

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

DISCUSSION PAPER

May 2022

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External legal adviser engaged to assist the Regulation Committee

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

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

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23 May 2022

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Part I Introduction

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

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

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

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

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

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

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

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

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

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

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

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

³ 2020 Report, 24.

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

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

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

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

- (1) unique features of the jurisdiction, including explanations of their origin and operation; and
- (2) challenges with the current framework that have been highlighted, whether by the parliamentary scrutiny committees themselves, or commentators;

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

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

Part II The evolution of the NSW framework and recent inquiries

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

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

The Committees

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

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

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

⁸ 2020 Report 5-6.

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

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

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

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

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

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

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

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

The Legislation Review Committee 2018 Inquiry

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

¹³ Ibid, 1.15.

¹⁴ The current Resolution establishing the Committee was made 8 May 2019, as amended on 20 November 2020.

¹⁵ See further explanation of how this has operated in practice in *New South Wales Legislative Council Practice* (Federation Press, 2nd ed, 2021) 644-5.

¹⁶ Minutes, NSW Legislative Council, 23 November 2017, pp 2223-2225.

¹⁷ Minutes, NSW Legislative Council, 8 May 2019, pp 101-102.

(a) Strengthening rights scrutiny

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

(b) Subordinate legislation scrutiny – workload and resourcing

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

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

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

The Regulation Committee 2020 Inquiry

In 2020, the Legislative Council referred an inquiry to the Regulation Committee in relation to a number of issues. In summary, the concerns were ‘the extent to which the Parliament has delegated power to make delegated legislation to the Executive government, including through the passage of so-called “shell” legislation and “Henry VIII” clauses’.²⁴ The submissions and Committee consideration undertaken in this inquiry canvassed these, as well as other issues. Here, it is useful to provide a summary of the issues that the Committee raised.

¹⁸ *Legislation Review Act 1987* (NSW) ss 8A and 9.

¹⁹ 2018 Report, Finding 1, Recommendations 1-3.

²⁰ *Ibid*, Recommendations 1-3.

²¹ *Ibid*, Recommendation 4, 29.

²² *Ibid*, 41.

²³ Government Response to the *Report of the Legislation Review Committee – Inquiry into the operation of the Legislation Review Act 1987* (Report 1/56, November 2018), 14 September 2021.

²⁴ Minutes, NSW Legislative Council, 26 February 2020, pp. 800-801.

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

The Government response to this recommendation was supportive – at least in principle, with the caveat that given the process of drafting explanatory notes in NSW (undertaken by legislative drafters) this might be better undertaken in the second reading speeches than the explanatory memorandum.²⁶

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

²⁵ 2020 Report, 27-31.

²⁶ Government Response to the Report of the Regulation Committee – Making of Delegated Legislation in New South Wales (Report 7, October 2020) (19 April 2021)

²⁷ 2020 Report, 6-9.

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

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

²⁸ 2020 Report, 11.

²⁹ 2020 Report, 20.

³⁰ 2020 Report, 13.

³¹ 2020 Report, 14.

³² 2020 Report, 9.

³³ Government Response to the Report of the Regulation Committee – Making of Delegated Legislation in New South Wales (Report 7, October 2020) (19 April 2021).

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

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

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

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

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

³⁴ Ibid 2-3.

³⁵ 2020 Report, 18-20.

³⁶ 2020 Report, 25. Recommendation 2.

³⁷ 2020 Report, recommendations, 5 and 6.

³⁸ Minutes, NSW Legislative Council, 20 November 2020, No. 72, Item 3, p 1748.

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

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

Part III Developing a best practice framework

Design principles

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

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

³⁹ Such as the *Anti-Discrimination Act 1977* (NSW).

⁴⁰ See further *Austral Fisheries Pty Ltd v Minister for Primary Industries and Energy* (1992) 37 FCR 463, 477 (O'Loughlin J); *Dignan's Case* 87 (Rich J).

⁴¹ *Kioa v Minister for Immigration and Ethnic Affairs* (1985) 159 CLR 550, 620 (Brennan J).

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

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

Given the complex nature of the laws and procedures governing delegated legislation and the variety of possible approaches to reform, the committee has concluded that a detailed examination of these issues by the NSW Law Reform Commission is required to ensure that New South Wales has in place a statutory framework for delegated legislation that is simpler, more robust and more accessible.⁴²

(emphasis added)

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

Simple: Simplicity means a system of delegated legislation, and a framework for regulating its making and oversight by Parliament, that is straightforward. The scope of the framework is relatively easy to ascertain, and exclusions and reasons for exclusions from that scope are readily available, coherent and consistent.

Requirements and processes should apply where possible in a uniform way to all delegated legislation, unless there is a clear, coherent and consistent reason for different treatment. Simplicity is a fundamental design principle because it makes the regulatory and scrutiny framework more easily understood by those involved in making legislation (Government agencies and drafters) and those overseeing delegated legislation (parliamentarians) as well as those subject to the obligations contained in delegated legislation (the public). It also means that any exceptions from the general position must be clearly and robustly justified.

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

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

⁴² 2020 Report, vii.

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

A set of best practice reforms

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

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

1. Statutory Consolidation

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

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

⁴³ 2020 Report, 21.

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

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

Summary:

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

2. Definitional clarity and robustness

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

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

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

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

- (a) where instruments adversely affect rights, liberties, duties and obligations; and
- (b) unless there is an alternative form of accountability (such as local council by-laws, or University Senate by-laws).

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

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

Summary:

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

- how to seek the advice of the Committee if there is uncertainty;
 - how to obtain a final decision as to the scope of the definition from the Committee;
 - the limited circumstances in which it might be appropriate for instruments to be exempted from the regulatory and oversight framework.
- The NSW Legislation Website should include all legislative instruments (see (3), below), and indicate if an instrument has been exempted from the framework for making and overseeing delegated instruments.

3. Increasing public accessibility

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

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

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

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

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

Summary:

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

4. Extending the role of the Legislative Council Regulation Committee

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

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

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

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

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

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

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

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

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

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

Summary:

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

5. Increased guidance to Government from the Regulation Committee

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

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

Summary:

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

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

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

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

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

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

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

Summary:

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

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

7. Greater transparency for rights scrutiny

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

The 2018 Report of the Legislation Review Committee raised concerns about the transparency of its rights scrutiny function under the *Legislation Review Act*, and in particular the clarity around the substance of the rights against which scrutiny would occur, and how Government justification of incursions into rights would be evaluated. It considered ‘that it would assist the scrutiny process for the Committee to determine the rights and liberties it will review bills and regulations against and inform the Parliament of these at the Start of each Session.’⁴⁷ This has not been followed. The concerns around the transparency and accessibility in relation to how the Committee will undertake its scrutiny of primary and subordinate legislation, therefore, remain.

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

⁴⁷ 2018 Report, Finding 1.

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

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

Summary:

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

8. Increased oversight of consultation

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

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

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

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

Summary:

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

9. Extending Scrutiny and Disallowance

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

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

⁴⁸ *Legislation Review Act* s 9(1).

⁴⁹ *Legislation Review Act* s 9(1A).

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

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

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

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

⁵⁰ See 2020 Report, 11.

⁵¹ *Interpretation Act 1984* (WA) s 42(4).

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

Summary:

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

10. Further restricting the ability to remake disallowed instruments

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

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

Summary:

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

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

11. Delayed commencement times

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

Summary:

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

Scrutiny of delegated instruments associated with national/uniform schemes

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

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

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

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

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

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

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

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

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

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

Appendix 1

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

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

- (1) That this House note that in its report entitled 'Making of delegated legislation in New South Wales', dated October 2020, the Regulation Committee recommended in Recommendation 2 that the Attorney General consider referring to the NSW Law Reform Commission the following terms of reference:

'1. Pursuant to section 10 of the Law Reform Commission Act 1967, the NSW Law Reform Commission is to review and report on:

- (a) the extent and use of delegated legislative powers in New South Wales
- (b) powers and safeguards relating to delegated legislation in other jurisdictions
- (c) suggestions for improvements in the use of delegated legislative powers to prevent executive overreach.

2. In particular, the Commission is to consider:

- (a) the merits of extending statutory provisions regarding disallowance and committee scrutiny to all instruments of a legislative character including quasi legislation
- (b) the adequacy of current requirements for consultation in the development of delegated legislation
- (c) the need to ensure that all forms of delegated legislation can be easily accessed by the public as soon as they commence
- (d) the need for additional safeguards in relation to the use of Henry VIII provisions, shell legislation and quasi legislation
- (e) the merits of consolidating into a single statute the Subordinate Legislation Act 1989, the Legislation Review Act 1987 and the relevant provisions of the Interpretation Act 1987
- (f) the merits of adopting a comprehensive statutory framework for primary and secondary legislation similar to the Legislative Standards Act 1992 (Qld)
- (g) the merits of extending the time limits for the disallowance of delegated legislation
- (h) the merits of extending the 4-month time limit on remaking a disallowed statutory rule
- (i) any other matters the Commission considers relevant.'

- (2) That this House notes the government's response to the Regulation Committee's report, dated 19 April 2021, in which Recommendation 2 was not supported.
- (3) That, in the absence of a referral by the Attorney General to the NSW Law Reform Commission, this House:
 - (a) refer the Regulation Committee's report and evidence back to the committee for further inquiry and report into options for reform of the management of delegated legislation in New South Wales, and
 - (b) authorise the committee to engage an external legal adviser to assist the committee in its inquiry into options for reform of the management of delegated legislation in New South Wales.
- (4) That the committee commence its inquiry in February 2022 and report by the first sitting day in August 2022.

Appendix 2

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Commonwealth

The Senate Committee was established as the Senate Standing Committee on Regulations and Ordinances” in 1932.⁵⁸ At that time it was a world leader, established prior to the Donoughmore Committee in the UK famously brought the potential of delegated legislative power into the public eye.⁵⁹ The Senate Committee was initially established to assist the Parliament scrutinise those instruments that were subject to disallowance by the Parliament – but as the breadth and nature of delegated legislation changed, the Committee’s work also evolved, and concerns have been raised as to the restrictions on its jurisdiction relating to disallowable instruments. The other distinguishing feature of the Senate Committee when it was initially established was that it was established as a technical scrutiny committee, not intended to examine the policy merits of the delegated instrument. This continues to define the Committee’s role today, and the other scrutiny committees across the country (with the exception of the NSW Regulation Committee); although it has given rise to concerns regarding the scrutiny of substantive policy merits of delegated instruments.

After almost a century of its operation, in 2018-2019, the Senate Standing Committee on Regulations and Ordinances conducted a full review of the oversight of delegated legislation. This inquiry revealed a number of issues of serious concern that had emerged in the practice of delegated legislation by the Executive, and the oversight by the Parliament. The Review looked at the “Committee’s continuing effectiveness and future direction”.⁶⁰ As part of this review, the Committee undertook travel to the UK and NZ, and was informed by this comparative practice.⁶¹ Following this report, the Committee undertook a deeper review into one area of its earlier inquiry: the exemption of instruments from disallowance and sunseting, and reported on that issue in 2020 and 2021.⁶² The government’s responses to these reports have indicated that many of the legislative reforms proposed will be subject to consideration in the current review of the *Legislation Act 2003* (Cth), and so it has largely deferred its response.⁶³ The three recent reports of the Committee provide an excellent oversight of the issues and reforms of interest at the federal level, and form the basis of the summary of issues set out below.

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

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

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

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

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

⁶¹ *Ibid.*

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

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

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

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

2. Consultation

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

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

⁶⁴ 2019 Report, 22, recommendation 4.

⁶⁵ 2019 Report, 25, recommendation 5

⁶⁶ 2019 Report, 25-29, recommendation 6.

⁶⁷ 2019 Report, 44, referring to its concerns expressed as far back as 2003 when the *Legislation Act* was first passed.

⁶⁸ See further Senate Standing Committee on Regulations and Ordinances, *Consultation under the Legislative Instruments Act 2003: Interim Report*, June 2007 .

⁶⁹ Section 15J.

⁷⁰ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 3 of 2018*, March 2018, 72.

⁷¹ Senate Standing Committee on the Scrutiny of Delegated Legislation, *Guidelines*, page 10.

3. *Incorporation of material*

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

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

4. *Overly broad delegations & Henry VIII clauses*

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

(a) *Use of regulations over rules*

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

⁷² 2019 Report, 50.

⁷³ Senate Standing Committee on Regulations and Ordinances, *40th Parliament Report*, June 2005, 29-32

⁷⁴ Senate Standing Committee on the Scrutiny of Delegated Legislation, Guidelines, 10.

⁷⁵ *Legislation Act* s 14(2).

⁷⁶ 2019 Report 82.

⁷⁷ See also Senate Standing Committee on the Scrutiny of Delegated Legislation, Guidelines, 31.

⁷⁸ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 1 of 2018*, February 2018, 67.

(b) Better advice to departments

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

(c) Policy scrutiny

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

5. *Exemptions from disallowance and sunseting*

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

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

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

⁷⁹ 2019 Report, 92, recommendation 8.

⁸⁰ A gap that has been noted by others, see, eg, Dennis Pearce, ‘Rules, Regulations and Red Tape: Parliamentary Scrutiny of Delegated Legislation’, *Papers on Parliament* No. 42, December 2004.

⁸¹ 2019 Report, 99.

⁸² 2019 Report, 101.

⁸³ 2019 Report, 105-106.

⁸⁴ 2019 report, 132, recommendation 17.

⁸⁵ 2019 Report, 86.

⁸⁶ 2019 Report, 121.

⁸⁷ Advance to the Finance Minister Determination (No 1 of 2017-2017)

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

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

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

- (a) exemptions should not be made where instruments adversely affect rights, liberties, duties and obligations; and
- (b) exemptions should not be made unless there is an alternative form of accountability.⁹⁵

The following categories should not be exempt:

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

⁸⁸ 2019 Report, 124 recommendations 15 and 16.

⁸⁹ 2019 Report, 143.

⁹⁰ 2019 Report, recommendation 19.

⁹¹ 2021 Report, 8.

⁹² 2021 Report, 104.

⁹³ 2021 Report, recommendation 1.

⁹⁴ See, eg, 2021 Report, recommendation 5, 6 and 7.

⁹⁵ 2021 Report, 115.

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

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

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

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

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

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

6. Commencement

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

⁹⁶ 2021 Report, 115-116.

⁹⁷ 2021 Report, Recommendation 3.

⁹⁸ 2021 Report, 120.

⁹⁹ 2021 Report, 120.

¹⁰⁰ Committee Guidelines 47-49.

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

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

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

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

8. *Reporting and publications*

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

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

¹⁰¹ 2019 Report, 136.

¹⁰² 2019 Report, 137, recommendation 18.

¹⁰³ 2019 Report, 73.

¹⁰⁴ 2019 Report, 74, Committee Action 5. See also Committee Guidelines (February 2022), page 6.

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

9. *Need for more support to Parliament and the Government*

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

10. *Special procedures – Expenditure*

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

11. *Constitutional validity*

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

¹⁰⁵ 2019 Report, recommendations 20 and 21.

¹⁰⁶ 2019 Report, committee action 11.

¹⁰⁷ (2012) 248 CLR 156.

¹⁰⁸ Made under the *Financial Framework (Supplementary Powers) Act 1997* (Cth) and the *Industry Research and Development Act 1986* (Cth).

¹⁰⁹ 2019 Report, 111

¹¹⁰ Guidelines, 53-55.

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

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

¹¹¹ Guidelines, 12.

Queensland

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

1. Review by reference to the Fundamental Legislative Principles

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

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

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

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

¹¹³ Zifcak (n 105), 261.

4 Meaning of fundamental legislative principles

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

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

- (2) The principles include requiring that legislation has sufficient regard to—
 - (a) rights and liberties of individuals; and
 - (b) the institution of Parliament.
- (3) Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation—
 - (a) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and
 - (b) is consistent with principles of natural justice; and
 - (c) allows the delegation of administrative power only in appropriate cases and to appropriate persons; and
 - (d) does not reverse the onus of proof in criminal proceedings without adequate justification; and
 - (e) confers power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer; and
 - (f) provides appropriate protection against self-incrimination; and
 - (g) does not adversely affect rights and liberties, or impose obligations, retrospectively; and
 - (h) does not confer immunity from proceeding or prosecution without adequate justification; and
 - (i) provides for the compulsory acquisition of property only with fair compensation; and
 - (j) has sufficient regard to Aboriginal tradition and Island custom; and
 - (k) is unambiguous and drafted in a sufficiently clear and precise way.
- (5) Whether subordinate legislation has sufficient regard to the institution of Parliament depends on whether, for example, the subordinate legislation—
 - (a) is within the power that, under an Act or subordinate legislation (the authorising law), allows the subordinate legislation to be made; and
 - (b) is consistent with the policy objectives of the authorising law; and
 - (c) contains only matter appropriate to subordinate legislation; and
 - (d) amends statutory instruments only; and

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

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

(ii) if authorised by an Act.

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

2. *No subordinate legislation specific scrutiny review*

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

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

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

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

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

¹¹⁶ Easten (n 114), 5.2.

¹¹⁷ Easten, 5.1.

South Australia

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

1. *Secretariat Support*

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

2. *Supporting Reports*

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

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

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

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

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

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

¹²¹ *Ibid.*

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

3. *Composition of the Committee*

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

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

¹²² Ibid 18.

¹²³ Ibid 18.

Tasmania

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

1. *The role of Treasury*

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

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

2. *Scope of jurisdiction over “regulations”*

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

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

¹²⁵ *Ibid* 13.

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

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

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

3. *Disclosure and cooperation by Government*

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

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

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

4. *Power to suspend regulations during recesses*

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

9. Report when Parliament not sitting

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

- (a) amend the regulation in the manner indicated by the Committee, or, if the Committee so recommends, rescind the regulation; or
- (b) take such action as may be necessary for the purpose of suspending the operation of the regulation, and ensuring that the operation thereof remains suspended, until both Houses of Parliament have dealt with the report.

¹²⁷ Parliamentary Standing Committee on Subordinate Legislation, Annual Report, 2020-2021, 2.

¹²⁸ Snell et al (n 124), 17.

¹²⁹ Parliamentary Standing Committee on Subordinate Legislation, Annual Report, 2020-2021, 2.

¹³⁰ Parliamentary Standing Committee on Subordinate Legislation, Annual Report, 2016-2017, 3.

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

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

The procedure, however, has not been used.

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

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

6. *Staffing*

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

¹³¹ Tasmania, Parliamentary Debates, Legislative Assembly, 'Subordinate Legislations Committee 1969' (Second Reading Speech, Tasmanian Parliamentary Library Bills Register) 3.

¹³² Subordinate Legislation (Miscellaneous Amendments) Bill.

¹³³ Snell et al, (n 124) 8.

Victoria

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

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

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

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

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

2. *Legislative instruments and determining “legislative character”*

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

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

¹³⁴ Guidelines [25].

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

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

3. Exemptions

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

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

4. Consultation and Making Statutory Rules and Legislative Instruments

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

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

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

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

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

5. *Human rights scrutiny*

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

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

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

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

6. *Creative responses to the scrutiny timeframes*

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

(a) *Power of suspension pending disallowance*

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

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

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

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

(b) Providing documents to SARC

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

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

Western Australia

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

1. *Incorporation*

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

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

The Committee made a number of recommendations directed at:

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

These recommendations have not been adopted.

2. *Henry VIII clauses*

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

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

¹³⁸ Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (LexisNexis, 5th ed, 2017) 98.

¹³⁹ Joint Standing Committee on Delegated Legislation (WA), Report 84, *Access to Australian Standards Adopted in Delegated Legislation* (June 2016).

¹⁴⁰ *Ibid*, i.

¹⁴¹ See *ibid*, executive summary.

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

3. *National schemes*

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

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

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

3. *Early provision of information*

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

¹⁴² Western Australia, Twenty-Third Report, Joint Standing Committee on Delegated Legislation (1997).

¹⁴³ *Ibid*, 12.2.

¹⁴⁴ Commonwealth, Scrutiny of National Schemes of Legislation-Position Paper, Working Party of Representatives of Scrutiny of Legislation Committees, 1996.

4. *Conflict between subsidiary legislation*

One matter highlighted by the Committee in 2009¹⁴⁵ was the issue of conflict between provisions of subsidiary legislation. This raises a number of concerns, including simply identifying conflicts where there is such a high volume of subsidiary legislation. When a conflict is identified, the Joint Standing Committee on Delegated Legislation has limited options available. It can report the conflict to the Parliament, but it can only recommend disallowance of the most recently-made provision on the basis of the time limits within which disallowance can be made.

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

Australian Capital Territory and Northern Territory

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

1. Incorporation of instruments

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

¹⁴⁶ Pearce and Argument (n 138), 78.

Canada

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

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

1. *Incorporation*

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

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

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

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

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

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

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

2. *Determining the nature of statutory instruments*

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

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

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

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

New Zealand

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

1. Consolidation of legislation

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

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

¹⁵² Caroline Morris and Ryan Malone “Regulations Review in the New Zealand Parliament” (2004) *Macquarie Law Journal* 7, 8; see also Dean R Knight and Edward Clark, *Regulations Review Digest* (7th ed, New Zealand Centre for Public Law, 2020), 7.

¹⁵³ Geoffrey Palmer “Deficiencies in New Zealand Delegated Legislation” (1999) 30 *VUWLR* 1, 2.

¹⁵⁴ *Ibid.*

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

2. *Complaints to the Regulations Review Committee*

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

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

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

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

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

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

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

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

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

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

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

5. *Commencement after 28 days (“the 28-day rule”)*

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

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

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

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

6. *Henry VIII clauses*

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

¹⁵⁸ See comparison in the Senate Standing Committee on the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Interim Report* (December 2020)

¹⁵⁹ New Zealand Cabinet Manual [7.96].

¹⁶⁰ See, eg, Regulations Review Committee Digest, 130-133.

recommendations, and this guidance is now contained in the Legislation Design and Advisory Committee Legislation Guidelines 2021.¹⁶¹

7. *Incorporation*

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

8. *Legislative Guidance*

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

¹⁶¹ Legislation Design and Advisory Committee, *Legislation Guidelines* (2021), 79-80.

¹⁶² Senate Standing Committee on Regulations and Ordinances, *Parliamentary Scrutiny of Delegated Legislation*, 3 June 2019, 90-91.

United Kingdom

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

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

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

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

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

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

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

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

¹⁶⁶ *Ibid* [65].

¹⁶⁷ *Ibid* [84].

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

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

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

¹⁶⁸ Ibid [102].

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

Appendix 3

	Leg'n governing DL	Guidelines, policies or other non-legislative instruments governing DL	Scope	Consultation (and enforcement)	Drafting	Commencement	Publicising & Tabling	Scrutiny	Disallowance & remarking (time limits, partial disallow, amending)	Sunsetting	Specific HR protections	Federal schemes	Shell leg'n	Henry VIII	Quasi-leg	Special procedures
Commonwealth	<p><i>Legislation Act 2003</i> (Cth)</p> <p><i>Legislation (Exemptions and other matters) Regulation 2015</i> (Cth)</p>	<p>Senate Standing Order 23</p> <p>Department of PMC, <i>Legislation Handbook</i></p> <p>Senate Scrutiny of Del Legislation Guidelines (consolidated 2nd ed, Feb 2022)</p> <p>Office of Parliament Counsel Drafting Direction [3.8]</p>	<p>S 8(2)(3) LA: "Legislative instrument" is any instrument declared as such by the law under which it is made, as well as any instrument registered as a LI.</p> <p>S 8(4) Instrument is a LI if (1) instrument is made under a power delegated by the Parliament, (2) any provision of the instrument determines the law or alters the content of the law; (3) it has the direct or indirect effect of affecting or imposing rights, privileges, obligations or interests.</p> <p>S 8(6) Acts or regulation can declare an instrument that meets requirements of (4) not to be a LI.</p> <p>S 11: Notifiable instruments – not legislative in character – must be registered but not subject to disallowance or sunsetting.</p> <p>OPC Drafting Directions include some information on when it is appropriate to exempt instruments from definition of LI.</p>	<p>S 17 LA: Before an instrument is made, rule maker must be satisfied that there has been consultation that is "considered by the rule-maker to be appropriate and reasonably practicable to undertake"</p> <p>Rule-maker to assess the extent to which consultation drew on the knowledge of persons having expertise in the fields, as well as others who may be affected by the instrument having time to comment.</p> <p>S 15(2)(d)(e) LA: Consultation that has been undertaken must be detailed in the Explanatory Statement.</p> <p>S 19 LA: consultation does not affect the validity or enforceability of a LI.</p>	<p>OPC Drafting Direction 3.8: OPC responsible for drafting regulations, can draft other instruments, or can be drafted by others (internal or external)</p> <p>S 15J LA: Sets out in detail what is included in an "Explanatory Statement".</p> <p>Further information on this is provided in the Legislation Handbook.</p> <p>S 16: OPC is responsible for encouraging high standards of drafting.</p> <p>OPC Drafting Direction 3.8 provides guidance for drafting.</p>	<p>S 12 LA: a legislative instrument commences at the start of the day after it is registered, unless the instrument itself provides otherwise. However, a legislative instrument, or a provision of the instrument, may commence before registration, provided the retrospective commencement does not disadvantage any person (other than the Commonwealth or a Commonwealth authority), or impose liability on a person for anything done or omitted to be done before the instrument is registered.</p>	<p>S 15G LA: Rule maker of a LI must lodge instrument with the Federal Register of Legislation as soon as practical after it is made. Explanatory Statement must also be lodged.</p> <p>S 38 LA – OPC must lay registered instruments before each House within 6 sitting days after registration of the instrument. Failure to table results in the LI being immediately repealed.</p> <p>S 39 LA: OPC must also lay ES for a LI before each house.</p>	<p>SO 23: The Senate Standing Committee on the Scrutiny of Delegated Legislation and its scrutiny principles.</p> <p>SO allow the Committee to consider all LI subject to disallowance, disapproval and affirmative resolution, as well as draft LI.</p> <p>Committee is made up of 6 Senators, three Government and three non-Government Senators. Government member is chair.</p> <p>Committee is supported by a secretariat (Secretary, Principal Research Officer, Senior Research Officer and Legislative Research Officer), and independent legal adviser.</p>	<p>S 42 LA: members and senators of the Australian Parliament may only lodge a motion to disallow an instrument or provision within 15 sitting days after the instrument is tabled.</p> <p>If the notice of motion is not dealt with, the instrument is taken to have been disallowed and is repealed at that time (unless the House of Representatives is dissolved or Parliament is prorogued).</p> <p>S 44 LA: Legislative instruments that are not subject to disallowance, including through regulations.</p> <p>S 48 LA: LI that has been disallowed must not be remade that is "the same in substance" unless the relevant House approves, within 6 months after the day of disallowance.</p>	<p>S 50LA: 10 years after made.</p> <p>S 51 LA: AG may defer sunsetting in limited circumstances.</p> <p>S 54: Exemptions to sunsetting, including by regulation.</p>	<p>Scrutiny principle 23(3)(b) of the committee's terms of reference requires the committee to ensure that instruments of delegated legislation do not trespass unduly on personal rights and liberties</p> <p>The Parliamentary Joint Committee on Human Rights (PJCHR) also examines all legislative instruments for compatibility with international human rights law. It is not restricted to examining instruments that are subject to disallowance.</p> <p>Parliamentary Joint Committee on Human Rights has published a guidance note on drafting statements of compatibility.</p>	<p>S 44 LA: Disallowance does not apply in relation to LI if the enabling legislation facilitates the establishment of an intergovernmental body or scheme, and the instrument is being made by the body or for the purposes of the body or scheme, unless it is a regulation or Act makes disallowable.</p> <p>Guidelines indicate that the Committee is concerned with instruments which establish significant elements of a regulatory regime, impose significant penalties, impose taxes or levies and have a significant impact on personal rights and liberties.</p> <p>Legislation Handbook – list of matters that should be implemented in primary legislation.</p>	<p>Scrutiny of Bills Committee criteria include "whether any delegation of legislative powers is appropriate"</p> <p>Scrutiny of DL Committee criteria include whether:</p> <p>"it contains matters more appropriate for parliamentary enactment"</p> <p>Guidelines detail instruments which require in relation to instruments made under Henry VIII clauses.</p> <p>See also the OPC Drafting Direction 3.8 on when it is appropriate to use Henry VII clauses.</p> <p>Legislation Handbook – list of matters that should be implemented in primary legislation, which includes amendments to primary legislation.</p>	<p>The Standing Orders of the Committee were amended to ensure the Committee has power to review instruments that contain amendments or modifications to primary legislation, and instruments made under Henry VIII clauses to ensure they are in force "only for as long as is strictly necessary"</p> <p>Committee Guidelines detail information it requires in relation to instruments made under Henry VIII clauses.</p>	<p>S 14 LA: Unless the contrary intention appears, legislative instruments cannot make provision in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time.</p> <p>S 41 LA – During time instrument is subject to disallowance, House may require the incorporate document to be made available to inspection.</p>	<p>The Scrutiny of DL Committee has adopted a set of special requirements (as set out in its Guidelines) relating to information required for LI authorising expenditure.</p> <p>The Committee has extended its scrutiny principles to include constitutional validity.</p>

	Leg'n governing DL	Guidelines, policies or other non-legislative instruments governing DL	Scope	Consultation (and enforcement)	Drafting	Commencement	Publicising & Tabling	Scrutiny	Disallowance & remaking (time limits, partial disallow, amending)	Sunsetting	Specific HR protections	Federal schemes	Shell leg'n	Henry VIII	Quasi-leg	Special procedures
NSW	<p><i>Interpretation Act 1987</i> (NSW)</p> <p><i>Subordinate Legislation Act 1989</i> (NSW)</p> <p><i>Legislation Review Act 1987</i> (NSW)</p>	<p>Resolution establishing the Regulation Committee (Made 8 May 2019, amended 20 November 2020)</p> <p>NSW Guide to Better Regulation, 2016</p>	<p>IA: "statutory rules" defined as "regulation, by-law, rule or ordinance, or a rule of court"</p> <p>SLA applies to "statutory rules" (s 3) "regulation, by-law, rule or ordinance that is made by Governor". Excludes those in Schedule 4, including Standing Order, rules of court and certain instruments made under <i>Constitution Act 1902</i>.</p> <p>LRA applies to "regulation" (s 3) which means a "statutory rule, proclamation or order that is subject to disallowance by either or both houses of Parliament." Statutory rule defined by reference to IA.</p>	<p>S 5 SLA – Regulatory Impact Statements required for "principal statutory rules". Exceptions in s 6.</p> <p>S 9: Failure to comply does not affect the validity of a statutory rule.</p> <p>NSW Guide to Better Regulation also has some consultation requirements.</p> <p>S 9(b)(viii) LRA – Legislation Review Committee review for compliance with s 5 of the SLA.</p>	<p>OPC drafts regulations.</p> <p>SLA s 4 – Compliance with guidelines in Sch 1 before a statutory rule is made.</p> <p>S 7 SLA – prior to making of statutory rule, must have certification that the rule may be legally made by AG or OPC.</p>	<p>S 39 IA: Statutory rule commences on the day of publication unless a later date specified in the regulation itself.</p>	<p>S 39 IA: Statutory rule must be published on the NSW Legislation website.</p> <p>S 40(1) IA: Notice of the making of a statutory rule must be laid before each House within 14 sitting days of being published on the NSW legislation website. Failure to comply does not affect validity.</p>	<p>S 9 LRA: Legislation Review Committee has responsibility for scrutinising all regulations while they are subject to disallowance.</p> <p>LRC 8 members, 3 from LC and 5 from LA.</p> <p>Legislative Council Regulation Committee – power to scrutinise any instruments of a legislative character regardless of form, including "the policy or substantive content" of the instrument, draft delegated legislation, and trends or issues in relation to delegated legislation.</p> <p>It must conduct inquiries referred to it by the LC, and can also self-refer an inquiry "relevant to the functions of the Committee".</p> <p>LCRC comprises 4 8 members: 4 Government, 2 Opposition and 2 cross bench. Non-Govt chair.</p>	<p>S 41(1) IA: Disallowance by either House before written notice is laid, or within 15 sitting days after notice is laid.</p> <p>Rule can be disallowed in part as well as in whole.</p> <p>Disallowance has same effect as repeal.</p> <p>S 8 SLA: Prohibits the remaking of a statutory rule that is the same in substance as a rule that has been disallowed within 4 months of disallowance, unless disallowance is rescinded by relevant house.</p>	<p>S 10 SLA – sunseting after 5 years.</p>	<p>S 9 LRA - Legislation Review Committee scrutiny criteria include whether the regulation "trespasses unduly on personal rights and liberties".</p>	NA	<p>S 8A LRA, Legislation Review Committee function includes reviewing Bills to see whether they</p> <p>"Inappropriately delegates legislative powers" and "insufficiently subjects the exercise of legislative power to parliamentary scrutiny"</p>	<p>S 8A LRA, Legislation Review Committee function includes reviewing Bills to see whether they</p> <p>"Inappropriately delegates legislative powers" and "insufficiently subjects the exercise of legislative power to parliamentary scrutiny"</p>	<p>S 42(1) IA – general and unlimited power of incorporation.</p> <p>S 69(1) IA: presumption that reference to incorporated document is reference to a document at the date on which the provision containing the reference took effect (rebuttable (2)).</p>	

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Qld	<p><i>Statutory Instruments Act 1992</i> (Qld)</p> <p><i>Legislative Standards Act 1992</i> (Qld)</p> <p><i>Parliament of Queensland Act 2001</i> (Qld)</p> <p><i>Human Rights Act 2019</i> (Qld)</p>	<p>Cabinet Handbook, Chapter 7.5 (Subordinate Legislation)</p> <p>Legislation Handbook</p> <p>Executive Council Handbook</p> <p>Queensland Government Guide to Better Regulation</p> <p>DPC: Guidelines for Developing Explanatory Statements</p> <p>Office of Qld Parliamentary Counsel: Fundamental Legislative Principles: the OQPC Handbook</p>	<p>SIA uses a number of terms:</p> <p>S 7: "Statutory instruments"</p> <p>S 8: "statutory rules"</p> <p>S 9: "subordinate legislation", which is subject to oversight, and is a defined subset of 'statutory rules and instruments'. It "includes regulations, orders in council of a legislative character and other statutory instruments declared to be Subordinate Legislation by the <i>Statutory Instruments Act 1992</i> or by another Act"</p> <p>There are a series of exemption, including by any Act, or before 1992, under regulation under the SIA.</p>	<p>Queensland Government Guide to Better Regulation: RIS required for subordinate legislation (note this is a non-statutory requirement)</p>	<p>S 7 LSA: OPC drafts subordinate legislation, unless exempt.</p> <p>Cabinet Handbook: Significant subordinate legislation has to be sent to the Cabinet for Executive Council approval. "Significant" is defined, and advice can be sought from Premier & Cabinet, Treasury, or Office of Best Practice Regulation within the Queensland Productivity Commission.</p> <p>S 22 & 24 LSA: Explanatory Statement, including RIS if developed, to be tabled in the Legislative Assembly.</p>	<p>S 32 SIA: Commencement on the day of notification/publication, or the day on which it is made.</p> <p>S 34: beneficial retrospective commencement can be done.</p>	<p>S 47 SIA: SL must be notified in the Gazette.</p> <p>S 49 SIA: SL must be laid before LA within 14 sitting days of notification, or ceases to have effect.</p>	<p>No specific committee since 2011. The portfolio committees have replaced the former Scrutiny of Legislation Committee.</p> <p>S 93 <i>Parliament of Qld Act</i>: portfolio parliamentary committees are responsible for examining each item of subordinate legislation in its portfolio, to consider policy, the application of fundamental legislative principles, and lawfulness of subordinate legislation. Committee also has responsibility for monitoring compliance with guidelines re: RIS issued by Treasury.</p> <p>Technical Scrutiny of Legislation Secretariat assists all Committees.</p>	<p>S 50 SIA: Disallowance motion can be brought 14 sitting days after the tabling. Subordinate legislation ceases to have effect if disallowed.</p> <p>S 51: If disallowed, it is taken never to have been made or approved, but nothing done or suffered under the legislation before it ceased to have effect is affected.</p>	<p>S 54 SIA: 10 year sunseting</p> <p>S 56A SIA: can be extended in limited circumstances by 12 months.</p>	<p>S 4(3) LSA: one principle that must be considered is whether subordinate legislation has sufficient regard to the rights and liberties of individual.</p> <p><i>Human Rights Act</i>: requires subordinate legislation to be tabled with a Human Rights Certificate, which states the compatibility of the subordinate legislation with the rights in the Act. Portfolio Committees scrutinise these certificates.</p> <p>s 48 HRA: A subordinate instrument may be invalid if it is inconsistent with the Charter Act and not authorised by its empowering Act so to be.</p>	<p>S 56 SIA: Subordinate legislation that is substantially uniform or complementary with Commonwealth/federal schemes might be exempted from sunseting of up to 5 years.</p>	<p>Legislation Handbook: OPC provides advice on whether primary or subordinate legislation is the appropriate vehicle.</p> <p>S 4(5) LSA: one principle that must be considered is whether subordinate legislation has sufficient regard to the institution of Parliament, which includes whether the matter is appropriate for delegated legislation.</p>	<p>Legislation Handbook: OPC provides advice on whether primary or subordinate legislation is the appropriate vehicle.</p> <p>The Handbook then provides: "Henry VIII clauses should not be used."</p> <p>S 4(5) LSA: one principle that must be considered is whether subordinate legislation has sufficient regard to the institution of Parliament, which includes whether the matter is appropriate for delegated legislation, and whether it amends another Act or other statutory instruments.</p>	<p>S 23 SIA: Statutory instrument can incorporate (with or without modification) the provisions of "another document" as in force at a particular time, or as in force from time to time. After 1992, there is a presumption it is incorporated from time to time unless stated.</p>	

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SA	<p><i>Legislative Instruments Act 1978 (SA)</i></p> <p><i>Parliamentary Committees Act 1991 (SA)</i></p>	<p>Premier & Cabinet Circular: Referral of Subordinate Legislation to the Legislative Review Committee (Oct 2012)</p> <p>Legislative Review Committee Information Guide</p>	<p>S 4 LIA: "Regulations" is defined as "any rule, regulation or by-law made under any Act."</p>	<p>There is no requirement for consultation, but the Committee's scrutiny principles include "those likely to be affected by the instrument were adequately consulted in relation to it." The Information Guide also asks that Supporting Reports include information on consultation (4.4). Supporting Reports are not publicly released.</p> <p>Regulatory Impact Statement required if threshold under the <i>Better Regulation Handbook</i> is met, but these are not provided to the Committee.</p>	<p>Some regulations, but not all, drafted by OPC.</p> <p>Cabinet must approve Regulations for Exec Council to advise the Governor.</p> <p>Instruments that are referred to it are, according to the Premier & Cabinet Circular, to be accompanied by a Supporting Report to the Committee. The Committee's Information Guide sets out the information a Supporting Report should include.</p>	<p>S 10AA LIA: regulations commence four months after being made. But this can be earlier, if specified in the Regulation that the Minister considers it necessary or appropriate. Cannot be retrospective unless authorised by the empowering legislation.</p> <p>S 16D LIA: LI that are not regulations may come into operation at the date/time specified in the instrument.</p>	<p>S 10(3) LIA – Regulations must be tabled within 6 sitting days.</p> <p>S 11 LIA – must be published in the Gazette or under the <i>Legislation Revision & Publication Act 2002</i>.</p>	<p>S 12 PCA: Legislative Review Committee.</p> <p>S 10A(1) LIA: Every regulation laid before Parliament is referred to the Committee. The Committee then inquires into and considers the regulations according to its scrutiny principles.</p> <p>Committee has own motion inquiry power.</p> <p>The Committee is made up of 3 MHA and 3 MLC. It is supported by a secretary and a research officer (both legally trained).</p>	<p>Information Guide: The Committee will give notice to the Minister before it decides to give notice of disallowance [3.8].</p> <p>S 10A LIA: Committee must report to the Houses if it recommends disallowance before the expiry of the disallowance period (14 days).</p> <p>Once notice of disallowance is given, there is no time constraint to move the motion.</p> <p>S 10(5)(Sa) LIA – if there is a failure to comply with tabling requirements, this can also trigger a disallowance.</p> <p>S 16G LIA: If an instrument is disallowed, it continues to have effect until the end of the day it was disallowed.</p>	<p>S 16B LIA – with a number of exceptions, sunseting occurs after 10 years, although this can be postponed by regulations for up to 4 years.</p> <p>The exceptions include local gov't by-laws, regulations amending an Act (made under a Henry VIII Clause), & regulations made pursuant to a federal agreement for uniform legislation.</p>	<p>Scrutiny principles include "whether the regulations unduly trespass personal rights and liberties."</p>	<p>S 16A(d) LIA – Exception to sunseting provisions.</p>	<p>Scrutiny principles include "Whether the regulations contain matter which, in the opinion of the Committee, should properly be dealt with in an Act of Parliament."</p>	<p>Scrutiny principles include "Whether the regulations contain matter which, in the opinion of the Committee, should properly be dealt with in an Act of Parliament."</p>	<p>S 16E LIA – Incorporation of "any other document" is permitted "as in force from time to time".</p>	

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Tas	<p><i>Subordinate Legislation Committee Act 1969</i> (Tas)</p> <p><i>Subordinate Legislation Act 1992</i> (Tas)</p> <p><i>Acts Interpretation Act 1931</i> (Tas)</p>	<p>Treasury, Legislation Impact Assessment Guidelines, Chapter 3, Preparing Subordinate Legislation (2016) (issued under s 3A SLA).</p> <p>Committee issued Procedural Requirements for Subordinate Legislation</p> <p>OPC, <i>Manual for the Preparation of Statutory Rules</i> (2010)</p>	<p>S 3 SLA: "Regulations" "made by the Governor" or are LI that are "declared by the Treasurer" to be SL for the purposes of the SLA.</p> <p>S 8 SLCA: "Regulations" refers to "a regulation, rule or by-law that is made under an Act and is required to be laid before both Houses of Parl, but does not include rules of court made by the judges..."</p> <p>S 2A AIA: "Regulation includes rule and bylaw"</p>	<p>S 4 & 12 SLA: If considered to impose significant impact, then Regulatory Impact Statement (RIS) & and undertake public consultation process to determine whether the subordinate legislation is in the public interest. Can be exempted (s 6).</p> <p>S 9 SLA: all relevant documents must be tabled to the SLC, including any comments and submissions received during public consultation process.</p> <p>"Fact Sheet" that is provided to the Committee also details the nature of the consultations.</p>	<p>SLA: Regulations drafted by PC and they must certify that s 7 requirements are met.</p> <p>Only some classes of regulations have to comply with the SLA requirements (those made by the Governor).</p> <p>Procedures: Regulation presented to Parliament with a Factsheet explaining the reasons for the regulation.</p>	<p>S 12 SLA: Taken to have been made on date it was published, or notification of its making was published in the Gazette.</p>	<p>S 47(3) AIA: Must be published in Gazette 21 days after making. Failure to comply will make null and void.</p> <p>S 47(3) AIA: Must be tabled within 10 sitting days.</p>	<p>Parliamentary Standing Committee on Subordinate Legislation (joint committee).</p> <p>S 3 SLCA: 6 members, 3 LC and 3 HA, no ministers or presiding officers.</p> <p>S 8 SLCA: Has power to review "regulations" as defined, against scrutiny principles.</p> <p>Oversees compliance with the SLA, to the extent applies to a regulation.</p>	<p>S 47(4) AIA: Disallowance by any House if motion is brought within 15 sitting days of Regulation being laid before the House. Disallowance has the effect of voiding from time of disallowance.</p> <p>S 47(7) Restriction on remarking delegated legislation that has been disallowed, within 12 months after such disallowance shall take effect until the same has been laid upon the table of such House and 30 sitting days of such House have elapsed after the same was so laid.</p>	<p>S 11 SLA: 10 years, but can be postponed for a period not exceeding 12 months.</p>	<p>S 8 SLCA: Scrutiny principles include: "the regulation unduly trespasses on personal rights and liberties"</p>	<p>S 6 SLA: No need to prepare RIS where uniform federal scheme involved.</p>	<p>S 8 SLCA: Scrutiny principles include: "the regulation contains matters that, in the opinion of the Committee, should be properly dealt with by an Act and not by regulation"</p>	<p>S 8 SLCA: Scrutiny principles include: "the regulation contains matters that, in the opinion of the Committee, should be properly dealt with by an Act and not by regulation"</p>	<p>S 9 SLCA: The SLC has power, following a process of reporting to the relevant agency that a regulation should be amended or rescinded, to suspend the operation of part, or the entirety, of a piece of DL when Parliament is not sitting until the Houses deal with the report.</p>	

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Vic	<p><i>Subordinate Legislation Act 1994</i> (Vic)</p> <p><i>Subordinate Legislation (Legislative Instruments) Regulations 2011</i> (Vic)</p> <p><i>Parliamentary Committees Act 2003</i> (Vic)</p> <p><i>Interpretation of Legislation Act 1984</i> (Vic)</p> <p><i>Charter of Human Rights & Responsibilities Act 2006</i> (Vic)</p>	<p>Subordinate Legislation Act 1994 Guidelines (2020)</p> <p>Requirements for updating the Subordinate Legislation Regulations</p> <p>Training on the Subordinate Legislation Act and its Guidelines (from Better Regulation Vic, OCPC, SARC, DPC Office of General Counsel)</p> <p>Practice Notes developed by the Regulations SARC to assist legislation officers</p> <p>Victorian Guide to Regulation</p> <p>Office of Chief Parliamentary Counsel's Notes for guidance on the preparation of statutory rules</p>	<p>S 3 SLA defines: "statutory rule" as a regulation made by the GIC.</p> <p>"Legislative instrument" are instruments made under an Act or statutory rule that is legislative in character. There is an indicative list of "administrative" instruments. Guidelines provide factors to determine legislative character.</p> <p>SI Leg (LI) Regs prescribes instruments that are not Lis, that are Lis, exempts Lis from SLAs requirements (in part or in full).</p> <p>S 4 SLA states that before Regulations prescribing instruments as SR or exempt, the Minister must consult the Scrutiny Committee.</p> <p>There is a set process for how LI are exempted from the operation of the SLA, set out in "Requirements for updating the Subordinate Legislation Regulations", including a statement of reasons for the request.</p>	<p>S 6 and 12C SLA: Initial consultation – with Ministers, agencies and sectors of the public on which a significant economic or social. Burden may be imposed (SR & LI). Must be certified to have occurred.</p> <p>S 7 and 12E SLA (SR & LI): RIS: Consultation with any sector of the public on which a significant economic or social burden may be imposed. RIS requirements s 10 and 12H; Notice requirements in s 11 and 12I.</p> <p>S10(3) (SR) and 12H(3) of SLA – independent advice as to adequacy of RIS.</p> <p>S 8 (statutory certificate) and s 12F (LI) – Exemption from consultation can be granted by an "exemption certificate" on specified grounds similar across both, but not the same), for instance, would not impose a significant economic or social burden on a sector of the public, or is of a fundamentally declaratory or machinery in nature.</p> <p>S12F (SI) also includes where has already undergone equivalent consultation, or is not more than 12 months and necessary to respond to public emergency, public health issue, or likely or actual significant damage to the environment, resource sustainability or the economy.</p> <p>There is also a Premier exemption in s 9 (SR) and 12G(LI).</p>	<p>Guidelines: Agency can draft LI themselves or in collaboration with OCPC.</p> <p>S 13 SLA: OCPC settles all statutory rules, and certifies that requirements of SLA are met. Issues 9 "s 13 certificate"</p> <p>S 14: The draft SR and EM must be submitted to the Gov in Council.</p>	<p>S 16 SLA (SR): the beginning of the day on which it is made, or the beginning of such later day as is expressed.</p> <p>Cannot be retrospective unless explicitly authorise by primary Act.</p>	<p>S16A SLA: LI must be published within 10 working days after LI is made.</p> <p>S 17 SLA – Notice of making of statutory rule must be published "forthwith after it is made", and notice published in the Gazette.</p> <p>The OCPC then arranges publication of the rule.</p> <p>S 15 and 16B SLA: SR and LI must be laid within 6 sitting days, with accompanying documents.</p> <p>S15A (SR) & 16C (LI) SLA: LI and documents must be given to SARC within 10 working days after being made for purposes of SARC scrutiny.</p> <p>S 15(3) SLA – copies of SR must also be posted or delivered to each MP who has requested it.</p>	<p>S 5 PCA – establishes the Scrutiny of Acts and Regulations Committee</p> <p>S 17 PCA: Examines Bills for matters including whether inappropriately delegates legislative power and whether it insufficiently subjects the exercise of legislative power to parliamentary scrutiny.</p> <p>S 21 (SR) and 25A(LI) scrutinises statutory rules & legislative instruments to ensure compliance with SLA. The criteria for review for SR is significantly expanded than for LI.</p> <p>S 21 and 35A SLA: SARC may report to Parliament is one of the criteria (scrutiny principles) in the section is breached.</p> <p>Parts 5 & 5A SLA: Grounds for review of SR & LI.</p> <p>Under the Charter, Committee is also responsible for reviewing all regulations and Lis and reporting to Parliament if it considers them to be incompatible with HR.</p> <p>Joint Committee, 4:3 composition with 4 Government members. Regulation Review Subcommittee, assisted by a Legal Adviser.</p> <p>S 27 SLA: Committee can advise the Minister about "any matter relating to the administration or operation of this Act", including exemption and making of guidelines.</p>	<p>S 23 and 25C SLA: Upon SARC's recommendation, Parliament may disallow the SR or LI within 18 sitting days of the tabling of the regulation/SI. Disallowance can be in whole or in part.</p> <p>Disallowance must occur within 12 sitting days of the notice.</p> <p>S 22 (SR) and 25B (LI) SLA – SARC can recommend that a statutory rule, recommender for disallowance, is suspended until period for disallowance expires, and unless GIC overrides this, the recommendation has effect after 7 days.</p>	<p>S 5 SLA (SR only) – automatic revocation after 10 years.</p> <p>S 5A: Extension of sunseting for up to 12 months.</p>	<p>SL Guidelines list matters that should be in primary legislation, including "matters which have a significant impact on individual rights and liberties"</p> <p>SARC's s 21 (SR, not LI) criteria include:</p> <p>"unduly trespasses on rights and liberties of the person previously established by law".</p> <p>Both s 21 and 25A (SR AND LI) include compatibility with the rights in the Charter.</p> <p>S 12A and 12D (SR & LI) SLA – Human rights certificate must also be prepared about compatibility with the Charter. Limited exemptions.</p> <p>S 32(3)(b) of the Charter: A subordinate instrument may be invalid if it is inconsistent with the Charter Act and not authorised by its empowering Act so to be.</p>	<p>SS 8 and 12F – Exemption from consultation is part of uniform scheme and there has been consultation under that scheme.</p>	<p>S 21 SLA (SR, not LI): "contains any matter or embodies any principles which should properly be dealt with by an Act and not by subordinate legislation"</p> <p>SL Guidelines: List matters that should be in primary legislation rather than subordinate legislation, including: matters of substance or important procedural matters (particularly if they also affect individual rights and liberties, e.g. provisions that reverse the onus of proof or certify evidentiary matters); o matters relating to a significant question of policy in that they introduce new policy or fundamentally change existing policy; o matters which have a significant impact on individual rights and liberties (e.g. powers of entry and search, arrest warrants, seizure and forfeiture), or which deal with property rights or traditional liberties and freedoms;</p> <p>Reinforced in OCPC Notes: "if possible, matters of detail subject to frequent change should be dealt with by subordinate legislation rather than primary legislation. Matters of policy and general principle should be dealt with in primary legislation, that is, in an Act. Significant matters should not be included in subordinate legislation..."</p>	<p>As per Shell Legislation (no special mention)</p>	<p>S 32 ILA – SI may apply, adopt or incorporate any document that is not a Law (for instance, an Australian Standard) only if there is express power in the primary legislation, that the incorporated material is available to the public at a reasonable cost. This can be in force as at a particular time, or as in force from time to time. There are requirements to facilitate parliamentary scrutiny of incorporation (including providing copies of the incorporated documents to the Parliament).</p> <p>Subordinate Legislation Regulations require that there must be a table of a footnote or endnote setting out all matter that is applied, adopted or incorporated by a SR.</p>	

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WA	<i>Interpretation Act 1984</i> (WA)	Standing Orders of the Legislative Council 10 and 67 Premier's Circular 2021/07 (reviewed 22/12/2021) Disallowance flowchart	S 5 IA: "Subsidiary legislation means any proclamation, regulation, rule, local law, by-law, order, notice, rule of court, local or region planning scheme, resolution, or other instrument, made under any written law and having legislative effect"	No general consultation requirements but may be required under specific Acts.	Premier's Circular: Information that must be provided in the Explanatory Memorandum set out. Generally drafted by OPC.	S 41(1)(b) IA: on the date of publication, on the date specified in the parent Act or a later date specified in the instrument.	S 41(1)(a) IA: Published in gazette S 42(1): Tabled in parliament within 6 sitting days after gazetted unless other date specified in parent act. If not tabled, no longer in force. Premier's Circular: to facilitate scrutiny by the Committee, within 10 business days of publication, copies of the instrument, the explanatory memorandum and other documentation must be provided to the Committee.	SO 10.5: Western Australian Joint Delegated Legislation Committee has power to all "instruments" that have been published (instruments include subsidiary legislation and other instruments subject to disallowance.) SO 10.7 Committee may consider "any systemic issue identified in 2 or more instruments of delegated legislation" as well as "the statutory and administrative procedures for the making of subsidiary legislation generally (but no so as to inquiry into any specific proposed instrument of subsidiary legislation that has yet to be published." Has own motion inquiry powers. 8 members: 4 from each house, Chair is a Government member. Supported by two advisory officers.	S 42 IA: Power to disallow instrument that is subject to disallowance under s 42 (regulation, local law or by-law) or another Act. Disallowance means regulation ceases to have effect, but does not affect validity of anything done or omitted to be done in the meantime. Notice of Motion must be brought within 14 sitting days of being tabled. SO 67: No timeframe within which a motion to disallow must be considered, but it must be resolved 17 sitting days of being moved. If not, then it must be put before Council rises. S 42(4) IA, SO 67: Instrument can be amended or substituted by a resolution of both Houses.	No sunsetting.	SO scrutiny criteria include: "has no unintended effect on any person's existing rights or interests"	SO scrutiny criteria include: "contains only matter that is appropriate for subsidiary legislation"	S 43(1) IA: Subsidiary legislation shall not be inconsistent with the provisions of the written law under which it is made or any Act, and shall be void to the extent of any inconsistency.			

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ACT	Legislation Act 2001 (ACT)	ACT PCO's Legislation Basics ACT Legislative Handbook	S 8 LA: "Subordinate law" is a regulation or rule made under an Act or another subordinate law. S 9: "Disallowable instrument" is a statutory instrument that is declared to be a disallowable instrument by an Act, subordinate law, or another disallowable instrument and a determination of fees or charged by a Minister under an Act or subordinate law. S 10 LA: "Notifiable instrument" is a statutory instrument that is declared to be notifiable by an Act, SL, DI or NI.	S 34 LA: RIS must be prepared for SL or DI that is "likely to impose appreciable costs on the community or part of the community". But the administering Minister can exempt a proposed law. And there are exceptions in s 36. S 35 LA: Mandatory requirements for the content of RIS. S 32 LA: There may be additional consultation requirements in individual Acts.	Regulations are drafted by the PCO ACT Legislation Handbook provides information on drafting an Explanatory Statement. Committee guide on "Technical and Stylistic standards – Tips/Traps" (2022) as well as "Guide to writing an explanatory statement" (2011)	S 73(2) LA: LI commences on the day after notification day or if the Act or instrument provides for another date. S 76 LA: Only "non-prejudicial" retrospective enactment is permissible.	S 19 LA: ACT Legislation Register must contain all subordinate laws, DI, NI and commencement notices as made. S 61: Legislative instruments must be notified (in the register gazette or otherwise). S 62: Failure to notify means instrument not enforceable. S 64: SL or DI must be presented to the LA not later than 6 sitting days after its notification day or taken to be repealed.	Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) 3 members	S 65 LA: Notice of motion to disallow a SL or DI must be given 6 sitting days after it is presented to the LA. If disallowance resolution is passed, the instrument is taken to be repealed the day after disallowance is notified. S 65(3) LA: Instrument deemed to be disallowed in the motion is not resolved. S 67: SL or DI cannot be remade the same in substance within 6 months of disallowance unless the LA has rescinded the disallowance or approved the making of the instrument. S 68: SL or DI can also be amended by resolution.	No sunsetting	Resolution establishing Committee includes scrutiny criteria "(ii) unduly trespasses on rights previously established by law" <i>Human Rights Act</i>	S 36: No RIS required if the matter arises under a territory law that is part of a uniform scheme of legislation or complementary with legislation of the Commonwealth, a State or NZ.	Resolution establishing Committee includes scrutiny criteria for Bills "(iv) inappropriately delegate legislative powers; or (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny" Also includes for instruments of a legislative instrument "contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly"	Resolution establishing Committee includes scrutiny criteria for Bills "(iv) inappropriately delegate legislative powers; or (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny" Also includes for instruments of a legislative instrument "contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly" Committee Fact Sheet on Henry VIII clauses (Nov 2011), which explains the undesirability of the use of Henry VIII clauses.	S 47(3) SL or DI may make provision by applying law of another jurisdiction or an instrument as in force only at a particular time (unless displaced). S 47(5) LA: Material that is "notifiable" 47(6) if the incorporation is from time to time, then each subsequent change is taken to be a notifiable instrument. (but this can be displaced). The Committee's Guide to Technical and Stylistic Standards (2022)	

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NT	<i>Interpretation Act 1978</i> (NT)	Standing Order 176	S 17 IA: Subord Leg: Regulations, rules or by laws to which s 63 applies, and any other instrument designated by an Act as one to which s 63 applies.		Generally OPC	S 63B IA: SL commences on the day specified in the SL, or if no day is specified, the day after the day on which it is made. Cannot be retrospective unless the primary Act expressly provides for this.	S 63 IA: Regulations must be published on the legislation website and notified in the Gazette as soon as practicable after it is made. Tabled in the LA within 6 sitting days after it is made. S 63A (similar rules or by-laws).	Subordinate Legislation and Publications Committee reviews all instruments of a legislative or administrative character that the LA may disallow or disapprove. 5 members. Has a general power of inquiry and reporting where matter referred by the Speaker.	S 63C IA: LA may disallow legislation or specified provisions of it, that is required to be tabled, whether or not it has been tabled. Notice of a disallowance resolution must be given within 12 sitting days after the SL is tabled, or 12 days after the last day it was required to be tabled. Disallowance has the same effect as repeal. S 64: SL that is the same in substance must not be made within 6 months unless the LA rescinds the resolution for disallowance.		SO 176: Committee scrutiny principle includes "whether the instrument trespasses unduly on personal rights or liberties"	NA	SO 176: Committee scrutiny principle includes "whether the instrument contains matter which in the opinion of the committee should properly be dealt with."	SO 176: Committee scrutiny principle includes "whether the instrument contains matter which in the opinion of the committee should properly be dealt with."	S 66 IA: Instruments may apply, adopt or incorporate any matter contained in any instrument or writing as in force or existing at the time when the instrument takes effect. But cannot incorporate any matter contained in an instrument or other writing as in force or existing from time to time.	

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UK	<p><i>Statutory Instruments Act 1946 (UK)</i></p> <p><i>Laying of Documents before Parliament (Interpretation) Act 1948 (UK)</i></p>	<p>Standing Orders of Both Houses</p> <p>The National Archives, <i>Statutory Instruments Practice</i> (5th ed, 2017)</p> <p>Office of Parliamentary Counsel, <i>Drafting Guidance</i> (June 2020)</p> <p>Secondary Legislation Scrutiny Committee: <i>Guidance for Departments Laying Instruments for the Secondary Legislation Scrutiny Committee</i> (Jan 2020)</p>	<p>S 1 SI Act defines "Statutory instrument" to mean "orders, rules, regulations or other subordinate legislation, to be exercised by an Order in Council or a statutory instrument.</p> <p>As there is otherwise no general framework for delegated legislation, the scope of oversight depends on whether the parent Act makes the instrument subject to any parliamentary procedure.</p>	<p>The Lords Secondary Legislation Scrutiny Committee is empowered to draw the special attention of the House of Lords to an instrument on the basis that 'there appear to be inadequacies in the consultation process which relates to the instrument'.</p> <p><i>Legislation and Regulatory Reform Act 2006</i> relates specifically to Legislative Reform Orders, a form of SI that amends primary legislation to remove regulatory burdens. There are special consultation requirements in this legislation for LROs.</p>	<p>Usually drafted by the legal office of the Government department concerned.</p> <p>OPC has issued some guidance.</p> <p>All general SIs should be accompanied by an explanatory note, and the JCSI have issued expectations on what will be contained in these notes.</p>	<p>Set by Act or instrument. Can come into effect on date made. But by convention, SI subject to a negative affirmation procedures come into force 21 days after being laid before Parliament.</p>	<p>S 2 SIA sets out publishing arrangements for SIs – as soon as they are made.</p> <p>Parent Act will stipulate whether SI must be laid before Parliament.</p> <p>S 4 SIA – procedure for laying SI that are required.</p>	<p>SO 151 (HoC) and SO 73 (Lords): Joint Standing Committee on Statutory Instruments conducts technical scrutiny of all statutory instruments.</p> <p>Select Committee on Statutory Instruments conducts technical scrutiny review where instruments laid before the House of Commons only (financial legislation)</p> <p>The Secondary Legislation Scrutiny Committee (Lords) conducts policy review of all statutory instruments. It has a special remit to review instruments to give effect to Brexit and determine whether they should be upgraded from negative to affirmative procedure. By convention the Lords doesn't consider SI until SLSC has reported.</p> <p>Delegated Powers and Regulatory Reform Committee (Lords) considers the proposals in Bills for delegations.</p> <p>Delegated Legislation Committees (HoC).</p> <p>See also Scottish Delegated Powers and Law Reform Committee. Scrutiny committees</p>	<p>Affirmative and negative resolution procedures, set out in the parent Act. Some SIs not subject to being laid before Parliament, or subject to a resolution procedure.</p> <p>SS 5 and 6 SIA: Negative resolution procedures.</p> <p>Negative resolution procedure: can occur in relation to draft SIs, which must lay for 40 days, or already made SIs, for 40 days.</p> <p>Affirmative resolution procedure: can be in draft, or already made, cannot be made or come into force unless approved.</p> <p>No power to amend SIs.</p>	<p>NA unless provided for in Act.</p>	<p>UK scrutiny committees are not expressly required to consider whether an instrument trespasses on personal rights and liberties. (the <i>Human Rights Act 1998</i> does not apply to secondary legislation). However, they are required to consider some matters that relate to this principle, for example, each committee is required to consider whether an instrument may have a retrospective effect.</p>	<p>NA – but note there are separate procedures that apply to SIs that apply to specific countries.</p>	<p>The Delegated Powers and Regulatory Reform Committee has asked the Government to identify Henry VIII powers in explanatory memorandums the Government produces for the committee's consideration of the delegated powers in bills (see Delegated Powers and Regulatory Reform Committee, <i>Guidance for Departments on the role and requirements of the Committee</i>, July 2014, paras 35 and 37).</p>		<p>Financial SIs – only subject to affirmation by House of Commons.</p>	

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NZ	Legislation Act 2019 (NZ)	House of Representatives, <i>Standing Orders</i> , Chapter 5 <i>Cabinet Office Manual</i> (Chapter 7), supplemented by CabGuide. Legislation Design and Advisory Committee's <i>Legislation Guidelines</i>	LA introduces a definition of "secondary legislation" that applies regardless of what it is called. Standing Orders define "Regulation" to mean "any delegated legislation, including secondary legislation within the meaning of the <i>Legislation Act 2019</i> ."	No general requirement, but increasingly individual statutes require procedures be followed before secondary legislation is made, including consultation requirements with those uniquely affected.	S 67 LA: PCO's function includes drafting any secondary legislation made by Order in Council, and any secondary legislation that amends an Act (Henry VIII clauses) Cabinet Manual requires that PCO drafts regulations made by Order in Council, and certifies that they are within power. Regulations must be approved by Cabinet.	S 26 LA: On the date stated or provided for in the legislation, or the day after it is published/made available. Cabinet Manual: Regulations do not come into effect until 28 days after published in Gazette, unless an exemption requires (eg, no effect on the public, emergency). S 114 LA – Minister must present secondary leg to the House.	S 69 LA – PCO publishes those it drafts. S 73 LA – otherwise the maker of the legislation has responsibility for publication. Cabinet Manual: Publication occurs in Gazette and Legislative Instruments series. S 114 LA – Minister must present secondary leg to the House.	Regulations Review Committee SO 326(1) – Examines regulations in accordance with scrutiny principles (SO 327). SO 326(2) – Examines <i>draft</i> regulations referred to it by Ministers. SO 326(3) – Examines regulation making power in Bills before another Committee. SO 326(4) – General power of inquiry relating to regulations. SO 326(5) and 328 – Hearing complaints in relation to regulation). By convention, chaired by non-govt MP. Convention also that non-govt majority, but not followed since 2011. Committee is serviced by qualified legal counsel engaged by the Clerk of the House. Regulations Review Committee Digest brings together all of the inquiries and reports of the Committee, updated regularly.	S 115-116, 119 LA: Secondary legislation is disallowable, amendable or replaceable at any time, unless specified as an exemption. S 117: if the House doesn't deal with a notice of motion for disallowance by the Committee within 21 days, disallowance will automatically occur. No limits on remarking disallowed instruments.	No generally applicable requirements, but note there have been recommendations from the Regulations Committee about this in relation to Henry VII clauses, and also to ensure currency.	NA	Regulations Review Committee's scrutiny principles includes "contains matter more appropriate for parliamentary enactment" See also the advice in Legislation Design and Advisory Committee's Legislation Guidelines	Cabinet Manual: Must be drafted by PCO. See also the advice in Legislation Design and Advisory Committee's Legislation Guidelines	ss 64-66 LA. Includes requirements around consultation, accessibility, incorporation dates and subsequent amendment.	Special procedures exist in relation to "confirmable instruments". The Reg Review Committee recommended this procedure, for instance, in relation to emergency regulations, taxes, Henry VIII clauses, and broad policy delegations. Special consultation requirements exist for reporting standards relating to departments, certain organisations and Offices of Parliament. Affirmative resolution procedures are sometimes specified in statutes, RRC has recommender these be used only in relation to governance and administration of parliamentary officers and agencies.	

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Canada	<i>Statutory Instruments Act</i> RSC 1985 c. S-22	Standing Order 104 (House of Commons) Senate Rules 12-4. First Report of the Committee for each session of Parliament (contains review criteria)	S 2 SIA: Statutory instrument means any rule, order, regulation, ordinance, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established, under an Act of Parliament or under the authority of GIC (with some exceptions listed) Regulation means statutory instrument made in the exercise of a legislative power conferred by an Act of Parliament or for the contravention of which a penalty, fine, or imprisonment is prescribed by or under an Act of Parliament.	NA	S 3 SIA: Proposed Regulations must be forwarded to the Clerk of the Privy Council, which is scrutinised against review criteria. This is enforceable through refusal to register: s 7 and revocation by the GIC: s 8.	S 9 SIA: Regulations comes into force day it is registered unless it expressly states and is authorised under Act, and an explanatory statement must accompany the regulation to the Clerk of the Privy Council.	S 5 & 6 SIA: Regulations shall be given to the Clerk of the Privy Council within 7 days of being made, to be certified, published in the Canada Gazette.	S 19 SIA establishes Canadian Standing Joint Committee for the Scrutiny of Regulations Composed of 8 Senators and a proportionate number of MPS. Two joint chairs. The Committee is assisted by joint clerks, legal counsel and secretariat staff. Under SIA: has the jurisdiction to scrutinise any statutory instrument, and the power to initiate the revocation of an instrument. SO: Committee can examine any matter referred to by both Houses, and can conduct inquiries into the supervision of the exercise of delegated legislation.	S 19 SIA: The Committee may recommend revocation of a regulation by House Order. Recommendation must be on the basis of not keeping with the intentions of the Act. Regulation making authority must have one month opportunity to repeal the instrument. Once notice is given to Houses, the motion must be considered within 15 sitting days, or deemed adopted.			Review Criteria: amounts to an exercise of a substantive legislative power properly the subject of a direct parliamentary enactment.	Review Criteria: amounts to an exercise of a substantive legislative power properly the subject of a direct parliamentary enactment.	S 18 SIA: General power to incorporate a document as it exists on a particular date, or as it is amended from time to time.	NA	