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28 June 2020

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
Canberra, ACT, 2600

Dear Senator,

Submission – Inquiry into exemption of delegated legislation from parliamentary oversight

Please accept this submission to the Committee's inquiry. My apologies for its lateness – it overlapped with exam marking, which had to take priority.

As per my previous submissions to this Committee, I remain concerned about what appears to be increased usage of exemptions of delegated legislation from parliamentary oversight through the exclusion of legislative instruments from potential disallowance.

From a constitutional point of view, legislative power is conferred on Parliament by s 1 of the Constitution. It is not conferred upon the executive. It has long been recognised by the courts, however, that Parliament may delegate its legislative powers to the executive to deal with the vast amount of administrative detail that needs to be the subject of legislative provision, and it would be impractical for Parliament to have to enact all such provisions itself. Nonetheless, Parliament may only delegate this power – it may not abdicate it. This is because 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.

This control and supervision is primarily fulfilled by the process for the tabling and disallowance of legislative instruments in each House. It gives the Houses the opportunity to scrutinise legislative instruments and take action if it would not have agreed to pass such provisions in a bill brought before it. 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.

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If legislative instruments are not subject to disallowance, and by virtue of this fact, are not subject to scrutiny by this Committee, then Parliament's control over the exercise of its delegated legislative power is seriously diminished. The only method remaining to Parliament to exercise control over such legislative instruments would be to repeal or amend the Act that authorises the relevant delegation of power. It is difficult to do this if Parliament is not made aware of problems or concerns about particular legislative instruments.

Hence, as a minimum, the Senate Standing Committee for the Scrutiny of Delegated Legislation should be given the power and responsibility to scrutinise non-disallowable legislative instruments, so that Parliament can be made aware if there are matters within those instruments that raise issues to which it may wish to respond.

In addition, the Commonwealth Government should set out publicly its criteria for classifying legislative instruments as non-disallowable and provide a reasonable justification for each such classification. This would allow the Committee to raise concerns if legislative instruments are made non-disallowable even though they do not reasonably fall within such classifications or do not meet the relevant justification for doing so.

It must be accepted that there may be good reasons why certain legislative instruments are non-disallowable. For example, it is reasonable for the Government to argue that certain types of measures taken under the *Biosecurity Act 2015* (Cth) during a pandemic should not be subject to disallowance, because such measures need to be taken on the basis of scientific and medical evidence, and making them disallowable would add inappropriate political considerations to the decision-making process. A further consideration is that such measures only apply for a limited time (3 months) during a declared emergency, so a disallowance procedure is therefore unnecessary.

However, it is also the fact that such measures may have very serious impacts upon the liberty and rights of individuals. Indeed, directions and determinations by the Health Minister under ss 477-478 of the *Biosecurity Act 2015* apply 'despite any provisions of any other Australian law', allowing them to override statute (i.e. a Henry VIII clause). Further, the period of an emergency may be extended, again and again, so that the measures apply for a long period. In addition, it is well known that in a significant number of other countries, emergency measures have been abused to oppress the public and continued for years.

Even though such actions are most unlikely to occur in Australia, because of our strong respect for rights and the rule of law, it is always wise to ensure that robust measures are in place to maintain and require scrutiny and democratic remedies against potential future abuses of power. Accordingly, even in relation to actions and directions during an emergency, there should be permanent measures in place to ensure scrutiny. While the establishment of a Senate Select Committee on COVID-19 was a welcome development, it was *ad hoc*. All legislative instruments made under the *Biosecurity Act* should be the subject of scrutiny, even if they are not disallowable.

Further, if an emergency is continued for a significant period of time (eg 6 months or longer) then consideration should be given to an automatic transformation of such legislative instruments into disallowable instruments after that time. By then, there would have been

sufficient time to assess the effectiveness and justification of emergency measures, so that an informed vote could be given on disallowance. Such a measure would discourage the use of emergency legislative instruments in the future for abusive purposes.

Disallowance, of course, is not an effective measure if Parliament is not sitting. This is a significant problem if the nature of the emergency is such as to prevent Parliament from meeting and fulfilling its supervisory and scrutiny responsibilities. In this regard, the Parliament should investigate further the possibility of meeting virtually by electronic means. Parliamentary committees can already do so (see House of Representatives Standing Order 235(b) and Senate Standing Order 30). This ensures that committee scrutiny is still feasible. But for disallowance to operate, the Houses need to sit. Even though the Houses have managed to sit for more limited periods during this pandemic, preparations should be made for future emergencies when the physical sitting of the Houses in Canberra may not be practicable.

While in the past some concerns have been raised as to whether or not the virtual sitting of Parliament by electronic means would be constitutionally valid, I do not take the view that there is a constitutional impediment to it. Indeed, if it occurred during a period of emergency, it would enhance, rather than impede, responsible and representative government. I refer the Committee to my discussion of the constitutional issues in: A Twomey, 'A virtual Australian parliament is possible – and may be needed – during the coronavirus pandemic', *The Conversation,* 25 March 2020: https://theconversation.com/a-virtual-australian-parliament-is-possible-and-may-be-needed-during-the-coronavirus-pandemic-134540.

As there has now been some experience of virtual Parliaments in a number of countries, this would be a subject worth inquiring into in greater depth, drawing on overseas experience. For example, Lord Norton of Louth gave some interesting observations about electronic voting in the House of Lords: https://nortonview.wordpress.com/2020/06/16/voting-electronically-is-easy-but-should-it-be/.

Yours sincerely,

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