



## Executive law-making doubles while accountability decreases

Briefing paper

September 2020

### Summary

- Executive law-making outside of Parliament has doubled in the last 30 years. Since the 1980s, it is up from 872 pieces of delegated legislation made per year to 1738 pieces in recent years.
- Through the delegation of law-making powers, policy decisions that affect the rights and obligations of individuals, business and industry are increasingly being made by the Executive without adequate parliamentary oversight or other forms of accountability.
- Commonwealth Parliament's response to the COVID-19 emergency has further concentrated power in the hands of individual Ministers, including a \$40 billion "Advance to the Finance Minister" which is 400 times any Advance made since 2010.
- Nearly 20% of federal COVID-19 related delegated law-making powers are exempt from parliamentary oversight. With Parliament suspended for nearly 3 months at the beginning of the crisis, very little scrutiny of legislation occurred.
- Accountability for executive law-making needs to be strengthened via regulating the reliance on delegations, establishing a National Integrity Commission, and independently enforcing the Statement of Ministerial Standards.

### Executive law-making on the rise

Executive law-making has increased significantly in the past 30 years. Through the delegation of law-making to the executive, power is being concentrated in the hands of individual Ministers. Parliament is abrogating its responsibility for important policy decisions, including decisions that relate to the expenditure of significant public funds.

Delegations allow the Executive and often individual Ministers to make laws that affect the rights and obligations of individuals, businesses and industry without consulting Parliament. Of course, delegation of law-making is often necessary. It allows for technical and administrative detail to be worked out later, for frequently changing regulatory regimes to keep apace, and for the executive to respond to emergencies. However, in recent times we have seen a dramatic increase in the significant issues of policy and public spending that have been determined by the Executive, including major parts of the Government's response to the COVID-19 crisis. This increase in delegated law-making power has been accompanied by decreased parliamentary oversight.

The use of delegated legislation by the Executive has doubled in the past 30 years, up from an annual average of 872 pieces between 1983 and 1988 to an annual average of 1738 pieces from 2013 and 2018.

**Table: Delegated legislation 1983-1988 and 2013-2018**

Period	Pieces of delegated legislation	Average (5.3 years)
2018 (Parliamentary year)	1570	
2017 (Parliamentary year)	1472	
2015 – 2016 (July to Dec)	2904	
2014-15 (July to June)	1656	
2013-14 (July to June)	1614	
<b>Average July 2013 - Nov 2018</b>	<b>9216</b>	<b>1738</b>
1986-87 (July to June)	832	
1985-1986 (August to June)	857	
1984-1985 (July to June)	836	
1984 (Feb to June)	268	
1983 (Parliamentary year)	793	
<b>Average Feb 1983 to June 1988</b>	<b>4621</b>	<b>872</b>

Sources: Senate Standing Committee for the Scrutiny of Delegated Legislation, Annual Reports and General Reports,

[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Scrutiny\\_of\\_Delegated\\_Legislation/Reports](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Reports)

### COVID-19 response concentrates power in the Executive

In response to the COVID-19 public health emergency, Parliaments all over the country have significantly expanded delegated emergency powers, resulting in a major concentration of power in the executive during this time. This has meant that major policy decisions affecting the welfare of millions of Australians, imposing rights and obligations on them, and involving multibillion-dollar public spending are made by the Executive with no parliamentary input and little parliamentary oversight.

Examples of law-making powers that have been delegated to the Executive in response to COVID-19 are:

- The *Biosecurity Act 2015* (Cth) gives broad powers to the Commonwealth 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.
- The \$40 billion Advance to the Commonwealth Finance Minister under the *Appropriation Act (No 5) 2019-2020* (Cth) and the *Appropriation Act (No 6) 2019-*

2020 (Cth). This is 400 times any Advance made since 2010.<sup>1</sup> As the High Court's decision in *Wilkie v Commonwealth* [2017] HCA 40 (involving the use of the Advance to the Finance Minister on the marriage equality postal survey) made clear, the government has a broad discretion as to how these funds are spent.

- The Commonwealth 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 Henry VIII clause in the Omnibus Act gives the Minister for Social Services the power to override the original rules in the *Social Security Act 1991* (Cth).
- The Commonwealth Minister for Industrial Relations has the power to exempt specified employers from provisions dealing with JobKeeper, under the *Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020* (Cth)
- The Commonwealth 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).

The majority of these decisions are made via delegated legislation. Some, including decisions under the *Biosecurity Act* and the \$40 billion Finance Advance, are entirely exempt from parliamentary oversight, including through the committee system.

### **Insufficient scrutiny**

Even compared to other government decision-making, there is very little accountability or scrutiny of executive law-making.

Challenging delegated legislation in the courts for exceeding its authorising statute is possible, but it is a largely ineffective scrutiny mechanism. The nature of modern delegations are generally very wide, and the Court has adopted a more constrained approach to reviewing delegated legislative decisions than other governmental decisions.

Otherwise, delegated law-making is supervised by parliament. However, parliamentary scrutiny at the federal level is only for technical issues (not policy decisions), and is retrospective in its operation.

After being made, delegated legislation must be listed on the register website, and tabled in Parliament. It will then be subject to technical scrutiny by the Senate's Committee for the Scrutiny of Delegated Legislation. The Committee's terms of reference include compliance with statutory and constitutional requirements, the protection of individual rights and liberties, levels of consultation by those affected by the instrument; principles of parliamentary oversight; and whether the instrument contains matters that should have been included in a parliamentary enactment.

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<sup>1</sup> 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](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1819/Quick_Guides/BudgetConcepts)

Parliament retains the power to disallow most pieces of delegated legislation via a motion. Disallowance only operates prospectively, that is, until a motion is passed, the law will remain in force. Further, the Senate Committee has voiced concern about the effectiveness of disallowance. It reported:

*"in practice, it is difficult for parliamentarians to keep abreast of the hundreds of instruments tabled each year, and all too often significant matters of policy are left to be determined by delegated legislation ... while the committee draws its technical scrutiny concerns about delegated legislation to the Senate's attention, there is no consistent scrutiny of its policy implications".<sup>2</sup>*

Some pieces of delegated legislation are exempt even from this form of scrutiny. The *Legislation Act 2003* (s 44(2)(b)) currently allows for the Executive itself to exempt instruments from scrutiny.

Of the 293 federal legislative instruments made since the beginning of the COVID-19 crisis, 53 instruments or 18% are exempt from *any* scrutiny by Parliament, including the scrutiny of the Senate Committee and disallowance by the Parliament.<sup>3</sup> The Senate Committee has expressed its own concerns about this practice, and is currently undertaking an inquiry into it.

On the 8<sup>th</sup> April 2020, the Senate resolved to establish a Select Committee on COVID-19 to inquire into the Australian Government's response to the COVID-19 pandemic. The committee has received hundreds of submissions and held 20 public hearings to gather evidence and ask questions of government and stakeholders. Finance Minister Matthias Cormann has been the only Minister to appear at a public hearing.<sup>4</sup>

Outside of these limited Parliamentary processes, there is no independent accountability mechanism to review or scrutinise the conduct of Ministers.

The Statement of Ministerial Standards (the Ministerial "Code of Conduct"), which is designed to protect the integrity, fairness and accountability of the discretions vested in Ministers) is not independently investigated or enforced. There are no formalised consequences for breaches. Allegations are assessed internally by the Department of Premier and Cabinet, and reports are not made public.

There is no independent agency to investigate allegations of corruption or misconduct involving Commonwealth Ministers. Anti-corruption commissions exist in every state and territory to investigate and expose corruption in the public sector, government and executive, but these do not have jurisdiction to investigate Commonwealth Ministers.

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<sup>2</sup> Senate Standing Committee on Regulations and Ordinances, 2019, *Parliamentary scrutiny of delegated legislation*, Inquiry Report 3 June 2019, [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Scrutiny\\_of\\_Delegated\\_Legislation/DelegatedLegislation](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/DelegatedLegislation)

<sup>3</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation, *Scrutiny of COVID-19 instruments*, accessed 16 June 2020, (statistic as at 14 September 2020), [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Scrutiny\\_of\\_Delegated\\_Legislation/Scrutiny\\_of\\_COVID-19\\_instruments](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Scrutiny_of_COVID-19_instruments)

<sup>4</sup> Senate Select Committee on COVID-19, *Inquiry into the Government's response to COVID-19*, accessed 14 July 2020, [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/COVID-19/COVID19](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/COVID-19/COVID19)

## **Recommendations**

- Parliament must limit its reliance on delegated law-making powers, and delegations should not be made that involve significant policy matters, that have substantial effects on the rights and obligations of individuals, and involve major public spending decisions. Any emergency-delegations must be drawn as narrowly as possible.
- Exemptions of delegated legislation from parliamentary oversight must be set out in primary legislation, and only occur where there is a clear and compelling justification for doing so, which will usually involve purely internal government processes or the existence of other forms of accountability.
- Establish a National Integrity Commission with jurisdiction over federal Ministers.
- Create an independent process and office for the investigation and enforcement of the Statement of Ministerial Standards.

## **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 include former judges Tony Fitzgerald AC QC and David Ipp AO QC. This submission was reviewed by the Centre's COVID response Project Committee, whose members are Professor George Williams AO, Professor Gabrielle Appleby and Professor Joo Cheong Tham.