



Law Council
OF AUSTRALIA

Exemption of delegated legislation from parliamentary oversight

Senate Standing Committee for the Scrutiny of Delegated Legislation

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

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:

- Australian Capital Territory Bar Association
- 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
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2020 Executive as at 1 January 2020 are:

- Ms Pauline Wright, President
- Dr Jacoba Brasch QC, President-elect
- Mr Tass Liveris, Treasurer
- Mr Ross Drinnan, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

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

Acknowledgement

The Law Council is grateful for the contribution of the Queensland Law Society to this submission. The Law Council also appreciates the involvement of its National Human Rights Committee and the Constitutional Law Committee which forms part of the Federal Litigation and Dispute Resolution Section.

Executive summary

1. The Law Council welcomes the opportunity to provide a submission to the Standing Committee for the Scrutiny of Delegated Legislation (**Committee**) as part of its inquiry into the exemption of delegated legislation from parliamentary oversight (**Inquiry**).
2. The Law Council considers that significant matters, such as those dealing with substantive policy issues rather than matters that are purely technical or administrative in nature, should be included in primary legislation rather than delegated legislation.
3. The Law Council's concerns regarding an overreliance on delegated legislation are exacerbated where an instrument is not subject to disallowance, noting that in such a case, the instrument is also beyond the scrutiny of the Committee for the Scrutiny of Delegated Legislation.¹
4. The Law Council is of the view that more is needed to meet the high standards of essential democratic processes, and is supportive of further measures to ensure there is effective and sufficient scrutiny of Executive power, consistent with the rule of law and the role of Parliament in our constitutional system.
5. These issues have become particularly prominent in light of questions regarding the appropriateness of exempting legislation made in times of emergency, including during the COVID-19 pandemic. The present circumstances highlight a tension between the urgent necessity of enabling effective, swift decision making, and the importance of scrutiny and oversight, providing a context from which debate in this area can proceed.
6. To further this discussion and to ensure there is appropriate oversight and scrutiny of delegated legislation, the Law Council makes the following recommendations:
 - In line with the 2019 recommendations of the then Standing Committee on Regulations and Ordinances:
 - all exemptions to disallowance should be in primary legislation and subsection 44(2) of the *Legislation Act 2003* (Cth) (**Legislation Act**) should be amended accordingly; and
 - guidelines in which exemption from disallowance is appropriate should be developed and used to scrutinise proposals to exempt.
 - During the COVID-19 pandemic and recovery period, statements of compatibility should accompany all legislative measures, including non-disallowable instruments, which significantly impact upon human rights.
 - The Committee should have regard to the findings of the Royal Commission into National Natural Disaster Arrangements as they relate to scrutiny and oversight of emergency response determinations.
 - Further guidance with respect to the exercise of emergency powers by the Executive should be developed, including consideration of review mechanisms to ensure those powers have been exercised appropriately.
 - Consideration should be given to the ability for Parliament to convene in times of emergency, including the option of virtual sittings.
 - Delegated legislation exempt from disallowance should be subject to a reporting requirement when such instruments affect basic human rights.
 - Parliamentary bodies responsible for the scrutiny of delegated legislation should be adequately resourced to be able to undertake timely scrutiny, especially in times of crisis.

¹ The Senate, '*Standing Orders and Other Orders of the Senate*', January 2020, SO 23(2).

Background to the Inquiry

7. The Inquiry follows on from the findings of the 2019 inquiry into parliamentary scrutiny of delegated legislation, undertaken by the Committee (then named the Standing Committee on Regulations and Ordinances).² In its 2019 report, the Committee raised a number of concerns with the exemption of delegated legislation from parliamentary oversight.³
8. The Law Council endorses the previous views of the Committee as they relate to the exemption of delegated legislation from disallowance, specifically the recommendation that the Australian Government should:
 - (a) review existing provisions exempting legislative instruments from disallowance, to determine whether such exemptions remain appropriate, and amend the Legislation Act to ensure all such exemptions are contained in primary legislation; and
 - (b) publish guidance as to the limited circumstances in which it may be appropriate to exempt instruments from disallowance.⁴
9. The Committee also recommended that the Office of Parliamentary Counsel should modify the Federal Register of Legislation to enable instruments which are exempt from disallowance to be readily identified.⁵
10. These recommendations were aimed at increasing transparency in the exemption process, recognising that to exempt an instrument from disallowance gives rise to significant scrutiny concerns and 'effectively removes Parliament's control of delegated legislation, leaving it to the Executive to determine (albeit within the confines of the enabling legislation and the Constitution) the content of the law'.⁶
11. In response, the Australian Government expressed support for the above recommendations except as they related to amending the Legislation Act to ensure exemptions are contained in primary legislation. This position of the Australian Government was justified out of concern that such measures would undo the changes effected by the *Acts and Instruments (Framework Reform) Act 2015* (Cth), as well as practicability and resourcing constraints.⁷
12. Despite this position, the Law Council endorses the views outlined by the Clerk of the Senate to this Inquiry that the Committee should further engage with this recommendation and seek to explore practical solutions in relation to the Government's concerns.⁸

² Senate Standing Committee on Regulations and Ordinances 'Parliamentary scrutiny of delegated legislation' (3 June 2019)

<www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Delegated_Legislation/Report>.

³ Ibid, [8.35].

⁴ Ibid, Recommendation 15.

⁵ Ibid, Recommendation 16.

⁶ Ibid, 123.

⁷ Australian Government 'Australian Government response to the Senate Standing Committee on regulations and Ordinances report: Parliamentary scrutiny of delegated legislation' (November 2019), 5

<https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/DelegatedLegislation/Government_Response>.

⁸ Clerk of the Senate, Submission No 3 to the Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into Exemption of Delegated Legislation from Parliamentary Oversight* (16 June 2020).

General views on the exemption from disallowance

13. The Law Council is of the view that significant matters, such as those dealing with substantive policy issues rather than matters that are purely technical or administrative in nature, should be included in primary legislation rather than delegated legislation. In this regard, the Law Council expects that, in order to fulfill this responsibility, the Australian Parliament will safeguard against the unnecessary delegation of unfettered law-making authority to the Executive.⁹ The Law Council's concern regarding delegated legislation is heightened where an instrument is not subject to disallowance.
14. Adequate scrutiny of legislative instruments is particularly critical in light of a trend towards addressing matters of policy and substance in delegated legislation rather than primary legislation. As was highlighted by the Committee in 2019, around half the law of the Commonwealth is delegated legislation, that is, law made by or on behalf of the Executive.¹⁰
15. With respect to delegated legislation exempt from disallowance, there is a clear tension between the urgent necessity of enabling effective, swift decision making, and the importance of scrutiny and oversight. Whether the grounds for exempting delegated legislation from disallowance are appropriate will always be a matter of context and proportionality. However, even where grounds for exemption from disallowance are legitimate, there are a range of practical measures and mechanisms which could be implemented to ensure that there is scrutiny and transparency. Such measures are outlined in this submission.
16. In instances where a legislative instrument is not subject to disallowance, the instrument is also beyond the scrutiny of the Committee.¹¹ It is noted, however, that instruments exempt from disallowance may still be scrutinised by the Parliamentary Joint Committee on Human Rights (**PJCHR**).¹² Despite this, there remains practical barriers for the effective review by the PJCHR, as discussed below at page 9.

Recommendation

- **In line with the 2019 recommendations of the then Standing Committee on Regulations and Ordinances:**
 - **all exemptions to disallowance should be in primary legislation and subsection 44(2) of the *Legislation Act 2003* should be amended accordingly; and**
 - **guidelines in which exemption from disallowance is appropriate should be developed and used to scrutinise proposals to exempt.**

Delegated legislation and COVID-19 response measures

17. The Committee has sought feedback in relation to the appropriateness of exempting legislation made in times of emergency, including in response to the COVID-19 pandemic, from parliamentary oversight.¹³ In this regard, the Law Council notes the establishment of the Senate Select Committee on COVID-19 to inquire into the

⁹ Law Council of Australia 'Legislative Standards' <<https://www.lawcouncil.asn.au/policy-agenda/human-rights/legislative-standards>>.

¹⁰ Senate Standing Committee on Regulations and Ordinances 'Parliamentary scrutiny of delegated legislation' (3 June 2019), ix.

¹¹ The Senate, 'Standing Orders and Other Orders of the Senate' (January 2020) SO 23(2).

¹² *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), s 7.

¹³ Senate Standing Committee for the Scrutiny of Delegated Legislation: *Inquiry into exemption of delegated legislation from parliamentary oversight*, Terms of Reference (a)(iv).

Australian Government's response to the COVID-19 pandemic over the next two years. It is submitted that this Committee should engage closely with that inquiry, as there are likely to be significant parallels in the issues raised by both inquiries.

18. 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. This additional scrutiny is of particular importance in the current context due to the level of activity occurring under instruments made under the *Biosecurity Act 2015* (Cth) (**Biosecurity Act**), which inherently limits the role the Committee can play.
19. The Law Council considers this Inquiry to be an important opportunity to reflect on the practical and policy implications of the many and varied instruments exempt from disallowance throughout this period. This reflection will assist to identify whether further measures and mechanisms are needed in association with such instruments.

Biosecurity Act

20. The pandemic has tested the outermost limits of mechanisms available to enact legislation exempt from disallowance, and the principles guiding the exercise of these powers. Between 1 January 2020 and 20 June 2020 there were 192 instances of COVID-19 related delegated legislation. It is understood that 42 of these instruments were exempt from disallowance. Over half of those were made under the powers granted in the Biosecurity Act, often including substantive matters of public policy.
21. The Law Council acknowledges the need for timely decision making on matters of public health in times of emergency, however submits that the use of the Biosecurity Act to authorise the making of exempted legislation ought to be carefully considered, particularly due to the significance of the powers available and the frequency of their use in the current crisis.
22. A considerable number of provisions in the Biosecurity Act enable the creation of delegated legislation which is not subject to disallowance. For example, during a human biosecurity emergency period, the Minister for Health may, under sections 477 and 478 of the Biosecurity Act, determine emergency requirements, or give directions, deemed necessary to prevent or control the entry, emergence, establishment or spread of the relevant disease in Australian territory. Subsection 477(2) states that emergency determinations made under subsection 477(1) are legislative instruments, but they are not subject to disallowance by the Parliament.
23. The Explanatory Memorandum to the Biosecurity Bill 2014 (Cth) outlines in the following terms why determinations on emergency requirements made under subsection 477(1) are not subject to disallowance:

*... the decision to determine a requirement should be made in accordance with an assessment of the relevant human health risks. If a requirement was disallowed, nationally significant human health risks might go unmanaged and the Commonwealth would be unable to take the fast and urgent action necessary to manage a threat or harm to Australia's human health.*¹⁴

¹⁴ Explanatory Memorandum to the Biosecurity Bill 2014 (Cth), 294.

24. The Explanatory Memorandum further notes 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'.¹⁵
25. While the Law Council acknowledges this justification, it is clear that the powers under the Biosecurity Act in recent times have been tested to an extraordinary degree and it is timely to review the appropriateness of such measures.
26. Few would disagree that the Government had to act quickly in the circumstances, however restrictions placed upon many communities have been ongoing and have now been in place for months. These kinds of decisions warrant further scrutiny and indicate that a review of the framework for exempting delegated legislation is needed.

Human rights compatibility statements

27. Under the *Human Rights (Parliamentary Scrutiny Act) 2011* (Cth) (**the HR Scrutiny Act**), the PJCHR is empowered to scrutinise all legislation, including delegated legislation, for compatibility with human rights. Statements of compatibility with human rights (**statements of compatibility**) are essential to this process, however the HR Scrutiny Act only requires statements of compatibility to be provided for legislative instruments that are subject to disallowance.¹⁶ Consequently, determinations under the Biosecurity Act have not been accompanied by statements of compatibility, despite the PJCHR's advice that:

*... given the potential impact on human rights of legislative instruments dealing with the COVID-19 pandemic, the committee considers it would be appropriate for all such legislative instruments to be accompanied by a detailed statement of compatibility.*¹⁷

28. The Law Council supports this view and also submits that the Committee should explore whether this approach may be appropriate not only in relation to delegated legislation responding to the pandemic, but in other contexts as well.
29. It is particularly concerning that the lack of statements of compatibility has undermined the PJCHR's ability to perform its scrutiny role for measures made under the Biosecurity Act. This raises a perception that the explicit consideration of human rights obligations may not have been part of the policymaking and drafting process of the non-disallowable instrument. Given the significant intrusion on the enjoyment of rights some of these instruments impose, this is an unsatisfactory situation.
30. For example, certain declarations have designated a number of geographical areas in Western Australia, Queensland, South Australia and the Northern Territory for the purposes of the Biosecurity Act and established that persons cannot enter these areas except in specified circumstances.¹⁸ These are made under subsection 477(1) of the Biosecurity Act, and failure to comply is punishable by five years imprisonment or a penalty of up to \$63,000.

¹⁵ Ibid, 17.

¹⁶ *Human Rights (Parliamentary Scrutiny Act) 2011* (Cth), s 9.

¹⁷ Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report of COVID-19 legislation, Report 5 of 2020* (29 April 2020) 4.

¹⁸ *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Determination 2020; Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Amendment (No. 1) Determination 2020.*

31. The Law Council acknowledges this measure was implemented following consultation and for the purposes of preventing the spread of COVID-19.¹⁹ Further, the PJCHR has noted that the measures are intended to prevent the spread of COVID-19 and would appear to promote the rights to life and health.²⁰
32. However, the PJCHR has also stated that the measures would appear to limit freedom of movement, and may disproportionately impact upon Indigenous persons, although this has not been specifically addressed in the explanatory materials.²¹ Consequently, the measures may also engage the right to equality and non-discrimination. The PJCHR notes that the rights engaged may be subject to permissible limitations if they are reasonable, necessary and proportionate, however no statement of compatibility has been provided.²²
33. As noted by Evans and Petrie, who raised the lack of a statement of compatibility provided in relation to the initial COVIDSafe determination,²³ 'it is worth pausing to consider what difference a human rights compatibility statement might have made'.²⁴ The statement requires the Minister to explicitly consider the human rights and freedoms contained in the seven core international human rights treaties under which Australia has obligations. He or she must explain how the legislation interferes with rights and consider whether restrictions on rights are proportionate, having regard to established international human rights law principles.
34. These principles affirm that measures that limit rights must be prescribed by law, be in pursuit of a legitimate objective, be rationally connected to their stated objective, and be proportionate to achieve that objective (having regard to less restrictive means of achieving it, whether effective safeguards are in place and whether it provides flexibility to consider individual circumstances).²⁵
35. The Law Council accepts that before a Minister makes a decision under subsection 477(1) of the Biosecurity Act, they must be satisfied of certain criteria, including that a measure is appropriate and adapted to achieve its purpose, that it is to be no more restrictive or intrusive than required in the circumstances, and that it must not extend longer than necessary.²⁶ It also accepts that statements of compatibility require additional time to prepare, imposing additional burdens during an emergency period.
36. However, in a reduced period of scrutiny and transparency, when much depends on delegated legislation and individuals' rights are heavily curtailed, it is also important to identify and explain to the public how their rights are being weighed up in the decision-making process, and to enable Committee scrutiny. The Law Council therefore recommends that statements of compatibility be provided to accompany all legislative

¹⁹ National Aboriginal Community Controlled Health Organisation, 'COVID-19 restrictions in remote communities' (22 June 2020) written and supplied by the Australian Government Department of Health, Canberra, <<https://www.naccho.org.au/covid-19-restrictions-in-remote-communities/>>; Australian Government Department of Health, 'Australian Health Sector Emergency Response Plan for Novel Coronavirus (COVID-19)' (March 2020) <<https://www.naccho.org.au/wp-content/uploads/management-plan-for-aboriginal-and-torres-straitislander-populations.pdf>>.

²⁰ Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report of COVID-19 legislation, Report 5 of 2020* (29 April 2020), 2.

²¹ *Ibid*, 7-9.

²² *Ibid*.

²³ Note, however, that the later Privacy Amendment (Public Health Contact Information) Bill 2020 has included a statement.

²⁴ Kylie Evans and Nicholas Petrie, 'COVID-19 and the Australian Human Rights Acts' (online, 6 May 2020) *AUSPUBLAW* <<https://auspublaw.org/2020/05/covid-19-and-the-australian-human-rights-acts/>>.

²⁵ Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report of COVID-19 legislation, Report 5 of 2020* (29 April 2020), vii.

²⁶ *Biosecurity Act 2015* (Cth) s 477(3).

measures, including non-disallowable instruments, which significantly impinge on human rights during the pandemic and recovery process.

Recommendation

- **During the COVID-19 pandemic and recovery period, statements of compatibility should accompany all legislative measures, including non-disallowable instruments, which significantly impact upon human rights.**

Beyond the pandemic

37. Legislation passed in the time of an emergency tends to be rushed, developed with little public or parliamentary scrutiny and is likely to be 'over-inclusive or under-inclusive, indiscriminate, or unenforceable'.²⁷ It is important that there is an opportunity for public consultation and wide-ranging debate about what will be an acceptable level of government control and intervention in such times, without the urgency attached to an unfolding crisis, but with the benefit of lessons recently learned from the pandemic.
38. It is therefore critical that this Inquiry learns from the outcomes of the delegated legislation responses to the current health and economic crisis. Guidance should be developed about what is appropriate subject matter for delegated legislation in the times of a health crisis (whether exempt from disallowance or not), so that we can prepare for future crises of a similar kind with the benefit of a framework that was developed before the crisis commenced.
39. In light of key learnings from the pandemic, the Law Council highlights a range of measures for the Committee to consider, including that the Committee consider specific mechanisms and guidance needed in relation to making delegated legislation exempt from disallowance during emergency situations.
40. In this regard, the Law Council notes that the Royal Commission into National Natural Disaster Arrangements was established on 20 February 2020 in response to the extreme bushfire season of 2019-20. The Royal Commission is due to report by 31 August 2020.
41. Where appropriate, this Committee should have regard to the findings of the Commission in respect of legal frameworks and scrutiny and oversight of emergency response determinations.

Recommendation

- **The Committee should have regard to the findings of the Royal Commission into National Natural Disaster Arrangements as they relate to scrutiny and oversight of emergency response determinations.**

Broader review of the framework for exempting delegated legislation

42. It is submitted that the Committee should consider other possible mechanisms for review and oversight which might be required, especially in emergency situations where a high degree of Executive power is being exercised. In particular, where delegated legislation that is exempt from disallowance amounts to substantive law, these

²⁷ Michael Eburn (2011) 'Responding to catastrophic natural disasters and the need for Commonwealth legislation' 10(3) Canberra Law Review 81, 85.

instruments should be subject to appropriate scrutiny at some point in time soon after they are made, especially when the decision might be in effect for a long time.

43. The Law Council acknowledges the need to make decisions quickly, especially in an emergency situation, however it is important that there is some form of oversight to ensure that the decisions are made appropriately and that the impacts of decisions are being measured and evaluated. This, of course, would still need to be balanced against the importance of ensuring decisions made in relation to a health emergency remain in line with best practice scientific and medical advice.

Recommendation

- **Further guidance with respect to the exercise of emergency powers by the Executive should be developed, including consideration of review mechanisms to ensure those powers have been exercised appropriately.**

Virtual sittings of Parliament

44. The pandemic has highlighted a need for Parliament to have flexible arrangements in place to enable parliamentary sittings during an emergency situation. Some of the legislative instruments enacted via delegated legislation during the pandemic might more appropriately be the subject of primary legislation, however the inability for Parliament to convene was an impediment to this occurring.

45. If Parliament was able to sit virtually when circumstances demand such measures, many of these decisions may still have been passed urgently, albeit in the form of primary legislation and voted on in the usual way by our elected representatives. Virtual sittings would also provide a forum for the disallowance of other delegated instruments when warranted. In this regard, Professor Anne Twomey has published commentary as to how virtual mechanisms for sitting could be implemented in a way that remains constitutionally valid.²⁸

46. While the Law Council does not have a settled view on the capacity for Parliament to convene virtually in times of emergency, it suggests that this is an issue that the Committee may wish to explore further.

Recommendation

- **Consideration should be given to the ability for Parliament to convene in times of emergency, including the option of virtual sittings.**

Increased resourcing to Parliamentary Committees at times of emergency

47. There has been a high volume of delegated legislation enacted during the pandemic, often implementing substantial changes to existing laws.

48. The Law Council recommends consideration be given to allocating extra resourcing to the Senate Standing Committee for the Scrutiny of Legislation, the PJCHR, and the Scrutiny of Bills Committee to assist with the timely scrutiny of delegated legislation, if similar circumstances arise again.

²⁸ Professor Anne Twomey (25 March 2020), 'A virtual Australian parliament is possible - and may be needed - during the coronavirus pandemic', The Conversation <<https://theconversation.com/a-virtualaustrian-parliament-is-possible-and-mav-be-needed-during-the-coronavirus-pandemic-134540>>.

Recommendation

- **Parliamentary bodies responsible for the scrutiny of delegated legislation should be adequately resourced to be able to undertake timely scrutiny, especially in times of crisis.**

International best practice

49. Governing bodies worldwide are currently tackling similar issues to those raised through this Inquiry, and there is scope for the Committee to engage with international best practice through knowledge sharing and collaboration with similar bodies.

50. For example, the Bonavero Institute of Human Rights (University of Oxford) has prepared a useful resource evaluating emergency measures implemented in a range of other countries, including in relation to the management and scrutiny of Executive power.²⁹ This report outlines that in New Zealand:

... 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 (broadcast publicly), is chaired by the leader of the opposition and has an opposition majority amongst its 11 members.³⁰

51. While the powers of this committee are not without criticism,³¹ its establishment is an innovative approach to promoting transparency and accountability, as well as maintaining representative debate during a crisis, accompanied by public discourse and engagement. It is submitted that the Committee should have regard to these developments, and other internationally, when considering best practice in an Australian context.

Disallowable delegated legislation in times of emergency

52. Throughout the COVID-19 pandemic, the mechanisms for the scrutiny of delegated legislation more generally have also proven to be functionally challenging, particularly when Parliamentary sittings were limited and at times cancelled. While perhaps beyond the Terms of Reference of this Inquiry, the Law Council submits many of the issues and ideas raised in this submission are also applicable to issues in relation to disallowable delegated legislation.

53. It is submitted that the Committee should also assess how well the mechanisms for disallowance work in times of emergency when parliament is not sitting as often. This is particularly pertinent given the increased likelihood of enacting substantive laws via delegated legislation during times of emergency.

Coronavirus Economic Response Package Omnibus Act 2020

54. The Law Council particularly notes the breadth of the delegated legislative power conferred by the *Coronavirus Economic Response Package Omnibus Act 2020* (Cth)

²⁹ 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>.

³⁰ Ibid, 64

³¹ Ibid.

(Omnibus Act). This piece of legislation contains a wide range of financial measures designed to in response to the economic impacts of the coronavirus.

55. Specifically, schedule 16 of the Omnibus Act empowers Ministers responsible for an Act or legislative instrument with a sunset date on or before 15 October 2020 to make a legislative instrument extending the sunset date for up to six months. While the relevant legislative instruments are disallowable, Parliamentary oversight is limited to disallowance (a blunt yes or no to the date specified by the Minister) and there is no legislative requirement for the Minister to be satisfied that extension is necessary because of the COVID-19 pandemic.
56. Of particular concern to the Law Council is the breadth of the measure and the potential for six-month extensions across large number of legislative schemes. This includes, for example, controversial measures such as questioning and detention powers in the *Australian Security Intelligence Organisation Act 1979* (Cth), which are due to sunset on 7 September 2020.
57. The Senate Scrutiny of Bills Committee sought further information from the Attorney-General after the passage and commencement of the Omnibus Act, which was published in the Scrutiny Digest of 10 June 2020.³² In response to concerns from the Scrutiny Committee as to the absence of criteria to consider before determining whether it is appropriate to defer sunset under the Omnibus Act, the Attorney-General noted that he has advised ministers that they should consider, and address in explanatory statements:
- whether the sunset Act or provision should continue beyond the current sunset date;
 - whether, as a result of the coronavirus pandemic, there are material difficulties in passing legislation to extend the sunset date before the Act or provision is due to sunset;
 - whether there is an identifiable risk to the public of allowing the Act or provision to sunset; and
 - any other exceptional circumstances that justify the making of a deferral determination.³³
58. The Law Council welcomes this response. However, it maintains its concern with the breadth of the measure and endorses the continuing view of the Scrutiny of Bills Committee that it would have been preferable to include such guidance on the face of the primary legislation.³⁴

³² Senate Standing Committee for the Scrutiny of Bills, 'Scrutiny Digest 7 of 2020' (10 June 2020), 40-42.

³³ Ibid.

³⁴ Ibid, [2.14].