

INQUIRY INTO MAKING OF DELEGATED LEGISLATION IN NEW SOUTH WALES

Organisation: Senate Standing Committee for the Scrutiny of Delegated
Legislation

Date Received: 5 May 2020



5 May 2020

The Hon Mick Veitch MLC
Committee Chair
Regulation Committee
Parliament House
Macquarie Street
SYDNEY NSW 2000

Via email: regulation.committee@parliament.nsw.gov.au

Dear Committee Chair,

Regulation Committee inquiry into the making of delegated legislation in New South Wales

Thank you for your invitation of 16 March 2020 to the Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) to make a submission to the New South Wales Legislative Council Regulation Committee's (Regulation Committee) inquiry into the making of delegated legislation in New South Wales.

The committee, known as the Senate Standing Committee on Regulations and Ordinances until December 2019, was established on 11 March 1932 and is therefore one of the Senate's oldest committees and Australia's oldest technical legislative scrutiny committee. The committee has always adopted a non-partisan approach to interpreting and applying its principles of technical scrutiny, setting aside party politics and policy considerations to focus on issues of general principle affecting the rights of people and Parliament.

2018/19 inquiry into parliamentary scrutiny of delegated legislation

After almost 90 years of operation, between November 2018 and June 2019 the committee undertook a significant and wide-ranging inquiry into parliamentary scrutiny of delegated legislation. Amongst other matters, the terms of reference required the committee to have regard to the role, powers and practices of similar parliamentary committees in other jurisdictions, including New South Wales. In this respect, the committee was grateful to the New South Wales Clerk of the Parliaments for his submission to the inquiry, which alerted the committee to the Regulation Committee's report evaluating the effectiveness of the Regulation Committee trial.

The final, unanimous report of the committee's inquiry (the 2019 inquiry report) was presented to the Senate on 3 June 2019. Please find the report attached. The report is also available on the committee's website.¹

¹ https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/DelegatedLegislation/Report.

On 27 November 2019 the Senate agreed to amend relevant standing orders in accordance with the recommendations of the inquiry. In summary, the changes clarified the committee's powers and functions, and addressed gaps in the broader framework of parliamentary scrutiny of delegated legislation, by:

- changing the committee's name;
- 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; and
- enabling the committee to identify, but not assess, issues in delegated legislation likely to be of interest to the Senate.

Further details about these changes to the standing orders are available on the committee's website.²

Significant matters in delegated legislation

As noted in chapter 5 of the 2019 inquiry report, the committee considers it essential that the Parliament does not delegate legislative powers that should be exercised by the Parliament itself. In this respect, the committee considers that when government is developing primary legislation which seeks to delegate legislative power, it should pay close attention to the importance of ensuring adequate parliamentary oversight. In particular, government officials should consider the advice issued by legislative scrutiny committees as to when matters would be more appropriately included in primary legislation.³ Details about the guidance that this committee has developed in this regard are provided below.

In the 2019 inquiry report, the committee also noted the important role played by the New Zealand Legislation Design and Advisory Committee in promoting quality legislation. The functions of that committee include providing advice to departments on delegated legislative powers, and on the allocation of provisions between primary and secondary legislation. The committee recommended that the Commonwealth government give consideration to developing a similar model, whereby departments could receive expert advice as to the appropriateness of delegating legislative powers (see recommendation 8). The committee noted 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.⁴

² https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Changes_to_committee_standing_orders.

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

⁴ *Ibid*, pp. 90–91.

Committee guidelines

Senate standing order 23(3)(j) requires the committee to scrutinise each instrument as to whether it contains matters more appropriate for parliamentary enactment. The committee has issued guidance which outlines the types of matters that it considers should ordinarily be included in primary legislation. In general, the committee considers that significant elements of a regulatory scheme, the imposition of taxes or levies, serious criminal offences and significant penalties, and matters which have a significant impact on personal rights and liberties should be included in primary legislation.

The committee also considers that provisions which modify the operation of primary legislation, or exempt persons or entities from the operation of primary legislation should not ordinarily be included in delegated legislation. Where delegated legislation nevertheless includes such provisions, the committee considers that it should cease to operate no more than three years after the commencement date for the relevant instrument to ensure a minimum degree of regular parliamentary oversight.

Please find a copy of the committee's guidelines attached. The guidelines are also available on the committee's website.⁵

2020 inquiry into the exemption of delegated legislation from parliamentary oversight

On 30 April 2020, the committee commenced an inquiry into the exemption of delegated legislation from parliamentary oversight using its new own motion inquiry power under Senate standing order 23(12). The committee's decision to undertake the inquiry was informed by its concern about the increasing exemption of delegated legislation from different mechanisms of parliamentary oversight, including disallowance and sunseting. The committee intends to table an initial report, which will focus on the exemption of COVID-19 related delegated legislation from parliamentary oversight, in the Senate by 19 August 2020. Further information about the inquiry is available on the committee's website.⁶

I trust this information is useful to the Regulation Committee as it undertakes this important inquiry.

Please do not hesitate to contact the committee via the secretariat on 02 6277 3066 or by email to sdlc.sen@aph.gov.au if the committee can be of any further assistance.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells

Chair

Senate Standing Committee for the Scrutiny of Delegated Legislation

⁵ https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Guidelines.

⁶ https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Exemptfromoversight.