Question: The CHAIR: When you talk about public complaints process, in your own mind can you tell the Committee what you are actually thinking of, what would that look like? How would it happen? If I was a member of the public and I wanted to lodge a complaint against the process, how do you see that happening?

Answer: I thank the committee for the opportunity to provide a written response to their question seeking further details about my vision for a new public complaint mechanism in respect of delegated legislation in NSW.

As I explained at the hearing, in making this recommendation I was endorsing Recommendation (f) in the submission of Professor Lorne Neudorf to this same inquiry. His recommendation was in the following terms:

> *Create a new public complaints process for delegated legislation - It is often the case that the implications of new law cannot be fully anticipated until it is applied in practice. Both the Legislation Review Committee and the Regulation Committee should establish a process for accepting public complaints in relation to existing delegated legislation. Standing orders and the relevant legislation should be amended as needed to provide the Committees with the authority to scrutinise and report upon delegated legislation referred by members of the public. Parliamentary disallowance should also be made available in relation to such delegated legislation.*

In my view, such a mechanism would be extremely valuable for civil society groups such as NSWCCL and any individual or business that has been individually aggrieved by a piece of delegated legislation. It would lighten the very onerous scrutiny burden carried by the Legislation Review and Regulation Committees by 'crowdsourcing' scrutiny and analysis, which can only improve the public debate. Public complaints may highlight issues with instruments which could not be foreseen upon enactment. Moreover, such a mechanism would give constituents and civil society confidence that their voices are being heard in relation to legislative instruments which may never attract media or political attention given their low-profile, and fast-changing or technical characteristics. In this way it strengthens the transparency and civic trust which is so fundamental to the rule of law.

Professor Neudorf has informed me in correspondence that his recommendation emerged from his comparative study of regulation-making practice, during which he examined New Zealand's Regulations Committee. Standing Order 320 of the NZ House of Representatives provides:

> *(1) Where a complaint is made to the committee or to the chairperson of the committee by a person or organisation aggrieved at the operation of a regulation, the complaint must be placed before the committee at its next meeting for the committee to consider whether, on the face of it, the complaint relates to one of the grounds on which the committee may draw a regulation to the special attention of the House.*
> *(2) The person or organisation making the complaint is given an opportunity to address the committee on the regulation unless the committee agrees by unanimous resolution not to proceed with the complaint.*

Examples of complaints made, and responses to complaints under these orders are available on the Committee's website under 'Business' and 'Reports'.

This model sets a great example on which NSW can build. An online dropbox, or even merely a dedicated email address, could be established through which complaints are made.

In my view, standing to make a complaint should be broader than just those *aggrieved*; it should explicitly include organisations such as NSWCCL with an intellectual or political interest in a particular instrument or "trends or issues that relate to regulations" as well as other forms of delegated legislation. Liberalising standing to this degree is unlikely to result in excess complaints which drain the committee's time and resources given the generally low public awareness of delegated legislation and allowance for rejecting complaints (discussed below).

The standing orders or legislation could require that the Committee "consider" the merits of the complaint and whether to conduct an inquiry into or otherwise draw to the attention of the Houses the delegated legislation which was the subject of the complaint. I expect the standard of 'consideration' to generally accord with that legally demanded of administrative actors, being 'proper, genuine and realistic' consideration requiring no more than an 'active intellectual process' with respect to the subject matter (see *Minister for Immigration and*

Citizenship v SZMDS (2010) 240 CLR 611; *Carrascalao v Minister for Immigration and Border Protection* (2017) 252 FCR 352). If a complaint is considered only for the request to lend further attention to the instrument to be declined, written reasons should be published explaining why the request was declined. Procedural fairness should be accorded, with the understanding that this is not a court and the committee is not adjudicating individual legal disputes. It is sensible to mandate unanimity in respect of the decision to reject a complaint, as this will reduce partisan rejection of complaints. It should not be too difficult to achieve unanimous decision-making where complaints are clearly unmeritorious or frivolous.

One of the best aspects of the NZ system is that the complainant is provided with an opportunity to address the committee unless the complaint is declined. We recommend that this feature be retained in the NSW mechanism, as it provides a maximum degree of procedural fairness and public participation. This could be a written or oral address.

NSWCCL emphasises that the complaints mechanism should be designed liberally rather than restrictively given the important transparency, scrutiny and public participation purposes it serves.

This recommendation is in addition to our endorsement of the Law Society of NSW recommendation that the Regulation Committee be given the power to self-initiate inquiries, which may assist in the implementation of the complaint mechanism. Given Parliament is constitutionally vested with legislative power, there is no reason why a Parliamentary committee cannot investigate a regulation at any time.

Finally, I recognise that these recommendations would need to be accompanied by an increase in the resources of the Committee.

I hope this is helpful to the Committee.

Kind regards,

Jared Wilk

Question:

The CHAIR: One of the issues around the vast numbers that the Hon. Greg Donnelly spoke about off the back of Professor Neudorf's testimony, there are resourcing issues. There are constraints. The committee into committees, as it is colloquially referred to that was chaired by the Hon. Scott Farlow, looked at a range of committee structures and enhancements to the Legislative Council committee structure, but it did come back to resourcing and what could be done within the resources that are made available. Some of the mechanisms that have been discussed today by other people of New Zealand or Victorian or even the Commonwealth model, if you were to set aside resources as not an issue, what would you consider to be the best mechanism for us to deal with these types of issues?

Answer:

I thank the Committee for the opportunity to answer the question given on notice.

The question refers specifically to the Legislative Council Committee. It is predicated on recommendations received in various submissions to the inquiry that the Committee should increase the scope of the instruments it considers to include review of a wider range of regulation. It is acknowledged that limited time to conduct formal scrutiny affects the overall capacity of the Committee.

Set out, below, are some suggested mechanisms to be adopted by the Committee to cope with increased workload. I've had the benefit of suggestions from Dr Sarah Moulds (a) and b) below).

a) The use of joint secretariats including senior experienced Secretariat staff. When evaluated in 2018, the Regulation Committee was supported by a director, inquiry manager and part time administration officer. By comparison Commonwealth committees tend to be assisted by a secretariat and numbers of research and administrative support and pool those resources. When necessary, the Committee should be able to call on seconded staff from specialist agencies.

b) The use of panels of experts, not limited to but, including legal experts. A panel of legal experts, paid hourly, rather than full time, could review instruments against the Committees scrutiny principles and report on compliance. The legal adviser to the UK Human Rights Committee, for example, reviews all Bills at an early stage, and brings those Bills which raise significant concerns to the Committee's attention. Early intervention in the review process also addresses issues around the short frame for scrutiny.

   The Committee could be assisted by other specialist advisers, remunerated at agreed rates, and engaged part time or only for the duration of a particular inquiry.

c) Coordination of multiple legislative review committees for inquiry and reporting.
   Professor Lorne Neudorf's submission recommends that the Legislation Review Committee and Regulation Committee coordinate their work.

   > *The Legislation Review Committee and the Regulation Committee should seek to coordinate their work in scrutinising delegated legislation as they play complementary roles. For instance, through its systematic scrutiny of all delegated legislation, the*

Legislation Review Committee can alert the Regulation Committee to problematic regulations. The Regulation Committee can in turn explore these concerns by carrying out an inquiry into the relevant delegated legislation.

Commonwealth parliament can have up to three or four committees working interactively, scrutinising a Bill, with each committee having a different mandate and membership; an indication of how existing Committees can cooperate to carry out extensive review of regulations.

d) Requirement for provision of a Statement of Compatibility to be provided with delegated legislation similar to that provided under s.8 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. This requirement was also a recommendation in the NSW Bar Association submission. In Queensland and Victoria the scrutiny committees are provided with an executive statement on rights implications before a Bill is introduced, similar to the Commonwealth Statement. NSW would be greatly assisted by a Charter of Human Rights against which rights implications could be measured.

e) Continued enhanced facilitation of public input. The deliberative capacity of this Committee benefits from public inquiry after which specific recommendations can be made for legislative change. Public submissions received from a range of organisations with the legal expertise to offer specific recommendations also provides a forum for different viewpoints. Public input should be a priority for legislation that restricts rights and freedoms.

Regards

Michelle Falstein