LEGISLATIVE COUNCIL

REGULATION COMMITTEE

Options for reform of the management of delegated legislation in New South Wales

Report 9

September 2022

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Regulation Committee

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Options for reform of the management of delegated legislation in New South Wales

"September 2022"

Chair: The Hon Mick Veitch MLC.

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Terms of reference

(1) That this House note that in its report entitled 'Making of delegated legislation in New South Wales', dated October 2020, the Regulation Committee recommended in 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.'

(2) That this House notes the government's response to the Regulation Committee's report, dated 19 April 2021, in which Recommendation 2 was not supported.

(3) That, in the absence of a referral by the Attorney General to the NSW Law Reform Commission, this House:

(a) refer the Regulation Committee's report and evidence back to the committee for further inquiry and report into options for reform of the management of delegated legislation in New South Wales, and

(b) authorise the committee to engage an external legal adviser to assist the committee in its inquiry into options for reform of the management of delegated legislation in

New South Wales.

(4) That the committee commence its inquiry in February 2022 and report by the last sitting day in September 2022.[1]

The terms of reference for the inquiry were referred to the committee by the Legislative Council on 24 November 2021.[2]

1 The original reporting date was the first sitting day in August 2022 (*Minutes,* NSW Legislative Council, 24 November 2021, pp 2847-2848). On Wednesday 8 June 2022, the reporting date was extended to the last sitting day in September 2022 (*Minutes*, NSW Legislative Council, 8 June 2022, p 3419).

2 *Minutes,* NSW Legislative Council, 24 November 2021, pp 2847-2848.

Committee details

Committee members		
Hon Mick Veitch MLC	Australian Labor Party	*Chair*
Ms Abigail Boyd MLC	The Greens	*Deputy Chair*
Hon Robert Borsak MLC	Shooters, Fishers and Farmers Party	
Hon Greg Donnelly MLC	Australian Labor Party	
Hon Wes Fang MLC	The Nationals	
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* The Hon Aileen MacDonald MLC replaced the Hon Catherine Cusack MLC as a substantive member of the committee from 16 August 2022. The Hon Catherine Cusack MLC was a substantive member of the committee to 9 August 2022.

** The Hon Taylor Martin MLC replaced the Hon Lou Amato MLC as a substantive member of the committee from 29 March 2022. The Hon Lou Amato MLC replaced the Hon Scott Farlow MLC as a substantive member of the committee from 1 March 2022.

Committee Secretariat

Ms Velia Mignacca, Principal Council Officer

Ms Lauren Evans, Senior Council Officer

Ms Ros O'Brien, Administration Officer

Ms Sharon Ohnesorge, Director

Chair's foreword

Under our system of government the Parliament is the ultimate law-making authority. In practice the Parliament may delegate some of its law-making powers to the Executive to address the pragmatic reality of governing a diverse, complex and rapidly-changing society. However, the Parliament retains responsibility for the laws that are made under its delegation and for ensuring that those laws are subject to appropriate supervision and restraint.

In its report on the making of delegated legislation in 2020 this committee raised concerns about weaknesses in the existing mechanisms for the control and scrutiny of delegated legislation and recommended that an inquiry be referred to the New South Wales Law Reform Commission to determine the desirability of specific reforms. However, in its response to the committee's report the Government did not support a referral to the Law Reform Commission to address the committee's concerns. Faced with this response, in November 2021 the Legislative Council referred the question of options for the reform of the management of delegated legislation back to the committee for inquiry and report, this time with an authorisation for the committee to engage an external legal adviser to assist it in the conduct of the inquiry.

In line with the new terms of reference, in February 2022 the committee commissioned a leading expert in constitutional law, Professor Gabrielle Appleby of the University of New South Wales, to prepare a Discussion Paper examining how the laws and procedures governing delegated legislation in New South Wales compare with those in other jurisdictions and identifying a 'best practice' model. The resulting Discussion Paper, which was published by the committee in June 2022, included a comprehensive analysis of regulatory and scrutiny frameworks for the management of delegated legislation and a set of design principles to guide the process of reform. Drawing on this material the Discussion Paper proposed a series of best practice reforms to 11 different aspects of the framework for the management of delegated legislation in New South Wales.

This report summarises the matters canvassed in the Discussion Paper, including Professor Appleby's proposals for reform, and sets out the committee's own views and recommendations. Specifically, in chapter 3 of the report the committee considers reform proposals in five key areas which constitute the core pillars of a revised best practice framework. These proposals concern:

- statutory consolidation
- definitional clarify and robustness
- increasing public accessibility
- extending the role of the Regulation Committee
- increased guidance to Government.

In chapter 4 the committee considers reform proposals relating to:

- greater transparency for rights scrutiny
- increased oversight of consultation
- further restricting the ability to remake disallowed instruments
- delayed commencement times
- extending scrutiny and disallowance
- stricter regulation, transparency and oversight of incorporation of quasi-legislation.

While the committee has not adopted all of the proposals contained in the Discussion Paper, it has drawn on many of these proposals in formulating the 14 recommendations that are set out in this report. Collectively, these recommendations are intended to enhance the management of executive-made laws by striking a more appropriate balance between the justifications behind delegations of legislative power and the constitutional imperatives of democratic law-making.

On behalf of the committee, I express my sincere appreciation for Professor Appleby's work in preparing the Discussion Paper, which combines academic rigour with a practical understanding of the challenges of navigating the process of reforming this complex area of law and procedure. I also extend my thanks to the members of the committee, and to the secretariat for their support.

The practices and procedures by which legislation is made can be seen as obscure and remote from everyday life. In reality, these practices and procedures embody constitutional principles which lie at the heart of the democratic system and touch every citizen of the state. This report continues the conversation begun in the committee's 2020 report about how best to ensure that the Parliament retains effective oversight and control of the laws made by the Executive, without impeding the legitimate use of delegated legislative power to support effective government. The report's ultimate aim is to inform a continuing discussion about this issue.

Hon Mick Veitch MLC
Committee Chair

Recommendations

Recommendation 1 **11**

That the provisions of the *Interpretation Act 1987*, *Subordinate Legislation 1989* and *Legislation Review Act 1987* be consolidated into a single Legislation Act which includes all provisions relating to the making, consultation, notice, tabling, publication, disallowance, remaking, sunsetting and scrutiny of primary and delegated legislation.

Recommendation 2 **15**

That the new Legislation Act apply to all instruments of a legislative character.

Recommendation 3 **15**

That, if a new Legislation Act is not enacted, the *Interpretation Act 1987*, *Subordinate Legislation 1989* and *Legislation Review Act 1987* be amended so that they apply to all instruments of a legislative character.

Recommendation 4 **16**

That appropriate exemptions from the definition and framework applying to instruments of a legislative character be made in primary legislation, and be guided by the following criteria:

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

Recommendation 5 **18**

That the NSW legislation website:

- publish all legislative instruments as soon as they are made
- clearly indicate where those instruments are exempted from any part of the regulatory and scrutiny framework.

Recommendation 6 **18**

That the statutory obligation to table notice of the making of a statutory rule be made enforceable by providing that any rule that is not duly notified to the Houses is invalid.

Recommendation 7 **23**

That the Legislative Council amend the resolution establishing the Regulation Committee to expand the committee's functions to include inquiring into and reporting on instruments of a legislative nature that are subject to disallowance against the scrutiny principles set out in section 9(1)(b) of the *Legislation Review Act 1987*.

Recommendation 8 **23**

That the Regulation Committee's secretariat be increased to support the additional work that will be required as a result of the committee's technical scrutiny function.

Conduct of inquiry

The terms of reference for the inquiry were referred to the committee by the Legislative Council on 24 November 2021.

In accordance with the terms of reference, the committee engaged Professor Gabrielle Appleby, UNSW Law & Justice, as an external legal advisor to prepare a Discussion Paper for the inquiry.

Inquiry related documents are available on the committee's website, including a full copy of the Discussion Paper.

Chapter 1 Introduction

This chapter briefly sets out the origin of and process for this inquiry, and provides a synopsis of the Discussion Paper prepared by the committee's external legal adviser.

Origin of the inquiry

1.1 This inquiry has its origin in matters that remained unresolved following the committee's inquiry into the making of delegated legislation in 2019-2020. That inquiry highlighted the need for improvements to the processes and safeguards for delegated legislation in New South Wales to strengthen democratic oversight and accountability in the Executive's use of legislative power. In its report on that inquiry the committee concluded that:

> The current statutory mechanisms for the control and scrutiny of delegated legislation in New South Wales are in need for reform to better protect democratic oversight and parliamentary sovereignty.[3]

1.2 While accepting that there is a need for change, the committee noted that the laws and procedures governing delegated legislation are complex and that there are various possible approaches to reform. In light of this the committee recommended that an inquiry be referred to the New South Wales Law Reform Commission to determine the desirability of specific reforms. The committee also recommended various direct reforms to the system for managing delegated legislation to enhance public accessibility and improve parliamentary oversight.

1.3 In April 2021 the Government responded to the committee's report, supporting or supporting in principle a number of the committee's recommendations. However, the Government did not support the report's key recommendation for the referral of an inquiry to the Law Reform Commission.[4]

1.4 In November 2021, in the absence of a reference to the Law Reform Commission, the Legislative Council referred the committee's 2020 report and evidence back to the committee for further inquiry and report. The terms of reference for this inquiry, in contrast to the earlier inquiry, authorised the committee to engage an external legal adviser to assist it.

The inquiry process

1.5 On 24 February 2022 the committee resolved to engage an external legal adviser to prepare a Discussion Paper in relation to the inquiry. The committee determined that the Discussion Paper should address the following questions:

> (a) How do NSW's framework and safeguards relating to delegated legislation compare with those of other Australian and relevant international jurisdictions?

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3 Regulation Committee, *Making of delegated legislation in New South Wales*, Report 7, October 2020, p 24.

4 NSW Government, *Inquiry into the making of delegated legislation in NSW – Government response*, 10 April 2021.

(b) What are the options for reform of the management of delegated legislation in NSW, including identifying a 'best practice' model (noting the considerations identified in the committee's earlier Recommendation 2)?

(c) What are the mechanisms by which these reforms could be implemented, including the priority and timing of relevant reforms?

1.6 The committee engaged Professor Gabrielle Appleby, UNSW Law & Justice, as its external legal advisor for the purpose of preparing the Discussion Paper.

1.7 On 2 June 2022 Professor Appleby conducted a private roundtable with the committee in which she presented the Discussion Paper to the committee. Following the roundtable the committee published the Discussion Paper on its inquiry webpage.

1.8 On 6 June 2022 the committee wrote to the Premier and the Attorney General seeking a submission to the inquiry from the NSW Government. However, given the detailed submissions received as part of the 2020 inquiry, including regarding options for reform of delegated legislation, the committee did not make a wider call for submissions as part of this inquiry. The NSW Government subsequently confirmed it would not be making a submission to the inquiry.

Synopsis of the Discussion Paper

1.9 The Discussion Paper prepared by Professor Appleby combines an overview of the regulatory and scrutiny framework for the management of delegated legislation in New South Wales and of the context in which such legislation is managed, with a comparative review of similar frameworks in other jurisdictions. From this material it offers a set of design principles to guide the development of reforms for New South Wales and identifies a set of best practice reforms. The Paper is structured as follows:

Part I Introduction

Part II The evolution of the New South Wales framework and recent inquiries

Part III Developing a best practice framework

Design principles

A set of best practice reforms

1.10 The comparative review which informs the best practice reforms set out in Part III is provided in two appendices to the Discussion Paper:

- Appendix 2 contains an analysis of key features of the regulatory and scrutiny frameworks for the management of delegated legislation in other Australian jurisdictions, the United Kingdom, Canada and New Zealand
- Appendix 3 contains a general summary, in table form, of the regulatory and scrutiny frameworks for the management of delegated legislation in Australian jurisdictions (including New South Wales), the United Kingdom, Canada and New Zealand.

1.11 In support of the approach adopted in the comparative review, the Discussion Paper advises that Australian jurisdictions have been considered 'world leaders' in relation to their frameworks for the management of delegated legislation. While there are many shared characteristics across these jurisdictions there is also a diversity of experience and a level of innovation and experimentation from which New South Wales can benefit. The regulation of delegated legislation has also emerged as an important governance issue in other Westminster parliamentary systems, particularly in the United Kingdom, Canada and New Zealand.[5]

1.12 Appendix 1 to this report reproduces the Discussion Paper, with the exception of Appendix 3 to the Discussion Paper.

[5] Professor Gabrielle Appleby, Discussion Paper, *Inquiry into options for reform of the management of delegated legislation in New South Wales*, p 5.

Chapter 2 The New South Wales context

As noted in chapter 1, the Discussion Paper prepared for this inquiry proposes reforms to the framework for managing delegated legislation in New South Wales based on a comparative review of other jurisdictions and consideration of issues relating to the laws in New South Wales. Key issues explored in the Paper with respect to New South Wales include:

- the constitutional principles underpinning the regulation and scrutiny of delegated legislation
- the current regulatory and scrutiny framework for the management of delegated legislation
- principles to guide the development of a best practice framework for the management of delegated legislation.

This chapter summarises matters addressed in the Discussion Paper in relation to these issues.

Constitutional principles

2.1 The introduction to the Discussion Paper highlights the fact that schemes for the regulation of delegated legislation involve tensions between constitutional principles and other requirements of our system of government.

2.2 As a matter of constitutional principle, legislative power is conferred on the Parliament because of its democratic character, diverse representational nature, and open deliberations. These are characteristics the Executive government does not share. The exercise of legislative power by the Parliament is also consistent with the principle of the rule of law.[6]

2.3 However, the delegation of legislative power from the Parliament to the Executive can be justified in various ways. These include:

- allowing for administrative or technical detail to be filled in by the relevant Executive agency, which has greater expertise and time to perform that role than Parliament
- allowing for the detail of legislative schemes to be removed from primary legislation, increasing its clarity and accessibility for the public
- responding in emergency situations where timely responses are vital for effectiveness.[7]

2.4 The Discussion Paper states that there is merit to these justifications, citing the High Court decision in *Dignan's Case* in which Justices Dixon and Evatt acknowledged the necessity of delegation for 'effective government'.[8] However, the Paper maintains that the line between effective and arbitrary government must be respected. An effective regulatory framework for the management of delegated legislation must take account of competing imperatives, namely:

6 Professor Gabrielle Appleby, Discussion Paper, *Inquiry into options for reform of the management of delegated legislation in New South Wales*, 23 May 2022 (hereafter 'Discussion Paper'), pp 4-5.

7 Discussion Paper, p 4.

8 *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 (*Dignan's Case*), 117 (Evatt J); see also Owen Dixon 'The Law and the Constitution' (1935) 51 *Law Quarterly Review* 590, 606; cited in Discussion Paper, p 4.

> … constitutional principles relating to the separation of powers, democratic governance and rule of law, and the pragmatic reality of governing diverse and complicated societies, particularly when unexpected exigencies arise.[9]

The current New South Wales framework

2.5 The framework for the management of delegated legislation in New South Wales involves the *Legislation Review Act 1987*, the *Subordinate Legislation Act 1989* and the *Interpretation Act 1987*, as well as the *NSW Guide to Better Regulation* (2016) and the work of two parliamentary oversight committees.

2.6 The Discussion Paper includes a general summary of this framework[10] and a more detailed examination of two particular aspects of the framework: the role of the parliamentary oversight committees, and recent inquiries that have highlighted the need for reform.[11]

The parliamentary oversight committees

2.7 Different committees of the New South Wales Parliament have been responsible for the oversight of delegated legislation at different times. In summary, for nearly 30 years an Upper House committee was responsible for the scrutiny of regulations, as occurs at the federal level. In 1987 this committee was replaced by a joint statutory committee. In 2002 the joint committee's mandate was expanded to include the scrutiny of bills as well as regulations. In 2017 the Legislative Council established its own committee for the review of regulations and in 2020 it expanded that committee's mandate to include the review of any legislative instrument.[12]

2.8 Currently therefore, there are two parliamentary oversight committees with complementary roles: the joint Legislation Review Committee reviews all disallowable regulations and bills against statutory scrutiny criteria, while the Legislative Council Regulation Committee has the power to review any legislative instrument, with a focus on substantive policy issues. However, recent inquiries have identified shortcomings in this oversight model as well as other deficiencies in the regulatory framework.

Recent inquiries

2.9 In 2018, in its review of the *Legislation Review Act 1987*, the Legislation Review Committee recommended that the Act be amended to provide for the establishment of a separate joint committee to be specifically tasked with examining subordinate legislation. This recommendation was based on an assessment of the volume of subordinate legislation the Legislation Review Committee is required to review and the tight timeframes within which its scrutiny and reporting must be undertaken. The committee also recommended measures to

9 Discussion Paper, p 4.

10 Discussion Paper, p 7; Appendix 3, p 70.

11 Discussion Paper, pp 7-13.

12 Discussion Paper, pp 7-8.

strengthen the scrutiny of bills and regulations by the committee and to improve engagement with the committee's reports.[13]

2.10 In 2020, in its inquiry into the making of delegated legislation in New South Wales, the Regulation Committee raised concerns about a range of different aspects of the current framework for the management of delegated legislation. These concerns included:

- overuse of mechanisms involving broad delegations of legislative power and the inadequacy of the existing scrutiny processes to address this
- inconsistencies in the definitions of the types of delegated legislation that are subject to parliamentary disallowance and scrutiny
- the timeframe within which delegated instruments that have been disallowed by a House of Parliament may be remade by the Executive
- the limited scope of the Executive's obligation to consult when making delegated legislation
- inconsistencies in the level of public accessibility of different forms of delegated legislation
- the fragmented nature of current statutory provisions regulating the making and oversight of delegated legislation when compared to other jurisdictions where there is greater consolidation.[14]

Principles to guide the development of reforms

2.11 Part III of the Discussion Paper identifies a set of overarching principles to guide the development of best practice reforms to the framework for managing delegated legislation. These principles are informed by the tensions between constitutional imperatives and pragmatism noted earlier in this chapter, and by the constitutional context in New South Wales.[15]

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

- the limited availability of judicial review of delegated legislation
- the lack of an overarching charter for the protection of human rights
- the long history of delegated legislative scrutiny in New South Wales
- lessons to be learnt from the response to COVID-19.[16]

13 Discussion Paper, pp 8-9; Legislation Review Committee, *Inquiry into the operation of the Legislation Review Act 1987*, Report 1/56, November 2018.

14 Discussion Paper, pp 9-13; Regulation Committee, *Making of delegated legislation in New South Wales*, Report 7, October 2020;

15 Discussion Paper, p 14.

16 Discussion Paper, pp 14-15.

2.13 Informed by this context, the Discussion Paper proposes that reforms to the regulatory and scrutiny framework be designed around principles that are encapsulated by the concepts of 'simple, robust and accessible'.[17] These principles are not intended to be mutually exclusive but rather 'mutually reinforcing'.[18]

2.14 The principle of **simplicity** requires a system of delegated legislation that is straightforward and relatively easy to ascertain with provisions that are coherent and consistent. The benefits of this principle are explained as follows:

> Simplicity is a fundamental design principle because it makes the regulatory and scrutiny framework more easily understood by those involved in making legislation (Government agencies and drafters) and those overseeing delegated legislation (parliamentarians) as well as those subject to the obligations contained in delegated legislation (the public). It also means that any exceptions from the general position must be clearly and robustly justified.[19]

2.15 The principle of **robustness** is underpinned by a desire to protect and strengthen democratic values:

> A robust framework of parliamentary oversight is necessary to ensure that the Executive's making of delegated legislation is injected with the democratic credentials of the Parliament. This will be particularly the case for delegated instruments that affect individual rights and liberties. In a robust model, any exceptions to the framework for making and overseeing the making of delegated instruments should be narrowly drawn, clear, coherent and consistent. The scrutiny work of the Parliament must be impartial, well resourced, and have realistic timeframes.[20]

2.16 The principle of **accessibility** includes notions of transparency and public accountability:

> Accessibility, that is, publicity and transparency of delegated instruments is fundamental for public understanding of the full extent of their statutory rights and obligations. Publicity and transparency around the framework that governs the making and oversight of delegated legislation is also key for public accountability for the making of these important instruments of government.[21]

17 Discussion Paper, p 5.

18 Discussion Paper, p 15.

19 Discussion Paper, p 15.

20 Discussion Paper, p 15.

21 Discussion Paper, p 15.

Chapter 3 Reforms strengthening the core pillars of the regulatory and scrutiny framework

The Discussion Paper prepared for this inquiry proposes reforms to 11 different elements of the regulatory and scrutiny framework for managing delegated legislation in New South Wales. This chapter examines the reforms that are proposed in relation to the first five elements, which represent the core pillars of a revised best practice framework:

- statutory consolidation
- definitional clarify and robustness
- increasing public accessibility
- extending the role of the Regulation Committee
- increased guidance to Government from the Regulation Committee.

In addressing each of these elements, the chapter provides a brief overview of the current state of the law and of any relevant issues that were raised in the committee's 2020 inquiry; a summary of the reforms proposed in the Discussion Paper; and an outline the committee's own views and recommendations.

Statutory consolidation

3.1 As noted in chapter 2, the framework for the management of delegated legislation is currently spread across three statutes: the *Subordinate Legislation Act 1989*, the *Interpretation Act 1987* and the *Legislation Review Act 1987*. Collectively these Acts contain the requirements governing the making, commencement, publication, tabling, disallowance, scrutiny, sunsetting (automatic repeal) and remaking of statutory rules.

3.2 In its 2020 inquiry into the making of delegated legislation, this committee noted that the interaction between the provisions of these Acts is complex. This is due in part to the fact that the definitions of the types of delegated legislation to which each Act applies are substantially, but not exactly the same.[22]

3.3 A number of participants in that inquiry expressed support for the idea that the provisions of the three Acts should be consolidated into a single Act. For example, the New South Wales Bar Association argued that consolidating the Acts would reduce confusion and promote transparency and open justice.[23] Associate Professor Lorne Neudorf, Adelaide Law School, stated that, as the three Acts were drafted at different times, and use different kinds of language and definitions, the application of the Acts is not always clear, which is 'very problematic from an accountability point of view'.[24]

22 Regulation Committee, *Making of delegated legislation in New South Wales*, Report 7, October 2020, p 21.

23 Regulation Committee, *Making of delegated legislation in New South Wales*, Report 7, October 2020, p 22.

24 Regulation Committee, *Making of delegated legislation in New South Wales*, Report 7, October 2020, p 22.

The reforms proposed in the Discussion Paper

3.4 The Discussion Paper notes that a number of jurisdictions have taken steps to revise older statutory frameworks by streamlining definitions and consolidating legislative provisions. This can be seen, for instance, in the Commonwealth's *Legislation Act 2003*, the *Legislation Act 2001* (ACT) and the *Legislation Act 2019* (NZ).[25]

3.5 The Discussion Paper notes that the New Zealand consolidation, which replaced the *Legislation Act 2012* (NZ) and *Interpretation 1999* (NZ), was animated by a concern that the interaction between the two older pieces of legislation had been described as 'vexing and confusing', particularly given the 'myriad of definitions' that were used across the statutes.[26]

3.6 To better align the statutory framework in New South Wales with best practice principles, the Discussion Paper proposes that the three existing Acts should be consolidated and that a single definition should determine the scope of the instruments that are captured by the framework:

> The guiding principles of simplicity and transparency would be furthered by a consolidation of the statutory regimes that govern the making, notice, tabling, publication, consultation, disallowance, remaking, sunsetting and scrutiny of delegated legislation in the one statute. Further, a single, consolidated definition of legislative instruments that applies to the substance of the instrument, not its form, would further assist not just the simplicity, but the robustness of the democratic oversight of all legislative instruments.[27]

3.7 The Discussion Paper summarises these proposed reforms as follows:

- The provisions of the *Interpretation Act 1987* (NSW), *Subordinate Legislation 1989* (NSW) and the *Legislation Review Act 1987* (NSW) should be consolidated into a single Legislation Act (NSW). The Legislation Act should contain all of the provisions relating to the making, consultation, notice, tabling, publication, disallowance, remaking, sunsetting and scrutiny of primary and delegated legislation.
- A single definition should be adopted to apply to all legislative and scrutiny frameworks.[28]

Committee comment

3.8 The committee notes that unlike New South Wales where the statutory framework for the management of delegated legislation is fragmented and complex, some jurisdictions have streamlined their legislative regimes by consolidating provisions relating to delegated legislation and primary legislation into a single Act. The committee believes that the adoption of such an approach in New South Wales is a common sense reform that would make it easier for members of the public, members of Parliament and government officials to understand the statutory

25 Discussion Paper, p 16.
26 Discussion Paper, p 16.
27 Discussion Paper, p 17.
28 Discussion Paper, p 17.

requirements that operate in this complex area of the law. This in turn would enhance executive accountability and strengthen democratic oversight of the uses of delegated legislative power.

3.9 The committee therefore recommends that the provisions of the *Interpretation Act 1987*, *Subordinate Legislation 1989* and the *Legislation Review Act 1987* be consolidated into a single Legislation Act which includes all provisions relating to the making, consultation, notice, tabling, publication, disallowance, remaking, sunsetting and scrutiny of primary and delegated legislation.

Recommendation 1

That the provisions of the *Interpretation Act 1987*, *Subordinate Legislation 1989* and *Legislation Review Act 1987* be consolidated into a single Legislation Act which includes all provisions relating to the making, consultation, notice, tabling, publication, disallowance, remaking, sunsetting and scrutiny of primary and delegated legislation.

3.10 The need for a consolidated definition to streamline the application of the different elements of the statutory framework is considered separately below.

Definitional clarity and robustness

3.11 While the *Interpretation Act 1987* and the *Subordinate Legislation Act 1989* both apply to 'statutory rules', the definition of 'statutory rule' contained in each Act is in slightly different terms.[29] The *Legislation Review Act 1987* in turn applies to 'regulations' which include statutory rules and certain other instruments.[30]

3.12 In its 2020 inquiry the committee expressed concern about the complexity of these arrangements and noted that inquiry participants had expressed support for extending statutory safeguards surrounding the use of delegated legislative power to all legislative instruments.[31] A further issue that was raised in that inquiry concerned the impact on legislative drafting: while the Parliamentary Counsel's Office is responsible for drafting 'statutory rules', the question of who drafts other instruments depends on a range of factors, and the quality of the legislation that is drafted by departments varies.[32]

29 See *Interpretation Act 1987*, section 21; *Subordinate Legislation Act 1989*, section 3.

30 *Legislation Review Act 1987*, section 3.

31 Regulation Committee, *Making of delegated legislation in New South Wales*, Report 7, October 2020, pp 8-9 and 21.

32 Regulation Committee, *Making of delegated legislation in New South Wales*, Report 7, October 2020, pp pp 16-17.

The reforms proposed in the Discussion Paper

3.13 The Discussion Paper argues that that a change in focus is needed from the *form* of an instrument to its substantive *effect*, so that all delegated instruments of a legislative character are captured by the regulatory and scrutiny framework:

> There are serious concerns around fragmentation and complexity in the application of the regulatory and scrutiny framework for delegated legislation, caused by the differences in definitions used across the statutes. These would be addressed in a way that increases simplicity, robustness, and accessibility by extending the requirements for making, disallowance and scrutiny in the statutory regimes to all delegated instruments of a legislative character. This would address concerns about gaps in the accountability system by reference to the requirement that instruments be in the form of 'statutory rules'. As was demonstrated in the government's use of public health orders to respond to the COVID-19 pandemic emergency, there are delegated instruments that are not formally within the definition of 'statutory rules' but that are of a legislative character and have significant impact on the rights and liberties of individuals.[33]

3.14 The Discussion Paper acknowledges that in a broadly-based statutory scheme which applies to *all* legislative instruments, it may be necessary for exemptions to be made in some circumstances. However, the Paper emphasises the need to limit the capacity to exempt legislative instruments from regulatory and scrutiny requirements. Drawing on recommendations by the Senate's scrutiny committee concerning the exemption of delegated legislation from Commonwealth statutory requirements,[34] the Paper proposes that all exemptions should be established in primary legislation rather than in regulations, and that exemptions should be guided by statutory criteria supplemented by guidance from the Parliament:

> There is much merit in the suggestion of the Senate's Scrutiny of Delegated Legislation Committee that if a broad definitional scope is adopted, any exemptions from the full framework of scrutiny and disallowance should be strictly regulated. Some exemptions may be justifiable, but all exemptions should be in primary legislation, and guided by statutory criteria for granting such exemptions, supplemented by Guidance … from the Parliament as to the limited circumstances in which it might be appropriate for instruments not to be subject to the regulatory and scrutiny framework.[35]

3.15 The Paper also specifies that, as proposed by the Senate scrutiny committee, exemptions should be restricted in cases involving instruments which adversely affect rights and liberties, instruments which are not subject to any alternative form of accountability, and instruments that override or modify primary legislation ('Henry VIII provisions'):

> In particular, exemptions should not be granted:
>
> (a) where instruments adversely affect rights, liberties, duties and obligations; and
>
> (b) unless there is an alternative form of accountability (such as local council by-laws, or University Senate by-laws).

33 Discussion Paper, p 17.

34 Discussion Paper, pp 18 and 38-40.

35 Discussion Paper, p 18.

> In the Guidance, there should be an outright prohibition of exempting Henry VIII provisions and instruments from the framework.[36]

3.16 To support the change in focus to the substantive effect of an instrument rather than its form, the Discussion Paper proposes that Government departments should receive guidance on how to assess whether an instrument is of legislative character, and that a process should be established to resolve cases in which the character of an instrument is not clear. The Paper also proposes that the role of providing such guidance and resolving uncertainties should be undertaken by the Regulation Committee, in line with an expanded mandate for the committee discussed later in the Paper (see below):

> Guidance from the Regulation Committee … should be provided to Government departments as to how to assess when instruments are of a legislative character so as to fall within the definition. A process should also be established that is simple and clear as to how to resolve ambiguous situations. This should not leave the final determination to the Executive government. Rather, where there is doubt, the Executive should seek the advice of the Committee.[37]

3.17 The Discussion Paper emphasises that, to protect the democratic character of the statutory framework, a process for resolving ambiguous cases must ensure that the final arbiter is the Parliament, rather than the Executive:

> It is imperative for the robustness of a democratic oversight regime that it is the Parliament, and not the Executive, who has the final say as to when an instrument is or is not of a legislative character.[38]

3.18 The comparative review attached to the Discussion Paper indicates that there are precedents in other jurisdictions for the creation of regulatory and scrutiny schemes that capture all 'legislative instruments' or all 'secondary legislation' rather than only particular forms, including the Commonwealth, Victoria and New Zealand.[39] Conversely, in schemes that are limited to particular forms of legislative instrument, problems have arisen around perceptions that the government has been able to make instruments in a particular form to avoid scrutiny requirements.[40]

3.19 The comparative review also refers to matters which highlight the importance of ensuring that questions about the legislative character of an instrument are determined by the Parliament. In Victoria, government guidelines state that where it is not clear whether an instrument is of

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36 Discussion Paper, p 18.

37 Discussion Paper, pp 17-18.

38 Discussion Paper, p 18.

39 Discussion Paper, pp 69, 74 and 79. The Commonwealth *Legislation Act 2003* applies to 'legislative instruments' which include instruments that (a) determine or alter the content of the law and (b) affect a privilege or interest, or create, vary or remove an obligation or right (section 8(4)). The Victorian *Subordinate Legislation Act 1994* includes provisions which apply to 'legislative instruments', defined as instruments made under an Act or statutory rule that are of a legislative character (section 3(1)). The New Zealand *Legislation Act 2019* applies to 'secondary legislation' which includes an instrument '(whatever it is called)' made under an Act and declared by an Act to be secondary legislation (section 5(1)).

40 See Discussion Paper, pp 49-50 and p 62.

legislative character agencies may wish to obtain legal advice 'before making a final decision'.[41] Further, in 2020, when confusion arose as to whether certain directions were of a legislative or administrative character, the parliamentary scrutiny committee concluded that 'responsibility for decisions about statutory rules and legislative instruments lies with the responsible minister'.[42] However, the Discussion Paper argues that:

> This would appear a problematic position in terms of the potential robustness of parliamentary scrutiny: allowing the Executive itself to determine the scope of those instruments subject to parliamentary requirements around making, consultation, publication, tabling, scrutiny and disallowance.[43]

3.20 The proposed reforms relating to these various issues are summarised in the Discussion Paper as follows:

- The scope of the new Legislation Act should extend to all instruments of a legislative character. If a consolidated statute is not adopted, the definitional scope of the *Interpretation Act 1987* (NSW), *Subordinate Legislation 1989* (NSW) and the *Legislation Review Act 1987* (NSW) should be streamlined, and extend to all instruments of a legislative character.
- Limited exemptions should be permitted from the definition and framework, but these exemptions must be made in primary legislation, and guided by the following criteria:
    a. exemptions should not be granted where instruments adversely affect rights, liberties, duties and obligations;
    b. exemptions should not be granted unless there is an alternative form of accountability;
    c. exemptions should never be granted for instruments made under Henry VIII provisions.
- Guidance from the Regulation Committee … should be provided to Government departments on:
    - how to assess when instruments are of a legislative character;
    - how to seek the advice of the Committee if there is uncertainty;
    - how to obtain a final decision as to the scope of the definition from the Committee;
    - the limited circumstances in which it might be appropriate for instruments to be exempted from the regulatory and oversight framework.[44]

41 Discussion Paper, p 52; Victorian Government, *Subordinate Legislation Act 1994 Guidelines*, p 11, paragraph 25.

42 Discussion Paper, pp 53; Victoria, Scrutiny of Acts and Regulations Committee, *Alert Digest No. 8 of 2020*, September 2020, p 27.

43 Discussion Paper, p 53.

44 Discussion Paper, pp 18-19.

Committee comment

3.21 The committee notes that the current statutory framework for the regulation and scrutiny of delegated legislation prioritises the form of an instrument over its substantive effect, leading to gaps in the accountability system. In effect, legislative instruments that are not made in a form which meets the requirements of relevant statutory definitions are excluded from the accountability and oversight requirements that apply to other legislative instruments.

3.22 To address this issue, and to align our statutory framework with best practice in other jurisdictions, the committee agrees with the proposal in the Discussion Paper to extend the regulatory and scrutiny requirements that apply to 'statutory rules' and 'regulations' to all instruments of a legislative character. This approach, which is also supported by evidence to the committee's 2020 inquiry, would ensure that all exercises of delegated legislative power are subject to appropriate safeguards such as the disallowance procedure and scrutiny and sunsetting provisions.

3.23 The committee accordingly recommends that a new Legislation Act apply to all instruments of a legislative character, or that, if a new Legislation Act is not enacted, the existing statutes be amended to the same effect.

Recommendation 2

That the new Legislation Act apply to all instruments of a legislative character.

Recommendation 3

That, if a new Legislation Act is not enacted, the *Interpretation Act 1987*, *Subordinate Legislation 1989* and *Legislation Review Act 1987* be amended so that they apply to all instruments of a legislative character.

3.24 The committee accepts that in a broadly-based statutory scheme which applies to all legislative instruments, it may be necessary for exemptions to be made in some circumstances. However, exemptions from safeguards such as the disallowance procedure and sunsetting requirements have the potential to undermine the robustness of the regulatory framework, and to diminish the Parliament's role as the ultimate law-making authority. The committee therefore supports the imposition of strict controls on the making of exemptions from the regulatory and scrutiny requirements that are to extend to all legislative instruments.

3.25 In particular, the committee recommends that any exemptions should be specified in primary legislation rather than being left to regulations. Further, the making of exemptions should be guided by appropriate criteria which take account of the concerns that have been identified by the Senate's scrutiny committee in inquiries concerning the exemption of delegated legislation from Commonwealth statutory requirements. These concerns include the need to limit exemptions involving instruments which adversely affect rights and liberties, instruments which are not subject to any alternative form of accountability, and instruments that override or modify primary legislation ('Henry VIII provisions').

Recommendation 4

That appropriate exemptions from the definition and framework applying to instruments of a legislative character be made in primary legislation, and be guided by the following criteria:

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

Increasing public accessibility

3.26 Under section 39(1) of the *Interpretation Act 1987* 'statutory rules' are required to be published on the NSW legislation website. However, the question of whether other types of delegated legislation are required to be published on the website is not straightforward.

3.27 In its 2020 inquiry the committee was told that:

- delegated legislation other than 'statutory rules' will usually be required to be published in the Gazette or on the legislation website by the Act under which it is made
- some statutory instruments are published on the legislation website at the request of the administering agency or at the initiative of the Parliamentary Counsel's Office
- delegated legislation may also be published on relevant departmental or corporation websites but there is no obligation on departments to do so.[45]

3.28 Statutory rules are also required to be notified in the parliamentary record. In that regard section 40(1) of the *Interpretation Act 1987* provides that written notice of the making of a statutory rule must be tabled in each of House of Parliament within 14 parliamentary sitting days of the day on which it is published on the NSW legislation website. However, under section 40(4), failure to lay a written notice before each House of Parliament in accordance with the section does not affect the validity of a statutory rule.

The reforms proposed in the Discussion Paper

3.29 The Discussion Paper argues that the lack of a central repository for the publication of all legislative instruments 'raises significant transparency and simplicity concerns'.[46] To address this problem the Paper proposes that all legislation should be available to the public in a single online location:

> While it might be considered desirable for instruments to be available on individual agency's websites, there is a level of simplicity, transparency and holistic understanding of NSW statute book that is gained from having a single, public-facing, online repository of all statutes, both primary and delegated. Further, transparency of the robustness of

45 Regulation Committee, *Making of delegated legislation in New South Wales*, Report 7, October 2020, p 14.

46 Discussion Paper, p 19.

> the democratic oversight of the statute book would be gained where all instruments are contained in the one place.[47]

3.30 The Discussion Paper also raises concerns about the strength of the current obligation to table statutory rules in Parliament given that section 40(4) of the *Interpretation Act 1987* provides that failure to comply does not affect the validity of the rule. To address this concern the Paper argues that section 40(4) should be amended to provide that the validity of a statutory rule is dependent on the tabling requirement being met:

> This provision undermines the strength of the tabling obligation in s 40(1). The tabling obligation is an important, additional dimension of ensuring the transparency and accessibility of legislative instruments, and the completeness of the official parliamentary record. This means notice of those instruments are recorded in the parliamentary proceedings, not just a Government website. This provides an official, point in time, publicly accessible record. Making the ongoing validity of the statutory rule dependent on meeting those tabling requirements – as occurs, for instance, at the federal level, would achieve this.[48]

3.31 The comparative review attached to the Discussion Paper notes that under the Commonwealth's *Legislation Act 2003* all legislative instruments must be lodged with the Federal Register of Legislation (section 15G). Further, registered instruments must be laid before each House of Parliament and failure to table a registered instrument within the specified time results in the instrument being immediately repealed (section 38).[49]

3.32 Similarly, under the *Legislation Act 2001* (ACT), the Legislation Register includes all subordinate laws, disallowable instruments and notifiable instruments (section 19). Further, subordinate laws and disallowable instruments must be presented to the Legislative Assembly and if not tabled within the specified time are taken to be repealed (section 64).[50]

3.33 The Discussion Paper summarises the proposed reforms relating to these issues as follows:

- The NSW Legislation website publish all legislative instruments as soon as they are made (in addition to individual agencies deciding to publish instruments on their own websites).
- The NSW Legislation website clearly indicate where those instruments are exempted from any part of the regulatory and scrutiny framework.
- The obligation to table the notice of making of a statutory rule in s 40(1) of the Interpretation Act 1987 (NSW) should be enforceable through an amendment to s 40(4), which invalidates any rule that is not duly tabled in the Houses.[51]

47 Discussion Paper, p 19.

48 Discussion Paper, p 19.

49 Discussion Paper, p 69.

50 Discussion Paper, p 76.

51 Discussion Paper, p 20.

Committee comment

3.34 While many statutory instruments are published on the NSW legislation website, there is currently no centralised platform for the publication of all legislative instruments in New South Wales. In the absence such a resource, a citizen or a member of Parliament who wishes to access legislation on a particular subject cannot be certain that the contents of the website provide a full and accurate picture of the statute book. While it is open to individual agencies to publish particular instruments on their own websites, the lack of a central repository for all legislation undermines transparency and accessibility, and limits opportunities for effective parliamentary oversight.

3.35 In addition to being published on the NSW legislation website, legislative instruments should be tabled in Parliament so that the parliamentary record accurately reflects the instruments that have been made under Parliament's delegation. To strengthen the existing requirement concerning the tabling of statutory rules, the committee agrees with the proposal to amend section 40(4) of the *Interpretation Act 1987* so that failure to comply will result in the invalidation of the rule. The committee notes that such an amendment is consistent with the position in the Commonwealth.

3.36 The committee therefore recommends that the NSW legislation website publish all legislative instruments as soon as they are made, and clearly indicate where those instruments are exempted from any part of the regulatory and scrutiny framework. We also recommend that the statutory obligation to table notice of the making of a statutory rule be made enforceable by providing that any rule that is not duly tabled in the Houses is invalid.

Recommendation 5

That the NSW legislation website:

- publish all legislative instruments as soon as they are made
- clearly indicate where those instruments are exempted from any part of the regulatory and scrutiny framework.

Recommendation 6

That the statutory obligation to table notice of the making of a statutory rule be made enforceable by providing that any rule that is not duly notified to the Houses is invalid.

Extending the role of the Regulation Committee

3.37 As noted in chapter 2, for many years the function of scrutinising delegated legislation against technical scrutiny criteria was performed by a committee of the Legislative Council. However, in 1987 this function was transferred to a joint committee of both Houses. More recently, in 2017, the Legislative Council established its own committee to examine the policy merits of regulations.

3.38 These developments have culminated in the current position in which two committees perform complementary functions relating to the oversight of delegated legislation: the joint Legislation Review Committee scrutinises all disallowable regulations, and bills, against principles set out in

the *Legislation Review Act 1987*, while the Legislative Council Regulation Committee – this committee – may review any instrument of a legislative character, with a focus on policy issues.

3.39 Recent inquiries have raised concerns about the effectiveness of this committee oversight model, as discussed in chapter 2. For example, in 2018 the Legislation Review Committee recommended that a separate joint committee be created to examine subordinate legislation to address concerns about the committee's workload, which involves the scrutiny of both bills and regulations.

The reforms proposed in the Discussion Paper

3.40 The Discussion Paper includes an analysis of aspects of the current system for committee oversight of delegated legislation and an outline of possible reforms to enhance that system.

Analysis of the current oversight model

3.41 The Discussion Paper notes that the composition of the two oversight committees differs in key respects: while the Regulation Committee has an equal number of Government and non-Government members and a non-Government chair, the Legislation Review Committee consists of five Government members and three non-Government members with a Government Chair.[52] The Discussion Paper argues that the extent of government representation on the joint committee raises concerns about the capacity of that committee to meet expectations of robust scrutiny in the performance of its role:

> The stark difference in the Government dominance of these two committees reveals concerns about the ability of the Legislation Review Committee to undertake its functions … Robust scrutiny, and the perception of robust scrutiny of the Executive's exercise of delegated legislative power, would certainly warn against scrutiny by a Government-dominated Committee.[53]

3.42 The Discussion Paper advises that in other jurisdictions Government dominance of similar joint committees has led to 'concerns that Government committee members are shielding legislative instruments from robust scrutiny', or the perception that this is occurring.[54] This observation is reinforced by matters noted in the comparative review.[55]

3.43 In contrast to these arrangements, the Discussion Paper highlights that in the Commonwealth Parliament the scrutiny committee is located in the Upper House. The Discussion Paper advises that this model for the scrutiny of delegated legislation:

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52 Discussion Paper, p 20.

53 Discussion Paper, p 20.

54 Discussion Paper, p 20.

55 For example, in South Australia a minority report of the joint scrutiny committee in 2021 stated that it had become common for successive chairs of the committee to exercise their casting vote to 'wa[ive] through' legislatives instruments that clearly do not meet the scrutiny expectations of at least half the committee members: Discussion Paper, p 48; Parliament of South Australia, Legislative Review Committee, *The Workload of the Legislative Review Committee*, 2021, p 18.

> reflects the particular role of upper houses in Australia in maintaining the democratic oversight of Executive action, and thus performing a key function in the practice of responsible and accountable government.[56]

3.44 The Paper goes on to note that concerns about aligning oversight mechanisms with the role of the Upper House were among the factors which motivated the creation of the Regulation Committee itself. In recommending the establishment of a committee to review regulations in 2015, the Select Committee on the Legislative Council Committee System noted that the combined functions of scrutinising bills and regulations in the Legislation Review Committee 'was inefficient and … the scrutiny of regulations was gradually diminishing', and that the scrutiny and oversight work sat squarely within the role of the Legislative Council as a house of review.[57]

3.45 The Discussion Paper maintains that the Select Committee's proposal for the new committee to be confined to policy scrutiny has 'left concerns about the technical scrutiny being undertaken in the Legislative Review Committee unaddressed'.[58] The Paper goes on to suggest:

> Now that the Regulation Committee has been established, and has operated as a successful, selective policy scrutiny committee, it is an opportune time to consider whether an increase in its functions is desirable.[59]

Options to address concerns relating to the oversight model

3.46 The Discussion Paper states that while it would be possible to address concerns about government dominance by changing the composition of the joint committee, a more direct response to the problems inherent in the current oversight model would be to return the technical scrutiny function to the Legislative Council:

> The current Government dominance of the Legislation Review Committee raises concerns. There are different ways to respond to this. One way might be to change the composition of the Legislation Review Committee, increasing the representation from the Legislative Council and non-Government members.
>
> However, a response that more directly responds to the concern that the scrutiny function is most appropriately located in the Legislative Council, is to return the technical scrutiny function to the Council.[60]

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56 Discussion paper, p 20, citing *Egan v Willis* (1998) 195 CLR 424, 451 (Gaudron, Gummow and Hayne JJ), and Steven Frappell and David Blunt, *New South Wales Legislative Practice*, Federation Press, 2nd edition, 2021, p 19.

57 Discussion Paper, pp 20-21.

58 Discussion Paper, p 21.

59 Discussion Paper, p 21.

60 Discussion Paper, p 21.

3.47 The Discussion Paper notes that such a reform could be implemented by amending the *Legislation Review Act 1987* or alternatively by amending the Legislative Council's resolution establishing the Regulation Committee:

> This [reform] could be achieved for instance, by [the scrutiny] function being shifted from the Legislative Review Committee to the already-established Regulation Committee, and an amendment made to Parts 2 and 3 of the *Legislation Review Act 1987* (NSW) to reflect that change. Alternatively, the Legislative Council may amend the resolution setting the functions of the Regulation Committee to extend them to include the scrutiny functions set out in s 9 of the *Legislation Review Act.*[61]

3.48 The Paper accepts that the option of amending the Council's resolution would result in a duplication of the work of the two committees, at least initially. However, it argues that the option would enable an assessment to be made of whether the Council committee was performing the scrutiny work with greater robustness, which would provide evidence as to whether there was a need for further statutory reform.[62] The Paper also suggests that the new scrutiny function would complement the committee's existing policy review function as the scrutiny work would alert the committee to potential instruments that might appropriately be the subject of a further inquiry into the substantive policy.[63]

3.49 The Paper notes that expanding the Regulation Committee's functions in this way would dramatically increase the committee's workload (which would now extend to all legislative instruments subject to disallowance) and the technical nature of its scrutiny. In light of this the Paper proposes that new function be accompanied by an increase in resourcing for secretariat support.[64]

3.50 Alongside extra secretariat support the Paper proposes that a permanent legal adviser be appointed to assist the committee in the detailed technical scrutiny work, similar to the long-standing practice in the Senate.[65] In addition the Paper argues that the committee should continue to be able to request the appointment of ad hoc external legal advisers for its thematic inquiries if necessary.[66]

3.51 The Discussion Paper summarises the proposed reforms relating to these issues as follows:

- The Legislative Council amend the resolution establishing the Regulation Committee and extend its functions to include to inquire and report on instruments of a legislative nature that are subject to disallowance against the scrutiny principles set out in s 9(1)(b) of the *Legislation Review Act 1987* (NSW).
- The Regulation Committee's secretariat should be increased to support this additional work; and the Committee should be supported by a dedicated legal adviser for its technical scrutiny function.

61 Discussion Paper, p 21.

62 Discussion Paper, p 21.

63 Discussion Paper, p 21.

64 Discussion Paper, p 21.

65 Discussion Paper, p 21.

66 Discussion Paper, p 22.

- The practice of providing for the appointment of an ad hoc external legal adviser for the Regulation Committee's thematic inquiries as is deemed necessary should be retained.[67]

Committee comment

3.52 The committee agrees with the Discussion Paper's proposal to return the technical scrutiny function for delegated legislation to a committee of the Legislative Council. As noted in the Paper, the function of scrutinising delegated legislation against accountability criteria aligns with the constitutional role of the Upper House in maintaining democratic oversight to support responsible and accountable government. Further, there are concerns that a government-dominated joint committee may not be capable of delivering a sufficiently robust level of scrutiny of the government's exercise of delegated legislative power, or the perception of robust scrutiny. In addition to these considerations there is evidence that the combination of the scrutiny of bills and regulations functions in the Legislation Review Committee has in practice led to workload pressures, inefficiency and a decline in the robustness of the scrutiny of regulations.

3.53 The committee believes that, as a first step, the preferred mechanism for implementing this reform would be to simply amend the resolution of the Legislative Council establishing the Regulation Committee to expand this committee's functions to include the scrutiny of legislative instruments against the principles in the *Legislation Review Act 1987*. While this would result in duplication of the work of the joint committee, at least initially, it would enable an assessment to be made of the effectiveness of the Council committee in the technical scrutiny role, which would assist in determining whether there is a need for any further statutory reform.

3.54 The introduction of this reform would have a dramatic impact on the workload of the Regulation Committee, which would be required to assess all legislative instruments that are subject to disallowance. To take account of this, the committee supports proposals to expand the committee's secretariat and appoint a permanent legal adviser to assist in the detailed technical scrutiny work.

3.55 The committee therefore recommends that:

- the Legislative Council amend the resolution establishing the Regulation Committee to expand the committee's functions to include inquiring into and reporting on instruments of a legislative nature that are subject to disallowance against the scrutiny principles set out in section 9(1)(b) of the *Legislation Review Act 1987*
- the Regulation Committee's secretariat be increased to support the additional work that will be required as a result of the committee's technical scrutiny function
- a dedicated legal adviser be appointed to support the Regulation Committee in the performance of its technical scrutiny function.

[67] Discussion Paper, p 22.

Recommendation 7

That the Legislative Council amend the resolution establishing the Regulation Committee to expand the committee's functions to include inquiring into and reporting on instruments of a legislative nature that are subject to disallowance against the scrutiny principles set out in section 9(1)(b) of the *Legislation Review Act 1987*.

Recommendation 8

That the Regulation Committee's secretariat be increased to support the additional work that will be required as a result of the committee's technical scrutiny function.

Recommendation 9

That a dedicated legal adviser be appointed to support the Regulation Committee in the performance of its technical scrutiny function.

Increased guidance to Government from the Regulation Committee

3.56 At present limited guidance is available to Government agencies concerning the information that is required by the parliamentary oversight committees to fulfil their scrutiny functions. Further, the guide to the preparation of primary and delegated legislation that was formerly published by the Parliamentary Counsel's Office[68] is no longer being published.[69]

3.57 This lack of guidance contrasts with the position in other jurisdictions where the relevant scrutiny committee, often in conjunction with Parliamentary Counsel's office and central Government agencies, offers significant advice to ensure Government meets its disclosure obligations to Parliament and to help improve the making and oversight of delegated instruments.[70]

The reforms proposed in the Discussion Paper

3.58 The Discussion Paper states that the provision of guidance to Government agencies in relation to requirements for parliamentary scrutiny enhances the effectiveness of the scrutiny regime:

> Such guidance increases the simplicity and understanding of the functions performed by the Committees in overseeing delegated legislative instruments by those in Government, and also has the potential to increase the robustness of the exchange of information between the Government and the committees, leading to more effective scrutiny of instruments.[71]

68 The *Manual for the Preparation of Legislation*, 8th edition, August 2000, included information concerning the role of the joint committee for the scrutiny of delegated legislation, the disallowance procedure and the program for the staged repeal of statutory rules.

69 Discussion Paper, p 22.

70 Notable examples of this approach include the Victorian, Queensland and Commonwealth regimes: Discussion Paper, pp 22, 69, 71, 74.

71 Discussion Paper, p 22.

3.59 The Paper also argues that the development of such guidance falls within the role of the Parliament and its committees, rather than the Executive government:

> There is a strong constitutional argument that guidance to Government on requirements for parliamentary scrutiny is driven by the Parliament and its committees, and not left to the Office of Parliamentary Counsel or the Cabinet to direct within Government. Rather, it forms part of a constitutional dialogue between the legislative and executive branches.[72]

3.60 Informed by these considerations, and by proposals concerning the role of the Regulation Committee previously discussed, the Discussion Paper proposes that the Regulation Committee should have the role of developing Guidance Notes concerning key aspects of the regulatory and scrutiny regime. These aspects include issues previously discussed in this chapter, such as how to assess whether an instrument is legislative in character, and issues to be canvassed in the next chapter, such as a proposed change to the timeframe within which legislative instruments come into effect.

3.61 The Discussion Paper summarises these proposals as follows:

- A series of Guidance Notes be developed by the Regulation Committee, that relate to key issues, including:
  - How to assess whether an instrument is a legislative instrument and therefore subject to scrutiny.
  - How to assess whether it is appropriate to exempt an instrument from any aspect of the regulatory and scrutiny framework.
  - What information should be provided to the Parliament in relation to the scrutiny principles, particularly justifications if there are any incursions into personal rights and liberties, and information on the level, nature and response to consultation that has been undertaken in relation to the instrument.
  - If a delayed commencement date is adopted …, the circumstances in which it might be justifiable for a legislative instrument to commence before 21 days after it is first published.
- These Guidance Notes should be subject to regular updating based on the ongoing experience of the Committee.[73]

Committee comment

3.62 The committee notes that the provision of guidance to Government agencies on the operation of the regulatory and scrutiny framework would enhance the effectiveness of the management of delegated legislation in New South Wales, consistent with the approach taken in other jurisdictions. Furthermore, the committee notes with concern that the Parliamentary Counsel's Office no longer appears to be publishing or updating the *Manual for the Preparation of Legislation*. On that basis, the committee recommends that the Parliamentary Counsel's Office recommence publishing a guide to the preparation of primary and delegated legislation.

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72 Discussion Paper, p 22.

73 Discussion Paper, pp 22-23.

Recommendation 10

That the Parliamentary Counsel's Office publish a guide to the preparation of primary and delegated legislation.

Options for reform of the management of delegated legislation in New South Wales: -

Chapter 4 Other key reforms

In addition to the reforms examined in chapter 3, the Discussion Paper proposes a range of other reforms to the framework for managing delegated legislation. These reforms concern:

- greater transparency for rights scrutiny
- increased oversight of consultation
- further restricting the ability to remake disallowed instruments
- delayed commencement times
- extending scrutiny and disallowance
- stricter regulation, transparency and oversight of incorporation of quasi-legislation.

This chapter examines the proposals relating to each of these issues in turn and outlines the committee's views and recommendations. It also briefly addresses two further issues that were raised in the inquiry: delegated legislation associated with national legislative schemes, and the use of explanatory notes to justify broad delegations of legislative power.

Greater transparency for rights scrutiny

4.1 In some Australian jurisdictions the framework for the scrutiny of delegated legislation is supplemented by a human rights-specific scrutiny framework, such as a bill or charter of rights or a parliamentary committee that is dedicated to the scrutiny of rights issues.[74] However, the approach that has been taken in New South Wales has been to include rights-specific principles among the criteria that are applied by the scrutiny committee when assessing bills and regulations. Under section 9(1)(b)(i) of the *Legislation Review Act 1987*, the functions of the Legislation Review Committee include reporting to Parliament on regulations that trespass unduly on personal rights and liberties.

4.2 In its 2018 review of the *Legislation Review Act 1987*, the Legislation Review Committee noted that concerns had been raised about a lack of transparency surrounding the nature of the rights against which the committee conducts its scrutiny and the committee's approach to evaluating Government justifications for incursions into rights. With these concerns in mind, the committee reported 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 Session.'[75] However, this idea has not been followed up and concerns around the transparency of the committee's scrutiny function remain.[76]

74 Discussion Paper, p 24, p 69 (Commonwealth), p 71 (Queensland), p 74 (Victoria), p 76 (ACT).

75 Discussion Paper, p 24; Legislation Review Committee, *Inquiry into the operation of the Legislation Review Act 1987*, Report 1/56, November 2018, Finding 1.

76 Discussion Paper, p 24.

The reforms proposed in the Discussion Paper

4.3 The Discussion Paper observes that one way of achieving greater clarity and robustness in the rights scrutiny function in New South Wales might be to adopt a set of uniform scrutiny criteria across both primary and subordinate legislation. This approach has been taken by the Queensland Parliament in the *Legislative Standards Act 1992* (Qld).[77]

4.4 However, the Discussion Paper states that there is already a level of uniformity of expectation for scrutiny across primary and subordinate legislation under the *Legislation Review Act 1987*, and that the scrutiny principles set out in the New South Wales Act largely reflect the legislative standards in Queensland. The Paper also states that the Queensland statute provides greater explanation of the nature of the rights scrutiny that is expected than the New South Wales Act, 'but not a huge amount more'.[78]

4.5 While noting the similarities in the *statutory* requirements in Queensland and New South Wales, the Discussion Paper advises that there is a significant difference between the two jurisdictions in the level of non-statutory guidance that is available to explain the operation of the statutory standards:

> where the expectations of Government in relation to rights compliance in Queensland is given greater clarity and explanation is the supporting guidelines to Government that accompany the Standards – from across various offices including the Office of Parliamentary Counsel, Department of Premier and Cabinet, the Executive Council, Cabinet Handbook and Legislation Handbook.[79]

4.6 Drawing on this aspect of the Queensland regime, the Discussion Paper proposes that in New South Wales additional guidance should be given to the Government to assist it in meeting expectations about the scrutiny of delegated instruments against rights-specific criteria:

> It would seem, therefore, that the most efficient and likely at least equally effective method of increasing the robustness of Committee oversight of incursions into rights and liberties is to increase the guidance that is given to Government as to the Committee's expectations as to types of rights and liberties that will engage the scrutiny criterion, and the level and nature of justification required for incursions into rights and liberties.[80]

4.7 This proposal is summarised in the Discussion Paper as follows:

> Guidance from the Regulation Committee … should be provided to Government departments and agencies on:
>
> - the personal rights and liberties that the Committee will scrutinise pursuant to the scrutiny criteria in s 9(1)(b) of the Legislation Review Act; and
> - how the Committee will approach its scrutiny of the Government's public interest justifications for incursions into personal rights and liberties.[81]

77 Discussion Paper, p 24 and p 71.

78 Discussion Paper, p 24.

79 Discussion Paper, pp 24-25.

80 Discussion Paper, p 25.

81 Discussion Paper, p 25.

Committee comment

4.8 The committee notes that an important component of the oversight framework for delegated legislation is the application of scrutiny principles that are designed to ensure the protection of individual rights and liberties. However, the Legislation Review Committee has reported that there is a need for greater transparency in relation to the nature of the rights and liberties against which bills and regulations are assessed. Further, compared to New South Wales, there is greater clarity surrounding Government obligations with respect to rights compliance in Queensland, as a result of the publication of guidelines that explain the operation of the statutory standards against which scrutiny will occur.

Increased oversight of consultation

4.9 Section 5 of the *Subordinate Legislation Act 1989* sets out requirements for consultation in the making of principal statutory rules. However, these requirements are not legally enforceable as section 9 of the Act provides that failure to comply does not affect the validity of the rule.

4.10 This lack of legal enforceability is also reflected in provisions of the federal *Legislation Act 2003* (Cth).[82] While the Senate's Scrutiny of Bills Committee has expressed the view that compliance with the consultation requirements of the Act should be a condition of the validity of an instrument,[83] this view has not been acted on.

4.11 Aside from the issue of enforceability, at the federal level concerns have been raised about the extent to which the Government understands the nature of the consultation requirements, and the adequacy of the information provided by the Government to the committee responsible for the scrutiny of instruments.[84] To address these concerns, in 2019, the terms of reference for the Senate's scrutiny of delegated legislation committee were amended with regard to the oversight of consultation. While under the previous terms of reference the committee was confined to considering whether the consultation requirements of the *Legislation Act 2003* had been met,[85] the committee now has responsibility for determining whether 'those likely to be affected by instrument were adequately consulted in relation to it'.[86] The committee has also issued guidelines on the sort of information it requires to undertake this aspect of its scrutiny function.[87]

82 Discussion Paper, p 25. Section 17 of the *Legislation Act 2003* (Cth) sets out requirements for rule-makers to consult before making legislative instruments. However, section 19 provides that the fact that consultation does not occur does not affect the validity or enforceability of the instrument.

83 Discussion Paper, p 25, p 36; Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 3 of 2018*, p 72.

84 Discussion Paper, p 25, p 36; Senate Standing Committee on Regulations and Ordinances, *Parliamentary Scrutiny of Delegated Legislation*, June 2019, pp 43-44.

85 Senate Standing Committee on Regulations and Ordinances, *Parliamentary Scrutiny of Delegated Legislation*, June 2019, p 47.

86 Discussion Paper, p 25, p 36; Senate Standing Order 23(3)(d).

87 Discussion Paper, p 25, p 36; Senate Standing Committee for the Scrutiny of Delegated Legislation, *Guidelines*, 2nd edition, February 2022, p 10; Senate Standing Committee for the Scrutiny of Delegated Legislation, *Principle (d): Adequacy of consultation*, revised February 2022.

4.12 In New South Wales the Legislation Review Committee already has express oversight over compliance with the consultation requirements in section 5 of the *Subordinate Legislation Act 1989*. Under section 9(b)(viii) of the *Legislation Review Act 1987* the committee's functions include to consider whether Parliament's attention should be drawn to any disallowable regulation on the ground that:

> any of the requirements of sections 4, 5 and 6 of the *Subordinate Legislation Act 1989* … appear not to have been complied with, to the extent that they were applicable in relation to the regulation.

4.13 However, there are concerns about the level of compliance with and transparency surrounding the Government's consultation obligations.[88]

The reforms proposed in the Discussion Paper

4.14 According to the Discussion Paper, there are challenges with making consultation obligations 'enforceable' against the Government:

> Creating a judicially enforceable obligation opens legislative instruments up to an avenue of judicial challenge that is not available against primary legislation; and could lead to major instability in the statute book.[89]

4.15 The Paper therefore argues that instead of pursuing the option of enforceability it would be preferable to address concerns about compliance with consultation requirements by strengthening existing oversight mechanisms:

> It would be more consistent with the process for the passage of primary legislation for the Parliament to retain oversight over the level of consultation undertaken in the making of delegated legislative instruments, but to increase the robustness of the democratic scrutiny of consultation.[90]

4.16 The Discussion Paper goes on to identify specific ways in which the oversight of compliance with consultation requirements could be enhanced:

- amending the *Legislation Review Act 1987* to make it explicit that the Legislation Review Committee can scrutinise the adequacy of consultation and can recommend disallowance to the Houses on the basis of a failure to meet consultation expectations
- providing greater guidance to Government as to how it is to meet the consultation requirements and report on the adequacy of the consultation undertaken.[91]

4.17 These proposals are summarised in the Discussion Paper as follows:

> - Section 9(1)(b) of the *Legislation Review Act 1987* (NSW) be amended to make explicit the Legislation Review Committee's role in scrutinising adequacy of

88 Discussion Paper, p 25.

89 Discussion Paper, p 25.

90 Discussion Paper, p 25.

91 Discussion Paper, pp 25-26.

consultation, and that it can recommend disallowance to the Houses on the basis of failing to meet consultation expectations.

- Guidance from the Regulation Committee … should be provided to Government departments and agencies on the expectations of the Committee in relation to the consultation requirements, and reporting to the Committee on the adequacy of the consultation.[92]

Committee comment

4.18 The committee notes that the consultation requirements in section 5 of the *Subordinate Legislation Act 1989* could be strengthened by making them enforceable so that a failure to comply would invalidate the statutory rule. However, the Discussion Paper advises that this option would be undesirable as it would open the door to judicial challenges that could lead to instability in the statute book.

4.19 The committee supports the proposal for the Regulation Committee to provide guidance as to its expectations regarding the consultation requirements and the Government's obligation to report to the committee on the adequacy of the consultation it undertakes.

Recommendation 11

That the Regulation Committee provide guidance to Government agencies on the committee's expectations in relation to:

- the consultation requirements
- reporting to the committee on the adequacy of consultation.

Further restricting the ability to remake disallowed instruments

4.20 Section 8 of the *Subordinate Legislation Act 1989* provides that at least four months must elapse before a statutory rule that has been disallowed by a House of Parliament can be remade, unless the disallowance resolution is rescinded by the House. The terms of section 8(2) and (3) are reproduced below:

> (2) No statutory rule, being the same in substance as the statutory rule so disallowed, may be published on the NSW legislation website within 4 months after the date of the disallowance, unless the resolution has been rescinded by the House of Parliament by which it was passed.
>
> (3) If a statutory rule is published in contravention of this section, the statutory rule is void.

4.21 The rationale for restricting the remaking of disallowed instruments includes the need to ensure that the Parliament's will as expressed in the disallowance motion is not subverted, and to promote the stability of the statute book:

[92] Discussion Paper, p 26.

> The restriction on the ability for the Executive to remake instruments that have been recently disallowed is intended to protect the integrity and robustness of the democratic mandate of the Parliament, expressed through a disallowance motion. It is also intended to promote the stability – and therefore simplicity and clarity – of the statute book. If the Executive were able to remake, immediately, a disallowed instrument, this would have the effect of potentially undermining the Parliament's will, as the new instrument would come into effect when made, although it would be subject to further disallowance. Depending on when Parliament is sitting, a remade instrument may be in effect for a relatively long period of time before Parliament is able to consider it again. This is, in effect, subverts the desires of the legislature.[93]

4.22 In the committee's 2020 inquiry into the making of delegated legislation, the New South Wales Bar Association described the statutory limitation on the remaking of disallowed rules 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'.[94] However, the Association submitted that to strengthen the force of the safeguard, consideration should be given to extending the period in which a disallowed rule cannot be remade from four to six months.[95]

The reforms proposed in the Discussion Paper

4.23 The Discussion Paper states that of those jurisdictions which limit the power to remake instruments that have been disallowed, New South Wales has the shortest timeframe: four months, unless the resolution of disallowance has been rescinded. By contrast, the Commonwealth, ACT and Northern Territory have six-month limits while Tasmania has a 12-month limit.[96]

4.24 The Discussion Paper goes on to state that time limits on the remaking of disallowed rules involve a balance between respecting the will of the legislature and the need for flexibility to respond to changing circumstances. The Paper argues that to strike a more appropriate balance in New South Wales the period during which such rules may not be remade should be extended:

> There is, of course, a need to balance the integrity of the democratic will of the House expressed through a disallowance motion, and the possibility that changed circumstances might mean that a rule that has been disallowed at one date, might no longer be seen as undesirable. However, given the possibility of subverting the legislature … it is appropriate to strike a balance between respecting the disallowance motion, and allowing for remaking at an appropriate time. This balance would seem most appropriately struck through a longer period preventing remaking, subject to the relevant House rescinding its disallowance motion.[97]

4.25 The proposed reform is summarised in the Paper as follows:

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93 Discussion Paper, p 28.

94 Regulation Committee, *Making of delegated legislation in New South Wales*, Report 7, October 2020, p 20.

95 Regulation Committee, *Making of delegated legislation in New South Wales*, Report 7, October 2020, p 20.

96 Discussion Paper, p 28, p 69, p 73, p 76, p 77.

97 Discussion Paper, p 28.

> Section 8(1) of the *Subordinate Legislation Act 1989* (NSW) be amended so as to increase the time period that a statutory instrument cannot be remade to six months after the motion of disallowance.[98]

Committee comment

4.26 The committee notes that the current statutory limitation on the timeframe for remaking disallowed rules performs an important role in the system of checks and balances that governs the use of delegated legislative power. By preventing the executive from immediately remaking a disallowed rule, the statutory limitation protects the integrity of the Parliament's democratic mandate as expressed in the disallowance motion. The committee believes the current four-month timeframe is adequate.

Delayed commencement times

4.27 Under the *Interpretation Act 1987* statutory rules commence on the day that they are published on the NSW legislation website (section 39(1)). This is consistent with the general position in Australian jurisdictions in which delegated instruments commence on the date that they are made.[99] However, in New Zealand and the United Kingdom it is well accepted that instruments should generally commence 28 or 21 days (respectively) after they are made.[100]

4.28 Delayed commencement provisions such as these enhance the public accessibility of delegated instruments. They also allow parliamentary scrutiny to occur before the instrument has commenced, enhancing the robustness of that scrutiny.[101]

The reforms proposed in the Discussion Paper

4.29 The Discussion Paper states that greater oversight of delegated legislation could be achieved by introducing what is known as affirmative resolution procedures, which require Houses to positively resolve to adopt instruments before the instruments come into effect. However, the Paper notes that tying the commencement of instruments to resolutions of the House would create an unrealistic workload for the scrutiny committee given the sheer volume of the instruments involved.[102] Instead, the Paper argues that the introduction of delayed commencement times would strike a more appropriate balance between robust oversight and operational efficiency in the context of the current disallowance framework. The Paper notes that similar reasoning has led the Senate's Scrutiny of Delegated Legislation Committee to recommend delayed commencement times at the federal level.[103]

98 Discussion Paper, p 28.

99 Discussion Paper, p 29. Commencement provisions for delegated legislation in other Australian jurisdictions are summarised in Appendix 3 to the Discussion Paper.

100 Discussion Paper, p 29, p 78, 79.

101 Discussion Paper, p 29.

102 Discussion Paper, p 29.

103 Discussion Paper, p 29, pp 40-41.

4.30 The Discussion Paper summarises its proposals relating to this issue as follows:

> - Section s 39A of the *Interpretation Act 1987* (NSW) should be amended so that legislative instruments should commence, unless otherwise permitted in the primary legislation, 21 days after they are first published.
> - Guidelines should be issued by the Regulation Committee … as to when it would be justifiable for instruments to be permitted to commence before the 21-day rule.[104]

Committee comment

4.31 The committee notes that delayed commencement provisions have not been adopted in Australian jurisdictions. In addition, delegated legislation is among the most effective tools for Government's to respond to situations where urgent action is needed to meet unexpected crises. As such, the committee does not recommend any changes to existing provisions.

Extending scrutiny and disallowance

4.32 Under the *Legislation Review Act 1987* the Legislation Review Committee is required to scrutinise regulations during the period in which they are subject to disallowance,[105] although this timeframe does not apply if, during the disallowance period, the committee resolves to review and report on a regulation.[106] The disallowance period in turn is governed by the *Interpretation Act 1987*. This Act provides that either House of Parliament may pass a resolution disallowing a statutory rule before notice of the making of the rule is laid before the House, or after such notice is laid if notice of the disallowance resolution is given within 15 sitting days.[107]

4.33 In effect, therefore, the Legislation Review Committee must conduct its scrutiny of each regulation within 15 sitting days of the date on which notice of the regulation is tabled. However, the requirement for the committee to meet this deadline in relation to every regulation gives rise to potential concerns. First, there is a danger that the scrutiny timeframe creates unsustainable workloads and time pressures for the committee. Second, as the practical effect of a regulation may not be appreciated until after 15 sitting days have elapsed, the committee's scrutiny and its opinion as to whether a regulation should be disallowed may not be fully informed by an understanding of the practical operation of the regulation.[108]

The reforms proposed by the Discussion Paper

4.34 The Discussion Paper explains that time limits on the scrutiny and disallowance of legislative instruments are justified as a means of providing greater certainty and consistency in the law. While there are no time limits on the repeal of primary legislation, the ability of just one House to disallow subordinate legislation can be seen as creating uncertainty in the absence of a clear

104 Discussion Paper, p 29.

105 *Legislation Review Act 1987*, section 9(1).

106 *Legislation Review Act 1987*, section 9(1A).

107 *Interpretation Act 1987*, section 41.

108 Discussion Paper, p 26.

limitation on the period in which disallowance can occur. These concerns are reflected in the fact that every jurisdiction examined in the Discussion Paper has adopted time limits for the disallowance of delegated instruments, with the exception of New Zealand which operates under a unicameral system.[109]

4.35 While acknowledging the importance of limitations on the disallowance period, however, the Discussion Paper argues that the scrutiny and disallowance regime would be strengthened if disallowance were permitted with the approval of *both* Houses of Parliament at any time:

> There would be justification … in the New South Wales context to allow explicitly for disallowance outside the time period where both Houses pass disallowance resolutions. This change would also provide an opportunity for the Houses to consider a late report from the Legislation Review Committee, should it resolve to provide a report outside the disallowance period, and to consider reports of the Regulation Committee, which are not limited to within the disallowance period.[110]

4.36 This proposed reform is summarised in the Paper as follows:

> Section 41 of the *Interpretation Act* should be amended so that disallowance may be allowed after the time limits set in 41(1) if passed by a resolution of both Houses.[111]

Other potential reforms

4.37 The Discussion Paper goes on to examine two further reforms that could potentially enhance procedures for the scrutiny and disallowance of delegated legislation before concluding that there are insufficient grounds for adopting the measures in New South Wales.

4.38 The first potential reform is the creation of a public complaints process. Such a process exists in New Zealand where members of the public can bring to the attention of the scrutiny committee any issues relating to existing delegated legislation which triggers committee consideration and may lead to a full inquiry. However, the Discussion Paper argues that the formalisation of a complaints process in New South Wales might be considered undesirable particularly where the scrutiny committee is already under workload pressures, and notes that members of the public already have the ability to write to the oversight committees.[112]

4.39 The second potential reform involves extending the power to disallow statutory rules to include a power to *amend* such rules. The Discussion Paper notes that the *Interpretation Act 1987* already allows either House to disallow a portion of a statutory rule[113] and that this has the practical effect of amending the operation of the rule. However, the Paper argues that amending the operation of a rule 'is at a different level from actively rewriting the rule, or parts of it',[114] and that the lack of any capacity for one House to amend a rule in this sense reflects the

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109 Discussion Paper, pp 26-27. Appendix 3 to the Discussion Paper includes a summary of the disallowance provisions in each jurisdiction including applicable time limits.

110 Discussion Paper, p 27.

111 Discussion Paper, p 28.

112 Discussion Paper, p 27 and p 63.

113 Section 41(6) of the *Interpretation Act 1987* provides that 'This section applies to a portion of a statutory rule in the same way as it applies to the whole of a statutory rule'.

114 Discussion Paper, p 27.

constitutional requirement for legislation to be passed by both Houses. The Paper goes on to note that the amendment of regulations is permitted in two jurisdictions, but that in one of these, Western Australia, amendment requires resolutions by *both* Houses, while the other jurisdiction, New Zealand, operates under a unicameral system. Given the lack of a clear consensus across the jurisdictions and the constitutional principles at play, the Paper concludes that the current position in New South Wales whereby instruments may be amended by the Executive and disallowed (in full or in part) by either House is appropriate.[115]

Committee comment

4.40 The committee notes that time limits for the scrutiny and disallowance of legislative instruments are desirable as they encourage greater certainty and consistency in the law. The committee also notes that the timeframe within which the Legislation Review Committee is required to scrutinise regulations, which equates to 15 sitting days from the date on which notice of the regulation is tabled, can pose challenges, including the fact that the practical effect of a regulation may not be appreciated until after 15 sitting days have elapsed.

4.41 However, at this stage the committee believes the case for reform to permit disallowance after the statutory period if a disallowance resolution is passed by both Houses of Parliament is not as strong as the other reforms recommended in the Discussion Paper. In this regard, the committee notes that this procedure is not a feature of the regulatory and scrutiny frameworks operating in almost all other comparable jurisdictions.

4.42 The committee also agrees with the view expressed in the Discussion Paper that there is currently insufficient justification for introducing other potential measures for strengthening scrutiny and disallowance procedures in New South Wales, such as a formal complaints process or the enactment of a provision that would allow either or both Houses to amend statutory rules.

Stricter regulation, transparency and oversight of incorporation of quasi-legislation

4.43 Quasi-legislation refers to the incorporation into legislation of non-legislative instruments such as guidelines, codes of practice and standards.[116] The authority for this practice in New South Wales lies in section 42(1) of the *Interpretation Act 1987*. This subsection provides that if an Act authorises provision to be made with respect to any matter by a statutory rule, such rule may make provision with respect to that matter by:

> applying, adopting or incorporating, with or without modification, the provisions of any Act or statutory rule *or of any other publication*, whether of the same or of a different kind [emphasis added].

4.44 The issue of changes to incorporated documents is addressed in section 69 of the *Interpretation Act 1987*. Section 69(1) creates a rebuttable presumption that reference to an incorporated document is a reference to a document at the date on which the provision containing the

115 Discussion Paper, pp 26-27.

116 Regulation Committee, *Making of delegated legislation in New South Wales*, Report 7, October 2020, p 30.

reference took effect. However, under section 69(2), an incorporated document has effect 'as in force for the time being' if that intention appears in the incorporating Act or instrument and, in the case of an incorporating instrument, if the primary Act under which the instrument is made permits documents to be incorporated as in force for the time being.

4.45 In its 2020 inquiry the committee's attention was drawn to provisions which illustrate the broad extent of the power to incorporate non-legislative material. For example, the committee was told that the effect of section 138(1) of the *Marine Safety Act 1998* is to give non-accountable bodies legislative power because their instruments if incorporated are given the force of law. Further, section 2.9 of the *Biodiversity Conservation Act 2016* would allow defences to prosecutions for an offence to be amended by ministerial codes of practice without any amendment to the regulation itself and without triggering tabling and disallowance requirements under the *Interpretation Act 1987*.[117] In the same inquiry concerns were expressed about the impact of quasi-legislation on parliamentary oversight of delegated legislation and on the public transparency of the contents of the law.[118]

4.46 The comparative review attached to the Discussion Paper notes that concerns about the use of quasi-legislation have also been raised in other jurisdictions.

4.47 At the federal level, the Senate committee for the scrutiny of delegated legislation has stated that 'incorporation of material by reference (particularly where that material is not publicly available) has been a longstanding concern for the committee'.[119] The committee's main concerns relate to the accessibility of incorporated material, and the committee has published guidelines which address this issue.[120]

4.48 In Western Australia concerns have been raised about the increased incorporation of Australian Standards into delegated legislation and the fact that these standards are not necessarily publicly available.[121] In Canada the joint scrutiny committee has expressed concerns about the increasingly frequent use of incorporation by reference in that jurisdiction and the accessibility of material that is incorporated by reference.[122] In New Zealand, following two reports from the Regulations Review Committee, detailed provisions were included in the *Legislation Act 2019* (NZ) regulating the incorporation of material in secondary legislation.[123]

117 Regulation Committee, *Making of delegated legislation in New South Wales*, Report 7, October 2020, p 31.

118 Regulation Committee, *Making of delegated legislation in New South Wales*, Report 7, October 2020, p 30.

119 Discussion Paper, p 37; Senate Standing Committee on Regulations and Ordinances, *Parliamentary Scrutiny of Delegated Legislation*, June 2019, p 50.

120 Discussion Paper, p 37; Senate Standing Committee for the Scrutiny of Delegated Legislation, *Guidelines*, 2nd edition, February 2022, p 10; *Principle (f): Access and use*, revised February 2022, p 1.

121 Discussion Paper, p 56; Parliament of Western Australia, Joint Standing Committee on Delegated Legislation, *Access to Australian Standards adopted in delegated legislation*, Report 84, June 2016, p i.

122 See references cited in Discussion Paper, pp 60-61.

123 Discussion Paper, p 65.

The reforms proposed in the Discussion Paper

4.49 The Discussion Paper identifies three potential reforms with regard to the regulation of the incorporation of material in New South Wales.

4.50 The first reform is around restricting the incorporation of non-legislative material into delegated legislation to circumstances where this is expressly contemplated by the primary Act. In that regard the Paper states:

> The first [concern] is whether the general and unlimited power of incorporation in s 42(1) should be replaced with the reverse presumption: requiring that only delegations that make express provision for incorporation allow incorporation (as seen in s 14(2) of the *Legislation Act 2003* (Cth)).[124] This would limit the use of quasi-legislation, except in those situations where the Parliament explicitly anticipates the need to incorporate, for instance, documents such as the Australian Standards. This would increase the robustness of parliamentary authorisation of the use of such instruments.[125]

4.51 The second potential reform is introducing a requirement that all incorporated material be tabled in Parliament, or otherwise made publicly available. This also embraces the need to ensure that, where material is incorporated as in force for the time being in accordance with section 69(2) of the *Interpretation Act 1987*, any subsequent changes to that incorporated material are publicly accessible. In that regard the Paper states:

> If provision is made for incorporation to occur from time to time [in accordance with section 69(2) of the *Interpretation Act 1987*], an obligation to table and publish documents whenever a change occurs should also be included. This would address the significant concerns around accessibility of incorporated materials. [126]

4.52 The third potential reform identified in the Paper is whether incorporated material should be deemed a legislative instrument and therefore subject to the requirements concerning consultation, publicity, scrutiny and disallowance that are proposed to apply to legislative instruments.[127]

4.53 The Discussion Paper summarises its conclusions in relation to these issues as follows:

- Section 42(1) of the *Interpretation Act 1987* (NSW) should be amended so that incorporation of other documents is only permitted where the individual primary legislation delegating authority permits this.
- All material that is incorporated in legislative instruments should be deemed to be a legislative instrument, and subject to the consultation, publicity, scrutiny and disallowance framework.

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124 Section 14(2) of the *Legislation Act 2003* (Cth) provides that: 'Unless the contrary intention appears, the legislative instrument or notifiable instrument *may not make provision* in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time' [emphasis added]: Discussion Paper, p 37.

125 Discussion Paper, p 23.

126 Discussion Paper, p 23.

127 Discussion Paper, p 23.

- The presumption in s 69(1) of the *Interpretation Act 1987* that a reference to an incorporated document is a reference to a document at the date on which the provision containing the provision took effect is retained. If documents are incorporated from time to time, any changes to the document is treated as a change to the legislative instrument, and subject to the regulatory and scrutiny framework.[128]

Committee comment

4.54 The committee notes that the incorporation of non-legislative instruments by delegated instruments results in external material becoming legally binding. From a pragmatic perspective, this avoids legislation becoming unduly cumbersome by having to include the content of the external material. However, concerns have been raised about the impact of the incorporation of non-legislative material on parliamentary oversight of the exercise of delegated legislative power, and on public access to the contents of the law.

4.55 To address these concerns, the committee supports the proposal in the Discussion Paper to restrict the terms of section 42(1) of the *Interpretation Act 1987* so that incorporation of an external document is only permitted where this is authorised by the relevant primary Act. The committee notes that this approach has been adopted by the Commonwealth Parliament in section 14(2) of the *Legislation Act 2003* (Cth).

4.56 The committee also agrees that documents incorporated by legislative instruments should themselves be subject to the consultation, publicity, scrutiny and disallowance framework that applies to legislative instruments, given they have the same force as legislative instruments. This framework should also extend to any *changes* that may be made to documents that are incorporated as in force from time to time – so that those changes are treated as a change to the legislative instrument, which in effect they are.

4.57 Accordingly, the committee recommends that:

- incorporation of non-legislative documents into legislative instruments only be permitted where the individual primary legislation delegating authority expressly provides for this
- non-legislative documents that are incorporated into legislative instruments be deemed to themselves be legislative instruments, and subject to the consultation, publicity, scrutiny and disallowance framework
- the statutory presumption that a reference to an incorporated document is a reference to a document at the date on which the provision containing the reference took effect be retained, and that where a non-legislative document is incorporated into a legislative instrument as in force from time to time, any change to that document be treated as a change to the legislative instrument, and subject to the same regulatory and scrutiny framework.

128 Discussion Paper, pp 23-24.

Recommendation 12

That incorporation of non-legislative documents into legislative instruments only be permitted where the individual primary legislation delegating authority expressly provides for this.

Recommendation 13

That non-legislative documents that are incorporated into legislative instruments be deemed to themselves be legislative instruments, and subject to the consultation, publicity, scrutiny and disallowance framework.

Recommendation 14

That:

- the statutory presumption that a reference to an incorporated document is a reference to a document at the date on which the provision containing the reference took effect be retained
- where a non-legislative document is incorporated into a legislative instrument as in force from time to time, any change to that document be treated as a change to the legislative instrument, and subject to the same regulatory and scrutiny framework.

Other issues

4.58 In addition to the proposed reforms discussed above, the Discussion Paper also canvassed the issue of scrutiny of delegated instruments associated with national or uniform legislation schemes. This issue is explored briefly below, in addition to a separate matter raised by the NSW Council for Civil Liberties concerning explanations for broad delegations of legislative power in explanatory notes.

Scrutiny of delegated instruments associated with national uniform schemes

4.59 National uniform schemes involve the enactment of primary legislation in local jurisdictions in accordance with arrangements that have been agreed to through Executive forums such as the Council of Australian Governments (COAG) or National Cabinet. These schemes pose challenges for parliamentary scrutiny, including the question of how delegated instruments made under uniform schemes can be subject to robust parliamentary oversight.[129]

4.60 It can be argued that delegated instruments adopted under national schemes may already have been through a sufficient process of negotiation and scrutiny, albeit in an Executive forum. Further, allowing local parliamentary scrutiny and disallowance might undermine the national, cooperative objectives of the schemes. Against this, however, is a concern that, if parliamentary scrutiny is exempted in whole or part there is no democratic oversight of these instruments.[130]

[129] Discussion Paper, p 29.

[130] Discussion Paper, p 29.

4.61 Some jurisdictions have exempted instruments adopted under national schemes from aspects of their local regulatory and scrutiny frameworks. These include exemptions from aspects of disallowance provisions,[131] sunsetting provisions[132] and consultation requirements.[133] However, there have also been moves to ensure that national schemes and associated delegated instruments are subject to proper parliamentary scrutiny:

- In 1996 a national working group representing all scrutiny of legislation and subordinate legislation committees released a position paper which recommended a robust, tailored approach to the scrutiny and oversight of primary and secondary instruments adopted under national schemes. This approach included uniform scrutiny principles and the possible establishment of a National Committee for the Scrutiny of National Schemes of Legislation.[134] However, the working group's proposal was never adopted.[135]
- In Western Australia a standing committee has been established to review legislation under uniform schemes,[136] although this is focused on primary, rather than delegated, legislation.[137]

4.62 The Discussion Paper notes that there is a lack of consensus concerning the appropriate mechanisms for ensuring effective oversight of instruments made under national schemes and suggests that this committee might wish to examine the issue in a future inquiry:

> While this Discussion Paper is not the place to undertake a full assessment as to the most appropriate way to ensure effective parliamentary scrutiny and oversight of national/uniform schemes, it is worth noting that there still remains no national consensus position as to best practice for instruments under such schemes, and it might be an issue that the Regulation Committee might wish to consider in a thematic inquiry in the future, possibly in collaboration with other scrutiny committees across the country.[138]

Explanations for broad delegations of legislative power in explanatory notes

4.63 One of the themes of the committee's 2020 inquiry into the making of delegated legislation was the potential for executive overreach in the use of broad delegations of legislative power. The particular types of delegations which gave rise to the most concern were Henry VIII provisions, shell legislation (which delegates power to fill in wide legislative gaps by subordinate legislation) and quasi-legislation.

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131 Discussion Paper, p 30; *Legislation Act 2003* (Cth), section 44(1)(a).

132 Discussion Paper, p 30; *Statutory Instruments Act 1992* (Qld) section 56; *Legislative Instruments Act 1978* (SA), section 16A(d).

133 Discussion Paper, p 30; *Subordinate Legislation Act 1992* (Tas) section 6; *Subordinate Legislation Act 1994* (Vic) section 8 and section 12F; *Legislation Act 2001* (ACT) s 36.

134 Discussion Paper, p 30; Commonwealth, *Scrutiny of National Schemes of Legislation; Position Paper*, Working Party of Representatives of Scrutiny of Legislation Committees, 1996.

135 Discussion Paper, p 30.

136 Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review.

137 Discussion Paper, p 30.

138 Discussion Paper, p 30.

4.64 Stakeholders to the 2020 inquiry submitted that one of the most effective ways of minimising the risk of overreach in the use of such broad delegations is to provide for greater transparency. The committee was also told that some jurisdictions have introduced requirements for mechanisms such as Henry VIII provisions to be highlighted in explanatory notes to bills. Informed by this evidence the committee's report included a recommendation that explanatory notes to bills highlight the presence of any Henry VIII provisions, shell legislation or quasi-legislation in the bill, and include an explanation of why such mechanisms are considered to be necessary.[139]

4.65 In its response to the 2020 report, the Government supported the use of explanatory notes to highlight the presence of Henry VIII provisions, shell legislation or quasi-legislation, and supported 'in principle' the provision of explanations as to why such mechanisms are necessary. However, the Government noted that in New South Wales the drafting of explanatory memoranda is undertaken by legislative drafters rather than policy officers, and that explanatory memoranda usually offer an explanation of the legal effect of a provision rather than its policy rationale. The Government concluded that explanations of the rationale for Henry VIII provisions, shell legislation or quasi-legislation 'may therefore be appropriately addressed in the second reading speech for the bill'.[140]

4.66 In correspondence to the committee dated July 2022, the NSW Council for Civil Liberties argued that the committee's recommendation on this issue, while desirable, did not go far enough, and that any commitment by the Government to address the issue in second reading speeches would, in itself, be 'insufficient'. In support of this position the Council referred to evidence it had provided to the Senate scrutiny committee proposing that there should be a legislative requirement for explanatory notes to include justifications for any exemptions from disallowance. The Council went on to state that '[t]he same view applies to … those bills and instruments which push against good regulation-making practice because they allow/include Henry VIII clauses, represent shell legislation or quasi legislation'.[141]

Committee comment

4.67 The committee notes that providing effective parliamentary oversight of delegated instruments adopted under national uniform schemes is an ongoing challenge for all jurisdictions in Australia. While oversight mechanisms such as the disallowance procedure have complex ramifications in the context of national schemes, excluding delegated instruments that have been developed in Executive government forums from parliamentary oversight poses a threat to parliamentary democracy. The development of a suitable approach to the oversight of this type of delegated legislation is beyond the scope of this inquiry, however the committee intends to keep a watching brief on this issue.

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139 Regulation Committee, *Making of delegated legislation in New South Wales*, Report 7, October 2020, Recommendation 4.

140 NSW Government, *Inquiry into the making of delegated legislation in NSW – Government response*, 10 April 2021, pp 4-5.

141 Correspondence from Ms Sarah Baker, Secretary, NSW Council for Civil Liberties to Chair, 21 July 2022, p 4.

4.68 On the issue of explanations for broad delegations of legislative power, the committee notes the Government's view that explanations for the inclusion in bills of Henry VIII provisions, shell legislation or quasi-legislation may be appropriately addressed in second reading speeches. The committee encourages the Government to act on that view and to ensure that second reading speeches on bills that include broad delegations contain an explanation of the reasons why.

4.69 Coming back to the design principles underpinning the reforms discussed in this report, it is hoped that the committee's recommendations, if adopted, will represent a regulatory and scrutiny framework for delegated legislation that is simple, robust and accessible. Particularly those recommendations directed at improving definitional clarity and robustness we are hopeful will provide a much stronger set of checks and balances that will deliver a higher standard of protection against executive overreach in the use of delegated legislative power.

Options for reform of the management of delegated legislation in New South Wales: -

Appendix 1 Discussion Paper

Inquiry into options for reform of the management of delegated legislation in New South Wales

DISCUSSION PAPER

May 2022

Prepared by Professor Gabrielle Appleby
UNSW Law & Justice

External legal adviser engaged to assist the Regulation Committee

I have been engaged as an external legal adviser to assist the Regulation Committee in its inquiry into options for reform of the management of delegated legislation in New South Wales, including in relation to its making, publication, commencement, tabling and oversight in Parliament through scrutiny and disallowance. The Terms of Reference for the Regulation Committee's inquiry are set out in **Appendix 1** to this Discussion Paper.

I have prepared the following Discussion Paper to assist the Committee in its deliberations. It provides an overview of the position in New South Wales, the unique context in which management of delegated legislation occurs in the State and a comparative overview of similar frameworks. From this material, it offers a set of design principles and best practice reforms. As will be explained, this analysis is driven by the objectives of creating a ***simple***, ***robust*** and ***accessible*** system for the management of delegated legislation in New South Wales.

Professor Gabrielle Appleby

UNSW Law & Justice

23 May 2022

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Part I Introduction

The question of how best to manage delegated legislation – including regulate its making, publication, commencement, tabling and oversight in Parliament through scrutiny and disallowance – is complex. Delegated legislation is a ubiquitous and voluminous tool of governance in all Australian jurisdictions, including New South Wales. In its 2020 report, the Regulation Committee observed that in the State, 'delegated legislation is the principal form of lawmaking'.[1]

In New South Wales, as in other jurisdictions, there is already in operation a detailed and technical statutory and non-statutory framework for the making of delegated legislation, its publication, commencement, tabling and oversight in Parliament through scrutiny and disallowance, and sunsetting: what I will refer to in this Paper as the ***'regulatory and scrutiny framework'***. Any such framework must strike a balance between tensions that inhere in constitutional principles relating to the separation of powers, democratic governance and rule of law, and the pragmatic reality of governing diverse and complicated societies, particularly when unexpected exigencies arise. Delegation of legislative power from the parliament to the Executive can be justified in a number of ways, each of which calls for different levels and forms of delegation:

- allowing for administrative or technical detail to be filled in by the relevant Executive agency, which has greater expertise and time to perform that role than Parliament;
- allowing for a degree of flexibility in regulatory regimes that can adapt and evolve over time without having to go back to Parliament every time a change is needed (for example, in relation to setting a fee schedule);
- allowing for the detail of legislative schemes to be removed from primary legislation, increasing its clarity and accessibility for the public;
- responding in emergency situations where timely responses are vital for effectiveness; and
- respecting the democratic legitimacy of other bodies, such as local governments.

Delegation of legislation power is also said to allow Parliament more time to deal with the more substantive matters of policy and principle that should be contained in primary legislation.

There is clearly merit to these justifications, and, indeed, the still-leading 1931 High Court decision in *Dignan's Case*, Justices Dixon and Evatt both acknowledged the necessity of delegation for 'effective government'.[2] But, the line between effective government and arbitrary government must be respected. As a matter of constitutional principle, legislative power is conferred on the Parliament because of its distinct democratic characters, its diverse,

1 Legislative Council Regulation Committee, *Making of Delegated Legislation in New South Wales* (Report 7, October 2020) ('**2020 Report**') vii, drawing on evidence given from Associate Professor Lorne Neudorf, University of Adelaide, see 2020 Report, 3.

2 *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 (*Dignan's Case*), 117 (Evatt J); see also Owen Dixon 'The Law and the Constitution' (1935) 51 *Law Quarterly Review* 590, 606.

plural representative nature, and its open deliberations. These are not characteristics that the Executive government shares. Further, masses of delegated legislative instruments, made by the Executive, largely in secret, raise serious rule of law concerns around accessibility and clarity of the law, as well as public understanding of the processes through which law is made and becomes enforceable.

A ***simple***, ***robust***, and ***accessible*** regulatory and scrutiny framework meets these constitutional challenges. A well-designed framework balances the justifications behind delegations of legislative power, and the constitutional imperatives of democratic law-making. The Regulation Committee, in its 2020 Report, made the following observation about a misbalance in the current New South Wales framework:

> 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.[3]

Australian jurisdictions have been considered world leaders in relation to their regulatory and scrutiny frameworks. Today, across the jurisdictions, there are many shared characteristics in these frameworks, but there is also evident a diversity of experience and a level of innovation and experimentation. It is from this diversity and innovation that New South Wales, in the review of its own framework, can benefit.[4] Regulation of delegated legislation has also emerged as an important governance issue in foreign Westminster parliamentary systems (in particular, the United Kingdom, Canada and New Zealand). Again, there is comparative experience and innovation that can inform the New South Wales review of its framework. The last two years have seen Government responses to the COVID-19 pandemic in Australian and foreign jurisdictions rely heavily on delegated legislative authority.[5] These experiences have shone a spotlight on a number of unnecessary – and sometimes unconstructive – complexities, and some latent deficiencies and gaps in these regimes.[6] These concerns arise not only for the ongoing COVID-pandemic, and future emergency, context, but raise very immediate questions for the general robustness of the frameworks, and whether they are fit for purpose for contemporary use of delegated instruments, and expectations of democratic accountability.

Of course, comparative work, even within jurisdictions of a single federation, must be done carefully. Consideration of regimes operating in other jurisdictions must be informed by the historical, social, political and economic context in which they operate. This Discussion Paper starts by exploring the unique political and constitutional context in which the New South Wales framework exists, and within which, reform must be considered. A full review

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3 2020 Report, 24.

4 On the benefits of experimentation within federal systems for policy development, see further, Gabrielle Appleby and Brendan Lim, 'Democratic Experimentalism', in Rosalind Dixon, *Australian Constitutional Values* (Hart Publishing, 2018) 221-242.

5 See, eg, for an overview of foreign responses, the Lex-Atlas: Covid-19 project that provides an overview and analysis of national legal responses to COVID-19 around the world: https://lexatlas-c19.org/about/

6 See, eg, Brendan Gogarty and Gabrielle Appleby, 'The role of Tasmania's subordinate legislation committee during the COVID-19 emergency' (2020) 45(3) *Alternative Law Journal* 188; Janina Boughey, 'Executive power in emergencies: Where is the accountability?' (2020) 45(3) *Alternative Law Journal* 168.

of the regulatory (legislative and non-legislative) frameworks for making and overseeing delegated legislation in each Australian jurisdiction has been undertaken, as well as a review of the frameworks operating in the United Kingdom, Canada and New Zealand. A discussion of each of these jurisdictions, and some of the key features and challenges in those jurisdictions is included in **Appendix 2**. The features that have been highlighted in this analysis include:

(1) unique features of the jurisdiction, including explanations of their origin and operation; and

(2) challenges with the current framework that have been highlighted, whether by the parliamentary scrutiny committees themselves, or commentators;

An overview of the statutory and non-statutory frameworks in each jurisdiction is attached as a table in **Appendix 3**.

This Discussion Paper will now turn to provide a brief summary of the current framework for regulating and overseeing the making of delegated legislation in New South Wales **(Part II)**, before turning to an analysis of a comparatively informed set of best practice reforms **(Part III)**.

Part II The evolution of the NSW framework and recent inquiries

The regulatory and scrutiny framework for delegated legislation in New South Wales is fragmented and complex. It has been the subject of recent committee inquiries, by the Legislation Review Committee (2018)[7] and the Regulation Committee (2020). Together these have highlighted a number of issues with the management of delegated legislation in the State that may require reform. In the remainder of this part, I briefly set out the historical context of the regulatory and scrutiny framework in New South Wales, and then turn to the inquiries and set out the issues they raised briefly. These issues are largely reflected in the points of inquiry that have been referred to the Regulation Committee as part of its current Terms of Reference (**Appendix 1**). The purpose of this part, then, is to understand the context behind the current Inquiry and its Terms of Reference.

The current regulatory and scrutiny framework for delegated legislation in New South Wales stretches across three pieces of legislation, and involves the regular work of two different parliamentary committees. **Appendix 3** provides a full breakdown of the framework for making and overseeing delegated legislation, as contained in the *Legislation Review Act 1987* (NSW), the *Subordinate Legislation Act 1989* (NSW) and the *Interpretation Act 1987* (NSW). These pieces of legislation are supplemented by the Legislative Council's Resolution establishing the Regulation Committee, and the *NSW Guide to Better Regulation* (2016). Previously, the Parliamentary Counsel's Office *Manual for the Preparation of Legislation* (8th ed, 2000) also provided some guidance, but this resource is no longer readily available on the Office's website. A summary of the operation of the different piece of legislation is also provided in the Regulation Committee's 2020 Report.[8]

The Committees

The Legislation Review Committee was established in 2002,[9] converting the previous Regulation Review Committee into the Legislation Review Committee with a mandate to review both primary and delegated legislation against a set of scrutiny criteria.[10] The catalyst for this major change in the framework was a 2001 review by the Legislative Council Standing Committee on Law and Justice relating to human rights protection in New South Wales.[11] While the 2001 review did not recommend the enactment of a statutory Bill of Rights, it recommended greater parliamentary scrutiny for human rights through the broadening of the jurisdiction of the Regulation Review Committee, and its function of scrutinising against a set of criteria that included trespassing on rights and liberties.

The Regulation Committee was established on 23 November 2017 on a trial basis following a recommendation by the Select Committee on the Legislative Council Committee System.[12]

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7 NSW Parliament, Legislation Review Committee, *Inquiry into the operation of the Legislation Review Act 1987* (2018) (**2018 Report**).

8 2020 Report 5-6.

9 *Legislation Review Amendment Act 2002* (NSW), amending the *Regulation Review Act 1987* (NSW).

10 *Legislation Review Act 1987* (NSW) ss 8A and 9.

11 NSW Legislative Council, Standing Committee on Law and Justice, *A NSW Bill of Rights* (Report 17, October 2001).

12 NSW Legislative Council, Select Committee on the Legislative Council Committee System, *Report on the Legislative Council Committee System* (2015).

The 2017 establishment of a Legislative Council Committee was informed by the experience in New South Wales from 1960-1987 where, as occurs at the federal level, scrutiny of regulations was undertaken by an upper house committee. In 1987, New South Wales shifted to a different model: a joint parliamentary committee. The Regulation Review Committee commenced under the *Regulation Review Act 1987*. The 2015 inquiry of the Select Committee on the Legislative Council Committee System recommended the establishment of an upper house committee for scrutinising delegated legislation, reflecting the Council's role and culture as a house of review. The Regulation Committee was established with an 'innovative approach to its role … focussing on the substantive policy issues regarding a small number of regulations of interest as well as trends relating to delegated legislation.'[13] This was intended as a response to concerns about the increased use of skeleton (shell) legislation, and the reliance on delegated legislation to implement fundamental policy positions. These concerns have continued to motivate the 2020 Inquiry, and inform the current inquiry's Terms of Reference. Following an evaluation of its trial, the Committee was re-established by a resolution of the Council.[14] The Committee's current terms of reference (which have undergone review since the 2020 Report) are to inquire and report on:

- any instruments of a legislative nature regardless of their form, including the policy or substantive content of the instrument;
- draft delegated legislation; and
- trends or issues in relation to delegated legislation.

Since its establishment, one of the key roles of the Regulation Committee has been to fulfil a policy scrutiny function for delegated instruments that are being considered for disallowance before the Council. To facilitate this, if an instrument is referred to the Committee that is the subject of a notice of motion or order of the day for disallowance in the Council, the notice or order is postponed until the Committee tables its report.[15]

The Regulation Committee was established with four Government members, two opposition members, and two crossbench members, with a Government Chair.[16] The Committee was renewed after its initial trial, in which it conducted two substantive inquiries. On its renewal, a cross-bench amendment to the Government motion establishing the Committee changed the composition so that the Chair was required to be a non-Government member.[17]

The Legislation Review Committee 2018 Inquiry

In November 2018, the Legislation Review Committee handed down the final report on its *Inquiry into the Legislation Review Act 1987* (NSW). This report focussed on two key issues.

13 Ibid, 1.15.
14 The current Resolution establishing the Committee was made 8 May 2019, as amended on 20 November 2020.
15 See further explanation of how this has operated in practice in *New South Wales Legislative Council Practice* (Federation Press, 2nd ed, 2021) 644-5.
16 Minutes, NSW Legislative Council, 23 November 2017, pp 2223-2225.
17 Minutes, NSW Legislative Council, 8 May 2019, pp 101-102.

(a) Strengthening rights scrutiny

The first was the Committee's function of scrutinising bills and regulations, and bringing the attention of Parliament on the ground that they 'trespass[] unduly on personal rights and liberties'.[18] The Committee made recommendations to clarify and bring greater transparency and rigour to Committee scrutiny against this criterion.[19] The Committee also made a number of recommendations to ensure engagement by the Parliament with the work and reports of the Committee, particularly but not exclusively in relation to rights issues.[20]

(b) Subordinate legislation scrutiny – workload and resourcing

The Committee also recommended an amendment to the 1987 Act, to establish a Joint Committee specifically tasked with examining subordinate legislation. This was based on an assessment of the volume of subordinate legislation, and the timeframes within which scrutiny and reporting must be undertaken for these instruments due to the disallowance period. This recommendation was framed so as to take into account the recent practice of the Legislative Council's Regulation Committee (established on a trial basis in 2017), but noted that this Committee had a separate, policy-review, function, and did not undertake the technical scrutiny mandated by s 9 of the *Legislation Review Act 1987* (NSW).[21]

The Committee also considered submissions from a number of stakeholders concerned about the workload of the Committee. The Committee noted its previous practice of relying on an independent panel of experts to advise on potential issues, but that this practice was no longer followed. The Committee ultimately concluded, however, "The Committee considers these issues are matters for the Committee and the NSW Parliament to manage internally."[22]

The Government's response to the Committee's recommendation on establishing a further committee indicated that it "supports measures to ensure appropriate scrutiny of subordinate legislation", but that under s 9 of the *Legislation Review Act*, technical scrutiny of regulations was already undertaken by the Legislation Review Committee. It then noted "resourcing the Committee is a matter for the Parliament."[23]

The Regulation Committee 2020 Inquiry

In 2020, the Legislative Council referred an inquiry to the Regulation Committee in relation to a number of issues. In summary, the concerns were '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'.[24] The submissions and Committee consideration undertaken in this inquiry canvassed these, as well as other issues. Here, it is useful to provide a summary of the issues that the Committee raised.

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18 *Legislation Review Act 1987* (NSW) ss 8A and 9.
19 2018 Report, Finding 1, Recommendations 1-3.
20 Ibid, Recommendations 1-3.
21 Ibid, Recommendation 4, 29.
22 Ibid, 41.
23 Government Response to the *Report of the Legislation Review Committee – Inquiry into the operation of the Legislation Review Act 1987* (Report 1/56, November 2018), 14 September 2021.
24 Minutes, NSW Legislative Council, 26 February 2020, pp. 800-801.

- **The use of shell legislation, Henry VII clauses, and quasi-legislation:** These were motivating issues for the Committee's inquiry. The Committee heard evidence that raised significant concerns as to the overuse of these mechanisms in New South Wales and the inadequacy of the existing scrutiny processes to address this.[25] Possible responses to these concerns included greater guidance to Government agencies in what matters were appropriate to delegate; the extent of reporting and explanation required in relation to such delegations to the Parliament; as well as special tabling requirements relating to regulations made under shell legislation; strengthening statutory presumptions around the incorporation of quasi-legislation; the adoption of affirmative resolution procedures; and targeted, shorter sunsetting provisions. The Committee ultimately recommended on this set of issues that the NSW Government ensure that explanatory notes to Bills:
    - highlight the presence in the Bill of any Henry VIII clauses, shell legislation or quasi-legislation;
    - include an explanation as to why such a broad delegation of legislative power is considered necessary.

  The Government response to this recommendation was supportive – at least in principle, with the caveat that given the process of drafting explanatory notes in NSW (undertaken by legislative drafters) this might be better undertaken in the second reading speeches than the explanatory memorandum.[26]
- **The scope of delegated legislation that is subject to parliamentary scrutiny and disallowance procedure:** The Committee considered the current scope of delegated legislation subject to tabling, disallowance and scrutiny. The interaction of the definition of statutory rule in the *Interpretation Act 1987* and the definition of regulation in the *Legislation Review Act 1987* provides the scope of instruments that are subject to procedures relating to the tabling, disallowance and scrutiny frameworks established by those pieces of legislation. The Committee heard that there are some inconsistencies between the definitions, as well as a general deficiency in the approach in the reliance on the *form* of the instrument, rather than its *legislative nature*. This meant government's extensive use of public health orders under the *Public Health Act 2010* (NSW) in its COVID-19 response were not subject to these procedures, and that quasi-legislation (that is, instruments incorporated into delegated instruments such as Australian Standards) are also not caught by the framework.[27] The use of a form-focused definition raises concerns that legislative schemes may be crafted to avoid scrutiny by the form of instrument they chose, not the substantive effect of it.
- **Timeframes for disallowance and review:** The Committee also heard concerns relating to the timeframe for disallowance – currently set at 15 parliamentary sitting

[25] 2020 Report, 27-31.
[26] Government Response to the Report of the Regulation Committee – Making of Delegated Legislation in New South Wales (Report 7, October 2020) (19 April 2021)
[27] 2020 Report, 6-9.

days after notice of the rule is tabled in the House. Unless a resolution is passed, scrutiny by the Legislation Review Committee must be undertaken in this time period. The policy review undertaken by the Regulation Committee is not so limited. The Committee heard concerns that this restriction hampered Parliament's ability to oversee instruments, as often a full assessment of the impact of an instrument can only be undertaken after it has been in operation for a longer period.[28]

- **Remaking of delegated instruments after disallowance:** The Committee heard concerns that the limit on remaking instruments that are the same in substance within four months of the disallowance by a House (unless that disallowance is revoked) was too short, particularly given the practice of other jurisdictions (the Commonwealth sets a six-month restriction on remaking instruments that have been disallowed).[29]
- **Consultation requirements for making of delegated legislation:** The Committee heard a number of submissions advocating for strengthening the consultation requirements, currently in s 6 of the *Subordinate Legislation Act 1989* (NSW), and supplemented by the *NSW Guide to Better Regulation* (2016). Concerns were raised with the limited scope of the obligation to consult, its unenforceable nature, the level of oversight of consultation, and the need for greater guidance to be provided to Government on the making of delegated legislation and the consultation and reporting requirements.[30]
- **Public accessibility of delegated legislation:** The Committee raised concerns about public accessibility for all the different forms of delegated legislation. While it accepted that the NSW Legislation Website publishes "statutory rules", this is determined by the form and not the substance of the instrument. Other instruments may be published in other forums – in the gazette, on individual departmental websites, and through the Parliamentary Counsel's Office. But the practice is not consistent.[31] This means there is less public transparency and accessibility, through a centralised platform, in relation to instruments that might be legislative in nature, but are not within the definition of "statutory rules". There is also little transparency around which instruments are disallowable and which are not.[32] The Committee recommended that NSW Government agencies give priority to identifying more effective ways to improve public access to all legislative instruments. The Government's response was that it supported this recommendation.[33] However, in the detail of its response, the Government indicated a preference for retaining the status quo in terms of individual departments and agencies determining the best platform for public access to delegated instruments. So, while the NSW Legislation Website

28 2020 Report, 11.
29 2020 Report, 20.
30 2020 Report, 13.
31 2020 Report, 14.
32 2020 Report, 9.
33 Government Response to the Report of the Regulation Committee – Making of Delegated Legislation in New South Wales (Report 7, October 2020) (19 April 2021).

provides a central point for statutory rules, and now COVID-19 public health orders, it is still not a centralised platform for all legislative instruments.[34]

- **Statutory provisions for the regulation of the making and oversight of delegated legislation in New South Wales:** The Committee heard two suggestions for the current form of the statutory provisions regulating the making and oversight of delegated legislation in NSW. The first was to consolidate the three different sources of statutory authority for the making and oversight of delegated legislation to reduce the complexity and confusion, caused, in particular, by the interaction between the definitions in the statutes. The second was to create a consolidated set of uniform standards for scrutiny across primary and delegated legislation, similar to that seen in the *Legislative Standards Act 1992* (Qld).
- **The protection of rights and liberties and delegated legislation:** As detailed above, this issue was the subject of greater consideration in the 2018 inquiry conducted by the Legislation Review Committee. The Regulation Committee again heard concerns that the NSW system for scrutiny of legislation and delegated legislation against human rights was less robust than other jurisdictions. Submissions advocated for greater protections, including through the enactment of a comprehensive bill of rights for New South Wales, or more explicit guidance in relation to the rights scrutiny function that is undertaken by the Legislation Review Committee.[35]
- **Drafting delegated legislation:** The Committee heard concerns directly from the Parliamentary Counsel's Office as to the quality of drafting of statutory instruments. Only 'statutory rules' are required to be drafted by the Parliamentary Counsel's Office. Concerns around legality, accessibility and clarity were raised in relation to instruments not drafted by the Office.

While the Committee made some direct recommendations, many of the issues that are outlined above were not immediately resolved. Rather, the Committee recommended that a further inquiry be undertaken by the NSW Law Reform Commission to determine the desirability of specific changes.[36] The Government decided not to undertake that further inquiry, and the Legislative Council referred the inquiry back to the Regulation Committee.

Some important changes were made following the 2020 Report. In accordance with the Committee's recommendations,[37] the resolution establishing the Regulation Committee was amended,[38] so as to strengthen its scrutiny jurisdiction, in particular, to:

1. expand its jurisdiction beyond regulations, to all legislative instruments regardless of their form, including the policy and substantive content of the instrument;
2. expand its jurisdiction to include draft legislative instruments; and

34 Ibid 2-3.
35 2020 Report, 18-20.
36 2020 Report, 25. Recommendation 2.
37 2020 Report, recommendations, 5 and 6.
38 Minutes, NSW Legislative Council, 20 November 2020, No. 72, Item 3, p 1748.

3. include the power to self-refer inquiries. (emphasis added)

This part, then, has provided the background to understand the issues that sit behind the terms of reference for the current inquiry. These issues have been identified in a New South Wales-specific context, and provide the key terms of reference for the current inquiry. However, the current inquiry should also be informed by the issues that have been raised, considered, and addressed through reform in other jurisdictions, reflecting on the extent to which these jurisdictions demonstrate the forming of a consensus around best practice for the making and oversight of delegated legislation (see further **Appendix 2** of this Discussion Paper).

Part III Developing a best practice framework

Design principles

This final part of the Discussion Paper provides a set of principles to guide the development a set of best practice reforms. This set of principles is informed by the tensions between constitutional principles of separation of powers, democracy and rule of law, and the pragmatism and effectiveness of government, that are set out in Part I of this Discussion Paper. They are also informed by the unique constitutional context of New South Wales. In particular, they have been developed with the following contextual factors in mind:

1. The importance of political resolution and oversight of human rights protection in the State. While there are rights-protective statutes,[39] there has been a consistent reluctance to pursue more holistic statutory rights reform such as through a Charter or Bill of Rights. Rather, there have been expressed in various forums, including the Legislation Review Committee's conclusions in its 2018 Report, that parliamentary oversight and scrutiny of rights issues is the most appropriate forum in the New South Wales context.
2. As in other Australian jurisdictions, the availability of judicial review in relation to the making of delegated legislation in New South Wales is limited, indeed more limited than the availability of judicial review of Executive decision-making. Certain grounds of judicial review – including taking into account relevant considerations and failing to take into account irrelevant considerations, acting under dictation or inflexible application of policy – cannot impugn the validity of delegated legislation. This has been explained by the Court on the grounds that the Court is reluctant to second guess the reasons and motives that lie behind what is essentially a legislative decision.[40] There are also major limits on the application of the ground of failure to comply with natural justice.[41] This more limited role for the courts reinforces the importance of parliamentary oversight over the making and operation of delegated instruments.
3. There is a long history of delegated legislative scrutiny in New South Wales, and the unique combination of technical and policy scrutiny that is undertaken by the Legislation Review Committee and the Regulation Committee, respectively, is a product of this history and context. Any reforms must be alive to this history and context, and build from the strengths of these Committees.
4. The acute and heavy reliance on delegated instruments in New South Wales during the government's response to COVID-19 raised a series of concerns about the complexity and scope of the regulatory and scrutiny framework. Future reform needs

[39] Such as the *Anti-Discrimination Act 1977* (NSW).
[40] See further *Austral Fisheries Pty Ltd v Minister for Primary Industries and Energy* (1992) 37 FCR 463, 477 (O'Loughlin J); *Dignan's Case* 87 (Rich J).
[41] *Kioa v Minister for Immigration and Ethnic Affairs* (1985) 159 CLR 550, 620 (Brennan J).

> to be informed by these lessons, which while they arose in the COVID-19 context, are not necessarily limited to instruments made during that period.

The principles that this Discussion Paper proposes as an analytical framework against which to consider reform proposals are drawn from a statement made by the Chair of the Regulation Committee in the 2020 Report, foreshadowing the need for reform:

> 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.[42]
>
> (emphasis added)

These principles are not mutually exclusive, but, rather, mutually reinforcing.

> **Simple:** Simplicity means a system of delegated legislation, and a framework for regulating its making and oversight by Parliament, that is straightforward. The scope of the framework is relatively easy to ascertain, and exclusions and reasons for exclusions from that scope are readily available, coherent and consistent. Requirements and processes should apply where possible in a uniform way to all delegated legislation, unless there is a clear, coherent and consistent reason for different treatment. Simplicity is a fundamental design principle because it makes the regulatory and scrutiny framework more easily understood by those involved in making legislation (Government agencies and drafters) and those overseeing delegated legislation (parliamentarians) as well as those subject to the obligations contained in delegated legislation (the public). It also means that any exceptions from the general position must be clearly and robustly justified.
>
> **Robust:** A robust framework of parliamentary oversight is necessary to ensure that the Executive's making of delegated legislation is injected with the democratic credentials of the Parliament. This will be particularly the case for delegated instruments that affect individual rights and liberties. In a robust model, any exceptions to the framework for making and overseeing the making of delegated instruments should be narrowly drawn, clear, coherent and consistent. The scrutiny work of the Parliament must be impartial, well resourced, and have realistic timeframes.
>
> **Accessible:** Accessibility, that is, publicity and transparency of delegated instruments is fundamental for public understanding of the full extent of their statutory rights and obligations. Publicity and transparency around the framework that governs the making and oversight of delegated legislation is also key for public accountability for the making of these important instruments of government.

[42] 2020 Report, vii.

The remainder of this Part of the Discussion Paper is guided by these three principles, as well as informed by practice of other Australian jurisdictions, particularly where there has formed a consensus around best practice to address identified challenges. and reforms that have been considered in those jurisdictions. Using these tools, a spectrum of reforms that might be considered appropriate for adoption in the New South Wales context is identified below.

A set of best practice reforms

It is important to remember in approaching the question of what *reforms* might be needed, that the New South Wales regulatory and scrutiny framework already meets, in many respects, many of the design principles of simplicity, robustness and accessibility. It has also been an innovator, leader and reformer across a number of areas that have enhanced its regulatory and scrutiny framework. The establishment of a separate policy scrutiny committee for delegated instruments in the form of the Legislative Council's Regulation Committee, for instance, is one of these areas; the extension of the jurisdiction of the Regulation Committee to consider draft instruments and own motion inquiries, is another. However, in a number of other key areas it is falling short of where consensus has emerged in Australia and oversees around best practice in achieving these objectives.

Below is a set of reforms that have been proposed to address the particular issues that have been identified in New South Wales in ways that best respond to the design principles, and are informed by best practice. These include those issues identified in the 2020 Report, and the Terms of Reference of the current inquiry, as well as other issues that have arisen in New South Wales, or consistently in other jurisdictions that have relevance to the New South Wales experience.

1. Statutory Consolidation

A number of jurisdictions have taken the step to revise older statutory frameworks, and undertake a process of streamlining definitions, and consolidating legislative provisions. This can be seen, for instance, in the Commonwealth's *Legislation Act 2003*, the ACT's *Legislation Act 2001* (ACT) and most recently, in the *Legislation Act 2019* (NZ). The New Zealand consolidation, which replaced the *Legislation Act 2012* and *Interpretation 1999*, was animated by a concern that the interaction between these two older pieces of legislation had been described as "vexing and confusion", particularly the "myriad of definitions" across the statutes.

Similar concerns have been expressed in relation to the framework in New South Wales, spread, as it is, over three pieces of legislation. The 2020 Report of the Regulation Committee explained that "the interaction between the provisions of these Acts is quite complex." The definitions are in substantially but not exactly the same terms, and with some definitions allowing for exemptions but others not. The different requirements regarding the making of rules are spread across a number of statutes.[43] Following the 2020 Report, the scope of the

[43] 2020 Report, 21.

scrutiny function of the Regulation Committee has also been expanded so as to extend to 'any instruments of a legislative nature regardless of its form'. This adds another different – and expanded – definition into the broader oversight framework.

The guiding principles of simplicity and transparency would be furthered by a consolidation of the statutory regimes that govern the making, notice, tabling, publication, consultation, disallowance, remaking, sunsetting and scrutiny of delegated legislation in the one statute. Further, a single, consolidated definition of legislative instruments that applies to the *substance* of the instrument, not its form, would further assist not just the simplicity, but the robustness of the democratic oversight of all legislative instruments. It would also go some way to addressing concerns that instruments of a legislative character that don't meet the definition of 'regulation' are not being drafted by the Parliamentary Counsel's Office and receiving the benefit of their skills and expertise. The recommended scope of the definition is addressed in (2).

Summary:

- The provisions of the *Interpretation Act 1987* (NSW), *Subordinate Legislation 1989* (NSW) and the *Legislation Review Act 1987* (NSW) should be consolidated into a single *Legislation Act* (NSW). The *Legislation Act* should contain all of the provisions relating to the making, consultation, notice, tabling, publication, disallowance, remaking, sunsetting and scrutiny of primary and delegated legislation.
- A single definition should be adopted to apply to all legislative and scrutiny frameworks.

2. Definitional clarity and robustness

There are serious concerns around fragmentation and complexity in the application of the regulatory and scrutiny framework for delegated legislation, caused by the differences in definitions used across the statutes. These would be addressed in a way that increases simplicity, robustness, and accessibility by extending the requirements for making, disallowance and scrutiny in the statutory regimes to *all* delegated instruments of a legislative character. This would address concerns about gaps in the accountability system by reference to the requirement that instruments be in the *form* of 'statutory rules'. As was demonstrated in the government's use of public health orders to respond to the COVID-19 pandemic emergency, there are delegated instruments that are not formally within the definition of 'statutory rules' but that are of a legislative character and have significant impact on the rights and liberties of individuals.

A change in focus is needed from the *form* an instrument, to the *substantive effect* of the instrument. Guidance from the Regulation Committee (see (5), below) should be provided to Government departments as to how to assess when instruments are of a legislative character so as to fall within the definition. A process should also be established that is simple and clear as to how to resolve ambiguous situations. This should not leave the final determination to the Executive government. Rather, where there is doubt, the Executive should seek the advice

of the Committee. It is imperative for the robustness of a democratic oversight regime that it is the Parliament, and not the Executive, who has the final say as to when an instrument is or is not of a legislative character.

There is much merit in the suggestion of the Senate's Scrutiny of Delegated Legislation Committee that if a broad definitional scope is adopted, any exemptions from the full framework of scrutiny and disallowance should be strictly regulated. Some exemptions may be justifiable, but all exemptions should be in primary legislation, and guided by statutory criteria for granting such exemptions, supplemented by Guidance (see further (5), below) from the Parliament as to the limited circumstances in which it might be appropriate for instruments not to be subject to the regulatory and scrutiny framework. In particular, exemptions should not be granted:

(a) where instruments adversely affect rights, liberties, duties and obligations; and

(b) unless there is an alternative form of accountability (such as local council by-laws, or University Senate by-laws).

In the Guidance, there should be an outright prohibition of exempting Henry VIII provisions and instruments from the framework.

Finally, there should be transparency as to when legislative instruments are not subject to the scrutiny and disallowance regime. As recommended in (3), below, all instruments should be contained on the NSW Legislation Website, which should also indicate where instruments are exempted from any part of the regulatory and oversight framework, and most importantly any exemptions from parliamentary disallowance.

Summary:

- The scope of the new *Legislation Act* should extend to all instruments of a legislative character. If a consolidated statute is not adopted, the definitional scope of the *Interpretation Act 1987* (NSW), *Subordinate Legislation 1989* (NSW) and the *Legislation Review Act 1987* (NSW) should be streamlined, and extend to all instruments of a legislative character.
- Limited exemptions should be permitted from the definition and framework, but these exemptions must be made in primary legislation, and guided by the following criteria:
    a. exemptions should not be granted where instruments adversely affect rights, liberties, duties and obligations;
    b. exemptions should not be granted unless there is an alternative form of accountability;
    c. exemptions should never be granted for instruments made under Henry VIII provisions.
- Guidance from the Regulation Committee (see (5), below) should be provided to Government departments on:
    - how to assess when instruments are of a legislative character;

- how to seek the advice of the Committee if there is uncertainty;
- how to obtain a final decision as to the scope of the definition from the Committee;
- the limited circumstances in which it might be appropriate for instruments to be exempted from the regulatory and oversight framework.

- The NSW Legislation Website should include all legislative instruments (see (3), below), and indicate if an instrument has been exempted from the framework for making and overseeing delegated instruments.

3. Increasing public accessibility

The NSW Government's response to the Regulation Committee's 2020 Report confirmed that while all statutory rules are published on the NSW Legislation Website, other legislative instruments may be published on individual agency websites, and not in the central repository. This position raises significant transparency and simplicity concerns. While it might be considered desirable for instruments to be available on individual agency's websites, there is a level of simplicity, transparency and holistic understanding of NSW statute book that is gained from having a single, public-facing, online repository of all statutes, both primary and delegated. Further, transparency of the robustness of the democratic oversight of the statute book would be gained where all instruments are contained in the one place, and it is indicated clearly where those instruments are exempted from any part of the regulatory and oversight framework.

Separate to publication on the NSW legislation website, is the public parliamentary record. There is a requirement in s 40(1) of the *Interpretation Act 1987* (NSW) that the written notice of the making of statutory rules must be tabled within 14 parliamentary sitting days of the day on which it is published on the NSW legislation website. However, according to s 40(4),

> Failure to lay a written notice before each House of Parliament in accordance with this section does not affect the validity of a statutory rule, but such a notice must nevertheless be laid before each House.

This provision undermines the strength of the tabling obligation in s 40(1). The tabling obligation is an important, additional dimension of ensuring the transparency and accessibility of legislative instruments, and the completeness of the official parliamentary record. This means notice of those instruments are recorded in the parliamentary proceedings, not just a Government website. This provides an official, point in time, publicly accessible record. Making the ongoing validity of the statutory rule dependent on meeting those tabling requirements – as occurs, for instance, at the federal level,[44] would achieve this.

[44] *Legislation Act 2003* (Cth) s 38(3).

Summary:

- The NSW Legislation website publish all legislative instruments as soon as they are made (in addition to individual agencies deciding to publish instruments on their own websites).
- The NSW Legislation website clearly indicate where those instruments are exempted from any part of the regulatory and scrutiny framework.
- The obligation to table the notice of making of a statutory rule in s 40(1) of the *Interpretation Act 1987* (NSW) should be enforceable through an amendment to s 40(4), which invalidates any rule that is not duly tabled in the Houses.

4. Extending the role of the Legislative Council Regulation Committee

As is explained in Part I above, the scrutiny function of the Legislative Review Committee was, before 1987, performed by a committee of the Legislative Council. The composition of the Legislation Review Committee and the Council's Regulation Committee differs in key respects. The Legislation Review Committee is a Joint Committee and must consist of 5 members from the Legislative Assembly and 3 members from the Legislative Council. Its current composition is 5 Government members and 3 non-Government members, with a Government Chair. The Regulation Committee is a Legislative Council Committee, and according to its resolution must consist of 4 Government members, 2 Opposition members and 2 cross-bench members, with a non-Government chair.

The stark difference in the Government dominance of these two committees reveals concerns about the ability of the Legislation Review Committee to undertake its functions. In other jurisdictions Government dominance of the similar joint scrutiny committees has led to concerns that Government Committee members are shielding legislative instruments from robust scrutiny, or even just the perception that this is occurring. Robust scrutiny, and the perception of robust scrutiny of the Executive's exercise of delegated legislative power, would certainly warn against scrutiny by a Government-dominated Committee. At the Commonwealth level, the scrutiny committee is an upper house committee. This reflects the particular role of upper houses in Australia in maintaining the democratic oversight of Executive action, and thus performing a key function in the practice of responsible and accountable government.[45]

Indeed, it was exactly this concern that motivated the establishment of the Council's Regulation Committee in November 2017. The Select Committee on the Legislative Council Committee System noted in 2015 two issues of concern. The first was that the combined functions of scrutinising bills and regulations in the Legislation Review Committee 'was inefficient and that the scrutiny of regulations was gradually diminishing.'[46] The second was that the Committee's scrutiny and oversight work sat squarely within the role of the

[45] *Egan v Willis* (1998) 195 CLR 424, 451 (Gaudron, Gummow and Hayne JJ), and see discussion in *New South Wales Legislative Practice* (Federation Press, 2nd edition, 2021) 19.

[46] Select Committee on the Legislative Council Committee System, Legislative Council, *Report on the Legislative Council Committee System* (2015) [1.12].

Legislative Council as a house of review. While the recommendation at that time was that the new Legislative Council Committee provide policy scrutiny only, this has left the concerns about the technical scrutiny being undertaken in the Legislative Review Committee unaddressed.

Now that the Regulation Committee has been established, and has operated as a successful, selective policy scrutiny committee, it is an opportune time to consider whether an increase in its functions is desirable. As an initial step, the composition of the committee that undertakes the delegated instrument scrutiny function must be considered. The current Government dominance of the Legislation Review Committee raises concerns. There are different ways to respond to this. One way might be to change the composition of the Legislation Review Committee, increasing the representation from the Legislative Council and non-Government members.

However, a response that more directly responds to the concern that the scrutiny function is most appropriately located in the Legislative Council, is to return the technical scrutiny function to the Council. This could be achieved for instance, by this function being shifted from the Legislative Review Committee to the already-established Regulation Committee, and an amendment made to Parts 2 and 3 of the *Legislation Review Act 1987* (NSW) to reflect that change. Alternatively, the Legislative Council may amend the resolution setting the functions of the Regulation Committee to extend them to include the scrutiny functions set out in s 9 of the *Legislation Review Act*. While this might, at least initially, involve a duplication in the work of the Committees, it would provide an opportunity for the Regulation Committee to undertake the scrutiny work, and for an assessment to then be made as to whether it is being performed with greater robustness. This might provide the evidence for further reform.

One advantage of extending the function of the Regulation Committee to include technical scrutiny is that, if properly resourced, this function would complement the current policy review function of that Committee. An obligation to review all instruments that are subject to disallowance when they are first tabled in the Houses would alert the Committee to potential instruments that might appropriately be the subject of a further inquiry into the substantive policy.

Of course, if this role were to be the bestowed on the Regulation Committee, this would dramatically increase its workload (which would now extend to all legislative instruments subject to disallowance) and the technical nature of its scrutiny. It would be imperative that this change should be accompanied by an increase in resourcing and secretarial support. In recognition of the technical nature of the work, and as has been noted in other jurisdictions, the Committee should also be assisted by a permanent legal adviser. This is similar to the practice in a number of jurisdictions, where a legal adviser is appointed to assist the Committee in the technical and detailed scrutiny work (see, for instance, the appointment of a legal adviser to assist the Senate's Scrutiny of Bills and Scrutiny of Delegated Legislation Committees).

Summary:

- The Legislative Council amend the resolution establishing the Regulation Committee and extend its functions to include to inquire and report on instruments of a legislative nature that are subject to disallowance against the scrutiny principles set out in s 9(1)(b) of the *Legislation Review Act 1987* (NSW).
- The Regulation Committee's secretariat should be increased to support this additional work; and the Committee should be supported by a dedicated legal adviser for its technical scrutiny function.
- The practice of providing for the appointment of an ad hoc external legal adviser for the Regulation Committee's thematic inquiries as is deemed necessary should be retained.

5. Increased guidance to Government from the Regulation Committee

At present, there is limited guidance provided by the Parliament through either of the Committees to Government departments and agencies as to the Committees' expectations in terms of the information and justifications they require to fulfil their functions. The Parliamentary Counsel's Office Guide is also no longer being published to assist Government in preparing delegated legislation. This lack of guidance is particularly notable in contrast to other jurisdictions, where the scrutiny committees, often in conjunction with material provided by the Office of Parliamentary Counsel and Government itself (whether that be through the Prime Minister & Cabinet/Premier and Cabinet office, or the Department of Treasury), provides significant advice to ensure Government meet its disclosure obligations to Parliament, and help improve the making and oversight of delegated instruments. Notable examples here include the Victorian, Queensland and Commonwealth regimes.

Such guidance increases the simplicity and understanding of the functions performed by the Committees in overseeing delegated legislative instruments by those in Government, and also has the potential to increase the robustness of the exchange of information between the Government and the committees, leading to more effective scrutiny of instruments. There is a strong constitutional argument that guidance to Government on requirements for parliamentary scrutiny is driven by the Parliament and its committees, and not left to the Office of Parliamentary Counsel or the Cabinet to direct within Government. Rather, it forms part of a constitutional dialogue between the legislative and executive branches.

Summary:

- A series of Guidance Notes be developed by the Regulation Committee, that relate to key issues, including:
    - How to assess whether an instrument is a legislative instrument and therefore subject to scrutiny.

- How to assess whether it is appropriate to exempt an instrument from any aspect of the regulatory and scrutiny framework.
- What information should be provided to the Parliament in relation to the scrutiny principles, particularly justifications if there are any incursions into personal rights and liberties, and information on the level, nature and response to consultation that has been undertaken in relation to the instrument.
- If a delayed commencement date is adopted (see (11), below), the circumstances in which it might be justifiable for a legislative instrument to commence before 21 days after it is first published.

- These Guidance Notes should be subject to regular updating based on the ongoing experience of the Committee.

6. Stricter regulation, transparency and oversight of incorporation of quasi-legislation

There is currently a general and unlimited power in s 42(1) of the *Interpretation Act 1987* (NSW) for delegated instruments to incorporate other documents. Section 69(1) creates a rebuttable presumption that reference to an incorporated document is a reference to a document at the date on which the provision containing the provision took effect.

There are three ongoing concerns about the NSW regulation of the incorporation of material. The first is whether the general and unlimited power of incorporation in s 42(1) should be replaced with the reverse presumption: requiring that only delegations that make express provision for incorporation allow incorporation (as seen in s 14(2) of the *Legislation Act 2003* (Cth). This would limit the use of quasi-legislation, except in those situations where the Parliament explicitly anticipates the need to incorporate, for instance, documents such as the Australian Standards. This would increase the robustness of parliamentary authorisation of the use of such instruments.

The second is whether a requirement should be included for all incorporated material to be tabled in Parliament with the delegated instrument, or otherwise made publicly available. If provision is made for incorporation to occur from time to time, an obligation to table and publish documents whenever a change occurs should also be included. This would address the significant concerns around accessibility of incorporated materials.

The third is whether this material should itself be subject to scrutiny and disallowance, that is, it should be deemed a legislative instrument. This would bring with it requirements for consultation, publicity, scrutiny and disallowance in relation not just to the instrument incorporating the material, but the material itself.

Summary:

- Section 42(1) of the *Interpretation Act 1987* (NSW) should be amended so that incorporation of other documents is only permitted where the individual primary legislation delegating authority permits this.

- All material that is incorporated in legislative instruments should be deemed to be a legislative instrument, and subject to the consultation, publicity, scrutiny and disallowance framework.
- The presumption in s 69(1) of the *Interpretation Act 1987* that a reference to an incorporated document is a reference to a document at the date on which the provision containing the provision took effect is retained. If documents are incorporated from time to time, any changes to the document is treated as a change to the legislative instrument, and subject to the regulatory and scrutiny framework.

7. Greater transparency for rights scrutiny

This Discussion Paper is not the appropriate forum to undertake a comprehensive consideration of the best form of rights-protection for the State of New South Wales, and in particular, whether the framework for scrutiny of delegated legislation ought to be supplemented, as it is now in the ACT, Victoria, Queensland and the Commonwealth, with a rights-specific scrutiny framework, for instance through a bill or charter or rights, or a dedicated parliamentary rights-scrutiny mechanism. Rather, this Discussion Paper proceeds within the current framework for parliamentary rights scrutiny, with a focus on improving those processes as they relate to delegated legislation.

The 2018 Report of the Legislation Review Committee raised concerns about the transparency of its rights scrutiny function under the *Legislation Review Act*, and in particular the clarity around the substance of the rights against which scrutiny would occur, and how Government justification of incursions into rights would be evaluated. It considered '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 Session.'[47] This has not been followed. The concerns around the transparency and accessibility in relation to how the Committee will undertake its scrutiny of primary and subordinate legislation, therefore, remain.

One of the ways greater clarity and robustness of the rights scrutiny function might be achieved is through the adoption of a set of uniform scrutiny criteria across both primary and subordinate legislation, such as those in the *Legislative Standards Act 1992* (Qld). However, this course may not be desirable for two reasons. The first is that, in many respects, there is already a level of uniformity of expectation for scrutiny across primary and subordinate legislation in ss 8A and 9 of the *Legislation Review Act*. Indeed, these scrutiny principles largely reflect the Legislative Standards set out in 4 of Queensland's *Legislative Standards Act*. The second is that the *Legislative Standards Act* itself provides some greater explanation of the nature of the scrutiny involved than the New South Wales statute, but not a huge amount more. Rather, where the expectations of Government in relation to rights compliance in Queensland is given greater clarity and explanation is the supporting guidelines to Government that accompany the Standards – from across various offices including the Office

[47] 2018 Report, Finding 1.

of Parliamentary Counsel, Department of Premier and Cabinet, the Executive Council, Cabinet Handbook and Legislation Handbook.

It would seem, therefore, that the most efficient and likely at least equally effective method of increasing the robustness of Committee oversight of incursions into rights and liberties is to increase the guidance that is given to Government as to the Committee's expectations as to types of rights and liberties that will engage the scrutiny criterion, and the level and nature of justification required for incursions into rights and liberties.

Summary:

- Guidance from the Regulation Committee (see (5), above) should be provided to Government departments and agencies on:
    - the personal rights and liberties that the Committee will scrutinise pursuant to the scrutiny criteria in s 9(1)(b) of the *Legislation Review Act*; and
    - how the Committee will approach its scrutiny of the Government's public interest justifications for incursions into personal rights and liberties.

8. Increased oversight of consultation

The current consultation requirements in s 5 of the *Subordinate Legislation Act 1989* (NSW) for principal statutory rules are, by virtue of s 9 of that Act, given no legal enforceability. This reflects similar "no legal enforceability" provisions in the federal *Legislation Act 2003* (ss 17 and 18). The Senate's Scrutiny of Delegated Legislation Committee has reported ongoing challenges in overseeing compliance with consultation requirements. These have been coupled with recommendations from the Senate's Scrutiny of Bills Committee to make the consultation requirements enforceable. The Senate has amended the Scrutiny of Delegated Legislation Committee's terms of reference to make a separate scrutiny criterion: "those likely to be affected by the instrument were adequately consulted in relation to it", and issued guidelines to Government about the information it will require in undertaking scrutiny under this criterion.

In New South Wales, the Legislation Review Committee already has express oversight over compliance with s 5 of the *Subordinate Legislation Act* (relating to consultation) under s 9(b)(viii) of the *Legislation Review Act 1987* (NSW). And yet, there are still concerns with the level of compliance with, and transparency about, the Government's consultation obligations.

There are, however, challenges with making consultation obligations 'enforceable' against the Government. Creating a judicially enforceable obligation opens legislative instruments up to an avenue of judicial challenge that is not available against primary legislation; and could lead to major instability in the statute book. It would be more consistent with the process for the passage of primary legislation for the Parliament to retain oversight over the level of consultation undertaken in the making of delegated legislative instruments, but to increase the robustness of the democratic scrutiny of consultation. This could be done by issuing greater Guidance to the Government from the Committee as to expectations both in terms of meeting

the consultation requirements, and reporting to the Committee on the adequacy of the consultation. It might also increase scrutiny of consultation by making explicit in the functions of the Committee, currently contained in the *Legislation Review Act*, that one of its scrutiny criteria is adequacy of consultation and compliance with the obligation in s 5 of the *Subordinate Legislation Act* (making more explicit the current references which are simply to ss 4-6 of the *SLA*). It might also make explicit in s 9 (1)(c) of the *Legislation Review Act* that failure to meet the Committee's expectations of consultation in s 5 of the *Subordinate Legislation Act* can be a ground in and of itself for recommending disallowance to the House.

Summary:

- Section 9(1)(b) of the *Legislation Review Act 1987* (NSW) be amended to make explicit the Legislation Review Committee's role in scrutinising adequacy of consultation, and that it can recommend disallowance to the Houses on the basis of failing to meet consultation expectations.
- Guidance from the Regulation Committee (see (5), above) should be provided to Government departments and agencies on the expectations of the Committee in relation to the consultation requirements, and reporting to the Committee on the adequacy of the consultation.

9. Extending Scrutiny and Disallowance

The scrutiny timeframe for the Legislation Review Committee is tied to the period during which the regulation is subject to disallowance by resolution of either or both Houses of Parliament,[48] although this timeframe does not apply if the Committee resolves in this period to review and report on the regulation.[49] Under s 41 of the *Interpretation Act 1987* (NSW), statutory rules are subject to disallowance by either House of Parliament before notice is laid before the House, or after notice is laid but only if notice of the resolution is given within 15 sitting days of the House after the relevant written notice was laid. There is no timeframe for the policy scrutiny undertaken by the Regulation Committee.

There is a danger that the technical scrutiny timeframes create unsustainable workloads and time pressures for the Legislation Review Committee, particularly in light of the resourcing staff support issues canvassed above at (4). There is also a concern that the extent and effect of the practical operation of the statutory rule will not be appreciated until after the 15 sitting days has elapsed, meaning scrutiny and possibly recommendations for disallowance to the Houses is not fully informed by an understanding and critique of the practical operation of the legislative instrument. Limits on time for scrutiny and disallowance are justified in the objective of providing greater levels of certainty and consistency through statutory rules: a time-limited disallowance provides a balance between democratic oversight, and the rule of law ideals of certainty and consistency. However, this idea of a "balance" that must be achieved between these principles overlooks that primary legislation is always subject to

[48] *Legislation Review Act* s 9(1).
[49] *Legislation Review Act* s 9(1A).

repeal by the Parliament at any time in the future. It might be argued that the ability of just one House to disallow subordinate legislation might create greater uncertainty compared to primary legislation, which requires both Houses to agree to repeal or amend primary legislation. Indeed, the only jurisdiction that has no time limits in relation to disallowance is New Zealand, that operates under a unicameral system.

There would be justification, however, in the New South Wales context to allow explicitly for disallowance outside the time period where both Houses pass disallowance resolutions. This change would also provide an opportunity for the Houses to consider a late report from the Legislation Review Committee, should it resolve to provide a report outside the disallowance period, and to consider reports of the Regulation Committee, which are not limited to within the disallowance period.

It was suggested in the Regulation Committee's 2020 inquiry that New South Wales should also consider introducing a public complaints process.[50] Such a process is in place in New Zealand, which allow members of the public to bring to the attention of the Committee any issues with existing delegated legislation, which then triggers Committee consideration of the complaint, with the complainant given an opportunity to address the Committee, that may lead to a full inquiry and report to Parliament. There is merit in allowing for members of the public to write to the Parliament, and the Committee, to draw attention to potential issues with delegated instruments, as it increases the potential robustness of democratic oversight. However, it does not necessarily flow that this requires the formalisation of a complaints process as has occurred in New Zealand. Formalisation would trigger Committee review, and potentially the right to address the Committee and a full investigation. This might be considered undesirable particularly where the Committee is already under workload pressures. However, the objectives of increased democratic oversight would seem adequately addressed through an extension of the power of disallowance outside the time limits to both Houses, coupled with the already existing ability of members of the public to write to the Committees to bring to their attention any issues with delegated legislation.

A further question in relation to extension of disallowance is whether the Houses' power to disallow statutory rules, whether in whole or in part, in s 41 of the *Interpretation Act 1987* (NSW), should be extended to *amending* statutory rules. Reflecting the constitutional requirement for both Houses to pass legislation, there is no power for one House to amend a statutory rule. Now, in some senses, the ability to disallow a portion of a statutory rule is, in effect, amending the operation of a statutory rule, but this is at a different level from actively rewriting the rule, or parts of it. In Western Australia, provision is made for amendment or substituting regulations, but this requires resolutions of both Houses.[51] In New Zealand, there is the power to amend secondary legislation, but, it is important to remember that the New Zealand Parliament operates in a unicameral system, without the requirement of both houses to engage with the passage of legislation. Both of these systems thus recognise the challenge of allowing for amendment of statutory rules by the legislature, particularly in a bicameral system. Given the lack of clear consensus of practice on the issue emerging in other

[50] See 2020 Report, 11.
[51] *Interpretation Act 1984* (WA) s 42(4).

jurisdictions, and the constitutional principles at play, the current New South Wales position would seem appropriate. This position still allows for the Houses to disallow instruments in whole or part, and the Executive to make responsive amendments to that disallowance (subject to the restriction on remaking an instrument that is the same in substance, see (10) below), or for the House to pass primary legislation if that is desired.

Summary:

- Section 41 of the *Interpretation Act* should be amended so that disallowance may be allowed after the time limits set in 41(1) if passed by a resolution of both Houses.

10. Further restricting the ability to remake disallowed instruments

The restriction on the ability for the Executive to remake instruments that have been recently disallowed is intended to protect the integrity and robustness of the democratic mandate of the Parliament, expressed through a disallowance motion. It is also intended to promote the stability – and therefore simplicity and clarity – of the statute book. If the Executive were able to remake, immediately, a disallowed instrument, this would have the effect of potentially undermining the Parliament's will, as the new instrument would come into effect when made, although it would be subject to further disallowance. Depending on when Parliament is sitting, a remade instrument may be in effect for a relatively long period of time before Parliament is able to consider it again. This is, in effect, subverts the desires of the legislature.

Of those jurisdictions that limit the power to remake instruments that have been disallowed, New South Wales currently has the shortest timeframe: four months, unless the resolution of disallowance has been rescinded.[52] In contrast, other jurisdictions (Commonwealth, ACT and Northern Territory) have six-month limits, and Tasmania has a 12-month limit. There is, of course, a need to balance the integrity of the democratic will of the House expressed through a disallowance motion, and the possibility that changed circumstances might mean that a rule that has been disallowed at one date, might no longer be seen as undesirable. However, given the possibility of subverting the legislature, outlined above, it is appropriate to strike a balance between respecting the disallowance motion, and allowing for remaking at an appropriate time. This balance would seem most appropriately struck through a longer period preventing remaking, subject to the relevant House rescinding its disallowance motion.

Summary:

- Section 8(1) of the *Subordinate Legislation Act 1989* (NSW) be amended so as to increase the time period that a statutory instrument cannot be remade to six months after the motion of disallowance.

[52] Section 8(1) of the *Subordinate Legislation Act.*

11. Delayed commencement times

While the general position in Australian jurisdictions is that delegated instruments commence on the date that they are made, it is well accepted in New Zealand and the UK that instruments should generally commence 28 or 21 days (respectively) after they are made. Delayed commencement facilitates public accessibility of the instruments, as well as provides an opportunity for parliamentary scrutiny to occur *before* the instrument has commenced, increasing robustness of that scrutiny. An alternative way to provide greater oversight would be to adopt affirmative resolution procedures, where the Houses must positively resolve to adopt instruments (as is seen with some instruments in the UK), but, given the sheer volume of the instruments involved, this would create an unrealistic workload for the Committee. Rather, delayed commencement times within the current framework of disallowance would seem to strike a more appropriate balance between robust oversight and operational efficiency. For these reasons, delayed commencement times has also been recommended at the federal level by the Senate's Scrutiny of Delegated Legislation Committee.

Summary:

- Section s 39A of the *Interpretation Act 1987* (NSW) should be amended so that legislative instruments should commence, unless otherwise permitted in the primary legislation, 21 days after they are first published.
- Guidelines should be issued by the Regulation Committee (see (5), above) as to when it would be justifiable for instruments to be permitted to commence before the 21-day rule.

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Scrutiny of delegated instruments associated with national/uniform schemes

A short comment is necessary in relation to the scrutiny of delegated instruments associated with national (uniform) schemes. These are instruments that are made under a piece of primary legislation that has been enacted in New South Wales, but forms part of a uniform, national scheme that has been agreed to through an Executive forum, such as COAG, or National Cabinet.

These schemes raise particular challenges for parliamentary scrutiny. This is in terms of the primary legislation implementing the schemes, where Parliament may feel pressured into adopting legislation that has been agreed to by the Executive in such a forum. It also raises questions about how delegated instruments adopted under those schemes, which might also be part of the uniform scheme, can still be subject to robust parliamentary oversight. There are arguments that such instruments may have already been through a sufficient process of negotiation and scrutiny, albeit in an Executive forum. There is also a concern that if local parliamentary scrutiny were allowed, and potential disallowance, this might undermine the national, cooperative objectives of the schemes. Against this is a concern that, if parliamentary scrutiny is exempted in whole or part, there is no democratic oversight of these instruments.

At the federal level, there is an exemption from disallowance for instruments that facilitates the establishment or operation of an intergovernmental body or scheme involving the Commonwealth and one or more States or Territories, unless the instrument is a regulation, or the enabling legislation or some other Act has the effect that the instrument is disallowable.[53] The Scrutiny of Delegated Legislation Committee, in its 2021 report into exemptions from disallowance, recommended that this blanket exemption be removed.[54] Other jurisdictions have some exemptions for instruments associated with national schemes. For instance, in Queensland and South Australia, there are some exemptions for instruments made under such schemes from the ordinary sunsetting provisions.[55] In Tasmania, Victoria and the ACT there are some exemptions from the general consultation requirements for instruments that are part of a national scheme where that scheme might itself have consultation requirements.[56] In Western Australia there is standing committee established specifically to review legislation under these schemes: the Standing Committee on Uniform Legislation and Statutes Review, although this is focussed on primary, rather than delegated, legislation. In New South Wales, there are no explicit exemptions for such schemes from the regulatory and scrutiny framework for delegated legislation.

In the late 1990s/early 2000s, there was a national working group that was established across all of the scrutiny of legislation and subordinate legislation committees. This working group released a national position paper recommending a robust, tailored way for parliamentary scrutiny and oversight to be established for national schemes, in relation to primary and secondary instruments. It recommended uniform scrutiny principles and possibly the establishment of a National Committee for the Scrutiny of National Schemes of Legislation.[57] The proposal was never implemented.

While this Discussion Paper is not the place to undertake a full assessment as to the most appropriate way to ensure effective parliamentary scrutiny and oversight of national/uniform schemes, it is worth noting that there still remains no national consensus position as to best practice for instruments under such schemes, and it might be an issue that the Regulation Committee might wish to consider in a thematic inquiry in the future, possibly in collaboration with other scrutiny committees across the country.

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53 *Legislation Act 2003* (Cth) s 44(1)(a).

54 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight: Final Report* (16 March 2021), Recommendation 3.

55 *Statutory Instruments Act 1992* (Qld) s 56; *Legislative Instruments Act 1978* (SA) s 16A(d).

56 *Subordinate Legislation Act 1992* (Tas) s 6; *Subordinate Legislation Act 1994* (Vic) ss 8 and 12F; *Legislation Act 2001* (ACT) s 36.

57 Commonwealth, Scrutiny of National Schemes of Legislation-Position Paper, Working Party of Representatives of Scrutiny of Legislation Committees, 1996.

Appendix 1

Terms of reference for Inquiry into options for reform of the management of delegated legislation in New South Wales

Referred for inquiry to the Regulation Committee by the Legislative Council on 24 November 2021:

(1) That this House note that in its report entitled 'Making of delegated legislation in New South Wales', dated October 2020, the Regulation Committee recommended in 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.'

(2) That this House notes the government's response to the Regulation Committee's report, dated 19 April 2021, in which Recommendation 2 was not supported.

(3) That, in the absence of a referral by the Attorney General to the NSW Law Reform Commission, this House:

(a) refer the Regulation Committee's report and evidence back to the committee for further inquiry and report into options for reform of the management of delegated legislation in New South Wales, and

(b) authorise the committee to engage an external legal adviser to assist the committee in its inquiry into options for reform of the management of delegated legislation in New South Wales.

(4) That the committee commence its inquiry in February 2022 and report by the first sitting day in August 2022.

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Appendix 2

Comparative Review – Discursive Analysis

Commonwealth

The Senate Committee was established as the Senate Standing Committee on Regulations and Ordinances" in 1932.[58]At that time it was a world leader, established prior to the Donoughmore Committee in the UK famously brought the potential of delegated legislative power into the public eye.[59] The Senate Committee was initially established to assist the Parliament scrutinise those instruments that were subject to disallowance by the Parliament – but as the breadth and nature of delegated legislation changed, the Committee's work also evolved, and concerns have been raised as to the restrictions on its jurisdiction relating to disallowable instruments. The other distinguishing feature of the Senate Committee when it was initially established was that it was established as a technical scrutiny committee, not intended to examine the policy merits of the delegated instrument. This continues to define the Committee's role today, and the other scrutiny committees across the country (with the exception of the NSW Regulation Committee); although it has given rise to concerns regarding the scrutiny of substantive policy merits of delegated instruments.

After almost a century of its operation, in 2018-2019, the Senate Standing Committee on Regulations and Ordinances conducted a full review of the oversight of delegated legislation. This inquiry revealed a number of issues of serious concern that had emerged in the practice of delegated legislation by the Executive, and the oversight by the Parliament. The Review looked at the "Committee's continuing effectiveness and future direction".[60] As part of this review, the Committee undertook travel to the UK and NZ, and was informed by this comparative practice.[61] Following this report, the Committee undertook a deeper review into one area of its earlier inquiry: the exemption of instruments from disallowance and sunsetting, and reported on that issue in 2020 and 2021.[62] The government's responses to these reports have indicated that many of the legislative reforms proposed will be subject to consideration in the current review of the *Legislation Act 2003* (Cth), and so it has largely deferred its response.[63] The three recent reports of the Committee provide an excellent oversight of the issues and reforms of interest at the federal level, and form the basis of the summary of issues set out below.

1. *Broadening powers of the Committee: draft delegated legislation, and expanded powers of inquiry*

In 2019, the Committee recommended that its terms of reference be expanded in Standing Order 23 to include two new powers.

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58 Following the report of the Senate Select Committee on the Standing Committee System, *Second Report*, July 1930, 3.

59 *Report of the Committee on British Parliament Ministers Powers* (1932).

60 Senate Standing Committee on Regulations and Ordinances, *Parliamentary Scrutiny of Delegated Legislation* (3 June 2019) ix ('2019 Report').

61 Ibid.

62 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight: Interim Report* (2 December 2020); Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight: Final Report* (16 March 2021).

63 See further: https://www.ag.gov.au/legal-system/administrative-law/legislation-act-2003/2021-22-review-legislation-act-2003

The first is the scrutiny of *proposed* (draft or exposure drafts of) delegated legislation in accordance with its scrutiny principles. The Committee noted that this would not be a usual or general practice (in that it would not consider drafts of the bulk of instruments that are made), but it would provide an express power to do so, for instance, where broad framework bills are introduced into Parliament that are accompanied by already drafted instruments that are intended to provide significant detail, or where there are significant legislative instruments proposed to be introduced.[64]

The second is to undertake general inquiries, including holding public hearings, meet where and when it sees fit, and to conduct business when the Parliament is adjourned,[65] and the power to undertake own motion inquiries (self-references).[66] In 2019 the Committee argued that the own-motion power could prove to be an important one, allowing it to undertake inquiries into systemic issued identified through its routine scrutiny work. In 2020-2021, the Committee undertook such an inquiry into exemptions from disallowance and sunsetting, demonstrating the value of the power.

2. *Consultation*

In 2019, the Committee noted it has "longstanding concerns regarding the consultation requirements in the *Legislation Act*",[67] including in relation to lack of Government understanding of the consultation requirements, the provision of inadequate information on consultation to the Committee, and overreliance on exemptions.[68] These concerns exist because of the tension created by s 17 of the *Legislation Act*, where the responsibility for determining the required consultation rests with the rule-maker, but the Committee has a transparency and accountability role in relation to the consultation that has been undertaken, reinforced by the requirements in the Act for the Explanatory Statements to detail the consultation undertaken.[69] The Scrutiny of Bills Committee has recommended that the consultation requirements in s 17 of the *Legislation Act* be expanded "and that compliance with those obligations is a condition of the validity of the relevant legislative instrument."[70]

Following its 2019 recommendation, the Committee's terms of reference were amended so that it now has responsibility for determining whether "those likely to be affected by the instrument were adequately consulted in relation to it", providing the Committee with greater oversight over Government consultation. The Committee has also issued a set of guidelines on the information it requires to undertake this scrutiny function.[71]

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64 2019 Report, 22, recommendation 4.
65 2019 Report, 25, recommendation 5
66 2019 Report, 25-29, recommendation 6.
67 2019 Report, 44, referring to its concerns expressed as far back as 2003 when the *Legislation Act* was first passed.
68 See further Senate Standing Committee on Regulations and Ordinances, *Consultation under the Legislative Instruments Act 2003: Interim Report,* June 2007 .
69 Section 15J.
70 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 3 of 2018*, March 2018, 72.
71 Senate Standing Committee on the Scrutiny of Delegated Legislation, Guidelines, page 10.

3. Incorporation of material

In its 2019 report, the Committee noted that "incorporation of material by reference (particularly where that material is not publicly available) has been a longstanding concern for the committee."[72] It is concerned that "the law should not be open to change that is indirect and undisclosed."[73] The main concerns of the Committee relate to the accessibility of material incorporated, and the Committee has issued Guidelines on the information that is required.[74] It is worth noting that, unlike many jurisdictions, the *Legislation Act 2003* already makes strict provision for the incorporation of documents that are not themselves legislative in character:

> Unless the contrary intention appears, the legislative instrument or notifiable instrument *may not make provision* in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time.[75] (emphasis added)

4. Overly broad delegations & Henry VIII clauses

The 2019 report noted that "perhaps the most common concern raised by the Scrutiny of Bills committee under principle 24(1)(a)(iv) [appropriate delegation of legislative power] is the inclusion of significant matters in delegated legislation."[76] This includes the use of "skeleton" or "framework" bills, or "shell" legislation. There are also concerns where the delegations are likely to have significant implications for personal rights and liberties, and where the delegation amounts to a Henry VIII clause, allowing delegated instruments to amend primary legislation.[77]

(a) Use of regulations over rules

One of the concerns of the Committee is that often instruments under these broad delegations are being made through "rules" rather than "regulations". This practice is in line with the recommendation in Drafting Direction 3.8 of the Office of Parliamentary Counsel, that all delegated legislation should be made in the form of legislative instruments, rather than Regulations, unless there is a good reason for doing so. The Scrutiny of Bills Committee noted in 2018 that regulations "are subject to a higher level of executive scrutiny than other instruments as regulations must be approved by the Federal Executive Council and must also be drafted by the Office of Parliamentary Counsel."[78] The 2019 report recommended this direction be changed.

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72 2019 Report, 50.
73 Senate Standing Committee on Regulations and Ordinances, *40th Parliament Report,* June 2005, 29-32
74 Senate Standing Committee on the Scrutiny of Delegated Legislation, Guidelines, 10.
75 *Legislation Act* s 14(2).
76 2019 Report 82.
77 See also Senate Standing Committee on the Scrutiny of Delegated Legislation, Guidelines, 31.
78 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 1 of 2018*, February 2018, 67.

(b) Better advice to departments

The Committee also recommended that there be greater support and advice offered to departments in developing proposals for Bills that delegate legislative power, through the creation of an expert advisory body.[79]

(c) Policy scrutiny

While the Senate Committee was reluctant for itself to engage in scrutiny of the policy merits of instruments, it did accept that, with broad delegations of power, there is often an accountability gap.[80] It stated: "There is currently no ordinary procedure by which standing committees consider policy matters in delegated legislation",[81] and concluded: "The absence of an ordinary process by which the policy merits of delegated legislation are scrutinised is an issue of ongoing concern."[82] It recommended that where delegated legislation gives rise to significant issues, the Committee should draw the Senate's attention to these, as well as that other committees should be notified to determine whether to conduct a review on the policy merits.[83] It was reluctant to adopt an affirmative resolution procedure (that would require the Houses to resolve to adopt instruments before coming into force) for such delegations, as it was concerned that this would encourage broad delegations (it was informed in this conclusion by the NZ and UK experience).[84]

5. Exemptions from disallowance and sunsetting

The 2019 report noted that the Scrutiny of Bills Committee routinely raised concerns about exemptions from disallowance and sunsetting.[85] It considered:

> that the disallowance procedure is one of the most effective procedural mechanisms by which the Parliament exercises control over delegated legislation and the Senate, through its power to disallow instruments, plays a vital role in preserving the principle of the separation of powers by ensuring there is appropriate control over the executive branch of government.[86]

Recently, there have been a number of high-profile exemptions from disallowance that have attracted adverse comment, including the Advance to the Finance Minister that allowed the Commonwealth to conduct the marriage equality postal plebiscite without parliamentary approval,[87] and the exemption from disallowance of the directions made under the *Biosecurity Act 2005* during COVID-19, including instruments such as the India travel ban.

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79 2019 Report, 92, recommendation 8.
80 A gap that has been noted by others, see, eg, Dennis Pearce, 'Rules, Regulations and Red Tape: Parliamentary Scrutiny of Delegated Legislation', *Papers on Parliament* No. 42, December 2004.
81 2019 Report, 99.
82 2019 Report, 101.
83 2019 Report, 105-106.
84 2019 report, 132, recommendation 17.
85 2019 Report, 86.
86 2019 Report, 121.
87 Advance to the Finance Minister Determination (No 1 of 2017-2017)

In 2019, the Committee noted that exemptions from disallowance are not required to be justified in Bills or legislative instruments, and it is not apparent what instruments are exempted in the Federal Register of Legislation. It recommended that there be stricter controls on how exemptions are granted, including that they be made only through primary legislation, that there be guidance as to the circumstances in which exemptions might be appropriate, and that all instruments that are exempted from disallowance are identified on the Federal Register of Legislation.[88]

In 2019, the Committee noted that sunsetting was "an essential opportunity for Parliament to ensure that the content of legislative instruments remains current and that Parliament maintains effective and regular oversight of delegated legislative powers".[89] It recommended that there be developed criteria for exemptions, and that all exemptions be contained in primary legislation.[90]

Following the 2019 report, the Committee conducted a further inquiry into exemptions from disallowance and sunsetting. It issued an Interim Report (2020) that considered the issue in the specific context of COVID-19, and its final report in 2021. In this inquiry, the Committee noted that exemption from disallowance effectively removes those instruments from parliamentary scrutiny.[91] The trend in use of delegated legislation has been accompanied, concerningly, with a trend in exemptions from disallowance. The report notes the paucity of guidance as to justify exemptions from disallowance.[92] The final report made 11-recommendations in relation to exemptions from disallowance, including that all exemptions from disallowance and sunsetting to be in primary legislation,[93] and that exemptions occur only in exceptional circumstances.[94] The Committee recommended that exceptional circumstances should be guided by the following principles:

(a) exemptions should not be made where instruments adversely affect rights, liberties, duties and obligations; and

(b) exemptions should not be made unless there is an alternative form of accountability.[95]

The following categories should not be exempt:

- instruments that override or modify primary legislation (Henry VIII provisions);
- instruments that trigger, or are a precondition to, the imposition of custodial penalties or significant pecuniary penalties;
- instruments that restrict personal rights and liberties; and
- instruments that facilitate expenditure of public money, including Advance to the Finance Minister determinations.

88 2019 Report, 124 recommendations 15 and 16.
89 2019 Report, 143.
90 2019 Report, recommendation 19.
91 2021 Report, 8.
92 2021 Report, 104.
93 2021 Report, recommendation 1.
94 See, eg, 2021 Report, recommendation 5, 6 and 7.
95 2021 Report, 115.

The Committee rejected the claims by the Attorney-General's Department, that the following rationales, without further exceptional circumstances, would be acceptable to justify exemptions:

- the instrument is made based on technical or scientific evidence;
- the instrument relates to internal departmental administration;
- the instrument is central to machinery of Government arrangements or electoral matters;
- commercial certainty will be affected;
- the exemption is in response to a parliamentary committee recommendation;
- the instrument is part of an intergovernmental scheme, or required under an international treaty or convention;
- the instrument is critical to ensuring urgent and decisive actions; and
- the exemption will provide certainty in meeting specific security needs.[96]

The Committee also recommended that the *Legislation Act 2003* be amended to repeal the blanket exemption of instruments facilitating the establishment or operation of an intergovernmental body or scheme from disallowance, and sunsetting.[97]

The 2021 Report, on exemptions to disallowance and sunsetting, noted the Committee's ongoing concern with respect to Henry VII clauses. It said:

> The committee is of the view that these limit parliamentary oversight and subvert the appropriate relationship between the Parliament and the executive. As such, they should not ordinarily be included in delegated legislation.[98]

While the Committee accepted that Henry VIII clauses might be required in limited circumstances, it recommended that they must be subject to strict sunsetting requirements of three years.[99] The Standing Orders of the Committee were amended to ensure the Committee has power to scrutinise that Henry VIII delegated instruments are "only for as long as is strictly necessary." The Committee's Guidelines contain further detail on the information it requires from the Government where instruments are issued that modify primary legislation.[100]

6. Commencement

The 2019 report expressed its concern around the current commencement regime, where the majority of instruments commence the day after they are registered on the Federal Register of Legislation. The Committee said:

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96 2021 Report, 115-116.
97 2021 Report, Recommendation 3.
98 2021 Report, 120.
99 2021 Report, 120.
100 Committee Guidelines 47-49.

> This is despite the fact that persons affected by an instrument may not be aware that it has been made, and may have limited (if any) opportunity to familiarise themselves with any rights, obligations or liabilities created or altered by the instrument before it takes effect. This issue is compounded by the fact that persons affected by an instrument may not be adequately consulted before an instrument is made.[101]

The Committee recommended that, subject to limited exceptions, the *Legislation Act* is amended so that legislative instruments commence 28 days *after* registration, and the Government develop guidance as to the limited circumstances in which an instrument may commence earlier.[102]

7. Ability to draw the Senate's attention to the scrutiny concerns of the committee

In 2019, the Committee noted that one of the challenges it faces was developing a reporting structure that was effective in drawing significant scrutiny concerns to the Senate's attention.[103] Since then, the Committee has made a number of structural changes to its reporting practices (see further below), and in addition, it resolved to use the potential to disallow an instrument to draw the Senate's attention to its concerns. It resolved to "lodge protective notices of motion to disallow every legislative instrument which it considers should be drawn to the attention of the Senate, to give the Senate sufficient time to consider the instrument."[104]

8. Reporting and publications

The Committee's 2019 inquiry considered whether its current approach to reporting and publicising its work was the most effective way of achieving its objectives in highlighting its scrutiny concerns. It undertook a comparative analysis of the approach to reporting in other jurisdictions. Some highlights of this comparative review are set out below.

The Commonwealth Committee's current approach is to report each sitting week through the *Delegated Legislation Monitor*. The Monitor raises scrutiny concerns, requests responses from Ministers, publishes those responses, and may draw matters to the attention of the Senate. In New Zealand, the Regulations Review Committee Digest provides a general overview of the work of the Committee, and synthesises its reports into a single, readily accessible source. In Canada, the Standing Joint Committee for the Scrutiny of Regulations reports to both Houses of Parliament on thematic issues, and relies more heavily on informal correspondence and private meetings, as opposed to formal reporting and responses with Ministers and departments. In Western Australia, the Joint Standing Committee on Delegated Legislation publishes a list of outstanding ministerial undertakings on its website.

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101 2019 Report, 136.
102 2019 Report, 137, recommendation 18.
103 2019 Report, 73.
104 2019 Report, 74, Committee Action 5. See also Committee Guidelines (February 2022), page 6.

The Senate Committee was concerned that the comprehensive nature of its current reports were undermining their effectiveness, and resolved to streamline this reporting to just those issues the Committee wishes to bring to the attention of the Senate. It also resolved to undertake more informal correspondence with Ministers and Departments, where it believed this might resolve its scrutiny concerns. Finally, it resolved to publish outstanding ministerial or agency undertakings.

9. Need for more support to Parliament and the Government

The 2019 Report made a number of recommendations about providing greater levels of support to parliamentarians and those in Government to understand delegated legislation, the Senate's role and the Committee's role and function. The Committee recommended that an independent agency be created to assist departments in drafting appropriate delegations, and that further training by provided for Senators, their staff, and departmental officers.[105] The Committee has also issued further guidelines in relation to each of its scrutiny principles, and any other matter relating to its role, functions and expectations.[106]

10. Special procedures – Expenditure

Since the High Court's decision in *Williams v Commonwealth (No. 1)*,[107] where the High Court held that the Commonwealth expenditure must, generally, be explicitly authorised by legislation, the Senate Committee has taken a particularly keen interest in the oversight of the making of legislative instruments that authorise executive expenditure.[108] It has a set of specific principles it applies to these instruments, and has recommended that legislative instruments that authorise such expenditure be subject to further scrutiny through an affirmative resolution procedure.[109] It has also issued instructions to Government in relation to Expenditure in its Guidelines.[110]

11. Constitutional validity

Following the High Court's *Williams* cases, the Senate Committee has become more engaged with scrutinising constitutional validity, including whether there is a head of power and otherwise constitutionally valid. The Standing Orders have been amended so as to include this as a separate ground of scrutiny. The Committee indicates that "questions of legal validity—including constitutional validity— are ultimately for the courts to determine, and that it is therefore not the committee's role to make determinative statements about legal

105 2019 Report, recommendations 20 and 21.
106 2019 Report, committee action 11.
107 (2012) 248 CLR 156.
108 Made under the *Financial Framework (Supplementary Powers) Act 1997* (Cth) and the *Industry Research and Development Act 1986* (Cth).
109 2019 Report, 111
110 Guidelines, 53-55.

validity". [111] Nonetheless, it considers that there may be circumstances where questions of constitutional validity need to be drawn to the Senate's attention, including:

- whether grants and programs specified in instruments made under the Financial Framework (Supplementary Powers) Act 1997 and the Industry Research and Development Act 1986 are supported by a constitutional head of legislative power; and
- instruments which raise questions as to whether they:
    - may breach the separation of powers doctrine embodied in the Constitution; or
    - may restrict the implied freedom of political communication.

111 Guidelines, 12.

Queensland

Queensland's regime for the making and oversight of delegated legislation is informed by two historical and structural features of the State. The first is the unicameral, non-proportional nature of its parliament, which places significant control over the legislative agenda in the hands of the governing party. There is no upper house performing the role of review, and parliamentary scrutiny occurs in the lower house, dominated as it is by Government members, or members who have agreed to support the Government. The second dynamic is the revelations of deep government and police corruption during the Fitzgerald Inquiry (the Commission of Inquiry into Possible Illegal Activities and Associated Misconduct), which reported in 1989, and the subsequent reform work of the Electoral and Administrative Review Commission, which led to the development of Queensland's Fundamental Legislative Principles, and a set of institutions and processes that are designed to safeguard against the abuses and excesses of power that were uncovered by the Fitzgerald Inquiry. Two interesting characteristics of the Queensland regime that emerge from this dynamic.

1. Review by reference to the Fundamental Legislative Principles

Queensland has long had a system of Government and parliamentary counsel certification of compliance with rights and liberties, as well as other standards associated with parliamentary scrutiny of bills and subordinate legislation, through the *Legislative Standards Act 1992* (Qld) and the framework of the "Fundamental Legislative Principles". The introduction of the *Human Rights Act 2019* (Qld) brought specific human rights scrutiny and requirements of Government certification of human rights compliance, these continue to supplement the Fundamental Legislative Principles. Nonetheless, at least to date, the focus of the Government guidelines and assistance to departments and agencies in preparing bills and subordinate legislation, remains the Principles.

These principles were introduced following the Bjelke-Peterson years by the Goss Government, and were pioneering in Australia for decades. They are intended to assist Cabinet and Parliament to understand the potential incursions into rights and liberties, and other fundamental principles, before enactment of legislation.[112] In tasking the Office of Parliamentary Counsel to provide an assessment of legislation against the Fundamental Legislative Principles, Spencer Zifcak has described the office as "no longer the creature of government but like the Auditor-General and the Ombudsman, stands alone and forms part of a new, post-Fitzgerald system of checks and balances on which good government in Queensland will now be founded."[113]

Today, these include, relevantly for subordinate legislation, and as set out in s 4 of the *LSA:*

[112] Wayne Goss, Speech delivered to the Fundamental Legislative Principles Seminar, 2 April 1993, Brisbane, Qld, referenced in Spencer Zifcak, 'Queensland: the new exemplar of democracy' (1993) 18(6) *Alternative Law Journal* 260.

[113] Zifcak (n 105), 261.

4 Meaning of fundamental legislative principles

(1) For the purposes of this Act, fundamental legislative principles are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law.

Note— Under section 7, a function of the Office of the Queensland Parliamentary Counsel is to advise on the application of fundamental legislative principles to proposed legislation.

(2) The principles include requiring that legislation has sufficient regard to—

(a) rights and liberties of individuals; and

(b) the institution of Parliament.

(3) Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation—

(a) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and

(b) is consistent with principles of natural justice; and

(c) allows the delegation of administrative power only in appropriate cases and to appropriate persons; and

(d) does not reverse the onus of proof in criminal proceedings without adequate justification; and

(e) confers power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer; and

(f) provides appropriate protection against self-incrimination; and

(g) does not adversely affect rights and liberties, or impose obligations, retrospectively; and

(h) does not confer immunity from proceeding or prosecution without adequate justification; and

(i) provides for the compulsory acquisition of property only with fair compensation; and

(j) has sufficient regard to Aboriginal tradition and Island custom; and

(k) is unambiguous and drafted in a sufficiently clear and precise way.

(5) Whether subordinate legislation has sufficient regard to the institution of Parliament depends on whether, for example, the subordinate legislation—

(a) is within the power that, under an Act or subordinate legislation (the authorising law), allows the subordinate legislation to be made; and

(b) is consistent with the policy objectives of the authorising law; and

(c) contains only matter appropriate to subordinate legislation; and

(d) amends statutory instruments only; and

(e) allows the subdelegation of a power delegated by an Act only—

(i) in appropriate cases and to appropriate persons; and

(ii) if authorised by an Act.

In 1997, the now abolished Scrutiny of Legislation Committee conducted a review into *The Use of Henry VIII Clauses in Queensland Legislation*. This review was extremely critical of the practice, and has resulted in a low tolerance to the use of these clauses in Queensland. The *Legislative Standards Act* includes as one scrutiny criterion whether the subordinate legislation has sufficient regard to the institution of Parliament, and this includes "whether the matter is appropriate for delegated legislation, and whether it amends another Act or other statutory instruments ". The Legislation Handbook then provides "Henry VIII clauses should not be used."

2. No subordinate legislation specific scrutiny review

In 2011, the Scrutiny of Legislation Committee was discontinued, and its scrutiny function was replaced by portfolio committees, which have in their mandate under the *Parliament of Queensland Act 2001* (s 93) policy review, as well as technical scrutiny, scrutiny against the FLPs, and human rights scrutiny, of Bills as well as subordinate legislation. Committees are assisted in their scrutiny functions by a Technical Scrutiny of Legislation Secretariat, which provides briefings to all committees on bills and subordinate legislation that comes before them. This approach has not been without its critics. Concerns include:

- Most portfolio committees dedicate their attention and focus to policy issues, with technical scrutiny questions getting 'comparatively less focus'.[114]
- The committees, dominated by Government through the membership of 3 Government MPs, 3 non-Government MPs, and a Government chair, are partisan in their scrutiny, favouring the Government of the day. This is exacerbated because the Committees consider policy as well as technical scrutiny.[115]
- Trends in scrutiny, including, for instance, increased use of skeletal legislation, Henry VIII clauses and quasi-legislation, are not reported on thematically across portfolios. However, under the current system "there are no reports specifically dedicated to FLP issues".[116]

Although alongside this, there have also been potential advantages identified, including that more MPs are exposed to technical, Fundamental Legislative Principles and human rights issues.[117]

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114 Renee Easten, 'Queensland's Approach to the Scrutiny of Legislation' (paper presented to the Australia-NZ Scrutiny of Legislation Conference, Perth, WA, July 2016) 5.1.

115 Lynda Pretty, 'Queensland's Scrutiny of Proposed Legislation by Parliamentary Committees: Do They Make for More Considered, Rights-Compatible Law?" (2021) 35(1) *Australasian Parliamentary Review* 54.

116 Easten (n 114), 5.2.

117 Easten, 5.1.

South Australia

The South Australian position is, in many respects, a standard position for a State jurisdiction in Australia. It contains the characteristics that you would expect to see in such a framework, with few innovations. Three areas of operational concern have arisen recently for the Legislation Review Committee in its scrutiny function which are worth highlighting for a broader comparative review.

1. Secretariat Support

The Committee has repeatedly drawn attention to its lack of sustainable levels of secretariat support, particularly following the conferral of the Committee of an additional function relating to petitions. In a 2021 report on its workload, the Committee asked for a review of resources, and that its view was the staffing was 'inadequate for the level of scrutiny work required of the Committee. Most other committees in Australia that scrutinise delegated legislation have at least three and as many as five assigned staff".[118]

2. Supporting Reports

There is a high level of frustration within the South Australian Legislation Review Committee with the quality of supporting reports that are provided by the Government to the Committee, particularly in relation to the consultation that has occurred in the development of instruments.[119] This has partly contributed to the increase in workload, as the Committee explains:

> The poor quality of supporting reports compounds the Committee's difficulty of reporting to Parliament on instruments referred to it within a reasonable timeframe and significantly adds to the workload of the Committee and its staff. The Committee is frequently required to correspond with Ministers, departments and other entities to seek clarification and fully inform itself about the effect of an instrument before reporting to Parliament.[120]

The quality of reports was the catalyst for the 2020 release of the Legislation Review Committee's Information Guide, which sets out in detail the information that the Committee requires to fulfil its function. In February 2021, the Committee concluded "Unfortunately, the content of many supporting reports continues to omit key information necessary for the Committee to properly consider each instrument before it."[121]

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118 Parliament of South Australia, Legislative Review Committee, *The Workload of the Legislative Review Committee* (2021) 8.

119 See, eg, that voiced to the South Australian Productivity Commission's Inquiry into Reform of South Australia's Regulatory Framework, 12 May 2021; Parliament of South Australia, Legislative Review Committee, *The Workload of the Legislative Review Committee* (2021) 5.

120 Parliament of South Australia, Legislative Review Committee, *The Workload of the Legislative Review Committee* (2021).

121 Ibid.

The Minority Report of the Legislative Review Committee's 2021 inquiry agreed that inadequate provision of information to the Committee was a major issue for the Committee, suggesting that there be a provision for the automatic disallowance of subordinate legislation that does not comply with the requirements of the Committee following a set period of time.[122]

3. Composition of the Committee

The Minority Report also used the Workload Review to draw attention to its concerns about the composition of the Committee, which is made up of 3 members of the House of Assembly and 3 of the Legislative Council. Currently, there are 3 Government members, 2 opposition members and a member of SA Best. The Chair has the casting vote. The minority Report states:

> The makeup of the Committee does not promote a multi-partisan approach to the review and scrutiny work of the Committee. Indeed, it has become common practice for successive chairs of the Committee to exercise their casting vote to wave through legislative instruments that clearly don't meet the scrutiny expectations of at least half of the Committee members. The lack of appropriate reporting on the work of the Committee means other Members of Parliament are not alerted to these contentious votes.[123]

[122] Ibid 18.
[123] Ibid 18.

Tasmania

The Tasmanian regime has some unique features, including the role of Treasury and the ability to suspend regulations during recesses. It has also been subject of a wide-ranging scrutiny in 1999/2000 as well as during the height of the COVID-19 pandemic, which has given particular insight into the operations of the Committee. Five issues arise for consideration under the Tasmanian scheme.

1. The role of Treasury

As has been documented elsewhere,[124] the context in which the 1992 *Subordinate Legislation Act*, and its 1994 amendments, were passed, shifted significant responsibility from the Subordinate Legislation Committee to the Treasury,[125] including by:

- giving the Treasurer the authority, by notice in the Gazette, to broaden or narrow the definition of subordinate legislation;
- giving the responsibility for developing guidelines for the preparation of subordinate legislation, including consultation requirements, to the Treasurer;
- the fact that the guidelines are not subordinate legislation, and therefore not subject to the scrutiny of the Subordinate Legislation Committee;
- making Regulatory Impact Statements only required where the Secretary of the Treasury is satisfied the subordinate legislation would impose a significant cost or disadvantage on any sector of the public.

2. Scope of jurisdiction over "regulations"

During the COVID-19 pandemic, a level of ambiguity was revealed as to the scope of the jurisdiction of the Subordinate Legislation Committee to review delegated legislation that was not designated to be "regulations".[126] This was at least partly referable to the different definitions of "regulation" used in the *Subordinate Legislation Act* and the *Subordinate Legislation Committee Act*. In its 2020-2021 report, the Subordinate Legislation Committee noted that there had been an issue "in respect to the type of subordinate legislative instruments that it is expected to scrutinize." The Committee sought independent legal advice, and wrote to the Premier stating that it was "the Committee's opinion that legislative reform is required to clarify what is within the scope of the Committee's functions and further requesting the Premier to consider a review of the processes applying in the making of

124 Rick Snell, Helen Townley and Darren Vance, 'The Tasmanian Subordinate Legislation Committee: Lifting the Scrutiny Veil by Degrees' (1999/2000) 4(2) *Deakin Law Review* 1

125 Ibid 13.

126 For more information on the basis of this ambiguity, see Gabrielle Appleby and Brendan Gogarty, 'The role of Tasmania's subordinate legislation committee during the COVID-19 emergency' (2020) 45 *Alternative Law Journal* 188.

subordinate legislation to strengthen weaknesses in the current arrangements. The Committee to date, has not received a response."[127]

This ambiguity arose during the COVID-19 pandemic, but should also be understood in the context of observations made in 2000 by Snell, Townley and Vance, that there was some evidence that the Government was intentionally labelling subordinate legislation 'something other than "regulations", "rules" or "by-laws"' to avoid Committee scrutiny.[128]

3. Disclosure and cooperation by Government

The Tasmanian Committee has expressed its ongoing frustration with the Government's failure to provide adequate and timely information to the Committee for it to perform its work. This, for instance, was expressed in the 2020-2021 Report:

> The Committee has from time to time encountered some issues in the timeliness of receiving information or the adequacy of information from Departments.[129]

In 2016, the issue was such that the Committee wrote to the Premier, requesting that the Premier direct departments to comply with their legislative obligations to provide documents and information to the Committee, which the Premier did.[130]

4. Power to suspend regulations during recesses

Section 9 of the *Subordinate Legislation Committee Act* provides a unique power to suspend the operation of part of the entirety of a piece of subordinate legislation during a parliamentary recess:

9. Report when Parliament not sitting

If, in the opinion of the Committee, a regulation that is examined by the Committee should be amended or rescinded and the Committee's report thereon is adopted by the Committee during any adjournment or recess, the Committee may cause a copy of its report to be sent to the authority by whom or by which the regulation was made and on receipt thereof that authority shall forthwith –

(a) amend the regulation in the manner indicated by the Committee, or, if the Committee so recommends, rescind the regulation; or

(b) take such action as may be necessary for the purpose of suspending the operation of the regulation, and ensuring that the operation thereof remains suspended, until both Houses of Parliament have dealt with the report.

127 Parliamentary Standing Committee on Subordinate Legislation, Annual Report, 2020-2021, 2.
128 Snell et al (n 124), 17.
129 Parliamentary Standing Committee on Subordinate Legislation, Annual Report, 2020-2021, 2.
130 Parliamentary Standing Committee on Subordinate Legislation, Annual Report, 2016-2017, 3.

The Premier explained at the time it was introduced, that it was needed to counter trends towards long parliamentary recesses, meaning that regulations:

> [C]an be in force for more than six months before Parliament has an opportunity to pass judgment upon them [during which time] . . . there is no redress for any person suffered injustice or hardship through the operation of the original regulations.[131]

The procedure, however, has not been used.

5. Attempt to extend the jurisdiction of the Committee to draft regulations

In 2009 and 2010, an attempt was made through a private members Bill to extend the jurisdiction of the Committee to consider draft regulations. While passed in the Legislative Council, this Bill never passed the Legislative Assembly.[132]

6. Staffing

The Committee is currently assisted by a Secretary, and until the 1990s was assisted by a private lawyer who examined and provided a report to the Committee on all regulations.[133] Now the Committee seeks legal advice if it reviews regulations and determines it is warranted.

131 Tasmania, Parliamentary Debates, Legislative Assembly, 'Subordinate Legislations Committee 1969' (Second Reading Speech, Tasmanian Parliamentary Library Bills Register) 3.
132 Subordinate Legislation (Miscellaneous Amendments) Bill.
133 Snell et al, (n 124) 8.

Victoria

The Victorian regime exhibits a number of characteristics relating to the making and scrutiny of delegated instruments that offer potentially novel comparative ideas.

1. *Role and composition of the Scrutiny of Acts and Regulations Committee*

The first is the role and composition of the Scrutiny of Acts and Regulations Committee (SARC). Like in New South Wales, the SARC is a joint-scrutiny committee with remit over primary and delegated legislation, although statutory rules and legislative instruments are subject to review by a Regulation Review Subcommittee, supported by its own legal adviser and senior research officer.

Prior to 1992, scrutiny was limited to delegated instruments, with the expansion of technical scrutiny to Bills in 1992. The advantage of this approach is that particularly questions relating to the appropriate delegation of legislative power, and appropriate parliamentary scrutiny, is dealt with by the same committee. But it carries with it risks of overburdening the Committee given the significant amount of legislation – primary and subordinate – that it is responsible for.

The second point to note is the Government dominance of the joint committee: with 4 Government members in the 7 member Committee. This is in direct contrast to the recently established Pandemic Management Committee in Victoria, which, in recognition of its key Executive scrutiny role, pursuant to s 21A of the *Parliamentary Committees Act 2003*, must not have more than half of the members as members of a political party forming the government.

2. Legislative instruments and determining "legislative character"

Section 3 of the *Subordinate Legislation Act 1994* (Vic) defines a legislative instrument to be 'an instrument made under an Act or statutory rule that is of a legislative character', with a list of exceptions. On the one hand, this approach has been argued to be best practice, as it defines the scope of the application of the *Subordinate Legislation Act 1994* and scrutiny by reference to the nature, not the form of the instrument. However, the Victorian experience has demonstrated that this approach is not without its challenges. There is significant guidance offered to departments and agencies to understand when an instrument is of a legislative character. This includes in the *Subordinate Legislation Act 1994*'s list of instruments of a purely administrative character. There is also a list of factors set out in the Guidelines (from page 11), but these ultimately state: "Where it is not clear whether an instrument is of legislative character, agencies may wish to obtain legal advice before making a final decision."[134]

This then raises a difficult question around who is the final arbiter on when an instrument is of a legislative character. This arose during the COVID-19 Pandemic, when there was some confusion as to whether Directions under the Public Health and Wellbeing Act were of a

[134] Guidelines [25].

legislative character. The Committee refused to itself express a view as to whether the Directions ultimately may be characterised as either legislative or administrative instruments. Ultimately, it stated 'responsibility for decisions about statutory rules and legislative instruments lies with the responsible Minister'. [135]

This would appear a problematic position in terms of the potential robustness of parliamentary scrutiny: allowing the Executive itself to determine the scope of those instruments subject to parliamentary requirements around making, consultation, publication, tabling, scrutiny and disallowance.

3. Exemptions

The *Subordinate Legislation Act 1994* allows for exemptions to be made through regulations or through certification. Exemptions may be made to the definition of "statutory rules" and "legislative instruments" (ss 4 and 4A of the *Subordinate Legislation Act 1994*), and these instruments may be exempted from the operation of the whole or part of the Act. Exemption certificates can be issued by the Minister or Premier from the consultation requirements of the Act (ss 8, 9, 12F and 12G of the *Subordinate Legislation Act 1994*). However, unlike many other jurisdictions discretion to exempt from the requirements of the scrutiny framework, the Victorian position confines and provides oversight for the exercise of this discretion. This is done through three key mechanisms:

(a) requiring consultation with the SARC before making a regulation that would prescribe or exempt an instrument as a statutory rule (s 4(2), and also s 27(a));

(b) setting out the criteria against which exemption from consultation requirements will be considered (see those listed for exemptions from consultation requirements in ss 8, 9, 12F and 12G); and

(c) providing a detailed process for updating the *Subordinate Legislation (Legislative Instruments) Regulations* where exemptions are located.

4. Consultation and Making Statutory Rules and Legislative Instruments

The level of support to Government for understanding the consultation requirements, drafting, and providing the necessary supporting documentation to Cabinet and Parliament, is significant in Victoria. This includes the following documents:

- Subordinate Legislation Act 1994 Guidelines (2020);
- Requirements for updating the Subordinate Legislation Regulations;
- Training on the Subordinate Legislation Act and its Guidelines (from Better Regulation Vic, Office of the Chief Parliamentary Counsel, SARC, Department of Premier and Cabinet Office of General Counsel);

[135] *Alert Digest No 8 of 2020* (September 2020). 26.

- Practice Notes developed by the Regulations SARC to assist legislation officers;
- Victorian Guide to Regulation; and
- Office of Chief Parliamentary Counsel's Notes for guidance on the preparation of statutory rules.

This level of guidance might partly be explicable by reference to the complexity and rigour of the consultation requirements in Victoria – which are detailed at length for both Statutory Rules and Legislative Instruments in Parts 2, 3 and 4 of the *Subordinate Legislation Act 1994*.[136]

5. Human rights scrutiny

As a jurisdiction with a charter of rights, Victoria has extensive scrutiny for human rights review, including as a general criterion under the *Subordinate Legislation Act 1994* in relation to the review of statutory rules (that they do not 'unduly trespass on rights and liberties of the person previously established by law), and then the added requirements of certification of compatibility with the rights set out in the *Charter of Rights and Responsibilities Act 2006* (Vic) (ss 21 and 25A). In addition to these *scrutiny* requirements, the *Charter* contains in s 32(3)(b) the statement that:

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

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

(Note, this provision is now incorporated into the Queensland human rights legislation: s 48 of the *Human Rights Act 2019* (Qld), but is not found in the earlier ACT *Human Rights Act*).

6. Creative responses to the scrutiny timeframes

The *Subordinate Legislation Act 1994* has a number of strict timelines for scrutiny and disallowance. In recognition of this, the legislation accommodates for these timeframes in two creative ways.

(a) Power of suspension pending disallowance

In recognition that an instrument might have detrimental effect on individuals during the period between it being made, and the Houses considering and determining whether to disallow it, if the Scrutiny Committee proposes to recommend disallowance or amendment, and it 'is of the opinion that considerations of justice and fairness require that the operation of

[136] For a history of these, see Gregory Craven, 'Consultation and the Making of Subordinate Legislation: A Victorian Initiative' (1989) 15(2) *Monash University Law Review* 92.

the statutory rule [or Legislative Instrument (LI)] or any part of the statutory rule [or LI] should be suspended pending the consideration by the Parliament of the statutory rule [or LI]' the following process applies:

- The Scrutiny Committee proposes in its report to the Parliament that the rule be suspended, and that is sent to the responsible Minister and Governor in Council.
- After a period of 7 days, unless the Governor in Council intervenes, the statutory rule/LI is suspended after seven days of sending that report.
- Suspension is until the period under which the rule/LI could be disallowed passes.[137]

(b) Providing documents to SARC

In recognition of the tight timeframes within which the SARC must perform its scrutiny, with the requirement that a motion for disallowance being brought within 18 sitting days of an instrument being tabled, s 15A and 16C of the *Subordinate Legislation Act* require that all the relevant documentation must be provided to SARC within 10 working days of the instrument being made. This will often allow for the scrutiny work of SARC to commence significantly earlier than if the SARC were reliant on the requirement of official tabling of this information in the Houses of six sitting days.

[137] Process set out in ss 22 (SR) and 25B (LI) of the *Subordinate Legislation Act*.

Western Australia

Leading commentators Dennis Pearce and Stephen Argument have observed that the Western Australian Joint Standing Committee on Delegated Legislation is "active and productive", and has produced thematic reports of national significance, including on incorporation and in relation to national schemes.[138] Here I consider those reports, as well as other issues raised in the jurisdiction.

1. Incorporation

In 2016, the Western Australian Joint Standing Committee on Delegated Legislation undertook an inquiry into the incorporation of Australian Standards in delegated legislation.[139] The inquiry was instigated because of concerns around the increased incorporation of Australian Standards into delegated legislation, and that these standards were not necessarily publicly available. The Committee said:

> This Committee believes that it is much more important that the public is aware of what such a standard (law) says, not only because everyone is entitled to know the law as it applies to them but also so that compliance may be better achieved.[140]

The Committee made a number of recommendations directed at:

- providing greater public and parliamentary access where delegated legislation incorporates Australian Standards;
- a default position against the adoption of standards "from time to time", which they found reduces parliamentary scrutiny of the standards; and
- the provision of information in the explanatory memorandum relating to the necessity/desirability of incorporating the standard and a summary of the material incorporated.[141]

These recommendations have not been adopted.

2. Henry VIII clauses

The Western Australian approach to Henry VIII clauses is novel: s 43(1) of the *Interpretation Act* creates the following position:

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

138 Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (LexisNexis, 5th ed, 2017) 98.
139 Joint Standing Committee on Delegated Legislation (WA), Report 84, *Access to Australian Standards Adopted in Delegated Legislation* (June 2016).
140 Ibid, i.
141 See ibid, executive summary.

This creates a rebuttable presumption against the use of Henry VIII clauses.

3. National schemes

The 23rd report of the Western Australian Joint Standing Committee on Delegated Legislation (1997) refers to a national project that was being undertaken by all scrutiny of legislation and subordinate legislation committees. This project related to scrutiny of national schemes of legislation.[142] The Western Australian report noted:

> Effective parliamentary scrutiny has been threatened because of the rise of national schemes of legislation which emerge from such bodies as the Council of Australian Governments (COAG) and various Ministerial Councils. Expressed at its simplest level, such councils agree to uniform legislation, usually in closed session, and then proceed through the participating Ministers to sponsor Bills through individual Parliaments, often with the message that the Bills cannot be amended for fear of destroying their uniform nature.[143]

The working group resulted in a national position paper,[144] that recommended uniform scrutiny principles and possibly the establishment of a National Committee for the Scrutiny of National Schemes of Legislation. This proposal resulted in a series of back and forth exchanges with the federal government, but ultimately was never implemented. Indeed, in many jurisdictions, national schemes of legislation are exempt from disallowance and sunsetting regimes. In Western Australia in 2005, the Parliament established its own committee – the Standing Committee on Uniform Legislation and Statutes Review to oversee these schemes, although this is focussed on primary legislative scrutiny.

3. Early provision of information

While the *Interpretation Act 1984* (s 42) provides subsidiary legislation and explanatory memorandum to be tabled within 6 parliamentary sitting days, the Premier's circular requires that all agencies responsible for administering the instruments to provide the necessary information to the Joint Standing Committee on Delegated Legislation within 10 business days of the publication date to facilitate the scrutiny within the strict time periods set for disallowance.

142 Western Australia, Twenty-Third Report, Joint Standing Committee on Delegated Legislation (1997).
143 Ibid, 12.2.
144 Commonwealth, Scrutiny of National Schemes of Legislation-Position Paper, Working Party of Representatives of Scrutiny of Legislation Committees, 1996.

4. Conflict between subsidiary legislation

One matter highlighted by the Committee in 2009[145] was the issue of conflict between provisions of subsidiary legislation. This raises a number of concerns, including simply identifying conflicts where there is such a high volume of subsidiary legislation. When a conflict is identified, the Joint Standing Committee on Delegated Legislation has limited options available. It can report the conflict to the Parliament, but it can only recommend disallowance of the most recently-made provision on the basis of the time limits within which disallowance can be made.

145 Joe Francis, 'Some Accountability Issues in Scrutinising Subsidiary Legislation Made under Skeletal Acts' (Australia-NZ Scrutiny of Legislation Conference, 6-8 July 2009, Canberra) https://www.aph.gov.au/About_Parliament/Senate/Whats_On/Conferences/sl_conference/papers/francis

Australian Capital Territory and Northern Territory

Both the Australian Capital Territory (ACT) and the Northern Territory operate in unicameral systems, although in the ACT the Government rarely governs by majority in the Assembly. The ACT's system has been innovative, particularly as the first jurisdiction to incorporate human rights review into delegated instruments review through the adoption of the *Human Rights Act*. The Northern Territory regime, in contrast, has been described by Pearce and Argument as difficult to assess because of its opaque nature, although this has been improved in recent times with additional reporting.[146]

1. Incorporation of instruments

One of the unique features of the ACT regime for scrutiny of delegated legislation, is its regulation of the incorporation of instruments into subordinate legislation and delegated instruments. While under s 47 of the *Legislation Act* this is allowed to occur, the presumption is that this will be only as in force at a particular time. The material that is incorporated is notifiable, and therefore must be published on the register (or other place). If the presumption is rebutted, and instruments are incorporated as they are amended from time to time, then each subsequent change to that instrument is taken to be a notifiable instrument (although this can be displaced).

146 Pearce and Argument (n 138), 78.

Canada

The federal framework for oversight of delegated legislation is relatively recent (with a general framework introduced in the 1950s but parliamentary scrutiny introduced as late as the 1970s). Today, this is achieved through a joint standing committee, and statutory requirements relating to the making, commencement, publication, scrutiny and revocation of statutory instruments. This framework has been through a series of reforms, including amendments allowing for parliamentary revocation of instruments on recommendation by the Committee, and incorporation of non-statutory material.[147] Canadian provinces have some similar frameworks, with some variations from the federal scheme.

The system of reliance on parliamentary scrutiny by committees has been subject to criticism, with similar reforms proffered in that jurisdictional context as have been suggested in Australia: greater clarity in instructions for drafting delegated instruments, affirmative resolution procedures, and increased public participation in the drafting of delegated instruments.[148] There have also been calls for tighter constitutional restrictions to be developed on the delegation of law making power in Canada.[149]

1. Incorporation

The question of incorporation by reference has proven controversial in Canada for a number of years. In 2009, the Joint Chair of the Standing Committee for the Scrutiny of Regulations, Andrew Kania, delivered a paper to the Australia-New Zealand Scrutiny of Legislation Conference on the concerns his committee held about the increasingly frequent use of incorporation by reference in that jurisdiction.[150] There is a legal dimension to this dispute: whether general regulation-making powers carry with them the power to incorporate documents, as amended from time to time. The Committee has taken the view that, unless there is an express power to do so, such incorporation is "improper and illegal". The debate raised an interesting question: whether a blanket approach, permitting the incorporation of material from time to time in any delegated instrument, would be desirable. While it might address the ongoing tension between the Government and the committee about whether such incorporation was permissible in any given case, it might not be constitutionally desirable. As the Chair explained:

147 See further House of Commons Procedure and Practice (3rd ed, 2017) Chapter 17.

148 Linda Reid, MLA, *Oversight of Regulations by Parliamentarians* (2010) 33(4) *Canadian Parliamentary Review* 7; Lorne Neudorf, 'Strengthening the Parliamentary Scrutiny of Delegated Legislation: Lessons from Australia" (2019) *Canadian Parliamentary Review* 25

149 Lorne Neudorf, "Reassessing the Constitutional Foundation of Delegated Legislation in Canada" (2018) 41:2 *Dalhousie Law Journal* 519

150 Andrew Kania, 'Incorporation by Reference in Canadian Federal Delegated Legislation: Contention, Concerns and Possible Reform (Paper delivered at the Australia-New Zealand Scrutiny of Delegated Legislation Conference, 6-8 July 2009) https://www.aph.gov.au/About_Parliament/Senate/Whats_On/Conferences/sl_conference/papers/kania See also the Standing Committee for the Scrutiny of Regulations, Second Report, (39th Parliament, 2nd Session, 2007) https://www.parl.ca/DocumentViewer/en/39-2/REGS/report-2

> It could be argued that Parliament should retain control over the individual circumstances in which this authority is appropriately exercised. This would continue the approach whereby Parliament itself decides on a case-by-case basis, having regard to the nature of the legislation, when a regulation making authority can referentially incorporate documents "as amended from time to time".

In 2015, this particular issue was resolved by introducing s 18 of the *Statutory Instruments Act* that provides that a general power to make a regulation includes the power to incorporate in it by reference a document – or a part of a document – as it exists on a particular date or as it is amended from time to time. These documents must be made "accessible". The Joint Committee responded to these amendments by issuing two reports indicating its ongoing concerns about accessibility to material incorporated by reference.[151]

2. Determining the nature of statutory instruments

The *Statutory Instruments Act* draws a distinction between statutory instruments and regulations, with the latter subject to greater scrutiny under the statutory framework, particularly in relation to drafting and revocation.

The *Statutory Instruments Act* contains a provision (s 4) that allows for clarification to be sought as to whether an instrument is a regulation, or not. However, the final decision-maker would appear to be the Deputy Minister of Justice, and not the Parliament:

> **4** Where any regulation-making authority or other authority responsible for the issue, making or establishment of a statutory instrument, or any person acting on behalf of such an authority, is uncertain as to whether a proposed statutory instrument would be a regulation if it were issued, made or established by that authority, it or he shall cause a copy of the proposed statutory instrument to be forwarded to the Deputy Minister of Justice who shall determine whether or not the instrument would be a regulation if it were so issued, made or established.

[151] *Report No. 90 - Accessibility of Documents Incorporated by Reference in Federal Regulations* (2016); *Report No. 92 - Accessibility of Documents Incorporated by Reference in Federal Regulations – Reply to the Government Response to Report No. 90)* (2016).

New Zealand

In New Zealand the Regulations Review Committee was initially established in 1986 based on concerns that the Executive was using regulations to achieve substantive policy objectives.[152] The concern was that the democratically elected and accountable Parliament's control over legislation, and policy decisions in legislation, was being undermined.[153] Former Prime Minister, Minister for Justice and law Professor, Sir Geoffrey Palmer also indicates that the unique political context of New Zealand – a unicameral legislature with a mixed-member proportional electoral system where minority governments can and do occur – has contributed to the current position, where there is an Executive desire to govern through delegated legislation, but also greater parliamentary scrutiny of the practice of delegation.[154] This tension has led to a robust scrutiny regime, but there remain ongoing points of tension between the Parliament (particularly the Regulations Review Committee) and the Government. A number of features of the scheme that are of particular comparative interest are highlighted below.

1. Consolidation of legislation

The *Legislation Act 2019* ("2019 Act") replaces the *Legislation Act 2012* and the *Interpretation Act 1999*. The 2020 Regulations Review Committee Digest described the position prior to the introduction of the 2019 Act, relating to the definition of instruments that are subject to the different regimes of publication and presentation to the House, and subject to scrutiny and disallowance, as "vexing and confusing" due to the "myriad of definitions" used in different statutes and instruments. The definition of secondary legislation adopted in the 2019 Act, rather than relying on "woolly and complicated definitions", requires the specification of secondary legislation as such in the empowering statute. This accords with an earlier recommendation of the Regulations Review Committee. The *Secondary Legislation Act 2021* has been passed to retrospectively achieve this task (a "massive project"). Both Acts came into effect on 28 October 2021. The Standing Orders now also apply a definition of "regulation" that picks up the definition of secondary legislation in the 2019 Act. In the Second Reading Speech introducing the legislation, the Minister indicated that its key reforms would be "for the first time in New Zealand law, identify clearly what is secondary legislation and therefore what this House's oversight is through the disallowance process. It will provide for improved access to that legislation."

This consolidation and streamlining of definitions addressed a number of concerns that some exercises of delegated legislative power were avoiding the full extent of the publicity and scrutiny framework through what are referred to in New Zealand as "deemed regulations", including rules, codes of conduct, and other instruments of a legislative character that were not "regulations". Use of such instruments had been the subject of inquiries, and

152 Caroline Morris and Ryan Malone "Regulations Review in the New Zealand Parliament" (2004) *Macquarie Law Journal* 7, 8; see also Dean R Knight and Edward Clark, *Regulations Review Digest* (7th ed, New Zealand Centre for Public Law, 2020), 7.
153 Geoffrey Palmer "Deficiencies in New Zealand Delegated Legislation" (1999) 30 *VUWLR* 1, 2.
154 Ibid.

recommendations, by the Regulations Review Committee.[155] The changed definition now brings these instruments within the oversight framework.

2. *Complaints to the Regulations Review Committee*

One novel feature of the Regulations Review Committee is that Standing Orders 326 and 328 give it the function of receiving complaints from persons or organisations aggrieved at the operation of a regulation. The Committee must review the complaint to see whether it falls within one of its nine areas of review. Unless the Committee agrees by a unanimous resolution not to proceed with the complaint, the person or organisation is given an opportunity to address the Committee, and the Committee can then launch a full inquiry, and report to the Parliament.

3. *Ability to review and report on draft regulations, and regulation making powers in Bills before other Committees*

Standing Order 326 extends the jurisdiction of the Regulations Review Committee to include reviewing and reporting on draft regulations that are referred to the Committee. While this appears to rarely occur in practice, the Committee has indicated that it thinks this provides the most appropriate time for scrutiny of regulations.[156]

The Committee can also consider Bills that are before other Committees, and write directly to that other Committee, which can then choose to include the Regulations Review Committee's concerns in its own report.

These novel functions are in addition to the Committee's general own motion investigative and reporting power, under which it has conducted a number of important inquiries into the scope of delegated legislation making, its transparency and oversight, that have led to legislative and non-legislative reforms to the framework for making and overseeing secondary legislation in New Zealand.

4. *Parliamentary control: disallowance, amendment and replacement*

The 2019 Act provides for a scheme of disallowance (in whole or part), amendment and replacement that is not limited in time. This applies to all secondary legislation, unless that is exempted (this is returned to, below). The Regulations Review Committee has observed that the flexibility of this "confirms the position of those who delegate in that a delegated power does not prevent the exercise of the same power by the person who delegates".[157]

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155 Most recently, Regulations Review Committee *Inquiry into the oversight of disallowable instruments that are not legislative instruments* (July 2014).

156 Regulations Review Committee "Activities of the Regulations Review Committee During 1999" [1999] AJHR I16X.

157 Regulations Review Committee "Report on the Statutory Publications Bill" [1990] AJHR I16 at 33.

Requirements for presentation to the House and disallowance can be exempted – this is set out in Schedule 3 of the 2019 Act. This lists provisions where exemption either applies unconditionally, or, applies if an "exemption ground" is met. Exemption grounds include grounds relating to national security, commercial confidentiality, or where other democratic accountability exists, such as bylaws. The use of exemptions in New Zealand has not been as widespread as in Australia; for instance, orders made pursuant to the *COVID-19 Public Health Response Act 2020* (NZ) were not exempted from the general oversight regime, including being subject to disallowance.[158]

5. Commencement after 28 days ("the 28-day rule")

The general position in New Zealand is set out in the Cabinet Manual, that regulations come into effect 28 days *after* they have been publicised in the Gazette. The Manual explains the constitutional, rule of law based principles for this:

> The 28-day rule reflects the principle that the law should be publicly available and capable of being ascertained before it comes into force.[159]

The Cabinet and Parliamentary Counsel's Office monitor compliance with the 28-day rule, and will grant exemptions only in limited circumstances, including:

> (a) where a regulation has little or no effect on the public, or confers only benefits on the public;
>
> (b) where the regulations are made in response to an emergency;
>
> (c) where early commencement is necessary for compliance with statutory or international obligations;
>
> (d) where early commencement is necessary to avoid unfair commercial advantage being taken, or the purpose of the regulations being defeated; or
>
> (e) where irregularities need to be validated.

6. Henry VIII clauses

The Regulations Review Committee has been highly critical of the use of Henry VIII clauses.[160] It has often recommended under its scrutiny principles that these clauses should be deleted altogether. The Committee conducts robust scrutiny of these provisions, and only accepts that they are essential in limited circumstances, such as transitional provisions and international treaty implementation. It has in the past considered that where Henry VIII clauses are included, instruments (or the clauses themselves) should be subject to a 1 or 3-year sunset clause, or, if in place for a longer period, subject to the parliamentary confirmation procedure. The Government has responded positively to these

158 See comparison in the Senate Standing Committee on the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Interim Report* (December 2020)
159 New Zealand Cabinet Manual [7.96].
160 See, eg, Regulations Review Committee Digest, 130-133.

recommendations, and this guidance is now contained in the Legislation Design and Advisory Committee Legislation Guidelines 2021.[161]

7. Incorporation

Following two reports from the Regulations Review Committee, the 2019 Act now provides detailed provisions for incorporating material by reference in ss 64-66, and Schedule 2. In addition to limiting the incorporation of any post-enactment amendments to material incorporated by reference (s 66), Schedule 2, also has strict requirements around publication of material incorporated by reference, and consultation on material incorporated by reference, although failure to comply with the schedule does not invalidate the secondary legislation.

8. Legislative Guidance

The New Zealand Legislation Design and Advisory Committee issues the *Legislation Guidelines*, and provides advice to departments of delegated legislative powers, and what matters are more or less suitable for delegation. The Senate Standing Committee on Regulations and Ordinances noted in its 2019 report: "that this may assist in resolving issues associated with inappropriate delegations of legislative power at the policy development and drafting stages, rather than raising these issues when the relevant bill is before the Parliament."[162] The Legislation Guidelines are also used by the Regulations Review Committee in its work reviewing regulation making powers in Bills before other Committees.

161 Legislation Design and Advisory Committee, *Legislation Guidelines* (2021), 79-80.
162 Senate Standing Committee on Regulations and Ordinances, *Parliamentary Scrutiny of Delegated Legislation*, 3 June 2019, 90-91.

United Kingdom

The system for oversight of statutory instruments in the United Kingdom is perhaps best characterised as complicated and non-uniform in procedure. Brexit and COVID have drawn attention to the extent and breadth of delegations,[163] giving rise to new review procedures, and calls for major reforms to the system. As a basic rule, statutory instruments are subject to the publicity, scrutiny and oversight that is set in their primary Act. Many statutory instruments are not subject to any parliamentary procedure, and simply become law on the date stated.[164] Others may be subject to either a disallowance, or affirmation procedure, depending on what is stipulated in their parent Act. As a general rule, 80% of scrutinised instruments are subject to disallowance procedures, and only 20% are subject to affirmation procedures.

The lack of simplicity and robustness in the review framework in the United Kingdom is problematic. The House of Lords Delegated Powerss and Regulatory Reform Committee issued a report last year, *Democracy Denied? The urgent need to rebalance power between Parliament and the Executive* (2021), that outlined a number of key concerns with the framework. The Committee expressed its concerns particularly with the overdelegation of significant policy decisions through subordinate legislation. It indicated that the limits on parliamentary oversight of delegated instruments (for instance, limits on amending delegated instruments) 'places an even greater significance on ensuring the appropriateness of the delegation in the first place.'[165]

It made a number of recommendations relating to the delegation of legislative power, including that the use of skeleton (shell) legislation be limited, and:

- Should the Government introduce skeleton legislation, the delegated powers memorandum should make an explicit declaration that the bill is a skeleton bill or clauses within a bill are skeleton clauses.
- Such a declaration should be accompanied by a full justification for adopting that approach, including why no other approach was reasonable to adopt and how the scope of the skeleton provision is constrained.[166]

The House of Lords Committee also expressed its concerns around the use of Henry VII clauses. While it acknowledged that they may be justified on occasion, they should narrow in scope and subject to affirmative affirmation procedures.[167] The Committee was also

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163 See, eg, House of Lords Delegated Powers and Regulatory Reform Committee, *Democracy Denied? The urgent need to rebalance power between Parliament and the Executive* (2021) https://committees.parliament.uk/publications/7960/documents/82286/default/; House of Lords Delegated Powers and Regulatory Reform Committee, Third Report, (2017) https://publications.parliament.uk/pa/ld201719/ldselect/lddelreg/22/2202.htm. See also Jonathan Jones, 'Reliance on secondary legislation has resulted in significant problems: it is time to rething how such laws are created' *The Constitution Unit* (13 October 2021) https://constitution-unit.com/2021/10/13/reliance-on-secondary-legislation-has-resulted-in-significant-problems-it-is-time-to-rethink-how-such-laws-are-created/

164 https://researchbriefings.files.parliament.uk/documents/SN06509/SN06509.pdf

165 House of Lords Delegated Powers and Regulatory Reform Committee, *Democracy Denied? The urgent need to rebalance power between Parliament and the Executive* (2021) 63.

166 Ibid [65].

167 Ibid [84].

concerned about the 'disguising' of legislative instruments in another form to avoid the full regulatory and scrutiny framework, which it referred to as 'perhaps the most striking and disturbing of recent developments that have had the effect of shifting the balance of legislative power from Parliament to the executive.'[168] Not only does it undermine the robustness of parliamentary oversight, but it also reduces the clarity and accessibility of the statute book for the public.

Sir Jonathan Jones, former Treasury Solicitor, the head of the UK Government Legal Department, has called for an entire overhaul of the framework for overseeing statutory instruments. His list of proposed reforms provides an excellent overview of the issues that exist in that jurisdiction:

- Tighter scrutiny of the scope of powers, the purposes for which they are granted, and the parliamentary procedures which apply to their exercise. While there is no constitutional bright line between appropriate or inappropriate use of secondary legislation, it might be possible to articulate some high-level tests or assumptions: for example that secondary legislation cannot be used to set 'policies or principles' but only for 'administrative or regulatory' purposes.
- In addition it might be possible to codify the types of parliamentary procedure which should apply to particular kinds of powers: for example to provide that instruments which amend primary legislation (under so-called 'Henry VIII powers'), or which create or extend criminal offences, are subject to enhanced scrutiny procedures, requiring parliamentary debates and votes.
- There is a case for going further, and making some categories of SI (for example those imposing restrictions on individual rights and freedoms, or setting penalties over a certain level) amendable: in other words MPs and peers would not only have the opportunity to debate an instrument, they could propose changes to it.
- There should be an assumption that making secondary legislation with no opportunity for prior parliamentary consideration is absolutely exceptional, defined as tightly as possible, with ministers having to justify any such exceptions. There should be a general rule that instruments must be published for a minimum period before they come into force. There are good reasons for the 21 day rule: it should be reasserted and if anything strengthened.
- There should be clearer protocols for the publication and accessibility of secondary legislation, especially when (exceptionally) it is necessary for instruments to come into force very quickly. Put simply, it should be easy to find an authoritative version of any SI as soon as it has been made. Regulations are published on the website www.legislation.gov.uk, but this takes time to catch up. We should never be in a position where it is near impossible to find the text of the law hours before it is due to come into force.

168 Ibid [102].

- When an Statutory Instrument amends previous legislation, it should be the norm to publish simultaneously a consolidated version of the law as amended. This would greatly aid transparency and comprehensibility of the law, particularly where the amendments made are very complex, or (again) are due to come into force at short notice.

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Appendix 2 Minutes

Minutes no. 16

Thursday 24 February 2022
Regulation Committee
Via Webex, 2.02 pm

1. Members present
Mr Veitch, *Chair*
Ms Boyd, *Deputy Chair*
Ms Cusack
Mr Donnelly
Mr Farlow
Mr Martin (substituting for Mr Fang)
Mr Poulos

2. Change of membership
The committee noted that Mr Fang replaced Mr Franklin as a substantive member of the committee on 25 January 2022.

3. Previous minutes
Resolved, on the motion of Mr Donnelly: That draft minutes no. 15 be confirmed.

4. Correspondence
The committee noted the following items of correspondence:

Received

- 13 September 2021 – Letter from Ms Michelle Falstein, Secretary, NSW Council for Civil Liberties to the secretariat, regarding the need for greater scrutiny of the Public Health Orders being used to manage the COVID-19 pandemic
- 1 October 2021 – Letter from Mr David Shoebridge MLC, Chair, Public Accountability Committee to the Chair, regarding correspondence from the NSW Council for Civil Liberties dated 13 September 2021.

Sent

- 29 September 2021 – Email from the Chair to Mr David Shoebridge MLC, Chair, Public Accountability Committee, forwarding correspondence from the NSW Council for Civil Liberties dated 13 September 2021.

5. Inquiry into options for reform of the management of delegated legislation in New South Wales

5.1 Terms of reference
The committee noted the following terms of reference referred by the House on 24 November 2021:

(1) That this House note that in its report entitled 'Making of delegated legislation in New South Wales', dated October 2020, the Regulation Committee recommended in 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.'

(2) That this House notes the government's response to the Regulation Committee's report, dated 19 April 2021, in which Recommendation 2 was not supported.

(3) That, in the absence of a referral by the Attorney General to the NSW Law Reform Commission, this House:

(a) refer the Regulation Committee's report and evidence back to the committee for further inquiry and report into options for reform of the management of delegated legislation in New South Wales, and

(b) authorise the committee to engage an external legal adviser to assist the committee in its inquiry into options for reform of the management of delegated legislation in New South Wales.

(4) That the committee commence its inquiry in February 2022 and report by the first sitting day in August 2022.

5.2 Inquiry process

Resolved, on the motion of Mr Donnelly: That the committee adopt the following process for the conduct of the inquiry:

1. Engage an external legal adviser to prepare a Discussion Paper covering the following questions:

(a) How do NSW's framework and safeguards relating to delegated legislation compare with those of other Australian and relevant international jurisdictions?

(b) What are the options for reform of the management of delegated legislation in NSW, including identifying a 'best practice' model (noting the considerations identified in the committee's earlier Recommendation 2)?

(c) What are the mechanisms by which these reforms could be implemented, including the priority and timing of relevant reforms?

Legal adviser to be provided with the committee's 2020 report and evidence, as well as the government response, as part of their brief.

2. External legal adviser to conduct a private roundtable with the committee to present and answer questions regarding the Discussion Paper
3. Committee to publish the Discussion Paper and seek NSW Government feedback thereon. Committee could also at this stage consider whether to seek submissions and/or conduct public hearings.
4. Committee to prepare its report, identifying both immediate priorities for reform as well as potential longer-term reforms.

5.3 Engagement of external legal adviser

Resolved, on the motion of Ms Cusack: That the committee seek to engage Professor Gabrielle Appleby, Professor of Law, University of New South Wales to assist in its inquiry, subject to:

- first obtaining Professor Appleby's hourly rate and an estimate of the time involved in preparing the Discussion Paper and attending the private roundtable with the committee
- the committee's agreement to the estimated costs.

6. Adjournment

The committee adjourned at 2.07 pm, *sine die.*

Sharon Ohnesorge
Committee Clerk

Minutes no. 17
Thursday 2 June 2022
Regulation Committee
1043, Parliament House, Sydney at 2.02 pm

1. Members present

Mr Veitch, *Chair*
Ms Boyd, *Deputy Chair*
Mr Borsak
Mr Donnelly (via Webex)
Mr Fang
Mr Martin (via Webex)
Mr Poulos (via Webex)

2. Change of membership

The committee noted that Mr Martin replaced the Mr Amato as a substantive member of the committee from 29 March 2022, and that Mr Amato replaced Mr Farlow as a substantive member of the committee from 1 March 2022.

3. Previous minutes

Resolved, on the motion of Mr Donnelly: That draft minutes no. 16 be confirmed.

4. Inquiry into options for reform of the management of delegated legislation in New South Wales

4.1 Private roundtable with Professor Gabrielle Appleby

The Chair tabled the Discussion Paper prepared by Professor Gabrielle Appleby.
Resolved, on the motion of Mr Fang: That the private roundtable with Professor Appleby be recorded for internal secretariat purposes only.

The committee conducted a private roundtable with Professor Appleby, who presented and answered questions regarding her Discussion Paper.

4.2 After the roundtable – next steps

Resolved, on the motion of Ms Boyd: That the committee:

- authorise the publication of the Discussion Paper by Professor Appleby
- write to the Premier and Attorney General, providing a copy of the Discussion Paper and seeking a submission to the inquiry by 29 July 2022.

4.3 Extension of reporting date

Resolved, on the motion of Mr Fang: That the Chair give notice and move in the House that the reporting date be extended to the last sitting day in September 2022.

5. Adjournment

The committee adjourned at 3.41 pm, *sine die.*

Sharon Ohnesorge
Committee Clerk

Draft minutes no. 18
Thursday 15 September 2022
Regulation Committee
Room 1254, Parliament House, Sydney at 1.30 pm

1. Members present

Mr Veitch, *Chair*
Ms Boyd, *Deputy Chair* (via Webex)
Mr Donnelly
Mr Fang
Mrs MacDonald
Mr Martin (via Webex)
Mr Poulos (via Webex)

2. Apologies

Mr Borsak

3. Previous minutes

Resolved, on the motion of Mr Donnelly: That draft minutes no.17 be confirmed.

4. Correspondence

The committee noted the following items of correspondence:

Received

- 22 July 2022 – Correspondence from Ms Sarah Bakker, Secretary, NSW Council for Civil Liberties responding to the terms of reference for the inquiry
- 2 August 2022 – Email from Mr Patrick Wynne, Office of the Hon Mark Speakman SC MP, Attorney General, advising that the NSW Government will not be making a submission to the inquiry.

Sent

- 6 June 2022 – Letter from the Hon Mick Veitch MLC, Chair of the Regulation Committee to the NSW Premier and Attorney General providing a copy of the Discussion Paper prepared by Professor Gabrielle Appleby, Professor of Law, University of New South Wales and seeking a submission to the inquiry on behalf of the NSW Government.

Resolved, on the motion of Mr Fang: That the committee publish correspondence from the NSW Council for Civil Liberties, dated 22 July 2022, responding to the terms of reference for the inquiry.

5. Inquiry into options for reform of the management of delegated legislation in New South Wales

5.1 Consideration of Chair's draft report

The Chair submitted his draft report entitled 'Options for reform of the management of delegated legislation in New South Wales', which, having been previously circulated, was taken as being read.

Chapter 3

Resolved, on the motion of Mr Martin: That Recommendation 4 be amended by omitting 'should never' and inserting instead 'should not, except in exceptional circumstances,'.

Mr Martin moved: That paragraphs 3.26-3.27 and Recommendation 5 be omitted:

'The committee notes that with the transition to a new framework centred on the concept of a 'legislative instrument', it will be necessary to establish a procedure to deal with cases where it is uncertain whether an instrument is of legislative character or not. As noted in the Discussion Paper, it is imperative that the final arbiter of this question is the Parliament, not the Executive. The committee agrees that it would be appropriate for this adjudicatory role to be performed by the Regulation Committee, at least in the first instance. The committee notes that if the House were to disagree with the committee's conclusion in relation to a particular instrument, it would be able to direct the committee to reconsider its conclusion or to override the committee's conclusion by expressing its own view.

The committee also agrees that the Regulation Committee should have a role in providing guidance to agencies on how to assess whether instruments are of legislative character and on the limited circumstances in which it may be appropriate for legislative instruments to be exempted from the statutory requirements. These functions are consistent with other recommended changes to the committee's role discussed below.

Recommendation 5

That the Regulation Committee provide guidance to Government agencies on:

- how to assess when instruments are of a legislative character
- how to seek the advice of the committee if there is uncertainty
- how to obtain a final decision as to the scope of the definition from the committee
- the limited circumstances in which it might be appropriate for instruments to be exempted from the regulatory and oversight framework.'

Question put.

The committee divided.

Ayes: Mr Fang, Mrs MacDonald, Mr Martin, Mr Poulos.

Noes: Ms Boyd, Mr Donnelly, Mr Veitch.

Question resolved in the affirmative.

Resolved, on the motion of Mr Martin: That:

a) paragraph 3.64 be amended by omitting 'The committee endorses the advice provided by the Discussion Paper that such guidance should be driven by the Parliament and its committees rather than being left to the executive government' and inserting instead 'Furthermore, the committee notes with concern that the Parliamentary Counsel's Office no longer appears to be publishing or updating the *Manual for the Preparation of Legislation*. On that basis, the committee recommends that the Parliamentary Counsel's Office recommence publishing a guide to the preparation of primary and delegated legislation'.

b) Recommendation 11 be omitted: 'That the Regulation Committee publish and regularly update a series of Guidance Notes to Government agencies concerning key issues relating to the regulation

and oversight of delegated legislation, including as recommended in this report', and the following new Recommendation be inserted instead:

'That the Parliamentary Counsel's Office publish a guide to the preparation of primary and delegated legislation.'

Chapter 4

Mr Martin moved: That paragraph 4.9 and Recommendation 12 be omitted:

'In light of these considerations, the committee supports the proposal for the Regulation Committee to provide guidance to Government agencies concerning the nature of the rights and liberties it will scrutinise pursuant to the statutory scrutiny criteria, and the approach the committee will take to the evaluation of public interest justifications for incursions into such rights.

Recommendation 12

That the Regulation Committee provide guidance to Government agencies on:

- the personal rights and liberties that the committee will scrutinise pursuant to the statutory scrutiny criteria
- how the committee will approach its scrutiny of the Government's public interest justifications for incursions into personal rights and liberties.

Question put.

The committee divided.

Ayes: Mr Fang, Mrs MacDonald, Mr Martin, Mr Poulos.

Noes: Ms Boyd, Mr Donnelly, Mr Veitch.

Question resolved in the affirmative.

Mr Martin moved: That:

a) paragraph 4.20 be omitted:

'Rather than going down this path, the committee agrees that the most effective way to improve consultation in the making of legislative instruments would be expand the scrutiny principle that is currently applied by the oversight committee beyond a mere assessment of whether the statutory requirements have been met, to include an assessment of the adequacy of the consultation undertaken. This would be consistent with the approach that has been taken in the Senate in relation to the oversight of compliance with the consultation obligations in the *Legislation Act 2003* (Cth). The committee also agrees that this expansion in the scrutiny criteria should be accompanied by an amendment that makes it clear that the committee can recommend disallowance on the basis of a failure to meet consultation expectations.'

b) paragraph 4.21 be amended by omitting 'In addition to statutory amendments' before 'the committee supports the proposal'.

c) Recommendation 13 be omitted:

'That:

- the statutory scrutiny principle concerning consultation be expanded to include an assessment of the adequacy of the consultation undertaken
- the power to recommend disallowance to the Houses on the basis of failing to meet consultation expectations be made explicit.'

Question put.

The committee divided.

Ayes: Mr Fang, Mrs MacDonald, Mr Martin, Mr Poulos.

Noes: Ms Boyd, Mr Donnelly, Mr Veitch.

Question resolved in the affirmative.

Mr Martin moved: That:

a) paragraph 4.28 be amended by inserting at the end: 'The committee believes the current four month timeframe is adequate.'

b) paragraphs 4.29-4.30 and Recommendation 15 be omitted:

'However, as highlighted in the Discussion Paper, the restriction on the remaking of disallowed rules that applies in New South Wales is not as stringent as it might be. Of all the jurisdictions that have limited the power to remake disallowed instruments, New South Wales has the shortest timeframe: four months unless the disallowance resolution is rescinded. By contrast, three jurisdictions have a six-month timeframe for the remaking of disallowed rules, including the Commonwealth, while one jurisdiction, Tasmania, has a twelve-month limit.

Informed by this comparative review and by the important principles which such statutory limitations are designed to protect, the committee supports the proposal to extend the period within which a disallowed rule may not be remade from four to six months.

Recommendation 15

That the time period in which a disallowed statutory instrument cannot be remade be increased to six months after the motion of disallowance.'

Question put.

The committee divided.

Ayes: Mr Fang, Mrs MacDonald, Mr Martin, Mr Poulos.

Noes: Ms Boyd, Mr Donnelly, Mr Veitch.

Question resolved in the affirmative.

Mr Martin moved: That:

a) paragraph 4.35 be omitted: 'While delayed commencement provisions have not been adopted in Australian jurisdictions, they are a well-accepted part of the regulatory and scrutiny frameworks in New Zealand and the United Kingdom and have been recommended by the Senate's committee for the scrutiny of delegated legislation. They represent best practice in the management of delegated legislation', and the following new paragraph be inserted instead:

'The committee notes that delayed commencement provisions have not been adopted in Australian jurisdictions. In addition, delegated legislation is among the most effective tools for Government's to respond to situations where urgent action is needed to meet unexpected crises. As such, the committee does not recommend any changes to existing provisions.'

b) paragraphs 4.36-4.37 and Recommendations 16 and 17 be omitted:

'A delayed commencement mechanism enhances the accessibility and transparency of delegated legislation and promotes the rule of law by allowing time for the persons who will be affected by the legislation to become aware of its contents. Delayed commencement also strengthens parliamentary oversight by allowing for scrutiny to occur in the period between the instrument being published and its coming into effect.

Accordingly, the committee recommends that legislative instruments should as a general rule commence 21 days after they are first published, unless otherwise permitted in the primary legislation. We also recommend that the Regulation Committee issue guidance to Government agencies as to when it would be justifiable to depart from this rule.

Recommendation 16

That legislative instruments should commence 21 days after they are first published, unless otherwise permitted in the primary legislation.

Recommendation 17

That the Regulation Committee provide guidance to Government agencies on when it would be justifiable for instruments to be permitted to commence before the 21-day rule.'

Question put.

The committee divided.

Ayes: Mr Fang, Mrs MacDonald, Mr Martin, Mr Poulos.

Noes: Ms Boyd, Mr Donnelly, Mr Veitch.

Question resolved in the affirmative.

Resolved, on the motion of Mr Fang: That:

a) The draft report as amended be the report of the committee and that the committee present the report to the House;

b) The Discussion Paper and correspondence relating to the inquiry be tabled in the House with the report;

c) The committee secretariat correct any typographical, grammatical and formatting errors prior to tabling;

d) The committee secretariat be authorised to update any committee comments where necessary to reflect changes to recommendations or new recommendations resolved by the committee;

e) Dissenting statements be provided to the secretariat within 24 hours after receipt of the draft minutes of the meeting;

f) The report to be tabled in the House on Wednesday 21 September 2022.

6. Adjournment

The committee adjourned at 1.56 pm, *sine die.*

Sharon Ohnesorge
Committee Clerk