



Tabling Statement - Delegated Legislation Monitor 7 of 2021

Wednesday, 12 May 2021

I rise to speak to the tabling of the Scrutiny of Delegated Legislation Committee's *Delegated Legislation Monitor 7 of 2021*.

In December last year I warned the chamber that the *Biosecurity Act 2015* provided the government with sweeping powers to make laws including travel bans on Australian citizens.

I advised that as these laws are exempt from disallowance, parliamentarians are prevented from scrutinising and, if necessary, disallowing them.

If the significance of the committee's concerns in this regard was not clear before the events of the last few weeks, it should now be abundantly clear that the committee's position has been truly vindicated.

Last year, the committee called 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.

It is clear to us all in this place that this is more important than ever.

As I foreshadowed, this chamber has found itself in the position where it is unable to consider whether it would be appropriate to disallow the determination made by the Minister for Health and Aged Care that prevents people, including Australians, from entering Australia if they have been in India.

The power to make these determinations under the *Biosecurity Act*, and the maximum penalty of 5 years imprisonment or a fine of \$66,600 for breaching them, have been features of the Act since it was passed in 2015.

This penalty applies to a breach of **any** determination made under section 477 of the Act.

It applies not only to the ban on Australians returning home from India, but also to other measures such as the ban on Australian citizens and permanent residents travelling overseas.

This is a piece of legislation that was passed by the Senate without any debate at all on these human biosecurity emergency provisions. Primary legislation relating to times of emergency should be subject to rigorous parliamentary scrutiny.

During these times governments are more likely to implement extraordinary measures that encroach upon individuals' rights and liberties making parliamentary oversight all the more important.

It is important for senators to recognise that we provided all governments, not just the current one, with the power to make these determinations under the *Biosecurity Act*.

We provided all governments with the power to impose 5 years imprisonment for breaching any requirements they see fit to make within the scope of the Act.

The India Travel Pause Determination shows us that these powers are being used in ways that we did not comprehend when the Act was passed in 2015.

The point is not to make a policy comment on this legislation or the actions of the Health Minister or those who were delegated power under the Act.

The point is to raise the issue of parliamentary scrutiny. Without the ability to scrutinise, the Parliament cannot make policy judgements, or even technical judgements, on proposed laws. The Constitution tasks the Parliament with ultimate lawmaking authority.

While the Parliament may delegate some of these powers to the executive, this does not absolve the Parliament of responsibility for these laws.

Exempting delegated legislation from disallowance undermines the Parliament's constitutionally mandated role. It has significant consequences for the democratic foundations of our system of government.

The committee recommended in its interim inquiry report in December that such instruments made under the *Biosecurity Act* should not be exempt from disallowance.

I remind the chamber that these determinations can override **any** provision of **any** – yes any - other Australian law.

It is totally unacceptable that such significant measures can be made during times of emergency with no effective oversight or control by the Parliament.

This is not an isolated occurrence. 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 example of this much broader issue.

Parliament cannot perform its democratic role if primary legislation continues to leave significant matters to delegated legislation that is exempt from disallowance.

There is a concerning increase in the number of laws which are made by the executive via delegated legislation and even more concerning is that approximately one in five of these laws are not subject to disallowance.

In its final inquiry report tabled in March, the committee recommended that the Senate endorse changes to its standing orders to allow the committee to scrutinise instruments that are exempt from disallowance. These proposed changes will come before the Senate on 16 June.

The high number of exempt instruments including especially the India Travel Pause Determination, show why it is imperative that the Senate adopt these changes next month so that in the future the committee can scrutinise such measures if we so choose.

It is time for the Parliament to reassert its constitutionally mandated role. The Senate's agreement to adopt the recommendations of the committee's inquiry will be an important first step in ensuring that we preserve our democratic values.

This also brings me to a timely reminder for all senators. We are still in a declared state of human biosecurity emergency. This emergency declaration has been in force since 18 March 2020 and has been renewed every three months since that date.

There is no limit on the number of times a human biosecurity emergency period may be extended, 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.

The committee has been clear—the government must propose amendments to the *Biosecurity Act* so that declarations of a human biosecurity emergency are subject to disallowance.

I would also like to draw the chamber's attention to the committee's comments regarding a range of legislative instruments made in the Treasury portfolio which modify the operation of provisions of the *Corporations Act 2001* and other Acts of Parliament.

As I have previously explained, not only do these instruments alter the operation of primary legislation made by this Parliament, they are intended to remain in force for substantial periods of time—ranging from five to 10 years.

This contravenes the committee's longstanding expectation that instruments which modify or exempt persons or entities from the operation of primary legislation should cease to operate no more than three years after they commence.

A shorter sunset period is essential to ensure that there is a minimum degree of regular parliamentary oversight of such instruments.

Since October last year, the committee has been corresponding with the Treasurer to resolve its scrutiny concerns regarding each of these instruments separately.

The committee has also given notices of motion to disallow each of the instruments in order to provide it with additional time to resolve its scrutiny concerns.

In working together to resolve these concerns the Treasurer undertook to engage with the committee on an ongoing basis. The committee thanks the Treasurer for his engagement in relation to this systemic issue.

In light of this ongoing good faith engagement between the committee and the Treasurer, the committee has resolved to withdraw the disallowance notices in place on the instruments.

However, if this systemic issue is not resolved, the committee will not hesitate to move to disallow Treasury portfolio instruments of concern in the future.

With these comments, I commend the committee's *Delegated Legislation Monitor 7 of 2021* to the Senate.