

**PARLIAMENTARY INQUIRY QUESTION ON NOTICE**

**Department of Health**

**Standing Committee on Scrutiny of Bills**

**Private briefing on provisions which exempt delegated legislation made  
under the Biosecurity Act 2015 from disallowance**

**17 November 2021**

**PDR Number: IQ21-000312**

**Exemption of relevant instruments made under the Biosecurity Act from disallowance**

**Written**

**Senator:** Helen Polley

**Question:**

Could the department please provide more detailed advice as to the exceptional circumstances that are said to justify the exemption of relevant instruments made under the Biosecurity Act from disallowance?

**Answer:**

The justification for the exemption of relevant instruments made under the Biosecurity Act from disallowance are set out in the relevant provisions of the Explanatory Statement for the legislative instrument. For example, the justification for the exemption from disallowance for the:

- *Biosecurity (Emergency Requirements—Remote Communities) Determination 2021* is set out at paragraphs nine to eleven of the Explanatory Statement,
- *Biosecurity Legislation Amendment (Incoming International Flights) Determination 2021* is set out at paragraphs seven to twenty of the Explanatory Statement, and
- *Biosecurity (Human Coronavirus with Pandemic Potential) Amendment (No. 1) Determination 2021* is set out at paragraphs four to nine of the Explanatory Statement.

**PARLIAMENTARY INQUIRY QUESTION ON NOTICE**

**Department of Health**

**Standing Committee on Scrutiny of Bills**

**Private briefing on provisions which exempt delegated legislation made  
under the Biosecurity Act 2015 from disallowance**

**17 November 2021**

**PDR Number: IQ21-000313**

**Instruments made under the Biosecurity Act with a scientific or technical element**

**Written**

**Senator:** Helen Polley

**Question:**

Is it the department's contention that any instrument made under the Biosecurity Act which has a scientific or technical element should be exempt from parliamentary oversight, even if there are other considerations involved? Could the department please provide an example of an instrument which is purely scientific and technical in nature?

**Answer:**

It is a matter for Parliament whether instruments with a scientific or technical element should be exempt from disallowance.

On 21 January 2020, acting under subsection 42(1), the Director of Human Biosecurity made the *Biosecurity (Listed Human Diseases) Amendment Determination 2020* to add human coronavirus with pandemic potential to the list of human diseases. The addition of human coronavirus with pandemic potential enabled human biosecurity measures to be imposed, thereby allowing Australia to manage and respond to biosecurity risks to human health caused by the human coronavirus.

The Director of Human Biosecurity added this disease following consultations with the Australian Health Protection Principal Committee and the Communicable Diseases Network Australia, comprising Chief Health Officers and communicable disease experts across state and territory governments. It was through consultation with these medical experts that the Director of Human Biosecurity was able to decide that COVID-19 should be considered communicable and able to cause significant harm to human health.

**PARLIAMENTARY INQUIRY QUESTION ON NOTICE**

**Department of Health**

**Standing Committee on Scrutiny of Bills**

**Private briefing on provisions which exempt delegated legislation made  
under the Biosecurity Act 2015 from disallowance**

**17 November 2021**

**PDR Number: IQ21-000314**

**Scrutiny over delegated legislation as a result of COVID-19**

**Written**

**Senator:** Helen Polley

**Question:**

Does the department agree that as a pandemic evolves, and public trust in government action has the potential to decline, there is a need for greater parliamentary scrutiny over delegated legislation? Could you please provide examples of instruments made under the Biosecurity Act 2015 that have been recalibrated and become more targeted and narrower in their scope as the current pandemic has continued?

**Answer:**

A good example of the way instruments made under the Biosecurity Act 2015 have been recalibrated and become more targeted and narrower over time is the series of emergency instruments related to remote communities. Whilst these were initially rapidly expanded to cover remote communities across Australia states they were gradually scaled back to be replaced by other more targeted measures.

The initial instrument, the *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential)(Emergency Requirements for Remote Communities) Determination 2020* commenced on 26 March 2020 to prevent or control the entry or spread of COVID-19 in parts of Queensland, Western Australia, South Australia and the Northern Territory.

On 8 April 2020 the instrument was amended to update the 'designated areas' in the Northern Territory and amend the definition of 'essential activity' to limit the operation of the essential activities to cases of urgency or when persons were operating in a manner agreed with a human biosecurity officer to minimise the extent to which other persons are exposed. The instrument was also amended to allow a person with an urgent need to carry out an essential activity related to commercial primary production or broadcasting services to enter a designated area and to allow the Director of Human Biosecurity, a chief human biosecurity officer for a State or Territory, a human biosecurity officer, a biosecurity official or an official performing functions relating to public health or biosecurity to enter a designated area in the course of the person's duties.

On 24 April 2020 the instrument was amended to remove previously determined 'designated areas' in South Australia, to exclude certain areas in the Northern Territory and to add an additional area as a 'designated area' in Queensland. The instrument was also amended to require a person entering a designated area not to have been in a foreign country, rather than outside Australian territory, in the 14 days immediately prior to entry, to improve the operational effectiveness of the instrument.

Areas in the Northern Territory and Western Australia were further excluded from the operation of the instrument on 5 June 2020. The instrument was also amended to exclude previously determined 'designated areas' in South Australia. The definition of 'essential activity' was amended to better manage operational requirements; including in relation to elections, officials performing regulatory functions to export food or agricultural commodities, and to address oil rig workers and vessels docking in designated areas.

On 12 June 2020 all previously determined 'designated areas' in Queensland were excluded and on 19 June 2020 all previously determined 'designated areas' in South Australia were excluded.

The Minister then repealed the instrument on 10 July 2020, following advice from the Acting Director of Human Biosecurity (who was the Acting Commonwealth Chief Medical Officer) that the instrument was no longer necessary to prevent or control the entry, emergence, establishment of spread of COVID-19.

**PARLIAMENTARY INQUIRY QUESTION ON NOTICE**

**Department of Health**

**Standing Committee on Scrutiny of Bills**

**Private briefing on provisions which exempt delegated legislation made  
under the Biosecurity Act 2015 from disallowance**

**17 November 2021**

**PDR Number: IQ21-000315**

**Amendments to the Biosecurity Amendment (Enhanced Risk Management) Bill 2021**

**Written**

**Senator:** Helen Polley

**Question:**

In Scrutiny Digest 15 of 2021 the committee asked the Minister for Agriculture and Northern Australia for advice as to whether the Biosecurity Amendment (Enhanced Risk Management) Bill 2021 could be amended such that information about human biosecurity group directions, such as the total number of directions made in a year and high-level details as to the nature and contents of each direction, must be set out in the department's annual report prepared under section 46 of the Public Governance, Performance and Accountability Act 2013. The minister advised that amendments were not appropriate as new publication requirements would be inconsistent with the current approach taken in the Biosecurity Act 2015 and may impact on privacy. The committee strongly considers that such amendments should be made and requests more detailed advice as to why these amendments are not possible.

**Answer:**

Publishing the nature and the contents of each direction may give rise to privacy concerns where the persons subject to the order may be identifiable from the nature of the order.

# **PARLIAMENTARY INQUIRY QUESTION ON NOTICE**

**Department of Health**

**Standing Committee on Scrutiny of Bills**

**Private briefing on provisions which exempt delegated legislation made  
under the Biosecurity Act 2015 from disallowance**

**17 November 2021**

**PDR Number: IQ21-000316**

**Parliamentary oversight of instruments that deal with significant issues**

**Written**

**Senator:** Helen Polley

**Question:**

Is it the department's contention that any instrument which deals with significant issues, or where disallowance could lead to significant impacts should be exempt from parliamentary oversight as a matter of course? Would this not exclude a large proportion of Commonwealth legislation from parliamentary oversight?

- As a general principle, the committee considers that Parliament's oversight of Commonwealth law should be greater, not lesser, when the consequences of that law are significant. This is particularly so when the law will impact on individual rights or liberties.
- If this justification was accepted as a general proposition, then any matter which could be considered to be of an emergency nature, or any measure designed to protect against significant consequences, could be routinely exempt from parliamentary scrutiny. This could conceivably include, for example, all legislation relating to matters of national defence, customs, intelligence, and emergency services. Parliament's position as lawmaker-in-chief implies that not only is it appropriate for Parliament to deal with these significant matters, but that it is Parliament's fundamental constitutional role to do so.

**Answer:**

Whether or not an instrument should be subject to disallowance is a matter for the Parliament.

**PARLIAMENTARY INQUIRY QUESTION ON NOTICE**

**Department of Health**

**Standing Committee on Scrutiny of Bills**

**Private briefing on provisions which exempt delegated legislation made  
under the Biosecurity Act 2015 from disallowance**

**17 November 2021**

**PDR Number: IQ21-000317**

**Exemptions from disallowance in circumstances that could lead to regulatory uncertainty  
for industry**

**Written**

**Senator:** Helen Polley

**Question:**

Is it the department's contention that exemptions from disallowance should be put in place in any circumstance in which disallowance could lead to regulatory uncertainty for industry? Would this not exclude a large proportion of Commonwealth legislation from parliamentary oversight?

- If this justification was accepted as a general proposition, then any matter which regulates industry in any significant way could be routinely exempt from parliamentary scrutiny. This could conceivably include, for example, all legislation relating to matters of taxation, corporations law, imports, exports, workplace relations or customs. Parliament's position as lawmaker-in-chief implies that not only is it appropriate for Parliament to deal with these significant matters, but that it is Parliament's fundamental constitutional role to do so.
- The risks identified in relation to certainty are in many ways the risks associated with law-making within a democratic system, and are the same risks associated with primary legislation which is subject at any time to amendment or repeal by the Parliament.

**Answer:**

Whether or not an instrument should be subject to disallowance is a matter for the Parliament.

**PARLIAMENTARY INQUIRY QUESTION ON NOTICE**

**Department of Health**

**Standing Committee on Scrutiny of Bills**

**Private briefing on provisions which exempt delegated legislation made  
under the Biosecurity Act 2015 from disallowance**

**17 November 2021**

**PDR Number: IQ21-000318**

**Recognition of the extrinsic benefits of parliamentary scrutiny over an instrument**

**Written**

**Senator:** Helen Polley

**Question:**

The potential for disallowance leads to increased scrutiny and deliberation and can result in improvements to instruments through amendments or significant administrative changes. In recent years, some non-disallowable instruments made under the Biosecurity Act have had technical issues. For example, it was recently necessary to retrospectively validate the Biosecurity (Clarifying Conditionally Non-prohibited Goods) Determination after it was invalidly made.<sup>1</sup> Does the department recognise the extrinsic benefits of parliamentary scrutiny over an instrument, noting that this increased scrutiny may improve the quality of instruments made under the Biosecurity Act?

**Answer:**

The Department of Health is not aware of further examples of instruments that contain 'technical issues' but would act to correct any technical issues that arise. Whether or not an instrument should be subject to disallowance is a matter for the Parliament.



**PARLIAMENTARY INQUIRY QUESTION ON NOTICE**

**Department of Health**

**Standing Committee on Scrutiny of Bills**

**Private briefing on provisions which exempt delegated legislation made  
under the Biosecurity Act 2015 from disallowance**

**17 November 2021**

**PDR Number: IQ21-000319**

**Ensuring regulatory certainty in relation to delegated legislation in ways other than  
exempting an instrument from disallowance?**

**Written**

**Senator:** Helen Polley

**Question:**

Does the department accept that, in some contexts, regulatory certainty in relation to delegated legislation can be ensured in ways other than exempting an instrument from disallowance? For example, by providing that an instrument does not take effect until it receives positive acceptance by a House of the Parliament or providing that an instrument does not take effect until the day immediately after the last day upon which such a disallowance resolution could have been passed by a House of Parliament, or a later day specified in the instrument.

**Answer:**

Urgent action may be required to respond to emergencies, such as the COVID-19 pandemic. A delay in having an instrument come into effect until the next parliamentary sitting or the expiry of the disallowance period would significantly impair the ability of the Commonwealth to respond quickly to human health emergency events, including new and emerging public health threats, which would put the lives and health of Australians at risk.

**PARLIAMENTARY INQUIRY QUESTION ON NOTICE**

**Department of Health**

**Standing Committee on Scrutiny of Bills**

**Private briefing on provisions which exempt delegated legislation made  
under the Biosecurity Act 2015 from disallowance**

**17 November 2021**

**PDR Number: IQ21-000320**

**Threshold for exempting provisions which confer a broad discretion from disallowance**

**Written**

**Senator:** Helen Polley

**Question:**

Many of the provisions within the Biosecurity Act confer a broad discretion on the decision-maker in terms of what they may consider in making the decision, or what requirements they may set. Does the department agree that, as a general principle, the threshold for exempting provisions which confer a broad discretion from disallowance should be higher?

**Answer:**

Whether or not an instrument should be subject to disallowance is a matter for the Parliament.

**PARLIAMENTARY INQUIRY QUESTION ON NOTICE**

**Department of Health**

**Standing Committee on Scrutiny of Bills**

**Private briefing on provisions which exempt delegated legislation made  
under the Biosecurity Act 2015 from disallowance**

**17 November 2021**

**PDR Number: IQ21-000321**

**Threshold for justifying an exemption from disallowance where the relevant instrument  
has the potential to impact on individual rights and liberties?**

**Written**

**Senator:** Helen Polley

**Question:**

Many of the provisions within the Biosecurity Act have the potential to impact on individual rights and liberties, for example, by prescribing offences which carry penalties of imprisonment. What is the department's view on the general principle that the threshold for justifying an exemption from disallowance should be higher in cases where the relevant instrument has the potential to impact on individual rights and liberties?

**Answer:**

Whether or not an instrument should be subject to disallowance is a matter for the Parliament.