



LEGISLATIVE COUNCIL

REGULATION COMMITTEE

# Evaluation of the Regulation Committee's technical scrutiny function



Report 10

February 2025

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Regulation Committee

# **Evaluation of the Regulation Committee's technical scrutiny function**

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Evaluation of the Regulation Committee's technical scrutiny function

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Chair: Hon Natasha Maclaren-Jones MLC



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## Terms of reference

The terms of reference were referred to the committee by the Legislative Council on 19 October 2023.

1. That the Regulation Committee table an evaluation of the arrangements under paragraph (3) of the amended resolution of the House appointing the Regulation Committee by the conclusion of the first sitting week in 2025.<sup>1</sup>

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<sup>1</sup> *Minutes*, NSW Legislative Council, 19 October 2023, p 644.

## Committee details

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### Committee members

<b>Hon Natasha Maclaren-Jones MLC</b>	Liberal Party	<i>Chair</i>
<b>Ms Abigail Boyd MLC</b>	The Greens	<i>Deputy Chair</i>
<b>Hon Susan Carter MLC</b>	Liberal Party	
<b>Hon Greg Donnelly MLC</b>	Australian Labor Party	
<b>Hon Dr Sarah Kaine MLC</b>	Australian Labor Party	
<b>Hon Tania Mihailuk MLC</b>	Independent	
<b>Hon Cameron Murphy MLC</b>	Australian Labor Party	
<b>Hon Bob Nanva MLC</b>	Australian Labor Party	

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### Secretariat

Bethanie Patch, A/Principal Council Officer

Robin Howlett, A/Council Officer

Madeleine Dowd, Director



## Chair's foreword

Following a recommendation of the Committee's 2022 report entitled *Options for reform of the management of delegated legislation in New South Wales*, the Legislative Council resolved in late 2023 to expand the Regulation Committee's functions. This expansion required the Committee to inquire into and report on instruments of a legislative nature that are subject to disallowance against the scrutiny grounds set out in *Legislation Review Act 1987*, section 9(1)(b) on a 12-month trial basis from the first sitting day of 2024. The expansion of the Committee's functions is consistent with the Legislative Council's role as a House of Review.

This report evaluates the Committee's exercise of its additional scrutiny function over the 12-month trial, as required by resolution of the House on 19 October 2023. In this report, the Committee found that the 12-month trial has proven the advantages of having an Upper House committee dedicated to the review and scrutiny of delegated legislation alone. Throughout 2024, the Committee has provided an additional level of oversight to the delegation of legislative power in New South Wales, reviewing all instruments of a legislative nature that are subject to disallowance and drawing to the attention of Parliament instruments which engaged the scrutiny grounds in the *Legislation Review Act 1987*.

The Committee's interactions with responsible ministers and bodies, undertakings made and subsequent amendments to both primary and subordinate legislation also evidence the Committee's capacity to effect positive change and to play an educative role on the best practice in the making of delegated legislation in New South Wales.

Particular note also must be made of the constructive approach that all members of the Committee have brought to the Committee's technical scrutiny role. The Committee operates very differently to most committees of the Legislative Council, and all members adopted a collaborative and apolitical manner throughout the trial, approaching the new function with the primary intent of improving delegated legislation in the state.

Following the undoubted success of the trial, the Committee has recommended that the Legislative Council amend the resolution establishing the Regulation Committee to permanently expand the Committee to include the technical review of delegated legislation against the scrutiny principles set out in the *Legislation Review Act 1987*, section 9(1)(b). The Committee has also recommended that if the House resolves to amend the establishing resolution, it should continue to be supported by a dedicated secretariat and a part-time independent legal adviser in order for the Committee to effectively discharge its function in scrutinising delegated legislation. The Committee also remains committed to other areas of reform related to delegated legislation in New South Wales, and has proposed an ambitious forward agenda, recommending two inquiries to be held in 2025, one into explanatory notes accompanying delegated legislation in New South Wales and another into the consolidation of the provisions of the *Interpretation Act 1987*, *Subordinate Legislation Act 1989* and the *Legislation Review Act 1987*.

In conclusion, the Committee would like to extend its thanks to the stakeholders who provided thoughtful and valuable submissions regarding the operation of the Committee's technical scrutiny function, namely Mr David Blunt AM, Clerk of the Parliaments and Clerk of the Legislative Council, Dr Ellen Rock, Independent legal adviser to the Regulation Committee and Associate Professor, Faculty of Law & Justice, University of New South Wales, Ms Annette O'Callaghan, NSW Parliamentary Counsel and The Cabinet Office. The Committee also extends its thanks to the Hon Penny Sharpe MLC, Leader of the Government in the Legislative Council, and her office for facilitating

a productive working relationship between the Committee and the Executive over the period of the 12-month trial. I thank my fellow Committee members for their dedicated work and commitment to the delivery of a successful technical scrutiny function, which would have not been possible without the professional support of the Committee secretariat.

Hon Natasha Maclaren-Jones MLC  
**Committee Chair**

## Findings

### **Finding 1**

**14**

That the return of the technical scrutiny function for delegated legislation to a committee of the Legislative Council has been successful in improving the quality of delegated legislation and enhancing parliamentary oversight of the Executive, and aligns with the constitutional role of the Upper House as a 'House of Review'.

### **Finding 2**

**21**

That in order for the Regulation Committee to effectively discharge its function in scrutinising delegated legislation, it should continue to be supported by a dedicated secretariat and a part-time independent legal adviser.

## Recommendations

- Recommendation 1** **14**  
That the Legislative Council amend the resolution establishing the Regulation Committee to permanently expand the Committee's functions to include technical review of delegated legislation against the scrutiny principles set out in the *Legislation Review Act 1987*, section 9(1)(b).
- Recommendation 2** **30**  
That the Regulation Committee continue to develop a positive and productive working relationship with ministers and bodies which promotes an understanding of the Committee and its technical scrutiny function.
- Recommendation 3** **35**  
That the Regulation Committee seek advice from the Clerk of the Parliaments on the potential use of protective disallowance notices of motions as a mechanism to provide the Committee with additional time to resolve scrutiny concerns with responsible ministers and bodies.
- Recommendation 4** **38**  
That the NSW Government, via the responsible minister or body, notify the Regulation Committee within five business days of an undertaking made to the Committee being implemented.
- Recommendation 5** **39**  
That the Legislative Council amend the resolution establishing the Regulation Committee to change the Committee's name to the Delegated Legislation Committee, to more accurately reflect the Committee's role and remit.
- Recommendation 6** **42**  
That the Regulation Committee conduct an inquiry in 2025 into explanatory notes accompanying delegated legislation in New South Wales to consider potential options for reform in this area.
- Recommendation 7** **44**  
That the Regulation Committee conduct an inquiry in 2025 into the consolidation of the provisions of the *Interpretation Act 1987*, *Subordinate Legislation Act 1989* and the *Legislation Review Act 1987*.





# Chapter 1 Introduction and background

This chapter provides the context to this evaluation report, as well as an overview of the background and evolution of the functions of the Regulation Committee.

## Resolution to table an evaluation report

1.1 On 19 October 2023, the Legislative Council adopted a resolution expanding the functions of the Regulation Committee to include inquiring into and reporting on instruments of a legislative nature that are subject to disallowance against the scrutiny grounds set out in the *Legislation Review Act 1987*, section 9(1)(b).

1.2 Specifically, paragraph (3) of the amended resolution required that:

The committee, from the first sitting day in 2024:

- a) is to consider all instruments of a legislative nature that are subject to disallowance while they are so subject, against the scrutiny principles set out in section 9(1)(b) of the *Legislation Review Act 1987*,
- b) may report on such instruments as it thinks necessary, including setting out its opinion that an instrument or portion of an instrument ought to be disallowed and the grounds on which it has formed that opinion, and
- c) may consider and report on an instrument after it has ceased to be subject to disallowance if the committee resolves to do so while the instrument is subject to disallowance.

1.3 As part of the motion to amend the establishing resolution, it was resolved that the Committee was to prepare a report evaluating the operation of its technical scrutiny function to be tabled during the first sitting week of 2025.

1.4 Following the tabling of the evaluation report, the House is to consider whether to continue the Committee's technical scrutiny function on a more permanent basis.

## Evidence for inclusion in the evaluation report

1.5 The Committee invited submissions from the following persons and departments:

- The Hon. Penny Sharpe, Leader of the Government in the Legislative Council
- Mr David Blunt AM, Clerk of the Parliaments and Clerk of the Legislative Council
- Ms Annette O'Callaghan, NSW Parliamentary Counsel
- Dr Ellen Rock, Independent legal adviser to the Regulation Committee and Associate Professor at the University of New South Wales
- The Cabinet Office.

1.6 The Committee received four submissions, which are available in Appendix 1.

- 1.7 The Committee extends its thanks to all those who provided a submission for consideration in the evaluation report.

## Origin of the Regulation Committee

- 1.8 This section of the report provides a summary of how delegated legislation has been reviewed by committees of the NSW Parliament, with a focus on the inception, development and key publications of the Legislative Council Regulation Committee.

### **The model for committee scrutiny of delegated legislation in New South Wales**

- 1.9 From 1960 to 1987, scrutiny of regulations in New South Wales was undertaken by an upper house committee, the Committee on Subordinate Legislation. In 1987, New South Wales shifted to a different model: a joint parliamentary committee, the Regulation Review Committee. In 2003, the Regulation Review Committee was replaced by the Legislation Review Committee, a joint statutory committee of both Houses, with responsibility for reviewing both subordinate and primary legislation. This joint committee remains in place today.

### **Emergence of the Legislative Council Regulation Committee**

- 1.10 In 2017, following a recommendation by the Select Committee on the Legislative Council Committee System, the Legislative Council established the Regulation Committee, on a trial basis, to inquire into and report on any regulation, including the policy or substantive content of a regulation, and trends or issues that relate to regulations.
- 1.11 The Regulation Committee conducted two inquiries during the trial period in 2018, both into specific pieces of delegated legislation.<sup>2</sup>
- 1.12 In 2019, as the start of the 57th Parliament, the Regulation Committee was re-established, this time as a standing committee.

### **2020 report into the making of delegated legislation in New South Wales**

- 1.13 In 2020, the Regulation Committee, chaired by the Hon Mick Veitch MLC, tabled a significant report entitled *Making of delegated legislation in New South Wales*. The report canvassed numerous key issues relating to the management and oversight of delegated legislation, including:
- concerns as to the overuse of shell legislation, Henry VIII clauses, and quasi-legislation in New South Wales, and the inadequacy of the existing scrutiny processes to address this,

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<sup>2</sup> On 12 April 2018, the House referred to the Regulation Committee an inquiry into the Environmental Planning and Assessment Amendment (Snowy 2.0 and Transmission Project) Order 2018. On 15 August 2018, the House referred to the Regulation Committee an inquiry into the Cemeteries and Crematoria Amendment Regulation 2018. The reports of both inquiries are available on the Parliament of NSW website.



- concerns around the scope of delegated legislation that is subject to parliamentary scrutiny and disallowance, including definitional inconsistencies between the different pieces of legislation, namely statutory rules and regulations, and a reliance on the form of the instrument, rather than its legislative nature,
- concerns relating to the timeframe for disallowance and the time limit on remaking instruments that are the same in substance,
- concerns around the consultation requirements for making of delegated legislation,
- concerns about public accessibility in respect of different forms of delegated legislation, and
- opportunities to improve the statutory framework for regulation of the making and oversight of delegated legislation in New South Wales.

**1.14** While the Committee made some direct recommendations, many of the issues outlined above were not immediately resolved, given the complex nature of the laws and procedures governing delegated legislation and the variety of possible approaches to reform. The Committee's overarching recommendation was that the NSW Law Reform Commission be tasked with reviewing and reporting on the matter, including options for reform.<sup>3</sup> This recommendation was not supported by the NSW Government.<sup>4</sup>

**1.15** Despite this recommendation not being supported, some important changes were made following the Committee's report, namely to the resolution establishing the Regulation Committee. The Committee's remit was expanded beyond regulations to include all legislative instruments regardless of their form, and to give the Committee the power to self-refer inquiries.<sup>5</sup>

### **2022 report into Options for reform of the management of delegated legislation in New South Wales**

**1.16** Following the tabling of its 2020 report, the Committee went on to table a second landmark report entitled *Options for reform of the management of delegated legislation in New South Wales* in 2022. The report drew on a comparative analysis of the regulatory and scrutiny framework for delegated legislation contained in a Discussion Paper prepared by leading public law expert Professor Gabrielle Appleby of the University of New South Wales.<sup>6</sup>

**1.17** In her Discussion Paper, Professor Appleby provided a comprehensive review of the regulatory (legislative and non-legislative) frameworks for making and overseeing delegated

<sup>3</sup> Regulation Committee, *Making of delegated legislation in New South Wales*, pp 40-42.

<sup>4</sup> NSW Government, *Inquiry into the making of delegated legislation in New South Wales – Government response*, 10 April 2021.

<sup>5</sup> *Minutes*, NSW Legislative Council, 20 November 2020, p 1749.

<sup>6</sup> See Professor Gabrielle Appleby, Discussion Paper, *Inquiry into options for reform of the management of delegated legislation in New South Wales*.

legislation in Australian jurisdictions as well as in New Zealand, the United Kingdom and Canada.<sup>7</sup>

**1.18** Based on her analysis of arrangements for the management of delegated legislation in other jurisdictions and particular aspects of the constitutional context in New South Wales, Professor Appleby advanced that reforms to the regulatory and scrutiny framework for delegated legislation in the state should be designed around the principles of simplicity, robustness and accessibility.<sup>8</sup>

**1.19** Guided by these principles, some of the reforms proposed in the Discussion Paper included:

- statutory consolidation
- definitional clarity and robustness
- increasing public accessibility
- extending the role of the Regulation Committee
- increased guidance to government from the Regulation Committee
- stricter regulation, transparency and oversight of incorporation of quasi-legislation.<sup>9</sup>

**1.20** The Committee's report drew on these principles set out by Professor Appleby and recommended wide-ranging changes to the regulatory and scrutiny framework for delegated legislation in New South Wales. Of these, perhaps the most significant recommendations were those regarding the expansion of the Committee's functions to include the scrutiny of all legislative instruments subject to disallowance against the scrutiny grounds in the *Legislation Review Act 1987*. This was and remains the statutory remit of the Legislation Review Committee.

**1.21** In making this recommendation, the Committee commented that:

- the function of scrutinising delegated legislation against accountability criteria aligns with the constitutional role of the Upper House in maintaining democratic oversight to support responsible and accountable government,
- there are concerns that a government-dominated joint committee may not deliver a sufficiently robust level of scrutiny of the government's exercise of delegated legislative power, or may not have the perception of delivering robust scrutiny of government, and
- 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.<sup>10</sup>

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<sup>7</sup> Professor Gabrielle Appleby, Discussion Paper, *Inquiry into options for reform of the management of delegated legislation in New South Wales*.

<sup>8</sup> Professor Gabrielle Appleby, Discussion Paper, *Inquiry into options for reform of the management of delegated legislation in New South Wales*, p 15.

<sup>9</sup> Professor Gabrielle Appleby, Discussion Paper, *Inquiry into options for reform of the management of delegated legislation in New South Wales*, pp 16-29.

<sup>10</sup> Regulation Committee, *Options for reforms of the management of delegated legislation in New South Wales*, p 22.

- 1.22** The Committee concluded that expanding its functions to include the scrutiny of disallowable instruments was the 'first step' to address some of these concerns.<sup>11</sup> 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.<sup>12</sup>
- 1.23** The Committee also recommended that its new, expanded function be accompanied by an increase in resourcing for secretariat support and the appointment of a dedicated legal adviser.
- 1.24** The three recommendations for reform of the Regulation Committee's role and remit were as follows:

**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.<sup>13</sup>

**Expansion of the Regulation Committee's functions in the 58th Parliament**

- 1.25** The Regulation Committee was reestablished in the 58th Parliament on 10 May 2023, with the Committee's remit under its establishing resolution being substantially the same as that in the 57th Parliament.
- 1.26** The composition of the Committee in the 58th Parliament was also similar to that in the prior parliament, being an eight-member committee, comprised of four government members, two opposition members, and two crossbench members, with a non-government Chair. On 9 June 2023, the Committee elected the Hon Natasha Maclaren-Jones MLC, a member of the Liberal Party, as Chair of the Committee and Ms Abigail Boyd MLC, a member of The Greens, as Deputy Chair.

<sup>11</sup> Regulation Committee, *Options for reforms of the management of delegated legislation in New South Wales*, p 22.

<sup>12</sup> Regulation Committee, *Options for reforms of the management of delegated legislation in New South Wales*, p 22.

<sup>13</sup> Regulation Committee, *Options for reforms of the management of delegated legislation in New South Wales*, p 23.

- 1.27** While the establishing resolution agreed to by the House in May 2023 did not expand the Committee's functions from the previous parliament, the newly constituted Committee remained committed to the reforms proposed in the 2022 report. In order to understand more about how a technical scrutiny function operated in practice, the Chair of the Committee and another member of the committee, the Hon Cameron Murphy MLC, visited the Senate and met with the secretariat to the Senate Standing Committee for the Scrutiny of Delegated Legislation in October 2023.
- 1.28** Subsequent to this informative visit, the Committee resolved on 11 October 2023 that the Chair of the Committee move a motion in the House to amend the establishing resolution of the Committee to implement recommendations 7-9 of its 2022 report, on a trial basis for 12 months, starting in 2024. Following this resolution, the relevant motion was moved by the Chair and was ultimately agreed to by the Council as formal business on 19 October 2023.

## Chapter 2 Reflections on the role and effectiveness of the Committee

This chapter examines the technical scrutiny function of the Committee and its effectiveness throughout its 12-month trial in 2024. It also discusses the important contributions of the Committee's secretariat and independent legal adviser, as well as the development of a dedicated website to support the Committee's additional function. Finally, this chapter provides an overview of the two principal publications produced by the Committee to provide a full and transparent record of the Committee's activities and work practices: the Guidelines for the operation of the Regulation Committee's technical scrutiny function and the Delegated Legislation Monitors.

### Analysis of the technical scrutiny function of the Committee

**2.1** This section of the report examines how the technical scrutiny function operated and how its effectiveness can be determined. It also provides a summary of feedback received from relevant stakeholders, including the Committee's independent legal adviser, NSW Parliamentary Counsel's Office, The Cabinet Office and Mr David Blunt AM, Clerk of the Parliaments and Clerk of the Legislative Council.

#### Overview

**2.2** The technical scrutiny function of the Committee requires the Committee to assess delegated legislation against the scrutiny principles that are set out the *Legislation Review Act 1987*, section 9(1)(b). The scrutiny principles are as follows:

- (i) that the regulation trespasses unduly on personal rights and liberties,
- (ii) that the regulation may have an adverse impact on the business community,
- (iii) that the regulation may not have been within the general objects of the legislation under which it was made,
- (iv) that the regulation may not accord with the spirit of the legislation under which it was made, even though it may have been legally made,
- (v) that the objective of the regulation could have been achieved by alternative and more effective means,
- (vi) that the regulation duplicates, overlaps or conflicts with any other regulation or Act,
- (vii) that the form or intention of the regulation calls for elucidation, or
- (viii) that any of the requirements of sections 4, 5 and 6 of the Subordinate Legislation Act 1989, or of the guidelines and requirements in Schedules 1 and 2 to that Act, appear not to have been complied with, to the extent that they were applicable in relation to the regulation.

- 2.3** In accordance with its establishing resolution, the Committee throughout the 12-month trial has considered any instrument that is disallowable, during the period in which it may be disallowed. This includes statutory rules, within the meaning of the *Interpretation Act 1987*, that are disallowable by virtue of section 41 of that Act, and other instruments to which section 41 applies indirectly (i.e., the Act under which an instrument is made provides that it is to be treated as if it were a statutory rule for the purposes of section 41).
- 2.4** Although the establishing resolution provides the Committee with the broad power to inquire into and report on any instrument of a legislative nature regardless of its form, including the policy or substantive content of the instrument, the Committee's focus in exercising its new scrutiny function during the trial period has been purely technical. The Committee has analysed the form and drafting of the instrument in question rather than inquiring into matters of government policy as expressed in that instrument.
- 2.5** The Committee has sought to review all disallowable instruments during the period in which they may be disallowed – 15 sitting days after the instrument was tabled in the House.<sup>14</sup> In practice, the Committee secretariat examined all new disallowable instruments and brings only those of particular concern to the Committee's attention.
- 2.6** Given the technical nature of the scrutiny principles and the volume and diversity of the instruments that must be reviewed, 15 sitting days provides a relatively short window in which to identify and resolve scrutiny concerns.
- 2.7** Where an instrument raises significant issues, the Committee has engaged with the responsible Minister or body to resolve the concerns. This engagement and its outcome have been outlined in a report of the Committee entitled a Delegated Legislation Monitor, which has been tabled each sitting week following the commencement of the trial.

### **Assessing the effectiveness of the technical scrutiny function of the Committee**

- 2.8** While the effectiveness of the Committee's technical scrutiny function may be hard to accurately quantify, there are a number of indicators which point to its success during the trial period. These indicators are summarised below:
- The number of instruments commented on, and ministerial responses received. In this respect, the Committee notes that all correspondence raising scrutiny concerns has been responded to, with a majority of responses being received on time and without the need for a follow up.
  - The number of undertakings made as a result of the Committee's comments. As discussed below, of the 34 instruments which engaged a scrutiny ground under the *Legislation Review Act 1987*, undertakings were made in respect of 10 instruments, six of which have already been implemented. Of those still outstanding, the Committee has been notified by the relevant minister that amendments are in progress for two of the instruments.

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<sup>14</sup> *Interpretation Act 1987*, s 41(1).

- The immediate legislative amendment of a regulation to resolve a scrutiny concern identified by the Committee following the Chair of the Committee's first notice of motion for disallowance.
- More subtle, long-term cultural impacts on the drafting of delegated legislation, in that instructors and legislative drafters are able to refer to entries in the Delegated Legislation Monitor to effect change.

### **Stakeholder feedback and assessments**

**2.9** As noted in Chapter 1, a number of key stakeholders provided feedback to the Committee regarding the operation of its technical scrutiny function. Dr Ellen Rock, Associate Professor at the University of New South Wales and independent legal adviser to the Committee, Ms Annette O'Callaghan, NSW Parliamentary Counsel, Mr David Blunt AM, Clerk of the Parliaments and The Cabinet Office set out insightful and important reflections on the effectiveness of this additional function.

#### *Independent legal adviser to the Committee*

**2.10** In her submission, Dr Rock endorsed the new technical scrutiny function of the Committee, describing it as a 'successful step towards increasing government accountability for the quality and content of delegated legislation in this State'.<sup>15</sup>

**2.11** Dr Rock stated that throughout the trial 'the Committee has offered Parliament a source of reliable and detailed advice on the content of instruments made pursuant to delegated legislation-making powers'.<sup>16</sup> She described the Committee's targeted review function as a 'specialised filter',<sup>17</sup> acknowledging that it effectively serves to 'potentially identify issues in delegated legislation that may otherwise have gone unnoticed'.<sup>18</sup>

**2.12** In addition to providing a general commentary on the Committee's role in identifying and resolving scrutiny concerns,<sup>19</sup> Dr Rock argued that the Committee's technical scrutiny function contributes to government accountability in key areas:

#### **Independent scrutiny**

The review of all disallowable instruments by the Committee provides an independent check on the content of delegated legislation in NSW. Most instruments are carefully prepared and drafted by expert legislative drafters in the PCO according to standard drafting guidelines, and observing internal quality controls. A smaller proportion are prepared "in-house" by the relevant agency. Regardless of the expertise of the drafter, there remains benefit in independent review. An outside perspective can identify potential issues that may not have been apparent during the drafting stage (eg

<sup>15</sup> Submission 1, Dr Ellen Rock, Associate Professor at the University of New South Wales, p 5.

<sup>16</sup> Submission 1, Dr Ellen Rock, Associate Professor at the University of New South Wales, p 5.

<sup>17</sup> Submission 1, Dr Ellen Rock, Associate Professor at the University of New South Wales, p 2.

<sup>18</sup> Submission 1, Dr Ellen Rock, Associate Professor at the University of New South Wales, p 2.

<sup>19</sup> Submission 1, Dr Ellen Rock, Associate Professor at the University of New South Wales, pp 3-4.

ambiguity in a word or phrase), or implications that may not have been fully considered.

### **Facilitating regulatory improvements**

By raising scrutiny concerns, the Committee can prompt the executive to take corrective action, such as re-making the instrument or undertaking to address the concern in some other way. For concerns that remain unresolved, the Committee's advice and recommendations can be relied on by Parliament in resorting to the more blunt corrective tool of disallowance. Even if the Committee has not recommended disallowance, the contents of its monitors are an important resource for other members of Parliament who may be considering a possible disallowance motion.<sup>20</sup>

Beyond addressing the content of disallowable instruments, the Committee's feedback can also prompt amendments to primary legislation in order to give appropriate effect to the intended regulatory regime.<sup>21</sup>

### **Fostering best practice**

The Committee's scrutiny function plays a more subtle, but no less important, role in fostering best practice in the use of delegated legislation-making powers. The content of the Chair's correspondence to responsible Ministers reinforces the scrutiny principles provided for under s 9(1)(b) of the *Legislation Review Act 1987* (NSW), which reflect fundamental expectations regarding the matters the government ought to have in mind when making regulations.

The dialogue between the Committee and the Minister focusses attention on examples of potentially problematic drafting issues, serving as a watchlist for future legislative action. At the Commonwealth level, it has been reported that legislative drafters have increasingly taken note of the issues raised by technical scrutiny committees.<sup>22</sup>

It can be hoped that a similar reflective practice will evolve in NSW, particularly given the involvement of seconded PCO staff in the Committee.<sup>23</sup>

**2.13** Ultimately, Dr Rock recommended that the 'Regulation Committee should have an ongoing function to engage in technical scrutiny of disallowable instruments against the principles set out in s 9(1)(b) of the *Legislation Review Act 1987* (NSW)'.<sup>24</sup> Dr Rock also recommended 'considering options for the delineation of scrutiny tasks between the Legislation Review

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<sup>20</sup> The notices of motion for disallowance given by the Chair and other members of Parliament are tracked by the Regulation Committee on its dedicated website.

<sup>21</sup> For example, the amendment of s 75 of the *Liquor Act 2007* (NSW) in response to the Committee's concerns regarding the offence provision in s 44C of the *Liquor Amendment (Vibrancy Reforms) Regulation 2024* (NSW), now repealed.

<sup>22</sup> Submission 1, Dr Ellen Rock, Associate Professor at the University of New South Wales, pp 2-4 quoting Senate Standing Committee on Regulations and Ordinances, Commonwealth Parliament, *Parliamentary Scrutiny of Delegated Legislation* (3 June 2019), p 11.

<sup>23</sup> Submission 1, Dr Ellen Rock, Associate Professor at the University of New South Wales, pp 3-4.

<sup>24</sup> Submission 1, Dr Ellen Rock, Associate Professor at the University of New South Wales, p 5.



Committee and the Regulation Committee with respect to Delegated Legislation. This may entail amendment to the *Legislation Review Act 1987 (NSW)*.<sup>25</sup>

### *NSW Parliamentary Counsel*

**2.14** The Committee also received feedback from Ms Annette O'Callaghan, NSW Parliamentary Counsel, who provided an important perspective on the operation of the Committee's technical scrutiny function.

**2.15** In evaluating the significance of this function and the effectiveness of its operation during the 12-month trial, Ms O'Callaghan stated that:

I would like to start by acknowledging the important role the Committee has in providing parliamentary oversight of statutory rules and other disallowable instruments and stating how invaluable the Committee's technical scrutiny function and its Delegated Legislation Monitors and Guidelines have been in the preparation of delegated legislation in 2024.<sup>26</sup>

**2.16** Ms O'Callaghan went on to explain that rigorous review of delegated legislation is an important part of executive oversight and ultimately expressed the view that the work of the Committee over the past year has successfully contributed to an increase in this kind of scrutiny:

While the Regulation Committee may to date only have been established on a trial basis I would argue that any additional parliamentary scrutiny of delegated legislation is to be welcomed as an important check and balance on Executive exercise of the delegated power to make that legislation. Obviously it is very much a matter for the Parliament whether it wishes to continue the work of the Regulation Committee. However, in my view that work is important and fundamental to democracy in NSW and the exercise of the Committee's technical scrutiny function is impactful.<sup>27</sup>

**2.17** Further, Ms O'Callaghan made the point that this scrutiny work, which 'ensures the Executive, including the NSW public sector, is subject to appropriate scrutiny in exercising powers delegated by the NSW Parliament'<sup>28</sup> is an 'important function of the Legislative Council, as the House of review'.<sup>29</sup>

**2.18** When reflecting on the effectiveness of the Committee's technical scrutiny function, Ms O'Callaghan stated that it has had an

...invaluable impact in providing a detailed parliamentary review of statutory rules and other instruments prepared by the Executive, and in ensuring the rules and other instruments have due regard to the principles that underpin a parliamentary democracy based on the rule of law.<sup>30</sup>

<sup>25</sup> Submission 1, Dr Ellen Rock, Associate Professor at the University of New South Wales, p 5.

<sup>26</sup> Submission 4, Ms Annette O'Callaghan, Parliamentary Counsel, p 1.

<sup>27</sup> Submission 4, Ms Annette O'Callaghan, Parliamentary Counsel, pp 1 and 3.

<sup>28</sup> Submission 4, Ms Annette O'Callaghan, Parliamentary Counsel, p 2.

<sup>29</sup> Submission 4, Ms Annette O'Callaghan, Parliamentary Counsel, p 2.

<sup>30</sup> Submission 4, Ms Annette O'Callaghan, Parliamentary Counsel, p 2.

**2.19** Additionally, the publication of the Committee's Guidelines and its Monitors were described as ensuring 'transparency and accountability in relation to disallowable instruments'.<sup>31</sup>

**2.20** Ms O'Callaghan also remarked on the broader advantages of Committee's technical scrutiny function, specifically as it relates to the work of the Parliamentary Counsel's Office and the statute book more broadly:

...the Committee's technical scrutiny function provides an important review of PCO's work, a review I welcome. This work undertaken by the Committee contributes to a statute book that is of the highest quality and in ensuring that delegated legislation within the statute book is fit for purpose for the NSW community.<sup>32</sup>

**2.21** When explaining the positive impact of the Committee's scrutiny function from the perspective of PCO, Ms O'Callaghan stated that there have been 'important practical implications'<sup>33</sup> for the drafting of delegated legislation and that the work of the Committee has

[created] an opportunity for greater consideration and transparency of the delegated legislation we draft and our drafting conventions and practices, encouraging conversations with the public sector agencies that instruct us, generally on behalf of Government Ministers, about whether matter is appropriate for inclusion in statutory rules and other disallowable instruments and an opportunity to refer to the Delegated Legislation Monitors and Guidelines in determining our approach to draft statutory rules and other disallowable instruments.<sup>34</sup>

**2.22** Ms O'Callaghan went on to summarise how the work of the Committee effectively supports the work of PCO and seeks to facilitate best practice in the drafting and review of legislation in New South Wales:

The Committee has to date identified a number of errors and areas of improvement in delegated legislation drafted by PCO and has raised important issues for further consideration by relevant Ministers and public sector agencies. All of this has supported us in our goals of ensuring the legislation we prepare for the people of NSW respects the rights and liberties of the individuals in our community and has appropriate respect for the institution of Parliament.<sup>35</sup>

**2.23** Finally, Ms O'Callaghan provided important context to legislative drafting and the role of PCO when explaining the significance of parliamentary scrutiny of legislation. She noted that while PCO has regard to the common law principles relating to legislation that underlie a parliamentary democracy based on the rule of law, 'PCO does not have statutory independence and is not the ultimate arbiter of the content of legislation'.<sup>36</sup> Ms O'Callaghan went on to state that 'PCO provides advice about the content of legislation and has varying degrees of influence about the content'.<sup>37</sup>

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<sup>31</sup> Submission 4, Ms Annette O'Callaghan, Parliamentary Counsel, p 2.

<sup>32</sup> Submission 4, Ms Annette O'Callaghan, Parliamentary Counsel, p 2.

<sup>33</sup> Submission 4, Ms Annette O'Callaghan, Parliamentary Counsel, p 2.

<sup>34</sup> Submission 4, Ms Annette O'Callaghan, Parliamentary Counsel, p 2.

<sup>35</sup> Submission 4, Ms Annette O'Callaghan, Parliamentary Counsel, p 2.

<sup>36</sup> Submission 4, Ms Annette O'Callaghan, Parliamentary Counsel, p 2.

<sup>37</sup> Submission 4, Ms Annette O'Callaghan, Parliamentary Counsel, p 2.

*Mr David Blunt AM, Clerk of the Parliaments and Clerk of the Legislative Council*

**2.24** In his submission to the Committee, Mr David Blunt AM, Clerk of the Parliaments and Clerk of the Legislative Council, also reflected on the operation of the Committee's technical scrutiny function. Mr Blunt stated that the 'Committee has clearly approached its additional new role with thoughtfulness and dedication'.<sup>38</sup>

**2.25** Mr Blunt also expressed a view that:

...the addition of comprehensive technical scrutiny of legislative instruments, on top of the existing innovative functions of the Regulation Committee... has the potential to place the NSW Legislative Council (and therefore the NSW Parliament) close towards the best practices in the management of delegated legislation.<sup>39</sup>

*The Cabinet Office*

**2.26** The Committee also received a submission from The Cabinet Office (TCO), which stated that: 'The Committee fulfils an important role in assisting the Legislative Council to exercise its constitutional function of scrutinising the exercise of executive powers by the Government of the day'.<sup>40</sup>

**Committee comment**

**2.27** The return of the technical scrutiny function for delegated legislation to a committee of the Legislative Council was a significant milestone, both in the evolution of the Regulation Committee, and for the Legislative Council in its role as a House of Review. It represents a continuation of the important work undertaken in the previous parliament, in which the Committee concluded that there was a need to reform the management of delegated legislation in New South Wales.

**2.28** The last 12 months have re-emphasised to the Committee that the exercise of its additional scrutiny function aligns with the constitutional role of the Upper House in maintaining democratic oversight to support responsible and accountable government. The Committee undertaking the scrutiny work it has over the past year represents an important means by which the Council effectively discharges this role.

**2.29** While there may have been concerns initially about a duplication of the work of the Legislation Review Committee, the Regulation Committee has proved the advantages of having an Upper House committee dedicated to the review and scrutiny of delegated legislation alone. As evidenced by the Committee's interactions with responsible ministers and bodies, undertakings and subsequent amendments to both primary and subordinate legislation, extending the functions of the Regulation Committee to include the scrutiny functions set out in the *Legislation Review Act 1987*, section 9(1)(b) has had a demonstrably positive impact on the making of delegated legislation in New South Wales.

<sup>38</sup> Submission 3, Mr David Blunt AM, Clerk of the Parliaments, Clerk of the Legislative Council, p 2.

<sup>39</sup> Submission 3, Mr David Blunt AM, Clerk of the Parliaments, Clerk of the Legislative Council, p 3.

<sup>40</sup> Submission 2, The Cabinet Office, p 1.

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**Finding 1**

That the return of the technical scrutiny function for delegated legislation to a committee of the Legislative Council has been successful in improving the quality of delegated legislation and enhancing parliamentary oversight of the Executive, and aligns with the constitutional role of the Upper House as a 'House of Review'.

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- 2.30** The Committee was pleased to receive positive feedback from its key stakeholders, Dr Rock, Ms O'Callaghan, Mr Blunt and The Cabinet Office, who broadly endorsed the conferral of the technical scrutiny function on the Committee. As highlighted in Ms O'Callaghan and Dr Rock's submissions, the Committee has served as an important transparency and accountability mechanism by providing an independent check on the exercise of delegated power. This feedback confirmed the view of the Committee that by raising scrutiny concerns with responsible ministers and bodies and publishing its concluding comments in the monitor, the Committee has facilitated corrective action, and played an educative role on 'best practice' in the making of delegated legislation.
- 2.31** The Committee was also pleased to hear about the specific impacts that the Committee's scrutiny function has had on the work of PCO and looks forward to continuing this meaningful and productive relationship.
- 2.32** The Committee is of the strong view that it has been successful in its delivery of the additional scrutiny function it took on during 2024. In order to continue and build on this important work, the technical scrutiny function undertaken on a 12-month trial basis should now be adopted permanently by the House as a function of the Regulation Committee.
- 2.33** Therefore, the Committee recommends that the Legislative Council endorse the work undertaken by the Regulation Committee in 2024 and subsequently amend the resolution establishing the Regulation Committee to permanently expand the Committee's functions to include technical review of delegated legislation against the scrutiny principles set out in the *Legislation Review Act 1987*, section 9(1)(b).
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**Recommendation 1**

That the Legislative Council amend the resolution establishing the Regulation Committee to permanently expand the Committee's functions to include technical review of delegated legislation against the scrutiny principles set out in the *Legislation Review Act 1987*, section 9(1)(b).

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**Resourcing and workload of the Committee**

- 2.34** This section of the report sets out how the additional scrutiny function of the Committee was operationalised in 2024, with specific regard to the recruitment of a dedicated secretariat, the appointment of an independent legal adviser and the development of bespoke website functionality. Additionally, this section provides an overview of the workload of the
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Committee during its 12-month trial period and some reflections on how this work was undertaken.

### Funding of the Regulation Committee

- 2.35** Mr David Blunt AM, Clerk of the Parliaments and Clerk of the Legislative Council, commented on the availability of ongoing funding to support the independent legal adviser and the establishment of a dedicated secretariat to support the Committee:

The NSW Budget papers and the *Appropriations (Parliament) Act* provide funding to The Legislature in two global amounts for capital and recurrent funding across all three parliamentary departments, Members and functions. The specific funding provided to a Committee or other function is therefore not immediately apparent, except to the Parliament's finance team who have access to the PRIME financial management system used by Treasury and which shows which budget bids have been funded in the forward estimates.

In anticipation of the Regulation Committee's additional new function potentially becoming ongoing, a "Parameter and Technical Adjustment" (PTA) bid was submitted as part of the 2024/25 budget process. Pleasingly, the bid was successful and funding has been provided in the forward estimates to support the work of the Committee. The amount provided in the forward estimates is sufficient to support the continuation of a secretariat consisting of four full-time equivalent (FTE) staff and a legal adviser to the Committee.

...

The legal adviser engaged to support the work of the Committee in 2024, Dr Ellen Rock, was engaged following a targeted request for expressions of interest process. Following questions raised by a Member of the Committee at the start of the year, for the remainder of the 58<sup>th</sup> Parliament, either a further targeted request for expressions of interest process or a general advertisement for expressions of interest could be adopted, if the House resolves that the Committee should continue to undertake its additional new function.<sup>41</sup>

### Committee secretariat

- 2.36** Given the significant expansion of the Regulation Committee's function, and consistent with recommendation 8 of the report *Options for reform of the management of delegated legislation in New South Wales*, it was necessary to seek funding for, and subsequently appoint, a dedicated secretariat to the Committee. Funding was ultimately approved to appoint a Director, two Principal Council Officers, a Senior Council Officer and a Council Officer.
- 2.37** It was determined that the specialised nature of the Committee's function necessitated that secretariat members undertaking research roles have a legal background, with experience reviewing and scrutinising delegated legislation. Recruitment was undertaken in December 2023 with newly developed position descriptions reflecting the need for these specific skillsets.

<sup>41</sup> Submission 3, Mr David Blunt AM, Clerk of the Parliaments, Clerk of the Legislative Council, pp 3-4.

**2.38** Currently, the secretariat is comprised of:

- a Director to provide expert support and strategic oversight of the Committee's operations and activities,
- two Principal Council Officers to undertake legislative scrutiny, analysis and research, including drafting the Delegated Legislation Monitors and meeting papers.
- a Senior Council Officer, with duties similar to those of the principal council officers, to undertake legislative scrutiny, analysis and research, including drafting the Delegated Legislation Monitors under the guidance of a Principal Council Officer, and
- a Council Officer to provide administration support to the scrutiny functions of the Committee, including maintenance of a database of disallowable instruments under scrutiny.

**2.39** The need for a dedicated, specialised secretariat was articulated by Dr Ellen Rock, independent legal adviser to the Committee, who stated:

Given the technical nature of the scrutiny principles, the volume of instruments that must be reviewed, and the relatively short window for disallowance, a well-resourced and specialised secretariat has been critical to the Committee's success. The Committee has been fortunate to have the support of a highly qualified secretariat during the 12-month trial period, comprised of members with a broad range of skills and experience relevant to the Committee's functions, including deep knowledge of parliamentary procedure, legislative process and legal principles.<sup>42</sup>

**2.40** The Committee was fortunate to have had two drafters from the NSW Parliamentary Counsel's Office seconded to the Committee secretariat in 2024, each for a period of six months. These drafters have been pivotal in setting up the Committee and providing training to other members of the secretariat to undertake legislative scrutiny. The importance of these secondments was echoed by Dr Rock, who stated that the Committee had benefited from the expertise of legislative drafters.<sup>43</sup>

### **Legal adviser**

**2.41** In accordance with paragraph 16(a) of the amended resolution establishing the Committee, a dedicated legal adviser was appointed to support the Committee in the performance of its technical scrutiny function. This mirrors practice in a number of other jurisdictions, including the Senate Standing Committees for the Scrutiny of Bills and Delegated Legislation.

**2.42** An expression of interest process was conducted in early 2024 for this position, and on 26 February 2024, the Committee resolved to approve the appointment of Dr Ellen Rock for a period of 12 months. Dr Rock has extensive expertise in administrative law, judicial review and government accountability, as well as experience with statutory interpretation in professional and academic contexts. At the time of this appointment, Dr Rock was employed as a Senior Lecturer, Faculty of Law, University of Technology Sydney. In November 2024,

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<sup>42</sup> Submission 1, Dr Ellen Rock, Associate Professor at the University of New South Wales, p 2.

<sup>43</sup> Submission 1, Dr Ellen Rock, Associate Professor at the University of New South Wales, p 2.

Dr Rock commenced a new position as Associate Professor in the Faculty of Law & Justice at the University of New South Wales.

**2.43** The legal adviser examines legislative instruments that come before the Committee and provides the Committee with an independent legal assessment as to whether they engage any of the scrutiny principles under the *Legislation Review Act 1987*, while also assisting the secretariat with the examination of complex issues. Since her appointment, Dr Rock has attended each meeting of the Committee to provide expert, independent advice on scrutiny issues coming before the Committee.

**2.44** When providing feedback on the 12-month trial of the Committee's technical scrutiny function, Dr Rock outlined how this role was performed and how the work of the independent legal adviser interacts with the work of the secretariat and the work of the Committee:

My role as independent legal advisor to the Committee has been ably supported by the dedicated members of the secretariat, who undertake the initial review of instruments to identify the more complex legal issues that require my legal analysis and advice.

After this review, if the secretariat and legal advisor form the view that a scrutiny issue warrants further inquiry, the secretariat draws this to the attention of the Committee. This filtering process ensures that the Committee's workload remains manageable, with the secretariat and legal advisor sifting out the most relevant scrutiny issues for the Committee to focus on.<sup>44</sup>

### ***Future recruitment of independent legal advisers***

**2.45** On Monday 26 February 2024, the Committee resolved that the secretariat draft a protocol that outlines the process of advertising for and the selection of the independent legal adviser with a view to ensuring the position is advertised to, and applications are encouraged from, candidates of diverse backgrounds, including culturally and linguistically diverse candidates, candidates based outside of Sydney and candidates with diverse educational backgrounds.

**2.46** Additionally, the Committee resolved that the Chair of the Committee write to the President of the Legislative to draw his attention to the future steps that will be taken by the Committee to ensure any future recruitment processes seek to engage applicants of diverse backgrounds, noting that these steps may be relevant to the Council's approach to the seeking of external advice more broadly.

### **Committee website**

**2.47** To operationalise the Committee's additional scrutiny function, it was determined that the existing Parliament of NSW's website did not have sufficient capability to adequately support this new function. On this basis, the Legislative Council, with the support of the Digital Transformation team within the Department of Parliamentary Services engaged a developer, NovaWorks, to develop additional website functionality.

<sup>44</sup> Submission 1, Dr Ellen Rock, Associate Professor at the University of New South Wales, pp 2-3.

**2.48** The development of the new website functionality commenced in late 2023 and was completed in May 2024 and included:

- an index of instruments scrutinised by the Committee, including links to the instrument and the monitors in which the instrument has been examined,
- an index of undertakings made by ministers or bodies in response to the Committee's scrutiny concerns setting out which undertakings have been implemented and which are outstanding, including links to the instrument,
- a disallowance alerts page, which sets out all instruments subject to a notice of motion for disallowance and includes which member gave the notice, when it was given, what the motion was and what the outcome of the motion was, and
- guidelines for the operation of the Committee's technical scrutiny function, discussed further below.

**2.49** The new website is being utilised in the publication of the Committee's work relating to its additional scrutiny function. Significantly, the functions of the website are unique to the Regulation Committee and ensure that information regarding the Committee's scrutiny function is readily available and accessible to users.

**2.50** In her submission, Dr Rock highlighted the utility of the Committee's new website:

The Regulation Committee website deserves particular mention. This website provides a simple forum to access a range of relevant information about delegated legislation that might otherwise require more sophisticated awareness of parliamentary and legislative procedure.

Visitors to the site are able to easily identify those instruments the Committee has raised concerns about along with a link to the relevant monitor. The website also allows visitors to track government undertakings given in response to the Committee's concerns, and the status and outcomes of disallowance motions.<sup>45</sup>

### **Workload of the Committee**

**2.51** Between February 2024 and 20 December 2024, 249 disallowable instruments have been published on the NSW legislation website and in the Government Gazette. Of those reviewed by the Committee, 34 instruments engaged one or more scrutiny principles under the *Legislation Review Act 1987*, section 9(1)(b). Subparagraph (vii), that the form or intention of the regulation calls for elucidation, was the most cited ground, referenced 29 times across the 14 Delegated Legislation Monitors published in 2024.<sup>46</sup>

**2.52** Table 1 below outlines the number of instruments which engaged a scrutiny ground under the *Legislation Review Act 1987*, section 9(1)(b) in 2024.

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<sup>45</sup> Submission 1, Dr Ellen Rock, Associate Professor at the University of New South Wales, p 4.

<sup>46</sup> This number does not account for when an instrument engages the same scrutiny ground multiple times.



**Table 1 Total number of instruments which engaged a scrutiny ground under the *Legislation Review Act 1987*, section 9(1)(b) in 2024**

Scrutiny ground under the <i>Legislation Review Act 1987</i> , section 9(1)(b)	Total number of instruments which engaged the scrutiny ground
(i) trespasses unduly on personal rights and liberties	2
(ii) may have an adverse impact on the business community	1
(iii) may not have been within the general objects of the legislation under which it was made	11
(iv) may not accord with the spirit of the legislation under which it was made, even though it may have been legally made	11
(v) that the objective could have been achieved by alternative and more effective means	1
(vi) that the regulation duplicates, overlaps or conflicts with any other regulation or Act	0
(vii) that the form or intention calls for elucidation	29
<b>Total</b>	<b>56</b>

## 2.53

The months of August, September and October were particularly busy for the Committee, attributable in part to the fact that many statutory rules were due for automatic repeal on 1 September. As demonstrated in Table 2 below, over August and September, a total of 86 disallowable instruments were published on the NSW legislation website or in the Gazette. During this time, instruments varied in complexity and size, with the longest regulation reviewed by the Committee being 56 pages.

**Table 2 Total number of disallowable instruments published on the NSW legislation website and in the Government Gazette from February to December 2024**

Month in 2024	Total number of disallowable instruments published on the NSW legislation website and in the Government Gazette
February <sup>47</sup>	9
March	20
April	12
May	8
June	41
July	18
August	69
September	17

<sup>47</sup> From the first sitting week in February 2024.

October	14
November	22
December	20

### Committee comment

- 2.54** During its trial period, the Committee has been supported by a dedicated secretariat, which is distinct from the way other committees of the Legislative Council are staffed. Other committees utilise a pooled model where secretariat staff support a number of diverse inquiries at any one time. The dedicated Regulation Committee secretariat in 2024 has been comprised of officers with a broad range of skills, experience and knowledge relevant to the Committee's functions, including statutory interpretation and parliamentary procedure.
- 2.55** Given the technical nature of the Committee's scrutiny work and the volume of instruments that must be reviewed in a short period of time, it is clear that a well-resourced, skilled and dedicated secretariat has been critical to the Committee's success.
- 2.56** In particular, the Committee has benefited from the expertise of two legislative drafters on secondment from the NSW Parliamentary Counsel's Office (PCO). The Committee is grateful for its ongoing relationship with PCO and in particular, appreciates the support of Annette O'Callaghan, NSW Parliamentary Counsel, in facilitating these secondments.
- 2.57** The Committee also extends its thanks to Dr Rock for her professional and timely legal advice over the course of the 12-month trial. Dr Rock has been invaluable in providing independent legal assessments of delegated legislation, evaluating compliance with the Committee's scrutiny principles and otherwise assisting the Committee with its work.
- 2.58** The development of a new website has also been important in facilitating access to the work of the Committee. It is a helpful resource for Parliament, the executive and interested members of the public to remain updated on the activities of the Committee, including the index of instruments, index of undertakings, disallowance alerts and guidelines. From the Committee's perspective, the website is an exemplar of a reform which meets the best practice design principles of simplicity, robustness and accessibility as advanced by Professor Appleby in her 2022 Discussion Paper. Overall, the website operates as a centralised platform to enhance accessibility and transparency of the making and scrutiny of delegated legislation in NSW, which is an important aspect of the Committee's function.
- 2.59** The Committee also acknowledges the comments by the Clerk of the Legislative Council regarding the availability of ongoing funding for a dedicated secretariat and independent legal adviser to the support the Committee. The availability of this funding to resource an appropriate secretariat is essential for the Committee to effectively discharge its important functions in scrutinising delegated legislation.
- 2.60** The Committee is of the view that without an adequately resourced and dedicated secretariat, it would be difficult to maintain the high standards it has established during its trial period.

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**Finding 2**

That in order for the Regulation Committee to effectively discharge its function in scrutinising delegated legislation, it should continue to be supported by a dedicated secretariat and a part-time independent legal adviser.

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**Publications of the Committee**

**2.61** This section of the report examines the two main publications produced by the Committee during its trial period: the guidelines for the operation of the Regulation Committee's technical scrutiny function and the Delegated Legislation Monitor. It provides an overview of the development and purpose of these publications and how they have evolved over the last 12 months.

**The guidelines**

**2.62** In order to assist with the understanding of how the Committee exercises its scrutiny responsibilities, at the beginning of 2024 the Committee published guidelines on its webpage that provide an overview of its intended approach in respect of each of the eight grounds under the *Legislative Review Act 1987*, section 9(1)(b). Information set out in the guidelines is intended as a guide only, is non-exhaustive and is subject to review. The guidelines emphasise that the Committee's focus is technical – it analyses the form and drafting of the instrument in question rather than inquiring into matters of government policy as expressed in that instrument.

**2.63** In developing the guidelines, the Committee relied on case law, research and journal articles, regarding the scrutiny principles. The Committee also referred to the guidelines developed by scrutiny committees in other Australian and international jurisdictions with similar principles, including the United Kingdom, Canada and New Zealand. In particular, the Committee acknowledges that the Consolidated Guidelines published by the Senate Standing Committee for the Scrutiny of Delegated Legislation were a particularly helpful resource.

**2.64** Shortly following their publication, the guidelines were sent to the Leader of the Government in the Legislative Council, the Hon Penny Sharpe MLC, Parliamentary Counsel's Office and The Cabinet Office for their information.

**2.65** It is the intention of the Committee that the guidelines serve as a valuable practical resource to stakeholders to understand the Committee's expectations and work practices. Therefore, the guidelines will be regularly reviewed and updated to ensure content remains current, useful and accurately reflects the operation of the Committee's technical scrutiny function.

**The Delegated Legislation Monitor**

**2.66** The Committee's usual practice is to table a report, the Delegated Legislation Monitor (the monitor), each sitting week. The Committee meets to deliberate on the monitor the Monday prior to tabling, and the minutes of these meetings are attached as an appendix to the monitor, similar to the practice of other parliamentary committees.

- 2.67** While the structure of the monitor has evolved and changed since it was first published, the substantive content remains the same. The monitor has four main parts:
- Initial matters, which outlines the operation of the Committee's technical scrutiny function.
  - Concluded scrutiny matters, which details the Committee's concluding comments on statutory instruments which raise scrutiny concerns relating to the grounds set out in the *Legislation Review Act 1987*, section 9(1)(b).
  - Instruments with no scrutiny concerns, which lists the instruments that the Committee has reviewed and in respect of which it has identified no scrutiny concerns.
  - Instruments raising scrutiny concerns, which lists the instruments in respect of which the Committee has identified scrutiny concerns and is engaging with the responsible minister or body.
- 2.68** In the first iterations of the monitor, there was an additional chapter which provided an outline of the Committee's preliminary comments on statutory instruments which raised scrutiny concerns. However, the Committee resolved to subsume these comments within the chapter detailing the Committee's concluding comments, so as to avoid repetition and the need for a reader to follow the instrument through multiple monitors.
- 2.69** To ensure transparency of communications regarding the scrutiny functions of the Committee, all correspondence sent to, and received from, responsible ministers or bodies relating to identified scrutiny concerns, as referred to in the monitors, are attached as an appendix to the monitors.
- 2.70** Following the tabling of a monitor, which usually takes place on a sitting Tuesday or Wednesday, ministers and bodies responsible for an instrument scrutinised in a monitor are advised of the Committee's concluding comments and receive a copy of the monitor.
- 2.71** During the trial, the Committee published 14 monitors, which are available on the Committee's website.

***Stakeholder reflections on the monitor***

- 2.72** In her submission, Dr Rock indicated that the Delegated Legislation Monitor is a significant contribution to government transparency regarding the making and scrutiny of delegated legislation. Dr Rock articulated:

[The] monitor provides a full and accurate record of the Committee's activities. For concluded matters, the monitor sets out a clear explanation of the scrutiny concerns raised, responses received from the responsible Minister, and the Committee's opinions and recommendations.<sup>48</sup>

- 2.73** Dr Rock went on to explain the benefit of the monitors as an accessible public record of the work done by the Council in scrutinising the functions of Government:

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<sup>48</sup> Submission 1, Dr Ellen Rock, Associate Professor at the University of New South Wales, p 4.

The monitor provides members of Parliament, the executive and the public with a full picture of the Committee's important work. Even for those matters where the Committee has recommended no further action be taken, the information contained in these monitors can serve as an important source of public information regarding the executive's intention in creating and administering delegated legislation.<sup>49</sup>

**2.74** Similarly, Mr David Blunt AM, Clerk of the Parliaments, reflected positively on the Committees' monitors and the scrutiny work the reports set out and stated that: that:

The Committee has clearly approached its additional new role with thoughtfulness and dedication. Delegated Legislation Monitors have been high quality.<sup>50</sup>

### **Committee comment**

**2.75** The Committee is pleased to receive positive feedback from the Clerk of the Parliaments and Dr Rock in relation to the quality of its monitors. The Committee is hopeful that the monitors, as well as the guidelines, have been of assistance to the Legislative Council, the Government, Parliamentary Counsel's Office and the Committee's stakeholders more broadly.

**2.76** Throughout the 12-month trial, the Committee has continued to review, update and refine the documents to ensure the content remains instructive and accurately reflects the Committee's expectations and work practices.

**2.77** The Committee reiterates its commitment to continue to work with stakeholders to make improvements, as necessary, to the guidelines and Delegated Legislation Monitor to ensure these documents remain fit for purpose to ministers, departments and other bodies engaging with the Committee.

**2.78** The Committee considers that the guidelines have provided a clear framework by which the Committee conducts its scrutiny of delegated legislation and reinforced a review process that is consistent, transparent and readily comprehensible by the Government and members of parliament. Overall, the guidelines align with the design principles proposed by Professor Appleby in her 2022 Discussion Paper and serve as an important mechanism to ensure the Committee's scrutiny function is robust and impartial.

**2.79** Ultimately, the Committee considers that the guidelines and monitors are informative documents, produced to a high standard, which contribute to the transparency of the Committee's technical scrutiny role.

<sup>49</sup> Submission 1, Dr Ellen Rock, Associate Professor at the University of New South Wales, p 4.

<sup>50</sup> Submission 3, Mr David Blunt AM, Clerk of the Parliaments, Clerk of the Legislative Council, p 2.



## Chapter 3 Potential changes to work practices of the Regulation Committee

This chapter outlines the Regulation Committee's current practices regarding engagement with ministers, departments and other bodies, undertakings and disallowance and evaluates options for potential improvements and reforms in these areas.

### Engagement with ministers and bodies

**3.1** This section provides an overview of the Committee's interactions with responsible ministers and bodies, including the perspectives from key stakeholders, The Cabinet Office and Dr Ellen Rock, the Committee's independent legal adviser.

#### Overview

**3.2** Where an instrument raises a concern under one of the Committee's scrutiny principles, the Committee will write to the responsible minister or body to request information regarding the instrument or its effects.

**3.3** Throughout the trial in 2024, the Committee engaged with 13 ministers in respect of the following portfolios regarding one or more instruments:

- The Hon Anoulack Chanthivong MP, Minister for Building
- The Hon Daniel Mookhey MLC, Treasurer
- The Hon David Harris MP, Minister for Gaming and Racing
- The Hon Jo Haylen MP, Minister for Transport
- The Hon John Graham MLC, Minister for Roads, Minister for Music and the Night-time Economy, and Minister for Jobs and Tourism
- The Hon Michael Daley, Attorney General
- The Hon Paul Scully MP, Minister for Planning and Public Spaces
- The Hon Penny Sharpe MLC, Minister for Climate Change, Minister for Energy and Minister for the Environment
- The Hon Prue Car MP, Minister for Education and Early Learning
- The Hon Ron Hoenig MP, Minister for Local Government
- The Hon Rose Jackson MLC, Minister for Water
- The Hon Sophie Cotsis MP, Minister for Industrial Relations
- The Hon Yasmin Catley MP, Minister for Police and Counter-terrorism

**3.4** The Committee also engaged with the following bodies:

- Legal Profession Admissions Board

- Statutory and Other Offices Remuneration Tribunal
- Supreme Court of NSW

**3.5** Typically, when the Committee requests information, the minister or body will have two weeks in which to respond. If the information provided is not sufficient to resolve the Committee's concerns, the Committee may raise again its concerns with the relevant minister or body or draw the instrument to the attention of the Legislative Council.

**3.6** As a result of raising scrutiny concerns with the responsible minister or body, the Committee may, if it has ongoing concerns, seek an undertaking for specific action to address its scrutiny concerns. The Committee may also recommend to the House that an instrument, or part of an instrument, be disallowed. Undertakings and the disallowance process are discussed in more detail below.

**3.7** On occasion, where an instrument raises minor issues that do not rise to the level of engaging a scrutiny concern under the *Legislative Review Act 1987*, the Committee has written to the responsible minister to bring such issues to the minister's attention for consideration and potential revision. Minor issues include typographical and cross-referencing errors that have the potential to affect the operation of the instrument. The Committee sent two minor issues letters during the trial period.<sup>51</sup>

**3.8** The Committee is aware that the Senate Standing Committee for the Scrutiny of Delegated Legislation, where appropriate, may invite a minister or departmental officials to attend a private briefing to enable the committee to further discuss and explore its scrutiny concerns.<sup>52</sup> During the trial period, the Committee did not hold any private briefings with a minister or body.

**3.9** In order to facilitate efficient and productive engagement with the Government, the Committee wrote to the Hon Penny Sharpe MLC, Leader of the Government in the Legislative Council in early 2024 to provide an overview of how the Committee would be operating and how it intended to engage with ministers and bodies. The Committee reflects that this early engagement with the Leader of the Government and her office has been critical in ensuring this new scrutiny function has been understood by the Government, including what is expected of ministers and bodies when the Committee sends a letter identifying issues in an instrument.

### **Reflections from key stakeholders**

**3.10** The Committee received feedback from The Cabinet Office and Dr Ellen Rock, independent legal adviser to the Committee, in relation to how the Committee has been engaging with ministers and bodies. In particular, Dr Rock identified a number of areas where changes could

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<sup>51</sup> The Committee sent two minor issues letters in 2024, one to the Minister for Building regarding the *Home Building Amendment (Supervision Practice Standard) Regulation 2024*, and another to the Minister for Education and Early Learning regarding the *Children (Education and Care Services) Supplementary Provisions Regulation 2024*.

<sup>52</sup> See Senate Standing Committee for the Scrutiny of Delegated Legislation, *Guidelines*, p 1.



be made in the future. The key themes of these important stakeholder reflections are summarised below.

### *Timeframes*

- 3.11** During the 12-month trial of the Committee's additional scrutiny function, the question of timeframes, in terms of how long ministers and bodies have to respond to correspondence from the Committee identifying scrutiny concerns, arose a number of times.
- 3.12** When discussing this issue, Dr Rock emphasised the importance of timely and complete responses from ministers and bodies, noting that 'if correspondence is delayed or fails to directly engage with the issues raised by the Committee, the Committee may be forced to finalise its views on a scrutiny issue without a full appreciation of the government's position'.
- 3.13** When considering if it would be appropriate to shorten the period ministers or bodies have to respond to scrutiny concerns identified by the Committee, and in turn, potentially increase the time that the Committee has to review an instrument and finalise its views, Dr Rock warned that doing this may 'negatively impact the quality of the Minister's response to scrutiny concerns'.<sup>53</sup>
- 3.14** In its submission to the Committee, The Cabinet Office (TCO) broadly commented on the disallowance timeframes, noting:

...the relevant disallowance timeframe in 2024 was never less than 56 calendar days. For an instrument made at any point in January 2024, assuming notice was given on 6 February 2024, the first sitting day of the year, a notice of a disallowance motion was required to be given by 4 June 2024 – 126 calendar days after the first sitting day of the year.<sup>54</sup>

- 3.15** TCO also remarked that the timeframe that ministers currently have to respond to correspondence, being two weeks, is already limited, and a further reduction 'is unlikely to result in better engagement between the Government and the Committee'.<sup>55</sup> From TCO's perspective, the current timeframes, whereby ministers have 14 calendar days to consider, seek relevant advice and respond to the Committee, 'is an appropriate timeframe that balances the demands made of both the Committee and its staff, as well as Ministers and the agencies that support them'.<sup>56</sup>

### *Informal engagement*

- 3.16** Dr Rock suggested that informal communication between the Committee and responsible ministers and bodies may improve the 'quality and efficiency'<sup>57</sup> of the Committee's current consultation process. Dr Rock noted that the Committee will likely build relationships with

<sup>53</sup> Submission 1, Dr Ellen Rock, Associate Professor at the University of New South Wales, p 6.

<sup>54</sup> Submission 2, The Cabinet Office, pp 1-2.

<sup>55</sup> Submission 2, The Cabinet Office, pp 1-2.

<sup>56</sup> Submission 2, The Cabinet Office, pp 1-2.

<sup>57</sup> Submission 1, Dr Ellen Rock, Associate Professor at the University of New South Wales, p 6.

staff within relevant departments and agencies, which, in turn, 'can support greater dialogue and engagement'.<sup>58</sup>

***Positive working relationships***

- 3.17** In her submission, Dr Rock argued that building a positive working relationship is mutually beneficial for the Committee and responsible ministers and bodies. She suggested that a positive working relationship 'allows the Committee to play a meaningful role in encouraging improvements and best practice in the creation of delegated legislation'.<sup>59</sup>

***Increasing awareness of the Committee and its functions***

- 3.18** Considering that the Committee's technical scrutiny function is a 'recent development'<sup>60</sup>, Dr Rock proposed that it would be beneficial to increase the profile of the Committee and awareness of the Committee's role. While it can be expected that awareness will naturally grow with time, Dr Rock also suggested that the Committee '[offer] workshops and seminars explaining its functions and processes'.<sup>61</sup>

***Restructuring of Committee correspondence***

- 3.19** As noted in Dr Rock's submission, current practice for correspondence is that scrutiny concerns are recorded in the order they appear in an instrument. Dr Rock queried where this 'is the most efficient way to direct the Minister's attention to those concerns that require a more immediate and considered response'.<sup>62</sup>
- 3.20** Dr Rock argued that '[b]undling scrutiny concerns together potentially risks burying those that are most important, and may also give the mistaken impression that the Committee is taking major issue with trivial matters, undermining the importance of its accountability role'.<sup>63</sup> On this point, Dr Rock suggested that 'the Committee consider restructuring its formal correspondence to more clearly signal the scrutiny issues that are of serious and immediate concern to the Committee'.<sup>64</sup>
- 3.21** Dr Rock acknowledged potential disadvantages with this approach, for example, it may not be possible for the Committee to know which issues are *prima facie* more or less serious until *after* the responsible minister responds.<sup>65</sup>

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<sup>58</sup> Submission 1, Dr Ellen Rock, Associate Professor at the University of New South Wales, p 8.

<sup>59</sup> Submission 1, Dr Ellen Rock, Associate Professor at the University of New South Wales, p 8.

<sup>60</sup> Submission 1, Dr Ellen Rock, Associate Professor at the University of New South Wales, p 8.

<sup>61</sup> Submission 1, Dr Ellen Rock, Associate Professor at the University of New South Wales, p 8.

<sup>62</sup> Submission 1, Dr Ellen Rock, Associate Professor at the University of New South Wales, p 7.

<sup>63</sup> Submission 1, Dr Ellen Rock, Associate Professor at the University of New South Wales, p 7.

<sup>64</sup> Submission 1, Dr Ellen Rock, Associate Professor at the University of New South Wales, p 7.

<sup>65</sup> Submission 1, Dr Ellen Rock, Associate Professor at the University of New South Wales, p 7.

**Committee comment**

- 3.22** In the Committee's experience over its 12-month trial, engagement from ministers and bodies has been largely positive and productive, with a majority of responses being delivered on time, and with the requisite detail.
- 3.23** This being said, the Committee does note that a small number of ministerial responses have been delayed or have not engaged substantively with the Committee's concerns. In order to address this issue, the Committee has considered requesting responsible ministers and bodies to respond to letters identifying scrutiny concerns within seven days, rather than the current 14 days, in order to avoid some of the more significant delays which could ultimately impact the ability of the Committee to conclude its scrutiny while an instrument is disallowable.
- 3.24** The Committee acknowledges The Cabinet Office's comments in regard to timeframes to respond, however, notes that resourcing, the number of new instruments made and the complexity of any one instrument will impact how long it takes the Committee to complete its analysis and engage with the responsible minister or body should a scrutiny issue arise.
- 3.25** Ultimately, a balance must be struck between providing responsible ministers or bodies with enough time to respond to the Committee, such that the scrutiny concerns may be adequately considered, while also ensuring the Committee is able to report on the relevant instrument in the monitor within the required timeframes. The Committee will continue to monitor this matter, but at this stage, will continue its approach of providing ministers and bodies with two weeks to respond to scrutiny concerns.
- 3.26** Where appropriate, the Committee is supportive of holding private briefings with ministers or bodies, similar to the practice of the Senate Standing Committee for the Scrutiny of Delegated Legislation. Private briefings may offer an opportunity for the Regulation Committee to engage with ministers or bodies to obtain further information about an instrument that raises scrutiny concerns and seek to resolve these concerns expeditiously. These meetings may also be an opportunity to discuss and resolve ongoing systemic scrutiny concerns.
- 3.27** The Committee is amenable to changing the format of its correspondence with ministers or bodies to ensure that significant scrutiny concerns are given prominence, noting however that it can be difficult to anticipate which issues may be more or less significant. The Committee also considers that once the functions of the Committee are more widely understood by the executive it may be expedient that the Committee, via its secretariat, engage with departments and agencies to informally gather information or seek clarification to identify and resolve technical scrutiny concerns, particularly in relation to more minor issues. This informal correspondence with departments and agencies is a practice of the Senate Standing Committee for the Scrutiny of Delegated Legislation and in the Committee's view, is an effective and practical means of engaging with government.
- 3.28** Relatedly, the Committee and its secretariat are open to any outreach opportunities that may be appropriate to further inform ministers, bodies and relevant departments about the Committee's role and operations.
- 3.29** On this basis, the Committee recommends that the Committee and its secretariat should continue to develop a positive and productive working relationship with ministers and bodies which promotes an understanding of the Committee and its technical scrutiny function.

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**Recommendation 2**

That the Regulation Committee continue to develop a positive and productive working relationship with ministers and bodies which promotes an understanding of the Committee and its technical scrutiny function.

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**Disallowance motions**

**3.30** This section covers the use of motions to disallow an instrument in the Legislative Council, including the Committee's first and only use of a disallowance motion during its 12-month trial. This section also examines the concept of 'protective disallowance motions', which are employed by the Senate Standing Committee for the Scrutiny of Delegated Legislation to provide more time to resolve scrutiny concerns with responsible ministers and bodies.

**Overview**

**3.31** Disallowance refers to the process, provided for in the *Interpretation Act 1987*, by which either House of Parliament may, by resolution, disallow a statutory instrument with the effect that the instrument is treated as if it has been repealed and any amendments made by it undone. An instrument may be disallowed by either House at any time, provided notice of the disallowance is given within 15 sitting days after notice of the rule was tabled in the House.

**3.32** Standing Orders 42 and 82 provide the procedures of the House for the bringing on, debating and resolution of a motion to disallow a statutory instrument under the *Interpretation Act 1987*, section 41 or the authority of any other act.

**3.33** In the Legislative Council, the day after the disallowance notice of motion is given, it is given precedence as 'Business of the House' on the Notice Paper. The disallowance motion remains as Business of the House for six sitting days. If it is not moved within that time, it will be set down as private members' business or government business as applicable. In NSW, unlike in some other jurisdictions, there is no provision for automatic disallowance of a statutory rule where a notice of motion for disallowance of the rule is not dealt with by the House within a certain period.<sup>66</sup>

**3.34** In 2024 during the trial, the Committee has only recommended disallowance of part of one instrument during the trial, which is discussed in the case study below.<sup>67</sup>

**Case study: The Committee's first recommendation of disallowance**

Although the Committee has made strong recommendations that particular instruments be amended to

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<sup>66</sup> *Legislation Act 2003* (Cth), section 42(2) provides for the automatic disallowance of a legislative instrument where a notice of disallowance has not been dealt with within 15 sitting days.

<sup>67</sup> There was a total of five notices of motion to disallow in the Legislative Council in 2024. Three were resolved in the negative, one was withdrawn and one is yet to be debated in the House.

address the Committee's scrutiny concerns in 2024, the Committee only recommended the disallowance of a portion of an instrument on one occasion: Schedule 1[12] of the Liquor Amendment (Vibrancy Reforms) Regulation 2024, published on the NSW legislation website on 28 June 2024. The notice of motion was ultimately withdrawn; however, the Committee's identification of the relevant issue and its recommendation of disallowance did appear to influence the introduction of legislation that rectified the issue.

By way of background, the Liquor Amendment (Vibrancy Reforms) Regulation 2024, Schedule 1[12] inserted clause 44C into the Liquor Regulation 2024. Clause 44C made it an offence for a licensee to permit business to be conducted at a licensed premises in a way that unduly disturbs, or unreasonably and seriously disturbs, the quiet and good order of the neighbourhood.

The Committee wrote to the responsible minister, the Minister for Gaming and Racing in relation to the amending regulation on 16 July 2024. An initial response was received on 12 August 2024. The Committee wrote back to the Minister seeking further information on 5 September 2024. A further response was received on 23 September 2024.

Based on the two letters from the Minister, the Committee formed the view that clause 44C either did not accord with the general objects and intention of the Liquor Act 2007 (the Act) and significantly detracted from the operation of the scheme set out in the Act, or was inconsistent with or repugnant to the Act. The clause, inserted for the particular purpose of enabling police officers and marine authorities to issue improvement notices under the Act, section 75, raised questions of potential inconsistency with the Act that had not been resolved to the Committee's satisfaction.

The Committee further formed the view that the provision inserted by the amending regulation, Schedule 1[12] was not within the general objects of, or did not accord with the spirit of the legislation under which it was made and that the item inserting the provision should, on this basis, be disallowed.

However, upon receiving a third item of correspondence relating to the amending regulation, stating that the Government's intention was to omit clause 44C from the regulation as part of the second tranche of the Government's Vibrancy Reforms, which was to be introduced via a new bill coming before Parliament in October 2024, the Committee came to a slightly different conclusion. On the basis of the commitment set out in the third item of correspondence, the Committee considered that if clause 44C was not omitted by way of legislation introduced to Parliament in October 2024, the provision of the amending regulation inserting clause 44C should then be disallowed. The committee therefore made the following recommendation:

*That:*

- (a) *the Chair of the Regulation Committee give notice of motion in the House, on or before 22 October 2024, that under the Interpretation Act 1987, section 41 the Legislative Council disallows the Liquor Amendment (Vibrancy Reforms) Regulation 2024, Schedule 1[12] as published on the NSW legislation website on 28 June 2024,*
- (b) *if by the first sitting day of November 2024, legislation to omit clause 44C from the Liquor Regulation 2018 has not been introduced to either House, the Chair of the Regulation Committee move the notice of motion to disallow the Liquor Amendment (Vibrancy Reforms) Regulation 2024, Schedule 1[12], and*
- (c) *if by the first sitting day of November 2024, legislation has been introduced to omit clause 44C from the Liquor Regulation 2018, the Chair of the Regulation Committee withdraw the notice of motion to disallow the Liquor Amendment (Vibrancy Reforms) Regulation 2024, Schedule 1[12]. In accordance with Recommendation (a), the Chair of the Regulation Committee gave notice of motion to disallow the Liquor Amendment (Vibrancy Reforms) Regulation 2024, Schedule 1[12] on Tuesday 15 October 2024.*

The Chair gave notice of the relevant motion as per the recommendation on 15 October 2024. This notice was subsequently withdrawn on 16 October 2024, as in accordance with part (b) of the Recommendation, the Government introduced the 24-Hour Legislation Amendment (Vibrancy

Reforms) Bill 2024 which proposed omitting the Liquor Amendment (Vibrancy Reforms) Regulation 2024, clause 44C. On 22 October 2024, this Bill passed the Legislative Council.

\* Regulation Committee, *Delegated Legislation Monitor Nos 7 and 11 of 2024*.

### Instruments drawn to the attention of the House

- 3.35** Throughout the trial period, there were a number of instruments that the Committee drew to the attention of the House, as a way to highlight significant scrutiny issues in the instrument, without recommending disallowance.
- 3.36** Of note, the Committee drew the attention of the House to the *Education Amendment (Non-Government School) Assets and Income Regulation 2024*, raising concerns about the use of legislative power to delegate matters to non- or quasi-legislative documents, such as guidelines.<sup>68</sup> The Committee also called the attention of the House to the *Design and Building Practitioners Amendment (Miscellaneous) Regulation 2024*, raising concerns about the successive use of a regulation-making power that is transitional in nature, where this could effectively lead to an indefinite exemption.<sup>69</sup>
- 3.37** When tabling the relevant monitor concluding the Committee's concerns on the above instruments, the Chair gave a short tabling statement. This statement reiterated the scrutiny concerns identified by the Committee and articulated that while the Committee did not recommend disallowance on this occasion, should the same issues arise, the Committee's position is that is highly likely that disallowance would be recommended.<sup>70</sup>

### Approach to disallowance in the Senate

- 3.38** In the case of the Senate, the disallowance process is set out in the *Legislation Act 2003* (Cth) and is reflected in the Senate Standing Order 78. By way of comparison, there were 22 disallowance notices of motion given in the Senate in 2024. Of those, 13 motions were withdrawn, seven were not disallowed, one was disallowed, and another is yet to be resolved.<sup>71</sup>
- 3.39** In accordance with the *Legislation Act 2003* (Cth), notices of motion for disallowance must be given within 15 sitting days after the instrument has been tabled and the Senate has a further 15 sitting days in which to deal with the notice; if the motion is not by then disposed of, the instrument is automatically disallowed.
- 3.40** Where the Senate Standing Committee for the Scrutiny of Delegated Legislation is unable to conclude its consideration of an instrument before the period for giving notice of motion of

<sup>68</sup> For more information about the Committee's conclusions regarding the *Education Amendment (Non-Government School) Assets and Income Regulation 2024*, see Delegated Legislation Monitors Nos 2 and 4.

<sup>69</sup> For more information about the Committee's conclusions regarding the *Design and Building Practitioners Amendment (Miscellaneous) Regulation 2024*, see Delegated Legislation Monitors No. 7.

<sup>70</sup> *Hansard*, NSW Legislative Council, 15 May 2024, pp 6-7 (Natasha Maclaren-Jones); *Hansard*, NSW Legislative Council, 7 August 2024, p 4 (Natasha Maclaren-Jones).

<sup>71</sup> Parliament of Australia, *Disallowance Alert*, [https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Disallowance\\_alert](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Disallowance_alert).

disallowance expires (15 sitting days), the committee will give a 'protective' notice of motion to disallow the instrument. In addition, the committee may give such a notice where the committee requires an undertaking to be implemented before it can conclude its consideration of the instrument. The committee will usually withdraw a 'protective' notice when it receives a satisfactory response to its scrutiny concerns or confirmation that any outstanding undertakings have been implemented.<sup>72</sup> In 2024, six of the notices of motions to disallow an instrument were 'protective'.<sup>73</sup> Five of these motions were withdrawn, and one instrument was disallowed.

- 3.41** In terms of the form of the protective notice of motion, the fact that a notice is 'protective' is not reflected in the motion itself. Rather, the fact that it is 'protective' is stipulated in the relevant Delegated Legislation Monitor. For example, the committee's decision to place a protective notice of motion to disallow the *Explosives Regulation 2024*, was articulated as follows in Monitor 13 of 2024:

1.59 Finally, as the committee awaits the minister's response to the matters outlined above, the committee has resolved to place a protective notice of motion to disallow the instrument to provide it with additional time to consider the minister's impending response.<sup>74</sup>

- 3.42** The potential for the Regulation Committee to utilise a similar 'protective' disallowance notice of motion in the future is canvassed in more detail below.

### **Feedback from the Committee's independent legal adviser**

- 3.43** In her submission to the Committee, Dr Rock reflected on the significance and impact of the Committee recommending disallowance, and noted that disallowance is an important accountability mechanism:

The Committee's ability to recommend disallowance is a significant power, and awareness of this possibility can encourage government to take the Committee's scrutiny concerns more seriously during consultation. Coercive powers of this type are an important accountability tool.<sup>75</sup> The Committee should not be reluctant to make a disallowance recommendation when warranted. However, it is important to recognise

<sup>72</sup> Harry Evans (ed), *Odgers' Australian Senate Practice* (Department of the Senate, 9<sup>th</sup> ed, 1999), p 438, 440.

<sup>73</sup> The instruments subject to a notice of motion to disallow were: *Explosives Regulation 2024*, *Recycling and Waste Reduction (Export-Waste Papers and Cardboard) Rules 2024*, *Jervis Bay Territory Rural Fires Rules 2024*, *Migration Amendment (Bridging Visa Conditions) Regulations 2023*, *Biosecurity (Electronic Decisions) Determination 2023*, and *Offshore Petroleum and Greenhouse Gas Storage (Greenhouse Gas Injection and Storage) Regulation 2023*.

<sup>74</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitor 13 of 2024*, p 16.

<sup>75</sup> Submission 1, Dr Ellen Rock, Associate Professor at the University of New South Wales, p 7 quoting Richard Mulgan, 'Accountability: An Ever-Expanding Concept?' (2000) 78 *Public Administration* 555.

that the threat of coercive accountability powers can potentially foster a defensive and adversarial dynamic.<sup>76</sup>

- 3.44** Dr Rock also reflected on the future operation of disallowance motions, and identified protective disallowance notice of motions as an option to extend the timeframe in which to review an instrument:

Another option, adopted by the equivalent Senate Committee, is to take pre-emptive steps to commence the disallowance process pending resolution of a scrutiny concern, commonly called a “protective” notice.<sup>77</sup> These notices are withdrawn once a scrutiny issue is resolved, but preserve the Senate’s ability to disallow beyond the standard period.<sup>78</sup>

- 3.45** When considering the use of protective disallowance motions, Dr Rock noted the fact that it would be important to frame these notices as a means of extending the timeframe for the Committee to continue its dialogue with a minister or department with the aim of resolving scrutiny concerns, as opposed to recommending disallowance on the basis of a serious infringement of a scrutiny principle. When describing how this could occur, Dr Rock said that:

Rather than making formal changes to legislation or the practice of the Legislative Council, in the shorter term it may be beneficial to focus on building stronger working relationships between the Committee and the executive...The Committee may also consider developing a procedure for the use of “protective” notices as a fall-back position. In doing so, it would be important that the purpose of these notices is clearly communicated to ensure that this does not undermine the symbolic and practical significance of a formal disallowance motion.<sup>79</sup>

### **Committee comment**

- 3.46** The Committee recognises that disallowance is a powerful accountability measure. It provides an important mechanism to prevent delegated legislative power being exercised in a manner not foreseen or provided for in the primary legislation, or in a way that might otherwise be considered undesirable by the Legislature. Although disallowance was only recommended on one occasion during the trial, the circumstances surrounding this recommendation highlighted that disallowance, or at least the potential for disallowance, can serve as a strong incentive for the Government to resolve and correct problems in delegated legislation.
- 3.47** While the Committee is prepared to make a disallowance recommendation if the circumstances warrant it, it is not the default mechanism to resolve scrutiny concerns. The

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<sup>76</sup> Submission 1, Dr Ellen Rock, Associate Professor at the University of New South Wales, p 8, referencing Thomas Schillemans, ‘Questions of Perspective – Accountability as a Behavioural Proposition’ in Matthew Flinders and Chris Monaghan (eds), *Questions of Accountability: Prerogatives, Power and Politics* (Hart Publishing, 2023) 23.

<sup>77</sup> Submission 1, Dr Ellen Rock, Associate Professor at the University of New South Wales, p 7 quoting Odgers' *Australian Senate Practice* (14th ed, 2022), chapter 15.

<sup>78</sup> Submission 1, Dr Ellen Rock, Associate Professor at the University of New South Wales, p 6.

<sup>79</sup> Submission 1, Dr Ellen Rock, Associate Professor at the University of New South Wales, p 6.



Committee is in favour of alternative solutions where possible, for example, undertakings, as the ultimate goal for the Committee is to improve the quality of delegated legislation in New South Wales.

- 3.48** During its trial period, the Committee drew the attention of the House to specific scrutiny concerns and noted that should that issue be identified again in the future, the Committee may utilise its power to recommend disallowance. For example, in relation to the *Design and Building Practitioners Amendment (Miscellaneous) Regulation 2024*, the Committee identified the successive use of a regulation-making power that was transitional in nature, where this power could effectively be used to create an indefinite exemption. While in this instance, the Committee did not recommend disallowance, the Committee notes that it will continue to monitor issues it identified during its 12-month trial, and should it be appropriate, may recommend disallowance in the future should those issues continue to arise.
- 3.49** In regard to protective disallowance motions, the Committee is open to the concept, especially where the Committee needs more time to resolve scrutiny concerns with a responsible minister or body. The Committee considers that although it was not specifically labelled as a 'protective disallowance', the notice of motion to disallow the *Liquor Amendment (Vibrancy Reforms) Regulation 2024*, Schedule 1[12] was *in effect* a form protective disallowance, granting the Government a specified amount of time to resolve the Committee's scrutiny concerns, prior to disallowance being moved.
- 3.50** The Committee acknowledges that the use of protective disallowance motions in the same manner and frequency as the Senate would be a significant cultural change in the New South Wales Legislative Council. As reflected in Dr Rock's comments, any decision to use a protective disallowance motion would need be clearly communicated to ensure that it does not dilute the significance of a formal disallowance motion.
- 3.51** In order to better understand how protective disallowance motions could operate in New South Wales, the Committee recommends that the Committee seek advice from the Clerk of the Parliaments on the potential use of protective disallowance notices of motions as a mechanism to provide the Committee with additional time to resolve scrutiny concerns with responsible ministers and bodies.

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### **Recommendation 3**

That the Regulation Committee seek advice from the Clerk of the Parliaments on the potential use of protective disallowance notices of motions as a mechanism to provide the Committee with additional time to resolve scrutiny concerns with responsible ministers and bodies.

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## **Undertakings**

- 3.52** This section covers undertakings made by ministers or bodies to address scrutiny concerns raised by the Committee and their effectiveness over the course of the Committee's 12-month trial. This section also provides a case study on an occasion where the Committee prompted the giving of an undertaking as an appropriate alternative to disallowance and outlines how

this could be done more regularly as a means of resolving scrutiny concerns identified by the Committee.

### Overview

**3.53** As a result of the Committee raising scrutiny concerns with the relevant minister or body, the Committee may seek an undertaking for specific action to address its scrutiny concerns. The Committee records relevant undertakings on the Index of Undertakings on its website. At present, only when a minister or body makes a promise to the Committee expressed as an 'undertaking' does the Committee regard it as such, i.e., 'intentions' to amend or review legislation will not be recorded as an undertaking.

**3.54** In 2024 during the trial period, undertakings were made in respect of the following ten instruments:

- *Electricity Infrastructure Investment Amendment (Consumer Trustee and Infrastructure Planner) Regulation 2024*
- *Government Sector Finance Regulation 2024*
- *Industrial Relations (General) Amendment (Fees) Regulation 2024*
- *Marine Pollution Regulation 2024*
- *Museum of Applied Arts and Sciences Regulation 2024*
- *NSW Admission Board Second Amendment Rule 2024*
- *NSW Admission Board Sixth Amendment Rule 2024*
- *NSW Admission Board Third Amendment Rule 2024*
- *Pipelines Amendment Regulation 2024*
- *Report and determination pursuant to section 14(2) of the Statutory and Other Offices Remuneration Act 1975 - President, Vice-President, Deputy Presidents and Acting Judge of the Industrial Relations Commission*
- *Road Transport Amendment (Automated Seatbelt Enforcement) Rule 2024*

**3.55** As at 20 December 2024, four undertakings remain outstanding. The Committee's current practice is to send follow-up correspondence where an undertaking has not been implemented within six months. The Committee proactively monitors the NSW legislation website and the Government Gazette for any undertakings which may be implemented. In the current letter template to ministers and bodies regarding undertakings, the Committee does not require that it be notified of whether and when an undertaking has been implemented.

**3.56** Of those ministers and bodies that have made undertakings, these have been voluntary. The Committee has on one occasion, however, prompted a minister to give an undertaking where this was an appropriate alternative to the Committee resolving to give notice of motion to disallow the relevant part of the amending regulation. This is discussed in the case study below.

**Case study: Undertakings, an alternative to disallowance**

The Committee reflects positively on the giving of an undertaking by the Hon. Penny Sharpe, MLC, in relation to the Pipelines Amendment Regulation 2024. As outlined in Delegated Legislation Monitor No. 12 of 2024, the Committee put forward the view that the *Pipelines Amendment Regulation 2024*, Schedule 1[2], proposed section 26C(1)(b), insofar as it enables a direction to be given to *dispose* of property, may not accord with the spirit of the Act or may be beyond the scope of the regulation-making powers in the Act.

The Minister told the Committee that:

The Government intends to shortly submit a Bill to amend various pieces of energy related legislation, which will clarify the regulatory making powers under sections 26C1(b) (Item 1). In the meantime, I note that section 69(1) could be relied upon as this is a matter that is necessary to be prescribed for carrying out or giving effect to this Act.

As stated in the monitor, the Committee had reservations about relying on the general 'necessary or convenient' regulation-making power in the Act, section 69(1) where there is a specific regulation-making power dealing with the matter prescribed.

In light of these reservations, and the Minister's concurrence with the Committee's findings, the Committee wrote back to the Minister for Energy requesting an express undertaking, by 14 April 2025, to amend the relevant regulation-making power, or the Pipelines Regulation 2023, to address this scrutiny concern. Such an undertaking was considered an appropriate alternative to the Committee resolving to give a notice of motion to disallow the relevant part of the amending regulation, preserving the Committee's ability to potentially disallow that part, if the intended amendments were not made in the next six months, given the uncertainty over whether and when a remedying bill would pass both Houses and commence. The Minister responded to the Committee and undertook to amend the Pipelines Regulation 2023 to address the Committee's concerns.

\*Regulation Committee, *Delegated Legislation Monitor No. 12 of 2024*, pp. 10-13.

**Committee comment**

- 3.57** The Committee appreciates the prompt implementation of undertakings by ministers and bodies during the trial period. Undertakings have the benefit of securing a satisfactory outcome in relation to the Committee's scrutiny concerns, without the disruption that a notice of motion to disallow may present.
- 3.58** In particular, the Committee would like to commend recent correspondence received from NSW Treasury which promptly notified the Committee that the undertakings had been implemented in relation to the *Government Sector Finance Regulation 2024* as a result of scrutiny concerns raised by the Committee. While the Committee has not specifically required that it be notified when undertakings have been implemented, it is appreciative of proactive and ongoing communication from ministers and bodies on updates to instruments as a result of the Committee's comments.
- 3.59** Although the Committee secretariat routinely checks newly published disallowable instruments for the implementation of undertakings, prompt notification of an undertaking being implemented means that the Committee can prioritise the relevant amending instrument in its review, and ultimately ensure that the Index of Undertakings is swiftly updated to reflect

any amendments. For this reason, the Committee endorses updating the current process for undertakings and recommends that, when an undertaking has been implemented, the responsible minister or body promptly notify the Committee of its implementation.

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**Recommendation 4**

That the NSW Government, via the responsible minister or body, notify the Regulation Committee within five business days of an undertaking made to the Committee being implemented.

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## Chapter 4 Future reform relating to delegated legislation in New South Wales

This chapter explores potential reforms relating to delegated legislation in New South Wales that would enhance or complement the technical scrutiny function of the Regulation Committee. Reforms include amending the name of the Regulation Committee, an inquiry into the use of explanatory notes, and consolidating the three Acts which govern the making of primary and subordinate legislation in the State.

### Amending the name of the Regulation Committee

- 4.1** As outlined in Chapter 1, when a committee of the Legislative Council was first tasked with the scrutiny of regulations in New South Wales, it was named the 'Committee on Subordinate Legislation'. In 2017, an Upper House committee was again constituted to undertake this scrutiny function under the Committee's current name: the Regulation Committee.
- 4.2** Despite the Committee's name, the establishing resolution and later amendments provide that the Committee's scope is not confined to regulations. Rather, the Committee may inquire into and report on *any instrument* of a legislative nature regardless of its form. In addition, the remit of the Committee's scrutiny function is 'all instruments of a legislative nature that are subject to disallowance while they are so subject'.
- 4.3** Hence, in accordance with the establishing resolution, the Committee considers a variety of types of delegated legislation, including regulations, rules, practice notes, guidelines and orders.

#### Committee comment

- 4.4** The Committee is of the view that it is important for its name to accurately reflect the work it undertakes.
- 4.5** The Committee's remit extends beyond the review and scrutiny of regulations to include all forms of delegated legislation subject to disallowance. It is on this basis that the Committee considers that its current name does not accurately reflect the Committee's functions, which may also lead to some confusion as to the work undertaken by the Committee.
- 4.6** The Committee therefore recommends that the House amend the establishing resolution of the Regulation Committee to change the Committee's name to the Delegated Legislation Committee, to more accurately reflect the Committee's role and remit.

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#### Recommendation 5

That the Legislative Council amend the resolution establishing the Regulation Committee to change the Committee's name to the Delegated Legislation Committee, to more accurately reflect the Committee's role and remit.

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## Explanatory notes

- 4.7 This section explores the function of explanatory notes in delegated legislation in New South Wales and briefly sets out the role that explanatory notes play in legislative scrutiny at the Commonwealth level and in Queensland.

### Explanatory notes in New South Wales

- 4.8 Explanatory notes, also referred to explanatory statements or memoranda, explain the purpose and details of bills or delegated legislation, usually in a concise and simple way. Explanatory notes may provide a useful tool for Parliament and its committees to access information on proposed legislation in order to fulfill their function of scrutinising the executive.<sup>80</sup>
- 4.9 In NSW, the explanatory note for delegated legislation is drafted by the Parliamentary Counsel's Office (PCO) and does not comment on the policy rationale for the instrument, but rather is mechanical in nature and focuses on the operation of the regulation. As provided by the PCO Standard, a guide to drafting principles for NSW legislation, the explanatory note should cite the regulation-making powers<sup>81</sup> and identify the presence of any Henry VIII provisions, shell legislation or quasi legislation.<sup>82</sup>
- 4.10 It is the Committee's understanding that NSW Government departments and agencies are required to draft explanatory notes that reference policy objectives as part of the package that goes to the Executive Council for approval, however, these documents are not publicly available.
- 4.11 For information as to the rationale for a principal regulation or a regulation remake, the Committee may rely on a regulatory impact statement (RIS), which is required under the *Subordinate Legislation Act 1989*. A RIS provides information on the economic, social, and environmental impacts of a proposed regulation.<sup>83</sup> However, a RIS is not required in certain circumstances,<sup>84</sup> including when the proposed statutory rule relates to matters of a machinery nature, direct amendments or repeals, and matters of a savings or transitional nature.<sup>85</sup> It is noted that only two RISs are available on the NSW Government website for regulations made in 2024.
- 4.12 The Committee also recognises that some draft amendment regulations may be posted on the NSW Government 'Have Your Say' website. These drafts may be accompanied by supporting

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<sup>80</sup> See Alex Hickman, *Explanatory Memorandums for proposed legislation in Australia: Are they fulfilling their purpose?* p 1.

<sup>81</sup> PCO Standard 11.1 states that empowering provisions may be omitted from the explanatory note if the provisions are correctly referenced in the body of the regulation.

<sup>82</sup> See Explanatory notes and overview, PCO Standard 11.

<sup>83</sup> *Subordinate Legislation Act 1989*, section 5 states that before a principal statutory rule is made, the responsible Minister is required to ensure that, as far as is reasonably practicable, a regulatory impact statement complying with Schedule 2 is prepared in connection with the substantive matters to be dealt with by the statutory rule.

<sup>84</sup> *Subordinate Legislation Act 1989*, section 6.

<sup>85</sup> *Subordinate Legislation Act 1989*, Schedule 3.

and explanatory materials, which may provide some insight into the rationale for certain amendments. However, there are several limitations of relying on such materials:

- The draft amendment regulations are *drafts*, so the version which is put forward for consultation may be different to that which is eventually published on the NSW legislation website.
- Drafts are often posted on the Have Your Say website months in advance, and later removed, so it would require proactive monitoring of the website on the small chance that the consultation draft would be of assistance to the Committee in its eventual review of the instrument after it is published.
- These supporting materials are primarily written as an aid for the public to provide feedback on the draft, and therefore may not specifically explain the amendment regulation.

### The use of explanatory notes in other Australian jurisdictions

**4.13** At the Australia-New Zealand Scrutiny of Legislation Conference held in Melbourne, Victoria in December 2024, attendees heard from Alex Hickman, Legal Advisory Officer, Legislative Council Committee Office of Western Australia about the use of explanatory notes in other jurisdictions.<sup>86</sup> The Commonwealth and Queensland were highlighted as best practice examples of the role explanatory notes can play in legislative scrutiny.

#### *Commonwealth*

**4.14** The *Legislation Act 2003* (Cth), section 15J outlines the required content for an explanatory statement, including an explanation on the purpose and operation of the instrument, and whether any consultation was undertaken.

**4.15** The Senate Standing Committee for the Scrutiny of Delegated Legislation (SDLC) is required to assess delegated legislation against the scrutiny principles outlined in Senate Standing Order 23. Scrutiny principle (g), as set out in Standing Order 23(3), requires that the SDLC scrutinise each instrument as to whether the accompanying explanatory material provides sufficient information to gain a clear understanding of the instrument.

**4.16** The SDLC has published guidelines which provide a checklist for each scrutiny principle as to what information should be included in an instrument's explanatory statement. The SDLC may ask a responsible minister or agency to make an undertaking to amend an explanatory statement to address the committee's scrutiny concerns.<sup>87</sup>

#### *Queensland*

**4.17** The *Legislative Standards Act 1992* (Qld), section 22 requires that when subordinate legislation is tabled in Parliament, it must be accompanied by an explanatory note prepared under the

<sup>86</sup> The Chair of the Committee, the Hon Natasha Maclaren-Jones MLC as well as two members of the Committee, the Hon Cameron Murphy MLC and the Hon. Tanya Mihailuk MLC attended the conference.

<sup>87</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation, *Guidelines*, p 2.

authority of the responsible Minister. Section 24 of that Act comprehensively lists the content that must be included in the explanatory note for subordinate legislation. For example, an explanatory note must include a brief statement of the policy objectives of the legislation and the reasons for them.

- 4.18** In Queensland, government departments are responsible for preparing an explanatory note for all types of subordinate legislation. The Queensland Department of Premier and Cabinet have published the *Guidelines to the preparation of explanatory notes*, which provides a template and examples to assist agency officers in drafting an explanatory note.

### **Committee comment**

- 4.19** The number one issue for the Committee when scrutinising instruments during its 12-month trial was understanding the intent behind a provision, with the most cited scrutiny ground being 'that the form or intention of the regulation calls for elucidation'. The Committee considers that if it had access to, or required the production of, an explanatory note drafted by the department or body with carriage of the instrument, the circumstances in which there is uncertainty or ambiguity may be reduced, negating the need to write to the responsible minister or body.
- 4.20** While on its face, the requirement for the provision of explanatory notes would be helpful, the Committee considers that more research and empirical evidence is necessary before the Committee would seek to require an explanatory note in a form similar to those made available in the Commonwealth or Queensland for the purposes of legislative scrutiny. This requirement would entail a significant change to current processes for the making of delegated legislation in New South Wales and it would be important to obtain the views of stakeholders before the Committee was able to come to a conclusion about this matter.
- 4.21** For this reason, the Committee therefore recommends that in 2025, the Committee conduct an inquiry into explanatory notes accompanying delegated legislation in New South Wales to consider potential options for reform in this area.

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### **Recommendation 6**

That the Regulation Committee conduct an inquiry in 2025 into explanatory notes accompanying delegated legislation in New South Wales to consider potential options for reform in this area.

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## **Statutory consolidation**

- 4.22** As articulated in the Committee's 2022 report *Options for reform of the management of delegated legislation in New South Wales*, 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, sunseting (automatic repeal) and remaking of statutory rules.



**4.23** In its 2022 report, the Committee noted that the interaction between the provisions of these Acts is complex, 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.<sup>88</sup> For example, the *Interpretation Act 1987* and the *Subordinate Legislation Act 1989* both apply to 'statutory rules', but the definition of 'statutory rules' contained in each Act is in slightly different terms. In turn, the *Legislation Review Act 1987* applies to 'regulations' which include statutory rules and certain other instruments.

**4.24** The Committee recommended the consolidation of these three acts into a single 'Legislation Act', noting that such a reform:

...would make it easier for members of the public, members of Parliament and government officials to understand the statutory requirements that operate in this complex area of the law. This in turn would enhance executive accountability and strengthen democratic oversight of the uses of delegated legislative power.<sup>89</sup>

#### **Committee comment**

**4.25** Without reproducing the Committee's previous comments on this topic in its 2022 report *Options for reform of the management of delegated legislation in New South Wales*, the Committee wishes to reinvigorate the conversation and expresses its support for consolidating provisions relating to delegated legislation and primary legislation into a single act. Undoubtedly, such reforms would complement and enhance the Committee's technical scrutiny function.

**4.26** For the reasons articulated in that report, the Committee reiterates its recommendation that the provisions of the *Interpretation Act 1987*, *Subordinate Legislation Act 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.

**4.27** To progress and implement this recommendation made by the Committee in 2022, it will be necessary to ensure the support of the Government, as well as undertake significant engagement and consultation with Parliamentary Counsel's Office.

**4.28** Therefore, in order to obtain the views of critical stakeholders and progress the consolidation of legislative provisions relating to delegated legislation, the Committee recommends that the Regulation Committee conduct an inquiry in 2025 into the consolidation of the provisions of the *Interpretation Act 1987*, *Subordinate Legislation Act 1989* and the *Legislation Review Act 1987*.

<sup>88</sup> Regulation Committee, *Options for reform of the management of delegated legislation in New South Wales*, Report 9, p 10-11.

<sup>89</sup> Regulation Committee, *Options for reform of the management of delegated legislation in New South Wales*, Report 9, p 9.

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**Recommendation 7**

That the Regulation Committee conduct an inquiry in 2025 into the consolidation of the provisions of the *Interpretation Act 1987*, *Subordinate Legislation Act 1989* and the *Legislation Review Act 1987*.

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# Appendix 1 Minutes

## Draft minutes no.20

Friday 31 January 2025

Regulation Committee

Room 1254 Parliament House, Sydney, 10.01 am

### 1. Members present

Mrs Maclaren-Jones, *Chair*

Ms Boyd, *Deputy Chair (via teleconference)*

Mrs Carter (from 10.08 am)

Mr Donnelly

Dr Kaine *(via teleconference)*

Mr Nanva *(via teleconference)*

Mr Murphy

### 2. Previous minutes

Resolved, on the motion of Mr Murphy: That draft minutes no. 19 be confirmed.

### 3. Correspondence

The Committee noted the following items of correspondence:

#### *Sent:*

- 19 November 2024 – Letter from Chair to Minister for Industrial Relations, the Hon Sophie Cotsis MP regarding an outstanding undertaking relating to the *Industrial Relations (General) Amendment (Fees) Regulation 2024*
- 19 November 2024 – Letter from Chair to Minister for Roads, the Hon John Graham MLC regarding outstanding undertakings relating to the *Road Transport Amendment (Automated Seatbelt Enforcement) Rule 2024*
- 19 November 2024 – Letter from Chair to Minister for Transport, the Hon Jo Haylen MP regarding outstanding undertakings relating to the *Marine Pollution Regulation 2024*
- 19 November 2024 – Letter from Chair to Attorney General, the Hon Michael Daley regarding scrutiny concerns concluded in the Delegated Legislation Monitor No. 14 of 2024
- 19 November 2024 – Letter from Chair to Minister for Water, the Hon Rose Jackson MLC regarding scrutiny concerns concluded in the Delegated Legislation Monitor No. 14 of 2024
- 25 November 2024 – Letter from Chair to Minister for Police and Counter-terrorism, the Hon Yasmin Catley MP regarding scrutiny concerns identified in the *Police Amendment (Police Officer Support Scheme) Regulation 2024*
- 25 November 2024 – Letter from Chair to Clerk of the Parliaments regarding the evaluation of the Regulation Committee
- 25 November 2024 – Letter from Chair to Secretary of the Cabinet Office, Ms Kate Boyd PSM regarding the evaluation of the Regulation Committee
- 25 November 2024 – Letter from Chair to Parliamentary Counsel, Ms Annette O'Callaghan regarding the evaluation of the Regulation Committee

- 25 November 2024 – Letter from Chair to Leader of the Government, the Hon Penny Sharpe MLC regarding the evaluation of the Regulation Committee
- 25 November 2024 – Letter from Chair to Dr Ellen Rock regarding the evaluation of the Regulation Committee
- 28 November 2024 – Letter from Chair to Minister for Music and the Night-time Economy, the Hon. John Graham MLC regarding scrutiny concerns identified in the *Music Festivals Amendment (Delegation) Regulation 2024*
- 13 December 2024 – Letter from Chair to Chief Justice of NSW, the Hon. A S Bell regarding scrutiny concerns identified in the *Supreme Court Act 1970–Supreme Court Practice Note SC EQ 4*
- 16 December 2024 – Letter from Chair to Minister for Climate Change, the Hon Penny Sharpe MLC regarding scrutiny concerns identified in the *Energy and Utilities Administration Amendment (Abolition of New Zero Board) Regulation 2024*
- 20 December 2024 – Letter from Chair to Minister for Transport, the Hon Jo Haylen MP regarding outstanding undertakings in relation to the *Marine Pollution Regulation 2024*
- 28 January 2025 – Letter from Chair to Minister for Energy, the Hon Penny Sharpe MLC regarding a minor issue identified in the *Electricity Infrastructure Investment Amendment (Functions) Regulation 2024* and the *Electricity Infrastructure Investment Amendment Regulation 2024*.

**Received:**

- 28 November 2024 – Letter from Minister for Industrial Relations, the Hon Sophie Cotsis MP regarding an outstanding undertaking relating to the *Industrial Relations (General) Amendment (Fees) Regulation 2024*
- 10 December 2024 – Letter from Dr Ellen Rock regarding the evaluation of the Regulation Committee
- 11 December 2024 – Letter from Minister for Transport, the Hon Jo Haylen MP regarding outstanding undertakings in relation to the *Marine Pollution Regulation 2024*
- 13 December 2024 – Letter from Jeanne Vandebroek, Director Financial Management Legislation, Policy and Assurance regarding the *Government Sector Legislation Amendment (Miscellaneous) Regulation 2024*
- 13 December 2024 – Letter from Minister for Police and Counter-terrorism, the Hon Yasmin Catley MP regarding scrutiny concerns identified in the *Police Amendment (Police Officer Support Scheme) Regulation 2024*
- 16 December 2024 – Letter from A/Deputy Secretary, General Counsel, the Cabinet Office regarding evaluation of the Regulation Committee
- 16 December 2024 – Letter from Minister for Music and the Night-time Economy, the Hon John Graham MLC regarding scrutiny concerns identified in the *Music Festivals Amendment (Delegations) Regulation 2024*
- 13 January 2025 – Letter from Minister for Climate Change, the Hon Penny Sharpe MLC regarding scrutiny concerns identified in the *Energy and Utilities Administration Amendment (Abolition of Net Zero Board) Regulation 2024*

- 13 January 2025 – Letter from Annette O’Callaghan, NSW Parliamentary Counsel regarding the evaluation of the Committee
- 24 January 2025 – Letter from Mr Greg Black, Clerk of the Scottish Parliament regarding the Delegated Powers and Law Reform Committee’s inquiry into framework legislation and Henry VIII provisions.

Committee noted that correspondence received from Dr Ellen Rock, Independent legal adviser to the Regulation Committee, The Cabinet Office, Mr David Blunt AM, Clerk of the Parliaments and Clerk of the Legislative Council and Ms Annette O’Callaghan, NSW Parliamentary Counsel providing feedback on the Committee’s technical scrutiny function is included as an appendix to the Chair’s draft report entitled ‘Evaluation report of the Regulation Committee’s technical scrutiny function’.

#### 4. **Australia-New Zealand Scrutiny of Legislation Conference (the Conference)**

Committee noted that the Australia-New Zealand Scrutiny of Legislation Conference was held in December 2024 at Parliament House, Melbourne. The theme was *Parliamentary Scrutiny: Looking to the Future*. Three members of the Committee attended the Conference, the Hon Natasha Maclaren-Jones MLC, the Hon Cameron Murphy MLC and the Hon Tania Mihailuk MLC.

Attendees heard from various subject matter experts, including leading academics, members of parliament and legal counsel. Mrs Maclaren-Jones presented a paper entitled ‘Breaking new ground – expanding the scrutiny function of the New South Wales Legislative Council’s Regulation Committee’. This paper, and others presented at the Conference, are available on the Scrutiny of Acts and Regulations Committee webpage on the Parliament of Victoria website.

#### 5. **Meeting with Scottish Parliament’s Delegated Powers and Law Reform Committee**

Committee noted that on Wednesday 22 January 2025, the Hon Natasha Maclaren-Jones met with members of the Scottish Parliament’s Delegated Powers and Law Reform Committee regarding its inquiry into the use of framework legislation. A note of the discussion is attached and will be available on the Scottish Parliament’s website.

#### 6. **Consideration of Chair’s draft report**

The Committee discussed the role and functions of the Committee and those of the Joint Legislation Review Committee.

Resolved, on the motion of Mr Murphy: That the Chair of the Regulation Committee write to the Chair of the Legislation Review Committee, Ms Lynda Voltz MP, to identify potential opportunities for collaboration between the two committee secretariats.

The Committee discussed the operation of the disallowance mechanism during the trial period in 2024 and ministerial engagement with correspondence from the Committee relating to scrutiny concerns. The Committee requested the secretariat prepare a flow chart setting out the process and time frames for reviewing statutory instruments, engaging with ministers and bodies and preparing the Delegated Legislation Monitors.

The Committee discussed the points at which members engage with the consideration of delegated legislation in which scrutiny concerns have been identified.

The Chair submitted her draft report entitled ‘*Evaluation of the Regulation Committee’s technical scrutiny function*’ which having been previously circulated, was taken as being read.

Resolved, on the motion of Mrs Carter: That Recommendation 4 be amended by omitting ‘promptly notify the Regulation Committee when an undertaking made to the Committee has been implemented’ and inserting instead ‘notify the Regulation Committee within five business days of an undertaking made to the Committee being implemented’.

Resolved, on the motion of Mrs Carter: That

The draft report as amended be the report of the Committee and that the Committee present the report to the House;

The Committee secretariat correct any typographical, grammatical and formatting errors prior to tabling;

The Committee secretariat be authorised to update any Committee comments where necessary to reflect changes to findings, recommendations, or new finding or recommendations resolved by the Committee;

Dissenting statements be provided to the secretariat within 24 hours after receipt of the draft minutes of the meeting;

The report be tabled out of session on Monday 10 February 2025.

## 7. **Implementation of recommendations arising from evaluation report**

The Chair tabled a draft notice of motion seeking to amend the resolution establishing the Regulation Committee so as to implement Recommendation 1 and Recommendation 5 of the Committee's report entitled 'Evaluation report of the Regulation Committee's technical scrutiny function', should it be adopted:

### **Draft notice of motion**

(1) That this House notes that:

- (a) on 19 October 2023, the Legislative Council resolved to 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* on a 12-month trial basis from the first sitting day of 2024,
- (b) following this resolution, the Regulation Committee commenced its additional scrutiny function from the first sitting day of 2024,
- (c) over the course of the 12-month trial, the Committee undertook a significant body of work, including:
  - (i) reviewing 249 statutory instruments against the scrutiny principles set out in section 9(1)(b) of the *Legislation Review Act 1987*, of which 34 instruments engaged one or more of the scrutiny principles,
  - (ii) tabling 14 reports, entitled Delegated Legislation Monitors, which set out the committee's conclusions regarding instruments that had engaged any of the scrutiny principles,
  - (iii) engaging with 13 ministers and three bodies in relation to scrutiny concerns identified in statutory instruments,
  - (iv) receiving undertakings from ministers and bodies to rectify specific issues identified by the committee in 10 instruments, six of which had been implemented as at 20 December 2024,
- (d) in accordance with the resolution of the House of 19 October 2023, the committee tabled a report entitled 'Evaluation of the Regulation Committee's technical scrutiny function' on 10 February 2025, which found that:
  - (i) the return of the technical scrutiny function for delegated legislation to a committee of the Legislative Council has been successful in improving the quality of delegated legislation and enhancing parliamentary oversight of the

- Executive, and aligns with the constitutional role of the Upper House as a 'House of Review' (Finding 1),
- (ii) in order for the Regulation Committee to effectively discharge its function in scrutinising delegated legislation, it should continue to be supported by a dedicated secretariat and a part-time independent legal adviser (Finding 2), and
- (e) on the basis of the committee's finding that the 12-month trial of its additional scrutiny function was a success, the committee therefore recommended that:
    - (i) the Legislative Council amend the resolution establishing the Regulation Committee to permanently expand the committee's functions to include technical review of delegated legislation against the scrutiny principles set out in the *Legislation Review Act 1987*, section 9(1)(b) (Recommendation 1),
    - (ii) the Legislative Council amend the resolution establishing the Regulation Committee to change the committee's name to the Delegated Legislation Committee, to reflect more accurately the committee's role and remit (Recommendation 5).
- (2) That, in accordance with Recommendation 1 and Recommendation 5 of the committee's evaluation report, the resolution of the House of 10 May 2023 appointing the Regulation Committee, as amended on 19 October 2023, be further amended by:
- (1) In paragraph (1), omitting 'Regulation Committee' and inserting instead 'Delegated Legislation Committee'.
  - (2) Omitting paragraph (3) and inserting instead
    - "(3) The committee is:
      - (a) to consider all instruments of a legislative nature that are subject to disallowance while they are so subject, against the scrutiny principles set out in section 9(1)(b) of the *Legislation Review Act 1987*.
      - (b) may report on such instruments as it thinks necessary, including setting out its opinion that an instrument or portion of an instrument ought to be disallowed and the grounds on which it has formed that opinion, and
      - (c) may consider and report on an instrument after it has ceased to be subject to disallowance if the committee resolves to do so while the instrument is subject to disallowance."

Resolved, on the motion of Ms Boyd: That the Chair move a motion in the House to amend the resolution establishing the Regulation Committee to implement Recommendations 1 and 5 of the committee's report entitled 'Evaluation report of the Regulation Committee's technical scrutiny function'.

## 8. Other business

The Committee discussed potential future changes to the scheduled time of its regular meeting to consider the Delegated Legislation Monitor.

## 9. Adjournment

The Committee adjourned at 11.11 am.

**10. Next Meeting**

Monday 10 February 2025, 11.00 am, Room 1254 (consideration of the Committee report entitled 'Delegated Legislation Monitor No. 1 of 2025').

Madeleine Dowd  
**Committee Clerk**



## Appendix 2 Submissions made to the evaluation report

Appendix 1 contains the following submissions received from stakeholders for consideration in the evaluation report.

- **Submission 1** – Dr Ellen Rock, Independent legal adviser to the Regulation Committee and Associate Professor, Faculty of Law & Justice, University of New South Wales, Received 10 December 2025
- **Submission 2** – Mr Matt Richards, Acting Deputy Secretary, General Counsel, The Cabinet Office, Received 16 December 2025
- **Submission 3**– Mr David Blunt AM, Clerk of the Parliaments and Clerk of the Legislative Council, Received 19 December 2025
- **Submission 4** – Ms Annette O'Callaghan, NSW Parliamentary Counsel, Received 13 January 2025.



10 December 2024

The Hon Natasha Maclaren-Jones MLC  
Committee Chair  
Legislative Council Regulation Committee  
NSW Parliament  
Parliament House, Macquarie Street  
SYDNEY NSW 2000

Dear Chair,

### **Stakeholder submission regarding the Legislative Council Regulation Committee**

Thank you for the invitation to offer feedback on the trial of the Regulation Committee's technical scrutiny function. My submission begins by highlighting the Committee's important accountability contributions before commenting on the scope for potential developments in its functions going forward.

#### **1. Background**

Like primary legislation, delegated legislation has significant capacity to affect the rights and interests of individuals, businesses and the broader community. Instruments made by the executive pursuant to delegated legislation-making powers can establish new offences, impose obligations, define access to entitlements, and regulate activities in ways that impact lives and livelihoods. Those regulatory impacts may all be perfectly lawful and appropriate if consistent with the terms and purpose of the primary Act, endorsed by the democratic process of Parliament. On occasion, an instrument is created that oversteps those boundaries. It is important that mechanisms are available to identify and address those potential problems when they arise.

The courts are one oversight mechanism that serves this purpose, with jurisdiction to declare an instrument invalid where it exceeds the scope of power conferred by a primary Act.<sup>1</sup> While judicial review is an extremely important accountability mechanism, it has its shortcomings. One is that judicial review grounds are much narrower than the types of scrutiny concerns that can be acted on by Parliament. Another is that it assumes a plaintiff with sufficient interest and resources will bring the matter before the courts, possibly leaving a problematic instrument on the books for lack of an invested litigant. A further limitation is that judicial intervention may come too late to prevent or remedy losses and harm. A declaration that an instrument is invalid might wipe the statute book clean, but this does not necessarily mean its practical impacts can be undone.<sup>2</sup>

Parliament's power to disallow delegated legislative instruments is another important accountability mechanism, provided for in NSW under s 41 of the *Interpretation Act 1987* (NSW). To fulfil its potential, it is critical that Parliament is afforded a meaningful opportunity

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<sup>1</sup> Eg *Swan Hill Corporation v Bradbury* (1937) 56 CLR 746.

<sup>2</sup> A declaration of invalidity operates retrospectively and can potentially open the door to a legal claim for loss or harm (eg an action in false imprisonment). However, sometimes events may have already travelled too far for legal remedies to assist: eg *Ruddock v Taylor* (2005) 222 CLR 612; *New South Wales v Kable* (2013) 252 CLR 118.

to engage with the content and effect of these instruments. For primary legislation, the nature of parliamentary process offers a forum for public scrutiny and debate. Being a step removed, delegated legislation made by the executive lacks this automatic parliamentary oversight.

The Legislation Review Committee is one channel for communicating concerns about delegated legislation to Parliament.<sup>3</sup> The 2022 report *Options for reform of the management of delegated legislation in New South Wales* outlines the potential disadvantages of shouldering that Committee with primary responsibility for scrutiny of delegated legislation.<sup>4</sup>

Acting on the recommendations in that report, the conferral of a technical scrutiny function on the Legislative Council Regulation Committee has demonstrated the value of an alternative model. This year, the Committee has offered Parliament a source of reliable and detailed advice on the content of instruments made pursuant to delegated legislation-making powers. The Committee has served as a specialised filter, reviewing all disallowable instruments and drawing Parliament's attention to relevant scrutiny concerns so that they can be aired, debated, and (if necessary) managed via disallowance. The monitors prepared by the Committee this year demonstrate that this targeted review function can potentially identify issues in delegated legislation that may otherwise have gone unnoticed.

## **2. The Committee's role**

The Committee's processes and procedures are described in detail in the relevant Guidelines adopted by the Committee in March 2024. Here, I offer more general commentary on these processes, and how they contribute to accountability for the content of delegated legislation in this State.

### **2.1. Identifying scrutiny issues**

The scrutiny function performed by the Committee is a technical one, requiring the evaluation of all disallowable instruments against the principles set out in s 9(1)(b) of the *Legislation Review Act 1987* (NSW).<sup>5</sup> These include grounds concerned with impacts on the community, consistency with empowering legislation, interaction with other legislation, issues of intent and clarity, and compliance with consultation requirements. Guidelines adopted by the Committee provide additional context for its approach to these principles. Importantly, the Committee is not concerned with the wisdom of government policy. Its scrutiny function is squarely targeted at the *manner* in which regulatory action is taken, rather than the underlying objective to be served.

Some technical scrutiny issues are more readily apparent than others. For example, it is usually straightforward to identify where a penalty exceeds the scope of delegated legislative power. More often, however, the issues considered by the Committee raise more difficult questions of statutory interpretation, requiring the reviewer to ascertain the legal meaning and effect of a regulatory provision. These are technical legal questions that require a sophisticated working understanding of the rules and principles of statutory interpretation. It is a 'specialised and exacting task'.<sup>6</sup>

Given the technical nature of the scrutiny principles, the volume of instruments that must be reviewed, and the relatively short window for disallowance, a well-resourced and specialised secretariat has been critical to the Committee's success. The Committee has been fortunate to have the support of a highly qualified secretariat during the 12-month trial period, comprised of members with a broad range of skills and experience relevant to the Committee's functions, including deep knowledge of parliamentary procedure, legislative process and legal principles. In particular, the Committee has benefited from the expertise of legislative drafters on secondment from the NSW Parliamentary Counsel's Office. My role as independent legal advisor to the Committee has been ably supported by the dedicated members of the

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<sup>3</sup> This function is assigned pursuant to the *Legislation Review Act 1987* (NSW) s 9.

<sup>4</sup> Legislative Council Regulation Committee, Parliament of New South Wales, *Options for reform of the management of delegated legislation in New South Wales* (Report No. 9, 2022), pp. 19–22.

<sup>5</sup> Resolution of the House establishing the Regulation Committee, amended 19 October 2023.

<sup>6</sup> Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (6<sup>th</sup> ed, LexisNexis, 2023), p. 68.

secretariat, who undertake the initial review of instruments to identify the more complex legal issues that require my legal analysis and advice.

After this review, if the secretariat and legal advisor form the view that a scrutiny issue warrants further inquiry, the secretariat draws this to the attention of the Committee. This filtering process ensures that the Committee's workload remains manageable, with the secretariat and legal advisor sifting out the most relevant scrutiny issues for the Committee to focus on.

## **2.2. Resolving scrutiny issues**

Scrutiny concerns of a minor nature may be reported in the relevant monitor without the need for additional action. For issues that warrant further inquiry, a consultation process is followed in which the Chair writes to the responsible Minister outlining the nature of the concern and requesting a response. This correspondence is generally detailed, identifying the specific scrutiny ground and the basis on which the instrument is thought to potentially contravene that ground. Given the relatively short window for disallowance, there is limited opportunity for lengthy consultation and exchange of correspondence. It is in the interests of all parties that correspondence on both sides is clear, detailed and engages directly with the relevant issues. If the Minister requires further information, it is again in the interests of all parties that this request is made early, allowing the consultation to be concluded well within the timeframe for disallowance.

The consultation process contributes significantly to the Committee's scrutiny functions. Sometimes additional context or information provided by the Minister may clarify issues in a way that resolves the Committee's initial concerns. The Committee's concerns may also be resolved if the Minister's response indicates that steps are being taken to address the issues raised by the Committee, or where the Minister undertakes to do so in future.

Of course, not all scrutiny issues are successfully resolved via the consultation process. If the unresolved issue is of a less serious nature, the Committee may record its continued concern in the monitor but take no further action. For more significant unresolved scrutiny concerns, the Committee may escalate the matter by drawing it to the attention of Parliament, or more specifically recommending to the House that all or part of the instrument should be disallowed. Again, those opinions and recommendations are recorded in the relevant monitor.

## **2.3. Oversight and accountability**

A number of points can be made regarding the Committee's important contributions to government accountability for the content of delegated legislative instruments.

### ***Independent scrutiny***

The review of all disallowable instruments by the Committee provides an independent check on the content of delegated legislation in NSW. Most instruments are carefully prepared and drafted by expert legislative drafters in the PCO according to standard drafting guidelines, and observing internal quality controls. A smaller proportion are prepared "in-house" by the relevant agency. Regardless of the expertise of the drafter, there remains benefit in independent review. An outside perspective can identify potential issues that may not have been apparent during the drafting stage (eg ambiguity in a word or phrase), or implications that may not have been fully considered.

### ***Facilitating regulatory improvements***

By raising scrutiny concerns, the Committee can prompt the executive to take corrective action, such as re-making the instrument or undertaking to address the concern in some other way. For concerns that remain unresolved, the Committee's advice and recommendations can be relied on by Parliament in resorting to the more blunt corrective tool of disallowance. Even if the Committee has not recommended disallowance, the contents of its monitors are an

important resource for other members of Parliament who may be considering a possible disallowance motion.<sup>7</sup>

Beyond addressing the content of disallowable instruments, the Committee's feedback can also prompt amendments to primary legislation in order to give appropriate effect to the intended regulatory regime.<sup>8</sup>

### ***Fostering best practice***

The Committee's scrutiny function plays a more subtle, but no less important, role in fostering best practice in the use of delegated legislation-making powers. The content of the Chair's correspondence to responsible Ministers reinforces the scrutiny principles provided for under s 9(1)(b) of the *Legislation Review Act 1987* (NSW), which reflect fundamental expectations regarding the matters the government ought to have in mind when making regulations.

The dialogue between the Committee and the Minister focusses attention on examples of potentially problematic drafting issues, serving as a watchlist for future legislative action. At the Commonwealth level, it has been reported that legislative drafters have increasingly taken note of the issues raised by technical scrutiny committees.<sup>9</sup> It can be hoped that a similar reflective practice will evolve in NSW, particularly given the involvement of seconded PCO staff in the Committee.

### ***Transparency and accessibility***

The Committee makes significant contributions to government transparency regarding the making and scrutiny of delegated legislation. One of the most important sources of this information is the Delegated Legislation Monitor published by the Committee each sitting week. This monitor provides a full and accurate record of the Committee's activities. For concluded matters, the monitor sets out a clear explanation of the scrutiny concerns raised, responses received from the responsible Minister, and the Committee's opinions and recommendations.

The monitor provides members of Parliament, the executive and the public with a full picture of the Committee's important work. Even for those matters where the Committee has recommended no further action be taken, the information contained in these monitors can serve as an important source of public information regarding the executive's intention in creating and administering delegated legislation.

The Regulation Committee website deserves particular mention. This website provides a simple forum to access a range of relevant information about delegated legislation that might otherwise require more sophisticated awareness of parliamentary and legislative procedure. Visitors to the site are able to easily identify those instruments the Committee has raised concerns about along with a link to the relevant monitor. The website also allows visitors to track government undertakings given in response to the Committee's concerns, and the status and outcomes of disallowance motions. All of these resources are an important way of increasing the accessibility and transparency of delegated legislation-making activities, as well as being a helpful resource for members of Parliament and the executive.

## **3. Future developments**

I commend the Committee and the secretariat for the work they have performed during the trial period. As with all new ventures, there are inevitable teething issues in establishing relevant processes, procedures and effective working arrangements. The smooth running of

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<sup>7</sup> The notices of motion for disallowance given by the Chair and other members of Parliament are tracked by the Regulation Committee on its dedicated website.

<sup>8</sup> For example, the amendment of s 75 of the *Liquor Act 2007* (NSW) in response to the Committee's concerns regarding the offence provision in s 44C of the *Liquor Amendment (Vibrancy Reforms) Regulation 2024* (NSW), now repealed.

<sup>9</sup> Senate Standing Committee on Regulations and Ordinances, Commonwealth Parliament, *Parliamentary Scrutiny of Delegated Legislation* (3 June 2019), p. 11.

the Committee this year is a testament to the dedication and professionalism of the Chair, each member of the Committee, and the highly qualified members of the secretariat.

In my view, the conferral of a technical scrutiny function on the Committee has been a positive and successful step towards increasing government accountability for the quality and content of delegated legislation in this State. My strong recommendation would be for the Committee to continue this role on an ongoing basis.

I make the following further comments and recommendations.

### **3.1. Formalising the role**

At present, the Committee's technical scrutiny function is conferred via an amendment by the House to the resolution establishing the Committee, dated 19 October 2023. An equivalent scrutiny function is conferred on the Legislation Review Committee pursuant to the *Legislation Review Act 1987* (NSW) s 9. In its report '*Options for reform of the management of delegated legislation in New South Wales*' dated September 2022, the Committee concluded that the duplication of these functions was a sensible 'first step' to enable assessment of the effectiveness of the Committee's role.<sup>10</sup>

If the Committee is to perform a technical scrutiny role going forward, I recommend considering options for the delineation of scrutiny tasks between the Legislation Review Committee and Regulation Committee with respect to delegated legislation. This may entail amendment to the *Legislation Review Act 1987* (NSW).

**Recommendation:** The Regulation Committee should have an ongoing function to engage in technical scrutiny of disallowable instruments against the principles set out in s 9(1)(b) of the *Legislation Review Act 1987* (NSW).

**Recommendation:** To reduce duplication, consider legislative amendment to confirm the roles of the Regulation Committee and Legislation Review Committee with respect to review of delegated legislation.

### **3.2. Timeframe for review**

The Committee is required to undertake its review within the 15 sitting day period for disallowance, starting from the day the instrument is laid before the House.<sup>11</sup> There are both benefits and drawbacks to encouraging prompt review of delegated legislation. Setting too long a period can lead to uncertainty and messy outcomes if an instrument has been in place for some time before disallowance. However, setting too short a period can mean the implications of an instrument are only realised once it is too late to intervene without complicated legislative amendment.

From a more practical perspective, it is important to consider whether the Committee's workload is achievable within the set period. The amount of time required by the Committee to conclude its scrutiny of an instrument varies due to a number of factors, including:

- the pattern of sitting weeks dictating the period for disallowance;
- the length and complexity of the instrument;
- the complexity of legal issues raised by the instrument, including those that may require research and input from the independent legal advisor;
- the number of other instruments under review at the relevant time;
- the timeliness and completeness of responses from government; and

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<sup>10</sup> Legislative Council Regulation Committee, Parliament of New South Wales, *Options for reform of the management of delegated legislation in New South Wales* (Report No. 9, 2022), [3.53].

<sup>11</sup> *Interpretation Act 1987* (NSW) s 41.

- whether additional clarification or follow-up is required by either the Committee or government.

For the most part, the Committee has managed this workload effectively during the trial period, but there have been occasions in which additional time would have been beneficial for both the Committee and the Minister or agency concerned. In particular, the tight timeframes have left very little margin for error where the Committee has required additional clarification from the responsible Minister.

There are possible options for extending the available timeframe. One option, which the Committee intends to explore, is to shorten the initial time allowed for a Minister to respond to the Committee’s correspondence, creating additional space for follow-up consultation and other inquiries. However, placing added pressure on government may also negatively impact the quality of the Minister’s response to scrutiny concerns. It will be helpful for the Committee to reflect on its experiences in selecting the ideal deadline for correspondence going forward. I anticipate that, over time, the Committee’s relationship with government will allow greater opportunities for informal communication that will improve the quality and efficiency of this consultation process. For example, the Committee is likely to exercise greater flexibility in timing if it is aware that the Minister is preparing a detailed and considered response to its concerns.

Outside the Committee’s own practice, there are potential options to formally extend the review timeframe. One option, highlighted in Professor Appleby’s Discussion Paper,<sup>12</sup> would be to amend legislation to permit disallowance on a resolution of both Houses beyond 15 sitting days. Another option, adopted by the equivalent Senate Committee, is to take pre-emptive steps to commence the disallowance process pending resolution of a scrutiny concern, commonly called a “protective” notice.<sup>13</sup> These notices are withdrawn once a scrutiny issue is resolved, but preserve the Senate’s ability to disallow beyond the standard period.

Rather than making formal changes to legislation or the practice of the Legislative Council, in the shorter term it may be beneficial to focus on building stronger working relationships between the Committee and the executive, as described below. The Committee may also consider developing a procedure for the use of “protective” notices as a fall-back position. In doing so, it would be important that the purpose of these notices is clearly communicated to ensure that this does not undermine the symbolic and practical significance of a formal disallowance motion.

Other formal options to address timing concerns may be considered in the coming years if needed.

**Recommendation:** The secretariat should continue to have access to the staff and resources required to complete timely review of instruments, with flexibility to accommodate high volume periods (eg in connection with staged repeal).

**Recommendation:** The Committee should continue to develop its practices and procedures to identify the most effective and efficient form of consultation with government with a view to concluding scrutiny concerns within the disallowance period.

**Recommendation:** The Committee can consider the use of “protective” disallowance motions as a fall-back position, but the purpose of these should be clearly communicated.

### ***3.3. Developing an adaptive approach***

In its review of instruments this year, the Committee has identified a wide array of potential scrutiny concerns varying in their degree of seriousness. At the higher end of the scale have been regulatory provisions with significant practical implications (eg criminal liability) that, in the Committee’s opinion, may exceed the power conferred by the primary Act or otherwise

<sup>12</sup> Professor Gabrielle Appleby, ‘Inquiry into options for reform of the management of delegated legislation in New South Wales’ (Discussion Paper, May 2022), p. 28.

<sup>13</sup> Odgers’ Australian Senate Practice (14<sup>th</sup> ed, 2022), chapter 15.

warrant closer scrutiny. Further down the scale are scrutiny concerns where the Committee requires clarification on a particular issue, or takes the view that the form or intention of a regulatory provision is insufficiently clear and would be improved by relatively minor amendments. The Committee also routinely identifies minor drafting errors or inconsistencies (eg typographical errors or incorrect cross-references) that would not generally rise to the level of a scrutiny concern warranting the Committee's intervention. In a given instrument, the Committee might identify a number of issues spanning across this scale of seriousness.

The Committee's approach this year has been to write to the responsible Minister when an instrument raises a significant scrutiny issue. If the Committee is already writing to the Minister, the correspondence will also record other more minor scrutiny issues or drafting queries that may not have warranted an approach to the Minister in their own right. Generally, the Committee records its queries according to the order in which the provision appears in the instrument under review. The Committee sometimes includes a note at the end of its correspondence indicating that one or more of the issues it has raised does not require a response from the Minister.

Reflecting on the Committee's operation this year, I query whether there might be benefit in potentially refining this approach. Writing only where a significant scrutiny concern is identified means that less serious (but still genuine) concerns or suggestions for improvement may not be ventilated. I also query whether recording all scrutiny concerns in the order that they appear in an instrument might not be the most efficient way to direct the Minister's attention to those concerns that require a more immediate and considered response. Bundling scrutiny concerns together potentially risks burying those that are most important, and may also give the mistaken impression that the Committee is taking major issue with trivial matters, undermining the importance of its accountability role.

The secretariat has raised the possibility of sending correspondence outside the formal Committee scrutiny process where it identifies potential drafting and typographical errors in an instrument that do not necessarily give rise to a scrutiny concern. I endorse that suggestion, which would allow the Committee to contribute to continuous improvement in the quality of delegated legislation without drawing on its formal powers.

In addition, the Committee might consider restructuring its formal correspondence to more clearly signal the scrutiny issues that are of serious and immediate concern to the Committee. Given the time constraints discussed above, this may assist a Minister in focussing time and attention on those matters that are most pressing and in respect of which the Committee anticipates a considered response. It would also demonstrate to government that where the Committee raises less significant issues, it does so with a view to improving the quality and clarity of delegated legislation rather than as a precursor to recommending disallowance.

I note that there are some potential difficulties and downsides with this approach. One is that it may not be apparent to the Committee whether a scrutiny concern is more or less serious until after it receives further input and information from the Minister. Another is that classifying some issues as "less serious" might suggest to the Minister that the issue does not need to be carefully considered and acted on. The Committee may like to consider the feasibility of this approach, bearing these difficulties in mind.

**Recommendation:** Develop a procedure to communicate drafting issues and errors identified during the scrutiny process that do not give rise to scrutiny concerns.

**Recommendation:** Consider the feasibility of modifying the format of the Committee's correspondence to more clearly indicate which issues require the most immediate and considered attention from the responsible Minister, and which are more general requests for clarification or suggestions for improvement in drafting.



### 3.4. Education and relationship-building

The Committee's ability to recommend disallowance is a significant power, and awareness of this possibility can encourage government to take the Committee's scrutiny concerns more seriously during consultation. Coercive powers of this type are an important accountability tool.<sup>14</sup> The Committee should not be reluctant to make a disallowance recommendation when warranted. However, it is important to recognise that the threat of coercive accountability powers can potentially foster a defensive and adversarial dynamic.<sup>15</sup>

A positive working relationship with government benefits the Committee, with an effective consultation process improving the quality of the Committee's scrutiny work. For the most part, the correspondence the Committee has received from government this year has been timely, complete and receptive to the Committee's concerns. Given the relatively short timeframe in which the Committee must complete its review, this is incredibly important. If correspondence is delayed or fails to directly engage with the issues raised by the Committee, the Committee may be forced to finalise its views on a scrutiny issue without a full appreciation of the government's position.

A positive working relationship with government also allows the Committee to play a meaningful role in encouraging improvements and best practice in the creation of delegated legislation. Where the Committee raises a genuine scrutiny concern, it is in the interests of all parties that this is recognised and acted on at an early stage rather than in response to an imminent notice of motion for disallowance. Where the Committee points out other less immediate (but still legitimate) scrutiny concerns or drafting queries, it is also in the best interests of all parties that these are given careful thought in future regulatory action. Again, a co-operative rather than adversarial dynamic is best suited to realising these benefits, with the threat of disallowance sitting in the background where agreement cannot be reached.

The Committee's technical scrutiny role is a very recent development. It is understandable that there might still be limited awareness of the Committee's important accountability functions, processes and powers in some quarters. If the Committee retains this scrutiny function, it can be expected that awareness will naturally grow with time, particularly for departments who have already engaged with the Committee this year. It is also likely that relationships will be developed with staff within relevant departments and agencies that can support greater dialogue and engagement that improves the efficiency and quality of consultation.

To this end, the Committee will benefit from maintaining a well-resourced secretariat that can continue to build institutional knowledge while creating connections with government departments and agencies. It would also be beneficial for the Committee and/or secretariat to increase awareness of the Committee's role within government, for example by offering workshops and seminars explaining its functions and processes.

**Recommendation:** The Committee should continue to develop a positive working relationship with government that promotes awareness of the full scope of its accountability functions, including both its coercive powers and the role it plays in supporting best practice in the creation of delegated legislation.

**Recommendation:** Ongoing resources should be committed to the secretariat to ensure that it can continue to develop institutional knowledge and working relationships with relevant departments and agencies.

**Recommendation:** Steps should be taken to increase the profile of the Committee and awareness of its powers and functions within government departments and agencies (eg offering internal workshops and seminars).

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<sup>14</sup> See eg Richard Mulgan, 'Accountability: An Ever-Expanding Concept?' (2000) 78 *Public Administration* 555.

<sup>15</sup> See eg Thomas Schillemans, 'Questions of Perspective – Accountability as a Behavioural Proposition' in Matthew Flinders and Chris Monaghan (eds), *Questions of Accountability: Prerogatives, Power and Politics* (Hart Publishing, 2023) 23.

It has been a pleasure to assist the Regulation Committee in the trial of its technical scrutiny function this year. Thank you for the opportunity to offer this feedback. I am happy to comment on any of these points in further detail if required.

Kind regards,

Associate Professor Ellen Rock  
UNSW Faculty of Law & Justice

Ref: A6266419  
16 December 2024

The Hon Natasha Maclaren-Jones MLC  
Chair, Regulation Committee  
Parliament House  
Macquarie Steet  
SYDNEY NSW 2000

By email: [Regulation.Committee@parliament.nsw.gov.au](mailto:Regulation.Committee@parliament.nsw.gov.au)

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Re: Evaluation of the Legislative Council's Regulation Committee

Dear Committee Chair,

I refer to your correspondence of 25 November 2024 to the Secretary of The Cabinet Office (TCO) regarding the work of the Regulation Committee (**Committee**).

The Committee fulfils an important role in assisting the Legislative Council to exercise its constitutional function of scrutinising the exercise of executive powers by the Government of the day.

As part of the process of evaluating the Committee's work, you have sought particular input on the following:

- the role and impact the Committee's technical scrutiny function may have had in relation to the making of delegated legislation this year
- the Delegated Legislation Monitors and the Guidelines for the operation of the Committee's technical scrutiny function
- the functionality of the Committee's webpage, and
- whether the department or other NSW Government departments and agencies would appreciate further information or outreach regarding the Committee's work practices.

TCO does not have any comments to make on these matters other than to thank the Committee and its staff for their important work.

However, TCO is aware that you have previously written to the Government regarding concerns about the timeliness of some responses from Ministers to requests from the Committee. In doing so, you have foreshadowed that the Committee may consider reducing the time for Ministers to respond from 14 days to seven days.

TCO appreciates that the Committee is required to carry out its work under scrutiny and subject to specified timeframes. However, TCO's view is that a further reduction to the already limited time

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available to Ministers and the agencies that support them is unlikely to result in better engagement between the Government and the Committee.

Section 40(1) of the *Interpretation Act 1987* requires that:

[w]ritten notice of the making of a statutory rule must be laid before each House of Parliament within 14 sitting days of that House after the day on which it is published on the NSW legislation website.

Section 41(1) of the Act relevantly states that:

[e]ither House of Parliament may pass a resolution disallowing a statutory rule—

- (a) at any time before the relevant written notice is laid before the House, or
- (b) at any time after the relevant written notice is laid before the House, but only if notice of the resolution was given within 15 sitting days of the House after the relevant written notice was so laid.

In 2024, all 15 of the Legislative Council's sitting weeks comprised three scheduled days each, for a total of 45 scheduled sitting days in the calendar year. The House did not sit at all in the months of January, April, July or December.

Assuming that the written notice is given on the first sitting day after an instrument is made, the relevant disallowance timeframe in 2024 was never less than 56 calendar days. For an instrument made at any point in January 2024, assuming notice was given on 6 February 2024, the first sitting day of the year, a notice of a disallowance motion was required to be given by 4 June 2024 – 126 calendar days after the first sitting day of the year.

In this context, TCO's view is that a timeframe of 14 calendar days for a Minister to consider, seek relevant advice from the public service, and respond to a request from the Committee is an appropriate timeframe that balances the demands made of both the Committee and its staff, as well as Ministers and the agencies that support them.

Of course, TCO and all public service agencies will continue to do whatever they can to support Ministers to comply with any requirements that the Legislative Council considers appropriate.

Sincerely,

**Matt Richards**  
A/Deputy Secretary, General Counsel



19 December 2024

The Hon Natasha Maclaren-Jones MLC  
Chair  
Regulation Committee  
Legislative Council  
Parliament House  
SYDNEY NSW 2000

Dear Mrs Maclaren-Jones

I refer to your request for a submission to the evaluation of the Legislative Council's Regulation Committee.

You have asked for my feedback, as Clerk of the Parliaments, on the Committee's exercise of its technical scrutiny function, and four specific issues, each of which are addressed below.

#### **Background – the work of the regulation Committee during 2024**

On 19 October 2023 the Legislative Council amended the resolution of the House establishing the Regulation Committee to require the committee to scrutinise delegated legislation that is subject to disallowance. The Committee was required to undertake this additional scrutiny function in respect of all relevant legislative instruments from the first sitting day in 2024.

I note that according to the resolution of the House of 19 October 2023, the Committee is to table an evaluation "of the arrangements" under this additional new function, by the conclusion of the first sitting week in 2025, and that the House is to consider further whether to continue that additional new function.

I also note that between the passing of the resolution on 19 October 2023 and the first sitting day of 2024, much preparatory work was undertaken, both by the Committee and the Procedure Office (which provides the Secretariat for the Committee). Consequently, from the first sitting week in 2024 the following arrangements and mechanism have been put in place to support the Committee's exercise of its additional new function:

- The provision of a four person Secretariat, including procedural, technical legal and administrative support staff,
- The engagement of the services of a legal adviser (as provided for under the resolution of 19 October 2023),

- The publication of guidelines outlining the Committee's approach to the additional new function,
- The preparation, consideration and tabling each sitting week of a *Delegated Legislation Monitor*,
- The development of a standalone webpage for the Committee, providing user friendly access to the Committee's scrutiny function, monitors and guidelines, an index of instruments about which the Committee has raised a scrutiny concern, an index of undertakings by government agencies in relation to instruments, and a disallowance alert page.

Each of these steps were informed by effective engagement with the Secretariats of scrutiny committees in other Australian Parliaments (particularly the Australian Senate), and the Parliamentary Counsel's Office.

### **Tabling of a Delegated Legislation Monitor during each sitting week**

At the end of 2024 the Regulation has tabled 14 Delegated Legislation Monitors. During the course of the year 250 instruments have been considered and scrutinised by the Committee. Scrutiny matters or concerns have been raised in relation to 34 instruments, with 11 undertakings provided by Ministers and others in respect of those concerns. In accordance with the resolutions of the Committee one notice of motion for the disallowance of part of an instrument was given by the Chair.

The Committee has clearly approached its additional new role with thoughtfulness and dedication. Delegated Legislation Monitors have been high quality. The responses of Ministers to matters raised, and the undertakings given in response (including to improve instruments), demonstrate the Government's constructive and respectful engagement with the Committee (particularly on the part of Ministers in the Legislative Council).

### **The Committee's additional scrutiny function and the role of the Legislative Council and its committees**

Ultimately it will be a matter for the Members of the Legislative Council to form a view early in 2025 as to whether or not the Committee's additional new function should continue and be made an ongoing part of the Committee's role, no doubt informed by the recommendations of the Committee in its evaluation report. I hope the Committee might find the following reflections of assistance as it considers its approach to these matters.

Enclosed for your information is a document entitled: "Chapter 26 – Back to the Future: Charting the Evolution of the New South Wales Legislative Council Regulation Committee," by Sharon Ohnesorge and Stephen Frappell. This will form one of the chapters in the forthcoming publication *Parliamentary Democracy at Work: Essays on the New South Wales Legislative Council*, which I have co-edited with Dr David Clune OAM. The book is expected to be published and available in January and will be officially launched on Wednesday 12 February 2025, by the President of the Legislative Council, the Hon Ben Franklin MLC.

The enclosed paper eloquently outlines and discusses the origins of the Regulation Committee, including its original innovative set of functions, and the process leading to and rationale for the recommendations that were implemented with the House granting the Committee its additional new role for 2024.

Of particular relevance to the Committee's consideration of its additional new scrutiny role and the role of the Legislative Council and its committees, are the particular aspects of the constitutional context identified by Professor Gabrielle Appleby as informing the development of principles to guide the process of reform in this area, as outlined, on page 408:

- 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, and
- Lessons to be learnt from the response to COVID-19.

In relation to the long history of delegated legislative scrutiny in New South Wales, reference is also made on page 395 to the fact that this function of reviewing all legislative instruments against technical scrutiny principles had previously been performed by a Legislative Council committee from 1960 to 1987.

I concur with the conclusion on pages 412-413 regarding the practical reality of the delegation of legislative power to executive government and the need to carefully manage such delegation so as to uphold fundamental constitutional principles including the separation of powers, democratic governance and the rule of law.

I also concur with the conclusion that the addition of comprehensive technical scrutiny of legislative instruments, on top of the existing innovative functions of the Regulation Committee (including the ability to examine the substantive policy merits of a small number of instruments and trends or issues relating to regulations), has the potential to place the NSW Legislative Council (and therefore the NSW Parliament) closer towards best practice in the management of delegated legislation.

Whilst it will be a matter for the Legislative Council and its Members to determine, hopefully based on the recommendations of your Committee, whether or not to continue the Committee's additional new role, I would like to think that the Department of the Legislative Council has done everything possible this year to assist the Committee in the efficient and effective discharge of its important responsibilities.

#### **The availability of ongoing funding to support the independent legal adviser, and the establishment of a dedicated secretariat to support the Committee**

The NSW Budget papers and the *Appropriations (Parliament) Act* provide funding to The Legislature in two global amounts for capital and recurrent funding across all three parliamentary departments, Members and functions. The specific funding provided to a Committee or other function is therefore not immediately apparent, except to the Parliament's finance team who have access to the PRIME financial management system used by Treasury and which shows which budget bids have been funded in the forward estimates.

In anticipation of the Regulation Committee's additional new function potentially becoming ongoing, a "Parameter and Technical Adjustment" (PTA) bid was submitted as part of the 2024/25 budget process. Pleasingly, the bid was successful and funding has been provided in the forward estimates to support the work of the Committee. The amount provided in the forward estimates is sufficient to support the continuation of a secretariat consisting of four full-time equivalent (FTE) staff and a legal adviser to the Committee.

There is one caveat that I should note here. The Department of the Legislative Council made a separate PTA bid to make ongoing the various one-off items of additional funding received during the period

2018-2024 to support the increased work of committees. Unfortunately this bid was unsuccessful, with result that all of that accumulated additional funding concluded on 30 June 2024. It is only due to the co-operation and generosity of the Clerk of the Legislative Assembly and the Chief Executive of the Department of Parliamentary Services, with the support of the President and Speaker, in re-allocating funding from across the Parliament, that the Department of the Legislative Council has been able to continue to support the work of committees this financial year. Given this local arrangement is for this financial year only it does leave the ability of the Department of the Legislative Council to continue to support the work of its committees and to make ongoing staff appointments quite vulnerable. A further PTA bid will be made as part of the 2025/26 budget process. The support of members of the Regulation Committee in relation to this bid would be greatly appreciated.

The legal adviser engaged to support the work of the Committee in 2024, Dr Ellen Rock, was engaged following a targeted request for expressions of interest process. Following questions raised by a Member of the Committee at the start of the year, for the remainder of the 58<sup>th</sup> Parliament, either a further targeted request for expressions of interest process or a general advertisement for expressions of interest could be adopted, if the House resolves that the Committee should continue to undertake its additional new function.

I trust this information is of assistance to the Regulation Committee. Please do not hesitate to contact me if you require any further information or have any questions about this submission.

Yours sincerely

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Clerk of the Parliaments



## CHAPTER 26

# BACK TO THE FUTURE: CHARTING THE EVOLUTION OF THE NEW SOUTH WALES LEGISLATIVE COUNCIL REGULATION COMMITTEE

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### INTRODUCTION

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

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

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

In a sense, the adoption of this recommendation would bring the Legislative Council both back to where it started and also into line with several other Australian and New Zealand jurisdictions. However, more innovatively perhaps, the Committee would

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combine the task with its existing functions scrutinising policy merits and trends with regard to delegated legislation.

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

## THE REGULATION COMMITTEE'S ESTABLISHMENT AS A TRIAL IN 2017

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

The report noted that there was general consensus among inquiry participants that Legislative Council committees "should play a greater role in scrutinising bills and regulations". The Select Committee heard in evidence that the existing joint Legislation Review Committee, the remit of which is to review all bills and regulations against technical scrutiny criteria, was "inefficient and that the scrutiny of the regulations was gradually diminishing".<sup>2</sup> This observation was informed by the experience in New South Wales from 1960-1987 where, as occurs at the federal level, scrutiny of regulations was undertaken by an upper house committee, the Committee on Subordinate Legislation. In 1987, New South Wales shifted to a different model: a joint parliamentary committee, the Regulation Review Committee. This was despite protest at the time from members of the Council that the function properly rested with the Council. In 2003, the Regulation Review Committee was in turn replaced by the Legislation Review Committee, also a joint committee of both Houses, with responsibility for reviewing subordinate but also primary legislation.<sup>3</sup>

In order to enhance scrutiny of delegated legislation, the Committee on Committees recommended that a Regulation Committee be established, on a trial basis, to consider policy and other issues relating to delegated legislation. The Select Committee considered that "rather than replicating the work of the joint Legislation Review Committee which reviews all disallowable regulations, the proposed committee would take an innovative

2. Select Committee on the Legislative Council Committee System, NSW Legislative Council, *Legislative Council committee system* (2016), p 4.

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

approach to its role, by focusing on the substantive policy issues regarding a small number of regulations of interest, as well as trends relating to delegated legislation".<sup>4</sup>

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

- (a) any regulation, including the policy or substantive content of a regulation, and
- (b) trends or issues that relate to regulations.<sup>5</sup>

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

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

The Regulation Committee conducted two inquiries during the trial period in 2018 – both into specific pieces of delegated legislation, rather than into trends or issues relating to regulations.<sup>6</sup> In both inquiries, the committee examined the purpose, implementation, and potential impacts of the regulations in detail. The committee also highlighted systemic issues with the government's public consultation processes when developing regulations. This led the committee to make recommendations in both inquiries that relevant government agencies consult and advise stakeholders about forthcoming regulations, their objectives and potential impacts so as to increase community awareness.

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

- involved a much broader remit than any inquiry into a regulation undertaken by the joint Legislation Review Committee in recent times, demonstrating that there is minimal overlap in the functions of both committees (which was an initial hesitation with respect to the Regulation Committee's establishment);
- were short and sharp, but long enough to allow stakeholders to provide input through written submissions and public hearings;

4. Select Committee on the Legislative Council Committee System, NSW Legislative Council, *Legislative Council committee system* (2016), p 4.

5. *Minutes*, NSW Legislative Council, 23 November 2017, pp 2223-5.

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

- gave stakeholders the opportunity to comment on the way delegated legislation is developed and operates, which leads to better regulation that meets both the needs of government and the communities they impact;
- gave legislators a greater visibility of delegated legislation, which has provided more oversight for the Parliament.

Overall, the committee concluded that:

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

The committee therefore recommended that the Legislative Council, at the commencement of the 57th Parliament, establish the Regulation Committee as a standing committee, allowing for trends or issues relating to delegated legislation to be analysed, and the continued review and analysis of any regulation of particular interest to the committee.<sup>7</sup>

## THE PERMANENT ESTABLISHMENT OF THE REGULATION COMMITTEE IN 2019

The Regulation Committee was re-established at the commencement of the 57th Parliament in May 2019 as a standing committee, with the role of inquiring into and reporting on any regulation referred to it by the House, including the policy or substantive content of the instrument, and trends or issues in relation to delegated legislation.<sup>8</sup> To facilitate its policy scrutiny function, the resolution provided that if an instrument is referred to the committee that is the subject of a notice of motion or order of the day for disallowance in the Council, the notice or order is postponed until the committee tables its report.

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

7. Regulation Committee, NSW Legislative Council, *Evaluation of the Regulation Committee trial* (2018), p 6.

8. *Minutes*, NSW Legislative Council, 8 May 2019, pp 100-3.

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

- in the first case, the committee recommended that the relevant regulations be disallowed,<sup>9</sup> which subsequently occurred;<sup>10</sup>
- in the second, the committee recommended that the relevant regulations not be disallowed;<sup>11</sup>
- in the third, the committee recommended that the House proceed to debate the disallowance of the relevant regulation, and that the Government address the committee comments and concerns identified by stakeholders, as set out in the report, during debate in the House.<sup>12</sup>

## THE REGULATION COMMITTEE'S FIRST REPORT ON DELEGATED LEGISLATION IN 2020

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

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

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

9. Regulation Committee, NSW Legislative Council, *Liquor Amendment (Music Festivals) Regulation 2019 and Gaming and Liquor Administration Amendment (Music Festivals) Regulation 2019* (2019).

10. *Minutes*, NSW Legislative Council, 26 September 2019, pp 478-9.

11. Regulation Committee, NSW Legislative Council, *Local Land Services Amendment (Critically Endangered Ecological Communities) Regulation 2019 and Local Land Services Amendment (Allowable Activities) Regulation 2019* (2019).

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

In October 2020, the Regulation Committee tabled the report entitled *Making of delegated legislation in New South Wales*. The following is a summary of the issues discussed in the committee's report:<sup>13</sup>

- **The use of shell legislation, Henry VIII clauses, and quasi-legislation:** The committee heard evidence that raised significant concerns as to the overuse of these mechanisms in New South Wales and the inadequacy of the existing scrutiny processes to address this. Possible responses to these concerns included greater guidance to government agencies in what matters were appropriate to delegate; the extent of reporting and explanation required in relation to such delegations to the Parliament as well as special tabling requirements relating to regulations made under shell legislation; strengthening statutory presumptions around the incorporation of quasi-legislation; the adoption of affirmative resolution procedures; and targeted, shorter sunset provisions. The committee ultimately recommended on this set of issues that the New South Wales Government ensure that explanatory notes to bills:
  - highlight the presence in a 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 New South Wales (undertaken by legislative drafters), this might be better undertaken in the second reading speech than the explanatory note.

- **The scope of delegated legislation that is subject to parliamentary scrutiny and disallowance procedure:** The committee considered the current scope of delegated legislation subject to tabling, disallowance and scrutiny. The interaction of the definition of a "statutory rule" in the *Interpretation Act 1987* and the definition of a "regulation" in the *Legislation Review Act 1987* provides the scope of instruments that are subject to procedures relating to the tabling, disallowance and scrutiny established by those pieces of legislation. The committee heard that there are some inconsistencies between the definitions, as well as a general deficiency in the approach in the reliance on the form of the instrument, rather than its legislative nature. This meant the Government's extensive use of public health orders under the *Public Health Act 2010* in its COVID-19 response was not subject to these procedures, and that quasi-legislation (that is, external instruments incorporated into delegated instruments) are also not caught by the framework. The use of a form-focused definition raises concerns that legislative schemes may be crafted to avoid scrutiny by the form of instrument chosen.

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

- **Timeframes for disallowance and review:** The committee also heard concerns relating to the timeframe for disallowance - currently set at 15 parliamentary sitting days after notice of the rule is tabled in the House. Unless a resolution is passed, scrutiny by the Legislation Review Committee must be undertaken in this time period. (The policy review undertaken by the Regulation Committee is not so limited.) The committee heard concerns that this restriction hampered Parliament's ability to oversee instruments, as often a full assessment of the impact of an instrument can only be undertaken after it has been in operation for a longer period.
- **Remaking of delegated instruments after disallowance:** The committee heard concerns that the limit on remaking instruments that are the same in substance within four months of disallowance by a House (unless that disallowance is revoked) was too short, particularly given the practice of other jurisdictions (the Commonwealth sets a six-month restriction on remaking instruments that have been disallowed).
- **Consultation requirements for making of delegated legislation:** The committee received a number of submissions advocating for strengthening the consultation requirements, currently in section 6 of the *Subordinate Legislation Act 1989*, and supplemented by the *NSW Guide to Better Regulation (2016)*. Concerns were raised about the limited scope of the obligation to consult, its unenforceable nature, the level of oversight of consultation, and the need for greater guidance to be provided to government on the making of delegated legislation and the consultation and reporting requirements.
- **Public accessibility of delegated legislation:** The committee heard concerns about public accessibility in respect of different forms of delegated legislation. While it is accepted that the NSW Legislation website publishes "statutory rules", this is determined by the form and not the substance of the instrument. Other instruments may be published in other forums - for example in the *Gazette*, or on individual departmental websites. Such inconsistency in practice means there is less public transparency and accessibility in relation to instruments that might be legislative in nature, but are not within the definition of "statutory rules". There is also little transparency around which instruments are disallowable and which are not. The committee recommended that New South Wales government agencies give priority to identifying more effective ways to improve public access to all legislative instruments. The Government's response was that it supported this recommendation. However, in the detail of its response, the Government indicated a preference for retaining the status quo in terms of individual departments and agencies determining the best platform for public access to delegated instruments. So, while the NSW Legislation website provides a central point for statutory rules, it is still not a centralised platform for all legislative instruments.
- **Statutory provisions for regulation of the making and oversight of delegated legislation in New South Wales:** The committee heard two suggestions for the

current form of the statutory provisions regulating the making and oversight of delegated legislation in New South Wales. The first was to consolidate the three different sources of statutory authority for the making and oversight of delegated legislation in New South Wales to reduce the complexity and confusion caused, in particular, by the interaction between the different definitions in the statutes. The second was to create a consolidated set of uniform standards for scrutiny across primary and delegated legislation, similar to that seen in the *Legislative Standards Act 1992* (Qld).

- **The protection of rights and liberties and delegated legislation:** The Regulation Committee heard concerns that the New South Wales system for scrutiny of legislation and delegated legislation in relation to human rights was less robust than other jurisdictions. Submissions advocated for greater protections, including through the enactment of a comprehensive bill of rights for New South Wales, or more explicit guidance in relation to the rights scrutiny function that is undertaken by the Legislation Review Committee.
- **Drafting delegated legislation:** The committee heard concerns directly from the Parliamentary Counsel's Office as to the drafting quality of statutory instruments. Only "statutory rules" are required to be drafted by the Parliamentary Counsel's Office. Concerns around legality, accessibility and clarity were raised in relation to instruments not drafted by the Office.

While the committee made some direct recommendations, many of the issues outlined above were not immediately resolved, given the complex nature of the laws and procedures governing delegated legislation and the variety of possible approaches to reform. To ensure that New South Wales has a statutory framework for delegated legislation that is simple, robust and accessible, the committee recommended that the NSW Law Reform Commission be tasked with reviewing and reporting on the extent and use of delegated legislative powers in New South Wales, powers and safeguards relating to delegated legislation in other jurisdictions, and suggestions for improvements in the use of delegated legislative powers to prevent executive overreach.<sup>14</sup>

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

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

- expand its jurisdiction beyond regulations, to all legislative instruments regardless of their form, including the policy and substantive content of the instrument;

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14. Regulation Committee, NSW Legislative Council, *Making of delegated legislation in New South Wales* (2020), p 41.



- expand its jurisdiction to include draft legislative instruments;
- include the power to self-refer inquiries.<sup>15</sup>

## REFERRAL OF A SECOND INQUIRY INTO REFORM OF THE MANAGEMENT OF DELEGATED LEGISLATION IN 2021

In November 2021,<sup>16</sup> in the absence of a referral by the Attorney General to the NSW Law Reform Commission, the Legislative Council referred the Regulation Committee's 2020 report and evidence back to the committee for further inquiry and report into options for reform of the management of delegated legislation in New South Wales. In addition, the committee was authorised to engage an external legal adviser to assist the committee in its inquiry.<sup>17</sup>

### Engagement of Professor Appleby to prepare a Discussion Paper on Delegated Legislation

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

- How do New South Wales's framework and safeguards relating to delegated legislation compare with those of other Australian and relevant international jurisdictions?
- What are the options for reform of the management of delegated legislation in New South Wales, including identifying a "best practice" model?
- What are the mechanisms by which these reforms could be implemented?

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

15. *Minutes*, NSW Legislative Council, 20 November 2020, p 1748.

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

17. *Minutes*, NSW Legislative Council, 24 November 2021, pp 2848-9.

## Professor Appleby's Analysis of Best Practice in the Management of Delegated Legislation

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

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

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

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

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

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

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

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

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

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

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

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

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

Victoria is notable in that, like the Commonwealth *Legislation Act 2003*, the *Subordinate Legislation Act 1994* (Vic) defines the scope and application of the Act by reference to the nature, not the form, of a delegated instrument. Specifically, section 3 of the Act defines a legislative instrument to be "an instrument made under an Act or subordinate rule that is of a legislative character". This approach is regarded as best practice. That said, Professor Appleby noted that the Victorian Scrutiny of Acts and Regulations Committee, which has a government majority, recently stated that "responsibility for decisions about statutory rules and legislative instruments lies with the responsible Minister", potentially allowing the executive government in Victoria greater involvement in determining those instruments subject to parliamentary review, tabling, scrutiny and disallowance.

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

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

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

Finally, the Victorian arrangements are also notable for including extensive protection of human rights. Under the *Subordinate Legislation Act 1994* (Vic), there is a general criterion

for review of statutory rules that they do not “unduly trespass on right and liberties of the person previously established by law”, together with an additional requirement of certification of compatibility with the rights set out in *Charter of Rights and Responsibilities Act 2006* (Vic) (ss 21 and 25A). In addition to these arrangements for the scrutiny of delegated legislation, the Charter contains in section 32(3)(b) the statement that:

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

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

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

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

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

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

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

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

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

### **Professor Appleby's Design Principles and Proposed Reforms for Delegated Legislation in New South Wales**

Based on her analysis of arrangements for the management of delegated legislation in other jurisdictions, including best practice as outlined above, Professor Appleby advanced a set of design principles in her Discussion Paper and a set of best practice reforms to 11 different aspects of the framework for the management of delegated legislation in New South Wales.

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

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

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

- simplicity requires a system of delegated legislation that is straightforward and relatively easy to ascertain with provisions that are coherent and consistent;

- robustness is underpinned by a desire to protect and strengthen democratic values, to ensure that the democratic credentials of the Parliament are injected into the executive's making of delegated legislation;
- accessibility includes notions of transparency and public accountability.

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

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

## THE REGULATION COMMITTEE'S SECOND REPORT ON DELEGATED LEGISLATION IN 2022

In its report tabled in September 2022, the Regulation Committee summarised Professor Appleby's proposals for reform and set out the committee's own views and recommendations in relation to each of the 11 aspects of the delegated legislation framework addressed in the Discussion Paper. While the committee did not adopt all of the proposals advanced in the Discussion Paper, it drew on many in formulating the 14 recommendations set out in the report. As stated in the Chair's foreword to the report, these recommendations are intended to "enhance the management of executive-made laws by striking a more appropriate balance between the justifications behind delegations of legislative power and the constitutional imperatives of democratic law-making".<sup>18</sup>

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

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

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

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

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

While acknowledging the different options available to address these concerns,<sup>19</sup> the committee concluded that, as a first step, the preferred mechanism for implementing this reform would be to simply amend the resolution of the Legislative Council establishing the Regulation Committee to expand its functions to include the scrutiny of legislative instruments against the principles in the *Legislation Review Act 1987*. As the committee observed, while this would (at least initially) result in duplication of the work of the joint committee, it would enable an assessment to be made of the effectiveness of the Council committee in the technical scrutiny role, which would assist in determining whether there is a need for any further statutory reform. There was also the suggestion in the Discussion Paper that the new scrutiny function would complement the committee's existing policy review function, as the scrutiny work would alert the committee to potential instruments that might appropriately be the subject of a further inquiry into the substantive policy.

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



The committee also recommended that its new, expanded function be accompanied by an increase in resourcing for secretariat support and the appointment of a dedicated legal adviser, as occurs in the Senate.<sup>20</sup>

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

First, on the subject of statutory consolidation, the committee recommended that the provisions of the *Interpretation Act 1987*, *Subordinate Legislation Act 1989* and *Legislation Review Act 1987* be consolidated into a single *Legislation Act* which includes all provisions relating to the making, consultation, notice, tabling, publication, disallowance, remaking, sunseting and scrutiny of primary and delegated legislation. In this regard, the committee noted that some jurisdictions have streamlined their legislative regimes by consolidating provisions relating to delegated legislation and primary legislation into a single Act. The committee concluded that the adoption of such an approach in New South Wales "is a common sense reform that would make it easier for members of the public, members of Parliament and government officials to understand the statutory requirements that operate in this complex area of the law ... [which] in turn would enhance executive accountability and strengthen democratic oversight of the uses of delegated legislative power".<sup>21</sup>

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

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

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

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

21. *Ibid*, pp 10-11.

and sunset provisions. The committee also supported the imposition of strict controls on the making of exemptions from the regulatory and scrutiny requirements to extend to all legislative instruments.<sup>22</sup>

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

- the Regulation Committee publish and regularly update a series of Guidance Notes to Government agencies concerning key issues relating to the regulation and oversight of delegated legislation;
- the time period in which a disallowed statutory instrument cannot be remade be increased from four months to six months after the motion of disallowance;
- legislative instruments should commence 21 days after they are first published, unless otherwise permitted in the primary legislation.<sup>23</sup>

The Government response to the report dated 12 December 2022 stated that it is considering each of the recommendations directed to it, noting that this process will take longer than the three months available to the Government to respond to the committee's report, especially given the wide-ranging implications of the proposed reforms, including the proposed amendments to three pieces of legislation – the *Interpretation Act 1987*, *Subordinate Legislation Act 1989* and the *Legislation Review Act 1987* – that are of central importance to the New South Wales statute book. The Government also advised that given the interrelated nature of the recommendations, it would consider them as a whole, in order to “take an informed and holistic position on the proposed reforms”.<sup>24</sup>

## CONCLUSION

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

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22. Ibid, pp 15-16.

23. Ibid, pp 117-20.

24. Correspondence from Premier Dominic Perrottet MP to the Clerk of the Parliaments, providing Government response to the inquiry into options for reform of the management of delegated legislation in New South Wales, 12 December 2022.

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

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

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

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

## POSTSCRIPT

This paper's prediction that 2023 and the start of the 58th Parliament would be a pivotal time for the Regulation Committee in the oversight of delegated legislation has proven prescient.

On 19 October 2023, the Legislative Council unanimously resolved that the functions of the Regulation Committee be expanded to include technical scrutiny of delegated legislation in New South Wales. In addition to the existing functions, the expanded resolution establishing the Regulation Committee now provides that:

The committee, from the first sitting day in 2024:

- (a) is to consider all instruments of a legislative nature that are subject to disallowance while they are so subject, against the scrutiny principles set out in section 9(1)(b) of the *Legislation Review Act 1987*,
- (b) may report on such instruments as it thinks necessary, including setting out its opinion that an instrument or portion of an instrument ought to be disallowed and the grounds on which it has formed that opinion, and
- (c) may consider and report on an instrument after it has ceased to be subject to disallowance if the committee resolves to do so while the instrument is subject to disallowance.

The House determined that this function should commence initially as a 12-month trial followed by an evaluation, and that a dedicated external legal adviser be appointed to support the Regulation Committee in the performance of its new technical scrutiny function.

In preparation for this additional function, a lot of work was done in late 2023 and early 2024, including:

- recruitment of a specialised secretariat comprising a Director, Research Officers and an Administration Officer;
- appointment of the external legal adviser;
- the development of guidelines outlining the intended approach of the committee to the technical scrutiny function, including its work practices and interpretation of the criteria in section 9(1)(b) of the *Legislation Review Act 1987*;
- the development of a standalone webpage for the committee, hosted in the Parliamentary Portal, providing user friendly access to the committee's scrutiny function, including the monitors and guidelines, an index of instruments about which the committee has raised a scrutiny concern, an index of undertakings by government agencies in relation to instruments, and a disallowance alert page;
- stakeholder engagement, including with the Parliamentary Counsel's Office, the New South Wales Government and secretariats of scrutiny committees across Australia;
- setting up the committee's work processes and procedures.

The committee subsequently published its first Delegated Legislation Monitor on 14 March 2024 and now publishes a Monitor each sitting week. The Monitor provides an overview of the committee's scrutiny concerns relating to instruments that are subject to disallowance while they are so subject.

Even in the relatively short time the committee's scrutiny function has been up and running, the additional level of oversight to delegated legislation in New South Wales has brought positive results, with detailed engagement from ministers and several undertakings given to improve instruments as a direct result of the committee's scrutiny concerns.

As indicated, the success of the 12-month trial will be reviewed at the end of 2024.

The Hon Natasha Maclaren-Jones MLC  
Committee Chair  
Regulation Committee  
Legislative Council

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Re: Your ref: D24/058848

13 January 2025

Dear Ms Maclaren-Jones

Thank you for your letter dated 25 November 2024 and the opportunity to provide feedback on the Regulation Committee's technical scrutiny function of reviewing all statutory rules and other disallowable instruments.

I would like to start by acknowledging the important role the Committee has in providing parliamentary oversight of statutory rules and other disallowable instruments and stating how invaluable the Committee's technical scrutiny function and its Delegated Legislation Monitors and Guidelines have been in the preparation of delegated legislation in 2024.

As you are aware, the Parliamentary Counsel's Office (PCO) is responsible for drafting and, through the NSW Legislation Website providing access to, all NSW statutory rules and other disallowable instruments. In drafting statutory rules and other disallowable instruments PCO has regard to the common law principles relating to legislation that underlie a parliamentary democracy based on the rule of law. In particular, PCO has regard to the principles that require legislation to have sufficient regard to:

- (a) the rights and liberties of individuals, and
- (b) the institution of Parliament.

Examples of principles requiring legislation to have sufficient regard to the rights and liberties of individuals include:

- Making rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review, and
- Consistency with the principles of natural justice, and
- Allowing the delegation of administrative power only in appropriate cases and to appropriate persons, and
- Reversing the onus of proof in criminal proceedings only with adequate justification, and
- Providing adequate protection against self-incrimination, and
- Not adversely affecting rights and liberties, or imposing obligations, retrospectively, and
- Drafting legislation in a way that is unambiguous and sufficiently clear and precise.

Examples of whether statutory rules and other disallowable instruments have sufficient regard to the institution of Parliament include:

- Whether the rule or other instrument is within power under the Act that allows the rule or instrument to be made, and
- Whether the rule or other instrument is consistent with the policy objectives of the empowering law, and
- Whether the rule or other instrument contains only matter appropriate to statutory instruments, and
- Whether the rule or other instrument allows the subdelegation of a power delegated by an Act only if authorised by an Act and only in appropriate cases and to appropriate persons.

While PCO has regard to the above principles in drafting and providing access to NSW legislation, PCO does not have statutory independence and is not the ultimate arbiter of the content of legislation. PCO provides advice about the content of legislation and has varying degrees of influence about the content. For example, under *the Subordinate Legislation Act 1989*, section 7(c), a proposed statutory rule cannot be submitted to the Governor for making, approval or confirmation unless the Parliamentary Counsel (or the Attorney General) has given an opinion as to whether the proposed statutory rule may legally be made. However, others of the principles mentioned above, while tenets of a parliamentary democracy and high quality legislation, are not statutory in basis and cannot be enforced by PCO.

The Committee's technical scrutiny function has had an invaluable impact in providing a detailed parliamentary review of statutory rules and other instruments prepared by the Executive, and in ensuring the rules and other instruments have due regard to the principles that underpin a parliamentary democracy based on the rule of law. The Committee's scrutiny function and publication of Monitors and Guidelines ensures transparency and accountability in relation to disallowable instruments. In particular, the Committee's technical scrutiny function provides an important review of PCO's work, a review I welcome. This work undertaken by the Committee contributes to a statute book that is of the highest quality and in ensuring that delegated legislation within the statute book is fit for purpose for the NSW community. It also ensures the Executive, including the NSW public sector, is subject to appropriate scrutiny in exercising powers delegated by the NSW Parliament – all of which is an important function of the Legislative Council, as the House of review.

For PCO, the exercise of the Committee's technical scrutiny function has had important practical implications: creating an opportunity for greater consideration and transparency of the delegated legislation we draft and our drafting conventions and practices, encouraging conversations with the public sector agencies that instruct us, generally on behalf of Government Ministers, about whether matter is appropriate for inclusion in statutory rules and other disallowable instruments and an opportunity to refer to the Delegated Legislation Monitors and Guidelines in determining our approach to draft statutory rules and other disallowable instruments. The Committee has to date identified a number of errors and areas of improvement in delegated legislation drafted by PCO and has raised important issues for further consideration by relevant Ministers and public sector agencies. All of this has supported us in our goals of ensuring the legislation we prepare for the people of NSW respects the rights and liberties of the individuals in our community and has appropriate respect for the institution of Parliament.

In my view, the Regulation Committee has important work to do, not least scrutinising the work undertaken by PCO, which as Parliamentary Counsel I am privileged to lead, and ensuring that our work accords with

## Parliamentary Counsel's Office



the common law principles that underlie our parliamentary democracy. While the Regulation Committee may to date only have been established on a trial basis I would argue that any additional parliamentary scrutiny of delegated legislation is to be welcomed as an important check and balance on Executive exercise of the delegated power to make that legislation. Obviously it is very much a matter for the Parliament whether it wishes to continue the work of the Regulation Committee. However, in my view that work is important and fundamental to democracy in NSW and the exercise of the Committee's technical scrutiny function is impactful.

Thank you again for the opportunity to provide feedback about the trial of the Committee's technical scrutiny function and for your willingness to provide an extension of time to give PCO an opportunity to contribute. I hope my views are of some assistance and I would, of course, be happy to assist in any other way that may be helpful.

Kind regards

Annette O'Callaghan  
Parliamentary Counsel







