

June 25, 2020

Committee Secretary
Senate Scrutiny of Delegated Legislation Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
By email: sdlc.sen@aph.gov.au

**Re: SUBMISSION TO THE SENATE SCRUTINY OF DELEGATED LEGISLATION COMMITTEE INQUIRY
INTO THE EXEMPTION OF DELEGATED LEGISLATION FROM PARLIAMENTARY OVERSIGHT**

Dear Secretary,

Thank you for the opportunity to make a submission to this Committee.

We make this submission in our capacity as members of the Centre for Comparative Constitutional Studies ('CCCS') and the Laureate Program in Comparative Constitutional Law at the Melbourne Law School, University of Melbourne. We are solely responsible for its content.

This submission has been prepared on behalf of CCCS by Professor Kristen Rundle, Professor Michael Crommelin AO, Professor Cheryl Saunders AO, Professor Adrienne Stone, and Ms Selena Bateman. We acknowledge the support of the Australian Research Council through Professor Stone's Laureate Fellowship FL 160100136.

If you have any questions relating to the submission, or if we can be of any further assistance, please do not hesitate to contact us.

Yours sincerely,



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CENTRE FOR COMPARATIVE CONSTITUTIONAL STUDIES

Submission to the Senate Standing Committee for the Scrutiny of Delegated Legislation
Inquiry into the exemption of delegated legislation from parliamentary oversight

25 June 2020

Introduction

The Centre for Comparative Constitutional Studies ('CCCS') is a research centre of Melbourne Law School at the University of Melbourne. CCCS undertakes research, teaching and engagement in relation to the Australian constitutional system as well as comparative constitutional law. The Laureate Program in Comparative Constitutional Law (LPCCL) at Melbourne Law School is funded by the Australian Research Council to pursue research relating to constitutionalism in liberal democracies.

We welcome the opportunity to make this submission to the Senate Standing Committee for the Scrutiny of Delegated Legislation ('the Committee') Inquiry into exemption of delegated legislation from parliamentary oversight ('the Inquiry').

We applaud the Committee's decision to convene this Inquiry at this time. In doing so the Committee seeks to engage with bedrock constitutional concerns about the conduct of lawmaking in our system of government. We note that the Committee's decision to convene this inquiry has been influenced by the current COVID-19 public health crisis and the extensive role being played by delegated legislation in the Government's response to it. However, we equally note that the Committee has been voicing concerns, for some time, about the increasing number of legislative instruments that are designated as not subject to 'disallowance' procedures and thus effectively exempt from parliamentary oversight.¹ We accordingly offer this submission to assist the Committee to develop principles to inform the proper use of non-disallowance mechanisms in times of 'emergency' and 'normality' alike.

To address the questions and issues raised in the Committee's Terms of Reference, we have organised our submission as follows:

1. Background: exemption from disallowance in the context of the Committee's role and our constitutional system
2. The current framework for exempting delegated legislation from parliamentary scrutiny
 - (a) The legislative framework for exempting delegated legislation from disallowance

¹ We describe the character of these procedures in section 2.

- (b) The institutional framework for exempting delegated legislation from disallowance
- (c) The current grounds for exempting delegated legislation from parliamentary oversight
- (d) The significance of what counts as a 'legislative instrument'
- 3. Principles that should govern the exemption of delegated legislation from parliamentary scrutiny
- 4. Exemption of delegated legislation from parliamentary oversight in times of emergency
- 5. The constitutionality of delegated legislation
- 6. Recommendations

1. Background: exemption from disallowance in the context of the Committee's role and our constitutional system

Throughout its history the Committee and its predecessors have understood the very important role it plays within our system constitutional of government. The Committee's function of subjecting legislative instruments to scrutiny and, where appropriate, to procedures for their disallowance, is designed to ensure that exercises of power of this kind do not exceed the limits of their statutory authorisation. In doing so the Committee makes a crucial contribution to ensuring that Parliament remains the primary lawmaking institution in our constitutional order.

The Committee's operating structure has recently been subject to a suite of important reforms that reflect the recommendations of the report published in June 2019 by the Committee's predecessor, the Senate Standing Committee for Regulations and Ordinances, ('the June 2019 Report'). These reforms reflect a desire on the Committee's part to modernise its role and functions to better meet the demands of its task in conditions of contemporary government. Relevantly, those conditions include the increasing prevalence of delegated legislation and other 'legislative instruments' as the source of legal authority for a wide range of government action.² By way of illustration, in 2018-2019 there were 1,127 legislative instruments subject to disallowance. This figure was consistent with the previous 5 years, in which 1,000-2,000 disallowable instruments were made each year.³

² We return to the question of what is a 'legislative instrument' in section 2(d), below.

³ *Odgers Australian Senate Practice* Ch 15 'Delegated Legislation, Scrutiny and Disallowance' (https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Odgers_Australian_Senate_Practice/Chapter_15).

About half of the law of the Commonwealth by volume consists of delegated legislation rather than primary legislation.⁴

The June 2019 Report makes clear that the sheer scale and variety of legislative instruments theoretically amenable to the Committee's scrutiny significantly hinder its capacity to perform its function to the level required by our constitutional system. The parallel development of the increasing number of legislative instruments that are designated as *exempt* from disallowance procedures was emphasised as a matter of serious concern to the Committee. The **Committee's comments** on this issue include the following:

The committee considers that exempting instruments from disallowance raises significant scrutiny concerns. This is because such exemptions effectively remove Parliament's control of delegated legislation, leaving it to the executive to determine (albeit within the confines of the enabling legislation and the Constitution) the content of the law. The committee acknowledges there may be circumstances in which it is appropriate to exempt delegated legislation from disallowance – for example, where it is clear that the instrument relates solely to the internal affairs of government. However, the committee considers that the circumstances in which instruments are exempted from disallowance should be strictly limited, with a justification for any exemption clearly articulated in the explanatory materials.⁵

We note that the Committee's concerns in this vein were reflected in **Recommendation 15** of the June 2019 report, which was ultimately not accepted by the Government. Recommendation 15 requested that the Government:

- (a) review existing provisions exempting legislative instruments from disallowance, to determine whether such exemptions remain appropriate, and amend the *Legislation Act 2003* to ensure all such exemptions are contained in primary legislation; and
- (b) publish guidance as to the limited circumstances in which it may be appropriate to exempt instruments from disallowance.

The remainder of this submission accordingly proceeds on the basis that the constitutional context of the Committee's important role needs no further explanation, and that the Committee's concerns about the increasing number of legislative instruments designated as not subject to disallowance procedures and exempt from its scrutiny have been made clear.

⁴ *Odgers Australian Senate Practice*, Ch 15 'Delegated Legislation, Scrutiny and Disallowance' (https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Odgers_Australian_Senate_Practice/Chapter_15).

⁵ June 2019 Report at para 8.35.

2. The current framework for exempting delegated legislation from parliamentary scrutiny

Paragraph (a) of the Inquiry's Terms of Reference seeks guidance on 'the appropriateness and adequacy of the **existing framework** for exempting delegated legislation from parliamentary oversight'. We understand that 'existing framework' to be comprised of multiple elements, which we will address in turn.

(a) The legislative framework for exempting delegated legislation from disallowance

Section 42 of the *Legislation Act 2003* outlines the procedure for the disallowance of legislative instruments, which is triggered by a notice of motion to disallow an instrument being given in a House of Parliament and sets up a timeline (15 sitting days) for its resolution. The provision clearly establishes a **presumption in favour of disallowance**. For example, subsection (2) provides that an instrument is taken to have been disallowed and is repealed if the notice of motion has not been withdrawn or otherwise disposed of within the prescribed timeframe.

Section 44 of the *Legislation Act 2003* is titled 'Legislative instruments that are **not subject to disallowance**'. Most relevantly for present purposes, subsection (2)(a) provides that the disallowance procedure outlined in section 42 does not apply if '**an Act declares**, or has the effect, that section 42 does not apply in relation to the instrument or provision', or (b) 'the legislative instrument **is prescribed by regulation**' for the purposes of that paragraph.

The designation of individual legislative instruments as not subject to disallowance is therefore done in **two ways**. The first is by recording the exemption in a provision of the **primary legislation** that authorises the making of the relevant legislative instrument. An example of how this is done is contained in s 477(2) of the *Biosecurity Act 2015* (Cth), which provides that the power of the Health Minister to determine an emergency health requirement during a human biosecurity emergency is a legislative instrument, but that 'section 42 (disallowance) of the Legislation Act 2003 does not apply to the determination'. Another recent example is s 41(7) of the *Future Drought Fund Act 2019* (Cth), which provides that the direction made by the responsible Minister to the Future Drought Fund Investment Board to mandate the Board's functions is a legislative instrument, but that neither s 42 of the Legislation Act nor the sunset provisions apply to the directions.

The second way of designating a legislative instrument as not subject to disallowance is through **delegated rather than primary legislation**. This involves making amendments to the regulations that exempt particular kinds of instruments from disallowance under the **Legislation (Exemptions and Other Matters) Regulation 2015**.

The June 2019 Report records the **Committee's concerns with respect to this second practice**. The Report notes how 'a vast range of exemptions from disallowance are set out in delegated legislation (namely the Legislation (Exemptions and Other Matters) Regulation 2015)', and states that 'decisions as to whether certain classes of delegated legislation or

particular instruments should be exempted from any form of parliamentary control should be contained in primary legislation rather than delegated to the executive'.⁶ The Committee's views on this issue are also reflected in the terms of **Recommendation 15**, reproduced above. **We agree entirely with the Committee's assessment** of this matter. Our suggestions for reform of this practice are outlined in **section 3**, and our concerns about its constitutional basis are explained in **section 5**.

(b) The institutional framework for exempting delegated legislation from disallowance

In practice the disallowance procedure outlined in section 42 of the *Legislation Act 2003* is initiated by the Chair of the Committee giving notice of a motion to disallow the instrument in the Senate. This step is taken when the Committee, with the assistance of its legal advisor, identifies an instrument which may offend against the Committee's '**scrutiny principles**'. These are the principles against which a legislative instrument subject to disallowance, disapproval, or affirmative resolution of the Senate is examined by the Committee for whether:

- (a) it is in accordance with its enabling Act and otherwise complies with all legislative requirements;
- (b) it appears to be supported by a constitutional head of legislative power and is otherwise constitutionally valid;
- (c) it makes rights, liberties, obligations or interests unduly dependent on insufficiently defined administrative powers;
- (d) those likely to be affected by the instrument were adequately consulted in relation to it;
- (e) its drafting is defective or unclear;
- (f) it, and any document it incorporates, may be freely accessed and used;
- (g) the accompanying explanatory material provides sufficient information to gain a clear understanding of the instrument;
- (h) it trespasses unduly on personal rights and liberties;
- (i) it unduly excludes, limits or fails to provide for independent review of decisions affecting rights, liberties, obligations or interests;
- (j) it contains matters more appropriate for parliamentary enactment; and
- (k) it complies with any other ground relating to the technical scrutiny of delegated legislation that the committee considers appropriate.

The June 2019 Report makes the important point that while in practice the Committee 'has only sparingly moved the disallowance of an instrument', it considers that 'the potential for it to do so encourages the executive to seek to address the committee's concerns'.⁷ The point for present purposes is that designating a legislative instrument as not subject to disallowance **removes the possibility that the kinds of concerns reflected in the scrutiny**

⁶ June 2019 Report at para 8.37.

⁷ June 2019 Report at para 8.33.

principles can even be raised. The consequence for the Committee is therefore clear: it is no longer able to perform its function as a parliamentary actor, and specifically as an actor of the Senate, in ‘preserving the principle of the separation of powers by ensuring that there is appropriate control over the executive branch of government’ with respect to that instrument.⁸

It is precisely this removal of the Committee’s scrutiny function that makes the role of other parliamentary actors central, especially the Committee’s ‘sister’ committee, the **Senate Standing Committee for the Scrutiny of Bills** (‘the Scrutiny of Bills Committee’). The present Committee’s recent change of name to the Senate Standing Committee for the Scrutiny of Delegated Legislation was done to indicate the alignment between its functions and those of the Scrutiny of Bills Committee.

With respect to the immediate concerns of this Inquiry, the relationship between the two committees is especially crucial. In short, the prospect of the present Committee being able to scrutinise the treatment of legislative instruments in primary legislation *before* it is enacted is largely dependent on the Scrutiny of Bills Committee raising concerns about proposed ‘non-disallowance’ designations at the stage when Bills are being considered.⁹ The Scrutiny of Bills Committee might raise these concerns directly with the Committee with a view to reporting shared concerns.¹⁰ It is through the work of the Scrutiny of Bills Committee in reporting such concerns to the Senate that they are brought to the attention of the Senate for the purpose of informing their deliberations with respect to the Bill in question.¹¹

The June 2019 Report suggests that efforts made by the Scrutiny of Bills Committee to draw its concerns about the proposed designation of certain legislative instruments as exempt from disallowance to the Parliament’s attention **have not been met with sufficient consideration on the part of the Parliament.** Exemptions subsequently enacted have in turn not been supported by adequate **justification** for doing so. The Report describes the situation as follows:

⁸ June 2019 Report at para 8.30.

⁹ Noting that Standing Order 24(1)(b) allows the Committee to scrutinise exposure drafts of legislation before it is formally introduced.

¹⁰ *Odgers Australian Senate Practice* (14th ed, 2016), 324 (also accessible https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Odgers_Australian_Senate_Practice/Chapter_12).

¹¹ This function is discharged in accordance with ‘scrutiny principles’ devised specifically for the Scrutiny of Bills Committee. These are as follows:

- whether the bill unduly trespasses on personal rights and liberties;
- whether administrative powers are defined with sufficient precision;
- whether appropriate review of decisions is available;
- whether any delegation of legislative powers is appropriate; and
- whether the exercise of legislative powers is subject to sufficient parliamentary scrutiny.

For present purposes it is notable that these ‘scrutiny principles’ address a narrower range of concerns than those that inform the present Committee’s scrutiny functions.

The committee is also concerned that bills frequently seek to exempt instruments made under them from disallowance without giving adequate justification for doing so. In this respect, the committee notes that while the Scrutiny of Bills committee routinely raises concerns about proposed exemptions from disallowance, the exemptions are nevertheless enacted. Consequently, instruments are made that are exempt from disallowance and thereby not subject to sufficient parliamentary control or oversight.¹²

The Committee's concerns on this matter appear to us to be valid.¹³ From a review of relevant Scrutiny Digests, it appears that the ordinary practice is that the Scrutiny of Bills Committee raises various concerns about disallowance exemptions in draft legislation and requests further information from the responsible Minister. However, in many instances the Bill is passed without any amendments to the relevant provisions. A review of the Senate **Hansard** record in relation to the **two examples noted above** is also illustrative of this issue. While in both cases the Scrutiny of Bills Committee raised the issue of the exemptions with the Senate,¹⁴ **in neither case did this result in amendments**, nor any debate of this issue.

We submit that this record of **insufficient parliamentary engagement with concerns repeatedly raised** about the designation of legislative instruments as not subject to disallowance is deeply worrying. In our view it indicates a significant failure on the part of Parliament to both perform its constitutional function of calling the executive to account, and to ensure that it remains the primary lawmaking institution within our constitutional system. It arguably also lies at the root of the problem of the increasing number of legislative instruments so designated. The practice accordingly highlights the need for the issue we address next, namely, greater clarity about the bases or 'grounds' on which the exemption of delegated legislation from disallowance and thus from parliamentary scrutiny might be inappropriate.

(c) The current grounds for exempting delegated legislation from parliamentary oversight

The Terms of Reference for this Inquiry seek submissions on the grounds upon which delegated legislation is currently exempted from parliamentary oversight. Our assessment is that current processes and practices provide **little guidance** on what these 'grounds' are or should be.¹⁵

¹² June 2019 Report at para 8.36.

¹³ Some recent examples include, Senate Standing Committee for the Scrutiny of Bills, Scrutiny Digest No 1 of 2020, 25-26 and Scrutiny Digest No 3 of 2020, 37-38 in relation to the National Vocational Education and Training Regulator Amendment Bill 2019; Scrutiny Digest No 7 of 2019, 66-67 and No 6 of 2019 in relation to the Emergency Response Fund Bill, 8-10; Scrutiny Digest 7 of 2017, 37-38; Scrutiny Digest 8 of 2017, 142-147, in relation to the Regional Investment Corporation Bill 2017; Scrutiny Digest 15 of 2018, 14-16; Scrutiny Digest 1 of 2019, 42-45, in relation to the Future Drought Fund Bill 2018.

¹⁴ Senate Standing Committee for the Scrutiny of Bills, Alert Digest No 2 of 2015, 11-12; Scrutiny Digest 15 of 2018, 14-16; Scrutiny Digest 1 of 2019, 42-45.

¹⁵ See the treatment of this point at para 8.38 of the June 2019 report.

In so far that there are any established ‘grounds’ for exempting delegated legislation from parliamentary oversight, these are (at best) to be **extrapolated** from the two main methods through which exemption from disallowance presently occurs. The first is the exemption of particular classes of legislative instruments, and the exemption of specific legislative instruments, through the operation of the Legislation (Exemptions and Other Matters) Regulation 2015.¹⁶ The second is the ad hoc approach in which exemptions from disallowance are contained in the individual statutes through which the power to make relevant legislative instrument is delegated.

A climate of **opacity** has developed around the issue of exempting delegated legislation from disallowance generally. On this matter we note the Committee’s observation in its June 2019 Report that it can be very difficult to find out **which legislative instruments are designated as exempt** from disallowance procedures, and the **number of such instruments currently in force**.¹⁷ The statistics noted in section 1 to indicate the scale of recent use of delegated legislation as the basis for authorising government action – approximately half of Commonwealth lawmaking by volume – did *not* include instruments that were exempt from disallowance. It is because ‘non-disallowable’ instruments are treated differently under the existing regime and are not able to be scrutinised by the Committee that it is much harder to access data about the scale of this class of instruments, and the policy contexts in which they might typically appear. In our view this opacity is itself instructive. It suggests that an attitude has developed toward the practice and prevalence of exemption from disallowance which sees both as matters of insufficient concern to warrant transparency as to the circumstances and scale of their occurrence.

(d) The significance of what counts as a ‘legislative instrument’

A further important aspect of the issues to which this Inquiry is directed is the question of what counts as a ‘legislative instrument’ in the first place. We note that the definition of ‘legislative instrument’ for the purpose of the regulatory framework established through the *Legislation Act 2003* has been amended on multiple occasions since this comprehensive regime for dealing with legislative instruments was enacted. In its current form, the definition of ‘**legislative instrument**’ includes:¹⁸

- (a) Instruments made under a primary law that gives a power to do something by legislative instrument;
- (b) Instruments made under a power delegated by the Parliament and registered on the Federal Register of Legislation;
- (c) Instruments that determine or alter the content of the law, rather than determining how the existing law applies to particular cases; and

¹⁶ Legislation (Exemption and other Matters) Regulation 2015 (Cth), reg 9.

¹⁷ June 2019 Report at para 8.13.

¹⁸ *Legislation Act 2003* (Cth), s 8(1).

(d) Instruments declared to be legislative instruments under certain provisions of the Legislation Act (and/or in the primary legislation)

The current definition was inserted in an attempt to clarify apparent ambiguities and circulatory in the previous statutory definition.¹⁹ That earlier definition hinged on whether an instrument was ‘of a legislative character’, and therefore raised difficult questions in some cases between drawing the line between ‘legislative’ and ‘administrative’ action. Still, even if defining what is a ‘legislative instrument’ or an act of a ‘legislative character’ can at times be complex, the point is that any such definition should not obscure what ought to be the **essential element of a legislative instrument**: namely, that it involves an exercise of *legislative* power that has been *delegated* by the Parliament to the executive.

The distinction between exercises of ‘legislative’ as opposed to ‘administrative’ power is of constitutional importance because it carries **different implications for the responsibilities of Parliament**. It is generally accepted as a matter of principle that when legislative power has been delegated by the Parliament to the executive, any such power should remain capable of scrutiny and control by the Parliament. This is because, being legislative in character, **the power belongs to the Parliament**. The fact of its delegation to the executive does not change the ultimate authority and responsibility of the Parliament for exercises of its legislative power.

We are therefore concerned that the amendments that have been made to the definition of a ‘legislative instrument’ have arguably operated **to obscure the ultimate inquiry** which, on existing constitutional principles, should be to work out whether the executive is exercising administrative or legislative power delegated to it by the Parliament. **If it is legislative power**, then **Parliament should retain oversight** of that exercise of power. Relevantly to the present Inquiry, our constitutional order has long recognised that the primary way that Parliaments retain and exercise that capacity for oversight is through the disallowance mechanism. We accordingly submit that the expansive definition currently given to what counts as a ‘legislative instrument’ is an important aspect of and indeed contributes to larger concerns about the increasing number of such instruments designated as exempt from disallowance procedures.

We turn now to outline the principles that we think should guide the question of when it might be inappropriate to designate a legislative instrument as ‘non-disallowable’ and thus exempt from parliamentary scrutiny.

¹⁹ See the 2008 Review of the Legislative Instruments Act (2009), 3[5]; Explanatory Memorandum, 2015 Instruments Amendment Act, 26.

3. Principles that should govern exemption of delegated legislation from parliamentary scrutiny

Paragraph (b) of the Inquiry's Terms of Reference asks whether the existing framework for exempting delegated legislation from parliamentary oversight **should be amended**, and if so, how. As already noted, the Terms of Reference also seek guidance on the 'grounds' upon which it might be appropriate to exempt delegated legislation from parliamentary oversight.

We submit that changes to current processes governing the exemption of delegated legislation from parliamentary oversight are **essential**, and that a **set of principles must be developed** to address the circumstances in which such exemption might be considered appropriate or inappropriate.

Our **first submission** is that the development of these principles must be informed by the commitment of our constitutional system to the supremacy of Parliament as the primary lawmaking institution and the limits on delegation of legislative power that this necessarily entails. We accordingly submit that the first step in reforming current practice should be to ensure that the **principle of disallowance**, mandated by both the constitutional convention of 'responsible government' and section 42 of the *Legislation Act 2003*, is **(re)asserted and sustained** at every level. No legislative instrument should be exempt from disallowance without justification, for the reason that disallowance is a key mechanism of parliamentary control.

Our **second submission** is that **exceptions** to this general principle should be determined by a **combination of two mechanisms**. The first mechanism would be to create **limited classes of legislated exceptions** to the general principle. This mechanism could operate in a similar manner to how classes of exempted instruments are currently listed in the Legislation (Exemptions and Other Matters) Regulation 2015. But the **crucial difference** would be that these classes of exempted instrument will have been determined by Parliament in primary legislation.²⁰ This change to current practice would operate to reassert the authority of Parliament as the primary lawmaking institution in our constitutional system.

The second mechanism for determining exceptions to the principle of disallowance, and which should be applicable to exemptions designated in the individual statutes through which the power to make the relevant legislative instrument has been delegated, is to **assess the proposed exemption against principles similar in substance to the 'scrutiny principles'** which currently inform the Committee's oversight functions. Our reason for

²⁰ An example of a class of legislative instrument that is currently expressly exempt from disallowance procedures by operation of section 44(1)(a) of the Legislation Act is those which concern an intergovernmental body or scheme involving the Commonwealth and one or more States or Territories. We note however that the relevant legislation and extrinsic materials relating to this example are opaque as to the rationale behind this exempted class. This absence of adequate explanation or justification for exemption is precisely why we are urging that Parliament take direct responsibility for determining which legislative instruments should be exempt from disallowance, and why.

suggesting that the scrutiny principles could be **‘repurposed’** for this task is because these principles fundamentally speak to the centrality of Parliament as the primary lawmaking institution in our constitutional system, and to **matters that ought properly to concern a parliament** within such a liberal democratic constitutional order.

Here we particularly emphasise those principles that **explicitly highlight the constitutional context of the Committee’s scrutiny role**. For example, scrutiny principles (c) (h) and (i) enable the Committee to call the Parliament’s attention to legislative instruments which, in the Committee’s view

- have left effects on peoples’ rights, liberties, obligations or interests insufficiently defined, or
- unduly trespass on personal rights and interests, or
- exclude, limit or fail to provide adequate avenues for independent review of decisions made in accordance with the instrument.

The message of these kinds of scrutiny principles is accordingly that such matters ought to be of concern to Parliament within a liberal democratic constitutional system committed to the rule of law. They are thus in need of parliamentary oversight through the Committee’s functions as a parliamentary actor. The same is evident in scrutiny principle (j), which enables the Committee to declare that a particular legislative instrument contains matters ‘more appropriate for parliamentary enactment’.

The Committee’s current scrutiny principles therefore provide an instructive indication of the limits that should apply to the making and content of delegated legislation in our constitutional system. They are accordingly **also instructive for the question of when exceptions to the general principle of disallowance would not be acceptable**. If a legislative instrument bears upon the kinds of matters indicated in the scrutiny principles, it should be in-principle subject to disallowance procedures. Any departure from that principle would need to be **carefully justified** by the Government, which when doing so should be obligated to explain how and why the instrument in question **does not raise these concerns** such as to make it an appropriate candidate for exemption from parliamentary scrutiny.

Consistent with our view that any ‘classes’ of exempt instruments should be determined by primary legislation, it is in our view equally essential that the criteria relevant to consideration of proposed exceptions to the foundational principle of disallowance should be settled through a **legislated framework**. The **executive should not be permitted to determine** the kinds of circumstances that might ground exceptions to the general principle of disallowance.

To effect this change in practice we suggest that the **Legislation Act 2003 could be amended** to state the operative principles either as part of the current provision governing exemption from disallowance (section 44), or in a new section. We note that **there is currently no guidance in that Act** as to why certain kinds of instruments are eligible for

exemption from disallowance. This seems to be in direct tension with the primary object of the *Legislation Act* to provide a comprehensive regime from the management of Acts and instruments, including by establishing ‘improved mechanisms for Parliamentary scrutiny of legislative instruments’.²¹

In addition, or as an alternative to legislative amendment, we recommend that these principles should be recorded in a **publicly available guidance** on circumstances which might justify exempting instruments from the principle of disallowance. We envisage that this guidance would provide the reference point for what must be addressed in any **mandatory statement of justification** for the proposed exemption designation at the **Bill stage**. We equally envisage that the guidance would **inform the task of the Scrutiny of Bills Committee** when seeking to draw the attention of Parliament to its concerns about a proposal to exempt delegated legislation from parliamentary scrutiny. We further envisage that the guidance would provide the reference point the mandatory statement of justification should form part of the **explanatory materials** accompanying any **legislation** in which an exemption from disallowance is ultimately enacted.

4. Exemption of delegated legislation from parliamentary oversight in times of emergency

Paragraph (a)(iv) of the Terms of Reference seeks guidance on the principles that might inform the appropriateness of exempting legislative instruments from parliamentary scrutiny in **times of emergency**. In raising this question the Committee is reacting specifically to the Government’s response to the current COVID-19 public health crisis. The great majority of legal instruments authorising relevant government action over the course of this response so far have been sourced in delegated rather than primary legislation. A large proportion of those delegated instruments have in turn been **exempted from disallowance** procedures. According to the *Scrutiny News* publication of 18 June 2020, as at 16 June 2020 the relevant proportion was **19.1% of the total number of legislative instruments** brought into force to that date.²²

We commend the Committee’s own-motion decision to **continue its general scrutiny functions** during this ‘emergency’ period and the absence of standard timetabled parliamentary sittings that has accompanied it. We equally commend the Committee’s action in publishing a regularly **updated list** of the legislative instruments that have been brought into force in association with the Government’s COVID-19 response, and which includes information about the status of the Committee’s scrutiny functions with respect to those instruments. Obviously, these functions have been and presently can only be

²¹ *Legislation Act 2003* (Cth), s 3(e).

²² See https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills/Scrutiny_News for access to the 18 June 2020 newsletter.

performed in relation to instruments that have not been designated as exempt from disallowance procedures. We make two observations in association with these points.

On the **absence of standard timetabled parliamentary sittings**, our **submission to the Senate Select Committee Inquiry into COVID-19** dated 28 May 2020 made clear that we consider this to be an entirely unacceptable feature of the Government's response to the current public health crisis.²³ In our view this response to COVID-19 has demonstrated that a **more structured approach to Parliament in times of crisis** is needed. Parliamentary sittings are presently ad hoc and their timetable set by the Government. This situation is clearly unsatisfactory. We therefore restate these objections in the present context, and specifically with a view to emphasising the **impact on the Committee** as a key parliamentary actor whose role and functions depend upon the wider environment of a properly functioning Parliament.

On the matter of the **large proportion of legislative instruments designated as exempt from parliamentary oversight** during the COVID-19 response, we offer the following observations. As stated in our submission to the Senate Select Committee on COVID-19, we accept that a system of constitutional government can accommodate 'emergency' measures in specific circumstances.²⁴ We also accept that delegated legislation may and frequently does play a prevalent role in such circumstances due to the speed and flexibility of this mode of lawmaking. However, it is equally our view that both the scale of delegated legislation in the Government's response to COVID-19, and the prevalence of 'non-disallowable' instruments among that body of delegated legislation, has been aided by the **ad hoc nature of current parliamentary activities**.

It is accordingly our view 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**. This view informs our further submission that the Committee **ought not to seek a separate set of principles** or 'grounds' upon which to determine the appropriateness of exempting delegated legislation from parliamentary scrutiny **during times of emergency**. It is our view that the principles that ought to apply in determining which legislative instruments should be exempt from parliamentary scrutiny hold in 'normal' and 'emergency' conditions alike. Our reason for taking this stance is because emergency measures have the greatest tendency to operate in a coercive manner, in particular by introducing serious curtailments on liberty. These consequences run against

²³ Michael Crommelin, Kristen Rundle, Cheryl Saunders and Adrienne Stone on behalf of the Centre for Comparative Constitutional Studies, 'Submission to the Senate Select Committee Inquiry on COVID-19', 28 May 2020. As at the date of the present submission, this earlier submission is still awaiting publication on the Senate COVID-19 Inquiry website. Should this Committee wish to view the submission before its publication on the Senate COVID-19 Inquiry website, please so advise and we will arrange for it to be sent directly to the Committee's Secretariat.

²⁴ See especially pp 1-4.

the foundational commitments of our constitutional order as a liberal parliamentary democracy. They accordingly demand more rather than less parliamentary oversight.

5. The constitutionality of delegated legislation

We note that as a result of the June 2019 report, the Committee's scrutiny principles now expressly include an assessment of each instrument to determine whether it appears to be supported by a constitutional head of legislative power and is otherwise constitutionally valid.²⁵ We support these changes to the Committee's remit, noting especially their relevance to the practice of the Commonwealth government following the *Williams* decisions to place a large amount of public expenditure in delegated legislation which is otherwise subject to very little parliamentary scrutiny. We therefore consider that the Committee plays a vital role in scrutinising the constitutionality of these instruments.

There are however other constitutional questions relevant to the Committee's role, and specifically in relation to the concerns of the present Inquiry. In our view there is a plausible argument that the current practice of exempting legislative instruments from disallowance **through delegated rather than primary legislation** could be **unconstitutional**. The basis for this argument is that by exempting legislative instruments from disallowance through delegated rather than primary legislation, Parliament is no longer 'making' legislation, by delegation or otherwise. Rather, Parliament has effectively **abdicated** rather than **exercised** its legislative power.²⁶

6. Recommendations

In accordance with the above submissions, we make the following recommendations:

1. The principle of disallowance mandated by both the constitutional convention of 'responsible government' and section 42 of the *Legislation Act 2003* should be reasserted and sustained at every level of parliamentary activity relevant to the making of legislative instruments.
2. Any exceptions to this general principle should be determined by reference to either:
 - (a) A legislated list of limited classes of exemptions from disallowance (eg through amendment to the *Legislation Act 2003*); and/or
 - (b) Assessing proposed individual exemptions against legislated principles similar in substance to the Committee's 'scrutiny principles' (eg through amendment to the *Legislation Act 2003*).

²⁵ Senate Standing Order 23 (3)(b).

²⁶ This issue has received little judicial attention to date. We note however that the submission made to this Inquiry by our colleagues at UNSW suggests that authority for an argument in similar terms to those just stated could be supported by *Dignan's* case (1931) 46 CLR 73. In any event, we submit that an argument along the lines just stated could be made on first principles.

3. All departures from the principle of disallowance should be carefully justified by the Government.
4. A publicly available guidance should explain the circumstances which might justify exempting instruments from the principle of disallowance, and should be used to inform:
 - a. the mandatory statement of justification for the proposed exemption designation that should accompany the presentation of the relevant Bill to the Parliament;
 - b. the task of the Scrutiny of Bills Committee when seeking to draw the attention of Parliament to a proposal to exempt delegated legislation from disallowance; and
 - c. the mandatory statement of justification that should form part of the explanatory materials accompanying legislation in which an exemption from disallowance has been enacted.
5. The principles upon which to determine the appropriateness of exempting delegated legislation from parliamentary scrutiny should be the same in circumstances of emergency as at any other time.