



LEGISLATIVE COUNCIL

REGULATION COMMITTEE

## Making of delegated legislation in New South Wales

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Report 7

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October 2020

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Regulation Committee

# **Making of delegated legislation in New South Wales**

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# Terms of reference

1. That the Regulation Committee inquire into and report on the making of delegated legislation in New South Wales, and in particular:
  - (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.
2. That the committee report by the last sitting day in October 2020.<sup>1</sup>

The terms of reference were referred to the committee by the Legislative Council on 26 February 2020.<sup>2</sup>

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<sup>1</sup> The original reporting date was the last sitting day in June 2020 (*Minutes*, Legislative Council, 26 February 2020, p 801). On 24 March 2020, the reporting date was extended to the last sitting day in September 2020 (*Minutes*, Legislative Council, 24 March 2020, p 878). On 6 August 2020, the reporting date was extended to the last sitting day in October 2020 (*Minutes*, Legislative Council, 6 August 2020, p 1198).

<sup>2</sup> *Minutes*, NSW Legislative Council, 26 February 2020, pp 800-801.

## Committee details

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### Committee members

<b>The Hon Mick Veitch MLC</b>	Australian Labor Party	<i>Chair</i>
<b>Ms Abigail Boyd MLC</b>	The Greens	<i>Deputy Chair</i>
<b>The Hon Robert Borsak MLC</b>	Shooters, Fishers and Farmers Party	
<b>The Hon Catherine Cusack MLC</b>	Liberal Party	
<b>The Hon Greg Donnelly MLC</b>	Australian Labor Party	
<b>The Hon Scott Farlow MLC</b>	Liberal Party	
<b>The Hon Ben Franklin MLC*</b>	The Nationals	
<b>The Hon Matthew Mason-Cox</b>	Liberal Party	

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\* The Hon Ben Franklin MLC replaced the Hon Sam Farraway MLC as a member of the committee from 3 August 2020.

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## Chair's foreword

It is probably not widely known that delegated legislation is the principal form of lawmaking in New South Wales. This inquiry has highlighted the importance of facilitating good legislative practice and improving the processes and safeguards for delegated legislation. Inquiry participants advocated a range of reforms to strengthen democratic oversight and accountability in the executive's use of legislative power, including the need to:

- rationalise the types of delegated legislation which are subject to parliamentary scrutiny and disallowance procedures
- improve consultation requirements and the public accessibility of delegated legislation
- streamline statutory safeguard provisions which are currently fragmented across an array of different Acts.

Given the complex nature of the laws and procedures governing delegated legislation and the variety of possible approaches to reform, the committee has concluded that a detailed examination of these issues by the NSW Law Reform Commission is required to ensure that New South Wales has in place a statutory framework for delegated legislation that is simpler, more robust and more accessible. The committee has therefore recommended that the Attorney General consider referring terms of reference to the Commission to review and report 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.

Separately to the NSW Law Reform Commission's work, the committee believes there is a need for greater transparency in the use of three specific legislative tools which carry the risk of executive overreach: 'Henry VIII clauses' – which delegate power to modify primary legislation; 'shell legislation' – which delegates power to fill in wide legislative gaps by subordinate legislation; and 'quasi legislation' – which proposes compliance based on the requirements of a non-legislative document.

The committee recommends that explanatory notes to bills which contain these types of provisions should highlight the presence of the provision in the bill and explain why such a broad delegation of legislative power is considered necessary. This will ensure that broad delegations of legislative power are specifically brought to the Parliament's attention and will assist the Parliament to assess whether the extent of the delegation in each case is justified and subject to adequate safeguards. The introduction of such a requirement was strongly supported by stakeholders and reflects arrangements in certain other jurisdictions.

In addition to the issue of transparency, the inquiry revealed gaps in the current framework for the scrutiny of delegated legislation by committees, which play a critical role in supervising the executive's exercise of legislative power. These gaps include limitations in the powers and functions of the Regulation Committee. To address these limitations the committee recommends that the resolution establishing the Regulation Committee be expanded to make it clear the committee may consider all instruments of a legislative nature and not just regulations, as well as draft delegated legislation. The committee also recommends that the resolution establishing the Regulation Committee be amended to enable the committee to self-refer inquiries.

In closing, I want to make the observation that this inquiry is fundamentally about improving lawmaking in New South Wales and ensuring that the public can have confidence that the laws made by delegated

legislation reflect an appropriate balance between parliamentary and executive power. This is ultimately in the interests of every member of the New South Wales Parliament and so I commend this report and its important recommendations to the House.

I also wish to extend my thanks to the stakeholders who provided such detailed and valuable evidence to this inquiry, to my committee colleagues, to the Parliamentary Research Service for their research paper on delegated legislation, to Hansard for their excellent work transcribing the hearing, and to the committee secretariat.



The Hon Mick Veitch MLC  
**Committee Chair**

# Recommendations

## Recommendation 1

26

That NSW Government agencies give priority to identifying more effective ways of communicating legislative instruments to the public, particularly instruments which impact on personal rights and liberties, and facilitating ready access to all such instruments by the public.

## Recommendation 2

41

That the Attorney General consider referring to the NSW Law Reform Commission the following terms of reference:

1. Pursuant to section 10 of the *Law Reform Commission Act 1967*, the NSW Law Reform Commission is to review and report on:
  - (a) the extent and use of delegated legislative powers in New South Wales
  - (b) powers and safeguards relating to delegated legislation in other jurisdictions
  - (c) suggestions for improvements in the use of delegated legislative powers to prevent executive overreach.
2. In particular, the Commission is to consider:
  - (a) the merits of extending statutory provisions regarding disallowance and committee scrutiny to all instruments of a legislative character including quasi-legislation
  - (b) the adequacy of current requirements for consultation in the development of delegated legislation
  - (c) the need to ensure that all forms of delegated legislation can be easily accessed by the public as soon as they commence
  - (d) the need for additional safeguards in relation to the use of Henry VIII provisions, shell legislation and quasi legislation
  - (e) the merits of consolidating into a single statute the *Subordinate Legislation Act 1989*, the *Legislation Review Act 1987* and the relevant provisions of the *Interpretation Act 1987*
  - (f) the merits of adopting a comprehensive statutory framework for primary and secondary legislation similar to the *Legislative Standards Act 1992* (Qld)
  - (g) the merits of extending the time limits for the disallowance of delegated legislation
  - (h) the merits of extending the 4-month time limit on remaking a disallowed statutory rule
  - (i) any other matters the Commission considers relevant.

## Recommendation 3

42

That, following the report of the NSW Law Reform Commission, the House refer further terms of reference to the Regulation Committee to inquire into and report on the Commission's findings and recommendations.

**Recommendation 4**

43

That, to foster greater transparency in the use of delegated legislative power, 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.

**Recommendation 5**

43

That the resolution establishing the Regulation Committee be amended to make it clear the committee may consider:

- all instruments of a legislative nature regardless of their form
- draft delegated legislation.

**Recommendation 6**

44

That the resolution establishing the Regulation Committee be amended to enable the committee to self-refer inquiries.

## Conduct of inquiry

The terms of reference for the inquiry were referred to the committee by the Legislative Council on 26 February 2020.

The committee received 8 submissions.

The committee held one public hearing at Parliament House in Sydney.

Inquiry related documents are available on the committee's website, including submissions, hearing transcripts and answers to questions on notice.



# Chapter 1 Background

This chapter sets the context for the complex and important issues explored in this report. It commences by setting out fundamental concepts regarding delegated legislation, before touching briefly on judicial review and parliamentary oversight, and the volume of delegated legislation in New South Wales.

## Delegated legislation: fundamental concepts

- 1.1** The separation of powers between the legislature and the executive is central to understanding the system of government in New South Wales. Under the *Constitution Act 1902*,<sup>3</sup> the legislature is the arm of government responsible for making laws, serving a critical role in publicly scrutinising laws proposed by the executive.
- 1.2** It is widely acknowledged that in a modern democracy, it is necessary and appropriate for the legislature to delegate some law-making functions to the executive. This form of legislation is usually referred to as delegated legislation, or alternatively as secondary, or subordinate, legislation. Such legislation encompasses statutory rules, by-laws, ordinances, orders in council and various other instruments made by the executive under the authority of a power conferred by an Act of Parliament.<sup>4</sup>
- 1.3** Delegated legislation ensures that:
  - appropriate administrative or highly technical detail can be ‘filled in’ by the executive rather than over-burdening scarce parliamentary time
  - there is a degree of flexibility to cater for changing circumstances.<sup>5</sup>
- 1.4** When the legislature delegates its law-making function to the executive, these laws are not subject to the same level of parliamentary scrutiny as primary legislation and are therefore open to the risk of overreach. This includes through over-reliance on:
  - statutory provisions which allow Acts of Parliament to be amended by delegated legislation (‘Henry VIII clauses’)
  - primary legislation which provides only an outline of the legislative scheme and relies on the detail being supplied in delegated legislation (‘shell legislation’) and
  - non-legislative instruments which are incorporated into legislation by reference (‘quasi legislation’).
- 1.5** As the NSW Parliamentary Counsel’s Office (hereafter, PCO) observes in its submission, the use of delegated legislation is therefore a balance between the need for legislative flexibility and the need for comprehensive and effective scrutiny of legislation.<sup>6</sup> Furthermore, whether delegated legislation is problematic depends ultimately on whether the power is properly

<sup>3</sup> *Constitution Act 1902*, section 5.

<sup>4</sup> Lynn Lovelock and John Evans, *New South Wales Legislative Council Practice*, (Federation Press, 2008), p 422.

<sup>5</sup> Submission 7, NSW Parliamentary Counsel’s Office, p 3.

<sup>6</sup> Submission 7, NSW Parliamentary Counsel’s Office, p 3.

executive or legislative in nature; that is, whether the scope of the delegation is so large that it enables the executive to govern by decree or to overcome the intent of the primary legislation, rather than being subordinate to it.<sup>7</sup> This is the analysis that should be undertaken when considering potential executive overreach.

- 1.6 The risk of executive overreach is to some extent inherent in the delegated legislation process given the lower levels of scrutiny applied to the making of such legislation. While primary legislation is subject to the three reading stages and debate in each chamber before being passed, delegated legislation becomes subject to parliamentary scrutiny and disallowance procedures only after it is made. Further, compared to the power to debate and amend primary legislation, the disallowance mechanism applicable to delegated legislation is blunt and severe and, perhaps as a consequence, is rarely successfully used.<sup>8</sup> PCO submitted that the more rigorous process applied to primary legislation suggests that substantive law-making should be confined to primary legislation to the greatest extent practical.<sup>9</sup>

## Judicial review and parliamentary oversight

- 1.7 Judicial review of delegated legislation essentially considers whether the legislation was validly made and within power. In his submission, Associate Professor Lorne Neudorf, Adelaide Law School, notes the following limitations of judicial review in scrutinising delegated legislation:
- in reviewing the legal validity of delegated legislation, courts may provide the executive with considerable latitude in light of the relevant statutory language
  - a court challenge to delegated legislation depends upon an aggrieved party initiating (and funding) litigation
  - there are few enforceable constitutional limits on Parliament's capacity to delegate its lawmaking powers.<sup>10</sup>
- 1.8 This latter point was most famously established in 1931 in *Victorian Stevedoring and General Contracting Company Pty Ltd v Dignan*,<sup>11</sup> in which the High Court upheld the constitutional validity of an extreme example of shell legislation that also incorporated a Henry VIII clause. More recently, the 2014 High Court case *ADCO Constructions Pty Ltd v Goudappel*<sup>12</sup> upheld a savings and transitional regulation made under a Henry VIII clause contained in workers compensation legislation.<sup>13</sup>
- 1.9 These cases emphasise the central role of Parliament in providing a comprehensive, robust scrutiny mechanism for delegated legislation. Flowing from this, Professor Gabrielle Appleby, UNSW Law, puts forward the following constitutional principle:

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<sup>7</sup> Submission 7, NSW Parliamentary Counsel's Office, p 2.

<sup>8</sup> Submission 7, NSW Parliamentary Counsel's Office, pp 5-6.

<sup>9</sup> Submission 7, NSW Parliamentary Counsel's Office, p 6.

<sup>10</sup> Submission 1, Associate Professor Lorne Neudorf, pp 2-3.

<sup>11</sup> (1931) 46 CLR 73.

<sup>12</sup> [2014] HCA 18.

<sup>13</sup> In their joint judgment, French CJ, Crennan, Kiefel and Keane JJ observed that Henry VIII clauses 'have frequently been criticised for good reason': [2014] HCA 18 at [31].

Within the New South Wales constitutional system, Parliament is the institution responsible for making the law. It fills this position because of its broad representative nature, with the widest and most diverse range of constituents represented in it, as well as its practice of conducting its activities in public, and subjecting them to challenge, debate and ultimately, an open vote for which its members will ultimately be accountable back to the people. While delegation of legislative power is permitted within this system, to respect the status of Parliament, delegation should only be done where the Parliament retains oversight of that power and retains responsibility for significant policy decisions that are made under it. In addition to the nature and practice of Parliament, delegations should be limited because of the rule of law principle that strives for certainty: use of overly broad delegations in shell legislation, Henry VIII clauses and quasi legislative instruments undermines the intelligibility of the statute book. None of this prevents the delegation of law-making power, and indeed there are generally accepted reasons for, and instances in which delegation is considered appropriate. However, it reinforces the need to limit these practices in delegation.<sup>14</sup>

- 1.10** The corollary of this principle is that a failure by Parliament to oversee delegated lawmaking can arguably be seen as a neglect of its functions.<sup>15</sup>

## The volume of delegated legislation in New South Wales

- 1.11** An analysis of primary and delegated legislation conducted by Associate Professor Neudorf found that:
- of the 437 enactments published on the NSW legislation website in 2019, 6 per cent, or 25 enactments, were pieces of primary legislation enacted by Parliament, while 94 per cent, or 412 enactments, were 'regulations'<sup>16</sup>
  - of the 3,470 pages of legislative text enacted in New South Wales in 2019, 13 per cent, or 462 pages, were in primary legislation, while 87 per cent, or 3,008 pages, were in delegated legislation.<sup>17</sup>
- 1.12** The analysis also revealed that delegated legislation published in 2019 covered 'a tremendous variety' of subject matters, including Aboriginal land rights, biosecurity laws, conservation of threatened species, coal mines, combat sports, elections, health services, liquor licensing, national parks, retirement villages, water management and work place injuries.<sup>18</sup>
- 1.13** Associate Professor Neudorf observed that the results of his analysis demonstrate that delegated legislation 'is the principal form of lawmaking in New South Wales'.<sup>19</sup> Further, the New South

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<sup>14</sup> Submission 6, Professor Gabrielle Appleby, p 5.

<sup>15</sup> Submission 1, Associate Professor Lorne Neudorf, p 3.

<sup>16</sup> On the NSW legislation website, subordinate legislation is referred to as 'regulations' even though it includes other types of instruments: [www.legislation.nsw.gov.au/information/subordinate-legislation](http://www.legislation.nsw.gov.au/information/subordinate-legislation).

<sup>17</sup> Evidence, Associate Professor Lorne Neudorf, Deputy Dean of Law and Associate Professor, Adelaide Law School, 27 July 2020, p 14.

<sup>18</sup> Evidence, Associate Professor Neudorf, 27 July 2020, p 15.

<sup>19</sup> Evidence, Associate Professor Neudorf, 27 July 2020, p 14.

Wales Parliament is delegating ‘tremendous lawmaking powers’ to the Government and the Government has no hesitation in using those powers to make new laws.<sup>20</sup>

- 1.14** Associate Professor Neudorf submitted that the figures reinforce the need for robust parliamentary oversight as a critical check on the use of delegated legislative power to prevent executive overreach and preserve the Parliament's constitutional role as lawmaker in chief.<sup>21</sup>

## **Structure of this report**

- 1.15** This report addresses the terms of reference for the inquiry by examining:

- the current legislative framework for delegated legislation in New South Wales and the extent to which existing statutory safeguards are adequate to prevent executive misuse of delegated law-making powers – Chapter 2
- the potential for executive overreach, mechanisms to prevent inappropriate delegations and ways of enhancing parliamentary scrutiny – Chapter 3.

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<sup>20</sup> Evidence, Associate Professor Neudorf, 27 July 2020, p 15.

<sup>21</sup> Evidence, Associate Professor Neudorf, 27 July 2020, p 15.

## Chapter 2 The legislative framework for delegated legislation

This chapter focuses on the current legislative framework for delegated legislation in New South Wales, exploring the extent to which the various existing statutory safeguards are adequate to prevent executive misuse of delegated law-making powers. The chapter goes on to examine the idea of statutory consolidation, the development of comprehensive legislative standards, and the need for further inquiry.

### Overview of the legislative scheme

- 2.1** There are three key pieces of legislation which together create the framework for delegated legislation in New South Wales. The relevant provisions of these Acts are summarised below.

**Table 1 Summary of legislative provisions regarding delegated legislation**

Act	Key provisions
<i>Interpretation Act 1987</i>	<p><b>Application of Act</b> – Applies to 'statutory rules', defined in s 21 as a regulation, by-law, rule or ordinance that is made by the Governor (or is required by law to be approved or confirmed by the Governor), or a rule of court.</p>
	<p><b>Section 39, Making of statutory rules</b> – requires that a statutory rule must be published on the NSW Legislation website and commences on the day of publication on the website unless a later date is specified in the regulation itself.</p>
	<p><b>Section 40, Notice of the making of statutory rules</b> – requires written notice of the making of a statutory rule to be laid before each House of Parliament within 14 sittings days of that House after the day on which it is published on the NSW Legislation website (though failure to do so does not invalidate the instrument).</p>
	<p><b>Section 41, Disallowance</b> – provides that either House of Parliament may resolve to disallow a statutory rule at any time before written notice of it is laid before the House or at any time after the relevant written notice is laid before the House, but only if notice of the resolution was given within 15 sitting days of the House after the relevant written notice was so laid. On the passing of such a motion, the rule ceases to have effect.</p>
	<p><b>Section 45A, Tabling of instruments</b> – provides that an instrument that may or must be tabled in a House of Parliament under any other Act (without any indication as to who is authorised or required to table it) may be laid before the House by a Minister or the Clerk of the House.</p>
	<p><b>Part 6A, Publication of legislation</b> – provides for publication of legislation on the NSW legislation website.</p>
<i>Subordinate Legislation Act 1989</i>	<p><b>Application of Act</b> – applies to 'statutory rules', defined in s 3 as a regulation, by-law, rule or ordinance that is made by the Governor (or is required by law to be approved or confirmed by the Governor), but does not include instruments specified in Schedule 4. Schedule 4 excluded instruments include the Legislative Council and Legislative Assembly Standing Orders, rules of court, and regulations and by-laws made under certain enabling acts, including the <i>Constitution Act 1902</i>.</p>
	<p><b>Section 4, Guidelines</b> – provides that before a statutory rule is made, the responsible Minister is required to ensure compliance with certain guidelines for the preparation of statutory rules</p>
	<p><b>Section 5, Regulatory impact statements and consultation</b> – provides that before a statutory rule is made, the responsible Minister is required to ensure that a regulatory</p>

Act	Key provisions
	impact statement is prepared, and that consultation with relevant stakeholder takes place.
	<b>Section 8, Remaking of a disallowed statutory rule</b> – prohibits the making of a statutory rule that is the 'same in substance' as a previously disallowed statutory rule within four months of the disallowance.
	<b>Section 10, Staged repeal</b> – provides for the staged repeal of statutory rules after five years.
<i>Legislation Review Act 1987</i>	<p><b>Application of Act</b> – applies to 'regulations', defined in s 3 as a statutory rule, proclamation or order that is subject to disallowance by either or both Houses of Parliament. 'Statutory rule' is in turn defined as per definition as in the <i>Interpretation Act 1987</i>.</p> <p><b>Part 2, Constitution and procedure of the Legislation Review Committee</b> – establishes the joint committee and sets out its procedures.</p> <p><b>Part 3, Functions of the Committee</b> – sets out the joint committee's functions, including to review all regulations while they are subject to disallowance to determine whether the special attention of Parliament should be drawn to any such regulation on any ground.</p>

## Key statutory safeguards

- 2.2 The legislative framework for delegated legislation includes a number of protections to guard against abuses in the executive's use of legislative power. Participants in this inquiry discussed a range of issues relating to these protections.
- 2.3 The particular issues discussed concerned: the scope of delegated legislation that is subject to parliamentary disallowance (i.e. veto) and review; exemptions from disallowance and review requirements; the timeframe for disallowance and review; consultation in the development of delegated legislation; the extent to which delegated legislation is accessible by the public; the protection of rights and liberties in delegated legislation; the role of the NSW Parliamentary Counsel's Office (hereafter, PCO) in the drafting of delegated legislation; and the remaking of delegated legislation that has been disallowed. These issues are discussed in turn below.

### The scope of delegated legislation that is subject to disallowance and review

#### *Current provisions*

- 2.4 The principal legislative mechanisms for ensuring that Parliament retains effective oversight of delegation legislation are the requirements that instruments:
- must be tabled in Parliament and are subject to disallowance by vote of either House of Parliament
  - must be reviewed by a specialist scrutiny committee which has power to draw the Parliament's attention to matters of concern.

**2.5** Part 6 of the *Interpretation Act 1987* establishes procedures relating to the tabling and disallowance of ‘statutory rules’<sup>22</sup> and defines ‘statutory rule’ as follows:

- (a) a regulation, by-law, rule or ordinance—
  - (i) that is made by the Governor, or
  - (ii) that is made by a person or body other than the Governor, but is required by law to be approved or confirmed by the Governor, or
- (b) a rule of court.<sup>23</sup>

**2.6** Delegated legislation that is not a ‘statutory rule’ is not required to be tabled in Parliament and cannot be disallowed unless the Act under which it is made expressly provides for it. According to PCO, there is only a ‘very limited category’ of legislation which makes provision for the disallowance of instruments that are not ‘statutory rules’.<sup>24</sup>

**2.7** The definition of ‘statutory rule’ impacts on the scope of the instruments which are subject to mandatory committee review. Under the *Legislation Review Act 1987* the Legislation Review Committee is required to consider any ‘regulation’,<sup>25</sup> which is defined as a ‘statutory rule’, proclamation or order that is subject to disallowance.<sup>26</sup>

**2.8** Recent examples of delegated legislation that are not statutory rules and are not therefore subject to disallowance or committee review include:

- public health orders made under section 7 of the *Public Health Act 2010*<sup>27</sup>
- the Statutory and Other Offices Remuneration Tribunal Determination with respect to Mr Michael Fuller APM in the office of the Commissioner of Police.<sup>28</sup>

### ***The views of inquiry participants***

**2.9** The evidence to the inquiry highlighted differences between the position in New South Wales, where the availability of the disallowance procedure depends on the form of the instrument concerned, and the approach which has been adopted in the Commonwealth *Legislation Act 2003*, which allows for the disallowance of a ‘legislative instrument’.

**2.10** The definition of ‘legislative instrument’ in the Commonwealth Act includes the matters specified in section 8(4):

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<sup>22</sup> *Interpretation Act 1987*, sections 40 and 41.

<sup>23</sup> *Interpretation Act 1987*, section 21(1).

<sup>24</sup> Answers to questions on notice, Parliamentary Counsel’s Office, 27 August 2020, p 2. For example, under section 16(4) of the *Gaming Machine Tax Act 2001* the tabling and disallowance provisions of the *Interpretation Act 1987* apply to ClubGRANTs guidelines.

<sup>25</sup> *Legislation Review Act 1987*, section 9.

<sup>26</sup> *Legislation Review Act 1987*, section 3.

<sup>27</sup> Submission 5, NSW Council for Civil Liberties, p 8; Evidence, Ms Annette O’Callaghan, Parliamentary Counsel, NSW Parliamentary Counsel’s Office, 27 July 2020, p 31.

<sup>28</sup> Ruling: President Ajaka, *Hansard*, NSW Legislative Council, 2 June 2020, pp 9-10.

- 8(4) An instrument is a legislative instrument if:
- (a) the instrument is made under a power delegated by the Parliament; and
  - (b) any provision of the instrument:
    - (i) determines the law or alters the content of the law, rather than determining particular cases or particular circumstances in which the law, as set out in an Act or another legislative instrument or provision, is to apply, or is not to apply; and
    - (ii) has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right.

**2.11** The Legislative Review Committee of the South Australian Parliament noted that section 8(4) defines legislative instrument ‘by reference to the legal effect of the instrument rather than the name of the instrument, as is the case in many jurisdictions’.<sup>29</sup> Similarly, Associate Professor Neudorf noted that section 8(4) encapsulates the idea that:

a legislative instrument must be truly *legislative* in character, in the sense of creating or changing the general law, as opposed to the essentially administrative act of making an order or designation.<sup>30</sup>

**2.12** Professor Appleby suggested that the application of Part 6 in the *Interpretation Act 1987*, which provides for the tabling and disallowance of ‘statutory rules’, should be expanded to include all instruments ‘of a legislative character’ including quasi-legislative instruments. In that regard Professor Appleby submitted:

This would expand the tabling and disallowance requirements, as well as the jurisdiction of the Legislation Review Committee. This would be consistent with best practice in this area, as is now seen in the Commonwealth scheme and the application of its scrutiny framework to instruments of a legislative character and the scope of the Senate Committee Standing Committee for the review of Delegated Legislation.<sup>31</sup>

**2.13** Similarly, the New South Wales Parliamentary Counsel, Ms Annette O’Callaghan, expressed the view that:

- the question of whether an instrument is disallowable should depend on the nature of the instrument rather than what the instrument is called
- instruments of a legislative character should be subject to scrutiny and disallowance procedures while instruments of a purely administrative nature may not require such stringent oversight.<sup>32</sup>

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<sup>29</sup> Submission 4, Legislative Review Committee, Parliament of South Australia, p 2.

<sup>30</sup> Submission 1, Associate Professor Lorne Neudorf, Attachment 1: Lorne Neudorf, ‘Strengthening the parliamentary scrutiny of delegated legislation: lessons from Australia’, *Canadian Parliamentary Review*, Winter 2019, p 26.

<sup>31</sup> Submission 6, Professor Gabrielle Appleby, p 6.

<sup>32</sup> Evidence, Ms O’Callaghan, 27 July 2020, p 31

- 2.14** In support of this position, the Parliamentary Counsel noted that at the moment only statutory rules are scrutinised and subject to the disallowance process, but that ‘a lot of instruments have importance despite not being statutory rules’.<sup>33</sup>
- 2.15** The Parliamentary Counsel also suggested that a focus on instruments of a legislative character would allow a better use of the limited time and resources available for scrutiny and disallowance procedures.<sup>34</sup>

### Exemptions from disallowance and review

#### *Current provisions*

- 2.16** The Commonwealth *Legislation Act 2003*, which includes provisions relating to the disallowance of ‘legislative instruments’, also allows for exemptions to be made.<sup>35</sup> In New South Wales, by contrast, the *Interpretation Act 1987* does not allow for particular statutory rules to be exempted from disallowance procedures.
- 2.17** In practice, however, where an Act authorises the making of delegated legislation of a type which does not meet the definition of ‘statutory rule’, that instrument is effectively exempted from disallowance unless the parent Act itself makes provision for disallowance of the instrument concerned.<sup>36</sup> The exclusion of an instrument from the disallowance procedure in turn excludes the instrument from consideration by the Legislation Review Committee. This raises the question of the extent of the delegated legislation that has been classified as something other than a ‘statutory rule’ in its enabling Act.
- 2.18** Aside from the substantive question of the extent of ‘exemptions’, issues have arisen in relation to transparency. While ‘statutory rules’ are published on the NSW legislation website there is no equivalent listing of other types of delegated legislation and there is scope for uncertainty as to whether particular instruments are disallowable or not.
- 2.19** The Commonwealth Parliament has taken steps to improve transparency by establishing the Federal Register of Legislation. The Register includes both ‘legislative instruments’, which are generally disallowable, and ‘notifiable instruments’, which are not legislative in character and are not disallowable.<sup>37</sup>

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<sup>33</sup> Evidence, Ms O’Callaghan, 27 July 2020, p 31.

<sup>34</sup> Evidence, Ms O’Callaghan, 27 July 2020, p 31.

<sup>35</sup> See, for example, *Legislation Act 2003* (Cth), section 8(6)-8(8) and section 44; Submission 1, Associate Professor Lorne Neudorf, Attachment 1: Lorne Neudorf, ‘Strengthening the parliamentary scrutiny of delegated legislation: lessons from Australia’, *Canadian Parliamentary Review*, Winter 2019, pp 26 and 30.

<sup>36</sup> For example, in the Legislative Council in June 2020 a notice of motion to disallow a determination made under the *Statutory and Other Offices Remuneration Act 1975* was ruled out of order on the basis that the disallowance provisions of that Act do not extend to the determination in question: Ruling: President Ajaka, *Hansard*, NSW Legislative Council, 2 June 2020, pp 9-10.

<sup>37</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation, Australian Senate, *Parliamentary scrutiny of delegated legislation* (2019), pp 6-7.

### ***The views of inquiry participants***

- 2.20** Associate Professor Neudorf submitted that, while significant quantities of delegated legislation are exempted from the disallowance and scrutiny procedures, ‘[t]he use of exemptions from disallowance should be truly exceptional’.<sup>38</sup>
- 2.21** Associate Professor Neudorf also put forward the view that to minimise the incentive for the executive to use exemptions to inappropriately avoid parliamentary scrutiny, the Regulation Committee should scrutinise exempted delegated legislation. He further recommended that the committee should maintain a listing of exempted delegated legislation in the interests of transparency.<sup>39</sup>
- 2.22** The South Australian Legislation Review Committee observed that it in the absence of a register of delegated legislation it would be challenging to locate all South Australian delegated legislation not published on [www.legislation.sa.gov.au](http://www.legislation.sa.gov.au). However, the committee also noted that ‘even with a register … the issue may come back to how the jurisdiction determines what is delegated legislation and what is not’.<sup>40</sup>
- 2.23** The Senate Standing Committee for the Scrutiny of Delegated Legislation advised that it has commenced an inquiry into the exemption of delegated legislation from parliamentary oversight in response to concerns about the increasing exemption of delegated legislation from different mechanisms of parliamentary oversight including disallowance.<sup>41</sup>

### **The timeframe for disallowance and review**

#### ***Current provisions***

- 2.24** Under section 41 of the *Interpretation Act 1987* either House of Parliament may resolve to disallow a statutory rule if notice of the resolution was given within 15 sitting days after notice of the rule was tabled in the House.
- 2.25** Under section 9 of the *Legislation Review Act 1987* the Legislation Review Committee is required to consider all regulations ‘while they are subject to disallowance’.<sup>42</sup> Once the 15 sitting day disallowance period has expired the regulation ceases to be subject to review by the Legislation Review Committee although there is the potential for a reference to be made to this committee or to another committee of the Parliament.

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<sup>38</sup> Submission 1, Associate Professor Lorne Neudorf, p 7.

<sup>39</sup> Submission 1, Associate Professor Lorne Neudorf, p 7; Evidence, Associate Professor Lorne Neudorf, Deputy Dean of Law and Associate Professor, Adelaide Law School, 27 July 2020, p 21.

<sup>40</sup> Submission 4, Legislative Review Committee of South Australia, p 3.

<sup>41</sup> Submission 3, Senate Standing Committee for the Scrutiny of Delegated Legislation, p 3.

<sup>42</sup> *Legislation Review Act 1987*, section 9(1)(a). However, the Legislation Review Committee is not precluded from considering a regulation after it has ceased to be subject to disallowance if, while it is subject to disallowance, the Committee resolves to review and report to Parliament on the regulation: *Legislation Review Act 1987*, section 9(1A).

### ***The views of inquiry participants***

- 2.26** Associate Professor Neudorf noted that it is often the case that the implications of new laws cannot be fully anticipated until the law is applied in practice. He therefore recommended the establishment of committee processes for accepting public complaints in relation to *existing* delegated legislation and that ‘Parliamentary disallowance should also be made available in relation to such delegated legislation’.<sup>43</sup>
- 2.27** A process for the scrutiny and disallowance of existing delegated legislation has been established in New Zealand. Under that process a member of the public may make a complaint about a regulation to the Regulation Review Committee. This triggers a review which enables the committee to consider regulations long after they have been made if a problem is later discovered.<sup>44</sup> The New Zealand Parliament may take action in response to recommendations by the committee irrespective of when the investigation is finalised.<sup>45</sup>
- 2.28** The NSW Council for Civil Liberties expressed support for Associate Professor Neudorf proposal to establish a public comments process.<sup>46</sup>
- 2.29** The NSW Bar Association did not comment on that proposal but did note that:

... limitations on the LRC's remit to review statutory rules mean that if problems in the operation of delegated legislation emerge after the disallowance period, the LRC may not be able to report on the matter. Often, the disallowance period will prove to be too short to allow for the effective assessment of a statutory rule's operation in practice.<sup>47</sup>

### **Consultation in the development of delegated legislation**

#### ***Current provisions***

- 2.30** Consultation in the development of delegated legislation is important given that delegated legislation is often a key source of individual legal rights, interests and obligations, but unlike primary legislation becomes subject to parliamentary scrutiny processes only after it comes into effect.
- 2.31** Sections 5 and 6 of the *Subordinate Legislation Act 1989* prescribe procedures for government entities to consult in the development of ‘principal statutory rules’. These include obligations to inform the public of proposed statutory rules (section 5(2)(a)), consult interested parties and consider stakeholder submissions (section 5(2)(b)(c)), and provide a Regulation Impact Statement unless exempted (sections 5(1) and 6).<sup>48</sup>

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<sup>43</sup> Submission 1, Associate Professor Lorne Neudorf, pp 6-7.

<sup>44</sup> Evidence, Associate Professor Neudorf, 27 July 2020, p 16.

<sup>45</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation, Australian Senate, *Parliamentary scrutiny of delegated legislation* (2019), p 30.

<sup>46</sup> Evidence, Mr Jared Wilk, Co-convenor, Civil Liberties and Human Rights Action Group, NSW Council for Civil Liberties, 27 July 2020, p 28; Answers to questions on notice, NSW Council for Civil Liberties, 12 August 2020, pp 1-2.

<sup>47</sup> Submission 8, NSW Bar Association, p 17.

<sup>48</sup> Submission 8, NSW Bar Association, p 14.

- 2.32 The operation of sections 5 and 6 is subject to a range of limitations.<sup>49</sup> The most significant of these is that failure to comply does not affect the validity of a statutory rule.<sup>50</sup> Ministerial compliance with the consultation requirements is more a matter of comity between the executive and legislature rather than an enforceable obligation.<sup>51</sup>
- 2.33 However, as pointed out by the NSW Bar Association, there is nothing to prevent the Parliament from ensuring that an enabling Act is drafted so as to make the validity of a secondary instrument dependent on compliance with some or all of the procedural requirements of *Subordinate Legislation Act 1989*, or to oblige a responsible minister to adhere to any other procedural requirements before a regulation can lawfully be made.<sup>52</sup>
- 2.34 Further, the Legislation Review Committee may draw the Parliament's attention to a disallowable regulation on the ground that any of the requirements in section 5 or 6 appear not to have been complied with.<sup>53</sup>
- 2.35 In addition to statutory consultation requirements, the 'better regulation principles' in the *NSW Guide to Better Regulation*, 2016, require consultation with business and the community to inform regulatory development.<sup>54</sup>

#### ***The views of inquiry participants***

- 2.36 Several inquiry participants expressed support for strengthening the statutory consultation requirements or suggested ways of achieving greater transparency in relation to the level of consultation that is undertaken.
- 2.37 For example, Associate Professor Neudorf told the committee that:

I think tightening up the consultation requirements, making sure they are more stringent and making sure they are actually followed ... Through consultation not only are you making better laws because you are getting more perspective being brought in, a diverse range of views, but you are also really increasing awareness of the law changing. People are all of a sudden thinking this actually could be enacted as a regulation and my business is going to change or I am going to have to do something differently. That is a really important way of increasing that awareness, so I would strongly recommend, to the extent possible, tightening up those consultation obligations.<sup>55</sup>

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<sup>49</sup> See, for example, Submission 8, NSW Bar Association, p 14.

<sup>50</sup> *Subordinate Legislation Act 1989*, section 9(1); Submission 8, NSW Bar Association, p 14.

<sup>51</sup> Submission 8, NSW Bar Association, p 15.

<sup>52</sup> Submission 8, NSW Bar Association, p 15. In that regard section 9(2) of the *Subordinate Legislation Act 1989* provides: 'The provisions of this Part regarding the requirements to be complied with before a statutory rule is made, approved or confirmed are in addition to, and do not affect, the provisions of any other Act'.

<sup>53</sup> *Legislation Review Act 1987*, section 9(1)(b)(viii). To assist the performance of this function a copy of the Regulatory Impact Statement and all written comments and submissions are to be forwarded to the committee within 14 days of the publication of the statutory rule: *Subordinate Legislation Act 1989*, section 5(4) and (5).

<sup>54</sup> Submission 7, NSW Parliamentary Counsel's Office, p 6.

<sup>55</sup> Evidence, Associate Professor Neudorf, 27 July 2020, p 20.

- 2.38** The NSW Council for Civil Liberties recommended that the exceptions to the requirement for a Regulatory Impact Statement should be reduced,<sup>56</sup> noting that:

An RIS is not required in all cases. Exceptions include direct amendment or repeal, complementary legislation of the Commonwealth, or matters unlikely to impose an appreciable cost or disadvantage to the public. This is problematic.

For example, the Commonwealth COVIDsafe Bill applies to State and Territory health authorities in relation to COVIDsafe app data. However, there is some uncertainty as to achievement of the application of the COVIDsafe Bill in every jurisdiction. It is intended that the states and territories will sign a Memorandum of Understanding to ensure they abide by the privacy rules around the use of the data for contact tracing. Any NSW MOU will contain sections that affect the rights and liberties of NSW citizens. Its scrutiny and publication must be paramount.<sup>57</sup>

- 2.39** The Law Society of New South Wales submitted that the Regulation Committee should be able to review Regulatory Impact Statements including by drawing on evidence from members of the community, expert stakeholders and public servants to enhance the regulatory approach adopted in the delegated legislation.<sup>58</sup>

- 2.40** Legislation in other jurisdictions referred to by various inquiry participants includes requirements for the Parliament to be informed about consultation undertaken in the making of delegated legislation. For example, under the *Legislation Act 2003* (Cth), the explanatory statement for a legislative instrument must contain a description of consultation undertaken in the making of the instrument or an explanation as to why no such consultation was undertaken.<sup>59</sup> Similar requirements apply under the *Legislative Standards Act 1992* (Qld).<sup>60</sup> The Queensland Act also requires that for ‘significant subordinate legislation’ the explanatory note tabled in Parliament must be accompanied by the regulatory impact statement prepared for the instrument concerned.<sup>61</sup>

- 2.41** Finally, in response to the limited operation of the procedural requirements of the *Subordinate Legislation Act 1989*, the NSW Bar Association submitted that New South Wales should introduce more extensive statutory guidance on the making of primary and delegated legislation which recognises the need to protect individual rights and liberties and made suggestions concerning the use of Regulatory Impact Statements in relation to Henry VIII clauses. These issues are discussed later in this chapter and in Chapter 3.

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<sup>56</sup> Submission 5, NSW Council for Civil Liberties, p 9.

<sup>57</sup> Submission 5, NSW Council for Civil Liberties, p 6.

<sup>58</sup> Submission, 2, Law Society of New South Wales, p 3.

<sup>59</sup> *Legislation Act 2003* (Cth), section 15J(2)(d)(e).

<sup>60</sup> *Legislative Standards Act 1992* (Qld), section 24(2).

<sup>61</sup> *Legislative Standards Act 1992* (Qld), section 24(3).

## Public accessibility

### *Current provisions*

- 2.42 The *Interpretation Act 1987* requires that a statutory rule must be published on the NSW legislation website<sup>62</sup> and commences on the day of publication on the website unless a later date is specified in the rule itself.<sup>63</sup> These requirements promote the rule of law by ensuring the public is aware of and able to obey laws affecting them.<sup>64</sup>
- 2.43 Delegated legislation that does not fall within the definition of ‘statutory rule’ will usually be required to be published in the Gazette or on the legislation website by the Act under which it is made.<sup>65</sup> For example, section 7 of the *Public Health Act 2010* requires a ministerial order to be published in the Gazette as soon as practicable after it is made, although failure to do so does not invalidate the order.<sup>66</sup>
- 2.44 Some statutory instruments are published by PCO on the NSW legislation website at the request of the administering agency, such as water sharing plans made under section 50 of the *Water Management Act 2000*.<sup>67</sup>
- 2.45 In addition PCO may decide to publish instruments of significant public interest on the legislation website even though they are not ‘statutory rules’. For example, the recent public health orders in response to the COVID -19 pandemic, which were required to be published in the Gazette, were voluntarily published by PCO on the legislation website.<sup>68</sup>
- 2.46 Delegated legislation may also be published on relevant departmental or corporation websites<sup>69</sup> although there is no obligation on departments to do so.<sup>70</sup>

### *The views of inquiry participants*

- 2.47 A recurring theme in the evidence to this inquiry was that members of the public are often not aware of or have difficulty accessing delegated legislation that can have significant impacts on their lives.
- 2.48 Associate Professor Neudorf expressed the view that communicating changes in the law to the public ‘is really the main challenge when it comes to delegated legislation’, given that the media is not interested in reporting the changes and the Gazette is not most people’s ‘weekend

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<sup>62</sup> *Interpretation Act 1987*, section 39(1)(a).

<sup>63</sup> *Interpretation Act 1987*, section 39(1)(b).

<sup>64</sup> Submission 8, NSW Bar Association, p 12.

<sup>65</sup> NSW Government, *Subordinate legislation* <https://www.legislation.nsw.gov.au/information/subordinate-legislation>.

<sup>66</sup> *Public Health Act 2010*, section 7(4).

<sup>67</sup> Answers to questions on notice, Parliamentary Counsel’s Office, p 1.

<sup>68</sup> Evidence, Mr Mark Cowan, Deputy Parliamentary Counsel, NSW Parliamentary Counsel’s Office, 27 July 2020, p 39.

<sup>69</sup> Evidence, Ms O’Callaghan, 27 July 2020, p 40.

<sup>70</sup> Evidence, Ms O’Callaghan, 27 July 2020, p 39.

reading'.<sup>71</sup> Associate Professor Neudorf also submitted that '[t]he rule of law requires that laws be made known to those who may be affected by them'.<sup>72</sup>

- 2.49** The Law Society of New South Wales noted that the public reporting of the provisions of the recent public health orders was often a long way from the text of the actual order, and observed that '[f]or the ordinary member of the public, being able to know the bounds of what they can and cannot do can be extraordinarily difficult'.<sup>73</sup> The Law Society argued there is a need for reliable guidance for the public as to what new laws entail, 'particularly where you have laws that involve an extraordinary amount of discretion, police discretion in [the case of the public health orders]'.<sup>74</sup>
- 2.50** The NSW Bar Association also referred to the difficulty of locating the recent public health orders in the Gazette and questioned the degree of transparency which is provided by the act of gazettal.<sup>75</sup>
- 2.51** The NSW Council for Civil Liberties noted that difficulties had been reported with online access to the public health orders, at least initially.<sup>76</sup> The Council also submitted that the instability of those orders, which were repeatedly amended, had caused uncertainty for New South Wales citizens, noting that 'Orders have been signed into law almost daily, often unknown to many Australians'.<sup>77</sup> In light of these concerns the Council submitted that:

Delegated legislation, such as the recent Public Health Orders, should be clear and known to all rather than in sparse and general terms leaving citizens to interpret them for themselves and giving the police wide discretion.<sup>78</sup>

- 2.52** To improve public access to delegated legislation participants suggested a range of reforms.
- 2.53** Associate Professor Neudorf submitted that consideration should be given to introducing legislation to require a delay in the commencement of delegated legislation after it is made, as is the case in New Zealand.<sup>79</sup> In New Zealand the Cabinet Manual includes a requirement that the Cabinet should not make delegated legislation effective until 28 days after it has already been published or noted in the Gazette. While this is not always followed, it is an indication of best practice that the government should follow.<sup>80</sup>
- 2.54** Associate Professor Neudorf noted that the Senate Standing Committee for the Scrutiny of Delegated Legislation in 2019 recommended that the Commonwealth enact a delayed start for

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<sup>71</sup> Evidence, Associate Professor Neudorf, 27 July 2020, p 20.

<sup>72</sup> Submission 1, Associate Professor Lorne Neudorf, p 8.

<sup>73</sup> Evidence, Mr Chalk, Chair, Public Law Committee, Law Society of New South Wales, 27 July 2020, p 6.

<sup>74</sup> Evidence, Mr Chalk, 27 July 2020, p 6.

<sup>75</sup> Evidence, Mr Michael McHugh SC, Senior Vice President, NSW Bar Association, 27 July 2020, p 6.

<sup>76</sup> Submission 5, NSW Council for Civil Liberties, p 5.

<sup>77</sup> Submission 5, NSW Council for Civil Liberties, p 8.

<sup>78</sup> Submission 5, NSW Council for Civil Liberties, p 9.

<sup>79</sup> Submission 1, Associate Professor Lorne Neudorf, p 8.

<sup>80</sup> Evidence, Associate Professor Neudorf, 27 July 2020, p 20.

legislative instruments from the day after registration to 28 days after registration with exceptions available only in limited circumstances.<sup>81</sup>

- 2.55 Associate Professor Neudorf also suggested that current committee reporting processes in New South Wales could be expanded to include the publication of alerts or the targeting of particular industries, groups or individuals to communicate information about new delegated legislation, although he acknowledged the difficulty of such a task given the volume and detailed nature of the delegated legislation produced each year.<sup>82</sup>
- 2.56 The Parliamentary Counsel advised that her office is seeking to improve the accessibility and transparency of the NSW legislation website. However, she acknowledged that the average member of the public may not be aware of the legislation website and would probably go to the relevant department website for particular legislation.<sup>83</sup>

### The role of the Parliamentary Counsel's Office

#### *Current provisions*

- 2.57 Currently, PCO is responsible for drafting all 'statutory rules', that is, instruments which are subject to disallowance.<sup>84</sup> The question of who drafts other instruments varies depending on the department, historical background and conventions.<sup>85</sup>

#### *The views of inquiry participants*

- 2.58 PCO advised that there have been problems in the past with the quality of statutory instruments that have not been drafted by the office.<sup>86</sup> These problems have related both to legality and accessibility. For example:

... it is often unclear what instruments have been made under a provision. Statutory instruments that are not drafted by this office often neglect to consider the statute book as a whole or contain procedural errors, including neglecting to repeal earlier instruments made under the same provision or are drafted in a way that makes it impossible to incorporate amendments into the principal instrument.<sup>87</sup>

- 2.59 A related problem is that some statutory instruments that are drafted by departmental officers are published on departmental websites which do not hold all historical versions of the

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<sup>81</sup> Submission 1, Associate Professor Neudorf, Attachment, Lorne Neudorf, 'Strengthening the parliamentary scrutiny of delegated legislation: lessons from Australia', *Canadian Parliamentary Review*, Winter 2019, p 28; Senate Standing Committee on Regulations and Ordinances (now the Standing Committee for the Scrutiny of Delegated Legislation), Australian Senate, *Parliamentary Scrutiny of delegated legislation* (2019), p 133-137 (Recommendation 18).

<sup>82</sup> Evidence, Associate Professor Neudorf, 27 July 2020, p 20.

<sup>83</sup> Evidence, Ms O'Callaghan, 27 July 2020, pp 38-39.

<sup>84</sup> Evidence, Ms O'Callaghan, 27 July 2020, p 32.

<sup>85</sup> Evidence, Ms O'Callaghan, 27 July 2020, p 32.

<sup>86</sup> Answers to questions on notice, Parliamentary Counsel's Office, p 1.

<sup>87</sup> Answers to questions on notice, Parliamentary Counsel's Office, p 1.

instrument. This means that the current instrument is available but when a court is dealing with a historical matter it is unclear what instrument applied on the relevant day.<sup>88</sup>

- 2.60** PCO advised that courts and tribunals have taken into account whether an instrument has been drafted by parliamentary counsel in interpreting the instrument. By way of example, PCO cited the following comments by Leeming JA in *Day v Harness Racing New South Wales* [2014] NSWCA 423:

It is important to appreciate that the Local Rule was not drafted by Parliamentary Counsel, nor scrutinised in the way that tends to occur of a bill as it passes through Parliament and receives assent. It is legitimate to have regard to the fact that regulations are less carefully drafted, and less keenly scrutinised, than primary legislation... It is equally legitimate to have regard to the fact that Local Rule 188A(2) was drafted by Mr Sanders, and adopted by the five members of HRNSW. I mean no disrespect, but none of those men would profess to expertise in legal drafting. Their rules should be construed bearing as much in mind.<sup>89</sup>

- 2.61** Along similar lines, PCO observed that the quality of legislation drafted by departments varies depending on the available resources and skills.<sup>90</sup>

- 2.62** PCO advised that as a result of problems with the quality of statutory instruments not drafted by the office:

- the types of statutory instruments the office has been asked to draft has increased over the years
- PCO is currently in discussion with a number of agencies about taking on responsibility for drafting instruments that are legislative, rather than administrative, in character.<sup>91</sup>

- 2.63** PCO expressed the view that if an instrument is considered important enough to be legislative in character, it should be drafted by professional legislative drafters.<sup>92</sup>

- 2.64** The issue of legislative drafting was also raised in a submission by the South Australian Legislation Review Committee:

... as a specialist drafting agency, it may be evident that the processes adopted by the New South Wales Office of Parliamentary Counsel show a high degree of professionalism in ensuring that the legislative products that are produced by them are of a high standard. However, an examination of these processes should not occur in isolation from processes adopted by executive agencies, or others, that instruct that Office about new or amending delegated legislation. Further, an examination of the practices of those participants directly involved in the making of delegated legislation who do not rely on a specialist drafting agency to produce delegated legislation may also be beneficial.<sup>93</sup>

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<sup>88</sup> Answers to questions on notice, Parliamentary Counsel's Office, p 1.

<sup>89</sup> Answers to questions on notice, Parliamentary Counsel's Office, p 1.

<sup>90</sup> Evidence, Ms O'Callaghan, 27 July 2020, p 32.

<sup>91</sup> Answers to questions on notice, Parliamentary Counsel's Office, p 1

<sup>92</sup> Evidence, Ms O'Callaghan, 27 July 2020, p 32.

<sup>93</sup> Submission 4, South Australian Legislation Review Committee, p 3.

## Protection of rights and liberties

### *Current provisions*

- 2.65 The scrutiny criteria applied by the Legislation Review Committee with respect to bills and regulations include matters relating to the protection of individual rights and liberties.<sup>94</sup> In the case of regulations the committee's functions include to consider whether the special attention of Parliament should be drawn to a regulation on the ground that 'the regulation trespasses unduly on personal rights and liberties'.<sup>95</sup>
- 2.66 The Legislation Review Committee has considered the impact of regulations on rights and liberties and the application of human rights instruments in its published reports. For example, in recent reports concerning COVID-19-related regulations, the committee examined the impact on victims' rights, the right to a fair trial, freedom of movement, freedom of assembly and association and the International Covenant on Civil and Political Rights.<sup>96</sup>
- 2.67 In a review of the *Legislation Review Act 1987* conducted in 2018, the Legislation Review Committee considered options for strengthening rights scrutiny including by listing specific rights and liberties in the Act, defining rights and liberties by reference to particular human rights treaties, and introducing a charter of rights.<sup>97</sup> Ultimately the committee did not recommend any legislative changes but stated that it would assist the scrutiny process for the committee to determine the rights and liberties it will review bills and regulations against and inform the Parliament of these at the start of each Parliament.<sup>98</sup>
- 2.68 In the same report the Legislation Review Committee considered proposals for statements of compatibility to be required outlining whether the bill or regulation is compatible with rights and liberties.<sup>99</sup> However, rather than adopting this approach the committee recommended that the standing orders of each House of parliament should require the member with carriage of a bill to address any matters identified by the committee during debate on the bill, or alternatively that the NSW Government should require the minister in charge of the bill to address such matters during debate on the bill.<sup>100</sup>

### *The views of inquiry participants*

- 2.69 The NSW Bar Association submitted that parliamentary scrutiny of primary and delegated legislation against human rights standards in New South Wales 'is less robust and human rights focused than in other Australian jurisdictions'. In that regard the Association noted that the

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<sup>94</sup> *Legislation Review Act 1987*, section 8A(1)(b)(i)-(iii), section 9(1)(b)(i).

<sup>95</sup> *Legislation Review Act 1987*, section 9(1)(b)(i).

<sup>96</sup> NSW Parliament, Legislation Review Committee, *Compilation of reports on Covid-19 related bills and regulations*, Volume 1: Summary (2020), pp xxiv, xxv, xxvi, xxvii.

<sup>97</sup> NSW Parliament, Legislation Review Committee, *Inquiry into the operation of the Legislation Review Act 1987*, Report 1/56 (2018), pp 9-16, pp 30-33.

<sup>98</sup> NSW Parliament, Legislation Review Committee, *Inquiry into the operation of the Legislation Review Act 1987*, Report 1/56 (2018), p 16, Finding 1.

<sup>99</sup> NSW Parliament, Legislation Review Committee, *Inquiry into the operation of the Legislation Review Act 1987*, Report 1/56 (2018), pp 19-23.

<sup>100</sup> NSW Parliament, Legislation Review Committee, *Inquiry into the operation of the Legislation Review Act 1987*, Report 1/56 (2018), p 23.

ACT, Victoria and Queensland have adopted statutory charters of rights, while a Commonwealth statutory committee reviews bills and delegated legislation for compatibility with human rights treaties.<sup>101</sup> It was also noted that the Queensland Parliament has established a statutory framework that requires legislation to have regard to individual rights and liberties.<sup>102</sup>

- 2.70** In response to the limitations in the scrutiny framework in New South Wales, the NSW Bar Association suggested a range of reforms to strengthen the protection of rights and liberties in both primary and delegated legislation. Those recommendations included:

- the enactment of a bill of rights for New South Wales<sup>103</sup>
- the enactment of a statutory framework for primary and delegated legislation similar to that contained in the *Legislative Standards Act 1992* (Qld) which would include requirements for ministers to provide a human rights assessment with every piece of legislation and proposed statutory rule<sup>104</sup>
- the provision of guidance as to the matters that may be more suitable for primary rather than delegated legislation such as the matters listed in the Commonwealth Department of Prime Minister and Cabinet's Legislation Handbook which include 'rules which have a significant impact on human rights and personal liberties'<sup>105</sup>
- parliamentary committee scrutiny of whether legislation complies with relevant rights and freedoms including those protected by the common law, the Constitution, the seven principal United Nations human rights treaties, other rights treaties to which Australia is a party and the UN Declaration on the rights of Indigenous peoples.<sup>106</sup>

- 2.71** A number of the issues addressed by the NSW Bar Association were also raised by other participants.

- 2.72** The NSW Council for Civil Liberties expressed support for the adoption of guidelines concerning the matters which are more appropriate for primary than delegated legislation such as those provided in the Commonwealth *Legislation Handbook*.<sup>107</sup> The Council also supported a requirement for a statement of human rights compatibility to be provided with delegated legislation and for a charter of human rights against which rights implications could be measured.<sup>108</sup>

- 2.73** The Law Society of New South Wales submitted that legislative instruments that have a significant and immediate impact on the legal rights, interests or obligations of individuals, companies or industries should be reviewed against:

1. the seven core human rights treaties, as defined by the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), and

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<sup>101</sup> Submission 8, NSW Bar Association, pp 19-20.

<sup>102</sup> Submission 8, NSW Bar Association, p 15.

<sup>103</sup> Submission 8, NSW Bar Association, p 5 (Recommendations (v) and (vi)), pp 19, 20.

<sup>104</sup> Submission 8, NSW Bar Association, pp 15-16.

<sup>105</sup> Submission 8, NSW Bar Association, p 18.

<sup>106</sup> Submission 8, NSW Bar Association, p 5 (Recommendation (vii)), p 20.

<sup>107</sup> Submission 5, NSW Council for Civil Liberties, pp 4-5.

<sup>108</sup> Answers to questions on notice, NSW Council for Civil Liberties, p 4.

2. common law rights including the presumption of innocence, legal professional privilege and the privilege against self-incrimination.<sup>109</sup>

## The remaking of disallowed delegated legislation

### *Current provisions*

- 2.74 The statutory framework for delegated legislation prohibits the immediate remaking of a disallowed statutory rule to ensure that the executive cannot circumvent the will of Parliament. In that regard section 8(1) of the *Subordinate Legislation Act 1989* provides that no statutory rule which is the same in substance as a statutory rule which has been disallowed by a House of Parliament may be made within four months of the date of the disallowance, unless the resolution of disallowance has been rescinded by the House concerned. Section 8(2) provides that if a statutory rule is made in contravention of the section the statutory rule is void.

### *The views of inquiry participants*

- 2.75 The NSW Bar Association characterised section 8 of the *Subordinate Legislation Act 1989* as ‘a recognition of parliamentary sovereignty’ and ‘an essential bar to the Executive subverting Parliament’s power of disallowance by repeatedly tabling the same statutory rule’.<sup>110</sup>
- 2.76 However, the Association noted the equivalent Commonwealth provision<sup>111</sup> imposes a longer time frame for the remaking of a disallowed instrument notwithstanding the shorter election cycles at the Commonwealth level compared to New South Wales. Under the Commonwealth provision secondary legislation that is the same in substance as a previously disallowed legislative instrument is of no effect if made within six months of the disallowance without the relevant House’s approval.<sup>112</sup>
- 2.77 In light of the longer time frame specified in the Commonwealth Act the NSW Bar Association submitted that consideration should be given to extending the period in which a statutory rule disallowed by Parliament cannot be validly made again from four to six months.<sup>113</sup>

## The form of the legislative scheme

- 2.78 As noted at the beginning of this chapter, in addition to the specific aspects discussed above, two broader suggestions concerning the legislative framework for delegated legislation were raised in this inquiry. Those suggestions concerned the merits of consolidating the existing statutory provisions into a single statute, and the need for additional uniform standards for both primary and delegated legislation to better protect democratic principles.

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<sup>109</sup> Submission 2, Law Society of New South Wales, p 2.

<sup>110</sup> Submission 8, NSW Bar Association, p 14.

<sup>111</sup> *Legislation Act 2003* (Cth), section 48.

<sup>112</sup> Submission 8, NSW Bar Association, p 15.

<sup>113</sup> Submission 8, NSW Bar Association, p 5 (Recommendation x).

## Statutory consolidation

### *Current provisions*

- 2.79 The key safeguards relating to delegated legislation are currently dispersed across three separate Acts:
- The *Interpretation Act 1987* provides for the publication and commencement of statutory rules, the tabling of statutory rules in Parliament and the disallowance of such rules by either House of Parliament.
  - The *Subordinate Legislation Act 1989* prescribes procedures concerning the making of statutory rules and for the automatic repeal of statutory rules that have been in force for five years.
  - The *Legislation Review Act 1987* establishes the Legislation Review Committee to review regulations subject to disallowance.
- 2.80 The interaction between the provisions of these Acts is quite complex. For example, while each Act contains a definition of ‘statutory rule’ in substantially the same terms,<sup>114</sup> the definition in the *Subordinate Legislation Act 1989* does not include ‘a rule of court’ and excludes instruments specified in a schedule to the Act.<sup>115</sup> Further, the *Legislative Review Act 1987* adopts the term ‘regulation’ to refer to ‘statutory rules’ as well as proclamations or orders that are subject to disallowance.<sup>116</sup> Moreover, while most of the provisions concerning the Legislation Review Committee are contained in the *Legislation Review Act 1987*, the committee’s functions concerning the scrutiny of Regulatory Impact Statements and postponements of the staged repeal of statutory rules are set out in the *Subordinate Legislation Act 1989*.<sup>117</sup>
- 2.81 In contrast to the position in New South Wales, Commonwealth protections concerning delegated legislation are contained in the *Legislation Act 2003* (Cth).<sup>118</sup> This Act includes provisions concerning consultation,<sup>119</sup> publication,<sup>120</sup> commencement,<sup>121</sup> tabling,<sup>122</sup> disallowance<sup>123</sup> and staged repeal.<sup>124</sup> However, the parliamentary scrutiny committee for delegated legislation is established under the standing orders of the Senate.<sup>125</sup>

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<sup>114</sup> *Interpretation Act 1987*, section 21(1); *Subordinate Legislation Act 1989*, section 3(1); *Legislation Review Act 1987*, section 3(1).

<sup>115</sup> *Subordinate Legislation Act 1989*, section 3(1), schedule 4.

<sup>116</sup> *Legislation Review Act 1987*, section 3(1), ‘regulation’.

<sup>117</sup> *Subordinate Legislation Act 1989*, section 5(4) and (5), section 11(4) and (5).

<sup>118</sup> Submission 8, NSW Bar Association, p 12.

<sup>119</sup> *Legislation Act 2003* (Cth), sections 17 and 19.

<sup>120</sup> Legislative instruments and notifiable instruments must be registered on the Federal Register of Legislation (*Legislation Act 2003*, sections 15G and 15H) which is available to the public on the approved website (*Legislation Act 2003*, sections 15A and 15C).

<sup>121</sup> *Legislation Act 2003* (Cth), section 12.

<sup>122</sup> *Legislation Act 2003* (Cth), sections 38–41.

<sup>123</sup> *Legislation Act 2003* (Cth), sections 42–46.

<sup>124</sup> *Legislation Act 2003* (Cth), Chapter 3, ‘Part 4 – Sunsetting of legislative instruments’.

<sup>125</sup> The Standing Committee for the Scrutiny of Delegated Legislation established under Senate Standing Order 23 assesses Commonwealth delegated legislation against specific scrutiny criteria. In addition

### ***The views of inquiry participants***

**2.82** The NSW Bar Association submitted that the rules governing subordinate legislation in New South Wales should be consolidated in a single statute<sup>126</sup> to reduce confusion and improve clarity.<sup>127</sup> The Bar Association argued that such a reform would promote transparency and open justice.<sup>128</sup>

**2.83** The NSW Council for Civil Liberties endorsed the Bar Association's recommendation for a consolidation of the Acts.<sup>129</sup>

**2.84** Associate Professor Neudorf also supported the recommendation noting that:

There are a number of benefits, because these three different Acts ... have been drafted at different times. They use different kinds of language, they use different definitions, so it is not always clear what fits into which category and that is very problematic from an accountability point of view. I think the consistency of having one approach, one set of definitions, everybody has clarity around what these terms means, what is in, what is out, for example in terms of disallowance or different scrutiny processes. I think that would really go a long way to clarifying the lay of the land of delegated legislation in New South Wales and it would allow everyone to focus their energies all in one piece of legislation. I think there is certainly a lot of benefit for that, so I would support that, absolutely.<sup>130</sup>

**2.85** The Parliamentary Counsel saw advantages in consolidating the Acts and advised that in the Australian Capital Territory a process of statutory consolidation and modernisation had occurred following a review:

I certainly would see an advantage in having a Legislation Act, something of that nature that brought everything into one Act. At the moment those Acts are hard to read together. Some of them have been drafted at different times, they use different concepts. Some of them have become quite hollowed out and do not have a lot of substance in them. It would be really beneficial I think for a review to be done and everything pulled into one Act. If you look at something like the ACT's Legislation Act, where they have done that review, they have consolidated and brought it all into one Act, it is a modern Act. It is a much more streamlined process. Anyone wanting to know how legislation works can go to one Act and work through it and will be provided with the detail. Also conceptually it all hangs together rather than being in separate pieces of legislation and them not necessarily quite working well together.<sup>131</sup>

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the Joint Committee on Human Rights established by the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) reviews Commonwealth bills and legislative instruments for compatibility with human rights.

<sup>126</sup> Submission 8, NSW Bar Association, pp 4 (Recommendation (i)) and 12.

<sup>127</sup> Submission 8, NSW Bar Association, p 12.

<sup>128</sup> Evidence, Mr McHugh, 27 July 2020, p 9.

<sup>129</sup> Evidence, Mr Wilk, 27 July 2020, p 27.

<sup>130</sup> Evidence, Associate Professor Neudorf, 27 July 2020, p 19.

<sup>131</sup> Evidence, Ms O'Callaghan, 27 July 2020, p 32.

## Comprehensive legislative standards

- 2.86** The committee received extensive evidence regarding the approach to legislative standards taken in Queensland. The Queensland Parliament has enacted a comprehensive framework for primary and delegated legislation which codifies the standards to which all legislation is expected to adhere. This framework is set out in the *Legislative Standards Act 1992* (Qld), which operates alongside the *Statutory Instruments Act 1992* (Qld) and the *Interpretation Act 1954* (Qld).
- 2.87** The *Legislative Standards Act 1992* establishes the concept of ‘fundamental legislative principles’ which are defined as ‘the principles relating to legislation that underlie a parliamentary democracy based on the rule of law’.<sup>132</sup> The principles require that legislation have ‘sufficient regard to: (a) the rights and liberties of individuals; and (b) the institution of Parliament’.<sup>133</sup>
- 2.88** Compliance with the fundamental legislative principles is not mandatory and it is for the Parliament to determine whether legislation has sufficient regard to one or more of the fundamental legislative principles.<sup>134</sup> To assist the Parliament with this task the Act includes requirements for explanatory notes to be tabled for both bills and subordinate legislation<sup>135</sup> and specifies the matters which are to be addressed in those notes. There are differences in the matters to be addressed in relation to bills and subordinate legislation. However, in both cases the explanatory note must include a brief assessment of the consistency of the legislation with fundamental legislative principles and, if it is inconsistent with fundamental legislative principles, the reasons for the inconsistency.<sup>136</sup>
- 2.89** Another important dimension of the Queensland Act is that it provides for the Office of the Queensland Parliamentary Counsel to give advice to ministers and government entities on the application of fundamental legislative principles.<sup>137</sup>
- 2.90** The NSW Bar Association and the Parliamentary Counsel each referred to specific aspects of the Queensland Act.<sup>138</sup> In addition the Parliamentary Counsel expressed support for the overall approach of enacting legislative standards as a means of improving the quality of legislation and promoting transparency and accountability.
- 2.91** In that regard the Parliamentary Counsel stated:

[T]he Queensland model of a Legislative Standards Act ... sets out what good quality legislation looks like and ... what should be in explanatory notes, both for bills and for subordinate legislation. I would very much recommend that model ...

For a bill, it has a brief statement of the policy objectives and the reasons for them, the way the policy objectives will be achieved, why this is the appropriate way of achieving those policy objectives, a brief statement of any reasonable alternative way of achieving

<sup>132</sup> *Legislative Standards Act 1992* (Qld), section 4(1).

<sup>133</sup> *Legislative Standards Act 1992* (Qld), section 4(2).

<sup>134</sup> Queensland Parliament, *Fundamental legislative principles*, updated March 2018, p 2.

<sup>135</sup> *Legislative Standards Act 1992* (Qld), section 22.

<sup>136</sup> *Legislative Standards Act 1992* (Qld), section 23(1)(f) (bills), section 24(1)(i) (subordinate legislation).

<sup>137</sup> *Legislative Standards Act 1992* (Qld), section 7(g)(ii).

<sup>138</sup> For example, the NSW Bar Association and Parliamentary Counsel supported the use of explanatory notes to highlight broad delegations of legislative power as discussed in Chapter 3.

the objectives and why that was not adopted, an assessment of the administrative costs, consistency with what Queensland calls fundamental legislative principles. But they are principles that underlie any good legislation in terms of making sure that we comply with the rule of law and respect the institution of Parliament. Then a brief statement about the extent to which consultation was carried out, a simple explanation of the purpose and intended operation of each clause—which we have here but ours is written very much from a legal point of view rather than a policy explanation. For subordinate legislation there is a much more fulsome list of things that should be included so that there is greater transparency and accountability for the executive.<sup>139</sup>

## The need for further inquiry

- 2.92** In its submission to the inquiry the NSW Bar Association recommended a wide range of reforms to the laws and procedures relating to delegated legislation.<sup>140</sup> These included reforms concerning matters considered in this chapter such as the protection of rights and liberties, as well as issues relating to the potential for executive overreach discussed in Chapter 3.
- 2.93** While identifying the need for reform, however, the NSW Bar Association also recognised that further examination of the use of delegated legislation and safeguards in other jurisdictions would assist in the formulation of improvements to address the issues raised in this inquiry. The Association therefore proposed that a reference be made to the New South Wales Law Reform Commission:

to examine the extent and use of delegated legislative powers, undertake a comparative study of powers and safeguards in other jurisdictions, and suggest improvements to prevent overreach.<sup>141</sup>

- 2.94** In support of this recommendation the NSW Bar Association advised that the resources and expertise of the Law Reform Commission has never been brought to bear on the issue of executive law-making powers.<sup>142</sup> The Association also noted that this committee does not have the resources of the Commission and is subject to a reporting deadline which prevents it from exploring the range of safeguards which have been developed in other jurisdictions.<sup>143</sup>

## Committee comment

- 2.95** The evidence discussed in this chapter highlights the importance of facilitating good legislative practice and improving processes and safeguards for legislation, and in particular delegated legislation. The current statutory mechanisms for the control and scrutiny of delegated legislation in New South Wales are in need of reform to better protect constitutional principles of democratic oversight and parliamentary sovereignty.

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<sup>139</sup> Evidence, Ms O'Callaghan, 27 July 2020, pp 30-31.

<sup>140</sup> Submission 8, NSW Bar Association, pp 4-5 (Recommendations (i)-(x)).

<sup>141</sup> Submission 8, NSW Bar Association, p 5 (Recommendation xi).

<sup>142</sup> Submission 8, NSW Bar Association, p 11.

<sup>143</sup> Evidence, Mr McHugh, 27 July 2020, p 5.

- 2.96** The evidence also demonstrates the complex nature of the laws and procedures governing delegated legislation and the variety of different approaches that are available to enhance the existing safeguards.
- 2.97** In view of the issues identified in the evidence the committee has concluded that further inquiry by a specialist body with appropriate expertise and resourcing would be desirable before specific changes to this complex area of the law are proposed.
- 2.98** In the next chapter the committee recommends that consideration be given to a reference to the NSW Law Reform Commission concerning the use of delegated legislative powers, safeguards in other jurisdictions and suggestions for improvement. The proposed reference to the NSW Law Reform Commission includes a request for the Commission to have particular regard to specified matters raised in this chapter as well as matters discussed in Chapter 3. The specified matters from this chapter reflected in the proposed reference are:
- the merits of extending statutory provisions regarding disallowance and committee scrutiny to all instruments of a legislative character including quasi-legislation
  - the adequacy of current requirements for consultation in the development of delegated legislation
  - the need to ensure that all forms of delegated legislation can be easily accessed by the public as soon as they commence
  - the merits of consolidating into a single statute the *Subordinate Legislation Act 1989*, the *Legislation Review Act 1987* and the relevant provisions of the *Interpretation Act 1987*
  - the adoption of a comprehensive statutory framework for primary and secondary legislation similar to the *Legislative Standards Act 1992* (Qld)
  - the merits of extending the time limits for the disallowance of delegated legislation
  - the merits of extending the 4-month time limit on remaking a disallowed statutory rule.
- 2.99** The committee believes that a detailed examination of these issues by the NSW Law Reform Commission is critical to ensuring that New South Wales has in place a statutory framework for delegated legislation that is simpler, more robust and more accessible.
- 2.100** Pending the conduct of an inquiry by the Law Reform Commission, the committee also believes there are practical steps which Government agencies could be taking to address one of the issues identified above – public access to delegated legislation – which would not depend on the implementation of legislative reforms.
- 2.101** As noted earlier, stakeholders in this inquiry raised significant concerns about the accessibility of the public health orders made in response to the COVID-19 pandemic. These orders carry criminal penalties and confer wide discretions on police but are not subject to disallowance or scrutiny by the Legislation Review Committee. The duration of the pandemic is uncertain and may yet result in the further executive law-making which has the effect of curtailing citizens' freedoms. It is vital that delegated legislation which impacts on rights and liberties is clearly communicated to the public particularly if it is a type of instrument which is not subject to parliamentary oversight mechanisms.

**2.102** The committee therefore recommends that NSW Government agencies give priority to identifying more effective ways of communicating legislative instruments to the public, particularly instruments which impact on personal rights and liberties, and facilitating ready access to all such instruments by the public.

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**Recommendation 1**

That NSW Government agencies give priority to identifying more effective ways of communicating legislative instruments to the public, particularly instruments which impact on personal rights and liberties, and facilitating ready access to all such instruments by the public.

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## Chapter 3    The potential for executive overreach

While delegated legislation has an important role to play in the administration of a modern state, broad delegations of legislative power present challenges to foundational constitutional principles of democratic oversight of the legislative function and to public confidence in the legitimacy of the law. One way of addressing such concerns is to strengthen existing safeguards within the legislative framework, such as those discussed in Chapter 2. However, some jurisdictions have developed specific mechanisms to reduce or prevent inappropriate or excessive delegations and enhance the executive's accountability for its use of legislative power.

This chapter documents concerns raised in the inquiry relating to the potential for executive overreach in the use of delegated legislation. The chapter then outlines the views of inquiry participants with regard to the reforms that could be implemented to address those concerns. The chapter concludes by making a number of recommendations for action by the government and the Legislative Council.

### Concerns raised in the inquiry

- 3.1**    The chief concerns raised in the inquiry with regard to executive overreach centered on the use of Henry VIII clauses, shell legislation and quasi legislation.

#### 'Henry VIII' clauses

- 3.2**    The term 'Henry VIII clause' is generally used to describe a clause in a principal Act of Parliament that allows for the making of delegated legislation and confers the ability for the delegated legislation to amend the principal Act of Parliament.<sup>144</sup>
- 3.3**    The term is usually used pejoratively and recalls the Proclamation by the Crown Act 1539, which gave the named monarch's proclamations force 'as though they were made by act of parliament'. Despite containing the caveat that the proclamations 'shall not be prejudicial to any person's inheritance, offices, liberties, goods, chattels or life', the delegation was sufficiently wide-ranging that it is understood as representing the height of executive power unchecked by, indeed enabled by, the legislature.<sup>145</sup>
- 3.4**    As the NSW Parliamentary Counsel's Office (hereafter, PCO) observed in its submission, in a sense all delegated power confers the ability to amend legislation, even if it be only to change a time period by which an event must occur or update penalty amounts for infringements imposed by the primary legislation.<sup>146</sup> However, the key to assessing whether delegated legislation is problematic is whether the scope of the delegation is so large that it enables the executive to govern by decree or to overcome the intent of the primary legislation, rather than being subordinate to it.<sup>147</sup> In light of this, PCO put forward the following definition of a Henry VIII clause for the purposes of this inquiry:

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<sup>144</sup>    Submission 7, NSW Parliamentary Counsel's Office, p 1.

<sup>145</sup>    Submission 7, NSW Parliamentary Counsel's Office, p 1.

<sup>146</sup>    Submission 7, NSW Parliamentary Counsel's Office, p 1.

<sup>147</sup>    Submission 7, NSW Parliamentary Counsel's Office, p 2.

a provision of an Act that gives considerable amending power to delegated legislation and allows the delegated legislation to amend the Act under which it is made or other Acts.<sup>148</sup>

- 3.5 PCO advised that compared to other Australian jurisdictions, there is a perception that legislation passed by the New South Wales Parliament may rely more heavily on the use of delegated legislation, including Henry VIII clauses.<sup>149</sup> Similarly, Professor Gabrielle Appleby, UNSW Law, noted that anecdotally the New South Wales Parliament appears to rely heavily on Henry VIII clauses in legislation.<sup>150</sup>

#### ***The nature of participants' concerns***

- 3.6 PCO raised the following general concerns with regard to Henry VIII clauses:
- As delegated legislation is subject to less scrutiny and consultation than primary Acts, its use to amend primary legislation can tend to re-weight the proper balance of power between legislature and executive and adversely affect public perceptions of the legitimacy of the laws made by subordinate instruments.<sup>151</sup>
  - The amendment of primary legislation by delegated legislation creates complexity in statutory interpretation and undermines the principles of plain language drafting and the related concern of making the law more accessible.<sup>152</sup>
  - Where legislation is being prepared or enacted on a short timetable, there is a temptation to leave the detail to delegated legislation, which can result in broader Henry VIII delegations than would otherwise be the case and content that is more properly the subject of primary legislation ultimately residing in subordinate instruments. An alternative approach would be to address these matters by subsequent amendment of the primary Act in an amending Act.<sup>153</sup>
- 3.7 In addition to these general concerns, PCO noted it has encountered issues in the process of drafting subordinate instruments pursuant to Henry VIII clauses, including whether the delegated legislation can disapply fundamental sections of an Act such as the principles, objects, purposes or priorities; and whether delegated legislation can displace provisions in an Act which embody fundamental administrative law principles such as limits on ministerial discretion or judicial review of administrative action.<sup>154</sup>
- 3.8 To illustrate its concerns relating to Henry VIII clauses PCO referred to the following examples in legislation:
- The *COVID-19 Legislation Amendment (Emergency Measures) Act 2020* inserted into the *Criminal Procedure Act 1986* a Henry VIII clause which authorises regulations to be made that override the provisions of any Act or other law. PCO observed that despite being

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<sup>148</sup> Submission 7, NSW Parliamentary Counsel's Office, p 2.

<sup>149</sup> Submission 7, NSW Parliamentary Counsel's Office, p 12.

<sup>150</sup> Submission 6, Professor Gabrielle Appleby, p 2.

<sup>151</sup> Submission 7, NSW Parliamentary Counsel's Office, p 7.

<sup>152</sup> Submission 7, NSW Parliamentary Counsel's Office, p 7.

<sup>153</sup> Submission 7, NSW Parliamentary Counsel's Office, p 7.

<sup>154</sup> Submission 7, NSW Parliamentary Counsel's Office, p 8.

qualified by several constraints including a sunsetting provision, this kind of Henry VIII clause is 'problematic from the perspective of a proper allocation of power', given that the power delegated is 'broad and essentially legislative' in nature.<sup>155</sup>

- The *Protection of the Environment Operations Act 1997* includes a Henry VIII clause which authorises regulations that can have a 'very significant impact' in expanding the regulatory scheme 'in new areas that may not have been contemplated when Parliament first enacted the enabling legislation'.<sup>156</sup> The Act also authorises regulations which may change defined terms used in the Dictionary to the primary Act while such changes 'would most appropriately be achieved via an amendment of the Act rather than via regulation'.<sup>157</sup>
- The *Workers Compensation Legislation Amendment Act 2012* included a Henry VIII clause which authorised savings and transitional regulations amending the Workers Compensation Acts 'in the manner specified in the regulations'.<sup>158</sup> In a challenge brought by an injured worker the High Court found that the Henry VIII clause disclosed a statutory purpose that overcame section 30(1)(c) of the *Interpretation Act 1987*, which would otherwise have preserved any right, privilege, obligation or liability acquired under a repealed Act or statutory rule. Accordingly, a regulation made under the Henry VIII clause was upheld notwithstanding its reversal of substantive rights and liabilities under the primary Act.<sup>159</sup>

**3.9** The NSW Bar Association similarly drew attention to several pieces of legislation delegating powers which it argued should have been more appropriately located in primary legislation.<sup>160</sup> The Association argued that by allowing key matters to be provided for in subsequent regulations rather than in the substantive provisions of the bill, Henry VIII clauses circumvent the ordinary process of parliamentary scrutiny and debate.<sup>161</sup>

**3.10** Following on, the NSW Council for Civil Liberties submitted that Henry VIII clauses undermine the notion of the separation of powers and parliamentary supremacy and enable policy to be produced beyond the principles of the parent Act without appropriate parliamentary debate.<sup>162</sup> By way of example, the Council argued that the powers delegated under the *COVID-19 Legislation Amendment (Emergency Measures) Act 2020* are 'extraordinarily broad' and 'highly discretionary',<sup>163</sup> and expressed particular concern that these powers had been applied while Parliament was not sitting due to the COVID-19 lockdown.<sup>164</sup>

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<sup>155</sup> Submission 7, NSW Parliamentary Counsel's Office, p 9.

<sup>156</sup> Submission 7, NSW Parliamentary Counsel's Office, p 9.

<sup>157</sup> Submission 7, NSW Parliamentary Counsel's Office, pp 9-10.

<sup>158</sup> *Workers Compensation Act 1987*, Schedule 6, Part 19H, clause 5(4)). This provision and other aspects of the Henry VIII clause inserted by the 2012 Act are noted in Submission 7, NSW Parliamentary Counsel's Office, p 10.

<sup>159</sup> Submission 7, NSW Parliamentary Counsel's Office, p 10.

<sup>160</sup> Submission 8, NSW Bar Association, pp 7-11.

<sup>161</sup> Submission 8, NSW Bar Association, p 4.

<sup>162</sup> Submission 5, NSW Council for Civil Liberties, p 7; Evidence, Mr Jared Wilk, Co-convenor, Civil Liberties and Human Rights Action Group, NSW Council for Civil Liberties, 27 July 2020, p 23.

<sup>163</sup> Submission 5, NSW Council for Civil Liberties, pp 7-8.

<sup>164</sup> Submission 5, NSW Council for Civil Liberties, p 7.

### 'Shell' legislation

- 3.11** Shell legislation, also referred to as ‘skeletal legislation’, denotes primary legislation which provides only the ‘bare bones’ of the legislative scheme with the detail to be set out in delegated legislation.<sup>165</sup> Shell legislation is similar to a Henry VIII clause in that it moves the power to legislate from the legislature to the executive.<sup>166</sup>
- 3.12** Professor Appleby submitted that a key indicator of a piece of shell legislation is that the delegations are of such a breadth that major, conflicting policy choices could be taken under them.<sup>167</sup> These delegations present accountability challenges because, while the government which originally sought such wide powers might offer assurances as to their exercise, such assurances will not bind the actions of future governments.<sup>168</sup>
- 3.13** An example of shell legislation is the *Biodiversity Conservation Act 2016*. This Act puts in place some of the regulatory scheme in relation to land clearing in the State but ‘leaves fundamental policy decisions to delegated legislation; … decisions that might change the entire policy orientation of that scheme’.<sup>169</sup> In particular the Act allows for defences to prosecutions to be created through regulations and codes of practice.<sup>170</sup>
- 3.14** Another example is the *Occupational Licensing (Adoption of National Law) Act 2010*. According to PCO the skeletal nature of the National Law reflected a lack of agreement amongst the jurisdictions about the detail of the scheme and the fact that insufficient policy work had been done. Further, parliamentary scrutiny committees criticised the legislation adopting the National Law as being an abrogation of parliamentary sovereignty in that too much of the scheme was left to be dealt with by delegated legislation. The Acts adopting the National Law were subsequently repealed in many jurisdictions including New South Wales.<sup>171</sup>

### Quasi legislation

- 3.15** Quasi legislation refers to the incorporation into legislation of non-legislative instruments such as guidelines, codes of practice and international standards.<sup>172</sup> Quasi legislation has been identified as a serious threat to parliamentary oversight of delegated legislation as well as public transparency as to the content of the law.<sup>173</sup> This is particularly concerning where those

<sup>165</sup> Submission 7, NSW Parliamentary Counsel’s Office, p 2.

<sup>166</sup> Submission 7, NSW Parliamentary Counsel’s Office, p 2.

<sup>167</sup> Submission 6, Professor Gabrielle Appleby, pp 1-2.

<sup>168</sup> Submission 6, Professor Gabrielle Appleby, p 2, citing House of Lords, Secondary Legislation Scrutiny Committee, *Response to the Strathclyde Review: Effective parliamentary scrutiny of secondary legislation*, April 2016, HL Paper 128 at [78], available at: <http://www.publications.parliament.uk/pa/ld201516/ldselect/lsecleg/128/128.pdf>.

<sup>169</sup> Submission 6, Professor Gabrielle Appleby, p 2.

<sup>170</sup> Submission 6, Professor Gabrielle Appleby, p 2; *Biodiversity Conservation Act 2016*, section 2.9.

<sup>171</sup> Submission 7, NSW Parliamentary Counsel’s Office, pp 10-11.

<sup>172</sup> There is a general power for the executive to incorporate such instruments under any delegation: *Interpretation Act 1987*, section 42(1); Submission 6, Professor Gabrielle Appleby, p 3.

<sup>173</sup> Submission 6, Professor Gabrielle Appleby, p 3.

instruments might change over time, effecting legislative change without any parliamentary oversight or even knowledge.<sup>174</sup>

**3.16** By way of example, the *Biodiversity Conservation Act* 2016 discussed above also incorporates quasi legislation. Section 2.9(1) of the Act provides that the regulations may make provision for additional defences to a prosecution ‘including by reference to acts done in accordance with codes of practice made or adopted under subsection (2)’. Section 2.9(2) provides that the regulations may provide for the making and publication by the Minister of codes of practice relating to certain matters. Professor Appleby advised that the incorporation of the minister’s code of practice by regulation would allow defences to be amended without any amendment to the regulation itself, and that this would avoid triggering the tabling and disallowance requirements that attach to regulations under the *Interpretation Act* 1987.<sup>175</sup>

**3.17** Another example of quasi legislation is section 138(1) of the *Marine Safety Act* 1998, which authorises the making of regulations that:

incorporate by reference any standards, rules, codes, specifications or methods, as in force at a particular time or as in force from time to time, prescribed or published by whatever means by an authority or body (whether or not it is a New South Wales authority or body).

**3.18** Professor Appleby submitted that this provision gives non-accountable bodies legislative power, because, if incorporated, their instruments are given the force of law. Professor Appleby further noted that this creates a challenge for the intelligibility of the statute book, as many of these instruments would be substantive documents that change regularly.<sup>176</sup>

## Reforms proposed by inquiry participants

**3.19** Broad delegations of legislative power such as those found in Henry VIII clauses and shell legislation are already subject to parliamentary scrutiny processes such as the three reading stages and debate in each chamber. However, despite these existing processes, inquiry participants argued that additional measures are needed to more effectively address the potential for executive overreach.

**3.20** The chief reforms suggested by participants concerned the publication of guidance in relation to the delegation of legislative power, the use of explanatory notes to bills and legislative instruments to enhance transparency, specific controls to limit broad delegations in Henry VIII clauses, shell and quasi legislation, and measures to enhance committee scrutiny.

### Guidance to prevent inappropriate delegations

**3.21** Guidance in relation to the delegation of legislative power can take the form of statutory provisions, government handbooks or material produced by parliamentary scrutiny committees. The evidence to the inquiry highlighted types of guidance which have been adopted in

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<sup>174</sup> Submission 6, Professor Gabrielle Appleby, p 3.

<sup>175</sup> Submission 6, Professor Gabrielle Appleby, p 4.

<sup>176</sup> Submission 6, Professor Gabrielle Appleby, pp 3-4.

Queensland, which has statutory and non-statutory forms, and the Commonwealth, which relies on non-statutory guidance.

- 3.22 In Queensland, the *Legislative Standards Act 1992* requires primary and subordinate legislation to have sufficient regard to ‘the institution of Parliament’<sup>177</sup> and sets out the criteria which are to guide the Parliament in determining whether this requirement has been met.<sup>178</sup> In addition, the *Legislation Handbook* published by the Queensland Department of Premier and Cabinet refers to the circumstances in which Henry VIII clauses may be used<sup>179</sup> and notes concerns relating to matters such as the use of unduly wide powers to fill in legislative gaps by subordinate legislation.<sup>180</sup>
- 3.23 At the Commonwealth level, the *Legislation Handbook* published by the Department of Prime Minister and Cabinet includes a non-exhaustive list of matters generally implemented only through Acts of Parliament rather than subordinate legislation, which include ‘amendments to Acts of Parliament’.<sup>181</sup> Further, the Senate Standing Committee for the Scrutiny of Delegated Legislation has issued guidelines concerning the matters that should ordinarily be included in primary legislation<sup>182</sup> and discussed the limited situations in which Henry VIII clauses may be used.<sup>183</sup>

#### *Proposals by inquiry participants*

- 3.24 PCO recommended the introduction of guidance to the executive, including PCO itself, about the appropriate use of Henry VIII clauses and shell legislation and noted there are differing mechanisms that could be used, ranging from guidelines to legislative standards.<sup>184</sup>
- 3.25 The Parliamentary Counsel, Ms Annette O’Callaghan, expressed a preference for guidance to be adopted in legislation as this would make it more difficult for ministers to fail to comply and would assist public servants in giving advice to ministers to avoid certain types of delegations.<sup>185</sup>
- 3.26 In this context, the Parliamentary Counsel pointed out that the legislative route need not imply a lack of flexibility. For instance in Queensland, the legislation identifies the principles to be

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<sup>177</sup> *Legislative Standards Act 1992* (Qld), section 4.

<sup>178</sup> *Legislative Standards Act 1992* (Qld), section 4(4) and (5).

<sup>179</sup> Queensland Department of Premier and Cabinet, *Legislation Handbook*, 7.3.3, <https://www.premiers.qld.gov.au/publications/categories/policies-and-codes/handbooks/legislation-handbook/fund-principles/parliament.aspx>; Submission 7, Parliamentary Counsel’s Office, pp 14-15.

<sup>180</sup> Queensland Department of Premier and Cabinet, *Legislation Handbook*, 7.3.1, <https://www.premiers.qld.gov.au/publications/categories/policies-and-codes/handbooks/legislation-handbook/fund-principles/parliament.aspx>.

<sup>181</sup> Commonwealth Department of Prime Minister and Cabinet, *Legislation Handbook*, February 2017, p 2; Submission 8, NSW Bar Association, p 18; Submission 5, NSW Council for Civil Liberties, p 4.

<sup>182</sup> Submission 3, Senate Standing Committee for the Scrutiny of Delegated Legislation, p 3.

<sup>183</sup> Submission 3, Senate Standing Committee for the Scrutiny of Delegated Legislation, p 3; Senate Standing Committee for the Scrutiny of Delegated Legislation, Australian Senate, *Guidelines*, 1st ed, February 2020, p 28.

<sup>184</sup> Submission 7, Parliamentary Counsel’s Office, p 4.

<sup>185</sup> Evidence, Ms Annette O’Callaghan, Parliamentary Counsel, NSW Parliamentary Counsel’s Office, 27 July 2020, p 33.

followed in legislation but does not prevent the Parliament from departing from those principles to deal with emerging situations, provided such departures are explained and justified to the Parliament and to the people.<sup>186</sup>

- 3.27 For its part, the NSW Bar Association recommended further guidance on the use of Henry VIII clauses, shell legislation and matters that are generally inappropriate for delegated legislation<sup>187</sup> and acknowledged that such guidance could be statutory or non-statutory.<sup>188</sup> Similar views were expressed by the NSW Council for Civil Liberties.<sup>189</sup>
- 3.28 From an academic perspective, Professor Appleby and Associate Professor Lorne Neudorf, Adelaide Law School, both expressed support for the development of guidance by parliamentary committees.<sup>190</sup> For example, Professor Appleby recommended that the Regulation Committee develop a set of guidelines against which the breadth of delegations are assessed and which set out the limited circumstances in which it is appropriate to rely on Henry VIII clauses and quasi legislation.<sup>191</sup>

### The use of explanatory notes

- 3.29 Guidance concerning the delegation of legislative power in Queensland and the Commonwealth includes stipulations as to the matters to be addressed in explanatory notes to bills and statutory instruments.
- 3.30 Under the *Legislative Standards Act 1992* (Qld) the explanatory notes to a bill or subordinate instrument must include a brief assessment of the consistency of the bill or instrument with the legislative principles set out in the Act and address the reasons for any inconsistency.<sup>192</sup>
- 3.31 At the Commonwealth level, the *Legislation Handbook* requires officers preparing explanatory memoranda to ensure an explanation is given for any unusual arrangements ‘such as using regulations for important measures that would normally be included in primary legislation or a ‘Henry VIII’ clause’.<sup>193</sup> Further, the Senate Standing Committee for the Scrutiny of Delegated Legislation has issued guidelines on the matters which should be addressed in explanatory

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<sup>186</sup> Evidence, Ms O’Callaghan, 27 July 2020, pp 32 and 37.

<sup>187</sup> Submission 8, NSW Bar Association, p 4 (Recommendation iv), p 18.

<sup>188</sup> Submission 8, NSW Bar Association, p 18.

<sup>189</sup> Submission 5, NSW Council for Civil Liberties, pp 4-5, p 9 (Recommendation 6).

<sup>190</sup> Submission 1, Association Professor Lorne Neudorf, p 7 (Recommendation (k)). Evidence, Associate Professor Lorne Neudorf, Deputy Dean of Law and Associate Professor, Adelaide Law School, 27 July 2020, p 22.

<sup>191</sup> Submission 6, Professor Appleby, pp 6-7.

<sup>192</sup> *Legislative Standards Act 1992* (Qld), sections 23(1)(f) and 24(1)(i)

<sup>193</sup> Commonwealth Department of Prime Minister and Cabinet, *Legislation Handbook*, February 2017, p 43.

statements concerning legislative instruments<sup>194</sup> made in the exercise of broad delegated powers.<sup>195</sup>

### ***Proposals by inquiry participants***

- 3.32** A number of inquiry participants recommended that similar measures be introduced in New South Wales to improve transparency and accountability in the use of delegated legislative power.
- 3.33** PCO recommended that consideration be given to introducing a mechanism, for example by a statement in the explanatory notes accompanying the bill, to ensure that the use of measures such as Henry VIII clauses or shell legislation is more openly brought to the attention of Parliament.<sup>196</sup>
- 3.34** In evidence to the committee, the Parliamentary Counsel advised that statutory requirements to address particular matters in explanatory notes need not be unduly onerous, but serve to ensure that it is the Parliament rather than the executive which decides on what information is provided:
- Having a list of things to be included in an explanatory notes does not mean it needs to be pages on each of those points, it is just you have got the key points that Parliament has agreed are important to appear in an explanatory memorandum or note and each of those is addressed, whether in a very brief way or a very fulsome way, but it is very specific for Parliament to make sure all of those matters have been addressed. It is Parliament that has decided then what should be in those explanatory notes rather than a faceless bureaucrat.<sup>197</sup>
- 3.35** Along similar lines, the NSW Bar Association recommended that consideration be given to creating:
- a statutory requirement that a bill containing a Henry VIII clause, "shell legislation" or conferring regulation-making powers on matters generally considered inappropriate for delegated legislation must be accompanied by an explanatory report to the Parliament and Legislation Review Committee ... outlining why such a drafting choice is necessary and appropriate.<sup>198</sup>
- 3.36** Associate Professor Neudorf and the NSW Council for Civil Liberties also expressed support for the concept of requiring explanatory notes to address matters such as Henry VIII clauses to ensure these are brought to the attention of Parliament.<sup>199</sup> Associate Professor Neudorf observed that the adoption of such a reform could lead to enhanced committee scrutiny of

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<sup>194</sup> Commonwealth legislative instruments must be accompanied by explanatory statements: *Legislation Act 2003* (Cth), section 15J.

<sup>195</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation, Australian Senate, *Guidelines*, 1st ed, February 2020, pp 27-28.

<sup>196</sup> Submission 7, Parliamentary Counsel's Office, p 4.

<sup>197</sup> Evidence, Ms O'Callaghan, 27 July 2020, p 31.

<sup>198</sup> Submission 8, NSW Bar Association, p 4 (Recommendation 5(ii)).

<sup>199</sup> Evidence, Associate Professor Neudorf, 27 July 2020, p 16; Evidence, Ms Michelle Falstein, Secretary, and Mr Jared Wilk, Co-convenor, Civil Liberties and Human Rights Action Group, NSW Council of Civil Liberties, 27 July 2020, pp 23-24.

Henry VIII provisions, as the relevant committee could engage with the rationale put forward in the explanatory note.<sup>200</sup>

### Specific controls on broad delegations

- 3.37** Inquiry participants suggested a range of measures to control the use of Henry VIII clauses including special committee procedures, affirmative resolution procedures<sup>201</sup> and sunsetting provisions.<sup>202</sup>
- 3.38** A number of participants also suggested that, to address concerns which arise in relation to shell legislation, the regulations to be made under such legislation should be available at the time the bill is presented to Parliament.<sup>203</sup> This would ensure that members of Parliament are fully informed about the legislative scheme they are voting for and that stakeholders could advise members of their views to contribute to the debate.<sup>204</sup> However, it was acknowledged that having the regulations ready when a bill is presented may be impracticable due to timing and resourcing constraints.<sup>205</sup> It was also noted that even if regulations are proposed when the bill is put forward, there would be no guarantee that those particular regulations will stay in place, as the regulations could be repealed and replaced with something different.<sup>206</sup>
- 3.39** A further reform was proposed to address an aspect of the problems which arise in relation to quasi legislation. Professor Appleby submitted that where non-legislative documents such as standards are incorporated into legislation by reference, there should be a mechanism which clearly identifies the date of the document to be incorporated, to ensure that there is clarity and certainty surrounding the version of the document which forms part of the law.
- 3.40** There is such a mechanism in place at present in section 69(1) of the *Interpretation Act 1987*, which contains a presumption that the reference to the incorporated document is a reference to that document as at the date on which the provision containing the reference took effect (known as date-stamping). However, section 69(2) allows that presumption to be overridden<sup>207</sup> if the relevant Act or instrument evinces an intention that the reference extends to the document as in force from time to time. Professor Appleby submitted that the use of quasi legislation

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<sup>200</sup> Evidence, Associate Professor Neudorf, 27 July 2020, p 16.

<sup>201</sup> Affirmative resolution procedures are procedures whereby statutory instruments come into effect or in some cases remain in effect only upon an affirmative resolution of each House: Submission 2, Law Society of New South Wales, Attachment 1, Professor Gabrielle Appleby, Emeritus Professor Mark Aronson, Dr Janina Boughey, UNSW Law, Submission to the Senate Standing Committee on Regulations and Ordinances, Parliamentary Scrutiny of Delegated Legislation inquiry, p 6.

<sup>202</sup> For example, Submission 1, Associate Professor Neudorf, p 7 (Recommendation (g)); Submission 5, NSW Council for Civil Liberties, pp 8-9 (Recommendation 4).

<sup>203</sup> Evidence, Ms O'Callaghan, 27 July 2020, pp 34, 38; Evidence, Mr Andrew Chalk, Chair, Public Law Committee, Law Society of New South Wales, 27 July 2020, p 12.

<sup>204</sup> Evidence, Ms O'Callaghan, 27 July 2020, p 38.

<sup>205</sup> Evidence, Associate Professor Neudorf, 27 July 2020, p 22; Evidence, Ms O'Callaghan, 27 July 2020, p 34.

<sup>206</sup> Evidence, Associate Professor Neudorf, 27 July 2020, p 22.

<sup>207</sup> Submission 6, Professor Gabrielle Appleby, p 3.

should be restricted by requiring the incorporated document to be date-stamped and recommended that the exception in section 69(2) of the *Interpretation Act 1987* be removed.<sup>208</sup>

### Enhancing committee scrutiny

- 3.41 There are two committees of the New South Wales Parliament with responsibility for the scrutiny of delegated legislation: the joint Legislation Review Committee and the Legislative Council Regulation Committee.
- 3.42 The Legislation Review Committee scrutinises and reports on bills introduced into Parliament against specified criteria, including whether a conferral of authority ‘inappropriately delegates legislative powers’ or ‘insufficiently subjects the exercise of legislative powers to parliamentary scrutiny’.<sup>209</sup> The committee also considers regulations while they are subject to disallowance and reports to Parliament if it wishes to draw attention to a particular regulation on a particular ground. In considering regulations the committee reviews provisions against specified scrutiny criteria<sup>210</sup> and is generally precluded from considering the underlying policy or merits.<sup>211</sup>
- 3.43 In contrast to the Legislation Review Committee which considers all new regulations, the Regulation Committee may inquire into and report on any regulation referred to it by the Legislative Council. Further, unlike the Legislation Review Committee which is concerned with technical scrutiny criteria, the Regulation Committee may examine the policy or substantive content of regulations. The Regulation Committee may also inquire into trends or issues that relate to regulations.<sup>212</sup>
- 3.44 The inquiry was told that committee scrutiny of delegated legislation plays a critical constitutional role in holding the executive to account and is the principal mechanism by which Parliament supervises the executive’s exercise of legislative power.<sup>213</sup> However, the committee heard that there are limitations on the effectiveness of the current committee scrutiny regime. For example:
- While the Legislation Review Committee is required to identify inappropriate delegations of legislative power and delegations which allow for insufficient scrutiny, and has flagged these issues in its reports, this has not prevented broad delegations, Henry VIII clauses and the use of quasi legislation provisions from appearing in the New South Wales statute book.<sup>214</sup>

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<sup>208</sup> Submission 6, Professor Gabrielle Appleby, p 6.

<sup>209</sup> *Legislation Review Act 1987*, section 8A.

<sup>210</sup> *Legislation Review Act 1987*, section 9.

<sup>211</sup> *Legislation Review Act 1987*, section 9(3); Submission 1, Associate Professor Lorne Neudorf, p 4. The Legislation Review Committee also has functions concerning review of the staged repeal of regulations (*Legislation Review Act 1987*, section 9(2)(a)) and consideration of regulatory impact statements (*Subordinate Legislation Act 1989*, section 5(4) and (5)).

<sup>212</sup> Resolution of the Legislative Council establishing the Regulation Committee: *Minutes*, Legislative Council, No 2, 8 May 2019, pp 100-103.

<sup>213</sup> Submission 1, Associate Professor Lorne Neudorf, p 6.

<sup>214</sup> Submission 6, Professor Gabrielle Appleby, p 5.

- The Legislation Review Committee only reports on delegated legislation when it wishes to raise a concern. The overall proportion of delegated legislation that is reported on by the committee therefore varies significantly year-to-year.<sup>215</sup>
- The expectation that the Legislation Review Committee will scrutinise all disallowable regulations is a tall order given the volume of delegated legislation that is made.<sup>216</sup>
- As the Regulation Committee is fairly new, having been permanently established in 2019, it is not yet possible to offer a comprehensive assessment of its work.<sup>217</sup>

**3.45** The evidence to the inquiry also highlighted examples of other jurisdictions in which committee scrutiny of delegated legislative power appears to be more robust than is the case in New South Wales.<sup>218</sup>

**3.46** To improve the effectiveness of committee scrutiny of delegated legislation in New South Wales, inquiry participants proposed a range of reforms to the powers, functions and resourcing of both the Legislative Review Committee and the Regulation Committee.

**3.47** The key proposals relating to the Regulation Committee are summarised below. Those proposals concern the need to broaden the forms of delegated legislation which may be examined by the committee, the consideration of draft delegated legislation, the power to self-refer inquiries, and expanding the committee's reporting mechanisms.

***Broadening the forms of delegated legislation considered by the Regulation Committee***

**3.48** Under its terms of reference, the Regulation Committee's scrutiny of delegated legislation is currently confined to the scrutiny of 'regulations'. However, as discussed in Chapter 2, delegated legislation can take many forms and statutory instruments of a legislative character require parliamentary oversight regardless of how the instrument is described.

**3.49** In practice, the Legislative Council has interpreted the remit of the Regulation Committee broadly. In 2018 the Council referred to the committee for inquiry and report an instrument that was expressed an 'order' rather than a 'regulation'.<sup>219</sup> Nevertheless, Professor Appleby submitted that, to avoid future doubt, the jurisdiction of the Regulation Committee should be extended to include 'all instruments of a legislative nature, regardless of their form', arguing that:

This would ensure the committee has policy and substantive oversight of all delegated instruments including quasi-legislative instruments, particularly important when there are broad delegations or Henry VIII clauses used.<sup>220</sup>

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<sup>215</sup> Submission 1, Associate Professor Lorne Neudorf, p 4.

<sup>216</sup> Evidence, Associate Professor Neudorf, 27 July 2020, p 17.

<sup>217</sup> Submission 1, Associate Professor Lorne Neudorf, p 5.

<sup>218</sup> See, for example, committee scrutiny processes in the Commonwealth, Queensland and Western Australia described in Submission 7, Parliamentary Counsel's Office, pp 12 – 16.

<sup>219</sup> Regulation Committee, NSW Legislative Council, *Environmental Planning and Assessment Amendment (Snowy 2.0 and Transmission Project) Order 2018* (2018), Report 1.

<sup>220</sup> Submission 6, Professor Gabrielle Appleby, p 6.

### ***The consideration of draft delegated legislation***

- 3.50 While the government is not required to publish draft delegated legislation, exposure drafts of regulations are sometimes released. Further, under the *Subordinate Legislation Act 1989* the Government must publish information concerning proposed principal statutory rules including whether, and if so where, a copy of the proposed rule may be obtained or inspected.<sup>221</sup> However, despite the fact that exposure drafts of delegated legislation are sometimes published, neither the Legislation Review Committee nor the Regulation Committee has the power to examine drafts.
- 3.51 The Law Society of New South Wales submitted that the ability of the Regulation Committee to effectively complement existing scrutiny mechanisms would be enhanced if the committee were enabled to review draft delegated legislation such as exposure drafts.<sup>222</sup>
- 3.52 Associate Professor Neudorf observed that committee scrutiny of draft bills and delegated legislation provides an opportunity for problems to be corrected before the legislation progresses and can be much more effective than ex post facto review.<sup>223</sup> He also observed that governments are more receptive to making changes at the preliminary stage than after the legislation has been made.<sup>224</sup> He therefore recommended that the Regulation Committee be empowered to scrutinise draft delegated legislation.<sup>225</sup>
- 3.53 The Senate Standing Committee for the Scrutiny of Delegated Legislation advised that changes to the Senate standing orders in 2019 included amendments clarifying that the committee may review draft delegated legislation in accordance with its scrutiny principles.<sup>226</sup>

### ***A self-referral power for the committee***

- 3.54 As noted above, while the Legislation Review Committee examines ‘all regulations’ that are subject to disallowance, the Regulation Committee may only examine regulations which have been referred to it by a resolution of the Legislative Council. However, other scrutiny committees of the Legislative Council which have a majority of non-government members<sup>227</sup> have been given the power to initiate their own inquiries in addition to conducting inquiries into matters referred to them by the House.
- 3.55 The Law Society of New South Wales submitted that the Regulation Committee should be able to initiate inquiries<sup>228</sup> and noted that a self-referral power is particularly important in periods

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<sup>221</sup> *Subordinate Legislation Act 1989*, section 5(2)(a)(ii)

<sup>222</sup> Submission 2, Law Society of New South Wales, p 3.

<sup>223</sup> Submission 1, Associate Professor Lorne Neudorf, p 7.

<sup>224</sup> Evidence, Associate Professor Neudorf, 27 July 2020, p 21.

<sup>225</sup> Submission 1, Associate Professor Lorne Neudorf, p 7 (Recommendation (i)). This recommendation was also made in relation to the Legislation Review Committee.

<sup>226</sup> Submission 3, Senate Standing Committee for the Scrutiny of Delegated Legislation, p 2.

<sup>227</sup> The Portfolio Committees, the Public Works Committee and the Public Accountability Committee have a majority of non-government members. The Regulation Committee has equal numbers of numbers of government and non-government members but the Chair is a non-government member.

<sup>228</sup> Submission 2, Law Society of New South Wales, p 3.

when the Parliament is not sitting: 'without the power of self-referral of inquiries, the Regulation Committee's ability to carry out its business can be hobbled while Parliament is adjourned'.<sup>229</sup>

**3.56** The NSW Bar Association,<sup>230</sup> the NSW Council for Civil Liberties<sup>231</sup> and Associate Professor Neudorf<sup>232</sup> agreed that the Regulation Committee should have the power to self-refer inquiries.

**3.57** The Standing Committee for the Scrutiny of Delegated Legislation advised that changes to the Senate standing orders in 2019 include amendments which enable the committee to self-initiate inquiries into matters related to the technical scrutiny of delegated legislation.<sup>233</sup> The Senate committee also advised that it has exercised its new power to initiate inquiries by commencing an inquiry into the exemption of delegated legislation from parliamentary oversight.<sup>234</sup>

### ***Expanded reporting mechanisms***

**3.58** Associate Professor Neudorf expressed the view that the Regulation Committee should publish reports more frequently, such as updates on concerns regarding delegated legislation that have been identified and associated governmental responses and undertakings.<sup>235</sup> At the hearing Associate Professor Neudorf clarified that more frequent reporting need not involve formal reports, as even a running narrative of the issues the committee has been considering would have the effect of enhancing accountability by showing that attention is being paid to the instruments.<sup>236</sup>

**3.59** In an article attached to his submission Associate Professor Neudorf noted that the Senate Standing Committee for the Scrutiny of Delegated Legislation has a variety of different reporting mechanisms including:

- a weekly Monitor which provides detailed information on the status of legislative instruments including concerns identified by the committee and actions required
- an online Disallowance Alert which provides updated information on the status of legislative instruments subject to a notice of motion for disallowance
- an annual Index of Instruments which provides a consolidated list of all legislative instruments for which the committee has identified concerns.<sup>237</sup>

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<sup>229</sup> Submission 2, Law Society of New South Wales, p 3.

<sup>230</sup> Evidence, Mr Michael McHugh SC, Senior Vice President, NSW Bar Association, 27 July 2020, p 12.

<sup>231</sup> Answers to questions on notice, NSW Council for Civil Liberties, p 2.

<sup>232</sup> Evidence, Associate Professor Neudorf, 27 July 2020, p 18.

<sup>233</sup> Submission 3, Senate Standing Committee for the Scrutiny of Delegated Legislation, p 2.

<sup>234</sup> Submission 3, Senate Standing Committee for the Scrutiny of Delegated Legislation, p 3.

<sup>235</sup> Submission 1, Associate Professor Lorne Neudorf, p 7 (Recommendation (l)). This view was also expressed in relation to the Legislation Review Committee.

<sup>236</sup> Evidence, Associate Professor Neudorf, 27 July 2020, p 17.

<sup>237</sup> Submission 1, Associate Professor Lorne Neudorf, Attachment, Lorne Neudorf, 'Strengthening the parliamentary scrutiny of delegated legislation: lessons from Australia', *Canadian Parliamentary Review*, Winter 2019, p 27.

- 3.60** In light of the activities of the Senate committee Associate Professor Neudorf suggested that there would be value in expanding the Regulation Committee's reporting mechanisms to include things like monitors and disallowance alerts.<sup>238</sup> In support of that view he noted that committees are 'the Parliament's eyes and ears' when it comes to delegated legislation and that many different actors in the institution rely on their reports.<sup>239</sup>
- 3.61** Other suggestions made by Associate Professor Neudorf included proposals that:
- the Regulation Committee maintain and publish a listing of delegated legislation which is not subject to the disallowance procedure or scrutiny by the Legislation Review Committee, in the interests of transparency<sup>240</sup>
  - the Regulation Committee publish summaries of the jurisprudence contained in its past reports.<sup>241</sup>

## Committee comment

- 3.62** The evidence in this inquiry, given by stakeholders with significant legal expertise, has highlighted concerns around the potential for executive overreach in the delegation of legislative power, particularly arising from the use of Henry VIII clauses, shell legislation and quasi legislation. Use of these legislative tools carries with it the risk that the executive may determine significant elements of statutory schemes in ways that the Parliament may not have intended. Why does this matter? In our view, it matters because the legitimacy of the laws made by delegated legislation may be adversely affected if the public perception is that the accepted balance between parliamentary and executive power has become skewed. At the end of the day, it is in the interests of good government that the potential for executive overreach is managed.
- 3.63** Of course, it is ultimately a matter for the Parliament to determine what safeguards are required to minimise the risk of executive overreach in the use of delegated legislative power. However, as noted in Chapter 2, there is a strong case for having the NSW Law Reform Commission examine these issues in depth to inform the Parliament's views, particularly given the complexity of the laws which operate in this area and the variety of possible approaches to reform.
- 3.64** In addition to the matters identified in Chapter 2 of this report concerning the legislative framework for delegated legislation, the Commission's terms of reference should also include consideration of the need for additional safeguards in relation to the use of Henry VIII provisions, shell legislation and quasi legislation.
- 3.65** Accordingly, the committee recommends that the Attorney General consider referring to the NSW Law Reform Commission terms of reference as set out below.

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<sup>238</sup> Evidence, Associate Professor Neudorf, 27 July 2020, pp 18-19.

<sup>239</sup> Evidence, Associate Professor Neudorf, 27 July 2020, p 19.

<sup>240</sup> Submission 1, Associate Professor Lorne Neudorf, p 7 (Recommendation (j)); Evidence, Associate Professor Neudorf, 27 July 2020, p 21.

<sup>241</sup> Submission 1, Associate Professor Lorne Neudorf, p 6 (Recommendation (c)); Evidence, Associate Professor Neudorf, 27 July 2020, pp 20-21. This recommendation was also made in relation to the Legislation Review Committee.

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## Recommendation 2

That the Attorney General consider referring to the NSW Law Reform Commission the following terms of reference:

1. Pursuant to section 10 of the *Law Reform Commission Act 1967*, the NSW Law Reform Commission is to review and report on:
  - (a) the extent and use of delegated legislative powers in New South Wales
  - (b) powers and safeguards relating to delegated legislation in other jurisdictions
  - (c) suggestions for improvements in the use of delegated legislative powers to prevent executive overreach.
2. In particular, the Commission is to consider:
  - (a) the merits of extending statutory provisions regarding disallowance and committee scrutiny to all instruments of a legislative character including quasi-legislation
  - (b) the adequacy of current requirements for consultation in the development of delegated legislation
  - (c) the need to ensure that all forms of delegated legislation can be easily accessed by the public as soon as they commence
  - (d) the need for additional safeguards in relation to the use of Henry VIII provisions, shell legislation and quasi legislation
  - (e) the merits of consolidating into a single statute the *Subordinate Legislation Act 1989*, the *Legislation Review Act 1987* and the relevant provisions of the *Interpretation Act 1987*
  - (f) the merits of adopting a comprehensive statutory framework for primary and secondary legislation similar to the *Legislative Standards Act 1992* (Qld)
  - (g) the merits of extending the time limits for the disallowance of delegated legislation
  - (h) the merits of extending the 4-month time limit on remaking a disallowed statutory rule
  - (i) any other matters the Commission considers relevant.

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- 3.66** The committee also believes it should revisit this matter once the NSW Law Reform Commission's report is finalised, to ensure that the impetus for reform in key areas is maintained. Accordingly, we recommend that following the report of the Commission, the House refer further terms of reference to the Regulation Committee to inquire into and report on the Commission's findings and recommendations.

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**Recommendation 3**

That, following the report of the NSW Law Reform Commission, the House refer further terms of reference to the Regulation Committee to inquire into and report on the Commission's findings and recommendations.

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- 3.67** In addition, the committee is of the view that there are a number of other important reforms which should be made in the meantime, separately to the NSW Law Reform Commission's work.
- 3.68** As noted by various stakeholders throughout the inquiry, one of the most effective ways of minimising the risk of executive overreach is to provide for greater transparency in the use of broad delegations of legislative power such as those contained in Henry VIII clauses. Some jurisdictions have achieved this by introducing requirements for explanatory notes to highlight the presence of such provisions in bills and statutory instruments and to explain why such a broad delegation is considered to be necessary. This preserves the flexibility to use provisions such as Henry VIII clauses in particular cases where this is justified, while facilitating scrutiny and accountability.
- 3.69** The adoption of statutory requirements concerning the content of explanatory notes such as those in place in Queensland is among the possible reforms which we have recommended be considered by the NSW Law Reform Commission. In the meantime, however, we believe the NSW Government should ensure that explanatory notes to bills highlight and explain the reasons for the inclusion in the bill of any provisions which:
- delegate power to modify, or exempt persons or entities from, the operation of primary legislation – i.e. Henry VIII clauses
  - delegate wide power to fill in legislative gaps by subordinate legislation – i.e. shell legislation
  - propose compliance based on the requirements of an external document such as a standard – i.e. quasi legislation.
- 3.70** Such a reform would make it easier for the Parliament to assess whether the extent of the delegation is justified and subject to adequate safeguards. Further, the justifications for broad delegations put forward in the explanatory notes to the bill would provide a yardstick against which the Parliament and its committees could scrutinise the delegated legislation eventually made once the bill was passed.

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#### **Recommendation 4**

That, to foster greater transparency in the use of delegated legislative power, 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.
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- 3.71** In addition to the issue of transparency, this inquiry has revealed gaps in the current framework for the scrutiny of delegated legislation by committees. These gaps included limitations concerning the types of delegated legislation which may be reviewed by the Regulation Committee, as well as the consideration by the committee of draft delegated legislation.
- 3.72** While the Regulation Committee currently considers ‘regulations’ under its terms of reference, inquiry participants highlighted the range of other types of instruments which are legislative in nature and therefore require parliamentary oversight. It also seems clear that scrutiny of draft regulations will in some circumstances be more effective than ex post facto review, as it provides an opportunity for problems to be corrected before the legislation progresses; yet currently this committee does not have the power to examine exposure drafts.
- 3.73** The committee therefore recommends that the resolution establishing the Regulation Committee be amended to make it clear the committee may consider all instruments of a legislative nature regardless of their form, as well as draft delegated legislation.

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#### **Recommendation 5**

That the resolution establishing the Regulation Committee be amended to make it clear the committee may consider:

- all instruments of a legislative nature regardless of their form
  - draft delegated legislation.
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- 3.74** A further gap in the committee scrutiny framework concerns the procedures by which inquiries are referred to this committee. Unlike other scrutiny committees of the Legislative Council, the Regulation Committee has not been vested with the power to initiate inquiries and can only consider regulations that have been referred to it by a resolution of the House. As a result, when the House is not sitting or when the chamber is focused on other matters, new regulations continue to be subject to technical scrutiny by the Legislation Review Committee but there is no mechanism for referring potentially problematic regulations to a committee which can consider the merits and policy basis.
- 3.75** The lack of a mechanism for referring inquiries during non-sitting periods is a particular concern. Many inquiry participants noted that during the temporary suspension of the

parliamentary sittings in response to the COVID-19 pandemic, the normal procedures for the disallowance of delegated legislation could not be used and yet there was a significant increase in the amounts of delegated legislation being made, including instruments which impacted on individual rights and liberties.

- 3.76** Expanding the committee's powers to include the self-referral of inquiries would enhance the Legislative Council's capacity to hold the Government to account for its use of delegated legislative powers. The committee therefore recommends that the resolution establishing the Regulation Committee be amended to enable the committee to self-refer inquiries.
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**Recommendation 6**

That the resolution establishing the Regulation Committee be amended to enable the committee to self-refer inquiries.

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## Appendix 1 Submissions

No.	Author
1	Associate Professor Lorne Neudorf
2	Law Society of New South Wales
3	Senate Standing Committee for the Scrutiny of Delegated Legislation
4	Legislative Review Committee of the Parliament of South Australia
5	NSW Council for Civil Liberties
6	Professor Gabrielle Appleby
7	NSW Parliamentary Counsel's Office
8	New South Wales Bar Association



## Appendix 2 Witnesses at hearings

Date	Name	Position and Organisation
<b>Monday 27 July 2020, Preston-Stanley Room, Parliament House, Sydney</b>	Mr Andrew Chalk	Chair, Public Law Committee, Law Society of New South Wales
	Mr Michael McHugh SC	Senior Vice President, NSW Bar Association
	Dr Lorne Neudorf	Deputy Dean of Law and Associate Professor, Adelaide Law School
	Ms Michelle Falstein	Secretary, NSW Council for Civil Liberties
	Mr Jared Wilk	Co-convenor, Civil Liberties and Human Rights Action Group, NSW Council for Civil Liberties
	Ms Annette O'Callaghan	Parliamentary Counsel, NSW Parliamentary Counsel's Office
	Mr Mark Cowan	Deputy Parliamentary Counsel, NSW Parliamentary Counsel's Office
	Mr Richard Hurford	Deputy Parliamentary Counsel, NSW Parliamentary Counsel's Office



# Appendix 3 Minutes

## Minutes no. 6

Monday 9 March 2020

Regulation Committee

Room 1136, Parliament House, Sydney, 8.31 am

### 1. Members present

Mr Veitch, *Chair*

Ms Boyd, *Deputy Chair*

Mr Banasiak (substituting for Mr Borsak)

Mr Donnelly

Mr Farlow

Mr Farraway

Mr Mason-Cox (by teleconference)

### 2. Apologies

Ms Cusack

### 3. Previous minutes

Resolved, on the motion of Mr Donnelly: That draft minutes no. 5 be confirmed.

### 4. Correspondence

The committee noted the following items of correspondence:

#### *Received:*

- 28 February 2020 – Email from Ms Zara Lowien, Executive Officer, Gwydir Valley Irrigators' Association Inc, to secretariat, attaching a letter regarding the inquiry into the impact and implementation of the Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020
- 4 March 2020 – Email from Mr Michael Murray, General Manager – Operations, Cotton Australia, inviting the committee on a site visit to the North West for the inquiry into the impact and implementation of the Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020.

### 5. Inquiry into the impact and implementation of the Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020

#### 5.1 Terms of reference

The committee noted the following terms of reference referred by the House on 27 February 2020:

1. That the Regulation Committee inquire into and report on the impact and implementation of the Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020.
2. That the committee report by Thursday, 14 May 2020.

#### 5.2 Provision of documents to participating member

Resolved, on the motion of Mr Banasiak: That Mr Field, who has advised the committee that he intends to participate for the duration of the inquiry into the impact and implementation of the Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020, be provided with copies of all inquiry related documents.

#### 5.3 Proposed timeline

Resolved, on the motion of Mr Donnelly: That, the committee adopt the following timeline for the administration of the inquiry:

- Thursday, 19 March 2020 – private briefing Department of Planning, Industry and Environment
- Week beginning Monday, 6 April 2020 – possible regional site visit to North West area, subject to member availability
- Thursday, 9 April 2020 – full day hearing
- Wednesday, 6 May 2020 – Chair's draft report to members
- Monday, 11 May 2020 – report deliberative
- Thursday, 14 May 2020 – table report.

#### **5.4 Private briefing**

Resolved, on the motion of Mr Farlow: That the Chair, on behalf of the committee, write to the Department of Planning, Industry and Environment seeking a private briefing on the provisions of the Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020.

#### **5.5 Submissions and stakeholder list**

Resolved, on the motion of Mr Donnelly: That the closing date for invited stakeholder submissions be Monday, 30 March 2020.

Resolved, on the motion of Mr Farraway: That the stakeholder email be varied to include the statement: 'The committee requests that your submission focus specifically on the implementation of the regulation and its direct impacts.'

Resolved, on the motion of Mr Farraway: That the following list of stakeholders be invited to make a submission to the inquiry:

- The Hon. Melinda Pavey, MP, Minister for Water, Property and Housing
- Department of Planning, Industry and Environment
- Murray-Darling Basin Authority
- National Farmers' Federation
- NSW Farmers
- Broken Hill City Council
- Local Government NSW
- National Irrigators Council
- New South Wales Irrigators Council
- Mr Ian Cole, Barwon-Darling Water
- Mr Tim Napier, Border Rivers Food and Fibre
- Ms Zara Lowien, Gwydir Valley Irrigators' Association
- Ms Jon-Maree Baker, Namoi Water
- Mr Grant Tranter, Macquarie River Food and Fibre
- Mr Michael Murray, Cotton Australia
- Mr Justin McClure, Australian Floodplain Association
- Inland Rivers Network
- Australian Floodplain Graziers Association
- Western Division Shires Association
- South West Water Users Association
- Macquarie Marsh Graziers Association
- Macquarie Effluent Creek Users'

#### **5.6 Open questionnaire**

Resolved, on the motion of Mr Banasiak: That:

- (a) an online open questionnaire be used to capture submissions from stakeholders,

- (b) the questions be as follows:
1. In what capacity are you answering this questionnaire? (Answer options: Interested Citizen; Organisation; Irrigator; Local Resident; Farmer; Other –free text)
  2. What is your view on the way the Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020 was implemented? (1000 word text box)
  3. What is your view on the impact of the Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020? (1000 word text box)
  4. Do you have any other comments on the regulation? (500 word text box)
- (c) the open questionnaire be publicly available until 11.59 pm, Sunday, 12 April 2020, and
- (d) the inquiry website submissions page be updated to direct stakeholders to the open survey.

## **6. Inquiry into the making of delegated legislation in New South Wales**

### **6.1 Terms of reference**

The committee noted the following terms of reference referred by the House on 26 February 2020:

- (1) That the Regulation Committee inquire into and report on the making of delegated legislation in New South Wales, and in particular:
    - (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.
- (2) That the committee report by the last sitting day in June 2020.

### **6.2 Proposed timeline**

Resolved, on the motion of Ms Boyd: That the committee adopt the following timeline for the administration of the inquiry:

- Close of submissions: Friday 1 May 2020
- Hearing: June/July 2020
- Reporting date: that the Chair give notice and move in the House that the reporting date be extended to the last sitting day in September 2020.

### **6.3 Stakeholder list**

Resolved, on the motion of Mr Farlow:

- That members have until 5.00 pm Friday 13 March 2020 to amend the Chair's proposed stakeholder list or nominate additional stakeholders, and that the committee agree to the stakeholder list by email, unless a meeting of the committee is required to resolve any disagreement
- That the Chair write to party leaders and crossbench members of the Legislative Council asking them to suggest stakeholders to be invited to make a written submission, with any suggestions received to be circulated to members for approval.

## **7. Adjournment**

The committee adjourned at 8.47 am, *sine die*.

Sharon Ohnesorge  
**Clerk to the Committee**

**Minutes no. 10**

Monday 27 July 2020

Regulation Committee

Preston-Stanley Room, Parliament House, Sydney, 9.19 am

**1. Members present**

Mr Veitch, *Chair*

Ms Boyd, *Deputy Chair*

Ms Cusack (via teleconference from 9.57 am)

Mr Donnelly (from 11.15 am)

Mr Farlow

Mr Farraway

**2. Apologies**

Mr Borsak

Mr Mason-Cox

**3. Previous minutes**

Resolved, on the motion of Mr Farlow: That draft minutes no. 9 be confirmed.

**4. Correspondence**

The committee noted the following items of correspondence:

**Received:**

- 17 March 2020 – Email from Mr Stephen Argument to the Chair, providing information to the committee regarding the delegated legislation inquiry
- 30 March 2020 – Email from Ms Felicity Mackie, Legislative Council Committee Office of Western Australia, to the committee, advising that the Standing Committee on Uniform Legislation and Statutes Review will not be making a submission to the delegated legislation inquiry
- 6 April 2020 – Letter from Mr Aaron Harper MP, Chair, Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee, Queensland Parliament, to the committee, advising that the committee will not be making a submission to the delegated legislation inquiry
- 7 April 2020 - Letter from Ms Felicity Wilson MP, Chair, Joint Legislation Review Committee, NSW Parliament, to the Chair, advising that the committee will not be making a submission into the delegated legislation inquiry
- 21 April 2020 – Email from Emeritus Professor Mark Aronson, UNSW, to the committee, attaching the joint submission to the Senate Standing Committee on Regulations and Ordinances
- 22 April 2020 – Email from Ms Karen Goldsmith, Executive Officer NSW, Planning Institute Australia, to the committee, advising that they will not be making a submission to the inquiry into delegated legislation
- 22 April 2020 – Email from Ms Ingrid Zappe, Legislative Research Officer, Parliamentary Joint Committee on Human Rights, Commonwealth Parliament, to the committee, advising that the committee will not be making a submission into the delegated legislation inquiry
- 22 April 2020 – Email from Mr Dennis Pearce, ANU, to the committee, advising that he will not be making a submission into the delegated legislation inquiry and suggesting Andrew Edgar of Sydney University Law School as a potential stakeholder
- 26 April 2020 – Email from Associate Professor Andrew Edgar, Legal Adviser, Scrutiny of Delegated Legislation Committee, to the secretariat, advising that he will not be making a submission to the inquiry into delegated legislation

- 30 April 2020 – Letter from Ms Leanne Linard MP, Chair, Education, Employment and Small Business Committee, Queensland Parliament, to the Chair, advising that the committee will not be making a submission to the delegated legislation inquiry
- 14 May 2020 – Email from Ms Lauren Cook, Senior Research Officer, Scrutiny of Acts and Regulations Committee, Parliament of Victoria, to the Chair, attaching a formal invitation to the Australia and New Zealand Scrutiny of Legislation Conference
- 14 May 2020 – Letter from Mr Mark Gepp MP, Chairperson, Scrutiny of Acts and Regulations Committee, Parliament of Victoria, to the Chair, regarding the delegated legislation inquiry
- 16 May 2020 – Letter from Mr Alastair Scott, Chairperson, New Zealand Regulations Review Committee, to the Chair, advising that the committee will not be making a submission to the delegated legislation inquiry
- 14 July 2020 - Email from Professor Gabrielle Appleby, UNSW Law, to secretariat, advising that she is unable to appear at the delegated legislation inquiry hearing.

**Sent:**

- 9 March 2020 - Letter from the Chair to the Leader of the Government, Leader of the Opposition and all crossbench members of the Legislative Council, inviting them to suggest stakeholders for the delegated legislation inquiry.

Resolved, on the motion of Mr Farlow: That the committee keep sensitive information in the email from Mr Argument to the Chair dated 17 March 2020 confidential, as per the request of the author.

## 5. Inquiry into the making of delegated legislation in New South Wales

### 5.1 Public submissions

The committee noted that the following submissions were published by the committee clerk under the authorisation of the resolution appointing the committee: submission nos. 1-8.

### 5.2 Reporting date

The committee noted that the reporting date is currently the last sitting day in September 2020.

Resolved, on the motion of Mr Farraway: That the Chair give notice and move in the House that the reporting date be extended to the last sitting day in October 2020.

### 5.3 Camera operator arrangements for committee hearings

The committee noted that new camera operator arrangements are in place to cover committee hearings, which will include a range of footage capabilities for members and witnesses. The existing Broadcast Guidelines for the filming of committee hearings will continue to apply.

### 5.4 Public hearing

The committee proceeded to take evidence in public.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witnesses were sworn and examined:

- Mr Andrew Chalk, Chair, Public Law Committee, Law Society of New South Wales
- Mr Michael McHugh SC, Senior Vice President, NSW Bar Association.

The evidence concluded and the witnesses withdrew.

The following witness appeared via teleconference and was sworn and examined:

- Associate Professor Lorne Neudorf, Deputy Dean of Law, Adelaide Law School.

The evidence concluded and the witness withdrew.

The following witnesses were sworn and examined:

- Ms Michelle Falstein, Secretary, NSW Council for Civil Liberties
- Mr Jared Wilk, Co-convenor, NSW Council for Civil Liberties and Human Rights Action Group.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Ms Annette O'Callaghan, Parliamentary Counsel, NSW Parliamentary Counsel's Office
- Mr Mark Cowan, Deputy Parliamentary Counsel, NSW Parliamentary Counsel's Office
- Mr Richard Hurford, Deputy Parliamentary Counsel, NSW Parliamentary Counsel's Office.

The evidence concluded and the witnesses withdrew.

The public hearing concluded at 2.57 pm.

**6. Next meeting**

The committee adjourned at 2.57 pm, *sine die*.

Sharon Ohnesorge  
**Committee Clerk**

**Draft minutes no. 12**

Friday 16 October 2020

Regulation Committee

Room 1254, 8.06 am.

**1. Members present**

Mr Veitch, *Chair*  
Ms Boyd, *Deputy Chair*  
Ms Cusack  
Mr Donnelly  
Mr Farlow (via teleconference)  
Mr Franklin

**2. Apologies**

Mr Borsak  
Mr Mason-Cox

**3. Previous minutes**

Resolved, on the motion of Mr Donnelly: That draft minutes no. 11 be confirmed.

**4. Inquiry into the making of delegated legislation in New South Wales**

**4.1 Answers to questions on notice**

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 NSW Council of Civil Liberties, received 12 August 2020
- answers to questions on notice from NSW Parliamentary Counsel's Office, received 27 August 2020
- answers to questions on notice from NSW Bar Association and attachment thereto, received 9 September 2020.

**4.2 Consideration of Chair's draft report**

The Chair submitted his draft report entitled *Making of delegated legislation in New South Wales*, which, having been previously circulated, was taken as being read.

Resolved, on the motion of Ms Boyd: That Recommendation 1 be amended by inserting at the end 'and facilitating ready access to all such instruments by the public'.

Resolved, on the motion of Mr Farlow: That Recommendation 2 be amended by omitting 'That the Attorney General refer to the NSW Law Reform Commission the following terms of Reference' and inserting instead 'That the Attorney General consider referring to the NSW Law Reform Commission the following terms of Reference'.

Resolved, on the motion of Ms Boyd: That paragraph 2 of Recommendation 2 be amended by inserting at the end 'the merits of extending the time limits for the disallowance of delegated legislation' and 'the merits of extending the 4-month time limit on remaking a disallowed statutory rule'.

Resolved, on the motion of Mr Donnelly: That:

- The draft report as amended be the report of the committee and that the committee present the report to the House;
- The transcripts of evidence, submissions, answers to questions on notice and correspondence relating to the inquiry be tabled in the House with the report;
- Upon tabling, all unpublished attachments to submissions be kept confidential by the committee;
- Upon tabling, all transcripts of evidence, submissions, answers to questions on notice and correspondence relating to the inquiry, be published by the committee, except for those documents kept confidential by resolution of the committee;
- The committee secretariat correct any typographical, grammatical and formatting errors prior to tabling;
- The committee secretariat be authorised to update any committee comments where necessary to reflect changes to recommendations or new recommendations resolved by the committee;
- Dissenting statements be provided to the secretariat within 24 hours after receipt of the draft minutes of the meeting;
- The Chair is tabling the report in the House on Thursday 22 October 2020.

## 5. Adjournment

The committee adjourned at 8.17 am, *sine die*.

Anthony Hanna  
Committee Clerk





