

Legislation is now being exempted from disallowance meaning Parliament no longer has the power to amend this legislation which includes the Social Security Act and the Corporations Act, relating to the power to change welfare benefits and arrangements for business. Although the clauses are temporary, the government has given itself the authority to extend them six months beyond their designated sunset date. #auspol

The @ScottMorrison_MP government's agenda is clearly visible and should be stopped.
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The federal government has embedded special powers in new Covid-19 laws to make unilateral changes to non-pandemic-related legislation, using what are known as "Henry VIII clauses" – named for the unchecked power they involve.

Affected legislation includes the Social Security Act and the Corporations Act, relating to the power to change welfare benefits and arrangements for business. Although the clauses are temporary, the government has given itself the authority to extend them six months beyond their designated sunset date.

The use of Henry VIII clauses further expands successive governments' growing practice of bypassing parliamentary scrutiny to make laws that are not subject to any kind of vote. This is done using what is known as delegated legislation instead of standard bills that must pass both houses.

Generally, parliament retains a power to strike out delegated laws that a majority deems bad.

But legislation is now also being exempted from disallowance, putting it beyond reach.

Essentially, parliament cannot amend or overturn it.

Two multi-party parliamentary committees are sounding an alarm.

This week, the senate's committee for the scrutiny of delegated legislation received final submissions to its inquiry into exemptions. Unusually, one came from another senate committee, the committee for the scrutiny of bills.

The bills committee raised the use of Henry VIII clauses, which the High Court has suggested may undermine parliament's constitutional role.

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Eminent lawyers, including Sydney University's Professor Anne Twomey and University of New South Wales professors Gabrielle Appleby and George Williams, have noted that some other delegated legislation may also be unconstitutional.

The committee for the scrutiny of bills' submission raised concerns about the use of delegated legislation for measures including appropriating money for funding allocations, establishing investment funds, which it warned have opaque rules, and changing national security law. Other submissions highlighted its use in refugee law, to change the rules in detention centres.

The committee said it had "consistently raised significant concerns" about Henry VIII clauses overriding primary legislation and potentially subverting relations between parliament and the executive.

"The committee considers that this has deprived Parliament of a crucial opportunity to have oversight of legislative changes being made during a period of emergency," it wrote, urging the committee for the scrutiny of delegated legislation to specifically examine the use of Henry VIII clauses.

It proposed that while parliament was sitting, changes to primary legislation should be made in bills on which it could vote.

When the Covid-19 pandemic was declared in March, the government initially suspended parliament until August but, amid opposition protests about accountability, it held single-day sittings in March and April to pass new umbrella pandemic legislation. That enabled the creation of delegated instruments for further measures.

Parliament then sat for another three days in May and seven days in June. It will resume on August 4, after the government produces a mini budget out of session on July 23.

In another submission to the delegated legislation committee, University of Adelaide associate law professor Dr Lorne Neudorf said the fact that more than 20 per cent of coronavirus-related delegated legislation had been exempted from disallowance by the parliament "strongly suggests the exemptions are not being used in the public interest".

"Instead," he wrote, "it suggests that the executive government is successfully using exemptions for ulterior and politically beneficial purposes, namely when it wishes to avoid parliamentary accountability for its decisions and policy choices."

Dr Neudorf, who has been examining the use of delegated legislation in Australia, Canada, the United States and Britain, told The Saturday Paper that a "troubling" trend is emerging.

"It's not just an Australian problem," he said. "It's a problem we see in similar kinds of common-law jurisdictions."

While Australia was not the worst example, its scrutiny processes were less extensive than in other countries. Laws were increasingly being made “behind closed doors”.

“Parliament really should be the lawmaker-in-chief,” Neudorf said. “Parliament is deliberative as an institution. It is accountable.”

In separate submissions, the Attorney-General’s and Home Affairs departments defended the use of delegated legislation and exemptions, especially during the pandemic.

Home Affairs confirmed it had created seven pandemic-related instruments – five in immigration and two in customs. All but one of these are exempt from parliamentary disallowance.

It said the instruments ensure the government is “able to respond to emergency situations rapidly and in a way that creates certainty for affected individuals”.

The Attorney-General’s Department said disallowance was “an essential and effective mechanism” for scrutiny but not always appropriate.

It said that where matters required “executive control”, were based on extensive scientific or technical considerations, or required “decisive and certain” government action, exemption was appropriate.

But critics, including the inquiring committee, suggest it’s the broad criteria that are not appropriate – and that too much legislation already exceeds them.