



Senator the Hon. Concetta Fierravanti-Wells
Senate Standing Committee for the Scrutiny of Delegated Legislation
PO Box 6100
Parliament House
CANBERRA ACT 2600

1 July 2020

Dear Senator, the Hon. Concetta Fierravanti-Wells,

Submission of the Legislative Review Committee of the Parliament of South Australia to the Senate Standing Committee for the Scrutiny of Delegated Legislation's Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight

Background

1. I refer to a letter from Senator the Hon. Concetta Fierravanti-Wells dated 6 May 2020 inviting the Legislative Review Committee of the Parliament of South Australia ('the SA Committee') to make a submission to the Senate Standing Committee for the Scrutiny of Delegated Legislation's ('the Senate Committee') Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight ('the Inquiry'). On 13 May 2020, the SA Committee resolved to provide a submission to the Inquiry.
2. On 22 June 2020, in response to a request from the SA Committee's Secretary, the Chair of the Senate Committee granted the SA Committee an extension for the receipt of a submission to the Inquiry until 3 July 2020. This submission is a submission of the SA Committee.
3. The membership of the SA Committee comprises the following Members of the Parliament of South Australia:
 - The Hon. Nicola Centofanti MLC (the SA Committee's Presiding Member);
 - The Hon. Irene Pnevmatikos MLC;
 - The Hon. Connie Bonaros MLC;
 - Mr. Josh Teague MP (Member for Heysen);
 - Mr. Dan Cregan MP (Member for Kavel);
 - The Hon. Zoe Bettison MP (Member for Ramsay).

The Inquiry

4. Chapter 8 of the Senate Standing Committee on Regulations and Ordinances' Parliamentary scrutiny of delegated legislation Inquiry Report ('the Scrutiny Inquiry Report') includes a discussion on 'exemptions from disallowance' in the context of disallowance procedures. Paragraph 8.2 of the Scrutiny Inquiry Report

notes that the Commonwealth's disallowance procedure 'is the primary mechanism by which the Parliament may exercise control over delegated legislation'¹. By exempting delegation legislation from disallowance, Parliament, whether the exemption is in an Act or in a regulation, accepts to relinquish its control over specific delegated legislation on the basis that control over the delegated legislation is inappropriate or unnecessary.

5. The SA Committee supports a review of existing provisions exempting legislative instruments from disallowance on the basis that such a review will enable Parliament to determine the appropriateness or otherwise of existing exemptions from disallowance. It also supports a move for such exemptions to be set out in primary legislation as well as efforts to make exemptions from disallowance readily identifiable.
6. In relation to guidance materials, paragraph 8.38 of the Scrutiny Inquiry Report raised a concern about the absence of government guidance materials noting:

'...there does not appear to be any publicly accessible government guidance as to the circumstances in which it may be appropriate to exempt instruments from disallowance.'²

While such guidance materials may be a helpful aid to the Executive, guidance materials should not attempt to pre-empt the will of a Parliament. Parliaments are not static institutions. Further, reference to guidance materials should not excuse the Executive from explaining in plain terms the grounds for an exemption from disallowance considering the circumstances of each case.

7. If an exemption from disallowance is sought by the Executive, there ought to be an acknowledgement that the nature of the request is one that bears an increased burden on the Executive to explain to Parliament the need for the exemption. Parliament should closely monitor each such explanation to ensure that an exemption from disallowance is not given as a matter of convenience to the Executive.
8. For example, the ground for the exemptions from disallowance given for item 3 of Schedule 1 (Amendments) to the Legislation (Exemptions and Other Matters) Amendment (Sunsetting and Disallowance Exemptions) Regulation 2016 ('the 2016 Regulation') may warrant closer investigation. Item 3 of Schedule 1 to the 2016 Regulation inserted item 23A into section 10 (Particular legislative instruments that are not subject to disallowance) of the Legislation (Exemption and Other Matters) Regulations 2015. The explanatory statement to the 2016 Regulation explains that 'new item 23A provides disallowance exemptions for the following instruments made under the *National Vocational Education and Training Regulator Act 2011* ('the VET Act'):
 - a determination made under subsection 7(2), 54(1) or 232(1)
 - an instrument made under paragraph 157(1)(p)

¹ See Senate Standing Committee on Regulations and Ordinances' Inquiry Report (2019) *Parliamentary scrutiny of delegated legislation*, p. 113. Accessible at aph.gov.au.

² Ibid, p. 123.

- a direction made under subsection 160(1) or 181(1), and
 - an instrument made under subsection 185(1), 186(1), 187(1), 188(1) and 189(1).³
9. Interestingly, the explanatory statement acknowledges that section 44(1) (Legislative instruments that are not subject to disallowance) of the *Legislation Act 2003* applies to the above instruments because the instruments ‘are integral to the establishment, facilitation and operation of an intergovernmental scheme for a national framework in the regulation of the vocational education and training sector, establishing accreditation regulations, standards and fees.’⁴ The explanatory statement states the specific ground for the exemptions as follows:
- ‘While the general exemption under section 44(1) applies to the above instruments, specific exemptions provided by regulations are appropriate to align the enabling Act with the exemption mechanism under the Legislation Act, as the National Vocational Education and Training Regulator Act refers to the Principal Regulation.’⁵
10. The stated ground for the exemptions appears to be because the VET Act refers to the exemption mechanism in paragraph 44(2)(b) of the *Legislation Act 2003*. In fact, the VET Act has 11 notes under provisions of that Act which refer to paragraph 44(2)(b) of the *Legislation Act 2003*. Several issues arise here. What motivated the Executive to put the stated ground for the exemptions to Parliament when the instruments are already exempt from disallowance under section 44(1) of the *Legislation Act 2003*? It is difficult to reconcile a need to exempt any instrument from disallowance twice. Is the stated ground for the exemptions from disallowance an accurate explanation for the exemptions? In the context, the Executive would almost certainly have weighed up a number of factors, including the time and resources involved in amending the VET Act to refer to the exemption mechanism in section 44(1) of the *Legislation Act 2003* against the time and resources involved in amending regulations in the manner in which it did. Finally, how should Parliament respond?
11. One challenge for Parliament is to ensure that, if the Executive puts to it an exemption from disallowance, Parliament has a clear and well-reasoned explanation for the exemption to consider. While that has no doubt been the goal of explanatory documents, 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. For example, the following table illustrates how form may be utilised to highlight explanations in an explanatory document:

³ Explanatory Statement to the Legislation (Exemptions and Other Matters) Amendment (Sunsetting and Disallowance Exemptions) Regulation 2016, F2016L01897. Accessible at legislation.gov.au

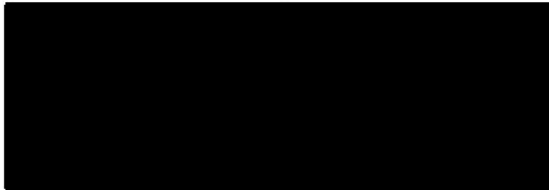
⁴ Ibid.

⁵ Ibid.

Item	An exemption from disallowance is sought for...	The grounds for the exemption are...
1.	a determination made under section xx of the <i>ABC Act 2020</i>	...?
2.	an instrument made under paragraph 123(1)(a) of the <i>XYZ Act 2015</i>	Same as item 1 (if the same grounds apply)
3.	etc.	...?

12. In relation to emergency situations, it is difficult to forecast a situation in which it may be appropriate to set aside parliamentary scrutiny of delegated legislation. In response to the COVID-19 pandemic, Parliaments across Australia have demonstrated a capacity to adapt without compromise to its role on behalf of the Australian people. For example, by using electronic means to hold meetings or, with the agreement of Members of a House of Parliament, to convene the House of Parliament with a reduced number of Members.
13. Further, the maintenance of parliamentary scrutiny of delegated legislation is arguably more important in times of an emergency not least because the Executive may rush the making of delegated legislation, which may lead to legislative errors that are not identified but for Parliamentary scrutiny of delegated legislation.

Yours sincerely,



Hon. Nicola Centofanti MLC
PRESIDING MEMBER