



Australian Government

Australian Government response to the
Standing Committee for the Scrutiny of Delegate
Legislation:

Inquiry into the exemption of delegated legislation from
parliamentary oversight: Interim report

18 November 2021

Introduction

On 8 April 2020, the Senate Standing Committee for the Scrutiny of Delegated Legislation resolved to inquire into and report on the exemption of delegated legislation from parliamentary oversight, with particular regard to:

- a. The appropriateness and adequacy of the existing framework for exempting delegated legislation from parliamentary oversight, including:
 - i. The amount and nature of delegated legislation currently exempt from parliamentary oversight;
 - ii. The grounds upon which delegated legislation is currently made exempt from parliamentary oversight;
 - iii. The manner in which delegated legislation is currently made exempt from parliamentary oversight; and
 - iv. The appropriateness of exempting delegated legislation made in times of emergency, including in response to the COVID-19 pandemic, from parliamentary oversight; and
- b. Whether the existing framework for exempting delegated legislation from parliamentary oversight should be amended, and if so, how, including:
 - i. The grounds upon which it is appropriate to exempt delegated legislation from parliamentary oversight; and
 - ii. The options available to ensure appropriate and adequate parliamentary oversight of delegated legislation in times of emergency.

The committee tabled its interim report on 2 December 2020.

The Australian Government has considered the recommendations of the Committee's interim report and has provided the following response. This response has been developed through input from the following departments:

- Department of the Prime Minister and Cabinet
- Attorney-General's Department
- Department of Finance
- Department of Health
- Department of Agriculture, Water and the Environment

Recommendation 1

2.73 The committee recommends that parliamentarians give adequate consideration to the appropriateness of exempting delegated legislation from parliamentary oversight mechanisms, such as disallowance, at the time the enabling provision is being considered by the Parliament, including by actively considering any comments made by the Senate Standing Committee for the Scrutiny of Bills in relation to such provisions, even in times of emergency.

The Government **notes** this recommendation and observes that it is a matter for the Parliament.

Recommendation 2

2.77 The committee recommends that the Senate Standing Committee for the Scrutiny of Bills or another independent body or person conduct a review of the appropriateness of the delegation of legislative powers in the *Biosecurity Act 2015*, including the appropriateness of provisions which exempt delegated legislation made pursuant to these powers from parliamentary oversight.

The Government **notes** this recommendation and observes that it is a matter for the Senate.

The Government further notes that the Senate Standing Committee for the Scrutiny of Bills conducted a review of exemptions from disallowance provisions in the *Biosecurity Act 2015* (Biosecurity Act) in its Scrutiny Digest 7 of 2021.

Recommendation 3

3.34 Noting the importance of parliamentary sittings in facilitating parliamentary oversight of delegated legislation in times of emergency, the committee recommends that presiding officers, the government and leaders of political parties take all possible steps to facilitate parliamentary sittings, even during times of emergency, and that the cancellation of parliamentary sittings only be taken as a last resort.

The Government **agrees** with this recommendation.

The first priority of any government of Australia is the security and protection of the Australian people. In the current context, for instance, the Government cannot ignore the risk to the health and safety of parliamentarians, ministerial staff, the public service and the broader community.

The Presiding Officers, that is, the Speaker of the House of Representatives and the President of the Senate are strong custodians for the institution of Parliament. The Presiding Officers have worked exceptionally hard to ensure the Parliamentary precincts are COVID-19 safe. The Presiding Officers have ensured the Parliament acted as a role model for other work places whilst ensuring the Parliament's vital work did not suffer.

To assist the Presiding Officers to determine the steps required to allow the Parliament to convene in a safe manner, a working group was established, comprising the Speaker of the House, the President of the Senate, the Government and the Opposition. The objective of the working group was to facilitate future sittings of the Parliament in a safe manner. The working group sought advice from the Commonwealth Chief Medical Officer and the ACT Chief Health Officer, taking into account the procedural requirements of the House and Senate.

Aside from a physical meeting of the Parliament, there are mechanisms available to non-Government parliamentarians to hold the Government to account. For instance, parliamentarians can put questions on notice to the Government seeking information on government policies and the administration of departments and agencies. Parliamentary committee inquiries into a range of policy issues and matters affecting the Australian community can continue when Parliament is not sitting.

Throughout 2020, this occurred, with many parliamentary committees holding virtual hearings.

Recommendation 4

4.55 The committee recommends that parliamentarians and the government ensure that delegated legislation made in times of emergency is subject to disallowance where it:

- can be used to override or modify primary legislation; or
- triggers, or is a precondition to, the imposition of custodial penalties or other measures which restrict personal rights and liberties.

The Government **notes** this recommendation.

Exemptions from the disallowance regime are ultimately a matter for the Parliament. Both the decision whether to delegate a power to enact legislation and any decision whether instruments made pursuant to such a power are exempt from disallowance are decisions of the Parliament. The Parliament should consider exemptions from disallowance on a case by case basis in light of the context of the relevant legislative scheme and accompanying safeguards.

The statutory review of the *Legislation Act 2003* may provide an opportunity for issues to be reviewed relating to the disallowance regime. Under subsection 59(1) of the *Legislation Act*, the body appointed to review the Act must review all aspects of the operation of the Act, and any related matters that the Attorney-General specifies.

Recommendation 5

4.62 The committee recommends that the government propose amendments to the *Biosecurity Act 2015* to provide that entry and exit requirement determinations made under sections 44 and 45 of the Act are subject to disallowance.

The Government **does not support** this recommendation.

Governments around the world have taken unprecedented steps to contain the COVID-19 pandemic. During such emergencies, there is a time-limited opportunity to interrupt the transmission of the disease and to manage human health risks.

The Government needs the ability to take urgent, decisive action and make technically and scientifically based decisions to reduce the potential number of cases and deaths within Australia and subsequently, the burden on the Australian health system.

The current framework under the *Biosecurity Act* includes controls on the making of delegated legislation. Delegated legislation is made based on a technically and scientifically based decision making process in order to manage risks to human health. Further, in the case of an emergency determination, the delegated legislation can only operate for a limited period, being the duration of the biosecurity emergency period or human biosecurity emergency period.

The structure of the *Biosecurity Act*, and the deliberate decision by the Parliament of Australia not to make specified delegated legislation disallowable, reflects the urgency required for such measures and the need to have certainty in the application of the measures to protect the Australian community from exposure to biosecurity risks. If disallowance was available, it would undermine this certainty as people could not be certain that the measures would not just be disallowed during the disallowance period.

Notably, while the Parliament has determined that disallowance of specified delegated legislation made under the *Biosecurity Act* is not appropriate, other accountability mechanisms to ensure such measures are appropriate and necessary are in place, including Senate Estimates and Questions on Notice. On 8 April 2020, the Senate resolved to establish a targeted Select Committee on COVID-19 to inquire into the Australian

Government's response to the COVID-19 pandemic. This Select Committee report is expected by or on 30 June 2022.

Recommendation 6

4.68 The committee recommends that the government propose amendments to the *Biosecurity Act 2015* to make the exercise of the human biosecurity control order powers in Part 3 of Chapter 2 of the Act conditional on a disallowable legislative instrument being in force, in addition to the existing preconditions to imposing a human biosecurity control order.

The Government **does not support** this recommendation.

Human biosecurity control orders are necessary for the legitimate objective of ensuring that individuals who may have been exposed to a listed human disease such as COVID-19 can be assessed and treated, and their close contacts readily identified. The existing safeguards relating to the imposition and review of a human biosecurity control order are extensive and require significant clinical judgements to be made by trained medical practitioners. Although, no such control orders have been made during the current COVID-19 pandemic, they remain an important mechanism for managing human biosecurity risks both during and outside of a pandemic.

Section 62(2) of the *Biosecurity Act 2015* demonstrates a conscious decision made by Parliament not to make human biosecurity control orders legislative instruments.

Recommendation 7

4.70 The committee recommends that the government propose amendments to the *Biosecurity Act 2015* to provide that human health response zone determinations made under section 113 of the Act are subject to disallowance.

The Government **does not support** this recommendation.

Human health response zones are designed to enable the quick and decisive action to prevent or reduce the risk of spread of a listed human disease. The potential for disallowance creates uncertainty and may undermine the effective containment of the spread of such diseases.

These determinations include strong safeguards. Each of the determinations made to manage and respond to the current pandemic were limited to a maximum period of three months and were repealed as soon as it was determined that the determinations were no longer necessary.

Recommendation 8

4,74 The committee recommends that the government propose amendments to the *Biosecurity Act 2015* to provide that declarations of human biosecurity emergency periods and associated extensions made under sections 475 and 476 of the Act are subject to disallowance.

The Government **does not support** this recommendation and has considered it as part of broader considerations discussed in response to recommendation 5.

Recommendation 9

4.77 The committee recommends that the government propose amendments to the *Biosecurity Act 2015* to provide that human biosecurity emergency requirements and directions made under sections 477 and 478 of the Act are subject to disallowance.

The Government **does not support** this recommendation and has considered it as part of broader considerations discussed in response to recommendation 5.

Recommendation 10

4.84 The committee recommends that parliamentarians and the government ensure that Advance to the Finance Minister determinations which can be used to allocate additional public funds during times of emergency above the ordinary limits set in annual Appropriation Acts are subject to disallowance.

The Government **does not support** this recommendation.

The Minister for Finance provided the Government response in his letter of 10 March 2021 to the Chair of the Select Committee including a detailed explanation why it would be seriously adverse to the public interest to make Advances under Annual Appropriation Acts disallowable (refer attached). That letter explained why the Committee is mistaken in concluding that disallowance would have little effect and highlighted how disallowance of these determinations can create shortfalls in appropriations that were previously endorsed in primary legislation.

Recommendation 11

4.87 In the limited circumstances in which it may be appropriate to exempt delegated legislation made in response to an emergency from disallowance, the committee recommends that parliamentarians and the government ensure that the source of such exemptions is set out in primary legislation.

The Government **notes** this recommendation and has considered it as part of broader considerations discussed in response to recommendation 4.

Recommendation 12

6.43 The committee recommends that the government ensure that all delegated legislation made in response to emergencies ceases to be in force after three months. Where measures implemented by delegated legislation are required for a longer period of time the relevant legislative instrument should be remade to facilitate parliamentary oversight.

The Government **notes** this recommendation and has considered it as part of broader considerations discussed in response to recommendation 4.

Recommendation 13

6.46 The committee recommends that where primary legislation empowers the executive to make delegated legislation to amend or modify the operation of primary legislation in times of emergency (via a 'Henry VIII' clause), parliamentarians and the government should ensure that the primary legislation:

- specifies a time limit in which those powers can be exercised; and
- requires the maker of the delegated legislation to be satisfied that Parliament is not sitting and is not likely to sit within two weeks after the day the relevant instrument is made before they make the instrument.

The Government **notes** this recommendation and has considered it as part of broader considerations discussed in response to recommendation 4.

Recommendation 14

6.48 The committee recommends that:

- the government limit the duration of delegated legislation made in times of emergency, and any measures implemented by such legislation, to dates prescribed on the face of the instrument; and
- where the duration of the delegated legislation made during times of emergency cannot be prescribed by setting dates on the face of the instrument, but must instead be contingent on something else, the government ensure that the relevant trigger is subject to oversight by the Commonwealth Parliament.

The Government **notes** this recommendation and has considered it as part of broader considerations discussed in response to recommendation 4.

Recommendation 15

6.50 The committee recommends that the government ensure that explanatory statements to delegated legislation made in response to emergencies clearly explain the anticipated duration of the measures implemented by the relevant instrument, particularly where that instrument is subject to automatic repeal but the measures it implements remain in force in other delegated legislation.

The Government **notes** this recommendation and has considered it as part of broader considerations discussed in response to recommendation 4.

Recommendation 16

7.60 The committee recommends that the Senate amend standing order 23 to ensure that all delegated legislation made during times of emergency is referred to the Senate Standing Committee for the Scrutiny of Delegated Legislation for consideration and, if necessary, report, regardless of its disallowance status.

The Government **notes** this recommendation and observes that it is a matter for the Senate.

Recommendation 17

7.63 The committee recommends that the government allocate sufficient resources to the parliamentary departments to ensure that parliamentary committees responsible for the policy and technical scrutiny of delegated legislation are always sufficiently resourced to effectively perform this vital role, particularly during times of emergency.

The Government **notes** this recommendation.

Recommendation 18

7.67 The committee recommends that the Senate establish a select committee during times of national emergency, including human biosecurity emergencies and other events declared to be a national emergency under Commonwealth law, to consider the policy merits of delegated legislation made in response to that emergency.

The Government **notes** this recommendation and observes that it is a matter for the Senate.



Senator the Hon Simon Birmingham

Minister for Finance
Leader of the Government in the Senate
Senator for South Australia

REF: MS21-000003

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

Dear Senator ~~Fierravanti-Wells~~ *Connie,*

I am writing in relation to the interim report of the Committee's inquiry into the exemption of delegated legislation from parliamentary oversight, hoping that the information contained herein may assist the Committee in its deliberations.

The Committee has proposed at Recommendation 10 of its report that parliamentarians and the Government ensure that Advance to the Finance Minister (AFM) determinations made in times of emergency should be subject to disallowance. It is my view that Recommendation 10 of the interim report, if pursued, would give rise to significant practical difficulties and risks to Commonwealth financial arrangements, and as a result frustrate the purpose and use of the AFM mechanism.

The AFM is a funding source of last resort that has been a longstanding provision that has featured in annual Appropriation Acts since 1901 and has equivalents in the appropriation laws of other Westminster Parliaments both preceding and following Federation. This contingency is intended to accommodate urgent and unforeseen expenditure that is not provided for, or is insufficiently provided for, in the current year, and where the passage of additional Appropriation Acts is either not possible or not practical. As the Finance Minister, I approve AFM proposals for expenditure up to a limit for the year, subject to these proposals meeting legislative requirements. I note that in doing so I use the powers already authorised by the Parliament when passing Appropriation Acts.

While I agree with the Committee that disallowance of an AFM determination would not invalidate expenditure that has already been made, it would leave entities short of the funds that they need to carry out other expenditure that has previously been approved by Parliament in what remains of a financial year.

Disallowance of an AFM determination would mean that an entity's appropriation is reduced to its original level. Yet the urgent expenditure it has already undertaken in reliance upon the determination would consequently be deducted from the newly reduced appropriation. This would leave the entity with a shortfall to fund other expenditure for which the Government originally budgeted and which the Parliament approved when it passed the Appropriation Act.

This 'collateral damage' effect could negatively impact longstanding programs that are relied upon by the public and have may have been repeatedly endorsed by the Parliament.

The reason why this problem occurs is because an AFM determination does not authorise expenditure on a particular purpose. It increases an existing multi-purpose line appropriation item (departmental or administered) in an Appropriation Act. If a House disallows the determination, it reverses the increase. This causes no problem if the urgent expenditure has not occurred. But if the urgent expenditure has occurred prior to the disallowance – which is a high risk as AFMs are innately matters of urgency – then the House's disallowance withdraws parliamentary authority to draw money to carry out other, ordinarily budgeted expenditure which the Parliament approved when it passed the Appropriation Act.

In its argument in support of a disallowance mechanism, the committee observes that if an AFM can be expended fast enough, ahead of passage of a disallowance motion, then *“disallowance would have little effect.”* It then observes *“consideration of a disallowance motion would at least provide opportunities for parliamentary debate and, if successful, would signify the relevant House's dissatisfaction in relation to the expenditure.”*

However, as outlined above, a disallowance would have a real impact regardless of whether or not the intended urgent expenditure had been undertaken. Mindful of the time limited impact of an AFM, should a parliamentarian wish to signal disagreement with an AFM, there other parliamentary processes such as Members or Senators' statements, general business motions, urgency motions, matters of public importance, or adjournment speeches.

The AFM is an important mechanism that provides the Government with the capacity to respond to urgent and unforeseen pressures such as those that emerged throughout the COVID-19 pandemic without impinging on the important role of the Parliament in its consideration of other legislation. While the Committee has considered the use of the AFM in the context of an emergency response to the extraordinary circumstances of COVID-19, most AFM allocations are significantly smaller in value.

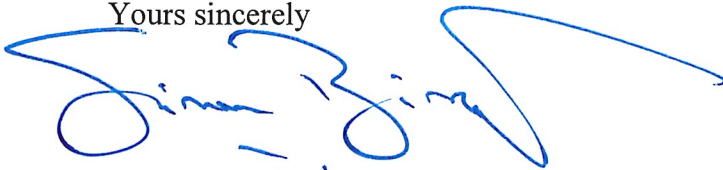
In the years commencing from 2008-09, the *Appropriation Act (No. 1)* has provided an AFM of \$295 million for the ordinary annual services of government while the *Appropriation Act (No. 2)* has provided an AFM of \$380 million for the non-ordinary annual services of government (which includes major capital expenditure and payments to states, territories and local governments). For perspective, I note that these sums are together less than one per cent of the Budget. Until the exceptional one-off contingencies enacted during the COVID-19 pandemic, these standard AFM provisions have remained constant despite the size of appropriations nearly doubling since that time.

I note that the same difficulties and risks, as set out above, would also apply if disallowance were applicable to the AFM in its ordinary context (outside an emergency scenario like the COVID-19 pandemic). Without certainty of funding availability, it is highly likely that entities would delay urgent AFM related expenditure until the relevant disallowance period had expired. This would fundamentally frustrate the purpose and use of the AFM to address urgent pressures and delay the implementation of Government policy.

Finally I note that, in its discussion of the disallowance idea, the committee incidentally observed that some of the transparency mechanisms associated with the AFM are not enshrined in legislation. If these are matters of concern, then I would welcome the committee's elaboration on that aspect of AFM administration and the opportunity to engage further in any potential actions on those matters.

I thank the Committee for its consideration of my views as it works to prepare its final report.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Simon Birmingham', with a large, sweeping flourish extending to the right.

Simon Birmingham

10 March 2021