



Committee Secretary
Senate Standing Committee for the Scrutiny of Delegated Legislation
PO Box 6100
Parliament House
Canberra ACT 2600

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

4 June 2020

Dear Secretary

RE: Exemption of delegated legislation from parliamentary oversight

Thank you for the opportunity to make a submission to the Senate Standing Committee for the Scrutiny of Delegated Legislation in its inquiry into the ‘Exemption of delegated legislation from parliamentary oversight’.

We write in our capacity as academics at the Faculty of Law, University of New South Wales. We are solely responsible for the views and content of this submission. We consent to this submission being published on the Committee’s website and would be happy to speak with the Committee further regarding any aspect of it.

We note that the current inquiry stems from Recommendation 15 of the 2019 Report on Parliamentary Scrutiny of Delegated Legislation that the Government:

- (a) review existing provisions exempting legislative instruments from disallowance, to determine whether such exemptions remain appropriate, and amend the Legislation Act 2003 to ensure all such exemptions are contained in primary legislation; and*
- (b) publish guidance as to the limited circumstances in which it may be appropriate to exempt instruments from disallowance.*

We strongly support this recommendation. The current approach to exempting legislative instruments from disallowance lacks clear guiding principles and risks diminishing the Senate’s function of providing democratic accountability over delegated legislation. The current approach also risks challenge in the High Court and the possibility of being rendered unconstitutional.

This submission has three parts:

Part 1: We explain the constitutional position in relation to delegation of legislative power at the federal level, and the challenge that exemption of delegations from parliamentary disallowance poses to this position.

Part 2: We set out two key principles that should guide exemptions from parliamentary disallowance processes.

Part 3: We explain where the current exemptions and exemption processes do not follow these general principles.

Part 4: We make five recommendations to give effect to the two key principles in light of the current practice.

Part 1: Constitutional position

Within our constitutional system, Parliament is the institution responsible for making the law. It fills this position because of its broad representative *nature*, with the widest and most diverse range of constituents represented in it, as well as its *practice* of conducting its activities in public, and subjecting them to challenge, debate and ultimately, an open vote for which its members will ultimately be accountable back to the people.

The separation of powers allows for the delegation of power between the Parliament and the Executive. However, to respect the status of Parliament, delegation of legislative power should only be done where the Parliament retains oversight of that power and retains responsibility for significant policy decisions that are made under it.

While there has yet to be an instance of delegations being ruled unconstitutional, this may occur if Parliament were to abdicate its responsibilities with respect to oversight. The potential for this can be traced back to the High Court's decision in *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73. This case has often been summarised as standing for the proposition that there are effectively no enforceable constitutional limits on the delegation of legislative power to the executive. However, this overlooks the reasoning of the judges, and particularly that of Dixon and Evatt JJ, who both indicated there may be constitutional limits to delegations.

Dixon J referred to the need for delegations to be supported by a head of legislative power, referring to both the need for the delegation not to be too wide or uncertain so as not to be a law with respect to a head of legislative power. He also said, rather delphically, that the distribution of powers (separation of powers) may supply 'considerations of weight' affecting the validity of an Act creating a legislative authority.¹ He explained that limit no further. Evatt J also made remarks about the necessity of ensuring some minimum level of contact between the power and Parliament. These were described by Geoffrey Sawer as 'practical tests' dictating a minimum level of parliamentary supervision.² These included the nature of the delegate ('The further removed the law-making authority is from continuous contact with Parliament, the less likely is it that the law will be a law with respect to [the Commonwealth Parliament's powers]') and the 'restrictions placed by Parliament upon the exercise of power

¹ *Dignan* (1931) 46 CLR 73, 101.

² Geoffrey Sawer, 'The Separation of Powers in Australian Federalism' (1961) 35 *Australian Law Journal* 177, 187.

by the subordinate law-making authority'.³ He also saw the circumstance in which delegations were made as relevant to their validity, for example delegations during war may be wider than otherwise justified by the Commonwealth's powers.⁴

These comments have never been tested in future cases, but there have been a number of developments, both legal and in practice, which indicate that it might be time to revisit them. At the legal level, we draw the Committee's attention to the High Court's more recent decisions in the *Williams* litigation, in which the Court, in a different context, articulated a new constitutional limitation on the Commonwealth executive's power to spend money that mandated greater parliamentary oversight.⁵ That decision drew on the doctrine of responsible government to create judicially enforceable constitutional limits, demonstrating a willingness of the Court to enforce the doctrine as a legal rather than political doctrine. While it has not been tested in the context of delegation, it demonstrates the willingness of the Court to engage with such matters.⁶

At the practical level, the Parliament's current system where delegated instruments are removed from parliamentary disallowance is one example of a contemporary practice that challenges the idea that Parliament retains final authority over parliamentary delegations. This may be vulnerable to a future constitutional challenge. Parliament should respond to this possibility by ensuring that any instances of removal from disallowance can be supported by well-articulated principle consistent with constitutional principle.

Part 2: Principles to guide exemptions from disallowance

The constitutional position dictates that where Parliament delegates law-making functions to the executive branch, there must be a mechanism to ensure that the executive has exercised those powers within the limits and in the manner that the democratically elected Parliament intended. Disallowance has been a 'vital component' of the Commonwealth Parliament's framework for ensuring that Parliament retains direct control over delegated law-making since 1904.⁷ There is no equivalent or alternative political or legal mechanism through which the executive branch is held to account for the powers it exercises in making delegated legislation.

Any exemption from the disallowance process should be carefully drawn. We submit that the constitutional position of the Parliament requires that these be guided by two key principles.

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

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

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

³ *Dignan* (1931) 46 CLR 73, 120.

⁴ *Ibid* 120-121.

⁵ *Williams v Commonwealth* (2012) 248 CLR 156 (*Williams (No1)*); *Williams v Commonwealth* (2014) 252 CLR 416 (*Williams (No 2)*).

⁶ See further analysis of this move in the Court's doctrine in Gabrielle Appleby and Joanna Howe, 'Scrutinising parliament's scrutiny of delegated legislative power' (2015) 15 *Oxford University Commonwealth Law Journal* 3.

⁷ Rosemary Laing (ed), *Odgers Australian Senate Practice* (14th ed, 2016) 1166.

as narrowly as possible to give effect to these justifications. We have identified **three** circumstances where exemptions can be clearly justified:

1. *By-laws of elected bodies*: The exemption of local council by-laws at the State level, and the by-laws of universities (including the ANU at the federal level under the *Australian National University Act 1991*) is justified on the basis that the democratic nature of the delegated law-making body provides the necessary accountability for these exercises of legislative power.
2. *Internal government processes*: These would include, for instance, the Prime Minister's directions to agency heads under *Public Service Act 1999* s 21 relating to management and leadership of APS employees, and other instruments issued for internal management purposes. These instruments do not have an impact on public rights, obligations, duties and as such Parliament may determine, for efficiency reasons, are not required to be subject to further democratic oversight.
3. *Instruments which require the assent of Parliament to come into force*: These instruments are made accountable to Parliament through the alternative mechanism of an allowance process, and as such there is appropriate democratic oversight and accountability.

Part 3: Current exemptions and exemptions process

The law and processes that currently apply to exemptions from disallowance do not follow these general principles. Section 44 of the *Legislation Act 2003* (Cth) provides that the disallowance process set out in s 42 of that Act does not apply to instruments or provisions thereof in three circumstances:

- (1) The primary legislation 'facilitates the establishment or operation of an intergovernmental body or scheme' and 'authorises the instrument to be made by the body for the purposes of the body or scheme', unless the enabling legislation otherwise provides, or the instrument is a regulation (s 44(1)).
- (2) The primary legislation provides that the instrument is not subject to disallowance (s 44(2)(a)).
- (3) Regulations prescribe that the instrument is not subject to disallowance (s 44(2)(b)).

The *Legislation (Exemptions and Other Matters) Regulation 2015* has been made under s 44(2)(b). Part 4 sets out classes of instruments and specific instruments which are not subject to disallowance. The classes of instruments not subject to disallowance are:

- Instruments which require the assent of Parliament to come into force;
- Ministerial directions;
- Instruments relating to superannuation; and
- Instruments made under an annual Appropriation Act.

The specific instruments excluded from disallowance under this Regulation, or under primary legislation, are numerous. Some, we submit, are not justifiable, and illustrate a potentially unconstitutional abdication of responsibility by the Parliament for supervision of delegations,

many of which have the capacity to affect adversely the rights of individuals. We draw the Committee's attention to three concerning examples of these:

- (a) **Biosecurity Determinations and Directions:** Part two, division two of the [Biosecurity Act 2015](#) (ss 474-479) enables the declaration of a human biosecurity emergency by the Governor General (the declaration which itself is exempt from disallowance). The federal Health Minister can then make any determination or any direction needed to deal with the biosecurity problem for a period of up to 3 months. These can go so far as to override any other law. They are not subject to disallowance by Parliament. Non-compliance with a determination or direction can lead to up to 5 years imprisonment.
- (b) **Migration Act:** Under s 195A of the *Migration Act 1958*, the Minister has a personal power to grant a visa to a person who is in detention, where this is determined to be in the 'public interest'. Part 4, Schedule 4 of the *Migration Regulations 1994* sets out a number of public interest criteria, one of which is that the visa applicant has signed a code of behaviour that has been approved by the Minister (criterion 4022). Clause 4.1 of Part 4, Schedule 4 requires the Minister to approve any code of behaviour used for this purpose, and specify which visa classes it applies to. Codes of behaviour are exempt from disallowance under s 44 of the *Legislative Instruments Act 2003*.

One code of behaviour has been made under the Regulations. The code applies to non-citizens living within Australia on a Bridging E visa. It sets out six expectations that signatories agree to abide by, and states that breach of these could lead to a reduction in income support or cancellation of the visa (which in turn leads to immigration detention). How the code operates in practice is not made clear: no process for how breach and consequences will be determined is set out, and some of the expectations are unclear in scope.⁸

It is entirely appropriate for criteria to be set out determining the circumstances in which a discretionary visa grant will be in the public interest. It is also appropriate for bridging visas to be granted subject to conditions. However, where the conditions involve broad executive discretions that have onerous consequences for individuals on public interest grounds, it is beneficial that parliamentary scrutiny, in the form of disallowance, be maintained.⁹

- (c) **Advance to the Finance Minister** – The 'Advance to the Finance Minister' in the *Appropriation Act [No 1]* allows the Finance Minister to decide, by Determination, to allocate appropriated funds where the Minister is satisfied there is an urgent and unforeseen need for that expenditure. This power was relied on by government in 2017 to fund the marriage equality plebiscite / survey under the *Census and Statistics*

⁸ For example, the code obliges signatories to refrain from participation or involvement in criminal activity, but does not make clear whether a conviction is required before a person can be determined to have breached this. It also states that signatories must not 'engage in any anti-social or disruptive activities that are inconsiderate, disrespectful or threaten the peaceful enjoyment of other members of the community'. This is a very broad requirement that leaves considerable scope for discretion and that, arguably, infringes the constitutionally protected implied freedom of political communication.

⁹ See also Elyse Methven and Anthea Vogl, 'We will decide who comes to this country, and how they behave: A critical reading of the asylum seeker code of behaviour' (2015) 40(3) *Alternative Law Journal* 175.

Act 1905 (Cth). It was unsuccessfully challenged in *Wilkie v Commonwealth*.¹⁰ The government had relied on this power despite the Senate having explicitly rejected a legislative attempt to authorise a plebiscite on same-sex marriage. A Determination under the *Advance to the Finance Minister* is not subject to disallowance, and was able to be relied on in the face of explicit parliamentary opposition.

While some of the exemptions from disallowance may be justified, there does not appear to be any clear rationale for the specific instruments excluded by the Regulation. The list of exclusions appears to be somewhat ad hoc.

Our impression that the existing exclusions are ad hoc is supported by the fact that there is no policy guidance on this issue in the Office of Parliamentary Counsel's Drafting Guidelines,¹¹ Drafting Directions,¹² or Instruments Handbook.¹³ The Directions and Handbook outline the approval process for exempting instruments from disallowance, and note that policy approval is required by the Attorney-General's Department.¹⁴ However, there is no detail on when exemption will be justified, or the factors that the Attorney-General's Department should consider in giving policy approval for an exemption. The circumstances in which exemptions are justified should be clear and transparent.

Part 4: Recommendations

To give effect to the two key principles we have set out in Part 2 above, and in light of contemporary practice, we submit the following recommendations for the Committee's consideration:

1. All exemptions to disallowance should be in primary legislation and s 44(2)(b) of the *Legislation Act 2003* should be amended to reflect this. We endorse the Committee's position in Recommendation 15 of the 2019 Report on Parliamentary Scrutiny of Delegated Legislation.
2. An agreed list of circumstances in which exemption from disallowance is justified be developed (see our recommended list in Part 2). This list should be included in the Office of Parliamentary Counsel's Drafting Guidelines and Drafting Directions, so that every proposed exemption is able to be clearly justified and subject to internal scrutiny prior to its introduction.
3. This list of circumstances in which exemption from disallowance is justified should be used to inform the work of the Senate's Scrutiny of Bills Committee and the Scrutiny of Delegated Legislation Committee.
4. Current exemptions in the *Legislation (Exemptions and Other Matters) Regulation 2015* should be individually reviewed against this list, and, if deemed justifiable, moved into primary legislation.

¹⁰ (2017) 91 ALJR 1035.

¹¹ <https://www.opc.gov.au/sites/default/files/s13ag320.v49.pdf>

¹² https://www.opc.gov.au/sites/default/files/dd3.8_0.pdf p 16

¹³ <https://www.opc.gov.au/sites/default/files/m17jfl42.v24.pdf> p 67.

¹⁴ https://www.opc.gov.au/sites/default/files/dd3.8_0.pdf p 16;
<https://www.opc.gov.au/sites/default/files/m17jfl42.v24.pdf> p 67.

5. The exemption of instruments made by a body or scheme established pursuant to intergovernmental agreements in s 44(1)(a) of the *Legislation Act* 2003 should be removed. It might be that the exemption of such legislative instruments is justifiable in some circumstances, but exclusion of such instruments from legislative oversight should be considered on a case by case basis, and if they are exempt, alternative means of democratic accountability should be considered. In most cases, disallowance by the federal parliament, representative of the whole Australian constituency, would be the most appropriate form of democratic oversight.

Yours sincerely

Gabrielle Appleby
Professor

Janina Boughey
Senior Lecturer

Sangeetha Pillai
Senior Research Associate
Kaldor Centre for International Refugee Law

George Williams
Dean, UNSW Law