NSW Council for Civil Liberties Inc.
PO Box A1386, Sydney South,
NSW 1235, Australia

e: office@nswccl.org.au
t: 02 8090 2952
www.nswccl.org.au

@nswccl
@nswccl

NSWCCL SUBMISSION

REGULATION COMMITTEE OF THE LEGISLATIVE COUNCIL OF THE PARLIAMENT OF NEW SOUTH WALES

INQUIRY INTO OPTIONS FOR REFORM OF THE MANAGEMENT OF DELEGATED LEGISLATION IN NSW

21 July 2022

Acknowledgment

In the spirit of reconciliation, the NSW Council for Civil Liberties acknowledges the Traditional Custodians of Country throughout Australia and their connections to land, sea and community. We pay our respect to their Elders past and present and extend that respect to all First Nations peoples across Australia. We recognise that sovereignty was never ceded.

About NSW Council for Civil Liberties

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

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

Contact NSW Council for Civil Liberties

http://www.nswccl.org.au
office@nswccl.org.au
Correspondence to: PO Box A1386, Sydney South, NSW 1235

1. NSWCCL (NSWCCL) thanks the Regulation Committee for the opportunity to make submissions to this important Inquiry.
2. NSWCCL made a submission and provided oral evidence to this Committee during its Inquiry into the Making of delegated legislation in New South Wales which was tabled on 22 October 2020 (the 2020 inquiry and 2020 report). At **Annexure A** you will find attached a full copy of our submission and answers to questions on notice to the 2020 Inquiry. We rely on that submission and those answers in their entirety for the purposes of this Inquiry and commend them to the Committee. NSWCCL also made a submission and gave oral evidence at the Senate Standing Committee for the Scrutiny of Delegated Legislation Inquiry into the exemption of delegated legislation from parliamentary oversight (final report 16 March 2021). At **Annexure B** you will find attached a full copy of our submission and a full copy of our answers to questions on notice to the Senate Inquiry. To the extent applicable to the different constitutional and legislative context in NSW, we rely on those documents in their entirety and commend them to the Committee.

NSWCCL reaction to 2020 report and Government response

3. The Government response to the 2020 report was tabled on 19 April 2021. The Committee's report was a comprehensive and long required examination of the processes by which much of the law in this State is made. Given the complexity of the law and procedure applicable to delegated legislation in NSW, NSWCCL considers it wise to refer an inquiry in the terms set out in Recommendation 2 of the 2020 report to the Law Reform Commission. NSWCCL is disappointed that the Government did not support that recommendation.
4. Although the 2020 report was a very welcome explanation [examination, perhaps?] of some of the key issues concerning delegated legislation, its recommendations offered a somewhat unambitious response to the evidence received.

5. Recommendation 1 is clearly a necessary step in furthering the rule of law principle that the governed must know the law by which they are governed. However it was drafted in open textured and discretionary terms which leave compliance with it very much in the eye of the beholder.
6. Recommendation 4 is a desirable step but does not go far enough. It broadly aligns with NSWCCL's answer to Question 9 of the questions on notice put to us by the Senate Standing Committee for the Scrutiny of Delegated Legislation (see **Annexure B**). In that answer NSWCCL stated that both the exempting bill and the particular exempted instrument must be accompanied by explanatory notes which attempt to justify the exemption from disallowance being effected and that this requirement must be a legislative one. The same view applies to bills which exempt instruments from disallowance in NSW and those bills and instruments which push against good regulation-making practice because they allow/include Henry VIII clauses, represent shell legislation or quasi legislation. NSWCCL notes that the Government supported this recommendation in principle however the actual reasoning given suggests that it only supports "highlighting" the presence of Henry VIII clauses, shell legislation or quasi legislation in bills. While the Government gave in principle support to explaining why such features are necessary, it noted that explanatory notes are prepared by legislative drafters and do not usually traverse the policy rationale for a bill, in distinction to other jurisdictions, and expressed a view that second reading speeches can better address the explanations sought by the Committee. To be clear, NSWCCL does not consider the Government's response to provide a commitment to inserting such explanations in second reading speeches going forward. But even if it did, we would still consider such a commitment to be insufficient.
7. Recommendations 5 and 6 of the 2020 report were also supported by NSWCCL. By the time of the Government response these recommendations were followed and the Committee's constituting resolution had been appropriately amended. At [23] of our

submission we stated that extra resources need to be made available to ensure proper scrutiny of delegated legislation is achieved. We hope this has occurred.

More scrutiny is needed

8. In the aftermath of the pandemic, in which delegated legislation was used to curtail fundamental rights of the citizens of NSW (often but not always with proper justification), it is more important than ever to reconsider the management of delegated legislation in NSW and ensure that past mistakes are not repeated. The balance must be restored to the relationship between the Executive and Parliament which has tipped too far in the Executive's favour. In order to restore this balance, ambition is required.
9. It remains of paramount concern that the disallowance procedure provided for in Part 6 of the *Interpretation Act 1987* does not apply to instruments which are not statutory rules. The definition of statutory rules in s 3 of the *Subordinate Legislation Act 1989* does not include rules which are not made by the Governor or which do not require the approval of the Governor by law. Thus, a very wide class of instruments are totally exempt from the disallowance procedure, including, for example, orders made by the Minister for Health under the *Public Health Act 2010*, which we all know have the capacity to provide for extreme intrusions into the daily lives of the citizens of NSW. In our answer to Question 1 of the questions on notice put to us by the Senate Committee for the Scrutiny of Delegated Legislation (see **Annexure B**), we stated the following:

> *Any consideration of the circumstances in which legislative instruments ought to be capable of exemption from disallowance must begin by acknowledging the indispensable constitutional role played by the disallowance procedure. Absent the opportunity to disallow legislative instruments, the only methods by which to remove the offending instrument are through either judicial review or Parliament repealing or amending the enabling legislation. Given the government almost invariably controls the House of Representatives, the chances of parliamentary amendment or repeal are slim. Since the judiciary rightly lacks the constitutional*

authority to do anything other than declare and enforce the law, it may only invalidate delegated legislation on the basis that it does not fall within the delegated legislative power granted by the enabling legislation. Thus, disallowance is the only realistic mechanism by which the offending instruments can be repealed in whole or part in the great majority of cases. The fact that other scrutiny mechanisms, of varying strengths, may nevertheless exist does not undermine the claim that disallowance is arguably the single most important scrutiny mechanism available.

10. NSWCCL strongly agrees with the submission of Professor Gabrielle Appleby to the 2020 Inquiry to the effect that the provisions of Part 6 of the *Interpretation Act 1987* should be expanded to apply the disallowance and tabling provisions to all delegated legislation.
11. Furthermore, there should be further provisions in the *Interpretation Act 1987* to limit the circumstances in which an exemption to the disallowance procedure should occur under s 41(9) of the *Interpretation Act 1987*. Although Parliament cannot bind itself, these restrictions would be accompanied by significant political weight and the Parliament would have to acknowledge the consequences of revising or going against the spirit of previously propounded legislative standards setting out the very limited circumstances in which exemption from disallowance can be allowed. NSWCCL considers that exemptions from disallowance should be limited to only the most exceptional circumstances. Given our utmost respect for the institution of Parliament and our concern for limiting "islands of power immune from supervision and restraint" (*Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531; [2010] HCA 1 at [99]), NSWCCL errs on the side of caution. We are highly sceptical of claims that there are ordinary or usual reasons, in normal times, justifying exemption from disallowance.
12. NSWCCL also cannot see why, as per the Bar Association's submission to the 2020 Inquiry, the time between the disallowance and remaking of a statutory rule should not be extended from 4 months to 6 months. At the federal level the relevant time period is

6 months. A longer period of time before a rule can be remade provides more protection from a scenario in which the Executive simply determines to remake disallowed rules again and again to circumvent parliamentary oversight. An extension of the term in which delegated legislation can be remade may also serve a deterrent function in preventing the Executive from too hastily attempting to make similar or substantially similar delegated legislation in the hope that there is no move to disallow it again.

13. NSWCCL agrees with Professor Appleby's second recommendation in her submission to the 2020 Inquiry that the exemption of quasi-legislation from the date-time stamp requirement effected by s 69(2) of the *Interpretation Act 1987* should be excised.
14. As in 2020, NSWCCL agrees with Professor Lorne Neudorf's suggestion for a public complaints mechanism for delegated legislation. On that topic our questions on notice dated 12 August 2020 are a useful reference (see **Annexure A**).
15. In principle, NSWCCL supports the idea of conferring on the NSW Parliament the ability to amend delegated legislation within a period of six sitting days after tabling, as presently found in s 68 of the *Legislation Act 2001* (ACT). This may be a useful mechanism for Parliamentary oversight and scrutiny of delegated legislation as it provides an alternative to the bluntness of disallowance.
16. Finally, consistent with a very longstanding NSWCCL position, NSWCCL agrees with the Bar Association's recommendations 5 and 6 in their submission to the 2020 inquiry that NSW should become the fourth state or territory in the Federation to implement a Bill of Rights. Their recommendations were as follows:

> *v. a statutory Bill of Rights should be enacted for NSW to:*
>
> > *a. require all legislation co be interpreted in accordance with Australia's international human rights obligations;*
> >
> > *b. provide for all proposed legislation and subordinate legislation to be scrutinised by Parliament against these standards;*

c. strengthen the mandate of the Parliament's LRC to carry out such scrutiny; and

d. allow for a declaration chat legislation is incompatible with such standards;

vi. consideration should be given to whether a Bill of Rights, if enacted, should permit striking down non-compliant subordinate legislation, unless the parent Act makes it impossible for compliance to occur[.]

Conclusion and reflections on fundamental principle

17. In this detailed and highly technical area of law and procedure it is all too easy to lose sight of the greater goal. We all share a commitment to better institutions which better reflect the fundamental constitutional principle of responsible government. Responsible government means that the Executive is responsible to Parliament. Pockets of Executive power immune from supervision and restraint strike at the heart of responsible government. At the core of responsible government, which is merely a species of representative democracy, is a faith in the collective wisdom and values of the people of NSW. It follows that our institutions should be designed in such a way that the people of NSW, through their elected representatives, make the laws by which they are governed. The procedure and practices of Parliament will ensure that laws are made with greater transparency and scrutiny than otherwise. This is ultimately one guard against the abuse of civil liberties by the Executive.

This submission was prepared by Jared Wilk, committee member, on behalf of the NSWCCL.

Yours sincerely,

Sarah Baker
Secretary

NSW Council for Civil Liberties

Contacts in relation to this submission:

Sarah Baker, Secretary

Annexure A

NSWCCL Submission tabled 22 October 2020 (the 2020 inquiry and 2020 report).

https://www.parliament.nsw.gov.au/lcdocs/submissions/67858/0005%20NSW%20Council%20of%20Civil%20Liberties.pdf

Answers to questions on notice to the 2020 Inquiry

Question: The CHAIR: When you talk about public complaints process, in your own mind can you tell the Committee what you are actually thinking of, what would that look like? How would it happen? If I was a member of the public and I wanted to lodge a complaint against the process, how do you see that happening?

Answer: I thank the committee for the opportunity to provide a written response to their question seeking further details about my vision for a new public complaint mechanism in respect of delegated legislation in NSW.

As I explained at the hearing, in making this recommendation I was endorsing Recommendation (f) in the submission of Professor Lorne Neudorf to this same inquiry. His recommendation was in the following terms:

> *Create a new public complaints process for delegated legislation - It is often the case that the implications of new law cannot be fully anticipated until it is applied in practice. Both the Legislation Review Committee and the Regulation Committee should establish a process for accepting public complaints in relation to existing delegated legislation. Standing orders and the relevant legislation should be amended as needed to provide the Committees with the authority to scrutinise and report upon delegated legislation referred by members of the public. Parliamentary disallowance should also be made available in relation to such delegated legislation.*

In my view, such a mechanism would be extremely valuable for civil society groups such as NSWCCL and any individual or business that has been individually aggrieved by a piece of delegated legislation. It would lighten the very onerous scrutiny burden carried by the Legislation Review and Regulation Committees by 'crowdsourcing' scrutiny and analysis, which can only improve the public debate. Public complaints may highlight issues with instruments which could not be foreseen upon enactment. Moreover, such a mechanism would give constituents and civil society confidence that their voices are being heard in relation to legislative instruments which may never attract media or political attention given their low-profile, and fast-changing or technical characteristics. In this way it strengthens the transparency and civic trust which is so fundamental to the rule of law.

Professor Neudorf has informed me in correspondence that his recommendation emerged from his comparative study of regulation-making practice, during which he examined New Zealand's Regulations Committee. Standing Order 320 of the NZ House of Representatives provides:

> *(1) Where a complaint is made to the committee or to the chairperson of the committee by a person or organisation aggrieved at the operation of a regulation, the complaint must be placed before the committee at its next meeting for the committee to consider whether, on the face of it, the complaint relates to one of the grounds on which the committee may draw a regulation to the special attention of the House.*
> *(2) The person or organisation making the complaint is given an opportunity to address the committee on the regulation unless the committee agrees by unanimous resolution not to proceed with the complaint.*

Examples of complaints made, and responses to complaints under these orders are available on the Committee's website under 'Business' and 'Reports'.

This model sets a great example on which NSW can build. An online dropbox, or even merely a dedicated email address, could be established through which complaints are made.

In my view, standing to make a complaint should be broader than just those *aggrieved*; it should explicitly include organisations such as NSWCCL with an intellectual or political interest in a particular instrument or "trends or issues that relate to regulations" as well as other forms of delegated legislation. Liberalising standing to this degree is unlikely to result in excess complaints which drain the committee's time and resources given the generally low public awareness of delegated legislation and allowance for rejecting complaints (discussed below).

The standing orders or legislation could require that the Committee "consider" the merits of the complaint and whether to conduct an inquiry into or otherwise draw to the attention of the Houses the delegated legislation which was the subject of the complaint. I expect the standard of 'consideration' to generally accord with that legally demanded of administrative actors, being 'proper, genuine and realistic' consideration requiring no more than an 'active intellectual process' with respect to the subject matter (see *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611; *Carrascalao v Minister for Immigration and Border Protection* (2017) 252 FCR 352). If a complaint is considered only for the request to lend further attention to the instrument to be declined, written reasons should be published explaining why the request was declined. Procedural fairness should be accorded, with the understanding that this is not a court and the committee is not adjudicating individual legal disputes. It is sensible to mandate unanimity in respect of the decision to reject a complaint, as this will reduce partisan rejection of complaints. It should not be too difficult to achieve unanimous decision-making where complaints are clearly unmeritorious or frivolous.

One of the best aspects of the NZ system is that the complainant is provided with an opportunity to address the committee unless the complaint is declined. We recommend that this feature be retained in the NSW mechanism, as it provides a maximum degree of procedural fairness and public participation. This could be a written or oral address.

NSWCCL emphasises that the complaints mechanism should be designed liberally rather than restrictively given the important transparency, scrutiny and public participation purposes it serves.

This recommendation is in addition to our endorsement of the Law Society of NSW recommendation that the Regulation Committee be given the power to self-initiate inquiries, which may assist in the implementation of the complaint mechanism. Given Parliament is constitutionally vested with legislative power, there is no reason why a Parliamentary committee cannot investigate a regulation at any time.

Finally, I recognise that these recommendations would need to be accompanied by an increase in the resources of the Committee.

I hope this is helpful to the Committee.

Kind regards,

Jared Wilk

Question:

The CHAIR: One of the issues around the vast numbers that the Hon. Greg Donnelly spoke about off the back of Professor Neudorf's testimony, there are resourcing issues. There are constraints. The committee into committees, as it is colloquially referred to that was chaired by the Hon. Scott Farlow, looked at a range of committee structures and enhancements to the Legislative Council committee structure, but it did come back to resourcing and what could be done within the resources that are made available. Some of the mechanisms that have been discussed today by other people of New Zealand or Victorian or even the Commonwealth model, if you were to set aside resources as not an issue, what would you consider to be the best mechanism for us to deal with these types of issues?

Answer:

I thank the Committee for the opportunity to answer the question given on notice.

The question refers specifically to the Legislative Council Committee. It is predicated on recommendations received in various submissions to the inquiry that the Committee should increase the scope of the instruments it considers to include review of a wider range of regulation. It is acknowledged that limited time to conduct formal scrutiny affects the overall capacity of the Committee.

Set out, below, are some suggested mechanisms to be adopted by the Committee to cope with increased workload. I've had the benefit of suggestions from Dr Sarah Moulds (a) and b) below).

a) The use of joint secretariats including senior experienced Secretariat staff. When evaluated in 2018, the Regulation Committee was supported by a director, inquiry manager and part time administration officer. By comparison Commonwealth committees tend to be assisted by a secretariat and numbers of research and administrative support and pool those resources. When necessary, the Committee should be able to call on seconded staff from specialist agencies.

b) The use of panels of experts, not limited to but, including legal experts. A panel of legal experts, paid hourly, rather than full time, could review instruments against the Committees scrutiny principles and report on compliance. The legal adviser to the UK Human Rights Committee, for example, reviews all Bills at an early stage, and brings those Bills which raise significant
concerns to the Committee's attention. Early intervention in the review process also addresses
issues around the short frame for scrutiny.

The Committee could be assisted by other specialist advisers, remunerated at agreed rates, and engaged part time or only for the duration of a particular inquiry.

c) Coordination of multiple legislative review committees for inquiry and reporting.
Professor Lorne Neudorf's submission recommends that the Legislation Review Committee and Regulation Committee coordinate their work.
The Legislation Review Committee and the Regulation Committee should seek to coordinate their work in scrutinising delegated legislation as they play complementary roles. For instance, through its systematic scrutiny of all delegated legislation, the

Legislation Review Committee can alert the Regulation Committee to problematic regulations. The Regulation Committee can in turn explore these concerns by carrying out an inquiry into the relevant delegated legislation. Commonwealth parliament can have up to three or four committees working interactively, scrutinising a Bill, with each committee having a different mandate and membership; an indication of how existing Committees can cooperate to carry out extensive review of regulations.

d) Requirement for provision of a Statement of Compatibility to be provided with delegated legislation similar to that provided under s.8 of the Human Rights (Parliamentary Scrutiny) Act 2011. This requirement was also a recommendation in the NSW Bar Association submission. In Queensland and Victoria the scrutiny committees are provided with an executive
statement on rights implications before a Bill is introduced, similar to the Commonwealth Statement. NSW would be greatly assisted by a Charter of Human Rights against which rights implications could be measured.

e) Continued enhanced facilitation of public input. The deliberative capacity of this Committee benefits from public inquiry after which specific recommendations can be made for legislative change. Public submissions received from a range of organisations with the legal expertise to offer specific recommendations also provides a forum for different viewpoints. Public input should be a priority for legislation that restricts rights and freedoms.

Regards Michelle Falstein

Annexure B

NSWCCL submission to the Senate Inquiry

https://d3n8a8pro7vhmx.cloudfront.net/nswccl/pages/6049/attachments/original/1606949017/sub22_NSWCCL.pdf?1606949017

Answers to Questions on Notice

Senate Scrutiny of Delegated Legislation Committee
ANSWERS TO WRITTEN QUESTIONS ON NOTICE
NSW Council for Civil Liberties
Inquiry into the exemption of delegated legislation from parliamentary oversight
28 August 2020

QUESTION 1:

Are there any circumstances in which you consider that it is appropriate to exempt delegated legislation from parliamentary oversight mechanisms, such as disallowance?

ANSWER:

Any consideration of the circumstances in which legislative instruments ought to be capable of exemption from disallowance must begin by acknowledging the indispensable constitutional role played by the disallowance procedure. Absent the opportunity to disallow legislative instruments, the only methods by which to remove the offending instrument are through either judicial review or Parliament repealing or amending the enabling legislation. Given the government almost invariably controls the House of Representatives, the chances of parliamentary amendment or repeal are slim. Since the judiciary rightly lacks the constitutional authority to do anything other than declare and enforce the law, it may only invalidate delegated legislation on the basis that it does not fall within the delegated legislative power granted by the enabling legislation. Thus, disallowance is the only realistic mechanism by which the offending instruments can be repealed in whole or part in the great majority of cases. The fact that other scrutiny mechanisms, of varying strengths, may nevertheless exist does not undermine the claim that disallowance is arguably the single most important scrutiny mechanism available. The situation is made worse by the fact that under current arrangements this committee cannot review exempted instruments. Naturally it follows that exemptions from disallowance should be limited to very exceptional circumstances. On this point, every submission to this inquiry, even that of the Attorney-General's department, seems to agree.

The difficulty lies in drawing the appropriate line. Given our utmost respect for the institution of Parliament and our concern for limiting pockets of Executive immunity and unrestrained power, NSWCCL errs on the side of caution. As per our submission, we are highly sceptical of claims that there are ordinary or usual reasons, in normal times, justifying exemption from disallowance. As a general rule, we are also sceptical of attempts to comprehensively spell out the exceptional circumstances - by their nature difficult to foresee – which may justify exemption from disallowance. Rather, our view is that those circumstances must be exceptional and provide a compelling justification for exemption. As per our submission, we do believe that the COVID-19 pandemic does likely provide sufficient justification, depending on a range of characteristics of the instrument involved, including the extent to which it unduly trespasses on civil liberties and rights, the status of the pandemic at the time, the mischief to which it is specifically directed, the geographical zone of operation or targeting of the instrument, etc. A world war or serious conflict in which Australia was embroiled may, depending on the circumstances, constitute another justification, as may a very serious depression or financial crisis. As you can see, we would set the threshold very high. Importantly, we believe exemption from disallowance should not be permitted where the instrument is made under a Henry VIII clause, unless the enabling provision specifies limits on the duration of the effect of the clause or instruments made under it.

We dealt with four circumstances identified by other submissions as possibly justifying exemption in our submission and explained why we believed they are not persuasive. These were:

- Where measures need to be taken on the basis of scientific and medical evidence, and making them disallowable would add inappropriate political considerations to the decision-making process;

- Where the democratic nature of the delegated law-making body provides the necessary accountability for these exercises of legislative power;
- Where instruments do not have an impact on public rights, obligations, duties and as such Parliament may determine, for efficiency reasons, are not required to be subject to further democratic oversight;
- Where instruments are made accountable to Parliament through the alternative mechanism of an allowance process, and as such there is appropriate democratic oversight and accountability.

Please see our submission for our responses to these.

In the Attorney-General's department submission, the authors listed 11 specific reasons which might justify exemption. In what follows we will take each in turn and briefly comment on the persuasiveness of the rationale behind them.

1. *There is an alternate parliamentary role in relation to that type of instrument.*
    - As we explained above, there is no alternate parliamentary mechanism which provides the same level of scrutiny as disallowance.
    - The example given is of a determination under s78 of the PGPA Act 2013 (Cth). Though the alternative procedure in that case allows for disallowance within 5 sitting days of tabling, this is a very short turnaround and likely too short for parliamentarians or the Committee to properly analyse and scrutinise the instrument. When the 5-day period elapses, the instrument is virtually beyond scrutiny.
2. *The rule-making process should or needs to be separated from the political process*
    - Please see our submission, paragraph 8 for our response to this point.
3. *The instrument is an internal management tool for Government and an integral part of the government's relationship with government agencies and employees*
    - Please see our submission, paragraph 10 for our response to this point.
4. *The instrument is central to machinery of government arrangements or electoral matters.*
    - It is difficult to understand the justification for minimising the role of Parliament in providing for, scrutinising or regulating the conduct of government arrangements or electoral matters.
    - Especially when crucial to the machinery of government or electoral matters, instruments of this kind would seem to be an intrinsically and paradigmatically political issue, and one central to the efficacy of parliamentary democracy, in which Parliament has the supreme role.
5. *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*
    - Commercial certainty is constantly undermined by policy and regulatory decisions. Statutes are frequently amended after they come into operation. Indeed, any change to the law, whether by primary or delegated legislation, can be seen to generate uncertainty. Yet this argument is not made, at least in all seriousness, with respect to primary legislation.
    - There is a reason that Parliament can always amend statute law, even if to do so would cause uncertainty. Reducing uncertainty for business has never justified disconnecting the process of lawmaking from the People's representatives.

6. *The instrument is intended to remain within Executive control*
    - This may seem like a convincing rationale at first. However, it is possible to envisage serious issues even with the example given by the Department: a direction under s29(7) of the Crimes (Currency) Act (1981).
    - Without going into the intricacies of the relevant statutory scheme, a direction of this type (assuming other legislative, judicial review or constitutional restrictions do not apply) could foreseeably be abused; imagine the Treasurer ordered that the person whose property has been condemned by a court as forfeited should be dealt with or disposed of by public authorities in a corrupt or improper manner? It would certainly be in the public interest to confer on the Senate the power to disallow an instrument which facilitates corruption or impropriety (even if judicial remedy were available).
7. *The exemption is in response to a parliamentary recommendation*
    - This is an entirely unconvincing justification. Parliamentary committees do not speak with the force of the entire Senate. The Senate (or the House for that matter) should have the opportunity to overrule the recommendation of a committee if it later disapproves of the recommendation or its implementation. Recommendations are not, and have never been treated as sacrosanct.
8. *The instrument is part of an intergovernmental scheme*
    - Such an instrument may well meet the test of exceptional circumstances providing a compelling justification.
    - However, it is not apparent quite what the justification is for this exemption, which is currently in force by virtue of s44(1) of the *Legislation Act 2003 (Cth).* To quote the eminent scholars behind the CCCS submission, per footnote 20: "We note however that the relevant legislation and extrinsic materials relating to this example are opaque as to the rationale behind this exempted class. This absence of adequate explanation or justification for exemption is precisely why we are urging that Parliament take direct responsibility for determining which legislative instruments should be exempt from disallowance, and why."
9. *The instrument is required under an international treaty or convention.*
    - International treaties to which Australia is a signatory regularly specify obligations which Australian law fails to implement. The Australian government is displaying an inconsistent approach on this question. Australia's constitutional arrangements are characterised by a dualist approach to international law, whereby international law does not form part of municipal law until relevantly enacted. Parliament's decision not to give effect to a treaty provision has always been accepted in Australia's legal system and democracy. The fact that we have an international law obligation to give effect to an international treaty in domestic law has never been thought to justify undermining the supremacy of Parliament.
    - Nevertheless, in appropriate cases, this may provide a compelling justification for exemption, given Parliament has already presumably enacted the relevant obligations or delegated the power to fulfil them to the Executive, and the courts would retain the ability to invalidate delegated legislation which is outside the field of the statute. However, much would depend on the relevant context and the nature of the treaty and instrument concerned.

10. *The instrument is critical to ensuring that urgent and decisive action can be taken in situations of emergency or where circumstances are rapidly evolving*
    - Please see our answer to question 5 in this document for our response to this justification.
    - It is possible that an instrument would nevertheless meet our threshold for justified exemption, depending on all of the surrounding circumstances.
11. *The exemption will provide certainty in meeting specific security needs*
    - NSWCCL observes that it does not represent a radical departure from political norms in Australia to defer to the Executive on matters of security. However, we would also note that NSWCCL has long been warning of the dangers of excessive deference to the Executive on an ever-expanding range of security matters, which has arguably facilitated an enormous shift in power to the Executive in this country since September 11 2001.
    - NSWCCL can certainly foresee circumstances in which the prevailing security environment tends in favour of deferment to the Executive and reduced parliamentary oversight. A serious international conflict or existential domestic security threat would be very likely to constitute such circumstances. We emphasise however that parliamentary scrutiny does not end where national security threats begin, and that depending on circumstances there may not be reasonable justification for exemption.

QUESTION 2:

Some submissions have questioned the appropriateness or effectiveness of disallowance as a parliamentary oversight mechanism during times of emergency. In the absence of disallowance, are there any other parliamentary oversight mechanisms that would be appropriate alternatives during such periods?

ANSWER:

It is by no means clear to NSWCCL that a 'time of emergency' necessarily constitutes sufficient justification for exempting delegated legislation from disallowance. Much depends on the nature of the emergency and the delegated legislation.

However, assuming the emergency was sufficiently grave, and the legislation sufficiently balanced, there are a number of parliamentary oversight mechanisms that are alternatives to (though not substitutes for) disallowance during an emergency period, suggested in the NSWCCL submission and other submissions to the Inquiry.

1. Timed repeal or clear sunset clauses in emergency legislative instruments. "An important constraint in those circumstances would be to limit the operation of the exemption, or the instrument itself, to the period of the emergency." Submission 3, Clerk of the Senate

2. The Senate Standing Committee for the Scrutiny of Delegated Legislation should be given the power and responsibility to scrutinise non-disallowable legislative instruments. "Committee scrutiny is therefore compatible with the context of making emergency delegated legislation during a pandemic as it provides an ex post facto review, at which point delegated legislation can be improved and strengthened…..If it is not practicable to

make disallowance available, the Senate should amend standing order 23 to allow the Committee to continue its scrutiny work for all delegated legislation, including delegated legislation that is not subject to disallowance." Submission 11, Neudorf

3. Conversion to a disallowable instrument after time. "[I]f an emergency is continued for a significant period of time (e.g. 6 months or longer) then consideration should be given to an automatic transformation of such legislative instruments into disallowable instruments after that time." Submission 18, Twomey

4. Statements of compatibility and other evaluative information. "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." Submission 21, Law Council of Australia

QUESTION 3:

Why is it important to explicitly limit the time in which emergency legislation is in force for? How could the inclusion of repeal or sunset clauses to time-limit emergency legislation provide for greater parliamentary oversight?

ANSWER:

This pandemic has provided Australia with a first-hand example of why it is important to explicitly limit the time in which emergency legislation is in force. That is, that various parliaments Commonwealth and State adjourned for significant periods of time. Parliament abdicated its responsibility to oversee and scrutinise determinations, orders and other types of delegated legislation.

Without being reviewed there must at least be explicit limits to the period of operation of emergency legislation. Our submission made the point that, although the determinations in the Act are time limited, the time of operation is renewable indefinitely and the emergency period has already been extended for a further three months from 17 June 2020 to 17 September 2020. Emergency legislation without time constraints arguably leads to a kind of executive creep, where power shifts to the executive and emergency powers are normalised.

Repeal or sunset clauses provide greater parliamentary oversight, because they are a trigger to remind the government and the people of Australia that legislation - in the case of COVID-19 an explosion of legislation - can be overlooked and continue unnecessarily and inappropriately for longer than intended. Sunsetting provides the opportunity for government to justify the further imposition of restrictions. These restrictions on human and civil rights are great and can only be expected to be accepted by the people of Australia for a short period. Sunsetting of legislative instruments, generally, is intended to ensure that laws remain fit for purpose and up to date.

It can also be argued that the notion of 'emergency' is itself temporally limited by definition. By the end of 3 or even 6 months, the emergency has metamorphosed into a new normal. Therefore, it makes inherent sense that the duration of the emergency and the significant powers accompanying it are 'sunset'.

QUESTION 4:

A significant portion of the instruments made in response to COVID-19 affect personal rights and liberties. Do you consider that there are sufficient safeguards to protect personal rights and liberties in the absence of disallowance?

ANSWER:

In NSWCCL's view, the disapplication of s42 of the Legislation Act 2003 (Cth) renders the scrutiny mechanisms available virtually inappreciable. The Senate, generally the House, if there is one, without a government majority, has its constitutional role effectively bypassed; it cannot repeal the instrument, and its Delegated Legislation Committee cannot review the instrument under Standing Orders, unless the instrument is also subject to disapproval or affirmation by the Senate. Without scrutiny, and particularly when combined with the presence of other dangerous regulation-making practices such as Henry VIII clauses, incorporation of quasi-legislation and the exploitation of so-called skeleton legislation, the Executive is given a licence to make significant social and policy decisions without listening to the People's voice expressed through their elected representatives.

In the COVID-19 context, we have seen the Executive utilising its powers under the *Biosecurity Act 2015 (Cth)* to substantially limit fundamental rights and liberties. The ministerial determinations by which these policy changes have been accomplished are not subject to disallowance (Biosecurity Act 2015 (Cth), s477(2)). They are paired with a Henry VIII clause of alarming breadth, stating that the Minister's determinations under section 477 of the Act apply "despite any provision of any other Australian law" (Biosecurity Act 2015 (Cth), s477(5)). Non-compliance with the determinations made under s477 constitutes a criminal offence with significant carceral punishments attached (Biosecurity Act 2015 (Cth), s479). Given that disallowance is not permitted, this Committee cannot scrutinise instruments made under s477, as such instruments are beyond Standing Order 23. In effect, the Parliament has signed a blank cheque enabling the Executive to make wide ranging policy decisions in response to the pandemic, with very serious civil liberties implications.

We acknowledge that the Senate 'COVID-19 Committee' has been formed to enhance scrutiny of the pandemic response, and that other parliamentary committees may do important scrutiny work (such as the PJCHR). We further acknowledge that questions on notice and the broader electoral cycle can provide some degree of scrutiny. However, the announcement in March that Parliament would be suspended until August – which has mercifully not eventuated – indicates just how easy it is to dispatch with the day-to-day scrutiny provided by parliamentary debate. The electoral cycle is simply inadequate for scrutiny of bills and instruments which are not widely known and may not have effect for years. The COVID-19 committee has an extremely broad mandate and can hardly concern itself with every piece of (constantly mounting) delegated legislation. Successive governments have evinced a worrying readiness to ignore the pleas of the PJCHR since its inception.

In sum, we do not believe scrutiny mechanisms are sufficient in the absence of disallowance.

QUESTION 5:

Approximately 19% of delegated legislation made in response to COVID-19 has been exempt from disallowance. Are exemptions from parliamentary oversight necessary for the Government to respond effectively to the pandemic?

ANSWER:

There is little doubt that the COVID-19 pandemic represents an unprecedented challenge to the Australian government, requiring it to act flexibly, quickly and on the basis of the best health and scientific advice. In our submission, we did consider the COVID-19 pandemic as a potential example of exceptional or emergency circumstances providing a compelling justification for exempting an instrument from disallowance. However, this should not be viewed as endorsing the view that any instrument which has been exempted was an appropriate instrument for exemption, or that any COVID-19 related instrument which the government desires to be exempt ought to be exempt.

We remain unconvinced that two of the reasons commonly provided for exempting delegated legislation from disallowance during the pandemic always or even usually supply adequate justification. The first refrain is that the instrument should be exempt because rule- making in that context should be "separated from the political process". As we explained in our submission at paragraph 8:

> "*NSWCCL does not consider that adding political considerations is always or even usually inappropriate even where measures need to be taken on the basis of health and scientific advice. Where those measures have very significant civil liberties implications, as the current determinations under the Biosecurity Act 2015 (Cth) have, their formulation and implementation are unavoidably and deeply political questions. 'Taking the politics out' entirely can lead to unaccountable technocratic governance."*

It is very rare that a matter of great public importance has no political implications. Different views may emerge on the matter and should be given voice in Parliament. The Attorney-General's department lists, as an example of the kind of matter epitomising circumstances in which exemption should be provided for this reason, "a determination of a listed disease under section 42 of the *Biosecurity Act 2015 (Cth)."* However, even listing of diseases under that Act cannot be considered merely politics free zones. Consider a scenario where the Minister under section 42 decides to list a disease the very existence of which is controversial. Under section 475 of the Act, the Governor-General, on the advice of the Health Minister, may declare that a human biosecurity emergency exists, which switches on the extraordinary powers in section 477 of the Act. The potential curtailments of civil liberties which follow could have been avoided if the listing under s42 were subject to disallowance.

Moreover, although it is not argued that Senators are always informed, rational and level-headed in respect of health, scientific or technical matters, a healthy system of parliamentary democracy should not shy away from providing elected representatives the opportunity to debate differing views on what may be fiercely contested, or genuinely uncertain questions of health or science.

Another argument made is that exemptions are justified where "the instrument is critical to ensuring that urgent and decisive action can be taken in situations of emergency or where circumstances are rapidly evolving" (Attorney-General's Department Submission, page 8). To this we can do no better than quote Professor Lorne Neudorf, who responds in his submission that:

> *"Disallowance and Committee scrutiny is therefore compatible with the context of making emergency delegated legislation during a pandemic as it provides an ex post facto review, at which point delegated legislation can be improved and strengthened. Parliamentary scrutiny of laws made by the executive government hastily and on the basis of incomplete information, which is much more likely during an emergency, is especially needed to provide accountability and fulfil the constitutional principle of responsible government" (Page 8).*

Furthermore, anxiety about the potential for disallowance to disrupt or hamper the response to a pandemic like COVID-19 ignore that disallowance is very rarely used in practice – with much

achieved through haggling over instruments in the knowledge that disallowance is always possible – and that by and large the Opposition has demonstrated a high degree of bipartisanship in respect of the pandemic response, as is arguably appropriate.

QUESTION 6:

Should the committee have the power to scrutinise and report on delegated legislation that is exempt from disallowance? How would this improve parliamentary oversight of delegated legislation?

ANSWER:

NSWCCL strongly recommends that the committee should be given the power to scrutinise exempted delegated legislation. This is about ensuring a minimum level of parliamentary scrutiny for instruments which change the content of the law of Australia. Although the committee would not be able to recommend disallowance if the instrument were exempted, it would be able to call mistakes, undue trespasses on civil liberties and poor drafting to the attention of the parliament and the wider community. If we are to have legislative instruments immune from repeal by the parliament entirely (at least while a majority government which has retained party cohesion prevails), senators should at least be permitted to publicly scrutinise and criticise, if need be, the actions of the Executive. We note that this committee fulfils a vital constitutional function in Australia's democratic system. Since parliamentarians lack the time or expertise to scrutinise the tremendous amount of delegated legislation created (with around 20% exempt from disallowance), the committee provides the institutional support for parliamentarians who wish to fulfil their scrutiny function.

QUESTION 7:

How could clear guidance be given on what constitutes an emergency period, particularly noting that some emergency periods may extend for long periods of time?

ANSWER:

In the context of the current pandemic, the emergency period in the Act is as long as necessary to prevent or control COVID-19, but no longer than 3 months (s475(4)). However, the human biosecurity emergency period may be varied or extended for up to three months, and the three month extension can be used more than once (s476) . The extension can only occur were the Health Minister is satisfied that COVID-19 continues to pose a severe and immediate threat, or cause harm on a national scale, and the extension is necessary to prevent or control the entry, emergence, establishment or spread of COVID-19 (s476(1)).

The Health Minister is not required to confer with the Chief Medical Officer or any other authority when determining what constitutes threat or harm for extending the emergency period. This broad discretion is problematic. Broad ministerial discretion is not only confined to delegated legislation but also statutes introduced during and related to the emergency.

The check on the power is that determinations made under the Act are meant to cease after 3 months. If this is not an effective or meaningful check, in that it continues to be extended, then clear guidance is required. That requirement might include criteria for "severe and immediate threat", based on an objective fact or event, and in consultation with others with the appropriate

expertise. If objective jurisdictional facts are contained in the legislation, whether the relevant declaratory instrument is valid will ultimately depend on the answer given by the judiciary.

Ideally, parliament should be sitting to scrutinise the execution of government emergency powers and it should be parliament that decides what constitutes the emergency period and whether it continues. The various powers should cease unless parliament votes to renew them and has the opportunity to amend them.

QUESTION 8:

Which branch of government should be responsible for issuing guidance on the circumstances in which it may be appropriate for delegated legislation to be exempt from parliamentary oversight?

ANSWER:

This is a genuinely difficult question.

If guidance is to be offered, the two options available are leaving its issuance to the Executive, or creating legislative guidelines in the *Legislation Act 2003 (Cth).*

The advantages of Parliament specifying guidelines in the Act itself are that this provides a certain, transparent mechanism by which our elected representatives can express their view on the appropriate circumstances for exemption. If the ability for the Executive to utilise delegated legislation to create exemptions to disallowance (section 44(2)(b) of the *Legislation Act 2003 (Cth)* were retained, these legislative guidelines would be important because they would enable courts to declare the exempting delegated legislation invalid to the extent it is inconsistent with the Act.

However, there are a number of issues with this approach. Firstly, legislative attempts to comprehensively enumerate circumstances justifying (or which should prohibit) exemption are unlikely to be successful. It is difficult to foresee which truly exceptional circumstances may arise, because by their nature, exceptional circumstances can be unforeseeable. It may also prove difficult to amend primary legislation, which may entrench an inadequate list. Secondly, this approach loses some of its force when, as per our recommendations, the loophole represented by s44(2)(b) is closed. In that scenario, exemptions must be created by primary legislation. Since parliament cannot bind itself, any legislative guidelines will fail to prevent a determined Parliament from simply overruling the *Legislation Act 2003 (Cth*) to the extent of inconsistency or otherwise repealing conflicting provisions. On the other hand, stating guidelines in the legislation itself will provide certainty and consistency to new legislation. Parliament is also unlikely to desire a disruption in the fabric of law especially where it would likely also absorb the political costs of impliedly repealing or legislating inconsistently with the new s44; and in any case, Parliament arguably has the democratic *bona fides* to unproblematically create exemptions if it so desires.

There are advantages of a model whereby the Executive, either through the OPC Drafting guidelines or some other instrument, promulgates a list of appropriate circumstances justifying exemption (or those in which it should be prohibited). The primary advantage is that such instruments would be more flexible than primary legislation yet can still provide certainty and transparency if required to be publicly disseminated.

However, in a world still containing s44(2)(b), such guidelines could not be used, upon judicial review of delegated legislation, to invalidate non-compliant exemptions effected by delegated legislation under that provision. They also lack the moral weight and democratic force of primary legislation which has been debated and passed by both Houses.

Perhaps the best model would be a mix of the two systems. In this model, the Legislation Act would set out a broad test, such as "all legislative instruments are subject to disallowance under s42 of this Act unless exceptional circumstances provide a compelling justification for exempting a particular instrument or class of instrument from disallowance." This would be broad enough to be immune from accusations of being an ill-considered attempt at exhaustive enumeration, and to accommodate changing circumstances. Exemptions would only be permitted to be effected through primary legislation. The Act would also specify that an instrument cannot be exempt from disallowance if it is made under a provision allowing the Executive to amend the enabling legislation or other primary legislation by virtue of the effect of the instrument (A Henry VIII clause). This would be stated not to apply to the extent that the effect of the provision, or related provisions, which is or are the subject of the Henry VIII subsection, is or are to sunset or limit in duration the power conferred or the effect of an instrument under that section. These statements and restrictions, as discussed, would be binding and accompanied by significant political weight, but only restraining insofar as future parliaments desire to legislate consistently with it. The Act would then specify that:

- the Attorney-General **must** make an instrument, which is to be made publicly available, under this section which outlines:
    - circumstances which, in the opinion of the Attorney-General, amount to exceptional circumstances providing a compelling justification for exemption from disallowance; and
    - circumstances (if any) which tend against exemption from disallowance.
- an instrument made under that section shall be deemed a legislative instrument and subject to disallowance under section 42 of this Act.
- a current list of legislative instruments exempted from disallowance under section 42 of this Act shall be provided in a schedule to the Act.

This way, the Executive can promulgate its own list. Although there would be no consequences for the Executive preparing a Bill which contains a justification not listed, or which breaches one of the listed standards, the government would have to face up to breaching its own publicly promulgated standards. Moreover, it is likely such a list would govern to some extent the way that legislation is drafted, as it is an expression of the government's thoughts on the matter. Since the list promulgated by the government is deemed to be a legislative instrument, the Senate can disallow the list if it is blatantly inappropriate or inadequate. Finally, listing all exempted DL in the schedule means that a valuable compilation will be available in one place.

QUESTION 9:

Unlike the requirements for the deferral of sunsetting, there is currently no requirement to include a justification for why an instrument is exempt from disallowance or sunsetting in its explanatory statement. Should there be a similar requirement to justify exemptions from disallowance and sunsetting in an instrument's explanatory statement?

ANSWER:

NSWCCL strongly believes that **both** the exempting Bill and the particular exempted legislative instrument **must** be accompanied by explanatory notes which attempt to justify the exemption from disallowance being effected. This requirement should be contained in a new section 44 of the

Legislation Act 2003 (Cth) . A following paragraph of the new section 44 must make clear that such explanatory notes must, in explicating the justification employed for exempting a particular instrument or class of instrument from disallowance under section 42 of this Act, consider whether:

a) the instrument is in accordance with its enabling Act and otherwise complies with all legislative requirements;

b) the instrument appears to be supported by a constitutional head of legislative power and is otherwise constitutionally valid;

c) the instrument makes rights, liberties, obligations or interests unduly dependent on insufficiently defined administrative powers;

d) those likely to be affected by the instrument were adequately consulted in relation to it;

e) the instrument's drafting is defective or unclear;

f) the instrument, and any document it incorporates, may be freely accessed and used;

g) the accompanying explanatory material provides sufficient information to gain a clear understanding of the instrument;

h) the instrument trespasses unduly on personal rights and liberties;

i) the instrument unduly excludes, limits or fails to provide for independent review of decisions affecting rights, liberties, obligations or interests; and

j) the instrument contains matters more appropriate for parliamentary enactment.

Of course, this list is drawn from the Committee's scrutiny principles contained in Standing Order 23. We agree with the Centre for Comparative Constitutional Studies analysis of the utility of these principles in assessing proposed exemptions from disallowance, at page 11 of their submission to this inquiry:

> *"The Committee's current scrutiny principles therefore provide an instructive indication of the limits that should apply to the making and content of delegated legislation in our constitutional system. They are accordingly also instructive for the question of when exceptions to the general principle of disallowance would not be acceptable. If a legislative instrument bears upon the kinds of matters indicated in the scrutiny principles, it should be in-principle subject to disallowance procedures. Any departure from that principle would need to be carefully justified by the Government, which when doing so should be obligated to explain how and why the instrument in question does not raise these concerns such as to make it an appropriate candidate for exemption from parliamentary scrutiny."*

The legislation should clarify that these principles are not an exhaustive statement of the matters to be considered when attempting to provide a justification.