



Delegated Legislation Monitor 13 of 2021

Tabling Statement

Wednesday, 25 August 2021

I appreciate this opportunity to speak to the tabling of the committee's *Delegated Legislation Monitor 13 of 2021*.

In the Monitor, the committee has drawn particular attention to 21 **Charter of the United Nations Listings**, which have been made by successive governments since 2001 but were only registered on the Federal Register of Legislation in May this year. These listings prescribe almost 300 individuals as being subject to counter-terrorism financial sanctions.

Following correspondence from the committee, the Minister for Foreign Affairs has acknowledged that the listings, which were originally registered as exempt from disallowance, are in fact subject to disallowance. In light of this, the Minister has indicated that her department will prepare replacement explanatory statements for the listings to reflect their status as disallowable legislative instruments.

The committee thanks the Minister for this undertaking. This outcome is a timely reminder of the importance of thorough parliamentary scrutiny of delegated legislation made by the executive.

While this clarification of the disallowance status of the instruments is welcome, the committee has further considered the listings in light of the terms of the Charter of the United Nations Amendment Bill 2021, which was introduced into the House of Representatives on 11 August 2021. If passed, the amendment bill will confirm the application and enforceability of the listings.

Noting the importance of the counter-terrorism financial sanctions regime, the committee has significant concerns about the incorrect classification of these listings as non-legislative for the past 20 years and the impact this may have on the validity of any action taken under the listings.

The committee is therefore seeking further advice from the minister as to when and how the Department of Foreign Affairs and Trade became aware that it would be necessary to register the listings to ensure their enforceability. The committee is also of the view that the explanatory statements do not adequately detail or assess the compatibility of the listings with human rights.

In this respect, the committee highlights the guidance provided by the Parliamentary Joint Committee on Human Rights that statements of compatibility should be stand-alone documents. These documents are essential to the examination of human rights in the legislative process. The introduction of the amendment bill into the Parliament also draws into question the accuracy of the explanatory statements in relation to the application of provisions of the *Legislation Act 2003* to the listings.

The committee is therefore requesting that the explanatory statements be amended to include more robust statements of compatibility with human rights and to clarify the impact of the amendment bill on the operation of the instruments.

I now turn to two instruments raised in the Monitor which relate to significant matters that the committee considers are inappropriate to be included in delegated legislation.

The first is the **Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021**.

This instrument sets out requirements relating to the use of restrictive practices in residential aged care settings. In this regard, the instrument regulates the use of chemical, physical, environmental and mechanical restraints, and the use of solitary confinement practices, on an extremely vulnerable group of people within the community.

The instrument complements changes to the Aged Care Act, which the chamber had the opportunity to consider and scrutinise earlier this year. It is unclear to the committee why the significant matters set out in the instrument were not also included on the face of the primary legislation.

Noting the importance of these measures to the protection of our elderly citizens, these matters are of a serious nature and should have come before this chamber.

The second instrument I draw attention to is the **Legislation (Exemptions and Other Matters) Amendment (2021 Measures No. 1) Regulations 2021**.

This instrument has the effect of extending exemptions to disallowance or sunseting in relation to certain legislative instruments. The committee has significant concerns about the use of delegated legislation to set out exemptions to parliamentary oversight mechanisms, such as disallowance or sunseting.

As I have previously highlighted, exempting delegated legislation from disallowance or sunseting is problematic because it undermines the ability of the Parliament to fulfil its constitutionally mandated role as lawmaker in chief. Parliament should always maintain effective control over the legislative power that it has delegated to the Executive.

These concerns were most recently set out in detail in the committee's final report of its inquiry into the exemption of delegated legislation from parliamentary oversight, which was tabled in the Senate in March.

We find it deeply regrettable that the government has not yet responded to this report and consider that this instrument indicates a clear lack of engagement by the government with the committee's concerns.

It is the committee's longstanding view that laws made by the executive should be subject to stringent parliamentary oversight. The committee considers that the justifications provided in the explanatory statement do not adequately justify these exemptions, nor explain why it is appropriate to include them in delegated legislation.

The committee will correspond with the Minister for Health and Aged Care and the Attorney-General to resolve its significant technical scrutiny concerns regarding these two instruments with a view to ensuring that fundamental principles of parliamentary propriety are upheld.

Finally, I would like to mention the **Bankruptcy Regulations 2021**.

The committee has been corresponding with the Assistant Minister to the Attorney-General in relation to these Regulations since May this year. The regulations include a large number of provisions which modify the operation of primary legislation.

I am pleased to advise that after correspondence from the committee, the Assistant Minister made an undertaking to conduct a review into the concerns raised by the committee. The review will assess whether the modifying provisions in the regulations may be more appropriately contained in primary legislation.

In addition, last week the Assistant Minister advised that she will progress an amendment to the regulations to provide that the modifying provisions sunset after five years.

The committee thanks the Assistant Minister for her engagement in relation to this instrument and welcomes her undertakings as this will allow for appropriate parliamentary oversight of the measures set out in the regulations.

In light of the Assistant Minister's undertakings, earlier today I gave notice of my intention to withdraw the committee's notice of motion to disallow the regulations.

With these comments, I commend the committee's *Delegated Legislation Monitor 13 of 2021* to the Senate.