



LEGISLATIVE COUNCIL

Guidelines for the operation of the Regulation Committee's technical scrutiny function

March 2024

Legislative Council Regulation Committee

Guidelines for the operation of its technical scrutiny function

Background

- 1.1 On 19 October 2023, the Legislative Council amended the resolution of the House establishing the Regulation Committee ('the committee') to require it to:
- '... from the first sitting day in 2024, consider all instruments of a legislative nature that are subject to disallowance while they are so subject, against the scrutiny principles set out in section 9(1)(b) of the *Legislation Review Act 1987*'.¹
- 1.2 This amendment follows recommendations made in the committee's 2022 report entitled *Options for reform of the management of delegated legislation in New South Wales*.² That report concluded, in recommendations 7, 8 and 9, that the role of the committee in scrutinising delegated legislation should be expanded, supported by an expanded secretariat and a legal adviser, in order to improve the oversight of the making and operation of delegated legislation in New South Wales.
- 1.3 Under the amended resolution, the committee is required to report on such instruments as it thinks necessary and may set out an opinion that an instrument, or portion of an instrument, ought to be disallowed.³ These reports will appear in the form of a monitor, available on the Legislative Council website and tabled in the House.
- 1.4 Disallowance refers to the process, provided for in the *Interpretation Act 1987*, by which either House of Parliament may, by resolution, disallow a statutory rule with the effect that the instrument is treated as if it has been repealed and any amendments made by it undone. An instrument may be disallowed if notice of the disallowance resolution is given within 15 sitting days after notice of the rule was tabled in the House.⁴
- 1.5 In these guidelines, for simplicity, reference is made generally to 'regulations' or 'instruments', which should be read to include any instrument falling within either of the two categories set out in paragraph 1.7, below (and includes, for example, certain orders, by-laws, rules, proclamations and guidelines).

¹ *Minutes*, NSW Legislative Council, 19 October 2023, pp 639-640.

² Regulation Committee, *Options for reform of the management of delegated legislation in New South Wales*, Report 9, September 2022.

³ Resolution establishing the Regulation Committee, resolved 10 May 2023, Minutes No. 2, Item 11, pp 37-39, as amended 19 October 2023, Minutes No. 33, Item 3, pp 639-640, paragraph (3)(b).

⁴ For further information regarding the disallowance procedure, see the Regulation Committee's report of October 2020 entitled *Making of delegated legislation in New South Wales*, Chapter 2 and the *Interpretation Act 1987*, Part 6.

- 1.6 These guidelines provide an overview of the intended approach of the committee to this technical scrutiny function. The information set out in these guidelines is intended as a guide only, is non-exhaustive and is subject to revision. If you have any feedback or questions relating to the committee's role, expectations or functions, please contact the secretariat on 9230 2253 or at Regulation.Committee@parliament.nsw.gov.au.

Committee work practices

- 1.7 In accordance with the resolution, the committee will consider any instrument that is disallowable, during the period in which it may be disallowed. That includes:
- 'statutory rules', within the meaning of the *Interpretation Act 1987*, that are disallowable by virtue of section 41 of that Act, and
 - other instruments to which section 41 applies indirectly, i.e., where the Act under which an instrument is made provides that it is to be treated as if it were a statutory rule for the purposes of section 41.
- 1.8 The committee will seek to review all disallowable instruments during the period in which they may be disallowed. In practice, the committee secretariat will examine all new disallowable instruments and bring only those of particular concern to the committee's attention.
- 1.9 Where an instrument raises significant issues, the committee will write to the responsible Minister to request information regarding the instrument or its effects, with those issues also being outlined in a monitor of the committee. If the information provided is not sufficient to resolve the committee's concerns, the committee may again raise its concerns with the relevant Minister or draw the instrument to the attention of the Legislative Council. The committee may, if it has outstanding concerns, also recommend to the House that an instrument, or part of an instrument, be disallowed.
- 1.10 Where an instrument raises only minor issues, the committee may set out those issues in a monitor without writing to the responsible Minister. In this circumstance, the committee may not seek a formal response from the Minister but rather, may identify the issues for the Minister's attention and information.
- 1.11 The committee may also, if it resolves during the period of disallowance to do so, report on instruments after the disallowance period has expired.
- 1.12 The committee will meet to consider and table a monitor each sitting week.
- 1.13 As per the resolution establishing the committee, a dedicated legal adviser has been appointed to support the performance of the committee's technical scrutiny function. The legal adviser will examine aspects of legislative instruments that the committee secretariat has brought, or will bring, to the committee's attention and provide the committee with an independent legal assessment of their compliance against the committee's scrutiny principles.

Application of scrutiny principles in section 9(1)(b) *Legislation Review Act 1987*

- 1.14 Section 9(1)(b) of the *Legislation Review Act 1987* sets out the grounds the committee will consider instruments against, as per the resolution establishing the committee.
- 1.15 The grounds are all closely linked and an instrument, or a provision of an instrument, may engage several. The committee's focus is 'technical' – it analyses the form and drafting of the instrument in question rather than inquiring into matters of government policy.⁵
- 1.16 The grounds in section 9 are also those the Legislation Review Committee is required by statute to consider.⁶

Section 9(1)(b)(i): "that the regulation trespasses unduly on personal rights and liberties"

- 1.17 Under this ground, the committee is required to scrutinise each regulation to consider whether it trespasses unduly on personal rights and liberties. When exercising its scrutiny function, the committee may take into account provisions affecting rights, freedoms and privileges recognised by the common law, and presumptions applicable to the making of legislation. This will include provisions purporting to:
- limit the right of access to the courts, including issues relating to the availability of review of executive action,
 - interfere with property rights, including taking of property without compensation,
 - interfere with personal liberty,
 - abrogate:
 - legal professional privilege
 - the privilege against self-incrimination
 - access to legal representation, including for those accused of a criminal offence,
 - remove or reduce obligations of procedural fairness owed by government decision-makers,
 - interfere with freedom of religion, freedom of association or freedom of political communication,
 - confer coercive powers, including powers of detention, arrest, entry, search and seizure,
 - confer immunity from liability,
 - commence or produce effects retrospectively, and

⁵ See the *Legislation Review Act*, section 9(3) of which applies to the Legislation Review Committee, but will guide the committee's approach too.

⁶ *Legislation Review Act 1987*, s 9(1)(b).

- create strict liability offences or reverse the ordinary onus of proof.⁷

1.18 As part of its analysis, the committee may also have regard to statutory rights, common law liberties and traditions, and the international conventions ratified by Australia.

1.19 Under this ground, the committee is not directly concerned with the validity of such provisions (a matter considered under the ground relating to section 9(1)(b)(iii)), but the committee will consider, and may seek further information regarding:

- the justification for trespassing on the right or liberty in question, and
- whether any such interference is provided for using clear and express language.

1.20 The Committee may draw to the attention of the House interferences with rights and liberties the committee considers to be undue.

Section 9(1)(b)(ii): "that the regulation may have an adverse impact on the business community"

1.21 Under this ground, the committee is asked to consider the impacts of a regulation on the business community.

1.22 As noted above, the committee's scrutiny function is not intended to provide a critique of the policy reflected in the regulation. Therefore, in considering whether a regulation 'may have an adverse impact on the business community' the committee's role is not to question the decision to regulate the business community (whether that is the business sector generally, a sector within that community or a particular size of business).

1.23 The committee may, however, report on and draw the attention of the House to particular features of a regulation that, by reason of its form or drafting, may have an adverse impact on the business community. The Legislation Review Committee has previously reported on the following matters relating to section 9(1)(b)(ii):

- onerous reporting requirements,
- the imposition of significant obligations on small businesses,
- the imposition of increased administrative burdens for particular businesses, and
- significant increases in fees.

1.24 Section 9(1)(b)(ii) is closely linked with section 9(1)(b)(viii), discussed below.

⁷ Chief Justice RS French "The Common Law and the Protection of Human Rights", Anglo Australasian Lawyers Society, 4 September 2009, Sydney, referring to and expanding upon the list provided by J Corrin, "Australia: Country Report on Human rights" (2009) Victoria University of Wellington Law Review 37 at 41-42. Dennis Pearce has collated a more detailed list of common law rights and privileges recognised by the courts in various cases in *Statutory Interpretation in Australia* (LexisNexis, 2019, 9th ed) [5.60].

1.25 In many circumstances a regulation may, to achieve the intended policy outcome, necessarily involve adverse impacts for business. The combined purpose of sections 4-6 of the *Subordinate Legislation Act 1989* is to ensure that adequate consideration of policy options, including options with less adverse effects on business, and adequate consultation take place before the creation of such new statutory rule. The committee will assess compliance with that expectation under section 9(1)(b)(viii).

Section 9(1)(b)(iii): "that the regulation may not have been within the general objects of the legislation under which it was made"

1.26 Under this ground the committee is asked to consider the consistency of a regulation with the objects of the statute under which it is made and the degree to which the regulation as a whole, or specific provisions of it, conforms with those objects.

1.27 This requires the committee to consider the objects and intended effects of the Act of Parliament, and how those objects appear to be implemented by the regulation. In doing so, the committee is concerned with the degree to which the instrument gives effect to the scheme established by Parliament, and not with the wisdom or merits of the policy contained in the Act or statutory rule. The committee may draw attention to instances where the effect of a statutory rule appears to detract from the operation of the Act, as envisioned by Parliament. The committee will also consider whether, before making the instrument, any statutory preconditions to the exercise of the regulation-making powers have been satisfied.

1.28 The committee's view is that the Parliament, in an Act, sets out which matters may be dealt with by way of regulation made under that Act i.e., the appropriate division of legislation-making power between Parliament and the Executive.

1.29 Under this ground, the committee will consider both the degree to which a statutory rule as a whole gives effect to the objects of the Act and whether each provision of a statutory rule is authorised by a regulation-making power in the Act.⁸

1.30 The committee will draw matters to the attention of the House in circumstances where there appears to be doubt that provisions are within power, including:

- a provision which is inconsistent with or repugnant to the Act under which it is made,
- a provision which appears to be beyond the scope of the delegated legislation-making powers in the Act under which it is made,
- retrospective commencement, without authority, of part or all of a statutory rule,
- extraterritorial application, without authority, of part or all of a statutory rule,
- the unlawful sub-delegation of legislative power,
- the creation, without authority, of references to non-legislative publications applied, adopted or incorporated in the regulation as those publications are in force from time to time, and

⁸ This is a conclusion further supported by reading section 9(1)(b)(iii) and (iv) together.

- the imposition of fees or criminal penalties without or beyond power.

- 1.31** The committee will also consider whether the instrument in question and its explanatory note, as read with any legislation being amended, sufficiently identifies the powers relied upon to make the instrument.
- 1.32** In reporting matters against this ground, the committee is drawing to the attention of members of the Legislative Council where there may be doubts as to whether a provision is in power. This is intended to support members in their oversight functions and in considering whether to disallow a regulation.
- 1.33** It is not the role of the committee to declare an instrument, or part of it, invalid. Rather, that is a matter for the courts to consider in the event of a challenge to the lawfulness of a statutory rule, in light of the Act under which it was made and with regard to section 32 of the *Interpretation Act 1987*.

Section 9(1)(b)(iv): "that the regulation may not accord with the spirit of the legislation under which it was made, even though it may have been legally made"

- 1.34** Under this ground, the committee is required to consider whether a regulation, although legally made, accords with the spirit of the legislation under the relevant Act.
- 1.35** This ground is very similar to the ground set out in subparagraph (iii), with the two being complementary to one another in practice. Central to both grounds is whether the regulation aligns with the policy and intention behind the principal legislation and whether the regulation is appropriately 'subordinate' to the empowering Act. Given the connection between the two grounds, it follows that where a regulation does not accord with the spirit of its empowering Act, it may also raise issues under subparagraph (iii).
- 1.36** When exercising its scrutiny function of this ground, the committee will look beyond the technical question of whether the regulation can be argued to fall within power. The committee will consider:
- whether the regulation makes unusual or unexpected use of a regulation-making power, including the use of powers in a manner that, although technically lawful, significantly detracts from the operation of the scheme set out in the Act, and
 - the extent to which the regulation accords with the general objects and intention of the enabling Act.

Section 9(1)(b)(v): "that the objective of the regulation could have been achieved by alternative and more effective means"

- 1.37** Under this ground the committee will consider whether the legislative 'means' of a regulation are the most appropriate legislative means to achieve its objectives.
- 1.38** The focus is not whether legislation is required generally. That is a question which relates most closely to grounds provided for in section 9(1)(vi) (duplication), (vii) (inert provision) and (viii)

(options analysis). Further, the focus is not a policy evaluation of whether the regulation will, in fact, achieve its objectives.

1.39 Rather, this ground is concerned with themes that were the subject of the committee's 2020 report entitled *Making of Delegated Legislation in New South Wales* relating to democratic oversight of, and accountability for, delegated law-making. In that report, the committee highlighted three particular areas of focus relating to this issue, which will be the focus of the committee under this ground, namely:

- the use of shell legislation,
- the use of Henry VIII powers, and
- the use of quasi-legislation.

Shell legislation

1.40 The use of shell legislation refers to circumstances in which wide legislative gaps in an Act are filled by subordinate legislation. The committee may highlight examples of shell legislation where a regulation contains matters that, in the view of the committee, are more appropriate for a Parliamentary enactment, including:

- the establishment of significant elements of a regulatory scheme in an instrument of delegated legislation, or
- the imposition of significant penalties.

1.41 The committee will also consider whether the explanatory note identifies that a regulation is made under shell legislation.⁹

Henry VIII powers

1.42 The use of a 'Henry VIII power' refers to the use of a provision in a principal Act of Parliament that allows for the making of delegated legislation and confers the ability for the delegated legislation to amend the principal Act of Parliament. The committee will consider any instances of the use of Henry VIII powers and may draw to the attention of the House where the committee is of the view that the matter ought to have been dealt with by an amending Bill.

1.43 The committee will also consider whether the explanatory note identifies the use of a power that directly or impliedly amends the application of the Act under which it was made.¹⁰

Quasi-legislation

1.44 Quasi-legislation refers to incorporation into legislation of non-legislative instruments such as guidelines, codes of practice and international standards. While section 42(1) of the *Interpretation Act 1987* permits a regulation to incorporate non-legislative instruments, the committee will scrutinise the use of quasi-legislation to call attention to instances where:

⁹ NSW Parliamentary Counsel's Office, *PCO Standard*, 9 May 2023, at 11.3.6, pp 204-205.

¹⁰ NSW Parliamentary Counsel's Office, *PCO Standard*, 9 May 2023, at 11.3.4-5, pp 203-204.

- a regulation incorporates documents that are not themselves subject to disallowance, (particularly where those documents are of a nature that can be expected to be regularly changed or updated beyond Parliamentary oversight), and
- a non-legislative instrument provides for significant elements of a regulatory scheme (which is analogous to shell legislation at one further degree of removal from Parliament).

1.45 The committee will also consider whether the explanatory note identifies that an instrument is quasi-legislation by virtue of its incorporation of one or more non-legislative instruments.¹¹

Section 9(1)(b)(vi): "that the regulation duplicates, overlaps or conflicts with any other regulation or Act"

1.46 The committee is required to scrutinise each regulation as to whether it, or part of it, duplicates, overlaps or conflicts with any other regulation or Act.

1.47 The enactment of the *Legislation Review Act 1987* was, in part, intended to address concerns about the "impact of unnecessary regulation" on economic development in New South Wales and a desire to "eliminate unnecessary regulations and roll back red tape".¹² This ground of reporting relates to the relationship between a new statutory rule and the pre-existing statute book.

1.48 In considering whether a statutory rule, or a provision of it, 'duplicates, overlaps or conflicts' with any other regulation or Act, the committee has two complementary aims. First, to draw attention to any apparently unnecessary growth in the size of the statute book as a whole and second, to ensure persons subject to regulation, in the general sense, can easily discern, understand and comply with any obligations imposed upon them.

1.49 A statutory rule may appear to duplicate or overlap with existing law in a number of circumstances, including:

- the replication of matter in a regulation that is provided for in the Act under which it is made,
- the inclusion of express provision that has no legal effect other than to reproduce the effect of a provision of the *Interpretation Act 1987*, and
- the enactment of a new criminal offence where the conduct concerned is made criminal by another generally applicable offence.

1.50 The committee will also consider any apparent conflict between a new statutory rule and existing statutory law. The courts apply well-established principles of statutory construction when called upon to discern the proper application of two apparently inconsistent legislative propositions.

1.51 Again, it is not the role of the committee to engage in such an exercise, or to proffer a view on the resolution of any apparent conflict. Rather, the committee is concerned with clarity and the comprehensibility of the statute book as a whole.

¹¹ NSW Parliamentary Counsel's Office, *PCO Standard*, 9 May 2023, at 11.3.7, pp 205-206.

¹² Barrie Unsworth, Second reading speech, Regulation Review Bill 1987, 28 October 1987.

- 1.52 The committee may seek information about the intended relationship between two seemingly conflicting provisions and report circumstances in which, in the committee's view, that relationship ought to be expressly clarified.
- 1.53 The committee, under this ground, will focus on conflicts between a regulation and:
- any another regulation, or
 - an Act other than the one under which it is made.
- 1.54 If it appears to the committee that a regulation conflicts with the Act under which it is made, those matters will be addressed under other grounds, in particular section 9(1)(b)(iii).

Section 9(1)(b)(vii): "that the form or intention of the regulation calls for elucidation"

- 1.55 Under this ground, the committee will generally be concerned with ambiguity and uncertainty.
- 1.56 The intention of this ground is to ensure delegated legislation is clear, legally certain and, wherever possible, drafted in terms that are readily comprehensible for all potential users of the legislation. This is particularly important where the legislation imposes legal obligations upon persons, backed by criminal sanctions.
- 1.57 In addition to being considered by the Legislation Review Committee, similar grounds for reporting instruments on this basis apply in the Commonwealth¹³, United Kingdom¹⁴ and New Zealand¹⁵ and the committee will be guided by the approach of those scrutiny committees. Matters relating to the form or intention of a regulation that may call for elucidation include:
- errors in drafting that affect the meaning or interpretation of the regulation,
 - the appropriate use of definitions to define key terms,
 - the imposition of uncertain obligations, especially in cases where conduct concerned is the subject of a criminal offence,
 - the avoidance of jargon and the use of plain English,
 - the inclusion of inert provisions, i.e., provisions that appear to produce no legal effect,
 - the inappropriate use of notes and examples, and
 - any other matters requiring clarification, including matters relating to explanatory notes.

Section 9(1)(b)(viii): "that any of the requirements of sections 4, 5 and 6 of the *Subordinate Legislation Act 1989*, or of the guidelines and requirements in

¹³ Senate Standing Committee for the Scrutiny of Delegated Legislation, Senate Standing Order 23(3)(e).

¹⁴ Joint Committee on Statutory Instruments, House of Commons Standing Order 151(1)(B)(vii), House of Lords Standing Order 74(2)(g).

¹⁵ Regulations Review Committee, House of Representatives, Standing Order 327(2)(i).

Schedules 1 and 2 to that Act, appear not to have been complied with, to the extent that they were applicable in relation to the regulations"

1.58 This ground requires the committee to consider the extent to which the minister responsible for a regulation has complied with relevant duties relating to the preparation of a regulation, imposed upon the relevant minister by the *Subordinate Legislation Act 1989*.

1.59 The *Subordinate Legislation Act 1989*, Part 2 concerns requirements regarding the making of statutory rules. Sections 4-6 and Schedules 1 and 2 are principally concerned with ensuring that the policy formulation process culminating in the making of a statutory rule is adequate. The provisions impose requirements relating to options analysis, consideration of the costs and benefits of a proposed statutory rule, consideration of the regulatory impact of such a rule and consultation requirements.

1.60 Section 4 applies to all statutory rules other than instruments:

- containing only citation, commencement and savings and transitional provisions, and
- instruments specified or described in Schedule 4.¹⁶

Before such a statutory rule is made, section 4 requires the Minister to ensure (as far as reasonably practicable) that the guidelines in Schedule 1 to that Act are complied with.¹⁷ Amongst other matters, these guidelines require consideration of the most appropriate options for achieving policy objectives, taking into account anticipated costs and benefits.

1.61 Sections 5 and 6 apply to a subset of instruments to which section 4 applies, namely 'principal statutory rules'. Principal statutory rules are defined, in essence, as statutory rules other than amending instruments.¹⁸ Before a *principal statutory rule* is made, the responsible minister is required to ensure that (as far as is reasonably practicable):

- a regulatory impact statement (RIS) is prepared in compliance with Schedule 2 (section 5(1)),
- notice of the proposed rule is published (section 5(2)(a)), and
- appropriate consultation takes place and submissions are appropriately considered (section 5(2)(b)-(c)).

1.62 Section 6 sets out cases in which a RIS is not necessary, including where the responsible minister certifies, on the advice of the Attorney General or the Parliamentary Counsel, that the rule comprises or relates to matters set out in Schedule 3. In those circumstances, the explanatory note to a principal statutory rule should indicate the grounds for a RIS exemption.

1.63 Non-compliance with these various requirements from Part 2 of the *Subordinate Legislation Act 1989* will not affect the legal validity of the statutory rule.¹⁹

¹⁶ *Subordinate Legislation Act 1989*, section 4(2) and section 3, definition of statutory rule.

¹⁷ *Subordinate Legislation Act 1989*, section 4(1).

¹⁸ *Subordinate Legislation Act 1989*, section 3, definition of principal statutory rule.

¹⁹ *Subordinate Legislation Act 1989*, section 9.

- 1.64** The committee's role in relation to the *Legislation Review Act 1987* section 9(1)(b)(vii) relates to identifying apparent non-compliance with those processes, to the extent they are applicable. It is not the role of the committee to second-guess the policy conclusions reached by Government as a consequence of engaging in those processes.²⁰
- 1.65** In examining statutory rules against this ground for reporting, the committee will consider, on the available materials:
- for all in scope statutory rules, whether the instrument, as made, appears to indicate the responsible Minister has ensured compliance with Schedule 1 [clause 4]. In relation to clause 4, which concerns whether a statutory rule is "expressed plainly and unambiguously, and consistently with the language of the enabling Act", the committee will consider whether the drafting is clear, in plain English, and consistent with the Act under which it was made. To that extent, this ground closely relates to section 9(1)(b)(iii) and (vii).
 - for principal statutory rules:
 - whether a RIS has been prepared in compliance with Schedule 2 and, if not, the basis for non-compliance with the RIS requirement under section 6(1)(a)-(c)
 - available evidence of compliance with section 5(2).
- 1.66** If it appears the Minister is placing reliance on it not being reasonably practicable to comply with the requirements of sections 4 and 5, the committee may inquire about the reasons for that.

²⁰ Subject to the other grounds of scrutiny and, in particular, the grounds set out in section 9(1)(b)(ii) and (v).

