



NEW SOUTH WALES
BAR ASSOCIATION

ANSWER TO QUESTION ON NOTICE

In its submission to the inquiry into the making of delegated legislation in New South Wales, the New South Wales Bar Association (**Association**) has proposed that shell legislation or Bills which contain Henry VIII clauses or confer regulation-making powers must be accompanied by an explanatory report to the Parliament and Legislation Review Committee (and/or the Regulation Committee) outlining why such a drafting choice is necessary and appropriate. The Committee has requested advice as to whether any comparable models or requirements currently exist.

There is a strong analogy between that proposal and section 23(1)(f) of the *Legislative Standards Act 1992* (Qld) (*LSA*).

When introducing a Bill in the Queensland Legislative Assembly, a member must circulate an explanatory note for the Bill under the *LSA* section 22(1). Section 23(1)(f) of the *LSA* requires that the Bill must contain a brief assessment of the consistency of the Bill with “*fundamental legislative principles*” and, if inconsistent with those fundamental legislative principles, the reasons for the inconsistency.

“*Fundamental legislative principles*” are defined by section 4(1) of the *LSA* as ‘the principles relating to legislation that underlie a parliamentary democracy based on the rule of law’. As per section 4(2), these principles include:

- (a) requiring that legislation has sufficient regard to the rights and liberties of individuals; and,
- (b) requiring that legislation has sufficient regard to the institution of Parliament.

Section 4(4) of the *LSA* provides that whether legislation has sufficient regard to the institution of Parliament depends on whether, for example, the Bill:

- (a) allows the delegation of legislative power only in appropriate cases and to appropriate persons; and
- (b) sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly; and,
- (c) authorises the amendment of an Act only by another Act.

An example of an explanation provided in accordance with section 23(1)(f) of the *LSA* is provided in the Explanatory Note for the Police Powers and Responsibilities and Other Legislation Amendment Bill 2019 (Qld).¹ To assist the Committee, a copy of that Explanatory Note is **attached**.

There are, however, some differences between section 23(1)(f) of the *LSA* and the Association’s proposal. The Association’s proposal:

¹ Pages 14-22.

- a. would involve a more specific and targeted definition of which forms of laws require explanatory notes of this kind (that is, those involving Henry VIII clauses, which constitute ‘shell legislation’ or which involve topics generally considered inappropriate for delegated legislation);
- b. would not merely require explanation of whether the Bill pays ‘sufficient regard’ to these principles, but of why drafting choices bearing upon these principles are ‘necessary and appropriate’; and,
- c. would not just require circulation of the explanatory memorandum to Parliament as a whole, but would be directed towards one or more relevant committees (the Legislation Review Committee and/or the Regulation Committee).

Nonetheless, section 23(1)(f) of the *LSA*, read in conjunction with the defined scope of “*fundamental legislative principles*” at section 4(2), provides a useful guide and close equivalent to the Association’s proposal.

Alternatively, or in addition, the existing requirement under the *Subordinate Legislation Act 1989* (NSW) that statutory rules ought to be accompanied by a Regulatory Impact Statement (RIS) could be amended to require the tabling of a similar statement at an earlier time when the Parliament is considering the enacting parent clause, rather than once the regulation has been drafted.

There are two important differences between the existing RIS model in NSW and the Association’s proposal. First, the Association is proposing that a RIS would need to be introduced to Parliament with the Bill and its explanatory memoranda so that it can be considered and debated simultaneously. The second is that the Association considers that the scope of the RIS should be broadened beyond economic impacts to include possible impacts upon human rights. Section D of the Association’s written submission outlines existing limitations of the RIS which could be amended to expand the scope and requirements of the statement and provide a further safeguard on Executive law-making.

Commonwealth Regulation Impact Statements provide a further model that could be adapted and adapted in NSW. At a Commonwealth level, a “Regulation Impact Statement” is required to accompany the explanatory memorandum of any bill containing a “substantive regulatory policy change”.² It is important to note that the term “regulation” in this context is very broadly defined to refer to “Any rule endorsed by government where there is an expectation of compliance”.³ The Regulation Impact Statement is put before Parliament alongside a bill, its explanatory memorandum and financial impact statement for consideration by parliamentarians at the time that a bill is debated.

The Association considers that this model could be amended and tailored in NSW to focus decision-makers’ attention on the impact of Henry VIII clauses or shell legislation that would give rise to regulation-making powers to develop substantive policy change without recourse back to the Parliament. The *Australian Government Guide to Regulation* explains the purpose of the RIS as follows:

The RIS is a tool designed to encourage rigour, innovation and better policy outcomes from the beginning. In the past, a RIS might have been something you put together at the end of a policy process, just before your proposal went to Cabinet or another decision maker. Now,RIS questions must be the starting point of your policy journey...

In addition, to assist the Committee, and for the avoidance of confusion, the Association wishes to clarify that references on page 3, final par, 4 and 7 [1] are references to the Legislative Review Committee. The Regulation Committee undertakes an important and complementary role, and should likewise be the beneficiary of appropriate parliamentary support and resourcing. However, in this instance, these answers were directed specifically to the ambit of the Legislative Review Committee.

² Department of Prime Minister and Cabinet, *The Australian Government Guide to Regulation* (2014) <https://www.pmc.gov.au/sites/default/files/publications/Australian_Government_Guide_to_Regulation.pdf>.

³ *Ibid*, 3.