

Interim Report—Exemption of delegated legislation from parliamentary oversight

Wednesday 2 December 2020

Opening remarks

I rise to speak to the tabling of the interim report of the Senate Standing Committee for the Scrutiny of Delegated Legislation's inquiry into the exemption of delegated legislation from parliamentary oversight.

As parliamentarians, we are elected by the Australian people to make and scrutinise the laws of this country. However, about half of the law of the Commonwealth by volume consists of delegated legislation, rather than Acts of parliament. I would like to repeat that: half of the law of the Commonwealth by volume consists of delegated legislation, rather than Acts of Parliament.

In 2019, 20 per cent of the 1,675 pieces of delegated legislation made by the executive were exempt from disallowance by the Parliament and scrutiny by the committee.

The volume of delegated legislation made by the executive, and the frequent exemption of these laws from parliamentary oversight, restricts our capacity as parliamentarians to perform our scrutiny and lawmaking functions.

The committee's inquiry considers the source, nature, and ongoing appropriateness of the exemption of delegated legislation from parliamentary oversight, informed by expert evidence and the committee's own scrutiny work over the past 88 years.

In the wake of the COVID-19 pandemic, this interim report focuses on how systemic issues in legislation, procedure and practice have combined to exempt delegated legislation

made in response to the pandemic from parliamentary oversight, and what actions can and should be undertaken to resolve these issues.

Legislative framework for the COVID-19 response

Part I of the report provides an overview of the legislative framework relied upon by the government to make delegated legislation in response to COVID.

The *Biosecurity Act 2015* is the key component of this framework. As the report explains, the Biosecurity Act confers extraordinarily broad powers on the executive to make non-disallowable delegated legislation which restricts personal rights and liberties and overrides any Australian law, including laws made by this Parliament.

Despite the significance of the delegated legislation-making powers in the Biosecurity Act, they received little consideration when the Biosecurity Bill was being considered in 2014 and early 2015.

Accordingly, the committee recommends that the Senate Standing Committee for the Scrutiny of Bills or another independent body or person review the delegation of legislative powers in the Biosecurity Act.

In the future, the committee urges all parliamentarians to carefully consider the delegated legislation-making powers in emergency legislation, to ensure that the exercise of these powers is subject to an appropriate degree of parliamentary oversight.

Features that contributed to exemptions from parliamentary oversight

Part II of the report considers the specific, systemic factors that have contributed to the exemption of delegated legislation made in response to COVID-19 from parliamentary oversight. These features include:

- the cancellation of parliamentary sittings;
- the exemption of delegated legislation from disallowance;
- the classification of delegated legislation as non-legislative;
- the duration of delegated legislation;

- and the exclusion of delegated legislation from scrutiny by parliamentary committees.

Exemption for disallowance

In particular, I would like to highlight the committee's concerns about the exemption of emergency delegated legislation from disallowance. Disallowance 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, nearly 20 per cent of all delegated legislation made in response to the pandemic between January and July this year was exempt from disallowance.

This includes all 27 legislative instruments made under the Biosecurity Act, and six Advance to the Finance Minister determinations, which allocated an additional \$2.1 billion of public funds to aspects of the government's response to COVID-19.

Consequently, parliamentarians have been prevented from scrutinising and, if necessary, disallowing, significant COVID-19 response measures. These include travel bans on Australian citizens, the declaration and extension of the human biosecurity emergency period, and restrictions on people entering and exiting certain areas within Australia.

The committee fully appreciates the government's need to make such laws in response to the COVID-19 pandemic. However, where such laws have the capacity to restrict personal rights and liberties or override laws made by Parliament, the committee considers that parliamentarians must—I underline must—have the capacity to scrutinise and, if necessary, disallow these laws.

The committee was also concerned to discover that one in five non-disallowable legislative instruments made in response to COVID-19 are exempt from disallowance due to pre-existing grounds determined by the executive, rather than the Parliament.

Accordingly, the report recommends that any grounds for exempting emergency-related delegated legislation from disallowance should be set out in primary legislation.

Exclusion from oversight by parliamentary committees

I also draw the chamber's attention to systemic issues which have excluded COVID-19 related delegated legislation from scrutiny by parliamentary committees.

The standing orders currently prevent the committee from considering non-disallowable legislative instruments in its regular scrutiny work.

To inform this inquiry, the committee found that 48 per cent of non-disallowable legislative instruments made in response to COVID-19 between January and July this year appeared to raise potential technical scrutiny issues.

However, the procedural constraints imposed by the standing orders prevented the committee from attempting to resolve these issues with the relevant departments or ministers.

Accordingly, the committee recommends that all delegated legislation made during times of emergency is subject to technical legislative scrutiny, regardless of its disallowance status.

Given the significant content and volume of delegated legislation made in response to COVID-19, the committee also recommends that a Senate select committee be established in times of emergency to specifically consider the policy merits of delegated legislation made in response to that emergency.

Concluding comments

I conclude by saying that the committee is grateful to everyone who has made a submission to this inquiry and given evidence to the committee's first ever public hearings

We trust that this interim report, and its focus on delegated legislation made in response to COVID-19, provides a useful case study of the detrimental impact of longstanding, systemic issues on Parliament's capacity to appropriately oversee delegated legislation made in times of emergency.

Our final report will further consider these systemic issues and the options available to the Parliament to resolve them.

In the meantime, the committee calls on all parliamentarians to carefully consider their responsibilities, as representatives of the people, to ensure that delegated legislation made in response to emergencies is subject to rigorous parliamentary oversight. That is a responsibility that we as parliamentarians have and it is the reason why we sit in this place.

I also acknowledge the hard work of the committee secretary, Glenn Ryall, and all his team. This is the first ever inquiry of this committee and their commitment to producing excellent work is to be highly commended. I and other committee members very much appreciate all your efforts.

With these comments, I commend the committee's interim report on the exemption of emergency delegated legislation from parliamentary oversight to the Senate, and I thank my colleagues on the committee for their hard work and their willingness to participate in this very important work on behalf of the people of Australia.