

**Submission
No 2**

INQUIRY INTO MAKING OF DELEGATED LEGISLATION IN NEW SOUTH WALES

Organisation: The Law Society of New South Wales

Date Received: 1 May 2020



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: PuLC/RHvk: 1866577

1 May 2020

Legislative Council of NSW Regulation Committee
Parliament House, Macquarie Street
Sydney NSW 2000

By email only: Regulation.Committee@parliament.nsw.gov.au

Dear Committee Secretary,

Inquiry into the making of delegated legislation in NSW

Thank you for the opportunity to provide a submission. The views of the Law Society of NSW are informed by its Public Law Committee.

The Law Society has long held concerns in respect of the extent that delegated legislation now deals with matters of policy and substance. While there will always be circumstances where delegated legislation provides an effective way of realising Parliamentary intent, unfettered delegated legislative power, often in the form of Henry VIII clauses, continues to represent an undesirable exception to Parliamentary oversight of the Executive.

In our view, the need for effective scrutiny into the making and use of delegated legislation in NSW is even more urgent given the unprecedented legislative and governing arrangements following the recent COVID-19 pandemic response.

We understand that the Joint Legislation Review Committee will continue to meet and carry out its business, though we also understand that, at the time of drafting this submission, its meeting schedule has not been settled. The Law Society has expressed concerns previously in respect of that Committee's capacity to carry out its remit, particularly in respect of delegated legislation, given that it is required to review all Bills and disallowable instruments.¹

It may be that the Legislation Review Committee's capacity to provide effective scrutiny of delegated legislation may increase during Parliament's adjournment. However, there are gaps in the Legislation Review Committee's remit which, in the Law Society's view, justify an ongoing and expanded role for the Regulation Committee. For example, the Legislation Review Committee's remit does not include draft delegated legislation, and includes only those regulations subject to disallowance.² Its remit also does not include a systemic review of regulations unless it is based on the staged repeal of regulations,³ nor does it include inquiry into matters of government policy.⁴

¹ This concern was acknowledged in New South Wales Parliament Legislative Council Regulation Committee, *Evaluation of the Regulation Committee trial* [Sydney, N.S.W.] 2018, [1.4].

² Section 9(1)(a), *Legislation Review Act 1987* (NSW).

³ Section 9(2)(a), *Legislation Review Act 1987*.

⁴ Section 9(3), *Legislation Review Act 1987*.

We commend the establishment of the NSW Public Accountability Committee inquiry into the NSW Government's management of the COVID-19 pandemic and any other related matters, but we submit that more general oversight of NSW delegated legislation should be in place while the NSW Parliament is adjourned.

We note that in 2019, there was an inquiry into the Commonwealth scrutiny of delegated legislation ("2019 Commonwealth inquiry"). The Law Society wrote to endorse the submission dated 24 January 2019, made by Professor Gabrielle Appleby, Emeritus Professor Mark Aronson and Dr Janina Boughey, Faculty of Law, University of New South Wales ("the UNSW submission"). This submission is attached for your information.

We supported all of the recommendations made in the UNSW submission, and bring this submission to the attention of the Regulation Committee in respect of this inquiry as the principles continue to be applicable in the NSW context.

In particular, we reiterate the views set out in the UNSW submission in respect of the prevalence of the modern practice of 'skeleton' Acts, resulting in delegated legislation that contain significant matters of policy and substance.

While we acknowledge that the nature of the COVID-19 public health emergency necessitated a wide-ranging legislative and regulatory response, the way in which delegated legislative instruments (by way of regulations and Ministerial Orders) have been used underscores the need for effective oversight, not only of the COVID-19 related response, but of the general functioning of government.

The Law Society particularly agrees with the recommendation that the role of relevant Parliamentary scrutiny committees should be adjusted to accommodate current practice. In addition to the recommendations made in the UNSW submission in respect of legislative instruments that have a significant and immediate impact on the legal rights, interests or obligations of individuals, companies or industries, the Law Society recommends that such instruments should be reviewed against:

1. the seven core human rights treaties, as defined by the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), and
2. common law rights including the presumption of innocence, legal professional privilege and the privilege against self-incrimination.

Additionally we note that as a result of the 2019 Commonwealth inquiry, the Senate agreed to General Business Notice of Motion No. 84. Specifically, the amendments clarify the Senate Standing Committee for the Scrutiny of Delegated Legislation's powers and functions, and address gaps in the broader framework of Parliamentary scrutiny of delegated legislation, including:

- amending the scope of the instruments that can be considered by the Committee;
- clarifying that the Committee may review draft delegated legislation in accordance with its scrutiny principles;
- providing the Committee with permanent general inquiry powers;
- enabling the Committee to self-initiate inquiries into matters exclusively related to the technical scrutiny of delegated legislation;
- clarifying the scope of the Committee's scrutiny principles;
- enabling the Committee to identify, but not assess, issues in delegated legislation likely to be of interest to the Senate; and

- clarifying the power of the legislation standing committees to inquire into and report on delegated legislation made in the portfolios allocated to them.⁵

Although the Australian Parliament has been adjourned, we note that Senate Committee for the Scrutiny of Delegated Legislation has announced that it will continue to meet regularly and continue to carry out oversight functions of all delegated legislation.⁶

The Law Society recommends that similar amendments be made to the NSW Regulation Committee's scope and function, in order to complement the existing scrutiny capacities of the Legislation Review Committee and the Public Accountability Committee as well as to enhance the effectiveness of the Regulation Committee itself.

We note that the need for a separate standalone regulation scrutiny committee was previously identified in 2016 by the Select Committee on the Legislative Council Committee System,⁷ and the issue of replicating the responsibilities of the Legislation Review Committee addressed by the 2018 trial of the Regulation Committee.⁸

The Regulation Committee's powers include inquiries into matters of policy, and trends. However, a gap continues to exist in respect of draft delegated legislation, and without the power of self-referral of inquiries, the Regulation Committee's ability to carry out its business can be hobbled while Parliament is adjourned. Importantly, the trial of the Regulation Committee identified that the Regulation Committee's work had multiplier effects in relation to the Parliamentary scrutiny afforded, as "the work of the committee presented broader issues to potentially be inquired into by other Legislative Council Committees."⁹

In our view, the ability of the Regulation Committee to effectively complement existing scrutiny mechanisms would be enhanced if it were enabled to review draft delegated legislation (for example, exposure drafts) and Regulatory Impact Statements, and enabled to self-initiate inquiries.

Amending the remit of the Regulation Committee in this way would assist to address the issue identified in the trial of the Regulation Committee in respect of the short time frames for review where a disallowance has been moved.¹⁰ These amendments could also allow the Regulation Committee to draw on evidence from members of the community noting that citizens have the right to take part in public affairs and elections contained at article 25 of the International Covenant on Civil and Political Rights),¹¹ expert stakeholders, and public servants to enhance the regulatory approach adopted in the delegated legislation. Leveraging of the expertise of these parties, particularly the public servants responsible for drafting the regulatory instruments, and who will ultimately be responsible for implementing it, will provide the Committee with a clearer picture of how the delegated legislation is being used to fulfil requirements under the primary legislation.

⁵ 'Changes to committee standing orders', *Parliament of Australia* (Web Page)

<https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Changes_to_committee_standing_orders>.

⁶ 'Scrutiny of COVID-19 instruments', *Parliament of Australia* (Web Page)

<https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Scrutiny_of_COVID-19_instruments>.

⁷ Select Committee on the Legislative Council Committee System, NSW Legislative Council, Legislative Council committee system (2016), 1.

⁸ Note 1, vi, [1.6], [1.7].

⁹ Note 1, [1.35].

¹⁰ Note 1, [1.24].

¹¹ The UN Human Rights Committee has stated in General Comment No. 25 (at paragraph 5) that the conduct of public affairs, referred to in article 25(a), relates to the exercise of legislative, executive and administrative powers, and covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels.

Finally, we note that if the functions of the Regulation Committee are expanded, it will require adequate resourcing in support.

Thank you once again for the opportunity to comment. For any further queries please contact Vicky Kuek, Principal Policy Lawyer, at _ or

Yours sincerely

Richard Harvey
President

Encl.



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: PuLC/EEvk: 1645873

27 February 2019

Senate Standing Committee on Regulations and Ordinances
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: regords.sen@aph.gov.au

Dear Committee Secretary,

Inquiry into Parliamentary Scrutiny of Delegated Legislation

Thank you for the opportunity to provide a submission. The views of the Law Society of NSW are informed by its Public Law Committee.

We write to endorse the submission dated 24 January 2019, made by Professor Gabrielle Appleby, Emeritus Professor Mark Aronson and Dr Janine Boughey, Faculty of Law, University of New South Wales ("the UNSW submission").

We support all of the recommendations made in the UNSW submission.

In particular, we reiterate the views set out in the UNSW submission in respect of the prevalence of the modern practice of skeleton Acts, resulting in delegated legislation that contain significant matters of policy and substance.

Given that delegated legislation now commonly deals with matters of policy and substance, the Law Society particularly agrees with the recommendation that the role of relevant Parliamentary scrutiny committees should be adjusted to accommodate current practice. In addition to the recommendations made in the UNSW submission in respect of legislative instruments that have a significant and immediate impact on the legal rights, interests or obligations of individuals, companies or industries, the Law Society recommends that such instruments should be reviewed against:

1. the seven core human rights treaties, as defined by the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), and
2. common law rights including the presumption of innocence, legal professional privilege and the privilege against self-incrimination.

Thank you once again for your attention.

Yours sincerely

Elizabeth Espinosa
President

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