



Australian Government
Department of Health

**Senate Standing Committee for the
Scrutiny of Delegated Legislation**

**Inquiry into the exemption of delegated legislation
from parliamentary oversight**

**SUBMISSION BY
THE AUSTRALIAN GOVERNMENT
DEPARTMENT OF HEALTH**

August 2020

Introduction

The Department of Health (the Department) actively participates in Parliamentary oversight processes, including providing submissions such as this one to Parliamentary Committees, providing evidence to Committee inquiries and the other processes of the Parliament. The Department welcomes this inquiry and is grateful for the opportunity to provide a submission.

Delegated legislation

Many Acts of Parliament delegate the power to make detailed rules and regulations to the executive government or regulatory agencies. Referred to by a number of terms, including ‘delegated legislation’ or ‘secondary legislation’, those rules and regulations supplement the parent Act and have the same legal force. This includes numerous pieces of delegated legislation administered by the Health portfolio.

Amount and nature of delegated legislation

Across the Government, 37,696 delegated legislative instruments are currently in force. Of those, 7,944 (21%) were marked as being exempt from disallowance when they were lodged on the Federal Register of Legislation. Of these, 6,564 are Tariff Concession Orders and Revocation Orders, which are no longer considered to be legislative instruments (see subsection 8(3) of the Legislation Act).

Accordingly, only 1,378 delegated legislative instruments fall within substantive exemptions from disallowance under the Legislation Act. This means that 96% of the 31,132 current delegated legislative instruments were subject to potential disallowance when they were made.

The Health portfolio administers a broad range of delegated legislative instruments on behalf of the Minister for Health, the Minister for Aged Care and Senior Australians, the Minister for Youth and Sport, and the Minister for Regional Health, Regional Communications and Local Government. The portfolio is responsible for 126 of the non-disallowable delegated legislative instruments currently in force. Seven of these were made under *Biosecurity Act 2015* (Cth) (the Biosecurity Act) in order to combat the COVID-19 pandemic.

Over the past five years, more than 5,000 disallowable delegated legislative instruments have been made. During that period (since January 2015), 15 (either in part or in their entirety) have been disallowed. This represents less than half of one per cent of all disallowable delegated legislative instruments made.

Two delegated legislative instruments administered by the Department were disallowed in part during that five year period. The Senate disallowed some items in the Dental Benefits Amendment Rule 2016 (No. 2) on 8 February 2017 as non-government Senators disagreed with aspects of the policy implemented by the Rules. The Therapeutic Goods and Other Legislation Amendment (Narcotic Drugs) Regulation 2016 was disallowed in part on 13 June 2017 for the same reason.

COVID-19 delegated legislation

Governments around the world have taken unprecedented steps to contain the COVID-19 pandemic. During such emergencies, there is a time-limited opportunity to interrupt the transmission of the disease and to manage human health risks.

The Commonwealth needs to be able to take urgent, decisive action and make technically and scientifically based decisions to reduce the potential number of cases and deaths within Australia and subsequently, the burden on the Australian health system.

On 21 January 2020, ‘human coronavirus with pandemic potential’ (COVID-19) was listed as a human disease in the *Biosecurity (Listed Human Diseases) Determination 2016* under the Biosecurity Act. On

18 March 2020, the Governor-General declared, under the Biosecurity Act, a human biosecurity emergency in relation to COVID-19. Since then, a number of delegated instruments have been made to manage and respond to the threat of COVID-19 to human health in Australia.

The current framework under the Biosecurity Act includes controls on the making of delegated legislation. Delegated legislation is made based on a technically and scientifically based decision making process in order to manage risks to human health. Further, in the case of an emergency, delegated legislation can only operate for a limited period, being the duration of the human biosecurity emergency period.

The structure of the Biosecurity Act, and the deliberate decision by the Parliament of Australia not to make such delegated legislation disallowable, reflects the urgency required for such measures and the need to have certainty in the application of the measures. If disallowance was available, it would undermine this certainty as people could not be certain that the measures would not just be disallowed during the disallowance period.

It should also be noted that, while the Parliament has determined that disallowance of legislation made under the Biosecurity Act is not appropriate, other accountability mechanisms to ensure such measures are appropriate and necessary are in place, including Senate Estimates and Questions on Notice. A targeted Select Committee to inquire into the Australian Government's response to the COVID-19 pandemic has also been established.

Appropriateness and options for amending the existing framework

The existing framework for exempting delegated legislation from certain types of parliamentary oversight would appear to work well. Existing processes for making delegated legislation allow urgent measures, such as those necessary to protect health and life, to be put in place quickly while also ensuring transparency and accountability.

In recent years, the need has arisen on several occasions for time-limited delegated legislation to be urgently implemented in response to emergencies, including natural disasters and, more recently, the COVID-19 pandemic. The review of the Legislation Act to be completed in 2021 may wish to consider whether it is necessary and appropriate to create an additional ground of exclusion from disallowance to support emergency delegated legislation to facilitate continuity of access to 'essential services' including the provision of healthcare on humanitarian grounds. While careful consideration would need to be given to such an exemption, including its scope and the process for activation, examples of Determinations that might come within such an exemption are:

- The *Health Insurance (Section 3C General Medical Services – Mental Health Services for Bushfire Response) Determination 2020* introduced new mental health services under the Medicare Benefits Schedule for people whose mental health was adversely affected by a bushfire in 2019-2020.
- The *Health Insurance (Section 3C General Medical Services – General Practice Telehealth Services for Bushfires Response) Amendment Determination 2020* enabled people affected by bushfires to access general practice mental health services by video conference.
- The *National Health (Continued Dispensing – Emergency Measures) Determination 2020* was implemented to ensure that patients could obtain PBS subsidised access to their medicines if they were unable to attend their doctor during the bushfire crisis. While this Determination was intended to be temporary, it was extended to apply to the COVID-19 pandemic.