



**REPORT OF THE REGULATION COMMITTEE –
OPTIONS FOR REFORM OF THE MANAGEMENT OF DELEGATED LEGISLATION IN
NEW SOUTH WALES
(REPORT 9, SEPTEMBER 2022)**

GOVERNMENT RESPONSE

On 24 November 2021, the Legislative Council referred terms of reference to the Regulation Committee (the **Committee**) to inquire into and report on options for reform of the management of delegated legislation in New South Wales. This followed the Committee's 2020 inquiry into the making of delegated legislation in New South Wales, the report of which was published on 22 October 2020.

The inquiry engaged an external legal adviser, Professor Gabrielle Appleby, to examine how the laws and procedures governing delegated legislation in New South Wales compare with those in other jurisdictions and identifying a 'best practice' model. Professor Appleby proposed a series of reforms to the framework for the management of delegated legislation in New South Wales. The Committee drew on those proposals to formulate its recommendations, which 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."

The Committee tabled its report (the **Report**) on 21 September 2022. The Report contains 14 recommendations, ten of which are directed (implicitly) to the Government.

The Government's response supports one of the Committee's recommendations and notes the remainder for further consideration. Enclosed is a table which details the Government's response to each of the Committee's recommendations.

COMMITTEE 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, sunseting and scrutiny of primary and delegated legislation.

GOVERNMENT RESPONSE

Noted for further consideration

The Government appreciates the work of the Committee and of Professor Appleby in reviewing the statutory framework for the management of delegated legislation across multiple jurisdictions and proposing a series of reforms for New South Wales.

The Government is committed to ensuring that the framework for the regulation and scrutiny of delegated legislation in New South Wales is appropriate, including in relation to the accessibility of legislative instruments.

The Government is considering each of the recommendations directed to it, noting that this process will take longer than the three months available to the Government to respond to the Committee's Report given the wide-ranging implications of the proposed reforms, including the proposed amendments to three pieces of legislation – the *Interpretation Act 1987*, *Subordinate Legislation Act 1989* and the *Legislation Review Act 1987* – that are of central importance to the NSW statute book.

Given the interrelated nature of the recommendations, the Government is considering them as a whole. For example, any actions taken in response to Recommendations 1 – 4 will impact on the implementation of the other recommendations. Considering the recommendations collectively will enable the Government to take an informed and holistic position on the proposed reforms.

Accordingly, the Government's response to Recommendation 1 also applies to the other recommendations of the Committee directed to the Government. Where further information is relevant, it has been included against individual recommendations below.

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

Noted for further consideration

COMMITTEE RECOMMENDATION	GOVERNMENT RESPONSE
	As stated above in response to Recommendation 1, the Government is considering this recommendation.
<p>3 That, if a new Legislation Act is not enacted, the <i>Interpretation Act 1987</i>, <i>Subordinate Legislation 1989</i> and <i>Legislation Review Act 1987</i> be amended so that they apply to all instruments of a legislative character.</p>	<p>Noted for further consideration</p> <p>As stated above in response to Recommendation 1, the Government is considering this recommendation.</p>
<p>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:</p> <ul style="list-style-type: none"> • 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’. 	<p>Noted for further consideration</p> <p>As stated above in response to Recommendation 1, the Government is considering this recommendation.</p>
<p>5 That the NSW legislation website:</p> <ul style="list-style-type: none"> • 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. 	<p>Noted for further consideration</p> <p>As stated above in response to Recommendation 1, the Government is considering this recommendation.</p> <p>The Government notes that any actions taken in response to Recommendation 2 (or, in the alternative, Recommendation 3) in relation to the scope of legislative instruments captured by any reforms to the legislative framework for managing delegated legislation would have an impact on the resources required to implement Recommendation 5. As set out in the Committee’s report, the Parliamentary Counsel’s Office (PCO), which manages the NSW legislation website, already publishes all statutory rules on the NSW legislation website in accordance with section 39(1) of the <i>Interpretation Act 1987</i>, as well as some other statutory instruments. Increasing the</p>

COMMITTEE RECOMMENDATION	GOVERNMENT RESPONSE
	<p>scope of instruments to be published on the website would have resourcing implications for the PCO, which the Government is considering as part of its consideration of the recommendations made by the Committee.</p> <p>Further, the Government notes that implementing Recommendation 5 also depends on the approach taken in response to Recommendation 4, which deals with exemptions to the regulatory and scrutiny framework for delegated legislation.</p>
<p>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.</p>	<p>Noted for further consideration</p> <p>As stated above in response to Recommendation 1, the Government is considering this recommendation. The Government notes that implementing this recommendation would involve an amendment to section 40(4) of the <i>Interpretation Act 1987</i>, but that if Recommendation 1 is implemented in full, the change would be reflected in a new single Legislation Act.</p>
<p>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 <i>Legislation Review Act 1987</i>.</p>	<p>Not directed to the Government</p>
<p>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.</p>	<p>Not directed to the Government</p>
<p>9 That a dedicated legal adviser be appointed to support the Regulation Committee in the performance of its technical scrutiny function.</p>	<p>Not directed to the Government</p>

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<p>10 That the Parliamentary Counsel's Office publish a guide to the preparation of primary and delegated legislation.</p>	<p>Supported and currently in progress</p> <p>The Parliamentary Counsel's Office is currently working on an updated guide to the preparation of primary and delegated legislation, which it expects to complete in the coming months. The Government notes that it is also considering this recommendation as part of its overall consideration of the Committee's recommendations, as any change to the legislative framework for managing delegated legislation may need to be reflected in the guide.</p>
<p>11 That the Regulation Committee provide guidance to Government agencies on the committee's expectations in relation to:</p> <ul style="list-style-type: none"> • the consultation requirements • reporting to the committee on the adequacy of consultation. 	<p>Not directed to the Government</p>
<p>12 That incorporation of non-legislative documents into legislative instruments only be permitted where the individual primary legislation delegating authority expressly provides for this.</p>	<p>Noted for further consideration</p> <p>As stated above in response to Recommendation 1, the Government is considering this recommendation as part of its consideration of all the recommendations directed to the Government.</p> <p>The Government notes that implementing this recommendation would involve an amendment to section 42(1) of the <i>Interpretation Act 1987</i>, but that if Recommendation 1 is ultimately implemented in full, the change would be reflected in a new single Legislation Act.</p>
<p>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.</p>	<p>Noted for further consideration</p> <p>As stated above in response to Recommendation 1, the Government is considering this recommendation as part of its consideration of all the recommendations directed to the Government, noting that how this recommendation is implemented would depend on whether Recommendation 1 is implemented in full.</p>

COMMITTEE RECOMMENDATION**GOVERNMENT RESPONSE**

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.

Noted for further consideration

As stated above in response to Recommendation 1, the Government is considering this recommendation as part of its consideration of all the recommendations directed to the Government.