

Regulation Committee

Evaluation of the Regulation Committee trial

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Terms of reference

These terms of reference were referred to the committee by the Legislative Council on 23 November 2017.¹

1. The Regulation Committee is to table a report evaluating the effectiveness of the trial by the last sitting day in November 2018.

¹ *Minutes*, NSW Legislative Council, 23 November 2017, p 2225.

Committee details

Committee members

The Hon Scott Farlow MLC	Liberal Party	<i>Chair</i>
The Hon Greg Donnelly MLC	Australian Labor Party	<i>Deputy Chair</i>
The Hon Paul Green MLC	Christian Democratic Party	
The Hon Trevor Khan MLC	The Nationals	
The Hon Shayne Mallard MLC	Liberal Party	
The Hon Mark Pearson MLC	Animal Justice Party	
The Hon Mick Veitch MLC	Australian Labor Party	
The Hon Natalie Ward MLC	Liberal Party	

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Chair's foreword

The Regulation Committee was established as a trial following the recommendation of the Select Committee on the Legislative Council Committee System.

It was envisaged that the Regulation Committee would consider policy and other issues relating to delegated legislation. In the trial period the Committee did not conduct any such inquiries into policies and trends in regulation, but rather conducted two inquiries into particular pieces of delegated legislation.

These two inquiries followed a much broader remit than any inquiry into regulation undertaken by the Legislative Review Committee in recent times and demonstrated that there is minimal overlap in the functions of both committees, which was an initial hesitation with respect to the Committee's establishment.

Both inquiries were short and sharp, but long enough to allow stakeholders to make their input to the Committee through written submissions and public hearings.

In both inquiries that have been undertaken, legislators have been able to gain a greater visibility of delegated legislation, which has provided more oversight for the Parliament. Stakeholders have also been able to provide their input into the operation and development of these pieces of delegated legislation, which is beneficial for better regulation that meets both the needs of government and the communities that they impact.

The work of the Regulation Committee has been both positive and effective, with all members of the Committee approaching the subject matter with the intent of producing better outcomes for the community. If the next Parliament is to determine that the Regulation Committee be established as a standing committee, it would of course require adequate staffing to make that possible and allow for the detailed analysis of delegated legislation and also inquiry into trends and issues relating to delegated legislation.

With that said, I commend the diligent and exceptional work of the Committee Secretariat who did a tremendous job in servicing the Regulation Committee during the trial, especially with an extremely busy workload for all committees at this stage of the Parliamentary cycle.

I commend this report to the House.



The Hon Scott Farlow MLC
Committee Chair

Recommendations

Recommendation 1

6

That the Legislative Council, at the commencement of the 57th Parliament, establish the Regulation Committee as a standing committee.

Recommendation 2

6

That, if the Regulation Committee is established as a standing committee in the 57th Parliament, the President of the Legislative Council and the Clerk of the Parliaments make representations to NSW Treasury seeking appropriate resourcing for the Regulation Committee.

Chapter 1 Experience of the trial committee

Origin of the Regulation Committee

- 1.1 In November 2016, the Select Committee on the Legislative Council Committee System tabled its report setting out proposals to ensure Upper House Committees continue to support the Legislative Council to fulfil its role as a house of review.
- 1.2 The report noted that during the inquiry there was a general consensus among inquiry participants that Legislative Council committees 'should play a greater role in scrutinising bills and regulations'.²
- 1.3 In response, the Select Committee on the Legislative Council Committee System proposed to enhance legislative scrutiny by trialling a Selection of Bills Committee and establishing a stand-alone Regulation Committee.³
- 1.4 The Select Committee heard in evidence that the current joint Legislation Review Committee, which is responsible for reviewing both regulations and bills, was 'inefficient and that the scrutiny of the regulations was gradually diminishing'.⁴
- 1.5 As a result, the Select Committee recommended a Regulation Committee be established, on a trial basis, to consider policy and other issues relating to delegated legislation.⁵
- 1.6 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'.⁶

Establishment of the trial

- 1.7 The Regulation Committee was established by consensus on 23 November 2017 on a trial basis to commence 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

² Select Committee on the Legislative Council Committee System, NSW Legislative Council, *Legislative Council committee system* (2016), p 1.

³ Select Committee on the Legislative Council Committee System, *Legislative Council committee system*, p 1.

⁴ Submission 6, Law Society of NSW, pp 5-6; *Hansard*, NSW Legislative Council, 5 April 2006, p 22060 (Don Harwin); Submission 9, State Parliamentary Labor Party, p 5. (Select Committee on the Legislative Council Committee System, NSW Legislative Council, *Legislative Council committee system* (2016), p 4.)

⁵ Select Committee on the Legislative Council Committee System, *Legislative Council committee system*, p vii.

⁶ Select Committee on the Legislative Council Committee System, *Legislative Council committee system*, p 4.

(b) trends or issues that relate to regulations.⁷

- 1.8 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 2018.⁸
- 1.9 The membership of the trial Regulation Committee followed the suggestion made in the report of the Select Committee on the Legislative Council Committee System that the committee comprise 'eight members, four of whom would be government members, one of whom would be the Chair; two opposition members and two crossbench members'.⁹
- 1.10 The Select Committee reasoned that as the Regulation Committee could potentially inquire into very broad subject matters, it would be assisted by including two crossbench members rather than one.¹⁰ This would help 'share the workload' as well as 'allow for a broader range of views to be considered in what will likely be an important oversight role'.¹¹

Inquiries conducted by the Regulation Committee

- 1.11 The Regulation Committee conducted two inquiries during 2018. The first inquiry was into the Environmental Planning and Assessment Amendment (Snowy 2.0 and Transmission Project) Order 2018. The second inquiry considered the Cemeteries and Crematoria Amendment Regulation 2018.
- 1.12 While the resolution establishing the Regulation Committee stated that a function of the committee be that it inquire into and report on trend or issues that relate to regulations, the committee did not conduct this type of policy based inquiry during the trial period.

Environmental Planning and Assessment Amendment (Snowy 2.0 and Transmission Project) Order 2018

- 1.13 This inquiry was established on 12 April 2018 and reported on 29 June 2018. It considered the impact and implementation of the Environmental Planning and Assessment Amendment (Snowy 2.0 and Transmission Project) Order 2018 (the Order) which was published on the NSW Legislation website on 9 March 2018.
- 1.14 The Order declared that development for the purposes of the Snowy 2.0 and transmission project was State significant infrastructure and critical State significant infrastructure. The inquiry investigated how this decision was made and considered concerns raised by inquiry participants. The concerns raised inquiry participants included: a perceived lack of consultation;

⁷ *Minutes*, NSW Legislative Council, 23 November 2017, pp 2223 – 2225.

⁸ *Minutes*, NSW Legislative Council, 23 November 2017, pp 2223 – 2225.

⁹ Select Committee on the Legislative Council Committee System, *Legislative Council committee system*, p 4.

¹⁰ Select Committee on the Legislative Council Committee System, *Legislative Council committee system*, p 5.

¹¹ Select Committee on the Legislative Council Committee System, *Legislative Council committee system*, p 5.

that other energy generation options were not considered; that the staged approval process did not holistically consider the impacts of the project on the environment; and the lack of legal redress.¹²

- 1.15** The report also identified the implications of declaring the project 'critical State significant infrastructure' and how this influenced the approval process and the viability of legal redress for stakeholders.¹³
- 1.16** The committee made two recommendations regarding the Department of Planning and Environment's communication and consultation processes in relation to the Order and the stages of the Snowy 2.0 project.¹⁴

Cemeteries and Crematoria Amendment Regulation 2018

- 1.17** This inquiry was established on 15 August 2018 and considered the impact and implementation of the Cemeteries and Crematoria Amendment Regulation 2018 (the Regulation), which was published on the NSW Legislation website on 25 June 2018.
- 1.18** The report discussed the objectives of the Regulation and the reasoning for renewable interment. It also looked at how the Regulation was developed; the adequacy of the public consultation process; and the appropriateness of the prescribed initial 25 year interment period.
- 1.19** The report identified a significant degree of misunderstanding regarding the government's proposal to address the need for more burial land via a renewable interment scheme.¹⁵
- 1.20** The committee made three recommendations. These focused on improving public awareness and understanding of renewable interment; increasing access to contact information for religious and cultural leaders; and amending Clause 5 of Regulation to make more explicit the responsibilities of cemetery operators.
- 1.21** The committee also made four findings concerning potential opportunities to acquire further land for cemeteries in the greater Sydney metropolitan area; the effectiveness of the consultation process followed by Cemeteries and Crematoria NSW; appropriate coffin design and materials to aid decomposition; and whether the prescribed initial period of renewable interment of 25 years is inappropriate for all soil types.
- 1.22** The report was tabled on 9 November 2018.

¹² Regulation Committee, NSW Legislative Council, *Environmental Planning and Assessment Amendment (Snowy 2.0 and Transmission Project) Order 2018* (2018), pp 1 and 6.

¹³ Regulation Committee, *Environmental Planning and Assessment Amendment (Snowy 2.0 and Transmission Project) Order 2018*, pp 3-6.

¹⁴ Regulation Committee, *Environmental Planning and Assessment Amendment (Snowy 2.0 and Transmission Project) Order 2018*, p vii.

¹⁵ Regulation Committee, NSW Legislative Council, *Cemeteries and Crematoria Amendment Regulation 2018* (2018), pp 4-5 and 13-16.

Issues arising during the trial

- 1.23 Two issues relating to the operation of the committee arose during the trial period – the impact of reporting timeframes on disallowance motions before the House, and staff resources available to support the committee.

Disallowance motions and reporting timeframes

- 1.24 Many forms of delegated legislation are subject to disallowance under Part 6 of the *Interpretation Act 1987* or under the provisions of the primary Act. Section 41 of the *Interpretation Act 1987* provides that either House may pass a resolution disallowing a statutory rule either before notice of the rule is laid before the House, or at any time after the notice is laid before the House, provided that, in the latter case, notice of the disallowance motion is given with 15 sitting days after the notice was laid before the House.¹⁶ On the passing of a disallowance motion the statutory rule in question 'shall cease to have effect'.¹⁷
- 1.25 The resolution establishing the Regulation Committee stipulates that where a regulation referred to the committee is the subject of a notice of motion or order of the day for the disallowance of the regulation:
- the notice or order stand postponed until the tabling of the committee report
 - unless otherwise ordered, the committee must table its report within six weeks
 - on tabling of the committee report, the Clerk is to place the notice of motion or order of the day on the Notice Paper at the stage it had reached prior to the regulation being referred.¹⁸
- 1.26 Of the two inquiries conducted by the Regulation Committee, only the Cemeteries and Crematoria Amendment Regulation 2018 was disallowable. In this instance, notice for a disallowance motion was given the day before the inquiry was referred by the House to the committee. This meant that the committee had six weeks to report unless otherwise ordered. As both the mover of the motion and the committee were aware that public input into the development of the Regulation had been lacking, it was resolved that the inquiry be extended to 12 weeks to allow sufficient time for the public to participate.
- 1.27 It is important to note that both inquiries conducted by the Regulation Committee have been short and sharp as opposed to the longer timeframes of regular inquiries which can be conducted over many months, sometimes years. For example the first inquiry, which was not disallowable, was conducted over an 11 week period.

¹⁶ *Interpretation Act 1987*, s 41(1); Lynn Lovelock and John Evans, *New South Wales Legislative Council Practice* (Federation Press, 2008), pp 426-427.

¹⁷ *Interpretation Act 1987*, s 41(2).

¹⁸ *Minutes*, NSW Legislative Council, 23 November 2017, p 2224.

Resourcing

- 1.28** The report on the Select Committee on the Legislative Council Committee System stated that the trial Regulation Committee should 'be staffed by a director and full time inquiry manager and a part time administrative officer'.¹⁹
- 1.29** Throughout 2018 the Regulation Committee has been staffed by a director, inquiry manager and administrative officer. At the same time these staff have concurrently served a number of other committees and inquiries. Resourcing allocations have been sufficient in 2018, mainly as a result of only two Regulation Committee inquiries being held during the year, and due to additional temporary staff being employed in the Committee office beyond the staffing establishment. However, it is likely that the resourcing requirements of the Regulation Committee would become more onerous if it were to conduct more inquiries in the next parliament, and if the committee were to conduct inquiries into more specialist and technical subject matter such as trends or issues relating to delegated legislation.

Conclusion

- 1.30** The committee considers the operation and work of the Regulation Committee as both positive and effective. The trial of the Regulation Committee has demonstrated the importance and complementary nature of Legislative Council scrutiny of regulations separate to that of the Joint Committee on Legislation Review.
- 1.31** The composition of members, with two cross bench members, has also worked effectively to provide for a broader range of views to be considered as they relate to the significant issues examined by the committee.
- 1.32** Further, while the resolution establishing the committee provides a six week timeframe for inquiries where a disallowance has been moved, the resolution also provides sufficient flexibility to enable the committee to vary the reporting timeframe where appropriate.
- 1.33** From the two regulations inquired into by the committee, the purpose, implementation, and potential implications/impacts of the regulations were identified and examined in detail. The committee also highlighted systemic issues with the government's public consultation processes when developing regulations.
- 1.34** This led to the committee making recommendations in both inquiries that relevant government departments and agencies communicate with, and consult and advise stakeholders about, forthcoming regulations, their objectives and potential impacts for stakeholders so as to increase awareness.
- 1.35** Members also identified that the work of the committee presented broader issues to potentially be inquired into by other Legislative Council Committees.
- 1.36** The committee considered that the innovative approach adopted by the trial Regulation Committee of focusing on substantive policy issues regarding a small number of regulations of

¹⁹ Select Committee on the Legislative Council Committee System, *Legislative Council committee system*, p 5.

interest, rather than reviewing all disallowable regulations, has proven to be efficient, effective and valuable.

- 1.37** If the Regulation Committee were to continue in the next Parliament it would allow for:
- trends or issues relating to delegated legislation to be analysed (this not being the case in 2018)
 - the continued review and analysis of any regulation of particular interest to the committee.
- 1.38** The committee therefore recommends that the Legislative Council, at the commencement of the 57th Parliament, establish the Regulation Committee as a standing committee.
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Recommendation 1

That the Legislative Council, at the commencement of the 57th Parliament, establish the Regulation Committee as a standing committee.

- 1.39** Resourcing for the operation of the trial Regulation Committee has been sufficient, given the additional temporary staff employed in the Committee office in the pre-election period (who have provided flexible support across all committees including the Regulation Committee), and due to only two inquiries being conducted in 2018. If the committee were to continue in the next Parliament and conduct more inquiries, including perhaps into trends and issues relating to delegated legislation, this increased workload would have resourcing implications.
- 1.40** It is recommended that if the Regulation Committee is established as a standing committee in the 57th Parliament, the President of the Legislative Council and the Clerk of the Parliaments make representations to NSW Treasury seeking appropriate resourcing for the committee.
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Recommendation 2

That, if the Regulation Committee is established as a standing committee in the 57th Parliament, the President of the Legislative Council and the Clerk of the Parliaments make representations to NSW Treasury seeking appropriate resourcing for the Regulation Committee.

Appendix 1 Minutes

Draft minutes no. 8

Thursday 1 November 2018

Regulation Committee

Room 1254, Parliament House, 10.02 am

1. Members present

Mr Farlow, *Chair*

Mr Donnelly, *Deputy Chair*

Mr Green

Mr Khan

Mr Mallard (from 10.05 am)

Mr Pearson (from 10.05 am)

Mr Veitch

Mrs Ward

2. Previous minutes

Resolved, on the motion of Mr Donnelly: That draft minutes no. 7 be confirmed.

3. Correspondence

The committee noted the following items of correspondence:

Received

- 25 September 2018 – Email from Mr George Simpson, Chief Executive Officer, Rookwood General Cemetery to secretariat, providing a copy of the report entitled 'Funeral poverty in Scotland: A review for Scottish Government'.

4. Inquiry into the Cemeteries and Crematoria Amendment Regulation 2018

4.1 Submissions

The committee noted that the following submission was published by the committee clerk under the authorisation of the resolution appointing the committee: submission no. 158.

4.2 Answers to questions on notice and supplementary questions

The committee noted that the following answers to questions on notice were published by the committee clerk under the authorisation of the resolution appointing the committee:

- answers to questions on notice from Cemeteries and Crematoria NSW and the Department of Industry received 5 October 2018
- answers to questions on notice from the NSW Aboriginal Land Council received on 24 October 2018.

4.3 Requested corrections to transcript of evidence 21 September 2018

Resolved, on the motion of Mr Veitch: That the committee authorise the correction to Mr Knoll's transcript of evidence from 21 September 2018, as requested by the witness.

4.4 Consideration of Chair's draft report

The Chair submitted his draft report entitled *Cemeteries and Crematoria Amendment Regulation 2018*, which, having been previously circulated was taken as being read.

Resolved, on the motion of Mr Donnelly: That paragraph 1.47 be amended by omitting 'cultural and religious' and inserting instead 'religious and cultural'.

Resolved on the motion of Mr Donnelly: That paragraph 1.48 be amended by inserting 'an education and' before 'awareness campaign'.

Resolved on the motion of Mr Donnelly: That Recommendation 1 be amended by inserting 'an education and' before 'awareness campaign'.

Resolved, on the motion of Mr Donnelly: That paragraph 1.49 be amended by omitting 'cultural or religious' and inserting instead 'religious and cultural'.

Mr Donnelly moved: That paragraph 1.50 be amended by omitting 'all cultural or spiritual leaders' and inserting instead 'all religious hierarchy and cultural leaders'.

Mr Green moved: That the motion of Mr Donnelly be amended by omitting 'hierarchy' before 'and cultural leaders'.

Amendment of Mr Green put and passed.

Original motion of Mr Donnelly, as amended, put and passed.

Resolved, on the motion of Mr Donnelly: That Recommendation 2 be amended by:

- a) omitting 'all cultural or spiritual leaders' before 'who must be consulted' and inserting instead 'all religious and cultural leaders'.
- b) omitting 'cultural or religious' before 'practices apply' and inserting instead 'religious and cultural'.

Resolved, on the motion of Mr Veitch: That the following new finding be inserted after paragraph 1.54:

'Finding X

The committee notes the concerns raised by several inquiry participants regarding the finite amount of land currently available for burials in the greater Sydney metropolitan area. The committee urges the government to look at potential opportunities to acquire further land for cemeteries in the greater Sydney metropolitan area as a matter of priority'.

Resolved, on the motion of Mr Donnelly: That Finding 1 be amended by omitting 'could have been more robust' and inserting instead 'should have been more robust'.

Resolved, on the motion of Mr Khan: That Finding 1 be amended by omitting 'would appear that it was not effective' and inserting instead 'would appear that it was ineffective'.

Mr Veitch moved: That a new finding be inserted after paragraph 2.58:

'Finding X

That design of coffins and use of certain materials will significantly delay decomposition of remains. The committee is of the view that more work must be undertaken by relevant government agencies to determine the appropriate coffin design and materials for use in the funeral industry to ensure there is no undue or significant delay in decomposition of remains'.

Mr Mallard moved: That the motion of Mr Veitch be amended by inserting at the end: ', or possible environmental consequences'.

Amendment of Mr Mallard put and passed.

Original question of Mr Veitch, as amended, put and passed.

Resolved, on the motion of Mr Donnelly: That:

- a) The draft report as amended be the report of the committee and that the committee present the report to the House;
- b) The transcripts of evidence, submissions, tabled documents, answers to questions on notice and supplementary questions, and correspondence relating to the inquiry be tabled in the House with the report;
- c) Upon tabling, all unpublished attachments to submissions be kept confidential by the committee;
- d) Upon tabling, all unpublished transcripts of evidence, submissions, tabled documents, answers to questions on notice and supplementary questions, and correspondence relating to the inquiry, be published by the committee, except for those documents kept confidential by resolution of the committee;
- e) The committee secretariat correct any typographical, grammatical and formatting errors prior to tabling;
- f) The committee secretariat be authorised to update any committee comments where necessary to reflect changes to recommendations or new recommendations resolved by the committee;
- g) Dissenting statements be provided to the secretariat within 24 hours after receipt of the draft minutes of the meeting;
- h) That the report be tabled on Friday 9 November 2018.

4.5 Consideration of Chair's draft evaluation report

The Chair submitted his draft report entitled *Evaluation of the Regulation Committee trial*, which, having been previously circulated was taken as being read.

Resolved, on the motion of Mr Khan: That:

- a) The draft report be the report of the committee and that the committee present the report to the House;
- b) The committee secretariat correct any typographical, grammatical and formatting errors prior to tabling;
- c) The committee secretariat be authorised to update any committee comments where necessary to reflect changes to recommendations or new recommendations resolved by the committee;
- d) Dissenting statements be provided to the secretariat within 24 hours after receipt of the draft minutes of the meeting;
- e) That the report be tabled on Friday 9 November 2018.

5. Adjournment

The committee adjourned at 10.58 am, *sine die*.

Emma Rogerson
Committee Clerk

