



public interest
ADVOCACY CENTRE

Submission to the Senate Scrutiny of Delegated Legislation Committee

Inquiry into the exemption of delegated legislation from parliamentary oversight

25 June 2020

About the Public Interest Advocacy Centre

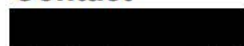
The Public Interest Advocacy Centre (PIAC) is an independent, non-profit legal centre based in Sydney.

Established in 1982, PIAC tackles barriers to justice and fairness experienced by people who are vulnerable or facing disadvantage. We ensure basic rights are enjoyed across the community through legal assistance and strategic litigation, public policy development, communication and training.

Our work addresses issues such as:

- Reducing homelessness, through the Homeless Persons' Legal Service
- Access for people with disability to basic services like public transport, financial services, media and digital technologies
- Justice for Aboriginal and Torres Strait Islander people
- Access to affordable energy and water (the Energy and Water Consumers Advocacy Program)
- Fair use of police powers
- Rights of people in detention, including equal access to health care for asylum seekers (the Asylum Seeker Health Rights Project)
- Transitional justice
- Government accountability.

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The Public Interest Advocacy Centre office is located on the land of the Gadigal of the Eora Nation.

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1. Expression of Principles

One of the fundamental principles of parliamentary democracy is that legislative power belongs to the Parliament, which represents the people. Parliament, however, can at times delegate its legislative power to the executive. Delegated legislation, in theory, deals with technical and administrative matters that Parliament does not have the time or expertise to deal with. It is not appropriate for it to deal with substantive policy issues.

The Senate Standing Committee for the Scrutiny of Delegated Legislation (The Committee) has previously expressed concerns about the overall use of delegated legislation, noting that government was increasingly using regulations to make laws, and that significant policy matters were being dealt with by delegated legislation.¹

PIAC shares these concerns. The increasing exemption of delegated legislation from parliamentary oversight exacerbates these issues. We express the following principles to assess the use of delegated legislation, and particularly exemption from parliamentary oversight.

Delegated legislation should not be used too often

As a principle, the use of delegated legislation should be limited as far as possible to administrative or technical matters, or matters that require an urgent response. The rapid and consistent increase in the amount of delegated legislation, linked to the proportion of instruments that are exempt from parliamentary oversight, shows it is used too often. Use of delegated legislation, in particular exempt from parliamentary oversight, should be limited and occur less frequently going forward.

Substantive issues should be considered by Parliament

Law should be made by the elected representatives of the people in Parliament. Substantive issues should be addressed through primary legislation. Significant policy matters, in particular the ones affecting the rights and liberties of individuals, should be properly considered by Parliament. When delegated legislation is used, parliamentary oversight in the form of disallowance, should be retained.

Use of delegated legislation should be adequately justified

Use of delegated legislation should be adequately justified, particularly when it is exempt from parliamentary oversight. Grounds may include the technical or administrative nature of the matter, the degree of urgency with which the matter must be dealt with, or its rapidly changing nature, requiring legislation to evolve regularly and rapidly. Justification for excluding delegated legislation from oversight should be clearly expressed in primary legislation.

¹ Commonwealth of Australia (2019) Parliamentary scrutiny of delegated legislation, Standing Committee on Regulations and Ordinances, Chair and Deputy's Chair foreword, page x, and 1.13.

Clear and transparent processes

Processes for making delegated legislation, particularly when exempted from parliamentary oversight, should be clear, transparent and adequate. Delegated legislation should only be enacted after an appropriate length of time allowing parliament to review. Instruments exempted from disallowance should be readily identifiable and searchable, including to the public.

2. Appropriateness and adequacy of the existing framework for exempting delegated legislation from parliamentary oversight

2.1 Amount and nature of delegated legislation currently exempt from parliamentary oversight

The amount of delegated legislation alone is cause for concern. It has been increasing greatly and now represents about half of all Commonwealth legislation in number. In the 1980s, about 850 instruments were made annually. This is now closer to 1700 instruments a year.² The Committee has consistently sought to highlight this, with delegated legislation representing 25% of its concerns over the last 5 years.³

PIAC is particularly concerned by the use of skeleton/framework bills, which are then ‘filled’ by delegated legislation. This is essentially asking Parliament to sign a blank cheque for the executive to use, and was previously identified as a concern by both the Committee and the Committee for the Scrutiny of Bills.⁴

The increase in the amount of delegated legislation exempted from disallowance and therefore parliamentary oversight is cause for further concern. In 2019, 20% of the delegated legislation was exempt from the disallowance process. This is likely to increase in 2020.⁵

This long-standing trend has been exacerbated during the Covid-19 public health crisis. As of Tuesday 16 June, 186 legislative instruments have been made in response to Covid-19 according to the tracker created by the Committee.⁶ At least 32 were exempt from disallowance entirely.⁷

² Commonwealth of Australia (2019) Parliamentary scrutiny of delegated legislation, Standing Committee on Regulations and Ordinances, 1.15.

³ Commonwealth of Australia (2019) Parliamentary scrutiny of delegated legislation, Standing Committee on Regulations and Ordinances, 5.14.

⁴ Commonwealth of Australia (2019) Parliamentary scrutiny of delegated legislation, Standing Committee on Regulations and Ordinances, 5.7, 5.20.

⁵ Australian Senate (2020) Media Release: Senate committee launches inquiry into the exemption of delegated legislation from parliamentary oversight. Available [here](#).

⁶ According to Committee website tracker [here](#).

⁷ Karen Middleton, Saturday Paper (2020) Parliament bypassed for Covid-19 legislation. Accessible [here](#).

The nature of the delegated legislation exempted from disallowance is also a cause of concern, with significant policy matters being dealt with by delegated legislation exempted from oversight. Middleton reports that:⁸

Covid-19 measures exempted from disallowance include increases to the government's borrowing capacity, changes to visa arrangements, restricted access to remote communities, laws covering the COVIDSafe tracing app, restrictions on exporting medical supplies and on accessing the antimalarial drug hydroxychloroquine, and the deferral of low- and mid-ranking public service pay rises.

Both the amount and the nature of delegated legislation exempt from parliamentary oversight show there are issues with the current framework. It would enhance Australian democracy to reform the framework, reducing the use of delegated legislation, its exemption from scrutiny and its use to deal with significant policy matters.

2.2 Grounds upon which delegated legislation is currently made exempt from parliamentary oversight

As previously noted by the Committee, 'numerous individual Acts exempt delegated legislation made under them from disallowance.'⁹ However, grounds on which delegated legislation is exempt from parliamentary oversight are currently unclear and not formalized. Indeed, there is no requirement for a bill (in the *Legislation Act 2003* (Cth) or elsewhere) that exempts its delegated legislation from disallowance to provide an explanation. With the exception of short advice to do so by the Office of Parliamentary Counsel,¹⁰ there seems to be no official guidance as to when exempting delegated legislation from disallowance is appropriate and justified. Part 4 of the *Legislation (Exemptions and Other Matters) Regulation 2015* 'prescribes classes of instruments, as well as specific instruments, which are not subject to disallowance.' This list has no clear explanation as to why these instruments are included.

Making delegated legislation exempt from parliamentary oversight is a serious matter that must be justified by grounds as part of a clear and transparent process as outlined in the expression of principles of this submission. Current exclusions from oversight are ad hoc and not based on clearly defined grounds. This is an issue that should be addressed.

2.3 Manner in which delegated legislation is currently made exempt from parliamentary oversight

There are currently three ways through which legislative instruments can be exempt from parliamentary oversight: 'Legislative instruments may be exempted from the disallowance process by the *Legislation Act*, or a regulation made under that Act (s.44), or by the Act under which they are made.'¹¹

⁸ *Ib id.*

⁹ Commonwealth of Australia (2019) Parliamentary scrutiny of delegated legislation, Standing Committee on Regulations and Ordinances, 8.10.

¹⁰ Office of Parliamentary Counsel, Drafting Directions 3.8, Subordinate Legislation, p. 17, <https://www.opc.gov.au/drafting-resources/drafting-directions> (accessed 16 June 2020). See also Department of the Prime Minister and Cabinet, Legislation Handbook, February 2017, p. 34, <https://www.pmc.gov.au/resource-centre/government/legislation-at-on-handbook> (accessed 16 June 2020)

¹¹ Parliament of Australia, Guide to Senate Procedure n19, accessible [here](#).

Delegated legislation should primarily be made exempt from the disallowance process by the Act under which they are made. This allows parliamentarians to debate the bill and whether disallowance exemptions are justified. It also allows scrutiny by the Parliamentary Joint Committee on Human Rights and Scrutiny of Bills Committee from both a technical and policy perspective. PIAC considers this preferable to exemptions being made through the *Legislation Act*, as it disconnects the exemptions from their purpose and the general policy context in which they are being made.

The Committee has previously noted that a range of exemptions are themselves set in delegated legislation.¹² The fact that it is possible for the executive to exempt itself from parliamentary oversight through use of s 44 of the *Legislation Act 2003* is a major cause of concern. It raises questions about constitutional validity and should be urgently reformed.¹³

There are also secondary issues when delegated legislation is not exempted from disallowance, but the period to pass a motion of disallowance has been reduced, or it is required for parliament to positively pass the motion within 15 days otherwise the instrument is considered approved.¹⁴ This is not appropriate considering delegated legislation is often made in the first place due to lack of time of Parliament. It is a serious concern if time is not made for Parliament to discuss the motion.

In conclusion, the manner in which delegated legislation is made exempt from parliamentary oversight is potentially a serious breach of the separation of powers and could be incompatible with the Constitution.¹⁵ It would be more appropriate for exemptions, and sunseting, to be set solely through primary legislation, as previously recommended by the Committee.¹⁶

2.4 Appropriateness of exempting delegated legislation made in times of emergency, including in response to the COVID-19 pandemic, from parliamentary oversight

Delegated legislation is normally assessed against a set of principles defined in Senate Standing order 23.¹⁷ This includes, in addition to compliance with statutory requirements and principles of parliamentary oversight, the protection of personal rights and liberties.

¹² Commonwealth of Australia (2019) Parliamentary scrutiny of delegated legislation, Standing Committee on Regulations and Ordinances, 8.37.

¹³ Appley, Boughey, P a , W ams (2020) Submission 1 to The Inquiry, Part 1: Constitutional position. Argument based on *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73, *Dignan* (1931) 46 CLR 73, 101, Geoffrey Sawer, *The Separation of Powers in Australian Federalism* (1961) 35 *Australian Law Journal* 177, 187, and more recently W ams t g at on *Williams v Commonwealth* (2012) 248 CLR 156 (*Williams (No1)*); *Williams v Commonwealth* (2014).

¹⁴ Commonwealth of Australia (2019) Parliamentary scrutiny of delegated legislation, Standing Committee on Regulations and Ordinances, 8.7,8.8.

¹⁵ Appley, Boughey, P a , W ams (2020) Submission 1 to The Inquiry, Part 1: Constitutional position. Argument based on *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73, *Dignan* (1931) 46 CLR 73, 101, Geoffrey Sawer, *The Separation of Powers in Australian Federalism* (1961) 35 *Australian Law Journal* 177, 187, and more recently W ams t g at on *Williams v Commonwealth* (2012) 248 CLR 156 (*Williams (No1)*); *Williams v Commonwealth* (2014).

¹⁶ Commonwealth of Australia (2019) Parliamentary scrutiny of delegated legislation, Standing Committee on Regulations and Ordinances, recommendations 15 and 19, p124, p143.

¹⁷ Senate Standing Order 23 (3) b and 23 (3) c.

The Covid-19 response, both at State and Commonwealth level, has included severe limitations of human rights such as freedom of movement, freedom of gathering, with consequences for Australian implied constitutional guarantees such as freedom of political communication. Some measures such as contact tracing and the current obligation to leave personal details to enter premises have implications for the right to privacy and protection of personal information.

While the use of delegated legislation can be justified by the urgency to respond to the pandemic, the number of instruments exempted from parliamentary oversight is concerning, given the extensive and unprecedented limitations imposed on personal rights and liberties.

Potential breaches of express or implied constitutional guarantees are sometimes considered by the Committee separately from the issue of whether the instrument is supported by a head of legislative power.¹⁸ While constitutional validity of instruments is ultimately a matter for the courts to determine, parliamentary oversight is an important mechanism through which personal rights and liberties are protected, not least during emergencies.

3. Potential amendments to the existing framework

3.1 Grounds upon which it is appropriate to exempt delegated legislation from parliamentary oversight

The four principles guiding our submission are that: delegated legislation should not be used too often; substantive issues should be considered by Parliament; use of delegated legislation should be adequately justified; and there should be clear and transparent processes.

Considering these, it is of the utmost importance that grounds upon which it is appropriate to exempt delegated legislation from parliamentary oversight are clearly defined. PIAC supports the development of clear guidelines, outlining both where exemption from disallowance may be justified, and the need for sunseting in most circumstances.

We note that other submissions argue for specific categories of grounds under which exemption from oversight is appropriate; such as by-laws made by elected bodies, internal government processes and instruments which require Parliament assent, as there is already an allowance mechanism.¹⁹ Finalisation of these categories should be based on expert advice from the Committee, academics and relevant stakeholders, while maintaining the principle that exemption should remain rare.

The power to make regulations exempt should also be restricted to primary legislation, removing the ability of the executive to effectively exempt via regulation. This would involve amending the *Legislation Act 2003* (Cth) to remove this ability, found in s 44(2)(b).²⁰

¹⁸ Commonwealth of Australia (2019) Parliamentary scrutiny of delegated legislation, Standing Committee on Regulations and Ordinances, 3.18.

¹⁹ Appley, Boughey, P a, W ams (2020) Submission 1 to The Inquiry. Accessible [here](#).

²⁰ Section 42 does not apply in relation to a legislative instrument, or a provision of a legislative instrument, if... the legislative instrument is prescribed by regulation for the purposes of this paragraph.

Recommendation 1 - Set grounds to exempt delegated legislation in primary legislation

Implement recommendation 15 of the 2019 inquiry into delegated legislation, recommending 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.'

3.2 Options available to ensure appropriate and adequate parliamentary oversight of delegated legislation in times of emergency

Responding to an emergency is a reasonable ground for using delegated legislation. Principles guiding appropriate and adequate parliamentary oversight should nonetheless continue to apply. Indeed, legislation made in times of emergency can have long lasting and wide-ranging consequences, including in potential unforeseen and unintended ways.

Parliament should continue to sit during times of emergency. Suspending Parliament for significant periods of times is not acceptable in a representative democracy, especially where there are safe alternatives allowing Parliament to continue to sit. Parliament should retain oversight through the disallowance process even in exceptional circumstances unless there are clear grounds showing it does not need to do so.

There should be proper process with appropriate time to review. Special circumstances allowing delegated legislation to commence one day after it is made should be clear and justified. A period of 28 days before enactment should continue to apply to delegated legislation made in times of emergency if there is no need for the secondary legislation to be urgently enacted.²¹

Access to information relating to delegated legislation should be maintained and easily accessible. Instruments that are exempted from disallowance should be readily identifiable and searchable. As previously noted by the Committee, there is no public record of instruments exempt from disallowance other than the Federal Register of Legislation,²² and it is not possible to search the registry of instruments for disallowance exemptions.²³

PIAC would support the creation of a mechanism to address this, such as modification of the Federal Register of Legislation by Office of Parliamentary Counsel, to include a register of all instruments exempt from disallowance.²⁴ This would be particularly important and useful in times of emergency to retain a clear view of all delegated legislation including exempted instruments, and ensure the emergency response remains focused on matters directly linked to the emergency and requiring an urgent response justifying both the use of delegated legislation and the absence of parliamentary oversight.

²¹ This was previously supported by the Committee, for example in Commonwealth of Australia (2019) Parliamentary scrutiny of delegated legislation, Standing Committee on Regulations and Ordinances, Recommendation 18, p138.

²² Commonwealth of Australia (2019) Parliamentary scrutiny of delegated legislation, Standing Committee on Regulations and Ordinances, 8.14.

²³ Ibid, 8.13.

²⁴ Previously supported by the Committee, Ibid, recommendation 16, p124.

Recommendation 2 – Ensure proper process with appropriate time to review

Implement recommendation 18 of the 2019 inquiry into delegated legislation, recommending that legislative instruments, subject to limited exceptions, commence 28 days after registration.

Recommendation 3 – Ensure exempted delegated legislation is readily searchable and identifiable

Implement recommendation 16 of the 2019 inquiry into delegated legislation, recommending that the Office of Parliamentary Counsel modify the Federal Register of Legislation to enable instruments which are exempt from disallowance to be readily identified.