_of_Reference>.

41 Parliament of Australia, 'Former Senate Committees' <www.aph.gov.au/Parliamentary_Business/Committees/Senate/Former_Committees>.

42 Parliament of Australia, 'Former House Committees' <www.aph.gov.au/Parliamentary_Business/Committees/House/Former_Committees>.

43 Parliament of Australia, 'Former Joint Committees' <www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees>.

44 See below [53]–[59].

38. Parliamentary committees, and the secretariats that support them, may not be well-equipped to undertake the full spectrum of PLS. For example, committee inquiries typically focus on high level policy issues and implementation, without directly addressing questions of legislative design or complexity.

39. Because the House of Representatives is necessarily controlled by the government, inquiries by committees of the House may be more difficult to establish. Furthermore, there is a risk that particular inquiries may be perceived as being political, rather than established with the objectives of PLS in mind.[45] Nonetheless, the presence of opposition and crossbench members on any committee can help to ensure a greater diversity of views than Executive-led inquiries, in which a reviewer or reviewing body would usually be nominated by the government of the day. Moreover, Ministers do not sit on parliamentary committees, meaning that even where committees include members of the governing party, they may bring differing perspectives.

Sunsetting

> *The spoonful of sugar that helps controversial legislation go down.*[46]

40. Legislation typically operates perpetually until it is amended or repealed. The default position for legislation is therefore one of permanence.

41. 'Sunset clauses' refer to provisions that cause legislation to cease to have effect after a set period of time has passed.[47] As the end of that period of time approaches, Parliament is left 'with the choice of passing new legislation renewing the relevant provisions (either in their entirety or in part), amending the provisions, or allowing them to terminate'.[48] Sunset clauses may also permit the sunsetting date to be extended by means other than an amending Act, such as a resolution of parliament or delegated legislation.[49] Overall, sunsetting can provide a vehicle for Parliament to undertake PLS, either as part of enacting replacement legislation or in extending the existing legislation. This PLS would generally take the form of a parliamentary inquiry, such as through a legislation or references committee.

42. Sunset provisions are often accompanied by a requirement for systematic review of the legislative regime before it sunsets, often specifying the committee, agency, or department responsible for completing the review.[50] Review provisions 'are in essence statutory "trigger" or reflection points that initiate [PLS] as a means for evidence-based decision making'.[51] Statutorily mandated review provisions are discussed further below.

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45 For commentary in relation to the 2019 Joint Select Committee on Australia's Family Law System, see Matthew Doran, 'Federal Government Announces Inquiry into Family Law and Child Support Systems', *ABC News* (17 September 2019) <www.abc.net.au/news/2019-09-17/federal-government-announces-inquiry-into-family-law-system/11520368>; Matthew Doran, 'Family Law Overhaul Promised, as Government Drafts New System More Inclusive of Children and Kinship Carers', *ABC News* (30 January 2023) <www.abc.net.au/news/2023-01-30/family-law-reform-overhaul-proposed/101905666>.

46 Chris Mooney, 'A Short History of Sunsets' (January–February 2004) Legal Affairs <www.legalaffairs.org/issues/January-February-2004/story_mooney_janfeb04.msp>, quoted in Nicola McGarrity, Rishi Gulati and George Williams, 'Sunset Clauses in Australian Anti-Terror Laws' (2012) 33(2) *Adelaide Law Review* 307, 308. See also John E Finn, 'Sunset Clauses and Democratic Deliberation: Assessing the Significance of Sunset Provisions in Antiterrorism Legislation' (2010) 48(3) *Columbia Journal of Transnational Law* 442, 485.

47 Despite this precise definition, the term is often used to describe all time-limiting legislative clauses: see, eg, Finn (n 46) 445; Antonios Kouroutakis, 'Sunset Clauses: A Historical, Positive and Normative Analysis' (PhD Thesis, University of Oxford, 2014) ch 1.

48 McGarrity, Gulati and Williams (n 46) 307.

49 See, for example, s 143(4) of the *Data Availability and Transparency Act 2022* (Cth), which provides that regulations may enable certain provisions of the Act to continue to apply after the Act's sunset date. See also Sean Molloy, Maria Mousmouti and Franklin De Vrieze, *Sunset Clauses and Post-Legislative Scrutiny: Bridging the Gap between Potential and Reality* (The PLS Series, Westminster Foundation for Democracy, February 2022) 14–15.

50 See, for example, *Intelligence Services Act 2001* (Cth) s 29, which provides that the functions of the Parliamentary Joint Committee on Intelligence and Security include reviewing counterterrorism legislation prior to its sunsetting.

51 Molloy, Mousmouti and De Vrieze (n 49) 6.

43. The precise origins of sunset clauses are contested, with some academics tracing their usage to Plato, Henry VIII, or Thomas Jefferson, respectively.[52] However, the term 'sunset clause' was coined only recently, following the Watergate scandal in the US, as a proposed check on government powers.[53]

44. Sunset clauses are familiar to Australian law, given that Commonwealth delegated legislation has been subject to a default sunsetting regime since 2003.[54] For this reason however, the majority of Australian scholarship on sunset clauses focuses on delegated legislation, with limited commentary addressing their use in primary legislation. Sunset clauses have sporadically been used in Commonwealth Acts, and research and data about their efficacy is limited. Moreover, existing legislative drafting guidance does not address when sunset clauses should be considered or included in Bills.

45. Commentary on the use of sunsetting in primary legislation has largely centred on the example of counter-terrorism legislation.[55] Sunsetting has been commonly employed in this type of legislation across numerous other jurisdictions.[56] However, even in Australian counterterrorism legislation, only two Acts out of dozens related to the topic have included sunset clauses.[57] In practice, sunsetting provisions in anti-terrorism legislation, including Australian legislation, are rarely allowed to lapse as scheduled.[58]

46. Existing research suggests that sunset clauses are more likely to be used during the intersection of certain circumstances, including:

- periods of panic, where the perceived urgency for government response is high;
- where information is either scarce or unreliable; and
- where government policies or proposals are highly politicised, contested, or controversial.[59]

47. Under these circumstances, sunset clauses are held up as a safeguard to protect civil freedoms, and to ensure policy-making evolves and is revised as more accurate information becomes available.[60] These factors explain why sunset clauses are commonly used in counter-terrorism legislation, which tends to represent the intersection of all three key circumstances.[61]

52 Kristen Underhill and Ian Ayres, 'Sunsets Are for Suckers: An Experimental Test of Sunset Clauses' (2022) 59(1) *Harvard Journal on Legislation* 101, 108–9; Molloy, Mousmouti and De Vrieze (n 49) 7.

53 Kouroutakis (n 47) 13.

54 See *Legislation Act 2003* (Cth) ch 3 pt 4. This approach followed the precedent set in New South Wales, Queensland, South Australia and Victoria: Stephen Argument, 'Is "Sunsetting" Limping Off into the Sunset?: Recent Developments in the Regime for Sunsetting of Commonwealth Delegated Legislation' (2019) 95 *AIAL Forum* 37, 37.

55 For examples of sunsetting provisions in primary legislation not related to counterterrorism, see *Special Recreational Vessels Act 2019* (Cth) s 17; *Broadcasting Services Act 1992* (Cth) s 43C(4A).

56 Finn (n 46) 450. For several examples of US federal statutes subject to sunsetting provisions, see Underhill and Ayres (n 52) 108.

57 McGarrity, Gulati and Williams (n 46) 310. These were the *ASIO Legislation Amendment (Terrorism) Act 2003* (Cth), which first introduced pt III div 3 of the *Australian Security Intelligence Organisation Act 1979* (Cth) ('*ASIO Act*'), and the *Anti-Terrorism Act (No 2) 2005* (Cth), which amended provisions of the *Criminal Code Act 1995* (Cth) and the *Crimes Act 1914* (Cth).

58 Finn (n 46) 495; McGarrity, Gulati and Williams (n 46) 321. For example, pt III div 3 of the *ASIO Act* was initially due to expire in 2006, but its operation was extended by several amendments to s 34ZZ until the division was amended by the *Australian Security Intelligence Organisation Amendment Act 2020* (Cth). Pt III div 3 of the *ASIO Act* is now due to sunset on 7 September 2025: s 34JF.

59 See, eg, Finn (n 46).

60 Ibid 448.

61 Ibid 450; Molloy, Mousmouti and De Vrieze (n 49).

48. Sunset clauses offer several potential benefits that make them attractive not only to drafters, but also to parliaments.[62] By placing an end-date on the operation of a legislative policy, subject to re-implementation, concerns regarding the efficacy or potential unintended consequences of a Bill may be alleviated, effectively making the law more palatable to law-makers.[63] This can facilitate faster responses to emergency circumstances, where delayed government responses may otherwise have long-lasting consequences.[64] Time-limited operation and a requirement for periodic review may also justify greater risk-taking in drafting and regulatory strategies.[65]

49. In the US, sunsetting has also been thought to facilitate information-sharing between the executive and legislature. This is perceived as a benefit from the legislature's perspective, particularly regarding the exercise of executive powers, because information may otherwise be difficult to obtain. For example, several US legislators have expressed the view that sunsetting was instrumental in their obtaining information about the exercise of counter-terrorism powers contained in controversial legislation.[66]

50. Sunset clauses also attract criticism. Most obviously, sunset clauses detract from legal certainty, and may hinder stakeholders' ability to plan their affairs in the long-term. There is also a concern that sunset clauses may be detrimental to the quality of pre-legislative scrutiny, encouraging legislators to pass what may otherwise be highly controversial legislation.[67] Scheduling a mandatory review in the future may amount to the proverbial 'kicking the can down the road', delaying important policy debates. Research has also shown that temporary legislation still contributes to shaping social and legal norms, such that residual effects may continue after legislation has sunset, or make similar or more draconian measures more likely to pass in the future.[68] The use of sunset clauses in US taxation legislation has also been criticised on the basis that it may skew the cost-benefit analysis for financial reforms (that is, the estimated 'cost' is limited to the proposed sunset period, even if the reforms are actually intended to be permanent).[69]

51. According to Finn, the calculation of

> success or failure of sunset provisions should not reduce to counting how many times such provisions have been repealed. Whether sunset clauses work depends instead upon whether they deliver the informational, distributive and deliberative benefits they promise.[70]

62 According to Underhill and Ayres, the potential benefits of sunset clauses include 'facilitating congressional oversight of agency functions, addressing agency capture, promoting experimentation, allowing the evolution of statutory schemes over time, accommodating future changes in facts, facilitating temporary responses to emergencies, facilitating research and consideration of data on whether the law is an optimal strategy for achieving legislative goals, improving democratic accountability (particularly for agencies), avoiding "policy drift" over time, avoiding undesirable entrenchment, correcting errors, reducing susceptibility for cognitive bias arising from fear of acting in error, creating incentives for affirmative congressional decision-making and reducing inertia, instilling urgency in legislative activity, and allowing discontinuation of laws that prove more expensive than anticipated' (citations omitted): Underhill and Ayres (n 52) 109–10.

63 Molloy, Mousmouti and De Vrieze (n 49) 6.

64 See, for example, Finn (n 46) considering counterterrorism legislation in the US, UK, Canada, and India.

65 Temporary legislation, subject to review, 'create[s] room for regulatory flexibility and learning': Sophia Ranchordás, 'Innovation-Friendly Regulation: The Sunset of Regulation, the Sunrise of Innovation' (2015) 55(2) *Jurimetrics* 201, 201. See also Sofia Ranchordás, 'Sunset Clauses and Experimental Regulations: Blessing or Curse for Legal Certainty?' (2015) 36(1) *Statute Law Review* 28.

66 See Finn (n 46) 468–9.

67 Antonios Kouroutakis and Sofia Ranchordás, 'Snoozing Democracy: Sunset Clauses, De-Juridification, and Emergencies' (2016) 25(1) *Minnesota Journal of International Law* 29, 35, 56, 71; Ranchordás, 'Innovation-Friendly Regulation: The Sunset of Regulation, the Sunrise of Innovation' (n 65) 217. See also Enrico Albanesi, 'Temporary Legislation as a Mechanism for Reaching Consensus: A Critical Analysis in the Absence of Ex Post Evaluation' in Sofia Ranchordás and Yaniv Roznai (eds), *Time, Law, and Change: An Interdisciplinary Study* (Hart Publishing, 2020) 191.

68 Finn (n 46) 490. See also Frank Fagan, 'After the Sunset: The Residual Effect of Temporary Legislation' (2013) 36 *European Journal of Law and Economics* 209.

69 Kouroutakis and Ranchordás (n 67) 72; Molloy, Mousmouti and De Vrieze (n 49) 8.

70 Finn (n 46) 501.

52. The committee tasked with reviewing the operation of the *Legislation Act 2003* (Cth) ('*Legislation Act*'), which contains the default sunsetting regime relating to delegated legislation, has considered the question of whether a similar, generally applicable regime should be extended to primary legislation. Ultimately, the committee found strongly against the suggestion of applying a default sunsetting regime to primary legislation based on the potential strain on resources and lack of corresponding benefits.[71]

Statutorily mandated review

53. Review clauses usually stipulate that the operation of an Act (in whole or in part) must be reviewed, either within a specified period of time or on a periodic basis. The *Legislation Handbook*, published by the Department of the Prime Minister and Cabinet, advises departments to consider including review mechanisms when developing legislation.[72] That guidance somewhat reflects the spectrum of scrutiny discussed above, stating that a review provision could, for example,

> require regular consideration of whether the legislation:
>
> (a) is operating in a way that is legally effective to implement government policy;
> (b) has resulted in any unintended legislative consequences;
> (c) remains relevant and clear; or
> (d) contains any outdated or redundant provisions.[73]

54. Review clauses may be coupled with sunset clauses, so as to inform the decision to re-enact legislation or allow provisions approaching their sunsetting date to lapse. Compared to ad hoc inquiries, mandatory review clauses have the benefit of being mandatory, although generally lacking enforcement mechanisms, and scheduled to occur at a specific time or periodically.

55. Mandatory review provisions appear to be more common in legislation arising out of long-term review and law reform processes.[74] Recent practice, however, suggests there may be a trend towards more widespread usage. For example, approximately half of all principal Acts longer than 10 pages passed between 2020 and 2022 contained mandatory review provisions.[75]

56. Review clauses vary as to the whether a review must be undertaken by a parliamentary committee or another body. For example, s 18 of the *National Emergency Declaration Act 2020* (Cth) provides:

> The Senate Standing Committee on Legal and Constitutional Affairs, or such other committee constituted under a resolution of the Senate, must:
>
> (a) begin a review of the operation of this Act immediately after this Act commences and report the Committee's findings to the Senate by 30 June 2021; and
> (b) begin a review of the operation of this Act by the fifth anniversary of the day this Act commences and report the Committee's findings to the Senate as soon as practicable after completing the review.[76]

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71 Sunsetting Review Committee, Attorney-General's Department (Cth), *Report on the Operation of the Sunsetting Provisions in the Legislation Act 2003* (September 2017) 32.
72 Department of the Prime Minister and Cabinet (Cth), *Legislation Handbook* (2017) [5.26].
73 Ibid.
74 For example, the *Personal Property Securities Act 2009* (Cth) can be traced to discussions in the 1970s, by an ALRC inquiry and Senate Legal and Constitutional Affairs Committee inquiry, with extensive consultation and input from industry and the States and Territories, as discussed in the Second Reading Speech for the Bill. See also the *Legislation Act 2003* (Cth), which arose from a report of the Administrative Review Council in 1992, and was preceded by three earlier Bills unsuccessfully introduced into Parliament in 1994, 1996 and 1998, as discussed in the Explanatory Memorandum for the Bill. The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) was the consequence of a review undertaken by the Council of Australian Governments (COAG), and a subsequent Federal Government review, as discussed in the Explanatory Memorandum for the Bill.
75 Excluding appropriation and supply Acts and Acts imposing levies or charges.
76 See also *Intelligence Services Act 2001* (Cth) s 29.

57. More commonly, however, mandatory review provisions confer broad discretion on a Minister to identify an appropriate review body. For example, of the 10 principal Acts passed between 2020–22 that contained a mandatory review clause, only the *National Emergency Declaration Act 2020* (Cth) stipulated that a review must be undertaken by a parliamentary committee.[77] Other provisions vary by requiring that the Minister must cause:

- 'a review' (one-off or periodically) to be undertaken;[78]
- an 'independent review' (one-off or periodically) to be undertaken;[79] or
- a review to be 'undertaken by one or more persons who, in the Minister's opinion, possess appropriate qualifications to undertake the review'.[80]

58. Compared to ad hoc parliamentary inquiries, mandatory review provisions have the benefit of being scheduled, and so do not depend upon regulatory failure or other political imperatives for their occurrence. However, failure to complete a review within the required time period, or to a reasonable standard of quality, does not usually attract clear legal consequences. Unlike sunset clauses, where the impending expiration of the law motivates parliamentary action, there is no comparable legal or political impetus to address the findings of a mandatory review.

59. Where a mandatory review provision does not require PLS, but ex post review by a non-parliamentary body, there may be even less potential for parliamentary engagement. For example, a failure to provide for final reports to be tabled in Parliament makes it more difficult to ensure Parliament is aware of a review's outcomes.[81] Review clauses also vary in their specificity, and do not uniformly specify review standards or procedures, meaning that methods and outputs may vary between reviewing bodies.[82]

Comparative practice: United Kingdom

60. Internationally, parliaments have adopted diverse approaches to PLS of primary legislation.[83] The UK Westminster Parliament provides an example of a comparable parliamentary system to the Australian Parliament with what have been described as 'semi-systematic' mechanisms for PLS.

61. The UK adopts a broad definition of PLS, which goes beyond narrow technical or legal analysis. This reflects the findings of the Law Commission in 2006, which found that 'post-legislative scrutiny should serve much broader purposes than a narrow review of legal consequences'.[84] At

77 *National Emergency Declaration Act 2020* (Cth) s 18.

78 *Australian Business Growth Fund (Coronavirus Economic Response Package) Act 2020* (Cth) s 21; *Australia's Foreign Relations (State and Territory Arrangements) Act 2020* (Cth) s 63A; *Recycling and Waste Reduction Act 2020* (Cth) s 185; *Federal Circuit and Family Court of Australia Act 2021* (Cth) s 284; *Data Availability and Transparency Act 2022* (Cth) s 142.

79 *Payment Times Reporting Act 2020* (Cth) s 57A; *Online Safety Act 2021* (Cth) s 239A; *Climate Change Act 2022* (Cth) s 17.

80 *National Anti-Corruption Commission Act 2022* (Cth) s 278.

81 An example in the context of delegated legislation is reg 5.44A of the *Migration Regulations 1994* (Cth), which requires that the regulations be reviewed every 10 years but does not require that any subsequent report be tabled in Parliament. The Senate Standing Committee for the Scrutiny of Delegated Legislation (formerly known as the Senate Standing Committee on Regulations and Ordinances) has expressed concern that the *Migration Regulations 1994* (Cth) are both exempt from the generally applicable sunsetting regime for delegated legislation, discussed below, and that the outcomes of each 10-yearly review do not need to be tabled in Parliament: see Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Delegated Legislation Monitor* (Monitor 9 of 2017, 14 August 2017) 10, 18–19.

82 Where 'no requirements for the review were specified, it could be assumed that the review would be entirely within the control of the relevant department': Argument, 'Is "Sunsetting" Limping Off into the Sunset?: Recent Developments in the Regime for Sunsetting of Commonwealth Delegated Legislation' (n 54) 40. In relation to the inconsistent quality of reviews under sunsetting provisions relating to delegated legislation, see Sunsetting Review Committee, Attorney-General's Department (Cth) (n 71) 12–13.

83 De Vrieze and Norton (n 5) 354. See also De Vrieze and Hasson (n 17).

84 Law Commission of England and Wales (n 4) [2.3]. See also Office of the Leader of the House of Commons (UK), *Post-Legislative Scrutiny — The Government's Approach* (March 2008) 10.

present, both Houses of the UK Parliament conduct post-legislative scrutiny to some extent, albeit in different manners reflecting the unique constitution of each chamber.[85]

62. UK government agencies and academics were among the earliest to identify the need to establish systematic processes for PLS, and to acknowledge that ad hoc responses to regulatory failure were insufficient for ensuring the quality of legislation over time. In the early 1990s, two committees, the Procedure Committee in the House of Commons and Hansard Society Commission, published reports recommending more thorough PLS measures.[86]

63. In 2004, the House of Lords Constitution Committee published *Parliament and the Legislative Process*, which included recommendations as to PLS.[87] This report explored the range of benefits PLS could bring to the legislative process as a whole, and acknowledged its widespread support.[88] The report recommended that PLS should be a routine process, with Acts to be reviewed within three years of their commencement or six years after their enactment, whichever was earlier.[89] While this report prompted government acknowledgement of PLS, reforms were postponed partly due to PLS being 'ill-defined'.[90] Instead, the matter was referred to the Law Commission,[91] which responded the following year by endorsing the recommendations of the Constitution Committee relating to the establishment of a joint parliamentary committee on PLS.[92]

64. The UK Government agreed to implement new PLS practices, but not in the forms recommended by the Law Commission.[93] The recommendation for a joint committee responsible for PLS was not accepted, partly on the basis that instituting a new committee could displace existing committees 'from their key and leading role in monitoring the policies and activities of government departments'.[94] Instead, PLS is now listed as a 'core task' of the House of Commons select committees.[95] The UK Government agreed that most Acts should be reviewed three to five years after coming into effect, but was of the opinion that government departments were best positioned to review the legislation they administer.[96] Departmental reviews would be published in Parliament as Command Papers, and sent to the relevant departmental select committee in the House of Commons, which would then determine if further examination was warranted.[97]

65. The UK approach has been described as a 'semi-systematic approach' to PLS because it 'involves both the Executive and the Parliament and combines internal departmental scrutiny with parliamentary scrutiny'.[98] By this approach, 'all Acts receive a preliminary scrutiny within Government and are considered for scrutiny within Parliament'.[99] No equivalent, standard procedure exists in Australia.

85 See generally Tom Caygill, 'A Tale of Two Houses: Post-Legislative Scrutiny in the UK Parliament' (2019) 21(2) *European Journal of Law Reform* 87; Tom Caygill, 'The UK Post-Legislative Scrutiny Gap' (2020) 26(3) *The Journal of Legislative Studies* 387.
86 Philip Norton, 'Post-Legislative Scrutiny in the UK Parliament: Adding Value' (2019) 25(3) *The Journal of Legislative Studies* 340, 344.
87 House of Lords Select Committee on the Constitution (UK) (n 16) 42–3.
88 Ibid 44.
89 Ibid.
90 House of Lords Select Committee on the Constitution (UK), *Parliament and the Legislative Process: The Government's Response* (6th Report of Session 2004–05, 20 April 2005) [31]–[32].
91 Law Commission of England and Wales (n 4) 4–5.
92 Ibid [3.32]–[3.40]. For information about the role, structure, and composition of select committees in the UK Parliament, see UK Parliament, 'Select Committees' <www.parliament.uk/about/how/committees/select/>.
93 See generally Office of the Leader of the House of Commons (UK) (n 84).
94 House of Lords Select Committee on the Constitution (UK) (n 90) [19].
95 Norton (n 86) 346.
96 Office of the Leader of the House of Commons (UK) (n 84) [16].
97 Ibid [9].
98 De Vrieze and Hasson (n 17) 15.
99 Ibid.

66. Between 2005 and 2015 in the UK, a total of 20 Acts were subject to formal PLS by a parliamentary committee, with a further 41 considered by committees as part of other inquiries.[100] The practice of engaging in PLS varied widely between select committees, with eight undertaking no formal PLS reviews in this period.[101]

67. The present arrangement requires the explanatory memorandum accompanying Bills to include criteria for evaluating the effectiveness of the Act three to five years after it comes into effect. After this period has elapsed, the relevant government department will publish a report against those criteria, and provide this to the House of Commons departmental select committee. If the committee thinks further scrutiny is necessary, it can instigate this process.[102]

68. While systematic PLS is largely the domain of the Executive (through departmental reviews) and the House of Commons, the House of Lords also routinely engages in PLS, but on a more limited basis. Since 2012, the House of Lords has committed to appointing at least one ad hoc committee per session to focus on an area of PLS. These ad hoc committees tend to focus on more specific, long-term matters, and generally produce a greater number of recommendations. Whereas the House of Commons focuses on breadth, the House of Lords scrutinises a single matter in depth. While the House of Commons tends to focus on legislation that is likely to be amended soon, the House of Lords focuses on topics which are 'deemed important, timely, play to the strengths of the House, and are not overly contentious politically'.[103] Baroness McIntosh of Pickering has commented that the House of Lords may be suited to taking on a larger PLS role, so as to allow the House of Commons to focus on pre-legislative scrutiny.[104]

69. Despite the combination of systematic and ad hoc structured PLS measures, researchers have found that the quality and consistency of reviews remains varied.[105] Neither House has developed the habit of using government department reports as the basis for establishing regular parliamentary PLS practices, leading to a 'post-legislative gap' in the scrutiny process.[106] Moreover, given the base-level review is conducted by government departments, and then communicated to department-specific select committees, there are persistent concerns regarding the potential for institutional and partisan bias in the scrutiny process.[107]

Complementary ex post review mechanisms

70. This section discusses three ex post review mechanisms that are similar to, and may complement, PLS:

- periodic miscellaneous amendments;
- revision programmes; and
- stewardship obligations.

71. As discussed below, each mechanism involves parliamentary input to some extent, although not in the same way as active PLS.

100 Thomas Caygill, 'A Critical Analysis of Post-Legislative Scrutiny in the UK Parliament' (PhD Thesis, Newcastle University, 2019) 81.
101 Ibid.
102 Cabinet Office (UK), *Guide to Making Legislation* (2022) 275.
103 Norton (n 86) 348.
104 Ibid 350.
105 De Vrieze and Norton (n 5) 355.
106 See Caygill, 'The UK Post-Legislative Scrutiny Gap' (n 85).
107 See, eg, De Vrieze and Norton (n 5) 355; Law Commission of England and Wales (n 4) [3.20]–[3.21], [3.50].

Periodic miscellaneous amendments

72. Periodically, Parliament passes legislation aimed at correcting errors and repealing redundant laws. Following a practice developed by the UK Parliament in the 19th century, the first of these 'Statute Law Revision Bills' at the Commonwealth level was passed in 1934.[108]

73. Statute Law Revision Bills are intended to make only technical amendments dealing 'only with tidying up, correction of errors, updating (including modernisation of style) and repeal of spent provisions'.[109] Modernisation may include, for example, replacing gender-specific language with gender-neutral terminology.[110]

74. Statute Law Revision Bills are passed irregularly, and no legislation requires or governs their preparation. As a matter of practice, the Office of Parliamentary Counsel (Cth) ('OPC') is responsible for preparing the legislation and formal policy approval may be given by First Parliamentary Counsel (as the head of OPC).[111] Statute Law Revision Acts are therefore a form of ex post review which results in a draft Bill that undergoes the usual pre-legislative scrutiny by Parliament.

75. Some departments have also developed a practice of periodically proposing miscellaneous amendments to the legislation they administer, although there is no clear whole-of-government approach. The Department of the Treasury (Cth), for example, conducts the Treasury Law Improvement Program, 'which supports the regulatory stewardship of Treasury portfolio legislation and also includes Treasury's regular minor and technical amendments process'.[112] Miscellaneous and technical amendments 'are periodically made to Treasury portfolio legislation to correct drafting errors, repeal inoperative provisions, address unintended outcomes and make other technical changes'.[113] These reviews usually only consider technical changes that can be made within existing policy settings.[114]

76. As Interim Reports A and B have demonstrated, and despite the best efforts of the Treasury Law Improvement Program, redundant and inconsistent provisions have nonetheless accumulated in corporations and financial services legislation over time.[115]

Revision programmes

77. The statutory revision programmes undertaken in New Zealand and Singapore demonstrate more formal and systematic approaches to ex post review than the periodic miscellaneous amendment processes discussed above. Like periodic miscellaneous amendments, however, revision programmes focus on technical changes to legislation.

78. Section 95 of the *Legislation Act 2019* (NZ) requires the New Zealand Attorney-General to prepare a '3-yearly revision programme for each new Parliament'. This obligation has its origins in a 2008 report of the New Zealand Law Commission, which observed that it was 'high time that

108 Commonwealth, *Parliamentary Debates*, House of Representatives, 1 August 1934, 1073 (Sir John Latham GCMG QC); *Statute Law Revision Act 1934* (Cth). See also Jonathan Teasdale, 'Statute Law Revision: Repeal, Consolidation or Something More?' (2009) 11 *European Journal of Law Reform* 157.

109 Department of the Prime Minister and Cabinet (Cth) (n 72) [4.9].

110 Commonwealth, *Parliamentary Debates*, Senate, 19 March 2008, 1213 (Kim Carr).

111 Department of the Prime Minister and Cabinet (Cth) (n 72) [3.1], [3.24].

112 Department of the Treasury (Cth), 'Improving Corporations and Financial Services Law' <www.treasury.gov.au/consultation/c2022-310544>.

113 Exposure Draft Explanatory Materials, Treasury Laws Amendment (Miscellaneous and Technical Amendments) Bill 2022. Exposure Draft Explanatory Materials, Treasury Laws Amendment (Miscellaneous and Technical Amendments) Bill 2019; Explanatory Statement, *Treasury Laws Amendment (Miscellaneous Amendments) Regulations 2018* (Cth).

114 See, eg, Exposure Draft Explanatory Materials, Treasury Laws Amendment (Miscellaneous and Technical Amendments) Bill 2022.

115 See, eg, Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [7.4]–[7.11].

there was a programme of systematic revision of the Acts in our statute book'.[116] According to the Law Commission, the 'whole point is that revision does not change the substance of the law, only its presentation. It is about access to the law and about understanding it'.[117] This position is given legislative effect by s 60 of the *Legislation Act 2019* (NZ).

79. Section 96 of the *Legislation Act 2019* (NZ) obliges the Chief Parliamentary Counsel, as head of the Parliamentary Counsel Office (NZ) ('PCO') to prepare revision Bills in accordance with the revision programme. That section also establishes the parameters of what a revision Bill may do, including:

- combining or dividing Acts or parts of Acts;
- omitting redundant and spent provisions;
- making 'changes in language, format, and punctuation to achieve a clear, consistent, gender-neutral, and modern style of expression, to achieve consistency with current drafting style and format, and generally to express better the spirit and meaning of the law';
- making 'minor amendments to clarify Parliament's intent, to resolve ambiguity, or to reconcile inconsistencies between provisions (or to do all of those things)';
- making 'minor amendments to update how provisions can be complied with, or operate, in a way that takes account of changes in technology if those amendments are consistent with the spirit and meaning of the law'; and
- 'for the purpose of enabling matters of general principle to be contained in Acts and matters of detail to be contained in secondary legislation', omit matters of detail from an Act and authorise those matters to be prescribed by secondary legislation.[118]

80. Under s 98 of the *Legislation Act 2019* (NZ), a revision Bill must be submitted to nominated 'certifiers', which include the Solicitor-General, a retired judicial officer, and the Chief Parliamentary Counsel, for their certification that the revision powers have been exercised appropriately and that the Bill does not change the effect of the law, except as authorised.

81. The parliamentary process for revision Bills has been 'streamlined under Standing Orders of the [New Zealand Parliament] so that a Bill moves relatively quickly through to enactment'.[119] This means that revision Bills undergo a different, and generally reduced, level of parliamentary scrutiny to other Bills.

82. The New Zealand revision programme also offers an opportunity to trial other methods for improving the presentation of legislation. For example, Barraclough, Fraser, and Barnes have suggested that the revision process

> is an interesting opportunity to put the better rules programme into practice: it is a good opportunity to use the programme to illustrate conceptual incoherence or logical inconsistency in existing statutes by following a better rules methodology, and to suggest proposed changes to the law that would better reflect Parliamentary intent.[120]

83. Further, the New Zealand Attorney-General has proposed that the 2021–23 revision programme be used to draft a revision Bill

116 New Zealand Law Commission, *Presentation of New Zealand Statute Law* (Report No 104, 2008) [13].
117 Ibid [15].
118 *Legislation Act 2019* (NZ) ss 96(2), (3).
119 Parliamentary Counsel Office (NZ), *Report of the Chief Parliamentary Counsel on the Review of Subpart 3 of Part 2 of the Legislation Act 2012* (March 2021) 24.
120 Tom Barraclough, Hamish Fraser and Curtis Barnes, *Legislation as Code for New Zealand: Opportunities, Risks, and Recommendations* (New Zealand Law Foundation, March 2021) [314]. See also Australian Law Reform Commission, 'Comparative Frameworks for Promoting Good Legislative Design' [18]–[20] <www.alrc.gov.au/wp-content/uploads/2022/08/ALRC-FSL-B-Comparative-frameworks-for-legislative-design.pdf>.

> in English and te reo Māori as a dual language revision drafting pilot to both learn from and to begin to develop the necessary capability, capacity, and processes for greater use of dual language drafting in the future.[121]

84. In March 2021, the New Zealand Chief Parliamentary Counsel reported on the operation and effectiveness of the revision programme.[122] In summary, the report observed:

> The experience of the first 2 programmes, under which 13 Acts have been updated, is that the revision process is lengthy and slow. Limitations of the revision powers and process, and other government policy and legislative priorities, affect the level of departmental support.[123]

85. In particular, the report found that the revision powers provided by the *Legislation Act 2019* (NZ) are 'too limited as they tightly constrain the changes that can be made'.[124] This provided a disincentive for departments to participate in the revision programme, and discouraged others from participating in the consultation process.[125] The report also found that 'despite the streamlined parliamentary process', those benefits did not outweigh the slow pre-parliamentary timeframe.[126]

86. To help address the problems posed by the tightly constrained power, the report recommended that the revision powers be expanded 'to permit limited, uncontroversial policy changes' and that the certification requirements be relaxed.[127] While the report recognised that identifying uncontroversial policy changes would require an exercise of judgement and should be subject to appropriate oversight,[128] conferring such a power on an otherwise independent agency could carry a risk of at least perceived politicisation.

87. In contrast to New Zealand, Singapore has developed the relatively novel practice of periodically revising the whole statute book for clarity and consistency. The 2020 Revised Edition of Acts of Singapore ('2020 Revised Edition') commenced on 31 December 2021, replacing the previous revised edition published in 1985.[129]

88. The *Revised Edition of the Laws Act 1983* (Singapore) confers power on a Law Revision Commission, appointed by the President, to prepare and publish a revised edition of Acts and delegated legislation.[130] The periodic appointment of Law Revision Commissioners, and therefore the frequency of revisions, appears to be a matter of Presidential discretion. The Singaporean revision powers are similar, although potentially narrower, than the New Zealand equivalents discussed above. In particular, the revised Acts must not change the meaning of any Act.[131]

89. By contrast to New Zealand revision Bills, which must be passed by the New Zealand Parliament, Singaporean revisions do not undergo parliamentary scrutiny before coming into effect. Rather, the President of Singapore may declare the date on which the revised edition of Acts come into effect, and the revised edition must be presented to the Parliament of Singapore.[132]

90. The 2020 Revised Edition was Singapore's ninth and largest universal revision, 'comprising 510 Acts with approximately 31,000 pages'.[133] According to Seah, a Singaporean legislative

121 Office of the Attorney General (NZ), *Legislation Act 2012: Revision Programme for 53rd Parliament* (Cabinet paper) <www.pco.govt.nz/cabinet-paper-legislation-act-2012-revision-programme-for-53rd-parliament/>.
122 Parliamentary Counsel Office (NZ), 'Report of the Chief Parliamentary Counsel on the Review of Subpart 3 of Part 2 of the Legislation Act 2012' (n 119).
123 Ibid 3.
124 Ibid 16.
125 Ibid.
126 Ibid 13.
127 Ibid 17.
128 Ibid 17–18.
129 Lam (n 21).
130 *Revised Edition of the Laws Act* (Singapore, 2020 rev ed) s 3.
131 Ibid s 4.
132 Ibid s 7.
133 Cheryl Seah, 'Singapore's 2020 Revised Edition of Acts' (2022) 1 *The Loophole* 13, 14.

drafter, the project took approximately five years, with some research commencing earlier, and involved almost 70 officers.[134] Seah identified ongoing amendments to legislation made preparing the 2020 Revised Edition slower and more difficult.[135]

Stewardship

91. New Zealand provides for two forms of government stewardship over the ongoing quality of its legislation: legislative stewardship and regulatory stewardship. The New Zealand revision programme, discussed above, is one aspect of the broader stewardship roles placed on PCO and government departments.

92. PCO exercises 'legislative stewardship', taking responsibility for the quality of New Zealand's statute book as a whole.[136] This includes the duty to 'provide guidance and other support for, and keep under review, practices relating to the design, drafting, and publication of legislation'.[137]

93. Government departments are expected to exercise 'regulatory system stewardship', which applies to the broader areas of governance, monitoring, and maintenance of the regulatory system overseen by the department.[138] Stewardship is one of the five public service principles governing delivery of government services in the *Public Service Act 2020* (NZ),[139] having been first introduced into predecessor legislation in 2013.[140] In particular, that Act requires chief executives of departments or agencies to support the relevant 'Minister to act as a good steward of the public interest', including by 'maintaining the currency of any legislation administered by their agency'.[141]

94. Legislative and regulatory stewardship have some overlap and are mutually reinforcing.[142] In March 2013, the New Zealand Government released its first set of guidance to assist government departments in understanding how to fulfil their stewardship obligations over the legislative schemes they administer.[143] The system of regulatory stewardship is therefore relatively young, with its parameters and effects still evolving.

95. New Zealand departments are also expected to report on their regulatory systems and management of them. In 2014, the New Zealand Productivity Commission recommended government departments should be required to prepare and publish regulatory system reports, setting out strategies for reviewing their legislative schemes, and every three years government should review the progress of each department.[144] It also recommended that government set out principles to direct departments to focus scrutiny on areas with the greatest anticipated benefits.[145] The New Zealand Government did not adopt these recommendations, but instead established a management strategy requiring the biggest regulatory departments to publish annual 'regulatory management strategies', assessing effectiveness, efficiency, durability and resilience, and fairness and accountability, of the legislation they administer.[146]

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134 Ibid 16.
135 Ibid 19–20.
136 *Legislation Act 2019* (NZ) s 129.
137 Ibid s 129; see also Parliamentary Counsel Office (NZ), *Briefing for the Incoming Attorney-General* (Briefing Paper, 3 November 2020) 8–9.
138 *Public Service Act 2020* (NZ) ss 12, 52.
139 Ibid s 12.
140 *State Sector Act 1988* (NZ) s 32(1)(d).
141 *Public Service Act 2020* (NZ) s 52(1)(d)(ii).
142 Parliamentary Counsel Office (NZ), 'April 2022: Commencement of Secondary Legislation: Reminder the 28-Day Rule Applies', *PCO Quarterly* (April 2022) <www.pco.govt.nz/pco-quarterly/#apr22no2>.
143 This guidance now forms part of New Zealand Government, *Government Expectations for Good Regulatory Practice* (April 2017) <www.treasury.govt.nz/information-and-services/regulation/regulatory-stewardship/good-regulatory-practice>.
144 New Zealand Productivity Commission, *Regulatory Institutions and Practices* (30 June 2014) rec 14.1.
145 Ibid rec 14.2.
146 Minister of Business, Innovation and Employment (NZ), *Regulatory Management Strategy 2017/18* (August 2017) cited in Tayla Crawford, 'Post-Legislative Scrutiny in New Zealand: Is a More Formal Mechanism Necessary' (2018) 32 *Victoria University of Wellington Legal Research Papers: Student and Alumni Paper Series* 1, 17.

96. While stewardship obligations are not legislated in Australia, the Treasury Law Improvement Program (discussed above) illustrates that a stewardship discourse nonetheless exists.[147] For example, in his second reading speech on the Treasury Laws Amendment (Modernising Business Communications and Other Measures) Bill 2022 (Cth), the Assistant Treasurer and Minister for Financial Services, Stephen Jones MP, stated:

> [The Bill] contains measures designed to maintain and improve Treasury portfolio legislation to ensure it remains current and fit for purpose. It reflects the government's commitment to its regulatory stewardship role and is a step towards a more modern and efficient legislative framework that supports businesses and consumers in their interactions with each other.[148]

Part IV: Post-legislative scrutiny of delegated legislation

97. This Part discusses parliamentary scrutiny of delegated legislation and the processes that facilitate it. It builds upon Chapters 1 and 4 of Interim Report B of the Financial Services Legislation Inquiry. Chapter 1 of Interim Report B discusses key concepts relating to delegated legislation,[149] and Chapter 4 discusses parliamentary scrutiny as an important safeguard on the delegation of legislative power.[150]

98. Parliament is the ultimate repository of legislative power, and has a duty to oversee the exercise of legislative power it has delegated to the executive.[151] This duty flows from the constitutional principle of responsible government, which has been described by the High Court as 'central' to the *Australian Constitution*.[152]

99. The scrutiny of delegated legislation is particularly relevant to the Financial Services Legislation Inquiry, in which the ALRC has been asked to examine regulatory design and the hierarchy of laws, including 'how delegated powers should be expressed in delegated legislation, consistent with maintaining an appropriate delegation of legislative authority'.[153] This Part also discusses the pre-legislative scrutiny work of the Senate Standing Committee for the Scrutiny of Bills ('Bills Scrutiny Committee') because the scope of an enabling provision has ramifications for the scrutiny of delegated legislation made under it.

100. The scrutiny of delegated legislation has become increasingly important as the volume of delegated legislation has increased over the past several decades, with an estimated 31,000 legislative instruments in force in 2021.[154] In Interim Report B, the ALRC observed that between 2010 and 2021 delegated legislation accounted for the vast majority of new legislation, and currently comprises over half of the total Commonwealth statute book.[155]

147 See above [1.75].
148 Commonwealth, *Parliamentary Debates*, House of Representatives, 6 February 2023, 59 (Stephen Jones).
149 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [1.28]–[1.36], [1.49]–[1.59].
150 Ibid [4.47]–[4.61].
151 See, eg, Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest* (Digest 7 of 2021, 12 May 2021) [4.5]: 'Section 1 of the Constitution vests legislative power in the Federal Parliament. Legislative scrutiny, including scrutiny of delegated legislation made by the Executive, is a core component of this central law-making role of Parliament. Moreover, the system of responsible and representative government established by the Constitution requires the Parliament, as the representative branch of government, to hold the Executive to account' (citation omitted).
152 *Williams v Commonwealth (No 1)* (2012) 248 CLR 156 [61]. See also Appleby and Howe (n 32).
153 Australian Law Reform Commission, *Terms of Reference* (n 1).
154 Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight: Final Report* (2021) 5.
155 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [6.8]–[6.9].

101. Australia has been recognised as an international leader in establishing processes for the scrutiny of delegated legislation.[156] Dharmananda has observed, however, that while the Parliamentary process for scrutinising delegated legislation 'has remained fundamentally unchanged for many decades', the 'legislative landscape has significantly changed'.[157]

102. The *Legislation Act* provides the current statutory foundation for the scrutiny of delegated legislation. Four key procedures ensure legislative instruments are subject to Parliamentary scrutiny:

- all legislative instruments must be registered on the Federal Register of Legislation;[158]
- all legislative instruments must be tabled before each House of Parliament within six sitting days of registration;[159]
- Parliament may disallow a legislative instrument within 15 sitting days of tabling;[160] and
- a legislative instrument will cease to have effect approximately 10 years after its commencement.[161]

103. However, an instrument may be exempt from disallowance and sunsetting through a provision of the *Legislation Act*, the *Legislation (Exemptions and Other Matters) Regulation 2015* (Cth) ('*LEOM Regulations*'), or through the enabling legislation. Exemptions, including exemptions from legislative instrument status, are discussed further below.[162]

104. As noted in Interim Report B, parliamentary time and that of its members is necessarily limited.[163] There simply would not be enough time for the Parliament as a whole, or its individual members, to consider every piece of delegated legislation in detail. Two committees aid Parliament in fulfilling its scrutiny functions in respect of delegated legislation: the Bills Scrutiny Committee and the Senate Standing Committee for the Scrutiny of Delegated Legislation ('Delegated Legislation Scrutiny Committee').[164] Both Committees are established and governed by Standing Orders of the Senate.[165] Their respective roles are discussed below.

Scrutiny of enabling provisions

105. Enabling provisions, also referred to as empowering or authorising provisions, refer to the provisions in primary legislation that delegate legislative power. Associate Professor Lorne Neudorf has described enabling provisions as the gatekeepers of legislative power because they define

156 See, eg, Gabrielle Appleby, *Discussion Paper: Inquiry into Options for the Reform of Delegated Legislation in New South Wales* (May 2022) 5; Dennis Pearce, 'Legislative Scrutiny: Are the ANZACS Still the Leaders?' (Paper, Australia-New Zealand Scrutiny of Legislation Conference, Scrutiny and Accountability in the 21st Century, 6–8 July 2009); Stephen Argument, 'The Poms Can't Teach Us Nuthin: Commentary on Paper by Professor Dennis Pearce' (Paper, Australia-New Zealand Scrutiny of Legislation Conference, Scrutiny and Accountability in the 21st Century, 6–8 July 2009).

157 According to Dharmananda, these changes include an increased volume of delegated legislation and that it is 'now not uncommon for substantive policy issues to be addressed in delegated legislation': Jacinta Dharmananda, Submission No 11 to Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Parliamentary Scrutiny of Delegated Legislation* (2019) 1–2.

158 *Legislation Act 2003* (Cth) s 15(k).

159 Ibid ss 38–9.

160 Ibid ss 42, 44.

161 Ibid ch 3 pt 4.

162 See below [143]–[155].

163 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [4.45]. See also Mark Aronson, 'Subordinate Legislation: Lively Scrutiny or Politics in Seclusion' (2011) 26(2) *Australasian Parliamentary Review* 4, 9.

164 Until 2019, the Senate Standing Committee for the Scrutiny of Delegated Legislation was known as the Senate Standing Committee on Regulations and Ordinances.

165 See Senate, Parliament of Australia, *Standing Orders* (October 2022) ord 23 (Scrutiny of Delegated Legislation), ord 24 (Scrutiny of Bills). Standing Orders are made pursuant to s 50 of the *Australian Constitution*, which empowers the Senate and House of Representatives to make rules and orders with respect to how their powers, privileges, and immunities may be exercised and upheld, and the order and conduct of their business and proceedings. See generally, regarding the Senate, Laing (n 28) 37–40.

the nature and scope of delegated power.[166] Enabling provisions also give a level of democratic legitimation to delegated legislation by predetermining the executive's law-making role.[167]

106. Enabling provisions are scrutinised as part of the pre-legislative process by the Bills Scrutiny Committee. Established in 1981, the Bills Scrutiny Committee assesses 'all bills against a set of non-partisan accountability standards to assist the Parliament in undertaking its legislative function'.[168] The Bills Scrutiny Committee describes these standards as technical scrutiny principles and provides further detail about the standards in its Guidelines.[169] Senate Standing Order 24(1)(a) sets out those principles, including most relevantly, the requirement to consider whether Bills 'inappropriately delegate legislative powers' or 'insufficiently subject the exercise of legislative power to parliamentary scrutiny'.

107. Although the focus of this Background Paper is *post*-legislative scrutiny, the *pre*-legislative scrutiny work of the Bills Scrutiny Committee has clear implications for delegated legislation made in reliance on enabling provisions. The following illustrates an enabling provision which the Bills Scrutiny Committee considered inappropriate on the basis that it lacked detail and delegated a power of unspecified, almost limitless breadth:

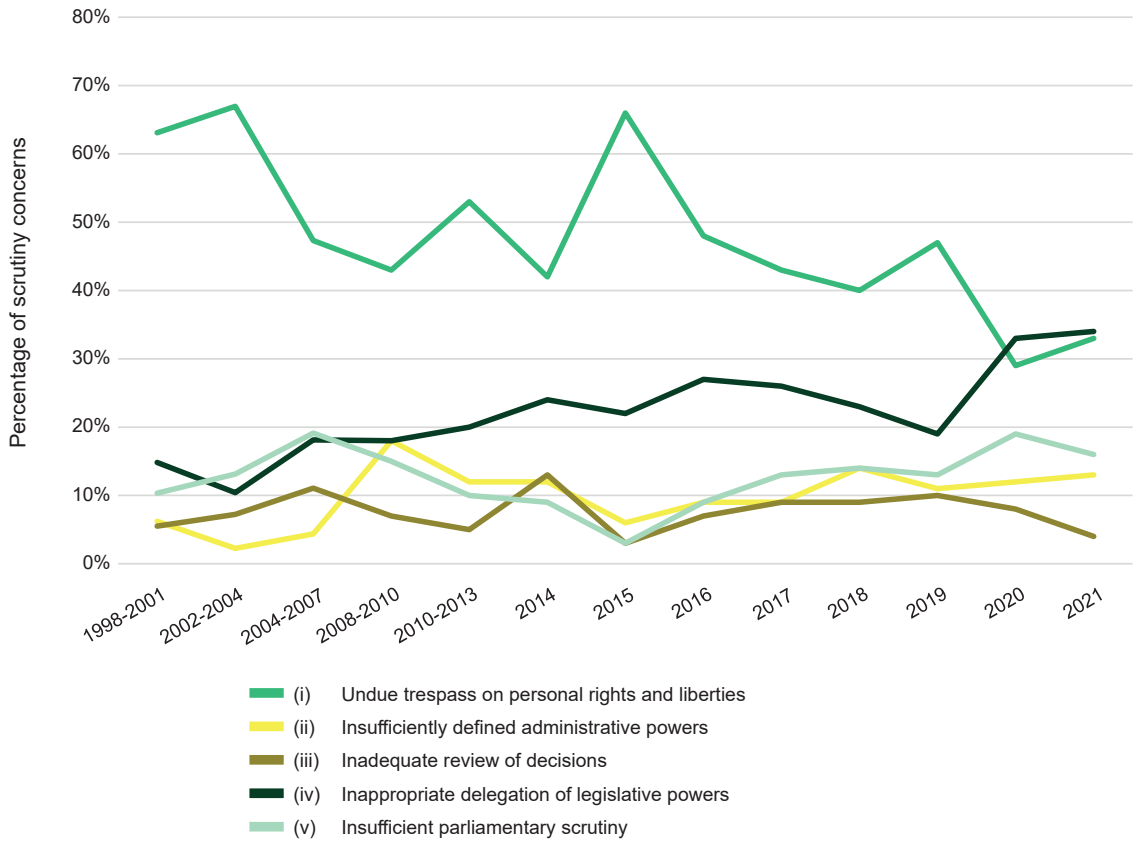
> The regulations may provide for prescribed decisions of the Secretary to be reviewed by prescribed review officers on applications, as prescribed, by prescribed persons.[170]

108. In most cases however, scrutinising whether delegations of legislative power are appropriate is a complex task, as it requires some degree of prospective assessment of how the power could be used. This may partly explain why the Committee's guidelines focus on specific identifiable issues, such as exemptions from disallowance or the quantum of penalties that may be included in legislative instruments, rather than employing more open-ended standards.[171]

109. **Figure 1** below shows that over the past two decades there has been a general increase in the proportion of concerns raised by the Bills Scrutiny Committee that relate to the inappropriate delegation of legislative power. Between 1998 and 2001, 15% of concerns raised by the Committee related to inappropriate delegation.[172] This proportion increased to 27% in 2016, 33% in 2020, and 34% in 2021. The increase for the 2020–21 period may be partly explained by the legislation enacted in relation to the COVID-19 pandemic.[173] Nonetheless, the Committee appears to have become increasingly concerned about the delegation of legislative power.

166 Lorne Neudorf, 'Enabling Provisions: The Gatekeeper of Legislative Power' (Presentation, Canadian Institute for the Administration of Justice, Making Laws in a Post-Modern World: Are You Ready?, 2020).
167 Hermann Pünder, 'Democratic Legitimation of Delegated Legislation — A Comparative View on the American, British and German Law' (2009) 58 *International and Comparative Law Quarterly* 353, 356.
168 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Guidelines* (2nd ed, 2022) 1.
169 Ibid.
170 Migration Legislation Amendment Bill 1989 (Cth) cl 61(1) cited in Dennis Pearce, 'Rules, Regulations and Red Tape: Parliamentary Scrutiny of Delegated Legislation' in *Papers on Parliament: Lectures in the Senate Occasional Lecture Series, and Other Papers* (Department of the Senate, Parliament of Australia, Papers on Parliament No 42, December 2004) 22.
171 See Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Guidelines* (n 168).
172 Senate, Parliament of Australia, *Standing Orders* (October 2022) ord 24(1)(a)(iv).
173 For further analysis, see Australian Law Reform Commission, 'Lawmaking during the Covid-19 Pandemic', *Topics of Interest* <www.alrc.gov.au/datahub/topics-of-interest/lawmaking-during-the-covid-19-pandemic/>.

Figure 1: Concerns of the Bills Scrutiny Committee



110. Notwithstanding the volume of concerns raised by the Bills Scrutiny Committee, its effectiveness has been questioned. The Delegated Legislation Scrutiny Committee has observed that

> despite the Scrutiny of Bills Committee's best efforts, warnings regarding the inappropriate delegation of legislative powers are routinely ignored, and legislation is enacted that leaves significant matters to delegated legislation, or allows delegated legislation to amend primary legislation. Once enacted, these powers are used to make legislative instruments which this committee considers contain matters more appropriate for parliamentary enactment. However, by the time this committee alerts the Senate to its concerns, it is effectively too late: the relevant primary legislation has already passed both Houses of Parliament.[174]

111. Echoing this sentiment, Van Geelen has observed that the 'main limitation of the [Bills Scrutiny Committee] as on oversight mechanism is that it tends not to enforce any real limits' on the scope of enabling provisions.[175] Appleby and Howe have also noted that

> Parliament can be thwarted in its attempts to control and scrutinise delegation by the current framework for scrutiny and the use of overly broad delegations at first instance. That is, effective future parliamentary scrutiny can be undermined because of the choices previous Parliaments have made about the nature and process of delegation.[176]

174 Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Parliamentary Scrutiny of Delegated Legislation* (n 29) [5.34].

175 Tess Van Geelen, 'Delegated Legislation in Financial Services Law: Implications for Regulatory Complexity and the Rule of Law' (2021) 38(5) *Company and Securities Law Journal* 296, 308.

176 Appleby and Howe (n 32) 18.

112. The Committee's lack of impact may be partly explained by the fact that Bills delegating legislative power often pass both Houses of Parliament before the Scrutiny of Bills Committee is able to fully examine and report upon them.[177] Proposals to amend Senate procedures to allow for a minimum scrutiny period or to prevent the passage of Bills until after the Scrutiny of Bills Committee has tabled its report have not been implemented, largely based on their potential to hold up the passage of legislation.[178] While the Committee may not have time to conduct a full analysis of each Bill, the Committee nonetheless operates as an early warning system to alert others to the need to examine provisions of concern.[179]

Scrutiny of legislative instruments

113. Established in 1932 as the Senate Standing Committee on Regulations and Ordinances, and renamed in 2019, the Delegated Legislation Scrutiny Committee is responsible for scrutinising all legislative instruments tabled in the Senate. The Committee is comprised of six senators, and supported by a secretariat and legal adviser. The secretariat and legal adviser review all disallowable legislative instruments against the scrutiny principles listed in Standing Order 23(2), and reports upon compliance to the Committee. The independence of the legal advice received by the Committee is considered significant. For example, as remarked by Hamer:

> The committee's reports are almost always unanimous — caused largely by the non-partisan legal advice it receives — and motions of disallowance are always backed by the Senate. It is a very effective committee, and one has only to look at the undesirable regulations it has successfully resisted to see what would happen in its absence.[180]

114. While any Member or Senator can lodge a motion of disallowance, in practice the scrutiny process is led by the Delegated Scrutiny Legislation Committee.[181] Standing Order 23 requires the Delegated Legislation Scrutiny Committee to scrutinise each legislative instrument 'subject to disallowance, disapproval or affirmative resolution by the Senate' to assess 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;

177 See Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Parliamentary Scrutiny of Delegated Legislation* (n 29) [5.38].

178 Ibid rec 9; Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Final Report—Inquiry into the Future Role and Direction of the Senate Scrutiny of Bills Committee* (2012) [4.25]–[4.26]. Note, however, that where the Committee's scrutiny of a Bill has been delayed by a Minister's lack of response to the Committee, Senate Standing Order 24(1)(g) allows a Committee member to move a motion, without notice, relating to the consideration of a Bill, and may include a motion that further consideration of the bill be delayed.

179 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Final Report—Inquiry into the Future Role and Direction of the Senate Scrutiny of Bills Committee* (n 178) [4.26].

180 The Hon David Hamer, *Can Responsible Government Survive in Australia?* (The Department of the Senate, 2nd ed, 2004) 316.

181 Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Parliamentary Scrutiny of Delegated Legislation* (n 29) [6.2].

k. in the case of an instrument exempt from sunsetting, it is appropriate for the instrument to be exempt from sunsetting;
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.

115. The Committee describes these matters as technical scrutiny principles.[182] In 2021, Standing Order 23 was amended to provide that the Committee may also consider legislative instruments that are exempt from disallowance and whether such exemption is appropriate.[183] Exemptions from disallowance are discussed further below.[184]

116. In cases where a legislative instrument raises concerns for the Delegated Legislation Scrutiny Committee, the Committee typically seeks to resolve its concerns through correspondence and discussion with the Minister responsible for the relevant portfolio.[185] The Committee may do this by seeking further information or proposing amendments to the relevant instrument. Some commentators have criticised the quality of responses given by Ministers and the Committee's perceived willingness to accept some responses without adequate questioning.[186]

117. Where the Committee's concerns cannot be resolved through correspondence, the Committee may report its concerns to the Parliament or move a notice of motion to disallow a legislative instrument, via the Committee's Chair. Through these mechanisms the Committee effectively fulfils Parliament's oversight role and helps to inform Senators.[187]

118. The Committee routinely publishes its correspondence with Ministers and reports on its work through the Delegated Legislation Monitor available on the Parliamentary website.[188]

119. By describing the criteria against which Bills and delegated legislation are assessed as 'technical' scrutiny principles, both the Bills and Delegated Legislation Scrutiny Committees signal their intention to avoid matters relating to underlying substance or policy. This avoidance of substantive or policy matters has been a long-standing feature of both Committees' work.[189]

120. On one view, the Committees' focus on technical matters and avoidance of policy, particularly in respect of delegated legislation, has been fundamental to their successful operation and authority. According to a former chairman of the Delegated Legislation Scrutiny Committee:

> It is because of its avoidance of issues of policy that the Committee has traditionally been such a strong bipartisan force within the Senate. It is a backbench Committee whose members can temporarily set political differences to one side. The Committee's remit thus allows strongly held and shared principles of liberty and propriety to create and underpin the bipartisan spirit which is

182 Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Guidelines* (2nd ed, 2022) 1. See also Stephen Argument, 'Australian Democracy and Executive Law-Making: Practice and Principle (Part I)' in *Papers on Parliament: Lectures in the Senate Occasional Lecture Series, and Other Papers* (Department of the Senate, Parliament of Australia, Papers on Parliament No 66, October 2016) 21, 26.
183 Senate, Parliament of Australia, *Standing Orders* (October 2022) ord 23(4A).
184 See below [1.143]–[1.155].
185 Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Guidelines* (n 182) 4; Stephen Argument, 'Legislative Scrutiny in Australia: Wisdom to Export?' (2011) 32(2) *Statute Law Review* 116, 138.
186 See, eg, Appleby and Howe (n 32) 20, 22; Cheryl Saunders, 'Australian Democracy and Executive Law-Making: Practice and Principle (Part II)' in *Papers on Parliament: Lectures in the Senate Occasional Lecture Series, and Other Papers* (Department of the Senate, Parliament of Australia, Papers on Parliament No 66, October 2016) 70, 81; Andrew Lynch, 'Commonwealth Spending after Williams (No 2): Has the New Dawn Risen?' (2015) 26(2) *Public Law Review* 83, 86.
187 See, eg, Lorne Neudorf, Submission to the Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into Exemption of Delegated Legislation from Parliamentary Oversight* (25 June 2020) 4–5.
188 Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, 'Delegated Legislation Monitors' <www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Monitor>.
189 See, eg, Appleby (n 156) 35; Argument, 'Legislative Scrutiny in Australia: Wisdom to Export?' (n 185) 128–31.

> the source of the Committee's authority in the Chamber, and beyond that in the Government and the Public Service.[190]

121. On the other hand, several commentators have expressed concern that focusing on only technical matters, particularly by the Delegated Legislation Scrutiny Committee, effectively shields policy issues from Parliament's view.[191] On the relatively few occasions when delegated legislation is disallowed, it is generally following a motion moved by a non-Committee Senator which is motivated (at least in part) by policy concerns.[192] However, the lack of a systematic procedure for Parliamentary examination of policy issues in delegated legislation is a cause of concern for many.[193]

122. According to Pearce:

> The major weakness in the oversight by the Parliament of delegated legislation is that the Parliament seldom reviews the policy embodied in the legislation. …
>
> [The Delegated Legislation Scrutiny Committee] has managed to keep the politics at bay by limiting its role to issues where its members feel that they are not driven to support their party. However, by so doing it has left a large hole in the oversight of delegated legislation. More significantly, it has created a culture which denies that the Parliament should be involved in the oversight of the policy underlying delegated legislation.[194]

123. Although Pearce was writing in 2004, the lack of a standard procedure for the scrutiny of policy in delegated legislation remains a cause of concern.[195] As outlined in Interim Report B, delegated legislation increasingly deals with matters of policy as opposed to administrative detail.[196] Arguably, the absence of systematic scrutiny of policy in delegated legislation is therefore a more serious issue than in the past.

124. Following the Delegated Legislation Scrutiny Committee's consideration of the issue in 2019, Senate Standing Orders were amended to:

- permit the Committee to draw the Senate's attention to matters which may raise 'significant issues' or 'otherwise give rise to issues likely to be of interest to the Senate'.[197] This amendment was not intended to permit the Committee 'to assess the policy merits of such issues', but to facilitate the identification of matters appropriate for investigation by other

190 Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Eighty-Third Report* (1988) 15, quoted in Argument, 'Legislative Scrutiny in Australia: Wisdom to Export?' (n 185) 130.

191 See, eg, Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Final Report—Inquiry into the Future Role and Direction of the Senate Scrutiny of Bills Committee* (n 178) [5.12]–[5.22] referring to the submission of the Law Council of Australia.

192 See, eg, disallowance of the *the Treasury Laws Amendment (Greater Transparency of Proxy Advice) Regulations 2021* (Cth), discussed in Nassim Khadem, 'Proxy Advice Law Which Sparked Fears It Would Reduce Investor Activism Defeated in the Senate', *ABC News* (10 February 2022) <www.abc.net.au/news/2022-02-10/proxy-advice-regulation-by-josh-frydenberg-defeated-in-senate/100819906>. Note, however, that concerns of the Delegated Legislation Scrutiny Committee may also factor into debates which include policy concerns, as illustrated by the debate relating to the *Australian Renewable Energy Agency (Implementing the Technology Investment Roadmap) Regulations 2021* (Cth): Commonwealth, *Parliamentary Debates*, Senate, 18 October 2021, 6002 (Jenny McAllister).

193 See, eg, Aronson (n 163) 4; Pearce (n 156) 5–9. The Delegated Legislation Scrutiny Committee has noted that some joint parliamentary committees have the power to consider policy issues in delegated legislation. However, 'the powers of these committees cover only a small or discrete class of delegated legislation', the committees 'do not have an ordinary process by which they review all such delegated legislation', and 'they have rarely inquired into legislative instruments within the applicable disallowance timeframes': Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Parliamentary Scrutiny of Delegated Legislation* (n 29) [6.19]–[6.20].

194 Pearce (n 170) 93.

195 See, eg, Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Parliamentary Scrutiny of Delegated Legislation* (n 29) [6.16]–[6.36].

196 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [3.22]–[3.24].

197 Senate, Parliament of Australia, *Standing Orders* (October 2022) ord 23(4).

committees 'while preserving the [Delegated Legislation Scrutiny Committee's] commitment to technical, non-partisan scrutiny';[198] and

- to clarify that legislation standing committees may inquire into and report on both primary legislation and delegated legislation in their relevant portfolios, so as 'to promote the policy scrutiny of delegated legislation by the Parliament, without compromising the [Delegated Legislation Scrutiny Committee's] strong and longstanding commitment to technical, non-partisan scrutiny'.[199]

125. The effectiveness of these measures has yet to be assessed.

Disallowance

126. Unless exempt, all delegated legislation must be tabled in Parliament and subject to disallowance by either House of Parliament.[200] Pursuant to s 42 of the *Legislation Act*, a motion of disallowance may be given in either House of Parliament within 15 parliamentary sitting days of a legislative instrument being tabled. If such a motion is passed or not otherwise disposed of, then the instrument will be repealed. The Delegated Legislation Committee has developed a practice of lodging 'protective' notices of motion to disallow a legislative instrument, allowing time to negotiate a resolution of the Committee's concerns, while preserving the power to seek disallowance.[201]

127. Actual disallowance is very rare: between 2010 and 2022 only 41 legislative instruments were disallowed out of the thousands tabled in Parliament.[202] As discussed above, the bulk of the Delegated Legislation Scrutiny Committee's work relates to negotiated changes through correspondence and dialogue. However, the threat of disallowance is what gives the Committee the ability to incentivise government engagement in negotiating changes to legislation to address scrutiny concerns.

128. Short of passing primary legislation that has the effect of overriding a legislative instrument, disallowance is Parliament's most important form of control over delegated legislation.[203] According to the Delegated Legislation Scrutiny Committee, it is 'the disallowance mechanism itself that allows for effective scrutiny within an already attenuated lawmaking process'.[204] However, disallowance has also been described as 'not a very satisfactory method of administration'.[205] This is principally because a legislative instrument generally commences on the day after it is registered on the Federal Register of Legislation or another nominated date,[206] both of which may be before the time for Parliamentary scrutiny and disallowance has elapsed. Combined with the general position that acts done while a legislative instrument was in force are not rendered invalid

198 Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Amendments to Senate Standing Orders 23 and 25(2)(a)* (Explanatory Note) 5.
199 Ibid.
200 *Legislation Act 2003* (Cth) ss 38, 42.
201 Laing (n 28) ch 15; Parliament of Australia, 'Disallowance Alert 2022' <www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Disallowance_Alert>.
202 This figure is taken from the Federal Register of Legislation, and includes legislative instruments disallowed by resolution of a House of Parliament, as well as legislative instruments which have been disallowed by virtue of the operation of ss 42(2) and (3) of the *Legislation Act*, which deem a legislative instrument to have been disallowed in instances where a notice of motion for disallowance has not been resolved.
203 Parliamentary Joint Committee on Human Rights, Senate Standing Committee for the Scrutiny of Bills and Senate Standing Committee for the Scrutiny of Delegated Legislation, Submission to Legislation Act Review Committee, Attorney-General's Department, *2021–2022 Review of the Legislation Act 2003* (December 2021) 2.
204 Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight: Final Report* (n 154) [7.27].
205 David Hamer (n 180) 307.
206 *Legislation Act 2003* (Cth) s 12.

by its subsequent disallowance, this means that it is possible for delegated legislation to achieve its '*entire objective* before Parliament has even had an opportunity to consider disallowance'.[207]

129. One further weakness of disallowance is the fact that the 'substantial operation of a piece of delegated legislation that may have been in place for weeks or even months' may be used as an argument against disallowance.[208] This is possible because breaks in Parliamentary sitting periods may amount to several months before the motion of disallowance is considered, during which the delegated legislation remains in force.

130. Interim Report B outlined several alternatives to the generally applicable disallowance regime contained in the *Legislation Act*, and the potential for improved guidance to assist in selecting the most appropriate statutory mechanism.[209]

Sunsetting

131. Sunsetting has been discussed further above in the context of primary legislation. The sunsetting process for delegated legislation is governed by Chapter 3 Part 4 of the *Legislation Act*, which provides for a generally applicable 10-year sunsetting period.[210] Section 49 of the *Legislation Act* states the purpose of the sunsetting mechanism is 'to ensure that legislative instruments are kept up to date and only remain in force for so long as they are needed'. While sunsetting enables Parliament to scrutinise and potentially disallow any legislative instrument that is proposed to be re-made prior to sunsetting, this is said to be only a by-product of the sunsetting regime, and not its intended purpose.[211]

132. Notwithstanding that parliamentary scrutiny may be seen as incidental, sunsetting arguably provides the most long-term mechanism for systematic and structured PLS in Australia.[212] For example, in its 2021 report the Delegated Legislation Scrutiny Committee reiterated its longstanding view that delegated legislation which exempts from or modifies an Act 'should not continue in force for such a period as to act as a de facto amendment to primary legislation'.[213] Sunsetting helps to achieve this.

133. Like many of the mechanisms in the *Legislation Act*, the sunsetting regime can be traced back to the Administrative Review Council's 1992 report, *Rule Making by Commonwealth Agencies*.[214] The first review of the sunsetting regime, as required under s 60 of the *Legislation Act*, was conducted 12 years after the mechanism was introduced, as a result of the 10-year period needing to elapse before the consequences of the provisions could be properly assessed. The second review of the sunsetting regime took place in 2017.[215]

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207 For example, 'in 2003, the Howard Government used a regulation that was subsequently disallowed by the Senate to prevent 14 Turkish Kurds seeking asylum in Australia from accessing the processes and protections contained in the Migration Act. The regulation retrospectively excised the island that the Kurds landed on, a legal position that remained unchanged for those asylum seekers despite subsequent parliamentary disallowance': Appleby and Howe (n 32) 23, citing Ernst Willheim, 'Government by Regulation: Deficiencies in Parliamentary Scrutiny?' (2004) 15 *Public Law Review* 9.

208 Appleby and Howe (n 32) 23. See also Administrative Review Council, *Rule Making by Commonwealth Agencies* (Report No 35, 1992) 42.

209 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [4.54]–[4.56].

210 Unless exempt under s 54, a legislative instrument will repeal on 1 April or 1 October falling on or after the 10th anniversary of a legislative instrument's registration: *Legislation Act 2003* (Cth) s 50.

211 Sunsetting Review Committee, Attorney-General's Department (Cth) (n 71) 7.

212 Ibid 27, referring to the joint submission of the Senate Standing Committee on the Scrutiny of Bills, the SSCRO and the Parliamentary Joint Committee on Human Rights.

213 Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight: Final Report* (n 154) 121.

214 Administrative Review Council (n 208); Sunsetting Review Committee, Attorney-General's Department (Cth) (n 71) 5.

215 See Sunsetting Review Committee, Attorney-General's Department (Cth) (n 71) 9.

134. In light of this, it is important to note that the framework is still in its relative infancy, with the last of the staggered sunsetting of historic legislative instruments only concluding in 2020. The full consequences and effectiveness of the regime may not become apparent for years to come.[216]

135. The generally applicable sunsetting regime in the *Legislation Act* can be modified in a number of ways:

- legislative instruments may be exempt, as discussed further below;[217]
- legislative instruments may set their own operational period shorter than 10 years;
- a sunsetting date may be extended by a resolution of either House of Parliament;[218]
- a sunsetting date may be deferred for up to two years by the Attorney-General;[219] and
- the sunsetting dates of multiple instruments may be aligned by the Attorney-General in order to facilitate a thematic review of the instruments collectively.[220]

136. The efficacy of the sunsetting framework depends on the level of organisation and preparedness of the relevant agency or government department in effectively reviewing legislative instruments prior to their ceasing to have effect. A range of practical measures exist to alert relevant agencies to upcoming sunsetting dates and to encourage more timely and well-prepared review processes.[221]

137. The 2017 Sunsetting Review Committee received several submissions indicating that legislative instruments were sometimes re-made with substantively identical content as a consequence of poor planning for sunsetting dates.[222] While it is the responsibility of the agency managing the legislative instrument to engage with the sunsetting process, the Attorney-General's Department (Cth) and OPC are described as holding important leadership roles.[223] In its 2017 report, the Sunsetting Review Committee stated that since the commencement of the sunsetting mechanism in the *Legislation Act* in 2003, 2,024 instruments have been subject to sunsetting, of which approximately 60% were allowed to sunset, were repealed, or were replaced.[224]

138. Sunsetting provisions have faced resistance because of the burdens they place on government agencies.[225] Agencies have criticised the framework for applying indiscriminately to all legislative instruments regardless of the varied burdens regular review would entail.[226]

139. Thematic review is one way to make the review process more efficient. According to the Attorney-General's Department (Cth), a thematic review

> is a review of two or more instruments which share a common theme that makes it more efficient or effective to review them together, rather than separately. This could include, for example, instruments

216 Ibid.
217 See below [1.143]–[1.155].
218 *Legislation Act 2003* (Cth) s 53. At the time of the Sunsetting Review Committee's report in 2017, this provision had not been relied upon: see Sunsetting Review Committee, Attorney-General's Department (Cth) (n 71) 23. However, the provision is at least symbolic in recognising Parliament as the ultimate repository of legislative power.
219 *Legislation Act 2003* (Cth) s 51. Deferral is given effect by the Attorney-General issuing a certificate of deferral, which must contain a statement of reasons, and will be deemed to be disallowable legislative instrument subject to parliamentary scrutiny. For further discussion of the deferral process, see Sunsetting Review Committee, Attorney-General's Department (Cth) (n 71) 15.
220 *Legislation Act 2003* (Cth) s 51A; Attorney-General's Department (Cth), *Guide to Managing the Sunsetting of Legislative Instruments* (2020) 16.
221 Sunsetting Review Committee, Attorney-General's Department (Cth) (n 71) 22. These measures include, for example, a requirement that the Attorney-General table in Parliament a list of instruments due to sunset within 18 months of Parliament's first sitting day (see s 52 of the *Legislation Act*) and an alert service operated via the Federal Register of Legislation (see 2022 Legislation Act Review Committee Report 14).
222 Ibid 10.
223 Ibid 11.
224 Ibid 5. For discussion, see Arie Freiberg, Monica Pfeffer and Jeroen van der Heijden, 'The "Forever War" on Red Tape and the Struggle to Improve Regulation' (2022) 81(3) *Australian Journal of Public Administration* 436, 13.
225 Freiberg, Pfeffer and van der Heijden (n 224) 13.
226 Sunsetting Review Committee, Attorney-General's Department (Cth) (n 71) 12.

> that implement a particular treaty or that regulate a particular industry. Thematic reviews are not limited to instruments made under a single Act or administered by a single agency.
>
> Thematic reviews allow agencies to review two or more instruments concurrently and to structure reviews around subject areas and policies, not instruments.[227]

140. A submission to the 2017 Sunsetting Review Committee noted that only seven thematic reviews had taken place, however these covered over 120 legislative instruments.[228]

141. The thoroughness of review prior to sunsetting varies considerably, potentially due to a lack of scrutiny criteria contained in legislation. The 2017 Sunsetting Review Committee considered whether review requirements should be introduced into the *Legislation Act*, but concluded this would be overly prescriptive given the diversity of rule-makers and legislative instruments the framework is intended to cover, as well as the risk of creating a culture of bare-minimum compliance.[229]

142. Some commentators have questioned the value of sunsetting as a check on executive law-making. For example, it has been argued that for the demand on resources that the process requires, it does not deliver meaningful improvements to delegated legislation, and that a stewardship role, such as that discussed in the context of New Zealand above, would be a more efficient and effective strategy.[230]

Exemptions from disallowance and sunsetting

143. This section discusses how delegated legislation may be exempted from the PLS mechanisms discussed above. Exemptions from scrutiny, disallowance, and sunsetting may limit or undermine Parliament's ability for oversight and control of delegated legislation.[231] In these situations, Parliament is left with its residual power to repeal or amend enabling legislation, or to enact new legislation. However, it should be observed that the decision to permit exemptions from disallowance and sunsetting is made by Parliament through provisions of the *Legislation Act*.

144. Legislative instruments can be exempt from disallowance and sunsetting by primary legislation or by regulations.[232] An instrument may also be precluded from disallowance and sunsetting by being deemed *not* to be a legislative instrument.[233]

'Legislative instrument' status

145. The ability to deem an instrument to not be a legislative instrument has the potential consequence that instruments truly of a legislative character may be exempt from disallowance and sunsetting.[234]

146. Until the introduction of Standing Order 23(4A) in 2021, exemption from disallowance meant that an instrument did not fall within the Delegated Legislation Scrutiny Committee's terms of reference. Standing Order 23(4A) now provides that the Committee may 'for the purpose of reporting on its terms of reference, consider instruments made under the authority of Acts of the

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227 Attorney-General's Department (Cth) (n 220) 16; *Legislation Act 2003* (Cth) s 51A, inserted by the *Legislative Instruments Amendment (Sunsetting Measures) Act 2013* (Cth).
228 Sunsetting Review Committee, Attorney-General's Department (Cth) (n 71) 19.
229 Ibid 12–13.
230 See, eg, Freiberg, Pfeffer and van der Heijden (n 224) 13; Regulatory Policy Framework Review Panel, *NSW Regulatory Policy Framework* (Final Report, August 2017) 7–8, 20–1, recs 1(c), (d), 25(d), (f).
231 Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight: Final Report* (n 154) [3.22].
232 See *Legislation Act 2003* (Cth) ss 44, 54.
233 Ibid s 8(6).This would include being deemed *to be* a notifiable instrument as defined by s 11 of the *Legislation Act*.
234 Ibid s 8(6)(a). As to what makes an instrument legislative in character, and the nature of legislative power, see Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [1.28]; Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight: Final Report* (n 154) [4.82]–[4.89].

Parliament that are not subject to disallowance'.[235] The reference to 'instruments' would appear to include instruments that fall outside of disallowance, because they are deemed *not* to be legislative instruments, but may nonetheless be considered by the Committee. Even where disallowance is unavailable, the Committee's reporting function can provide valuable insights to Parliament and the public at large.[236]

147. It remains contentious whether an instrument that is substantively legislative in character can be fully removed from Parliamentary oversight, or whether this would breach the constraints on the delegation of federal legislative power under the *Australian Constitution*.[237] The legitimacy of delegations of legislative power, and the doctrine of responsible government, rest on Parliamentary scrutiny and accountability.[238]

148. To address these concerns, the 2022 Legislation Act Review Committee Report recommended that the Attorney-General's formal approval should be required for any future substantive exemptions from legislative instrument status and such future exemptions should appear only in primary legislation.[239] There is at present no legislative criteria regarding the exemption of legislative instruments from disallowance and scrutiny, nor any duty to give reasons for the exemption decision.

Disallowance and sunsetting

149. Neudorf has noted that:

> Given the principles of accountability, transparency and responsible government are at stake in relation to delegated legislation … exemption from disallowance and Committee scrutiny should be truly exceptional — reserved only for circumstances where a compelling justification can be put forward for its use.[240]

150. As noted above, exemptions from disallowance and sunsetting may be created by primary legislation or regulations. The *LEOM Regulations* contains lists of instruments that are exempt from sunsetting, with both classes of instrument and individual instruments.

151. The final report of the 2020–21 Inquiry of the Delegated Legislation Scrutiny Committee recommended the *LEOM Regulations* be repealed and any exemptions from disallowance and sunsetting be set out in a schedule to the *Legislation Act*.[241] The Committee also recommended that the *Legislation Act* be amended to provide that only Parliament could create exemptions, rather than permitting the Executive arm of government (as the maker of delegated legislation) to do so by regulations.[242] This approach was also endorsed by non-government and parliamentary stakeholders' submissions to the Legislation Act Review Committee.[243]

152. The criteria for exempting delegated legislation from sunsetting have been criticised by government agencies for being too narrow.[244] While the 2017 Sunsetting Review Committee did

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235 Senate, Parliament of Australia, *Standing Orders* (October 2022) ord 23(4A).
236 Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight: Final Report* (n 154) [7.107]–[7.108]; Neudorf, Submission to the Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into Exemption of Delegated Legislation from Parliamentary Oversight* (n 187) 10.
237 See Legislation Act Review Committee, Attorney-General's Department (Cth), *2021–2022 Review of the Legislation Act 2003* (2022) 37.
238 Ibid 25–8.
239 Ibid rec 3.4.
240 Neudorf, Submission to the Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into Exemption of Delegated Legislation from Parliamentary Oversight* (n 187) 6.
241 Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight: Final Report* (n 154) rec 2.
242 Ibid rec 1.
243 Legislation Act Review Committee, Attorney-General's Department (Cth) (n 237) 37–8.
244 Sunsetting Review Committee, Attorney-General's Department (Cth) (n 71) 24.

not go so far as to recommend broadening the grounds for exemptions, it did recommend the exemptions framework be reviewed by the Attorney General's Department every five years.[245] The Delegated Legislation Scrutiny Committee has previously raised concerns about insufficient justifications for exemptions from sunsetting being included in explanatory materials for enabling legislation.[246]

153. The 2017 Sunsetting Review Committee listed five policy criteria that in its view may justify exempting a legislative instrument from sunsetting:

- the rule-maker has been given a statutory role independent of government, or is operating in competition with the private sector;
- the instrument is designed to be enduring and not subject to regular review;
- commercial certainty would be undermined by sunsetting;
- the instrument is part of an intergovernmental scheme; and/or
- the instrument is subject to a more stringent statutory review process than is set out in the Legislation Act, and preserving that process is important.[247]

154. The justification for exempting some instruments from sunsetting on the basis of protecting commercial certainty runs the risk that particularly large, complex, and entrenched instruments may be exempted despite the fact that they could benefit most from regular review.[248] Furthermore, the Delegated Legislation Scrutiny Committee has recently expressed the view that

> while the committee acknowledges the importance of regulatory certainty for business it notes that regulatory changes are a consideration that many different stakeholders across a range of sectors and industries need to consider. Again, the committee notes that should the certainty provided by the exceptions be of such a critical nature to industry this certainty would be best provided through primary legislation.[249]

155. Different views regarding the significance of commercial certainty reflect a broader difference of views regarding exemptions from Parliamentary oversight between government agencies on the one hand, and non-government and parliamentary stakeholders on the other. In its 2021–22 Review of the *Legislation Act*, the Review Committee observed 'distinctly opposing views' held by these stakeholders regarding the current framework for exemptions from the definition of legislative instrument, disallowance, and sunsetting.[250] Arguably, this divergence reflects the ongoing difficulty of striking a balance between the expediency of delegated legislation and the important constitutional principles at stake.[251] Ultimately, the Review Committee concluded that while

> there may be some scope for more stringent policy approval and parliamentary scrutiny in relation to some types of exemptions, [the Committee] also considers the existing framework and established exemptions to be generally appropriate.[252]

245 Ibid rec 26.
246 Ibid 24–5.
247 Ibid 25.
248 Ibid.
249 Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Delegated Legislation Monitor — Committee Correspondence* (Monitor 1 of 2022, 25 January 2022) 30.
250 Legislation Act Review Committee, Attorney-General's Department (Cth) (n 237) 4, 40.
251 See, eg, Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [3.8]–[3.9], [4.2], [4.53].
252 Legislation Act Review Committee, Attorney-General's Department (Cth) (n 237) 40.

International comparisons

156. This section discusses the approaches to the scrutiny of delegated legislation in the UK and New Zealand as two Westminster style parliaments that enable straightforward comparison to Australia.

United Kingdom

157. The UK has several significant points of departure compared to the scrutiny of delegated legislation in Australia. The scrutiny of enabling provisions and delegated legislation itself is dispersed among several Parliamentary Committees, including the Joint Committee on Statutory Instruments, the Delegated Powers and Regulatory Reform Committee, and the Secondary Legislation Scrutiny Committee. Unlike Australia, the UK makes much greater use of the affirmative resolution procedure, in addition to using the negative resolution procedure. Under the affirmative resolution procedure, delegated legislation must be 'affirmed' by the legislature before it comes into effect. Under the negative resolution procedure, delegated legislation comes into effect before it is tabled in Parliament and is subject to parliamentary disallowance period (usually 40 days).[253] In UK legislation, the enabling provision determines the applicable procedure for an instrument.[254] Affirmative procedures are rare in Australia, with Argument only identifying 11 instances in 2011.[255]

158. The House of Lords Delegated Powers and Regulatory Reform Select Committee is responsible for scrutinising empowering provisions in Bills. The government provides an explanatory memorandum setting out any enabling provisions in all government Bills,[256] and drafting guidance lists the matters that should be included both in the enabling provision and in the accompanying memorandum.[257] The Delegated Powers and Regulatory Reform Committee has expressed concern over the breadth of enabling provisions and significant policy matters being left to delegated legislation, even describing this practice as 'the denial of democracy'.[258] The Committee's concerns have led to the amendment of drafting guidance.[259]

159. The Joint Committee on Statutory Instruments is responsible for the general legal and technical scrutiny of delegated legislation, on the terms set out in the Standing Orders.[260]

160. Perhaps the most significant difference between the Australian and UK approach to scrutinising delegated legislation is the systematic review of policy matters in the UK. To enable the scrutiny of policy in delegated legislation without jeopardising the non-partisan reputation of other scrutiny committees, the House of Lords established a Select Committee on the Merits of Statutory Instruments in 2003.[261] This Committee has since been renamed the Secondary Legislation Scrutiny Committee, however its terms of reference still include policy criteria. The Committee is composed of 12 Peers from the House of Lords, and the lack of electoral pressure on the Peers may enable less partisan consideration of policy issues. The Secondary Legislation Scrutiny Committee scrutinises delegated legislation in two stages. Stage 1 refers to the scrutiny

253 Secondary Legislation Scrutiny Committee, House of Lords (UK), 'Secondary Legislation Scrutiny Committee — Role' <committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/role/>; Parliament of the United Kingdom, 'What Is Secondary Legislation?' <www.parliament.uk/about/how/laws/secondary-legislation>; Cabinet Office (UK) (n 102) [15.6]–[15.14].

254 Richard Kelly, *Statutory Instruments* (Briefing Paper No 06509, House of Commons Library, 15 December 2016) 11.

255 Argument, 'Legislative Scrutiny in Australia: Wisdom to Export?' (n 185) 141.

256 Cabinet Office (UK) (n 102) 131. These are sometimes called 'delegated powers memoranda'.

257 Ibid 138–43.

258 Delegated Powers and Regulatory Reform Committee, *Democracy Denied? The Urgent Need to Rebalance Power between Parliament and the Executive* (House of Lords Paper No 106, 12th Report of Session 2021–22).

259 See ibid [165]–[166]; Cabinet Office (UK) (n 102) [15.3].

260 Parliament of the United Kingdom, 'Role — Joint Committee on Statutory Instruments (JCSI)' <committees.parliament.uk/committee/148/statutory-instruments-joint-committee/role/>; House of Commons (UK), *Standing Order 151* (Public Business 2021, 2 December 2021).

261 Pearce (n 170) 6.

of instruments proposed to proceed under the negative resolution procedure, and consideration of whether these instruments are suitable to remain under the negative procedure or whether they should be subject to the affirmative resolution procedure.[262] Stage 2 considers all delegated legislation, including instruments already subject to Stage 1 scrutiny, on the basis of a list of scrutiny criteria in the Committee's Terms of Reference.[263] Instruments the Committee wishes to comment upon are published in its weekly report for the attention of the House of Commons. The Secondary Legislation Scrutiny Committee also accepts public submissions regarding the operation of instruments, regardless of when they came into force.[264]

161. In the House of Commons, a 12–16 day period allows any Member to pursue issues raised in the report, and may table a motion for debate within a 40-day 'prayer period' for rejecting (or disallowing) negative resolution procedure instruments.[265]

162. In the aftermath of Brexit, a large body of delegated legislation is being used to convert EU law into UK laws;[266] this process is testing the strength of the UK's existing safeguards, and further review of these outcomes may be warranted in the years to come.

New Zealand

163. New Zealand's approach to scrutinising delegated legislation has undergone recent reform which has aligned its procedures with comparable jurisdictions, including Australia.

164. Prior to 2019, New Zealand had several overlapping definitions of delegated legislation arising from different sources, and the application of various scrutiny procedures to each was contested.[267] Legislative reforms implemented in 2021 created a single category of secondary legislation and updated parliamentary scrutiny and publication requirements.[268]

165. By contrast to the earlier position, the reforms require all secondary legislation to be put before Parliament and subject to disallowance, unless Parliament gives a specific exemption.[269] Secondary legislation cannot come into force until at least 28 days after it has been notified in the New Zealand Gazette, unless a waiver is granted by Cabinet.[270]

166. When reviewing secondary legislation, the New Zealand Parliament has some powers that go beyond Australia's. The New Zealand Parliament may, for example:

- disallow secondary legislation at any point after its enactment, not merely within a set review period;[271] and
- amend the content of instruments.[272]

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262 Secondary Legislation Scrutiny Committee, House of Lords (UK), *Secondary Legislation Scrutiny Committee — Role* (n 253); Secondary Legislation Scrutiny Committee, House of Lords (UK), 'Proposed Negatives Recommended for Upgrade' (UK Parliament, 25 February 2020) <committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/content/111534/proposed-negatives-under-consideration>.

263 Parliament of the United Kingdom, 'Secondary Legislation Scrutiny Committee — Terms of Reference' (23 October 2020) <committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/content/120278/toref>.

264 Secondary Legislation Scrutiny Committee, House of Lords (UK), 'Writing to Us about an Instrument' (25 February 2020) <committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/content/111543/writing-to-us-about-an-instrument/>.

265 Parliament of the United Kingdom, 'Secondary Legislation Scrutiny Committee — Stage 2 Scrutiny' (25 February 2020) <committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/content/111542/stage-2-scrutiny>.

266 See, eg, Select Committee on the Constitution, House of Lords (UK), *European Union (Withdrawal) Bill: Interim Report* (3rd Report of Session 2017–19, 7 September 2017) [39].

267 For a discussion of the previous definitions, see Dean R Knight and Edward Clark, *Regulations Review Committee Digest* (New Zealand Centre for Public Law, 7th ed, 2020) 27–35.

268 See *Legislation Act 2019* (NZ) s 5.

269 Ibid pt 5.

270 *Legislation Act 2019* (NZ).

271 Ibid ss 116–18.

272 Ibid s 119.

167. Some of these distinctions may be explained by New Zealand's unicameral parliamentary structure, which has resulted in greater government reliance upon delegated legislation to implement policy, coupled with more robust scrutiny mechanisms.[273] Based at least partly on this distinguishing feature, previous inquiries have found that some of these measures may be less appropriate in the Australian context.[274]

168. The Legislation Guidelines prepared by the New Zealand Legislation Design and Advisory Committee ('LDAC') provide guidance on the drafting and content of New Zealand legislation.[275] The Legislation Guidelines discuss a range of safeguards that can be included to restrain the exercise of delegated legislative power.[276] These include sunset clauses and confirmation clauses.[277] A confirmation clause may require an instrument to be revoked after a certain period unless confirmed by an Act of Parliament. This adds an additional layer of oversight beyond a sunset clause, which only requires the regulatory agency to remake the instrument if it is to remain in force.[278]

169. The Regulations Review Committee is the primary parliamentary body responsible for scrutinising secondary legislation in New Zealand. Unlike in Australia, members of the public may complain about the operation of secondary legislation directly to the Committee in relation to one of the nine grounds for scrutiny listed in Standing Order 327(2).[279] The Committee may investigate any complaint and this may lead to the tabling of reports and recommendations for reform.[280] As these complaints only occur after the delegated legislation has commenced, it is necessarily post-legislative. Moreover, the Committee is also able to scrutinise the enabling provisions in Bills before other Parliamentary committees, and to report on those provisions.[281]

Part V: Benefits, risks, and opportunities of post-legislative scrutiny

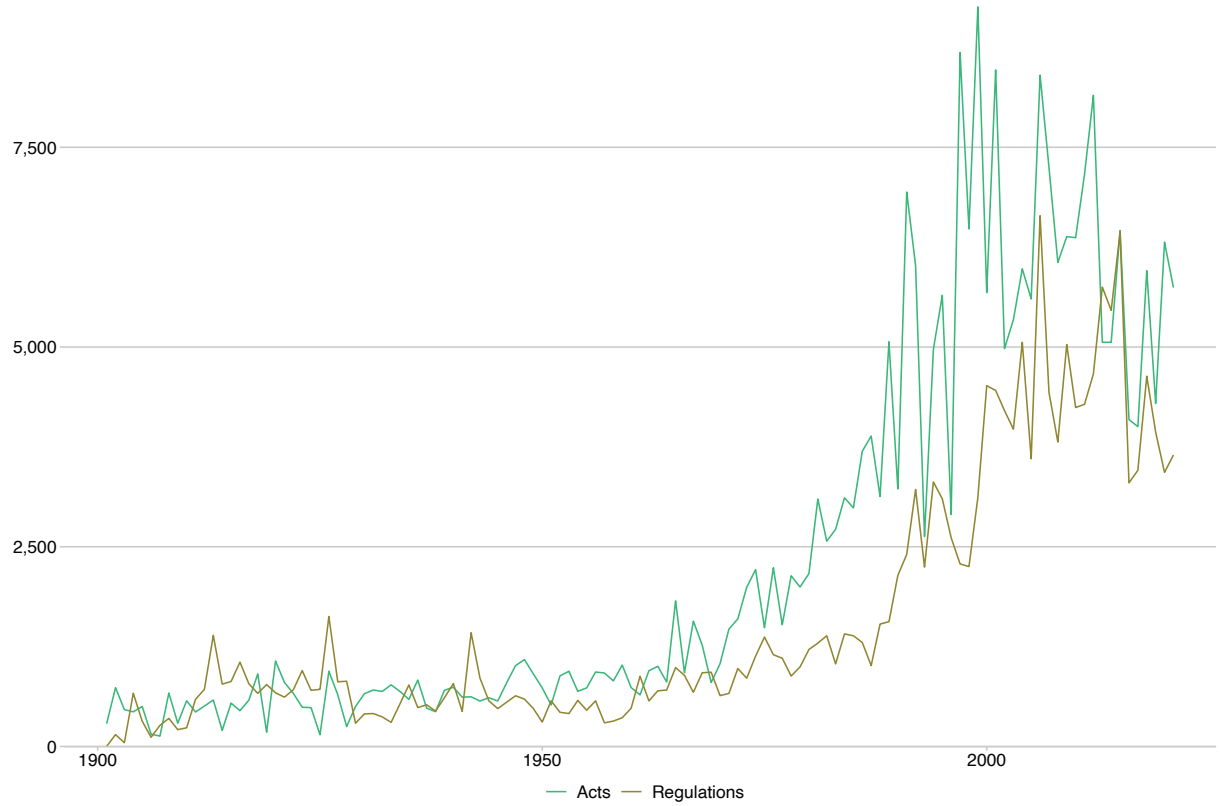
170. PLS provides an opportunity to reassess the substance and quality of a piece of legislation, to correct any errors or unintended consequences, and allows parliament to measure the success of its legislative outputs.[282] The benefits of PLS would most clearly be reflected in improved legislation, whether measured in terms of technical improvements or substantive effectiveness. Less obviously, but perhaps more importantly, PLS can also lead to improved law-making processes more generally. However, there are several risks and challenges that may undermine the efficacy of a PLS scheme.

171. The present Australian parliamentary scrutiny committees were created for a different legislative environment than exists today. Historically, the volume and complexity of legislation was significantly lower, and there was less reliance on delegated legislation to implement policy matters.[283] As the range of legislative subjects has increased, the Commonwealth statute book

273 Appleby (n 156) 62. See also Rt Hon Sir Geoffrey Palmer, 'Deficiencies in New Zealand Delegated Legislation' (1999) 30 *Victoria University of Wellington Law Review* 1.
274 See, eg, Appleby (n 156) 27; Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Parliamentary Scrutiny of Delegated Legislation* (n 29) 137–40.
275 Legislation Design and Advisory Committee (NZ), *Legislation Guidelines* (2021). See also Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) 53, 116–7.
276 Legislation Design and Advisory Committee (NZ) (n 275) 74–7.
277 Ibid 77.
278 Ibid.
279 See House of Representatives (NZ), *Standing Orders* (2020) ords 326–8.
280 New Zealand Parliament, 'Complaining about Regulations: What You Need to Know', *Procedural Guides* <www.parliament.nz/en/visit-and-learn/how-parliament-works/procedural-guides/complaining-about-regulations-what-you-need-to-know/>.
281 Legislation Design and Advisory Committee (NZ) (n 275) 68.
282 See, eg, 'Championing Parliamentary Oversight: The London Declaration on Post-Legislative Scrutiny' (n 6).
283 Aronson (n 163) 5; Dharmananda (n 157) 1–2. For further discussion of complexity in Commonwealth legislation, see Australian Law Reform Commission, 'Measuring Legislative Complexity', *Legislative Complexity and Law Design* <www.alrc.gov.au/datahub/legislative-complexity-and-law-design/measuring-legislative-complexity/>.

has expanded in size and coverage. Yet, there has not been a complimentary shift to adapt review mechanisms to meet the volume of scrutiny demands. **Figure 2** below shows how the number of pages included in Acts and regulations annually has increased significantly in the past 50 years.[284]

Figure 2: Annual pages of Acts and regulations (1901–2021)



172. Addressing many of these issues would likely require a shift in political and parliamentary perspectives, as well as a potential increase or reallocation of resources. Expectations for immediate results, with parliamentary success measured by Bills passed into law rather than their long-term efficacy, is not conducive to effective long-term PLS. Arguably, a cultural shift from 'set-and-forget', to one of custodianship or stewardship, would be needed to facilitate increased PLS at the Commonwealth level.

173. A lack of accountability and ownership over the maintenance of legislative coherence may, at least in part, be attributable to the turnover of public servants and politicians.[285] There is also little political incentive to introduce more onerous scrutiny measures.[286] Furthermore, the lack of systematic PLS of primary legislation may be a factor that contributes to the increasing reliance on broad delegated legislative powers, as incomplete policy measures in primary legislation utilise delegated legislation to fill the gaps.[287]

284 For further discussion, see Australian Law Reform Commission, 'A Short History of a Long Statute Book', *The Commonwealth Statute Book* (2022) <www.alrc.gov.au/datahub/the-commonwealth-statute-book/a-short-history-of-a-long-statute-book/>.

285 Freiberg, Pfeffer and van der Heijden (n 224) 8; Argument, 'Australian Democracy and Executive Law-Making: Practice and Principle (Part I)' (n 182) 52.

286 David Hamer (n 180) 320, quoting the UK delegate to the third Commonwealth Conference on Delegated Legislation: 'The opposition do not want to rock the boat too much, because they are waiting to get into power. They do not want too nosy a Joint Committee on Statutory Instruments with too many powers, and therefore do nothing about it because they are waiting to get back into government'.

287 Van Geelen (n 175) 309.

174. PLS should not be considered an end in itself, but rather a process for improving the quality of existing legislation, identifying best drafting practices, and facilitating novel forms of regulatory design.[288] Any systematic PLS regime would likely require regular review itself to ensure it remains fit for purpose.

Benefits

175. The benefits of PLS vary according to the scope of scrutiny undertaken. At the narrowest definition of PLS, focusing purely on consistency and clarity within and between legislation, potential benefits would include improved comprehension, readability, and navigability. Broader definitions of PLS, encapsulating review of whether policy objectives have been met, would aim to assess whether legislation 'is working out in practice as intended and if not to discover why and to address how any problems can be remedied quickly and cost-effectively'.[289] The London Declaration on Post-Legislative Scrutiny encourages parliaments to consider whether intended policy outcomes have been met as part of their PLS processes.[290]

176. The direct, quantifiable impacts of the PLS process, recorded and reported by parliamentary scrutiny committees, include the:

- number of pieces of legislation scrutinised;
- number of reports or comments published by the scrutiny committees;
- extent to which these comments or reports are considered in Parliament; and
- extent to which these processes result in actual changes to the legislation itself.[291]

177. These are the most visible impacts of PLS. However, these metrics do not paint a full picture: discussions with Ministers and their departments may occur outside of the public's view, and the committees' work may have an 'unseen influence' on the development of legislation.[292] This means the figures reported by the parliamentary scrutiny committees do not reflect the full extent to which parliamentary committees directly influence the content of specific pieces of legislation.

178. At present, there is potential for some legislative issues to go unnoticed by Parliament. Failure to bring legislation into effect, or to utilise delegations of legislative power, will generally not be brought to Parliament's attention, allowing potentially redundant law to accumulate on the statute book. Moreover, unintended consequences, whether due to drafting error or as an unexpected consequence of policy choices, may not be brought to Parliament's attention unless its effects are uniquely visible or of a kind likely to lead to objection from the public.[293] Broader PLS processes than those that currently exist could bring additional benefits in these areas.

288 De Vrieze and Norton (n 5) 358.
289 Law Commission of England and Wales (n 4) [2.7].
290 'Championing Parliamentary Oversight: The London Declaration on Post-Legislative Scrutiny' (n 6) 212.
291 This information is recorded in the annual reports of each Standing Committee: Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, 'Annual Reports' <www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills/Annual_Reports>; Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, 'Committee Reports' <www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Reports>.
292 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Annual Report 2021* (30 March 2022) [2.7]–[2.11].
293 See, eg, House of Lords Select Committee on the Constitution (UK) (n 16) [169]: 'Legislation may not fulfil its intended purpose. That may come to Parliament's attention if it has palpable negative consequences. It may not come to Parliament's attention at all if it simply has no effect. In some cases, it has no effect for the simple reason that Ministers have not brought the provisions of Acts into force. It may have unintended consequences, but not of a nature to provoke groups or citizens to object'.

Improvements to drafting and debate

179. There is a growing discourse surrounding the use of PLS to facilitate 'full-cycle engagement by parliaments in the legislative process'.[294] This approach encourages the use of PLS to identify strengths and weaknesses in approaches to legislative design to inform pre-legislative scrutiny and future legislative drafting practices. For this reason, PLS should focus not only on identifying problems,[295] but also on identifying best practice.[296]

180. At present, it has been suggested that parliamentarians are inclined to measure the success of a policy measure by its enactment into law.[297] This view is reinforced by the suggestion that a drafter's mandate is to draft Bills that will be passed into law, which takes primacy over considerations such as clarity and coherence.[298] However, this short term perspective is apt to undervalue the long term efficacy of the law, including its implementation and potential unintended consequences. By including PLS clauses in legislation, this may shift legislators' and drafters' attention to other criteria for success beyond the enactment of legislation, potentially improving the quality of policy formation and drafting processes.[299] Moreover, by understanding that a law may be subject to review based on its policy objectives, this may encourage more explicit enunciation of policy objectives, which would assist such PLS.[300]

Improving democratic accountability and transparency

181. As noted above, Parliament is the ultimate repository of legislative power with duties to oversee the quality of the statute book, and exercise oversight of legislative power delegated to the executive.[301] Effective PLS processes arguably enhance and protect fundamental constitutional principles, such as the separation of powers and responsible government.

182. Moreover, for effective review to occur, PLS typically requires the collection and sharing of data and information among key stakeholders. Therefore, PLS may encourage public and inter-agency participation in the law-making process.[302] Tabling this information in Parliament also facilitates transparency, public accountability, and democratic discourse.

Facilitating reform in urgent or contentious circumstances

183. PLS processes have gained greater foothold in areas of policy characterised by urgency and uncertainty. Including PLS measures in legislation of this kind provides a safeguard against rash policy-making, by ensuring democratic deliberation will recur once more information is available and panic has subsided.[303]

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294 De Vrieze and Norton (n 5) 357. See also 'Championing Parliamentary Oversight: The London Declaration on Post-Legislative Scrutiny' (n 6) 213.

295 Law Commission of England and Wales (n 4) [2.13], quoting the Hansard Society's submission: 'Post-legislative scrutiny should not focus exclusively on defective legislation, much less be solely an exercise in the identification of failure and the allocation of blame. It is important that post-legislative scrutiny also encourages the identification and dissemination of best practice. It is vital that lessons are learned from the examples of legislation that works well in order to strengthen future policy and legislative development'.

296 'Championing Parliamentary Oversight: The London Declaration on Post-Legislative Scrutiny' (n 6) 211; Law Commission of England and Wales (n 4) [2.5], [2.14]; Office of the Leader of the House of Commons (UK) (n 84) 11.

297 Norton (n 86) 342; De Vrieze and Norton (n 5) 356.

298 According to Lord Rodger of Earlsferry, passing Bills 'is the draftsman's principal task': quoted in Norton (n 86) 342. See also Sir George Engle KCB QC, former First Parliamentary Counsel of the UK, citing Lord Thring's observation that 'Bills are made to pass as razors are made to sell': Sir George Engle, '"Bills Are Made to Pass as Razors Are Made to Sell": Practical Constraints in the Preparation of Legislation' (1983) 4(2) *Statute Law Review* 7, 7.

299 Law Commission of England and Wales (n 4) [2.9], [3.48]; Caygill, *A Critical Analysis of Post-Legislative Scrutiny in the UK Parliament* (n 100) 42.

300 Law Commission of England and Wales (n 4) [3.7]–[3.12]; Office of the Leader of the House of Commons (UK) (n 84) 12–13; Angus Francis, 'The Review of Australia's Asylum Laws and Policies: A Case for Strengthening Parliament's Role in Protecting Rights through Post-Enactment Scrutiny' (2008) 32(1) *Melbourne University Law Review* 83, 91–2.

301 See above [11] and [98].

302 De Vrieze and Norton (n 5) 357; 'Championing Parliamentary Oversight: The London Declaration on Post-Legislative Scrutiny' (n 6) 213; Finn (n 46) 458.

303 Finn (n 46) 445.

184. The balance of power between the legislature and executive has shifted throughout the history of the Parliamentary model of government, and PLS clauses represent another chapter in this history. By providing for mandatory PLS, Parliament may be seen to be renegotiating the balance of power, and such clauses may be used as a bargaining tool to temper extreme or controversial policy positions during the design of legislation.[304]

185. In areas of political controversy, PLS measures may encourage consensus-building between competing perspectives, by providing a safeguard against unintended consequences. PLS also may facilitate experimentation in regulatory strategies and design, by ensuring such innovations will be reviewed for efficacy.[305]

Risks

186. While there are meaningful arguments for expanding PLS in Australia, there would be challenges and risks to doing so.

Increased demand on resources

187. The greatest challenge facing current PLS measures, and which is usually referenced whenever potential reforms are discussed, is the availability of limited resources.[306] At present, the scrutiny committees are not always able to complete their analysis and reports on legislation prior to the expiration of the relevant periods, and suggestions for additional time have been disregarded.[307] These challenges only appear likely to grow, as the volume of legislation itself continues to increase. Additional PLS measures would require increased time, staff, and funding.[308] Dedicating further parliamentary or governmental resources to PLS would mean prioritising PLS over other competing tasks, which represents an opportunity cost.[309] Moreover, the demand from legislators for immediate results, described as 'nowism', is a limiting factor. 'Nowism' refers to

> the challenges faced by Parliaments in scrutinising legislation at a time when people expect instantaneous results — people expect things to be done urgently and when there are considerable pressures on Parliaments to consider the legislation put before them.[310]

188. The relatively small size of the Commonwealth Parliament, and particularly the Senate where most legislative scrutiny takes place, is a particular challenge to expanding the range of PLS undertaken by Parliament. The Australian House of Representatives has 151 members and the Senate has 76 members. By contrast, the UK House of Commons has 650 members,[311] and the House of Lords has approximately 800 members 'eligible to take part in the work of the House'.[312] As a result of their limited number, backbench and non-government Senators, in particular, may sit on multiple committees which compete for their time.

189. A resource demand would also be imposed on relevant stakeholders whose participation would be needed to provide information and perform a meaningful evaluation of the law's efficacy.[313]

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304 Ibid 456.
305 Underhill and Ayres (n 52) 109–10. See also Ranchordás, 'Sunset Clauses and Experimental Regulations: Blessing or Curse for Legal Certainty?' (n 65); Albanesi (n 67).
306 Norton (n 86) 345; Law Commission of England and Wales (n 4) [2.15], [2.21].
307 See Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Parliamentary Scrutiny of Delegated Legislation* (n 29) [2.44], [4.13]–[4.14]. [5.34], [8.3], [8.16]; Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Final Report—Inquiry into the Future Role and Direction of the Senate Scrutiny of Bills Committee* (n 178) [4.25]–[4.26].
308 Aronson (n 163) 15.
309 Norton (n 86) 347; De Vrieze and Norton (n 5) 358.
310 Aronson (n 163) 5, quoting Michael Mischin, Parliament of Western Australia, *Hansard* 9 August 2011, 5278-9.
311 UK Parliament, 'House of Commons' <www.parliament.uk/business/commons/>.
312 UK Parliament, 'Members and Their Roles', *House of Lords* <www.parliament.uk/business/lords/whos-in-the-house-of-lords/members-and-their-roles/>.
313 De Vrieze and Norton (n 5) 358.

190. However, the increased resources needed to conduct effective PLS could be offset against any improvements to efficiency such changes may bring about.[314] For this reason, long-term cost-benefit assessments of PLS processes would be needed to determine the implications for parliamentary and departmental resources.

Political considerations

191. The primary justification for limiting the grounds of parliamentary scrutiny to technical considerations is the need to quarantine those committees from the appearance and effects of partisan bias. The 'risk of replay of arguments' is one of the key risks of PLS identified by the Law Commission.[315] To ameliorate this, it is importance to specify review criteria in advance, such as by including grounds for review in the explanatory materials to legislation.[316]

192. PLS reforms would also depend upon political will. However, there is limited partisan advantage at present for implementing expanded forms of PLS.[317] According to De Vrieze, PLS is not considered 'an exciting issue'.[318] As previously discussed, a government's success is often judged by the passage of Bills, and the embedding of the Executive within the legislature under the Westminster system means this also amounts to Parliament's political imperative.[319] This is supported by the observation that ad hoc PLS typically occurs only in relation to highly visible and publicised issues.[320] As noted by Norton:

> For Members of Parliament, then, post-legislative scrutiny may be acknowledged as important for ensuring 'good' law, but there is little political pay-off for them undertaking such activity unless it contributes to profile raising over and above other inquiries.[321]

193. As discussed above, PLS can facilitate consensus with respect to controversial legislation.[322] While this has the benefit of allowing for experimentation in new regulatory strategies and reform in politicised areas, there is also a risk that it may allow objectionable legislation to be passed more easily. PLS measures such as sunsetting may have the effect of shifting political responsibility and electoral risk from current to future legislators, in effect undermining accountability.[323] A promise to revisit controversial policy measures may delay important debates, and in practice later reviews may be of a more limited quality if they occur at all.

194. The practice of using PLS measures to justify more extreme or controversial policy measures to become law may have long term consequences, as even temporary legislation has been shown to shape norms and practices after it has been repealed. Moreover, studies have shown that the benefits of PLS as a means of consensus building may not equally benefit all political leanings. For example, a study of 1,639 US adults found that the inclusion of sunset clauses in Federal statutory provisions was more likely to persuade 'liberal-leaning' participants to accept 'conservative' policies, but that consequence was not reciprocated by 'conservative-leaning' participants towards 'liberal' policies.[324] If PLS measures only supported consensus building towards particular political viewpoints, this could undermine public confidence in the legislative and post-legislative process, as well as create 'policy drift' over time.[325]

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314 Law Commission of England and Wales (n 4) [2.21].
315 De Vrieze and Norton (n 5) 351, 357; Law Commission of England and Wales (n 4) [2.15]; House of Lords Select Committee on the Constitution (UK) (n 16) 9.
316 De Vrieze and Norton (n 5) 357.
317 Ibid 355; Law Commission of England and Wales (n 4) [2.18].
318 De Vrieze (n 6) 85.
319 See above [172].
320 Norton (n 86) 348.
321 Ibid.
322 See above [185].
323 Finn (n 46) 451.
324 See generally Underhill and Ayres (n 52).
325 'Policy drift' in this context refers to 'the lopsided compromise effects of sunset clauses [that] may produce long-term tendencies toward more conservative legislation': Ibid 107.

The challenges of measuring efficacy

195. A key issue that arises when considering potential models for systematic PLS is how efficacy should be assessed over time. Given the inevitable resource-demands of PLS measures, a corresponding benefit is to be expected.[326] At present, cost-benefit analyses of legislative measures are completed at the pre-legislative stage, and are predictive. PLS could be used to confirm their accuracy, by determining whether earlier prediction were accurate.

196. The benefits of PLS, and any potential detriments, are difficult to quantify. For example, much of the parliamentary scrutiny committees' existing practices occur out of public view, and many of the benefits and risks associated with PLS processes are not readily susceptible to quantification. Anecdotal evidence from a Clerk of the Senate has indicated that the work of the Scrutiny of Delegated Legislation Committee has had a 'significant cumulative impact on the quality of legislative instruments and the explanatory statements accompanying them'.[327]

197. Better PLS is facilitated by clear grounds for review. Therefore a lack of clearly articulated policy and legislative objectives, combined with broad delegations of legislative power, provide spurious grounds on which to expect parliamentary committees to conduct thorough review and scrutiny.[328] This is compounded in the case of long, complex pieces of legislation covering multiple topics and objectives, which do not invite a concrete criteria for reviewing long-term efficacy. Poor quality explanatory materials also make scrutiny more difficult.[329]

Technological opportunities

198. The ALRC has previously noted the potential for technology to improve the drafting and publication of legislation more generally.[330] Likewise, there may also be ways for technology to aid and augment the PLS process.

199. Given the thousands of pieces of legislative and explanatory materials reviewed annually, comprising tens of thousands of pages, technology-assisted analysis may increase efficiency of scrutiny undertaken by the Bills and Delegated Legislation Scrutiny Committees. Neudorf, for example, has noted that artificial intelligence — which is sometimes used for contract analysis and document review in private practice — may be adapted to help analyse delegated legislation.[331]

200. Short of artificial intelligence, a program written in a basic programming language, such as R or Python, could be used to identify potentially problematic legislation and generate a report to be more closely reviewed by the relevant scrutiny committee. For example, this technology could automatically perform keyword searches to highlight particular matters of interest or be used to identify particular legislative trends by treating legislation as data.[332] These techniques could make scrutiny work more efficient as well as potentially better-informed by highlighting 'macro-level' trends. Similar methods have been developed and used by the ALRC throughout the Financial Services Legislation Inquiry.[333]

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326 De Vrieze and Norton (n 5) 356.

327 Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight: Final Report* (n 154) [6.13].

328 Law Commission of England and Wales (n 4) [3.7]–[3.12], [3.59]; Office of the Leader of the House of Commons (UK) (n 84) 12–13; Francis (n 300) 91–2. See also Helen Xanthaki, 'An Enlightened Approach to Legislative Scrutiny: Focusing on Effectiveness' (2018) 9(3) *European Journal of Risk Regulation* 431, 440–2.

329 See, eg, Freiberg, Pfeffer and van der Heijden (n 224) 10.

330 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) rec 19; Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) [6.71]–[6.76], [10.49], [10.107].

331 Lorne Neudorf, 'Reassessing the Constitutional Foundation of Delegated Legislation in Canada' (2018) 41 *Dalhousie Law Journal* 519, 571.

332 Appendix A, 'Data Methodology' Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021).

333 Australian Law Reform Commission, 'DataHub' <www.alrc.gov.au/datahub/>.