

# Submission to the Inquiry into exemption of delegated legislation from parliamentary oversight

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The NSW Young Lawyers Public Law and Government Committee (the **Committee**) makes the following submission in response to the Inquiry into exemption of delegated legislation from parliamentary oversight (the **Inquiry**).

## **NSW Young Lawyers**

NSW Young Lawyers is a division of The Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 16 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

The NSW Young Lawyers Public Law and Government Committee comprises over 1,000 members who include a range of practicing lawyers from the public and private sectors, barristers and law students. The Public Law and Government Committee aims to educate members of the legal profession, and the wider community, about developments in public law and to provide a social environment for young lawyers to develop their skills. The Public Law and Government Committee's areas of interest include, but are not limited to, administrative and constitutional law and the work of government lawyers.

## **Summary of Recommendations**

This submission draws on the *Biosecurity Act 2015* (Cth) to respond principally to point a) iv) of the Terms of Reference of the Inquiry. The Committee recommends the following:

1. Absent the most extreme of justifications, delegated legislation should not be excluded from disallowance.
2. The Senate should give greater scrutiny to bills with clauses that exempt legislative instruments from disallowance. In particular, the Senate's attention should be drawn to the scope and effect of the particular enabling provisions, including 'Henry VIII' clauses, broad discretions, potential interference with personal rights, and potential criminal sanctions.
3. Senate Standing Order 23 should be amended to give power to the Standing Committee for the Scrutiny of Delegated Legislation to review legislative instruments even where they are not subject to disallowance.

## Principles underpinning delegated legislation

1. The separation of powers doctrine guards against arbitrary rule by separating legislative, executive, and judicial functions. In line with this general principle, the power to enact laws is rightly the primary power of Parliament. Parliament, as an assembly of democratically elected representatives, is particularly suited to the function of law-making because it operates as a forum for 'vigorous and open debate in public between those speaking for the full spectrum of rival interests and different views'.<sup>1</sup>
2. However, Parliament frequently delegates its law-making function to the Executive to permit the making of legislative instruments (or delegated legislation). As a matter of practical reality, the Executive is accorded the ability to address administrative detail, or accommodate rapidly changing or uncertain situations through delegated legislation.<sup>2</sup>
3. The making of legislative instruments by the executive government without parliamentary enactment arguably violates the spirit of the separation of powers and the principle of law-making by only elected representatives, though on a basis able to be justified so long as it is 'founded on the ability of either House of the Parliament to disallow... such laws made by executive office-holders.'<sup>3</sup> One purpose of the requirements under ss 38 and 42 of the *Legislation Act 2003* (Cth) is 'to facilitate the scrutiny by the Parliament of registered legislative instruments.'<sup>4</sup>
4. The Committee agrees with the view that the referring of all disallowable legislative instruments to the Standing Committee for the Scrutiny of Delegated legislation under Senate Standing Order 23(2) is an important mechanism for promoting 'compliance with statutory requirements, the protection of individual rights and liberties, and principles of parliamentary oversight.'<sup>5</sup> That is not an oversight that should be lightly foregone.
5. Given the importance of the disallowance process to maintaining the proper roles of Parliament and Executive, the Committee submits that any exemptions from the disallowance process set out in s

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<sup>1</sup> Denise Meyerson, 'Rethinking the constitutionality of delegated legislation' (2003) 11 *Australian Journal of Administrative Law* 45, 53.

<sup>2</sup> Harry Evans and Rosemary Laing (eds), *Odgers' Australian Senate Practice* (Department of the Senate, 14<sup>th</sup> ed, 30 June 2019) ch 15  
<[https://www.aph.gov.au/About\\_Parliament/Senate/Powers\\_practice\\_n\\_procedures/Odgers\\_Australian\\_Senate\\_Practice/Chapter\\_15](https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Odgers_Australian_Senate_Practice/Chapter_15)>.

<sup>3</sup> Harry Evans and Rosemary Laing (eds), *Odgers' Australian Senate Practice* (Department of the Senate, 14<sup>th</sup> ed, 30 June 2019) ch 15  
<[https://www.aph.gov.au/About\\_Parliament/Senate/Powers\\_practice\\_n\\_procedures/Odgers\\_Australian\\_Senate\\_Practice/Chapter\\_15](https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Odgers_Australian_Senate_Practice/Chapter_15)>.

<sup>4</sup> *Legislation Act 2003* (Cth) s 37. See also *Dignan v Australian Steamships Pty Ltd* (1931) 45 CLR 188, 202.

<sup>5</sup> Harry Evans and Rosemary Laing (eds), *Odgers' Australian Senate Practice* (Department of the Senate, 14<sup>th</sup> ed, 30 June 2019) ch 15

42 of the *Legislation Act 2003* (Cth) must be based on robust justification. In this respect, the Committee submits that the Standing Committee for the Scrutiny of Delegated Legislation has an important role to play in assessing any such exemption provisions, by reference to:

- a. the scope of the power to create delegated legislation;
  - b. the purpose for, and the circumstances in which, the delegated legislation is to be made;
  - c. the adequacy of the justification advanced for exemption; and
  - d. the impact on Parliament's ability to scrutinise the delegated legislation.
6. The mere fact that delegated legislation may be used to respond to an emergency is not, by itself, sufficient to justify making that legislation exempt from disallowance. That is because:
- a. While there are compelling reasons to give the Executive flexibility to respond to emergencies, the mere possibility of future disallowance does not remove such flexibility; and
  - b. It can be assumed that Parliament would have due regard to any public emergency in considering whether to exercise its power to disallow.
7. That is especially so where the enabling provision in question permits the making of delegated legislation with a broad scope, permits the overriding of other laws, or permits substantial criminal consequences or intrusions upon civil liberties.

## **Delegated Legislation under the *Biosecurity Act 2015* (Cth)**

8. By way of example, the Committee is concerned about the wide powers that the Health Minister has once the Governor-General declares that a human biosecurity emergency exists under s 475(1) of the *Biosecurity Act 2015* (Cth). Such determinations and directions may be given despite any provision of any other Australian law.<sup>6</sup>
9. Like many other instruments that can be made under the *Biosecurity Act 2015* (Cth),<sup>7</sup> a determination by the Health Minister under s 477(1) is a legislative instrument, but is not subject to s

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<[https://www.aph.gov.au/About\\_Parliament/Senate/Powers\\_practice\\_n\\_procedures/Odgers\\_Australian\\_Senate\\_Practice/Chapter\\_15](https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Odgers_Australian_Senate_Practice/Chapter_15)>.

<sup>6</sup> *Biosecurity Act 2015* (Cth) s 477(5), 478(4).

<sup>7</sup> See, eg, *Biosecurity Act 2015* (Cth) ss 42(3), 44(3), 45(3), 50(2), 110(3), 112(3), 113(7).

42 of the *Legislation Act 2003* (Cth).<sup>8</sup> This was justified on the basis that the Government may need to take ‘fast and urgent action necessary to manage a threat or harm to Australia’s human health.’<sup>9</sup>

10. The Standing Committee for the Scrutiny of Bills noted that these exemptions may be considered to delegate legislative powers inappropriately and considered the justification advanced for this in the Explanatory Memorandum.<sup>10</sup> However, the Senate should also have had regard to the following concerning aspects of the power to make a non-disallowable instrument under s 477(1):

- a. **A ‘Henry VIII’ Clause:** A requirement determined under s 477(1) ‘applies despite any provision of any other Australian law’.<sup>11</sup> This ‘Henry VIII’ clause allows delegated legislation to modify the operation of statute, which inverts the appropriate relationship between Parliament and the Executive discussed above.
- b. **Creation of offences with substantial penalties:** Non-compliance with a determination made under s 477(1) may lead to up to 5 years imprisonment and/or 300 penalty units.<sup>12</sup>
- c. **Broad discretion:** The power of the Minister to determine requirements is enlivened by a declaration of a human biosecurity emergency under s 476. This declaration is based on the Minister’s own satisfaction of matters in s 476(1) and is not disallowable. Although the specific criteria in s 476(1) does not readily permit the Executive to ‘recite itself into power’,<sup>13</sup> Parliament may still value the disallowance process as an accountability mechanism. The power to determine requirements under s 477(1) is also broad. Determinations could affect numerous areas, provided that they are directed at disease prevention and control. Section 477(4) also expresses the relevant limits of the power in purposive terms—for example, the precondition that the Minister be satisfied ‘that requirement is likely to be effective in, or to contribute to, achieving the purpose for which it is to be determined’.<sup>14</sup> Parliamentary scrutiny could ensure that the requirement is effective,<sup>15</sup> appropriate and adapted to its purpose,<sup>16</sup> and proportionate.<sup>17</sup>

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<sup>8</sup> *Biosecurity Act 2015* (Cth) s 476(2).

<sup>9</sup> Explanatory Memorandum, *Biosecurity Bill 2014* (Cth) 297.

<sup>10</sup> Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Alert Digest No 2 of 2015* (4 March 2015) 12.

<sup>11</sup> *Biosecurity Act 2015* (Cth) s 477(5).

<sup>12</sup> *Biosecurity Act 2015* (Cth) s 479(3).

<sup>13</sup> *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 263.

<sup>14</sup> *Biosecurity Act 2015* (Cth) s 477(4)(a).

<sup>15</sup> *Biosecurity Act 2015* (Cth) s 477(4)(a).

<sup>16</sup> *Biosecurity Act 2015* (Cth) s 477(4)(b).

<sup>17</sup> See *Biosecurity Act 2015* (Cth) ss 477(4)(c)–(e).

11. While acknowledging that the Select Committee's role is not to focus upon the *Biosecurity Act 2015* (Cth) or any other particular piece of enabling legislation, the Committee submits that the above are factors that should be of serious concern to Parliament in authorising the making of non-disallowable delegated legislation. Absent the most extreme of justifications, delegated legislation with such a character should not be excluded from disallowance.

### **Recommendation 1**

Absent the most extreme of justifications, delegated legislation should not be excluded from disallowance.

### **Recommendation 2**

The Senate should give greater scrutiny to bills with clauses that exempt legislative instruments from disallowance. In particular, the Senate's attention should be drawn to the scope and effect of the particular enabling provisions, including 'Henry VIII' clauses, broad discretions, potential interference with personal rights, and potential criminal sanctions.

## **Scrutiny of non-disallowable delegated legislation**

12. As a further matter, Senate Standing Order 23(2), which allows instruments to be referred to the Senate Standing Committee for the Scrutiny of Delegated Legislation, presently only extends to legislative instruments that are subject to disallowance. As such, the Senate Standing Committee is unable to review or report on s 477(1) determinations or other non-disallowable instruments.<sup>18</sup>
13. The Committee recommends that the Standing Committee for the Scrutiny of Delegated Legislation should be able to review legislative instruments, even where these are not subject to disallowance. This is particularly the case where, like the instruments recently made under the *Biosecurity Act 2015* (Cth), these have the potential to affect personal rights and liberties. Even in the absence of disallowance procedures, the Standing Committee may have an advisory function through:
- a. reviewing draft legislative instruments, for example, under Standing Order 23(5);
  - b. formally and informally liaising with the relevant executive decision-maker and department to resolve issues with draft delegated legislation before tabling;

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<sup>18</sup> Andrew Edgar, 'Law-making in a crisis: Commonwealth and NSW coronavirus regulations' (Blog post, 30 March 2020) <<https://auspublaw.org/2020/03/law-making-in-a-crisis:-commonwealth-and-nsw-coronavirus-regulations/>>.

- c. promoting accountability by making the Senate and the public aware of legislative instruments that are not consistent with the Scrutiny Principles;
  - d. reviewing non-disallowable instruments to contribute to developing best practice; and
  - e. in an appropriate case, proposing legislative action that might effectively override the delegated legislation.
14. We note, for example, that the Parliamentary Joint Committee on Human Rights is not restricted to examining instruments that are subject to disallowance.<sup>19</sup>
15. Concerned as it is with the technical aspects of legislative instruments,<sup>20</sup> review by the Standing Committee is not open to the criticism that it interferes with the capacity of the executive to respond appropriately to emergencies and that it presents the risk that ‘political considerations will play a role in what should be a technical and scientific decision making process’.<sup>21</sup>

### **Recommendation 3**

Amend Senate Standing Order 23 to give power to the Standing Committee for the Scrutiny of Delegated Legislation to review legislative instruments that are not subject to disallowance.

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<sup>19</sup> *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 7.

<sup>20</sup> Standing Committee for the Scrutiny of Delegated Legislation, *Guidelines*, (1<sup>st</sup> ed, 2020) 5.

<sup>21</sup> Explanatory Memorandum, Biosecurity Bill 2014 (Cth) 17.

## Concluding Comments

NSW Young Lawyers and the Committee thank you for the opportunity to make this submission. If you have any queries or require further submissions please contact the undersigned at your convenience.

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