The Senate

Standing Committee for the Scrutiny of Delegated Legislation

Inquiry into the exemption of delegated legislation from parliamentary oversight

Final report

16 March 2021

ISBN: 978-1-76093-199-5

This document was prepared by the Senate Standing Committee for the Scrutiny of Delegated Legislation and printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

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7.15 The committee recommends the *Legislation Act 2003* be amended to require all exemptions from disallowance and sunsetting to be in primary legislation.

Recommendation 2

7.16 The committee recommends the Legislation (Exemptions and Other Matters) Regulation 2015 be repealed and any exemptions in the regulation that remain appropriate instead be set out in a schedule to the *Legislation Act 2003*. In so doing, the current broad exemptions relating to 'an instrument that is a direction by a Minister to any person or body', 'an instrument (other than a regulation) relating to superannuation', and 'an instrument made under an annual Appropriation Act' should be excluded from the new schedule.

Recommendation 3

7.50 The committee recommends the *Legislation Act 2003* be amended to repeal the blanket exemption of instruments facilitating the establishment or operation of an intergovernmental body or scheme from disallowance, and sunsetting.

Recommendation 4

7.57 The committee recommends that Advance to the Finance Minister determinations be disallowable legislative instruments.

Recommendation 5

7.78 The committee recommends legislation be introduced to provide that the explanatory memoranda of all bills that delegate legislative power and exempt this delegated legislation from disallowance or sunsetting must contain a statement that outlines the exceptional circumstances that justify an exemption from disallowance and/or sunsetting.

Recommendation 6

7.79 The committee recommends the *Legislation Act 2003* be amended to provide that the explanatory statements to instruments exempt from disallowance or sunsetting must contain a statement that outlines the exceptional circumstances that justify an exemption from disallowance and/or sunsetting.

Recommendation 7

7.80 The committee recommends that should recommendation 5 and recommendation 6 not be accepted by the government, the Senate agree to an order of continuing effect to provide that:

- the explanatory memoranda of all bills that delegate legislative power and exempt this delegated legislation from disallowance or sunsetting must

contain a statement that outlines the exceptional circumstances that justify an exemption from disallowance and/or sunsetting; and

- the explanatory statements to instruments exempt from disallowance and sunsetting must contain a statement that outlines the exceptional circumstances that justify the exemption from disallowance and/or sunsetting.

Recommendation 8

7.96 The committee recommends that the Senate adopt the following resolution in relation to the circumstances where it may be appropriate to exempt delegated legislation from disallowance and sunsetting:

- The Senate notes:
  - the Constitution vests the legislative power of the Commonwealth in the Federal Parliament;
  - if the Parliament is to satisfy this constitutionally mandated role, it must have the ability to scrutinise all legislation made by the executive; and
  - exemptions from disallowance and sunsetting undermine the ability of the Parliament, and particularly the Senate, to undertake this scrutiny.
- The Senate resolves:
  - delegated legislation should be subject to disallowance and sunsetting to permit appropriate parliamentary scrutiny and oversight unless there are exceptional circumstances; and
  - any claim that circumstances justify exemption from disallowance and sunsetting will be subjected to rigorous scrutiny with the expectation that the claim will only be justified in rare cases.

Recommendation 9

7.104 Noting that in its response to the committee's 2019 inquiry the government agreed that legislative instruments should only be exempted from disallowance in very limited circumstances, the committee recommends that the Senate adopt the following order for the production of documents:

- That there be laid on the table, by the Minister representing the Attorney-General, by no later than 5 pm on Tuesday, 3 August 2021, a statement setting out:
  - the rationale for specifying that each class of instrument and each particular instrument in Part 2 of the Legislation (Exemptions and Other Matters) Regulation 2015 are not legislative instruments; and

- the exceptional circumstances that justify each exemption from disallowance or sunsetting currently set out in Parts 4 and 5 of the Legislation (Exemptions and Other Matters) Regulation 2015.

Recommendation 10

7.116 The committee recommends that standing order 23 be amended as follows, with effect from 1 July 2021:

Omit 'and' from the end of subparagraph (3)(j).

Omit subparagraph (3)(k), substitute:

(k) in the case of an instrument exempt from sunsetting, it is appropriate for the instrument to be exempt from sunsetting;

(l) in the case of an instrument that amends or modifies the operation of primary legislation, or exempts persons or entities from the operation of primary legislation, the instrument is in force only for as long as is strictly necessary; and

(m) it complies with any other ground relating to the technical scrutiny of delegated legislation that the committee considers appropriate.

After paragraph (4), insert:

(4A) The committee may, for the purpose of reporting on its terms of reference, consider instruments made under the authority of Acts of the Parliament that are not subject to disallowance. For such instruments the committee may also consider whether it is appropriate for the instrument to be exempt from disallowance.

Recommendation 11

7.125 The committee recommends that section 11 of the *Legislation Act 2003* be amended to clarify that notifiable instruments must not be legislative in character.

Foreword

The Standing Committee for the Scrutiny of Delegated Legislation was established in 1932 as the Senate Standing Committee on Regulations and Ordinances. The Senate amended its standing orders on 27 November 2019, with effect from 4 December 2019, to change the committee's name to the Senate Standing Committee for the Scrutiny of Delegated Legislation and make other changes to clarify and update the committee's powers and functions.

In November 2014, the 670-page Biosecurity Bill 2014 was introduced to the Parliament. The intent of the bill was to provide a modern regulatory framework to manage the risk of pests and diseases entering Australian territory and causing harm to animal, plant and human health, the environment, and the economy. The bill's explanatory memorandum stated it was necessary to protect Australia's way of life.

The bill was referred to a Senate committee, which made 13 recommendations and subject to those being implemented, recommended the bill be passed.[1] The House of Representatives and the Senate each spent five hours considering and debating the bill.[2] With only minor amendments, the bill was passed by both Houses of Parliament on 14 May 2015. It became law as the *Biosecurity Act 2015* in June 2015.

In 2020, the COVID-19 pandemic swept the world and countries responded with measures previously inconceivable. In Australia, the Federal Health Minister imposed strict exit requirements on Australian citizens, and he gained the ability to place control orders on individuals who were exposed to or had the signs or symptoms of COVID-19.

Whether the Parliament was aware at the time, the *Biosecurity Act 2015* had given the Health Minster the ability to exercise extraordinary powers through the making of legislative instruments, many of which are exempted from disallowance and parliamentary scrutiny. And from these instruments flowed a number of other actions with significant consequences for ordinary Australians.

The point is not to make a policy comment on this legislation or the actions of the Health Minister or those who were delegated power under the Act. The point is to raise the issue of parliamentary scrutiny. Without the ability to scrutinise, the Parliament cannot make policy, or even technical, judgements on proposed laws.

The Constitution tasks the Parliament with ultimate lawmaking authority. While in practice the Parliament may delegate some of these powers to the executive, this does not absolve the Parliament of responsibility for laws so delegated. It is the capacity to scrutinise delegated legislation, which constitutes about half the law of the Commonwealth by volume, that preserves constitutional principle. The only substantive way scrutiny of

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1 The Senate Rural and Regional Affairs and Transport Legislation Committee focussed primarily on the agricultural aspects of the bill; only two recommendations related to the Department of Health. See: Senate Rural and Regional Affairs and Transport Legislation Committee, *Biosecurity Bill 2014 and related bills*, March 2015.

2 According to research from the Parliamentary Library, the House of Representatives spent a total of 5 hours and 8 minutes; the Senate, 5 hours and 14 minutes.

delegated legislation can occur is through the disallowance mechanism. Recent trends in leaving significant policy matters to delegated legislation and exempting delegated legislation from disallowance and thus scrutiny, however, are undermining this mechanism. This has significant consequences for the democratic foundations of our system of government.

Last year, 17.4 per cent of delegated legislation was exempted from disallowance. In addition to those laws made under the *Biosecurity Act 2015*, other laws exempted from disallowance included laws:

- increasing the Federal government debt ceiling to $1.2 trillion; and
- changing Australian content obligations that apply to commercial television broadcasters.

As parliamentarians, it behoves us to take seriously, beyond simple rhetorical commitment, the scrutiny of legislation that has the potential to affect the ordinary lives of our constituents in profound ways. If we, as parliamentarians, do not recognise our responsibility is to our constituents, then we undermine the compact upon which representative democracy rests for its legitimacy.

What is at stake here is not a matter of policy, it is the fundamental responsibility of the Parliament to appropriately scrutinise the legislation that comes before it and in so doing, fulfil its constitutional function.

The Parliament cannot perform this function if primary legislation continues to leave significant matters to regulation such that its substance cannot be scrutinised prior to it becoming law. The Parliament cannot scrutinise instruments that are exempted from disallowance or sunsetting. As will be discussed in this report, the grounds upon which instruments might legitimately be exempted from disallowance are vanishingly small.

Insisting on the technical soundness of legislation is not a partisan position; it is the least that is required to ensure the Parliament fulfils its lawmaking function.

It is time for the Parliament to reassert its constitutionally-established role. The Scrutiny of Delegated Legislation Committee asks for no more than legislation to come before the Parliament that meets technical scrutiny principles. It is only when this occurs that the Parliament can effectively consider the substance of the policy contained therein.

This report concludes the committee's inquiry in the exemption of delegated legislation from parliamentary oversight, and must be read in conjunction with the committee's interim report tabled in December 2020. Action on the 18 recommendations in the interim report and the 11 recommendations in this final report is essential to ensure the constitutional role of the Parliament is maintained going forward.

Senator the Hon Concetta Fierravanti-Wells
Chair

Senator the Hon Kim Carr
Deputy Chair

Part I — Background

Chapter 1

Introduction

…we have seen that the principle that the laws come from Parliament is being eroded.[1]

1.1 What is the role of the Parliament? The answer to this fundamental question is to be found in the Constitution:

> The legislative power of the Commonwealth shall be vested in the Federal Parliament...[2]

1.2 If the Parliament is unable to scrutinise legislation because it has been exempted from disallowance, the Parliament's role as the ultimate lawmaking authority is diminished. As a matter of principle, the extent to which this is occurring is immaterial. If one accepts the principle that the legislative power of the Commonwealth is vested in the Parliament, any exemption from disallowance is problematic. The urgency with which this issue must be addressed is heightened by the evident expansion of executive law making that is not subject to parliamentary oversight.

1.3 The Parliament itself, though, is implicated in the undermining of the system of parliamentary oversight. Whether through a failure to properly scrutinise legislation, understand its import, or through mere acquiescence, it has contributed to the current state of affairs by allowing over many years for executive-made laws to be exempted from disallowance.

1.4 Insisting that legislation is subject to effective parliamentary oversight is not a matter of policy, but of ensuring the proper functioning of the institutions established by the Constitution.

1.5 The Parliament must be able to effectively exercise oversight of executive-made laws, before its ability to do so slips away. The Senate has a special role. It is the 'safeguard of the Commonwealth', one of few places 'where a government can be, of right, questioned and obliged to answer'.[3]

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1 Mr Morgan Begg, Research Fellow, Institute of Public Affairs, Committee Hansard, 27 August 2020, p. 11.

2 *Australian Constitution*, s. 1.

3 Harry Evans and Rosemary Laing, eds, *Odgers' Australian Senate Practice*, 14th edition, Department of the Senate, 2016, p. 29.

What is delegated legislation?

1.6 Delegated legislation is laws made by the executive (most often ministers or senior departmental officers). Individual pieces of delegated legislation are generally known as legislative instruments.[4] Such legislation has the same force of law as primary legislation even though it is not debated and passed by both Houses of Parliament. There is no opportunity for legislative instruments themselves to be debated in the Parliament or amended before they come into force. The Parliament's power is limited to disallowing or vetoing the legislative instrument. This might occur after it has already become law.

1.7 There are over 100 different types of legislative instrument, including regulations made by the Governor-General, rules, orders, ordinances, declarations and certificates.[5] The executive has the power to make these laws because it has been provided this power by an Act of Parliament, either directly or through regulation.[6]

1.8 Legislative instruments are defined in section 8 of the *Legislation Act 2003* (Legislation Act) as including instruments:

- made under a primary law that gives a power to do something by legislative instrument;
- made under a power delegated by the Parliament and registered on the Federal Register of Legislation;
- that determine or alter the content of the law; and
- declared to be legislative instruments under certain provisions of the Legislation Act (and/or in the primary legislation).[7]

1.9 Legislative instruments generally have a legislative character, that is, the instrument determines or alters the law, rather than determining particular circumstances in which the law applies. Legislative instruments may also affect a privilege or interest, impose an obligation, create a right, or vary or remove an obligation or right.[8]

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4 Legislative instruments differ from notifiable instruments, though both can be classified as delegated legislation. Notifiable instruments are not subject to the tabling, disallowance or sunsetting requirements generally imposed on legislative instruments.

5 There are over 100 different types of legislative instrument. Harry Evans and Rosemary Laing, eds, *Odgers' Australian Senate Practice*, 14th edition, Department of the Senate, 2016, p. 431.

6 Attorney-General's Department, *Submission 14*, p. 3.

7 *Legislation Act 2003*, s. 8.

8 There is some ambiguity to this definition, however. An instrument that has these characteristics might be declared by an Act or regulation not to be a legislative instrument. Similarly, a piece of legislation may designate an instrument of an administrative character as a legislative instrument.

Legislation Act 2003, s. 8(4)–8(6); Attorney-General's Department, answers to questions taken on notice, public hearing, Canberra, 3 September 2020 (received 8 October 2020), p. 3.

1.10 It is this legislative character, in that legislative instruments have the capacity to change the duties, rights or obligations of people, that makes it appropriate that such instruments are subject to parliamentary scrutiny.[9]

1.11 Delegated legislation has an important role in the Australian legal system and has been identified as the 'principal form of lawmaking', constituting about half the law of the Commonwealth by volume.[10] According to the Attorney-General's Department, there are approximately 31,132 legislative instruments currently in force.[11] By some accounts, its quantity is said to exceed that of primary legislation and it is used to make new laws in every field, on matters that are minor and substantial. There exist hundreds of enabling Acts and most contain multiple grants of authority to the executive.[12]

1.12 Given its prevalence and importance to the contemporary legal system, it is important, in the words of Associate Professor Lorne Neudorf, that we 'strive to ensure that it aligns with the values of a democratic society based on the rule of law'.[13] Professor Neudorf is not alone in this view. The Law Council of Australia argues for the high standards of essential democratic process, consistent with the rule of law and the role of the Parliament in Australia's constitutional system, to be applied to delegated legislation.[14]

The disallowance framework for delegated legislation

1.13 Ordinarily, the Parliament has the opportunity to scrutinise and disallow delegated legislation, though the procedure for scrutinising delegated legislation is substantively different to that of scrutinising primary legislation. Legislative instruments usually (but not necessarily) come into effect prior to their consideration by the Parliament, and a legislative instrument may not be tabled for consideration by the Parliament for a significant time after it has been made.

1.14 While there is a legislated timeframe for disallowance once the legislative instrument has been tabled (see below), the timeframe for instruments to be tabled in the Parliament is variable. Section 15G of the Legislation Act requires the rule-maker for a legislative instrument to register the instrument and its explanatory materials on the Federal Register of Legislation 'as soon as practicable' after the

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9 Ms Jacinta Dharmananda, *Committee Hansard*, 27 August 2020, p. 22.

10 Associate Professor Lorne Neudorf, *Submission 11*, p. 2; Harry Evans and Rosemary Laing, eds, *Odgers' Australian Senate Practice*, 14th edition, Department of the Senate, 2016, p. 432. See also: Ms Pauline Wright, President, Law Council of Australia, *Committee Hansard*, 27 August 2020, p. 1.

11 The Department of Health put the number as 37,696. Mr Andrew Walter, First Assistant Secretary, Integrity and Security Division, Attorney-General's Department, *Committee Hansard*, 3 September 2020, p. 5; Department of Health, *Submission 27*, p. 1.

12 Associate Professor Lorne Neudorf, *Submission 11*, p. 2.

13 Associate Professor Lorne Neudorf, Deputy Dean of Law & Associate Professor, Adelaide Law School, University of Adelaide, *Committee Hansard*, 31 August 2020, p. 20.

14 The Law Council of Australia, *Submission 21*, p. 5.

instrument has been made.[15] Legislative instruments must be registered and are not enforceable unless and until they are registered.[16] An instrument enters into force either on a specified date or the day after registration.[17] It is possible to specify a legislative instrument does not enter into force until such time as the disallowance period has passed.

1.15 Section 38 of the Legislation Act requires the instrument to be tabled in each House of Parliament within six sitting days after being registered.[18] Depending on the parliamentary sitting calendar, there can be a significant delay between an instrument commencing (and thus being enforceable), and it being tabled in the Parliament. In some instances, a legislative instrument can commence retrospectively, extending further the period between commencement and tabling.

1.16 Once tabled, there are no formal stages for legislative passage (such as first, second, and third readings), opportunities to debate the instrument in committee of the whole and vote on amendments, or procedural restraints on such legislation being 'rushed' through the Parliament.[19]

Section 42 of the Legislation Act 2003

1.17 The disallowance framework is established in section 42 of the Legislation Act. Under section 42, any member of either House can give notice of a motion to disallow an instrument within 15 sitting days beginning on the first sitting day after the instrument was tabled in the relevant House.[20]

1.18 If a Senator or Member gives a notice of a motion to disallow (that is, the Senator or Member tells the House they intend to disallow the instrument), from the day the motion is given, a further 15 sitting days are allowed to resolve the motion. If, during this time, the House in which the motion is given decides to disallow the instrument or provision, the instrument or provision ceases to have effect immediately after the passing of the resolution.[21]

1.19 If a notice of motion to disallow an instrument has been given, but is unresolved at the end of 15 sitting days of that House (beginning on the first sitting day after the giving of the notice), the instrument or provision is taken to have been disallowed and is repealed at that time.[22] The intent of this provision is that the

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15 *Legislation Act 2003*, s. 15G(1).

16 *Legislation Act 2003*, s. 15H, 15K.

17 *Legislation Act 2003*, s. 12(1). See also: Harry Evans and Rosemary Laing, eds, *Odgers' Australian Senate Practice*, 14th edition, Department of the Senate, 2016, pp. 439–444.

18 *Legislation Act 2003*, s. 38(1).

19 Harry Evans and Rosemary Laing, eds, *Odgers' Australian Senate Practice*, 14th edition, Department of the Senate, 2016, p. 441.

20 *Legislation Act 2003*, s. 42(1).

21 *Legislation Act 2003*, paragraph 42(1)(b).

22 *Legislation Act 2003*, subsection 42(2).

disallowance process cannot be frustrated by the House not making time to consider the motion for disallowance within the 15 sitting day period. Any disallowance is not retrospective. Actions taken prior to the disallowance do not become unlawful.

1.20 This disallowance procedure may be modified by the instrument's authorising legislation. The primary legislation may modify the period in which the legislative instrument may be subject to disallowance,[23] or alter the process by which the legislative instrument is deemed to be disallowed.[24]

Exemptions from disallowance framework

1.21 Some legislative instruments, however, are exempt from disallowance and thus from full parliamentary scrutiny. There is no requirement for exempt legislative instruments to be tabled in the Parliament (though many are), but they are registered on the Federal Register of Legislation. It is not currently possible to search the register for non-disallowable instruments as a category.[25]

1.22 The manner in which the exemption from disallowance framework operates, whether through the enabling legislation or regulation, and views as to its constitutionality, are addressed in chapter 3.

Legislative instruments exempt from disallowance are not scrutinised

1.23 Instances of instruments being disallowed are not common. Between 2010 and 2019, of the thousands of pieces of delegated legislation tabled in the Parliament, only 17 were disallowed.[26] Nevertheless, the mechanism of disallowance serves a crucial function. Delegated legislation does not always deal with purely technical or administrative matters, it can also deal with matters of policy

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23 For instance, *Public Governance, Performance and Accountability Act 2013*, section 79 (relating to determinations made under subsection 78(1) or (3) of that Act) reduces the 15-day disallowance period to five days. Modifications to the disallowance procedure are discussed in greater detail in the committee's 2019 report on the parliamentary scrutiny of delegated legislation. Standing Committee on Regulations and Ordinances, *Parliamentary Scrutiny of Delegated Legislation*, 3 June 2019, pp. 114–115.

24 For instance, *Commercial Broadcasting (Tax) Act 2017*, section 13 requires the resolution to disallow to be passed (that is, the Parliament has to positively pass a resolution to disallow), it does not allow for it to be passed through the lapsing of the 15 days. Standing Committee on Regulations and Ordinances, *Parliamentary Scrutiny of Delegated Legislation*, 3 June 2019, pp. 114–115.

25 Improving the searchability of the Federal Register of Legislation was a recommendation of the committee's 2019 report, to which the Government agreed. Standing Committee on Regulations and Ordinances, *Parliamentary Scrutiny of Delegated Legislation*, 3 June 2019, pp. 121–124; Australian Government, *Australian Government Response to the Senate Standing Committee on Regulations and Ordinances Report: Parliamentary Scrutiny of Delegated Legislation*, November 2019, p. 5.

26 The Department of Health calculates the number slightly differently. It estimates that over the past five years, more than 5,000 disallowable delegated legislative instruments have been made, and only 15 (in part or entirely) have been disallowed. This is less than one half of one per cent of all disallowable delegated legislative instruments made. Department of Health, *Submission 27*, p. 1; Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Interim report*, 2 December 2020, p. 62.

significance. It is through the disallowance process that delegated legislation can be scrutinised on technical and policy grounds.

1.24 Around 1,500 pieces of disallowable delegated legislation are tabled in the Parliament each year (see below). The Scrutiny of Delegated Legislation Committee examines delegated legislation for compliance with a number of technical principles that go to whether the matters in delegated legislation are, amongst other things:

- in accordance with the enabling Act and thus lawful;
- constitutionally valid;
- do not unduly trespass on personal rights and liberties;
- are clearly drafted and accompanied by appropriate explanatory materials;
- provide for independent review where relevant; and
- do not contain matters more appropriate for parliamentary enactment.

1.25 If the committee has concerns, it brings these concerns to the attention of the Senate.[27]

1.26 While the scope of committee's scrutiny function is bounded by technical matters, the committee has the ability to escalate delegated legislation that deals with policy issues to parliamentary committees and the Senate generally.[28]

1.27 When an instrument is exempt from disallowance, this scrutiny does not occur. There is a risk the executive may put forward controversial laws without the committee being able to inform the Senate of such matters. If uninformed, the Senate may not act on matters that raise technical scrutiny and policy concerns.

Rising trend in delegated legislation and exemptions from disallowance

1.28 The volume of delegated legislation made each year is increasing over time. From an average in the mid-1980s of around 850 disallowable instruments tabled each year, it currently sits around 1,500 each year.[29]

1.29 The committee's interim report for this inquiry tabled in December 2020 noted that the trend towards an increase in delegated legislation is accompanied by a trend over time for increasing amounts of delegated legislation to be exempt from disallowance. In 2019, delegated legislation exempt from disallowance stood at

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27 The committee's scrutiny process is described in: Standing committee for the Scrutiny of Delegated Legislation, *Guidelines*, 1st edition, February 2020.

28 The Senate, *Standing Orders and other orders of the Senate*, January 2020, SO 23(4); 25(2)(a).

29 Standing Committee on Regulations and Ordinances, *Parliamentary Scrutiny of Delegated Legislation*, 3 June 2019, p. 11; Standing Committee for the Scrutiny of Delegated Legislation, *Annual Report 2019*, 17 June 2020, p. 15; Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Interim report*, 2 December 2020, p. 109.

nearly 20 per cent. In 2020, 17.4 per cent of delegated legislation was exempt from disallowance, continuing the upward trend over time.

Table 1: Instruments exempt from disallowance 2014–2020

Year	Exempt	Disallowable	Total	Percentage exempt
2020	299	1,416	1,715	**17.4%**
2019	330	1,345	1,675	**19.7%**
2018	256	1,630	1,886	**13.6%**
2017	265	1,436	1,701	**15.6%**
2016	347	1,698	2,045	**17.0%**
2015	361	1,840	2,201	**16.4%**
2014	277	1,609	1,886	**14.7%**

1.30 The committee is not alone in noticing this development. Associate Professor Lorne Neudorf states it suggests exemptions from disallowance are being used to avoid parliamentary accountability for decisions and policy choices. This is not something that is in the public interest.[30]

Structure of this report

1.31 This report is divided into three parts. Part I describes the nature and use of delegated legislation. It discusses the background to the inquiry and the committee's interim report tabled in December 2020.

1.32 Part II examines first the existing framework for exemptions from disallowance, including the reasons legislation is delegated and the significance of the disallowance mechanism. It canvasses views as to the constitutionality of exempting delegated legislation from disallowance, and discusses more broadly the role of the Parliament in a representative democracy. Second, the part looks at how the existing framework operates in practice and assesses a number of rationales that have been put forward to justify an exemption from disallowance. The paucity of guidance as to appropriate grounds to justify an exemption from disallowance is discussed. The part closes with a case study of the Advance to the Finance Minister determinations.

1.33 Part III is forward looking. It discusses a range of issues with a view to ensuring exemptions from disallowance are appropriate. It examines perspectives on

30 Associate Professor Lorne Neudorf, *Submission 11*, p. 6.

the substance and status of guidance. The critical role of the committee and the necessity for its scrutiny principles to be expanded is argued.

1.34 The report closes with a discussion of the views of the committee, and makes 11 recommendations.

Part I – Background

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Part II – The existing framework for exemptions from disallowance

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Chapter 2

Background to the inquiry and final report

Given its importance to the contemporary legal system, we must take the process of making delegated legislation seriously.[1]

2.1 This inquiry has arisen from long-running concerns about the substance of delegated legislation, the increasing proportion of delegated legislation exempt from disallowance, and the use of delegated legislation to respond to the COVID-19 pandemic.

2019 Inquiry into the parliamentary scrutiny of delegated legislation

2.2 In 2019, the committee (then the Senate Standing Committee on Regulations and Ordinances) conducted an inquiry into parliamentary scrutiny of delegated legislation. It noted the significant work of the committee was not widely known, and in any case was undermined by a lack of understanding of the role the Parliament plays in exercising control over delegated legislation.[2]

2.3 The committee called for the Parliament to take seriously its scrutiny role, and to take note of the concerns raised by the committee and work to resolve these concerns.[3]

2.4 The 2019 report made 22 recommendations and notably resulted in amendments to the Senate standing orders in November 2019 to expand the committee's scrutiny powers under standing order 23.[4] This has resulted in parliamentarians having a greater awareness of the committee and the importance of its work.

2.5 The government identified nine recommendations that applied to itself.[5] Of the nine recommendations, it agreed with one and a half (recommendation 15(b) and recommendation 16, discussed below).

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1 Dr Lorne Neudorf, Deputy Dean of Law & Associate Professor, Adelaide Law School, University of Adelaide, *Committee Hansard*, 31 August 2020, p. 20.

2 Senate Standing Committee on Regulations and Ordinances, 2019, *Parliamentary Scrutiny of Delegated Legislation*, 3 June 2019, p. ix.

3 Senate Standing Committee on Regulations and Ordinances, 2019, *Parliamentary Scrutiny of Delegated Legislation*, 3 June 2019, p. ix.

4 The amendments also clarified the power of Senate legislation committees to scrutinise the policy of legislative instruments made within their portfolios.

The Senate, *Standing Orders and other orders of the Senate*, January 2020, SO 25(2)(a).

5 The Government responded to recommendations 8, 11, 14, 15–19, and 21. Australian Government, *Australian Government Response to the Senate Standing Committee on Regulations and Ordinances Report: Parliamentary Scrutiny of Delegated Legislation*, November 2019.

Concerns raised about exemptions from disallowance

2.6 The 2019 report foreshadowed the committee's growing concerns with legislative instruments exempted from disallowance and the undermining of the Parliament's role in scrutinising legislation. The committee expressed concern at the time that bills frequently sought to exempt instruments made under the provisions of the bill from disallowance without adequate justification for doing so. While the Scrutiny of Bills Committee routinely raised concerns about proposed exemptions from disallowance, the committee expressed some frustration that 'the exemptions are nevertheless enacted'.[6]

2.7 Amongst other things, the committee recommended all exemptions from disallowance be placed in primary legislation (recommendation 15(a)) and appropriate guidance be produced by the government (recommendation 15(b)). The government responded:

- it did not support recommendation 15(a) to amend the Legislation Act to ensure exemptions from disallowance are contained in primary legislation, on the basis this would undo changes effected by the *Acts and Instruments (Framework Reform) Act 2015*, and that it would be 'impractical given the substantial time and resources required to redraft existing delegated legislation and primary legislation'; and
- it supported recommendation 15(b) that legislative instruments should only be exempted from disallowance in very limited circumstances and undertook to publish guidance regarding such circumstances.[7]

2.8 The government has yet to publish any guidance on the 'very limited circumstances' in which legislative instruments should be exempted from disallowance, and the committee returns to this undertaking in its recommendations.

2.9 Similarly, the government supported recommendation 16 that the Office of Parliamentary Counsel would modify the Federal Register of Legislation to allow instruments exempt from disallowance to be readily identified. The government has yet to complete this work, which it estimated would be delivered in late 2020.[8]

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6 Senate Standing Committee on Regulations and Ordinances, 2019, *Parliamentary Scrutiny of Delegated Legislation*, 3 June 2019, p. 123.

7 Australian Government, *Australian Government Response to the Senate Standing Committee on Regulations and Ordinances Report: Parliamentary Scrutiny of Delegated Legislation*, November 2019, p. 5.

8 Australian Government, *Australian Government Response to the Senate Standing Committee on Regulations and Ordinances Report: Parliamentary Scrutiny of Delegated Legislation*, November 2019, p. 5.

Inquiry terms of reference

2.10 On 30 April 2020, the committee resolved, under Standing Order 23(12), to inquire into and report on the exemption of delegated legislation from parliamentary oversight, with particular regard to:

(a) the appropriateness and adequacy of the existing framework for exempting delegated legislation from parliamentary oversight, including:

i. the amount and nature of delegated legislation currently exempt from parliamentary oversight;

ii. the grounds upon which delegated legislation is currently made exempt from parliamentary oversight;

iii. the manner in which delegated legislation is currently made exempt from parliamentary oversight; and

iv. the appropriateness of exempting delegated legislation made in times of emergency, including in response to the COVID-19 pandemic, from parliamentary oversight; and

(b) whether the existing framework for exempting delegated legislation from parliamentary oversight should be amended, and, if so, how, including:

i. the grounds upon which it is appropriate to exempt delegated legislation from parliamentary oversight; and

ii. the options available to ensure appropriate and adequate parliamentary oversight of delegated legislation in times of emergency.

Interim report of the inquiry

2.11 The committee tabled an interim report for this current inquiry on 2 December 2020. The interim report primarily discussed:

- the appropriateness of exempting delegated legislation made in times of emergency, including in response to the COVID-19 pandemic, from parliamentary oversight;[9] and
- the options available to ensure appropriate and adequate parliamentary oversight of delegated legislation in times of emergency.[10]

2.12 In so doing, the report found that both the volume of delegated legislation made by the executive, and the frequent exemption of laws from parliamentary

[9] Term of Reference (a)(iv).

[10] Term of Reference (b)(ii).

oversight, restricts the capacity of the Parliament to perform its scrutiny and lawmaking functions. Systemic issues must be addressed to remedy this situation.[11]

2.13 The importance of the recommendations in the interim report is not lessened by any recommendations in this final report. Eighteen recommendations were made in the interim report and these are listed at Appendix 3.

Focus of this final report of the inquiry

2.14 This final report focusses on exemptions from the disallowance mechanism. It looks broadly at issues of constitutionality, how the current framework for exemptions from disallowance operates, and how the deficiencies in its operation might be addressed. In so doing, it continues the discussion started in the interim report.

Terminology

2.15 For the purposes of this report, parliamentary oversight of delegated legislation is discussed in the context of the disallowance mechanism. The interim report discussed the effectiveness of other methods of parliamentary oversight in times of emergency.

2.16 Although the interim report included notifiable instruments within the definition of delegated legislation, this report refers primarily to legislative instruments when discussing delegated legislation.

Conduct of the inquiry

2.17 The committee advertised the inquiry on its website, and wrote to a number of organisations and individuals to invite them to make submissions by 25 June 2020.

2.18 The committee received 30 submissions, listed at Appendix 1. The public submissions are available on the committee's website.

2.19 The committee held three public hearings:

- 27 August 2020, Canberra;
- 31 August 2020, Canberra; and
- 3 September 2020, Canberra.

2.20 A list of all witnesses that appeared at the hearings can be found at Appendix 2 of this report, and full Hansard transcripts of proceedings, answers to questions taken on notice, and additional information can be found on the committee's website.[12]

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11 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Interim report*, 2 December 2020, p. 3.

12 Further information can be found at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Exemptfromoversight.

Acknowledgments

2.21 The committee acknowledges and thanks all those who assisted with and contributed to the inquiry by making submissions and providing evidence at the public hearings.

2.22 The committee particularly thanks the Committee Secretary, Mr Glenn Ryall, and members of the secretariat for their work in producing this report. The committee also thanks Associate Professor Andrew Edgar, the committee's legal adviser.

Part II — The existing framework for exemptions from disallowance

Chapter 3

The existing framework for exemptions from disallowance and its constitutionality

An exemption [from disallowance] can be described as Parliament relinquishing its role in relation to a certain kind of Federal law made by the executive.[1]

3.1 Fundamental to Australia's constitutional system of government is the separation of powers between the Parliament that makes the laws, the executive that administers the laws, and the judiciary that determines legal disputes. The Constitution vests legislative power in the Federal Parliament and the constitutional principle of responsible government requires the Parliament to hold the executive government to account. Legislative power is not conferred upon the executive.[2]

3.2 There is in the Constitution, however, no strict demarcation between legislative and executive powers. Although only the Parliament can pass legislation, in practice legislation often delegates legislative power to allow for the executive to make regulations and rules.[3]

3.3 The Constitution does not provide specifically for whether the Parliament can or cannot delegate its legislative power to make law to a non-legislative body (such as the executive).[4] Nevertheless, the courts have recognised the Parliament may delegate legislative powers to the executive.[5]

3.4 The issue of constitutionality turns then on the residual level of oversight that remains when legislative power is delegated. Is it the case that a key principle of Australian democracy—that the Parliament retains power over parliamentary

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1 Associate Professor Lorne Neudorf, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 (received 11 September 2020), pp. 35–36.

2 Associate Professor Lorne Neudorf, *Submission 11*, p. 5; Professor Anne Twomey, *Submission 18*, p. [1]; NSW Young Lawyers, *Submission 23*, p. 3.

3 Australian Government Solicitor, *Australia's Constitution pocket edition: with overview and notes by the Australian Government Solicitor*, 14th edition, Commonwealth of Australia, Canberra, p. vii; Professor Gabrielle Appleby, Dr Janina Boughey, Dr Sangeetha Pillai and Professor George Williams, *Submission 1*, p. 2.

4 Mr Jackson Ho, *Submission 9*, p. [2].

The Institute of Public affairs argues delegated legislation is a feature of the Westminster system. Henry VIII was the first monarch to task subordinates to make the equivalent of today's delegated legislation. Institute of Public Affairs, *Submission 16*, p. [5].

5 Professor Gabrielle Appleby, Dr Janina Boughey, Dr Sangeetha Pillai and Professor George Williams, *Submission 1*, pp. 2–3; Institute of Public Affairs, *Submission 16*, p. [7]; Professor Anne Twomey, *Submission 18*, p. [1]; NSW Young Lawyers, *Submission 23*, p. 3.

delegations—is challenged by non-disallowable instruments?[6] Or, is the fact the Parliament has approved the exemptions, and retains the ability to rescind or amend the enabling (primary) legislation, sufficient oversight to ensure constitutionality?

3.5 This chapter discusses views on these issues, beginning with the existing framework for exemptions from disallowance and its significance, then continuing with a discussion of the constitutionality of exemptions from disallowance. It examines the substance of parliamentary control, and closes by considering the role and responsibilities of the Parliament in a parliamentary democracy.

Why the power to make legislation is delegated

3.6 *Odgers' Australian Senate Practice* states 'the essential theory of delegated legislation is that while the Parliament deals directly with general principles, the executive, or other body empowered to make subordinate legislation, attends to matters of administration and detail', though there are also other justifications.[7]

3.7 Notwithstanding their legitimacy, additional justifications for delegated legislation generally speak to issues of practicality:

- it allows Parliament to focus its limited resources on substantial or pressing issues. It is impractical for all legally binding rules to be made by the Parliament itself;[8]
- provides flexibility;[9]
- can be made more quickly than primary legislation;[10]
- reduces the complexity of legislation;[11] and
- allows the application of the law to be adjusted to account for circumstances that cannot be foreseen at the time of the making of the law.[12]

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6 This is suggested by: Professor Gabrielle Appleby, Dr Janina Boughey, Dr Sangeetha Pillai and Professor George Williams, *Submission 1*, pp. 2–3.

7 Harry Evans and Rosemary Laing, eds, *Odgers' Australian Senate Practice*, 14th edition, Department of the Senate, 2016, p. 430.

8 Administrative Review Council, *Rule Making by Commonwealth Agencies*, Report No. 35, Australian Government Publishing Service, 1992, p. 3; Associate Professor Lorne Neudorf, *Submission 11*, p. 3.

9 Associate Professor Lorne Neudorf, *Submission 11*, p. 3.

10 Associate Professor Lorne Neudorf, *Submission 11*, p. 3; Institute of Public Affairs, *Submission 16*, p. [7].

11 Administrative Review Council, *Rule Making by Commonwealth Agencies*, Report No. 35, Australian Government Publishing Service, 1992, p. 4.

12 Harry Evans and Rosemary Laing, eds, *Odgers' Australian Senate Practice*, 14th edition, Department of the Senate, 2016, p. 430. See also: Institute of Public Affairs, *Submission 16*, p. [7]; Mr Grant Moodie, Special Counsel, Chief Legal Office, Australian Securities and Investments Commission, *Committee Hansard*, 3 September 2020, p. 2.

3.8 Justifications for delegated legislation generally carry the assumption the substance of the delegated legislation deals with technical and administrative matters with which the Parliament does not have the time or expertise to deal. However, the committee has previously noted delegated legislation is increasingly being used to make laws on significant policy matters.[13] Although, it must be noted, this is not necessarily contrary to the definition of a legislative instrument in the Legislation Act that allows such instruments to determine or alter the content of the law.[14]

3.9 Through delegated legislation exempted from disallowance, the Parliament gives the executive a significant amount of power to make legislation that cannot be substantively scrutinised by the Parliament. This is particularly the case with Henry VIII clauses (discussed below), and skeleton legislation that leave significant matters of substance to delegated legislation.[15]

The framework for exemptions from disallowance

Legislation Act 2003

3.10 At a general level, exemptions from disallowance are provided for in the *Legislation Act 2003* (Legislation Act). Section 44 establishes the means to exempt instruments from disallowance. It does so by allowing for the disallowance process in section 42 of the Act (see chapter 1) not to apply to instruments in the following three circumstances:

- where primary legislation allows for the creation or operation of an intergovernmental body (involving the Commonwealth and one or more of the states or territories) and the instrument is made by the body or for the purposes of the body or scheme;
- if the primary legislation declares section 42 does not apply in relation to the instrument or provision; or
- a regulation provides that the instrument is not subject to disallowance.[16]

Legislation (Exemptions and Other Matters) Regulation 2015 (LEOM)

3.11 The relevant regulation is the Legislation (Exemptions and Other Matters) Regulation 2015 (LEOM Regulation). The LEOM Regulation was first made following

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13 Standing Committee on Regulations and Ordinances, *Parliamentary scrutiny of delegated legislation*, 3 June 2019, p. 6. See also: Public Interest Advocacy Centre, *Submission 10*, p. 1; Centre for Public Integrity, *Submission 13*, p. [2].

14 *Legislation Act 2003*, s. 8.

15 Mr Jared Wilk, Co-convenor, Human Rights Action Group, NSW Council for Civil Liberties, *Committee Hansard*, 27 August 2020, p. 17.

16 *Legislation Act 2003*, s. 44. See also: Public Interest Advocacy Centre, *Submission 10*, p. 3; Attorney-General's Department, *Submission 14*, pp. 4–5; Department of Agriculture, Water and the Environment, *Submission 17*, pp. 1–2.

amendments to the *Legislation Act 2003* (then the *Legislative Instruments Act 2003*) by the *Acts and Instruments (Framework Reform) Act 2015*. Under the new framework, exemptions from disallowance previously spread across the Legislative Instruments Regulation and the *Legislative Instruments Act 2003* were consolidated into the LEOM Regulation.[17] In the explanatory statement to the regulation, the government stated a central list of exemptions would 'make it easier for users to access information about exemptions'.[18]

3.12 Under subsection 54(2) of the Legislation Act, the LEOM Regulation is not subject to sunsetting. Ordinarily, legislative instruments sunset ten years after they are made, unless exempted from doing so. Sunsetting means an instrument is automatically repealed and ceases to be law. The government may choose to remake the instrument if it considers there remains a need for the instrument. Typically, when a legislative instrument sunsets and is remade, there is an opportunity through the disallowance procedure for the Parliament to reconsider the appropriateness of the content of the instrument.[19] Because it is exempt from sunsetting, the Parliament will not have the opportunity to reconsider the appropriateness of the content of the LEOM Regulation.

3.13 Part 4 of the LEOM Regulation establishes a range of exemptions from disallowance. Section 9 exempts from disallowance four broad classes of legislative instrument:

- an instrument that does not commence unless it is approved by either or both Houses of the Parliament;
- an instrument that is a direction by a Minister to any person or body;
- an instrument (other than a regulation) relating to superannuation; and
- an instrument made under an annual Appropriation Act.[20]

3.14 Section 10 exempts from disallowance particular instruments made under certain provisions of almost 30 pieces of primary legislation.[21]

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17 Legislation (Exemptions and Other Matters) Regulation 2015, *Explanatory Statement to F2015L01475*, pp. 1–2.

18 Legislation (Exemptions and Other Matters) Regulation 2015, *Explanatory Statement to F2015L01475*, pp. 1, 24–25.

The Government also stated it was a response to the 2008 Review of the *Legislative Instruments Act*. Recommendation 42 of this review was to the effect the Attorney-General's Department prepares and publishes on ComLaw a list of exemptions under the *Legislative Instruments Act*, and of any statutory requirements relating to the publication, tabling, disallowance or review of legislative instruments that apply in addition to, or instead of, the *Legislative Instruments Act*. Anthony Blunn, Ian Govey, John McMillan, 2008 *Review of the Legislative Instruments Act 2003*, 31 March 2009, p. 53.

19 See the discussion on sunsetting in chapter 5.

20 Legislation (Exemption and Other Matters) Regulation 2015, s. 9.

3.15 Sections 6 and 7 also specify classes of instruments and a range of particular instruments are not legislative instruments and therefore not subject to any requirements in the Act that apply to legislative instruments, including tabling and disallowance.[22]

Exemptions from disallowance require parliamentary approval

3.16 Despite these broad provisions allowing for exemptions from disallowance, no instruments can be exempted from disallowance without Parliamentary approval or acquiescence (whether directly or indirectly). This is explained by the Attorney-General's Department:

> As exemptions must be set out in primary legislation, or regulations that are themselves subject to disallowance, all proposals for exemptions from disallowance are subject to Parliamentary oversight.[23]

3.17 The Parliament authorises the making of delegated legislation, and the enabling legislation can set the terms, conditions and other criteria considered appropriate to limit the use of the power (including exemptions from disallowance). It is also the case that enabling legislation can be repealed or amended by the Parliament.[24]

3.18 The provisions in the Legislation Act providing for the making of the LEOM Regulation were approved by the Parliament with the passing of the *Acts and Instruments (Framework Reform) Act 2015*.[25] This legislation was of necessity passed prior to the regulation being made. The LEOM Regulation itself was a disallowable instrument and was subject to parliamentary scrutiny. Any amendments to the LEOM Regulation to include further exemptions from disallowance would be subject to disallowance, though as discussed above, the instrument is not subject to sunsetting.[26]

3.19 It must be noted, as the principal LEOM Regulation was not disallowed, the Parliament's ability to revisit the rationale for an exemption from disallowance when it is made pursuant to a provision in the LEOM Regulation is often undermined.[27] It is

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21 Legislation (Exemption and Other Matters) Regulation 2015, s. 10.

22 Legislation (Exemption and Other Matters) Regulation 2015, s. 6–7.

23 Attorney-General's Department, *Submission 14*, pp. 4–5.

24 Associate Professor Lorne Neudorf, *Submission 11*, p. 2. See also: Ms Jacinta Dharmananda, *Submission 25*, p. 8.

25 Item 47 of Schedule 1 repealed and substituted new subsections 44(2) and (3) into the then *Legislative Instruments Act 2003*.

26 Attorney-General's Department, Answers to written questions taken on notice (received 8 October 2020).

27 For example, in some instances, it is not clear on the face of the bill or the accompanying explanatory memorandum that instruments made under a particular enabling provision will be exempt from disallowance under the LEOM Regulation.

technically possible for the Parliament to decide to override the LEOM Regulation and not allow for a piece of delegated legislation to be exempt from disallowance. For reasons discussed in the next section, this is unlikely to occur.

The significance of the disallowance mechanism

> *The responsibilities and actions of Parliament should be understood and evaluated from the starting assumption that it is a critical and responsible actor in the constitutional system.*[28]

3.20 *Odgers' Australian Senate Practice* acknowledges the ability of the executive to make laws has the appearance of a considerable violation of the principle of the separation of powers between the Parliament and the executive. However, this principle has nevertheless been largely preserved:

> …by a system for the parliamentary control of executive lawmaking…founded on the ability of either House of the Parliament to disallow, that is, to veto, such laws made by executive office-holders'.[29]

3.21 Disallowance is widely acknowledged as the principal measure of control the Houses of Parliament can exercise over delegated legislation, and is commonly cited as an important check on the executive's delegated legislative powers.[30] For the Institute of Public Affairs:

> The power to veto or disallow laws made by ministers and agencies is a powerful mechanism for parliamentarians to ensure legislation is consistent with the rule of law and that the rights and liberties of Australians are protected.[31]

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28 Centre for Comparative Constitutional Studies, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 and written (received 10 September 2020), p. 1.

29 Harry Evans and Rosemary Laing, eds, *Odgers' Australian Senate Practice*, 14th edition, Department of the Senate, 2016, p. 429.

30 Mr Richard Pye, Clerk of the Senate*, Submission 3*, p. [1]; Australian Government Solicitor, *Australia's Constitution pocket edition: with overview and notes by the Australian Government Solicitor*, 14th edition, Commonwealth of Australia, Canberra, p. vii.

31 Ms Dara Macdonald, Research Fellow, Institute of Public Affairs, *Committee Hansard*, 27 August 2020, p. 8.

The implications of an exemption from disallowance

> *…the disapplication of s42 of the Legislation Act 2003 (Cth) renders the scrutiny mechanisms available virtually inappreciable…The Senate…has its constitutional role effectively bypassed; it cannot repeal the instrument, and its Delegated Legislation Committee cannot review the instrument under Standing Orders…*[32]

3.22 If disallowance preserves the role of the Parliament established in the Constitution, the exempting of instruments from parliamentary scrutiny might be said to undermine the Parliament's role.

3.23 An exemption from disallowance raises key questions about the accountability of the executive to the Parliament as it effectively prevents scrutiny of delegated legislation: 'When an instrument is exempt from disallowance, the scrutiny mechanisms available are virtually inappreciable'.[33]

3.24 An exemption from disallowance means the Parliament, the institution charged with making laws, loses the chief mechanism it has to prevent delegated legislative power being exercised in a manner not foreseen or provided for in the primary legislation, or in a way that might otherwise be considered undesirable.[34]

3.25 For some, the disallowance procedure plays an indispensable constitutional role. Without the disallowance procedure, the only methods by which an instrument may cease to have effect are judicial review or by the Parliament repealing or amending the enabling legislation. According to the NSW Council of Civil Liberties, there is little chance of either occurring:

> Given the government almost invariably controls the House of Representatives, the chances of parliamentary amendment or repeal are slim. Since the judiciary rightly lacks the constitutional authority to do anything other than declare and enforce the law, it may only invalidate delegated legislation on the basis that it does not fall within the delegated legislative power granted by the enabling legislation.[35]

3.26 This raises the importance of the role of the Senate in the disallowance process. *Odgers' Australian Senate Practice* is dismissive of the House of Representatives' capacity to exercise independent legislative power. It is argued that in practice, the independence required to exercise legislative power is stymied by the fact the executive government initiates most legislation in the House of

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32 NSW Council for Civil Liberties, Answers to written questions taken on notice (received 2 September 2020), p. 6.

33 Mr Jared Wilk, Co-convenor, Human Rights Action Group, NSW Council for Civil Liberties, *Committee Hansard*, 27 August 2020, p. 17.

34 Mr Richard Pye, Clerk of the Senate*, Submission 3*, p. [3].

35 NSW Council for Civil Liberties, Answers to written questions taken on notice (received 2 September 2020), p. 1.

Representatives, has controlled that House for much of its existence through a party majority, and advises the Governor-General. For these reasons, it is concluded 'the task of exercising the legislative power falls upon the Senate'.[36]

The constitutionality of exemptions from disallowance

3.27 It is generally accepted that while the Parliament may delegate legislative power, it may not completely abdicate its legislative power. To do so would be unconstitutional.[37] The question is whether exemptions from disallowance are a complete abdication.

3.28 There is broad agreement the Parliament must retain a level of supervision over the exercise of legislative power it delegates to the executive.[38] There are differing views as to what would satisfy this minimum level of supervision. Arguments as to the practicality of all instruments being subject to disallowance are often balanced against judgements on what constitutes an appropriate level of oversight of executive lawmaking.

3.29 Views as to the constitutionality of delegated legislation exempted from disallowance may be established from constitutional first principles or through reference to case law. Regardless of the route to a judgement on constitutionality, arguments start from the same point: the Parliament is constitutionally responsible for lawmaking.

Assessing constitutionality on the basis of constitutional principle

3.30 For arguments from first principles, the Constitution obligates the Parliament to establish meaningful controls on the executive's use of exemptions and on its use of delegated legislation more generally.[39]

3.31 According to Associate Professor Lorne Neudorf, in being vested with legislative power, Parliament was given public trust and has a constitutional

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36 Harry Evans and Rosemary Laing, eds, *Odgers' Australian Senate Practice*, 14th edition, Department of the Senate, 2016, p. 299. See also, p. 29.

37 See: Professor Gabrielle Appleby, Dr Janina Boughey, Dr Sangeetha Pillai and Professor George Williams, *Submission 1*, pp. 2–3; Jackson Ho, *Submission 9*, p. [2]; Professor Anne Twomey, *Submission 18*, p. [1].

38 Professor Anne Twomey, *Submission 18*, p. [1]; Professor Anne Twomey, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 and written (received 11 September 2020), p. 1.

39 Associate Professor Lorne Neudorf, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 (received 11 September 2020), p. 20.

obligation that flows from this trust to supervise the exercise of legislative power when it is delegated by Parliament to another body.[40]

3.32 Excessive use of delegated legislation, and delegated legislation exempt from oversight:

> …raise a real question of which institution is actually in charge of the Commonwealth's legislative power. Is Parliament fulfilling its constitutional role and responsibilities as lawmaker in chief?[41]

3.33 The Centre for Comparative Constitutional Studies is less equivocal: while acknowledging arguments based on case law, the Centre is of the view the unconstitutionality of non-disallowable delegated legislation could plausibly be made on first principles in the case of legislative instruments exempted from disallowance through delegated legislation (that is, through the LEOM Regulation). The Centre argues in such cases:

> …the Parliament is no longer 'making' legislation, by delegation or otherwise. Rather, Parliament has effectively abdicated rather than exercised its legislative power.[42]

Assessing constitutionality through case law

3.34 From a pragmatic and practical perspective (in terms of time and also technical expertise), executive-made delegated legislation is accepted as a necessity. And the ability of the Parliament to delegate legislative powers to the executive has generally been upheld by the High Court over time.[43]

3.35 However, the Court has not accepted this power on pragmatic or practical grounds. It has accepted delegated legislation as constitutionally permissible, according to the Professor Kristen Rundle:

> …[on] the assumption that Parliament, as the primary lawmaking institution of our constitutional order, would retain control of delegated legislation. So the processes of scrutiny and disallowance are absolutely fundamental to the constitutional justification of why delegated legislation

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40 Associate Professor Lorne Neudorf, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 (received 11 September 2020), p. 22. See also: Professor Kristen Rundle, Co-Director, Centre for Comparative Constitutional Studies, Melbourne Law School, University of Melbourne, *Committee Hansard*, 31 August 2020, p. 2.

41 Associate Professor Lorne Neudorf, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 (received 11 September 2020), p. 22.

42 Centre for Comparative Constitutional Studies, *Submission 12*, p. 14.

43 Professor Kristen Rundle, Co-Director, Centre for Comparative Constitutional Studies, Melbourne Law School, University of Melbourne, *Committee Hansard*, 31 August 2020, p. 2. See also: Professor Anne Twomey, *Submission 18*, p. [1].

> is okay in the first place, because they point to Parliament retaining control as the primary lawmaking institution.[44]

3.36 While the High Court has upheld wide delegations of legislative power, decisions indicate entirely unregulated delegations might be unconstitutional. The submission from Professor Gabrielle Appleby, Dr Janina Boughey, Dr Sangeetha Pillai and Professor George Williams, cites the 1931 decision in *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan*.[45]

3.37 This judgement has often been taken to stand for the proposition there are no enforceable constitutional limits on the delegation of legislative power to the executive. However, Professor Gabrielle Appleby, Dr Janina Boughey, Dr Sangeetha Pillai and Professor George Williams argue the reasoning of some judges in this case indicates there may be a requirement for a minimum level of parliamentary supervision, though this has not been tested.[46]

3.38 Subsequent developments in constitutional law pertaining in particular to the operation of the doctrine of responsible government, specifically *Williams v Commonwealth* (the *Williams* cases),[47] according to Professor Gabrielle Appleby, indicate that the current High Court might require greater parliamentary control and supervision of delegations of legislative power today.[48]

3.39 Although noting judgements in the *Williams* cases had placed an increased emphasis on the role of the Houses of Parliament in scrutiny of executive acts, Professor Anne Twomey highlighted the unanimous judgment in W*ilkie v*

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44 Professor Kristen Rundle, Co-Director, Centre for Comparative Constitutional Studies, Melbourne Law School, University of Melbourne, *Committee Hansard*, 31 August 2020, p. 2.

45 Professor Gabrielle Appleby, Dr Janina Boughey, Dr Sangeetha Pillai and Professor George Williams, *Submission 1*, p. 2; Professor Gabrielle Appleby, *Committee Hansard*, 31 August 2020, p. 14.

46 Professor Gabrielle Appleby, Dr Janina Boughey, Dr Sangeetha Pillai and Professor George Williams, *Submission 1*, p. 2.

The New South Wales Council for Civil Liberties makes a similar point that exemption of delegated legislation from parliamentary disallowance could be an unconstitutional abdication of legislative power. Though this is yet to be determined. New South Wales Council for Civil Liberties, *Submission 22*, p. 4.

47 *Williams v Commonwealth* (2012) 248 CLR 156 (*Williams (No. 1)*); *Williams v Commonwealth* (2014) 252 CLR 416 (*Williams (No. 2)*).

48 Professor Gabrielle Appleby, *Committee Hansard*, 31 August 2020, p. 14; Professor Gabrielle Appleby, Dr Janina Boughey, Dr Sangeetha Pillai and Professor George Williams, *Submission 1*, p. 3.

Commonwealth (2017).[49] Professor Twomey argued if the constitutionality of non-disallowable instruments as a breach of the separation of powers were to be argued before the Court today, it would be likely that the Court would take into account the history of their usage, their significant number, and the consequences of finding each invalid. Accordingly, Professor Twomey is of the view it is unlikely the High Court would find non-disallowable legislative instruments invalid due to a breach of the separation of powers.[50]

3.40 While case law may suggest there are limits on the exemption of instruments from proper scrutiny by the Parliament, for Professor George Williams, it is not yet clear what the limits are.[51]

What constitutes Parliamentary control

Are scrutiny and disallowance necessary for the parliament to retain control of its legislative powers?

3.41 Professor Twomey notes with regard to the constitutionality of delegated legislation exempted from disallowance:

> …legislative power is conferred upon Parliament by the Constitution and to abdicate that power would be to breach that constitutional conferral of power on Parliament. Accordingly, Parliament must retain control over its delegated legislative power and be in a position to supervise the exercise of delegated legislative powers in order to be effective in exercising that control.[52]

3.42 Professor Twomey argues the mechanism of control and supervision is the process of tabling and disallowance.[53] However, Professor Twomey (like others) makes a fine point: while the Parliament cannot fully abdicate its responsibility, it can

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49 This judgement upheld a determination by the Finance Minister to apply the Advance to the Finance Minister and a direction to the Australian Bureau of Statistics under section 9 of the *Census and Statistics Act*. Both were non-disallowable instruments, and both gave effect to actions to which the Senate objected. Professor Anne Twomey, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 and written (received 11 September 2020), p. 1.

See discussion on the Advance to the Finance Minister Determination in chapter 4.

50 Professor Anne Twomey, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 and written (received 11 September 2020), p. 1. See also: Associate Professor Lorne Neudorf, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 (received 11 September 2020), pp. 16–21.

51 Professor George Williams, *Committee Hansard*, 31 August 2020, p. 15.

52 Professor Anne Twomey, *Submission 18*, p. [1].

53 Professor Anne Twomey, *Submission 18*, p. [1].

delegate it. There are instances where exemptions from disallowance may be reasonable (and views on this are discussed in chapter 4).[54]

3.43 Professor Kristen Rundle is less equivocal and argues if one accepts the principle that the Constitution situates the Parliament as the primary lawmaking institution, and allows for delegated legislation on the basis of continuing and ultimate parliamentary control of that delegated legislation, then it follows there must be effective parliamentary control.[55]

3.44 In particular, this parliamentary control comes through the disallowance procedure and its availability:

> …disallowance is not just a technical process that your committee [Scrutiny of Delegated Legislation Committee] can instigate; it's actually a principle that serves the operation of our constitutional order and, specifically, the centrality of Parliament's lawmaking powers within it…it is not simply a presumption that can be rebutted when convenient…[56]

3.45 The disallowance mechanism, according to the Centre for Comparative Constitutional Studies, is more than a potential outcome invalidating a legislative instrument. The disallowance mechanism encompasses initial scrutiny by the Scrutiny of Delegated Legislation Committee in accordance with the scrutiny principles, followed potentially by disallowance deliberation in the chamber, and possibly disallowance.[57]

Is it sufficient that Parliament retains the ability to amend the enabling legislation?

3.46 Although some argue the disallowance mechanism is essential for Parliamentary scrutiny, others are of the view the Parliament does not abdicate its responsibility by allowing exemptions from disallowance because it remains able to change the laws that provide for the delegated legislation.

3.47 Professor Twomey is of the view that in itself, delegating legislative power without disallowance is not unconstitutional. This is because the Parliament retains the ability to amend the enabling legislation and withdraw the delegation. For

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54 At a practical level, that there is too much delegated legislation for the Parliament to seriously consider is regarded as both reality and a problem. Disallowance is the mechanism by which the Parliament can oversight delegated legislation, but the capacity for this power to be used effectively is limited by the sheer scale of delegated legislation. Centre for Public Integrity, *Submission 13*, p. [2].

55 Professor Kristen Rundle, Co-Director, Centre for Comparative Constitutional Studies, Melbourne Law School, University of Melbourne, *Committee Hansard*, 31 August 2020, p. 2. See also: Professor Anne Twomey, *Committee Hansard*, 31 August 2020, p. 8.

56 Professor Kristen Rundle, Co-Director, Centre for Comparative Constitutional Studies, Melbourne Law School, University of Melbourne, *Committee Hansard*, 31 August 2020, p. 2.

57 Centre for Comparative Constitutional Studies, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 and written (received 10 September 2020), p. 2.

Professor Twomey, there is no requirement for disallowance and it is up to the Parliament to determine how it supervises delegated legislation:

> Parliament would completely abdicate its responsibility if it was unable to change the laws that provided for the delegated legislation.[58]

3.48 However, Professor Twomey continues, there is no systematic way, other than through parliamentary committees, for delegated legislation to be scrutinised and if delegated legislation is not scrutinised:

> ...it can lead to Parliament effectively abdicating its power by simply not knowing how that power is being exercised, and, from a practical point of view, that's obviously inappropriate.[59]

3.49 That Parliament can amend the enabling legislation is not accepted as a rationale for exemption by the Human Rights Action Group, in part pointing to the reality of the party system in the Australian Parliament:

> It is not enough to say that Parliament can always repeal the empowering provision; as has been recognised since Federation…When an instrument is exempt from disallowance, the scrutiny mechanisms available are virtually inappreciable. The Senate, generally the House, if there is one, without a government majority, has its constitutional role effectively bypassed; it cannot repeal the instrument, and its Delegated Legislation Committee cannot review the instrument under Standing Orders, unless the instrument is also subject to disapproval or affirmation by the Senate.[60]

3.50 It is unclear whether the ability to withdraw the delegation would satisfy others who argue there must be substance to the oversight. The Centre for Comparative Constitutional Studies argues Parliament cannot constitutionally absolve itself from effective control of all legislative instruments because control is critical to the validity of all instruments. As such, the mechanism of parliamentary control must not merely exist, it must be effective in practice in ensuring control. A

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58 Professor Anne Twomey, *Committee Hansard*, 31 August 2020, p. 12; Professor Anne Twomey, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 and written (received 11 September 2020), p. 1. See also: Attorney-General's Department, *Submission 14*, p. 5 (fn 3).

59 Professor Anne Twomey, *Committee Hansard*, 31 August 2020, p. 12. See also: Mr Jared Wilk, Co-convenor, Human Rights Action Group, NSW Council for Civil Liberties, *Committee Hansard*, 27 August 2020, p. 17; Centre for Comparative Constitutional Studies, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 and written (received 10 September 2020), pp. 1–2.

60 Mr Jared Wilk, Co-convenor, Human Rights Action Group, NSW Council for Civil Liberties, *Committee Hansard*, 27 August 2020, p. 17.

mechanism that allows exemption from disallowance is 'foundationally problematic in constitutional terms'.[61]

3.51 Similarly, Professor Gabrielle Appleby, Dr Janina Boughey, Dr Sangeetha Pillai and Professor George Williams argue the lawmaking responsibilities of the Parliament extend beyond passing the laws that provide for delegated legislation: 'there must be a procedure to ensure the executive exercises the delegated powers within the framework of the legislation, according to the intentions of the Parliament'.[62] The submission suggests disallowance is the only mechanism through which the executive can be held to account for the powers it exercises in making delegated legislation; 'there is no equivalent or alternative political or legal mechanism'.[63] Nevertheless, like others, Professor Gabrielle Appleby, Dr Janina Boughey, Dr Sangeetha Pillai and Professor George Williams accept some limited exemptions may be justified (and this is discussed in chapters 4 and 5).

The special case of framework bills and investment mandates

3.52 A framework bill establishes the authority and broad principles for a legislative scheme, but leaves the detail on the scope of the scheme and how the scheme will operate to delegated legislation. This delegated legislation may not be available in draft form before the enabling legislation is passed by the Parliament.[64]

3.53 A particular instrument typically exempt from disallowance is an investment mandate. There are six Commonwealth investment funds established under their own legislation for the purpose of generating funding to finance specific policy outcomes.[65] The legislation for each fund establishes the purpose of the fund, the circumstances that must be met to withdraw and spend from the fund, the mechanics of how the monies are to be invested, and requires the responsible minister to issue an investment mandate. It is the investment mandate that provides operational and technical direction to the Board for its investment functions for each fund. These investment mandates primarily establish the appropriate benchmark rate of return and acceptable level of risk.[66]

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61 Centre for Comparative Constitutional Studies, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 and written (received 10 September 2020), pp. 1–2.

62 Professor Gabrielle Appleby, Dr Janina Boughey, Dr Sangeetha Pillai and Professor George Williams, *Submission 1*, p. 3. See also: Institute of Public Affairs, *Submission 16*, p. [3].

63 Professor Gabrielle Appleby, Dr Janina Boughey, Dr Sangeetha Pillai and Professor George Williams, *Submission 1*, p. 3.

64 Standing Committee on Regulations and Ordinances, *Parliamentary Scrutiny of Delegated Legislation*, 3 June 2019, pp. 82–83.

65 These funds, managed by the Future Fund Board of Guardians and supported by the Future Fund Management Agency are: Future Fund, Medical Research Fund, DisabilityCare Australia Fund, Aboriginal and Torres Strait Islander Land and Sea Future Fund, Future Drought Fund, and Emergency Response Fund. Department of Finance, *Submission 28*, p. 7.

66 Department of Finance, *Submission 28*, pp. 7–8.

3.54 Appropriate parliamentary oversight is challenged by framework bills that leave all substantive details in relation to the operation of new legislative schemes to complex delegated legislation that is often unavailable when the bill is being debated in the Parliament. As a consequence, according to the Clerk of the Senate:

> …the Parliament is effectively asked to sign a blank cheque for a legislative scheme where key elements of the legislation are not specified. If exemption from disallowance is coupled with a legislative scheme that established only a framework and a broad power to lay down the details of the scheme in delegated legislation, it might be thought that Parliament was largely abdicating its legislative role.[67]

3.55 The Scrutiny of Bills Committee highlighted the case of ministerial directions to funds about investment functions. Bills such as the Future Drought Fund Bill 2018 and the National Housing Finance and Investment Corporation Bill 2019, provided for an investment mandate to outline the operational details of the fund. Such investment mandates are often exempt from disallowance on the grounds they are directions from the minister.[68]

3.56 Provisions like these prevent parliamentary oversight of crucial details regarding how public money will be spent or invested. The Scrutiny of Bills Committee is of the view there are methods that would allow for parliamentary scrutiny while ensuring commercial and operational certainty. This includes providing that an investment mandate will not come into force until the disallowance period has passed.[69]

Role and responsibilities of the Parliament in a representative democracy

…there's a cultural shift needed here, back towards the primacy of Parliament.[70]

3.57 Aside from constitutional arguments, the role the Parliament carries out—its functioning as an institution—is said to be at the heart of the compact upon which representative government rests. Removing the Parliament's power to scrutinise legislation, according to the Canberra Alliance for Participatory Democracy, undermines the relationship between the people and the representatives they elect to make laws. The Alliance writes:

> …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.[71]

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67 Mr Richard Pye, Clerk of the Senate*, Submission 3*, p. [3]. See also: Public Interest Advocacy Centre, *Submission 10*, p. 2.

68 Scrutiny of Bills Committee, *Submission 4*, p. 3.

69 Scrutiny of Bills Committee, *Submission 4*, p. 3.

70 Professor Kristen Rundle, Co-Director, Centre for Comparative Constitutional Studies, Melbourne Law School, University of Melbourne, *Committee Hansard*, 31 August 2020, p. 3.

3.58 Beyond this, the debate of legislation has important functions in a democracy. For Associate Professor Neudorf:

> …it is within the ordinary parliamentary process where we find the principles of accountability and transparency that help make good legislation. These principles also protect the legitimacy of Parliament to make laws in a democratic society. While it may be slow-going, the process of three readings of draft legislation in two chambers, open debate, committee study and a public vote ensures that parliamentarians must squarely face their choices in making new law…
>
> Delegated legislation may be made behind closed doors without adequate warning, and without an opportunity for robust debate or discussion. This attenuated lawmaking process is problematic in a democratic society that values the rule of law.[72]

3.59 Whether directly or indirectly through the LEOM Regulation, the Parliament allows for exemptions from disallowance. The Centre for Comparative Constitutional Studies questions whether the Parliament is taking seriously, or paying sufficient attention to, the Senate Scrutiny of Bills Committee's concerns in this regard.[73] Bills are passed without amendments to provisions that allow for exemptions from disallowance. The Centre stated:

> We submit that this record of insufficient parliamentary engagement with concerns repeatedly raised about the designation of legislative instruments as not subject to disallowance is deeply worrying. In our view it indicates a significant failure on the part of Parliament to both perform its constitutional function of calling the executive to account, and to ensure that it remains the primary lawmaking institution within our constitutional system. It arguably also lies at the root of the problem of the increasing number of legislative instruments so designated.[74]

3.60 This broad concern was raised by the committee in its 2019 report, noting in particular the damaging practice of leaving significant matters of policy to delegated legislation:

> …despite the Scrutiny of Bills Committee's best efforts, warnings regarding the inappropriate delegation of legislative powers are routinely ignored, and legislation is enacted that leaves significant matters to delegated legislation, or allows delegated legislation to amend primary legislation.[75]

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71 Canberra Alliance for Participatory Democracy, *Submission 6*, pp. 1–2.

72 Associate Professor Lorne Neudorf, *Submission 11*, p. 3.

73 Professor Kristen Rundle, Co-Director, Centre for Comparative Constitutional Studies, Melbourne Law School, University of Melbourne, *Committee Hansard*, 31 August 2020, p. 3.

74 Centre for Comparative Constitutional Studies, *Submission 12*, p. 7.

75 Standing Committee on Regulations and Ordinances, *Parliamentary Scrutiny of Delegated Legislation*, 3 June 2019, p. 90.

3.61 It may also be the case that parliamentarians are not aware of the implications of exemptions from disallowance when bills are considered and passed by the Parliament.[76]

3.62 In closing, Professor Twomey reflects on the power and responsibilities of the Parliament:

> In the end, it's the Parliament, and the houses of Parliament, that control the matters. So if Parliament is willing to let the executive make those sorts of decisions about what is disallowable and what is not then it's Parliament ceding that power to the executive.[77]

3.63 It is to the practice of this power that the report turns next, examining the rationales the Parliament has historically accepted for exemptions from disallowance and views on their appropriateness.

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[76] See, for instance, the exchange between Senator Kim Carr and Mr Morgan Begg, Research Fellow, Institute of Public Affairs, *Committee Hansard*, 27 August 2020, p. 11.

[77] Professor Anne Twomey, *Committee Hansard*, 31 August 2020, p. 8.

Chapter 4

The existing framework for exemptions from disallowance in operation

This may seem like a convincing rationale at first…[1]

4.1 The existing framework for exemptions from disallowance allows for a wide range of exemptions through primary or enabling legislation, and through the LEOM Regulation. The LEOM Regulation itself specifies broad categories and specific instruments that are exempt from disallowance. By passing primary legislation that contains exemptions from disallowance, the Parliament has established precedent for a wide range of reasons exemptions from disallowance may be permitted.

4.2 The issue of exemptions from disallowance is exacerbated by there being no requirement that such exemptions are justified in either the explanatory materials for the enabling legislation, or the explanatory statement for the legislative instruments themselves. Current guidance materials are severely deficient in their advice to legislative drafters on the grounds where it may be appropriate to exempt instruments from disallowance.

4.3 This chapter examines first the substance of the guidance material for legislative drafters as it relates to exemptions from disallowance. Perhaps consequent of the lack of guidance, ministers have put forward and the Parliament has acquiesced to a number of questionable grounds for exemptions from disallowance. Rationales for exemptions from disallowance in legislation passed by the Parliament are discussed.

4.4 The chapter then examines a particular type of instrument exempt from disallowance, the Advance to the Finance Minister determinations. This particular case study demonstrates how exemptions from disallowance can be used to frustrate the expressed intent of the Parliament.

4.5 Ultimately, it is accepted there may legitimately be grounds for exemptions from disallowance. These grounds, however, are significantly smaller than is current practice.

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1 NSW Council for Civil Liberties, Answers to written questions taken on notice (received 2 September 2020), p. 3.

No requirement to explain or justify an exemption from disallowance

4.6 Section 44 of the *Legislation Act 2003* (Legislation Act) allows for delegated legislation to be exempted from disallowance if this is provided for in the enabling legislation or through the LEOM Regulation.

4.7 However, there is no requirement for a bill that exempts delegated legislation from disallowance to be accompanied by an explanation justifying the exemption. The LEOM Regulation itself is also deficient in the sense it does not provide 'grounds' or a 'rationale' for exemption, only a list of legislative instruments and classes of legislative instruments that are not subject to disallowance. Further, there is no official guidance as to when exempting delegated legislation from disallowance is appropriate or justified, in either a bill or the LEOM Regulation.[2]

4.8 Other than from government departments,[3] this inquiry has not been able to identify any significant support for the operation of the current framework; quite the opposite. Associate Professor Neudorf perhaps represented the views of many when he stated the situation is 'entirely inadequate and unsatisfactory' because there is no objective way to determine the appropriateness of a particular exemption.[4]

4.9 It might generally be agreed the exemptions in various pieces of primary legislation and those provided for through section 44 of the Legislation Act are overly broad. Absent the requirement to actually justify an exemption, in the words of the Institute for Public Affairs, the current framework:

> …will invariably capture delegated legislation where there is no reasonable justification for exempting it from disallowance (to the extent that the

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2 The Australian Securities and Investments Commission, for instance, stated the Legislation Act and LEOM Regulation can be unclear as to whether an exemption from disallowance is actually provided for. This is discussed further in chapter 5. Australian Securities and Investments Commission, Answers to written questions taken on notice (received 22 September 2020), pp. [1–3]; Mr Grant Moodie, Special Counsel, Chief Legal Office, Australian Securities and Investments Commission, *Committee Hansard*, 3 September 2020, p. 1. See also: Public Interest Advocacy Centre, *Submission 10*, p. 3; Ms Jacinta Dharmananda, Answers to written questions taken on notice (received 18 September 2020), p. 1.

3 See, for instance: Minister for Veterans' Affairs, *Submission 2*, p. 3; Department of Home Affairs, *Submission 8*, pp. 3–5; Attorney-General's Department, *Submission 14*, p. 8; Department of Agriculture, Water and the Environment, *Submission 17*, pp. 1–2; Department of Education, Skills and Employment, *Submission 26*, p. 5; Department of Health, *Submission 27*, p. 2; Department of Finance, *Submission 28*, pp. 7, 9–10.

4 Associate Professor Lorne Neudorf, *Submission 11*, p. 7. See also the views of: Public Interest Advocacy Centre, *Submission 10*, p. 3; Centre for Comparative Constitutional Studies, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 and written (received 10 September 2020), pp. 9–10; Mr Jared Wilk, Co-convenor, Human Rights Action Group, NSW Council for Civil Liberties, *Committee Hansard*, 27 August 2020, p. 17; Ms Jacinta Dharmananda, *Committee Hansard*, 27 August 2020, p. 21; Dr Gabrielle Appleby, *Committee Hansard*, 31 August 2020, p. 14.

Parliament is of the view that there is a reasonable justification for exempting it from disallowance).[5]

Current guidance materials

4.10 There are currently three substantive documents that contain guidance for the drafting of delegated legislation:

- Office of Parliamentary Counsel, *Instruments Handbook*;
- Office of Parliamentary Counsel, *Drafting Direction 3.8: Subordinate legislation*; and
- Department of Prime Minister and Cabinet, *Legislation Handbook*.

4.11 Being largely focussed on technical compliance with the Legislation Act, none of these documents provides clear policy guidance for exemptions from disallowance. While they may outline the approval process for exempting instruments (including approval by the Attorney-General's Department or the Attorney-General) and provide other technical detail, there is no substantive guidance on when an exemption would be appropriate or justified, or the factors the Attorney-General's Department should consider in giving policy approval for an exemption.[6]

4.12 For its part, the Attorney-General's Department states it consults with the instructing agency to 'ensure that appropriate justification exists and is set out in the bill's explanatory memorandum'.[7]

Instruments Handbook

4.13 The *Instruments Handbook* does not include any guidance on rationales that might be appropriate for exemptions from disallowance, stating that most exemptions are straightforward because they are permitted by enabling legislation. This is something of a circular argument that provides no substantive justification. However, the Handbook does note exemptions that are 'more generic', particularly those that refer to the 'purpose of an instrument', can be more difficult to apply and advises agencies to seek legal advice on the exemption.[8]

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5 Institute of Public Affairs, Answers to questions taken on notice, public hearing, Canberra, 27 August 2020 and written (received 11 September 2020), p. [4].

6 See: Professor Gabrielle Appleby, Dr Janina Boughey, Dr Sangeetha Pillai and Professor George Williams, *Submission 1*, p. 6; Scrutiny of Bills Committee, *Submission 4*, p. 2; Legislative Review Committee of the Parliament of South Australia, *Submission 19*, p. 3.

7 This reference is in relation to exemptions created through primary legislation. Attorney-General's Department, *Submission 14*, p. 5. See also: Mr Stephen Oxley, First Assistant Secretary, Heritage, Reef and Wildlife Trade Division, Department of Agriculture, Water and the Environment, *Committee Hansard*, 3 September 2020, p. 22.

8 Office of Parliamentary Counsel, *Instruments Handbook*, July 2019, p. 67.

4.14 Although stating 'the explanatory statement for an instrument should be as clear and helpful as possible', the *Instruments Handbook* does not require any rationale to be provided if an instrument is exempt from disallowance.[9] Neither does section 15J of the Legislation Act, which establishes the requirements for an explanatory statement and upon which the OPC guidance is based.[10]

Drafting Direction 3.8: Subordinate legislation

4.15 The Office of Parliamentary Council drafting direction for subordinate legislation states notwithstanding exemptions provided for in the Legislation Act and LEOM Regulation, there is 'an expectation' that legislative instruments will be subject to disallowance unless there is 'a special reason that justifies a full or partial exemption'.[11] A 'special reason' is not defined.

4.16 If, however, 'the policy is that the disallowance regime should not apply to the instrument', and the instrument is legislative in character, the document states the exemption will require the agreement of the Attorney-General's Department or the Attorney-General.[12]

4.17 The drafting direction does not advise that a rationale for the exemption be provided, in either the explanatory memorandum of the enabling legislation or the explanatory statement of the instrument itself.

Legislation Handbook

4.18 The Legislation Handbook similarly provides little guidance on appropriate rationales for exemption from disallowance. It states there must be a 'strong justification' to depart from the Legislation Act, suggesting a strong justification would be where parliamentary disallowance may cause 'uncertainty for business if the instrument is to be relied upon from the date it takes effect'.[13] The legitimacy of this rationale is discussed below.

4.19 The handbook nevertheless highlights the object of the Legislation Act to ensure access to, and parliamentary scrutiny of, laws affecting the public, in addition

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9 Office of Parliamentary Counsel, *Instruments Handbook*, July 2019, p. 57.

10 *Legislation Act 2003*, s. 15J. See also: Ms Jacinta Dharmananda, *Submission 25*, pp. 6–7.

11 Office of Parliamentary Counsel, *Drafting Direction 3.8: Subordinate legislation*, June 2020, p. 12.

12 Office of Parliamentary Counsel, *Drafting Direction 3.8: Subordinate legislation*, June 2020, p. 17.

The Attorney-General's Department, however, stated that for exemptions contained in primary legislation, there is no formal approval process as such. Portfolio ministers have ultimate responsibility for exemptions in primary legislation. Mr Andrew Walter, First Assistant Secretary, Integrity and Security Division, Attorney-General's Department, *Committee Hansard*, 3 September 2020, p. 5.

13 Department of Prime Minister and Cabinet, *Legislation Handbook*, February 2017, p. 34. See also: Ms Jacinta Dharmananda, *Submission 25*, pp. 6–7.

to improving the transparency and integrity of the making of legislative instruments. It warns:

> …the Senate Standing Committee for the Scrutiny of Bills is likely to consider carefully any bill that proposes the exemption of an instrument that would normally have been subject to the Legislation Act's requirements. It is therefore important that the explanatory memorandum states clearly why the exemption is necessary and what will be the effect.[14]

Views on exemptions accepted by the Parliament

> *The list is quite extraordinary in demonstrating just how out of hand things have got in this area.*[15]

4.20 There have been consequences arising from the absence of clear guidance as to when it might be appropriate to exempt delegated legislation from parliamentary oversight. The executive has put forward a number of rationales and over time the Parliament has passed legislation containing these rationales.

4.21 The Attorney-General's Department provided a summary of 11 rationales for exemptions from disallowance to which the Parliament has acquiesced, and these are discussed below.[16] For the Department, what the Parliament has accepted in the past provides guidance for future exemptions and is the basis of advice it provides to other departments.[17]

4.22 Some categories are supported by submitters and witnesses and the interim report accepted there may be limited grounds for exemptions.[18] However, this support is subject to significant reservations such that no category in its entirety is considered to be a constitutionally grounded justification for an exemption from disallowance. This demonstrates an approach to exemptions from disallowance based on broad categories may be ineffective to maintain appropriate and constitutional parliamentary oversight of delegated legislation.

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14 Department of Prime Minister and Cabinet, *Legislation Handbook*, February 2017, p. 34.

15 Professor George Williams, *Committee Hansard*, 31 August 2020, p. 18.

16 This was an updated list from the 2008 Review of the *Legislative Instruments Act*. Attorney-General's Department, *Submission 14*, pp. 6–8; Anthony Blunn, Ian Govey, John McMillan, *2008 Review of the Legislative Instruments Act 2003*, 31 March 2009, pp. 65–66.

17 Mr Andrew Walter, First Assistant Secretary, Integrity and Security Division, Attorney-General's Department, *Committee Hansard*, 3 September 2020, pp. 6–7.

18 For instance, Professor Anne Twomey argues 'it must be accepted there may be good grounds why certain legislative instruments are non-disallowable'. Professor Anne Twomey, *Submission 18*, p. [2]. See also: Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Interim report*, 2 December 2020, p. 72.

Rationale 1: There is an alternative parliamentary role in relation to the instrument

> *…the mere existence of an alternate parliamentary role is not in itself relevant; it is the appropriateness of that alternative that rule-makers must be directed to consider.*[19]

4.23 This rationale suggests a legislative instrument might be exempt from the disallowance mechanism if there is another way the Parliament can scrutinise the legislative instrument. That an exemption from disallowance may be made on these grounds makes several assumptions. These assumptions include that there are in fact alternative parliamentary roles, that all parliamentary roles are substantively the same, and that alternative modes of scrutiny are comparable. While there is support for this rationale, it is heavily qualified and rests on the substance of the alternative parliamentary role.[20]

4.24 The Centre for Comparative Constitutional Studies states that from a constitutional standpoint, the possibility of an alternative parliamentary role is the only reason of those presented that can plausibly justify exemption. However, this is contingent on the 'availability and practical efficacy of the "alternate parliamentary role" as a mechanism of parliamentary control'.[21]

4.25 This 'alternative parliamentary role', for Professor Gabrielle Appleby, Dr Janina Boughey, Dr Sangeetha Pillai and Professor George Williams, must amount to parliamentary oversight and control if it is to provide an alternative form of democratic accountability. If it does not do so, the exemption would not be justified.[22] The mere existence of an alternative is not sufficient, according to the Law Council, it is the appropriateness that must be considered.[23]

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19 Law Council of Australia, Answers to questions taken on notice, public hearing, Canberra, 27 August 2020 and written (received 11 September 2020), p. 10.

20 See, for instance: Professor Anne Twomey, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 and written (Received 11 September 2020), p. 6.

21 Centre for Comparative Constitutional Studies, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 and written (received 10 September 2020), pp. 2–3.

22 Professor Gabrielle Appleby, Dr Janina Boughey, Dr Sangeetha Pillai and Professor George Williams, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 (received 5 September 2020), p. 2.

23 Law Council of Australia, Answers to questions taken on notice, public hearing, Canberra, 27 August 2020 and written (received 11 September 2020), p. 10.

See also arguments as to the substance of the alternative parliamentary role in: Associate Professor Lorne Neudorf, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 (received 11 September 2020), pp. 2–3; Mr Morgan Begg, Research Fellow, Institute of Public Affairs, *Committee Hansard*, 27 August 2020, p. 9.

4.26 As to what an appropriate alternative parliamentary role might be, the NSW Council for Civil Liberties suggests there is no alternative parliamentary mechanism that provides the same level of scrutiny as the disallowance procedure.[24]

4.27 An example provided by the Attorney-General's Department, though, might meet the standard suggested by some submitters: determinations establishing special accounts under section 78 of the *Public Governance, Performance and Accountability Act 2013*. While such determinations are exempted from disallowance under section 42 of the Legislation Act, they are subject to disallowance within five sitting days of tabling, and do not commence until after this period has expired.[25]

Rationale 2: The rule-making process should or needs to be separated from the political process

> *The 'political process' is what provides democratic accountability in our system of government.*[26]

4.28 The Attorney-General's Department states the need for a decision to be made on scientific and technical grounds would justify an exemption because the rule-making needs to be separated from the political process. It cites as an example, a determination of a listed human disease under section 42 of the *Biosecurity Act 2015*. To allow disallowance, that is, to give the Parliament the opportunity to consider the scientific and technical evidence could, according to the Department, undermine the decision-making process, frustrate risk management processes, and lead to inadequate management of biosecurity risks.[27]

4.29 The Department of Agriculture, Water and the Environment supported this general point, adding, 'but, sensibly, there are some things which are purely technical and scientific that you delegate to experts to decide—is 12.5 pH the right pH to do something?'[28]

4.30 Several questions can be raised about the legitimacy of this rationale, particularly as the Parliament has considered and passed legislative schemes based

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24 NSW Council for Civil Liberties, Answers to written questions taken on notice (received 2 September 2020), p. 2.

25 Attorney-General's Department, *Submission 14*, p. 6.

26 Professor Gabrielle Appleby, Dr Janina Boughey, Dr Sangeetha Pillai and Professor George Williams, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 (received 5 September 2020), p. 2.

27 Attorney-General's Department, *Submission 14*, pp. 6–7. See also: Department of Health, Answers to written questions taken on notice (received 8 October 2020), pp. [20–21]; Department of Agriculture, Water and the Environment, *Submission 17*, p. 2.

28 Mr Matt Koval, First Assistant Secretary, Biosecurity Policy and Implementation Division, Department of Agriculture, Water and the Environment, *Committee Hansard*, 3 September 2020, pp. 17–18.

on technical and scientific considerations.[29] If indeed 12.5 pH is the right pH to do something, this would not be beyond the capacity of the Parliament to understand.

4.31 It is relevant to recall that without scrutiny, 'the executive is given a licence to make significant social and policy decisions without listening to the people's voice expressed through their elected representatives'.[30]

4.32 This rationale is shaded by a pejorative framing of politics that does not acknowledge the political process is what constitutes parliamentary accountability, and that parliamentary decision-making and public accountability are integral to good decision-making.[31] For instance, recent debates in the Senate in 2019 and 2020, where the possibility an instrument might be disallowed, resulted in:

- amendments to the instrument;[32]
- repeal of the instrument;[33] and/or
- administrative changes to address concerns that underpinned the proposed disallowance.[34]

4.33 It is nonsensical to suggest lawmaking can occur without an element of politics as lawmaking requires the exercise of discretion to make choices. For Associate Professor Lorne Neudorf, it is not clear what can be gained by separating the lawmaking process that involves making choices, from parliamentary oversight, but it is easy to see what is lost.[35]

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29 See: Professor Gabrielle Appleby, Dr Janina Boughey, Dr Sangeetha Pillai and Professor George Williams, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 (received 5 September 2020), p. 2.

30 Mr Jared Wilk, Co-convenor, Human Rights Action Group, NSW Council for Civil Liberties, *Committee Hansard*, 27 August 2020, p. 17.

31 Dr Gabrielle Appleby, *Committee Hansard*, 31 August 2020, p. 18; Centre for Public Integrity, Answers to questions taken on notice, public hearing, Canberra, 27 August 2020 and written (received 10 September 2020), p. [3].

32 For example, two motions proposing to disallow the Quality of Care (Minimising the Use of Restraints) Principles 2019 were withdrawn on 28 November 2019, after the committees which had been given them reported their satisfaction with amendments providing for a review after 12 months and an automatic repeal after 2 years. Mr Richard Pye, Clerk of the Senate*, Submission 3*, p. [1].

33 For example, an unsuccessful motion to disallow the Fair Work Amendment (Variation of Enterprise Agreements) Regulations 2020 seemed to have a role in the government repealing the instrument to limit the period of its operation. Mr Richard Pye, Clerk of the Senate*, Submission 3*, p. [2].

34 For example, debate on a motion to disallow the Aviation Transport Security Amendment (Security Controlled Airports) Regulations 2019. Mr Richard Pye, Clerk of the Senate*, Submission 3*, pp. [1–2].

35 Associate Professor Lorne Neudorf, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 (received 11 September 2020), pp. 3–5.

4.34 That parliamentary debate can sometimes be imperfect is acknowledged by the NSW Council for Civil Liberties, but the Council is unequivocal this is not grounds for an exemption from disallowance:

> …although it is not argued that Senators are always informed, rational and level-headed in respect of health, scientific or technical matters, a healthy system of parliamentary democracy should not shy away from providing elected representatives the opportunity to debate differing views on what may be fiercely contested, or genuinely uncertain questions of health or science.[36]

4.35 Parliamentarians are in fact able to take into account medical and scientific evidence when considering whether to disallow a measure, though there are instances of politically contentious decisions where other considerations might be at play.[37] Professor Twomey argues it cannot be taken that the government will always make decisions initially on the basis of medical or scientific evidence and may in fact itself be exercising powers in a way that is intended to gain political advantage.[38] Professor Twomey suggests an exemption only be permitted if the law actually constrains the way the instrument is made; it must be required to be based upon technical or scientific matters.[39]

4.36 The attachment of 'scientific' or 'technical' to a rule does not make it pure in substance. For the Law Council of Australia:

> …this is by no means a decisive factor…the process behind making a legislative instrument may appear at first glance to be purely scientific or depoliticised when in fact it is not, or not entirely; what may appear to be a 'scientific' decision may implicate a range of 'non-scientific' consequences that mean the decision should properly be subject to review.[40]

4.37 It is the case that the consequences of a decision matter. As expressed by the NSW Council for Civil Liberties:

> Adding political considerations is not *always* or even *usually* inappropriate, even where measures need to be taken on the basis of health and scientific advice. Where those measures have very significant civil liberties

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36 NSW Council for Civil Liberties, Answers to written questions taken on notice (received 2 September 2020), p. 7.

37 See: Dr Gabrielle Appleby, *Committee Hansard*, 31 August 2020, p. 18; Professor Anne Twomey, *Committee Hansard*, 31 August 2020, p. 10.

38 Professor Anne Twomey, *Committee Hansard*, 31 August 2020, p. 10.

39 Professor Anne Twomey, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 and written (Received 11 September 2020), p. 6.

40 The Law Council accepts this may be an acceptable but not decisive factor in a rationale for an exemption from disallowance. Law Council of Australia, Answers to questions taken on notice, public hearing, Canberra, 27 August 2020 and written (received 11 September 2020), p. 11.

> implications, their formulation and implementation are unavoidably political questions.[41]

4.38 The Council continues, it is rare that a matter of great public importance has no political implications. Different views on a matter should be given voice in Parliament.[42] That the Parliament would take an unscientific or non-evidence based view and arbitrarily overturn a declaration made, for instance, under the Biosecurity Act is, for the Institute of Public Affairs, 'completely unrealistic'.[43]

4.39 It is worth considering that 'taking the politics out entirely can lead to unaccountable technocratic governance'.[44]

Rationale 3: The instrument is an internal management tool for government

4.40 That an instrument is an internal management tool for government and thus justifiably exempt from disallowance assumes internal management tools cannot substantively affect the independence or apolitical nature of the public service; determine or alter the content of the law; or have significant civil liberties implications.

4.41 By way of example, the Prime Minister is able to issue a direction in writing to agency heads under section 21 of the *Public Service Act 1999* (Public Service Act), relating to the management and leadership of Australian Public Service employees.[45] When read in the context of other provisions of the Public Service Act (none of which permit exemption from disallowance), the Centre for Comparative Constitutional Studies states the provision could plausibly allow an exemption from parliamentary oversight of a direction that encroaches on the statutory independence of an agency.[46]

4.42 Because the Parliament has an interest in the maintenance of an independent and apolitical public service, Professor Twomey is of the view the Parliament 'could rightly object to, and seek to disallow, instruments that threaten

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41 NSW Council for Civil Liberties, *Submission 22*, p. 5.

42 NSW Council for Civil Liberties, Answers to written questions taken on notice (received 2 September 2020), p. 7.

43 Mr Morgan Begg, Research Fellow, Institute of Public Affairs, *Committee Hansard*, 27 August 2020, p. 9.

44 NSW Council for Civil Liberties, *Submission 22*, p. 5.

45 Attorney-General's Department, *Submission 14*, p. 7.

46 Centre for Comparative Constitutional Studies, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 and written (received 10 September 2020), p. 3.

its independent status',[47] and the NSW Council for Civil Liberties argues against any such exemption on these grounds.[48]

4.43 While there is some support for this rationale, this support is heavily qualified:

- the instrument must not have an impact on public rights, obligations or duties;[49] and
- the matter must be technical or administrative.[50]

Rationale 4: The instrument is central to machinery of government arrangements or electoral matters

4.44 The Parliament has in the past accepted exemptions from disallowance on the basis the instrument is central to machinery of government arrangements or electoral matters. While the example provided by the Attorney-General's Department is benign—amendments to references in legislation to ministers or departments that are no longer current—this category is broad and potentially captures matters some argue the Parliament should be examining. This is because such an exemption from disallowance in effect justifies minimising the role of the Parliament in providing for, scrutinising or regulating conduct of government arrangements or electoral matters.[51]

4.45 Some machinery of government matters might not raise scrutiny concerns, particularly if they do not have an impact on public rights, obligations or duties, or are technical or administrative.[52] This is nevertheless an open-ended category that

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47 Professor Anne Twomey, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 and written (Received 11 September 2020), p. 6. See also: Associate Professor Lorne Neudorf, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 (received 11 September 2020), pp. 5–6.

48 NSW Council for Civil Liberties, *Submission 22*, p. 5.

49 Professor Gabrielle Appleby, Dr Janina Boughey, Dr Sangeetha Pillai and Professor George Williams, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 (received 5 September 2020), p. 2.

50 Law Council of Australia, Answers to questions taken on notice, public hearing, Canberra, 27 August 2020 and written (received 11 September 2020), p. 11.

51 NSW Council for Civil Liberties, Answers to written questions taken on notice (received 2 September 2020), p. 2.

52 Professor Gabrielle Appleby, Dr Janina Boughey, Dr Sangeetha Pillai and Professor George Williams, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 (received 5 September 2020), p. 2; Law Council of Australia, Answers to questions taken on notice, public hearing, Canberra, 27 August 2020 and written (received 11 September 2020), p. 11.

some believe makes it inappropriate as a constitutionally principled basis for justifying an exemption from disallowance.[53]

4.46 For the Institute of Public Affairs, these are ordinary decisions and should be subject to the same scrutiny as any other decision.[54]

4.47 In particular, exempting instruments related to electoral matters raises significant concerns for many, given electoral matters 'go to the heart of democracy'.[55] If an instrument concerns administrative matters determined by an independent body such as the Australian Electoral Commission, an exemption might be justified. However, Professor Twomey stated if an instrument was made by a minister and included the potential for manipulation to achieve electoral advantage, it should be disallowable.[56]

4.48 The NSW Council for Civil Liberties agrees, stating:

> …instruments of this kind would seem to be an intrinsically and paradigmatically political issue, and one central to the efficacy of parliamentary democracy, in which Parliament has the supreme role.[57]

Rationale 5: Commercial certainty will be adversely affected

Commercial certainty is constantly undermined by policy and regulatory decisions.[58]

4.49 The rationale that commercial certainty will be adversely affected applies an arbitrary definition to commercial uncertainty.[59] Any change in laws or any decision of the government, however made, leads to uncertainty. It is 'impossible to conceive', according to the Centre for Comparative Constitutional Studies, 'any

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53 Centre for Comparative Constitutional Studies, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 and written (received 10 September 2020), p. 3.

54 Ms Dara Macdonald, Research Fellow, Institute of Public Affairs, *Committee Hansard*, 27 August 2020, pp. 9–10.

55 Associate Professor Lorne Neudorf, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 (received 11 September 2020), p. 6.

56 Professor Anne Twomey, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 and written (Received 11 September 2020), p. 7.

57 NSW Council for Civil Liberties, Answers to written questions taken on notice (received 2 September 2020), p. 2.

58 NSW Council for Civil Liberties, Answers to written questions taken on notice (received 2 September 2020), pp. 2–3.

59 This rationale is also put forward by the Treasury in relation to a Declaration of Terrorist Incident that allows the Treasurer to invoke the operation of an insurance scheme by declaring a terrorist incident and setting a reduction percentage on the payment of insurance claims. The Treasury, *Submission 20*, p. 9.

legislative measure that does not have some impact on "commercial (business) certainty"'.[60]

4.50 As noted by the NSW Council of Civil Liberties:

> Statutes are frequently amended after they come into operation. Indeed, any change to the law, whether by primary or delegated legislation, can be seen to generate uncertainty. Yet this argument is not made, at least in all seriousness, with respect to primary legislation. There is a reason that Parliament can always amend statute law, even if to do so would cause uncertainty. Reducing uncertainty for business has never justified disconnecting the process of lawmaking from the people's representatives.[61]

4.51 However, Professor Twomey argues there may be grounds for this exemption on the basis of uncertainty and instability potentially caused by disallowance. There should nevertheless be a substitute scrutiny mechanism.[62]

4.52 As to the potential for disallowance to create uncertainty, for the Law Council of Australia, where the need for certainty is the only ground for exemption, this could be met by having the delegated legislation come into effect after the disallowance period has expired.[63]

Rationale 6: The instrument is intended to remain within executive control

4.53 That an instrument may be intended to remain within executive control implies the intent of the executive overrides the authority of the Parliament. The Treasury claims this rationale was the basis for what would become the significant carve-out in the LEOM Regulation for instruments that are a direction by a minister.[64]

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60 Centre for Comparative Constitutional Studies, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 and written (received 10 September 2020), p. 4.

61 NSW Council for Civil Liberties, Answers to written questions taken on notice (received 2 September 2020), pp. 2–3. See also: Professor Gabrielle Appleby, Dr Janina Boughey, Dr Sangeetha Pillai and Professor George Williams, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 (received 5 September 2020), pp. 2–3; Associate Professor Lorne Neudorf, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 (received 11 September 2020), pp. 7–8.

62 Professor Anne Twomey, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 and written (Received 11 September 2020), p. 6.

63 The Law Council makes this point broadly in relation to the date from which delegated legislation is effective, not in relation to this particular rationale. Law Council of Australia, Answers to questions taken on notice, public hearing, Canberra, 27 August 2020 and written (received 11 September 2020), pp. 18–19.

64 Legislation (Exemptions and Other Matters) Regulation 2015, s. 9; Legislative Instruments Bill 2003, *Explanatory Memorandum*, p. 23; The Treasury, *Submission 20*, Attachment A, p. 2.

4.54 In itself, however, it is a broadly drawn and ambiguous rationale that could potentially exempt large numbers of instruments.[65]

4.55 Should the rationale be tightened to encompass purely administrative matters, the Law Council is of the view it may be justified. Nevertheless the intent should be the intent of the Parliament, not the executive.[66]

Rationale 7: The exemption is in response to a parliamentary recommendation

4.56 An exemption based on a recommendation of a parliamentary committee does not necessary reflect the will of the whole Parliament. This is because government could conceivably pass a resolution of the House or have a committee it controls make a recommendation on a controversial matter.[67]

4.57 The NSW Council for Civil Liberties pointed out:

> Parliamentary committees do not speak with the force of the entire Senate. The Senate…should have the opportunity to overrule the recommendation of a committee if it later disapproves of the recommendation or its implementation.[68]

4.58 Notwithstanding the status of committee recommendations noted above, some do suggest it could be a relevant factor, to be considered amongst others, in justifying non-disallowance.[69]

Rationale 8: The instrument is part of an intergovernmental scheme

4.59 Legislative instruments (other than regulations) that are part of an intergovernmental scheme are exempted from disallowance under section 42 of the

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65 Professor Gabrielle Appleby, Dr Janina Boughey, Dr Sangeetha Pillai and Professor George Williams, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 (received 5 September 2020), p. 3. See also: Professor Anne Twomey, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 and written (received 11 September 2020), p. 7; Centre for Comparative Constitutional Studies, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 and written (received 10 September 2020), p. 6; NSW Council for Civil Liberties, Answers to written questions taken on notice (received 2 September 2020), p. 3.

66 Law Council of Australia, Answers to questions taken on notice, public hearing, Canberra, 27 August 2020 and written (received 11 September 2020), p. 12.

67 Professor Twomey suggests there may be some cases where this rationale could be appropriate. Professor Anne Twomey, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 and written (Received 11 September 2020), p. 7.

68 NSW Council for Civil Liberties, Answers to written questions taken on notice (received 2 September 2020), p. 3.

69 See, for instance: Law Council of Australia, Answers to questions taken on notice, public hearing, Canberra, 27 August 2020 and written (received 11 September 2020), p. 12; Associate Professor Lorne Neudorf, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 (received 11 September 2020), pp. 10–11.

Legislation Act. As a rationale for an exemption from disallowance, it carries the implication there has been significant negotiation and sufficient scrutiny through the process of obtaining agreement from all participating governments, and as a consequence intergovernmental schemes do not require parliamentary oversight. While some are satisfied this may be the case, they suggest a tightening of the criteria to ensure it is not inappropriately used. Others are not convinced it is grounds at all to exempt the activities of the executive from parliamentary oversight.

4.60 The Department of Education argued in favour of these exemptions. It claims this exemption is necessary to underpin and sustain cooperative arrangements between the Commonwealth and the states and territories in support of national regulatory frameworks. It is the Department's view the Parliament should not be able to unilaterally disallow instruments that are part of a multilateral scheme; and such schemes are subject to other oversight and accountability processes within any multi-jurisdictional scheme that is subject to the terms of an inter-governmental agreement that must be agreed by a Ministerial Council.[70]

4.61 The difficulty expressed with this as a rationale is it establishes a domain of executive activity that is exempt from parliamentary oversight. From this perspective, there is little intrinsic to intergovernmental schemes that can justify their exemption from the principles of parliamentary government,[71] notwithstanding the claim of the Department of Education that disallowance would undermine confidence in intergovernmental arrangements and discourage ongoing state/territory cooperative support.[72]

4.62 The Institute for Public Affairs writes that although the exemption for instruments that establish or are made by a body that involves multiple states and the Commonwealth seems sound, it gives rise to a major problem: over regulation combined with limited oversight. The Institute argues intergovernmental schemes, such as the National Classification Scheme for ratings, and the nationally applicable consumer regime administered by the Australian Competition and Consumer Commission (ACCC), produce regulations that can significantly impact people. For instance, it states the ACCC has 44,160 pages of regulation exempt from scrutiny, what it refers to as 'regulatory dark matter', which can have a significant impact on competition and small business.[73]

4.63 The Attorney-General's Department would not be drawn on whether it was appropriate to exempt from disallowance instruments made by a body or scheme established pursuant to intergovernmental agreements. It referred to the

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70 Department of Education, Skills and Employment, *Submission 26*, pp. 1–2.

71 Centre for Comparative Constitutional Studies, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 and written (received 10 September 2020), p. 5.

72 Department of Education, Skills and Employment, *Submission 26*, p. 2.

73 Institute of Public Affairs, *Submission 16*, p. [12].

explanatory memorandum to the Legislation Instruments Bill 2003 that stated the provision was necessary because the Commonwealth Parliament should not, as part of a legislative instruments regime, unilaterally disallow instruments that are part of a multilateral scheme. It stated this recognised unilateral disallowance by the Commonwealth would undermine the cooperative nature of these schemes.[74]

4.64 Pointing to the practicalities of negotiation, and despite identifying intergovernmental agreements as a 'black box that nobody ever gets to scrutinise at all, because you've got that diffusion of power amongst the various jurisdictions', Professor Twomey stated:

> If you've hashed out an intergovernmental agreement between six states and the Commonwealth, you've all reached an agreed model and then it gets knocked off on a disallowance measure or the like, that could be extremely difficult too. There are good reasons to avoid that happening.[75]

4.65 Even considering this observation, there is little support for this rationale as a general exemption, though there is some recognition it may be legitimate if tightened and considered on a case-by-case basis. Professor Twomey is of the view that even if exempt, such instruments should nevertheless be scrutinised by a parliamentary committee.[76]

4.66 Professor Gabrielle Appleby, Dr Janina Boughey, Dr Sangeetha Pillai and Professor George Williams are more prescriptive: in specific cases an alternative democratic accountability process may be appropriate, but the default should be disallowance by the Parliament.[77] The NSW Council for Civil Liberties calls for a 'compelling justification'.[78]

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74 Attorney-General's Department, Answers to written questions taken on notice (received 8 October 2020), p. 16.

75 Professor Twomey, however, does not equate exemption from disallowance with exemption from scrutiny, and calls for exempted instruments to be examined by the Scrutiny of Delegated Legislation Committee. This is discussed in chapter 6. Professor Anne Twomey, *Committee Hansard*, 31 August 2020, p. 10.

76 Professor Anne Twomey, *Committee Hansard*, 31 August 2020, p. 10; Professor Anne Twomey, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 and written (received 11 September 2020), p. 6.

See also Associate Professor Lorne Neudorf who argues in several instances that an exemption from disallowance does not necessarily require an exemption from scrutiny. This is taken up further in the next chapter. Associate Professor Lorne Neudorf, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 (received 11 September 2020).

77 Professor Gabrielle Appleby, Dr Janina Boughey, Dr Sangeetha Pillai and Professor George Williams, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 (received 5 September 2020), p. 3.

4.67 For the Law Council of Australia, that governments may be frustrated or inconvenienced by a disallowance is not a strong rationale for removing democratic safeguards, though it recognises the difficulties that may arise if a parliament disallows an instrument agreed upon by multiple governments.[79]

Rationale 9: The instrument is required under an international treaty or convention

4.68 International treaties can go deeply to the substance of Australian laws and regulations.[80] Nevertheless, there may often be significant discretion in how countries implement international undertakings in their national laws.[81] There is some support for this rationale on a case-by-case basis; others can see no constitutional reason why the adoption into domestic law of international treaty obligations should be treated as exclusively within the purview of the executive.[82]

4.69 Given the latitude and discretion provided for in international treaties, the Law Council of Australia states whether an instrument is actually 'required' under a treaty or convention has to be assessed on a case-by-case basis.[83]

4.70 Further, that a treaty might require a certain law to be implemented should be subject to scrutiny because 'international treaties to which Australia is a signatory regularly specify obligations which Australian law fails to implement'.[84] The Parliament, as the ultimate lawmaking authority, is not obligated to give effect to treaty provisions. While there may be a compelling justification in some cases, any

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Associate Professor Neudorf argues this may be acceptable in some cases, but there should still be scrutiny by the committee. See: Associate Professor Lorne Neudorf, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 (received 11 September 2020), pp. 11–12.

78 NSW Council for Civil Liberties, Answers to written questions taken on notice (received 2 September 2020), p. 3.

79 Law Council of Australia, Answers to questions taken on notice, public hearing, Canberra, 27 August 2020 and written (received 11 September 2020), p. 12.

80 This is particularly the case noting that the Commonwealth often seeks to rely on the external affairs power in paragraph 51(xxix) of the *Constitution* to support legislation that implements treaty obligations.

81 Law Council of Australia, Answers to questions taken on notice, public hearing, Canberra, 27 August 2020 and written (received 11 September 2020), pp. 12–13.

82 See, for instance: Centre for Comparative Constitutional Studies, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 and written (received 10 September 2020), p. 5; Professor Gabrielle Appleby, Dr Janina Boughey, Dr Sangeetha Pillai and Professor George Williams, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 (received 5 September 2020), p. 3.

83 Law Council of Australia, Answers to questions taken on notice, public hearing, Canberra, 27 August 2020 and written (received 11 September 2020), pp. 12–13.

84 NSW Council for Civil Liberties, Answers to written questions taken on notice (received 2 September 2020), p. 3.

judgement as to the adequacy of this rationale depends on the relevant context and the nature of the treaty and instrument concerned.[85]

4.71 While noting international treaties can deal with a wide range of matters and there may be a temptation for the executive to avoid meaningful oversight of international agreements that are implemented into domestic law, the rationale may be acceptable to Associate Professor Neudorf. This would require, however, evidence disallowance could potentially be 'injurious to the Commonwealth in the conduct of international affairs'.[86]

Rationale 10: The instrument is critical to ensuring urgent and decisive actions

4.72 While instruments may be essential to ensuring urgent and decisive actions, it does not necessarily follow that they be exempt from disallowance on this basis. Consequent of the fact instruments can be made and commence prior to their consideration by the Parliament, many point out there is nothing in the disallowance process that prevents urgent and decisive executive action.[87]

4.73 Nevertheless, the Department of Health suggested this may be reason to actually expand the grounds upon which exemption from disallowance might be permitted. The Department argued for exemptions specifically with regard to emergency delegated legislation that facilitates continuity of access to 'essential services' including the provision of healthcare on humanitarian grounds.[88] However, if this was indeed the case, it is difficult to imagine a circumstance in which such an instrument would, in fact, be disallowed and therefore the capacity of this argument to justify an exemption from disallowance seems limited.

4.74 Given instruments made in response to an emergency can have a significant impact on personal rights and liberties, for some it is inappropriate that they would be exempted from parliamentary consideration through the disallowance process. In genuine emergency situations, the Parliament has demonstrated a capacity to act in

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85 NSW Council for Civil Liberties, Answers to written questions taken on notice (received 2 September 2020), p. 3.

86 Associate Professor Lorne Neudorf, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 (received 11 September 2020), pp. 12–13.

87 See, for instance, Centre for Comparative Constitutional Studies, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 and written (received 10 September 2020), p. 6; Centre for Public Integrity, Answers to questions taken on notice, public hearing, Canberra, 27 August 2020 and written (received 10 September 2020), p. 2. This issue was also addressed extensively in the interim report.

88 Department of Health, *Submission 27*, p. 2.

a bipartisan manner.[89] Aside from the fact the disallowance process does not prevent an instrument coming into effect or hinder swift government action in an emergency, any actual disallowance operates prospectively.[90]

4.75 For the Institute of Public Affairs any exemption based on this rationale fails to understand how the disallowance process works in practice:

> There is no positive case for providing an exemption for delegated legislation on the basis that such delegated legislation was made in response to an emergency…The requirement to act swiftly in response to an emergency is not hampered by the requirement to answer questions about the response after the fact.[91]

4.76 While warning against the potential misuse of this rationale, others suggest in some instances such exemptions from disallowance may be appropriate, depending on 'all of the surrounding circumstances'.[92] Regardless, there is a strong argument that when such instruments are remade or renewed when they sunset, they are subject to disallowance to ensure Parliamentary scrutiny over their continuing proportionality and justifiability.[93]

Rationale 11: The exemption will provide certainty in meeting specific security needs

Parliamentary scrutiny does not end where national security threats begin.[94]

4.77 Responses to the rationale that parliamentary oversight can be legitimately avoided on security grounds, dispute the implication the disallowance process

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89 For instance, the Criminal Code Amendment (Food Contamination) Bill 2018 (the Strawberries Bill) was introduced and passed on the same day (20 September 2018) and gained Royal Assent the following day (21 September 2018). The Coronavirus Economic Response Package Omnibus Bill 2020 was introduced and passed on the same day (23 March 2020) and gained Royal Assent the following day (24 March 2020).

90 Professor Gabrielle Appleby, Dr Janina Boughey, Dr Sangeetha Pillai and Professor George Williams, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 (received 5 September 2020), pp. 3–4. See also: Associate Professor Lorne Neudorf, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 (received 11 September 2020), pp. 13–14.

91 Institute of Public Affairs, Answers to questions taken on notice, public hearing, Canberra, 27 August 2020 and written (received 11 September 2020), p. [3].

92 NSW Council for Civil Liberties, Answers to written questions taken on notice (received 2 September 2020), pp. 4, 7. See also: Professor Anne Twomey, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 and written (Received 11 September 2020), pp. 5–6.

93 Law Council of Australia, Answers to questions taken on notice, public hearing, Canberra, 27 August 2020 and written (received 11 September 2020), p. 13.

94 NSW Council for Civil Liberties, Answers to written questions taken on notice (received 2 September 2020), p. 4.

prevents decisive action, and suggest that given such measures are likely to intrude on personal rights and liberties, the need for parliamentary oversight is arguably more important.

4.78 As with instruments that might be required in an emergency situation, it was pointed out by the Centre for Comparative Constitutional Studies:

> There is nothing in the disallowance process, that must be triggered and run its course in accordance with a statutorily governed timeframe, that prevents decisive action of the kind envisaged in legislation that addresses questions of security.[95]

4.79 While acknowledging the political norm in Australia is to defer to the executive on matters of security, the NSW Council for Civil Liberties warned of the 'danger of excessive deference to the executive on an ever-expanding range of security matters, which has arguably facilitated an enormous shift in power to the executive' since 2001. Nevertheless, it acknowledged there may be limited circumstances where an exemption may be appropriate such as an 'existential domestic security threat'.[96]

4.80 Others expressed certainty that this was not grounds for an exemption from disallowance. This is because such instruments typically involve significant incursions into personal rights and liberties making scrutiny critical. Security concerns can be addressed through processes that allow for the consideration of confidential information.[97]

4.81 In conclusion, while perhaps convincing superficially, there is little support expressed for the blanket application of any category identified by the Attorney-General's Department. On the contrary, the committee is well informed any exemption from disallowance must be justified on its individual merits. This will be discussed further in the next chapter. Prior to moving to this discussion, it is necessary to examine a growing issue of instruments being classified as notifiable instruments, despite their demonstrably legislative nature.

Classification of instruments

4.82 An issue closely related to inappropriate justifications for exemptions from disallowance is the categorisation of instruments as notifiable instruments, which

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95 Centre for Comparative Constitutional Studies, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 and written (received 10 September 2020), p. 6.

96 NSW Council for Civil Liberties, Answers to written questions taken on notice (received 2 September 2020), p. 4.

97 Professor Gabrielle Appleby, Dr Janina Boughey, Dr Sangeetha Pillai and Professor George Williams, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 (received 5 September 2020), p. 4; Associate Professor Lorne Neudorf, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 (received 11 September 2020), pp. 14–15.

similarly receive no parliamentary scrutiny. While the Legislation Act defines legislative instruments (section 8) and notifiable instruments (section 11), sections in the Legislation Act allow for enabling legislation or regulation to provide otherwise.

4.83 Subsections 8(6) to 8(8) of the Legislation Act establish circumstances in which an instrument is not considered to be a legislative instrument, regardless of whether it otherwise satisfies the definition of a legislative instrument. These subsections allow for a legislative instrument to be declared not to be a legislative instrument by primary legislation or the LEOM Regulation. Section 11 allows for primary legislation to specify an instrument will be a notifiable instrument, regardless of whether it is legislative in character.[98]

4.84 As discussed in the interim report, the explanatory memorandum to the bill that created the category of notifiable instrument specified such instruments would not be legislative in character.[99] However, no such limits are prescribed in the legislation. Indeed, quite the opposite is the case. The Legislation Act specifically allows for instruments that might otherwise meet the criteria for a legislative instrument to be categorised as notifiable instruments.[100] This becomes a scrutiny concern because notifiable instruments are not tabled in the Parliament, and are thus not subject to parliamentary scrutiny, to disallowance, or to sunsetting.

4.85 In the interim report, the committee identified concerns regarding the classification of a number of notifiable instruments.[101]

4.86 It appears to be the case that some notifiable instruments determine or alter the law, and directly or indirectly affect a privilege or interest, impose an obligation, create a right, or vary or remove an obligation or right.[102]

4.87 The Treasury acknowledged it was aware the use of notifiable rather than legislative instruments subject to disallowance was an area of growing concern. It highlighted a recent case identified by the Scrutiny of Bills Committee with the Structured Finance Support (Coronavirus Economic Response Package) Bill 2020. The bill established a fund and a special account to allow the government to make

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98 *Legislation Act 2003*, s. 8(6) – 8(8), 11(1).

99 Acts and Instruments (Framework Reform) Bill 2014, *Replacement explanatory memorandum*, p. 3.

100 *Legislation Act 2003*, s. 8(4)–8(8). See also: Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Interim report*, 2 December 2020, pp. 74–76; Mr Andrew Walter, First Assistant Secretary, Integrity and Security Division, Attorney-General's Department, *Committee Hansard*, 3 September 2020, p. 8.

101 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Interim report*, 2 December 2020, pp. 74–82.

102 These are some characteristics of a legislative instrument identified in the Legislation Act. *Legislation Act 2003*, s. 8(4)(b).

investments in structured finance markets. Certain instruments in the Act are specified to be notifiable instruments and are therefore not subject to disallowance, such as those made under section 13(3) that allows the minister to determine the amount credited to the fund.[103]

4.88 The Treasury justified the designation of the instruments as notifiable on the basis disallowance would prevent the government from acting in urgent circumstances, and if it did, any investment made during the disallowance period would carry risk, and could undermine commercial certainty in the investment. This would frustrate the purpose of the instrument.[104]

4.89 The committee will turn to the acceptability of such justifications, whether for exemptions from disallowance or for categorisation as notifiable instruments, in the next chapter. For now, it is sufficient to indicate there are significant concerns with the justification.

The use to which instruments exempt from disallowance can be put

4.90 When an instrument has been exempted from disallowance, the Parliament in effect loses any ability to ensure the instrument is used for the purpose established in the enabling legislation, beyond amending or repealing the primary legislation. The following case study of the Advance to the Finance Minister determinations is illustrative.

Case study: Advance to the Finance Minister

4.91 A particular category of instrument that is exempt from disallowance is the Advance to the Finance Minister determinations. This case study shows how exemptions from parliamentary oversight leave the Parliament with little recourse when the delegated power is used contrary to the expressed intent of the Parliament.

4.92 The Advance to the Finance Minister allows the Finance Minister to provide additional funds to entities when satisfied there is an urgent need for expenditure.[105] The Parliament agrees to appropriate the funds for the Advance each time it passes an Appropriation Bill, and agrees the advance allocation is a legislative instrument not subject to disallowance.[106]

4.93 Before allocating funds, the Finance Minister must be satisfied that there is an urgent need for expenditure, in the current year, that is not provided for, or is insufficiently provided for in the Appropriations Bills: because of an erroneous

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103 The Treasury, *Submission 20*, pp. 2–3.

104 The Treasury, *Submission 20*, p. 3.

105 Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 15 of 2020*, 11 November 2020, p. 13.

106 Department of Finance, *Submission 28*, pp. 4, 7.

omission or understatement; or because the expenditure was unforeseen until after the last day on which it was practicable to provide for it in the Appropriation Bill.[107] However, as noted below, the High Court's interpretation of this legislative restriction on the exercise of the Finance Minister's powers renders it of no substantive effect.[108]

4.94 For the Department of Finance, exempting the instrument from disallowance avoids a situation whereby section 42 of the Legislation Act might frustrate the purpose of this instrument.[109] The Department argues the power is appropriately qualified. Appropriations Acts require there to be a need for urgent expenditure for an Advance to be allocated and requiring such allocations to be subject to disallowance would delay urgent expenditure. It claims this would 'fundamentally frustrate the operation of the AFM mechanism and the delivery of Australian Government programs and services'.[110]

4.95 The Department of Finance argued without the Advance to the Finance Minister being exempted from disallowance, the government would not have been able to quickly purchase necessary health and medical equipment for the National Medical Stockpile in the quantities and timeframes required to respond to the COVID-19 pandemic.[111]

4.96 While it is not clear why an Advance to purchase needed medical equipment to respond to a pandemic would be disallowed by the Parliament, the Advance itself has been used in a number of circumstances that raise questions about the requirement that it be used to fund urgent expenditure. Some of these expenditures have been:

- payments to local governments through the Regional and Local Community Infrastructure Program ($206,500,247 in 2008–09); and
- 'Supporting football in the lead up to the 2015 Asian Cup' ($7,500,000 in 2010–11).[112]

4.97 Professor Gabrielle Appleby, Dr Janina Boughey, Dr Sangeetha Pillai and Professor George Williams highlighted the use of the Advance to fund the Australian

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107 Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 12 of 2017*, 18 October 2017, p. 96.

108 Anne Twomey, 'Wilkie v Commonwealth: A Retreat to Combet over the Bones of Pape, Williams, and Responsible Government', *AUSPUBLAW*, 27 November 2017, auspublaw.org/2017/11/wilkie-v-commonwealth/; Anne Twomey, 'A tale of two cases: Wilkie v Commonwealth and Re Canavan', *Australian Law Journal*, vol. 92, 2018, pp. 17–21.

109 Department of Finance, *Submission 28*, p. 4.

110 Department of Finance, *Submission 28*, p. 7.

111 Department of Finance, *Submission 28*, p. 7.

112 Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 12 of 2017*, 18 October 2017, pp. 97–98.

Marriage Law Postal Survey in 2017, despite the Senate having explicitly rejected a legislative attempt to authorise a plebiscite on same-sex marriage.[113]

4.98 The Advance was also raised by the Scrutiny of Bills Committee who referenced High Court jurisprudence that emphasises the central role of the Parliament:

> …while the High Court has held that an appropriation must always be for the purpose identified by the Parliament, '[i]t is for the Parliament to identify the degree of specificity with which the purpose of an appropriation is identified'. The Advance to the Finance Minister provisions leaves the allocation of the purpose of certain appropriations in the hands of the Finance Minister, rather than the Parliament.[114]

4.99 Professor Twomey stated 'it is clearly wrong that the Minister for Finance can use the Advance to fund measures that the Parliament does not support and has previously refused to fund'. The Finance Minister should not be able to use the Advance to avoid the necessity for Senate approval for the expenditure.[115] However, Professor Twomey acknowledges in practical terms, it would be difficult to disallow a payment that has already been made. Further, the period between an amount being allocated under the Advance and the last date by which disallowance can occur, due to parliamentary sitting patterns, can be significant. If there is a genuinely urgent need, it may be inappropriate to wait for the disallowance period to expire.[116]

4.100 Given this difficulty, Professor Twomey suggests the legislative conditions on the use of the Advance should be tightened. References to 'urgent' and 'unforeseen' were 'watered down by the High Court in *Wilkie*, so that more stringent restrictions, making clear Parliament's intentions, would be merited'. There are situations where the use of the money would legitimately be 'urgent' and in such cases, the minister should provide a written justification, which should be submitted to a parliamentary committee for oversight.[117]

4.101 In contrast, the Centre for Public Integrity was unequivocal: it is neither necessary nor appropriate to exempt Advance to the Finance Minister determinations from disallowance because they delegate significant legislative power to the executive and present a risk of misuse of power for partisan gain. For

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113 Professor Gabrielle Appleby, Dr Janina Boughey, Dr Sangeetha Pillai and Professor George Williams, *Submission 1*, pp. 5–6.

114 Scrutiny of Bills Committee, *Submission 4*, p. 3.

115 Professor Anne Twomey, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 and written (Received 11 September 2020), p. 3.

116 Professor Anne Twomey, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 and written (Received 11 September 2020), p. 3.

117 Professor Anne Twomey, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 and written (Received 11 September 2020), pp. 3, 5.

the Centre, disallowance is an essential scrutiny mechanism in respect of the allocation of public funds. There are no 'alternative' oversight mechanisms.[118]

4.102 Authorising and scrutinising appropriations is one of Parliament's central functions; the High Court has made it clear the executive power of the Commonwealth does not extend to 'any and every form of expenditure of public moneys'.[119] There must be scrutiny of delegated legislation allocating public funds.

4.103 A range of views has been canvassed in this chapter on the rationales for exempting delegated legislation from disallowance to which the Parliament has previously acquiesced. Most have been found by the evidence to the inquiry to lack sufficient substance to justify an exemption from parliamentary oversight. Although a limited number are potentially considered appropriate justifications, this is subject to significant qualification and limitation such that no rationale can be supported in its entirety or accepted as broadly applicable. As a consequence, it is difficult to argue against exemptions being assessed by the Parliament on a case-by-case basis. Making such an assessment, though, requires some guidance and it is to this that the next chapter turns.

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118 Centre for Public Integrity, Answers to questions taken on notice, public hearing, Canberra, 27 August 2020 and written (received 10 September 2020), pp. 1–2.

119 *Williams* (No 2) in Centre for Public Integrity, Answers to questions taken on notice, public hearing, Canberra, 27 August 2020 and written (received 10 September 2020), p. 3.

Part III — Future scrutiny of delegated legislation

Chapter 5

Appropriate grounds, authority and guidance on exemptions from disallowance

The legislative power of the Commonwealth shall be vested in the Federal Parliament…[1]

5.1 Exemptions from disallowance are ultimately a decision of the Parliament, regardless of whether they come through enabling legislation or through provisions of the *Legislation Act 2003* (Legislation Act) that provided for the making of the LEOM Regulation.[2] As found in the interim report, there may be some limited circumstances when it may be appropriate for legislative instruments to be exempt from disallowance.[3] Any judgement as to appropriate grounds for disallowance will of necessity have to balance against the constitutional principle of parliamentary authority over lawmaking.

5.2 The previous chapter made clear an approach that exempts entire categories of instrument, or instruments made under particular provisions no matter their content, cannot be supported. There is a strong case to be made that exemptions must be justified on an individual basis, but this does not mean the examination of every justification need start from first principles. Rather, it is appropriate that the Parliament, through its scrutiny committees, provides appropriate guidance for justifications to be made, and for the Parliament's consideration of justifications for exemptions from disallowance.

5.3 Approaches to establishing appropriate grounds for exemptions that take a principles-based approach and category-based approach each have their strengths and shortcomings, but these may be ameliorated by combining both approaches and requiring any explanation to also consider the particular context surrounding the instrument.

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1 *The Constitution*, s. 1.

2 The Parliament passed the *Acts and Instruments (Framework Reform) Act 2015* that amended the *Legislative Instruments Act 2003*, which amongst other things, changed the name of the Act to the *Legislation Act 2003*. Provisions of the *Acts and Instruments (Framework Reform) Act 2015* allowed for the making of the LEOM Regulation. When the LEOM Regulation was tabled, the Parliament did not disallow it. Because it is not subject to sunsetting, the LEOM Regulation will not be remade and thus cannot be reconsidered by the Parliament.

3 See: Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Interim report*, 2 December 2020, pp. 61–72.

5.4 Regardless of the guidance provided for future exemptions from disallowance, improving parliamentary oversight of delegated legislation will require amendments to the Legislation Act, and an examination of the appropriateness of existing exemptions from disallowance.

5.5 This chapter discusses how the Parliament can ensure it fulfils its constitutional mandate by establishing a defensible framework for circumstances in which exemptions from disallowance might be appropriate. It speaks to the need for transparency in justifying exemptions, and to the requirement for the Parliament to take seriously its scrutiny functions and agree to principles on the very limited grounds where exemptions from disallowance might be appropriate. It highlights a worrying trend away from accountability, and argues for any guidelines on exemptions to have status that carries the weight of parliamentary opinion. In closing it discusses amendments to the Legislation Act, the future of the Legislation (Exemptions and Other Matters) Regulation 2015 (LEOM Regulation), and broad concerns with exemptions from sunsetting.

Exemptions from disallowance and their effect on accountability to the Parliament

> *In a liberal, democratic, parliamentary constitutional order, matters that concern such things as trespassing on personal rights and liberties, failing to provide for adequate accountability protections and so forth are matters which citizens expect their parliament to be concerned with.*[4]

5.6 The discussion in previous chapters has identified something of a consensus that, in order to ensure the Parliament's lawmaking role is not undermined, the constitutional grounds upon which exemptions from disallowance might be permitted are small. As a consequence, exemptions from disallowance should be very few. There are some differing views, however, as to what constitutes this small arc of acceptability.

5.7 The Institute of Public Affairs is of the view that although the Parliament may have legal and constitutional authority to exempt delegated legislation from disallowance, it is an 'authority that the Parliament should refuse to exercise. The Parliament has a responsibility to reassert itself as a check on the executive by removing all exemptions to disallowance for delegated legislation'.[5]

5.8 Others are somewhat more equivocal, suggesting there may be particular situations where exemptions can be justified, subject to certain conditions being met. The Law Council is of the view it does not consider it is ever appropriate or necessary to include significant matters, such as those dealing with substantive

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4 Professor Kristen Rundle, Co-Director, Centre for Comparative Constitutional Studies, Melbourne Law School, University of Melbourne, *Committee Hansard*, 31 August 2020, p. 7.

5 Institute of Public Affairs, *Submission 16*, p. [6].

policy issues, in delegated legislation, whether it is subject to disallowance or not. But in the case of responding to matters of public health in times of emergency, there may be some instances of legitimate grounds for exemption from disallowance, on a temporary, time-limited basis, with renewals possibly subject to disallowance.[6]

5.9 Regardless of the acceptability of particular exemptions (to which this chapter will return), the principle of parliamentary accountability remains. This is explained by the Centre for Comparative Constitutional Studies. The essential element of a legislative instrument is that it 'involves an exercise of legislative power that has been delegated by the Parliament to the executive'. Being legislative in character, the power belongs to the Parliament. 'The fact of its delegation to the executive does not change the ultimate authority and responsibility of the Parliament for exercises of its legislative power'.[7]

5.10 As the Parliament remains the legislative authority, the gravity of requests for disallowance must be recognised. The Legislative Review Committee of the Parliament of South Australia emphasised this when it wrote that seeking exemption from disallowance is a request that bears an increased burden to explain to the Parliament the need for the exemption. An exemption from disallowance should not be given as a matter of convenience to the executive.[8]

5.11 Ensuring accountability requires consideration of where exemptions from disallowance should be justified and how the Parliament should examine such requests for exemptions.

Any exemptions from disallowance should be justified

5.12 Given the existing lack of guidance on the appropriateness of exemptions from disallowance, there is no standard practice for the justification of exemptions. That there be more discipline applied to the justification of exemptions is not an isolated view. The Centre for Public Integrity suggested the requirement to justify exemptions from disallowance could deter the exempting of instruments from oversight mechanisms where they should not properly be employed.[9] And there is general support for a requirement to provide a written justification for why an

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6 Law Council of Australia, Answers to questions taken on notice, public hearing, Canberra, 27 August 2020 and written (received 11 September 2020), p. 18.

7 The Centre is making this point in the context of its concerns about the definition of a legislative instrument, and the distinction between legislative and administrative power. Centre for Comparative Constitutional Studies, *Submission 12*, p. 9.

8 Legislative Review Committee of the Parliament of South Australia, *Submission 19*, p. [2].

9 Centre for Public Integrity, Answers to questions taken on notice, public hearing, Canberra, 27 August 2020 and written (received 10 September 2020), p. [4].

instrument should be exempt from disallowance or sunsetting in relevant explanatory materials.[10]

5.13 There are varying views, however, on when exemptions should be justified: at the point they are provided for in the enabling legislation (whether directly or by invoking the LEOM Regulation), or in the explanatory statement of the instrument itself.

Justification of exemptions in the explanatory statement

5.14 There is support for exemptions to be justified in the explanatory statement of the instrument, which itself should have explicit regard to the scrutiny principles in the Senate standing orders.[11] While the Institute of Public Affairs does not agree that any delegated legislation should be exempt from disallowance, if there are exemptions, an improvement on the current model would be requiring the instrument to contain an explanatory statement justifying why it should be exempt.[12]

5.15 Justifying exemptions in the explanatory statement would serve an important scrutiny function, and this is considered in the next chapter. However, once the Parliament provides for a legislative instrument to be exempt from disallowance either through primary legislation or the LEOM Regulation, by the time the instrument is actually made it is past the point where an exemption from disallowance can be effectively disputed by the Parliament (other than by amending the enabling legislation or the LEOM Regulation).

5.16 The Attorney-General's Department questioned the efficacy of requiring a justification for an exemption from disallowance after the exemption has been accepted. The exemption from disallowance is typically created by the enabling legislation and it is at this point that justifications should be provided as to why exemption from disallowance is appropriate, not when the instrument is presented.[13]

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10 See, for instance: Law Council of Australia, Answers to questions taken on notice, public hearing, Canberra, 27 August 2020 and written (received 11 September 2020), p. 20; Ms Jacinta Dharmananda, Answers to written questions taken on notice (received 18 September 2020), p. 5.

11 Centre for Comparative Constitutional Studies, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 and written (received 10 September 2020), p. 9. See also: Mr Jared Wilk, Co-convenor, Human Rights Action Group, NSW Council for Civil Liberties, *Committee Hansard*, 27 August 2020, p. 17; Professor Anne Twomey, Answers to questions taken on notice, public hearing, Canberra 31 August 2020 and written (received 11 September 2020), p. 6; Ms Jacinta Dharmananda, Answers to written questions taken on notice (received 18 September 2020), p. 5.

12 Institute of Public Affairs, Answers to questions taken on notice, public hearing, Canberra, 27 August 2020 and written (received 11 September 2020), p. [4].

13 Attorney-General's Department, Answers to written questions taken on notice (received 8 October 2020), p. 8.

5.17 Given the practicalities of disputing an exemption from disallowance at the stage at which the delegated legislation is tabled in the Parliament, exemptions from disallowance can most effectively be considered at the bill stage.

Exemptions should be scrutinised by the Parliament at the bill stage

> *…to consider scrutiny and appropriateness only at the level of the delegated instrument is to address the issue after the horse has bolted. The power for it to be made has already been granted by the statute.*[14]

5.18 Considering the rationale for exemptions from disallowance in order that they may be assessed for legitimacy cannot effectively occur at any point other than when the enabling legislation is considered by the Parliament.[15] This stands regardless of whether the exemption is provided for directly in the enabling legislation, or through the LEOM Regulation. The importance of parliamentary scrutiny at this time is therefore imperative. According to Ms Jacinta Dharmananda:

> Each time a statute enables the making of an exempt instrument, or, if in regulation, each time a regulation is tabled in Parliament that provides for exempt instruments, that enabling legislation should be subject to all available parliamentary scrutiny mechanisms to ensure that the executive sufficiently justify (including in the explanatory material) the reason for the need for exemption.[16]

5.19 That the Parliament adequately scrutinises primary legislation is the expressed expectation of government officials who put forward legislation that provides for delegated legislation to be exempted from disallowance. Officials from the Department of Health stated their view, 'if you were pushing for something to be non-disallowable, you would expect scrutiny of that decision as the legislation is going through'.[17] The Department of Education made statements to similar effect, 'the Parliament has had the opportunity to assess the probity and efficacy of exempting such instruments when they have been made…'[18]

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14 Ms Jacinta Dharmananda, *Committee Hansard*, 27 August 2020, p. 21.

15 Although, as noted above, it remains the case that justifying exemptions in the explanatory statement to an instrument would still serve an important scrutiny function. This is considered in the next chapter.

16 Ms Jacinta Dharmananda, Answers to written questions taken on notice (received 18 September 2020), p. 3.

17 Mr Stephen Bouwhuis, Assistant Secretary, Legal and Assurance Division, Department of Health, *Committee Hansard*, 3 September 2020, p. 23.

18 The comment is made in relation to the exemptions to create non-disallowable instruments underpinning national schemes being contained in enabling legislation. Department of Education, Skills and Employment, *Submission 26*, p. 2.

5.20 In arguing against making Advance to the Finance Minister determinations disallowable, the Department of Finance argued the provision is itself subject to parliamentary scrutiny through the legislative process:

> Each time that the Parliament passes an Appropriation Bill which includes an AFM provision, the Parliament is agreeing to appropriate funds, not just as itemised in the Bill, but also to deal with urgent and unforeseen expenditure up to the amount set out under the AFM provisions.[19]

5.21 Individual parliamentarians are assisted in their scrutiny role by a parliamentary committee that exists to carry out such scrutiny. Under Senate standing orders 24(1)(a)(iv) and (v), the Scrutiny of Bills Committee is required to scrutinise each bill to determine, amongst other things, whether it inappropriately delegates legislative power, and insufficiently subjects the exercise of legislative power to parliamentary scrutiny.[20]

5.22 For the Scrutiny of Bills Committee, the disallowance process is an important aspect of parliamentary scrutiny and the default position is that parliamentary oversight is provided for all delegated legislation unless there is a 'very strong reason' for exemption. Over time, the committee has expressed strong views on a number of issues, including:

- significant matters, such as those dealing with substantive policy issues rather than matters that are purely technical or administrative in nature, should be included in primary legislation rather than delegated legislation; and
- when a provision specifies an instrument is not subject to disallowance, the committee expects the explanatory memorandum to set out a full explanation justifying the need for the exemption, reference to the LEOM Regulation is not generally accepted as sufficient justification.[21]

5.23 Over time, the Scrutiny of Bills Committee has brought to the attention of the Senate scrutiny concerns about delegated legislation exempt from disallowance in the following contexts: Advance to the Finance Minister determinations; ministerial directions to funds about investment functions; national security

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19 Department of Finance, Answers to written questions taken on notice (received 18 September 2020), p. [3]

It is also the case there is a standing exemption in the LEOM Regulation which provides that all instruments made under an annual Appropriation Act (including Advance to the Finance Minister determinations), are exempt from disallowance. Legislation (Exemptions and Other Matters) Regulation 2015, s. 9.

20 The Senate, *Standing Orders and other orders of the* Senate, January 2020, SO 24(1)(a)(iv), 24(1)(a)(v).

21 Scrutiny of Bills Committee, *Submission 4*, p. 2.

legislation; the *Biosecurity Act 2015*; sunsetting; and Henry VIII clauses.[22] It is incumbent on the Parliament to actively consider these concerns.

Who should establish appropriate grounds for exemptions

> *It's for politicians to decide what they think is more important—that is, whether the current power they have is more important or whether in the long run it's more important to include proper measures of accountability.*[23]

5.24 A general requirement to justify exemptions from disallowance is not sufficient to ensure effective parliamentary oversight; the substance of the rationale is important and this requires the formulation of guidance. It is questionable whether government departments are of a mind to formulate appropriate guidance. Regardless, it is appropriate that guidance is provided by the Parliament as the constitutional lawmaking authority.

5.25 Government agencies, particularly the Attorney-General's Department, are of the view the current framework works well. In the words of the Department of Education, 'it strikes an appropriate balance between functional and efficient executive administration and the importance of parliamentary oversight'.[24] Neither the Attorney-General's Department nor the Attorney-General have, or seek to have, a gatekeeper role for new exemptions created in primary legislation.[25] The Department is therefore not inclined to suggest, on behalf of the government, the limited grounds upon which exemptions from disallowance might be made. This is despite the fact it advises other departments on exemptions from disallowance.[26]

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22 Scrutiny of Bills Committee, *Submission 4*, pp. 3–4.

23 Professor Anne Twomey, *Committee Hansard*, 31 August 2020, p. 9.

24 Department of Education, Skills and Employment, *Submission 26*, pp. 4–5; Attorney-General's Department, *Submission 14*, p. 8; Department of Health, *Submission 27*, p. 2.

The Department of Home Affairs, the Department of Agriculture, Water and the Environment, the Department of Veterans' Affairs, and the Department of Finance similarly raise no concerns with the current framework, instead explaining how it works and warning against any changes. Minister for Veterans' Affairs, *Submission 2*, p. 3; Department of Home Affairs, *Submission 8*, pp. 3–5; Department of Agriculture, Water and the Environment, *Submission 17*, pp. 1–2; Department of Finance, *Submission 28*, pp. 7, 9–10.

25 Attorney-General's Department, Answers to questions taken on notice, public hearing, 3 September 2020 (received 8 October 2020), p. [5–6]; Mr Andrew Walter, First Assistant Secretary, Integrity and Security Division, Attorney-General's Department, *Committee Hansard*, 3 September 2020, pp. 5, 10.

26 Some government departments stated the Attorney-General's Department was best placed to provide guidance on the appropriateness of exemptions from disallowance. See, for instance: Department of Agriculture, Water and the Environment, Answers to written questions taken on notice (received 6 November 2020), pp. 6–7; Department of Health, Answers to written questions taken on notice (received 8 October 2020), pp. [22, 24].

5.26 The Attorney-General's Department advised instead:

> Both the decision to enact a power to make legislative instruments and whether instruments made pursuant to such a power are exempt from disallowance are matters for the Parliament.[27]

5.27 Others are similarly of the view establishing appropriate grounds for exemptions from disallowance is not only within the purview of the Parliament, it is a fundamental responsibility of the legislative branch—whether it be established in legislation or as guidance.[28] The Centre for Comparative Constitutional Studies argued the executive branch should not be permitted to determine the circumstances governing disallowance; the Parliament is the oversight actor and exemptions to the 'foundational principle of disallowance should be settled through a legislated framework'.[29] The possible status of any such guidance will be discussed below.

5.28 Professor Anne Twomey suggested while the executive can issue guidance to its officers, if the Parliament wishes to legislate to impose legal constraints on the circumstances in which it may be appropriate for delegated legislation to be exempt from parliamentary oversight, it may do so and its legislation would override any inconsistent executive guidance.[30]

5.29 The Law Council alternatively suggests the committee is well-placed to develop and publish guidance material. The Attorney-General's Department and

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27 Attorney-General's Department, Answers to written questions taken on notice (received 8 October 2020), answers to questions 3, 4, 6, 8, 10, 12, 13, 15, 17.

28 See, for instance: Professor Gabrielle Appleby, Dr Janina Boughey, Dr Sangeetha Pillai and Professor George Williams, Answers to written questions on notice (received 26 October 2020), p. 2; Centre for Public Integrity, Answers to questions taken on notice, public hearing, Canberra, 27 August 2020 and written (received 10 September 2020), p. 3; Ms Jacinta Dharmananda, Answers to written questions taken on notice (received 18 September 2020), p. 3; Associate Professor Lorne Neudorf, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 (received 11 September 2020), pp. 35–36.

29 Although the decision is one for the Parliament, the Centre noted there remains a role for the executive in working with the Parliament to identify factors or criteria and arguing its views on when exemption might be justified. Centre for Comparative Constitutional Studies, *Submission 12*, p. 11; Centre for Comparative Constitutional Studies, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 and written (received 10 September 2020), p. 8. See also: Associate Professor Lorne Neudorf, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 (received 11 September 2020), pp. 35–36.

30 Professor Anne Twomey, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 and written (received 11 September 2020), p. 6.

other key stakeholders may be consulted with reference to the guidance material. This guidance material would be housed within the committee.[31]

Determining appropriate grounds for exemptions from disallowance

5.30 Chapter 4 discussed a range of rationales for exemptions from disallowance that have been contained in the explanatory materials of legislation passed by the Parliament. It found most to be insufficiently robust. That the current framework for exemptions from disallowance is both *ad hoc* and is capable of encompassing a broad range of instruments regardless of the legitimacy of any justification, speaks to the importance of establishing firm guidance. There are two approaches that may be taken to establish appropriate grounds for an exemption from disallowance: principles and broad categories.

5.31 The necessarily limited nature of guidance was emphasised by Ms Jacinta Dharmananda who argued it would be difficult to provide comprehensive or definitive prescriptive criteria given the variety of reasons that may be appropriate for specific instruments and circumstances. She warns, 'attempts at a definitive criteria are likely to be overly general at best, or, if too specific, unable to accommodate a future unforeseen development at worst'.[32]

5.32 A similar point was made by the Department of Finance. While the Department acknowledged the value of practical guidance on circumstances in which it is appropriate for delegated legislation to be exempt from disallowance, it would be difficult to foresee all possible future scenarios when developing any such guidance.[33]

5.33 Many recommendations were put to the committee on appropriate grounds for exemption. Some recommendations emphasised the need for high-level principles, others suggested broad categories.[34] A proviso was well expressed by the Law Council—the grounds for exempting delegated legislation from disallowance will

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31 The Law Council also suggested the executive may produce its own guidance, as noted in recommendation 15 of the committee's 2019 report. Law Council of Australia, Answers to questions taken on notice, public hearing, Canberra, 27 August 2020 and written (received 11 September 2020), p. 9.

32 Ms Jacinta Dharmananda, *Submission 25*, p. 7.

33 Department of Finance, Answers to written questions taken on notice (received 18 September 2020), p. [9].

34 Submitters did not necessarily use the terms 'principle' or 'category' in their advice. Rather, the various suggestions made in submissions and other evidence have been collated under these broad terms. Some submitters noted the difficulty of identifying reasons for an exemption from disallowance that could be applied generally.

always be a matter of context and proportionality.[35] It might further be added that any exemptions must remain compatible with the Parliament's ultimate lawmaking responsibilities under the Constitution.[36]

Principles

5.34 While a number of grounds might be put forward for exemptions from disallowance, Professor Gabrielle Appleby, Dr Janina Boughey, Dr Sangeetha Pillai and Professor George Williams are of the view justifications must be driven by principles (or tests), specifically:

- exemptions should not apply where the instruments are affecting rights, liberties, duties and obligations; and
- exemptions should not apply unless there is an alternative form of accountability.[37]

5.35 Professor Appleby and others argue that by focussing on the effect of an instrument, or whether there are alternative forms of accountability, there would be

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35 The Law Council further notes, even where grounds for exemption from disallowance are legitimate, there are a range of practical measures and mechanisms which can be implemented to ensure scrutiny and transparency. The Law Council of Australia, *Submission 21*, p. 7.

36 See: Associate Professor Lorne Neudorf, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 (received 11 September 2020), p. 36; Professor Gabrielle Appleby, Dr Janina Boughey, Dr Sangeetha Pillai and Professor George Williams, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 (received 5 September 2020), p. 1.

37 The answers to questions on notice identify these principles as 'tests'. The submission from Professor Gabrielle Appleby, Dr Janina Boughey, Dr Sangeetha Pillai and Professor George Williams suggests two principles to guide exemptions from disallowance—that exemptions are set out in primary legislation, and there must be clear justifications (these issues are addressed in chapter 7). The submitters suggest an alternative form of accountability might include instruments requiring the approval of both Houses of Parliament to come into force. Professor Gabrielle Appleby, *Committee Hansard*, 31 August 2020, p. 17; Professor Gabrielle Appleby, Dr Janina Boughey, Dr Sangeetha Pillai and Professor George Williams, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 (received 5 September 2020), p. 1; Professor Gabrielle Appleby, Dr Janina Boughey, Dr Sangeetha Pillai and Professor George Williams, *Submission 1*, pp. 3–4.

See also: Centre for Public Integrity, Answers to questions taken on notice, public hearing, Canberra, 27 August 2020 and written (received 10 September 2020), p. 2.

The Australian Federation of Air Pilots called for enhanced freedom of information mechanisms in lieu of full parliamentary oversight, on the basis the Parliament cannot perform an oversight function on all technical regulations. The committee did not directly consider this. See: Australian Federation of Air Pilots, *Submission 30*, pp. 4–6.

only a very narrow category of instruments left that might justifiably be exempt from disallowance.[38]

5.36 What constitutes strong alternative accountability, however, may not be an issue of general agreement. As an example of alternative accountability, the by-laws of elected bodies or a university, such as the Australian National University (ANU), where there is alternative democratic accountability through the elected body, were suggested as potentially justifying an exemption from disallowance.[39]

5.37 Statutes, orders or rules made under the *Australian National University Act 1991* (ANU Act) are specifically exempted from disallowance under section 10 of the LEOM Regulation. The Department of Education claims making the ANU's statutes, rules and orders disallowable would 'create an additional and unnecessary layer of governance' that would reduce the ANU's efficiency and its independence. The Department further argues disallowance of rules or orders made under the ANU Act would be incompatible with the University's self-governing status and impede its ability to properly manage its internal administration and delivery of academic programs. The Department adds, 'the democratic nature of the ANU Council, as the delegated lawmaking body, provides the requisite level of oversight and accountability for any such exercises of legislative power'.[40]

5.38 However, it is not clear this case for an alternative form of accountability is broadly accepted. In this particular example, the actual independence of the ANU Council, as the basis upon which it is appropriate to exempt ANU statutes, rules and orders from disallowance, was questioned. While Civil Liberties Australia supported the general point, it did not agree the ANU itself should be exempted given several members of the Council are appointed by the Minister.[41]

5.39 The existence of other alternative yet equivalent forms of parliamentary accountability was discussed in the previous chapter. Notwithstanding the legitimacy of this principle, any exemption from disallowance needs to be assessed on its individual merits; recourse to broad categories will not ensure sufficient parliamentary oversight in all cases.

Categories

5.40 The establishment of principles does not exclude guidance on certain categories that may be acceptable, possibly acceptable, or never acceptable. Any

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38 This comment was made in the context of the acceptability of Henry VIII clauses. Professor Gabrielle Appleby, Dr Janina Boughey, Dr Sangeetha Pillai and Professor George Williams, Answers to questions taken on notice (received 26 October 2020), p. 3.

39 Dr Gabrielle Appleby, *Committee Hansard*, 31 August 2020, p. 17; Professor Gabrielle Appleby, Dr Janina Boughey, Dr Sangeetha Pillai and Professor George Williams, *Submission 1*, p. 4.

40 Department of Education, Skills and Employment, *Submission 26*, p. 4.

41 Civil Liberties Australia suggests the number is 8; the Act specifies 7. Civil Liberties Australia, *Submission 7*, p. 1; *Australian National University Act 1991*, s. 10.

exclusion from parliamentary oversight, however, requires that the grounds for exclusion be justified in individual cases, not merely stated. This point was emphasised by the Legislative Review Committee of the Parliament of South Australia, which stated reference to guidance materials should not be accepted as a substitute for a clear explanation in plain terms for the grounds for an exemption from disallowance.[42]

Exceptional circumstances

5.41 It is suggested the default should be that all delegated legislation is subject to disallowance and any exemptions should be few in number, clearly defined, and limited to genuinely exceptional circumstances.[43] The Attorney-General's Department agrees exemptions from disallowance should only be created where exceptional policy circumstances exist,[44] as does the Department of Education that calls for exemptions from disallowance in 'very limited circumstances' and where they are strictly circumscribed and properly justified.[45]

5.42 However, it is clear what constitutes exceptional circumstances may require guidance. Rationales put forward by the Attorney-General's Department (from legislation passed by the Parliament) were judged by Professor George Williams to be 'quite mundane…well beyond the exceptional policy circumstance…there's not much you couldn't shoehorn into one of these categories if you really wanted to remove the possibility of disallowance'.[46]

5.43 It should not be underestimated how difficult it is to identify with certainty or finality what 'exceptional circumstances' actually are.[47] Exceptional circumstances are, by their nature, difficult to foresee. And furthermore, for the NSW Council for Civil Liberties, even in exceptional circumstances, the characteristic of the instrument involved and the situation in which it would be deployed would remain relevant to any consideration. There can be certainty, however, that delegated legislation made

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42 Legislative Review Committee of the Parliament of South Australia, *Submission 19*, p. [2].

43 Associate Professor Lorne Neudorf, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 (received 11 September 2020), pp. 22–24. See also: NSW Council for Civil Liberties, Answers to written questions taken on notice (received 2 September 2020), pp. 1, 10; NSW Council for Civil Liberties, *Submission 22*, p. 6; Ms Jacinta Dharmananda, *Submission 25*, p. 5; Professor George Williams, *Committee Hansard*, 31 August 2020, p. 18; Dr Lorne Neudorf, Deputy Dean of Law & Associate Professor, Adelaide Law School, University of Adelaide, *Committee Hansard*, 31 August 2020, p. 20; Public Interest Advocacy Centre, *Submission 10*, p. 5; NSW Young Lawyers, *Submission 23*, p. 2.

44 Attorney-General's Department, *Submission 14*, p. 6.

45 Department of Education, Skills and Employment, *Submission 26*, p. 5.

46 Professor George Williams, *Committee Hansard*, 31 August 2020, pp. 18–19; Attorney-General's Department, *Submission 14*, pp. 6–8.

47 Ms Jacinta Dharmananda, Answers to written questions taken on notice (received 18 September 2020), p. 4.

pursuant to Henry VIII clauses should not be permitted to be exempt from disallowance, unless the enabling provision places limits on the duration and effect.[48]

Exceptional circumstances and Henry VIII clauses

5.44 A Henry VIII clause is a provision in primary legislation. It means that if delegated legislation made under the primary legislation it is inconsistent with the primary legislation, the delegated legislation prevails. The result is that the executive may amend, or modify the operation of, primary legislation by making delegated legislation under a Henry VIII clause.[49]

5.45 These clauses are so named because King Henry VIII obtained parliamentary authority to give the force of law to his proclamations under the Statute of Proclamations of 1539. Proclamations made under the statute were able to infringe later Acts of Parliament.[50]

5.46 The case of Henry VIII clauses might best be considered within the context of exceptional circumstances. The Scrutiny of Bills Committee states 'such clauses impact on the level of parliamentary scrutiny and may subvert the appropriate relationship between the Parliament and the executive'.[51]

5.47 While some are of the view they should be examined in the same manner as other legislative instruments (and are thus unlikely to be accepted as appropriate for an exemption from disallowance), others are of the view there is 'no principled argument in support of their exemption from disallowance'.[52] The Centre for Public Integrity argues 'the power to disallow is the only thing standing between a Henry VIII clause and a total usurpation of the Parliament's oversight'.[53]

5.48 The Law Council is one organisation of the view Henry VIII clauses should be assessed on the same grounds as other delegated legislation. It notes the need for

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48 NSW Council for Civil Liberties, Answers to written questions taken on notice (received 2 September 2020), p. 1.

49 Gabriël Moens and John Trone, 2012, 'The validity of Henry VIII clauses in Australian federal legislation', *Journal of Constitutional History/Giornale di Storia Constituzionale*, vol. 24, p. 133.

50 Gabriël Moens and John Trone, 2012, 'The validity of Henry VIII clauses in Australian federal legislation', *Journal of Constitutional History/Giornale di Storia Constituzionale*, vol. 24, p. 133. See also: Institute of Public Affairs, *Submission 16*, p. [5].

51 Scrutiny of Bills Committee, *Submission 4*, p. 4. See also: Professor Gabrielle Appleby, Dr Janina Boughey, Dr Sangeetha Pillai and Professor George Williams, Answers to questions taken on notice (received 26 October 2020), p. 3.

52 Centre for Comparative Constitutional Studies, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 and written (received 10 September 2020), p. 9. See also: Law Council of Australia, Answers to questions taken on notice, public hearing, Canberra, 27 August 2020 and written (received 11 September 2020), p. 16; Jackson Ho, *Submission 9*, p. [3].

53 Centre for Public Integrity, Answers to questions taken on notice, public hearing, Canberra, 27 August 2020 and written (received 10 September 2020), p. 1.

some form of parliamentary oversight (especially in times of emergency) to ensure decisions are made appropriately and the impacts are being measured and evaluated. This is more crucial where the decision of an individual has the potential to override Acts of Parliament. As such, there is a strong argument for subjecting such instruments to disallowance.[54]

5.49 However, there is not unanimous agreement that Henry VIII clauses are never justified. Some suggest they may be appropriate in limited circumstances subject to restrictions: they should be limited in duration,[55] or only permitted in exceptional or urgent situations.[56]

5.50 Departments argue for the flexibility, stating non-disallowable Henry VIII clauses reflect the urgency required for such measures and the need for certainty in their application.[57]

5.51 As an exception rather than the rule, Professor Twomey agrees Henry VIII clauses may be necessary in circumstances where action must be taken quickly to rectify an unexpected problem when the Parliament is not sitting, is dissolved, or otherwise unable to act in a timely manner.[58] Having stated a case for their existence, Professor Twomey is of the view the exercise of powers under such clauses should be subject to review and potential disallowance once Parliament is in the position to deal with the matter. There should be a presumption that 'action taken pursuant to a Henry VIII clause should be disallowable'.[59]

Administrative or technical matters

5.52 It was put to the committee there are instances where delegated legislation deals with administrative and technical issues (rather than substantive policy issues which should be contained in primary legislation), and it is not necessary for the Parliament to be able to override such instruments.[60] The Law Council of Australia agreed it may be appropriate to exempt delegated legislation from disallowance,

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54 Law Council of Australia, Answers to questions taken on notice, public hearing, Canberra, 27 August 2020 and written (received 11 September 2020), p. 16.

55 Mr Jared Wilk, Co-convenor, Human Rights Action Group, NSW Council for Civil Liberties, *Committee Hansard*, 27 August 2020, p. 18.

56 Ms Jacinta Dharmananda, Answers to written questions taken on notice (received 18 September 2020), p. 5.

57 Department of Health, Answers to written questions taken on notice (received 8 October 2020), p. 18.

58 Professor Anne Twomey, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 and written (Received 11 September 2020), p. 2.

59 Professor Anne Twomey, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 and written (Received 11 September 2020), p. 2.

60 Mx Han Aulby, Executive Director, The Centre for Public Integrity, *Committee Hansard*, 27 August 2020, p. 14. See also: Public Interest Advocacy Centre, *Submission 10*, pp. 1–2.

'where it truly is technical administration legislation', and if this is the case, the exemption should be in the primary legislation.[61]

5.53 However, the Centre for Public Integrity warned technical matters could not be established as a broad category without limitation. For the Centre, it is only appropriate to exempt delegated legislation from parliamentary oversight mechanisms when it involves technical matters and the following conditions are met:

- the exemptions are set out in primary legislation;
- the instruments have democratic oversight through other mechanisms (for instance, where the democratic nature of the delegate ensures the requisite accountability or accountability is achieved via the requirement of parliamentary approval); and
- the instrument does not affect human rights or involve questions of policy or the expenditure of public funds.[62]

Guidance must combine high level principles and limited categories

5.54 The views of the Centre for Public Integrity reflect the insight that any exemptions from disallowance based on a broad category need to also satisfy general principles, and further, must be individually argued according to the context of the instrument if the Parliament is to retain its oversight function. The following case of instruments relating to superannuation amply demonstrates issues that arise when blanket exemptions are provided for individual categories—as occurs in the LEOM Regulation.

Case study: Superannuation and the difficulty of establishing broad categories

5.55 Even rationales that appear well founded may be subject to differing views as to their appropriateness. The case of instruments relating to superannuation supports the argument for the application of overarching principles to categories in any proposal to exempt an instrument from disallowance.

5.56 Part 4 of the LEOM Regulation establishes a legislative instrument (other than a regulation) relating to superannuation is not subject to disallowance.[63] The explanatory statement for the exemption at the time stated:

> This exemption exists because exposure of superannuation instruments to disallowance would cause commercial uncertainty as well as uncertainty

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61 Ms Pauline Wright, President, Law Council of Australia, *Committee Hansard*, 27 August 2020, p. 2.

62 Centre for Public Integrity, Answers to questions taken on notice, public hearing, Canberra, 27 August 2020 and written (received 10 September 2020), p. 1.

63 Australian Securities and Investments Commission, *Submission 5*, p. 3. See also: Australian Securities and Investments Commission, Answers to written questions taken on notice (received 22 September 2020), pp. [2–3]; Mr Richard Pye, Clerk of the Senate, *Submission 3*, p. [3].

> for superannuation fund members and providers. These instruments are intended to have enduring operation and are not suitable for the disallowance process.[64]

5.57 The need for the broad superannuation exemption, however, is questioned by the Australian Securities and Investments Commission (ASIC), which makes legislative instruments relating to superannuation. The Commission is of the view there are no legislative instruments that fall within ASIC's purview that should not be subject to disallowance.[65]

5.58 Because of uncertainty as to the application of the exemption from disallowance in the LEOM Regulation, ASIC does not currently claim exemptions from disallowance for the legislative instruments it makes, and generally has not in the past claimed exemptions from disallowance.[66]

5.59 The Commission also points out an anomaly whereby certain instruments made relating to superannuation are exempt from disallowance, but instruments of a similar type relating to managed investment schemes are not exempt from disallowance.[67]

5.60 While ASIC acknowledges it is a matter for the government to determine whether legislative instruments relating to superannuation should be exempt from disallowance, ASIC 'would not be concerned if such ASIC instruments were brought into the general disallowance regime' and into the general sunsetting regime.[68] The Commission states:

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64 Legislation (Exemptions and Other Matters) Regulation 2015, *Explanatory Statement*, p. 25.

65 Mr Grant Moodie, Special Counsel, Chief Legal Office, Australian Securities and Investments Commission, *Committee Hansard*, 3 September 2020, p. 1.

66 The LEOM Regulation exempts instruments 'relating to superannuation' but does not define this and provides limited guidance as to the intended scope for the exemption. ASIC identified a general concern with whether instruments made by ASIC under the *Corporations Act 2001* (Corporations Act) and the *National Consumer Credit Protection Act 2009* (Credit Act) are exempt from disallowance. The Corporations Act and the Credit Act rely on referral of powers from the states to the Commonwealth and give effect to a COAG agreement in relation to national laws. As such, it could be considered that they facilitate the operation of an intergovernmental scheme. Instruments made under the Corporations Act, however, are specifically carved out of the exemption from disallowance in section 44(1) of the Legislation Act. There is no carve out for instruments made under the Credit Act, and such instruments, according to ASIC, might be exempt from disallowance. Australian Securities and Investments Commission, Answers to written questions taken on notice (received 22 September 2020), pp. [1–2]; Mr Grant Moodie, Special Counsel, Chief Legal Office, Australian Securities and Investments Commission, *Committee Hansard*, 3 September 2020, p. 1.

67 Mr Grant Moodie, Special Counsel, Chief Legal Office, Australian Securities and Investments Commission, *Committee Hansard*, 3 September 2020, p. 2.

68 Australian Securities and Investments Commission, *Submission 5*, p. 3.

> In ASIC's experience, we consider there is limited benefit from exempting from disallowance the legislative instruments made by ASIC that relate to superannuation...
>
> ASIC would observe that our practical experience is that the absence of exemptions has not hindered our regulatory work.[69]

5.61 Regardless of ASIC's views, the Attorney-General's Department repeated the rationale in the explanatory statement to the LEOM Regulation, that the exemption exists because 'exposure of superannuation instruments to disallowance would cause commercial uncertainty, as well as uncertainty for superannuation fund members and providers'. It further claimed 'the instruments are intended to have enduring operation and are not suitable for the disallowance process'.[70]

5.62 This example amply demonstrates that mere statements as to there being grounds for exemptions for disallowance does not constitute a sufficient rationale for consideration by the Parliament.

There is a general inclination away from accountability

5.63 Comments made by government officials during hearings suggests there may be a general inclination away from parliamentary accountability. When asked to respond to the suggestion that instruments exempted from disallowance during an emergency should be automatically transformed to disallowable instruments after a period of time, the Attorney-General's Department suggested the use of 'safeguards' may be an alternative. Mr Walter stated the Attorney-General's Department encouraged agencies to think about appropriate safeguards, 'if you're removing one safeguard, is there another appropriate safeguard?'[71]

5.64 The reference to 'safeguards' suggests rather than needing parliamentary oversight, the executive can judge the measures required to ensure an instrument is not only appropriate but also being used appropriately. This would appear contrary to the constitutional principle of parliamentary authority and oversight.

5.65 The Department of Education similarly raises concern with prescriptive guidance, claiming 'bespoke consideration of exemptions on a case by case basis

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69 ASIC did not comment on the appropriateness of exemptions from disallowance for instruments relating to superannuation made by other agencies, ministers and statutory office-holders. Australian Securities and Investments Commission, Answers to written questions taken on notice (received 22 September 2020), pp. [2, 4].

70 Attorney-General's Department, Answers to written questions taken on notice (received 8 October 2020), p. 13.

71 Mr Walter also suggested exemptions from disallowance would canvass 'alternative safeguards where appropriate'. Mr Andrew Walter, First Assistant Secretary, Integrity and Security Division, Attorney-General's Department, *Committee Hansard*, 3 September 2020, p. 12. See also, p. 5.

would impede administrative efficiency associated with the delegated lawmaking function'.[72]

5.66 That departments might try to game any guidelines or categories was suggested in responses to the proposition more prescriptive guidance on the appropriateness of exemptions from disallowance should be established. The Attorney-General's Department stated:

> The first concern is that, if you set out a prescribed set of categories, for example, that an instrument could fall into to, therefore, be allowed to be exempt from disallowance, we'd find a proliferation of instruments that would become disallowable because departments, agencies and ministers would say, 'We fit in that category, it should be exempt from disallowance'…
>
> …we may see more pressure put on defining instruments as not being legislative instruments in the first place. You can do that under the Legislation Act or through primary legislation. Obviously, a piece of primary legislation can declare that an instrument is not a legislative instrument. It might put more pressure on those provisions, which would have the terrible consequence, I think, of taking a whole lot out of the whole regime which means not being tabled and not going on the Register of Legislation, which could take us back to the pre *Legislative Instruments Act* days, where certain things were clearly publicly available—namely, regulations and rules—and a whole lot of other things, like ordinances, were not necessarily available to the public eye and didn't have parliamentary scrutiny.[73]

5.67 Concerns about inclinations away from transparency were expressed by the Centre for Comparative Constitutional Studies, which argues:

> A climate of opacity has developed around the issue of exempting delegated legislation from disallowance generally…In our view this opacity is itself instructive. It suggests that an attitude has developed toward the practice and prevalence of exemption from disallowance which sees both as matters of insufficient concern to warrant transparency as to the circumstances and scale of their occurrence.[74]

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72 Department of Education, Skills and Employment, *Submission 26*, p. 5.

73 Mr Andrew Walter, First Assistant Secretary, Integrity and Security Division, Attorney-General's Department, *Committee Hansard*, 3 September 2020, p. 8.

74 Centre for Comparative Constitutional Studies, *Submission 12*, p. 7.

Guidance on principles for exemptions from disallowance—legislated or policy

> *…specific instruction on the form of explanatory documents may assist in making it less likely that the executive may choose to put vague and potentially contemptuous explanations to Parliament.*[75]

5.68 Differing views exist on whether acceptable grounds for exemptions from disallowance would be best legislated or be made at the policy level. At the least, it was put to the committee that guidance should be of sufficient status to support appropriate parliamentary oversight.

5.69 The Centre for Comparative Constitutional Studies argues the status of guidance should be such that it establishes the content of any mandatory statement of justification at the bill stage. It would also inform the task of the Scrutiny of Bills Committee.[76]

5.70 While the Legislative Review Committee of the Parliament of South Australia supported the production of guidance materials as helpful aids to the executive, it cautioned that such materials should not attempt to pre-empt the will of a Parliament.[77]

5.71 There was some support for the notion that criteria for exemptions from disallowance should be set out in legislation.[78] But meeting any such criteria would not be sufficient for Associate Professor Neudorf, who called also for a compelling justification that is consistent with grounds established by the Parliament.[79]

5.72 The Attorney-General's Department supports the criteria for exemptions being maintained as policy, rather than established in legislation, emphasising all

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75 Legislative Review Committee of the Parliament of South Australia, *Submission 19*, p. [3].

76 The Centre also calls for amendment to the Legislation Act. Centre for Comparative Constitutional Studies, *Submission 12*, pp. 11–12.

77 Legislative Review Committee of the Parliament of South Australia, *Submission 19*, p. [2].

78 See, for instance: Centre for Comparative Constitutional Studies, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 and written (received 10 September 2020), p. 8; Centre for Public Integrity, Answers to questions taken on notice, public hearing, Canberra, 27 August 2020 and written (received 10 September 2020), p. 3; Institute of Public Affairs, Answers to questions taken on notice, public hearing, Canberra, 27 August 2020 and written (received 11 September 2020), p. [3].

Associate Professor Neudorf argued for a schedule to the Legislation Act to list all instruments or classes of instruments that are exempt, citing the relevant grounds in the Legislation Act. Associate Professor Lorne Neudorf, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 (received 11 September 2020), pp. 22–24.

79 Associate Professor Lorne Neudorf, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 (received 11 September 2020), p. 18.

exemptions are subject to parliamentary scrutiny through the passage of primary legislation or the disallowance process.[80] The Department further argues:

- the diversity of legislative instruments requires flexibility in exemptions;
- no significant issues have been raised with the operation of the disallowance regime with the Department;
- other agencies are of the view the regime is operating effectively;
- departments give parliamentary scrutiny committee requests for further information on particular instruments 'appropriate consideration'; and
- the existing framework in section 44 is operating effectively.[81]

5.73 Regardless of where the guidance sits, Ms Dharmananda urged transparency:

> If we accept that legislation has been passed that allows some instruments to be exempt then the next issue is making it transparent and clear to the public and users of the legislation which instruments are exempt and why.[82]

Amendment to the *Legislation Act 2003*

5.74 Submitters put to the committee that amendments to the Legislation Act are required—most specifically section 44, which allows for exemptions from disallowance.

5.75 The objects of the Legislation Act contains a strong presumption of parliamentary scrutiny, making section 44 stand out as an anomaly, according to Professor Kristen Rundle:

> I think that if we are to reassert the notion of parliamentary control upon which the structure of our constitutional order depends then we have to have an in-principle suspicion towards section 44…[83]

5.76 The Act also contains a presumption in favour of disallowance—evidenced through the procedure in section 42 for the disallowance of legislative instruments. As discussed in chapter 1, the procedure is started by a notice of motion to disallow an instrument or provision in an instrument that is given in a House of Parliament within 15 sitting days of the House beginning on the first sitting day after a copy of the instrument was laid before the House. There is a fifteen day timeline to resolve

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80 Attorney-General's Department, *Submission 14*, p. 8.

81 Attorney-General's Department, *Submission 14*, p. 8.

82 Ms Jacinta Dharmananda, *Committee Hansard*, 27 August 2020, p. 21.

83 Professor Kristen Rundle, Co-Director, Centre for Comparative Constitutional Studies, Melbourne Law School, University of Melbourne, *Committee Hansard*, 31 August 2020, p. 3.

the notice. If it has not been dealt with in that time, the instrument or provision is taken to have been disallowed and repealed at that time.[84]

5.77 There is a general view it is only ever appropriate to exempt from disallowance when the exemption is established in the primary legislation, and if the exemption is made pursuant to appropriate guidance. The Law Council argued in favour of the committee's 2019 report recommendations that all exemptions from disallowance be in the primary legislation and subsection 44(2) of the Legislation Act be amended accordingly. An amendment to this effect is broadly supported.[85]

5.78 If section 44 stands, it is essential, according to Professor Kristen Rundle, 'to form clear views and articulate clear principles as to the circumstances in which there can be exemption from parliamentary oversight, given that to do so is to relinquish parliamentary control over lawmaking'.[86]

Exemptions through delegated legislation

5.79 Exemptions from disallowance made through the LEOM Regulation are particularly concerning for many, quite aside from the fact placing exemptions in regulation prevents the Parliament having an ongoing role in scrutinising the rationale for and legitimacy of the exemptions. Exemption through regulation is described as a 'circuitous and problematic' practice that allows for the bypassing of lawmaking procedures for primary legislation.[87]

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84 See: Centre for Comparative Constitutional Studies, *Submission 12*, p. 4.

85 Law Council of Australia, Answers to questions taken on notice, public hearing, Canberra, 27 August 2020 and written (received 11 September 2020), p. 15; The Law Council of Australia, *Submission 21*, p. 5. See also: Professor Kristen Rundle, Co-Director, Centre for Comparative Constitutional Studies, Melbourne Law School, University of Melbourne, *Committee Hansard*, 31 August 2020, p. 1; Centre for Public Integrity, *Submission 13*, p. [3]; Professor Gabrielle Appleby, Dr Janina Boughey, Dr Sangeetha Pillai and Professor George Williams, Answers to written questions taken on notice (received 26 October 2020), p. 2; Mr Jared Wilk, Co-convenor, Human Rights Action Group, NSW Council for Civil Liberties, *Committee Hansard*, 27 August 2020, pp. 17, 19; Dr Gabrielle Appleby, *Committee Hansard*, 31 August 2020, p. 14; Centre for Public Integrity, Answers to questions taken on notice, public hearing, Canberra, 27 August 2020 and written (received 10 September 2020), p. 3; Mr Richard Pye, Clerk of the Senate*, Submission 3*, p. [4]; Jackson Ho, *Submission 9*, p. [3]; Professor Anne Twomey, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 and written (received 11 September 2020), p. 2; Standing Committee on Regulations and Ordinances, *Parliamentary Scrutiny of Delegated Legislation*, 3 June 2019, p. 123; Legislative Review Committee of the Parliament of South Australia, *Submission 19*, p. 2.

86 Professor Rundle suggests section 44 is constitutionally questionable. Professor Kristen Rundle, Co-Director, Centre for Comparative Constitutional Studies, Melbourne Law School, University of Melbourne, *Committee Hansard*, 31 August 2020, p. 3.

87 Jackson Ho, *Submission 9*, p. [3].

5.80 Exemptions relying on provisions of the LEOM Regulation cannot effectively be considered by the Parliament when they are made, unless the Parliament decides to overrule the LEOM Regulation and amend the enabling legislation accordingly. Although the enabling provision for the making of the LEOM Regulation was provided for in amendments to the Legislation Act made by the *Acts and Instruments (Framework Reform) Act 2015*, its entire substance was not necessarily clear when the Parliament passed the Act and delegated authority to the executive. Nevertheless, it is the case the Parliament had the option to disallow the LEOM Regulation when it was tabled. Given it is exempt from sunsetting, there is no opportunity for the Parliament to reconsider it, other than by amending the primary legislation to repeal it.

5.81 Some question the logic inherent in the LEOM Regulation:

> …it does seem a little bit odd to have a regulation that is made under section 44 and itself is a delegated legislation that then determines whether other delegated legislation should be exempt from disallowance.[88]

5.82 The committee has previously made clear its view, through recommendation 15(a) in the 2019 report that the government:

- reviews existing provisions exempting legislative instruments from disallowance, to determine whether such exemptions remain appropriate, and amends the Legislation Act to ensure all such exemptions are contained in primary legislation.[89]

5.83 The government did not support the recommendation, claiming it would reverse some of the changes effected by the *Acts and Instruments (Framework Reform) Act 2015* that provided for a single framework covering registration, publishing and management of all Commonwealth Acts and instruments. It further claimed it would be impractical to redraft all legislation to give effect to an amendment that all exemptions be provided in primary legislation.[90]

5.84 The government's claim as to the impracticality of redrafting legislation was not accepted by the Law Council of Australia. Resourcing and time can be resolved by allocating the necessary resources. Neither did the Council accept the rationale that such a recommendation would reverse previous decisions:

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88 Mr Grant Moodie, Special Counsel, Chief Legal Office, Australian Securities and Investments Commission, *Committee Hansard*, 3 September 2020, p. 3.

89 Standing Committee on Regulations and Ordinances, *Parliamentary Scrutiny of Delegated Legislation*, 3 June 2019, p. 124.

90 Australian Government, *Australian Government Response to the Senate Standing Committee on Regulations and Ordinances Report: Parliamentary Scrutiny of Delegated Legislation*, November 2019, p. 5.

> The fact that certain changes which have been made in the past will be undone should not, in the Law Council's view, preclude the Australian Government from taking a particular course of action if it is the correct course of action and one that would improve the scrutiny process to ensure that delegated legislation accords with the rule of law.[91]

The sunsetting framework and accountability

5.85 An important factor providing for parliamentary oversight of delegated legislation is the framework for the automatic repeal of instruments after ten years (sunsetting framework). The intent of the sunsetting framework (that is, the point at which instruments are no longer law) is to ensure legislative instruments are up-to-date and only in force for so long as required.[92] Sunsetting of legislative instruments is an opportunity for the executive and the Parliament to consider whether they need to be remade, and is an important accountability measure that provides the Parliament with a valuable tool for oversight.[93]

5.86 As discussed in the committee's interim report, the framework for sunsetting is established under section 50 of the Legislation Act. In general, legislative instruments registered on the Federal Register of Legislation are automatically repealed ten years after registration.[94]

5.87 Once the period for disallowance has expired on a legislative instrument, the Parliament cannot disallow the measures in the instrument until such time as the relevant measures are remade in a new instrument. When an instrument is subject to the sunsetting framework, the opportunity will only arise once every ten years, or perhaps longer if the sunset date is deferred.[95]

5.88 Some specific instruments and classes of instruments are exempted from sunsetting under provisions of the LEOM Regulation.[96] There is currently no

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91 The Law Council stated the Government's reasons were legitimate, but did not justify not implementing Recommendation 15 in its entirety. Law Council of Australia, Answers to questions taken on notice, public hearing, Canberra, 27 August 2020 and written (received 11 September 2020), p. 14.

92 Attorney-General's Department, *Submission 14*, p. 4; Legislation Amendment (Sunsetting Review and Other Measures) Bill 2018, *Explanatory Memorandum*, p. 2.

93 Scrutiny of Bills Committee, *Submission 4*, pp. 2, 4; Associate Professor Lorne Neudorf, *Submission 11*, p. 4. See also, in relation to instruments made in times of emergency: NSW Council for Civil Liberties, Answers to written questions taken on notice (received 2 September 2020), p. 5.

94 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Interim report*, 2 December 2020, pp. 89–90.

95 *Legislation Act 2003*, Chapter 3, Part 4.

96 The Regulation lists nearly seven pages of specific legislative instruments not subject to sunsetting, and seven classes of instrument. Legislation (Exemptions and Other Matters) Regulation 2015, s. 11–12.

requirement for the explanatory statement of an instrument exempt from sunsetting to provide a justification for this exemption.[97]

5.89 There is broad support to reaffirm the need for sunsetting of legislative instruments and for any exemptions from sunsetting to be set out in primary legislation, as previously recommended.[98] There is also support for justifications for exemption from sunsetting to be provided in an instrument's explanatory statement.[99]

5.90 The views of the committee as to appropriate grounds, authority and guidance for exemptions from disallowance are provided in chapter 7. Prior to this, it is appropriate to examine of the role of the committee and its scrutiny function. And it is to this the report now moves.

See a broader discussion of sunsetting in the Committee's 2019 report: Standing Committee on Regulations and Ordinances, *Parliamentary scrutiny of delegated legislation*, 3 June 2019, pp. 140–143.

97 There is an expectation from the Scrutiny of Delegated Legislation Committee, however, that such an explanation will be provided in the explanatory statement. See: Senate Standing Committee for the Scrutiny of Delegated Legislation, *Guidelines*, 1st edition, February 2020, p. 30.

98 See, for instance: Public Interest Advocacy Centre, *Submission 10*, p. 4; Professor Gabrielle Appleby, Dr Janina Boughey, Dr Sangeetha Pillai and Professor George Williams, Answers to written questions taken on notice (received 26 October 2020), p. 2; Law Council of Australia, Answers to questions taken on notice, public hearing, Canberra, 27 August 2020 and written (received 11 September 2020), p. 20.

Associate Professor Neudorf argues for legislating appropriate grounds for exemptions from sunsetting. See: Associate Professor Lorne Neudorf, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 (received 11 September 2020), pp. 24, 38.

99 Professor Anne Twomey, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 and written (received 11 September 2020), p. 6; Centre for Comparative Constitutional Studies, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 and written (received 10 September 2020), p. 9; The Centre for Public Integrity, Answers to questions taken on notice, public hearing, Canberra, 27 August 2020 and written (received 10 September 2020), p. [4]; Professor Gabrielle Appleby, Dr Janina Boughey, Dr Sangeetha Pillai and Professor George Williams, Answers to written questions taken on notice (received 26 October 2020), p. 3.

Chapter 6

The role of the Scrutiny of Delegated Legislation Committee

Even from a governmental point of view, there is technically nothing wrong with scrutiny unless, from a governmental point of view, it's exposing the fact that you're behaving badly. The more scrutiny, the better.[1]

6.1 Active scrutiny of delegated legislation does not largely occur on the floor of the Parliament, which is limited to disallowing a legislative instrument. Substantive scrutiny, and negotiation with the executive, occurs in the Standing Committee for the Scrutiny of Delegated Legislation.

6.2 It is this committee that assists parliamentarians in their examination of delegated legislation by elevating for parliamentary consideration any concerns with delegated legislation. Formerly the Standing Committee on Regulations and Ordinances, the Standing Committee for the Scrutiny of Delegated Legislation scrutinises all instruments subject to disallowance, disapproval or affirmative resolution by the Senate, and brings its concerns to the attention of the Senate.

6.3 The work of the committee establishes important precedents that over time have improved the quality of delegated legislation put before the Senate. The scrutiny work of the committee and by extension the legislative role of the Parliament, however, is stymied by the fact neither the committee nor the Parliament can scrutinise legislation exempt from disallowance. Such instruments are never examined to ensure, amongst other things, they are in accordance with the primary legislation, are lawful, and do not trespass unduly on personal rights and liberties.

6.4 Although expanding the committee's remit to examine instruments exempt from disallowance is an important step, it is by no means sufficient to ensure the Parliament carries out its legislative functions as required by the Constitution.

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1 Professor Anne Twomey, *Committee Hansard*, 31 August 2020, p. 8.

Functions of the committee

…the committee makes a crucial contribution to ensuring that Parliament remains the primary lawmaking institution in our constitutional order.[2]

6.5 The committee assesses delegated legislation against a set of scrutiny principles that focus on compliance with statutory requirements, the protection of individual rights and liberties, and parliamentary oversight. Since its establishment in 1932, it has been nonpartisan in nature and technical in its focus.[3]

6.6 Under Senate standing order 23(2), all instruments made under the authority of Acts of Parliament, which are subject to disallowance, disapproval or affirmative resolution by the Senate and which are of a legislative character, stand referred to the committee for consideration and, if necessary, report.[4]

The committee's scrutiny principles

The scrutiny largely occurs through the consideration of parliamentary committees, such as the Senate Standing Committee on the Scrutiny of Delegated Legislation. Its scrutiny, therefore, fulfils a constitutional function.[5]

6.7 The committee examines each instrument against eleven scrutiny principles and determines whether the attention of the Senate should be drawn to the instrument if it raises issues that are likely to be of interest to the Senate.[6] The scrutiny principles, at standing order 23(3), require the committee to scrutinise each instrument as to whether:

(a) it is in accordance with its enabling Act and otherwise complies with all legislative requirements;

(b) it appears to be supported by a constitutional head of legislative power and is otherwise constitutionally valid;

(c) it makes rights, liberties, obligations or interests unduly dependent on insufficiently defined administrative powers;

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2 Centre for Comparative Constitutional Studies, *Submission 12*, p. 2.

3 The committee was established in 1932 as the Senate Standing Committee on Regulations and Ordinances. The Senate amended its standing orders on 27 November 2019, with effect from 4 December 2019, to change the committee's name to the Senate Standing Committee for the Scrutiny of Delegated Legislation and make other changes to clarify and update the committee's powers and functions.

4 The Senate, *Standing Orders and other orders of the Senate*, January 2020, SO23(2).

5 Professor Anne Twomey, *Submission 18*, p. [1].

6 The committee has interpreted this standing order to include legislative instruments that, in combination with their enabling Acts, authorise the Commonwealth to spend public money on grants or programs, or else give rise to significant policy matters. The Senate, *Standing Orders and other orders of the Senate*, January 2020, SO23(4).

(d) those likely to be affected by the instrument were adequately consulted in relation to it;

(e) its drafting is defective or unclear;

(f) it, and any document it incorporates, may be freely accessed and used;

(g) the accompanying explanatory material provides sufficient information to gain a clear understanding of the instrument;

(h) it trespasses unduly on personal rights and liberties;

(i) it unduly excludes, limits or fails to provide for independent review of decisions affecting rights, liberties, obligations or interests;

(j) it contains matters more appropriate for parliamentary enactment; and

(k) it complies with any other ground relating to the technical scrutiny of delegated legislation that the committee considers appropriate.

6.8 Standing order 25(2)(a) authorises the Senate's legislation committees to inquire into and report on legislative instruments made in the portfolios allocated to them. Under standing order 23(4), the committee may resolve to draw an instrument to the attention of the Senate and the relevant legislation committee if it raises significant issues.

The committee's use of protective disallowance notices

6.9 If a legislative instrument raises concerns against any of the scrutiny principles, the Chair may give a notice of motion to disallow the instrument. This is known as a protective disallowance notice, or protective notice of motion. As discussed in chapter 1, this disallowance notice must usually be given within 15 sitting days after the instrument has been tabled. The Senate then has 15 sitting days to deal with the notice.[7]

6.10 The notice is given with the intent to protect the ability of the Senate to disallow an instrument. Having identified a scrutiny concern, the committee writes to the relevant minister asking for further explanation or information, or for an undertaking for specific action to address the issue of concern. The committee, via its secretariat, may also seek additional information or clarification on a potential scrutiny concern from the relevant agency, before the committee escalates the

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7 The committee may also use a protective disallowance notice if it is unable to conclude its consideration of an instrument before the original disallowance period expires. Mr Richard Pye, Clerk of the Senate*, Submission 3*, p. [2]; *Legislation Act 2003*, s. 42; Harry Evans and Rosemary Laing, eds, *Odgers' Australian Senate Practice*, 14th edition, Department of the Senate, 2016, Chapter 15.

matter to the minister.[8] If the committee receives a satisfactory explanation or undertaking from the relevant minister, the protective disallowance notice is typically withdrawn.[9]

6.11 The committee might also give a disallowance notice with the intent of recommending that the Senate disallow the instrument. The Senate has never rejected a recommendation by the committee to disallow an instrument.

6.12 The Table Office publishes a *Disallowance Alert* that lists all instruments subject to a motion for disallowance, whether at the instigation of the committee or an individual senator or member. The *Disallowance Alert* also records the progress and outcome of any notice.

Establishing precedents

6.13 The Clerk of the Senate argues the work of the committee, in particular the development and publication of a reasoned basis for the positions it takes, has influenced the processes for drafting and consultation. He states this has had a 'significant cumulative impact on the quality of legislative instruments and the explanatory statements accompanying them'.[10]

6.14 The committee's expectations with regard to its new scrutiny principles were consolidated in early 2020 when it released its *Guidelines* on the scrutiny principles and other matters.[11]

6.15 Ministers and agencies regularly agree to amend legislative instruments and their explanatory statements to ensure they comply with the committee's scrutiny criteria. Committee records indicate that since 2013, the number and speed of return of ministerial responses has substantially increased. In 2013, the committee received 22 ministerial responses. In 2019, it received 196 responses from ministers and agencies.

6.16 Similarly, the number of ministerial and agency undertakings to amend or revoke instruments, amend explanatory statements, or amend enabling legislation increased from 23 in 2011 to 124 in 2019.

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8 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Role of the Committee*, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Role_of_the_Committee (accessed 9 February 2021). See also: Harry Evans and Rosemary Laing, eds, *Odgers' Australian Senate Practice*, 14th edition, Department of the Senate, 2016, Chapter 15.

9 Harry Evans and Rosemary Laing, eds, *Odgers' Australian Senate Practice*, 14th edition, Department of the Senate, 2016, Chapter 15.

10 Mr Richard Pye, Clerk of the Senate*, Submission 3*, p. [2].

11 Standing Committee for the Scrutiny of Delegated Legislation, *Guidelines*, 1st edition, February 2020.

6.17 Notably, of the replacement explanatory statements that were scrutinised by the committee in 2019, 75 per cent were registered to address the committee's concerns.

6.18 Quite aside from the direct impact on individual instruments, the broader impact of the committee's work is important. The First Parliamentary Counsel has noted the longer-term and broader impact of the committee's work:

> …is reflected in the OPC's practice of referring to the role of the committee, as well as matters that are likely to attract adverse comment from the committee, in formal guidance materials, training materials and in day-to-day dealings with government agency clients. OPC's drafting practices also develop over time in response to scrutiny concerns of the committee. This has contributed to greater consistency in the form and content of legislation.[12]

Scrutiny of non-disallowable instruments

6.19 As it currently stands, the committee is limited by the standing orders of the Senate to scrutinising legislative instruments that are subject to disallowance, disapproval or affirmative resolution by the Senate. The committee cannot scrutinise legislative instruments exempt from disallowance. This stands in contrast to the Parliamentary Joint Committee on Human Rights, which has the ability to examine all legislative instruments.[13]

6.20 There is very little support for this anomaly to continue. It is the view of some that the constitutionality of delegated legislation exempt from disallowance depends on it being subject to scrutiny. Others argue scrutiny by the committee is essential for transparency and improving parliamentary oversight.[14]

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12 Mr Peter Quiggin PSM, First Parliamentary Counsel, quoted in Mr Richard Pye, Clerk of the Senate*, Submission 3*, pp. [2–3].

13 This is provided for in the *Human Rights (Parliamentary Scrutiny) Act 2011*. See also: The Law Council of Australia, *Submission 21*, p. 9; NSW Young Lawyers, *Submission 23*, p. 7; Ms Jacinta Dharmananda, Answers to written questions taken on notice (received 18 September 2020), p. 3.

14 See, for instance, discussions and arguments on these points: Mr Jared Wilk, Co-convenor, Human Rights Action Group, NSW Council for Civil Liberties, *Committee Hansard*, 27 August 2020, p. 17; Professor Anne Twomey, *Committee Hansard*, 31 August 2020, p. 12; Professor Anne Twomey, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 and written (Received 11 September 2020), p. 3; Institute of Public Affairs, Answers to questions taken on notice, public hearing, Canberra, 27 August 2020 and written (received 11 September 2020), p. [4]; Ms Jacinta Dharmananda, Answers to written questions taken on notice (received 18 September 2020), pp. 2–3; Associate Professor Lorne Neudorf, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 (received 11 September 2020); NSW Council for Civil Liberties, Answers to written questions taken on notice (received 2 September 2020), pp. 4–5, 8.

6.21 Scrutiny and disallowance, according to the Centre for Comparative Constitutional Studies, are not inextricably linked. They are separable. Scrutiny in and of itself is an important mechanism of parliamentary oversight.[15] Associate Professor Neudorf argues it is essential the committee's scrutiny work is de-coupled from the question of exemptions from disallowance.[16] The disallowance mechanism is in fact the final point of an extremely important process which is itself a mechanism of parliamentary oversight. This is the scrutiny process.[17]

6.22 It is generally held the committee should be authorised to scrutinise all delegated legislation even where there is no formal power to disallow. Though for some who argue for greater restrictions on exemptions from disallowance this is necessary but not sufficient.[18] Scrutiny, even without the power to disallow, provides some transparency, a limited amount of accountability, and nevertheless informs the Parliament and the broader public.

6.23 Although not supportive of any exemptions from disallowance, the Institute of Public Affairs states a significant problem of delegated legislation is that it lacks the transparency of parliamentary debate. Transparency would be improved if the committee could query the responsible minister and report on all delegated legislation created.[19]

6.24 Acknowledging its limitations, at the very least the effect of scrutinising instruments exempt from disallowance would be, according to the Centre for Public Integrity, to enliven the accountability mechanism of the tabling in Parliament of

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15 Centre for Comparative Constitutional Studies, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 and written (received 10 September 2020), p. 9.

16 Associate Professor Lorne Neudorf, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 (received 11 September 2020), pp. 32–34; Associate Professor Lorne Neudorf, *Committee Hansard*, Monday 31 August 2020, p. 20.

17 Professor Kristen Rundle, Co-Director, Centre for Comparative Constitutional Studies, Melbourne Law School, University of Melbourne, *Committee Hansard*, 31 August 2020, p. 4.

18 See, for instance: Dr Gabrielle Appleby, *Committee Hansard*, 31 August 2020, p. 15; Centre for Public Integrity, Answers to questions taken on notice, public hearing, Canberra, 27 August 2020 and written (received 10 September 2020), p. 4; Professor Kristen Rundle, Co-Director, Centre for Comparative Constitutional Studies, Melbourne Law School, University of Melbourne, *Committee Hansard*, 31 August 2020, p. 4; NSW Council for Civil Liberties, Answers to written questions taken on notice (received 2 September 2020), p. 8; Professor Anne Twomey, *Submission 18*, p. [2]; NSW Young Lawyers, *Submission 23*, pp. 6–7.

19 Institute of Public Affairs, Answers to questions taken on notice, public hearing, Canberra, 27 August 2020 and written (received 11 September 2020), pp. [1–2, 4].

committee concerns. Although this is not a sufficient mechanism to achieve accountability, it is a necessary one.[20]

6.25 While Professor Twomey accepts some limited grounds for the exemption of delegated legislation from disallowance, she is of the view no legislation should be exempted from parliamentary oversight because such oversight serves the function of informing the Parliament, and without scrutiny, the Parliament's control over the exercise of its delegated legislative power is 'seriously diminished', raising constitutionality concerns.[21]

6.26 Professor Twomey argues parliamentary committees should have the capacity to review delegated legislation, regardless of whether it is disallowable because the Houses of Parliament must be informed about delegated legislation so they can fulfil their supervisory functions.[22]

6.27 As discussed previously, it is unlikely the Parliament would overturn enabling legislation. Nevertheless, Professor Twomey states the ability to repeal or amend legislation that grants powers to make legislative instruments exempt from disallowance is not effective if the Parliament is not aware of any particular problems in relation to the instruments because, due to an absence of scrutiny, they are not brought to the Parliament's attention.[23]

6.28 Associate Professor Neudorf states scrutiny by parliamentary committees has a number of benefits even when disallowance is not available, 'it creates a record, identifies defects that can be corrected and keeps parliamentarians informed of the executive use of delegated powers'.[24]

6.29 The value of scrutinising non-disallowable instruments is also recognised by government departments. The Department of Home Affairs stated tabling, even for non-disallowable instruments, 'is itself a scrutiny mechanism'.[25] Tabling supports transparency and provides members of Parliament and senators with an opportunity to view and comment on legislative instruments. This serves, for the Department of Home Affairs, as 'an alternative mechanism ensuring transparency and

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20 Centre for Public Integrity, Answers to questions taken on notice, public hearing, Canberra, 27 August 2020 and written (received 10 September 2020), p. [4]. See also: Mr Jared Wilk, Co-convenor, Human Rights Action Group, NSW Council for Civil Liberties, *Committee Hansard*, 27 August 2020, p. 17.

21 Professor Anne Twomey, *Submission 18*, pp. [1–2].

22 Professor Anne Twomey, *Submission 18*, p. [2]; Professor Anne Twomey, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 and written (Received 11 September 2020), p. 3; Professor Anne Twomey, *Committee Hansard*, 31 August 2020, p. 10.

23 Professor Anne Twomey, *Committee Hansard*, 31 August 2020, p. 8.

24 Associate Professor Lorne Neudorf, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 (received 11 September 2020), pp. 5–6.

25 Department of Home Affairs, *Submission 8*, p. 3. See also: Ms Jacinta Dharmananda, *Submission 25*, p. 4.

commentary'.[26] This scrutiny, though, would be enhanced by the committee having the ability to scrutinise non-disallowable instruments in order that the Parliament might be informed.

An absence of parliamentary attention to the committee's work

6.30 As noted earlier in the report, beyond debate on a disallowance motion, there is no provision for the active scrutiny of delegated legislation on the floor of the Senate (or the House). Although there is potentially thirty days to disallow an instrument, the process itself is fleeting and limited to a vote to disallow.[27] The substance of the scrutiny occurs through the scrutiny committees.

6.31 According to the NSW Council for Civil Liberties, many parliamentarians lack the time or expertise to scrutinise the significant amount of delegated legislation created. It is the Scrutiny of Delegated Legislation Committee that provides the institutional support for parliamentarians who wish to fulfil their scrutiny functions.[28]

6.32 However, there is a view concerns raised by scrutiny committees are not sufficiently heeded by the Parliament. As pointed out by the Centre for Comparative Constitutional Studies, despite clear concerns raised by the Scrutiny of Bills Committee, bills are nevertheless passed without amendment to provisions that allow for exemptions from disallowance. There is an absence of parliamentary attention when bills depart from the fundamentals of the way the constitutional order is structured.[29]

6.33 The Centre states:

> We submit that this record of insufficient parliamentary engagement with concerns repeatedly raised about the designation of legislative instruments as not subject to disallowance is deeply worrying. In our view it indicates a significant failure on the part of Parliament to both perform its constitutional function of calling the executive to account, and to ensure that it remains the primary lawmaking institution within our constitutional system.[30]

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26 Department of Home Affairs, *Submission 8*, p. 3. See also: Ms Jacinta Dharmananda, *Submission 25*, p. 4.

27 Harry Evans and Rosemary Laing, eds, *Odgers' Australian Senate Practice*, 14th edition, Department of the Senate, 2016, p. 441.

28 NSW Council for Civil Liberties, Answers to written questions taken on notice (received 2 September 2020), p. 8.

29 Centre for Comparative Constitutional Studies, *Submission 12*, p. 7; Professor Kristen Rundle, Co-Director, Centre for Comparative Constitutional Studies, Melbourne Law School, University of Melbourne, *Committee Hansard*, 31 August 2020, p. 3.

30 Centre for Comparative Constitutional Studies, *Submission 12*, p. 7.

Scrutinising non-disallowable legislative instruments as a first step

6.34 Allowing the committee to scrutinise delegated legislation exempted from disallowance, however, addresses only one side of the accountability debate. According to Mr Morgan Begg:

> The other part of the debate has to be reducing the amount of delegated legislation that is being created. That means having fewer senior bureaucrats that are empowered to make laws, fewer agencies, fewer departments which have delegated authority to make laws. That in the long run would make the Senate committee's job of reviewing delegated legislation much easier, because there would be much fewer of them.[31]

6.35 The Centre for Comparative Constitutional Studies emphasises the scale and variety of legislative instruments that fall within the purview of the committee hinder its capacity to perform its function to the level required by the constitutional system.[32] This is exacerbated by the growing number of instruments exempted from disallowance procedures.[33]

The complementary role of the Scrutiny of Bills Committee

6.36 Since 1981, the Senate Standing Committee for the Scrutiny of Bills has scrutinised all bills against a set of non-partisan accountability standards to assist the Parliament in its legislative function. These standards are set out in Senate standing order 24.

6.37 Under the standing orders, the committee is required to report on, amongst other things, whether a bill inappropriately delegates legislative powers, or insufficiently subjects the exercise of legislative power to parliamentary scrutiny.[34]

6.38 Through its scrutiny work, the 'committee has consistently drawn attention to bills that seek to limit or remove appropriate parliamentary scrutiny', to the extent these concerns make up almost 38 per cent of the committee's workload.[35]

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31 Mr Morgan Begg, Research Fellow, Institute of Public Affairs, *Committee Hansard*, 27 August 2020, p. 11.

32 Centre for Comparative Constitutional Studies, *Submission 12*, p. 3.

33 Several witnesses called for the committee to be sufficiently resourced to carry out its scrutiny functions. Law Council of Australia, Answers to questions taken on notice, public hearing, Canberra, 27 August 2020 and written (received 11 September 2020), p. 17; The Law Council of Australia, *Submission 21*, p. 5; Associate Professor Lorne Neudorf, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 (received 11 September 2020), p. 37.

34 The Senate, *Standing Orders and other orders of the Senate*, January 2020, SO 24.

35 Senate Standing Committee for the Scrutiny of Bills, *Submission 4*, p. 1.

6.39 The committee advises it has made clear its scrutiny view:

> …significant matters, such as those dealing with substantive policy issues rather than matters that are purely technical or administrative in nature, should be included in primary legislation rather than delegated legislation. The committee's scrutiny concerns in this regard will be heightened where the relevant instrument is not subject to disallowance. The committee considers that the disallowance process is an important aspect of parliamentary scrutiny.[36]

6.40 It is of note the Scrutiny of Bills Committee has generally not accepted that an instrument is exempted from disallowance under the LEOM Regulation as sufficient justification, of itself, for the exemption. This is especially so where an instrument contains significant policy matters.[37]

6.41 Having examined a range of views on the constitutionality of exemptions from disallowance, the rationales the Parliament has previously accepted for exemptions from disallowance, and the role of the committee, the report now turns to the committee's views and recommendations.

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[36] Senate Standing Committee for the Scrutiny of Bills, *Submission 4*, p. 2.

[37] Senate Standing Committee for the Scrutiny of Bills, *Submission 4*, p. 2.

Chapter 7

Committee view and recommendations

…we should get the house in order and we should make sure that Parliament is on stronger ground…[1]

7.1 This inquiry arose from the committee's long-running concern with the increasing proportion of delegated legislation that is exempted from disallowance and thus parliamentary scrutiny. At times, almost 20 per cent of delegated legislation has been exempted from disallowance. The expectation that executive lawmaking is scrutinised is not a partisan policy position; it is a matter of ensuring the constitutionally mandated role of the Parliament is respected.

7.2 The constitutional principle, that the legislative power of the Commonwealth is vested in the Parliament, is undermined by an overreliance on delegated legislation, which is exacerbated by the exemption of this legislation from disallowance.

7.3 Delegated legislation becomes law when it is made by the executive. While this may be convenient for the executive, used excessively it undermines the Parliament's role as lawmaker-in-chief.

7.4 Fears disallowance will lead to uncertainty appear to be without substance with less than half of one per cent of all disallowable legislative instruments disallowed.[2] The committee calculates between 2010 and 2019, of the thousands of pieces of delegated legislation tabled in the Parliament, only 17 were disallowed.[3]

7.5 That the Parliament insists its role is respected is not a judgement 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 scrutiny, there is an erosion of constitutional principle.

7.6 The Parliament has, in part, created this problem itself by passing legislation that allows for exemptions from disallowance. In this sense it can be argued the

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1 Professor George Williams, *Committee Hansard*, 31 August 2020, p. 16.

2 This calculation was provided by the Department of Health for disallowable instruments made between 2015 and 2020. Department of Health, *Submission 27*, p. 1.

3 The committee calculates the number differently to the Department of Health. Of the many thousands of instruments put before the parliament between 2010 and 2019, only 191 notices of motion to disallow were given, and only 17 succeeded. Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Interim report*, 2 December 2020, p. 62.

integrity of the Parliament's role as the ultimate lawmaking authority turns on its scrutiny of the primary legislation that provides for delegated legislation to be made, and for this legislation to be exempted from oversight.

The existing framework for exemptions from disallowance and its constitutionality

7.7 Chapter 3 discussed the existing framework for exemptions from disallowance and the significance of the disallowance mechanism, before examining the constitutionality of exemptions from disallowance and the substance of parliamentary control.

7.8 The existence of delegated legislation is, in and of itself, unremarkable. Legislative powers can be delegated for good reasons, not the least of which is that the practice should allow the Parliament to focus on matters of substantive policy or import. However, a trend towards the incorporation of significant policy matters into delegated legislation, in conjunction with the growing use over time of exemptions from disallowance, make it necessary for the Parliament to consider whether the current framework for exemptions from disallowance is appropriate.

The Legislation Act and the LEOM Regulation

7.9 The framework for exemptions from disallowance that is established in section 44 of the *Legislation Act 2003* (Legislation Act) provides for a practice that has become broad and far-reaching. Amongst other things, the Legislation Act allows for primary legislation to exempt delegated legislation from disallowance, and for regulations made under the Legislation Act to exempt various instruments from disallowance. These regulations, the Legislation (Exemptions and Other Matters) Regulation (LEOM Regulation), contain significant carve-outs from the principle of disallowance upon which the system for the parliamentary control of executive law-making is premised.

7.10 The LEOM Regulation is problematic in many respects. Significantly, it provides for exemptions from disallowance without requiring a justification. By establishing broad categories of instruments as exempt from disallowance, the Parliament is unable to consider the legitimacy of the exemptions on a case-by-case basis. As the discussion in this report has shown, many rationales for exemption cannot be supported. While it is the case the LEOM Regulation was a disallowable instrument, it is not subject to sunsetting. The Parliament does not have the opportunity to reconsider its content when it automatically repeals (sunsets).

7.11 In effect, the LEOM Regulation is contrary to a central principle upheld by the committee: exemptions from disallowance should be contained in primary

legislation.[4] Placing exemptions in primary legislation allows for the exemptions to be properly scrutinised through a full parliamentary process at the bill stage, and considered on a case-by-case basis.

7.12 Having said this, while there are indeed countless pieces of primary legislation that have been passed by the Parliament exempting delegated legislation from disallowance, it is not clear parliamentarians have adequately considered the appropriateness of such exemptions. This point will be taken up later.

7.13 As a first step in resolving the inadequate scrutiny of delegated legislation, it is imperative exemptions from disallowance are placed in primary legislation rather than being provided for through the LEOM Regulation. All exemptions must be adequately scrutinised when they are made, on a case-by-case basis.

7.14 The committee is particularly concerned about the current broad exemptions from disallowance in section 9 of the LEOM Regulation. The committee notes, for example, that last year an instrument increasing the Federal government debt ceiling to $1.2 trillion was exempt from disallowance on the basis of the broad exemption for instruments that are 'a direction by a Minister to any person or body'.[5]

Recommendation 1

7.15 The committee recommends the *Legislation Act 2003* be amended to require all exemptions from disallowance and sunsetting to be in primary legislation.

Recommendation 2

7.16 The committee recommends the Legislation (Exemptions and Other Matters) Regulation 2015 be repealed and any exemptions in the regulation that remain appropriate instead be set out in a schedule to the *Legislation Act 2003*. In so doing, the current broad exemptions relating to 'an instrument that is a direction by a Minister to any person or body', 'an instrument (other than a regulation) relating to superannuation', and 'an instrument made under an annual Appropriation Act' should be excluded from the new schedule.

7.17 The committee accepts the necessity for delegated legislation; it does not accept that in delegating legislative powers to the executive, the Parliament has no further constitutional function. The Parliament must be concerned with whether, in delegating legislation and allowing it to be exempt from disallowance, the Parliament

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4 Senate Standing Committee on Regulations and Ordinances, *Parliamentary scrutiny of delegated legislation*, 3 June 2019, pp. 122–24; Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Interim report*, 2 December 2020, pp. 6–7.

5 See table item 2 in section 9 of the Legislation (Exemptions and Other Matters) Regulation 2015.

retains sufficient oversight to fulfil its constitutionally-established legislative responsibilities.

Constitutionality and the disallowance mechanism

7.18 The principle of the accountability of the executive to the Parliament is raised by an exemption from disallowance. It is through the disallowance mechanism that the separation of powers between the Parliament and the executive is maintained in instances where legislative power is delegated to the executive. The legitimacy of the practice of exempting delegated legislation from disallowance depends on whether, in such situations, the Parliament is actually able to maintain its legislative authority.

7.19 It is well established the Parliament cannot fully abdicate its constitutional responsibilities. There are views on whether exemptions from disallowance, that by their nature reduce parliamentary scrutiny, can be interpreted as such an abdication.

7.20 The substance of the Parliament's constitutional function is met in different ways and at different points in the legislative process. The committee acknowledges the work of the Scrutiny of Bills Committee in bringing its concerns to the Parliament on the appropriateness of matters left to delegated legislation, and exemptions from disallowance.

7.21 The response to the COVID-19 pandemic brought into strong relief the fact the Parliament may not always be aware of the implications that might follow from all the legislation it passes. This raises a tangential question of whether if the Parliament does not understand the full import of exemptions from disallowance provided for in a bill and nevertheless passes that bill, the legislation can be said to have been appropriately scrutinised and the Parliament to have fulfilled its constitutional role.

7.22 Nevertheless, beyond the point at which a bill might be debated and amended, it is the disallowance function that provides for the effective scrutiny of delegated legislation that comes before the Parliament, if not by the Parliament as a whole then certainly by the Scrutiny of Delegated Legislation Committee on behalf of the Parliament.

7.23 The exemption from disallowance of some legislative instruments immediately raises the question of how the constitutional role of the Parliament as the mandated lawmaking authority might be satisfied. While the Parliament retains the ability to overturn the enabling legislation, the committee is of a mind to recall an important aspect of Chief Justice French's judgment in *Williams v Commonwealth*:

> …responsible government has resulted in a powerful executive which, using the mechanisms of party discipline, is in a position to exert strong influence over the government party or parties in both Houses. The executive has become what has been described as 'the parliamentary wing of a political party' which 'though it does not always control the

> Senate…nevertheless dominates the Parliament and directs most exercises of the legislative power.[6]

7.24 As noted by submitters to the inquiry, while overturning the enabling legislation is possible in theory, in practice it is problematic for the Parliament to rely on this to maintain control of its delegated legislative power. Overturning existing exemptions set out in primary legislation would require the agreement of the House of Representatives which is almost invariably dominated by the party or parties forming government. It is clear governments of all political persuasions would have little interest in reducing their own lawmaking powers.

7.25 The Senate has no power alone to repeal an exempt instrument through the enabling legislation, including where an exempt instrument is made in circumstances that could not have been envisaged when the enabling provision was passed.

Exemptions from disallowance and their effect on executive accountability

7.26 The committee notes arguments that were put forward as to the constitutionality of exemptions from disallowance, whether based on constitutional principle or the case law that follows from it. Ultimately, whether exemption of delegated legislation from disallowance is unconstitutional is a matter that can only be established by the courts.

7.27 Regardless of its constitutionality though, exemption from disallowance certainly challenges and offends the constitutional principle of executive accountability to the Parliament. This is because it undermines the capacity of the Parliament to exercise control over delegated legislation. It is the disallowance mechanism itself that allows for effective scrutiny within an already attenuated lawmaking process.

7.28 The functioning of the disallowance mechanism ultimately goes to the role and responsibilities of the Parliament, and the substance of a parliamentary democracy. The principles of accountability and transparency manifest through the debate and scrutiny that occurs in the Parliament.

7.29 Over time, whether through omission or commission, the Parliament has acquiesced to a number of rationales for exemptions from disallowance. It is incumbent upon the Parliament to consider the implications of power ceded to the executive absent effective oversight. And it is to the practice of this oversight that the committee now turns.

The existing framework for exemptions from disallowance in operation

7.30 Chapter 4 looked at guidance on exemptions from disallowance provided in existing legislative drafting materials, before discussing how the framework for

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6 *Williams v Commonwealth* (2012) 248 CLR 156, quoting: Mantziaris, 'The Executive – A common law understanding of legal form and responsibility', in French, Lindell and Saunders (eds), Reflections on the Australian Constitution (2003) 125 at 130.

exemptions from disallowance operates in practice. In particular, it canvassed views on rationales for exemptions from disallowance previously accepted by the Parliament.

7.31 Whether by passing primary legislation or through the making of the LEOM Regulation, the Parliament has, by implication if not intentionally, permitted a range of rationales for exemptions from disallowance. It is clear there is a tendency to generalise from individual instances where the Parliament has approved legislation that exempts legislative instruments from disallowance, to broad categories. In this sense, the Parliament sets the precedents for later executive action.

7.32 This situation of spiralling exemptions is partly a consequence of the absence of strong guidance on the limited circumstances in which exemptions from disallowance could be appropriate. As discussed in chapter 3, it is exacerbated by a lack of attention to the constitutionality of exemptions from disallowance and the Parliament's legislative role and responsibilities.

7.33 That the only substantive support for the operation of the existing framework comes from government departments is instructive. It is also a warning against the Parliament leaving to the judgement of others what may be appropriate grounds for disallowance. This will be discussed later in this chapter.

Current guidance material on grounds to justify an exemption from disallowance is insufficient

7.34 It is evident the current drafting guidance material on exemptions from disallowance is deficient, and in its deficiencies encourages a greater latitude for exemptions rather than prompting caution in their use. In effect, the guidance advises how to go about exempting instruments from disallowance, rather than counselling on the appropriateness of doing so. There being no current requirement to justify an exemption exacerbates the problem.

7.35 That the enabling legislation permits an exemption from disallowance is not a rationale for the exemption; that there should be a 'special reason' provides no substantive assistance on appropriateness; and 'the policy is that the disallowance regime should not apply' is manifestly inadequate. Yet these are suggested by the existing guidance when drafting legislation.[7]

7.36 There is a clear need for guidance material to actually provide substantive guidance on the appropriateness of exemptions from disallowance. However, the wisdom of basing this guidance on the current operation of the disallowance framework is questionable as it would likely result in a 'how to' guide rather than one

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7 See: Office of Parliamentary Counsel, *Drafting Direction 3.8: Subordinate legislation*, June 2020, pp. 12, 17.

that reflects the seriousness with which the constitutional role of the Parliament as the ultimate lawmaking authority must be taken.

Grounds for exemptions that have been passed in legislation by the Parliament

7.37 Aside from the evident deficiencies in the Legislation Act and LEOM Regulation, the grounds for exemption from disallowance acquiesced to by the Parliament in primary legislation have established a regime that could be almost limitless.

7.38 It should be recalled at this point, before discussing views on these grounds, that any exemption from disallowance effectively hollows out the Parliament's capacity to scrutinise legislation and raises substantive concerns about whether the Parliament is capable of fulfilling its constitutional role. In effect, allowing exemptions from disallowance is a case of the Parliament saying it need not have the ability to perform a direct oversight function for a particular piece of delegated legislation. If this is the case, there must be good reason.

7.39 While unobjectionable examples might be provided by the Attorney-General's Department to illustrate past exemptions in legislation passed by the Parliament, the open-ended nature of most rationales provides significant latitude for instruments to be included under these categories.

7.40 The committee is inclined to accept very few of the rationales presented as sufficient to justify an exemption from disallowance. Guidance to this effect is provided later in the chapter. The committee is certainly not disposed to accepting any as blanket exemptions. It is not possible to determine the legitimacy of an exemption without an examination of the rationale on a case-by-case basis that considers the broader contextual factors.

7.41 While perhaps convincing at a superficial level, most rationales fall down upon any substantive analysis, and if acceptable at all, they must be severely circumscribed. It is the committee's view an alternative parliamentary role must really be an alternative whose substance amounts to equivalent parliamentary oversight and control. It would be untenable for an internal management tool for government to have significant civil liberties implications or an influence on the apolitical nature of the public service. Instruments relating to electoral matters or machinery of government arrangements would seem to be ordinary decisions whose exemption from disallowance may rarely be justified.

7.42 It is certainly irrelevant to the Parliament whether the executive intends an instrument to remain within executive control. Constitutionally, it is for the Parliament to make this decision. A parliamentary committee recommendation while perhaps persuasive in some circumstances cannot be taken to reflect the will of the Parliament as a whole. Commercial uncertainty can be overcome by having the delegated legislation come into effect after the disallowance period has passed. Also insufficient to allow for an exemption absent justification is the case where an

instrument may be required by an international treaty, or to meet national security needs.

7.43 The interim report accepted that there may be some instruments justifiably exempt from disallowance in times of emergency. This though was heavily qualified, and goes in support of the requirement that exemptions from disallowance should be provided only in exceptional circumstances. The committee stated in the interim report that although there would be limited circumstances in which it may be appropriate to exempt legislation from disallowance, it was inappropriate for this to be done on the basis of broad categories set out in another piece of delegated legislation, in this case, the LEOM Regulation.[8] This is something to which the committee returns later in this chapter when it provides guidance on the limited circumstances in which there may be appropriate grounds for exemptions.

Separating law-making from the political process

7.44 That the Parliament may not agree with the intent of the executive is too quickly equated with a pejorative framing of politics. This framing suggests the Parliament is not a representative forum, and that the people's voice expressed through their representatives should not be heard when significant policy decisions are made. This argument, upon examination, slips quickly into the absurd.

7.45 The mere mention of 'scientific' or 'technical' does not necessarily make an instrument so, or elevate a rule above the realm of the political given all decisions involve judgement. Neither does it make the substance of a rule apolitical. The COVID-19 pandemic has amply shown that the consequences of a decision matter, and the consideration of these consequences is inevitably political in terms of politics as judgement. The alternative to 'politics' is unaccountable governance, fundamentally at odds with democratic principles.

7.46 It should also be emphasised the Parliament is certainly not incapable of understanding scientific or technical issues, and calling upon expert assistance when required.

Intergovernmental schemes

7.47 Under section 44 of the Legislation Act, instruments (other than regulations) made for the purpose of intergovernmental schemes are exempted from disallowance. The implication is there has been significant negotiation and scrutiny in the process of obtaining agreement from all government parties. While this may be the case in some instances, this is not sufficient for it to stand as a blanket exemption from disallowance.

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8 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Interim report*, 2 December 2020, p. 72.

7.48 As expressed by the Centre for Comparative Constitutional Studies, this rationale establishes a domain of executive activity exempt from parliamentary oversight. And it would seem the justifications provided are not sufficient to allow for a departure from the principle of executive accountability to the Parliament. If indeed there has been significant negotiation and scrutiny, and all parties to the agreement are satisfied, that it might then be disallowed would seem a minute risk of insufficient size to justify an exemption.

7.49 Nevertheless, if examined on its merits and found to provide a compelling case for exemption, and if appropriately circumscribed, an exemption may be appropriate in limited and rare circumstances. Exemption should not be automatic, and there should not be an exemption from sunsetting of such instruments.

Recommendation 3

7.50 The committee recommends the *Legislation Act 2003* be amended to repeal the blanket exemption of instruments facilitating the establishment or operation of an intergovernmental body or scheme from disallowance, and sunsetting.

Advance to the Finance Minister Determinations

7.51 The committee considered the special case of the Advance to the Finance Minister determinations, which are non-disallowable legislative instruments provided for in the Appropriation Acts.

7.52 As discussed in the interim report, the Department of Finance justifies the exemption from disallowance on the basis the Parliament passes the appropriation bill that contains the exemption from disallowance. It also states making the instrument subject to disallowance would fundamentally frustrate the operation of the mechanism. Views as to the legitimacy of this exemption from disallowance were discussed, both supportive and otherwise.[9]

7.53 The committee made clear in the interim report it was not persuaded of the need to exempt these instruments from disallowance. In particular, the committee noted that additional funds would become available to fund the urgent expenditure immediately after the relevant Advance determination was registered on the Federal Register of Legislation. There would be no need to wait until the Parliament was sitting or the disallowance period had expired. Until such time as a disallowance

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9 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Interim report*, 2 December 2020, pp. 59–60.

motion was passed by either House, funds could be validly spent under the Advance.[10]

7.54 When Parliament passes the enabling provisions for the making of Advance to the Finance Minister determinations, a constraint is imposed by providing that the power to make a determination can only be exercised 'if the Finance Minister is satisfied that there is an urgent need for expenditure'. However, a decision of the High Court in 2017 has watered down this constraint to the point where it is of no substantive effect. In the words of Professor Anne Twomey:

> The term 'urgent' was stripped of substantive meaning…The High Court's interpretation of 'urgent need' means that this requirement is satisfied if the government decides that it wants to spend money in the period between appropriation bills. There would appear to be no circumstances in which a government desire to spend could not satisfy the criteria of 'urgent need' as interpreted by the High Court.[11]

7.55 That the Advance might not be used to respond to legitimately urgent situations is suggested by the range of measures the Advance has been used to fund. Expenditure for 'supporting football in the lead up to the 2015 Asian Cup' or payments to local governments through the Regional and Local Community Infrastructure Program, come immediately to mind.[12] In addition, as submitters highlighted, the Advance has been used to fund measures, such as the Australian Marriage Law Postal Survey in 2017, despite the Senate having explicitly rejected a legislative attempt to authorise a plebiscite on same-sex marriage.

7.56 The committee is aware of concerns that disallowance of an Advance to the Finance Minister determination could leave entities short of the funds that they need to carry out expenditure unrelated to the purposes of the Advance.[13] Nevertheless, the committee maintains its view set out in the interim report. If the Advance is used for a genuine emergency situation, the likelihood of it subsequently being disallowed would be virtually non-existent, and not sufficient to justify an exemption from disallowance. The potential for disallowance would simply operate to ensure that the Advance is only utilised in genuinely urgently circumstances, as intended by the Parliament.

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10 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Interim report*, 2 December 2020, pp. 71–72.

11 Anne Twomey, 'A tale of two cases: Wilkie v Commonwealth and Re Canavan', *Australian Law Journal*, vol. 92, no. 1, 2018, pp. 17–21.

12 Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 12 of 2017*, 18 October 2017, pp. 97–98.

13 This is because disallowance of an Advance to the Finance Minister determination would mean that an entity's appropriation is reduced to its original level from the time the disallowance motion is passed by a House of the Parliament.

Recommendation 4

7.57 The committee recommends that Advance to the Finance Minister determinations be disallowable legislative instruments.

A case of frustration

7.58 The committee particularly notes the suggestion in departmental submissions that 'disallowance would frustrate'.[14] The committee is of a mind to point out that disallowance does not frustrate; 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, is what is likely to frustrate.

7.59 A well-formed instrument that is made according to its enabling legislation and enjoys broad support will not be disallowed, and is thus unlikely to manifest any of the consequences suggested by departments. Many rationales that point to the possibility of negative outcomes call for such a significant stretch to the credulity of the Parliament that they cannot be seriously considered.

7.60 Many concerns could well be addressed by an instrument not coming into force until such time as the disallowance period has passed, by shorter disallowance periods in some limited cases, or by providing for an instrument to be approved through a vote of the Houses of the Parliament. This latter option could potentially allow for an instrument to be approved and enter into force more quickly than might otherwise occur under the typical 15 sitting day disallowance period. A recent instance of this was the Australian Charities and Not-for-Profits Commission Amendment (2021 Measures No. 1) Regulations 2021, which was tabled and approved by the Senate in two sitting days.[15] These options would, of necessity, require the executive to apply greater foresight to the timing of its rule-making. The convenience of the executive cannot be an appropriate rationale for an exemption from disallowance.

7.61 The fear of disallowance would seem overstated. It is the Department of Health that points out over the past five years more than 5,000 disallowable delegated legislative instruments have been made; only 15 (in part or entirely) have

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14 See, for instance: Attorney General's Department, *Submission 14*, pp. 6–7; Department of Agriculture, Water and the Environment, *Submission 17*, p. 2; The Treasury, *Submission 20*, pp. 2–3; Department of Education, Skills and Employment, *Submission 26*, pp. 3–4; Department of Finance, *Submission 28*, p. 4, 7.

15 Section 45-20 of the *Australian Charities and Not-for-Profits Commission Act 2012* allows for certain regulations to be made if both Houses of Parliament pass a resolution to approve the provision. The regulations commence on the day the resolution is passed by the second House.

been disallowed. This is less than half of one per cent of all disallowable delegated legislative instruments made.[16]

7.62 That few exemptions from disallowance are considered justifiable on the evidence, and those that are considered justifiable come with significant qualifiers and limitations, emphasises the importance that exemptions from disallowance must contain a rationale that justifies the exemption and be considered on a case-by-case basis.

Appropriate grounds, authority and guidance for exemptions from disallowance

7.63 Chapter 5 discussed a range of issues relating to the provision and status of guidance on the grounds upon which it may be acceptable to exempt delegated legislation from disallowance.

7.64 The principle of parliamentary accountability should not be diminished by exemptions from disallowance, but instead emphasised. That the Parliament may grant an exemption from disallowance should only follow from the presentation of a robust defence that can credibly withstand the scrutiny of the Parliament. If necessary, the Parliament should not hesitate to append sufficient protections against potential misuse.

7.65 As to a robust defence, its substance should be informed by the recognition a request to exempt delegated legislation from disallowance is a request of significant gravity. The acceptability of exemptions from disallowance can never be taken as a means to undermine parliamentary accountability.

7.66 It must also be recognised that the basis upon which the Parliament acquiesces to an exemption from parliamentary oversight sets a precedent that establishes possibilities for future exemptions. These precedents must be very carefully set.

Exemptions should be justified at the bill stage, and in the explanatory statement

7.67 There is very little discipline around the justification of exemptions from disallowance and as such, explanatory materials do not often present a defensible rationale. Instead, they often relying as a self-evident justification on the existence of a provision in the legislation or regulation that allows for exemption.

7.68 There is nothing self-evident about an exemption from disallowance and the committee will return shortly to appropriate grounds for exemptions. First, however, it is important to establish where justifications should be presented for their consideration by the Parliament.

7.69 The committee certainly recognises the validity of Ms Dharmananda's view that examining exemptions at the level of delegated legislation is to address the issue

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16 Department of Health, *Submission 27*, p. 1.

after the horse has bolted.[17] Though the committee argues there is value in establishing a justification for an exemption in the explanatory statement of a legislative instrument, just as a justification should be included in the explanatory statement for any exemption from sunsetting.[18]

7.70 As discussed in previous chapters, if the Parliament is not informed of scrutiny concerns, it is not able to act on these concerns to address exemptions set out in primary legislation or the LEOM Regulation (however unlikely this may be). The value here, though, depends on its appropriate scrutiny and the committee will address the necessity for allowing it to scrutinise legislative instruments exempt from disallowance later in this chapter.

7.71 Nevertheless, it stands that the most effective way of ensuring scrutiny is for the justification for exemptions from disallowance to be clearly explained at the bill stage in the explanatory memorandum. It is then incumbent on the Parliament to adequately scrutinise each rationale. And indeed, this is the expressed expectation of departments who put forward the legislation, though their commitment to providing adequate explanation is not always clear.

7.72 As set out in the committee's 2019 inquiry report, there is sufficient evidence the Parliament has not paid due regard to the views of the Scrutiny of Bills Committee which has continually raised over time its concerns:

- significant matters, such as those dealing with substantive policy issues, are being inappropriately relegated to delegated legislation;
- the explanatory memoranda of bills that exempt instruments from disallowance do not provide sufficient justification for the exemption, reference to the LEOM regulation is insufficient; and
- with Henry VIII clauses, which amend or modify the operation of primary legislation.[19]

7.73 The committee has noted previously, it is past time for the Parliament to acknowledge the well-founded concerns raised by the Scrutiny of Bills Committee when considering exemptions from disallowance.

Exemptions from sunsetting

7.74 Exemptions from sunsetting are a significant impediment to the Parliament's scrutiny work. The sunsetting regime provides an opportunity for the Parliament to reconsider the appropriateness of an instrument, in general, ten years after it has

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17 Ms Jacinta Dharmananda, *Committee Hansard*, 27 August 2020, p. 21.

18 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Guidelines*, 1st edition, February 2020, p. 30.

19 Standing Committee on Regulations and Ordinances, *Parliamentary scrutiny of delegated legislation*, 3 June 2019, p. 90; Senate Standing Committee for the Scrutiny of Bills, *Submission 4*, pp. 2–4.

been made. Given the passage of time, few instruments would not benefit from amendments to take regard of events and developments in the intervening years, if they are in fact remade after this time.

7.75 The committee is of the view any exemption from sunsetting must be established in primary legislation and justified in the bill's explanatory memorandum, and in the explanatory statement for the instrument itself, regardless of whether the instrument is exempt from disallowance.

Review of the Legislation Act

7.76 The committee is aware section 59 of the Legislation Act requires the Attorney-General to appoint persons to a body by 5 June 2021 to review all aspects of the operation of the Act and any related matter. This report is to be completed by 5 June 2022.[20]

7.77 Drawing upon the discussion in chapter 5 that it is within the purview of the Parliament to establish guidance in relation to the limited grounds upon which exemptions from disallowance might be acceptable, the committee is not of the view it would be appropriate for the Attorney-General to make any such determinations in the review of the Legislation Act. Accordingly, the committee suggests a number of legislative amendments that would go some way to ensuring the protection of the Parliament's role as the ultimate lawmaking authority.

Recommendation 5

7.78 The committee recommends legislation be introduced to provide that the explanatory memoranda of all bills that delegate legislative power and exempt this delegated legislation from disallowance or sunsetting must contain a statement that outlines the exceptional circumstances that justify an exemption from disallowance and/or sunsetting.

Recommendation 6

7.79 The committee recommends the *Legislation Act 2003* be amended to provide that the explanatory statements to instruments exempt from disallowance or sunsetting must contain a statement that outlines the exceptional circumstances that justify an exemption from disallowance and/or sunsetting.

Recommendation 7

7.80 The committee recommends that should recommendation 5 and recommendation 6 not be accepted by the government, the Senate agree to an order of continuing effect to provide that:

- **the explanatory memoranda of all bills that delegate legislative power and exempt this delegated legislation from disallowance or sunsetting must**

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[20] Attorney-General's Department , Answers to written questions taken on notice (received 8 October 2020), p. 12.

contain a statement that outlines the exceptional circumstances that justify an exemption from disallowance and/or sunsetting; and

- **the explanatory statements to instruments exempt from disallowance and sunsetting must contain a statement that outlines the exceptional circumstances that justify the exemption from disallowance and/or sunsetting.**

Parliament should establish the appropriate grounds for exemptions

7.81 Saying there exists a balance, as the Department of Education has, between the practicality of having all instruments subject to disallowance, and accountability to the Parliament, does not necessarily make it so. It is merely a statement without any evident substance. This inquiry has been constituted on the grounds that if there is in fact such a balance to be found, it remains lost at the current moment.

7.82 It is clear from evidence presented to the inquiry, the Attorney-General's Department is not disposed to providing appropriate guidance to Commonwealth departments on acceptable rationales for exemptions from disallowance. The Attorney-General's Department and others argue instead that this is a responsibility of the Parliament. In this, they are correct.

7.83 Reflecting on Professor Twomey's evidence, it is indeed for parliamentarians to put aside considerations of short-term expediency and decide that in the long run it is important that there be proper measures of accountability. Should there be any doubt as to this responsibility, constitutional requirements make it clear. When we sit as senators and members of parliament, we must remember we are not just politicians but also parliamentarians.

7.84 It is essential that appropriate advice is provided to departments as they are drafting legislation, and that departments act in good faith. It is worth reflecting on evidence provided by the Centre for Comparative Constitutional Studies, specifically:

> …the work that needs to be done in justifying the necessarily limited class of proposed exemptions from disallowance is to explain why the proposed exemption is constitutionally permissible; not why Parliament or the committee as a key parliamentary actor stands to obstruct the work of Government.[21]

7.85 The committee notes both the Department of Agriculture, Water and the Environment, and the Department of Health indicated they would welcome advice

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21 Centre for Comparative Constitutional Studies, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 and written (received 10 September 2020), p. 1.

from the committee on appropriate grounds on which exemptions from disallowance are appropriate.[22]

Appropriate grounds for disallowance

7.86 It is certainly the case, as suggested by the Attorney-General's Department and others, that legislative instruments vary considerably in subject matter and operation, making it hard to provide an exhaustive list of circumstances in which exemptions from disallowance may be appropriate. But it does not follow that the Parliament should accept assurances that any proposal to exempt a legislative instrument from disallowance has been carefully confined in scope and canvasses alternative safeguards where appropriate.[23]

7.87 The committee acknowledges any guidance will need to apply overarching principles to a limited number of categories. Categories or principles on their own have the potential to create a wider range of exemptions than may be justified by the context of each instrument. Guidance though is necessary but not sufficient. Departments must legitimately argue each claim on its contextual merits, and those who make use of the guidance in drafting legislation must respect the intent, rather than work to manipulate the letter, of the guidance.

7.88 As to the substance of this guidance, the committee agrees with Associate Professor Neudorf: the overarching principle should be that regardless of the exemption from disallowance, the Parliament must remain capable of holding the executive to account for its exercise of delegated legislative powers and 'each ground should be consistent with Parliament's role as lawmaker in chief'.[24]

7.89 The committee is not inclined at this stage to have the acceptable grounds for exemptions set out in primary legislation, though notes alternative views on this raised during the inquiry. It also acknowledges excessively prescriptive requirements may prove difficult to apply in all circumstances. Having examined the evidence, an approach that combines principles with categories is the most effective way to provide guidance on acceptable grounds for exemptions from disallowance.

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22 Department of Agriculture, Water and the Environment, Answers to written questions taken on notice (received 6 November 2020), p. 5; Department of Health, Answers to written questions taken on notice (received 8 October 2020), p. [21].

23 See: Mr Andrew Walter, First Assistant Secretary, Integrity and Security Division, Attorney-General's Department, *Committee Hansard*, 3 September 2020, pp. 5, 12. See also: Attorney-General's Department, Responses to written questions on notice of 9 September 2020 (Received 8 October 2020), p. 3.

24 Associate Professor Lorne Neudorf, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 (received 11 September 2020), p. 36.

Guidance on appropriate grounds for the exemption of legislative instruments from disallowance

Categories

7.90 The committee is strongly of the view that exemptions should be established in primary legislation, and be limited to two categories: where there are exceptional circumstances and where they are dealing with administrative or technical matters.

Key principles

7.91 The committee agrees two key principles should guide the Parliament in its scrutiny of exemptions from disallowance:

- exemptions should not be made where instruments adversely affect rights, liberties, duties and obligations; and
- exemptions should not be made unless there is an alternative form of accountability.[25]

7.92 Accordingly, the committee establishes the following guidance:

- exemptions from disallowance are unlikely to be acceptable unless exceptional circumstances can be demonstrated;
- exemptions from disallowance are more likely to be acceptable where there is an equivalent alternative parliamentary role; and
- exemptions from the standard sunsetting regime set out in the *Legislation Act 2003* are more likely to be acceptable where the instrument is limited in duration to a period equivalent to or less than the standard sunsetting period of 10 years.

7.93 Subject to the circumstances of particular cases, the following categories of delegated legislation should not be exempt from disallowance or sunsetting:

- instruments that override or modify primary legislation (Henry VIII provisions);
- instruments that trigger, or are a precondition to, the imposition of custodial penalties or significant pecuniary penalties;
- instruments that restrict personal rights and liberties; and
- instruments that facilitate expenditure of public money, including Advance to the Finance Minister determinations.

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[25] See, for instance: Dr Gabrielle Appleby, *Committee Hansard*, 31 August 2020, p. 17; Professor Gabrielle Appleby, Dr Janina Boughey, Dr Sangeetha Pillai and Professor George Williams, Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 (received 5 September 2020), p. 1; Centre for Public Integrity, Answers to questions taken on notice, public hearing, Canberra, 27 August 2020 and written (received 10 September 2020), p. 2.

Generally unacceptable grounds

7.94 The following rationales for exempting delegated legislation from disallowance and sunsetting are highly unlikely to be acceptable in any circumstances:

- the rule-making process should be or needs to be separated from the political process; and
- the instrument is intended to remain within executive control.

Potentially acceptable grounds if genuinely exceptional circumstances can be identified

7.95 Noting the default position that all delegated legislation should be subject to disallowance and sunsetting, and noting also that there are mechanisms other than an exemption from disallowance available to address particular concerns,[26] the following rationales for exemption from disallowance are unlikely to be acceptable unless genuinely exceptional circumstances can be identified in relation to the particular instrument:

- the instrument is made based on technical or scientific evidence;
- the instrument relates to internal departmental administration;
- the instrument is central to machinery of government arrangements or electoral matters;
- commercial certainty will be affected;
- the exemption is in response to a parliamentary committee recommendation;
- the instrument is part of an intergovernmental scheme, or required under an international treaty or convention;
- the instrument is critical to ensuring urgent and decisive actions; and
- the exemption will provide certainty in meeting specific security needs.

[26] Alternatives include making the instrument from the time the disallowance period has expired, and providing for a shorter disallowance period.

Recommendation 8

7.96 The committee recommends that the Senate adopt the following resolution in relation to the circumstances where it may be appropriate to exempt delegated legislation from disallowance and sunsetting:

- **The Senate notes:**
  - **the Constitution vests the legislative power of the Commonwealth in the Federal Parliament;**
  - **if the Parliament is to satisfy this constitutionally mandated role, it must have the ability to scrutinise all legislation made by the executive; and**
  - **exemptions from disallowance and sunsetting undermine the ability of the Parliament, and particularly the Senate, to undertake this scrutiny.**
- **The Senate resolves:**
  - **delegated legislation should be subject to disallowance and sunsetting to permit appropriate parliamentary scrutiny and oversight unless there are exceptional circumstances; and**
  - **any claim that circumstances justify exemption from disallowance and sunsetting will be subjected to rigorous scrutiny with the expectation that the claim will only be justified in rare cases.**

7.97 Having established guidance as to what may be considered appropriate grounds for the Parliament to assess exemptions from disallowance, the committee recommends that explanatory material reflects the guidance.

Guidance must be acted upon in good faith

7.98 The case of instruments made in relation to superannuation, and in particular the Attorney-General's Department's unwillingness to acknowledge ASIC's view that an exemption from disallowance is not necessary, suggests a lack of willingness to consider seriously the need for delegated legislation to be exempt from disallowance. It also suggests an unwillingness to explore alternative options, such as making an instrument commence from the time the disallowance period has expired, or having confidence the instrument does not stray from the legislative mandate.

7.99 The Department of Education's warning against 'bespoke consideration' of instruments suggests a similar inclination. If one stands firm on constitutional principle, then bespoke consideration is the only way the Parliament can fulfil its constitutional role.

7.100 The committee is of a mind to call for, in the words of Professor George Williams, 'a more principled process that really respects the proper role of

Parliament, particularly when instruments are made that so directly impact upon citizens' rights and liabilities'.[27]

Examination of current exemptions

7.101 There is no substantive disagreement with the principle that exemptions from disallowance should be in exceptional circumstances only. The existing rationales for exemption from disallowance in the explanatory statement to the LEOM Regulation are insufficient and should be reconsidered in light of the committee's guidance.

7.102 The committee notes the government's previous reticence to reconsider exemptions provided for in the LEOM Regulation or to amend enabling legislation accordingly to provide for disallowance. The grounds upon which the government rejected recommendation 15a of the committee's 2019 inquiry were, of note, disputed by the Law Council of Australia.[28]

7.103 The committee is of the view existing exemptions should be justified on the grounds established by the committee and acknowledged by the government itself when it agreed there are only 'very limited circumstances' in which it is appropriate to exempt a legislative instrument from disallowance.[29]

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27 Professor George Williams, *Committee Hansard*, 31 August 2020, p. 16.

28 Recommendation 15a called for the government to review all existing provisions exempting legislative instruments from disallowance to determine whether such exemptions remained appropriate, and to amend the Legislation Act to ensure all such exemptions are contained in primary legislation. The government stated transferring exemptions in the LEOM Regulation to the Legislation Act would undo previous changes, and in any case, was impractical in terms of time and resources. The Law Council stated sufficient resourcing could be allocated to the task of redrafting legislation such that it would not be an insurmountable task. Further, the fact certain changes made in the past would be undone was not a valid argument if the course of action is the correct course of action. Law Council of Australia, Answers to questions taken on notice, public hearing, Canberra, 27 August 2020 and written (received 11 September 2020), p. 14; Australian Government, *Australian Government Response to the Senate Standing Committee on Regulations and Ordinances Report: Parliamentary Scrutiny of Delegated Legislation*, November 2019, p. 5; Standing Committee on Regulations and Ordinances, *Parliamentary Scrutiny of Delegated Legislation*, 3 June 2019, p. 124.

29 Australian Government, *Australian Government Response to the Senate Standing Committee on Regulations and Ordinances Report: Parliamentary Scrutiny of Delegated Legislation*, November 2019, p. 5.

Recommendation 9

7.104 Noting that in its response to the committee's 2019 inquiry the government agreed that legislative instruments should only be exempted from disallowance in very limited circumstances, the committee recommends that the Senate adopt the following order for the production of documents:

- **That there be laid on the table, by the Minister representing the Attorney-General, by no later than 5 pm on Tuesday, 3 August 2021, a statement setting out:**
  - **the rationale for specifying that each class of instrument and each particular instrument in Part 2 of the Legislation (Exemptions and Other Matters) Regulation 2015 are not legislative instruments; and**
  - **the exceptional circumstances that justify each exemption from disallowance or sunsetting currently set out in Parts 4 and 5 of the Legislation (Exemptions and Other Matters) Regulation 2015.**

The role of the Scrutiny of Delegated Legislation Committee

7.105 Chapter 6 discussed how the role of the committee might be expanded to underpin the constitutionality of exemptions from disallowance.

7.106 The Scrutiny of Delegated Legislation Committee performs a crucial function in assessing delegated legislation against scrutiny principles set by the Senate. Its work establishes precedents and as a consequence the quality of delegated legislation has improved over time.

7.107 However, its scrutiny work is hampered by not being able to scrutinise instruments exempt from disallowance. Although disallowance is not possible, it is the view of many that the scrutiny function remains important to inform the Parliament.

7.108 The committee is aware scrutiny without the ability to disallow can only serve an awareness raising function. The committee is of a mind to agree with Professor George Williams:

> Disallowance is there for a reason—because it actually provides a mechanism that brings scrutiny and accountability that is simply not likely to be there if it's merely an investigation without consequence.[30]

7.109 Over time, and in accordance with the clear guidance in this chapter, the committee expects to see few instruments exempt from disallowance, and only in exceptional circumstances and where a robust justification is provided.

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30 Professor George Williams, *Committee Hansard*, 31 August 2020, p. 18.

The acceptability of Henry VIII clauses

7.110 The committee has previously raised significant concerns regarding the use of Henry VIII clauses. These are clauses in delegated legislation that amend or modify the operation of primary legislation, or exempt persons or entities from the operation of primary legislation. The committee is of the view that these limit parliamentary oversight and subvert the appropriate relationship between the Parliament and the executive. As such, they should not ordinarily be included in delegated legislation.[31]

7.111 Nevertheless, the committee has acknowledged there may be some very limited circumstances where such clauses may be appropriate in delegated legislation. However, it has made clear its view that such instruments should be in force for only as long as is strictly necessary and should cease to operate no more than three years after the commencement date for the instrument, unless exceptional circumstances exist.

7.112 The committee establishes the following guidance on the exceptional circumstances in which it may be appropriate for such instruments to remain in force for more than three years:

- where the operative provisions of an instrument will not practically commence for those affected by the instrument for a period of time after the formal commencement date for the instrument;[32] and
- where the instrument will sunset no more than five years after the commencement date for the instrument and the explanatory statement to the instrument makes it clear that the measures in the instrument will not need to remain in force after the instrument sunsets.

7.113 The committee will consider the application of these exceptional circumstances on a case-by-case basis taking into account the content and context of the particular instrument.

ASIC's exemption and modification powers

7.114 As an example of the committee's approach to delegated legislation containing Henry VIII clauses, the committee has been particularly concerned with the duration of instruments made by the Australian Securities and Investments Commission (ASIC) under ASIC's exemption and modification powers. These instruments address a range of subject matters within ASIC's portfolio, by providing

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31 Standing Committee for the Scrutiny of Delegated Legislation, *Guidelines*, 1st edition, February 2020, pp. 28–30.

32 See, for example, ASIC Corporations, Credit and Superannuation (Internal Dispute Resolution) Instrument 2020/98 [F2020L00962]. Most provisions of this instrument formally commenced on 30 July 2020, however the new internal dispute resolution standards and requirements set out in the instrument will practically take effect from 5 October 2021.

for exemptions from, and modifications to, certain provisions of the *Corporations Act 2001* and other Acts of Parliament. The committee's expectation about such instruments is informed by its longstanding view that such delegated legislation should not continue in force for such a period as to act as a de facto amendment to primary legislation.

7.115 As set out in *Delegated Legislation Monitor 2 of 2021*, the committee acknowledges there are circumstances where it may be appropriate for ASIC to quickly address anomalous or inconsistent outcomes in the application of primary legislation by delegated legislation when authorised to do so by the Parliament. However, the committee considers that a three year timeframe for such instruments is appropriate as it allows for ASIC to rapidly address such issues, while providing a significant period of time while the instrument is in force to consider whether the modification or exemption provided by the instrument will be required for a longer period. If it is determined that a modification or exemption is required for a longer period, the committee considers that certainty for business and the market can be best provided by incorporating the modification or exemption onto the face of the primary legislation. However, if this is not considered appropriate in the circumstances, the committee considers that the Parliament should at least be given a regular opportunity to review and scrutinise modifications or exemptions to primary legislation that it has enacted.

Recommendation 10

7.116 The committee recommends that standing order 23 be amended as follows, with effect from 1 July 2021:

Omit 'and' from the end of subparagraph (3)(j).

Omit subparagraph (3)(k), substitute:

(k) in the case of an instrument exempt from sunsetting, it is appropriate for the instrument to be exempt from sunsetting;

(l) in the case of an instrument that amends or modifies the operation of primary legislation, or exempts persons or entities from the operation of primary legislation, the instrument is in force only for as long as is strictly necessary; and

(m) it complies with any other ground relating to the technical scrutiny of delegated legislation that the committee considers appropriate.

After paragraph (4), insert:

(4A) The committee may, for the purpose of reporting on its terms of reference, consider instruments made under the authority of Acts of the Parliament that are not subject to disallowance. For such instruments the committee may also consider whether it is appropriate for the instrument to be exempt from disallowance.

Parliamentary attention to scrutiny concerns

7.117 The committee frequently raises scrutiny concerns about instruments, as does the Scrutiny of Bills Committee in relation to the enabling provisions that allow instruments to be made.

7.118 Regardless of the policy issue, the Parliament must take seriously and act upon the concerns raised by both the Scrutiny of Bills Committee and this committee. As discussed in the committee's 2019 report:

> When the committee draws its concerns about delegated legislation to the Senate's attention it is high time that all parliamentarians and the government of the day listen to those concerns and take action to resolve them.[33]

7.119 Requiring a piece of primary legislation, or delegated legislation, to meet these principles does not affect the policy intent of the legislation or any delegated legislation stemming from it.

The classification of instruments: notifiable versus legislative

7.120 Continuing on the theme of parliamentary attention to scrutiny concerns, the committee raises a further issue that goes to the ability of the Parliament to fulfil its constitutional role, that of the classification of instruments as notifiable instruments. Notifiable instruments are not subject to tabling, disallowance or sunsetting and thus significantly circumscribe the Parliament's scrutiny function, particularly when misused.[34]

7.121 Where primary legislation specifies an instrument made under it will be notifiable, there is very little to prevent an instrument that satisfies the criteria for a legislative instrument to be made instead a notifiable instrument, other than the Parliament refusing to accept the designation when considering the primary legislation. Sections 8 and 11 of the Legislation Act allow an Act to declare an instrument is not a legislative instrument and to specify something be done by notifiable instrument.[35] The Legislation Act also allows the LEOM Regulation to specify that an instrument is not a legislative instrument.[36] All of this may be done regardless of whether the instrument may otherwise be characterised as a legislative instrument.

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33 Senate Standing Committee on Regulations and Ordinances, *Parliamentary scrutiny of delegated legislation*, 3 June 2019, p. ix.

34 *Legislation Act 2003*, s. 7, 11.

35 *Legislation Act 2003*, s. 8, 11. A more detailed discussion of the provisions in the Act is made in the interim report. Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Interim report*, 2 December 2020, pp. 74–77.

36 *Legislation Act 2003*, s. 11(2)(b).

7.122 In providing a rationale for the use of notifiable instruments in the *Structured Finance Support (Coronavirus Economic Response Package) Act 2020*, the Treasury relied on the argument that disallowance would prevent the government from acting in urgent circumstances and, if it did, any investment made during the disallowance period would carry risk, and could undermine commercial certainty in the investment, which would frustrate the purpose of the instrument.[37]

7.123 The interim report discussed the fact disallowance does not prevent governments acting urgently, and no disallowance is retrospective. The minute possibility an instrument designed to assist Australians during a pandemic might then be disallowed at a later date is not a sufficient rationale to undermine the Parliament's legislative authority. Instruments crafted according to their enabling legislation and used for the purpose the Parliament has approved when passing the legislation, are unlikely to be disallowed.

7.124 This rationale suggests to the committee that departments are not taking seriously or are ill-informed of the need for all legislation to meet technical scrutiny principles and for the constitutional role of the Parliament to be respected.

Recommendation 11

7.125 The committee recommends that section 11 of the *Legislation Act 2003* be amended to clarify that notifiable instruments must not be legislative in character.

Concluding comments

7.126 The committee began its report with the observation 'we have seen that the principle that the laws come from Parliament is being eroded'.[38] The report finishes as it started.

7.127 Requiring legislation to reflect the constitutionally-mandated role of the Parliament is not a judgement on policy. Ensuring legislation meets technical scrutiny principles has no bearing on a government's legislative mandate. It is time for the Parliament to reassert its constitutional authority as lawmaker-in-chief.

Senator the Hon Concetta Fierravanti-Wells
Chair

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37 The Treasury, *Submission 20*, pp. 2–3.

38 Mr Morgan Begg, Research Fellow, Institute of Public Affairs, *Committee Hansard*, 27 August 2020, p. 11.

Appendix 1

Submissions, answers to questions on notice, and additional information

Submissions

1	Professor Gabrielle Appleby, Dr Janina Boughey, Dr Sangeetha Pillai and Professor George Williams AO
2	The Hon Darren Chester MP, Minister for Veterans' Affairs
3	Mr Richard Pye, Clerk of the Senate
4	Senate Standing Committee for the Scrutiny of Bills
5	Australian Securities and Investments Commission (ASIC)
6	Canberra Alliance for Participatory Democracy
7	Civil Liberties Australia
8	Department of Home Affairs
9	Mr Jackson Ho
10	Public Interest Advocacy Centre
11	Associate Professor Lorne Neudorf, Adelaide Law School
12	Centre for Comparative Constitutional Studies
13	The Centre for Public Integrity
14	Attorney-General's Department
15	Accountable Income Management Network
16	Institute of Public Affairs
17	Department of Agriculture, Water and the Environment
18	Professor Anne Twomey
19	Legislative Review Committee of the Parliament of South Australia
20	Department of the Treasury
21	Law Council of Australia
22	NSW Council for Civil Liberties
23	NSW Young Lawyers
24	ACT Standing Committee on Justice and Community Safety (Legislative Scrutiny Role)
25	Senior Lecturer Jacinta Dharmananda
26	Department of Education, Skills and Employment

27	Department of Health
28	Department of Finance
29	Australian Airline Pilots' Association (AusALPA)
30	Australian Federation of Air Pilots

Answers to questions on notice

NSW Council for Civil Liberties – Answers to written questions taken on notice (received 2 September 2020)

Professor Gabrielle Appleby, Dr Janina Boughey, Dr Sangeetha Pillai and Professor George Williams – Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 (received 5 September 2020)

Department of Finance – Answer to question taken on notice, public hearing, Canberra, 3 September 2020 (received 9 September 2020)

Centre for Comparative Constitutional Studies – Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 and written (received 10 September 2020)

Centre for Public Integrity – Answers to questions taken on notice, public hearing, Canberra, 27 August 2020 and written (received 10 September 2020)

Associate Professor Lorne Neudorf – Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 (received 11 September 2020)

Institute of Public Affairs – Answers to questions taken on notice, public hearing, Canberra, 27 August 2020 and written (received 11 September 2020)

Professor Anne Twomey – Answers to questions taken on notice, public hearing, Canberra, 31 August 2020 and written (received 11 September 2020)

Law Council of Australia – Answers to questions taken on notice, public hearing, Canberra, 27 August 2020 and written (received 11 September 2020)

Ms Jacinta Dharmananda – Answers to written questions taken on notice (received 18 September 2020)

Department of Finance – Answer to question taken on notice, public hearing, Canberra, 3 September 2020 (received 18 September 2020)

Department of Finance – Answers to written questions taken on notice (received 18 September 2020)

Australian Securities and Investments Commission – Answers to written questions taken on notice (received 22 September 2020)

Department of Health – Answers to questions taken on notice, public hearing, Canberra, 3 September 2020 (received 6 October 2020)

Department of Health – Answers to written questions taken on notice (received 6 October 2020)

Attorney-General's Department – Answers to questions taken on notice, public hearing, Canberra, 3 September 2020 (received 8 October 2020)

Attorney-General's Department – Answers to written questions taken on notice (received 8 October 2020)

Professor Gabrielle Appleby, Dr Janina Boughey, Dr Sangeetha Pillai and Professor George Williams – Answers to written questions taken on notice (received 26 October 2020)

Department of Agriculture, Water and the Environment – Answers to written questions taken on notice (received 6 November 2020)

Additional information

Centre for Comparative Constitutional Studies – 'Law-making and accountability in responding to COVID-19: The case of New Zealand,' Dean R. Knight (received 11 September 2020)

Institute of Public Affairs – 'Cutting red tape: Regdata applications in North America,' Daniel Wild and Scott Hargreaves (received 11 September 2020)

Institute of Public Affairs – 'States of emergency: An analysis of COVID-19 petty restrictions,' Morgan Begg (received 11 September 2020)

Institute of Public Affairs – 'Reducing red tape in Australia: 'One in, two out' rule,' Daniel Wild, Jake Fraser and Michael Husek (received 11 September 2020)

Institute of Public Affairs – 'Regulatory dark matter: How unaccountable regulators subvert democracy by imposing red tape without transparency,' Kurt Wallace (received 11 September 2020)

Department of Agriculture, Water and the Environment – Correction to Hansard evidence, public hearing, Canberra, 3 September 2020 (received 18 September 2020)

Department of Health – Correction to Hansard evidence, public hearing, Canberra, 3 September 2020 (received 29 September 2020)

Appendix 2

Public hearings

Thursday, 27 August 2020 – Canberra

Law Council of Australia

Ms Pauline Wright, President
Dr Natasha Molt, Director of Policy
Professor Andrew Byrnes, Member, National Human Rights Committee *(via teleconference)*

Institute of Public Affairs *(via teleconference)*

Ms Dara MacDonald, Research Fellow
Mr Morgan Begg, Research Fellow

Centre for Public Integrity *(via teleconference)*

Mx Han Aulby, Executive Director

NSW Council for Civil Liberties *(via teleconference)*

Ms Michelle Falstein, Secretary
Mr Jared Wilk, Co-Convener, Human Rights Action Group

Ms Jacinta Dharmananda – private capacity *(via teleconference)*

Monday, 31 August 2020 – Canberra

Centre for Comparative Constitutional Studies *(via teleconference)*

Professor Kristen Rundle, Co-Director

Professor Anne Twomey – private capacity *(via teleconference)*

Professor Gabrielle Appleby, Dr Janina Boughey, Dr Sanjeetha Pillai and Professor George Williams AO *(via teleconference)*

Professor George Williams AO
Professor Gabrielle Appleby
Dr Janina Boughey

Associate Professor Lorne Neudorf, Deputy Dean of Law, Adelaide Law School *(via teleconference)*

Thursday, 3 September 2020 – Canberra

Australian Securities and Investments Commission *(via teleconference)*

Mr Grant Moodie, Special Counsel, Chief Legal Office
Mr Chris Savundra, General Counsel, Chief Legal Office

Attorney-General's Department

Mr Andrew Walter, First Assistant Secretary, Integrity and Security Division
Ms Joanna Virtue, Assistant Secretary, Integrity and Criminal Law Branch

Department of Health

Ms Caroline Edwards, Associate Secretary
Mr Stephen Bouwhuis, Assistant Secretary, Legal and Assurance Division

Department of Agriculture, Water and the Environment

Mr Matt Koval, First Assistant Secretary, Biosecurity Policy and Implementation Division
Ms Alice Linacre, First Assistant Secretary, Chief Counsel, Legal Division
Mr Stephen Oxley, First Assistant Secretary, Heritage, Reef and Wildlife Trade Division
Dr Peta Derham, Assistant Secretary, Murray-Darling Basin Policy
Ms Anna Willock, Executive Manager, Fisheries Management Branch, Australian Fisheries Management Authority

Department of Finance *(via teleconference)*

Dr Stein Helgeby, Deputy Secretary, Governance and Resource Management
Ms Tracey Carroll, First Assistant Secretary, Financial Analysis, Reporting and Management Division
Mr Scott Dilley, First Assistant Secretary, Governance Division
Mr Iain Scott, First Assistant Secretary, Corporate Services Division
Ms Louise Rafferty, Assistant Secretary, Legal and Assurance Branch, Corporate Services Division

Appendix 3

Interim report – List of recommendations

Recommendation 1

2.73 The committee recommends that parliamentarians give adequate consideration to the appropriateness of exempting delegated legislation from parliamentary oversight mechanisms, such as disallowance, at the time the enabling provision is being considered by the Parliament, including by actively considering any comments made by the Senate Standing Committee for the Scrutiny of Bills in relation to such provisions, even in times of emergency.

Recommendation 2

2.77 The committee recommends that the Senate Standing Committee for the Scrutiny of Bills or another independent body or person conduct a review of the appropriateness of the delegation of legislative powers in the *Biosecurity Act 2015*, including the appropriateness of provisions which exempt delegated legislation made pursuant to these powers from parliamentary oversight.

Recommendation 3

3.34 Noting the importance of parliamentary sittings in facilitating parliamentary oversight of delegated legislation in times of emergency, the committee recommends that presiding officers, the government and leaders of political parties take all possible steps to facilitate parliamentary sittings, even during times of emergency, and that the cancellation of parliamentary sittings only be taken as a last resort.

Recommendation 4

4.55 The committee recommends that parliamentarians and the government ensure that delegated legislation made in times of emergency is subject to disallowance where it:

- can be used to override or modify primary legislation; or
- triggers, or is a precondition to, the imposition of custodial penalties or other measures which restrict personal rights and liberties.

Recommendation 5

4.62 The committee recommends that the government propose amendments to the *Biosecurity Act 2015* to provide that entry and exit requirement determinations made under sections 44 and 45 of the Act are subject to disallowance.

Recommendation 6

4.68 The committee recommends that the government propose amendments to the *Biosecurity Act 2015* to make the exercise of the human biosecurity control order powers in Part 3 of Chapter 2 of the Act conditional on a disallowable legislative instrument being in force, in addition to the existing preconditions to imposing a human biosecurity control order.

Recommendation 7

4.70 The committee recommends that the government propose amendments to the *Biosecurity Act 2015* to provide that human health response zone determinations made under section 113 of the Act are subject to disallowance.

Recommendation 8

4.74 The committee recommends that the government propose amendments to the *Biosecurity Act 2015* to provide that declarations of human biosecurity emergency periods and associated extensions made under sections 475 and 476 of the Act are subject to disallowance.

Recommendation 9

4.77 The committee recommends that the government propose amendments to the *Biosecurity Act 2015* to provide that human biosecurity emergency requirements and directions made under sections 477 and 478 of the Act are subject to disallowance.

Recommendation 10

4.84 The committee recommends that parliamentarians and the government ensure that Advance to the Finance Minister determinations which can be used to allocate additional public funds during times of emergency above the ordinary limits set in annual Appropriation Acts are subject to disallowance.

Recommendation 11

4.87 In the limited circumstances in which it may be appropriate to exempt delegated legislation made in response to an emergency from disallowance, the committee recommends that parliamentarians and the government ensure that the source of such exemptions is set out in primary legislation.

Recommendation 12

6.43 The committee recommends that the government ensure that all delegated legislation made in response to emergencies ceases to be in force after three months. Where measures implemented by delegated legislation are required for a longer period of time the relevant legislative instrument should be remade to facilitate parliamentary oversight.

Recommendation 13

6.46 The committee recommends that where primary legislation empowers the executive to make delegated legislation to amend or modify the operation of primary legislation in times of emergency (via a 'Henry VIII' clause), parliamentarians and the government should ensure that the primary legislation:

- specifies a time limit in which those powers can be exercised; and
- requires the maker of the delegated legislation to be satisfied that Parliament is not sitting and is not likely to sit within two weeks after the day the relevant instrument is made before they make the instrument.

Recommendation 14

6.48 The committee recommends that:

- the government limit the duration of delegated legislation made in times of emergency, and any measures implemented by such legislation, to dates prescribed on the face of the instrument; and
- where the duration of delegated legislation made during times of emergency cannot be prescribed by setting dates on the face of the instrument, but must instead be contingent on something else, the government ensure that the relevant trigger is subject to oversight by the Commonwealth Parliament.

Recommendation 15

6.50 The committee recommends that the government ensure that explanatory statements to delegated legislation made in response to emergencies clearly explain the anticipated duration of the measures implemented by the relevant instrument, particularly where that instrument is subject to automatic repeal but the measures it implements remain in force in other delegated legislation.

Recommendation 16

7.60 The committee recommends that the Senate amend standing order 23 to ensure that all delegated legislation made during times of emergency is referred to the Senate Standing Committee for the Scrutiny of Delegated Legislation for consideration and, if necessary, report, regardless of its disallowance status.

Recommendation 17

7.63 The committee recommends that the government allocate sufficient resources to the parliamentary departments to ensure that parliamentary committees responsible for the policy and technical scrutiny of delegated legislation are always sufficiently resourced to effectively perform this vital role, particularly during times of emergency.

Recommendation 18

7.67 The committee recommends that the Senate establish a select committee during times of national emergency, including human biosecurity emergencies and other events declared to be a national emergency under Commonwealth law, to consider the policy merits of delegated legislation made in response to that emergency.