



## **BACK TO THE FUTURE: CHARTING THE EVOLUTION OF THE NSW LEGISLATIVE COUNCIL REGULATION COMMITTEE**

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# **BACK TO THE FUTURE: CHARTING THE EVOLUTION OF THE NSW LEGISLATIVE COUNCIL REGULATION COMMITTEE**

## **Introduction**

This paper tells the story of the New South Wales Legislative Council's Regulation Committee, from its origins as a recommendation of the so-called 'Committee on Committees' in 2016, its initial operation as a trial, its permanent establishment as a standing committee with the innovative role of reviewing the policy merits of regulations as well as trends or issues in relation to delegated legislation, and its two landmark reports into delegated legislation in 2020 and 2022.

The paper highlights the committee's recent 2022 inquiry into options for reform of the management of delegated legislation in New South Wales, which involved the appointment of an external legal adviser to prepare a Discussion Paper, and the subsequent tabling of a report recommending wide-ranging changes to the regulatory and scrutiny framework for delegated legislation in New South Wales, informed by a comparative analysis of best practice across other jurisdictions.

One of the committee's key recommendations was to expand the remit of the Regulation Committee to include reviewing all instruments of a legislative nature that are subject to disallowance against technical scrutiny principles (a function in fact performed by a Legislative Council committee from 1960 to 1987), with the benefit of a dedicated legal adviser. While in New South Wales this function currently rests with the Joint Legislation Review Committee, the Regulation Committee considered that the Legislative Council should perform this task under its own auspices.

In a sense, the adoption of this recommendation would bring the Legislative Council both back to where it started and also into line with several other Australian and New Zealand jurisdictions. However, more innovatively perhaps, the Committee would combine the task with its existing functions scrutinising policy merits and trends with regard to delegated legislation.

Other reforms recommended by the Regulation Committee in its 2022 report include consolidation of legislation dealing with delegated legislation in New South Wales, extending the regulatory and scrutiny regime to all instruments of a legislative character, and several other matters. These will be touched on briefly in this paper.

## **The Regulation Committee's establishment as a trial in 2017**

The Legislative Council's Regulation Committee has its origin in the report of the Select Committee on the Legislative Council Committee System, tabled in November 2016. That committee, known as the Committee on Committees, was established to inquire into and report on how the committee system can continue to support the Legislative Council to effectively fulfil its role as a House of Review.

The report noted that there was general consensus among inquiry participants that Legislative Council committees 'should play a greater role in scrutinising bills and regulations'. The Select Committee heard in evidence that the existing joint Legislation Review Committee, the remit of which is to review all bills and regulations against technical scrutiny criteria, was 'inefficient and

that the scrutiny of the regulations was gradually diminishing'.<sup>1</sup> This observation was informed by the experience in New South Wales from 1960-1987 where, as occurs at the federal level, scrutiny of regulations was undertaken by an upper house committee, the Committee on Subordinate Legislation. In 1987, New South Wales shifted to a different model: a joint parliamentary committee, the Regulation Review Committee. This was despite protest at the time from members of the Council that the function properly rested with the Council. In 2003, the Regulation Review Committee was in turn replaced by the Legislation Review Committee, also a joint committee of both Houses, with responsibility for reviewing subordinate but also primary legislation.<sup>2</sup>

In order to enhance scrutiny of delegated legislation, the Committee on Committees recommended that a Regulation Committee be established, on a trial basis, to consider policy and other issues relating to delegated legislation. The Select Committee considered that 'rather than replicating the work of the joint Legislative Review Committee which reviews all disallowable regulations, the proposed committee would take an innovative approach to its role, by focusing on the substantive policy issues regarding a small number of regulations of interest, as well as trends relating to delegated legislation'.<sup>3</sup>

The Regulation Committee was established by consensus in November 2017 to commence on a trial basis on the first sitting day in 2018 and conclude on the last sitting day in November 2018. The committee was established to inquire and report on:

- (a) any regulation, including the policy or substantive content of a regulation, and
- (b) trends or issues that relate to regulations.<sup>4</sup>

Following the suggestion of the Committee on Committees, the membership of the trial Regulation Committee comprised eight members: four government members, one of whom would be the Chair; two opposition members; and two crossbench members.

As part of the resolution establishing the Regulation Committee, it was resolved that the committee table a report evaluating the effectiveness of the trial by the last sitting day in November 2018.

The Regulation Committee conducted two inquiries during the trial period in 2018 – both into specific pieces of delegated legislation, rather than into trends or issues relating to regulations.<sup>5</sup> In both inquiries, the committee examined the purpose, implementation, and potential impacts of the regulations in detail. The committee also highlighted systemic issues with the government's public consultation processes when developing regulations. This led the committee to make recommendations in both inquiries that relevant government agencies consult and advise

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<sup>1</sup> Select Committee on the Legislative Council Committee System, NSW Legislative Council, *Legislative Council committee system* (2016), p 4. Interestingly,

<sup>2</sup> In 2018, the joint Legislation Review Committee itself recommended that that a separate joint committee be created to examine subordinate legislation to address concerns about the committee's workload: Joint Legislation Review Committee, Parliament of New South Wales, *Inquiry into the operation of the Legislation Review Act 1987* (2018), p 29.

<sup>3</sup> Select Committee on the Legislative Council Committee System, NSW Legislative Council, *Legislative Council committee system* (2016), p 4.

<sup>4</sup> *Minutes*, NSW Legislative Council, 23 November 2017, pp 2223-2225.

<sup>5</sup> The first inquiry was into the Environmental Planning and Assessment Amendment (Snowy 2.0 and Transmission Project) Order 2018, and the second inquiry considered the Cemeteries and Crematoria Amendment Regulation 2018.

stakeholders about forthcoming regulations, their objectives and potential impacts so as to increase community awareness.

In its evaluation report tabled in November 2018, the Regulation Committee observed that both inquiries undertaken during the trial period:

- involved a much broader remit than any inquiry into a regulation undertaken by the joint Legislation Review Committee in recent times, demonstrating that there is minimal overlap in the functions of both committees (which was an initial hesitation with respect to the Regulation Committee's establishment)
- were short and sharp, but long enough to allow stakeholders to provide input through written submissions and public hearings
- gave stakeholders the opportunity to comment on the way delegated legislation is developed and operates, which leads to better regulation that meets both the needs of government and the communities they impact
- gave legislators a greater visibility of delegated legislation, which has provided more oversight for the Parliament.

Overall, the committee concluded that:

- the operation and work of the Regulation Committee was both positive and effective, with the trial demonstrating the importance and complementary nature of Legislative Council scrutiny of regulations separate to that of the joint Legislation Review Committee
- the innovative approach adopted by the trial Regulation Committee of focusing on substantive policy issues regarding a small number of regulations of interest, rather than reviewing all disallowable regulations, has proven to be efficient, effective and valuable
- the work of the committee presented broader issues for potential inquiry by other Legislative Council committees.

The committee therefore recommended that the Legislative Council, at the commencement of the 57th Parliament, establish the Regulation Committee as a standing committee, allowing for trends or issues relating to delegated legislation to be analysed, and the continued review and analysis of any regulation of particular interest to the committee.<sup>6</sup>

### **The permanent establishment of the Regulation Committee in 2019**

The Regulation Committee was re-established at the commencement of the 57<sup>th</sup> Parliament in May 2019 as a standing committee, with the role of inquiring into and reporting on any regulation referred to it by the House, including the policy or substantive content of the instrument, and trends or issues in relation to delegated legislation.<sup>7</sup> To facilitate its policy scrutiny function, the resolution provided that if an instrument is referred to the committee that is the subject of a notice of motion or order of the day for disallowance in the Council, the notice or order is postponed until the committee tables its report.

While the composition of members on the committee remained unchanged from its initial operation as a trial, a crossbench amendment to the Government motion establishing the committee required the Chair to be a non-Government member.

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<sup>6</sup> Regulation Committee, NSW Legislative Council, *Evaluation of the Regulation Committee trial* (2018), p 6.

<sup>7</sup> *Minutes*, NSW Legislative Council, 8 May 2019, pp 100-103.

The first 18 months of the 57<sup>th</sup> Parliament saw the committee conduct three inquiries into specific regulations, all of which canvassed the policy content of the instruments and made policy-related recommendations to relevant government agencies. In relation to disallowance:

- in the first case, the committee recommended that the relevant regulations be disallowed,<sup>8</sup> which subsequently occurred<sup>9</sup>
- in the second, the committee recommended that the relevant regulations not be disallowed<sup>10</sup>
- in the third, the committee recommended that the House proceed to debate the disallowance of the relevant regulation, and that the government address the committee comments and concerns identified by stakeholders, as set out in the report, during debate in the House.<sup>11</sup>

### The Regulation Committee's first report on delegated legislation in 2020

Having up until that time conducted a series of policy scrutiny inquiries into specific delegated instruments, the time was ripe for a broader review of the system for delegated legislation in New South Wales, picking up on the committee's other key function to inquire into 'trends or issues in relation to delegated legislation'.

In February 2020, the House referred to the Regulation Committee terms of reference to inquire into and report on:

- (a) the extent to which the Parliament has delegated power to make delegated legislation to the executive government, including through the passage of so-called "shell" legislation and "Henry VIII clauses",
- (b) the use of delegated legislation making power, including any instances of executive government overreach, which might include:
  - (i) the amendment of primary legislation by delegated instruments,
  - (ii) the adoption of certain laws by means of delegated rather than primary legislation, and
- (c) any other related matter.

In October 2020, the Regulation Committee tabled the report entitled *Making of delegated legislation in New South Wales*. The following is a summary of the issues discussed in the committee's report:<sup>12</sup>

- **The use of shell legislation, Henry VIII clauses, and quasi-legislation:** The committee heard evidence that raised significant concerns as to the overuse of these

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<sup>8</sup> Regulation Committee, NSW Legislative Council, *Liquor Amendment (Music Festivals) Regulation 2019 and Gaming and Liquor Administration Amendment (Music Festivals) Regulation 2019* (2019).

<sup>9</sup> *Minutes*, NSW Legislative Council, 26 September 2019, pp 478-479.

<sup>10</sup> Regulation Committee, NSW Legislative Council, *Local Land Services Amendment (Critically Endangered Ecological Communities) Regulation 2019 and Local Land Services Amendment (Allowable Activities) Regulation 2019* (2019).

<sup>11</sup> Regulation Committee, NSW Legislative Council, *Impact and implementation of the Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020* (2020).

<sup>12</sup> This summary is drawn from G. Appleby, *Inquiry into options for reform of the management of delegated legislation in New South Wales – Discussion Paper* (May 2022), pp 10-12.

mechanisms in New South Wales and the inadequacy of the existing scrutiny processes to address this. Possible responses to these concerns included greater guidance to Government agencies in what matters were appropriate to delegate; the extent of reporting and explanation required in relation to such delegations to the Parliament as well as special tabling requirements relating to regulations made under shell legislation; strengthening statutory presumptions around the incorporation of quasi-legislation; the adoption of affirmative resolution procedures; and targeted, shorter sunset provisions. The committee ultimately recommended on this set of issues that the NSW Government ensure that explanatory notes to bills:

- highlight the presence in the bill of any Henry VIII clauses, shell legislation or quasi-legislation;
- include an explanation as to why such a broad delegation of legislative power is considered necessary.

The Government response to this recommendation was supportive – at least in principle, with the caveat that given the process of drafting explanatory notes in NSW (undertaken by legislative drafters), this might be better undertaken in the second reading speech than the explanatory note.

- **The scope of delegated legislation that is subject to parliamentary scrutiny and disallowance procedure:** The committee considered the current scope of delegated legislation subject to tabling, disallowance and scrutiny. The interaction of the definition of a 'statutory rule' in the *Interpretation Act 1987* and the definition of a 'regulation' in the *Legislation Review Act 1987* provides the scope of instruments that are subject to procedures relating to the tabling, disallowance and scrutiny established by those pieces of legislation. The committee heard that there are some inconsistencies between the definitions, as well as a general deficiency in the approach in the reliance on the form of the instrument, rather than its legislative nature. This meant the Government's extensive use of public health orders under the *Public Health Act 2010* in its COVID-19 response were not subject to these procedures, and that quasi-legislation (that is, external instruments incorporated into delegated instruments) are also not caught by the framework. The use of a form-focused definition raises concerns that legislative schemes may be crafted to avoid scrutiny by the form of instrument chosen.
- **Timeframes for disallowance and review:** The committee also heard concerns relating to the timeframe for disallowance – currently set at 15 parliamentary sitting days after notice of the rule is tabled in the House. Unless a resolution is passed, scrutiny by the Legislation Review Committee must be undertaken in this time period. The policy review undertaken by the Regulation Committee is not so limited. The committee heard concerns that this restriction hampered Parliament's ability to oversee instruments, as often a full assessment of the impact of an instrument can only be undertaken after it has been in operation for a longer period.
- **Remaking of delegated instruments after disallowance:** The committee heard concerns that the limit on remaking instruments that are the same in substance within four months of disallowance by a House (unless that disallowance is revoked) was too short, particularly given the practice of other jurisdictions (the Commonwealth sets a six-month restriction on remaking instruments that have been disallowed).

- **Consultation requirements for making of delegated legislation:** The committee heard a number of submissions advocating for strengthening the consultation requirements, currently in s 6 of the *Subordinate Legislation Act 1989*, and supplemented by the *NSW Guide to Better Regulation* (2016). Concerns were raised about the limited scope of the obligation to consult, its unenforceable nature, the level of oversight of consultation, and the need for greater guidance to be provided to government on the making of delegated legislation and the consultation and reporting requirements.
- **Public accessibility of delegated legislation:** The committee heard concerns about public accessibility in respect of different forms of delegated legislation. While it is accepted that the NSW Legislation website publishes 'statutory rules', this is determined by the form and not the substance of the instrument. Other instruments may be published in other forums – in the gazette, on individual departmental websites, and through the Parliamentary Counsel's Office. Such inconsistency in practice means there is less public transparency and accessibility in relation to instruments that might be legislative in nature, but are not within the definition of 'statutory rules'. There is also little transparency around which instruments are disallowable and which are not. The committee recommended that NSW Government agencies give priority to identifying more effective ways to improve public access to all legislative instruments. The Government's response was that it supported this recommendation. However, in the detail of its response, the Government indicated a preference for retaining the status quo in terms of individual departments and agencies determining the best platform for public access to delegated instruments. So, while the NSW Legislation website provides a central point for statutory rules, it is still not a centralised platform for all legislative instruments.
- **Statutory provisions for regulation of the making and oversight of delegated legislation in New South Wales:** The committee heard two suggestions for the current form of the statutory provisions regulating the making and oversight of delegated legislation in NSW. The first was to consolidate the three different sources of statutory authority for the making and oversight of delegated legislation in NSW to reduce the complexity and confusion, caused, in particular, by the interaction between the different definitions in the statutes. The second was to create a consolidated set of uniform standards for scrutiny across primary and delegated legislation, similar to that seen in the *Legislative Standards Act 1992* (Qld).
- **The protection of rights and liberties and delegated legislation:** The Regulation Committee heard concerns that the NSW system for scrutiny of legislation and delegated legislation in relation to human rights was less robust than other jurisdictions. Submissions advocated for greater protections, including through the enactment of a comprehensive bill of rights for New South Wales, or more explicit guidance in relation to the rights scrutiny function that is undertaken by the Legislation Review Committee.
- **Drafting delegated legislation:** The committee heard concerns directly from the Parliamentary Counsel's Office as to the drafting quality of statutory instruments. Only 'statutory rules' are required to be drafted by the Parliamentary Counsel's Office. Concerns around legality, accessibility and clarity were raised in relation to instruments not drafted by the Office.

While the committee made some direct recommendations, many of the issues outlined above were not immediately resolved, given the complex nature of the laws and procedures governing delegated legislation and the variety of possible approaches to reform. To ensure that NSW has a

statutory framework for delegated legislation that is simple, robust and accessible, the committee recommended that the NSW Law Reform Commission be tasked with reviewing and reporting on the extent and use of delegated legislative powers in New South Wales, powers and safeguards relating to delegated legislation in other jurisdictions, and suggestions for improvements in the use of delegated legislative powers to prevent executive overreach.<sup>13</sup>

Regrettably, the Government's response to this recommendation was to not support a further inquiry by the Law Reform Commission.

However, some important changes were made following the committee's report, namely to the resolution establishing the Regulation Committee. In accordance with the committee's recommendations, the resolution was amended to:

- expand its jurisdiction beyond regulations, to all legislative instruments regardless of their form, including the policy and substantive content of the instrument
- expand its jurisdiction to include draft legislative instruments
- include the power to self-refer inquiries.<sup>14</sup>

### **Referral of a second inquiry into reform of the management of delegated legislation in 2021**

In November 2021,<sup>15</sup> in the absence of a referral by the Attorney General to the NSW Law Reform Commission, the Legislative Council referred the Regulation Committee's 2020 report and evidence back to the committee for further inquiry and report into options for reform of the management of delegated legislation in New South Wales. In addition, the committee was authorised to engage an external legal adviser to assist the committee in its inquiry.<sup>16</sup>

### **Engagement of Professor Appleby to prepare a Discussion Paper on delegated legislation**

The committee subsequently engaged leading public law academic Professor Gabrielle Appleby, Law & Justice Faculty, University of New South Wales, to prepare a Discussion Paper considering the following questions:

- How do NSW's framework and safeguards relating to delegated legislation compare with those of other Australian and relevant international jurisdictions?
- What are the options for reform of the management of delegated legislation in NSW, including identifying a 'best practice' model?

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<sup>13</sup> Regulation Committee, NSW Legislative Council, *Making of delegated legislation in New South Wales* (2020), p 41.

<sup>14</sup> *Minutes*, NSW Legislative Council, 20 November 2020, p 1748.

<sup>15</sup> Three months earlier, in August 2021, the Regulation Committee tabled a further 'trends or issues' inquiry report, this time into the making of environmental planning instruments (otherwise known as SEPPs) under the *Environmental Planning and Assessment Act 1979*, and whether SEPPs should be disallowable under the *Interpretation Act 1987*. While the committee ultimately did not recommend that SEPPs should be disallowable, a number of other recommendations were made to the government regarding consultation mechanisms, communication and transparency, and enhancing parliamentary scrutiny of these instruments: Regulation Committee, NSW Legislative Council, *Environmental planning instruments (SEPPs)* (2021).

<sup>16</sup> *Minutes*, NSW Legislative Council, 24 November 2021, pp 2848-2849.

- What are the mechanisms by which these reforms could be implemented?

Professor Appleby's Discussion Paper was published by the committee in May 2022. It is available on the NSW Legislative Council Regulation Committee's website.

### **Professor Appleby's analysis of best practice in the management of delegated legislation**

In her Discussion Paper, Professor Appleby provided a comprehensive review of the regulatory (legislative and non-legislative) frameworks for making and overseeing delegated legislation in Australian jurisdictions as well as in New Zealand, the United Kingdom and Canada.

As a general comment, she observed that Australian jurisdictions have been considered 'world leaders' in relation to their frameworks for the management of delegated legislation. She also observed that while there are many shared characteristics across jurisdictions, there is also a diversity of experience and a level of innovation and experimentation from which New South Wales can benefit.

In relation to specific jurisdictions, **New Zealand** is notable for the recent enactment of the *Legislation Act 2019* (NZ), consolidating the previous overlapping and confusing provisions of the *Legislation Act 2012* (NZ) and the *Interpretation Act 1999* (NZ). The 2019 Act also adopted a new consolidated and streamlined definition of 'secondary legislation', addressing previous concerns that certain types of 'deemed regulations' such as rules, codes of conduct and the like were not subject to parliamentary scrutiny. The Standing Orders of the House have in turn been updated to apply a definition of 'regulations' that picks up the definition of secondary legislation in the 2019 Act.

The arrangements in New Zealand are also notable for the general provision in the Cabinet Manual that regulations come into effect 28 days *after* they have been publicised in the Gazette. The Manual specifies that this 28-day rule reflects the principle that the law should be publicly available and capable of being ascertained before it comes into force. There are only very limited circumstances in which exemptions to this rule may be granted, including where regulations are made in response to an emergency.

Another feature of the 2019 Act is that it provides for amendment or replacement of delegated legislation, unless it is exempt. Generally, regimes for the management of delegated legislation in other jurisdictions only provide for the disallowance, in whole or in part, of delegated legislation, and then only within a certain period of the making of that legislation. As stated by the NZ Parliament's Regulation Review Committee, this flexibility in New Zealand to amend or replace delegated legislation reflects that 'a delegated power does not prevent the exercise of the same power by the person who delegates'.

Another novel feature of the New Zealand system is that under Standing Orders 326 and 328, the Regulation Review Committee can receive complaints from persons or organisations aggrieved at the operation of a regulation and can investigate the complaint through a full inquiry.

A final notable feature of the New Zealand arrangements is the acceptance by the Government, now captured in Guideline 15.1 of the Legislation Design and Advisory Committee Legislation Guidelines 2021, that Henry VIII clauses should only be used in very limited circumstances. The introduction to Guideline 15.1 states:

Legislation should empower secondary legislation to amend or override an Act only if there is a strong need or benefit to do so, the empowering provision is as limited as possible to achieve the objective, and the safeguards reflect the significance of the power.

The Australian **Commonwealth** arrangements under the *Legislation Act 2003* (Cth) are notable for adopting a very broad definition of delegated legislation, including by reference both to its character as well as its nature. Under section 8(4) of the Act, an instrument is a legislative instrument if it is made under a power delegated by the Parliament; and any provision of the instrument determines the law or alters the content of the law, and directly or indirectly affects a privilege or interest, imposes an obligation, creates a right, or varies or removes an obligation or right.

In addition, the 2003 Act is noteworthy for establishing a strong regime for the making, tabling and disallowance of delegated legislation. The Act requires that *all* legislative instruments be registered in the Federal Register of Legislation (s 15H) and provides that no instrument is enforceable unless it is registered (s 15K). It also requires that copies of legislative instruments be laid before each House of the Parliament within six sitting days of registration (s 38), and instruments not so tabled cease to have effect. Most significantly of all, where notice of a motion to disallow a regulation is given within 15 sitting days, and that notice is not dealt with within 15 sitting days, the instrument is deemed to have been disallowed (s 42). As *Odgers* expresses, this provision ensures that once a disallowance motion has been given, the matter must be dealt with in some proactive way, and that an instrument under challenge cannot simply continue in force just by virtue of the disallowance motion not having been resolved by the relevant House.

In her paper, Professor Appleby highlighted the important role played within this structure by two longstanding Senate Committees: the Scrutiny of Delegated Legislation Committee (previously known as the Regulation and Ordinances Committee), first established in 1932, and the Scrutiny of Bills Committee.

However, it must be acknowledged that there are also challenges at the Commonwealth level. Professor Appleby noted recent reports of both Senate committees pointing to areas of concern such as the excessive use of 'skeleton' legislation and Henry VIII clauses, and the inability of the Scrutiny of Delegated Legislation Committee to review draft delegated legislation. Another issue of concern is the exemption of certain instruments from disallowance and sunset provisions, with a recent high-profile example being the Advance to the Finance Minister that allowed the Commonwealth to conduct the marriage equality plebiscite without parliamentary approval. In 2020 and 2021, the Scrutiny of Bills Committee tabled further reports on the issue of exemptions, setting out criteria for exemptions in very limited circumstances, but also nominating categories of delegated legislation which should never be subject to exemption, including provisions that restrict personal rights and liberties, instruments that facilitate expenditure of public money and Henry VIII provisions.

The **ACT** *Legislation Act 2001* replicates many of the disallowance provisions at the Commonwealth level but it is notable that the period for disallowance of an instrument where a disallowance notice is given but not dealt with is reduced to 6 sitting days, compared to 15 sitting days at the Commonwealth level (s 65). Where a subordinate law or instrument is disallowed, a new law or instrument the same in substance may not be made for six months (s 67).

**Victoria** is notable in that, like the Commonwealth *Legislation Act 2003*, the *Subordinate Legislation Act 1994* (Vic) defines the scope and application of the Act by reference to the nature, not the form, of a delegated instrument. Specifically, section 3 of the Act defines a legislative instrument to be 'an instrument made under an Act or subordinate rule that is of a legislative character. This

approach is regarded as best practice. That said, Professor Appleby noted that the Victorian Scrutiny of Acts and Regulations Committee, which has a government majority, recently stated that 'responsibility for decisions about statutory rules and legislative instruments lies with the responsible Minister', potentially allowing the executive government in Victoria greater involvement in determining those instruments subject to parliamentary review, tabling, scrutiny and disallowance.

Another notable and perhaps unique feature of the Victorian system is that it attempts to place restrictions on the exemption of delegated legislation from the operation of the *Subordinate Legislation Act 1994* (Vic) by:

- requiring consultation with the Scrutiny of Acts and Regulations Committee before making a regulation that would prescribe or exempt an instrument as a statutory rule (s 4(2), and also s 27(a))
- setting out the criteria against which exemption from consultation requirements will be considered (see those listed for exemptions from consultation requirements in ss 8, 9, 12F and 12G)
- providing a detailed process for updating the *Subordinate Legislation (Legislative Instruments) Regulations* where exemptions are located.

The Victorian arrangements are also unique in that they provide that a legislative instrument may be suspended where it might be considered to have a detrimental effect on individuals during the period between being made and the Houses considering and determining whether to disallow the instrument. Under arrangements in ss 22 (SR) and 25 (LI) of the *Subordinate Legislation Act 1994* (Vic), if the Scrutiny of Acts and Regulations Committee proposes to recommend disallowance or amendment, and it is of the opinion that considerations of justice and fairness require that the operation of a legislative instrument be suspended, that opinion is sent to the relevant minister and the Governor in Council, and after seven days, unless the Governor intervenes, the instrument is suspended. The suspension is until the period under which the instrument could be disallowed by the Parliament expires.

Finally, the Victorian arrangements are also notable for including extensive protection of human rights. Under the *Subordinate Legislation Act 1994* (Vic), there is a general criterion for review of statutory rules that they do not 'unduly trespass on right and liberties of the person previously established by law', together with an additional requirement of certification of compatibility with the rights set out in *Charter of Rights and Responsibilities Act 2006* (Vic) (ss 21 and 25A). In addition to these arrangements for the scrutiny of delegated legislation, the Charter contains in s 32(3)(b) the statement that:

(3) This section does not affect the validity of— (b) a subordinate instrument or provision of a subordinate instrument that is incompatible with a human right and is empowered to be so by the Act under which it is made.

This has the effect that, should a subordinate instrument be made that is found by the Court to be incompatible with a human right, where there is no specific empowerment in the Act under which it is made, this might lead to a finding of invalidity.

**Tasmania** is unique in that it incorporates in section 9 of the *Subordinate Legislation Committee Act 1969* (Tas) a power to suspend the operation of part of or the entirety of a piece of subordinate legislation during a parliamentary recess, although it is understood this provision has not been used to date.

**Queensland** is notable for its adoption of a framework of 'Fundamental Legislative Principles', introduced by the Goss Government following the Bjelke-Peterson years, designed to safeguard against the abuses and excesses of power which were uncovered by the Fitzgerald Inquiry. The Principles are intended to assist Cabinet and the Parliament of Queensland to understand any potential incursions into rights and liberties, and other fundamental principles, before the enactment of legislation. Relevantly, section 4 of the *Legislative Standards Act 1992* (Qld) provides that Parliamentary Counsel must consider whether legislation has sufficient regard to the rights and liberties of individuals, including allowing the delegation of administrative power only in appropriate cases and to appropriate persons. It also provides that Parliamentary Counsel in preparing subordinate legislation is to consider whether the legislation is within power of the relevant act, is consistent with the policy objectives of the relevant act, contains only matters appropriate to subordinate legislation and amends statutory instruments only.

It is also notable that Queensland has a low tolerance of Henry VIII clauses. In 1997, the now abolished Scrutiny of Legislation Committee conducted a review which was extremely critical of the use of Henry VIII clauses in Queensland legislation. The *Legislative Standards Act 1992* (Qld) includes in section 4 a requirement that a bill should only authorise the amendment of an act by another act. The Queensland Legislation Handbook in turn provides that 'Henry VIII clauses should not be used'.

The arrangements in **Western Australia** are notable in two regards. The first is the inclusion in section 43(1) of the *Interpretation Act 1984* (WA) of a rebuttable presumption against the use of Henry VIII clauses. It provides:

Subsidiary legislation shall not be inconsistent with the provisions of the written law under which it is made, or of any Act, and subsidiary legislation shall be void to the extent of any such inconsistency.

The second is the establishment in the Western Australia Legislative Council of a dedicated committee, the Standing Committee on Uniform Legislation and Statutes Review, to oversee national legislation schemes. A particular focus of the committee is to review the impact of any such scheme on the sovereignty and law-making power of the Parliament of Western Australia. It is notable that in many Australian jurisdictions, national legislation schemes are exempt from disallowance and sunset arrangements. However, the mooted establishment of a National Committee for the Scrutiny of National Schemes of Legislation, able to review intergovernmental legislation developed at national cabinet or ministerial councils, has never been realised.

Whilst Australasian jurisdictions have clearly adopted some innovative and best practice approaches to the challenge of overseeing delegated legislation, Professor Appleby noted that arrangements in the **United Kingdom Parliament** for the oversight of delegated legislation are best characterised as complicated and non-uniform. In the light of Brexit and COVID, two reports out of the UK in 2021, a report of the House of Lords Delegated Powers and Regulatory Reform Committee entitled *Democracy Denied? The urgent need to rebalance power between Parliament and the Executive*, and a report of the Hansard Society entitled *Delegated legislation: the problems with the process*, together indicate the need for a major overhaul of the system for managing delegated legislation in the UK.

### **Professor Appleby's design principles and proposed reforms for delegated legislation in NSW**

Based on her analysis of arrangements for the management of delegated legislation in other jurisdictions, including best practice as outlined above, Professor Appleby advanced a set of design

principles in her Discussion Paper and a set of best practice reforms to 11 different aspects of the framework for the management of delegated legislation in NSW.

Particular aspects of the constitutional context in New South Wales that informed the development of principles to guide the process of reform included:

- the limited availability of judicial review of delegated legislation
- the lack of an overarching charter for the protection of human rights
- the long history of delegated legislative scrutiny in New South Wales
- lessons to be learnt from the response to COVID-19.

Informed by this context, the Discussion Paper proposed that reforms to the regulatory and scrutiny framework for delegated legislation in NSW should be designed around the principles of simplicity, robustness and accessibility:

- simplicity requires a system of delegated legislation that is straightforward and relatively easy to ascertain with provisions that are coherent and consistent
- robustness is underpinned by a desire to protect and strengthen democratic values, to ensure that the democratic credentials of the Parliament are injected into the Executive's making of delegated legislation
- accessibility includes notions of transparency and public accountability.

Driven by these principles, the reforms proposed in the Discussion Paper encompassed:

- statutory consolidation
- definitional clarity and robustness
- increasing public accessibility
- extending the role of the Regulation Committee
- increased guidance to government from the Regulation Committee
- stricter regulation, transparency and oversight of incorporation of quasi-legislation
- greater transparency for rights scrutiny
- increased oversight of consultation
- extending scrutiny and disallowance
- further restricting the ability to remake disallowed instruments
- delayed commencement times.

### **The Regulation Committee's second report on delegated legislation in 2022**

In its report tabled in September 2022, the Regulation Committee summarised Professor Appleby's proposals for reform and set out the committee's own views and recommendations in relation to each of the 11 aspects of the delegated legislation framework addressed in the Discussion Paper. While the committee did not adopt all of the proposals advanced in the Discussion Paper, it drew on many in formulating the 14 recommendations set out in the report. As stated in the Chair's foreword to the report, these recommendations are intended to 'enhance the management of executive-made laws by striking a more appropriate balance between the

justifications behind delegations of legislative power and the constitutional imperatives of democratic law-making'.<sup>17</sup>

The committee's recommendations can be grouped into five main categories:

- reforms to improve the statutory framework for delegated legislation
- reforms to enhance public accessibility and transparency
- expanding the remit of the Regulation Committee
- increased guidance to government
- reforms relating to the management of quasi-legislation.

Of these, perhaps the most significant recommendations were those directed at expanding the remit of the Regulation Committee to include the scrutiny of all legislative instruments subject to disallowance against the statutory scrutiny principles in the *Legislation Review Act 1987* – as is currently undertaken by the Joint Legislation Review Committee. In making this recommendation, and drawing on the detailed analysis in the Discussion Paper, the committee noted that:

- the function of scrutinising delegated legislation against accountability criteria aligns with the constitutional role of the Upper House in maintaining democratic oversight to support responsible and accountable government
- there are concerns that a government-dominated joint committee may not be capable of delivering a sufficiently robust level of scrutiny of the government's exercise of delegated legislative power, or the perception of robust scrutiny
- there is evidence that the combination of the scrutiny of bills and regulations functions in the Legislation Review Committee has in practice led to workload pressures, inefficiency, and a decline in the robustness of the scrutiny of regulations.

While acknowledging the different options available to address these concerns,<sup>18</sup> the committee concluded that, as a first step, the preferred mechanism for implementing this reform would be to simply amend the resolution of the Legislative Council establishing the Regulation Committee to expand its functions to include the scrutiny of legislative instruments against the principles in the *Legislation Review Act 1987*. As the committee observed, while this would (at least initially) result in duplication of the work of the joint committee, it would enable an assessment to be made of the effectiveness of the Council committee in the technical scrutiny role, which would assist in determining whether there is a need for any further statutory reform. There was also the suggestion in the Discussion Paper that the new scrutiny function would complement the committee's existing policy review function, as the scrutiny work would alert the committee to potential instruments that might appropriately be the subject of a further inquiry into the substantive policy.

The committee also recommended that its new, expanded function be accompanied by an increase in resourcing for secretariat support and the appointment of a dedicated legal adviser, as occurs in the Senate.<sup>19</sup>

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<sup>17</sup> Regulation Committee, NSW Legislative Council, *Options for reform of the management of delegated legislation in New South Wales* (2022), p ix.

<sup>18</sup> For example, amending the *Legislation Review Act 1987* to either change the composition of the joint committee, or to return the technical scrutiny function to a Legislative Council committee such as the Regulation Committee.

<sup>19</sup> Regulation Committee, NSW Legislative Council, *Options for reform of the management of delegated legislation in New South Wales* (2022), pp 18-23.

The committee's recommendations regarding statutory reform of the framework for delegated legislation were also significant.

First, on the subject of statutory consolidation, the committee recommended that the provisions of the *Interpretation Act 1987*, *Subordinate Legislation 1989* and *Legislation Review Act 1987* be consolidated into a single Legislation Act which includes all provisions relating to the making, consultation, notice, tabling, publication, disallowance, remaking, sunseting and scrutiny of primary and delegated legislation. In this regard, the committee noted that some jurisdictions have streamlined their legislative regimes by consolidating provisions relating to delegated legislation and primary legislation into a single Act. The committee concluded that the adoption of such an approach in New South Wales 'is a common sense reform that would make it easier for members of the public, members of Parliament and government officials to understand the statutory requirements that operate in this complex area of the law ... [which] in turn would enhance executive accountability and strengthen democratic oversight of the uses of delegated legislative power.'<sup>20</sup>

Second, on the subject of definitional clarity and robustness, the committee recommended that the new Legislation Act apply to all instruments of a legislative character, and that appropriate exemptions from the definition and framework applying to instruments of a legislative character be made in primary legislation, guided by the following criteria:

- exemptions should not be granted where instruments adversely affect rights, liberties, duties and obligations
- exemptions should not be granted unless there is an alternative form of accountability
- exemptions should not, except in exceptional circumstances, be granted for instruments made under Henry VIII provisions.

In explaining the need for such reforms, the committee noted that the current statutory framework for the regulation and scrutiny of delegated legislation prioritises the *form* of an instrument over its substantive effect, leading to gaps in the accountability system. In effect, legislative instruments that are not made in a form consistent with relevant statutory definitions are excluded from the accountability and oversight requirements that apply to other legislative instruments. Extending the regulatory and scrutiny requirements to *all* instruments of a legislative character is consistent with best practice in other jurisdictions and would ensure that all exercises of delegated legislative power are subject to appropriate safeguards such as the disallowance procedure and scrutiny and sunseting provisions. The committee also supported the imposition of strict controls on the making of exemptions from the regulatory and scrutiny requirements to extend to all legislative instruments.<sup>21</sup>

Close readers of the committee's report would find in the minutes of the report deliberative meeting a number of recommendations that were in the Chair's draft report but were not supported by a majority of the committee. Of note were recommendations:

- that the Regulation Committee publish and regularly update a series of Guidance Notes to Government agencies concerning key issues relating to the regulation and oversight of delegated legislation

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<sup>20</sup> Regulation Committee, NSW Legislative Council, *Options for reform of the management of delegated legislation in New South Wales* (2022), pp 10-11.

<sup>21</sup> Regulation Committee, NSW Legislative Council, *Options for reform of the management of delegated legislation in New South Wales* (2022), pp 15-16.

- that the time period in which a disallowed statutory instrument cannot be remade be increased from four months to six months after the motion of disallowance
- that legislative instruments should commence 21 days after they are first published, unless otherwise permitted in the primary legislation.<sup>22</sup>

The Government response to the report dated 12 December 2022 stated that it is considering each of the recommendations directed to it, noting that this process will take longer than the three months available to the Government to respond to the committee's report, especially given the wide-ranging implications of the proposed reforms, including the proposed amendments to three pieces of legislation – the *Interpretation Act 1987*, *Subordinate Legislation Act 1989* and the *Legislation Review Act 1987* – that are of central importance to the NSW statute book. The Government also advised that given the interrelated nature of the recommendations, it would consider them as a whole, in order to 'take an informed and holistic position on the proposed reforms'.<sup>23</sup>

## Conclusion

The practical reality of running an efficient and effective Westminster-style system of government is that parliaments must delegate legislative power to the executive government. Inevitably, however, such delegation, unless carefully managed, undermines (or has the potential to undermine) fundamental constitutional principles including the separation of powers, democratic governance and the rule of law. As acknowledged in Professor Appleby's Discussion Paper, schemes for the regulation of delegated legislation will therefore always involve tensions between constitutional principles and other requirements of our system of government.

As this paper has summarised, Australian parliaments and the New Zealand Parliament have been at the forefront of Westminster-style parliaments in responding to this challenge by developing mechanisms for the tabling, committee scrutiny, disallowance and sunseting of delegated legislation. However, until recently, the NSW Parliament has not been particularly innovative or progressive in this space, and the regime for the management of delegated legislation in NSW as it stands is not particularly robust or cohesive.

Into this space has stepped the NSW Legislative Council's Regulation Committee. Since 2017 it has sought to carve out for itself an important and innovative role, by focusing on the substantive policy issues regarding a small number of regulations of interest, as well as trends relating to delegated legislation.

The committee now stands at a turning point as the 57th Parliament in NSW comes to an end, and a new parliament approaches. In addition to its existing functions, the committee seeks to extend to the NSW Legislative Council the traditional role of technical scrutiny in respect of all legislative instruments, whilst at the same time advocating broader reform of the system for regulating delegated legislation in NSW, informed by the work of Professor Appleby and best practice management of delegated legislation in parliaments across Australia and New Zealand.

2023 and the start of the 58th Parliament therefore looms as a pivotal time for the NSW Legislative Council and its new Regulation Committee in the oversight of delegated legislation in NSW.

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<sup>22</sup> Regulation Committee, NSW Legislative Council, *Options for reform of the management of delegated legislation in New South Wales* (2022), pp 117-120.

<sup>23</sup> Correspondence from Premier Dominic Perrottet MP to the Clerk of the Parliaments, providing government response to the inquiry into options for reform of the management of delegated legislation in New South Wales, 12 December 2022.