



Final Report—Exemption of delegated legislation from parliamentary oversight

Tuesday 16 March 2021

I rise to speak to the tabling of the final report of the Scrutiny of Delegated Legislation Committee's inquiry into the exemption of delegated legislation from parliamentary oversight.

Last year, 299 pieces of delegated legislation were exempt from disallowance. This means the Parliament was prevented from scrutinising, and having the opportunity to veto, 299 laws made by the executive.

This is problematic not only because it undermines the ability of the Parliament to fulfil its constitutionally mandated role as lawmaker in chief.

It is also problematic because delegated legislation, which constitutes about half the law of the Commonwealth by volume, has the capacity to affect the daily lives of Australians in profound ways.

For example, last year the Parliament was unable to scrutinise laws that imposed international travel bans on Australian citizens; laws which increased the federal government debt ceiling to \$1.2 trillion; and laws that changed Australian content obligations that apply to commercial television broadcasters—just a very random example.

In theory, delegated legislation should only deal with purely technical or administrative matters, but this is no longer the case. In practice delegated legislation now often deals with matters of policy significance. An already unsatisfactory situation is becoming intolerable.

Interim report

The committee's interim report, tabled in December last year, focused on the exemption of delegated legislation made during times of emergency from parliamentary oversight, and used the *Biosecurity Act 2015* as a case study.

The interim report also examined some of the systemic factors that contribute to the exemption of emergency delegated legislation from parliamentary oversight.

The report made 18 recommendations whose implementation are necessary to ensure appropriate parliamentary oversight of delegated legislation in times of emergency.

Final report

The final report that I have just tabled broadens the discussion beyond times of emergency, and examines the framework for the exemption of delegated legislation from disallowance.

It makes 11 recommendations that when implemented, will ensure appropriate scrutiny and oversight of delegated legislation.

The functioning of the disallowance mechanism is ultimately about the role and responsibilities of the Parliament, and the substance of a parliamentary democracy.

It is through debate and scrutiny that the principles of accountability and transparency are manifest.

Whether exemptions from disallowance are constitutional, and there are certainly differing opinions discussed in the report, the practice certainly challenges the constitutional principle of executive accountability to the Parliament.

Over time, the Parliament has, whether intentionally or not, accepted a range of rationales for exemptions from disallowance.

It has done this by passing primary legislation that provides for instruments to be exempted from disallowance.

The Parliament has even passed legislation that allows a regulation to exempt other pieces of delegated legislation from disallowance. The committee considers that this is totally unacceptable.

The committee's final report examines a number of rationales for exemption and finds the majority cannot be supported and should not be accepted by the Parliament.

I speak now to one particular rationale: that the making of laws has to be separated from the political process.

This type of pejorative framing of politics suggests the Parliament is not a representative forum, and that the people's voice expressed through their representatives should not be heard.

This is contrary to constitutional principle and offends the very substance of representative democracy. It cannot be accepted as a rationale to avoid parliamentary scrutiny.

It is worth noting the 'alternative' to politics is unaccountable governance and this is fundamentally at odds with democratic principles.

Should the executive be concerned about the potential for parliamentary disallowance, it should be assured it is not the disallowance mechanism that might frustrate legislative plans.

It is, rather, poorly conceived legislative instruments that do not adhere to the committee's scrutiny principles, that undermine the constitutional role of the Parliament, or that are not in accordance with the intent of the enabling legislation or the Parliament, that will frustrate legislative plans.

The role of the committee

Around 1,500 pieces of delegated legislation are tabled in the Parliament each year and because scrutiny on the floor is limited to disallowing the legislation, it is the Scrutiny of Delegated Legislation Committee that assists parliamentarians in their examination of this legislation.

The committee examines all disallowable delegated legislation against 11 technical scrutiny principles and brings any concerns to the attention of the Senate.

Over time, the committee's work has established important precedents that have improved the quality of delegated legislation put before the Parliament.

Ministers and agencies regularly agree to amend legislative instruments and their explanatory statements to ensure they comply with the committee's scrutiny principles.

However, the committee is not currently able to undertake this essential scrutiny on instruments that are exempt from disallowance.

The committee must have the ability to scrutinise delegated legislation that is exempt from disallowance because without this ability the Parliament is not informed, and if not informed, it cannot meet the constitutional requirement that it remain the ultimate lawmaking authority.

As such, the committee recommends changes to the standing orders to allow the scrutiny of delegated legislation exempt from disallowance, and to add an additional two scrutiny principles.

Guidance to departments and agencies

The final report provides very clear guidance to departments and agencies on the grounds that might justify an exemption from disallowance. These are vanishingly small.

In summary, the committee considers that:

- delegated legislation should be subject to disallowance and sunseting to permit appropriate parliamentary scrutiny and oversight, unless there are truly exceptional circumstances; and
- any claim that circumstances justify exemption from disallowance and sunseting will be subjected to rigorous scrutiny with the expectation the claim will only be justified in rare cases.

Conclusion

When we sit in this place, we are not just politicians, we are also parliamentarians, constitutionally responsible for the laws that are made to benefit all Australians.

Insisting that the role of the Parliament is respected is not a judgment on the content of any piece of legislation or the legislative agenda of any government.

It is rather the application of the rule of law to the role of the Parliament in a constitutional democracy. Without the ability to scrutinise, the Parliament cannot make policy, or even technical, judgements on proposed laws.

With these comments, I commend the committee's report to the Senate.