New South Wales
Council for Civil Liberties

NSWCCL SUBMISSION

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF DELEGATED LEGISLATION

INQUIRY INTO THE EXEMPTION OF DELEGATED LEGISLATION FROM PARLIAMENTARY OVERSIGHT

8 July 2020

About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

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1) The New South Wales Council for Civil Liberties (NSWCCL) welcomes the opportunity to make submissions to the Senate Standing Committee for the Scrutiny of Delegated Legislation (Committee) with respect to its Inquiry concerning the exemption of delegated legislation from parliamentary oversight (Inquiry).
2) NSWCCL commends the Committee's resolve to meet regularly during the recent period of parliamentary adjournment to ensure its continued scrutiny of all delegated legislation, particularly disallowable executive-made COVID-19 instruments. There are significant constraints on the capacity of the Committee to scrutinise particular legislative instruments exempt from parliamentary disallowance, but it is nonetheless performing a very valuable role in flagging 'framework' issues.
3) The Australian government's response to the COVID-19 crisis has been enabled by the provision of extraordinary powers to Executive Government and Government agencies. This has been achieved largely through the mechanism of determinations under the expansive human biosecurity provisions of the *Biosecurity Act 2015 (Cth).* As of 6 July 2020, there were 199 specific COVID-19 'instruments' and, of greatest concern, at least 42 of these are not disallowable, denying the Committee the ability to scrutinise them.[1]
4) The Committee is empowered to scrutinise delegated legislation subject to parliamentary oversight against its 12 technical scrutiny principles (Senate Standing Order 23). These principles include whether the legislation unduly trespasses on personal rights and liberties. However, many of the determinations exempt from parliamentary disallowance are having a significant impact on individual rights and liberties, effectively contain serious offences and impose obligations to do or desist from certain activities. As we understand it, the Committee has no power to scrutinise whether particular pieces of delegated legislation should in fact be disallowable under the current standing orders.

[1] Scrutiny of COVID-19 instruments, List of COVID-19 related delegated legislation, Parliament of Australia <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Scrutiny_of_COVID-19_instruments>

Recommendation 1: The Committee's role should be expanded so that it can analyse legislative instruments which are not subject to parliamentary disallowance, disapproval or affirmative resolution of the Senate, and to scrutinise the justification for the existence of delegated legislation of that substance and form in the first place.

Our in-principle position

5) NSWCCL notes that most of the submissions to this inquiry have accepted that exemption of delegated legislation is justifiable in a variety of circumstances, though most have advocated legislative or administrative guidelines confining those circumstances.

6) Our position is that it is almost always unjustifiable to exempt delegated legislation from parliamentary disallowance. The fundamental principle that the people of Australia, through their representatives, make the laws of Australia should be cleaved to as closely as possible. This is a cornerstone of the rule of law and ultimately a guard against the abuse of civil liberties by the Executive. Indeed, as discussed by several submissions, exempting delegated legislation from parliamentary disallowance could be an unconstitutional abdication of legislative power, though this is yet to be determined.[2]

7) Some circumstances pointed to, justifying exemptions from disallowance, are:
    - Where "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";[3]
    - Where "the democratic nature of the delegated law-making body provides the necessary accountability for these exercises of legislative power."[4]
    - Where "instruments do not have an impact on public rights, obligations, duties and as such Parliament may determine, for efficiency reasons, are not required to be subject to further democratic oversight".[5]

[2] Submission 1, Gabrielle Appleby, Janina Boughey, Sangeetha Pillai and George Williams, Gilbert & Tobin Centre of Public Law UNSW, 4 June 2020; Submission 18, Anne Twomey, The University of Sydney, 28 June 2020
[3] Submission 18, Anne Twomey, The University of Sydney, 28 June 2020
[4] Submission 1, Gabrielle Appleby, Janina Boughey, Sangeetha Pillai and George Williams, Gilbert & Tobin Centre of Public Law UNSW, 4 June 2020
[5] Ibid.

- Where "instruments are made accountable to Parliament through the alternative mechanism of an allowance process, and as such there is appropriate democratic oversight and accountability".[6]

8) As regards the first circumstance, NSWCCL does not consider that adding political considerations is *always* or *even usually* inappropriate even where measures need to be taken on the basis of health and scientific advice. Where those measures have very significant civil liberties implications, as the current determinations under the *Biosecurity Act 2015 (Cth*) have, their formulation and implementation are unavoidably and deeply political questions. 'Taking the politics out' entirely can lead to unaccountable technocratic governance.
9) With respect to the second circumstance, even if by-law making bodies invested with federal subordinate legislative power are democratic, NSWCCL does not believe that this justifies exemption from parliamentary disallowance, though it may ameliorate the issues somewhat. There may also be concerns about the democratic bona fides of by-law making bodies.[7]
10) In relation to the third circumstance, the examples used were "the Prime Minister's directions to agency heads under Public Service Act 1999 s 21 relating to management and leadership of APS employees, and other instruments issued for internal management purposes."[8] NSWCCL agrees with Civil Liberties Australia that the fact that such determinations have a significant impact on APS employees is an important consideration, and argues that the possibility of a substantial effect on private rights (or industrial rights in this case) is enough to support the ability for Parliament to retain powers of disallowance.[9]
11) Finally, NSWCCL cannot see why the fact that instruments require allowance necessarily justifies making them exempt to parliamentary disallowance, as considerations may change over time.
12) The only exception to this principle should be exceptional emergency circumstances, such as the COVID-19 pandemic. Even then, regulations which are not subject to parliamentary disallowance should be subject to clear sunset clauses which should not be indefinitely renewable by the Executive.
13) The NSWCCL accepts that most of the extraordinary COVID-related constraints on rights to free movement and social gatherings have been justified as necessary for the protection of public health and safety in the short term. The exemption from parliamentary disallowance of a great deal of

[6] Ibid.
[7] E.g see the concerns about ANU in Submission 7, Civil Liberties Australia, 24 June 2020.
[8]
[9] Submission 7, Civil Liberties Australia, 24 June 2020.

COVID-19 regulations was justifiable in the immediate initial stages of the pandemic when great speed and decisive action were pivotal to its successful containment. But as we move into the transition stage and a new normal, the COVID-19 regulations should be systemically reviewed to assess their ongoing need and their compatibility with accepted principles for good regulations and good regulation-making in a Parliamentary democracy. In particular, NSWCCL is concerned that while the Biosecurity determinations are subject to a sunset clause the time of operation is renewable indefinitely.[10]

14) Emergency regulations which are not subject to disallowance should not contain Henry VIII clauses unless those clauses are specifically subject to their own sunset periods.
15) Finally, the NSWCCL takes this opportunity to concur with other submissions which have called for Parliament to exercise its supervisory and scrutiny role to the maximum extent during these times of emergency. We were greatly concerned about Parliament's decision in March to greatly limit its sitting periods, though it has managed to sit more than expected.[11]
16) We also agree that with Public Interest Advocacy Centre (PIAC) that the procedural changes suggested in Recommendations 16 and 19 of the 2019 inquiry into delegated legislation be implemented.

Recommendation 2: All delegated legislation should be subject to parliamentary disallowance in normal times, with the Legislation Act 2003 (Cth) amended to reflect this.

Recommendation 3: Delegated legislation may only be exempt from parliamentary disallowance in exceptional or emergency situations, with clear criteria established in the Legislation Act 2003 (Cth) in relation to sunset periods for such legislation and the use of Henry VIII clauses.

Recommendation 4: An investigation be initiated by either this Committee or some other authority to determine, pending an authoritative statement by the High Court of Australia, whether the practice of exempting legislative instruments from parliamentary disallowance

[10] Submission 18, Anne Twomey, The University of Sydney, 28 June 2020
[11] See NSWCCL Statement of March 30 2020 at https://www.nswccl.org.au/statement_covid_19_and_government_oversight.

amounts to an unconstitutional abdication of legislative power, as has been suggested by leading constitutional commentators.[12]

Recommendation 5: Parliament should use all means possible to continue sitting, even during emergencies, in order to provide its scrutiny and supervisory functions over delegated legislation. Parliament should investigate further the possibility of meeting virtually by electronic means and have regard to the arguments of constitutional experts such as Professor Twomey in this process.[13] This recommendation echoes previous public statements made by NSWCCL.[14]

Recommendation 6: As PIAC recommends, implement recommendation 18 of the 2019 inquiry into delegated legislation, recommending that legislative instruments, subject to limited exceptions, commence 28 days after registration.[15]

Recommendation 7: As PIAC recommends, implement recommendation 16 of the 2019 inquiry into delegated legislation, recommending that the Office of Parliamentary Counsel modify the Federal Register of Legislation to enable instruments which are exempt from disallowance to be readily identified.[16]

[12] See Submission 1, Gabrielle Appleby, Janina Boughey, Sangeetha Pillai and George Williams, Gilbert & Tobin Centre of Public Law UNSW, 4 June 2020; Submission 12, Centre for Comparative Constitutional Law, Melbourne Law School, 25 June 2020.
[13] Twomey, 'A virtual Australian parliament is possible – and may be needed – during the coronavirus pandemic', The Conversation, 25 March 2020: https://theconversation.com/avirtual-australian-parliament-is-possible-and-may-be-needed-during-the-coronaviruspandemic-134540.
[14] NSWCCL Statement of March 30 2020 at https://www.nswccl.org.au/statement_covid_19_and_government_oversight.
[15] Submission 10, Public Interest Advocacy Centre, 25 June 2020.
[16] Ibid.

This submission was prepared by Jared Wilk and Michelle Falstein on behalf of the New South Wales Council for Civil Liberties. This submission benefitted from the submission by Dr Lesley Lynch member of the NSWCCL executive to the Senate Select Committee on COVID-19. We hope it is of assistance to the Committee.

Yours sincerely,

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