



AUSTRALIAN
SENATE


Senate Standing Committee for the
Scrutiny of Delegated Legislation

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17 March 2021

Senator the Hon Sarah Henderson
Chair
Senate Legal and Constitutional Affairs Legislation Committee
Parliament House
CANBERRA ACT 2600

Via email: legcon.sen@aph.gov.au


Dear Chair,

Review of the *National Emergency Declaration Act 2020*

Thank you for the opportunity for the Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) to make a submission to the Legal and Constitutional Affairs Legislation Committee's review of the *National Emergency Declaration Act 2020* (the Act).

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 principles of parliamentary oversight. The committee is especially concerned when primary legislation provides the executive with broad power to make delegated legislation exempt from parliamentary oversight in times of emergency, when individual rights and liberties may be restricted.

The committee is concerned that the Act provides the executive with significant powers to make delegated legislation in times of emergency, and that this legislation is exempt from disallowance by the Parliament. In this regard, the committee's view is that these powers appear to replicate powers in the *Biosecurity Act 2015* (Biosecurity Act).

Background and the Biosecurity Act 2015

In December 2020 the committee published the interim report of its inquiry into the exemption of delegated legislation from parliamentary oversight.¹ This report focused on the COVID-19 pandemic and the role of the Biosecurity Act in providing sweeping power to the executive to make delegated legislation exempt from parliamentary scrutiny and disallowance.

The interim report showed how the Biosecurity Act confers extraordinarily broad powers on the executive branch of government, including powers to make delegated legislation which trespasses significantly on personal rights and liberties and overrides any Australian law. Of particular concern to the committee, the Biosecurity Act exempts all such delegated legislation from the

1 Senate Standing Committee for the Scrutiny of Delegated Legislation, Interim report: Exemption of delegated legislation from parliamentary oversight, December 2020 <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Exemptfromoversight/Interim_report>.

disallowance procedure. The government has justified exempting instruments made under the Biosecurity Act from disallowance on the grounds that they are based on technical or scientific decisions and therefore need to be insulated from political considerations. However, in the committee's view, where a law trespasses on personal rights and liberties, or modifies or overrides primary legislation, our system of representative democracy requires elected representatives to have the opportunity to scrutinise and, if necessary, repeal that law.

Despite the significance of the delegated legislation-making powers in the Biosecurity Act, it is the committee's view that they received little consideration when the Biosecurity Bill was being considered in 2014 and early 2015. In its interim inquiry report the committee urged all parliamentarians to carefully consider the delegated legislation-making powers in emergency legislation, to ensure that the exercise of these powers is subject to an appropriate degree of parliamentary oversight.

National Emergency Declaration Act 2020

National Emergency Declaration (Consequential Amendments) Act 2020

The committee is concerned that the Act provides for near identical powers to the Biosecurity Act to make delegated legislation exempt from parliamentary oversight in times of emergency.

The Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) scrutinised the provisions of the bill which became the Act in-depth in *Scrutiny Digest 18 of 2020*. The committee endorses and supports all scrutiny concerns identified by the Scrutiny of Bills committee in relation to the Act, and this submission draws attention to particular provisions of primary concern.

The Scrutiny of Bills Committee raised concerns in *Scrutiny Digest 18 of 2020* that the Act enables the executive to make non-disallowable delegated legislation declaring a national emergency and extending a declaration of national emergency, potentially on an indefinite basis. The committee shares the Scrutiny of Bills Committee's concerns that the Act, and the *National Emergency Declaration (Consequential Amendments) Act 2020* (the Consequential Act), provides for delegated legislation to modify primary legislation, and for significant matters in delegated legislation.

Of particular concern to this committee are sections 11, 12 and 13 of the Act. Section 11 of the Act provides the Governor-General with the power to declare a national emergency by legislative instrument that is not subject to disallowance. Section 12 provides that the Governor-General may extend the period for which a national emergency declaration is in force for up to three months, with no limit on the number of extensions, by legislative instrument that is not subject to disallowance. Section 13 provides that the Governor-General may vary any other aspect of an emergency declaration, and such a variation is a legislative instrument exempt from disallowance.

Exempting such significant measures from disallowance in the same manner as the emergency declarations and exemptions of the Biosecurity Act excludes these laws from effective parliamentary oversight.

The committee is also particularly concerned about section 15 of the Act which empowers ministers to modify certain provisions of primary law in relation to administrative requirements during a declared national emergency.² This is akin to a Henry VIII clause, which are provisions

2 The committee notes that the National Emergency Declaration Regulations 2020 [F2020L01640] were registered on the Federal Register of Legislation on 18 December 2020, as made under section 15 of the *National Emergency Declaration Act 2020*.

enabling delegated legislation to amend primary legislation. The committee has long been concerned with provisions in delegated legislation which modify the operation of primary legislation, particularly where those modifications appear to substantially depart from the original provision.

The committee also notes concerns with section 17 of the Act which provides that reports on the exercise of powers or functions under a national emergency law as defined by the law must be tabled in each House of the Parliament as soon as practicable. In this regard, the committee supports the position of the Scrutiny of Bills Committee that such reports should be tabled in each House no later than 14 days after the relevant minister receives the report.³

The committee welcomes the inclusion of section 14A of the Act which requires the Senate Standing Committee on Legal and Constitutional Affairs, or such other committee constituted under a resolution of the Senate, to review each national emergency declaration made under section 11 by the first anniversary of the day the declaration is made and report the committee's findings to the Senate as soon as practicable after completing the review. In the committee's view, such measures improve the ability of Parliament to scrutinise the use of these significant powers and retain oversight of delegated lawmaking power.

In relation to the Consequential Act, the committee is concerned that it has expanded the power for non-legislative instruments to exempt therapeutic goods, biologicals and devices from the operation of the *Therapeutic Goods Act 1989*. As detailed by the Scrutiny of Bills Committee, the Consequential Act also amended section 80J of the *Privacy Act 1988* to "authorise the collection, use and disclosure of personal information by entities in relation to affected individuals at any time an emergency declaration is in force, in line with the further requirements in section 80P".⁴ The Scrutiny of Bills Committee notes that an emergency declaration under section 80J is not a legislative instrument, and the committee echoes their concerns that such an instrument may impact on individual privacy but is exempt from parliamentary scrutiny. In its interim report the committee raised similar concerns about this provision and the use of non-legislative instruments to exempt entities from the Australian Privacy Principles in the context of the 2019-2020 bushfires.⁵

As outlined in the committee's interim report, primary legislation made for times of emergency should be subject to rigorous parliamentary scrutiny, particularly noting the extraordinary lawmaking powers that may be delegated to the executive. These powers may include the ability to override or modify primary legislation or limit personal rights and liberties. Such consideration

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- 3 Senate Standing Committee for the Scrutiny of Bills, *Digest 18 of 2020*, p. 18, https://www.aph.gov.au/-/media/Committees/Senate/committee/scrutiny/scrutiny_digest/2020/PDF/d18.pdf?la=en&hash=FC0DB9BEE4B0C7C27F8997BD36344BBE6F002845.
 - 4 Senate Standing Committee for the Scrutiny of Bills, *Digest 18 of 2020*, p. 21, https://www.aph.gov.au/-/media/Committees/Senate/committee/scrutiny/scrutiny_digest/2020/PDF/d18.pdf?la=en&hash=FC0DB9BEE4B0C7C27F8997BD36344BBE6F002845.
 - 5 Senate Standing Committee for the Scrutiny of Delegated Legislation, Interim report: Exemption of delegated legislation from parliamentary oversight, pp. 81–82, December 2020 https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Exemptfromoversight/Interim_report.

ensures that Parliament may sufficiently safeguard the exercise of emergency powers by the executive in the future.

For more detail in relation to the committee's concerns about the use of delegated legislation in times of emergency, the committee refers you to the interim report of its inquiry into exemptions of delegated legislation from parliamentary oversight.⁶

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation

6 Senate Standing Committee for the Scrutiny of Delegated Legislation, Interim report: Exemption of delegated legislation from parliamentary oversight, December 2020
https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Exemptfromoversight/Interim_report.