

The Senate

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Standing  
Committee for the  
Scrutiny of Delegated  
Legislation

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Inquiry into the exemption of delegated  
legislation from parliamentary  
oversight

Interim report

2 December 2020

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## List of recommendations

### Recommendation 1

**2.73** The committee recommends that parliamentarians give adequate consideration to the appropriateness of exempting delegated legislation from parliamentary oversight mechanisms, such as disallowance, at the time the enabling provision is being considered by the Parliament, including by actively considering any comments made by the Senate Standing Committee for the Scrutiny of Bills in relation to such provisions, even in times of emergency.

### Recommendation 2

**2.77** The committee recommends that the Senate Standing Committee for the Scrutiny of Bills or another independent body or person conduct a review of the appropriateness of the delegation of legislative powers in the *Biosecurity Act 2015*, including the appropriateness of provisions which exempt delegated legislation made pursuant to these powers from parliamentary oversight.

### Recommendation 3

**3.34** Noting the importance of parliamentary sittings in facilitating parliamentary oversight of delegated legislation in times of emergency, the committee recommends that presiding officers, the government and leaders of political parties take all possible steps to facilitate parliamentary sittings, even during times of emergency, and that the cancellation of parliamentary sittings only be taken as a last resort.

### Recommendation 4

**4.55** The committee recommends that parliamentarians and the government ensure that delegated legislation made in times of emergency is subject to disallowance where it:

- can be used to override or modify primary legislation; or
- triggers, or is a precondition to, the imposition of custodial penalties or other measures which restrict personal rights and liberties.

### Recommendation 5

**4.62** The committee recommends that the government propose amendments to the *Biosecurity Act 2015* to provide that entry and exit requirement determinations made under sections 44 and 45 of the Act are subject to disallowance.

#### **Recommendation 6**

**4.68** The committee recommends that the government propose amendments to the *Biosecurity Act 2015* to make the exercise of the human biosecurity control order powers in Part 3 of Chapter 2 of the Act conditional on a disallowable legislative instrument being in force, in addition to the existing preconditions to imposing a human biosecurity control order.

#### **Recommendation 7**

**4.70** The committee recommends that the government propose amendments to the *Biosecurity Act 2015* to provide that human health response zone determinations made under section 113 of the Act are subject to disallowance.

#### **Recommendation 8**

**4.74** The committee recommends that the government propose amendments to the *Biosecurity Act 2015* to provide that declarations of human biosecurity emergency periods and associated extensions made under sections 475 and 476 of the Act are subject to disallowance.

#### **Recommendation 9**

**4.77** The committee recommends that the government propose amendments to the *Biosecurity Act 2015* to provide that human biosecurity emergency requirements and directions made under sections 477 and 478 of the Act are subject to disallowance.

#### **Recommendation 10**

**4.84** The committee recommends that parliamentarians and the government ensure that Advance to the Finance Minister determinations which can be used to allocate additional public funds during times of emergency above the ordinary limits set in annual Appropriation Acts are subject to disallowance.

#### **Recommendation 11**

**4.87** In the limited circumstances in which it may be appropriate to exempt delegated legislation made in response to an emergency from disallowance, the committee recommends that parliamentarians and the government ensure that the source of such exemptions is set out in primary legislation.

#### **Recommendation 12**

**6.43** The committee recommends that the government ensure that all delegated legislation made in response to emergencies ceases to be in force after three months. Where measures implemented by delegated legislation are required for a longer period of time the relevant legislative instrument should be remade to facilitate parliamentary oversight.

### **Recommendation 13**

**6.46** The committee recommends that where primary legislation empowers the executive to make delegated legislation to amend or modify the operation of primary legislation in times of emergency (via a ‘Henry VIII’ clause), parliamentarians and the government should ensure that the primary legislation:

- specifies a time limit in which those powers can be exercised; and
- requires the maker of the delegated legislation to be satisfied that Parliament is not sitting and is not likely to sit within two weeks after the day the relevant instrument is made before they make the instrument.

### **Recommendation 14**

**6.48** The committee recommends that:

- the government limit the duration of delegated legislation made in times of emergency, and any measures implemented by such legislation, to dates prescribed on the face of the instrument; and
- where the duration of delegated legislation made during times of emergency cannot be prescribed by setting dates on the face of the instrument, but must instead be contingent on something else, the government ensure that the relevant trigger is subject to oversight by the Commonwealth Parliament.

### **Recommendation 15**

**6.50** The committee recommends that the government ensure that explanatory statements to delegated legislation made in response to emergencies clearly explain the anticipated duration of the measures implemented by the relevant instrument, particularly where that instrument is subject to automatic repeal but the measures it implements remain in force in other delegated legislation.

### **Recommendation 16**

**7.60** The committee recommends that the Senate amend standing order 23 to ensure that all delegated legislation made during times of emergency is referred to the Senate Standing Committee for the Scrutiny of Delegated Legislation for consideration and, if necessary, report, regardless of its disallowance status.

### **Recommendation 17**

**7.63** The committee recommends that the government allocate sufficient resources to the parliamentary departments to ensure that parliamentary committees responsible for the policy and technical scrutiny of delegated legislation are always sufficiently resourced to effectively perform this vital role, particularly during times of emergency.

## **Recommendation 18**

**7.67** The committee recommends that the Senate establish a select committee during times of national emergency, including human biosecurity emergencies and other events declared to be a national emergency under Commonwealth law, to consider the policy merits of delegated legislation made in response to that emergency.

## Chair and Deputy Chair's Foreword

A core tenet of Australia's system of representative democracy is that our laws are made by parliamentarians whom the Australian people have elected to represent them. However, in practice, Parliament delegates many of its law-making powers to the executive branch of government. Generally speaking, about half of the law of the Commonwealth by volume consists of delegated legislation, rather than Acts of Parliament. The disallowance procedure is the primary mechanism by which the Parliament maintains some oversight and control of these laws. Yet, in 2019, 20 per cent of the 1,675 laws made by the executive were exempt from disallowance. The significant volume of delegated legislation made by the executive, and the frequent exemption of this delegated legislation from parliamentary oversight, pose serious challenges to Parliament's constitutionally recognised law-making role.

Against this backdrop, the COVID-19 pandemic has posed an additional challenge to the way governments and Parliaments operate around the world. The need for governments to act quickly and decisively in response to the pandemic has meant that many measures have been implemented by delegated legislation, rather than primary legislation. This is understandable. However, noting the potential impact of emergency-related measures on personal rights and liberties and the ability for such measures to override other laws made by the Parliament, delegated legislation made during emergencies must be subject to parliamentary oversight with minimal exceptions. This approach ensures respect for Parliament's constitutional role as the primary institution responsible for making law and scrutinising possible encroachments on personal rights and liberties.

In light of these challenges, the Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) has initiated this inquiry to investigate the source, nature and appropriateness of the exemption of delegated legislation from parliamentary oversight. This interim report considers how various legislative, procedural and practical features of our system of government have combined to exempt delegated legislation made in response to the COVID-19 pandemic from parliamentary oversight. In doing so, it recommends actions that must be taken to address these systemic issues to protect against the inappropriate exemption of emergency-related delegated legislation from parliamentary oversight in the future.

Importantly, the committee is not concerned with the policy merits of delegated legislation made in response to COVID-19, but, rather, with the technical question of what factors have enabled or inhibited parliamentary oversight, including exemptions from the disallowance procedure. In this way, this case study of the exemption of COVID-19 related delegated legislation from parliamentary oversight serves to shine a light on the deeper, systemic issues which inhibit Parliament from effectively overseeing delegated legislation at all times, not just during emergencies. The final report will further consider the impact of these systemic issues, and the

actions required to guard against the inappropriate exemption of such laws from parliamentary oversight.

Part I provides an overview of the legislative framework relied on by the government to make delegated legislation in response to the COVID-19 pandemic. The *Biosecurity Act 2015* (Biosecurity Act) is the key component of this framework. As Chapter 2 explains, the Biosecurity Act confers extraordinarily broad powers on the executive branch of government, including powers to make delegated legislation which trespasses significantly on personal rights and liberties and overrides any Australian law. Of particular concern, the Biosecurity Act exempts all such delegated legislation from the disallowance procedure.

The government has justified exempting instruments made under the Biosecurity Act from disallowance on the grounds that they are based on technical or scientific decisions and therefore need to be insulated from political considerations. However, in our view, where a law trespasses on personal rights and liberties, or modifies or overrides primary legislation, our system of representative democracy requires elected representatives to have the opportunity to scrutinise and, if necessary, repeal that law.

Part II considers the specific legislative, procedural and practical features of our parliamentary system that have contributed to the exemption of delegated legislation made in response to the COVID-19 pandemic from parliamentary oversight, and assesses the appropriateness of these exemptions.

Chapter 3 demonstrates how the alteration and cancellation of parliamentary sittings has inhibited the capacity of parliamentarians to consider and, where they are able to, disallow COVID-19 related delegated legislation. The committee fully appreciates that the need for social distancing posed a significant and urgent challenge to the Parliament and its operations at the start of the pandemic. Nevertheless, given the critical role of parliamentary sittings in facilitating parliamentary oversight of delegated legislation, the committee considers that Parliament must be adequately prepared and resourced to enable parliamentary sittings in future emergencies.

Chapter 4 highlights how the disallowance framework in the *Legislation Act 2003* has contributed to the exemption of delegated legislation made in response to the COVID-19 pandemic from parliamentary oversight. This procedure is one of the most important tools that the Parliament has at its disposal to maintain control of delegated legislation. Despite the importance of this procedure, approximately 20 per cent of all delegated legislation made in response to the pandemic was exempt from disallowance, including all 27 legislative instruments made under the Biosecurity Act.

Our examination of the legislative sources of these exemptions reveals systemic problems with the legislative framework for disallowance. Many exemptions were enabled by provisions in primary legislation which appear to have received very little consideration by the Parliament when they were enacted. This is particularly true of the exemptions from disallowance in the Biosecurity Act. Looking towards the future,

the committee recommends that Parliament and government address these systemic issues to ensure that delegated legislation made in times of emergency is subject to disallowance where it can be used to override or modify primary legislation or triggers, or is a precondition to, the imposition of custodial penalties or other measures which restrict personal rights and liberties.

Chapters 5, 6 and 7 consider how systemic issues with the framework for the classification, duration and committee consideration of delegated legislation have contributed to a lack of parliamentary oversight of delegated legislation made in response to the COVID-19 pandemic.

The committee has made 18 recommendations in this report to improve parliamentary oversight of delegated legislation in times of emergency. Our concerns about parliamentary oversight of delegated legislation made during emergencies are not limited to this particular emergency, nor the actions of any particular government. For too long, Parliament and governments of all political persuasions have contributed to a system of laws, procedures, and practices which diminish Parliament's capacity to oversee executive law-making. Delegated legislation made during COVID-19 is just one case study of this much broader issue. The committee will continue to investigate this systemic issue over the course of this inquiry. In the meantime, we call on all parliamentarians to carefully consider their responsibilities, as lawmakers and representatives of the people, to ensure rigorous oversight of delegated legislation made in times of emergency, particularly where it limits personal rights and liberties or overrides law made by the Parliament.



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## **Part I — Background**

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# Chapter 1

## Introduction

1.1 In our system of representative democracy the Parliament is responsible for making laws. However, in practice, Parliament delegates a substantial amount of its law-making power to the executive. Generally speaking, about half of the law of the Commonwealth by volume consists of delegated legislation, rather than Acts of Parliament.<sup>1</sup> Parliamentarians rely on scrutiny measures, including the critical procedure of disallowance, to maintain control of the executive's use of this delegated power.

1.2 Throughout its history, the Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) has played an essential role in ensuring that there is effective parliamentary scrutiny of delegated legislation. It is the committee's view that in 2020, Parliament's role in overseeing delegated legislation made in response to COVID-19 has been unquestionably constrained.

1.3 There is no question that the pandemic has posed significant challenges for the government and the Parliament. The government has responded to this challenge by using delegated legislation to act quickly and decisively. This is an understandable and justifiable response. However, the reliance on delegated legislation which is partially or totally exempt from parliamentary disallowance and other forms of scrutiny has shone a light on systemic issues that diminish the Parliament's ability to effectively scrutinise such legislation. The unprecedented circumstances of a global pandemic necessitate an unprecedented response. However, the Parliament must still be in a position to effectively fulfil its duty to exercise control over laws made by the executive.

1.4 This interim report considers the nature and appropriateness of the exemption of delegated legislation from parliamentary oversight during times of emergency. The report examines the systemic factors which contribute to such exemptions, including the legislative and procedural frameworks for the classification, commencement, disallowance and repeal of delegated legislation, and practical constraints on the capacity of the Parliament and its committees to adequately scrutinise delegated legislation.

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1 Harry Evans and Rosemary Laing, eds, *Odgers' Australian Senate Practice*, 14th edition, Department of the Senate, 2016, p. 432.

## Role of the committee

1.5 Since its establishment nearly 90 years ago the committee has operated as a nonpartisan technical legislative scrutiny committee responsible for scrutinising certain types of delegated legislation made by the executive branch of government.<sup>2</sup>

1.6 The role of the committee is to examine ‘all instruments made under the authority of Acts of the Parliament, which are subject to disallowance, disapproval or affirmative resolution by the Senate and which are of a legislative character’,<sup>3</sup> and to determine whether those instruments comply with the committee’s technical scrutiny principles.

1.7 The committee's scrutiny principles are formally defined by Senate standing order 23(3), and focus on compliance with statutory requirements, the protection of individual rights and liberties, and principles of parliamentary oversight. Standing order 23(4) also provides that the committee shall ‘scrutinise each instrument to determine whether the attention of the Senate should be drawn to the instrument on the ground that it raises significant issues, or otherwise gives rise to issues that are likely to be of interest to the Senate’.<sup>4</sup>

1.8 In addition to its regular scrutiny work, standing order 23(12) empowers the committee to self-initiate inquiries exclusively into matters related to its existing technical scrutiny role.

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## Inquiry terms of reference

1.9 On 30 April 2020 the committee resolved, under standing order 23(12), to inquire into and report on the exemption of delegated legislation from parliamentary oversight, with particular regard to:

- (a) the appropriateness and adequacy of the existing framework for exempting delegated legislation from parliamentary oversight, including:
  - i. the amount and nature of delegated legislation currently exempt from parliamentary oversight;
  - ii. the grounds upon which delegated legislation is currently made exempt from parliamentary oversight;

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2 The committee was established in 1932 as the Senate Standing Committee on Regulations and Ordinances. The Senate amended its standing orders on 27 November 2020, with effect from 4 December 2020, to change the committee's name to the Senate Standing Committee for the Scrutiny of Delegated Legislation and make other changes to clarify and update the committee's powers and functions.

3 The Senate, [Standing Orders and other orders of the Senate](#), January 2020, SO 23(2).

4 The Senate, [Standing Orders and other orders of the Senate](#), January 2020, SO 23(2).

- iii. the manner in which delegated legislation is currently made exempt from parliamentary oversight; and
  - iv. the appropriateness of exempting delegated legislation made in times of emergency, including in response to the COVID-19 pandemic, from parliamentary oversight; and
- (b) whether the existing framework for exempting delegated legislation from parliamentary oversight should be amended, and, if so, how, including:
- i. the grounds upon which it is appropriate to exempt delegated legislation from parliamentary oversight; and
  - ii. the options available to ensure appropriate and adequate parliamentary oversight of delegated legislation in times of emergency.

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### **Conduct of the inquiry to date**

1.10 The committee advertised the inquiry on its website, and wrote to a number of organisations and individuals to invite them to make submissions by 25 June 2020.

1.11 The committee received 30 submissions, listed at Appendix 1. The public submissions are available on the committee's website.

1.12 The committee held three public hearings:

- 27 August 2020, Canberra;
- 31 August 2020, Canberra; and
- 3 September 2020, Canberra.

1.13 A list of all witnesses that appeared at the hearings can be found at Appendix 2 of this report, and full Hansard transcripts of proceedings and answers to questions taken on notice can be found on the committee's website.<sup>5</sup>

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### **Background to the inquiry**

1.14 The committee's decision to undertake the inquiry was informed by a number of considerations, including its 2019 inquiry into parliamentary scrutiny of delegated legislation,<sup>6</sup> the increasing proportion of delegated legislation exempt

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5 Further information can be found at [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Scrutiny\\_of\\_Delegated\\_Legislation/Exemptfromoversight](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Exemptfromoversight).

6 Further information about the 2019 inquiry can be found at Senate Standing Committee for the Scrutiny of Delegated Legislation, [www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Scrutiny\\_of\\_Delegated\\_Legislation/DelegatedLegislation](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/DelegatedLegislation).

from disallowance, and the use of delegated legislation to respond to the COVID-19 pandemic.

### ***2019 inquiry into parliamentary scrutiny of delegated legislation***

1.15 The committee's general concerns regarding the exemption of delegated legislation from parliamentary oversight are informed by the findings of its 2019 inquiry into parliamentary scrutiny of delegated legislation.<sup>7</sup> As part of the inquiry the committee raised particular concerns regarding the exemption of delegated legislation from disallowance procedures.<sup>8</sup> The committee noted that such exemptions effectively remove Parliament's control of delegated legislation and therefore leaves it to the executive to determine (within the confines of the enabling legislation and the Constitution) the content of the law.

1.16 The committee also expressed particular concerns that:

- there is no formal requirement that explanatory memoranda to bills that provide exemptions from disallowance explain or justify those exemptions, nor is there any guidance as to when it may be appropriate to include such exemptions in a bill;
- a vast range of exemptions from disallowance are set out in delegated legislation (namely the *Legislation (Exemptions and Other Matters) Regulation 2015*); and
- there is no publicly accessible government guidance as to the circumstances in which it may be appropriate to exempt instruments from disallowance.

1.17 The committee made several recommendations in relation to the exemption of delegated legislation from parliamentary oversight. In particular, the committee recommended that the government 'review existing provisions exempting legislative instruments from disallowance, to determine whether such exemptions remain appropriate, and amend the *Legislation Act 2003* (Legislation Act) to ensure all such exemptions are contained in primary legislation'.<sup>9</sup>

1.18 However, the government did not support this recommendation, stating in its response to the inquiry:

The Government does not support the recommendation to amend the Legislation Act to ensure exemptions are contained in primary legislation. Transferring exemptions currently contained in the LEOM Regulation to

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7 Senate Standing Committee on Regulations and Ordinances, [\*Parliamentary scrutiny of delegated legislation\*](#), 3 June 2019.

8 Senate Standing Committee on Regulations and Ordinances, *Parliamentary scrutiny of delegated legislation*, 3 June 2019, pp. 122-124.

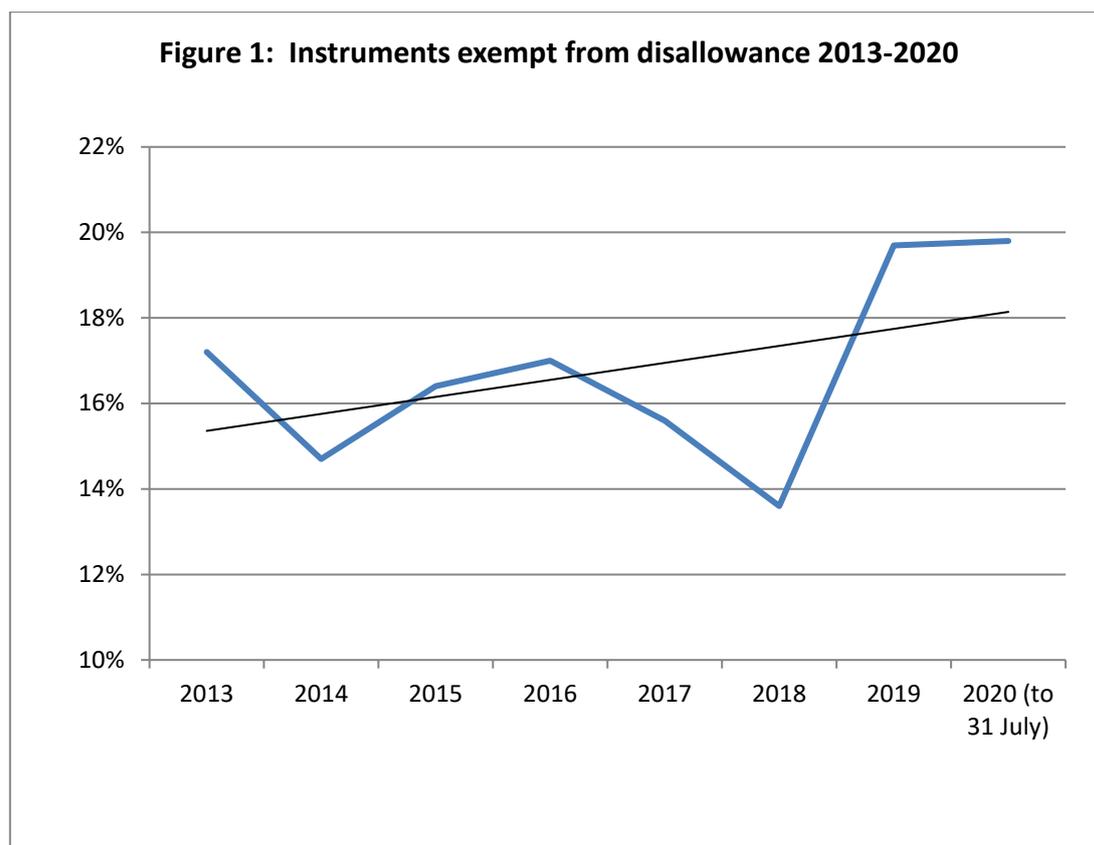
9 Senate Standing Committee on Regulations and Ordinances, *Parliamentary scrutiny of delegated legislation*, 3 June 2019, p. 124.

the *Legislation Act 2003* (Legislation Act) or primary legislation would undo the changes effected by the *Acts and Instruments (Framework Reform) Act 2015*. It is also impractical given the substantial time and resources required to redraft existing delegated legislation and primary legislation.<sup>10</sup>

1.19 The government supported a small number of the committee's recommendations,<sup>11</sup> and committed to publishing guidance materials regarding circumstances where it is appropriate to exempt instruments from disallowance; as well as to amending the Federal Register of Legislation to enable exempt instruments to be easily identified. However, at the time of tabling this report the government has yet to implement these recommendations.

### ***Significant amount of exempt delegated legislation***

1.20 The committee's decision to undertake the current inquiry was also informed by its concerns about the significant amount of delegated legislation which is exempt from disallowance. The graph and table below outline the proportion of legislative instruments which were exempt from disallowance from 2013 to mid-2020.



10 Australian Government, [Australian Government Response to the Senate Standing Committee on Regulations and Ordinances report: Parliamentary scrutiny of delegated legislation](#), 8 November 2019, p. 5.

11 Recommendation 15 (part B) and recommendation 16.

**Table 1: Instruments exempt from disallowance 2013-2020**

Year	Exempt	Disallowable	Total	Percentage exempt
<b>2020 (to 31 July)</b>	193	784	977	<b>19.8%</b>
<b>2019</b>	330	1345	1675	<b>19.7%</b>
<b>2018</b>	256	1630	1886	<b>13.6%</b>
<b>2017</b>	265	1436	1701	<b>15.6%</b>
<b>2016</b>	347	1698	2045	<b>17.0%</b>
<b>2015</b>	361	1840	2201	<b>16.4%</b>
<b>2014</b>	277	1609	1886	<b>14.7%</b>
<b>2013</b>	639	3086	3725	<b>17.2%</b>

1.21 In particular, the committee is concerned that in 2019, nearly 20 per cent of legislative instruments were exempt from disallowance. The number of instruments exempt from disallowance in 2020 is also likely to be above average due to the increased number of exempt instruments made in response to the COVID-19 pandemic.

### ***Use of delegated legislation during recent emergencies***

1.22 The committee's decision to undertake this inquiry was further informed by the extensive use of delegated legislation, made under both existing primary legislation and new legislation passed in the early months of the COVID-19 pandemic, and associated reduced opportunities for parliamentary oversight.<sup>12</sup>

1.23 On 18 March 2020, the Governor-General declared that a human biosecurity emergency existed as a result of the COVID-19 pandemic. The declaration initially related to a period of three months until 17 June 2020.<sup>13</sup> At the time of tabling the declaration had been extended twice until 17 December 2020.<sup>14</sup> This declaration of emergency gave the Minister for Health expansive powers to determine emergency requirements, or give directions, deemed necessary to prevent or control the entry,

12 Appendix 3 contains a list of delegated legislation made between 1 January 2020 and 31 July 2020 in response to COVID-19.

13 Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020 [F2020L00266].

14 Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension) Instrument 2020 [F2020L00574]; Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 2) Instrument 2020 [F2020L01129].

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emergence, establishment or spread of COVID-19 in Australian territory via non-disallowable legislative instruments during the emergency period.<sup>15</sup>

1.24 Parliament also enacted a number of bills in response to the COVID-19 pandemic which, among other things, enabled delegated legislation to be made to:

- exempt classes of persons from the operation of provisions of primary legislation;<sup>16</sup>
- modify provisions of primary legislation;<sup>17</sup> and
- prescribe circumstances in which the Commonwealth may pay money from the \$1 billion fund for assistance for severely affected regions.<sup>18</sup>

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### Focus of the interim report

1.25 This interim report focuses on the exemption of delegated legislation made during times of emergency from parliamentary oversight. It particularly addresses the issues raised in evidence received by the committee relevant to terms of reference (a)(iv) and (b)(ii):

- the appropriateness of exempting delegated legislation made in times of emergency, including in response to the COVID-19 pandemic, from parliamentary oversight; and
- the options available to ensure appropriate and adequate parliamentary oversight of delegated legislation in times of emergency.

1.26 The focus of the interim report is the delegated legislation made in response to the COVID-19 pandemic. In addition to the evidence submitted to the committee, the committee has conducted its own analysis of delegated legislation made in response to COVID-19,<sup>19</sup> and registered on the Federal Register of Legislation between 1 January and 31 July 2020. This includes both disallowable and non-disallowable legislative instruments. In addition, the committee considered notifiable instruments made in response to COVID-19 and registered within the same period.

1.27 While this interim report focuses on delegated legislation made in times of emergency, the final report of the inquiry will address the other terms of reference

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15 *Biosecurity Act 2015*, section 477.

16 *Coronavirus Economic Response Package Omnibus Act 2020*, schedule 8, item 1.

17 *Coronavirus Economic Response Package Omnibus Act 2020*, schedule 11, item 40A.

18 *Appropriation (Coronavirus Economic Response Package) Bill (No. 1) 2019-2020*, section 12.

19 The committee's criteria for determining whether delegated legislation was made in response to COVID-19 was based on whether the relevant instrument stated that it was made in response to COVID-19, either on the face of the instrument or in the explanatory statement.

and broader issues in relation to the exemption of delegated legislation from parliamentary oversight.

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### **Structure of this report**

1.28 This interim report is divided into two parts. Part I provides an overview of the Commonwealth legislative framework for making COVID-19 delegated legislation. Part II analyses the factors that contribute to the exemption of emergency delegated legislation from parliamentary oversight. The structure is outlined below:

#### ***Part I - Background***

- Chapter 1 – Introduction
- Chapter 2 – Commonwealth legislative framework for making COVID-19 delegated legislation

#### ***Part II – Systemic factors contributing to the exemption of emergency delegated legislation from parliamentary oversight***

- Chapter 3 – Alteration and cancellation of parliamentary sittings
- Chapter 4 – Exemption from disallowance
- Chapter 5 – Classification of delegated legislation
- Chapter 6 – Duration of delegated legislation
- Chapter 7 – Exclusion of delegated legislation from parliamentary committee consideration

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### **Acknowledgments**

1.29 The committee acknowledges and thanks all those who assisted with and contributed to the inquiry by making submissions and providing evidence at the public hearings.

## Chapter 2

# Commonwealth legislative framework for making COVID-19 delegated legislation

### Overview

2.1 This chapter outlines the Commonwealth legislative framework for making delegated legislation in response to the COVID-19 pandemic, focusing on the *Biosecurity Act 2015* (Biosecurity Act) and other Acts made in direct response to COVID-19. After outlining the powers in primary legislation to make delegated legislation, the chapter considers:

- the adequacy of the parliamentary scrutiny given to the enabling legislation;
- the legislative responses to COVID-19 in other comparable jurisdictions; and
- the committee's view as to the appropriateness of the framework.

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### Delegated legislation making powers in the Biosecurity Act

2.2 The Biosecurity Act provides the primary legislative basis on which the government may respond to human biosecurity emergencies, such as the COVID-19 pandemic. Between 1 January and 31 July 2020, the government made 26 legislative instruments under the Biosecurity Act in response to COVID-19.

2.3 The following section provides an overview of the most significant delegated legislation making powers relating to human biosecurity emergencies in the Biosecurity Act. In particular, it considers how these powers were exercised in response to COVID-19 and, in some cases, exempted from parliamentary oversight.<sup>1</sup> This section also outlines the parliamentary scrutiny of the enabling provisions before they were enacted.

#### ***Listed human disease determinations and human biosecurity control orders***

2.4 Section 42 of the Biosecurity Act empowers the Director of Human Biosecurity to determine that a human disease is a 'listed human disease',<sup>2</sup> where

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1 The committee further considers the appropriateness of the exemption of delegated legislation made under these powers from disallowance in Chapter 4.

2 Subsection 544(1) of the *Biosecurity Act 2015* provides that the Director of Human Biosecurity is the person who occupies, or is acting in, the position of Commonwealth Chief Medical Officer.

the Director considers that the disease may be communicable and cause significant harm to human health.<sup>3</sup>

2.5 On 21 January 2020, the Director of Human Biosecurity added human coronavirus with pandemic potential to the principal list of human diseases.<sup>4</sup> This marked the first time that a disease had been added to the principal list of human diseases since it was made in 2016.<sup>5</sup>

2.6 The determination of a listed human disease is a precondition for exercising a range of other human biosecurity emergency powers to manage the spread of the listed disease. This includes the ability of a biosecurity officer<sup>6</sup> to impose human biosecurity control orders on individuals.<sup>7</sup> Once imposed, such control orders may require an individual to be decontaminated,<sup>8</sup> undergo an examination,<sup>9</sup> provide body samples,<sup>10</sup> or receive a vaccination, treatment or medication.<sup>11</sup> Control orders are not legislative instruments and, as such, are not subject to parliamentary oversight via tabling, disallowance or sunseting. As the listed human disease determination triggers the ability to use coercive powers its significance extends far beyond the scope of its enabling provision.

#### *Exemption from disallowance*

2.7 While they are subject to general tabling and sunseting requirements, listed human disease determinations are not subject to disallowance by the Parliament. Consequently, this committee is not empowered to scrutinise these instruments,<sup>12</sup>

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3 Before making such a determination, the Director of Human Biosecurity must consult with each state and territory chief health officer, and the Director of Biosecurity. See *Biosecurity Act 2015*, subsection 42(3).

4 Biosecurity (Listed Human Diseases) Amendment Determination 2020 [F2020L00037].

5 Biosecurity (Listed Human Diseases) Determination 2016 [F2020C00095].

6 Subsection 60(1) of the Biosecurity (Listed Human Diseases) Amendment Determination 2020 [F2020L00037] provides that a biosecurity control order may be imposed on an individual by a chief human biosecurity officer, a human biosecurity officer, or a biosecurity officer.

7 A biosecurity officer may only impose a biosecurity control order on an individual if, amongst other factors, the officer is satisfied that the individual has one or more signs or symptoms of a listed human disease, has been exposed to a listed human disease, or has failed to comply with an entry requirement in relation to a human disease. See *Biosecurity Act 2015*, subsection 60(2).

8 *Biosecurity Act 2015*, section 89.

9 *Biosecurity Act 2015*, section 90.

10 *Biosecurity Act 2015*, section 91.

11 *Biosecurity Act 2015*, sections 92 and 93.

12 The committee is only empowered to scrutinise instruments that are subject to disallowance, disapproval or affirmative resolution by the Senate.

and, because a disallowance motion may not be moved, opportunities to debate these determinations in Parliament are limited.<sup>13</sup> The explanatory memorandum to the Biosecurity Bill 2014 provides the following justification for the non-disallowable status of these determinations:

The decision to determine, vary or revoke a listed human disease determination is a technical and scientific decision that is made based on whether the human biosecurity risk is able to be satisfactorily managed. Subjecting these determinations to disallowance could undermine the technically and scientifically based decision making process and frustrate risk management processes. In addition, disallowance of a determination made under this clause could lead to inadequate management of biosecurity risks posed by listed human diseases.<sup>14</sup>

### **Entry and exit requirement determinations**

2.8 Section 44 of the Biosecurity Act empowers the Health Minister to determine requirements for individuals entering Australian territory at a prescribed point of entry,<sup>15</sup> to prevent a listed human disease from entering, or establishing itself or spreading in Australian territory.<sup>16</sup> Section 45 similarly empowers the Health Minister to determine requirements for individuals leaving Australian territory,<sup>17</sup> or operators of outgoing passenger aircraft or vessels,<sup>18</sup> to prevent a listed human disease spreading to another country,<sup>19</sup> or to respond to a recommendation made to the Health Minister by the World Health Organisation under the International Health Regulations.<sup>20</sup>

2.9 There is no limit on the requirements that the Health Minister may set out in a determination, other than that it must not include measures that may be included in a human biosecurity control order.<sup>21</sup> Examples of the type of requirements that may be included in the determination, include requirements for individuals to

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13 In the absence of the priority time available for consideration of disallowance motions as Business of the Senate, non-disallowable legislative instruments may only be debated in the Senate at times set aside for consideration of general matters, such as senators' statements, general business debates, matters of public importance and urgency, and the adjournment debate.

14 Biosecurity Bill 2014, explanatory memorandum, p. 98.

15 Subsection 44(2) provides that the relevant landing places and ports must accord with Division 2 or 3 of Part 4 of the *Biosecurity Act 2015*.

16 *Biosecurity Act 2015*, subsection 44(1).

17 *Biosecurity Act 2015*, paragraph 45(2)(a).

18 *Biosecurity Act 2015*, paragraph 45(2)(b).

19 *Biosecurity Act 2015*, paragraph 45(1)(a).

20 *Biosecurity Act 2015*, paragraph 45(1)(b).

21 *Biosecurity Act 2015*, subsections 44(7) and 45(7).

complete a questionnaire on their health;<sup>22</sup> operators of outgoing passenger aircrafts or vessels to treat the aircraft or vessel in a particular way;<sup>23</sup> and individuals to be screened.<sup>24</sup> There is no express requirement that the Health Minister consult with the Chief Medical Officer or other experts prior to making the requirement. Failure to comply with entry and exit requirements attracts a civil penalty of 30 penalty units.<sup>25</sup> In addition, a human biosecurity control order may be imposed on a person who fails to comply with an entry or exit requirement in relation to a listed human disease.<sup>26</sup>

2.10 Between 1 January and 31 July 2020, the Health Minister made two exit requirement determinations in response to COVID-19.<sup>27</sup> The first determination,<sup>28</sup> registered on 26 March 2020, required individuals bound for prescribed countries, and departing from prescribed airports, to be screened by a human biosecurity officer 'for the purpose of establishing whether the individual may be, or may have been, infected with human coronavirus with pandemic potential'.<sup>29</sup> The second determination, registered on 2 April 2020, added Nauru to the list of prescribed countries in the first determination.<sup>30</sup>

#### *Exemption from disallowance*

2.11 While they are subject to general tabling and sunseting requirements, these entry and exit requirement determinations are not subject to disallowance by the Parliament and therefore are not subject to effective parliamentary oversight.<sup>31</sup> The explanatory memorandum to the Biosecurity Bill 2014 justifies the exemption of entry and exit requirements from disallowance on the same basis as the exemption of the listed human disease determinations,<sup>32</sup> namely that the decision to determine such requirements is 'a technically and scientifically based decision making process

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22 *Biosecurity Act 2015*, paragraph 44(6)(b).

23 *Biosecurity Act 2015*, paragraph 45(6)(c).

24 *Biosecurity Act 2015*, paragraphs 44(6)(e) and 45(6)(h).

25 *Biosecurity Act 2015*, section 46.

26 *Biosecurity Act 2015*, subsection 60(2). The two other circumstances prescribed by subsection 60(2) in which an order may be imposed are where the biosecurity officer is satisfied that the individual has one or more signs or symptoms of a listed human disease, or has been exposed to a listed human disease or another individual who has one or more signs or symptoms of a listed human disease.

27 Biosecurity (Exit Requirements) Determination 2020 [F2020L00323]; Biosecurity (Exit Requirements) Amendment (Nauru) Determination 2020 [F2020L00388].

28 Biosecurity (Exit Requirements) Determination 2020 [F2020L00323].

29 Biosecurity (Exit Requirements) Determination 2020 [F2020L00323], subsection 4(2).

30 Biosecurity (Exit Requirements) Amendment (Nauru) Determination 2020 [F2020L00388].

31 *Biosecurity Act 2015*, subsections 44(3) and 45(3).

32 Discussed above at paragraph 2.7.

incorporating whether the human biosecurity risk is able to be satisfactorily managed'.<sup>33</sup> It further states:

Subjecting these determinations to disallowance could undermine the technically and scientifically based decision making process and frustrate risk management processes. In addition, disallowance of a determination made under this clause could lead to inadequate management of risks to human health.<sup>34</sup>

### ***Human health response zone determinations***

2.12 Section 113 of the Biosecurity Act empowers the Director of Human Biosecurity to determine that a specified area within a state or territory is a 'human health response zone', and to specify certain requirements, where the Director is satisfied that it is necessary to do so for the purposes of preventing or reducing the risk of, a listed human disease emerging, establishing itself or spreading in Australian territory or part of an Australian territory.<sup>35</sup> Where a human health response zone is declared, individuals entering or leaving the zone can be subject to specified requirements, and specified classes of individuals can be excluded from the zone, for up to three months.<sup>36</sup>

2.13 Between 1 January and 31 July 2020 the Director of Human Biosecurity made four primary human health response zone determinations in response to the COVID-19 pandemic,<sup>37</sup> prescribing the following areas:

- Swissotel Sydney in New South Wales;<sup>38</sup>
- Howard Springs Accommodation Village in the Northern Territory;<sup>39</sup>

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33 Biosecurity Bill 2014, explanatory memorandum, p. 100.

34 Biosecurity Bill 2014, explanatory memorandum, p. 100.

35 *Biosecurity Act 2015*, subsections 113(1) and (4).

36 *Biosecurity Act 2015*, subsection 113(3).

37 Biosecurity (Human Health Response Zone) (Howard Springs Accommodation Village) Determination 2020 [F2020L00107]; Biosecurity (Human Health Response Zone) (Royal Australian Air Force Base Learmonth) Determination 2020 [F2020L00086]; Biosecurity (Human Health Response Zone) (North West Point Immigration Detention Centre) Determination 2020 [F2020L00087]; Biosecurity (Human Health Response Zone) (Swissotel Sydney) Determination 2020 [F2020L00313]. The Director of Human Biosecurity also made two amendment determinations to repeal the primary determinations: Biosecurity Repeal (Human Health Response Zones) Determination 2020 [F2020L00270]; Biosecurity Repeal (Human Health Response Zone) (Swissotel Sydney) Determination 2020 [F2020L00510].

38 Biosecurity (Human Health Response Zone) (Swissotel Sydney) Determination 2020 [F2020L00313], subsequently repealed by the Biosecurity Repeal (Human Health Response Zone) (Swissotel Sydney) Determination 2020 [F2020L00510].

- North West Point Immigration Detention Centre, Christmas Island;<sup>40</sup> and
- Royal Australian Air Force Base Learmonth, Western Australia.<sup>41</sup>

2.14 The determinations also specified certain classes of individuals who could not enter the zone, and imposed requirements for certain individuals leaving the zone. For example, the determination relating to the Swissotel Sydney required individuals not to enter the zone unless they were in a prescribed category of exemption.<sup>42</sup> It also required individuals leaving the zone to communicate their intention to leave to prior to leaving.<sup>43</sup>

#### *Exemption from disallowance*

2.15 While they are subject to general tabling and sunseting requirements, human health response zone determinations are exempt from disallowance by the Parliament and therefore are not subject to effective parliamentary oversight.<sup>44</sup> The explanatory memorandum to the Biosecurity Bill 2014 justifies this exemption on the same basis as other non-disallowable legislative instruments relating to human biosecurity emergencies, namely that it could undermine technical and scientific based decision making and risk management processes.<sup>45</sup>

#### ***Human biosecurity emergency declarations***

2.16 Section 475 of the Biosecurity Act provides that the Governor-General may, by legislative instrument, declare that a human biosecurity emergency exists if the Health Minister is satisfied that:

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- 39 Biosecurity (Human Health Response Zone) (Howard Springs Accommodation Village) Determination 2020 [F2020L00107], subsequently repealed by the Biosecurity Repeal (Human Health Response Zones) Determination 2020 [F2020L00270].
- 40 Biosecurity (Human Health Response Zone) (North West Point Immigration Detention Centre) Determination 2020 [F2020L00087], subsequently repealed by the Biosecurity Repeal (Human Health Response Zones) Determination 2020 [F2020L00270].
- 41 Biosecurity (Human Health Response Zone) (Royal Australian Air Force Base Learmonth) Determination 2020 [F2020L00086], subsequently repealed by the Biosecurity Repeal (Human Health Response Zones) Determination 2020 [F2020L00270].
- 42 Biosecurity Repeal (Human Health Response Zone) (Swissotel Sydney) Determination 2020 [F2020L00510], section 6. Categories of exemption included individuals accompanying others who were children or an 'incapable person', New South Wales police, biosecurity officers and individuals given authority by the person with operational control over the zone.
- 43 Biosecurity Repeal (Human Health Response Zone) (Swissotel Sydney) Determination 2020 [F2020L00510], section 7.
- 44 *Biosecurity Act 2015*, subsection 113(7).
- 45 Biosecurity Bill 2014, explanatory memorandum, p. 124.

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- a human disease, which has been listed under section 42 of the Biosecurity Act, is posing a severe and immediate threat, or is causing harm, to human health on a nationally significant scale; and
  - the declaration is necessary to prevent or control the entry into, or emergence, establishment or spread of the listed human disease in Australian territory or part of Australian territory.

2.17 A human biosecurity emergency declaration remains in force for the human biosecurity emergency period, which must not be longer than three months.<sup>46</sup> However, the Governor-General may, by legislative instrument, vary the human biosecurity emergency period to extend it for up to three months<sup>47</sup>. There is no limit on the number of times a human biosecurity emergency period may be extended,<sup>48</sup> nor is there any requirement for the Governor-General or the Health Minister to inform Parliament of an intention to extend the period, or provide a justification for the extension.

2.18 The human biosecurity emergency declaration has significance beyond the terms of section 475 of the Biosecurity Act. Of particular note are the Health Minister's powers to determine emergency requirements and give directions under sections 477 and 478 of the Act,<sup>49</sup> which may only be exercised during a human biosecurity emergency period.<sup>50</sup> In addition, the duration of some of the measures implemented by delegated legislation made in response to COVID-19 has been tied to the duration of the human biosecurity emergency.<sup>51</sup>

#### *Exemption from disallowance*

2.19 While they are subject to general tabling and sunseting requirements, human biosecurity emergency declarations and extensions are exempt from disallowance by the Parliament and therefore are not subject to effective parliamentary oversight.<sup>52</sup> There is also no specific requirement to notify the Parliament when a human biosecurity emergency has been declared or extended, beyond the general tabling and registration requirements which apply to all legislative instruments. The explanatory memorandum to the Biosecurity Bill 2014 noted that the exemption of human biosecurity emergency declarations from disallowance is necessary as:

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46 *Biosecurity Act 2015*, subsection 475(4).

47 *Biosecurity Act 2015*, subsection 476(1).

48 *Biosecurity Act 2015*, subsection 476(3).

49 These are considered further at paragraphs 2.24 to 2.30.

50 *Biosecurity Act 2015*, subsections 477(5) and (6).

51 See paragraphs 2.21 to 2.23 below.

52 *Biosecurity Act 2015*, subsections 475(2) and 476(3).

...the decision to declare a human biosecurity emergency should be scientifically based and made in accordance with an assessment of the relevant human biosecurity risks. If an emergency declaration was disallowed, nationally significant human biosecurity risks might go unmanaged and the Commonwealth would be unable to take the fast and urgent action necessary to manage a threat or harm to Australia's human health.<sup>53</sup>

2.20 A similar rationale applies to exempting extensions of biosecurity emergency declarations from disallowance.<sup>54</sup>

*Use in response to COVID-19*

2.21 On 18 March 2020, the Governor-General declared that a human biosecurity emergency existed regarding the COVID-19 pandemic.<sup>55</sup> The response to the COVID-19 pandemic marked the first time that a human biosecurity emergency declaration has been made under section 475 of the Biosecurity Act. The human biosecurity emergency declaration specified that the human biosecurity period would end on 17 June 2020.

2.22 On 14 May 2020, the Governor-General extended the human biosecurity emergency period for a further three months until 17 September 2020.<sup>56</sup> The human biosecurity emergency period was subsequently extended until 17 December 2020.<sup>57</sup> There is no limit on how long the emergency period may be extended for in the future.

2.23 As noted above, the human biosecurity emergency declaration has triggered the exercise of, and set the duration of, several significant measures which the government has implemented in response to COVID-19 in delegated legislation.

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53 Biosecurity Bill 2014, explanatory memorandum, pp. 292-293.

54 Biosecurity Bill 2014, explanatory memorandum, p. 293.

55 See Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020 [F2020L00266]. On 21 January 2020, human coronavirus with pandemic potential (COVID-19) was specified as a listed human disease under section 42 of the *Biosecurity Act 2015*. See Biosecurity (Listed Human Diseases) Amendment Determination 2020 [F2020L00037].

56 Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension) Instrument 2020 [F2020L00574].

57 Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 2) Instrument 2020 [F2020L01129].

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These include determinations of emergency requirements which may override any Australian law, discussed immediately below.<sup>58</sup>

### ***Human biosecurity emergency requirements and directions***

2.24 Sections 477 and 478 of the Biosecurity Act empower the Health Minister to determine any requirements or give any directions during a human biosecurity emergency period, where the minister is satisfied that the requirement or direction is necessary to:

- prevent or control the entry, emergence, establishment or spread of the listed human disease into Australian territory or part of Australian territory;<sup>59</sup>
- prevent or control the spread of the listed human disease to another country;<sup>60</sup> or
- give effect to a recommendation made by the World Health Organization in relation to a listed human disease.<sup>61</sup>

2.25 Significantly, the Biosecurity Act provides that such emergency requirements and directions have effect despite 'any provision of any other Australian law' and may override the operation of primary legislation.<sup>62</sup> Failure to comply with emergency requirements or with a ministerial direction attracts a custodial penalty of up to five years' imprisonment or a fine of 300 penalty units (\$63,000), or both.<sup>63</sup>

2.26 Emergency requirements and directions cease to have effect at the end of the human biosecurity emergency period, unless they are revoked earlier.<sup>64</sup> While the Health Minister must be satisfied that measures only apply 'as long as is necessary', the human biosecurity emergency period may be extended indefinitely and, as such, it appears that emergency requirements and directions may also continue in force indefinitely.

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58 Instruments made in response to COVID-19 under other primary Acts have also been tied to the biosecurity emergency declaration and remain in force for the duration of the emergency declaration. See, for example, Customs (Prohibited Exports) Amendment (COVID-19 Human Biosecurity Emergency) Regulations 2020 [F2020L00343] and the discussion on duration of emergency instruments in Chapter 6 of this report.

59 *Biosecurity Act 2015*, subparagraphs 477(1)(a)(i)-(ii) and 478(1)(a)(i)-(ii).

60 *Biosecurity Act 2015*, paragraphs 477(1)(b) and 478(1)(b).

61 *Biosecurity Act 2015*, paragraphs 477(1)(c) and 478(1)(c).

62 *Biosecurity Act 2015*, subsections 477(5) and 478(4).

63 *Biosecurity Act 2015*, section 479.

64 *Biosecurity Act 2015*, subsection 477(7).

### *Exemption from disallowance*

2.27 While they are subject to general tabling and sunseting requirements, human biosecurity emergency requirement determinations made under section 477 are exempt from disallowance by the Parliament and therefore are not subject to effective parliamentary oversight.<sup>65</sup> Human biosecurity emergency directions under section 478 are also not subject to tabling or sunseting requirements, nor are they subject to disallowance.

2.28 The explanatory memorandum to the Biosecurity Bill 2014 noted that the exemption of human biosecurity emergency requirement determinations from disallowance is necessary as:

...the decision to determine a requirement should be made in accordance with an assessment of the relevant human health risks. If a requirement was disallowed, nationally significant human health risks might go unmanaged and the Commonwealth would be unable to take the fast and urgent action necessary to manage a threat or harm to Australia's human health.<sup>66</sup>

### *Use in response to COVID-19*

2.29 The response to the COVID-19 pandemic was the first time the Health Minister has exercised powers to determine emergency requirements during a human biosecurity emergency since the enactment of the Biosecurity Act.

2.30 Between 1 January and 31 July 2020, the executive made 16 legislative instruments pursuant to subsection 477(1) of the Biosecurity Act to determine certain emergency requirements to prevent or control the spread of COVID-19. These legislative instruments addressed a range of matters, including:

- overseas travel bans for Australian citizens and permanent residents;<sup>67</sup>
- restrictions on international cruise ships from entering Australian ports;<sup>68</sup>
- domestic travel bans preventing a person from entering designated remote communities;<sup>69</sup>

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65 *Biosecurity Act 2015*, subsection 477(2).

66 Biosecurity Bill 2014, explanatory memorandum, p. 294.

67 See, for example, Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020 [F2020L00306].

68 See, for example, Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements) Determination 2020 [F2020L00267].

69 See, for example, Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Determination 2020 [F2020L00324].

- closure of retail outlets;<sup>70</sup>
- prohibitions on the practice of price gouging of prescribed essential goods;<sup>71</sup> and
- privacy and contact tracing.<sup>72</sup>

***Parliamentary scrutiny of the delegated legislation making powers in the Biosecurity Act<sup>73</sup>***

2.31 The Biosecurity Bill 2014 was introduced in the House of Representatives on 27 November 2014.<sup>74</sup> Although the bill was before the House of Representatives for six sitting days and before the Senate for 18 sitting days, the human biosecurity emergency provisions were largely ignored in parliamentary consideration of the bill. The following section outlines the parliamentary consideration of the Biosecurity Bill 2014 at the time it was before the Parliament.

*Consideration in the chambers*

2.32 In his second reading speech, the Minister for Agriculture noted that the human biosecurity emergency powers 'will be seldom used', although it is 'important legislative powers are available to manage serious communicable diseases should

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70 See, for example, Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—Retail Outlets at International Airports) Determination 2020 [F2020L00344].

71 See, for example, Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Essential Goods) Determination 2020 [F2020L00355].

72 See, for example, Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—Public Health Contact Information) Determination 2020 [F2020L00480].

73 The committee is grateful to the Parliamentary Library for its research assistance in relation to this matter.

74 Biosecurity Bill 2012 (2012 Bill) was originally introduced on 28 November 2012 to replace the *Quarantine Act 1903*. As the 2012 Bill was not passed prior to the prorogation of the 43rd Parliament, it lapsed and was reintroduced in 2014, as the Biosecurity Bill 2014. Prior to the introduction of the bills, the Senate Standing Committee on Rural and Regional Affairs and Transport undertook a series of inquiries relating to biosecurity and quarantine arrangements for the importation of plant and animal products. See, for example, Senate Rural and Regional Affairs and Transport References Committee, [Inquiry into Australia's biosecurity and quarantine arrangements](#), 10 April 2012.

they occur'.<sup>75</sup> The minister did not address the exemption of delegated legislation made pursuant to the human biosecurity emergency provisions from disallowance.<sup>76</sup>

2.33 The Biosecurity Bill 2014 was introduced in the Senate on 10 February 2015, and it was debated over a period of four sitting days.<sup>77</sup> During committee of the whole, amendments were made to establish a statutory position of the Inspector-General of Biosecurity. During debate, no senators referred directly to the human biosecurity emergency provisions. However, one senator moved a second reading amendment relating to parliamentary oversight of the executive law-making powers in the bill:

The Senate calls on the Government to review the biosecurity framework to provide that biosecurity policy determinations are subject to disallowance and therefore Parliamentary scrutiny.<sup>78</sup>

2.34 The amendment was unsuccessful and on 13 May 2015 the Biosecurity Bill 2014 was passed by the Senate on the voices with the support of the government and the opposition.<sup>79</sup> The Biosecurity Act received the Royal Assent on 16 June 2015.<sup>80</sup>

2.35 The powers available under the Biosecurity Act are extremely broad and have been used for a wide range of measures in response to the pandemic. These are discussed in more detail in Chapter 4.

#### *Consideration by parliamentary committees*

2.36 The Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee) made a number of comments in relation to the bill in its *Alert Digest 2 of*

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75 The Hon. Barnaby Joyce MP, Minister for Agriculture, [House of Representatives Hansard](#), 27 November 2014, p. 13429.

76 The second reading debate, second reading and third reading in the House of Representatives all occurred on 9 February 2015. During debate, two members referred directly to the human biosecurity emergency provisions, stating that the measures were reasonable and appropriate in emergency circumstances: Mr David Gillespie MP, [House of Representatives Hansard](#), 9 February 2015, pp. 96-98; Ms Jane Prentice MP, [House of Representatives Hansard](#), 9 February 2015, pp. 125-127.

77 The second reading debate occurred over three sitting days on 18 March, 11 May and 12 May 2015, and the bill was considered in committee of the whole on 12 May and 13 May 2015.

78 Senator Nick Xenophon, [Senate Hansard](#), 12 May 2015, p. 2811.

79 [Journals of the Senate](#), No. 92, 12 May 2015, p. 2542.

80 See Parliament of Australia, Biosecurity Bill 2014, <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr5379%22> (accessed 16 November 2020).

2015.<sup>81</sup> In particular, the Scrutiny of Bills committee raised concerns about the appropriateness of exempting a range of delegated legislation made under the bill from disallowance, including the provisions relating to human biosecurity emergencies. Ultimately, the committee drew its scrutiny concerns to the attention of the Senate and left the question of whether it was appropriate to exempt such instruments from disallowance to the Senate as a whole.<sup>82</sup> The Scrutiny of Bills committee's comments were tabled in the Senate 11 sitting days prior to the Senate's consideration of the bill.

2.37 The Biosecurity Bill 2014 was also referred to the Rural and Regional Affairs and Transport Legislation Committee for inquiry and report by 17 March 2015.<sup>83</sup> The committee received 29 written submissions, including one from the Department of Health, and held a public hearing on 11 February 2015.<sup>84</sup> No submitters or witnesses raised concerns about parliamentary oversight of delegated legislation made pursuant to the human biosecurity emergency provisions. Two of the committee's 14 recommendations were directed to the Department of Health and related to the human biosecurity provisions of the bill,<sup>85</sup> but neither recommendation related to human biosecurity emergencies, and none of the recommendations related to parliamentary oversight of delegated legislation made under the Act.

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## Delegated legislation making powers in Acts made in direct response to the COVID-19 pandemic

### Overview

2.38 To supplement the existing human biosecurity emergency framework the Commonwealth Parliament had passed 16 Acts by 31 October 2020. These Acts primarily address the health and economic impacts of COVID-19.<sup>86</sup>

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- 81 Senate Standing Committee for the Scrutiny of Bills, [Alert Digest No. 2 of 2015](#), March 2015, pp. 11-26.
- 82 Senate Standing Committee for the Scrutiny of Bills, [Alert Digest No. 2 of 2015](#), March 2015, p. 12.
- 83 [Journals of the Senate](#), 27 November 2014, p. 1891.
- 84 Senate Standing Committee on Rural and Regional Affairs and Transport, [Biosecurity Bill 2014 \[Provisions\]](#), 17 March 2015, p. 59.
- 85 Senate Standing Committee on Rural and Regional Affairs and Transport, [Biosecurity Bill 2014 \[Provisions\]](#), 17 March 2015, pp. vii-viii.
- 86 The primary legislation made in direct response to COVID-19 addresses a broad range of subject matters including: economic response measures; health and aged care; social services; employment; privacy and contact tracing; changes to business practice and regulation; additional appropriations; and consequential and administrative amendments to primary legislation. See Appendix 4 for a full list of Acts passed in response to COVID-19 to 31 October 2020.

2.39 The Acts contain several provisions which confer powers on the executive branch of government to make delegated legislation in response to the COVID-19 pandemic. Some provisions allow for the inclusion of significant matters in delegated legislation, enable delegated legislation to modify the operation of primary legislation (Henry VIII clauses) or limit parliamentary oversight of delegated legislation. Of particular relevance to this inquiry, the COVID-19 response Acts allow for legislative instruments to be made to:

- exempt classes of persons from, or modify the operation of, provisions of the *Corporations Act 2001* and Corporations Regulations 2001 for up to six months;<sup>87</sup>
- modify provisions of the social security law relating to the qualification of persons for social security payments and the rate of social security payments;<sup>88</sup>
- prescribe circumstances in which the Commonwealth may pay money from a \$1 billion fund for assistance for severely affected regions;<sup>89</sup>
- defer the sunseting dates for Acts and legislative instruments which are scheduled to sunset on or before 15 October 2020;<sup>90</sup>
- allocate additional public funds to entities in relation to the COVID-19 economic response;<sup>91</sup> and
- set out the details of the operation of a guarantee scheme that could result in the Commonwealth incurring liabilities of up to \$20 billion.<sup>92</sup>

2.40 Additionally, certain provisions of the COVID-19 response Acts provide for the making of notifiable instruments, which are not subject to the tabling, disallowance or sunseting requirements imposed on legislative instruments.<sup>93</sup> For example, certain provisions allow for notifiable instruments to be made which:

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87 *Coronavirus Economic Response Package Omnibus Act 2020*, schedule 8, item 1.

88 *Coronavirus Economic Response Package Omnibus Act 2020*, schedule 11, item 40A.

89 *Assistance for Severely Affected Regions (Special Appropriation) (Coronavirus Economic Response Package) Act 2020*, section 7.

90 *Coronavirus Economic Response Package Omnibus Act 2020*, schedule 16, subitem 1(2).

91 *Appropriation (Coronavirus Economic Response Package) Act (No. 1) 2019-2020*, section 10; *Appropriation (Coronavirus Economic Response Package) Act (No. 2) 2019-2020*, section 12. Instruments made under these provisions are not subject to disallowance.

92 *Guarantee of Lending to Small and Medium Enterprises (Coronavirus Economic Response Package) Act 2020*, sections 4 and 5.

93 *Legislation Act 2003*, section 7. The impact of classifying delegated legislation as a notifiable instrument on parliamentary oversight is discussed further in Chapter 5.

- credit additional amounts to the Structured Finance Support (Coronavirus Economic Response) Fund Special Account;<sup>94</sup> and
- determine the dates that contact tracing via the COVIDSafe app may remain in use and specifies the particular government agencies which are data store administrators responsible for the collection and storage of information via the COVIDSafe app.<sup>95</sup>

### ***Parliamentary scrutiny of COVID-19 response Acts***

#### *Consideration of COVID-19 related bills in the chambers*

2.41 In the circumstances of the evolving COVID-19 pandemic, the bills drafted in direct response to the pandemic received very little consideration in either chamber before they were agreed to. For example, a package of eight bills intended to respond to the economic impact of COVID-19 was introduced into, and passed, both Houses on 23 March 2020. A further two bills were introduced and passed by both Houses on 8 April 2020.<sup>96</sup> Due to these expedited timeframes, there were very limited opportunities for senators and members to engage closely with particular provisions of these bills, including provisions which empowered the executive to make delegated legislation for the purposes summarised above at paragraphs 2.39 and 2.40.

#### *Consideration of COVID-19 related bills by parliamentary committees*

2.42 The Scrutiny of Bills committee continued to meet while the parliamentary sittings were adjourned to ensure appropriate oversight of primary legislation, particularly COVID-19 related legislation.<sup>97</sup>

2.43 The Scrutiny of Bills committee raised scrutiny concerns and sought responses from the relevant minister or drew its concerns to the attention of the Senate in relation to 11 COVID-19 response bills that received the Royal Assent by 31 October 2020. There were only four government bills made in response to COVID-19 during this period which did not raise any concerns for the committee.<sup>98</sup>

2.44 The committee raised particular concerns regarding the delegation of legislative power, including:

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94 *Structured Finance Support (Coronavirus Economic Response Package) Act 2020*, section 13.

95 *Privacy Amendment (Public Health Contact Information) Act 2020*, subsections 94Y(1) and 94Z(1).

96 See Appendix 4 for a full list of Acts passed in response to COVID-19 to 31 October 2020.

97 Senate Standing Committee for the Scrutiny of Bills, [Scrutiny News No. 4 of 2020](#), 3 April 2020.

98 Great Barrier Reef Marine Park Amendment (Coronavirus Economic Response Package) Bill 2020; Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Bill 2020.

- the inclusion of Henry VIII clauses to modify primary legislation via delegated legislation;<sup>99</sup>
- the use of framework legislation which contains only the broad principles of a legislative scheme and relies heavily on delegated legislation to determine the scope and operation of the scheme;<sup>100</sup>
- provisions which allow for the inclusion of significant matters, such as the circumstances in which significant amounts of public money may be spent, in delegated legislation;<sup>101</sup> and
- provisions which allow for delegated legislation to make exemptions to the operation of primary legislation.<sup>102</sup>

2.45 Due to the quick passage of the bills, all 11 bills on which the Scrutiny of Bills committee had comments passed Parliament prior to the committee tabling its initial comments.

2.46 Similarly, the Parliamentary Joint Committee on Human Rights (PJCHR) resolved to meet regularly outside of parliamentary sittings to scrutinise legislation, with particular emphasis on scrutinising laws relating to the COVID-19 response.<sup>103</sup> On 29 April 2020, the PJCHR tabled a special report on COVID-19 primary and delegated legislation.<sup>104</sup> In addition, the PJCHR resolved to reframe its subsequent reports to highlight its concerns regarding COVID-19 related legislation and has published a full list of COVID-19 related primary and delegated legislation on its webpage.<sup>105</sup>

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99 Senate Standing Committee for the Scrutiny of Bill, [Scrutiny Digest 5 of 2020](#), pp. 13-14.

100 Senate Standing Committee for the Scrutiny of Bill, [Scrutiny Digest 5 of 2020](#), pp. 17-18; Senate Standing Committee for the Scrutiny of Bill, [Scrutiny Digest 6 of 2020](#), pp. 5-6.

101 See, for example, Senate Standing Committee for the Scrutiny of Bill, [Scrutiny Digest 5 of 2020](#), pp. 9-10.

102 See, for example, Senate Standing Committee for the Scrutiny of Bill, [Scrutiny Digest 6 of 2020](#), pp. 9-10.

103 Parliamentary Joint Committee on Human Rights, [Human Rights committee to scrutinise COVID-19 related legislation](#), *Media Release*, 25 April 2020.

104 Parliamentary Joint Committee on Human Rights, [Report 5 of 2020: Human rights scrutiny report of COVID-19 legislation](#), 29 April 2020.

105 Parliamentary Joint Committee on Human Rights, *COVID-19 Legislative Scrutiny*, [www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/COVID19\\_Legislative\\_Scrutiny](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/COVID19_Legislative_Scrutiny) (accessed 25 November 2020).

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2.47 In addition to technical legislative scrutiny, the Senate resolved to establish the COVID-19 Select Committee (COVID-19 committee) on 8 April 2020.<sup>106</sup> The work of the COVID-19 committee is considered in further detail in Chapter 7.<sup>107</sup> In summary, the COVID-19 committee's terms of reference are broadly drafted to empower it to consider the Australian government's response to the COVID-19 pandemic, and any related matters. Consequently, and understandably, hearings and submissions to date have focused on the policy impacts of the measures implemented by the government, rather than the level of parliamentary oversight over the individual measures.

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### **Delegated legislation made under other Acts**

2.48 For the purposes of this report, the committee has focused its analysis on the delegated legislation making powers in the Biosecurity Act and the COVID-19 related primary legislation. However, delegated legislation was also made under a range of other Commonwealth primary legislation in response to COVID-19. This delegated legislation is discussed in greater detail in subsequent chapters as it relates to exemptions from parliamentary oversight.<sup>108</sup>

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### **Approaches in other jurisdictions**

2.49 Emergency responses to COVID-19 varied across different jurisdictions. The following section outlines key features of the emergency legislative frameworks relied on in other jurisdictions to respond to COVID-19.

#### ***Delegated legislation-making powers in emergency legislation***

2.50 In addition to their existing public health emergency legislation,<sup>109</sup> all Australian states and territories, as well as New Zealand, passed additional primary

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106 [Journals of the Senate](#), No. 48, 8 April 2020, pp. 1580-1584.

107 See Chapter 7 of this report, paragraphs 7.34 to 7.35.

108 Appendix 3 contains a list of delegated legislation made in response to COVID-19 in the period 1 January 2020 to 31 July 2020.

109 *Public Health Act 2010* (NSW); *Public Health Act 2005* (Qld); *South Australian Public Health Act 2011* (SA); *Public Health Act 1997* (Tas); *Public Health and Wellbeing Act 2008* (Vic); *Public Health Act 2016* (WA); *Public Health Act 1997* (ACT); *Notifiable Diseases Act 1981* (NT); *Civil Contingencies Act 2004* (UK); *Epidemic Preparedness Act 2004* (NZ).

legislation in response to COVID-19.<sup>110</sup> These COVID-19 response Acts provided for a range of delegated legislation making powers, including providing for delegated legislation to override or modify primary legislation. Generally, these modification powers are similar to the provisions of sections 477 and 478 of the Biosecurity Act.

2.51 Parliaments in other jurisdictions mandated a range of different safeguards to retain oversight of the exercise of these delegated legislation making powers. For example, in NSW broad Henry VIII powers (enabling delegated legislation to modify the operation of primary legislation) may only be exercised if the NSW Parliament is not currently sitting and is not likely to sit within two weeks after the day on which the regulations are made.<sup>111</sup> In Victoria, delegated legislation made pursuant to the modification powers of the *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic) are time-limited to a period of six months,<sup>112</sup> and are subject to disallowance.<sup>113</sup>

2.52 Similarly, in New Zealand the *COVID-19 Public Health Response Act 2020* (NZ) empowers the Health Minister and Director General of Health to make COVID-19 orders for a range of purposes, including requiring people to stay in place, to refrain from travelling, to be isolated or quarantined.<sup>114</sup> These powers are similar to those conferred on the Health Minister by the Biosecurity Act to determine requirements and directions. However, unlike the approach in the Commonwealth, the New Zealand legislation provides that COVID-19 orders are subject to disallowance,<sup>115</sup> and, further, are automatically revoked if they are not approved by the New Zealand Parliament within a prescribed period.<sup>116</sup>

2.53 Compared to the Commonwealth, it appears that other jurisdictions including the states and territories and New Zealand have taken a more limited approach when granting powers to make delegated legislation in response to COVID-19.

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110 See, for example, *COVID-19 Emergency Response Act 2020* (ACT); *COVID-19 Legislation Amendment (Emergency Measures) Act 2020* (NSW); *Emergency Legislation Amendment Act 2020* (NT); *COVID-19 Emergency Response Act 2020* (Qld); *COVID-19 Emergency Response Act 2020* (SA); *COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020* (Tas); *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic); *Emergency Management (COVID-19 Response) Act 2020* (WA); *COVID-19 Public Health Response Act 2020* (NZ).

111 See, for example, *Criminal Procedure Act 1986* (NSW), paragraph 366(2)(a), inserted by item 1, Schedule 1 to the *COVID-19 Legislation Amendment (Emergency Measures) Act 2020 No 1* (NSW).

112 *COVID-19 Omnibus (Emergency Measures) Act 2020*, sections 11 and 22.

113 *COVID-19 Omnibus (Emergency Measures) Act 2020*, sections 10 and 21.

114 *COVID-19 Public Health Response Act 2020* (NZ), section 11.

115 *COVID-19 Public Health Response Act 2020* (NZ), section 17.

116 *COVID-19 Public Health Response Act 2020* (NZ), section 16.

## ***Parliamentary scrutiny of primary legislation made in response to the COVID-19 pandemic***

### *Consideration of COVID-19 related bills in parliamentary chambers*

2.54 Noting the need to respond quickly to the unfolding emergency, COVID-19 response Acts also received assent exceptionally quickly in other jurisdictions, with Acts typically receiving the Royal Assent one to six days after introduction.<sup>117</sup>

2.55 While parliamentary consideration was very quick, parliaments in some jurisdictions amended the proposed delegated legislation making provisions in COVID-19 response bills. For example, in the UK the Coronavirus Bill 2020 was amended to require a government minister to arrange a motion every six months debating whether the temporary provisions of the Act should expire,<sup>118</sup> following concerns raised in the House of Commons and by the House of Lords Delegated Powers and Regulatory Reform Committee regarding the length of time the extraordinary powers were proposed to remain in force.<sup>119</sup> Additionally, the bill was amended to require the government to publish a status report, to be debated in both Houses, if the Act is substantively operating after one year.<sup>120</sup> The UK government also undertook to publish a table setting out the status of provisions in the Act which may be repealed when no longer required.<sup>121</sup>

2.56 In New Zealand, the COVID-19 Public Health Response Bill was amended in response to concerns raised in debate,<sup>122</sup> requiring the Parliament to consider whether the Act should be renewed every 90 days.<sup>123</sup>

### *Consideration of COVID-19 related bills by parliamentary committees*

2.57 Similar to the Commonwealth, the rapid passing of primary legislation in all jurisdictions significantly inhibited the ability of parliamentary committees to make comments before the COVID-19 response bills were made into law. Additionally,

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117 For further detail in relation to the period in which these COVID-19 response Acts were passed in comparable jurisdictions see Appendix 5.

118 *Coronavirus Act 2020* (UK), section 98.

119 See House of Lords Select Committee on the Constitution, [Coronavirus bill – Fourth report of session 2019-21 – HL Paper 44](#), (24 March 2020).

120 *Coronavirus Act 2020* (UK), section 99.

121 See Department of Health and Social Care, *Guidance: Coronavirus Act 2020: status table*, 7 May 2020, [www.gov.uk/government/publications/coronavirus-act-2020-status/coronavirus-act-2020-status-table](http://www.gov.uk/government/publications/coronavirus-act-2020-status/coronavirus-act-2020-status-table) (accessed 25 November 2020).

122 Parliament of New Zealand, [Hansard – COVID-19 Public Health Response Bill – Third reading](#), 13 May 2020.

123 *COVID-19 Public Health Response Act 2020* (NZ), subsection 3(2).

suspended or reduced parliamentary sittings in most jurisdictions impacted on the ability of committees to perform post-legislative scrutiny.

2.58 Most state and territory parliamentary committees were unable to scrutinise or table reports on the COVID-19 response bills prior to them receiving assent. The Australian Capital Territory (ACT) is a notable outlier to this trend. The ACT's Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) engaged with the Attorney-General on a draft of the *COVID-19 Emergency Response Legislation Amendment Act 2020* (ACT), and the final bill introduced into the ACT Legislative Assembly took those comments into account.<sup>124</sup>

2.59 In New Zealand the urgency with which the *COVID-19 Public Health Response Act 2020* (NZ) was passed meant that there was no opportunity for the bill to be subject to parliamentary committee scrutiny prior to enactment. However, acknowledging this gap in oversight, the New Zealand Parliament referred the Act to the Finance and Expenditure Committee for consideration and review on the day after it received the Royal Assent.<sup>125</sup> The subsequent inquiry received 1,342 written submissions and heard oral evidence from 19 witnesses.<sup>126</sup>

2.60 In addition, the New Zealand Parliament established the Epidemic Response Committee on 25 March 2020, to consider and report to the Parliament on matters relating to the New Zealand government's management of the COVID-19 pandemic. The primary purpose of the committee was to facilitate scrutiny whilst Parliament was not meeting; however, unlike the Commonwealth's COVID-19 committee, the committee also specifically examined and made recommendations in relation to two COVID-19 related bills.<sup>127</sup>

2.61 UK parliamentary committees undertook pre- and post-legislative scrutiny of the Coronavirus Bill 2020 and the subsequent *Coronavirus Act 2020* (UK). For example, the House of Lords Delegated Powers and Regulatory Reform Committee

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124 ACT Standing Committee on Justice and Community Safety (Legislative Scrutiny Role), *Scrutiny Report 42*, 19 May 2020, p. 1.

125 New Zealand Parliament, *Inquiry into the operation of the COVID-19 Public Health Response Act 2020*, 27 July 2020, [https://www.parliament.nz/en/pb/sc/business-before-committees/document/INQ\\_97823/inquiry-into-the-operation-of-the-covid-19-public-health#RelatedAnchor](https://www.parliament.nz/en/pb/sc/business-before-committees/document/INQ_97823/inquiry-into-the-operation-of-the-covid-19-public-health#RelatedAnchor) (accessed 25 November 2020).

126 New Zealand Parliament, *Inquiry into the operation of the COVID-19 Public Health Response Act 2020*, 27 July 2020, p. 4, [https://www.parliament.nz/en/pb/sc/reports/document/SCR\\_99623/inquiry-into-the-operation-of-the-covid-19-public-health](https://www.parliament.nz/en/pb/sc/reports/document/SCR_99623/inquiry-into-the-operation-of-the-covid-19-public-health) (accessed 25 November 2020).

127 New Zealand Parliament, *What was the Epidemic Response Committee?*, 1 March 2020, <https://www.parliament.nz/en/visit-and-learn/history-and-buildings/special-topics/epidemic-response-committee-covid-19-2020/what-was-the-epidemic-response-committee/> (accessed 25 November 2020). The committee received evidence about the bills and recommended amendments.

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was able to table a report on the Coronavirus Bill 2020 prior to it being considered in the House of Lords.<sup>128</sup> As outlined above, the government introduced new mechanisms into the bill in response to concerns raised by the committee and parliamentarians. The UK House of Lords Select Committee on the Constitution also subsequently published a report on the *Coronavirus Act 2020* (UK) after it had received the Royal Assent.<sup>129</sup>

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## Evidence before the committee

2.62 While much of the evidence received by the committee focused on the exemption of delegated legislation made in response to COVID-19 from parliamentary oversight, some submitters and witnesses also addressed the provisions in primary legislation which enabled such exemptions.

2.63 For example, the Scrutiny of Bills committee highlighted its concerns with regard to the COVID-19 response bills, noting that several of the bills included broad Henry VIII powers to amend or modify a number of Acts, including the *Corporations Act 2001* and social security legislation. The Scrutiny of Bills committee noted:

The committee's scrutiny concerns in this instance are heightened by the quick passage of the bills and the lack of limitations and safeguards around the exercise of the power. The committee considers that this has deprived Parliament of a crucial opportunity to have oversight of legislative changes being made during a period of emergency. As such, the committee has consistently recommended that where the Parliament is sitting, changes to, or exemptions from, primary legislation should be made by introducing a bill for consideration by the Parliament, rather than relying on the use of a Henry VIII clause.<sup>130</sup>

2.64 The Scrutiny of Bills committee invited this committee to consider delegated legislation made pursuant to Henry VIII clauses within the scope of its inquiry, noting their ability to undermine parliamentary oversight.<sup>131</sup>

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128 House of Lords Select Committee on the Constitution, [Coronavirus bill – Fourth report of session 2019-21 – HL Paper 44](#), (24 March 2020).

129 The committee's concerns related to the appropriateness of the Act's fast-tracking through both Houses, the sunset clause, the use of delegated powers including broad and Henry VIII powers, and the Act's parliamentary oversight, legal accountability and impact on the functioning of courts and civil liberties. The committee recommended that as a result of the fast-tracking the Government should stand prepared to consider amendments sooner than the six-month renewal vote as provisions may need modification and re-drafting. See House of Lords Select Committee on the Constitution, *Coronavirus bill – Fourth report of session 2019-21 – HL Paper 44*, (24 March 2020).

130 Senate Standing Committee for the Scrutiny of Bills, *Submission 4*, p. 4.

131 Senate Standing Committee for the Scrutiny of Bills, *Submission 4*, p. 4.

2.65 Further, the Centre for Public Integrity raised concerns that primary legislation made in response to COVID-19 has concentrated power in the hands of individual Commonwealth ministers.<sup>132</sup> The Centre cited examples such as Advance to the Finance Minister determinations under the *Appropriation Act (No. 5) 2019-2020* and *Appropriation Act (No. 6) 2019-2020* and the Treasurer's power to set rules in relation to the JobKeeper payment under the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020*.

2.66 More generally, a representative of the Institute of Public Affairs commented during the public hearing on 27 August 2020:

We've seen in 2020 huge regimes across the nation imposing draconian rules disregarding the parliamentary democratic process. I think that when all this is said and done there will be a lot to say and a lot to review about exactly what this emergency legislation looked like, what it enabled the government to do and what the role of parliament is in administering and responding to these kinds of emergencies.<sup>133</sup>

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### **Committee view**

2.67 The committee considers that the legislative response to the COVID-19 pandemic has raised important questions as to the adequacy of parliamentary oversight of emergency legislation. Whilst the committee's concerns largely focus on delegated legislation, the committee considers that the lack of parliamentary scrutiny of the enabling primary legislation may contribute to the exemption of delegated legislation from parliamentary oversight.

2.68 Primary legislation made in response to times of emergency should be subject to rigorous parliamentary scrutiny, particularly noting the extraordinary law-making powers that may be conferred on the executive. These powers may include the ability to override or modify primary legislation or limit personal rights and liberties. Such consideration ensures that Parliament may sufficiently safeguard the exercise of emergency powers by the executive in the future.

2.69 In light of these views, the committee has significant concerns with regard to the adequacy of parliamentary oversight that was afforded to both the Biosecurity Act and Acts made in direct response to the COVID-19 pandemic.

#### *Acts made in direct response to the COVID-19 pandemic*

2.70 The committee acknowledges the time pressures associated with the need to enact legislation in response to the COVID-19 pandemic. Nevertheless, the committee is concerned about the lack of parliamentary oversight afforded to the

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132 Centre for Public Integrity, *Submission 13*, p. 1.

133 Mr Morgan Begg, Institute for Public Affairs, *Committee Hansard*, 27 August 2020, p. 10.

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COVID-19 response bills, noting the gravity of the measures they contain, and, in particular, the delegated legislation making powers they conferred on the executive.

2.71 While the Scrutiny of Bills committee raised concerns about those powers,<sup>134</sup> the speed with which the bills were considered prevented any detailed parliamentary consideration of the appropriateness of those powers. The experiences in other jurisdictions indicate, however, that there is scope for greater parliamentary oversight of the delegated legislation making powers in emergency primary legislation within tight timeframes.

2.72 The lack of oversight of these enabling provisions is one of the factors that may have contributed to the exemption of delegated legislation made in response to COVID-19 from parliamentary oversight. These exemptions are considered in greater detail in Part II of this report.

### **Recommendation 1**

**2.73 The committee recommends that parliamentarians give adequate consideration to the appropriateness of exempting delegated legislation from parliamentary oversight mechanisms, such as disallowance, at the time the enabling provision is being considered by the Parliament, including by actively considering any comments made by the Senate Standing Committee for the Scrutiny of Bills in relation to such provisions, even in times of emergency.**

#### *Biosecurity Act*

2.74 The COVID-19 pandemic has highlighted the broad scope of powers that may be exercised by the executive during a human biosecurity emergency and raised questions about the appropriateness of existing exemptions of delegated legislation made under the Biosecurity Act from disallowance.

2.75 The committee is particularly concerned about the lack of parliamentary scrutiny afforded to the human biosecurity emergency powers in the Biosecurity Act when the bill was before the Parliament. In this regard, the committee notes that the government and opposition agreed to the passage of the bill through the Senate on the voices. The lack of attention given to these powers at the time is perhaps not surprising, noting that the bill and accompanying explanatory memorandum together exceeded 1000 pages, and primarily focused on non-human biosecurity matters.

2.76 Nevertheless, the COVID-19 pandemic has now demonstrated the significance of those powers, and the implications of their exclusion from disallowance and other forms of parliamentary oversight. The committee further considers these implications in Part II this report. However, noting that primary legislation falls outside the purview of this committee, the committee makes the recommendation below.

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134 See, for example, Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2020* (17 April 2020).

**Recommendation 2**

**2.77** The committee recommends that the Senate Standing Committee for the Scrutiny of Bills or another independent body or person conduct a review of the appropriateness of the delegation of legislative powers in the *Biosecurity Act 2015*, including the appropriateness of provisions which exempt delegated legislation made pursuant to these powers from parliamentary oversight.

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**Part II — Systemic factors contributing to  
the exemption of emergency delegated  
legislation from parliamentary oversight**

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# Chapter 3

## Alteration and cancellation of parliamentary sittings

### Overview

3.1 This chapter considers how the alteration and cancellation of parliamentary sittings contributes to reduced parliamentary oversight of delegated legislation made in times of emergency, and addresses:

- the alteration and cancellation of sittings of the Commonwealth Parliament during the COVID-19 pandemic;
- evidence before the committee regarding the impact of the cancellation of parliamentary sittings on parliamentary oversight of delegated legislation made in response to COVID-19; and
- the committee's view as to the appropriateness of the impact of the cancellation of parliamentary sittings on parliamentary oversight of delegated legislation made in times of emergencies.

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### Framework for determining parliamentary sittings

3.2 Sittings of Parliament are highly relevant to the oversight of delegated legislation because they enable several parliamentary processes including:

- tabling and debating of reports relevant to delegated legislation;<sup>1</sup>
- asking questions of the executive about the exercise of law-making powers delegated by the Parliament;
- introduction and debate of motions relating to delegated legislation, including disallowance motions; and
- establishment of, or referral of inquiries to, committees for the consideration of delegated legislation and related matters.<sup>2</sup>

3.3 Section 50 of the Commonwealth Constitution empowers both Houses of the Parliament to make rules and orders with respect to the 'order and conduct of its

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1 The standing orders of each House provide for the presentation of certain documents outside of parliamentary sittings: see, for example, House of Representatives standing order 247 and Senate standing order 38(7) regarding the out of sitting presentation and publication of committee reports. However, of course, these reports may not be debated until the Parliament next sits.

2 See, further, in relation to the importance of sittings of the Senate: Harry Evans and Rosemary Laing, eds, *Odgers' Australian Senate Practice*, 14th edition, Department of the Senate, 2016, p. 29.

business and proceedings either separately or jointly with the other House'. This broad power includes the ability for each House to set its own sitting pattern.

3.4 In practice, a proposed sitting calendar is drafted by the government. In the House of Representatives, the proposed program of sittings is then presented by the Leader of the House, who moves a motion for its adoption. In the Senate, the Manager of Government Business typically moves two motions—one to set the days of meeting, and another to set the days of estimates hearings and related arrangements. Occasionally, amendments to the proposed days of meeting may be moved, especially in the Senate.<sup>3</sup>

3.5 Amendments to the agreed program of sittings may also be moved throughout the year to extend, add or cancel sitting days, although in normal times this is uncommon. As the Senate controls its own meetings government proposals to vary the days of meetings must be agreed to separately in both Houses.

3.6 Just as the sitting of Parliament facilitates parliamentary oversight of delegated legislation, the cancellation of parliamentary sittings limits opportunities for parliamentary oversight to occur. Subject to some exceptions, this can effectively exempt delegated legislation from parliamentary oversight for the period in which Parliament does not sit. This is particularly important because legislative instruments generally commence the day after the instrument is registered on the Federal Register of Legislation and are therefore in force while the Parliament is not sitting and there is no possibility for a disallowance notice to be given in relation to the instrument.<sup>4</sup>

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## **Cancellation of parliamentary sittings during COVID-19**

### ***Disruptions to sittings of the Commonwealth Parliament***

3.7 The House of Representatives and the Senate first agreed to the 2020 program of sittings on 24 October and 14 November 2019 respectively.<sup>5</sup> Since then, the program of sittings has been varied four times in response to the COVID-19 pandemic.

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3 For example, in 2018, an amendment was moved (and agreed) to the proposed 2019 sitting calendar. See, [Journals of the Senate](#), No. 133, 29 November 2018, pp. 4317-4318.

4 *Legislation Act 2003*, section 12.

5 [Journals of the Senate](#), No. 27, 14 November 2019, pp. 850-851; [Votes and Proceedings](#), No. 27, 24 October 2019, p. 407.

3.8 First, on 23 March 2020, the Houses resolved to suspend sittings until 11 August 2020, and allow for future sittings in a different 'manner and form' than provided for in their standing orders.<sup>6</sup>

3.9 The Houses subsequently returned earlier than August to consider legislation relating to the economic response to COVID-19 on 8 April 2020 and again from 12 to 14 May 2020.

3.10 On 14 May 2020, motions were moved and agreed to in both Houses to set a revised program of sittings for the remainder of 2020,<sup>7</sup> although sitting days planned for 4 to 6 August and 10 to 13 August did not proceed.

3.11 As a consequence of the variations to the sitting calendar, as at 30 November 2020, the House of Representatives had sat on 18 days fewer than originally agreed for 2020, and the Senate had sat on 15 days fewer than originally agreed.<sup>8</sup>

3.12 The reduction in parliamentary sitting days increased the length of time between instruments being registered on the Federal Register of Legislation and commencing, and being tabled in Parliament and becoming eligible to be disallowed. For example, the cancellation of the proposed sittings on 4 to 6 and 10 to 13 August 2020 meant that senators and members first had an opportunity to initiate the disallowance procedure for COVID-19 related legislative instruments registered between 19 June and 21 August on 24 August 2020. In some instances, this was up to nine weeks after the instrument had commenced.

### ***Alteration and cancellation of sittings of Parliaments in other jurisdictions***

3.13 During the COVID-19 pandemic, parliaments in Australia and overseas have taken different approaches to balancing the need to meet with the need to mitigate the risk of transmission. In some instances, such approaches have reduced the Parliament's capacity to oversee emergency-related delegated legislation, particularly where they have included the cancellation of parliamentary sittings.

3.14 Most Australian state and territory parliaments altered their sitting patterns in some manner in response to the COVID-19 pandemic. In summary, it appears that some days of parliamentary sitting were cancelled in all states and territories with

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6 [Journals of the Senate](#), No. 47, 23 March 2020, p. 1562; [Votes and Proceedings](#), No. 51, 23 March 2020, p. 833.

7 [Journals of the Senate](#), No. 51, 14 May 2020, p. 1470; [Votes and Proceedings](#), No. 55, 14 May 2020, p. 895.

8 These figures were calculated by comparing the sitting pattern agreed to in 2019 with the total number of sitting days completed at the end of November 2020. Up to 30 November 2020, the House of Representatives was originally scheduled to sit on 69 days, but instead sat on 51 days. The Senate was originally scheduled to sit on 54 days, but instead sat on 39 days.

the exception of Western Australia and South Australia.<sup>9</sup> Accordingly, in these two states, a consistent level of parliamentary oversight was maintained both before and during the emergency period related to the COVID-19 pandemic.

3.15 Research conducted by the Parliamentary Library,<sup>10</sup> combined with evidence submitted to the inquiry by the Centre for Public Integrity,<sup>11</sup> indicates that the cancellation of 18 sittings days in the House of Representatives and 15 sittings days in the Senate was higher than the number of sitting days cancelled by the legislatures in Canada, France, Germany, New Zealand, Spain, the United Kingdom, and the United States of America, which ranged between zero and nine cancelled sitting days.

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## Evidence before the committee

### *Importance of parliamentary sittings during times of emergencies for parliamentary oversight of delegated legislation*

3.16 Submitters and witnesses highlighted the importance of parliamentary sittings as part of the effective oversight of delegated legislation during times of emergency, and in particular raised concerns about the cancellation of parliamentary sittings during the COVID-19 pandemic.<sup>12</sup>

3.17 The Public Interest Advocacy Centre considered that Parliament should continue to sit during times of emergency, noting that 'suspending Parliament for significant periods of times is not acceptable in a representative democracy'.<sup>13</sup> The Centre for Comparative Constitutional Studies agreed with this view, commenting that the cancellation of parliamentary sittings is an 'entirely unacceptable feature of

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9 See Nicholas Horne, *COVID-19 and parliament sittings (current as at 2 April 2020)*, Parliamentary Library Flag Post, 2 April 2020, [www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/FlagPost/2020/April/COVID-19\\_and\\_parliamentary\\_sittings](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2020/April/COVID-19_and_parliamentary_sittings), (accessed 21 October 2020).

10 See Nicholas Horne, *COVID-19 and parliamentary sittings (current as at 2 April 2020)*, Parliamentary Library Flag Post, 2 April 2020, [www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/FlagPost/2020/April/COVID-19\\_and\\_parliamentary\\_sittings](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2020/April/COVID-19_and_parliamentary_sittings), (accessed 21 October 2020).

11 Mx Han Aulby, The Centre for Public Integrity, answers to questions on notice, 27 August 2020 (received 10 September 2020).

12 See, for example, Centre for Comparative Constitutional Studies, *Submission 12*, p. 13; Professor Anne Twomey, *Submission 18*, p. 3; Law Council of Australia, *Submission 21*, p. 13; New South Wales Council for Civil Liberties, *Submission 22*, p. 6; Han Aulby, The Centre for Public Integrity, answers to questions on notice, 27 August 2020 (received 10 September 2020).

13 Public Interest Advocacy Centre, *Submission 10*, p. 6.

the Government's response to the current public health crisis'.<sup>14</sup> The New South Wales Council for Civil Liberties concurred, calling for Parliament to 'exercise its supervisory and scrutiny role to the maximum extent during these times of emergency'.<sup>15</sup>

3.18 Professor Anne Twomey considered the cancellation of parliamentary sittings during COVID-19 from a constitutional perspective. Professor Twomey explained that the legislative power afforded by section 51 of the Constitution is conferred on the Parliament and not the executive—it is the Parliament that delegates its legislative power to the executive for the making of delegated legislation. Professor Twomey considered therefore that Parliament has an obligation to 'retain control over its delegated legislative power and be in a position to supervise the exercise of delegated legislative powers in order to be effective in exercising that control'.<sup>16</sup>

3.19 Some submitters specifically considered the effect of the cancellation of sittings on the parliamentary oversight processes that sittings facilitate. For example, in relation to tabling, Ms Jacinta Dharmananda observed that:

[t]he Legislation Act requires that 'each registered legislative instrument' be tabled in each House of parliament. Instruments exempt from disallowance are not exempted from this tabling requirement. Tabling itself has scrutiny value.<sup>17</sup>

3.20 Professor Twomey considered the effect of the cancellation of parliamentary sittings on the disallowance process:

Disallowance, of course, is not an effective measure if Parliament is not sitting. This is a significant problem if the nature of the emergency is such as to prevent Parliament from meeting and fulfilling its supervisory and scrutiny responsibilities...But for disallowance to operate, the Houses need to sit.<sup>18</sup>

3.21 The Public Interest Advocacy Centre agreed with this view, proposing that Parliament should retain oversight of delegated legislation through the disallowance process 'even in exceptional circumstances unless there are clear grounds showing it does not need to do so'.<sup>19</sup>

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14 Centre for Comparative Constitutional Studies, *Submission 12*, p. 13.

15 New South Wales Council for Civil Liberties, *Submission 22*, p. 6.

16 Professor Anne Twomey, *Submission 18*, p. 1.

17 Ms Jacinta Dharmananda, Senior Lecturer, Law School, University of Western Australia, *Submission 25*, p. 4.

18 Professor Anne Twomey, *Submission 18*, p. 3.

19 Public Interest Advocacy Centre, *Submission 10*, p. 6.

3.22 By way of resolution to the issues raised above, participants in the inquiry proposed that continued parliamentary sittings should be a key priority, particularly during times of emergency.<sup>20</sup>

3.23 The Centre for Comparative Constitutional Studies observed that the government's response to COVID-19 has demonstrated 'that a more structured approach to Parliament in times of crisis is needed'; and suggested that 'emergency conditions highlight the need for the active and effective participation of Parliament generally, as well as important parliamentary actors like the Committee specifically'.<sup>21</sup>

3.24 Specifically, the New South Wales Council for Civil Liberties recommended that 'Parliament should use all means possible to continue sitting, even during emergencies, in order to provide its scrutiny and supervisory functions over delegated legislation'.<sup>22</sup>

3.25 Several submitters discussed the possibility of Parliament meeting in other ways, for example, virtually<sup>23</sup> however, this report will not address the appropriateness of such considerations as they fall outside the scope of the inquiry's terms of reference.

*Importance of parliamentary sittings during times of emergencies for parliamentary consideration and scrutiny of primary legislation*

3.26 Some submitters also reflected on the impact of the truncation of sittings on Parliament's capacity to consider and appropriately scrutinise the provisions in bills which empower the executive to make delegated legislation during times of emergency. For example, the Law Council of Australia submitted that:

Legislation passed in the time of an emergency tends to be rushed, developed with little public or parliamentary scrutiny and is likely to be 'over-inclusive or under-inclusive, indiscriminate, or unenforceable'.<sup>24</sup>

3.27 Associate Professor Lorne Neudorf also commented on this matter, proposing that parliamentary oversight and scrutiny is even more important during times of emergency than at other times:

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20 See, for example, Centre for Comparative Constitutional Studies, *Submission 12*, p. 13; New South Wales Council for Civil Liberties, *Submission 22*, p. 6.

21 Centre for Comparative Constitutional Studies, *Submission 12*, p. 13.

22 New South Wales Council for Civil Liberties, *Submission 22*, p. 7.

23 See, for example, Public Interest Advocacy Centre, *Submission 10*, p. 6; Centre for Comparative Constitutional Studies, *Submission 12*, p. 12; Law Council of Australia, *Submission 21*; New South Wales Council for Civil Liberties, *Submission 22*, pp. 6-7. It is noted that from 24 August 2020 both chambers had in place arrangements to facilitate remote participation.

24 Law Council of Australia, *Submission 21*, p. 11.

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Parliamentary scrutiny of laws made by the executive government hastily and on the basis of incomplete information, which is much more likely during an emergency, is especially needed to provide accountability and fulfil the constitutional principle of responsible government.<sup>25</sup>

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### **Committee view**

3.28 The committee acknowledges the unique and challenging circumstances brought about by the COVID-19 pandemic, including the need to reduce the risk of exposure to the virus. However, the committee is concerned that it appears that there was little planning for contingencies to ensure that the Parliament could meet in such circumstances, and to ensure that the disruption to parliamentary sittings was kept to an absolute minimum.

3.29 In this context, the committee is concerned about the impact of the cancellation of parliamentary sittings on parliamentary oversight of emergency-related delegated legislation. It is particularly concerned about the extent to which the cancellation of sittings contributed to the effective exemption of delegated legislation from such oversight.

3.30 The significant reduction of sitting days in the Senate and House of Representatives meant that there were fewer days on which emergency-related delegated legislation could be tabled in the Parliament and be subject to disallowance motions. It also meant that there were fewer opportunities for select committees or committee inquiries to be established to consider delegated legislation, and for this committee and other parliamentary committees to raise concerns about emergency-related delegated legislation on the floor of the chambers.

3.31 Further, the timing of the variations to the sitting calendar meant that delegated legislation was practically exempted from these oversight mechanisms during the significant gap in sittings between 18 June and 24 August 2020, when 81 legislative instruments<sup>26</sup> were made in response to COVID-19. As Professor Twomey alluded to in her evidence to the committee, the delayed and reduced sittings had a particularly significant impact on Parliament's capacity to invoke the disallowance procedure during these non-sitting periods.<sup>27</sup>

3.32 The committee agrees with submitters that the exemption of emergency-related delegated legislation from parliamentary oversight due to the reduction and

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25 Associate Professor Lorne Neudorf, University of Adelaide, *Submission 11*, p. 8.

26 72 disallowable and nine non-disallowable legislative instruments.

27 Professor Anne Twomey, *Submission 18*, p. 3.

cancellation of parliamentary sittings is cause for significant concern. The committee's technical scrutiny work also informs its view that such concern is heightened when the relevant delegated legislation contains measures which should be subject to a particularly high level of scrutiny, such as instruments which override other Australian laws or trespass on personal rights and liberties.

3.33 In light of this concern, the committee agrees that Parliament should use all means possible to continue sitting during emergencies in order to provide its scrutiny and supervisory functions over delegated legislation.

### **Recommendation 3**

**3.34 Noting the importance of parliamentary sittings in facilitating parliamentary oversight of delegated legislation in times of emergency, the committee recommends that presiding officers, the government and leaders of political parties take all possible steps to facilitate parliamentary sittings, even during times of emergency, and that the cancellation of parliamentary sittings only be taken as a last resort.**

# Chapter 4

## Exemptions from disallowance during times of emergency

### Overview

4.1 The exemption of delegated legislation from the disallowance procedure is a systemic issue which significantly limits parliamentary oversight of delegated legislation. This chapter considers how this systemic issue has impacted parliamentary oversight during the COVID-19 pandemic. After briefly outlining the current disallowance framework, the chapter addresses:

- the exemption of COVID-19 related delegated legislation from disallowance and equivalent procedural oversight mechanisms in the Commonwealth and other jurisdictions; and
- the committee's view as to the appropriateness of exempting delegated legislation from disallowance during times of emergency.

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### Disallowance framework

4.2 Disallowance refers to the procedure by which parliamentarians may seek the agreement of a House of the Parliament to disallow a legislative instrument in whole or in part,<sup>1</sup> so that it ceases to have effect from the time of disallowance.<sup>2</sup>

4.3 Disallowance is perhaps the most significant procedural mechanism by which the Parliament oversees and exerts control over delegated legislation. In addition to providing parliamentarians with the opportunity to effectively repeal executive-made laws, the disallowance procedure directs attention of the Parliament and the public to particular legislative instruments by facilitating opportunities for

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1 *Legislation Act 2003*, section 42. The standing orders of each House set out additional rules relating to the manner in which disallowance notices are considered in the relevant chamber. For example, Senate standing order 78 requires a senator to give notice of their intention to withdraw a disallowance notice. This provides an opportunity for another senator to take over the notice, even if the original 15 days in which notice can be given has expired: see further, Department of the Senate, Guide to Senate Procedure No. 19, [Disallowance](#).

2 Paragraph 45(1) of the *Legislation Act 2003* provides that disallowance has the same effect as if the relevant part or instrument had been repealed from the time of disallowance.

parliamentary consideration and debate.<sup>3</sup> It also provides a trigger for consideration of a legislative instrument by this committee.<sup>4</sup>

### ***Framework for disallowing delegated legislation***<sup>5</sup>

4.4 The *Legislation Act 2003* (Legislation Act) sets out the standard framework by which delegated legislation may be disallowed.<sup>6</sup> The framework only applies to legislative instruments and does not include notifiable instruments.<sup>7</sup>

4.5 Section 42 of the Legislation Act provides that all members of either House have 15 sitting days from the first sitting day after a legislative instrument is tabled to give notice of their intention to move a motion in the relevant House to disallow a legislative instrument in whole or in part. If a senator or member gives such a notice, there are 15 further sitting days in which the motion may be resolved, commencing on the first sitting day after the notice is given. During that period, if the House in which the motion was given resolves to disallow the instrument or provision, the instrument or provision ceases to have effect immediately after the passing of the resolution.<sup>8</sup>

4.6 If a notice of motion to disallow an instrument has been given, but remains unresolved after the 15 sitting days from the day after it was given, that instrument or provision is deemed to have been disallowed and ceases to have effect.<sup>9</sup> This ensures that the disallowance process cannot be frustrated by not making time to consider a motion for disallowance within the applicable 15 sitting day period.

4.7 In some cases, the standard disallowance procedure under the Legislation Act may be modified by a legislative instrument's authorising primary legislation. Such modifications may alter the period in which the legislative instrument may be subject

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3 For example, in the Senate a motion to disallow an instrument is categorised as 'Business of the Senate' and therefore consideration and debate of disallowance motions generally takes precedence over government and general business (Senate standing order 58).

4 Senate standing order 23(2) provides that 'all instruments made under the authority of Acts of the Parliament, which are subject to disallowance, disapproval or affirmative resolution by the Senate and which are of a legislative character, shall stand referred to the committee for consideration and, if necessary, report'.

5 As noted previously, the final report of this inquiry will contain a more in depth examination of the disallowance framework.

6 See, in particular, *Legislation Act 2003*, section 42.

7 Section 42 of *Legislation Act 2003* only provides for disallowance of 'legislative instruments'. Section 8 of the Legislation Act provides that an instrument is not a legislative instrument if it is declared by an Act not to be a legislative instrument (paragraph 8(6)(a)) or if it is a notifiable instrument because the primary law gives power to do something by notifiable instrument (paragraph 8(8)(a)).

8 *Legislation Act 2003*, paragraph 42(1)(b).

9 *Legislation Act 2003*, subsection 42(2).

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to disallowance,<sup>10</sup> or alter the process by which the legislative instrument is deemed to be disallowed.<sup>11</sup>

***Framework for exempting delegated legislation from disallowance***

4.8 The Legislation Act also sets out the framework by which legislative instruments may be exempted from disallowance.<sup>12</sup> Section 44 of the Legislation Act provides that the following classes of legislative instruments are exempt from disallowance:

- instruments expressly exempted by another Act from the disallowance provisions of the Legislation Act;
- instruments listed in regulations made under the Legislation Act; and
- instruments (except regulations) made under an Act which facilitate the establishment or operation of an intergovernmental body or scheme, and which authorises instruments to be made for those purposes.<sup>13</sup>

4.9 The Legislation (Exemptions and Other Matters) Regulation 2015 made under the Legislation Act prescribes particular instruments and classes of instruments that are not subject to disallowance.<sup>14</sup> These include:

- directions by a minister to any person or body;<sup>15</sup>
- instruments made under an annual Appropriation Act;<sup>16</sup> and
- instruments, other than regulations, made under prescribed provisions of the *Migration Act 1958* and the *Migration Regulations 1994*.<sup>17</sup>

4.10 The Legislation Act does not require the explanatory memorandum to a bill which proposes to exempt delegated legislation from disallowance to include a justification for that exemption.

4.11 The Legislation Act also does not require the explanatory statement to an exempt legislative instrument to state that it is exempt, or explain the legislative

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10 See, for example, *Public Governance, Performance and Accountability Act 2013*, section 79 (relating to determinations made under subsection 78(1) or (3) of that Act).

11 See, for example, *Commercial Broadcasting (Tax) Act 2017*, section 13.

12 *Legislation Act 2003*, section 44. Note that notifiable instruments are not subject to disallowance, because the disallowance framework only applies to legislative instruments, see *Legislation Act 2003*, section 42.

13 *Legislation Act 2003*, section 44.

14 *Legislation Act 2003*, paragraph 44(2)(b).

15 Legislation (Exemptions and Other Matters) Regulation 2015, section 9, table item 2.

16 Legislation (Exemptions and Other Matters) Regulation 2015, section 9, table item 4.

17 Legislation (Exemptions and Other Matters) Regulation 2015, section 10, item 20.

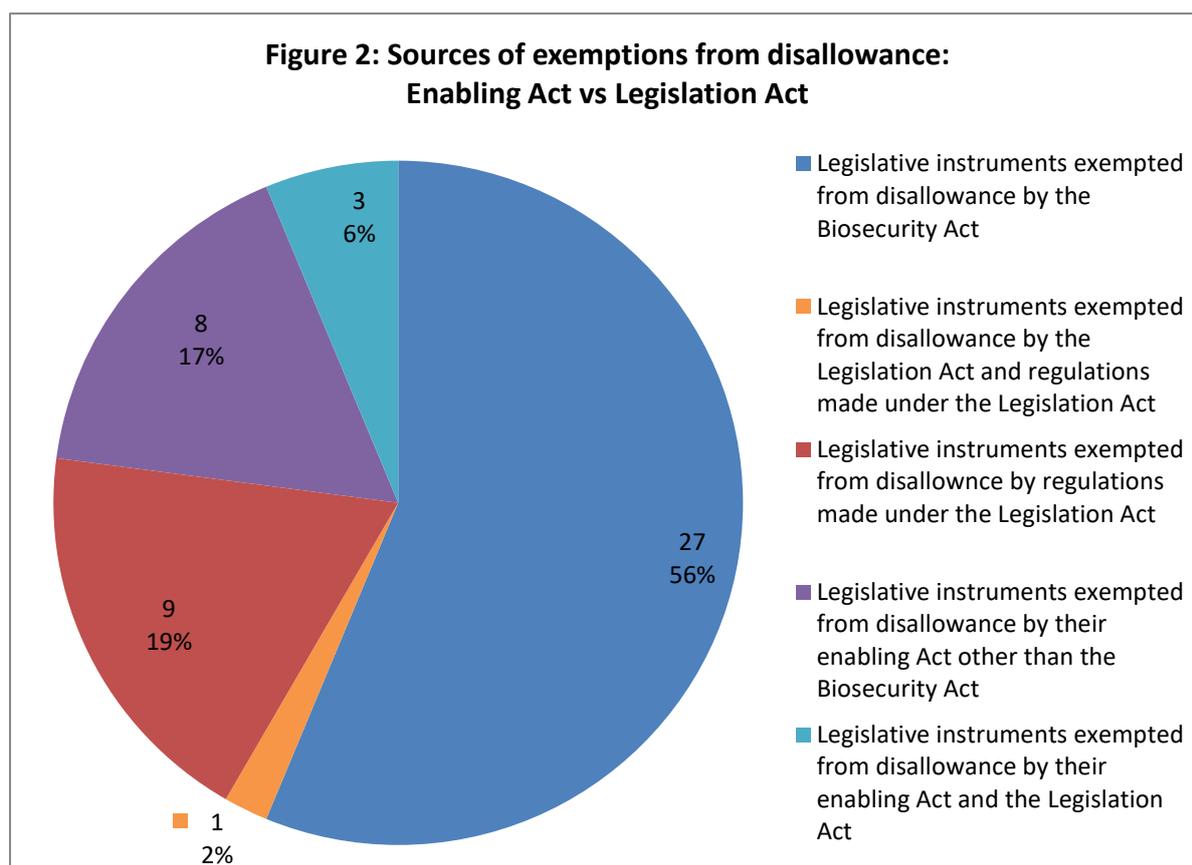
authority for such an exemption. In practice, however, many explanatory statements do include a section relating to the instrument's exemption from disallowance.

4.12 The final report of this inquiry will address the committee's broader concerns about the manner and extent to which delegated legislation is exempted from disallowance. The following sections consider these issues in relation to delegated legislation made in times of emergency.

## Exemptions from disallowance during the COVID-19 pandemic

### *Approach in the Commonwealth*

4.13 Approximately 20 per cent of all legislative instruments made in response to COVID-19 between 1 January and 31 July 2020 were exempt from disallowance.<sup>18</sup> These exemptions from disallowance were authorised by a variety of legislative sources. **Figure 2** below illustrates the sources of legislative authority for the exemption of COVID-19 related legislative instruments from disallowance.



18 48 of the 249 legislative instruments made in relation to COVID-19 between 1 January and 31 July 2020 were exempt from disallowance. This figure does not include notifiable instruments made in response to COVID-19 which are not subject to disallowance as they are not legislative instruments. Statistics on the proportion of instruments exempt from disallowance from 2013 to 2020 are set out in Chapter 1.

4.14 While the majority of these legislative instruments were exempted from disallowance by their enabling Act alone,<sup>19</sup> a significant proportion were exempted from disallowance by the Legislation Act and the Legislation (Exemptions and Other Matters) Regulation 2015.<sup>20</sup> The following section provides greater detail about the sources of authority for the exemption of COVID-19 related delegated legislation from disallowance.

*Instruments exempted from disallowance by the Biosecurity Act*

4.15 The Biosecurity Act provided the sole legislative authority to exempt 27 COVID-19 related legislative instruments from disallowance. This constitutes 56 per cent of the total number of exempt legislative instruments made in response to COVID-19 between 1 January 2020 and 31 July 2020. These legislative instruments addressed a range of significant matters, including to:

- add human coronavirus to the list of diseases to which a disease must be added before the human biosecurity emergency powers may be exercised;<sup>21</sup>
- declare that a human biosecurity emergency exists, and extend that declaration;<sup>22</sup>
- determine that a specified area within a state or territory is a human health response zone, and require specified classes of individuals not to enter a human health response zone;<sup>23</sup>
- restrict international outbound travel for Australian citizens and permanent residents;<sup>24</sup>

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19 35 legislative instruments (approximately 73 per cent of the total exempt instruments) were exempted from disallowance by their enabling Act alone.

20 Nine legislative instruments (approximately 19 per cent of the total exempt instruments) were exempted from disallowance by regulations made pursuant to the Legislation Act only. One legislative instrument was exempted from disallowance by both the Legislation Act and regulations made under the Act. The three remaining non-disallowable legislative instruments were exempted from disallowance on the basis of both their enabling Act and regulations made under the Legislation Act.

21 Biosecurity (Listed Human Diseases) Amendment Determination 2020 [F2020L00037].

22 Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020 [F2020L00266]. In relation to the extension see, for example, the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension) Instrument 2020 [F2020L00574], which extended the duration of the original declaration, which was due to cease on 17 June 2020, for a further three months until 17 September 2020.

23 See, for example, Biosecurity (Human Health Response Zone) (Royal Australian Air Force Base Learmonth) Determination 2020 [F2020L00086].

- require international cruise ship operators not to enter a port in an Australian territory before a specified date;<sup>25</sup>
- require individuals departing Australia from specified airports bound for specified countries to undergo a health screening for signs and symptoms of COVID-19;<sup>26</sup>
- require individuals not to enter certain areas;<sup>27</sup> and
- require designated retail outlets in prescribed areas of designated international airports not to engage in trade.<sup>28</sup>

4.16 Despite being exempt from disallowance, some legislative instruments made under the Biosecurity Act may override the operation of primary legislation and may significantly impact personal rights and liberties through triggering, or acting as a precondition to, the use of significant coercive powers or the imposition of custodial penalties.<sup>29</sup> More information relating to the nature and content of legislative instruments made under the Biosecurity Act is in Chapter 2.<sup>30</sup>

*Instruments exempted from disallowance by other Acts*

4.17 The following five Acts provided the legal authority for 11 COVID-19 related legislative instruments as being exempt from disallowance:

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- 24 Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020 [F2020L00306].
  - 25 Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements) Determination 2020 [F2020L00267], as amended by the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements) Amendment Determination (No. 1) 2020 [F2020L00339].
  - 26 Biosecurity (Exit Requirements) Determination 2020 [F2020L00323]; Biosecurity (Exit Requirements) Amendment (Nauru) Determination 2020 [F2020L00388].
  - 27 See, for example, the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Determination 2020 [F2020L00324].
  - 28 Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—Retail Outlets at International Airports) Determination 2020 [F2020L00344].
  - 29 For example, requirements made under subsection 477(1) and directions given under subsection 478(1) of the *Biosecurity Act 2015* apply despite any provision of any Australian law. Further, failure to comply with such requirements and directions attracts a penalty of 300 penalty units or five years' imprisonment, or both.
  - 30 See, in particular, pp. 11 to 21 of Chapter 2.

- *Appropriation Act (No. 2) 2019-2020*;<sup>31</sup>
- *Appropriation (Coronavirus Economic Response Package) Act (No. 2) 2019-2020*;<sup>32</sup>
- *Therapeutic Goods Act 1999*;<sup>33</sup>
- *Public Governance, Performance and Accountability Act 2013*;<sup>34</sup> and
- *Supply Act (No. 2) 2020-2021*.<sup>35</sup>

4.18 The majority of these legislative instruments relate to the allocation of government expenditure in response to COVID-19. This includes six Advance to the Finance Minister (AFM) determinations,<sup>36</sup> which enable the Finance Minister to allocate additional funds for expenditure without the need to appropriate additional funds through a new appropriation bill.<sup>37</sup> These instruments provided additional appropriations totalling \$2.13 billion in response to the COVID-19 pandemic; however the enabling provisions for these determinations do not restrict the allocation of additional funds to COVID-19 response measures.

*Instruments exempted from disallowance under the Legislation Act and regulations made under that Act*

4.19 The Legislation Act, and the Legislation (Exemptions and Other Matters) Regulation 2015 made under that Act, provide legal authority for the exemption of

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31 Advance to the Finance Minister Determination (No. 1 of 2019-2020) [F2020L00220]; Advance to the Finance Minister Determination (No. 2 of 2019-2020) [F2020L00235]; Advance to the Finance Minister Determination (No. 5 of 2019-2020) [F2020L00422].

32 Advance to the Finance Minister Determination (No. 3 of 2019-2020) [F2020L00402]; Advance to the Finance Minister Determination (No. 4 of 2019-2020) [F2020L00421].

33 Poisons Standard July 2020 [F2020L00899], Poisons Standard Amendment (Hydroxychloroquine and Salbutamol) Instrument 2020 [F2020L00291]; Poisons Standard Amendment (Hydroxychloroquine) Instrument 2020 [F2020L00387].

34 Public Governance, Performance and Accountability (Section 75 Transfers) Amendment Determination 2019-2020 (No. 6) [F2020L00614]; Public Governance, Performance and Accountability (Section 75 Transfers) Amendment Determination 2019-2020 (No. 7) [F2020L00737].

35 Advance to the Finance Minister Determination (No. 1 of 2020-2021) [F2020L00875].

36 Advance to the Finance Minister Determination (No. 1 of 2019-2020) [F2020L00220]; Advance to the Finance Minister Determination (No. 2 of 2019-2020) [F2020L00235]; Advance to the Finance Minister Determination (No. 3 of 2019-2020) [F2020L00402]; Advance to the Finance Minister Determination (No. 4 of 2019-2020) [F2020L00421]; Advance to the Finance Minister Determination (No. 5 of 2019-2020) [F2020L00422]; Advance to the Finance Minister Determination (No. 1 of 2020-2021) [F2020L00875].

37 See *Wilkie v Commonwealth* (2017) 263 CLR 487.

13 COVID-19-related legislative instruments from disallowance. Nine of these 13 legislative instruments (approximately 19 per cent of the total exempt instruments) were exempted from disallowance by regulations made pursuant to the Legislation Act only.<sup>38</sup> These instruments fell into the following categories of exemptions under the regulations:

- instruments made under subsection 24(3) of the *Public Service Act 1999*;<sup>39</sup>
- by-laws made under section 271 of the *Customs Act 1901* for the purposes of Schedule 4 to the *Customs Tariff Act 1995*;<sup>40</sup> and
- instruments, other than regulations, made under prescribed provisions of the *Migration Act 1958* and the Migration Regulations 1994.<sup>41</sup>

### ***Approaches in other jurisdictions***

#### *Australian states and territories*

4.20 Each Australian state and territory made delegated legislation to help combat the COVID-19 pandemic and its effects. Although the approach varied across the states and territories, COVID-19 related delegated legislation was generally subject to disallowance, with particular exceptions. For example, in Queensland, the *COVID-19 Emergency Response Act 2020* (Qld) provides ministers with broad powers

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38 In addition, one legislative instrument is exempt from disallowance by both the Legislation Act and regulations made under the Act. The three remaining legislative instruments are exempt from disallowance on the basis of both their enabling Act and regulations made under the Legislation Act.

39 Legislation (Exemptions and Other Matters) Regulation 2015, section 10, table item 27(b). This exempts the Public Service (Terms and Conditions of Employment) (General wage increase deferrals during the COVID-19 pandemic) Determination 2020 [F2020L00418] from disallowance.

40 Legislation (Exemptions and Other Matters) Regulation 2015, section 10, table item 12(e). This exempts the Customs By-law No.2041552 [F2020L00965] and the Customs By-law No. 2019608 [F2020L00540] from disallowance.

41 Legislation (Exemptions and Other Matters) Regulation 2015, section 10, table item 20. This exempts the following legislative instruments from disallowance: Migration (LIN 20/045: Class of persons for Visitor (Class FA) visa applications) Instrument 2020 [F2020L00157]; Migration (LIN 20/099: Classes of Persons for Student (Temporary) (Class TU) Visa Applications) Instrument 2020 [F2020L00158]; Migration (LIN 20/046: Arrangements for Visitor (Class FA) Visa Applications) Instrument 2020 [F2020L00160]; Migration (LIN 20/122: COVID-19 Pandemic event for Subclass 408 (Temporary Activity) visa and visa application charge for Temporary Activity (Class GG) visa) Instrument 2020 [F2020L00409]; Migration (LIN 20/158: Classes of Persons for Student (Temporary) (Class TU) Visa Applications) Instrument 2020 [F2020L00955].

to make delegated legislation to modify primary legislation for various purposes.<sup>42</sup> The explanatory memorandum to the bill notes that such delegated legislation is subject to the disallowance process.<sup>43</sup> By contrast, public health directions made under the *Public Health Act 2005* (Qld) are not subject to disallowance. Dr Peta Stephenson and Professor Jonathan Crowe have expressed concern that the non-disallowable status of these instruments 'substantially curtails the oversight of the Parliament and removes an important check on power'.<sup>44</sup>

4.21 In addition, the majority of public health emergency declarations made by the states and territories are made via notifiable instrument,<sup>45</sup> and are consequently exempt from parliamentary oversight through tabling, disallowance, sunseting, or scrutiny by parliamentary committees.

#### *United Kingdom*

4.22 In the United Kingdom (UK), three broad categories of parliamentary scrutiny procedures apply to delegated legislation: those that are made negative, made affirmative and draft affirmative.<sup>46</sup> Of these, the 'made negative' procedure is most common.<sup>47</sup> It is also most similar to the Australian disallowance procedure. Under the 'made negative' procedure, instruments become law when made but may subsequently be annulled within 40 days.<sup>48</sup> Under the 'made affirmative' procedure,

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42 These include altering statutory timeframes, facilitating the ongoing functioning of courts and tribunals and enabling activities that would otherwise be done in person to be done by other means: *COVID-19 Emergency Response Act 2020*, sections 8, 9, 13, and 17 and paragraph 15(3)(a).

43 COVID-19 Emergency Response Bill 2020 (QLD), explanatory memorandum, pp. 6–7, <https://www.legislation.qld.gov.au/view/pdf/bill.first.exp/bill-2020-011> (accessed 23 November 2020).

44 Dr Peta Stephenson and Professor Jonathan Crowe for Auspublaw, *Queensland Public Health Laws and COVID-19: A Challenge to the Rule of Law?*, 21 August 2020 <https://auspublaw.org/2020/08/queensland-public-health-laws-and-covid-19-a-challenge-to-the-rule-of-law/> (accessed 23 November 2020).

45 See, for example, *Public Health Act 1997* (ACT), subsection 119(5) and *South Australian Public Health Act 2011* (SA), paragraph 87(2)(a).

46 There are several variations on each of these three procedures: Fox and Blackwell identify 11 variants of 'enhanced' procedures: Ruth Fox and Joel Blackwell, *The Devil is in the Detail*, London: Hansard Society, 2014, p. 5.

47 M Jack, ed., *Erskine May's Treatise on the Law, Privileges and Usage of Parliament*, 24<sup>th</sup> ed, London, LexisNexis, 2011, p. 686.

48 The Hansard Society, 'Coronavirus statutory instruments dashboard', <https://www.hansardsociety.org.uk/publications/data/coronavirus-statutory-instruments-dashboard> (accessed 1 November 2020). In addition, there is a longstanding convention that, wherever possible, statutory instruments subject to the negative procedure be laid before the Parliament (tabled) at least 21 days before they come into effect ('the 21-day rule').

instruments become law when made but must be approved by either one or both Houses of Parliament within a specified time frame to remain in force.<sup>49</sup> By contrast, the 'draft affirmative' procedure requires draft instruments to be laid and approved by either one or both Houses before being made as law. Some instruments are also laid in Parliament with no other scrutiny procedures attached.

4.23 As of 1 November 2020, the Hansard Society's *Coronavirus Statutory Instruments Dashboard* noted that 278 COVID-related statutory instruments had been laid before the UK Parliament. Of these, approximately 70 per cent were subject to the 'made negative' procedure, 26 per cent were subject to the 'made affirmative' procedure, 3.5 per cent were subject to the 'draft affirmative' procedure and 0.5 per cent were 'laid only'.<sup>50</sup> This means that, in stark contrast to the Commonwealth's approach, 99.5 per cent of statutory instruments made in response to COVID-19 and tabled in the UK Parliament have been subject to a parliamentary scrutiny procedure at least equivalent to, or more rigorous than, the disallowance procedure.

#### *New Zealand*

4.24 The *COVID-19 Public Health Response Act 2020* (NZ) is the primary COVID-19 legislation which provides the powers to make COVID-19 related delegated legislation in New Zealand. The New Zealand Regulations Review Committee noted that orders made under the *COVID-19 Public Health Response Act 2020* (NZ) are subject to strong safeguards, including:

- there are clear criteria for when the Minister (or the Director-General) may make orders;
- orders made by the Minister are automatically revoked 10 sitting days or 60 days (whichever is later) after the order is made, unless it is first approved by the House of Representatives;
- orders must be published on a government website and be notified in the Gazette 48 hours before they come into force;
- orders are disallowable instruments and must be presented to the House;
- orders must be kept under review by the Minister or Director-General; and
- the right to seek judicial review is not limited.<sup>51</sup>

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49 The Hansard Society, 'Coronavirus statutory instruments dashboard', (accessed 1 November 2020).

50 The Hansard Society, 'Coronavirus statutory instruments dashboard', (accessed 1 November 2020).

51 New Zealand Regulations Review Committee, [Briefing to review secondary legislation made in response to COVID-19: Final Report](#), August 2020, p. 13.

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## Evidence before the committee

4.25 While the majority of submitters and witnesses noted that disallowance is an important mechanism to ensure greater parliamentary oversight of delegated legislation, many also considered that exemptions from disallowance may be appropriate or necessary in times of emergency. The majority of these submitters and witnesses noted that such exemptions should be limited, narrowly defined and adequately justified by the executive.<sup>52</sup>

4.26 One submitter, the Institute of Public Affairs, argued that there are no justifiable circumstances in which delegated legislation made in times of emergency should be exempt from disallowance.<sup>53</sup> The Institute acknowledged that the requirement to act quickly in an emergency may hinder any review prior to implementation of any delegated legislation, however, proposed that 'there is no reason why measures taken during an emergency should not be allowed to be examined retrospectively, particularly if they are still in force after the threat subsides'.<sup>54</sup>

4.27 Commonwealth departments that provided evidence to the committee about exemptions from disallowance in times of emergency supported the current exemption regime.<sup>55</sup> For example, the Attorney-General's Department suggested that it may be appropriate to exempt certain legislative instruments from disallowance where those instruments are 'critical to ensuring that urgent and decisive action can be taken in situations of emergency or where circumstances are rapidly evolving'.<sup>56</sup>

4.28 The Department of Health considered that times of emergency may necessitate more exemptions from disallowance, rather than fewer, noting that:

In recent years, the need has arisen on several occasions for time-limited delegated legislation to be urgently implemented in response to emergencies, including natural disasters and, more recently, the COVID-19 pandemic. The review of the Legislation Act to be completed in 2021 may wish to consider whether it is necessary and appropriate to create an additional ground of exclusion from disallowance to support emergency

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52 See, for example, Law Council of Australia, *Submission 21*, p. 7; Institute of Public Affairs, *Submission 16*, p. 5; Ms Jacinta Dharmananda, Senior Lecturer, Law School, University of Western Australia, *Submission 25*, p. 5.

53 Institute of Public Affairs, *Submission 16*, p. 5.

54 Institute of Public Affairs, *Submission 16*, p. 2.

55 See, for example, Department of the Treasury, *Submission 20*, p. 5; Department of Education, Skills and Employment, *Submission 26*, p. 5; Department of Finance, *Submission 28*, p. 7.

56 Attorney-General's Department, *Submission 14*, p. 8.

delegated legislation to facilitate continuity of access to 'essential services' including the provision of healthcare on humanitarian grounds.<sup>57</sup>

4.29 In contrast, other submitters and witnesses contended that making emergency delegated legislation subject to disallowance would not inhibit the government's ability to react quickly and effectively to an emergency.<sup>58</sup> For example, responding to the Attorney-General's Department's assertion about the necessity of exempting emergency delegated legislation from disallowance, Professors Adrienne Stone and Kristen Rundle from the Centre for Comparative Constitutional Studies stated:

We reject this category and the proposed reason for it. There is nothing in the disallowance process – that must be triggered and run its course in accordance with a statutorily governed timeframe – that prevents decisive government action of the kind envisaged in legislation supporting emergency measures, such as the Biosecurity Act.<sup>59</sup>

***Exemption of delegated legislation made under the Biosecurity Act from disallowance***

4.30 A number of submitters drew particular attention to the exemptions from disallowance of instruments made under the Biosecurity Act. For some submitters concerns regarding exemptions under this Act were heightened by the powers conferred by the Act.<sup>60</sup> Associate Professor Lorne Neudorf noted that during a biosecurity emergency the Health Minister is granted 'exceptionally broad legal powers':

During a human biosecurity emergency, the *Biosecurity Act 2015* confers exceptionally broad legal powers on the health minister, authorising measures that are seen by the minister as 'necessary' to prevent or control the spread of infection. In particular, the minister may impose 'any requirement' and 'give any direction, to any person'. Measures that are adopted by the minister enjoy a quasi-constitutional status. The Act deems them to take priority over 'any provision of any other Australian law', an exceptional legal status that is not conferred on delegated legislation by any other federal statute. Serious criminal penalties are imposed on persons who fail to comply with measures that are taken under the Act, including substantial fines and up to 5 years' imprisonment. The Act

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57 Department of Health, *Submission 27*, p. 3.

58 See, for example, Institute of Public Affairs, *Submission 16*, p. 5.

59 Centre for Comparative Constitutional Studies, answers to questions on notice, 31 August 2020 (received 10 September 2020), p. 6.

60 For example, see New South Wales Young lawyers, *Submission 23*, p. 5.

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exempts measures taken by the health minister from disallowance (and therefore committee scrutiny as well).<sup>61</sup>

4.31 The Attorney-General's Department supported the need to exempt instruments made under the Biosecurity Act from disallowance, stating that 'the rule-making process should or needs to be separated from the political process'. In particular, the department contended that the listing of a human disease under section 42 of the Biosecurity Act should be exempted on the basis that:

Listing a human disease is a technical and scientific decision based on whether human biosecurity risk is able to be satisfactorily managed. Subjecting these determinations to disallowance could undermine the decision-making process, frustrate risk management processes, and lead to inadequate management of biosecurity risks.<sup>62</sup>

4.32 Second, the department suggested that some instruments are 'critical to ensuring that urgent and decisive action can be taken in situations of emergency or where circumstances are rapidly evolving', noting the case of human biosecurity emergency declarations made under section 475 of the Biosecurity Act:

Emergency declarations should be made in accordance with an assessment of the relevant human biosecurity risks. If an emergency declaration was disallowed, nationally significant human biosecurity risks might go unmanaged and the Commonwealth would be unable to take the fast and urgent action necessary to manage a threat or harm to Australia's human health.<sup>63</sup>

4.33 Similarly, the Department of Agriculture, Water and the Environment stated that biosecurity determinations should be exempt from disallowance to prevent political considerations interfering with what should be a technical and scientific process.<sup>64</sup>

4.34 In contrast, Associate Professor Neudorf found these justifications to be unconvincing, noting:

For the most part, delegated legislation made under similar laws in Canada, New Zealand and the United Kingdom is subject to committee scrutiny and disallowance in the ordinary way. This comparative context reveals the hollowness of claims that exemptions in this category are necessary to avoid the political process or for the Executive to take decisive action.<sup>65</sup>

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61 Associate Professor Lorne Neudorf, *Submission 11*, pp. 7–8.

62 Attorney-General's Department, *Submission 14*, p. 6.

63 Attorney-General's Department, *Submission 14*, p. 8.

64 Department of Agriculture, Water and the Environment, *Submission 17*, p. 2.

65 Associate Professor Lorne Neudorf, answers to questions on notice, 31 August 2020 (received 11 September 2020), p. 2.

4.35 Professors Stone and Rundle also noted that 'there is nothing in the disallowance process that prevents decisive government action of the kind envisaged in the Biosecurity Act, or appropriate respect for specialist expertise'.<sup>66</sup>

4.36 The New South Wales Council for Civil Liberties also submitted that it was inappropriate to exclude delegated legislation made under the Biosecurity Act from disallowance to separate the measures from political considerations, submitting that the significant civil liberties implications of the Biosecurity Act measures mean their 'formulation and implementation are unavoidably and deeply political questions. 'Taking the politics out' entirely can lead to unaccountable technocratic governance'.<sup>67</sup>

4.37 The Law Council submitted that 'the pandemic has tested the outermost limits of mechanisms available to enact legislation exempt from disallowance, and the principles guiding the exercise of these powers'.<sup>68</sup> The Council acknowledged that while there is a need for timely decision making in relation to public health matters during times of emergency, the use of the Biosecurity Act to make exempted delegated legislation 'ought to be carefully considered particularly due to the significance of the powers available and the frequency of their use in the current crisis'.<sup>69</sup>

4.38 Professor Anne Twomey accepted that exemptions from disallowance are reasonable in certain circumstances. She considered that it is reasonable for the government to argue that it is justifiable to exempt delegated legislation made under the Biosecurity Act in times of emergency as it would be inappropriate for such measures to be vulnerable to political considerations given that they should be made on the basis of scientific and medical evidence.<sup>70</sup> She explained:

In some cases exemptions might be necessary. In times of emergency there may be an urgent need to do unpopular things. If disallowance is in prospect, governments may fail in their duty to take hard decisions based upon expert evidence and instead make compromised, more politically favourable decisions, due to the risk that their actions would be disallowed by an Opposition seeking to benefit from populism. The Opposition may also not have full access to the data, evidence and expertise to make an

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66 Centre for Comparative Constitutional Studies, answers to questions on notice, 31 August 2020 (received 10 September 2020), p. 6.

67 New South Wales Council for Civil Liberties, *Submission 22*, p. 5.

68 Law Council of Australia, *Submission 21*, p. 8.

69 Law Council of Australia, *Submission 21*, p. 8.

70 Professor Anne Twomey, *Submission 18*, p. 2.

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informed judgement in deciding whether to disallow measures taken in an emergency.<sup>71</sup>

4.39 However, Professor Twomey noted that continued scrutiny of such measures is essential given the significant impact of emergency measures on individual rights and liberties.<sup>72</sup> Amongst other methods to ensure appropriate scrutiny, she suggested that delegated legislation made in times of emergency could become subject to disallowance after six months, and instruments made after an emergency has existed for six months are made disallowable.<sup>73</sup> A similar proposal was also made by the Law Council which suggested that renewals of emergency instruments which were exempt from disallowance due to urgency should be subject to disallowance.<sup>74</sup>

***Exemption of expenditure-related delegated legislation from disallowance in times of emergency***

4.40 In addition to concerns about the non-disallowable status of delegated legislation made under the Biosecurity Act, submitters raised concerns about the non-disallowable status of delegated legislation which facilitates significant government expenditure during COVID-19, particularly Advance to the Finance Minister (AFM) determinations.

4.41 The Department of Finance (Finance) provided justifications for these exemptions from disallowance with a particular emphasis on their need in times of emergency. For example, Finance's written submission stated:

The Appropriation Acts require that, in order for an AFM to be allocated, there must be a need for urgent expenditure. Requiring AFM allocations to be subject to disallowance would delay otherwise urgent expenditure, particularly when Parliament is not sitting or is unable to sit. This would fundamentally frustrate the operation of the AFM mechanism and the delivery of Australian Government programs and services.<sup>75</sup>

4.42 Finance expanded on this point in its response to questions on notice, explaining that the enabling provisions for AFM determinations are subject to parliamentary scrutiny through the legislative process:

Each time that the Parliament passes an Appropriation Bill which includes an AFM provision, the Parliament is agreeing to appropriate funds, not just

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71 Professor Anne Twomey, answers to questions on notice, 31 August 2020 (received 11 September 2020), p. 5.

72 Professor Anne Twomey, *Submission 18*, p. 2.

73 Professor Anne Twomey, answers to questions on notice, 31 August 2020 (received 11 September 2020), p. 4.

74 Law Council of Australia, answers to questions on notice, 27 August 2020 (received 11 September 2020), p. 15.

75 Department of Finance, *Submission 28*, p. 7.

as itemised in the Bill, but also to deal with urgent and unforeseen expenditure up to the amount set out under the AFM provision.<sup>76</sup>

4.43 In addition, Finance advised that the Finance Minister had agreed to further transparency and accountability mechanisms in relation to the extraordinary \$40 billion AFM provisions established during the COVID-19 pandemic. These mechanisms include issuing a media release each week an AFM is allocated and seeking the concurrence of the Shadow Finance Minister, on behalf of the Opposition, for any proposed allocation of an AFM over \$1 billion.<sup>77</sup>

4.44 In its submission the Centre for Public Integrity recommended that any delegated legislation that allocates appropriations or other spending of public money should not be exempt from disallowance.<sup>78</sup>

4.45 Professor Anne Twomey considered that there are valid arguments to be made both in favour and against exempting AFM determinations from disallowance:

On the one hand, it is clearly wrong that the Minister for Finance can use the Advance to fund measures that the Parliament does not support and has previously refused to fund. The Advance should not be able to be used as a means of avoiding the necessity for Senate approval of the purpose of expenditure. On the other hand, I can see the inherent difficulty in disallowing a payment that has already been made. Given parliamentary sitting patterns, the period between an amount being allocated under the Advance and the last date by which disallowance can occur, can be quite long. If the need is genuinely 'urgent', then it may well be inappropriate to have to wait for the expiry of the disallowance period to access the money (eg if it is needed to fund the acquisition of vaccines in a pandemic, as occurred with the use of the Advance to provide H1N1 flu vaccines). But if money is accessed immediately, and then the determination under the Advance to allocate that money is later disallowed, this may be problematic.<sup>79</sup>

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76 Department of Finance, *Submission 28*, p. 7.

77 Department of Finance, answers to questions on notice, 9 September 2020 (received 18 September 2020), p. 3. See also *Senate Hansard*, 23 March 2020, p. 1860.

78 Centre for Public Integrity, *Submission 13*, p. 3.

79 Professor Anne Twomey, answers to questions on notice, 31 August 2020 (received 11 September 2020), p. 3.

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## Committee view

### *Appropriateness of exempting delegated legislation made in times of emergency from disallowance*

4.46 The committee considers that primary legislation should enable the government to quickly and decisively respond by various means to significant human biosecurity risks on the basis of expert evidence. In some instances, delegated legislation may well be the most appropriate means of swiftly responding to such risks. However, as a starting presumption, the committee considers that laws made by the executive pursuant to powers delegated by the Parliament should be subject to parliamentary oversight, with very limited exemptions. The final report will address in detail the committee's general views about the nature and scope of any such exemptions, by reference to the evidence submitted during the inquiry. In respect of times of emergency, the committee particularly considers that it is not appropriate to exempt delegated legislation from the disallowance procedure, where such delegated legislation:

- can be used to override or modify primary legislation;
- triggers, or is a precondition to, the imposition of custodial penalties or other measures which restrict personal rights and liberties; or
- can be used to allocate additional public funds above the ordinary limits set in annual Appropriation Acts.

4.47 In addition, in the limited circumstances in which it may be appropriate to exempt emergency related delegated legislation from disallowance, the committee considers that the source of that exemption should be provided by primary legislation, rather than delegated legislation.

4.48 In reaching this view, the committee has had particular regard to the following considerations. First, as a practical matter, the disallowable status of delegated legislation does not impede the commencement of a legislative instrument, with legislative instruments made by the executive able to commence the day after they are registered.<sup>80</sup> The subsequent disallowance of a legislative instrument (which may only occur after the instrument has been tabled in the Parliament) does not invalidate actions taken under the instrument prior to the time of disallowance.<sup>81</sup> Consequently, the committee does not consider that the disallowable status of a legislative instrument would, of itself, prevent the government from taking immediate and decisive action in response to a significant emergency.<sup>82</sup>

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80 *Legislation Act 2003*, section 12.

81 *Legislation Act 2003*, section 42.

82 See, for example, Centre for Comparative Constitutional Studies, answers to questions on notice, 31 August 2020 (received 10 September 2020), p. 6.

4.49 Second, the instances of the disallowance procedure resulting in disallowance by the Parliament is very low. Of the 191 notices of motion to disallow legislative instruments given between 2010 and 2019 in both Houses, only 17 (8.9 per cent) have succeeded (and many thousands of instruments were never the subject of such a motion). In practice, the disallowance procedure serves to focus the Parliament's attention on a small number of legislative instruments by providing opportunities for parliamentary debate, and promoting dialogue between the executive and legislative branches of government about the manner in which legislative powers delegated to the executive have been exercised. Consideration of the risks and opportunities of subjecting emergency-related delegated legislation to disallowance must be assessed with this in mind.

4.50 Third, as detailed at paragraphs 4.20 to 4.24, in contrast to the Commonwealth's approach, delegated legislation made in response to COVID-19 by governments in similar jurisdictions has largely been subject to a parliamentary scrutiny procedure.<sup>83</sup> The comparison with the United Kingdom is particularly stark, where 99.5 per cent of statutory instruments made in response to COVID-19 have been subject to a form of parliamentary procedure equivalent to, or greater than, the disallowance procedure. While the circumstances relating to COVID-19 have varied between jurisdictions, it is clear that other jurisdictions have subjected a much greater proportion of emergency-related delegated legislation to parliamentary scrutiny procedures while responding to the COVID-19 emergency. This evidence lends weight to the committee's view that, as a starting presumption and with very limited exceptions, laws made by the executive, including those made in response to an emergency, should be subject to parliamentary oversight.<sup>84</sup>

4.51 Fourth, arguments against making emergency related delegated legislation disallowable must be balanced with the need to ensure adequate checks and balances on the limitation of the personal rights and liberties of individuals who may be subject to such delegated legislation. This need is particularly pronounced in times of emergencies, where legislative measures implemented in response to emergencies may be more likely to trespass on personal rights and liberties than those implemented in non-emergency periods.<sup>85</sup> While measures implemented by emergency-related delegated legislation might be based on 'technical or scientific'

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83 Associate Professor Lorne Neudorf, answers to questions on notice, 31 August 2020 (received 11 September 2020), p. 2.

84 The committee will consider the general circumstances where it may be permissible to exempt delegated legislation from disallowance in its final report.

85 See, for example, Centre for Comparative Constitutional Studies, answers to questions on notice, 31 August 2020 (received 10 September 2020), p. 13.

decisions,<sup>86</sup> their implementation takes on a political dimension where it has the capacity to directly or indirectly limit personal rights and liberties. This is particularly evident where the enabling provision vests the relevant law-making power in a minister, rather than a technical expert, and does not specifically require the minister to consult with technical experts in making the delegated legislation, or otherwise be satisfied of the advice or approval of such experts before making it.<sup>87</sup>

4.52 In our system of government the Parliament is the primary institution responsible for the scrutiny and judgment of possible encroachments on personal rights and liberties.<sup>88</sup> Disallowance is one of the most powerful mechanisms that the Parliament has at its disposal to discharge this responsibility in relation to delegated legislation. Where emergency-related delegated legislation has the capacity to trespass directly or indirectly on personal rights and liberties, Parliament should have the opportunity to discharge its rights-protecting responsibilities via the application of the disallowance procedure and other forms of parliamentary oversight, regardless of whether the relevant legislation was based on a technical or scientific decision.

4.53 Fifth, views about the manner and appropriateness of exempting emergency-related delegated legislation from disallowance must be informed by the constitutional separation of powers between the legislature and executive, and Parliament's role in Australia's system of representative democracy. The committee considers that the Parliament, and particularly the Senate, has an important role in ensuring that delegated legislation is subject to effective scrutiny by elected representatives who reflect the considered views of the community and that governments of all persuasions do not introduce extreme measures in the absence of broad community support. The committee therefore considers that where a law trespasses on personal rights and liberties, or modifies or overrides primary legislation, our system of representative democracy requires our elected representatives to have the opportunity to scrutinise and, if necessary, repeal an executive-made law.

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86 See, for example, the Attorney-General's Department's characterisation of a determination of a listed human disease under section 42 of the *Biosecurity Act 2015*: Attorney-General's Department, *Submission 14*, p. 6, item 2.

87 See, for example, sections 477 and 478 of the *Biosecurity Act 2015* which do not require the Health Minister to receive advice from, or otherwise consult with, experts before determining emergency requirements and directions under those provisions.

88 See, for example, the 2016 report of the Australian Law Reform Commission's inquiry into traditional rights and freedoms, which described parliamentary debate as 'the ultimate forum for the scrutiny of, and judgments about, encroachments on rights': Australian Law Reform Commission, [\*Traditional Rights and Freedoms – Encroachments by Commonwealth Laws\*](#), (March 2016), paragraph 3.21 in Chapter 3.

4.54 In evidence before the committee, some legal experts raised the possibility that the exemption of delegated legislation from disallowance might be unconstitutional, where it amounts to an abdication of Parliament's responsibilities with respect to oversight.<sup>89</sup> The committee intends to consider this issue in greater detail in its final report. For the purposes of this interim report, the committee considers that Parliament should take extra care to ensure that emergency related delegated legislation is subject to sufficient oversight to guard against this possibility.

#### **Recommendation 4**

**4.55 The committee recommends that parliamentarians and the government ensure that delegated legislation made in times of emergency is subject to disallowance where it:**

- **can be used to override or modify primary legislation; or**
- **triggers, or is a precondition to, the imposition of custodial penalties or other measures which restrict personal rights and liberties.**

#### *Appropriateness of exempting listed human disease determinations from disallowance*

4.56 The Director of Human Biosecurity may determine that a human disease is a 'listed human disease' where the Director considers that the disease may be communicable and cause significant harm to human health. These determinations are exempt from disallowance and enliven the use of human biosecurity control orders, discussed further in paragraph 4.63.

4.57 The Director of Human Biosecurity is required to consult with the chief health officer for each state and territory and the Director of Biosecurity before making the determination.<sup>90</sup> These features support the Attorney-General's Department's characterisation of such determinations as 'technical and scientific decision[s]', and its consequent concerns that subjecting such determinations to disallowance could 'undermine the decision-making process, frustrate risk management processes, and lead to inadequate management of biosecurity risks'.<sup>91</sup>

4.58 The committee acknowledges the justifications provided by the Attorney-General's Department for the exemption of listed human disease determinations from disallowance. The committee considers that it is appropriate to continue to exempt the listing of a specific disease from disallowance, as the decision as to whether a disease meets the legislative criteria to be included as a listed

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89 See, for example, Professor Gabrielle Appleby, Dr Janina Boughey, Dr Sangeetha Pillai and Professor George Williams AO, *Submission 1*, pp. 2–3. See also Centre for Comparative Constitutional Studies, *Submission 12*, and NSW Council for Civil Liberties, *Submission 22*.

90 *Biosecurity Act 2015*, subsection 42(2).

91 Attorney-General's Department, *Submission 14*, p. 6.

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disease under the Biosecurity Act is one that appears to rely solely on technical or scientific evidence.

*Appropriateness of exempting entry and exit requirement determinations from disallowance*

4.59 As outlined in Chapter 2, sections 44 and 45 of the Biosecurity Act empower the Health Minister to impose both entry and exit requirements on persons entering and exiting Australian territory. In contrast to the listed human disease provisions, the committee considers these provisions provide the Health Minister with an extremely broad power to make entry and exit requirements, with the only criteria being that the determinations apply for the purpose of preventing a listed human disease from entering, establishing itself or spreading in Australia.

4.60 The committee notes that the provisions are drafted to provide the Health Minister with broad powers to determine requirements in relation to individuals and classes of individuals, and may include a range of measures such as requiring the completion of health questionnaires and health and travel history screenings. Neither provision contains an exhaustive list of the requirements or measures that may be imposed, which the committee considers provides an essentially unlimited power to make requirements insofar as they are linked to the aim of preventing the spread of a listed disease in Australia. Given that the provisions themselves provide little to no safeguards or limitations on the exercise of these powers, and the resulting determinations are likely to impact a person's privacy or other personal rights or liberties, the committee considers that Parliament should be in a position to properly scrutinise any determinations as they are made and, if necessary, seek to resolve any concerns it may have via the disallowance procedure. In this regard, the committee reiterates that the disallowance status of a legislative instrument does not, of itself, prevent that instrument from coming into force.

4.61 The committee's view that entry and exit requirement determinations should be subject to disallowance is further strengthened by the fact that failure to comply with an entry or exit requirement is a trigger to the imposition of a human biosecurity control order.<sup>92</sup> As set out in Chapter 2, such orders may require individuals to receive treatment, undergo examinations and remain at a specified place, and failure to comply is punishable by 300 penalty units or five years' imprisonment, or both.<sup>93</sup> In the committee's view, this factor alone means that the entry and exit requirements fall within the category of delegated legislation made during times of emergency which should be subject to disallowance.

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92 *Biosecurity Act 2015*, paragraph 60(2)(c).

93 *Biosecurity Act 2015*, section 107.

## Recommendation 5

**4.62 The committee recommends that the government propose amendments to the *Biosecurity Act 2015* to provide that entry and exit requirement determinations made under sections 44 and 45 of the Act are subject to disallowance.**

*Making human biosecurity control orders contingent on non-disallowable legislative instruments*

4.63 The human biosecurity control order provisions in Part 3 of Chapter 2 of the Biosecurity Act are enlivened after the Director of Human Biosecurity declares that a human disease is a 'listed human disease' as discussed at paragraph 4.56. These control orders may be imposed on an individual where they have been exposed to, or have the signs of symptoms, of a 'listed human disease'. As discussed in paragraph 4.59 an order may also be imposed on an individual where they have failed to comply with an entry requirement in relation to a listed human disease.<sup>94</sup>

4.64 Many, if not all, of the biosecurity measures that may be included in a human biosecurity control order have the potential to trespass significantly on personal rights and liberties. These include measures which require an individual to:

- go to, and remain at, their intended place of residence;<sup>95</sup>
- be decontaminated;<sup>96</sup>
- undergo an examination;<sup>97</sup>
- provide body samples;<sup>98</sup> and
- receive a vaccination, treatment, or medication.<sup>99</sup>

4.65 Failure to comply with a human biosecurity control order is an offence punishable by 300 penalty units or five years' imprisonment or both.<sup>100</sup>

4.66 Section 62 of the Biosecurity Act provides that a human biosecurity control order is not a legislative instrument. However, as drafted, human biosecurity control orders cannot be made without a listed human disease determination, which is a non-disallowable legislative instrument. Given the potentially significant impact of human biosecurity control orders on personal rights and liberties, combined with the seriousness of the penalty for non-compliance, the committee considers that the

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94 *Biosecurity Act 2015*, section 60.

95 *Biosecurity Act 2015*, section 87.

96 *Biosecurity Act 2015*, section 89.

97 *Biosecurity Act 2015*, section 90.

98 *Biosecurity Act 2015*, section 91.

99 *Biosecurity Act 2015*, sections 92 and 93.

100 *Biosecurity Act 2015*, section 107.

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control order powers should only be exercisable if a disallowable legislative instrument has first authorised this.

4.67 Accordingly, the committee considers that it would be appropriate to amend the Biosecurity Act to provide that a human biosecurity control order may only be imposed where a disallowable legislative instrument is in force. Such a legislative instrument should specify the period of time in which control orders may be made, and the particular listed human disease to which the control order must relate. This approach would ensure that the imposition of human biosecurity control orders in relation to a particular listed human disease is contingent on the existence of a disallowable legislative instrument, as well as the non-disallowable listed human disease determination.

### **Recommendation 6**

**4.68 The committee recommends that the government propose amendments to the *Biosecurity Act 2015* to make the exercise of the human biosecurity control order powers in Part 3 of Chapter 2 of the Act conditional on a disallowable legislative instrument being in force, in addition to the existing preconditions to imposing a human biosecurity control order.**

#### *Appropriateness of exempting human health response zone determinations from disallowance*

4.69 As outlined in Chapter 2, section 113 of the Biosecurity Act empowers the Director of Human Biosecurity to determine that a specified area within a state or territory is a 'human health response zone' and specify requirements relating to individuals entering or leaving the zone. At the beginning of the COVID-19 pandemic in 2020, human health response zone determinations were largely used to facilitate the quarantining of returning travellers to Australia. In doing so, the determinations specified requirements which prevented people from entering certain areas.<sup>101</sup> While such restrictions may be necessary for the purpose of limiting the spread of COVID-19, they nonetheless represent an incursion on the personal liberties of the affected people. Further, the committee considers these determinations give the Director of Human Biosecurity a broad basis on which to exercise this power, constrained only by the need to be satisfied that such a determination is necessary for preventing or reducing the risk of the establishment or spread of a listed human biosecurity disease in Australia, and that it not include a measure that could be included in a human biosecurity control order.<sup>102</sup> On these grounds, while the determinations are made by the Director of Human Biosecurity rather than the

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101 See, for example, Biosecurity (Human Health Response Zone) (North West Point Immigration Detention Centre) Determination 2020 [F2020L00087], section 6; Biosecurity (Human Health Response Zone) (Royal Australian Air Force Base Learmonth) Determination 2020 [F2020L00086], section 6.

102 *Biosecurity Act 2015*, section 113.

minister, given the potential impact on personal rights and liberties, the committee considers that they engage the committee's threshold for when emergency-related delegated legislation must be subject to disallowance. In this regard, the committee reiterates that the disallowance status of an instrument does not, of itself, prevent that instrument from coming into force.

### **Recommendation 7**

**4.70 The committee recommends that the government propose amendments to the *Biosecurity Act 2015* to provide that human health response zone determinations made under section 113 of the Act are subject to disallowance.**

#### *Appropriateness of exempting human biosecurity emergency declarations and extensions from disallowance*

4.71 As outlined in Chapter 2, section 475 of the Biosecurity Act sets out the circumstances in which a human biosecurity emergency may be declared by the Governor-General to exist. Section 476 sets out the circumstances in which such a declaration may be varied to extend the human biosecurity emergency period. Both the original declaration and extensions to the declaration are not subject to disallowance.<sup>103</sup>

4.72 In declaring a human biosecurity emergency to exist, or extending this, neither the Governor-General or Health Minister are expressly required to seek the advice of, or otherwise consult with, prescribed experts. However, unlike the powers relating to determinations of emergency requirements and emergency directions made under sections 477 and 478 of the Biosecurity Act,<sup>104</sup> the power to declare a human biosecurity emergency does not, of itself, confer broad discretionary legislation-making powers on the executive, nor do they enable non-disallowable legislative instruments to override any Australian law. Instead, similar to listed human disease determinations made under section 42 of the Biosecurity Act, the human biosecurity emergency declarations act as a precondition to the exercise of such powers. For example, emergency requirements and emergency directions may only be exercised 'during a human biosecurity emergency period'. Moreover, the duration of many legislative instruments made in response to COVID-19 under other primary legislation is tied to the duration of the human biosecurity emergency period.

4.73 In line with the committee's strong view that delegated legislation should be subject to parliamentary oversight, with only very limited exemptions, the committee considers that it is inappropriate to exempt both the initial human biosecurity emergency declaration by the Governor-General and extensions to the declaration from disallowance. This is particularly so because such a declaration is a

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103 *Biosecurity Act 2015*, subsections 475(2), 476(2).

104 See paragraphs 4.75 to 4.77.

precondition to the implementation of other non-disallowable legislative measures which may override any Australian law and may restrict personal rights and liberties.<sup>105</sup> In this regard, the committee notes that these declarations are substantially different in nature from the listed human disease determinations discussed at paragraph 4.56 which are made by the Director of Human Biosecurity, in consultation with state and territory chief health officers, based on technical or scientific evidence. For these reasons, in the committee's view, it is not appropriate to exempt human biosecurity emergency declarations from disallowance.

## Recommendation 8

**4.74 The committee recommends that the government propose amendments to the *Biosecurity Act 2015* to provide that declarations of human biosecurity emergency periods and associated extensions made under sections 475 and 476 of the Act are subject to disallowance.**

*Appropriateness of exempting human biosecurity emergency requirements and directions from disallowance*

4.75 As set out in Chapter 2, sections 477 and 478 of the Biosecurity Act also give wide powers to make human biosecurity emergency requirements and directions. The committee considers that the following combination of features of the requirements and directions render them inappropriate to be exempt from disallowance:

- the discretion conferred on the Health Minister to make requirements and directions is drafted in the broadest possible terms to include 'any requirement' and 'any direction', to 'any person';
- in light of this broad discretion, the measures imposed by requirements and directions have the potential to trespass on personal rights and liberties;<sup>106</sup>
- the enabling provisions do not require the Health Minister to receive advice from or otherwise consult with experts, such as the Director of Human Biosecurity, before making the requirements and directions;<sup>107</sup>

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105 These include, but are not limited to, determinations of emergency requirements and emergency directions under sections 477 and 478 of the *Biosecurity Act 2015*.

106 Subsections 477(4) and 478(3) of the Act provide that, before determining a requirement or giving a direction, the Health Minister must be satisfied that the requirement or direction and the manner in which it is to be applied is no more restrictive or intrusive than is required in the circumstances. However, there are no explicit prohibitions on the imposition of measures which trespass on personal rights and liberties.

107 This contrasts with the enabling provisions for listed human disease determinations – see *Biosecurity Act 2015*, section 42.

- the requirements or directions apply despite any provision of any other Australian law;<sup>108</sup> and
- failure to comply with the requirements or directions can attract a criminal penalty of five years' imprisonment for non-compliance.<sup>109</sup>

4.76 In light of these features, the committee considers that the potential consequences of a human biosecurity emergency requirement or direction being disallowed, are outweighed by the following factors:

- the disallowable status of a relevant requirement or direction would not prevent the requirement or direction from being made or commencing before the disallowance period had expired;
- the disallowable status would enable this committee to assess the instrument against the technical scrutiny principles in Senate standing order 23;
- the disallowable status would enable the Parliament to fully perform its rights-assessing and rights-protecting responsibilities with respect to delegated legislation;
- the disallowable status would enable the Parliament to actively control the exercise of the legislative powers that it has delegated to the executive, in accordance with the constitutional separation of powers;
- governments in comparative jurisdictions have been able to respond to COVID-19 using similar delegated legislation, despite that legislation being subject to parliamentary procedures equivalent to, or stronger than, the disallowance procedure; and
- in practice, statistical evidence of past disallowance notices indicates that the likelihood that either House of the Parliament would disallow a human biosecurity requirement or direction, particularly one supported by appropriate scientific and technical advice, is extremely low.<sup>110</sup>

## **Recommendation 9**

**4.77 The committee recommends that the government propose amendments to the *Biosecurity Act 2015* to provide that human biosecurity emergency requirements and directions made under sections 477 and 478 of the Act are subject to disallowance.**

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108 *Biosecurity Act 2015*, subsection 477(5).

109 *Biosecurity Act 2015*, section 479.

110 See paragraph 4.49.

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*Appropriateness of exempting Advance to the Finance Minister determinations made in times of emergency from disallowance*

4.78 From 2008-09 to 2019-20 the amount of additional public funds available to be allocated by the Finance Minister under the AFM provisions in annual appropriation bills was \$675 million. In response to the COVID-19 outbreak this amount was increased to \$40 billion. Significantly, as noted at paragraph 4.18, the enabling provisions for these extraordinary AFMs did not restrict the allocation of additional funds to COVID-19 response measures.

4.79 Noting the extraordinary amount of public money that may be allocated under these provisions, the committee considers that AFM determinations which can be used to allocate additional public funds during times of emergency above the ordinary limits set in annual Appropriation Acts should be subject to disallowance.

4.80 While the committee acknowledges and welcomes the transparency and accountability mechanisms announced by the former Finance Minister in relation to the extraordinary COVID-19 AFM provisions,<sup>111</sup> the committee notes that these mechanisms are not enshrined in legislation.

4.81 The committee is also not persuaded by the Department of Finance's assertion that requiring AFM determinations to be subject to disallowance would delay otherwise urgent expenditure or would fundamentally frustrate the operation of the AFM mechanism.<sup>112</sup> In this regard, the committee notes that additional funds would become available to fund the urgent expenditure immediately after the relevant AFM determination was registered on the Federal Register of Legislation. There would be no need to wait until the Parliament was sitting or the disallowance period had expired. Until such time as a disallowance motion was passed by either House funds would be able to be validly spent under the AFM.

4.82 The committee acknowledges that, in practice, this may mean that it is possible that all funds could have been validly expended under an AFM by the time a disallowance motion was passed and therefore the disallowance would have little practical effect.<sup>113</sup> However, the committee does not consider that this possibility means that it is inappropriate to provide for AFM determinations to be subject to disallowance. In such circumstances, consideration of a disallowance motion would at least provide opportunities for parliamentary debate and, if successful, would signify the relevant House's dissatisfaction in relation to the expenditure.

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111 These mechanisms include issuing a media release each week an AFM is allocated and seeking the concurrence of the Shadow Finance Minister, on behalf of the Opposition, for any proposed allocation of an AFM over \$1 billion.

112 Department of Finance, *Submission 28*, p. 7.

113 As funds would have been validly expended up until the time a disallowance motion is passed these funds would not need to be recovered by the Commonwealth.

4.83 The committee will further consider the appropriateness of exempting Advance to the Finance Minister determinations from disallowance at all times in its final report.

#### **Recommendation 10**

**4.84 The committee recommends that parliamentarians and the government ensure that Advance to the Finance Minister determinations which can be used to allocate additional public funds during times of emergency above the ordinary limits set in annual Appropriation Acts are subject to disallowance.**

*Appropriateness of exempting emergency-related delegated legislation from disallowance via regulations made under the Legislation Act*

4.85 As noted at paragraph 4.19, nine of the non-disallowable legislative instruments made in response to COVID-19 were exempted from disallowance only on the basis of categories prescribed by the Legislation (Exemptions and Other Matters) Regulation 2015. The committee considers that it is inappropriate for delegated legislation made in response to times of emergency to be exempted from disallowance on the basis of categories set out in another piece of delegated legislation, noting the increased likelihood that delegated legislation made in response to times of emergency may engage personal rights and liberties, confer broad discretionary powers on the executive, or otherwise contain measures that require parliamentary oversight.

4.86 The committee will further consider the general appropriateness of prescribing categories of exemption from disallowance in delegated legislation, rather than primary legislation, at all times, in its final report.

#### **Recommendation 11**

**4.87 In the limited circumstances in which it may be appropriate to exempt delegated legislation made in response to an emergency from disallowance, the committee recommends that parliamentarians and the government ensure that the source of such exemptions is set out in primary legislation.**

# Chapter 5

## Classification of delegated legislation in times of emergency

### Overview

5.1 The classification of instruments as being either 'legislative' or 'non-legislative' is a systemic issue which contributes to the exemption of delegated legislation from parliamentary oversight. This chapter considers how this systemic issue has impacted parliamentary oversight during the COVID-19 pandemic and the 2019-2020 bushfires. After briefly outlining the current framework for the classification of instruments, the chapter addresses:

- how COVID-19 related instruments are classified in the Commonwealth;
- evidence before the committee regarding the appropriateness of classifying instruments as legislative or non-legislative; and
- the committee's view as to the appropriateness of classifying emergency delegated legislation as 'non-legislative', noting the impact this has on parliamentary oversight of delegated legislation made in times of emergency.

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### Framework for the classification of instruments

5.2 The Legislation Act sets out the framework for classifying instruments as legislative or non-legislative. At a general level, this framework distinguishes between 'legislative instruments' and non-legislative 'notifiable instruments', and sets out exemptions from these definitions.<sup>1</sup>

5.3 The following section provides an overview of this framework and considers its consequences for parliamentary oversight of delegated legislation, noting that only legislative instruments are subject to key forms of oversight, including tabling, disallowance, sunseting, and technical legislative scrutiny by this committee.

#### ***Framework for classifying delegated legislation as legislative instruments***

5.4 Sections 8 to 10 of the Legislation Act set out the requirements for instruments to be classified as a legislative instrument. In essence, an instrument will be considered to be a legislative instrument if:

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1 The current framework was established through amendments made to the *Legislation Act 2003* by the *Acts and Instruments (Framework Reform) Act 2015* (amending Act). The amending Act also renamed the *Legislative Instruments Act 2003* as the *Legislation Act 2003*, and moved certain provisions relating to exemptions from registration, disallowance and sunseting from primary legislation to delegated legislation.

- the primary legislation under which it is made specifies that the instrument will be a legislative instrument (this is the most common approach in modern legislation);<sup>2</sup>
- the instrument is registered on the Federal Register of Legislation as a legislative instrument;<sup>3</sup>
- the instrument is in the form of regulations, proclamations and ordinances;<sup>4</sup> and
- the instrument is legislative in character, which includes instruments where any provision:
  - determines the law or alters the content of the law, rather than determining particular cases or circumstances in which the law, as set out in an Act or another legislative instrument or provision, is to apply, or is not to apply; and
  - has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right.<sup>5</sup>

5.5 Subsection 9(1) of the Legislation Act clarifies that the classification of an instrument as a legislative instrument by subsections 8(2), (3) or (5) 'does not imply that the instrument is, or must be, of legislative character'.

5.6 Subsections 8(6) to 8(8) of the Legislation Act set out the circumstances in which an instrument is not considered to be a legislative instrument. Subsection 8(6) provides that an instrument is not a legislative instrument if it is declared by an Act not to be a legislative instrument, or is prescribed by the Legislation (Exemptions and Other Matters) Regulation 2015 for that purpose, despite possessing the

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2 *Legislation Act 2003*, subsection 8(2).

3 *Legislation Act 2003*, subsection 8(3).

4 *Legislation Act 2003*, subsection 8(5). Section 10 of the *Legislation Act 2003* declares particular types of instruments to be legislative instruments: a regulation or Proclamation made under a power delegated by the Parliament, except where the Proclamation is a commencement instrument, a Territory Ordinance covered by subsection 10(2) or a regulation, rule or by-law under such an Ordinance, an instrument prescribed by the regulation for the purpose of the paragraph, and an instrument that includes a provision that amends or repeals another legislative instrument. Section 57A declares certain instruments that were made under a power delegated by the Parliament before 1 January 2005 to be legislative instruments.

5 *Legislation Act 2003*, subsection 8(4).

characteristics set out in subsections 8(4) and 8(5) that would otherwise qualify it as a legislative instrument.<sup>6</sup>

5.7 Subsection 8(8) also prescribes certain instruments and documents that are not legislative instruments, despite anything else in section 8.<sup>7</sup> These include instruments that are notifiable instruments because the primary law gives power to do something by notifiable instrument.<sup>8</sup> The explanatory memorandum to the 2015 bill which inserted this provision explains that subsection 8(8) was inserted into the Legislation Act to:

address potential confusion if an instrument is described as notifiable instrument in the primary law but has legislative character, or the rule maker wishes to register it as a legislative instrument.<sup>9</sup>

5.8 In this way, subsection 8(8) is an important element of the classification framework implemented by the 2015 amendments to the Legislation Act,<sup>10</sup> because it provides that an instrument that may be legislative in character can nonetheless be classified as a non-legislative instrument.

### ***Framework for classifying instruments as notifiable instruments***

5.9 The Legislation Act also provides for the classification of instruments as notifiable instruments, which the Office of parliamentary Counsel describes as 'notices of a legal nature that are not legislative but still of long-term public interest'.<sup>11</sup> Section 11 provides that the following instruments are notifiable instruments:

- instruments made under primary legislation which specifies that the instrument will be a notifiable instrument (this is the most common approach in modern legislation);<sup>12</sup>

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6 Subsection 8(7) clarifies that subsection 8(6) does not apply to instruments which are legislative instruments under subsection 8(3), by registration. Subsection 9(2) further states that the fact that an instrument is not a legislative instrument because of subsection 8(6), does not, of itself, imply that the instrument is not, or should not be, of legislative character.

7 An instrument that is a notifiable instrument because of subsection 11(1) of the *Legislation Act 2003*, a commencement instrument, a compilation of a legislative instrument or notifiable instrument, rules of court or a compilation of rules of court, and explanatory statements for legislative instruments and rules of court.

8 *Legislation Act 2003*, paragraph 8(8)(a), referring to subsection 11(1), discussed further at paragraph 5.13.

9 Acts and Instruments (Framework Reform) Bill 2014, Replacement explanatory memorandum, p. 27.

10 These changes were made by the *Acts and Instruments (Framework Reform) Act 2015*.

11 Office of Parliamentary Counsel, [Instruments Handbook](#), May 2019, p. 2.

12 *Legislation Act 2003*, subsection 11(1).

- commencement instruments for Acts, provisions of Acts, legislative instruments or other notifiable instruments;<sup>13</sup>
- instruments, other than legislative instruments, prescribed by the Legislation (Exemptions and Other Matters) Regulation 2015 for the purpose of paragraph 11(2)(b) of the Legislation Act;<sup>14</sup> and
- instruments, other than legislative instruments, that include a provision which amends or repeals other notifiable instruments.<sup>15</sup>

5.10 The explanatory memorandum to the 2015 bill which inserted the category of notifiable instruments explains that this category was created 'to cover instruments that are not appropriate to register as legislative instruments, but for which public accessibility and centralised management is desirable'.<sup>16</sup> It adds that 'notifiable instruments will not be legislative in character, and as such they will not be made subject to parliamentary scrutiny or sunseting'.<sup>17</sup> Despite this advice, the classification framework prescribed by the Legislation Act appears (by virtue of section 11) to enable an instrument to be classified as a notifiable instrument where its primary legislation deems it to be a notifiable instrument, whether or not it is legislative in character. This has potentially significant consequences for parliamentary oversight of executive law-making.<sup>18</sup>

5.11 The classification of instruments under the Legislation Act is relevant to parliamentary oversight of delegated legislation, because different categories of instruments are subject to different degrees of oversight. For example, sections 38 and 39 of the Legislation Act require the Office of Parliamentary Counsel to arrange for a copy of each legislative instrument registered on the Federal Register of Legislation, and the accompanying explanatory statement, to be tabled in each House within six sitting days of that House after registration. These requirements apply to both disallowable and non-disallowable legislative instruments. However, there is no equivalent requirement to table notifiable instruments or other instruments which are not legislative instruments.<sup>19</sup>

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13 *Legislation Act 2003*, paragraph 11(2)(a).

14 *Legislation Act 2003*, paragraph 11(2)(b).

15 *Legislation Act 2003*, paragraph 11(2)(d).

16 Acts and Instruments (Framework Reform) Bill 2014, Replacement explanatory memorandum, p. 3.

17 Acts and Instruments (Framework Reform) Bill 2014, Replacement explanatory memorandum, p. 3.

18 This issue will be explored further in the final report of the committee's inquiry.

19 In addition, the *Legislation Act 2003* only requires explanatory statements to be lodged for instruments which are registered as legislative instruments, not notifiable instruments: *Legislation Act 2003*, subsection 15G(4).

5.12 Like the tabling requirements, the disallowance and sunset provisions in the Legislation Act,<sup>20</sup> discussed in Chapters 4 and 6, only apply to legislative instruments, not notifiable instruments or other instruments which are not declared to be legislative instruments. This means that the committee is not able to consider and report on notifiable instruments because the Senate standing orders only refer instruments to the committee which are made under the authority of Acts of the Parliament, and are subject to disallowance, disapproval, or affirmative resolution by the Senate, which notifiable instruments are not.<sup>21</sup>

5.13 The lack of scrutiny measures attached to notifiable instruments is particularly concerning in circumstances where primary legislation describes an instrument as a notifiable instrument, despite it being legislative in character, and that instrument is therefore deemed to be notifiable pursuant to subsection 11(1) of the Legislation Act. In these circumstances, it appears that Parliament is precluded from supervising the exercise of legislative power which it has delegated to the executive branch of government.

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### **Classification of delegated legislation during the COVID-19 pandemic**

5.14 Most Commonwealth instruments that have been made in response to COVID-19 are in the form of legislative instruments. However, some instruments made in response to COVID-19 have been non-legislative instruments. Of particular note, the committee identified 21 notifiable instruments relating to COVID-19 that were registered on the Federal Register of Legislation between 1 January and 31 July 2020. These notifiable instruments provide for a range of matters, including:

- public health emergency declarations;<sup>22</sup>
- exemptions from primary legislation;<sup>23</sup>

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20 *Legislation Act 2003*, Chapter 3, Parts 2 and 4.

21 Senate standing order 23(2). The Parliamentary Joint Committee on Human Rights is similarly only empowered to consider legislative instruments: *Human Rights (Parliamentary Scrutiny) Act 2011*, section 7.

22 See, for example, the Public Health (Jervis Bay Territory) Emergency Declaration 2020 [F2020N00051], and the subsequent extension instrument: Public Health (Jervis Bay Territory) Emergency Declaration Extension 2020 (No. 1) [F2020N00052].

- instruments of delegation;<sup>24</sup> and
- declarations that primary legislation applies to particular classes of persons.<sup>25</sup>

5.15 The following section describes the content of these non-legislative instruments and the implications of their classification as non-legislative for parliamentary oversight.

*Classification of instruments made under the Biosecurity Act*

5.16 It appears that the majority of COVID-19 related instruments made under the *Biosecurity Act 2015* (Biosecurity Act) have been made as legislative instruments and have therefore been subject to at least some form of parliamentary oversight (although notably not the disallowance process, as considered further in Chapter 4).

5.17 However, subsection 62(2) of the Biosecurity Act expressly provides that human biosecurity control orders made for the purposes of section 60 of that Act are not legislative instruments. Noting this, it is difficult to ascertain how many control orders were imposed in response to COVID-19, and what requirements they included.

5.18 In its April 2020 examination of instruments made under the Biosecurity Act, the Parliament Library noted:

Human biosecurity control orders are not legislative instruments which must be tabled in the Parliament. There is no legislative requirement to publish information about the number made, or the biosecurity measures

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- 23 See, for example, Therapeutic Goods (Medical Devices—Accredited Pathology Laboratories) (COVID-19 Emergency) Exemption 2020 [F2020N00032]; Therapeutic Goods (Medical Devices—Face Masks and Other Articles) (COVID-19 Emergency) Exemption 2020 [F2020N00033]; Therapeutic Goods (Medical Devices—Ventilators) (COVID-19 Emergency) Exemption 2020 [F2020N00046]; Therapeutic Goods (Medicines—Hydroxychloroquine and Chloroquine) (COVID-19 Emergency) Exemption 2020 [F2020N00041]; Therapeutic Goods (Medicines—Lopinavir and Ritonavir) (COVID-19 Emergency) Exemption 2020 [F2020N00039]; Therapeutic Goods (Medicines—Remdesivir) (COVID-19 Emergency) Exemption 2020 [F2020N00040]; Therapeutic Goods (Medical Devices—Donor Screening) (COVID-19 Emergency) Exemption 2020 [F2020N00075]; and Therapeutic Goods (Medical Devices—Novel Coronavirus) (Emergency) Exemption 2020 [F2020N00015].
- 24 See, for example, Guarantee of Lending to Small and Medium Enterprises (Coronavirus Economic Response Package) (Minister) Delegation 2020 [F2020C00437]; Guarantee of Lending to Small and Medium Enterprises (Coronavirus Economic Response Package) (Minister) Delegation 2020 [F2020N00043]; and Guarantee of Lending to Small and Medium Enterprises (Coronavirus Economic Response Package) (Minister) Amendment Delegation 2020 [F2020N00060].
- 25 See, for example, Health Insurance (Eligible persons and citizens of Malta) Order 2020 [F2020N00045]; Health Insurance (Eligible persons and citizens of Italy) Order 2020 [F2020N00044].

to which they relate. When the COVID-19 restrictions are eventually lifted there does not appear to be a mechanism by which to measure the extent to which this power was exercised.<sup>26</sup>

### *Classification of instruments made under COVID-19 primary legislation*

5.19 Certain Acts of Parliament made in response to COVID-19 provide for the making of notifiable instruments. For example, certain provisions allow for notifiable instruments to be made which:

- credit additional amounts to the Structured Finance Support (Coronavirus Economic Response) Fund Special Account;<sup>27</sup> and
- determine the dates that contact tracing via the COVIDSafe app may remain in use and specifies the particular government agencies which are data store administrators responsible for the collection and storage of information via the COVIDSafe app.<sup>28</sup>

5.20 Of particular concern to the committee are three COVID-19 related notifiable instruments which provide for the delegation of all the powers and functions of the Treasurer under certain sections of the *Guarantee of Lending to Small and Medium Enterprises (Coronavirus Economic Response Package) Act 2020*, relating to loan guarantees, to the secretary and deputy secretary of the Attorney-General's Department. Additionally, the notifiable instruments provide for directions which the secretary and deputy secretary must comply with. These directions appear to set out significant elements of the Coronavirus SME Guarantee Scheme, which enables small and medium enterprises to access additional funding to combat the current and future effects of COVID-19.<sup>29</sup>

5.21 The committee notes that at the time the relevant bill was being considered by the Parliament, the Scrutiny of Bills committee raised concerns about the inclusion of significant matters in notifiable instruments. The Scrutiny of Bills committee considered that:

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26 Parliamentary Library, *COVID-19 Economic response—delegation by the Director of Human Biosecurity*, 14 April 2020, [www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/Flag\\_Post/2020/April/Delegation\\_by\\_the\\_Director\\_of\\_Human\\_Biosecurity](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Flag_Post/2020/April/Delegation_by_the_Director_of_Human_Biosecurity) (accessed 16 November 2020).

27 *Structured Finance Support (Coronavirus Economic Response Package) Act 2020*, section 13.

28 *Privacy Amendment (Public Health Contact Information) Act 2020*, subsections 94Y(1) and 94Z(1).

29 For example, by providing that the total face value of loans in connection with which guarantees are granted should not exceed \$40 billion and setting out requirements for guarantees to be granted. See *Guarantee of Lending to Small and Medium Enterprises (Coronavirus Economic Response Package) (Minister) Delegation 2020* [F2020C00437].

In particular, the investment strategies and policies, investment decision-making criteria and considerations relating to investment risk and return for the Fund have all been set out in a notifiable instrument that is not subject to parliamentary disallowance, while certain matters relating to the administration of the Fund have been set out in a disallowable legislative instrument.

The committee reiterates its view that significant matters, such as how a fund to which the Commonwealth will invest a significant amount of public money is to operate, should be included on the face of primary legislation.<sup>30</sup>

### *Classification of delegated legislation made under other Acts*

5.22 A number of COVID-19 related notifiable instruments made under other existing primary legislation contain significant matters, including matters which significantly impact personal rights and liberties.<sup>31</sup>

5.23 The committee is particularly concerned that a notifiable instrument was used to declare a public health emergency in the Jervis Bay Territory.<sup>32</sup> The emergency declaration was subsequently extended via notifiable instrument for a total of 180 days.<sup>33</sup> This declaration of emergency has the effect of triggering the exercise of certain emergency powers and the imposition of significant penalties.<sup>34</sup>

5.24 In addition, the committee is concerned that a number of notifiable instruments were made which provide for exemptions from and modifications to the operation of primary legislation.<sup>35</sup> For example, eight notifiable instruments provide for exemptions of specified therapeutic goods and specified kinds of medical devices from the operation of certain sections of the *Therapeutic Goods Act 1989*

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30 Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 6 of 2020](#), 13 May 2020, p. 51.

31 14 notifiable instruments were made pursuant to provisions which existed prior to COVID-19.

32 See Public Health (Jervis Bay Territory) Emergency Declaration 2020 [F2020N00051]. The instrument declares an emergency under section 119 of the *Public Health Act 1997* (ACT), as in force in the Jervis Bay Territory under section 4A of the *Jervis Bay Territory Acceptance Act 1915*.

33 Public Health (Jervis Bay Territory) Emergency Declaration Extension 2020 (No. 1) [F2020N00052] and Public Health (Jervis Bay Territory) Emergency Declaration Further Extension (No. 1) 2020 [F2020N00084].

34 *Public Health Act 1997* (ACT), section 120.

35 The committee considers that provisions in delegated legislation which modify the operation of primary legislation may limit parliamentary oversight and subvert the appropriate relationship between Parliament and the executive. The committee's longstanding view is that such provisions should not ordinarily be included in delegated legislation.

(Therapeutic Goods Act).<sup>36</sup> This allows the Health Minister to make the specified goods urgently available in Australia if the minister is satisfied it is in the national interest.<sup>37</sup>

5.25 While noting that subsections 18A(11) and 41GW(2) of the Therapeutic Goods Act provide that the minister must, within five sitting days, table a document setting out particulars of the exemptions in each House of the Parliament, failure to comply with this subsection does not affect the notifiable instrument's validity. The committee considers that tabling such notifiable instruments may provide for a degree of parliamentary oversight; however, it appears that the minister did not table any of these notifiable instruments within the specified period.

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### **Classification of delegated legislation during other recent emergencies**

5.26 This interim report focuses on delegated legislation made in response to COVID-19. However, the committee notes that its concerns arising from the classification of delegated legislation made in response to COVID-19 were also evidenced in delegated legislation made in response to the 2019-2020 bushfires.

5.27 The Commonwealth government made a range of notifiable instruments in response to the bushfires. The committee is particularly concerned about one instrument which declares the 'Bushfires in Australia resulting in death, injury and/or property damage occurring from August 2019 into 2020' as an emergency for the purposes of section 80J of the *Privacy Act 1988* (Privacy Act).<sup>38</sup> The declaration triggers the operation of Part VIA of the Privacy Act, which relates to dealing with personal information in emergencies and disasters. Subsection 80P(1) of the Privacy Act provides that, while an emergency declaration is in force, an entity may (subject to certain limitations) collect, use and disclose personal information relating to an individual if the entity reasonably believes that the individual may be involved in the

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36 Therapeutic Goods (Medical Devices—Accredited Pathology Laboratories) (COVID-19 Emergency) Exemption 2020 [F2020N00032]; Therapeutic Goods (Medical Devices—Face Masks and Other Articles) (COVID-19 Emergency) Exemption 2020 [F2020N00033]; Therapeutic Goods (Medical Devices—Ventilators) (COVID-19 Emergency) Exemption 2020 [F2020N00046]; Therapeutic Goods (Medicines—Hydroxychloroquine and Chloroquine) (COVID-19 Emergency) Exemption 2020 [F2020N00041]; Therapeutic Goods (Medicines—Lopinavir and Ritonavir) (COVID-19 Emergency) Exemption 2020 [F2020N00039]; Therapeutic Goods (Medicines—Remdesivir) (COVID-19 Emergency) Exemption 2020 [F2020N00040]; Therapeutic Goods (Medical Devices—Donor Screening) (COVID-19 Emergency) Exemption 2020 [F2020N00075]; Therapeutic Goods (Medical Devices—Novel Coronavirus) (Emergency) Exemption 2020 [F2020N00015].

37 *Therapeutic Goods Act 1989*, sections 18A and 41GS.

38 Privacy (Australian Bushfires Disaster) Emergency Declaration (No. 1) 2020 [F2020N00009].

emergency. The declaration has the effect of exempting entities from secrecy provisions,<sup>39</sup> and the Australian Privacy Principles.<sup>40</sup>

5.28 Despite the significant, legislative consequences of the emergency declaration, it is not a legislative instrument.<sup>41</sup> Consequently, it is not subject to parliamentary oversight via the tabling, disallowance and sunseting frameworks or technical legislative scrutiny by this committee, nor is it accompanied by an explanatory statement.<sup>42</sup> The explanatory memorandum to the 2006 bill which inserted Part VIA into the Privacy Act justifies this classification of the declaration on the basis that:

The declaration is an administrative declaration which does not constitute a legislative instrument within the meaning of the Legislative Instruments Act. All the consequences of the declaration are set out in the Bill and there is nothing in the declaration itself that sets out new rules or imposes obligations.<sup>43</sup>

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### Evidence before the committee

5.29 While a number of submitters raised broader concerns in relation to the classification of instruments as legislative or non-legislative,<sup>44</sup> fewer submitters and witnesses addressed the relevance of the classification of instruments to the exemption of emergency-related delegated legislation from parliamentary oversight.

5.30 Ms Jacinta Dharmananda noted that notifiable instruments are already registered on the Federal Register of Legislation. She considered that there is little value to be gained by tabling emergency notifiable instruments, other than making them public. In relation to the notifiable instrument made in response to the 2019-2020 Australian bushfires,<sup>45</sup> Ms Dharmananda suggested that the content and

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39 *Privacy Act 1988*, subsection 80P(2). Entities remain subject to the designated secrecy provisions set out in subsection 80P(7), and provisions prescribed by the regulations for that purpose.

40 *Privacy Act 1988*, subsection 80P(4).

41 *Privacy Act 1988*, subsection 80L(3).

42 The *Legislation Act 2003* only requires explanatory statements to be lodged for instruments which are registered as legislative instruments, not notifiable instruments: *Legislation Act 2003*, subsection 15G(4).

43 Privacy Legislation Amendment (Emergencies and Disasters) Bill 2006, Revised explanatory memorandum, p. 5.

44 See, for example, Department of the Treasury, *Submission 20*, p. 3; Department of Veterans' Affairs, *Submission 2*, p. 2; Ms Jacinta Dharmananda, *Submission 25*, p. 3; Ms Jacinta Dharmananda, *Committee Hansard*, 27 August 2020, p. 22.

45 See paragraph 5.27.

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classification of emergency delegated legislation is a matter for Parliament to determine at the time the enabling bill is before it.<sup>46</sup>

5.31 In relation to the same instrument, the Attorney-General's Department noted that:

Emergency declarations under the *Privacy Act 1988* are made in emergency situations where there is a need for decisive action or where circumstances are rapidly evolving. Under section 80L of the Privacy Act, an emergency declaration is not a legislative instrument although it must be published on the department's website and registered on the Federal Register of Legislation so that it is publicly known that a declaration has been made. This recognises the reality that emergency declarations are made in time critical circumstances where allowing time for the parliamentary oversight process would not be appropriate. The declaration is administrative in nature. All the consequences of the declaration are set out in Part VIA of the Privacy Act and there is nothing in the declaration itself that sets out new rules or imposes obligations.<sup>47</sup>

5.32 The Attorney-General's Department noted that the question as to whether this is appropriate and whether the Privacy Act should be amended to provide for the inclusion of these emergency declarations in legislative instruments is a matter for Parliament to determine.

5.33 The Department of the Treasury provided evidence in relation to COVID-19 related notifiable instruments made within the Treasury Portfolio. In particular, Treasury drew on the example of instruments made under the *Structured Finance Support (Coronavirus Economic Response Package) Act 2020*, noting that the Scrutiny of Bills committee raised concerns about notifiable instruments made under the Act. In response to those concerns, Treasury advised:

The nature of the instrument meant that it was more appropriate to be registered as a notifiable instrument because delaying urgent expenditure to await the expiry of the disallowance process would frustrate the purpose of the instrument. The purpose is to provide additional funding to the Structured Finance Support Fund following agreement with the Finance Minister, to support access to finance for smaller lenders.<sup>48</sup>

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46 Ms Jacinta Dharmananda, answers to questions on notice, 27 August 2020 (received 18 September 2020), p. 5.

47 Attorney-General's Department, answers to questions on notice, 3 September 2020 (received 8 October 2020), p. 15.

48 Department of the Treasury, *Submission 20*, p. 3.

## Committee view

5.34 The committee is concerned about the potentially inappropriate classification of emergency-related instruments as non-legislative, noting that such classification has the effect of exempting the relevant instrument from effective parliamentary oversight, including tabling, disallowance, and consideration by this committee.

5.35 Evidence to the committee suggests that some emergency-related instruments were classified as notifiable, rather than legislative, to circumvent parliamentary scrutiny mechanisms such as disallowance, rather than because the instrument was not legislative in character, or was otherwise unsuitable to be classified as a legislative instrument.<sup>49</sup>

5.36 The committee is particularly concerned about non-legislative instruments made in response to emergencies that may substantially affect personal rights and liberties, including by triggering or authorising the use of coercive powers and the imposition of significant penalties. These instruments include declarations of emergencies under Part VIA of the Privacy Act which authorise the collection, use and disclosure of personal information and human biosecurity control orders under the Biosecurity Act which permit human biosecurity control officers to impose requirements on specified individuals in relation to a specified disease. As noted in Chapter 4, human biosecurity control orders can impose significant and restrictive measures which impact an individual's rights and liberties.<sup>50</sup>

5.37 The committee considers that the making of such instruments should be subject to parliamentary oversight, to ensure adequate checks and balances. In the limited circumstances in which an instrument may be unsuitable for classification as a legislative instrument, such as individual biosecurity control orders, the committee considers that the exercise of the enabling powers should be conditional on the existence of a disallowable legislative instrument.<sup>51</sup>

5.38 The committee also concurs with the views of the Scrutiny of Bills committee in relation to the inclusion of significant policy matters in non-legislative instruments. The committee considers that instruments setting out significant emergency response policies, such as the Coronavirus SME Guarantee Scheme, should be subject to effective parliamentary oversight and therefore should not be classified as notifiable instruments.

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49 See paragraph 5.33.

50 These measures may include, but are not limited to: restrictions on movement, providing contact information, requiring specific clothing or equipment to be worn, requiring medical examinations and body samples to be provided, medical isolation.

51 See, further discussion in Chapter 4, in particular paragraphs 4.63 to 4.68.

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5.39 Enabling non-legislative instruments to modify or override the operation of primary legislation by, for example, exempting medical devices from the operation of the Therapeutic Goods Act, is also of concern to the committee. The committee has longstanding concerns about enabling delegated legislation to modify or override the operation of legislation which has been passed by Parliament. It considers that this reduces parliamentary scrutiny and may subvert the appropriate relationship between the legislative and executive branches of government. In this context, the committee's concerns are even more acute as setting out such measures in non-legislative instruments provides the executive with the unfettered ability to modify or override primary legislation without any oversight by the Parliament.

5.40 Noting that legislative instruments generally commence the day after they are registered on the Federal Register of Legislation,<sup>52</sup> the committee does not consider that the classification of emergency-related instruments as legislative instruments would frustrate the government's capacity to respond quickly and effectively to emergencies.

5.41 Given that the committee's concerns go to the broader framework for the classification of instruments at all times, the committee will consider this matter in greater detail in its final report. In the meantime, the committee considers that the Parliament should heed the advice of the Senate Standing Committee for the Scrutiny of Bills as to the appropriateness of provisions in primary legislation which enable notifiable instruments to be made.

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52 *Legislation Act 2003*, section 12.



# Chapter 6

## Duration of delegated legislation made in times of emergency

### Overview

6.1 The committee's scrutiny of delegated legislation made during the COVID-19 pandemic has brought to light a range of systemic scrutiny issues relating to the duration of delegated legislation which have the capacity to reduce parliamentary oversight of that delegated legislation. After briefly outlining the current framework for determining the duration of delegated legislation, the chapter addresses:

- how the duration of delegated legislation made during the COVID-19 pandemic impacted on parliamentary oversight of that delegated legislation; and
- the committee's view as to the appropriateness of the impact of the duration of delegated legislation made in response to emergencies on the exemption of delegated legislation from parliamentary oversight.

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### Framework for the duration of delegated legislation

6.2 The length of time that delegated legislation remains in force may be determined by a range of legislative mechanisms, including registration, commencement, repeal and sunseting.

6.3 The duration of delegated legislation is highly relevant to parliamentary oversight of delegated legislation because certain forms of oversight are limited to particular points in the life cycle of an instrument. For example, Parliament only has a maximum of 30 sitting days from the day after it is tabled in which to disallow a legislative instrument.<sup>1</sup> Once that period has expired, Parliament does not have another opportunity to disallow the measures contained in that instrument unless and until the relevant measures are remade in a new instrument. Where an instrument is subject to the sunseting framework,<sup>2</sup> this opportunity only arises once every ten years, or longer if the sunset date is deferred or aligned with an instrument that is due to sunset later.<sup>3</sup>

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1 *Legislation Act 2003*, section 42. Noting that a parliamentarian has 15 sitting days in which to give a notice of motion to disallow the instrument, and then if such a notice of motion is given, they have a further 15 sitting days.

2 *Legislation Act 2003*, Chapter 3, Part 4.

3 *Legislation Act 2003*, sections 51 and 51A.

6.4 This is particularly relevant to delegated legislation made during times of emergency, which may require more regular oversight due to the haste in which it is made and its capacity to trespass on personal rights and liberties and override primary legislation.<sup>4</sup>

#### ***Making, registration and commencement***

6.5 The Legislation Act requires the maker of a legislative instrument or notifiable instrument to lodge the instrument for registration on the Federal Register of Legislation 'as soon as practicable after [it] is made'.<sup>5</sup>

6.6 The commencement of delegated legislation is often linked to the date on which it is registered on the Federal Register of Legislation. Subsection 12(1) of the Legislation Act provides that legislative instruments and notifiable instruments commence at the start of the day after the instrument is registered on the Federal Register of Legislation, unless the instrument provides otherwise.<sup>6</sup> The commencement of a disallowable legislative instrument is unrelated to the period in which it may be disallowed, unless the instrument or its enabling Act provides otherwise.<sup>7</sup>

#### ***Automatic repeal***

6.7 Some delegated legislation is subject to automatic repeal. Division 1 of Part 3 of Chapter 3 of the Legislation Act sets out the framework for the automatic repeal of amending and repealing instruments and provisions. Section 48A of the Act provides that legislative and notifiable instruments are subject to automatic repeal where their only legal effect is to amend or repeal one or more other legislative or notifiable instruments.

6.8 The particular point in time at which an instrument or provision subject to automatic repeal is repealed depends on the instrument's type and disallowance status. Generally, instruments or provisions of instruments are repealed on the day after the latest of the following events occurs:

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4 See, for example, non-disallowable instruments made under sections 477 and 478 of the *Biosecurity Act 2015*, which have effect 'despite any provision of any other Australian law'.

5 *Legislation Act 2003*, subsections 15G(1) and 15G(2). Section 15A of the *Legislation Act 2003* provides for the establishment, maintenance and content of the Federal Register of Legislation. The Federal Register of Legislation may be accessed at <http://www.legislation.gov.au>.

6 *Legislation Act 2003*, subsection 12(1).

7 Subsection 12(1A) of the *Legislation Act 2003* confirms that an instrument, or a provision of an instrument, may commence before registration, provided the retrospective commencement does not disadvantage any person (other than the Commonwealth or a Commonwealth authority), or impose liability on a person for anything done or omitted to be done before the instrument is registered.

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- the end of the last day on which the instrument may be disallowed in a House of the Parliament;
  - the commencement of the instrument; and
  - the registration of the instrument on the Federal Register of Legislation.<sup>8</sup>

6.9 The same rules apply to the repeal of amending and repealing provisions in addition to amending and repealing instruments.<sup>9</sup>

6.10 Importantly, the automatic repeal of such an instrument or provision does not affect the actual amendment or repeal made by that instrument or provision.<sup>10</sup> However, in practice, the automatic repeal can create confusion as to the status of various instruments and provisions. This is because the relevant instrument or provision will be listed as repealed on the Federal Register of Legislation, but the duration of the actual measures it affects is determined by the duration of the principal law or instrument to which it relates.

### **Sunsetting**

6.11 Sunsetting is the formal process by which Commonwealth legislative instruments are automatically repealed after a fixed period of time, unless further action is taken to extend that law.<sup>11</sup>

6.12 Part 4 of Chapter 3 of the Legislation Act establishes the framework for the sunseting of Commonwealth delegated legislation. Under section 50 of the Act, with some exceptions, legislative instruments registered on the Federal Register of Legislation after 1 January 2005 are automatically repealed ten years after registration.<sup>12</sup> In practice, legislative instruments are most typically exempted from sunseting by prescription in the Legislation (Exemptions and Other Matters) Regulation 2015.<sup>13</sup> The Legislation Act does not specify any particular conditions or criteria that must be satisfied before new exemptions are made. Instead, there is a general principle that sunseting exemptions should only be granted where the

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8 *Legislation Act 2003*, subsection 48A(2).

9 *Legislation Act 2003*, subsection 48C(2).

10 *Legislation Act 2003*, subsections 48A(3) and 48C(3).

11 In some instances, sunseting may also be used as an umbrella term to refer generally to the repeal of delegated legislation.

12 *Legislation Act 2003*, section 50. Instruments are repealed on the first 1 April or 1 October that falls on or after their tenth anniversary of registration. The sunseting of legislative instruments registered on 1 January 2005 (that is, all instruments made before that date) is staggered, with the sunset date of determined by the table set out in subsection 50(2). The exceptions are set out in section 54 of the *Legislation Act 2003*.

13 Legislation (Exemptions and Other Matters) Regulation 2015, Part 5.

instrument is not suitable for regular review under the Legislation Act, underpinned by criteria set out in the *Guide to Managing Sunsetting of Legislative Instruments*.<sup>14</sup>

6.13 The Attorney-General may also defer the sunset date of an instrument for up to two years by way of a certificate. The certificate is not a disallowable instrument (unless the deferral is for more than one year).<sup>15</sup> Additionally, the Attorney-General may, by disallowable legislative instrument, align the sunsetting date of multiple instruments to facilitate a thematic review.<sup>16</sup> Amongst other conditions, the new date cannot be later than five years after the earliest date on which any of the instruments subject to a review was originally due to repeal.

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### **Duration of Commonwealth delegated legislation during the COVID-19 pandemic**

6.14 As noted above, the committee's scrutiny of delegated legislation made during the COVID-19 pandemic has brought to light a range of systemic scrutiny issues regarding the duration of emergency-related delegated legislation. The following section highlights some of the most significant issues observed by the committee.

#### ***Delays between commencement and tabling***

6.15 The committee observed significant delays between the commencement and tabling of some delegated legislation made in response to COVID-19. Some of the lengthier delays appear to be attributable to the alteration and cancellation of the parliamentary sittings, addressed in detail in Chapter 3. For example, one legislative instrument made by the Minister for Families and Social Services which modified the operation of the *Social Security Act 1999* and *Social Security (Administration) Act 1999* commenced on 21 June 2020, but was not tabled in either chamber until 24 August 2020.<sup>17</sup> The instrument was therefore operational but not subject to

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14 The criteria are that the rule-maker has been given a statutory role independent of the government, or the rule maker 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 the instrument is subject to a more rigorous statutory review process, see Attorney-General's Department, *Guide to Managing Sunsetting of Legislative Instruments*, 2016, <https://www.ag.gov.au/LegalSystem/AdministrativeLaw/Documents/guide-to-managing-sunsetting-of-legislative-instruments-december-2016.pdf> (accessed 29 June 2020).

15 *Legislation Act 2003*, section 51.

16 *Legislation Act 2003*, section 51A. The deferred sunset date must not be more than five years after the earliest day on which any of the instruments covered by the instrument of deferral would otherwise have sunset under the *Legislation Act 2003*.

17 Social Security (Coronavirus Economic Response—2020 Measures No. 11) Determination 2020 [F2020L00765].

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parliamentary oversight for 63 days before it was tabled in the Parliament, and subject to disallowance.<sup>18</sup>

***Duration of measures in delegated legislation made in response to COVID-19***

6.16 The duration of measures implemented by delegated legislation made in response to COVID-19 has varied significantly. In some instances, the duration was clearly limited to short periods of time, after which point another legislative instrument was required to be made if the measure were to continue. For example, section 113 of the *Biosecurity Act 2015* (Biosecurity Act) expressly provides that human health response zone determinations may not be in force for more than three months. Therefore, each of the human health response zone determinations which have been made pursuant to that section in response to COVID-19 includes a provision which clarifies that it is 'in force for 3 months beginning on the day that it commences'.<sup>19</sup>

6.17 The duration of other COVID-19 related measures has not been fixed on the face of the instrument itself, but has instead been tied to the time in which another instrument remains in force. These include the emergency requirement determinations made under section 477 of the Biosecurity Act. Between 1 January and 30 July 2020 the government made 17 emergency requirement determinations, including the determination which imposed the overseas travel ban for Australian citizens.<sup>20</sup> Subsection 477(1) of the Biosecurity Act provides that emergency requirement determinations cease to have effect at the end of the human biosecurity emergency period, unless revoked earlier. At the time of tabling this report, this period has twice been extended by non-disallowable legislative instrument,<sup>21</sup> such that the measures in emergency requirement determinations

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18 Section 42 of the *Legislation Act 2003* provides that a notice of motion to disallow a legislative instrument or a provision of a legislative instrument may only be given on the first sitting day after an instrument has been tabled in the relevant House.

19 See, for example, Biosecurity (Human Health Response Zone) (Royal Australian Air Force Base Learmonth) Determination 2020 [F2020L00086], section 7.

20 Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020 [F2020L00306].

21 *Biosecurity Act 2015*, section 476.

which have not otherwise been repealed continue until 17 December 2020, rather than the initial date of 17 June 2020.<sup>22</sup>

6.18 Another example of this issue can be seen in instruments made to prohibit the export of goods such as face masks and hand sanitiser from Australia.<sup>23</sup> These measures have the potential to have a wide impact on consumers, the health industry and export businesses. An instrument was made in response to COVID-19 to limit the export of these specified goods, which was achieved by amendments to existing customs regulations. Although the amending instrument was automatically repealed on 1 September 2020,<sup>24</sup> the instrument prescribed that the amendments it inserted into the existing customs regulations remain in force during the COVID-19 human biosecurity emergency period.<sup>25</sup>

6.19 Other legislative instruments made in response to COVID-19 do not specify an end date for the measures they contain. Consequently, the measures may continue in effect until they are repealed or sunset after ten years. This issue arises in relation to amendments made to the foreign acquisitions and takeovers regime by delegated legislation. The relevant instrument amended the principal regulation to set the monetary thresholds for particular actions to nil,<sup>26</sup> with the effect that the majority of actions relating to the holding or acquisition of interests in Australian business or land require notification to the Treasurer. While the instrument itself was repealed on 2 September 2020 via the automatic repeal provisions, the amendments

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22 The human biosecurity emergency period was first prescribed by the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020 [F2020L00266]. As made, that declaration was registered on 17 March, commenced on 18 March 2020 and was due to cease on 17 June. However, subsequent amendments made by the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension) Instrument 2020 [F2020L00266] and the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 2) Instrument 2020 [F2020L01129] extended the period until 17 September 2020 and 17 December 2020 respectively.

23 See the amendments inserted into the Customs (Prohibited Exports) Regulations 1958 by the Customs (Prohibited Exports) Amendment (COVID-19 Human Biosecurity Emergency) Regulations 2020 [F2020L00343].

24 As per Division 1 of Part 3 of Chapter 3 of the *Legislation Act 2003*. This Division provides for the automatic repeal of legislative or notifiable instruments whose only legal effect is to amend or repeal one or more other instruments.

25 Subregulation 13GI(1) of the Customs (Prohibited Exports) Regulations 1958, as inserted by item 2 of Schedule 1 to the Customs (Prohibited Exports) Amendment (COVID-19 Human Biosecurity Emergency) Regulations 2020.

26 Foreign Acquisitions and Takeovers Regulation 2015, as amended by the Foreign Acquisitions and Takeovers Amendment (Threshold Test) Regulations 2020 [F2020L00435].

it made to the principal regulations remain in force until that instrument sunsets in 2026.<sup>27</sup>

*Duration of delegated legislation which modifies or overrides primary legislation*

6.20 The committee observed an increased number of legislative instruments made to modify or override the operation of primary legislation in response to COVID-19 (otherwise known as Henry VIII clauses). A significant proportion of these legislative instruments were made pursuant to the Henry VIII provisions in COVID-19 primary legislation,<sup>28</sup> and provided for a range of matters including:

- modifying social security law to provide for additional COVID-19 related payments;<sup>29</sup> and
- modifying primary legislation to amend its sunseting date, which has been used to extend significant legislation such as the cashless debit card trials, and ASIO's powers to question and detain people.<sup>30</sup>

6.21 The committee notes that, while these powers were envisaged to provide the government with greater flexibility to respond to COVID-19 when parliamentary sittings had been cancelled, the government continued to make such legislative instruments after parliamentary sittings recommenced.<sup>31</sup>

6.22 Additionally, the committee observed that existing modification powers continued to be exercised during 2020, including the power to modify, or exempt

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27 It is noted that in response to concerns raised by the Parliamentary Joint Committee on Human Rights in relation to this legislative instrument, the Treasurer advised that the intention was that these temporary measures would transition to broader ongoing reform measures on 1 January 2021, but that due to uncertainties about the duration of the coronavirus pandemic it was too early to specify an end-date for the application of these regulations. See Treasurer's response, as set out in Parliamentary Joint Committee on Human Rights, *Report 9 of 2020* (18 August 2020), p. 145.

28 These powers are discussed in detail in Chapter 2.

29 *Coronavirus Economic Response Package Omnibus Act 2020*, schedule 11, item 40A.

30 *Coronavirus Economic Response Package Omnibus Act 2020*, schedule 16, subitem 1(2). See Coronavirus Economic Response Package (Deferral of Sunseting—Income Management and Cashless Welfare Arrangements) Determination 2020 [F2020L00572] and Coronavirus Economic Response Package (Deferral of Sunseting—ASIO Special Powers Relating to Terrorism Offences) Determination 2020 [F2020L01134].

31 For example, the Coronavirus Economic Response Package (Deferral of Sunseting—ASIO Special Powers Relating to Terrorism Offences) Determination 2020 [F2020L01134] was registered on 4 September 2020 to defer the sunseting of certain provisions of the *Australian Security Intelligence Organisation Act 1979*.

certain classes of persons or entities from the operation of, certain provisions of the *Corporations Act 2001* (Corporations Act).<sup>32</sup>

6.23 Some legislative instruments made pursuant to these powers were time-limited by express provisions in their enabling legislation.<sup>33</sup> In contrast, a number of other legislative instruments made in response to COVID-19 provided for modifications to primary legislation and were not time-limited to the emergency period. For example, the committee raised concerns regarding three instruments which modified certain provisions of the Corporations Act to provide relief from certain disclosure and licensing requirements in response to the constraints created by COVID-19 that did not specify when the measures would cease to operate.<sup>34</sup>

### ***Manner of prescribing the duration of COVID-19 related delegated legislation and associated measures***

6.24 The human health response zone determinations and human biosecurity emergency requirements and directions under the Biosecurity Act reflect the differences in the manner in which the duration of delegated legislation relating to COVID-19 has been prescribed. While the duration of the human health response zone determinations is set out on the face of the instruments, the duration of human biosecurity emergency requirements and directions depends on the duration of the human biosecurity emergency period,<sup>35</sup> which may be subject to an indefinite number of extensions by non-disallowable legislative instrument.<sup>36</sup>

6.25 Human biosecurity emergency requirement determinations are one example of where the duration of delegated legislation made in response to COVID-19 has been made conditional on other Commonwealth laws. In other instances, the duration of Commonwealth legislative instruments has depended on matters contained in state laws. For example, the duration of a measure in a disallowable

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32 See, for example, ASIC Corporations (Trading Suspensions Relief) Instrument 2020/289 [F2020L00377].

33 For example, subitem 40A(5) of Schedule 11 to the *Coronavirus Economic Response Package Omnibus Act 2020* specifies that legislative instruments made for the purposes of that provision (to modify social security law) have no effect after 31 December 2020 and subitem 40A(6) provides that the provision is repealed on the same date.

34 ASIC Corporations (Amendment) Instrument 2020/290 [F2020L00376]; ASIC Corporations (Trading Suspensions Relief) Instrument 2020/289 [F2020L00377]; and ASIC Corporations (COVID-19—Advice-related Relief) Instrument 2020/355 [F2020L00425]. See *Senate Standing Committee for the Scrutiny of Delegated Legislation, Delegated Legislation Monitor 6* (21 May 2020) p. 9 and *Senate Standing Committee for the Scrutiny of Delegated Legislation, Delegated Legislation Monitor 8* (17 June 2020) p. 15.

35 Subsections 477(7) and 478(7) provide that requirement and direction determinations cease to have effect at the end of the human biosecurity emergency period, unless they are revoked earlier.

36 *Biosecurity Act 2015*, section 476.

legislative instrument permitting approved child care providers to waive their fees for child care services was set by reference to the start and end date of 'Stay at Home Directions'. The instrument defines 'Stay at Home Directions' as:

the Stay at Home Directions (Restricted Areas) (Vic) issued under the *Public Health and Wellbeing Act 2008* (Vic), as in force from time to time, and includes any instrument replacing that instrument.<sup>37</sup>

6.26 Such directions are made by the Chief Health Officer in that officer's role as Victorian Public Health Commander. They are not disallowable by the Victorian Parliament, and the Commonwealth Parliament has no role in determining the duration of the directions.

6.27 The complexity of the framework for the duration of legislative instruments can make it difficult to determine the actual duration of emergency-related measures implemented by delegated legislation made in response to the COVID-19 pandemic. For example, delegated legislation which is subject to automatic repeal appears on the Federal Register of Legislation as 'no longer in force' from the date of that automatic repeal. However, the measures themselves (which were inserted into, or which amended, the principal instrument) remain in force for the duration of the principal instrument.

6.28 For example, the non-disallowable legislative instrument which added 'human coronavirus with pandemic potential' to the principal listed human diseases determination was registered on 21 January 2020 but repealed on 22 January 2020 due to the operation of the automatic repeal provisions.<sup>38</sup> Consequently, it is recorded as 'no longer in force' on the Federal Register of Legislation.<sup>39</sup> However, the actual listing of human coronavirus with pandemic potential remains in force in the principal listed human disease determination until that determination sunsets in six years on 1 October 2026, or is otherwise repealed.

6.29 As discussed in Chapters 2 and 4, human biosecurity control orders may be exercised in relation to diseases which have been added to the 'listed human disease determination'.<sup>40</sup> Accordingly, the failure of the amending instrument to specify an end date for the inclusion of human coronavirus with pandemic potential in the principal listed human disease determination means that such an order may be imposed in relation to the human coronavirus with pandemic potential until the

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37 Child Care Subsidy Amendment (Coronavirus Response Measures No. 5) Minister's Rules 2020 [F2020L00930], item 4 of Schedule 1.

38 Biosecurity (Listed Human Diseases) Amendment Determination 2020 [F2020L00037].

39 See Federal Register of Legislation, *Biosecurity (Listed Human Diseases) Amendment Determination 2020*, 4 February 2020, <https://www.legislation.gov.au/Details/F2020L00037> (accessed 25 November 2020).

40 *Biosecurity Act 2015*, subsection 60(2).

principal determination sunsets in October 2026, or is otherwise repealed.<sup>41</sup> While this may be both necessary and appropriate, the explanatory statement to the amending instrument provides no information about the duration of that measure in the principal determination, including the justification for the duration.

### Approaches in other jurisdictions

6.30 As set out in the table below, the states have generally opted for short terms of expiry for legislation made in response to the COVID-19 pandemic:

Jurisdiction	Primary Act	Duration of COVID 19 legislation
New South Wales	<i>COVID-19 Legislation Amendment (Emergency Measures) Act 2020</i> (NSW)	Regulations made for exceptional circumstances expire six months after commencement, or earlier by parliamentary resolution. <sup>42</sup>
Queensland	<i>COVID-19 Emergency Response Act 2020</i> (Qld)	The Act and extraordinary regulations made under the Act sunset on 31 December 2020. <sup>43</sup>
South Australia	<i>COVID-19 Emergency Response Act 2020</i> (SA)	The majority of provisions in the Act will expire as per the date set out by the minister by notifiable instrument. <sup>44</sup>  The date for expiry must be the day on which all relevant declarations in relation to COVID-19 have ceased, or six months from commencement of the Act, whichever is the earlier. <sup>45</sup>
Tasmania	<i>COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020</i> (Tas)	Notices issued under the Act are in force for 12 months or less if so specified and all will be revoked 60 days after the Act's emergency cessation day. <sup>46</sup>

41 The usual conditions for imposing a human biosecurity control order must otherwise be met. See *Biosecurity Act 2015*, section 60.

42 *COVID-19 Legislation Amendment (Emergency Measures) Act 2020* (NSW), subsection 366(5).

43 *COVID-19 Emergency Response Act 2020* (Qld), section 25.

44 *COVID-19 Emergency Response Act 2020* (SA), section 6.

45 *COVID-19 Emergency Response Act 2020* (SA), subsection 6(2).

46 *COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020* (Tas), section 8.

		The emergency cessation day must be specified by the minister as no more than 90 days after the Director of Public Health advises that emergency circumstances are no longer necessary to combat COVID-19. <sup>47</sup>
Victoria	<i>COVID-19 Omnibus (Emergency Measures) Act 2020 (Vic)</i>	Parts 1 and 2 of the Act are repealed six months from commencement and regulations in force under these parts are impliedly revoked on the same day.
Western Australia	<i>Emergency Management Act 2005 (WA)</i> , as amended by the <i>Emergency Management Amendment (COVID-19 Response) Act 2020 (WA)</i>	The Act provides that the Governor may make regulations under the Act with no time limits specified. <sup>48</sup> Some powers in the Act sunset. <sup>49</sup>

### Evidence before the committee

6.31 A number of submitters raised concerns about the potential for delegated legislation made in response to times of emergency to remain in force for longer than is necessary to address the emergency. These concerns stem from the view that such delegated legislation:

- may have a significant effect on personal rights and liberties; or
- may modify the operation of primary legislation in the absence of parliamentary sittings.

6.32 All submitters who advocated limiting the duration of delegated legislation made in times of emergency agreed that such limitations would facilitate greater parliamentary oversight of the relevant legislation, particularly in the absence of other parliamentary oversight mechanisms such as disallowance. For example, Professor Anne Twomey suggested that, in the absence of the disallowance procedure:

47 *COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020 (Tas)*, section 27.

48 *Emergency Management Act 2005 (WA)*, as amended by the *Emergency Management Amendment (COVID-19 Response) Act 2020 (WA)*, section 102.

49 See, for example, *Emergency Management Act 2005 (WA)*, as amended by the *Emergency Management Amendment (COVID-19 Response) Act 2020 (WA)*, section 72A.

Another, or additional, option is to include limits on the period of time during which emergency provisions, and the delegated legislation made under them, can operate, requiring parliamentary action to extend them (as has recently been seen in Victoria).<sup>50</sup>

6.33 Professor Twomey also suggested that limiting the duration of emergency delegated legislation may be a sufficient alternative oversight mechanism to disallowance, particularly at the beginning of an emergency:

There may be good reason to substitute sunseting for disallowance at the beginning of an emergency, when the situation is unstable, there are many unknowns and decisions need to be given effect immediately. It is a different matter if those provisions extend beyond, say, a second period of extension. Once an emergency is running for at least 6 months, there should be a clearer idea of its scope, its length and how to deal with it.<sup>51</sup>

6.34 The New South Wales Council for Civil Liberties agreed that limiting the duration of delegated legislation has an important role to play, particularly in emergency periods, noting that the notion of 'emergency' is itself temporally limited by definition. The Council further argued that:

By the end of 3 or even 6 months, the emergency has metamorphosed into a new normal. Therefore, it makes inherent sense that the duration of the emergency and the significant powers accompanying it are 'sunset'.<sup>52</sup>

6.35 The Clerk of the Senate similarly commented that, while emergency circumstances may justify the exemption of delegated legislation from disallowance, 'an important constraint in those circumstances would be to limit the operation of the exemption, or the instrument itself, to the period of the emergency'.<sup>53</sup>

6.36 The Attorney-General's Department advocated the insertion of self-repealing provisions in primary legislation to limit the operation of delegated legislation made during times of emergency:

Self-ceasing enabling provisions and explicit requirements as to the purpose and operation of COVID-19 legislative instruments provide good examples of such safeguards and limitations.<sup>54</sup>

6.37 Expanding on this point, the New South Wales Council for Civil Liberties noted that legislative instruments which are made pursuant to Henry VIII clauses

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50 Professor Anne Twomey, answers to questions on notice (received 11 September 2020), pp. 2–3.

51 Professor Anne Twomey, answers to questions on notice (received 11 September 2020), p. 4.

52 New South Wales Council of Civil Liberties, answers to questions on notice (received 2 September 2020), p. 5.

53 Clerk of the Senate, *Submission 3*, p. 4.

54 Attorney-General's Department, *Submission 14*, p. 8.

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should not be exempt from disallowance unless express repeal provisions are included on the face of the primary legislation. The Council expressed particular concern that the duration of instruments made under the Biosecurity Act has been extended on the basis of extensions to the declarations of a human biosecurity emergency, highlighting that 'the time of operation is renewable indefinitely'.<sup>55</sup>

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### **Committee view**

6.38 The COVID-19 pandemic has highlighted systemic issues relating to the duration of delegated legislation made in times of emergency which diminish the Parliament's capacity to exercise oversight and control of such delegated legislation, and, in some cases, effectively exempt it from parliamentary oversight.

#### *Delays between commencement and tabling*

6.39 The committee is concerned about the sometimes lengthy delays between the commencement of delegated legislation made in response to recent emergencies, and the tabling of that delegated legislation in the Parliament. While instruments are available as registered on the Federal Register of Legislation, tabling is an important scrutiny mechanism as it serves to formally and procedurally bring an instrument to the attention of the Parliament. While parliamentarians may be aware of instruments as they become registered on the Federal Register of Legislation, it is important that tabling occurs as close to (if not before) an instrument commences to ensure that all parliamentarians have knowledge as to the law as in force.

6.40 Tabling is also a trigger for other parliamentary processes including disallowance, the core scrutiny mechanism for delegated legislation. The committee acknowledges that disrupted and delayed sitting times may have contributed to delays in tabling, but reiterates the importance of ensuring that alternative measures to facilitate parliamentary sittings are available to ensure effective and timely parliamentary scrutiny of these laws.

#### *Duration of delegated legislation made during times of emergency*

6.41 As discussed previously, the duration of delegated legislation made in response to COVID-19 has varied significantly. In some instances, emergency-response measures have been limited to short periods of time set out on the face of the instrument. In other instances, the duration has been subject to variation and extension without parliamentary oversight. In other examples, the duration of measures implemented by delegated legislation has not been explicitly fixed, such that the measures only cease on the sunseting of the instrument or the instrument into which the measures are inserted. This can occur years after the emergency for which the measures were intended has ended.

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55 New South Wales Council for Civil Liberties, *Submission 22*, p. 6.

6.42 The committee is concerned by this variation, particularly where it prevents Parliament from overseeing the extension of emergency-related measures. The committee is particularly concerned about delegated legislation which implements emergency-related measures but does not specify an end date, such that they rely on the sunseting framework to be repealed. In the committee's view, an end date is necessary to ensure an appropriate level of regular parliamentary oversight, and to guard against the risk that temporary measures enacted in response to COVID-19 become an ongoing part of the law without appropriate parliamentary scrutiny.

### **Recommendation 12**

**6.43 The committee recommends that the government ensure that all delegated legislation made in response to emergencies ceases to be in force after three months. Where measures implemented by delegated legislation are required for a longer period of time the relevant legislative instrument should be remade to facilitate parliamentary oversight.**

#### ***Duration of delegated legislation made in times of emergency which modifies or overrides primary legislation***

6.44 The duration of delegated legislation is of particular concern to the committee where that delegated legislation is used to modify or override primary legislation. In non-emergency periods, it is the committee's general view that delegated legislation which modifies primary legislation should not continue in force for more than three years to ensure regular parliamentary oversight of the provisions. However, the committee is concerned to ensure that there is even more regular scrutiny of these modification powers during emergency periods, particularly noting the impact that such powers may have on personal rights and liberties.

6.45 The committee acknowledges that the extraordinary circumstances relating to the COVID-19 pandemic may have necessitated the use of delegated legislation to modify primary legislation for matters such as providing for additional social security payments or deferring the sunseting of primary legislation, when Parliament was not sitting. However, it is not appropriate to continue to use Henry VIII powers for significant periods of time, particularly when regular parliamentary sittings have recommenced.

### **Recommendation 13**

**6.46 The committee recommends that where primary legislation empowers the executive to make delegated legislation to amend or modify the operation of primary legislation in times of emergency (via a 'Henry VIII' clause), parliamentarians and the government should ensure that the primary legislation:**

- **specifies a time limit in which those powers can be exercised; and**
- **requires the maker of the delegated legislation to be satisfied that Parliament is not sitting and is not likely to sit within two weeks after the day the relevant instrument is made before they make the instrument.**

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***Manner of prescribing the duration of delegated legislation made in times of emergency***

6.47 As a technical matter, the committee is concerned about delegated legislation made in response to COVID-19 which sets the duration of emergency-related measures by reference to non-disallowable instruments, or other laws and events outside the Parliament's control, rather than by dates set out on the face of the instrument. Noting that delegated legislation made in times of emergency is more likely to contain significant matters, override or modify primary legislation, or trespass on personal rights and liberties than that made at other times, the committee considers that it is particularly important that the duration of such delegated legislation is made clear on the face of the instrument, and remains within the control of the Commonwealth Parliament.

**Recommendation 14**

**6.48 The committee recommends that:**

- **the government limit the duration of delegated legislation made in times of emergency, and any measures implemented by such legislation, to dates prescribed on the face of the instrument; and**
- **where the duration of delegated legislation made during times of emergency cannot be prescribed by setting dates on the face of the instrument, but must instead be contingent on something else, the government ensure that the relevant trigger is subject to oversight by the Commonwealth Parliament.**

6.49 More generally, the committee is concerned that the complex manner in which the duration of emergency-related delegated legislation is determined is itself a barrier to effective parliamentary oversight, because parliamentarians and others may not be able to readily ascertain the duration of such measures in considering whether the executive has appropriately exercised the law-making powers it has delegated to it. The committee considers that greater explanation of the duration of emergency-related delegated legislation and the measures they contain in their accompanying explanatory statements would greatly assist the Parliament, including this committee, to have effective oversight of emergency measures.

**Recommendation 15**

**6.50 The committee recommends that the government ensure that explanatory statements to delegated legislation made in response to emergencies clearly explain the anticipated duration of the measures implemented by the relevant instrument, particularly where that instrument is subject to automatic repeal but the measures it implements remain in force in other delegated legislation.**



# Chapter 7

## Exclusion of delegated legislation from committee consideration in times of emergency

### Overview

7.1 This chapter considers how the practical and procedural exclusion of delegated legislation from committee consideration contributes to the lack of parliamentary oversight of delegated legislation made in times of emergency. After briefly outlining the current framework for parliamentary committee consideration of delegated legislation, this chapter addresses:

- the practical and procedural constraints which impacted scrutiny of delegated legislation by parliamentary committees during the COVID-19 pandemic;
- evidence before the committee regarding the appropriateness of excluding emergency-related delegated legislation from scrutiny by parliamentary committees; and
- the committee's view as to the appropriateness of excluding delegated legislation from scrutiny by parliamentary committees during times of emergency.

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### Framework for committee consideration of delegated legislation

7.2 Both the Senate and the House of Representatives have a variety of parliamentary committees to which the Houses delegate responsibility for certain matters. Parliamentary committees play a particularly important role in facilitating policy and legislative scrutiny, and providing opportunities for organisations and individuals to express their views directly to parliamentarians.<sup>1</sup> The following discussion outlines the framework in which delegated legislation can, or cannot be, scrutinised by parliamentary committees.

#### ***Technical legislative scrutiny of delegated legislation by parliamentary committees***

##### *Senate Standing Committee for the Scrutiny of Delegated Legislation*

7.3 The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) examines all legislative instruments which are subject to disallowance, disapproval or affirmative resolution by the Senate.<sup>2</sup> The committee's routine scrutiny of disallowable legislative instruments is generally conducted within

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1 Department of the Senate, [Senate Brief No. 4 – Senate Committees](#), October 2020, p. 1.

2 The Senate, [Standing Orders and other orders of the Senate](#), January 2020, SO 23(2).

the timeframes that apply to the disallowance process. Working within these timeframes ensures that the committee is able to engage with relevant ministers and, if necessary, initiate the disallowance procedure in relation to instruments about which it has concerns. The committee regularly uses the disallowance procedure to resolve technical scrutiny issues with the executive.<sup>3</sup> The Senate has never rejected a recommendation from the committee that an instrument should be disallowed.<sup>4</sup>

7.4 Amendments to the Senate standing orders made in November 2019 also empowered the committee to scrutinise each instrument to determine whether the Senate's attention should be drawn to it on the ground that it raises significant issues, or otherwise gives rise to issues that are likely to be of interest to the Senate.<sup>5</sup> The purpose of this amendment was to 'encourage the policy scrutiny of delegated legislation by the Australian Parliament, while preserving the committee's commitment to technical, non-partisan scrutiny'.<sup>6</sup> In practice, the committee draws the Senate's attention to instruments containing matters of interest to the Senate by writing to the Chairs of the relevant Senate and Joint parliamentary committees, and reporting on the instruments in the *Delegated Legislation Monitor*.<sup>7</sup>

7.5 The 2019 amendments to the Senate standing orders also conferred an own-motion inquiry power on the committee to 'inquire into and report on any matter related to the technical scrutiny of delegated legislation'.<sup>8</sup> This inquiry marks the first time that the committee has exercised this power. The purpose of this addition to the committee's powers was to enable the committee to inquire into systemic, technical scrutiny issues identified through its routine scrutiny work, without being constrained by the timeframes arising from the need to seek a referral by the Senate.<sup>9</sup> The committee must still seek a referral from the Senate to inquire into any matter outside the scope of this own motion inquiry power.

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3 For example, in 2019 the Chair, on behalf of the committee, gave 19 notices of motion to disallow instruments. All these notices were subsequently withdrawn following the receipt of a satisfactory response from the relevant minister.

4 Harry Evans and Rosemary Laing, eds, *Odgers' Australian Senate Practice*, 14<sup>th</sup> edition, Department of the Senate, 2016, p. 437.

5 The Senate, *Standing Orders and other orders of the Senate*, January 2020, SO 23(4).

6 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Parliamentary scrutiny of delegated legislation*, June 2019, p. 105.

7 Chapters 2 and 3 of the *Delegated Legislation Monitor* identify instruments which, in the committee's view, raise significant matters, or otherwise give rise to issues that are likely to be of interest to the Senate.

8 The Senate, *Standing Orders and other orders of the Senate*, January 2020, SO 23(12).

9 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Parliamentary scrutiny of delegated legislation*, June 2019, p. 28.

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### *Senate Standing Committee for the Scrutiny of Bills*

7.6 The Scrutiny of Bills committee assesses all bills before the Parliament against its own set of scrutiny principles set out in Senate standing order 24. These principles focus on individual rights and liberties, independent review and parliamentary oversight.<sup>10</sup>

7.7 Of particular relevance to parliamentary oversight of delegated legislation, the Scrutiny of Bills committee considers whether any delegation of legislative powers in a bill before the Parliament is appropriate. The issue of whether a bill appropriately delegates legislative powers (for example, whether it leaves significant matters to delegated legislation) is a perennial concern for the Scrutiny of Bills committee, with approximately one quarter of that committee's concerns being made under this scrutiny principle.<sup>11</sup>

7.8 However, where a bill is under consideration by the Scrutiny of Bills committee the standing orders do not prevent the passage of the bill before that committee has reported.<sup>12</sup> As a result, around 11 per cent of bills in recent years have passed the Senate before the Scrutiny of Bills committee has finally reported on the bill.<sup>13</sup>

7.9 The Scrutiny of Bills committee also considers whether a bill 'insufficiently subject[s] the exercise of legislative power to parliamentary scrutiny'.<sup>14</sup> Among other things, under this principle the Scrutiny of Bills committee is concerned to ensure that legislative instruments are not inappropriately excluded from the disallowance process.

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10 The Senate, *Standing Orders and other orders of the Senate*, January 2020, SO 24(1)(a).

11 Concerns raised under principle 24(1)(a)(iv) accounted for 24 per cent of the Scrutiny of Bills committee's comments in 2014; 22 per cent in 2015; 27 per cent in 2016; 26 per cent in 2017; 23 per cent in 2018. See Senate Standing Committee for the Scrutiny of Bills, [The work of the committee in 2014](#), March 2015, p. 12; Senate Standing Committee for the Scrutiny of Bills, [The work of the committee in 2015](#), October 2016, p. 22; Senate Standing Committee for the Scrutiny of Bills, [Annual Report 2016](#), March 2017, p. 10; Senate Standing Committee for the Scrutiny of Bills, [Annual Report 2017](#), March 2018, p. 14; Senate Standing Committee for the Scrutiny of Bills, [Annual Report 2018](#), February 2019, p. 12.

12 By contrast, Senate standing order 115 order prevents the passage of a bill that has been referred to a legislation committee before that committee has reported.

13 The percentage of bills that passed both Houses before the Scrutiny of Bills committee received a response was: 18 per cent in 2015; 14 per cent in 2016, 5 per cent in 2017; 6 per cent in 2018. See Senate Standing Committee for the Scrutiny of Bills, [The work of the committee in 2015](#), October 2016, p. 4; Senate Standing Committee for the Scrutiny of Bills, [Annual Report 2016](#), March 2017, p. 4; Senate Standing Committee for the Scrutiny of Bills, [Annual Report 2017](#), March 2018, p. 6; Senate Standing Committee for the Scrutiny of Bills, [Annual Report 2018](#), February 2019, p. 5.

14 The Senate, *Standing Orders and other orders of the Senate*, January 2020, SO 24(1)(a)(v).

### *Parliamentary Joint Committee on Human Rights*

7.10 In addition, the Parliamentary Joint Committee on Human Rights (PJCHR) engages in technical scrutiny of delegated legislation to determine its compatibility with international human rights law.<sup>15</sup> The PJCHR undertakes its scrutiny function as a technical inquiry relating to Australia's international human rights obligations and does not consider the broader policy merits of legislation.<sup>16</sup> Unlike the Scrutiny of Delegated Legislation committee, the PJCHR is empowered to examine both disallowable and non-disallowable legislative instruments.<sup>17</sup>

### ***Policy scrutiny of delegated legislation by committees***

#### *Legislative and general purpose standing committees*

7.11 The legislation, references and select committees of the Senate are a core component of the Senate's policy scrutiny functions. In particular, legislation committees have responsibility for the policy scrutiny of bills before the Parliament, and the policy scrutiny of delegated legislation. The policy focus of each of the eight legislative standing committees is determined by portfolio allocation, as prescribed by the Senate.<sup>18</sup>

7.12 In November 2019, following a recommendation of this committee arising from its 2019 inquiry into parliamentary scrutiny of delegated legislation, the Senate agreed to amend standing order 25(2)(a), to clarify that the legislation committees may inquire into and report on legislative instruments made in the portfolios allocated to them. Following that amendment, the committee now regularly refers legislative instruments of interest to the relevant legislation committee, which may

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15 *Human Rights (Parliamentary Scrutiny) Act 2011*, section 7. The PJCHR considers all legislative instruments (both disallowable and non-disallowable) against the seven core human rights treaties set out in that Act. These include the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; International Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of All Forms of Discrimination against Women; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Rights of the Child; and Convention on the Rights of Persons with Disabilities.

16 Parliamentary Joint Committee on Human Rights, [Guide to human rights](#), June 2015, p. ii. Similar to this committee, the underpinning policy for an instrument may provide context for PJCHR's technical scrutiny.

17 Section 7 of the *Human Rights (Parliamentary Scrutiny) Act 2011* prescribes the functions of the PJCHR. Subsection 7(a) provides that a function of the committee is to 'examine Bills for Acts, and legislative instruments, that come before either House of the Parliament for compatibility with human rights, and to report to both Houses of Parliament on that issue'. No distinction is drawn between disallowable and non-disallowable legislative instruments.

18 For the allocation of departments and agencies at the beginning of the 46<sup>th</sup> Parliament, please see: [Journals of the Senate](#), No. 3, 4 July 2019, pp. 83–84.

examine, inquire into and report on these instruments, although there is no requirement for them to do so.

7.13 There are several examples of the Senate legislative committees undertaking policy scrutiny of delegated legislation. For example, recently, the Rural and Regional Affairs and Transport Legislation Committee examined the Aviation Transport Security Amendment (Security Controlled Airports) Regulations 2019. The instrument was registered on 18 December 2019 and subsequently referred to the committee. The committee held a public hearing on the instrument, and heard evidence from regional airports and airlines, as well as from the Department of Home Affairs and the Department of Infrastructure, Transport, Regional Development and Communications.<sup>19</sup>

#### *Senate select committee consideration*

7.14 In addition to the legislative and general purpose standing committees and the legislative scrutiny committees, select committees may be established by the Senate at any time to inquire into and report on particular matters.<sup>20</sup> Of particular relevance to this inquiry, on 8 April 2020 the Senate resolved to establish a Select Committee on COVID-19 (COVID-19 committee) to inquire into the Australian Government's response to the COVID-19 pandemic.

7.15 The Scrutiny of Delegated Legislation committee has historically advocated for the establishment of select committees during times of emergency which are expressly required to scrutinise the policy merits of emergency delegated legislation.<sup>21</sup> The committee has noted that such scrutiny may aid in:

- ensuring appropriate parliamentary oversight of the significant volume of delegated legislation made during times of emergency;<sup>22</sup> and
- considering the appropriateness of implementing extraordinary measures via delegated legislation, including the exercise of significant emergency powers which impact personal rights and liberties.<sup>23</sup>

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19 The Hansard transcript from the hearing, along with tabled documents, answers to questions on notice and other additional information is available on the committee's website, see Senate Standing Committees on Rural and Regional Affairs and Transport, Other Committee Activities, [Examination of Security Controlled Airports Regulations](#) (accessed 21 September 2020).

20 Department of the Senate, *Senate Brief No. 4, Senate Committees*, October 2020, p. 1.

21 For example, the committee advocated for the establishment of a joint select committee to scrutinise the policy merits of a significant volume of delegated legislation made under the *National Security Act 1939* during the Second World War. See Senate Standing Committee on Regulations and Ordinances, [Sixth Report](#) (April 1947), pp. 1–2.

22 Senate Standing Committee on Regulations and Ordinances, [Fifth Report](#) (September 1942), pp. 2, 5–6.

7.16 For example, in response to World War II, the committee concluded that 'no practical purpose' would be served by it continuing to review emergency delegated legislation made under the *National Security Act 1939* (National Security Act) against its technical scrutiny principles. Instead, it recommended the establishment of a joint committee to regularly consider and report to Parliament on the practical application of the delegated legislation made under the National Security Act. In reaching this view it had regard to several matters, including that the key issues arising in delegated legislation made under the National Security Act concerned matters of policy, which were outside the scope of the committee's terms of reference.<sup>24</sup>

### ***Constraints on committee consideration of delegated legislation***

#### *Procedural constraints on committee consideration of delegated legislation*

7.17 The capacity of parliamentary committees to undertake scrutiny of delegated legislation at any time, including during times of emergency, is constrained by at least three key procedural features. First, in relation to technical, non-partisan scrutiny of delegated legislation by the Scrutiny of Delegated Legislation committee, the Senate standing orders exclude non-disallowable legislative instruments from the instruments which stand referred to the committee for consideration and report.<sup>25</sup> The exclusion of disallowable legislative instruments from the committee's consideration has had a particular impact on its capacity to undertake technical scrutiny of delegated legislation made in response to COVID-19, of which approximately 20 per cent has been exempt from disallowance.<sup>26</sup>

7.18 Second, there is no legislative or procedural bar to the commencement of delegated legislation before it has been scrutinised by this committee, the Parliamentary Joint Committee on Human Rights or any other parliamentary committee. Accordingly, delegated legislation which a parliamentary committee considers raises significant scrutiny or policy concerns may have effect from commencement unless and until the relevant committee decides to seek the disallowance of the instrument.

7.19 Third, and relatedly, there is no procedural bar to the passage of a bill before the Scrutiny of Bills committee has reported on it. This is relevant to the scrutiny of delegated legislation, because it means that the Parliament will not necessarily have the benefit of comments about the delegated-legislation making powers in primary legislation before the bill passes.

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23 Senate Standing Committee on Regulations and Ordinances, *Fifth Report* (September 1942), p. 5.

24 Senate Standing Committee on Regulations and Ordinances, *Fifth Report* (September 1942).

25 Senate standing order 23(2).

26 For further details, see Chapter 4 – Exemptions from disallowance during times of emergency.

7.20 Until recently, there was also a potential procedural impediment to committee consideration of the policy merits of delegated legislation. However, the 2019 amendments to the Senate standing orders,<sup>27</sup> resolved any procedural ambiguity as to the capacity of legislation committees to consider, and, if necessary, report on, the policy merits of delegated legislation.<sup>28</sup> Prior to the amendment, legislation committees could likely have relied on their broader powers to inquire into and report on the performance of the departments and agencies allocated to them to consider delegated legislation.<sup>29</sup> However, in practice, inquiries into delegated legislation were typically undertaken by references committees on referral by the Senate.<sup>30</sup> The amendment to standing order 25(2) makes it clear that legislation committees are empowered to inquire into and report on legislative instruments made in the portfolios allocated to them, without a referral from the Senate. In doing so, these amendments removed a potentially significant procedural constraint on committee consideration of the policy aspects of delegated legislation.

*Practical constraints on committee consideration of delegated legislation*

7.21 The capacity of parliamentary committees to undertake policy or technical scrutiny of delegated legislation is also inhibited by a number of practical constraints on their time and resources.

7.22 The principal factor constraining such scrutiny is the sheer volume of delegated legislation.<sup>31</sup> During periods of emergency, there is generally an increase in the amount of delegated legislation made, due to the government's need to respond quickly to the relevant crisis. The volume of additional delegated legislation made during such emergencies is a significant constraint on the capacity of committees to effectively oversee delegated legislation, noting their already significant workloads and the significant demands on committee members' limited time.<sup>32</sup>

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27 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Parliamentary scrutiny of delegated legislation* (June 2019).

28 See Senate standing order 25(2)(b).

29 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Parliamentary scrutiny of delegated legislation* (June 2019), p. 100.

30 See, Senate Standing Committee for the Scrutiny of Delegated Legislation, *Parliamentary scrutiny of delegated legislation* (June 2019), p. 100.

31 Approximately half of the law of the Commonwealth by volume consists of delegated legislation (as opposed to Acts of Parliament). The amount of delegated legislation made has substantially increased over time, with an average of 2,150 legislative instruments now made per year (compared to approximately 850 per year in the mid-1980s).

32 For example, from 1 July 2019 to 30 June 2020, 74 references were made by the Senate to committees, 7,300 submissions were processed and 4,300 witnesses were heard at 225 public hearings. See Department of the Senate, [Annual Report 2019-20](#), p. 4.

7.23 Committees may also be constrained in their ability to oversee delegated legislation by limitations imposed on meetings and movement in response to the relevant emergency. For example, emergency restrictions may inhibit the ability of both committees, and the Parliament, to physically meet to consider the policy issues the delegated legislation raises.<sup>33</sup> In turn, the cancellation of sittings in response to emergencies prevents new committees being established. It also prevents committee members from physically tabling reports in the Houses and speaking to the content of the reports at the relevant time that the report is tabled. In this regard, while the standing orders of each chamber facilitate opportunities for parliamentarians to speak to reports tabled out of sitting, it is preferable for reports to be debated and considered when they are most relevant, particularly where they concern matters relevant to an evolving emergency.

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### **Constraints on parliamentary committee consideration of delegated legislation made in response to COVID-19**

7.24 Despite the disruptions caused by COVID-19, this committee and others resolved to perform their regular scrutiny functions throughout the pandemic as best as possible in the circumstances.<sup>34</sup> The following section provides an overview of the technical and policy scrutiny of delegated legislation conducted by parliamentary committees throughout the COVID-19 pandemic in both the Commonwealth and other jurisdictions.

#### ***Commonwealth approach***

##### *Technical legislative scrutiny of delegated legislation made in response to COVID-19*

7.25 The technical legislative scrutiny committees continued to scrutinise delegated legislation made in response to COVID-19, within certain constraints imposed by the cancellation of physical meetings and parliamentary sittings. Both this committee and the Parliamentary Joint Committee on Human Rights continued to meet regularly by teleconference to perform their scrutiny functions, in particular

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33 See, for example, the detailed statement by the President of the Senate on 24 August 2020 regarding the impact of restrictions made in response to COVID-19 on the physical movement on Senators and their capacity to perform their parliamentary duties: Senator the Hon. Scott Ryan, President of the Senate, [Senate Hansard](#), 24 August 2020, pp. 3704–3705. See also Senate Procedure Committee, [COVID-19 and the Senate](#), Second report of 2020, October 2020.

34 Many committees resumed and continued their work through the use of teleconference and videoconference capabilities. Unlike parliamentary sittings, Senate committees have been empowered to hold public and private meetings via teleconference since 1997.

to scrutinise legislation relating to the COVID-19 pandemic.<sup>35</sup> Both committees also committed to publishing a list of all the COVID-19 related legislative instruments to improve transparency and public oversight of delegated legislation made in response to the pandemic.<sup>36</sup> The Parliamentary Joint Committee on Human Rights tabled a number of special reports on COVID-19 legislation.<sup>37</sup> In addition, the Scrutiny of Bills committee raised a number of concerns about the inclusion of significant matters in delegated legislation when scrutinising the COVID-19 response primary legislation.<sup>38</sup>

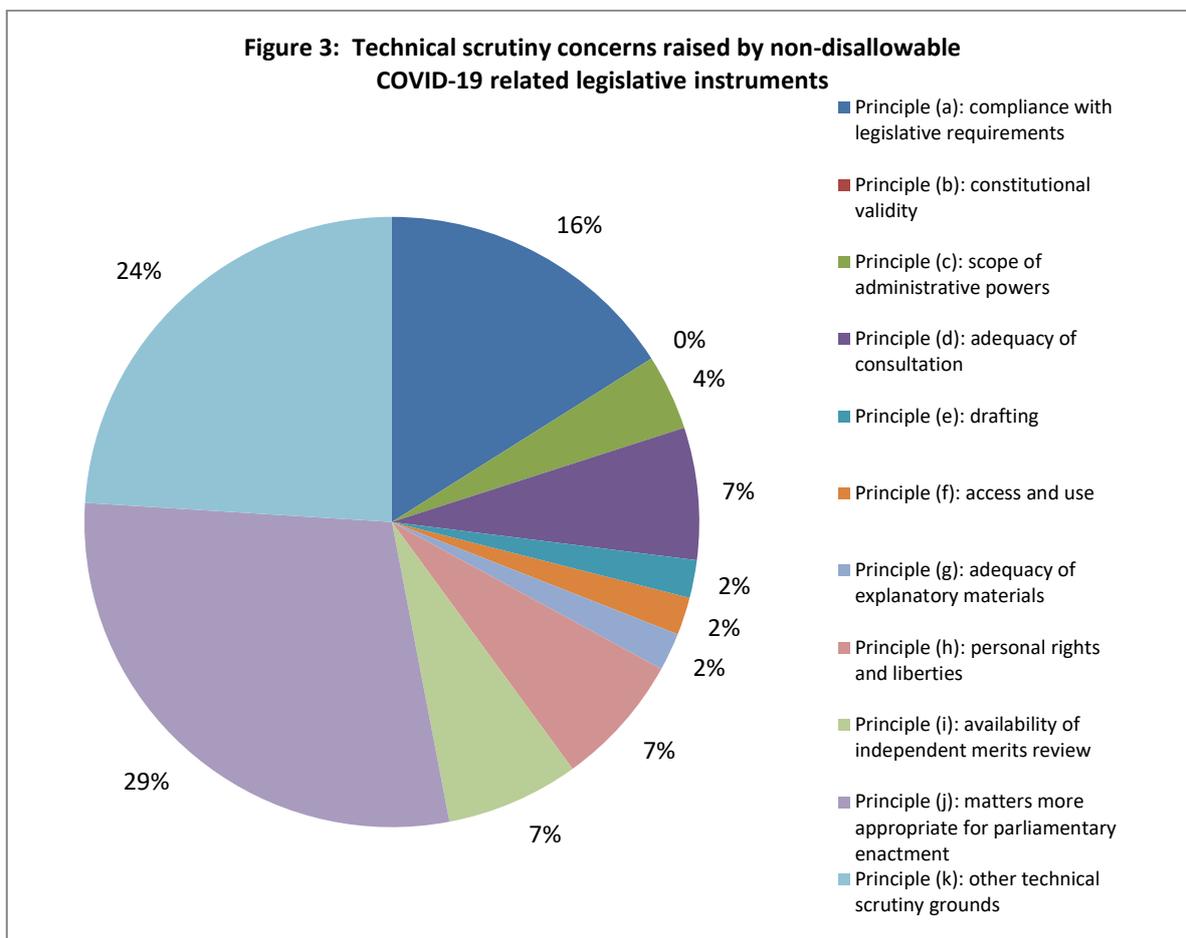
7.26 As part of its regular, technical scrutiny work, this committee assessed 201 disallowable legislative instruments made in response to the pandemic between 1 January and 31 July 2020. Of these, the committee found that 33 (approximately 16.4 per cent) raised technical scrutiny concerns. The committee drew three of the 201 instruments to the attention of the Senate in its Delegated Legislation Monitor, as they included the committee's most significant unresolved technical scrutiny concerns.<sup>39</sup> In addition, the committee drew 45 disallowable legislative instruments (approximately 22.4 per cent) registered within the same period to the attention of the Senate, pursuant to Senate standing order 23(4).<sup>40</sup> In order to provide the committee with additional time to address its technical scrutiny concerns, the

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- 35 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Media statement - Senate committee to continue to scrutinise delegated legislation, including COVID-19 related legislation](#) (1 April 2020); Parliament of Australia, *Parliamentary Joint Committee on Human Rights*, [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights) (accessed 25 November 2020).
- 36 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny News*, No. 4, 3 April 2020; Parliamentary Joint Committee on Human Rights, *COVID-19 Legislative Scrutiny*, [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/COVID19\\_Legislative\\_Scrutiny](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/COVID19_Legislative_Scrutiny) (accessed 25 November 2020).
- 37 Parliamentary Joint Committee on Human Rights, [Report 5 of 2020: Human rights scrutiny of COVID-19 legislation](#), 29 April 2020.
- 38 See, for example, Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 5 of 2020](#), 17 April 2020.
- 39 The committee drew its concerns regarding the Coronavirus Economic Response Package (Deferral of Sunsetting—Income Management and Cashless Welfare Arrangements) Determination 2020 [F2020L00572], Foreign Acquisitions and Takeovers Amendment (Threshold Test) Regulations 2020 [F2020L00435] and Australian Postal Corporation (Performance Standards) Amendment (2020 Measures No. 1) Regulations 2020 [F2020L00579] to the attention of the Senate. See Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 9 of 2020](#), 27 August 2020, pp. 1–14; Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 12 of 2020](#), 11 November 2020, pp. 1–3.
- 40 Senate standing order 23(4) requires the committee to scrutinise each instrument to determine whether the attention of the Senate should be drawn to the instrument on the ground that it raises significant issues or otherwise gives rise to issues that are likely to be of interest to the Senate.

committee also placed 'protective' notices of motion to disallow four disallowable legislative instruments.

7.27 To inform this inquiry, the committee has also reviewed the 48 non-disallowable instruments which were made in response to COVID-19 between 1 January and 31 July 2020, but because they are not subject to disallowance are exempt from the committee's regular scrutiny work. Of particular concern, the committee has identified potential scrutiny issues in 23 of those instruments (48 per cent), which it would ordinarily have raised with the relevant agency or minister had they fallen within the scope of standing order 23(2). This indicates that non-disallowable legislative instruments made in response to COVID-19 were far more likely to contain technical scrutiny issues than disallowable legislative instruments.

7.28 **Figure 3** below outlines the spread of potential scrutiny issues identified by the committee against its eleven scrutiny principles in Senate standing order 23(3).



7.29 The majority of issues raised by these non-disallowable instruments related to the inclusion of significant matters in delegated legislation.<sup>41</sup> These concerns primarily centred on legislative instruments made pursuant to section 477 of the *Biosecurity Act 2015* (Biosecurity Act) and Advance to the Finance Minister (AFM) determinations. As noted in Chapter 4, legislative instruments made under section 477 of the Biosecurity Act may override the operation of primary legislation and impose significant rights-limiting measures. Similarly, AFM determinations may allocate significant additional public funds to entities where the Finance Minister is satisfied that there is an urgent need for expenditure that is not provided for, or is insufficiently provided for, in an appropriation Act.

7.30 The committee generally has significant scrutiny concerns about the use of delegated legislation to modify or override the operation of legislation which has been passed by Parliament.<sup>42</sup> Such delegated legislation impacts on levels of parliamentary scrutiny and may subvert the appropriate relationship between the Parliament and the executive. This is particularly true of AFM determinations, noting that one of the core functions of the Parliament is to authorise and scrutinise proposed appropriations.<sup>43</sup> The committee also considers that significant matters, including measures with the capacity to significantly impact personal rights and liberties, are more appropriately enacted via primary, rather than delegated, legislation. The inclusion of such matters in non-disallowable legislative instruments, and the exemption of these instruments from the committee's regular technical scrutiny, therefore raises serious concerns.

7.31 The committee also has concerns about the adequacy of parliamentary oversight of the matters contained in a large proportion of COVID-19 related non-disallowable instruments.<sup>44</sup> These concerns largely relate to the timeframes in which COVID-19 response measures in non-disallowable instruments remain in force,

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41 13 instruments raised issues relating to significant matters in delegated legislation. The committee would ordinarily raise such issues under Senate standing order 23(3)(j) which requires the committee to scrutinise each instrument as to whether it contains matters more appropriate for parliamentary enactment.

42 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Guidelines](#), 1<sup>st</sup> edition, February 2020, p. 28.

43 *Combet v Commonwealth* (2005) 224 CLR 494, 577 [160]; *Wilkie v Commonwealth* (2017) 263 CLR 487 [91]. The committee further considers the appropriateness of exempting AFMs made in times of emergency from disallowance in Chapter 4 of this report.

44 11 instruments raised issues relating to parliamentary oversight. The committee generally raises such issues under Senate standing order 23(3)(k) which requires the committee to scrutinise each instrument as to whether it complies with any other ground relating to the technical scrutiny of delegated legislation that the committee considers appropriate.

particularly where the instruments modify primary legislation or limit personal rights and liberties.<sup>45</sup>

7.32 On reviewing the non-disallowable COVID-19 related instruments for the purposes of this inquiry, the committee also considers that 12 instruments raise significant policy matters that the committee would ordinarily have drawn to the attention of the Senate and other relevant parliamentary committees, pursuant to Senate standing order 23(4), had they fallen within the scope of the committee's regular technical scrutiny work.

7.33 In summary, the committee's findings indicate that many of the non-disallowable instruments made in response to COVID-19 appear to raise several highly concerning technical scrutiny issues, more so than the legislative instruments which were subject to disallowance. Therefore, the exclusion of these instruments from the committee's regular technical scrutiny prevented the committee from attempting to resolve these issues with the executive, and performing its oversight role.

#### *Policy scrutiny of delegated legislation made in response to COVID-19*

7.34 The COVID-19 committee has been the main parliamentary committee responsible for general policy scrutiny of the government's response to COVID-19. As of 24 November 2020, the COVID-19 committee has published 480 submissions and held 36 public hearings. It is due to present its final report to the Senate by 30 June 2022.<sup>46</sup>

7.35 Between 1 January and 31 October 2020, the Scrutiny of Delegated Legislation committee drew 29 disallowable legislative instruments made in response to COVID-19 to the attention of the COVID-19 committee, pursuant to Senate standing order 23(4). However, given the scope of the committee's broad mandate to inquire into the Australian Government's response to the COVID-19 pandemic, the volume of evidence it has already received, and the large volume of COVID-19 related delegated legislation, the committee may understandably not have the opportunity to examine the policy merits of all COVID-19 related delegated legislation in detail.

#### ***Approaches in other jurisdictions***

##### *Technical scrutiny*

7.36 Australian technical legislative scrutiny committees continued to examine delegated legislation as part of their regular scrutiny process during the COVID-19

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45 The committee's concerns about the duration of emergency delegated legislation are explored further in Chapter 6 of this report.

46 More information about the inquiry, including the Hansard transcripts from the public hearings, is available on the COVID-19 committee's website at:  
[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/COVID-19/COVID19](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/COVID-19/COVID19).

pandemic. However, unlike the Commonwealth, other Australian technical scrutiny committees are not restricted to considering delegated legislation that is subject to disallowance.<sup>47</sup>

7.37 In New Zealand, the Regulations Review Committee initiated an inquiry to review delegated legislation made in response to COVID-19,<sup>48</sup> and any powers relating to delegated legislation in bills referred to select committees that related to COVID-19.<sup>49</sup> In its final report, the Regulations Review Committee noted that the findings of its scrutiny of the COVID-19 legislation reflected the findings of its 2016 inquiry into Parliament's legislative response to future national emergencies. In particular, it emphasised the recommendations that:

- emergency legislation should take the form of primary legislation wherever reasonably possible, rather than relying on broad powers to make delegated legislation;
- select committees should consider the policy of emergency legislation; and
- as much time as possible should be allowed for select committee consideration of emergency legislation.<sup>50</sup>

7.38 In the United Kingdom, the House of Lords Secondary Legislation Scrutiny Committee considered all statutory instruments laid before Parliament subject to parliamentary procedure made in response to the COVID-19 pandemic. To further assist the House of Lords in its consideration of these instruments, the committee:

- published a list of all COVID-19 related instruments subject to the committee's scrutiny on its website, accompanied by links to the reports in which the committee considered them (updated daily);<sup>51</sup> and
- added a dedicated section to its reports summarising each COVID-19 related instrument which is subject to the committee's scrutiny.<sup>52</sup>

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47 For example, the Victorian Scrutiny of Acts and Regulations Committee is empowered to consider 'any legislative instruments laid before Parliament'. See *Subordinate Legislation Act 1994* (Vic), subsection 25A(1).

48 While the Regulations Review Committee is not expressly empowered to scrutinise non-disallowable delegated legislation, most delegated legislation made in response to COVID-19 was disallowable, and was therefore scrutinised by the Regulations Review Committee.

49 See Regulations Review Committee (NZ), *First Interim report (Briefing to review secondary legislation made in response to COVID-19)*, 8 May 2020, p. 4.

50 Regulations Review Committee (NZ), *Final report (Briefing to review secondary legislation made in response to COVID-19)*, 7 May 2020, p. 63.

51 See UK Parliament, *Scrutiny of secondary legislation laid to tackle coronavirus pandemic*, 9 November 2020, <https://committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/news/115532/scrutiny-of-secondary-legislation-laid-to-tackle-coronavirus-pandemic/> (accessed 25 November 2020).

### *Policy scrutiny*

7.39 Parliamentary committees in the majority of Australian jurisdictions initiated inquiries to scrutinise the state or territory government's policy response to the COVID-19 pandemic.<sup>53</sup> Most of these inquiries were undertaken by existing standing committees.<sup>54</sup> However, some Australian parliaments formed select committees in response to COVID-19.<sup>55</sup> None of these committees were specifically mandated to scrutinise delegated legislation made in response to COVID-19 and did not examine specific delegated legislation within the scope of their inquiries.

7.40 By contrast, in both New Zealand and the UK, parliamentary committees gave specific consideration to the policy merits of delegated legislation made in response to COVID-19 within the scope of their broader inquiries into the pandemic. In New Zealand, for example, the Epidemic Response Committee was established on 25 March 2020 to consider and report to the House on matters relating to the Government's management of COVID-19.<sup>56</sup> The Epidemic Response Committee focused its scrutiny on the legislative framework of the government's response and made a number of recommendations relating to the delegation of legislative powers in COVID-19 related primary legislation.<sup>57</sup>

7.41 In the United Kingdom, the House of Commons Public Administration and Constitutional Affairs Committee (Public Administration committee) undertook an inquiry into the Government's response to COVID-19 and the *Coronavirus Act 2020*

52 See, for example, [House of Lords Secondary Legislation Scrutiny Committee](#).

53 Western Australia (WA) is the only outlier to this trend. The WA Procedure and Privileges Committee undertook an inquiry into the Legislative Assembly's response to COVID-19 but at the time of reporting no parliamentary committee had initiated an inquiry into the Government's policy response.

54 For example, in Victoria the Public Accounts and Estimates Committee initiated an own motion inquiry into the responses to COVID-19 taken by the Victorian Government, including as part of the National Cabinet, to manage the COVID-19 pandemic and any other matter related to the COVID-19 pandemic up to each reporting date of the committee.

55 For example, the ACT Select Committee on the COVID-19 pandemic response was established on 2 April 2020 to inquire into 'any matter relating to the ACT Government's health and financial response and any other matter relating to the COVID-19 Pandemic as it relates to the ACT'. See Legislative Assembly for the ACT, *COVID-19 pandemic response (Dissolved)*, <https://www.parliament.act.gov.au/parliamentary-business/in-committees/previous-assemblies/select-committees-ninth-assembly/select-committee-on-the-covid-19-response#tab1509618-1id> (accessed 25 November 2020).

56 See New Zealand Parliament, *Notice of Motion – establishing the Epidemic Response Committee*, 25 March 2020, <https://www.parliament.nz/en/visit-and-learn/history-and-buildings/special-topics/epidemic-response-committee-covid-19-2020/notice-of-motion-establishing-the-epidemic-response-committee/> (accessed 25 November 2020).

57 See, for example, Epidemic Response Committee (NZ), *Final report (Immigration (COVID-19 Response) Amendment Bill) 243-1*, (May 2020), pp. 2–7.

(UK), with particular consideration to the government's approach to COVID-19 legislation and the framework for parliamentary scrutiny'.<sup>58</sup> In its final report dated 10 September 2020, the Public Administration committee gave detailed consideration to the policy of specific delegated legislation and broader concerns about the manner and form in which such delegated legislation is made. Specifically, the Public Administration committee noted that:

The regulations introducing various levels of "lockdown" were made under the *Public Health (Control of Diseases) Act 1984*. All such regulations were made under what the Committee described as the "urgent procedure" under the Public Health Act. This meant legislation was brought into force without any form of prior scrutiny. Parliamentary scrutiny is important to improve the quality of legislation and there may have been errors or unnecessary confusion in the lockdown regulations. The Committee concluded that the case for the urgent procedure, particularly for regulations easing lockdown, was not always been justified and the Government should accord greater priority to scheduling debates on such legislation in a timelier manner.<sup>59</sup>

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## Evidence before the committee

7.42 The committee received wide-ranging evidence from submitters and witnesses regarding the role of parliamentary committees in providing oversight of delegated legislation made in times of emergency. The evidence discussed the different roles and functions of policy and technical scrutiny committees and provided recommendations of how the powers and functions of such committees can be better utilised in times of emergency, such as during the COVID-19 pandemic.

7.43 This section provides an overview of the main issues arising from the evidence provided to the committee.

### ***Importance of committee oversight of delegated legislation in times of emergency***

7.44 Professor Twomey, in a response to a question on notice, exemplified the opinions of submitters and witnesses in relation to scrutiny by parliamentary

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58 House of Commons Public Administration and Constitutional Affairs Committee (UK), *New inquiry: Responding to Covid-19 and the Coronavirus Act 2020*, (15 May 2020), <https://committees.parliament.uk/work/310/responding-to-covid19-and-the-coronavirus-act-2020/news/115036/new-inquiry-responding-to-covid19-and-the-coronavirus-act-2020/> (accessed 25 November 2020).

59 House of Commons Public Administration and Constitutional Affairs Committee (UK), *Fourth Report – Parliamentary Scrutiny of the Government's handling of Covid-19* (10 September 2020), p. 3.

committees during times of emergency, by stating 'continuing scrutiny by parliamentary committees is crucial in a time of emergency'.<sup>60</sup>

7.45 Commenting on the role of technical scrutiny of legislation made during times of emergency, Associate Professor Lorne Neudorf submitted that:

To be clear, the disallowance procedure under the *Legislation Act 2003* does not prevent delegated laws from being made. It provides for the availability of their repeal after they are made through a simplified process. In other words, parliamentary confirmation is not required before new delegated legislation can have legal effect. Disallowance and Committee scrutiny is therefore compatible with the context of making emergency delegated legislation during a pandemic as it provides an ex post facto review, at which point delegated legislation can be improved and strengthened. Parliamentary scrutiny of laws made by the executive government hastily and on the basis of incomplete information, which is much more likely during an emergency, is especially needed to provide accountability and fulfil the constitutional principle of responsible government.<sup>61</sup>

7.46 This comment highlights that even though legislation and legislative instruments may not be able to be scrutinised prior to implementation, a post-implementation review is still a critical mechanism of parliamentary oversight during times of emergency.

***Constraints on committee consideration of delegated legislation during times of emergency***

7.47 Evidence before the committee also identified a number of factors which inhibited the capacity of parliamentary committees to effectively consider delegated legislation during times of emergency.

***Procedural constraints on committee consideration of delegated legislation in times of emergency***

7.48 As discussed above, this committee does not currently have the power to examine delegated legislation that is exempt from disallowance. Several submitters commented on the importance of oversight of these exempt instruments and that the committee should be empowered to scrutinise such delegated legislation.

7.49 For example, the New South Wales Council for Civil Liberties submitted that:

The Committee's role should be expanded so that it can analyse legislative instruments which are not subject to parliamentary disallowance, disapproval or affirmative resolution of the Senate, and to scrutinise the

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60 Professor Anne Twomey, answers to question on notice, 31 August 2020, received 11 September 2020.

61 Associate Professor Lorne Neudorf, *Submission 11*, p. 8.

justification for the existence of delegated legislation of that substance and form in the first place.<sup>62</sup>

7.50 Professor Neudorf submitted that:

If it is not practicable to make disallowance available, the Senate should amend standing order 23 to allow the Committee to continue its scrutiny work for all delegated legislation, including delegated legislation that is not subject to disallowance. As noted above, Committee scrutiny can play an important role in providing accountability, even if disallowance is not available, through its reports. These reports will list and scrutinise delegated legislation made in response to the emergency, providing enhanced transparency and an important historical record of executive government actions taken under exceptionally broad delegated powers.<sup>63</sup>

7.51 Professor Twomey, in an answer to a question on notice, also stated that:

...I am strongly of the view that in those circumstances where legislative instruments are not disallowable, they should be the subject of parliamentary scrutiny by a parliamentary committee. Otherwise, Parliament will lack the information necessary to fulfil its supervisory role in any meaningful way. Even if a House cannot prevent an instrument from continuing in effect, it can make public the problems with the instrument. If those problems are serious or the Government's conduct is egregious, then it is likely to be picked up by the media and influence public debate. That may, in turn, influence the Government to alter its behaviour or the legislative instrument in question.<sup>64</sup>

*Practical constraints on committee consideration of delegated legislation in times of emergency*

7.52 Submitters commented that during times of emergency there is increased lawmaking activity, both in terms of primary and delegated legislation.<sup>65</sup> Submitters and witnesses discussed how the increased legislative activity places a strain on committees in performing their scrutiny function.<sup>66</sup>

7.53 Ms Pauline Wright, President of the Law Council of Australia, indicated that:

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62 New South Wales Council for Civil Liberties, *Submission 22*, p. 4.

63 Associate Professor Lorne Neudorf, University of Adelaide, *Submission 11*, p. 10.

64 Professor Anne Twomey, answers to questions on notice, 31 August 2020 (received 11 September 2020).

65 See for example: Public Interest Advocacy Centre, *Submission 13*, p. 2; Institute of Public Affairs, *Submission 16*; Professor Anne Twomey, *Submission 18*; Law Council of Australia, *Submission 21*, p. 12.

66 See for example: Law Council of Australia, *Submission 21*, p. 12; Associate Professor Lorne Neudorf, answers to questions on notice, 31 August 2020 (received 11 September 2020); Professor Kirsten Rundle, Co-Director, Centre for Comparative Constitutional Studies, Melbourne Law School, University of Melbourne, *Committee Hansard*, 31 August 2020, p. 5.

It's also crucial to provide adequate resourcing to the parliamentary bodies responsible for the scrutiny of delegated legislation so that they can perform their role without delay, especially during a crisis.<sup>67</sup>

7.54 Similarly, in its submission, the Law Council of Australia, recommended that:

Parliamentary bodies responsible for the scrutiny of delegated legislation should be adequately resourced to be able to undertake timely scrutiny, especially in times of crisis.<sup>68</sup>

7.55 Further, Professor Neudorf, in discussing a common theme which has subsequently arisen throughout this report on the need for heightened scrutiny of the executive during times of emergency, commented on the importance of properly resourcing scrutiny committees during emergency periods:

...Emergency legislation will almost certainly limit fundamental rights and liberties. It will also be made quickly with potentially incomplete information. Given the important interests at stake, and the suboptimal lawmaking conditions in which it is made, it is important that legislative scrutiny is not weakened, limited or ineffective in times of emergency. I would therefore endorse the submission that legislative scrutiny committees, including this Committee, are allocated extra resources in order to enable them to continue carrying out their essential work.<sup>69</sup>

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## Committee view

### ***Procedural constraints on committee oversight of delegated legislation made in times of emergency***

7.56 As set out at paragraphs 7.27 to 7.33, the committee has identified several significant scrutiny issues in non-disallowable legislative instruments made in response to COVID-19, which it was not able to scrutinise, and attempt to resolve, as part of its regular technical scrutiny processes. Of particular concern is the number of instruments which appeared to raise issues under scrutiny principle (j), where an instrument appears to contain matters more appropriate for parliamentary enactment, and principle (k), where an instrument appears to impact on parliamentary oversight.

7.57 The committee considers that the non-disallowable status of emergency-related legislative instruments exacerbates the need for parliamentary

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67 Ms Pauline Wright, President, Law Council of Australia, *Committee Hansard*, 27 August 2020, p. 2.

68 Law Council Australia, *Submission 21*, p. 13.

69 Associate Professor Lorne Neudorf, answers to questions on notice, 31 August 2020, (received 11 September 2020), pp. 37–38.

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committee consideration of such delegated legislation. The disallowance status should not, as is currently the case, act as a barrier to such consideration.

7.58 While the 2019 amendments to Senate standing order 25(2) removed a potential procedural barrier to the Senate legislation committees undertaking policy scrutiny of all legislative instruments,<sup>70</sup> the limited scope of standing order 23(2) remains a barrier to technical legislative scrutiny of non-disallowable legislative instruments by this committee.

7.59 As noted above, the committee regularly uses the disallowance procedure to prompt engagement with the executive to resolve the committee's technical scrutiny concerns. The committee is concerned that the absence of such a procedural mechanism when scrutinising non-disallowable legislative instruments may diminish the committee's capacity to effectively resolve its concerns. In this regard, any consideration of the expansion of its mandate should also be accompanied by consideration as to whether it is necessary to provide for additional procedural mechanisms to facilitate engagement with the committee on its scrutiny concerns. The committee will consider this issue further in the final report of this inquiry.

### **Recommendation 16**

**7.60 The committee recommends that the Senate amend standing order 23 to ensure that all delegated legislation made during times of emergency is referred to the Senate Standing Committee for the Scrutiny of Delegated Legislation for consideration and, if necessary, report, regardless of its disallowance status.**

#### ***Practical constraints on committee oversight of delegated legislation made in times of emergency***

##### *Capacity constraints and resourcing*

7.61 Following the 2019 amendments to Senate standing order 25(2), which clarified that the Senate legislation committees could inquire into and report on delegated legislation, the committee considers that the most significant constraints which remain on the consideration of the policy merits of delegated legislation by parliamentary committees relate to the availability of committee members' time and resources, rather than procedural impediments. These constraints are particularly evident in times of emergency, in which the committee has observed a significant increase in the complexity and significance of delegated legislation.

7.62 Similarly, as emergency legislation is apt to limit personal rights and liberties and is likely to be made amid time pressures, the committee agrees with the views of a number of submitters to the inquiry that it is important to ensure that technical legislative scrutiny committees are adequately resourced into the future in order to

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70 Senate standing order 25(2) was amended to clarify that the legislative committees may inquire into and report on legislative instruments made in the portfolios allocated to them.

enable them to continue carrying out this vital work particularly during times of emergency.

### **Recommendation 17**

**7.63 The committee recommends that the government allocate sufficient resources to the parliamentary departments to ensure that parliamentary committees responsible for the policy and technical scrutiny of delegated legislation are always sufficiently resourced to effectively perform this vital role, particularly during times of emergency.**

#### *Establishing select committees in response to emergencies*

7.64 The committee considers that the establishment of select committees to scrutinise the policy response to emergencies is an important component of parliamentary oversight during emergency periods. In this regard, the committee welcomes the establishment of the COVID-19 select committee to consider the government's response to the COVID-19 pandemic. However, it appears that the broad scope of that committee's mandate, the volume of evidence it has received to date, and the large volume of COVID-19 related delegated legislation will understandably make it difficult for the committee to consider the policy merits of all COVID-19 related delegated legislation in detail.

7.65 Accordingly, the committee considers that, in addition to broad policy scrutiny of the government's response to a particular emergency, it is appropriate that a committee be established to consider the policy merits of delegated legislation made in response to the same emergency. Such an approach would facilitate detailed policy scrutiny of individual instruments made by the executive during times of emergency, and complement the work of other committees responsible for broader policy scrutiny of the government's response.

7.66 Moreover, as discussed above, the establishment of a select committee to conduct policy scrutiny of delegated legislation made in response to emergencies accords with the approach advocated by this committee's predecessor during the Second World War, in response to the volume, complexity and policy significance of delegated legislation made during that time. The stark similarity of views between the committees, expressed 78 years apart, demonstrates the seriousness with which the Parliament should treat the exemption of delegated legislation made in times of emergency from policy scrutiny by its committees.

### **Recommendation 18**

**7.67 The committee recommends that the Senate establish a select committee during times of national emergency, including human biosecurity emergencies and other events declared to be a national emergency under Commonwealth law, to consider the policy merits of delegated legislation made in response to that emergency.**

**Senator the Hon Concetta Fierravanti-Wells**

**Chair**

**Senate Standing Committee for the Scrutiny of Delegated Legislation**



# Appendix 1

## Submissions, answers to questions on notice, and additional information

### Submissions

- 1 Professor Gabrielle Appleby, Dr Janina Boughey, Dr Sangeetha Pillai and Professor George Williams AO
- 2 The Hon Darren Chester MP, Minister for Veterans' Affairs
- 3 Mr Richard Pye, Clerk of the Senate
- 4 Senate Standing Committee for the Scrutiny of Bills
- 5 Australian Securities and Investments Commission (ASIC)
- 6 Canberra Alliance for Participatory Democracy
- 7 Civil Liberties Australia
- 8 Department of Home Affairs
- 9 Mr Jackson Ho
- 10 Public Interest Advocacy Centre
- 11 Associate Professor Lorne Neudorf, Adelaide Law School
- 12 Centre for Comparative Constitutional Studies
- 13 The Centre for Public Integrity
- 14 Attorney-General's Department
- 15 Accountable Income Management Network
- 16 Institute of Public Affairs
- 17 Department of Agriculture, Water and the Environment
- 18 Professor Anne Twomey
- 19 Legislative Review Committee of the Parliament of South Australia
- 20 Department of the Treasury
- 21 Law Council of Australia
- 22 NSW Council for Civil Liberties
- 23 NSW Young Lawyers
- 24 ACT Standing Committee on Justice and Community Safety (Legislative Scrutiny Role)
- 25 Senior Lecturer Jacinta Dharmananda
- 26 Department of Education, Skills and Employment

27	Department of Health
28	Department of Finance
29	Australian Airline Pilots' Association (AusALPA)
30	Australian Federation of Air Pilots

### **Answers to questions on notice**

NSW Council for Civil Liberties – Answers to written questions taken on notice (received 2 September 2020)

Professor Gabrielle Appleby, Dr Janina Boughey, Dr Sangeetha Pillai and Professor George Williams – Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 (received 5 September 2020)

Department of Finance – Answer to question taken on notice, public hearing, Canberra, 3 September 2020 (received 9 September 2020)

Centre for Comparative Constitutional Studies – Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 and written (received 10 September 2020)

Centre for Public Integrity – Answers to questions taken on notice, public hearing, Canberra, 27 August 2020 and written (received 10 September 2020)

Associate Professor Lorne Neudorf – Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 (received 11 September 2020)

Institute of Public Affairs – Answers to questions taken on notice, public hearing, Canberra, 27 August 2020 and written (received 11 September 2020)

Professor Anne Twomey – Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 and written (received 11 September 2020)

Law Council of Australia – Answers to questions taken on notice, public hearing, Canberra, 27 August 2020 and written (received 11 September 2020)

Ms Jacinta Dharmananda – Answers to written questions taken on notice (received 18 September 2020)

Department of Finance – Answer to question taken on notice, public hearing, Canberra, 3 September 2020 (received 18 September 2020)

Department of Finance – Answers to written questions taken on notice (received 18 September 2020)

Australian Securities and Investments Commission – Answers to written questions taken on notice (received 22 September 2020)

Department of Health – Answers to questions taken on notice, public hearing, Canberra, 3 September 2020 (received 6 October 2020)

Department of Health – Answers to written questions taken on notice (received 6 October 2020)

Attorney-General's Department – Answers to questions taken on notice, public hearing, Canberra, 3 September 2020 (received 8 October 2020)

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Attorney-General's Department – Answers to written questions taken on notice (received 8 October 2020)

Professor Gabrielle Appleby, Dr Janina Boughey, Dr Sangeetha Pillai and Professor George Williams – Answers to written questions taken on notice (received 26 October 2020)

Department of Agriculture, Water and the Environment – Answers to written questions taken on notice (received 6 November 2020)

### **Additional information**

Centre for Comparative Constitutional Studies – 'Law-making and accountability in responding to COVID-19: The case of New Zealand,' Dean R. Knight (received 11 September 2020)

Institute of Public Affairs – 'Cutting red tape: Regdata applications in North America,' Daniel Wild and Scott Hargreaves (received 11 September 2020)

Institute of Public Affairs – 'States of emergency: An analysis of COVID-19 petty restrictions,' Morgan Begg (received 11 September 2020)

Institute of Public Affairs – 'Reducing red tape in Australia: 'One in, two out' rule,' Daniel Wild, Jake Fraser and Michael Husek (received 11 September 2020)

Institute of Public Affairs – 'Regulatory dark matter: How unaccountable regulators subvert democracy by imposing red tape without transparency,' Kurt Wallace (received 11 September 2020)

Department of Agriculture, Water and the Environment – Correction to Hansard evidence, public hearing, Canberra, 3 September 2020 (received 18 September 2020)

Department of Health – Correction to Hansard evidence, public hearing, Canberra, 3 September 2020 (received 29 September 2020)



## Appendix 2

### Public hearings

*Thursday, 27 August 2020 – Canberra*

**Law Council of Australia**

Ms Pauline Wright, President

Dr Natasha Molt, Director of Policy

Professor Andrew Byrnes, Member, National Human Rights Committee (*via teleconference*)

**Institute of Public Affairs (*via teleconference*)**

Ms Dara MacDonald, Research Fellow

Mr Morgan Begg, Research Fellow

**Centre for Public Integrity (*via teleconference*)**

Mx Han Aulby, Executive Director

**NSW Council for Civil Liberties (*via teleconference*)**

Ms Michelle Falstein, Secretary

Mr Jared Wilk, Co-Convener, Human Rights Action Group

**Ms Jacinta Dharmananda – private capacity (*via teleconference*)**

*Monday, 31 August 2020 – Canberra*

**Centre for Comparative Constitutional Studies (*via teleconference*)**

Professor Kristen Rundle, Co-Director

**Professor Anne Twomey – private capacity (*via teleconference*)**

**Professor Gabrielle Appleby, Dr Janina Boughey, Dr Sanjeetha Pillai and Professor George Williams AO (*via teleconference*)**

Professor George Williams AO

Professor Gabrielle Appleby

Dr Janina Boughey

**Associate Professor Lorne Neudorf, Deputy Dean of Law, Adelaide Law School (*via teleconference*)**

*Thursday, 3 September 2020 – Canberra*

**Australian Securities and Investments Commission (*via teleconference*)**

Mr Grant Moodie, Special Counsel, Chief Legal Office  
Mr Chris Savundra, General Counsel, Chief Legal Office

**Attorney-General's Department**

Mr Andrew Walter, First Assistant Secretary, Integrity and Security Division  
Ms Joanna Virtue, Assistant Secretary, Integrity and Criminal Law Branch

**Department of Health**

Ms Caroline Edwards, Associate Secretary  
Mr Stephen Bouwhuis, Assistant Secretary, Legal and Assurance Division

**Department of Agriculture, Water and the Environment**

Mr Matt Koval, First Assistant Secretary, Biosecurity Policy and Implementation Division  
Ms Alice Linacre, First Assistant Secretary, Chief Counsel, Legal Division  
Mr Stephen Oxley, First Assistant Secretary, Heritage, Reef and Wildlife Trade Division  
Dr Peta Derham, Assistant Secretary, Murray-Darling Basin Policy  
Ms Anna Willock, Executive Manager, Fisheries Management Branch, Australian Fisheries Management Authority

**Department of Finance (*via teleconference*)**

Dr Stein Helgeby, Deputy Secretary, Governance and Resource Management  
Ms Tracey Carroll, First Assistant Secretary, Financial Analysis, Reporting and Management Division  
Mr Scott Dilley, First Assistant Secretary, Governance Division  
Mr Iain Scott, First Assistant Secretary, Corporate Services Division  
Ms Louise Rafferty, Assistant Secretary, Legal and Assurance Branch, Corporate Services Division

## Appendix 3

### List of COVID 19 Instruments

The following table lists the 249 legislative instruments that were made in response to the COVID-19 pandemic and registered on the Federal Register of Legislation between 1 January to 31 July 2020 inclusive. In assessing whether an instrument was made in response to the COVID-19 pandemic, the committee had regard to the text of the legislative instrument and accompanying explanatory statement.

Instrument name	FRL number
Accounting Standard AASB 2020-4 Amendments to Australian Accounting Standards – Covid-19-Related Rent Concessions	F2020L00877
Advance to the Finance Minister Determination (No. 1 of 2019-2020)	F2020L00220
Advance to the Finance Minister Determination (No. 1 of 2020-2021)	F2020L00875
Advance to the Finance Minister Determination (No. 2 of 2019-2020)	F2020L00235
Advance to the Finance Minister Determination (No. 4 of 2019-2020)	F2020L00421
Advance to the Finance Minister Determination (No. 5 of 2019-2020)	F2020L00422
Advance to the Finance Minister Determination (No. 3 of 2019-2020)	F2020L00402
Aged Care (Leave from Residential Care Services) (Situation of Emergency— Human Coronavirus with Pandemic Potential) Determination 2020	F2020L00656
Aged Care (Subsidy, Fees and Payments) Amendment (Workforce Continuity Funding) Determination 2020	F2020L00352
Aged Care (Transitional Provisions) (Subsidy and Other Measures) Amendment (Workforce Continuity Funding) Determination 2020	F2020L00353
Aged Care Legislation Amendment (Subsidies-COVID-19 Support) Instrument 2020	F2020L00615
Air Navigation (Exemption for Commercial Non-Scheduled Flights) Amendment Determination 2020	F2020L00571
Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2020 (No. 2)	F2020L00559
Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2020 (No. 3)	F2020L00602

Instrument name	FRL number
Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2020 (No. 1)	F2020L00427
ASIC Corporations (AFCA Regulatory Requirement) Instrument 2020/0433	F2020L00560
ASIC Corporations (Amendment and Repeal) Instrument 2020/579	F2020L00932
ASIC Corporations (Amendment) Instrument 2020/290	F2020L00376
ASIC Corporations (Amendment) Instrument 2020/396	F2020L00470
ASIC Corporations (Amendment) Instrument 2020/452	F2020L00591
ASIC Corporations (Amendment) Instrument 2020/565	F2020L00697
ASIC Corporations (Approval of Variation of March 2020 Banking Code of Practice) Instrument 2020/602	F2020L00854
ASIC Corporations (COVID-19 – Distribution of Debit Cards) Instrument 2020/401	F2020L00478
ASIC Corporations (COVID-19—Advice-related Relief) Instrument 2020/355	F2020L00425
ASIC Corporations (Deferral of Design and Distribution Obligations) Instrument 2020/486	F2020L00618
ASIC Corporations (Extended Reporting and Lodgment Deadlines—Listed Entities) Instrument 2020/451	F2020L00587
ASIC Corporations (Extended Reporting and Lodgment Deadlines—Unlisted Entities) Instrument 2020/395	F2020L00469
ASIC Corporations (Trading Suspensions Relief) Instrument 2020/289	F2020L00377
ASIC Corporations, Superannuation and Credit (Amendment) Instrument 2020/99	F2020L00789
ASIC Credit (Deferral of Mortgage Broker Obligations) Instrument 2020/487	F2020L00623
ASIC Market Integrity Rules (Securities Markets) Class Waiver Amendment Instrument 2020/586	F2020L00764
Australian Postal Corporation (Performance Standards) Amendment (2020 Measures No. 1) Regulations 2020	F2020L00579
Australian Skills Quality Authority Instrument Fixing Fees Amendment (Refund of Fees) Determination 2020	F2020L00548
Banking (BEAR) determination No. 1 of 2020	F2020L00347

Instrument name	FRL number
Biosecurity (Exit Requirements) Amendment (Nauru) Determination 2020	F2020L00388
Biosecurity (Exit Requirements) Determination 2020	F2020L00323
Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Amendment (No. 3) Determination 2020	F2020L00606
Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020	F2020L00266
Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements) Determination 2020	F2020L00267
Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020	F2020L00306
Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Determination 2020	F2020L00324
Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements) Amendment Determination (No. 1) 2020	F2020L00339
Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—Retail Outlets at International Airports) Determination 2020	F2020L00344
Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Essential Goods) Determination 2020	F2020L00355
Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Amendment Determination (No. 1) 2020	F2020L00415
Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Amendment (No. 2) Determination 2020	F2020L00466
Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—Public Health Contact Information) Determination 2020	F2020L00480
Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension) Instrument 2020	F2020L00574

Instrument name	FRL number
Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements) Amendment Determination (No. 2) 2020	F2020L00594
Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Amendment (No.6) Determination 2020	F2020L00752
Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Repeal Determination 2020	F2020L00897
Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Amendment (No. 4) Determination 2020	F2020L00668
Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Amendment (No. 5) Determination 2020	F2020L00683
Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—Retail Outlets at International Airports) Amendment (No. 1) Determination 2020	F2020L00964
Biosecurity (Human Health Response Zone) (Howard Springs Accommodation Village) Determination 2020	F2020L00107
Biosecurity (Human Health Response Zone) (North West Point Immigration Detention Centre) Determination 2020	F2020L00087
Biosecurity (Human Health Response Zone) (Royal Australian Air Force Base Learmonth) Determination 2020	F2020L00086
Biosecurity (Human Health Response Zone) (Swissotel Sydney) Determination 2020	F2020L00313
Biosecurity (Listed Human Diseases) Amendment Determination 2020	F2020L00037
Biosecurity Repeal (Human Health Response Zone) (Swissotel Sydney) Determination 2020	F2020L00510
Biosecurity Repeal (Human Health Response Zones) Determination 2020	F2020L00270
CASA EX57/20 — Licensing, and Operator Training and Checking (Extensions of Time Due to COVID-19) Exemptions Instrument 2020	F2020L00337
CASA EX60/20 – CRS and SM CRS Document to Cover Specialist Maintenance by a Class D AMO – Instrument 2020	F2020L00616

Instrument name	FRL number
CASA EX63/20 — Licensing, and Operator Training and Checking (Extensions of Time Due to COVID-19) Exemptions Amendment Instrument 2020 (No. 1)	F2020L00412
CASA EX65/20 — Extension of Airworthiness Review Certificate (COVID-19) Exemption 2020	F2020L00420
CASA EX69/20 – EPC Requirements for ATOs Transitioning to the FER (Extensions of Time Due to COVID-19) – Exemption Amendment Instrument 2020 (No. 1)	F2020L00456
CASA EX70/20 — Licensing, and Operator Training and Checking (Extensions of Time Due to COVID-19) Exemptions Amendment Instrument 2020 (No. 2)	F2020L00457
CASA EX82/20 — Non-Destructive Testing and Aircraft Welding Authorities (Visual Testing) Exemption 2020	F2020L00630
CASA EX83/20 — Aeronautical Knowledge Examinations (Extension of Time Due to COVID-19) Exemption 2020	F2020L00580
CASA EX90/20 — Helicopter Aircrew Members Amendment Instrument 2020 (No. 1)	F2020L00724
CASA EX92/20 — Materials Flammability Airworthiness Standards (Medical Isolation Transportation Devices) Instrument 2020	F2020L00796
CASA EX97/20 — Aircraft Engineer Licence and Rating Training and Qualification (Extension of Time Due to COVID-19) Exemption 2020	F2020L00866
Child Care Subsidy (Extension of First Deadline) Instrument 2020	F2020L00829
Child Care Subsidy Amendment (Coronavirus Economic Response Package) Minister’s Rules 2020	F2020L00295
Child Care Subsidy Amendment (Coronavirus Response Measures No. 2) Minister’s Rules 2020	F2020L00406
Child Care Subsidy Amendment (Coronavirus Response Measures No. 3) Minister’s Rules 2020	F2020L00490
Child Care Subsidy Amendment (Coronavirus Response Measures No. 4) Minister’s Rules 2020	F2020L00802
Child Care Subsidy Amendment (Coronavirus Response Measures No. 5) Minister’s Rules 2020	F2020L00930
Civil Aviation Legislation Amendment (Part 139 Aerodromes—Transitional Provisions and Consequential Amendments) Regulations 2020	F2020L00913
Civil Aviation Order 48.1 Amendment Instrument 2020 (No. 1)	F2020L00805

Instrument name	FRL number
Civil Aviation Safety Amendment (Part 66 Transition Extension) Regulations 2020	F2020L00824
Commercial Broadcasting (Tax) (Transmitter Licence Tax Rebate) Rules 2020	F2020L00426
Commonwealth Grant Scheme Guidelines Amendment (No. 1) 2020	F2020L00940
Commonwealth Scholarships Guidelines (Research) Amendment (No. 1) 2020	F2020L00934
Coronavirus Economic Response Package (Deferral of Sunsetting – Financial Management and Accountability Determination 2010/02) Determination 2020	F2020L00348
Coronavirus Economic Response Package (Deferral of Sunsetting – Income Management and Cashless Welfare Arrangements) Determination 2020	F2020L00572
Coronavirus Economic Response Package (Deferral of Sunsetting–PGPA Act Determination (National Disability Research Special Account 2016)) Determination 2020	F2020L00780
Coronavirus Economic Response Package (Deferral of Sunsetting—Treasury Portfolio Instruments) Determination 2020	F2020L00895
Coronavirus Economic Response Package (Modifications—National Redress Scheme for Institutional Child Sexual Abuse) Determination 2020	F2020L00604
Coronavirus Economic Response Package (Payments and Benefits) Alternative Decline in Turnover Test Rules 2020	F2020L00461
Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 6) 2020	F2020L00921
Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 4) 2020	F2020L00603
Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 5) 2020	F2020L00884
Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 1) 2020	F2020L00479
Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 2) 2020	F2020L00546
Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 3) 2020	F2020L00605
Coronavirus Economic Response Package (Payments and Benefits) Rules 2020	F2020L00419

Instrument name	FRL number
Corporations (Coronavirus Economic Response) Determination (No. 1) 2020	F2020L00553
Corporations (Coronavirus Economic Response) Determination (No. 2) 2020	F2020L00611
Corporations (Relevant Providers Continuing Professional Development Standard) Determination (Amendment) 2020	F2020L00912
Customs (Prohibited Exports) Amendment (COVID-19 Human Biosecurity Emergency) Regulations 2020	F2020L00343
Customs By-law No. 2019608	F2020L00540
Customs By-law No.2041552	F2020L00965
Defence Determination, Conditions of service (Star rank increment advancement) Amendment Determination 2020 (No. 12)	F2020L00867
Defence Determination, Conditions of service Amendment (COVID-19 response) Determination 2020 (No. 6)	F2020L00278
Defence Determination, Conditions of service Amendment (COVID-19 response) Determination 2020 (No. 7)	F2020L00336
Defence Determination, Conditions of service Amendment (COVID-19 response) Determination 2020 (No. 8)	F2020L00417
Defence Determination, Conditions of service Amendment (COVID-19 response) Determination 2020 (No. 9)	F2020L00528
Defence Determination, Conditions of service Amendment (Maritime Spiritual Wellbeing Officer and Specialist Officer) Determination 2020 (No. 14)	F2020L00887
Defence Determination, Conditions of service Amendment Determination 2020 (No. 13)	F2020L00886
Defence Determination, Conditions of service Amendment Determination 2020 (No. 11)	F2020L00672
Education Services for Overseas Students (Registration Charges) Amendment (COVID-19 Exemptions) Regulations 2020	F2020L00905
Export Market Development Grants (Export Performance Requirements) Amendment (2019-20 Grant Year) Instrument 2020	F2020L00722
Fair Work Amendment (Variation of Enterprise Agreements No. 2) Regulations 2020	F2020L00702
Fair Work Amendment (Variation of Enterprise Agreements) Regulations 2020	F2020L00432

Instrument name	FRL number
Fair Work Commission Amendment (Miscellaneous Measures) Rules 2020	F2020L00471
Financial Framework (Supplementary Powers) Amendment (Infrastructure, Transport, Regional Development and Communications Measures No. 6) Regulations 2020	F2020L00944
Financial Framework (Supplementary Powers) Amendment (Infrastructure, Transport, Regional Development and Communications Measures No. 4) Regulations 2020	F2020L00658
Financial Framework (Supplementary Powers) Amendment (Social Services Measures No. 2) Regulations 2020	F2020L00792
Financial Sector (Collection of Data) (reporting standard) determination No. 5 of 2020	F2020L00561
Financial Sector (Collection of Data) (reporting standard) determination No. 6 of 2020	F2020L00562
Financial Sector (Collection of Data) (reporting standard) determination No. 4 of 2020	F2020L00434
Financial Sector (Collection of Data) class of corporations determination No. 1 of 2020	F2020L00433
Foreign Acquisitions and Takeovers Amendment (Threshold Test) Regulations 2020	F2020L00435
Great Barrier Reef Marine Park Amendment (Coronavirus Economic Response Package) Regulations 2020	F2020L00698
Greenhouse and Energy Minimum Standards (Exemption) Instrument (No. 1) 2020	F2020L00868
Guarantee of Lending to Small and Medium Enterprises (Coronavirus Economic Response Package) Rules 2020	F2020L00413
Health Insurance (Diagnostic Imaging Services Table) Regulations (No. 2) 2020	F2020L00713
Health Insurance (General Medical Services Table) Regulations (No. 2) 2020	F2020L00711
Health Insurance (Pathologist-determinable Services) Amendment Determination 2020	F2020L00251
Health Insurance (Pathologist-determinable Services) Amendment Determination (No. 2) 2020	F2020L00519
Health Insurance (Pathology Services Table) Amendment (Indexation) Regulations 2020	F2020L00728

Instrument name	FRL number
Health Insurance (Section 3C General Medical Services – Additional GP Bulk-billing Incentives) Determination 2020	F2020L00441
Health Insurance (Section 3C General Medical Services – Application of GP and Allied Health COVID-19 Services and Specialist, Consultant Physician and Consultant Psychiatrist COVID-19 Telehealth Services) Amendment Determination 2020	F2020L00298
Health Insurance (Section 3C General Medical Services - COVID-19 Telehealth and Telephone Attendances) Amendment (Further Expansion of Remote Attendance Items) Determination 2020	F2020L00593
Health Insurance (Section 3C General Medical Services - COVID-19 Telehealth and Telephone Attendances) Determination 2020	F2020L00342
Health Insurance (Section 3C General Medical Services – COVID-19 Services) Determination 2020	F2020L00292
Health Insurance (Section 3C General Medical Services – COVID-19 Telehealth and Telephone Attendances) Amendment Determination 2020	F2020L00403
Health Insurance (Section 3C General Medical Services – COVID-19 Telehealth and Telephone Attendances) Amendment (Bulk-billing) Determination 2020	F2020L00404
Health Insurance (Section 3C General Medical Services – COVID-19 Telehealth and Telephone Attendances) Amendment (Expansion of Specialist Services) Determination 2020	F2020L00405
Health Insurance (Section 3C General Medical Services – COVID-19 Telehealth and Telephone Attendances) Amendment (Bulk-billing Requirement and New Remote Attendance Services) Determination 2020	F2020L00442
Health Insurance (Section 3C General Medical Services – COVID-19 Telehealth and Telephone GP Attendances) Amendment (Patient’s Usual Medical Practitioner) Determination 2020	F2020L00922
Health Insurance (Section 3C General Medical Services – GP and Allied Health COVID-19 Services) Determination 2020	F2020L00249
Health Insurance (Section 3C General Medical Services – GP and Allied Health COVID-19 Services) Amendment Determination No.1 2020	F2020L00255
Health Insurance (Section 3C General Medical Services – GP and Allied Health COVID-19 Services) Amendment Determination No. 2 2020	F2020L00259
Health Insurance (Section 3C General Medical Services – GP and Allied Health COVID-19 Services) Amendment Determination No. 3 2020	F2020L00261

Instrument name	FRL number
Health Insurance (Section 3C General Medical Services – GP and Allied Health COVID-19 Services) Amendment (Consequential) Determination 2020	F2020L00530
Health Insurance (Section 3C General Medical Services – Specialist, Consultant Physician and Consultant Psychiatrist COVID-19 Telehealth Services) Determination 2020	F2020L00248
Health Insurance (Section 3C General Medical Services – Specialist, Consultant Physician and Consultant Psychiatrist COVID-19 Telehealth Services) Amendment Determination No.1 2020	F2020L00254
Health Insurance (Section 3C General Medical Services – Specialist, Consultant Physician and Consultant Psychiatrist COVID-19 Telehealth Services) Amendment Determination No.2 2020	F2020L00260
Health Insurance (Section 3C Pathology Services – COVID-19) Amendment Determination 2020	F2020L00258
Health Insurance (Section 3C Pathology Services – COVID-19) Amendment (No. 2) Determination 2020	F2020L00373
Health Insurance (Section 3C Pathology Services – COVID-19) Amendment (No. 3) Determination 2020	F2020L00592
Health Insurance (Section 3C Pathology Services – COVID-19) Amendment (No. 4) Determination 2020	F2020L00954
Health Insurance (Section 3C Pathology Services – COVID-19) Determination 2020	F2020L00250
Health Insurance Legislation Amendment (Bulk-billing Incentive) Regulations 2020	F2020L00341
Health Insurance Legislation Amendment (Consequential Change to Incorporated GMST Clauses and Eye Movement Desensitisation and Reprocessing) Determination 2020	F2020L00535
Health Insurance Legislation Amendment (Indexation) Determination 2020	F2020L00742
Higher Education Support (HELP Tuition Protection Levy) (Administrative Fee) Determination 2020	F2020L00947
Higher Education Support (HELP Tuition Protection Levy) (Risk Rated Premium and Special Tuition Protection Components) Determination 2020	F2020L00960
Industry Research and Development (National Communications Campaign to Support Small Business Program) Instrument 2020	F2020L00607

Instrument name	FRL number
Intellectual Property Laws Amendment (Fee Exemptions) Regulations 2020	F2020L00703
Marriage (Celebrant Registration Charge) Determination 2020	F2020L00588
Medical and Midwife Indemnity Legislation Amendment (Eligible Run-off Claims) Rules 2020	F2020L00375
Medical Indemnity Amendment (Eligible Run-off Claims) Regulations 2020	F2020L00363
Migration (LIN 20/045: Class of persons for Visitor (Class FA) visa applications) Instrument 2020	F2020L00157
Migration (LIN 20/046: Arrangements for Visitor (Class FA) Visa Applications) Instrument 2020	F2020L00160
Migration (LIN 20/099: Classes of Persons for Student (Temporary) (Class TU) Visa Applications) Instrument 2020	F2020L00158
Migration (LIN 20/102: Arrangements for Student (Temporary) (Class TU) visa applications) Instrument 2020	F2020L00156
Migration (LIN 20/122: COVID-19 Pandemic event for Subclass 408 (Temporary Activity) visa and visa application charge for Temporary Activity (Class GG) visa) Instrument 2020	F2020L00409
Migration (LIN 20/158: Classes of Persons for Student (Temporary) (Class TU) Visa Applications) Instrument 2020	F2020L00955
National Consumer Credit Protection Amendment (Coronavirus Economic Response Package) Regulations 2020	F2020L00386
National Disability Insurance Scheme Amendment (Provider Registration – Extension of Exemption) Rules 2020	F2020L00790
National Greenhouse and Energy Reporting (Safeguard Mechanism) Amendment (Extended Transition) Rule 2020	F2020L00566
National Health (Continued Dispensing – Emergency Measures) Amendment Determination 2020 (No.5) (PB 58 of 2020)	F2020L00848
National Health (Continued Dispensing – Emergency Measures) Amendment Determination 2020 (No.2) (PB 23 of 2020)	F2020L00361
National Health (Continued Dispensing – Emergency Measures) Amendment Determination 2020 (No.4) (PB 44 OF 2020)	F2020L00643
National Health (Continued Dispensing – Emergency Measures) Amendment Determination 2020 (No.3) (PB 36 of 2020)	F2020L00522

Instrument name	FRL number
National Health (Continued Dispensing – Emergency Measures) Amendment Determination 2020 (No.6) (PB 70 of 2020)	F2020L00977
National Health (COVID-19 Supply of Pharmaceutical Benefits (Expansion of Telehealth and Telephone Attendances) Special Arrangement 2020	F2020L00414
National Health (COVID-19 Supply of Pharmaceutical Benefits) Special Arrangement 2020	F2020L00312
National Health (Electronic National Residential Medication Chart Trial) Amendment (Approved Residential Care Services) Special Arrangement 2 of 2020	F2020L00446
National Health (Highly specialised drugs program) Special Arrangement Amendment Instrument 2020 (No. 5)) (PB 46 OF 2020)	F2020L00646
National Health (Listing of Pharmaceutical Benefits) Amendment Instrument 2020 (No. 5) (PB 42 of 2020)	F2020L00641
National Health (Pharmaceutical Benefits) Legislation Amendment (Continuing treatment during Coronavirus pandemic) Instrument 2020	F2020L00531
National Health Security (National Notifiable Disease List) Amendment Instrument 2020	F2020L00111
National Redress Scheme for Institutional Child Sexual Abuse Amendment (2020 Measures No. 2) Rules 2020	F2020L00733
National Vocational Education and Training Regulator (Charges) Amendment (COVID-19) Determination 2020	F2020L00547
Norfolk Island Continued Laws Amendment (Coronavirus Economic Response Measures) Rules 2020	F2020L00926
Other Grants Guidelines (Research) Amendment (No. 1) 2020	F2020L00936
Paid Parental Leave Amendment (Coronavirus Economic Response) Rules 2020	F2020L00726
Paid Parental Leave Amendment (Flexibility Measures) Rules 2020	F2020L00837
Parliamentary Business Resources Amendment (Office Expenses No. 2) Regulations 2020	F2020L00785
Parliamentary Business Resources Amendment (Office Expenses) Regulations 2020	F2020L00575
Parliamentary Contributory Superannuation (Early Release Payments) Regulations 2020	F2020L00542

Instrument name	FRL number
Part 101 Manual of Standards (Extensions of Time Due to COVID-19) Amendment Instrument 2020 (No. 1)	F2020L00394
Part 139 (Aerodromes) Manual of Standards Amendment Instrument 2020 (No. 1)	F2020L00931
Parst 66 Manual of Standards Amendment Instrument 2020 (No. 1)	F2020L00874
Poisons Standard Amendment (Hydroxychloroquine and Salbutamol) Instrument 2020	F2020L00291
Poisons Standard Amendment (Hydroxychloroquine) Instrument 2020	F2020L00387
Poisons Standard July 2020	F2020L00899
Private Health Insurance (Incentives) Amendment Rules (No. 1) 2020	F2020L00354
Public Governance, Performance and Accountability (Section 75 Transfers) Amendment Determination 2019-2020 (No. 7)	F2020L00737
Public Governance, Performance and Accountability (Section 75 Transfers) Amendment Determination 2019-2020 (No. 6)	F2020L00614
Public Governance, Performance and Accountability Amendment (Corporate Plans) Rules 2020	F2020L00677
Public Service (Terms and Conditions of Employment) (General wage increase deferrals during the COVID-19 pandemic) Determination 2020	F2020L00418
Social Security (Coronavirus Economic Response—2020 Measures No. 1) Determination 2020	F2020L00310
Social Security (Coronavirus Economic Response—2020 Measures No. 2) Determination 2020	F2020L00311
Social Security (Coronavirus Economic Response—2020 Measures No. 3) Determination 2020	F2020L00338
Social Security (Coronavirus Economic Response—2020 Measures No. 4) Determination 2020	F2020L00474
Social Security (Coronavirus Economic Response—2020 Measures No. 5) Determination 2020	F2020L00509
Social Security (Coronavirus Economic Response—2020 Measures No. 6) Determination 2020	F2020L00475
Social Security (Coronavirus Economic Response—2020 Measures No. 7) Determination 2020	F2020L00545

Instrument name	FRL number
Social Security (Coronavirus Economic Response—2020 Measures No. 8) Determination 2020	F2020L00428
Social Security (Coronavirus Economic Response—2020 Measures No. 9) Determination 2020	F2020L00440
Social Security (Coronavirus Economic Response—2020 Measures No. 10) Determination 2020	F2020L00690
Social Security (Coronavirus Economic Response—2020 Measures No. 11) Determination 2020	F2020L00765
Social Security (Coronavirus Economic Response—2020 Measures No. 13) Determination 2020	F2020L00980
Social Security (Deeming Threshold Rates) Determination 2020	F2020L00416
Social Security (Ordinary Waiting Period Exemption) Instrument 2020	F2020L00247
Social Security Legislation Amendment (Measures No. 1) Determination 2020	F2020L00786
Southern Bluefin Tuna Fishery (Overcatch and Undercatch) Determination No. 2 of 2020	F2020L00915
Statement of Principles concerning coronavirus disease 2019 (COVID-19) (Reasonable Hypothesis) (No. 46 of 2020)	F2020L00709
Statement of Principles concerning coronavirus disease 2019 (COVID-19) (Balance of Probabilities) (No. 47 of 2020)	F2020L00710
Structured Finance Support (Coronavirus Economic Response Package) Rules 2020	F2020L00309
Superannuation Guarantee (Administration) Amendment (Aged Care Retention Bonus) Regulations 2020	F2020L00859
Superannuation Guarantee (Administration) Amendment (Jobkeeper Payment) Regulations 2020	F2020L00655
Tax Agent Services (Specified BAS Services No.1) Instrument 2020	F2020L00429
Taxation Administration (Coronavirus Economic Response Package—Ancillary Funds) Amendment Guidelines 2020	F2020L00684
Tertiary Education Quality and Standards Agency Determination of Fees No. 1 of 2020	F2020L00549
Therapeutic Goods (Charges) Amendment (2020 Measures No. 1) Regulations 2020	F2020L00727

Instrument name	FRL number
Therapeutic Goods (Excluded Goods—Hand Sanitisers) Determination 2020	F2020L00340
Therapeutic Goods (Medical Devices—Specified Articles) Instrument 2020	F2020L00463
Therapeutic Goods Amendment (Declared Goods) Order (No. 1) 2020	F2020L00465
Therapeutic Goods Amendment (Excluded Goods) Determination (No.1) 2020	F2020L00464
Therapeutic Goods Amendment (Excluded Goods—Hand Sanitisers) Determination 2020	F2020L00359
Therapeutic Goods Amendment (Excluded Goods—Hand Sanitisers) Determination (No. 2) 2020	F2020L00551
Therapeutic Goods Amendment (Radiopharmaceuticals and Radiopharmaceutical Active Ingredients) Regulations 2020	F2020L00544
Therapeutic Goods Legislation Amendment (2020 Measures No. 1) Regulations 2020	F2020L00946
Torres Strait Regional Authority (Postponement of Election) Instrument 2020	F2020L00448
Treasury Laws Amendment (Release of Superannuation on Compassionate Grounds) Regulations 2020	F2020L00431
Treasury Laws Amendment (Release of Superannuation on Compassionate Grounds) Regulations (No. 2) 2020	F2020L00532
VET Student Loans (VSL Tuition Protection Levy) (Administrative Fee) Determination 2020	F2020L00951
VET Student Loans (VSL Tuition Protection Levy) (Risk Rated Premium and Special Tuition Protection Components) Determination 2020	F2020L00961
VET Student Loans Amendment Rules (No. 1) 2020	F2020L00569
Veterans' Entitlements (Provisional Access to Medical Treatment) Amendment Determination 2020	F2020L00368
Veterans' Affairs Pharmaceutical Benefits Schemes Amendment (Special Arrangement—COVID-19 Supply of Pharmaceutical Benefits) Determination 2020	F2020L00437
Veterans' Children Education Schemes (COVID-19 Supplement) Amendment Determination 2020	F2020L00477
Veterans' Entitlements (Asset-test Exempt Income Stream (Market-linked) — Payment Factors) Principles Amendment Instrument 2020	F2020L00894



## Appendix 4

### Acts passed by the Commonwealth Parliament in response to COVID-19

The table below lists the COVID-19 response Acts passed by the Commonwealth Parliament which received the Royal Assent by 31 October 2020.

Act	Description
<b><i>Aged Care Legislation Amendment (Emergency Leave) Act 2020</i></b>	This Act introduces an emergency leave type that will enable approved providers to remain eligible for residential care subsidy in declared emergency situations (such as the COVID-19 pandemic) and ensure approved providers cannot decide to charge aged care residents a fee during a declared emergency to reserve their place in an aged care service. These emergency situations may include natural disasters, pandemics or other large-scale emergencies that may impact the safe provision of residential aged care and the safety of the resident.
<b><i>Appropriation (Coronavirus Economic Response Package) Act (No. 1) 2019-2020</i></b>	The Act appropriates \$1,651,133,000 from the Consolidated Revenue Fund for the ordinary annual services of the Government in relation to the Coronavirus Economic Response, and for related purposes.
<b><i>Appropriation (Coronavirus Economic Response Package) Act (No. 2) 2019-2020</i></b>	The Act appropriates \$740,050,000 in additional money from the Consolidated Revenue Fund for certain expenditure in relation to the Coronavirus Economic Response, and for related purposes.
<b><i>Assistance for Severely Affected Regions (Special Appropriation) (Coronavirus Economic Response Package) Act 2020</i></b>	The Act appropriates up to \$1 billion in funds for the purposes of making payments to support communities, regions and industry sectors affected by the economic impacts of COVID-19, for specified purposes. Any payments under this appropriation must be made by 30 June 2021.
<b><i>Australian Business Growth Fund (Coronavirus Economic Response Package) Act 2020</i></b>	The Act appropriates \$100,000,000 to be invested in an Australian Business Growth Fund for the purpose of providing small and medium Australian enterprises with access to capital.
<b><i>Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Act 2020</i></b>	The Act provides that two sets of cash flow boost payments may be made to businesses which have made payments for wages or salaries, where the Commissioner for Taxation is satisfied that they are eligible to receive such payments.

Act	Description
<b><i>Coronavirus Economic Response Package (Jobkeeper Payments) Amendment Act 2020</i></b>	This Act extends the operation of the JobKeeper scheme to 28 March 2021.
<b><i>Coronavirus Economic Response Package (Payments and Benefits) Act 2020</i></b>	The Act establishes a framework for the Treasurer to make rules to provide for the Commissioner of Taxation to make payments to eligible entities. Eligibility for particular payments as well as the amount of payments and the time when they are to be paid are to be set out in the rules. The payments may only be made in respect of the period from 1 March 2020 until 31 December 2020 (inclusive).
<b><i>Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020</i></b>	<p>The Act makes a number of amendments to various other Acts to:</p> <ul style="list-style-type: none"> <li>• support the practical operation of the JobKeeper scheme in Australian workplaces;</li> <li>• ensure certain categories of smaller non-ADI lenders will fall within the definition of financial institution in existing legislation;</li> <li>• modify the calculation method used for Child Care Subsidy reconciliation and ensure that payments of Additional Child Care Subsidy and certain grants can draw on standing appropriations;</li> <li>• create a temporary mechanism for responsible ministers to change arrangements for meeting information and documentary requirements in response to the challenges posed by the coronavirus;</li> <li>• allow the Veterans' Minister to increase the amount paid to persons receiving a payment under a provision of the Veterans' Law by the amount of the coronavirus supplement and vary the qualifications and eligibility for payments; and</li> <li>• allow de-identified taxation information to be disclosed to the Treasury for the purposes of policy development, or analysis, in relation to the coronavirus.</li> </ul>
<b><i>Coronavirus Economic Response Package Omnibus Act 2020</i></b>	The Act, containing 16 schedules, amends a number of Acts in order to provide an economic response, and deals with other matters, relating to COVID-19, and for related purposes. For example, Schedule 4 of the Act amends social security and taxation Acts to provide for a \$750 stimulus payment to some recipients of social welfare and veterans payments; Schedule 11 provides for a temporary fortnightly supplement of \$550 to some social welfare payment recipients; and Schedule 13 enables the release of up to \$10,000 of superannuation on compassionate grounds.

Act	Description
<b><i>Great Barrier Reef Marine Park Amendment (Coronavirus Economic Response Package) Act 2020</i></b>	This Act effectively waives the requirement for Great Barrier Reef Marine Park permission holders to pay the environmental management charge to the Great Barrier Reef Marine Park Authority for the period 1 January 2020 to 31 March 2020. This is intended to provide financial relief to the Great Barrier Reef tourism industry and other relevant permission holders impacted by the COVID-19 pandemic.
<b><i>Guarantee of Lending to Small and Medium Enterprises (Coronavirus Economic Response Package) Act 2020</i></b>	The Act provides that the minister may grant a guarantee to a financial institution in connection with loans made, or to be made, by the financial institution if granting the guarantee is likely to assist in dealing with the economic impacts of COVID-19. It also provides that up to \$20 billion from the Consolidated Revenue Fund may be appropriated for the purpose of meeting any liabilities that the Commonwealth incurs under those guarantees.
<b><i>Privacy Amendment (Public Health Contact Information) Act 2020</i></b>	This Act seeks to provide stronger privacy protections for users of the Commonwealth's COVIDSafe app and data collected through the COVIDSafe app than that which would otherwise apply in the <i>Privacy Act 1988</i> .
<b><i>Structured Finance Support (Coronavirus Economic Response Package) Act 2020</i></b>	The Act sets up the Structured Finance Support (Coronavirus Economic Response) Fund. The Fund, consisting of the Structured Finance Support (Coronavirus Economic Response) Fund Special Account and investments of the fund, must be credited with \$15 billion.
<b><i>Treasury Laws Amendment (A Tax Plan for the COVID-19 Economic Recovery) Act 2020</i></b>	This Act amends the rates of income tax payable by persons, in response to the COVID-19 pandemic.



## Appendix 5

### Passage of COVID-19 response Acts in comparable jurisdictions

The table below outlines the period in which COVID-19 response Acts were passed in comparable jurisdictions and the effect of the relevant Acts, including whether they amend existing primary legislation. While it lists the most significant Act enacted in each jurisdiction, it does not purport to capture all primary legislation each jurisdiction passed in response to COVID-19.

Jurisdiction	Act	Effect of Act	Introduced	Royal Assent
<b>ACT</b>	<i>COVID-19 Emergency Response Act 2020</i>	This is a standalone Act which also amends a range of ACT primary legislation.	2 April 2020	7 April 2020
<b>NSW</b>	<i>COVID-19 Legislation Amendment (Emergency Measures) Act 2020</i>	This Act amends a range of NSW primary legislation.	24 March 2020	25 March 2020
<b>NT</b>	<i>Emergency Legislation Amendment Act 2020</i>	This Act amends the <i>Public and Environmental Health Act 2011</i> and the <i>Information Act 2002</i> .	24 March 2020	25 March 2020
<b>QLD</b>	<i>Public Health and Other Legislation (Public Health Emergency) Amendment Act 2020</i>	This Act amends a range of QLD primary legislation.	18 March 2020	19 March 2020
<b>SA</b>	<i>COVID-19 Emergency Response Act 2020</i>	This Act amends a range of SA primary legislation.	7 April 2020	9 April 2020
<b>TAS</b>	<i>COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020</i>	This is a standalone Act which also amends the <i>Emergency Management Act 2006</i> and the <i>Residential Tenancy Act 1997</i> .	25 March 2020	27 March 2020

<b>Jurisdiction</b>	<b>Act</b>	<b>Effect of Act</b>	<b>Introduced</b>	<b>Royal Assent</b>
<b>VIC</b>	<i>COVID-19 Omnibus (Emergency Measures) Act 2020</i>	This Act amends a range of VIC primary legislation.	23 April 2020	24 April 2020
<b>WA</b>	<i>Emergency Management (COVID-19 Response) Act 2020</i>	This Act amends the <i>Emergency Management Act 2005</i> .	31 March 2020	3 April 2020
<b>NZ</b>	<i>COVID-19 Public Health Response Act 2020</i>	This is a standalone Act which also amends a range of NZ primary legislation.	12 May 2020	13 May 2020
<b>UK</b>	<i>Coronavirus Act 2020</i>	This is a standalone Act which also amends a range of UK primary legislation.	19 March 2020	25 March 2020