



25 June 2020

Committee Secretary
Senate Standing Committee for the Scrutiny of Delegated Legislation
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Senate Standing Committee for the Scrutiny of Delegated Legislation:

Re: Inquiry into Exemption of Delegated Legislation from Parliamentary Oversight

I would like to thank you for the opportunity to make a submission in connection with your inquiry into the exemption of delegated legislation from parliamentary oversight.

By way of introduction, I am an Associate Professor at Adelaide Law School, University of Adelaide and a member of its Public Law and Policy Research Unit.

For the past two years, I have been the Chief Investigator of a comparative study on the parliamentary scrutiny of delegated legislation. The project examines parliamentary controls on delegated legislation in Australia, Canada, New Zealand and the United Kingdom. Funding is provided by the Social Sciences and Humanities Research Council of Canada. The goal of the project is to map the formal and informal ways in which national parliaments scrutinise delegated legislation through their committee systems, and to offer suggestions for reform with a view to strengthening the scrutiny process. The project has involved field work at each of the four parliaments, which included interviews of parliamentarians and officials.

I am presently writing up the results of the project for publication, but am happy to provide a brief written submission that includes some observations from the project. I hope that your Committee will find these comments useful.

This submission incorporates and builds upon submissions that I have previously made both individually and as part of the Public Law and Policy Research Unit to other parliamentary inquiries.¹

I. Introduction

Delegated legislation is the principal form of lawmaking in the modern Australian legal system. The quantity of delegated legislation greatly exceeds that of primary legislation. Delegated legislation is used to make new law in every field of law. While some of these laws relate to relatively minor matters, others are used to implement substantial policy choices.

Delegated legislation refers to laws that are made by the executive government directly, outside of Parliament. The government is able to make delegated legislation only because it is authorised to do so by Parliament. The mechanism by which this occurs is a grant of authority in primary legislation enacted by Parliament, also known as enabling legislation.

Enabling legislation might confer lawmaking powers on a minister, the cabinet or an executive agency. It is up to Parliament to decide who can exercise the power. Importantly, the enabling legislation can also set terms, conditions and impose any other criteria that is thought appropriate to limit the use of the power. Enabling legislation can always be repealed or changed by Parliament.

Some delegated powers are narrowly crafted, being tailored to special circumstances. In those cases, the powers might only be available to be used by the executive government if the specified circumstances materialise, such as in the event of a public health emergency. Other powers are defined quite broadly and can be used by the government for a range of purposes at any time.

There are hundreds of enabling statutes. Most contain multiple grants of authority. It is a question of interpreting the statutory provision at issue to work out how much power is delegated in each case and what conditions or limits will apply. This question is important as

¹ These include submissions to inquiries by the Commonwealth Senate's Select Committee on COVID-19, the South Australia Legislative Council's COVID-19 Response Committee and the New South Wales Legislative Council's Regulation Committee.

the executive government can only legally make delegated legislation in strict compliance with the enabling legislation. A judge may declare delegated legislation to be invalid and of no legal effect if it is not consistent with its enabling legislation, although this remedy for the executive government exceeding its powers relies upon litigation being initiated by an aggrieved party.

Several reasons explain the proliferation of delegated legislation. Delegation allows Parliament to focus its limited resources on pressing or more substantial matters. In this way, delegated legislation can complement Parliament's role as lawmaker in chief. Delegation also provides enhanced flexibility and can usually be made more quickly than primary legislation, which must be enacted through the ordinary (and often lengthy) parliamentary process.

Nevertheless, it is within the ordinary parliamentary process where we find the principles of accountability and transparency that help make good legislation. These principles also protect the legitimacy of Parliament to make laws in a democratic society. While it may be slow-going, the process of three readings of draft legislation in two chambers, open debate, committee study and a public vote ensures that parliamentarians must squarely face their choices in making new law.

In the case of the executive government making delegated legislation, however, there is much less accountability and transparency. Delegated legislation may be made behind closed doors without adequate warning, and without an opportunity for robust debate or discussion. This attenuated lawmaking process is problematic in a democratic society that values the rule of law.

II. Accountability

In order to provide a measure of accountability and transparency for delegated legislation made by the executive government, Parliament enacted the *Legislation Act 2003*.² The Act sets out a systematic process for the registration and publication of delegated legislation.³ It also encourages the executive government to consult with those who are likely to be affected by

² *Legislation Act 2003* (Cth).

³ *Legislation Act 2003* (Cth), ch 2.

delegated legislation before it is made.⁴ Other accountability measures include the sunseting of most delegated legislation every 10 years.⁵

The most powerful measure in the *Legislation Act 2003* is the disallowance procedure. The procedure provides a simplified way for Parliament to repeal (disallow) delegated legislation that has already been made, without having to enact new legislation. The procedure requires delegated legislation to be laid before each House of Parliament after it is registered.⁶ It then allows either House to disallow that delegated legislation by a simple majority vote within a fixed period of time.⁷

As mentioned, one of the main reasons for why Parliament delegates powers to the executive government is that it does not have the time or resources to make every new law. By the same rationale, parliamentarians are unlikely to find the time or resources to scrutinise all new delegated legislation – especially given the tremendous volume of new delegated legislation that is made each year.

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the “**Committee**”) helps to solve this problem. The Committee plays a critical role in closely scrutinising delegated legislation and reporting to Parliament on its findings.⁸ Its reports are relied upon by parliamentarians in reviewing delegated legislation. By informing parliamentarians about problems and concerns with delegated legislation, the reports of the Committee are essential to the effecting working of the disallowance procedure.

Actual disallowance of delegated legislation is rare. The Committee’s scrutiny work often reveals problems that can be quickly remedied by the executive government. The government can be incentivised to correct defects in delegated legislation to avoid the formal disallowance

⁴ *Legislation Act 2003* (Cth), s 17.

⁵ *Legislation Act 2003* (Cth), pt 4.

⁶ *Legislation Act 2003* (Cth), s 38.

⁷ *Legislation Act 2003* (Cth), s 42.

⁸ The Committee’s scrutiny focuses on technical grounds that are set out in s 23(3) of the Senate’s Standing Orders.

process and the embarrassment of having its delegated legislation disallowed. It may also wish to correct problems brought to its attention to improve the quality of delegated legislation.

Above and beyond the provisions in the *Legislation Act 2003*, Parliament holds the executive government to account as part of the constitutional principle of responsible government.⁹ In order for it to hold the government to account, Parliament must be supplied with information on government activities. This information comes from a variety of sources including minister's responses to questions, written information provided to parliamentarians by the government, formal inquiries and other committee reports.

In the context of delegated legislation – the most significant source of the executive government's legal powers – Parliament relies on the Committee's reports for information about how these powers are exercised. It should be remembered that it is Parliament itself that conferred these powers on the executive government through enabling legislation. In other words, Parliament is the original and constitutionally-vested source of legislative power that is exercised by the executive government. It is against this backdrop of Parliament being in charge, and ultimately responsible for the exercise of legislative power, that the Committee's scrutiny work and reports help Parliament fulfil its obligations under the constitutional principle of responsible government by holding the government to account.

III. Exemption

The *Legislation Act 2003* allows for delegated legislation to be exempted from the disallowance procedure in certain circumstances.¹⁰ When delegated legislation is exempt from disallowance, the Committee is also precluded from carrying out its scrutiny work in relation to that delegated legislation.¹¹

⁹ Referred to as the 'central' constitutional principle in *Williams v Commonwealth of Australia* [2012] HCA 23, [61] (per French CJ).

¹⁰ *Legislation Act 2003* (Cth), s 44.

¹¹ Section 23(2) of the Senate's Standing Orders provides that only delegated legislation subject to disallowance is referred to the Committee.

IV. Terms of Reference

a. the appropriateness and adequacy of the existing framework for exempting delegated legislation from parliamentary oversight, including:

i. the amount and nature of delegated legislation currently exempt from parliamentary oversight;

It has been reported by the Committee that approximately 20 percent of all delegated legislation was exempted from disallowance (and therefore Committee scrutiny as well) in 2019. This is a surprisingly high number, especially as it pre-dates the COVID-19 pandemic in which greater volumes of exempted delegated legislation can be expected to be made. Given the principles of accountability, transparency and responsible government at stake in relation to delegated legislation (as discussed above), exemption from disallowance and Committee scrutiny should be truly exceptional – reserved only for circumstances where a compelling justification can be put forward for its use. The exemption of 20 percent of all delegated legislation from disallowance and Committee scrutiny, coupled with the growing trend to use exemptions, strongly suggests that exemptions are not being used in the public interest. Instead, it suggests that the executive government is successfully using exemptions for ulterior and politically beneficial purposes, namely when it wishes to avoid parliamentary accountability for its decisions and policy choices. It is hard to square the troubling lack of accountability and transparency for 20 percent of the most significant source of Australian law with the values of a free and democratic society based on the rule of law.

ii. the grounds upon which delegated legislation is currently made exempt from parliamentary oversight;

iii. the manner in which delegated legislation is currently made exempt from parliamentary oversight; and

Section 44 of the *Legislation Act 2003* allows for delegated legislation to be exempt from disallowance (and therefore Committee scrutiny as well) if specified by the enabling legislation (s 44(2)(a)) or when specified by a regulation that is made by the executive government (s 44(2)(b)). No justification for the use of an exemption is required by the statute. The current state of affairs is therefore entirely inadequate and unsatisfactory as no rationale is required to be put forward by the executive government for exempting delegated legislation from parliamentary oversight. Because the statute does not require justification or impose any criteria, there is no objective way to determine the appropriateness of a particular exemption. Further, allowing for exemptions to be made by regulation (s 44(2)(b)) removes the safety valve of parliamentary approval for exemptions by placing the decision to exempt delegated legislation in the hands of the government itself. Conceivably, a regulation providing an exemption could itself be specified to be exempt from disallowance – surely an outcome that was not intended by Parliament as it would completely avoid the main form of parliamentary oversight provided by the *Legislation Act 2003*.

- iv. the appropriateness of exempting delegated legislation made in times of emergency, including in response to the COVID-19 pandemic, from parliamentary oversight.*

During a human biosecurity emergency, the *Biosecurity Act 2015* confers exceptionally broad legal powers on the health minister, authorising measures that are seen by the minister as “necessary” to prevent or control the spread of infection.¹² In particular, the minister may impose “any requirement” and “give any direction, to any person”.¹³ Measures that are adopted by the minister enjoy a quasi-constitutional status. The Act deems them to take priority over “any provision of any other

¹² *Biosecurity Act 2015* (Cth), ss 477(1), 478(1).

¹³ *Biosecurity Act 2015* (Cth), ss 477(1), 478(1).

Australian law”, an exceptional legal status that is not conferred on delegated legislation by any other federal statute.¹⁴ Serious criminal penalties are imposed on persons who fail to comply with measures that are taken under the Act, including substantial fines and up to 5 years’ imprisonment.¹⁵ The Act exempts measures taken by the health minister from disallowance (and therefore committee scrutiny as well).¹⁶

While broad delegated powers are needed in the context of the COVID-19 pandemic to allow the government to take quick action in response to rapidly evolving circumstances, the lack of parliamentary oversight is troubling. To be clear, the disallowance procedure under the *Legislation Act 2003* does not prevent delegated laws from being made. It provides for the availability of their repeal *after* they are made through a simplified process. In other words, parliamentary confirmation is not required before new delegated legislation can have legal effect. Disallowance and Committee scrutiny is therefore compatible with the context of making emergency delegated legislation during a pandemic as it provides an *ex post facto* review, at which point delegated legislation can be improved and strengthened. Parliamentary scrutiny of laws made by the executive government hastily and on the basis of incomplete information, which is much more likely during an emergency, is especially needed to provide accountability and fulfil the constitutional principle of responsible government.

It is worth noting that the Senate established a select committee to carry out an inquiry into the government’s response to the COVID-19 pandemic. That committee has until 30 June 2022 to submit its final report. While that inquiry is an important accountability measure, it will

¹⁴ *Biosecurity Act 2015* (Cth), ss 477(5), 478(4).

¹⁵ *Biosecurity Act 2015* (Cth), ss 479(3)-(4).

¹⁶ *Biosecurity Act 2015* (Cth), s 477(2).

not be able to cure past deficiencies for delegated legislation that was made more than 2 years before the time its final report is delivered. This Committee's scrutiny is needed to provide a measure of accountability for COVID-19-related delegated legislation in real time, as that legislation is made. This should include pandemic-related delegated legislation that has been exempted from disallowance to create an ongoing record of the government's actions and choices in exercising its exceptional delegated powers during the pandemic.

- b. *whether the existing framework for exempting delegated legislation from parliamentary oversight should be amended, and, if so, how, including:*
 - i. *the grounds upon which it is appropriate to exempt delegated legislation from parliamentary oversight; and*

The existing framework for exempting delegated legislation should be amended in relation to the grounds for exemption. First, these grounds should be clearly established in the *Legislation Act 2003* as a condition for the availability of any exemption made by the executive government (s 44(2)(b)). This would allow for a meaningful review of exemptions on the basis of objective criteria. Second, the loophole that allows the executive government to totally avoid parliamentary scrutiny under the *Legislation Act 2003* should be closed. A regulation providing an exemption should itself always be subject to scrutiny on the basis of whether the exemption is appropriate. Third, grounds should be clearly stated in the *Legislation Act 2003* in relation to the provision providing for Parliament to exempt delegated legislation from disallowance (s 44(2)(a)). This would help guide future legislation and promote consistency for new legislation in which an exemption is proposed. Fourth, the grounds for an exemption should be developed with a view to limiting the availability of an exemption to truly exceptional circumstances. In cases where an exemption is initiated by the executive government itself (s 44(2)(b), the

Legislation Act should require a compelling justification to be put forward that meets the statutory grounds.

- ii. *the options available to ensure appropriate and adequate parliamentary oversight of delegated legislation in times of emergency.*

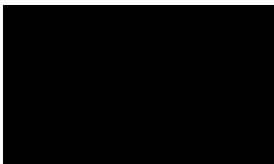
To ensure the appropriate and adequate parliamentary oversight of delegated legislation in times of emergency, the disallowance procedure should be made available for such delegated legislation.

If it is not practicable to make disallowance available, the Senate should amend standing order 23 to allow the Committee to continue its scrutiny work for all delegated legislation, including delegated legislation that is not subject to disallowance. As noted above, Committee scrutiny can play an important role in providing accountability, even if disallowance is not available, through its reports. These reports will list and scrutinise delegated legislation made in response to the emergency, providing enhanced transparency and an important historical record of executive government actions taken under exceptionally broad delegated powers.

Thank you again for the opportunity to contribute to this inquiry.

I would be happy to clarify or expand upon any aspect of my written submission.

Yours sincerely,



Lorne Neudorf, BSc, JD, LLM, PhD

Associate Professor