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Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
Box 6100
CANBERRA ACT 2600

By email: sdlc.sen@aph.gov.au

24 June 2020

Dear Committee Chair

Civil Liberties Australia (CLA) agrees with Submission No 1, by the Gilbert + Tobin Centre of Public Law and UNSW Law, that:

First, exemptions from the disallowance process ought to be set out in primary legislation.

Delegating the power to exempt certain instruments from disallowance to the executive—as *Legislation Act 2003* s 44(2)(b) currently does—fundamentally undermines Parliament’s role in overseeing delegated law-making.

—Submission 1 p3

CLA agrees with Submission No 1’s statement:

Second, there must be clear justifications for exempting specific categories or types of delegated legislation from the disallowance process.

CLA agrees with Submission No 1’s statement:

Exemption categories should be drawn as narrowly as possible to give effect to these justifications.

However, CLA strongly disagrees with examples given by Submission No 1 under their “**three circumstances**”:

1. By-laws of elected bodies:

While CLA believes exemption of “by-laws of local councils at the State level” is appropriate because all councillors of local government councils are elected on a regular basis at public and open elections at which all those eligible may stand, the second-mentioned example of the ANU at the federal level is not a “democratic” law-making body of the same quality. For example, at least half (some eight) of the Governing Council of the ANU are appointed by the Australian Parliament/Executive.

2. Internal government processes:

Similarly, CLA does not agree that an exemption should apply to any aspect of directions immediately or subsequently forming part of the rules/codes of conduct of APS employees. APS employees are not consulted in any meaningful way as to the making of the APS rules, and therefore have no protection from inappropriate rules other than the purview of Parliament.

Without proper democratic input, APS employees depend on the last-resort option of parliamentary committees to safeguard their rights. For example, the Human Rights Committee of Parliament may well wish to propose amendments to the APS Code of Conduct following the Banerji case in the High Court. APS employees are in no position to bargain aspects of the rules/codes in or out when they join the APS, even when agreeing to individual contracts or formal workplace agreements.

There is no industrial democracy in developing the Code(s) of the APS.

3. Instruments which require the assent of Parliament to come into force:

CLA does not believe there is a proper democratic and accountability regime associated with at least one such instrument, Army Regulations.

While Parliament, through the Scrutiny Committee, has oversight of the Army Regulations presented to it, they arrive before the Committee as an intrinsically flawed compilation devoid of proper democratic input. The only class consulted in relation to drawing up the Army Regulations is the Officer class.

The Army Regulations, however, apply to both the Officer class and to the "troops". There should be – there must be, CLA believes – a democratic process involved in drawing up the "legislation" which is to govern all serving members of the Army. Currently, only about 1/7th of the people affected are consulted. To a very great extent, those consulted are the ones imposing the legislation, the Officers (in a flawed "legal" process, CLA believes) and not those to whom the legislation is most applied and enforced, the troops.

Instant obedience is said to be a requirement during warfare, but overwhelmingly the Army Regulations will play out in day-to-day employment settings where the core rules and codes should be more akin to a normal workplace than a theatre of war. CLA is aware of instances where Army Regulations have been abused because of the flawed nature of how they are derived, with the "ruling" class only being consulted.

The examples given in 2 and 3 above are not insignificant in the Australian "workforce". Employees under APS and Army delegated legislation strictures would comprise about 200,000 Australian workers. Because their workplace or industrial rights are so restricted by the very instruments in question (the rules/codes, or the Army Regulations), these Australian working citizens who are the absolute core of service to the nation's people require greater, rather than less, oversight by parliamentary committees and by the formal approval of Parliament itself.

CLA Recommendation 1:

In summary, CLA endorses the recommendations contained in Submission 1, with the above exceptions.

CLA Recommendation 2:

In addition, CLA recommends that when delegated instruments are next being prepared for presentation to a relevant parliamentary body (usually Scrutiny Committee processes, but possibly others), the documentation must at the next instance, and once every 10 years following, include a convincing argument for why the process should be continued as delegated legislation rather than being re-written into the primary Act(s) and/or why the matter should not be managed in a different way.

As an example, there is no reason that the ANU by-laws should continue to be approved by the Australian Parliament. At the time the ANU was created, federal parliament was the only mechanism available to fulfil such a role. However, since then, the ACT Legislative Assembly would arguably be a better place to monitor, adjust and approve the by-laws that should apply locally within the Territory to both the ANU and University of Canberra. Equally, it is not equitable or a fair go that some students in the national capital attend a university that is subject to a Human Rights Act under ACT law whereas the students of another university do not. Further, the students of all universities in the ACT should be treated equally in relation to their human rights vis-a-vis student matters: that is not the case in relation to students of the UNSW compared to the University of Canberra.

Undoubtedly, similar anomalies will become apparent if each delegated instrument is reviewed next time round, and then once every 10 years. ENDS

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