



Delegated Legislation Monitor 16 of 2021

Tabling Statement

Thursday, 25 November 2021

I rise to speak to the tabling of the committee's *Delegated Legislation Monitor 16 of 2021*.

I would like to take this opportunity to again highlight the committee's significant concerns about the exemption of delegated legislation made under the Biosecurity Act from disallowance by the Parliament. As senators would be aware, the initial emergency declaration in relation to COVID-19 was first made on 18 March 2020. Since this time, the government has made numerous pieces of delegated legislation which impact on the everyday lives of Australians. Chief among them is the Overseas Travel Ban determination which has severely restricted overseas travel by Australian citizens.

In the Monitor I have just tabled the committee has commented on an instrument which amends the Overseas Travel Ban Determination to remove the automatic exemption for persons who ordinarily reside in another country from the overseas travel ban. The committee is extremely concerned that this instrument not only engages several of the committee's scrutiny principles, including freedom of movement, conferral of discretionary powers, consultation, and matters more appropriate for parliamentary enactment, but is also exempt from disallowance.

It is the committee's view that emergency delegated legislation must be subject to appropriate parliamentary oversight. By continuing to make instruments under the Biosecurity Act which are exempt from disallowance, Parliament's constitutional role as the primary institution responsible for making law is undermined. The committee has been raising this issue since the beginning of the pandemic but has not received a sufficient response to the concerns it has raised.

The committee has continually been advised that instruments made under the Biosecurity Act should not be subject to parliamentary oversight as this would undermine the government's ability to take urgent action to manage the threat to Australia posed by this pandemic. The committee appreciates that during an emergency it is necessary for governments to take urgent and decisive action. However, Parliament must also have effective oversight of these critical decisions and retain the ability to scrutinise the actions of governments.

On 18 November the government finally tabled its responses to the committee's interim and final reports for the inquiry into the exemption of delegated legislation from parliamentary oversight. These government responses were tabled nearly 12 months after the committee's interim report was tabled in December last year.

The committee is insulted by the brevity and lack of real consideration included in these responses. The committee has been engaging constructively with the government for over two years in relation to these matters and yet there has been little to no shift in the attitude of government. The responses do not give due consideration to the Senate's unanimous support for the recent changes to the committee's standing orders which provided for the scrutiny of exempt instruments or the Senate's view that delegated legislation should be subject to disallowance and sunseting to permit appropriate parliamentary scrutiny and oversight unless there are exceptional circumstances.

Of the 18 recommendations made in the interim report, the government has only agreed with one—related to the importance of parliamentary sittings in facilitating parliamentary oversight of delegated legislation in times of emergency. The committee is deeply concerned that the government has advised that it does not support any of the committee's recommendations related to providing that instruments made under the Biosecurity Act be made subject to disallowance. The response makes several arguments in justifying why it is appropriate for instruments made under the Biosecurity Act to remain exempt from disallowance. However, each of these arguments has been previously found deficient by the committee.

In the first instance, the response argues that governments around the world have taken unprecedented steps to contain the COVID-19 pandemic, noting that there is a time-limited opportunity to interrupt the transmission of the disease and to manage human health risks. The government emphasised that it needs the ability to take urgent, decisive action and make technically and scientifically based decisions to reduce the potential number of cases and deaths within Australia and subsequently, the burden on the Australian health system.

However, the committee has consistently made the point that the disallowable status of delegated legislation does not prevent the government from acting quickly and decisively as it does not impede the immediate commencement and enforceability of an instrument. In addition, COVID-19 delegated legislation in comparable overseas jurisdictions has largely been subject to a parliamentary scrutiny procedure.

The government also argues that the current framework under the Biosecurity Act includes controls on the making of delegated legislation, and that in the case of an emergency determination, the delegated legislation can only operate for a limited period, being the duration of the biosecurity emergency period or human biosecurity emergency period.

The committee considers that this argument is flawed as the duration of the human biosecurity emergency period is itself determined through an instrument which is exempt from disallowance. In addition, any extension of the emergency period is also exempt from disallowance and there is no limit on the number of times it can be extended.

The government response noted that the deliberate decision by the Parliament not to make specified delegated legislation disallowable reflects the urgency required for such measures and the need to have certainty in the application of the measures to protect the Australian community from exposure to biosecurity risks.

However, the Biosecurity Bill was only debated for approximately five hours in each House. And the focus of this debate was not related to those human biosecurity emergency provisions which are now the subject of such significant scrutiny.

The response also suggests that if disallowance was available, it would undermine certainty as people could not be sure that the measures would not be disallowed during the disallowance period. This argument falls down as it is well established that the instances of the disallowance procedure resulting in disallowance by the Parliament are very low. Senators, as elected representatives, would be well aware of any impact that disallowance would have and would consider such matters as part of their deliberations. The committee considers that the possibility that the Senate would disallow an instrument that would put at risk human health or undermine Australia's agriculture sector is so remote as to be fanciful.

Instead, the committee considers that the disallowance process is an opportunity to work in a constructive manner with the executive to enhance delegated legislation to ensure that it operates and functions within the boundaries placed upon it by the Parliament. In relation to instruments made under the Biosecurity Act, the committee considers that the disallowance process is apt to facilitate appropriate debate and scrutiny of the use of emergency powers and would operate to ensure that such powers are not misused.

Finally, the government response points out that there are other accountability mechanisms to ensure such measures are appropriate and necessary are in place, including Senate Estimates and Questions on Notice, and the Select Committee on COVID-19. Although these accountability mechanisms do exist, I emphasise that our system of representative democracy requires elected representatives to have an opportunity to scrutinise and, if necessary, repeal executive-made law.

Similarly, in its response to the final inquiry report, the government did not agree to any of the 11 recommendations made by the committee. It appears that the government has largely delayed considering the substantive concerns raised by the committee in relation to the disallowance framework until the upcoming statutory review of the Legislation Act.

In conclusion, the committee considers that arguments against making delegated legislation disallowable must be balanced with the need to ensure adequate checks and balances on limitations to the personal rights and liberties of individuals. The committee maintains that the government should consider amending sections 476 and 477 of the Biosecurity Act, as set out in the Monitor, to provide that any future extensions to the human biosecurity emergency period and determinations setting out emergency requirements will be subject to disallowance.

The committee reiterates that if the government is not amenable to moving such amendments it may consider moving its own amendments to the Biosecurity Amendment (Enhanced Risk Management) Bill 2021 to ensure appropriate parliamentary oversight.

With these comments, I commend the committee's *Delegated Legislation Monitor 16 of 2021* to the Senate.