



The Centre for Public Integrity

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Submission to the Senate Standing Committee for the Scrutiny of Delegated Legislation

25th June 2020

Dear Secretary,

Thank you for the opportunity to make a submission to the inquiry into the exemption of delegated legislation from Parliamentary oversight. We congratulate the committee for conducting an inquiry into this important issue.

The Centre for Public Integrity is an independent think tank dedicated to preventing corruption and increasing public trust in government. We are concerned with the increasing concentration of Commonwealth executive power. Executive power challenges the principles of democratic decision-making and increases the risk of corruption.

The response to COVID-19 has concentrated executive power

The Government's response to COVID-19 has concentrated power in the hands of individual Ministers, much of it implemented via delegated legislation:

- The Minister for Health has 'human biosecurity emergency powers' including power to issue requirements necessary to prevent and control the spread of COVID-19 (e.g. social distancing rules; movement restrictions) under the *Biosecurity Act 2015* (Cth).
- \$40 billion Advance to the Finance Minister under the *Appropriation Act (No 5) 2019-2020* (Cth) and the *Appropriation Act (No 6) 2019-2020* (Cth). The Minister for Finance has broad discretion to allocate this funding.
- The Minister for Social Services has been given the power to alter eligibility rules and payment rates for all social security payments under the *Coronavirus Economic Response Package Omnibus Act 2020* (Cth).
- The Minister for Industrial Relations has the power to exempt specified employers from provisions dealing with JobKeeper, enabling stand-down provisions under the *Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020* (Cth)
- The Treasurer has the power to set rules for the \$130 billion JobKeeper scheme under the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* (Cth).

Lack of accountability of delegated legislation

Accountability measures that ensure policy decisions made via delegated legislation are in the public interest and follow proper process are limited. These decisions are not given detailed deliberation in Parliament and are not transparent to public scrutiny.

We are concerned that:

- Significant questions of policy are being delegated
- Senate Committee scrutiny process is limited to technical issues
- Other scrutiny measures in *the Legislation Act 2003* are shallow and retrospective in nature – publicly registered and tabled before Parliament after being made law
- Disallowance is the only mechanism for Parliamentary oversight in the current system, but in practice the capacity for Parliament to effectively utilise this power may be limited when faced with hundreds of instruments each year

In addition, the increasing use of delegated legislation puts individual power in the hands of Ministers who do not face independent accountability outside of Parliamentary scrutiny. Ministerial accountability is limited to a Standard of Ministerial Conduct that is monitored internally by the Department of Premier and Cabinet. There is no independent agency with the powers and jurisdiction necessary to investigate allegations of misconduct or corruption at a Ministerial level.

Exemption of delegated legislation from disallowance

Scrutiny measures implemented by the *Legislation Act 2003* and the Senate Committee process are largely void for delegated legislation that is exempt from disallowance.

Of the 183 legislative instruments made since the beginning of the COVID-19 crisis, 19.1% are exempt from disallowance by Parliament and scrutiny by the Senate Committee.¹ These include delegated legislation under the Biosecurity Act and the allocation of the Advance to the Finance Minister. We are concerned that the increasing exemption of delegated legislation from disallowance threatens democratic decision making and the constitutional role of Parliament.

Sections 475 to 479 of the Biosecurity Act gives broad powers to the Health Minister to extend the emergency period of a human biosecurity emergency and determine emergency requirements within that period. There are no limits to the requirements or directions that the Health Minister can make, and they apply despite any provision of any other Australian law. There is a 5 years offence for failure to comply.

All of the powers given to the Health Minister in this section of the Biosecurity Act are implemented via legislative instruments that are exempt from disallowance.

On the 23rd March Commonwealth Parliament passed a \$40 billion Advance to the Finance Minister under the *Appropriation Act (No 5) 2019-2020* (Cth) and the *Appropriation Act (No 6) 2019-2020* (Cth).

¹ Senate Committee for the Scrutiny of Delegated Legislation, *Scrutiny of COVID-19 instruments*, accessed 16 June 2020,

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Scrutiny_of_COVID-19_instruments

The Commonwealth Minister for Finance Mathias Cormann has broad discretion to allocate this funding. Appropriation legislation allows for spending to occur for any purpose where the Minister is satisfied there is an urgent need for expenditure that is not otherwise provided for.²

This is the largest Advance to the Finance Minister established to date, 400 times any Advance made since 2010.³ To date the Finance Minister has allocated \$1.97 billion of the \$40 billion available in this Advance.⁴

These funds are allocated via delegated legislation and are exempt from disallowance.⁵

These two current examples point to a larger issue where laws affecting human rights and large public spending are being implemented without consultation or Parliamentary deliberation and are then exempt from the final safeguard of disallowance.

Recommendations

- 1) Exemptions to disallowance should be in primary legislation
- 2) Establish criteria for circumstances in which exemption of delegated legislation is justified, focussing on administrative instruments or instruments that have democratic oversight through other mechanisms
 - a) Any delegated legislation that allocates Appropriations or other spending of public money should not be able to be exempt from disallowance
 - b) Any delegated legislation that affects human rights should not be able to be exempt from disallowance
 - c) Any delegated legislation that deals with questions of policy should not be able to be exempt from disallowance
- 3) Parliament should give greater consideration of Senate Committee's reports on delegated legislation and better utilise disallowance
- 4) Greater Ministerial accountability including independent enforcement of Standard of Ministerial Conduct, and a National Integrity Commission to investigate allegations of corrupt conduct

² *Appropriation Act (No.5) 2019-2020* (Commonwealth) and *Appropriation Act (No. 6) 2019-2020* (Commonwealth)

³ Mather & Chowns, 2019, *Budget concepts—Advance to the Finance Minister: a quick guide*, Parliamentary Library, Research Paper series 2018-19, 28 March 2019, https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1819/Quick_Guides/BudgetConcepts

⁴ Finance Minister, 2020, *2020 Media Releases*, accessed 3rd June 2020, <https://www.financeminister.gov.au/media-releases/2020>

⁵ Senate Standing Committee for the Scrutiny of Delegated Legislation, 2020, *Scrutiny of COVID-19 instruments*, accessed 21st May 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Scrutiny_of_COVID-19_instruments

Warm regards,

A handwritten signature in blue ink on a light grey background. The signature reads "H. Aulby" in a cursive style.

Han Aulby

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About The Centre for Public Integrity

The Centre for Public Integrity is an independent think tank dedicated to preventing corruption, protecting the integrity of our accountability institutions, and eliminating undue influence of money in politics in Australia. Board members of the Centre are the Hon Tony Fitzgerald AC QC, the Hon David Ipp AO QC, the Hon Stephen Charles AO QC, the Hon Anthony Whealy QC, Professor George Williams AO, Professor Joo Cheong Tham and Geoffrey Watson SC. More information at www.publicintegrity.org.au.