



Law Council
OF AUSTRALIA

Inquiry into the exemption of delegated legislation from parliamentary oversight

Supplementary submission

Senate Scrutiny of Delegated Legislation Committee

11 September 2020

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The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

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- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
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Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

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- Ms Caroline Counsel, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council acknowledges the assistance of its National Human Rights Committee in the preparation of this submission.

Introduction

1. On 27 August 2020, the Law Council of Australia (**Law Council**) appeared before the Standing Committee for the Scrutiny of Delegated Legislation (**Committee**) following an invitation to provide evidence to the Committee's inquiry into the exemption of delegated legislation from parliamentary oversight (**Inquiry**).
2. This supplementary submission addresses:
 - (a) matters that were raised by the Committee during the Law Council's appearance at the public hearing of 27 August 2020 which the Law Council verbally took on notice; and
 - (b) matters that the Committee subsequently raised as further Questions on Notice, by email to the Law Council dated 28 August 2020.
3. This submission is ancillary to the Law Council's primary submission to the Inquiry of 2 July 2020 (**Law Council's Submission**).

Responses to Questions on Notice

Question 1: Statements of compatibility

4. At the public hearing of 27 August 2020, Senator Scarr inquired about the rationale behind the legislated position that a statement of compatibility with human rights is not required to accompany a legislative instrument that is exempt from the disallowance process, and about the Law Council's response to that rationale.¹

Rationale

5. As stated in the Law Council's Submission, statements of compatibility with human rights (**statements of compatibility**) are an essential tool used by the Parliamentary Joint Committee on Human Rights (**PJCHR**) in its function of scrutinising bills and legislative instruments for compatibility with human rights.² However, statements of compatibility need not be provided for legislative instruments that are exempt from disallowance.³
6. The legislative history of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) (**HR Act**) does not appear to articulate the reason for excluding non-disallowable instruments. The rationale may have been that the effective scrutiny by the PJCHR in relation to delegated legislation was dependent on the ability to move disallowance of an instrument, and that this was not possible in the case of non-disallowable instruments. However, the PJCHR has regularly reviewed non-disallowable instruments for human rights compatibility and taken these matters up with Ministers when it considers that the instruments have human rights implications. The PJCHR has noted that the absence of a statement of compatibility in many such cases has made the task of scrutiny more difficult and slower.

¹ Evidence to Senate Scrutiny of Delegated Legislation Committee, Parliament of Australia, Canberra, 27 August 2020, 4 (Hon Senator Scarr).

² See, *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), s 7; Law Council of Australia, 'Submission to the Inquiry on the exemption of delegated legislation from parliamentary oversight' (2 July 2020) (**Law Council's Submission**) at [27].

³ See, *Human Rights (Parliamentary Scrutiny Act) 2011* (Cth), s 9, which only imposes a requirement for statements of compatibility to accompany disallowable instruments.

7. A further rationale may have been that non-disallowable instruments would exclusively or overwhelmingly address technical or operational matters that were unlikely to give rise to any significant issues and that therefore a requirement to prepare statements of compatibility in all cases would be otiose.
8. In practice, this may well have been the case for most non-disallowable instruments, though in some cases the distinction between legislative and non-legislative instruments (if that is the basis of the legislative scrutiny) may be hard to draw. However, as the Law Council has stated, in practice, some non-disallowable instruments have human rights ramifications and should be reviewed.⁴ For proper human rights scrutiny, a statement of compatibility is therefore desirable.
9. Some non-disallowable instruments may also give rise to issues of consistency with the scrutiny principles that the Committee employs (which include but go beyond human rights norms), and so may be deserving of scrutiny on those bases too.

Law Council's response

10. The Law Council considers that the suggested rationale for exempting non-disallowable instruments from needing a statement of compatibility, as it was expressed at the time the HR Bill was passed, is no longer valid.
11. The increasing use of non-disallowable instruments in recent years, including during times of crisis and often in relation to substantive matters of public policy,⁵ means that the assumptions behind the starting point (as articulated in the Explanatory Memorandum and Second Reading Speech)⁶ that parliamentary debate is not appropriate in respect of these instruments, can no longer be made. This, in turn, undermines the entire rationale for exempting rule-makers from the need to prepare a statement of compatibility.
12. One example of a non-disallowable instrument related to COVID-19 that has had a significant impact on the enjoyment of human rights is the *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020 (Travel Ban Determination)*.⁷ This instrument imposed significant restrictions on Australian citizens and permanent residents leaving the country. The original Explanatory Statement to the Travel Ban Determination did not contain a statement of compatibility with human rights; nor did the (undated) Replacement Explanatory Statement that was subsequently issued.
13. The PJCHR considered the Travel Ban Determination in late April 2020⁸ and, while itself identifying a number of potential human rights compatibility issues, noted that as:

⁴ See, for example, paragraph 16 below.

⁵ See, Law Council's Submission (n 2) at [20].

⁶ The Explanatory Memorandum to the Human Rights (Parliamentary Scrutiny) Bill 2020 states simply that: '[a]s with bills, statements are intended to be succinct assessments aimed at informing Parliamentary debate and containing a level of analysis that is proportionate to the impact of the proposed legislative instrument on human rights.' The Second Reading Speech to the HR Bill sets out a similar aim for statements of compatibility: '[w]hen parliament comes to consider bills and legislative instruments, statements of compatibility will alert parliament to the relevant human rights considerations and will assist in informing parliamentary debate.'

⁷ F2020L00306 (in force 25 March 2020).

⁸ Parliamentary Joint Committee on Human Rights (PJCHR), *Human rights scrutiny report 5 of 2020* (29 April 2020) at 19-21.

*...there is no statement of compatibility accompanying the explanatory statement to the instrument, no assessment of the compatibility of this measure with any human rights has been provided. Further information is required as to the compatibility of this measure with human rights, particularly the rights to freedom of movement, equality and non-discrimination and the right to a private life.*⁹

14. Accordingly, the Committee sought further information from the Minister on these issues. The Minister provided additional information, although the response dealt generally with a number of determinations made under the *Biosecurity Act 2015* (Cth) (**Biosecurity Act**) and did not give detailed information or a focused justification of the proportionality of the applicable travel restrictions.¹⁰ It was not until nearly two months after its initial examination that the PJCHR was able to conclude its inquiry, stating that it 'would be appropriate for all future legislative instruments developed in response to the COVID-19 pandemic to be accompanied by a detailed statement of compatibility'.¹¹
15. The Minister's response assured the PJCHR that '[t]he fact that statements of compatibility were not prepared for these instruments should not be taken to indicate that such rights are not a key consideration in the Government's response'.¹² Nonetheless, it is unclear *how* human rights were taken into account, what the nature of the assessment of the proportionality of the restrictions was and what the evidence was on which it was based. This is something which a properly substantiated statement of compatibility would have outlined.
16. The Travel Ban Determination and many other instruments made in response to COVID-19 have not only raised human rights compatibility issues within the scope of the HR Act, but also important issues of consistency with the principles employed by the Committee in its scrutiny of delegated legislation. These include whether an instrument makes rights or liberties unduly dependent on insufficiently defined administrative powers, trespasses unduly on personal rights or liberties and unduly limits the possibility of independent reviews of decisions affecting rights. The status of an instrument as non-disallowable limits the ability of the Committee to properly scrutinise it, even where it has significant impacts on human rights. It is appropriate that such instruments be subject to scrutiny by the Committee.
17. It is not only in relation to delegated legislation developed as a result of COVID-19 that these issues arise. Indeed, the PJCHR has regularly requested that statements of compatibility be provided with non-disallowable instruments that have a significant potential impact on human rights.
18. For example, in relation to a proposal to confer on the relevant Minister the power to declare, by way of non-disallowable legislative instruments, classes of persons who could be obliged to provide certain types of personal identifiers (including biometric data), the PJCHR noted far before the pandemic, in April 2019:

⁹ PJCHR, *Human rights scrutiny report 5 of 2020* (29 April 2020) at 20, [1.57].

¹⁰ The Minister's advice noted specifically that: '...prohibiting Australians from overseas travel reduces the risk of infection to the individual overseas and to persons in Australia on their return'. The PJCHR, while noting that the temporary nature of these measures was significant for assessing their proportionality, reported: 'it would have been useful for more specific information to have been provided by the minister as to why these particular measures would constitute proportionate limitations on human rights, and what safeguards (if any) would regulate their application.' See, PJCHR, *Human rights scrutiny report 7 of 2020* (17 June 2020) at 23, 24, [1.61].

¹¹ *Ibid* at 10, [1.26].

¹² *Ibid* at 22, [1.59].

It is acknowledged that it may be a relevant safeguard that determinations are legislative instruments and so will be subject to further scrutiny by the committee and parliament. However, it is noted that the minister's response states any such instrument will be non-disallowable. Given such instruments will not be subject to disallowance (a procedure which would have the effect of repealing the instrument), this restricts the role of parliament as an effective safeguard in relation to the minister's power. Noting the potentially significant human rights implications of any such instrument, while a statement of compatibility would not be required for such an instrument, the committee has previously noted that it is good practice for measures that engage human rights to provide an assessment of human rights compatibility. In this respect, it is noted that the committee is still required to examine a non-disallowable instrument for human rights compatibility.¹³

19. The Law Council is committed to encouraging Parliament to address human rights concerns and issues identified by the PJCHR in the development and refinement of legislation.¹⁴ Therefore, for the reasons set out at paragraphs [27] to [36] of the Law Council's Submission (and assuming that as a result of this Inquiry, the use of non-disallowable instruments does not revert to largely technical or internal matters which do not generally raise significant human rights issues), the Law Council recommends that during the COVID-19 pandemic and recovery period, statements of compatibility should accompany all legislative measures, including non-disallowable instruments, which potentially affect human rights. Based upon the above, there is also an argument that this requirement should endure beyond the COVID-19 recovery period.
20. Finally, the Law Council draws the Committee's attention to its submission to the Australian Human Rights Commission's (**AHRC**) 'Free and equal: An Australian conversation on human rights inquiry' in November 2019. The Law Council noted concerns with the extent to which the PJCHR's exemplary reports are ignored by Parliament, and that statements of compatibility with human rights, contained in explanatory memoranda to bills, sometimes fail to provide sufficient legal analysis of human rights impacts.¹⁵
21. Accordingly, alongside the above, the Committee should consider the need for the development of further resources to train government officers to draft statements of compatibility (in addition to templates and guidance notes). Consideration could also be given to some other means of preparing compatibility statements – such as by an independent statutory office holder.

Question 2: Guidance on exemptions from disallowance

22. At the public hearing of 27 August 2020, Senator Scarr inquired about where guidance as to whether or not a legislative instrument should be exempt from disallowance should reside. Senator Scarr asked, for example, whether guidance should be in legislation, whether it should be considered by Parliament and be contained in an Act of Parliament, or whether it should reside somewhere else.¹⁶

¹³ PJCHR, *Human rights scrutiny report 2 of 2019* (2 April 2019) at 206, [2.121] (examining the *Migration Amendment (Streamlining Visa Processing) Bill 2018*) (footnote omitted).

¹⁴ See, Law Council of Australia, 'Policy statement on Human Rights and the Legal Profession: Key principles and commitments' (May 2017) at cl 22.

¹⁵ See, Law Council, 'Submission to the Australian Human Rights Commission's Free and equal: An Australian conversation on human rights inquiry' (13 November 2019) at 35.

¹⁶ Evidence to Senate Scrutiny of Delegated Legislation Committee, Parliament of Australia, Canberra, 27 August 2020, 4-5 (Senator Scarr).

23. Following this question being taken on notice at the hearing, the Committee has also asked by email dated 28 August 2020 as to the most appropriate branch of government that should be responsible for issuing guidance on the circumstances in which it may be appropriate for delegated legislation to be exempt from parliamentary oversight.
24. The Law Council's Submission suggested that guidance be developed in relation both to the question of what is appropriate subject matter for delegated legislation in times of health crisis (whether exempt from disallowance or not), and of when it may be appropriate to exempt delegated legislation from disallowance during emergency situations.¹⁷
25. Going less directly to the Inquiry's Terms of Reference, the Law Council also suggested that guidance in the form of criteria to consider before determining whether it is appropriate to defer sunseting under the *Coronavirus Economic Response Package Omnibus Act 2020* (Cth) should have been included on the face of that Act.¹⁸
26. The suggestion in the Law Council's Submission to develop guidance on exempting instruments from disallowance echoed part of Recommendation 15 in the Committee's *2019 Report on Parliamentary Scrutiny of Delegated Legislation (2019 Report)*: that the Australian Government should 'publish guidance as to the limited circumstances in which it may be appropriate to exempt instruments from disallowance'.¹⁹ Such guidance would, as the Committee put it, offer a framework for government officials in deciding whether certain instruments should be non-disallowable and should be referred to in relevant explanatory memoranda justifying proposals of exemption from non-disallowance.²⁰
27. As suggested by the President of the Law Council at the Public Hearing, the Law Council considers that the Committee is well-placed to develop and publish guidance material as to when it is appropriate for delegated legislation to be exempt from parliamentary oversight.
28. It is noted that the Attorney-General's Department (**AGD**), in its submission to the Inquiry, has highlighted that it currently provides advice to other agencies which are considering creating an exemption from disallowance, in the form of 'advice in relation to the policy intention of the disallowance regime and examples of established rationales that have been used to support exemption from disallowance'.²¹ Noting this role, the AGD, together with other key stakeholders, should be consulted in the formulation of guidance material, and could maintain a function of offering support to Government officials tasked with drafting relevant legislative instruments, with reference to the guidance material developed and housed within the Committee.

Question 3: Grounds for exemption from disallowance

29. At the public hearing of 27 August 2020, Senator Scarr referred to the list in the AGD's Submission to the Inquiry of the grounds upon which Parliament has exempted legislative instruments from disallowance, which drew upon a table first prepared as

¹⁷ Law Council's Submission (n 2) at [38]-[39], [42]-[43] and [57]-[58].

¹⁸ Ibid at [57]-[58].

¹⁹ Senate Standing Committee on Regulations and Ordinances 'Parliamentary scrutiny of delegated legislation' (3 June 2019) Recommendation 15.

²⁰ Ibid at [8.38].

²¹ See, Attorney-General's Department, 'Submission to the Inquiry on the exemption of delegated legislation from parliamentary oversight' (June 2020) ('**AGD's Submission**') at 6.

part of the *2008 Review of the Legislative Instruments Act 2003 (2008 Review)*.²² The AGD updated the table with current examples and included additional grounds on which Parliament has exempted legislative instruments from disallowance since the 2008 Review.

30. Senator Scarr inquired about the Law Council's view on:

- (a) each of the twelve grounds for exempting legislative instruments from disallowance which are listed at pages 6-8 of the AGD's submission to the Inquiry; and
- (b) if guidelines were developed, which of the above grounds might fall within those guidelines and which would fall without those guidelines.²³

31. The reasons why legislative instruments have been exempted from disallowance, and whether in the Law Council's view these should be recognised as potentially valid under the proposed guidelines for rule-makers, are set out below. The Law Council considers that certain of these 'reasons' would be useful to include as factors indicating the appropriateness of exemption from disallowance in potential guidelines.

32. The Law Council notes that simple proof that one or more of these factors exists in relation to a particular proposed legislative instrument will not necessarily mean non-disallowance is appropriate. Rather, it will be recognised as one relevant factor for consideration in circumstances where the threshold requirements are met (namely, that the other recommendations for further scrutiny safeguards made in the Law Council's Submission and this supplementary submission are also implemented).

(a) There is an alternate parliamentary role in relation to that type of instrument.

In the case of both of the examples presented by the AGD against this reason, parliamentary scrutiny of the relevant legislative instrument is still ensured (whether because it can be directly amended by a House of Parliament, or because it is still subject to disallowance, but for five sitting days after tabling instead of 15).²⁴

However, these forms of parliamentary scrutiny are not directly equivalent to the scrutiny under the disallowance process. Therefore, the Law Council considers that the word 'appropriate' should be included in front of the word 'alternate', to emphasise that the mere existence of an alternate parliamentary role is not in itself relevant; it is the appropriateness of that alternative that rule-makers must be directed to consider.

With that amendment, this ground for exemption may be listed as a factor suggesting the appropriateness of exemption from disallowance under potential guidelines.

²² See, Anthony Blunn AO, Ian Govey and Professor John McMillan, *2008 Review of the Legislative Instruments Act 2003* (31 March 2009) at Appendix D.

²³ Evidence to Senate Scrutiny of Delegated Legislation Committee, Parliament of Australia, Canberra, 27 August 2020, 5 (Senator Scarr).

²⁴ See, *AGD's Submission* (n 21) at 6. Note, the instruments referred to are: a standard made under section 122 of the *Broadcasting Services Act 1992* (Cth), which can be directly amended by a House of Parliament; and determinations establishing special accounts under section 78 of the *Public Governance, Performance and Accountability Act 2013* (Cth), which are exempt from disallowance under section 42 of the *Legislation Act*, but are instead subject to disallowance within five sitting days of tabling, and do not commence until after that period has expired.

(b) The rule-making process should or needs to be separated from the political process.

The Law Council considers this is a relevant factor in justifying non-disallowance.

For example, the Law Council has acknowledged the justification contained in the Explanatory Memorandum to the Biosecurity Bill 2014 (Cth), being that if certain decisions under the Biosecurity Act were to be subject to disallowance, 'political considerations will play a role in what should be a technical and scientific decision making process'.²⁵

Here, it was the need to make a decision to determine a requirement under the Biosecurity Act 'in accordance with an assessment of the relevant human health risks' that justified the separation of the rule-making process from the political process.²⁶ It is likely that other matters of public health or which significantly affect the fundamental life and rights of the Australian community may be proposed as candidates for a depoliticised decision-making process in the future.

However, this is by no means a decisive factor, as is illustrated by the issues that the Law Council has raised with the powers used under the Biosecurity Act at paragraphs [20] to [26] of its Submission. Indeed, the process behind making a legislative instrument may appear at first glance to be purely scientific or depoliticised when in fact it is not – or not entirely. What may appear to be a 'scientific' decision may in fact implicate a whole range of 'non-scientific' consequences that mean the decision should properly be subject to review.

(c) The instrument is an internal management tool for Government and an integral part of the government's relationship with government agencies and employees.

As this factor is likely to indicate that the matter in question is technical or administrative in nature, the Law Council considers this is a relevant factor in justifying non-disallowance.

(d) The instrument is central to machinery of government arrangements or electoral matters.

As this factor is likely to indicate that an instrument is technical or administrative in nature, the Law Council considers this is a relevant factor in justifying non-disallowance.

(e) The instrument is to operate from the time it is made and commercial (business) certainty will be adversely affected if it can be disallowed at a later date.

See paragraphs 68 to 70 below.

(f) The instrument is intended to remain within Executive control.

²⁵ *Law Council's Submission* (n 2) at [23]-[26]; Explanatory Memorandum to the Biosecurity Bill 2014 (Cth), 17.

²⁶ Explanatory Memorandum to the Biosecurity Bill 2014 (Cth), 294.

The Law Council considers this factor to be excessively vague.

The example that is given by the AGD of an instrument that has been exempted from disallowance on this basis is a direction from the Treasurer stipulating how an article that is condemned by a Court as forfeited to the Commonwealth is to be dealt with or disposed of by public authorities. This seems to be clearly an administrative act. The Law Council considers that the nature of a matter as purely administrative or technical is a relevant factor in justifying non-disallowance.

Yet as currently worded, this factor is extremely broad and essentially states that whatever the executive wants not to be subject to disallowance, shall not be. The universality of this categorical description seems unjustifiable and it should be tightened to refer to purely administrative matters for the Executive.

Further, it is not stated with clarity to whom the requisite intention must belong (though this is presumed to be Parliament). The Law Council would require this to be explicitly stated before this might be considered an appropriate factor.

(g) The exemption is in response to a parliamentary recommendation.

The Law Council considers this is a relevant factor in justifying non-disallowance.

(h) The instrument is part of an intergovernmental scheme.

The Law Council refers to the Submission to this Inquiry by the Centre of Comparative Constitutional Studies, which points out that the legislation and extrinsic materials for this exemption are 'opaque as to the rationale behind this exempted class'.²⁷ The mere fact that an instrument is part of an intergovernmental scheme which may be frustrated or inconvenienced if the instrument is subject to disallowance is without more unlikely, in the Law Council's view, to be a strong enough policy consideration for removing an essential democratic safeguard.

The example given in the AGD submission of an instrument whose exemption from disallowance has been justified by this factor is an instrument made in support of an international arrangement under the *Trans-Tasman Mutual Recognition Act 1997* (Cth) with New Zealand. However, domestic intergovernmental arrangements could also be justified through reference to this factor. Yet there is arguably a stronger case for subjecting domestic intergovernmental arrangements to review, as Australia's international reputation is unlikely to be a factor in these instances.

Despite the above, the Law Council appreciates that there are difficulties should the Federal Parliament have the capacity to disallow an instrument that has been agreed upon by multiple governments.

(i) The instrument is required under an international treaty or convention.

The Law Council considers this is a relevant factor in justifying non-disallowance.

²⁷ See, Centre for Comparative Constitutional Studies, 'Submission to the Inquiry on the exemption of delegated legislation from parliamentary oversight' (25 June 2020) at 10.

However, the question of whether and when an instrument is actually 'required' under a treaty or convention will need to be assessed on a case-by-case basis. Depending on the treaty in question, there may be considerable discretion in the steps that may be open to Australia to give effect to the treaty. Some steps may infringe on human rights or other technical scrutiny principles of the Committee more than others, and this may be an appropriate subject for Parliamentary scrutiny and disallowance.

To some extent issues may be foreshadowed through the consideration by the Joint Standing Committee on Treaties, though in some cases that will not be possible in advance.

(j) The instrument is critical to ensuring that urgent and decisive action can be taken in situations of emergency or where circumstances are rapidly evolving.

The Law Council considers this is a relevant factor in justifying non-disallowance. However, as suggested at paragraph 47 below, there is a strong argument that while such instruments may be defensibly non-disallowable so as to facilitate urgent and decisive action in emergency circumstances, renewals of such instruments should be made disallowable, thereby ensuring Parliamentary scrutiny of their continuing proportionality and justifiability.

(k) The exemption will provide certainty in meeting specific security needs.

See paragraphs 68 to 70 below, and note that broadly the same comments with respect to certainty apply in a security context as in a business context.

(l) Other reason.

The Law Council considers that the above factors should, if they are listed in any guidance materials, be framed as being merely of potential relevance to the appropriateness of non-disallowance (as explained at paragraphs 31 to 32 above). As such, it is not necessary to include this factor.

Question 4: Position of Australian Government

33. At the public hearing of 27 August 2020, Senator Scarr referred to paragraph 11 of the Law Council's Submission and asked the Law Council to respond to the specific concerns of the Australian Government which were referred to in that paragraph.
34. As the Law Council stated at the relevant paragraph, the Australian Government has expressed support for Recommendations 15 of the 2019 Report, except as it related to amending the Legislation Act to ensure all exemptions from disallowance are contained in primary legislation.²⁸
35. The Australian Government stated it was concerned that this measure would undo the changes effected by the *Acts and Instruments (Framework Reform) Act 2015* (Cth) (**AIFR Act**). This Act provided for a single framework covering registration, publishing and management of all Commonwealth Acts and instruments, including by providing for exemptions to be contained in the *Legislation (Exemptions and Other Matters)*

²⁸ *Law Council's Submission* (n 2) at [11].

Regulations 2015.²⁹ The Australian Government also stated this part of Recommendation 15 is impractical given the time and resourcing needed to redraft the relevant legislation.³⁰

36. The Law Council does not consider that the above reasons, while legitimate, justify not implementing Recommendation 15 in its entirety. The fact that certain changes which have been made in the past will be undone should not, in the Law Council's view, preclude the Australian Government from taking a particular course of action if it is the correct course of action and one that would improve the scrutiny process to ensure that delegated legislation accords with the rule of law.³¹
37. Further, the Law Council considers that the Australian Government's concerns about resourcing and time can be addressed by allocating it the necessary resources; perhaps not a simple matter in the time of a pandemic, but clearly necessary because of it.

Question 5: International comparisons

38. At the public hearing of 27 August 2020, Senator Ciccone and Senator Carr inquired about examples of the process for:
- (a) non-disallowance of legislative instruments;
 - (b) holding Parliament remotely; and
 - (c) holding Parliament physically

in other Western liberal democracies and/or Westminster systems, such as the United Kingdom and Canada, in the face of the current COVID-19-related issues.³²

39. Senator Davey inquired about the process outlined at paragraph 38(a) above, for the same countries, in non-pandemic circumstances.³³
40. The Law Council commends the Committee's aim to engage with international best practice when confronting what is a global problem. A brief summary of relevant systems in the United Kingdom, Canada and New Zealand is set out in the table at **Attachment A**.

Question 6: Exempting delegated legislation from oversight

41. By email dated 28 August 2020, the Committee asked whether there are any circumstances in which the Law Council considers that it is appropriate to exempt delegated legislation from parliamentary oversight mechanisms, such as disallowance.

²⁹ Ibid; Australian Government 'Australian Government response to the Senate Standing Committee on regulations and Ordinances report: Parliamentary scrutiny of delegated legislation' (November 2019), 5.

³⁰ Ibid.

³¹ Note, the AGD has stated in its submission to this Inquiry that the AIFR Act made 'substantial amendments' to the predecessor of the Legislation Act, the *Legislative Instruments Act 2003* (Cth). However, the AGD also stated that the AIFR Act 'included some refinements and clarifications of the disallowance mechanism...but did not substantially alter its operation'. See, *AGD's Submission* (n 21) at 4.

³² Evidence to Senate Scrutiny of Delegated Legislation Committee, Parliament of Australia, Canberra, 27 August 2020, 6 (Senator Ciccone, in the case of subparagraphs 38(a) and 38(b) above; and Senator Kim Carr, in the case of subparagraph 38(c)).

³³ Evidence to Senate Scrutiny of Delegated Legislation Committee, Parliament of Australia, Canberra, 27 August 2020, 6 (Senator Davey).

42. The Law Council considers that there should be strict limits on when delegated legislation can be exempted from disallowance, to ensure adequate parliamentary control. Clearly, some parliamentary oversight mechanisms may be better suited to a particular situation than others (for example, in emergency situations where a high degree of Executive power is being exercised).³⁴ The Committee should assess which alternatives best fit which scenarios.
43. For example, where a non-disallowable instrument amounts to a change to the law, the instrument should be subject to appropriate scrutiny soon after being made, especially when the decision might be in effect for a long time.³⁵
44. Whether it is appropriate to exempt a legislative instrument from disallowance will often be a matter of context and proportionality.³⁶ It requires consideration of the tension between the need to enable effective, often urgent decision making on the one hand, and the importance of scrutiny and oversight on the other.³⁷
45. However, as the Law Council has stated and in line with recommendations by this Committee the 2019 Report, it will only ever be appropriate to exempt delegated legislation from disallowance where the exemption is set out in primary legislation.³⁸ It will also only be appropriate if the exemption is made pursuant to the appropriate guidance.³⁹
46. Further, even where there are legitimate grounds for exempting an instrument from disallowance, a range of practical measures must still be taken to ensure the scrutiny and transparency of the rule-making process. For example, in the Law Council's view, during the COVID-19 pandemic and recovery period (as well as, potentially, more generally) all legislative measures including non-disallowable instruments should be accompanied by a statement of compatibility where they affect basic human rights.⁴⁰
47. Further, the Committee should consider whether renewals of instruments which were made non-disallowable by reason of urgency in circumstances of emergency, and which apply for an initial set period, should be disallowable. A side benefit of this arrangement would be that Parliament would be able to evaluate at least some of the impacts of that instrument for the purposes of determining whether it continues to be a proportionate and justified measure and whether it is appropriate to renew it.
48. It is also crucial to provide adequate resourcing to the parliamentary bodies responsible for the scrutiny of delegated legislation so that they can perform their role without delay, especially in times of crisis.⁴¹

Question 7: Source of exemption from disallowance

49. By email dated 28 August 2020, the Committee stated that currently, a number of grounds for exempting delegated legislation from disallowance and sunseting are set out in delegated legislation, rather than primary legislation. It asked whether this is

³⁴ *Law Council's Submission* (n 2) at [42]-[43].

³⁵ *Ibid.* For further a more in-depth analysis of this issue, refer to the Law Council's Submission including at paragraphs [13] to [16] and [42] to [43].

³⁶ Evidence to Senate Scrutiny of Delegated Legislation Committee, Parliament of Australia, Canberra, 27 August 2020, 1 (Pauline Wright).

³⁷ *Ibid.*

³⁸ *Ibid.*; *Law Council's Submission* (n 2) at [6]; Evidence to Senate Scrutiny of Delegated Legislation Committee, Parliament of Australia, Canberra, 27 August 2020, 1 (Pauline Wright).

³⁹ *Law Council's Submission* (n 2) at [6].

⁴⁰ *Law Council's Submission* (n 2) at [6].

⁴¹ *Ibid.*

appropriate, or whether the grounds for exemptions should only be set out in primary legislation.

50. The Law Council's answer with respect to exemption from disallowance can be found at paragraph 45 above.⁴²

Question 8: Exemption of extensions from disallowance

51. By email dated 28 August 2020, the Committee inquired whether it is appropriate that any extensions to the emergency periods declared under the Biosecurity Act are exempt from disallowance, noting that there is no limit on the number of times that an emergency period may be extended.
52. The view that the Law Council has expressed in its Submission and this supplementary submission on the need for revisions to the current process of exempting delegated legislation from disallowance apply equally to exemptions from disallowance of extensions to emergency periods declared under the Biosecurity Act. Proposals for this and other such exemptions would only be appropriate in the Law Council's view if compliant with its recommendations for reform. As noted above, there is a case for subjecting extensions of periods to be disallowable instruments.
53. More specifically, the Law Council has previously expressed concerns about the power conferred on Ministers under the *Coronavirus Economic Response Package Omnibus Act 2020* (Cth) to extend certain sunset dates for up to six months by *disallowable* instrument.⁴³ These concerns are only amplified where instruments imposing similarly grave conditions on the Australian people are not subject to disallowance.

Question 9: Henry VIII clauses

54. By email dated 28 August 2020, the Committee noted that Determinations and Directions by the Health Minister under the Biosecurity Act have effect 'despite any provision of any other Australian law'. The Committee asked whether, noting that these provisions act as Henry VIII clauses, it is appropriate that these instruments are exempt from disallowance by the Parliament.
55. The Law Council's view on how to assess whether and when it may be appropriate to exempt legislation from disallowance, as set out at paragraphs 41 to 48 above, is intended to contemplate all kinds of delegated legislation (including instruments that contain Henry VIII clauses). Acknowledging the need to make decisions quickly, especially in emergency situations, it is essential that there is some form of oversight to ensure that the decisions are made appropriately and that their impacts are being measured and evaluated. This becomes more crucial where the decision of an individual has the potential to override Acts of Parliament, making a strong argument for subjecting such instruments to disallowance.

Question 10: Scrutiny by the Committee

56. By email dated 28 August 2020, the Committee asked whether it should have the power to scrutinise and report on delegated legislation that is exempt from

⁴² Note, this will in turn affect the application of the sunset exemption under section 54 of the *Legislation Act 2003* (Cth).

⁴³ *Law Council's Submission* (n 2) at [55]-[58].

disallowance, and how would this improve parliamentary oversight of delegated legislation.

57. The Law Council supports the commitment by the Committee to meet regularly throughout the COVID-19 pandemic to ensure appropriate parliamentary oversight is maintained in these unprecedented times. The Law Council also applauds the Committee for committing to publishing a list of all COVID-19 related delegated legislation registered on the Federal Register of Legislation.
58. Where delegated legislation that is exempt from disallowance amounts to change to the law, these instruments should be subject to appropriate scrutiny soon after they are made, especially when the decision might be in effect for a long time.⁴⁴ The Law Council considers the Committee's expertise means it is most suitable for performing this task.

Question 11: Committee resourcing

59. By email dated 28 August 2020, the Committee referred to the Law Council's Submission where it is noted that consideration should be given to allocating extra resources to the Committee and other legislative scrutiny committees in times of emergency. The Committee asked whether in the Law Council's view, this would improve parliamentary oversight of emergency legislation.
60. The Law Council reiterates its position that allocating extra resourcing to the Committee, the PJCHR and the Scrutiny of Bills Committee to assist with the timely scrutiny of delegated legislation would enable them to undertake timely scrutiny, especially in times of crisis. This would improve parliamentary oversight of emergency legislation.

Question 12: Alternative oversight mechanisms

61. By email dated 28 August 2020, the Committee noted that some submissions to the Inquiry have questioned the appropriateness or effectiveness of disallowance as a parliamentary oversight mechanism during times of emergency. In the absence of disallowance, the Committee asked whether there are any other parliamentary oversight mechanisms that would be appropriate alternatives during such periods.
62. The Law Council has noted that there are a range of practical measures and mechanisms which could be implemented to ensure that scrutiny and transparency are observed in times of emergency (including where grounds for exemption from disallowance are legitimate).⁴⁵ These measures are outlined in the Law Council's Submission.⁴⁶

Question 13: The need for exemptions from disallowance

63. By email dated 28 August 2020, the Committee noted that approximately 19 per cent of delegated legislation made in response to COVID-19 has been exempt from disallowance. It asked whether exemptions from parliamentary oversight necessary for the Government to respond effectively to the pandemic.

⁴⁴ *Law Council's Submission* (n 2) at [42].

⁴⁵ *Law Council's Submission* (n 2) at [15].

⁴⁶ See, paragraphs [18]-[19], [36], [38]-[41], [42]-[48] and [51].

64. The question of whether and when it may be appropriate to exempt legislation from disallowance is addressed at paragraphs 41 to 48 above. As the Law Council has stated, it does not consider that it is ever appropriate or necessary to include significant matters, such as those dealing with substantive policy issues, in delegated legislation – let alone in circumstances where there is no option for disallowance. However, the Law Council acknowledges the need for timely decision making on matters of public health in times of emergency as part of the Government’s response to the pandemic.⁴⁷ There may in some instances be legitimate grounds for exempting delegated legislation from disallowance, for example on a temporary, time-limited basis, with renewals possibly subject to disallowance.⁴⁸
65. However, as to the question of necessity, the Law Council submits that the authorisation of exemptions from parliamentary oversight, for example through the Government’s use of the Biosecurity Act, warrants careful consideration. This is particularly important given the significance of the powers available and the frequency of their use in the current crisis.
66. Between 18 March 2020 and 21 August 2020 there were 276 instances of COVID-19 related delegated legislation, of which approximately 50 were exempt from disallowance. Over half of those exempt instruments were made under the powers granted in the Biosecurity Act, often including substantive matters of public policy.
67. Whether it is necessary to delegate (and exempt from disallowance) matters that are purely technical or administrative in nature, is to be assessed according to the above analysis. However, also as stated at paragraph 62 above, it is never necessary to eliminate all parliamentary oversight to respond effectively to the pandemic, as numerous measures and mechanisms exist to fulfil this function even where exemption from disallowance may be considered necessary.

Question 14: Date from which delegated legislation is effective

68. By email dated 28 August 2020, the Committee noted that exemptions from disallowance are sometimes justified on the basis that disallowance undermines legal certainty. It inquired whether this concern could instead be addressed by having delegated legislation come into effect after the disallowance period has expired.
69. One of the grounds on which Parliament has exempted instruments from disallowance under the Legislation Act, as listed by the AGD in its Submission to the Inquiry, was that the instrument: ‘is to operate from the time it is made and commercial (business) certainty will be adversely affected if it can be disallowed at a later date’.⁴⁹ Another was where the exemption ‘will provide certainty in meeting specific security needs’.⁵⁰ The AGD noted that this reason may also apply in cases where an instrument aims at ‘once-only transitional arrangements’, for example, changes in a public sector body’s governance structures.⁵¹
70. Where the need for certainty is the only ground for exemption, the Law Council’s view is that this need could equally be met by having delegated legislation come into effect

⁴⁷ Ibid at [21].

⁴⁸ Ibid at [15].

⁴⁹ See, AGD’s *Submission* (n 21) at 7. The instruments listed as examples included: ‘an instrument made under section 18 of the *Payment Systems (Regulation) Act 1998* (Cth), which empowers the Reserve Bank to make standards for participants in designated payment systems’; and ‘[i]nstruments made under the *Radiocommunications Act 1992* which relate to the procedures for allocating spectrum licenses’.

⁵⁰ Ibid.

⁵¹ Ibid.

after the disallowance period has expired. This solution may, however, be less satisfactory in urgent cases. As the Legislation Act is currently drafted there would be, at minimum, a delay of 15 sitting days between registration and the instrument in question coming into effect.⁵²

Question 15: Protection of personal rights and liberties

71. By email dated 28 August 2020, the Committee noted that a significant portion of the instruments made in response to COVID-19 affect personal rights and liberties. The Committee inquired whether the Law Council considers that there are sufficient safeguards to protect personal rights and liberties in the absence of disallowance.
72. As stated in the Law Council's Submission, the Law Council considers that the lack of a requirement for statements of compatibility for non-disallowable instruments has impeded and slowed down the PJCHR's scrutiny role during the pandemic, including for measures made under the Biosecurity Act.⁵³
73. Additionally, the fact that an instrument may trespass unduly on personal rights and liberties (a factor which falls within this Committee's mandate)⁵⁴ but will be excluded from review because it is not disallowable inappropriately limits the effective scrutiny by Parliament both in relation to human rights compatibility and for consistency with the other standards the Committee oversees. The threat or exercise of the power to disallow has provided an important tool in the Committee's work and has frequently led to improvements to legislation without the instrument in question eventually being disallowed.⁵⁵
74. This indicates that there are insufficient safeguards to protect personal rights and liberties in the absence of disallowance. It also raises a troubling perception that the explicit consideration of human rights obligations may not have been part of the policymaking and drafting process of these non-disallowable instruments, some of which significantly intrude on the enjoyment of rights.
75. The Law Council agrees with the PJCHR that all legislative instruments dealing with the COVID-19 pandemic should be accompanied by a detailed statement of compatibility – and potentially also instruments made in other contexts.⁵⁶
76. However, accompaniment by a statement of compatibility is not necessarily the only salve needed to address this problem. On this point, please refer to paragraphs 20 and 21 above.

Question 16: Justification in explanatory statement

77. By email dated 28 August 2020, the Committee noted that unlike the requirements for the deferral of sunseting, there is currently no requirement to include a justification for why an instrument is exempt from disallowance or sunseting in its explanatory

⁵² See, *Legislation Act 2003* (Cth) at ss 38 and 42. The minimum timeframe of 15 sitting days assumes the Office of Parliamentary Counsel arranges for a copy of each registered legislative instrument to be delivered to each House of Parliament on the same day as registration and that this is a sitting day (when they have up to 6 sitting days to do so); and that no events occur to restart the period of 15 sitting days required to permit a notice of motion for disallowance to be made.

⁵³ See, *Law Council's Submission* (n 2) at [27]-[29].

⁵⁴ See, Senate Standing Orders, Standing Order 23(3)(h).

⁵⁵ See, Mr Richard Pye, Clerk of the Senate, 'Submission to the Inquiry on the exemption of delegated legislation from parliamentary oversight' (16 June 2020) at 2-3.

⁵⁶ See, *Law Council's Submission* (n 2) at [27]-[29].

statement. The Committee inquired whether there should be a similar requirement to justify exemptions from disallowance and sunseting in an instrument's explanatory statement.

78. When applying to defer the sunseting of a legislative instrument, a rule-maker must make an explanatory statement in the form of a written application to the Attorney-General, pursuant to paragraph 51(1)(b) of the Legislation Act. The Attorney-General may only agree to a deferral if they are satisfied, based upon the written application, that various criteria are met.⁵⁷
79. The Law Council supports legislating a similar requirement to include written justification for why an instrument should be exempt from disallowance or sunseting in the relevant explanatory materials. The Law Council also supports the Committee's suggestion that the guidance which should be developed to assist government officials in deciding whether certain instruments should be non-disallowable (as discussed at paragraph 26 above) should be referred to in the written justification for the proposal.⁵⁸
80. Finally, whether this requirement is implemented, the Law Council maintains its views on the need for the various other safeguards it has set out above and its original Submission.

⁵⁷ These include, that the instrument would be otherwise likely to be in force within 24 months after the sunseting day; and that there are reasons the rule-maker could not have foreseen and avoided (or that it is inappropriate to make a replacement instrument in circumstances where a new government must be formed).

⁵⁸ See, *Ibid* at [8.38].

ATTACHMENT A: International comparisons

Country	Legislative instruments and disallowance during a pandemic	Legislative instruments and disallowance outside a pandemic	Virtual Parliament arrangements	Arrangements for Parliament to meet physically
<p>United Kingdom</p>	<p>There has been some public debate about the <i>Health Protection (Coronavirus, Restrictions) (England) Regulations 2020</i>, which has ‘drawn attention to the fact that the government’s official guidance did not always appear to line up with the provisions’.ⁱ</p> <p>When Parliament resumed meeting in hybrid form in April, public health regulations made under delegated powers during the adjournment of Parliament were cited as a priority for business of the House.ⁱⁱ</p>	<p>In the United Kingdom (UK), parliamentary oversight of delegated legislation ‘is primarily conducted by two committees’, being the Joint Committee on Statutory Instruments and the House of Lords Secondary Legislation Scrutiny Committee.ⁱⁱⁱ</p> <p>Outside the pandemic, concerns have emerged in the UK about ‘[t]he government’s reliance on delegated powers and delegated legislation to deliver Brexit’.^{iv}</p> <p>There is also a growing concern that ‘in many areas – including Brexit – delegated legislation is being used to deliver important policy changes’, including through a ‘reliance’ on Henry VIII powers.^v</p> <p>‘At present, parliamentary committees in Westminster do not apply a fixed set of criteria to determine which legislative powers should or should not be delegated to government. Rather, parliamentary committees take a more pragmatic approach.’^{vi}</p> <p>The disallowance procedure has been described as ‘very unsatisfactory’, given the Committees have ‘no right to demand a debate’ but can merely table a motion to disallow.^{vii}</p>	<p>For approximately two months, the majority of British Members of Parliament (MPs) worked from home and Oral Questions and Oral Statements were ‘as much as possible’ virtually made.^{viii}</p> <p>In April 2020, a ‘hybrid’ system was agreed whereby up to 50 MPs could be present in the chamber and voting was conducted remotely.^{ix} This system took effect from May.^x</p> <p>The UK Parliament also introduced a <i>CommonsVote</i> app indicating MPs’ votes after a division, and a <i>HousePapers</i> app with parliamentary papers.^{xi}</p> <p>The system worked as follows: ‘Houses of Parliament continue[d] debate, Parliamentary Question Time and select committees continue[d] using public internet provision.’^{xii} The House of Commons was fitted out with screens.^{xiii}</p> <p>The UK parliament has been described as having ‘muddled through’ its virtual sitting after Easter, ‘using online voting, Zoom and Microsoft Teams in the chamber and pre-prepared questions for ministers’.^{xiv}</p> <p>From 2 June 2020, Virtual Parliament ceased in the Commons.^{xv} Its hybrid sittings have been described as a ‘temporary fix’ which were ‘abandoned...as soon as it was safer to do so in early June’.^{xvi}</p>	<p>From 2 June 2020, Parliament has met physically.^{xvii}</p> <p>Under this arrangement, MPs’ staff continued to work from home and numbers in the chamber are limited.^{xviii} Consultation also took place regarding how MPs with underlying health conditions could contribute to proceedings.^{xix} This resulted in temporary arrangements, currently in place until 3 November 2020, which allow remote participation for this group of MPs.^{xx} This includes via proxy voting.^{xxi}</p>

Country	Legislative instruments and disallowance during a pandemic	Legislative instruments and disallowance outside a pandemic	Virtual Parliament arrangements	Arrangements for Parliament to meet physically
Canada	<p>In Canada, the Federal Government has broad powers to quarantine and isolate individuals at national borders, make laws for peace, order and good governance (including in national emergency situations) and others.^{xxii} However, ‘to qualify as a national emergency, a situation must “exceed the capacity or the authority ... (of provinces) ... to deal with.”^{xxiii}</p>	<p>The disallowance process in Canada is only open to the House of Commons (not the Senate) and has been described as ‘weak’.^{xxiv} The use of delegated legislation has also been described as ‘widespread’.^{xxv} In fact, the great majority of Bills delegate lawmaking powers to the executive.^{xxvi} Further, academics such as Associate Professor Lorne Neudorf have recognised the ‘real concerns about the quality, transparency and accountability’ of the process of making delegated legislation.^{xxvii}</p> <p>In terms of scrutiny, certain Acts may provide that a legislative instrument made under that Act must be tabled, but there is no overarching Act requiring such instruments to be tabled.^{xxviii}</p> <p>A standing joint committee for the scrutiny of statutory instruments is empowered to examine ‘all instruments for which the government is directly responsible’. However, exemptions apply for instruments ‘dealing with international affairs and federal-provincial relations, the prevention and suppression of subversive or hostile activities, and those whose disclosure would result in an injustice or undue hardship to an individual.’^{xxix}</p>	<p>Canada has been described as having adopted ‘successful measures’ for its House of Commons to meet, albeit in a somewhat restricted form by way of a ‘quasi-virtual stop-gap’.^{xxx}</p> <p>On 27 May, following adjournment from 20 April to 25 May, the House of Commons opened in ‘hybrid’ form.^{xxxi} During the period of adjournment, Parliament was replaced mostly with special committee meetings.^{xxxii} These included the so-called ‘Committee of the Whole’, which, unlike other parliamentary committees, comprises all MPs. It performs the role of scrutinising pre-legislation and can convert to a House to provide voting where necessary.^{xxxiii}</p> <p>When the House of Commons resumed in hybrid form, this marked the first time that Canadian MPs had been able to debate virtually, as an alternative to being physically present in seats in the House of Commons.^{xxxiv}</p> <p>On 18 August 2020, the first session of the 43rd Parliament was prorogued and its second session is scheduled for 23 September 2020.^{xxxv}</p>	See column to left.
New Zealand	<p>‘There are significant legal powers at the New Zealand government’s disposal. The Health Act 1956 and the Epidemic Preparedness Act 2006 are the key pieces of legislation that provide such powers to the Government. The Civil Defence Emergency Management Act 2002 also provides powers if the situation becomes more severe.’^{xxxvi}</p>	<p>Some delegated legislation is not caught by the disallowance process, particularly laws made by local authorities. However, regulations fall under the process.^{xxxvii}</p> <p>Regulations must be laid before Parliament in New Zealand and MPs may give a notice of disallowance at any time, even years following enactment.^{xxxviii} The House of Representatives may also disallow a part of a regulation.</p> <p>Further, the Regulations Review Committee may give a notice of motion which, if not addressed within 21 days, causes a regulation to be automatically disallowed.^{xxxix}</p>	<p>‘An Epidemic Response committee was established to scrutinise the Government’s action in lieu of the House’s usual accountability mechanisms. The select committee meets by Zoom (and broadcasts these meetings publicly).’^{xl}</p> <p>The Epidemic Response Committee was televised through various apps and online pages. “We had a whole new select committee that was basically taking over Parliament’s role of holding the government to account. It was replacing question time and ministerial statements - it was really the only show in town and understandably [MPs] from all sides of the House wanted to get that in front of as many people as possible”.^{xli}</p>	<p>Post lockdown, as of 24 April 2020 and by agreement of the Business Committee representing all parties, the New Zealand Parliament has sat in hybrid form and carried out its full functions, though with limited agenda and ‘limited, but rotating virtual participation’.^{xlii}</p> <p>Adaptations include physical distancing and a reduced number of MPs in chamber; reduced staffing; and reduction in duration and/or occurrence of particular debates.^{xliii}</p>

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- ⁱ Dr Jack Caird, 'What is the aim of parliamentary scrutiny of delegated legislation?' (28 April 2020) <<https://www.hansardsociety.org.uk/blog/what-is-the-aim-of-parliamentary-scrutiny-of-delegated-legislation/>>.
- ⁱⁱ Parliament, 'Procedure under coronavirus restrictions: proposals for remote participation: Arrangements to facilitate debate on motions and consideration of legislation' At cl (21 April 2020) at cl 61. See, also, Bonavero Institute of Human Rights (6 May 2020), 'Bonavero Report No. 3/2020' University of Oxford <www.law.ox.ac.uk/sites/files/oxlaw/v3_bonavero_reports_series_human_rights_and_covid_19_20203.pdf> ('**Bonavero Report**') at 105. It is stated: 'The Health Protection (Coronavirus) Regulations 2020 were made on 26 March 2020 by the Secretary of State for Health and Social Care under powers conferred by sections 45C(1), (3)(c), (4)(d), 45F(2) and 45P of the Public Health (Control of Disease) Act 1984: 'restrictions or requirements... in response to... a threat to public health' (s 45C(3)(c)). ...the Secretary of State believed 'by reason of urgency, it is necessary to make this instrument without a draft having been laid before, and approved by a resolution of, each House of Parliament.' This absence of scrutiny is based on a dubious premise, given that the government had almost three months' notice of the emergence of novel coronavirus before these Regulations were made. There has been some debate between public lawyers as to the specificity and therefore lawfulness of these restrictions'.
- ⁱⁱⁱ Dr Caird, 'What is the aim of parliamentary scrutiny of delegated legislation?' (n 1).
- ^{iv} Ellis Paterson and Dr Jack Caird, 'Brexit, Delegated Powers and Delegated Legislation: a Rule of Law Analysis of Parliamentary Scrutiny' (20 April 2020) *Bingham Centre for the Rule of Law* <<https://binghamcentre.biicl.org/publications/brexit-delegated-powers-and-delegated-legislation-a-rule-of-law-analysis-of-parliamentary-scrutiny/>> Introduction.
- ^v *Ibid* at 5.
- ^{vi} *Ibid* at 11.
- ^{vii} David Hamer, 'Can responsible Government survive in Australia?' (2004) *Parliament of Australia* <https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/~link.aspx?id=62501A4F244B4174BBDB1BF023BE12B1&z=z> ('**Can responsible Government survive?**').
- ^{viii} Parliament, 'Changes to House of Lords sittings following Easter recess' (9 April 2020) <<https://www.parliament.uk/business/news/2020/april1/changes-to-house-of-lords-sittings-following-easter-recess/>>.
- ^{ix} Alice Tidey, 'Coronavirus: UK MPs vote for return to parliament after remote working during lockdown' *Euronews* <<https://www.euronews.com/2020/06/02/uk-mps-to-vote-on-whether-it-s-safe-to-return-to-parliament/>>.
- ^x Parliament, 'House of Commons Chamber proceedings during the COVID-19 pandemic' (undated) <<https://www.parliament.uk/about/how/covid-19-hybrid-proceedings-in-the-house-of-commons/>> ('**House of Commons Chamber**').
- ^{xi} Sarah Moulds, 'As the first 'remote' sitting starts in Canberra, virtual parliaments should be the new norm, not a COVID bandaid' (24 August 2020) <<https://theconversation.com/as-the-first-remote-sitting-starts-in-canberra-virtual-parliaments-should-be-the-new-norm-not-a-covid-bandaid-144737>>.
- ^{xii} *Bonavero Report* (n ii) at 111.
- ^{xiii} Associate Professor Tom Gerald Daly, 'In times of crisis, does Parliament really matter?' (10 August 2020) *University of Melbourne* <<https://pursuit.unimelb.edu.au/articles/in-times-of-crisis-does-parliament-really-matter>> ('**In times of crisis**').
- ^{xiv} *Ibid*.
- ^{xv} Josiah Mortimer, 'Why the government's rationale for closing the 'Virtual Parliament' doesn't add up' (21 May 2020) <<https://www.electoral-reform.org.uk/why-the-governments-rationale-for-closing-the-virtual-parliament-doesnt-add-up/>> ('**Closing the 'Virtual Parliament'**').
- ^{xvi} In times of crisis (n xiii).
- ^{xvii} Closing the 'Virtual Parliament' (n xv).
- ^{xviii} Jacob Rees-Mogg MP, 'The virtual Parliament is no longer necessary. We can do so much better' (1 June 2020) <<https://www.politicshome.com/thehouse/article/the-virtual-parliament-is-no-longer-necessary-we-can-do-so-much-better>>.
- ^{xix} *Ibid*.
- ^{xx} House of Commons Chamber (n x).
- ^{xxi} *Ibid*.
- ^{xxii} See, Amy Swiffen, 'The limits of Canada's federal emergency law during the coronavirus pandemic' (2 April 2020) <<https://theconversation.com/the-limits-of-canadas-federal-emergency-law-during-the-coronavirus-pandemic-134309>>.
- ^{xxiii} *Ibid*. Particular examples of actual or attempted delegation during the pandemic in Canada are set out at Sujit Choudhry, 'Part Two: COVID-19 & the Canadian Constitution' (12 May 2020) *Centre for Constitutional Studies, University of Alberta* <<https://ualawccsprod.srv.ualberta.ca/2020/05/part-two-covid-19-the-canadian-constitution/>>.
- ^{xxiv} *Can responsible Government survive?* (n vii).
- ^{xxv} *Ibid*.
- ^{xxvi} Lorne Neudorf, 'Reassessing the Constitutional Foundation of Delegated Legislation in Canada' (Fall 2018) *Dalhousie Law Journal* 41:2, 519.

^{xxvii} Ibid at 522.

^{xxviii} Ibid.

^{xxix} *Can responsible Government survive?* (n vii).

^{xxx} *House of Commons Chamber* (n x).

^{xxxi} *In times of crisis* (n xiii).

^{xxxii} Ibid.

^{xxxiii} Ibid; see also, The Samara Centre for Democracy, 'Towards a Virtual Parliament: Design choices and democratic values' (1 May 2020)

<<https://www.samaracanada.com/democracy-monitor/towards-a-virtual-parliament>> ('**Towards a Virtual Parliament**').

^{xxxiv} See, The Canadian Press, "OK, let's make history": hybrid House of Commons convenes to debate COVID-19' (27 May 2020) <<https://www.ctvnews.ca/canada/ok-let-s-make-history-hybrid-house-of-commons-convenes-to-debate-covid-19-1.4956328>>; Towards a Virtual Parliament (n xli).

^{xxxv} Parliament of Canada, 'House of Commons' <<https://www.ourcommons.ca/en>>.

^{xxxvi} *Bonavero Report* (n ii) at 62.

^{xxxvii} *Can responsible Government survive?* (n vii).

^{xxxviii} Ibid.

^{xxxix} Ibid.

^{xl} *Bonavero Report* (n ii) at 66.

^{xli} Phil Smith, 'Going virtual: taking parliament onto the holodeck' (26 April 2020) <<https://www.rnz.co.nz/national/programmes/the-house/audio/2018743818/going-virtual-taking-parliament-onto-the-holodeck>>.

^{xlii} Steven Chaplin, 'Protecting parliamentary democracy in "plague" times: Accountability and democratic institutions during the pandemic' (13 May 2020) *Commonwealth Law Bulletin* 46, 1.

^{xliii} Daniela Maoate-Cox, 'Parliament post-lockdown: more money and bills but fewer debates and MPs' (24 April 2020) <<https://www.rnz.co.nz/national/programmes/the-house/audio/2018743934/parliament-post-lockdown-more-money-and-bills-but-fewer-debates-and-mps>>.