CAPaD - Awakening Democracy

The Canberra Alliance for Participatory Democracy

Committee Secretary
Senate Scrutiny of Delegated Legislation Committee
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Dear Secretary

We are writing in response to the opportunity provided by the Senate Standing Committee for the Scrutiny of Delegated Legislation to make submissions to its inquiry into the **exemption of delegated legislation from parliamentary oversight**. This submission is made by the Canberra Alliance for Participatory Democracy, a civil society organisation which focuses on the quality and accountability of the relationship between the people and their elected representatives. Detailed information about our goals and activities is available on our website: https://canberra-alliance.org.au/. In line with our organisational focus, our comments are provided from a governance policy perspective.

We are deeply concerned that trust in government is at historically low levels, with increasing scepticism that our political institutions are working in the interests of the people. The expectation that they should do so sits at the heart of the compact on which representative government is based. We, the people, choose our representatives on the understanding that our government will promote the public interest and be responsive to the people, and that the machinery of government will facilitate the expression of the wishes of those represented.[1]

Pitkin, a leading theorist on representative government, observed that "Representative government is not defined by particular actions at a particular moment, but by long-term systemic arrangements – by institutions and the way in which they function."[2] This reflection has a direct bearing on the Committee's inquiry into the exemption of delegated legislation from parliamentary oversight, in that the systemic arrangements governing disallowance directly affect the capacity of community members to engage through their elected representatives in the shaping of legislation that affects their interests.

Section 1 of the Australian Constitution vests legislative power in the parliament. Removing the parliament's power to scrutinise and disallow legislative instruments compromises that provision. This in turn undermines the relationship between the people and the representatives they elect to make the laws that govern them and supervise their execution. Where lawmaking is removed from the purview of the parliament, elected representatives

[1] Pitkin, Hanna 1967, *The Concept of Representation*, p.232 sets out these attributes of representative government.
[2] ibid p.234

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are unable to advance the interests of their constituents in relation to that legislation. In a practical sense, a pluralist parliament offers a mechanism to consider and respond to a spectrum of community views in a way that a majoritarian executive does not.

For these reasons, we were deeply concerned to read in the Committee's media release that in 2019 some 20 percent of all delegated legislation was exempted from disallowance, and that this figure is expected to rise in 2020 with the provisions of COVID related laws. A subsequent report in *The Saturday Paper* of 16 May indicated that 32 of the at least 137 regulations made as part of the government's Covid-19 response were not subject to disallowance.

We have looked at only a small section of the legislation made to enable aspects of the government's response to Covid-19. We would note in this regard that Part 3 of each of *Appropriation (Coronavirus Economic Response Package) Act (No. 1) 2019-2020* and *Appropriation (Coronavirus Economic Response Package) Act (No. 2) 2019-2020* provides for an Advance to the Finance Minister to a maximum permissible value of $800M and $1200M respectively. S10(2) of the first act and s12(2) of the second act provide for the Finance Minister to make determinations regarding the provision of expenditure. In each case, the Act specifies that

> A determination made under subsection (2) is a legislative instrument, but neither section 42 (disallowance) nor Part 4 of Chapter 3 (sunsetting) of the *Legislation Act 2003* applies to the determination.

Expenditure of this order must be assumed to be based on significant policy framings which Parliament could be expected to need to consider.

The Committee's June 2019 report *Parliamentary Scrutiny of Delegated Legislation,* in particular the discussion of the exemption of delegated legislation from parliamentary scrutiny, documents a number of major flaws in the current system of exemption of legislative instruments from disallowance, and makes several important recommendations. Our comments look at the Committee's findings through the lens of ensuring robust representative government.

Accountability

Parliament, as the branch of government empowered by the constitution to make laws and the body that directly represents the people of Australia, needs to be fully accountable to the people for the substance of all legislation made.

The Committee, in its June 2019 report (paragraph 8.37), noted that "a vast range of exemptions from disallowance are set out in delegated legislation (namely the Legislation (Exemptions and Other Matters) Regulation 2015". Seemingly, in this way, parliament has delegated to the executive a considerable share of the power to make the groundrules as to what legislative instruments do not need to be brought back to the parliament. We strongly endorse the Committee's Recommendation 15 to review existing provisions exempting legislative instruments from disallowance and to amend the *Legislation Act 2003* to ensure that all such exemptions are contained in primary legislation. We also strongly endorse the Committee's view, at paragraph 8.35, that "the circumstances in which instruments are exempted from disallowance should be strictly limited, with a justification for any exemption clearly articulated in explanatory materials".

The Committee canvasses a number of measures to make clear the justification for proposing an exemption from disallowance and a more robust process for testing these

justifications. Building on this discussion, we would urge: the development and publication of criteria for the exemption of legislative instruments from disallowance; a requirement to include in explanatory memoranda a justification for any provision exempting a legislative instrument from disallowance, based on the published criteria; and assigning to either this Committee or the Committee for the Scrutiny of Bills an express function to scrutinise all provisions in primary legislation providing for the exemption of a legislative instrument from disallowance to verify compliance with the published criteria.

Transparency

The public should be able to establish with ease what legislation governs them, including exempted legislative instruments that have been made without any parliamentary consideration. The Committee's 2019 report makes clear that this is not currently the case. We understand that there is no discrete listing of legislative instruments which have been exempted from disallowance. We would support the creation of a cumulative published index of exempted legislative instruments, with instruments listed at the time that they are registered. At minimum, exempted instruments should be tagged and searchable as such in the Federal Register of Legislation, as proposed by the Committee in paragraph 8.39 of its 2019 report. We would also urge that no exempted legislative instrument come into force until 28 days after registration, as recommended by the Committee in its 2019 report for all delegated legislation. This provision is particularly important for exempted legislative instruments since they are more likely to fly under the radar, being excluded from parliamentary review.

Responsiveness

There is currently no mechanism of which we are aware for parliament to modify or disallow exempted legislative instruments: they exist by executive fiat. Even should the Committee persuade parliament to tighten the future regime, there will remain a considerable volume of extant legislative instruments on the books. We would strongly recommend a power for parliament to consider and modify or repeal controversial instruments. This would provide a vehicle for parliament to respond to any significant public concerns, in the same way as it can review controversial laws should the numbers so permit.

Yours Sincerely

Peter Tait
Secretary
Canberra Alliance for Participatory Democracy