

INQUIRY INTO MAKING OF DELEGATED LEGISLATION IN NEW SOUTH WALES

Organisation: Legislative Review Committee of the Parliament of South
Australia

Date Received: 13 May 2020



The Director
Regulation Committee
Parliament House, Macquarie Street
SYDNEY NSW 2000

13 May 2020

Dear Director,

Submission of the Legislative Review Committee of the Parliament of South Australia to the New South Wales Legislative Council's Regulation Committee's Inquiry into the making of delegated legislation in New South Wales

Background

1. I refer to a letter from the Hon. Mick Veitch MLC dated 16 March 2020 inviting the Legislative Review Committee of the Parliament of South Australia ('the SA Committee') to make a submission to the New South Wales Legislative Council's Regulation Committee's ('the Regulation Committee') Inquiry into the making of delegated legislation in New South Wales ('the Inquiry'). On 29 April 2020, the SA Committee resolved to provide a submission to the Inquiry.
2. On 29 April 2020, in response to a request from the SA Committee's Secretary, the Chair of the Regulation Committee granted the SA Committee an extension for the receipt of a submission to the Inquiry until 15 May 2020. This submission is a submission of the SA Committee.
3. The membership of the SA Committee comprises the following Members of the Parliament of South Australia:

The Hon. Nicola Centofanti MLC (the SA Committee's Presiding Member);
The Hon. Irene Pnevmatikos MLC;
The Hon. Connie Bonaros MLC;
Mr. Josh Teague MP (Member for Heysen);
Mr. Dan Cregan MP (Member for Kavel);
The Hon. Zoe Bettison MP (Member for Ramsay).
4. One of the functions of the SA Committee is to inquire into, consider and report on subordinate legislation referred to it under the *Subordinate Legislation Act 1978* (SA).

The Inquiry

5. Given the Inquiry is concerned with the making of delegated legislation in New South Wales, the SA Committee views the Inquiry as predominately a matter best left to those more familiar with the New South Wales context. That said, the SA Committee considers that there are a range of threshold issues that the Regulation Committee may wish to consider during its Inquiry.

Threshold issues

6. First, what is delegated legislation? While such a question may appear elementary, discussion in Pearce and Argument's 'Delegated Legislation in Australia' suggests that the distinction between whether an instrument made under an Act is *legislative* as opposed to *administrative* is 'not always easy or logical'¹. Given this, it is worth noting the approach taken by the Commonwealth in its *Legislation Act 2003* (Cth) to offer certainty about what is and what is not a 'legislative instrument' in that jurisdiction.
7. Specifically, subsection 8(4) of *Legislation Act 2003* (Cth), as follows, answers whether an instrument is a 'legislative instrument' by reference to the legal effect of the instrument rather than the name of the instrument, as is the case in many other jurisdictions:

- '(4) An instrument is a *legislative instrument* if:
 - (a) the instrument is made under a power delegated by the Parliament; and
 - (b) any provision of the instrument:
 - (i) determines the law or alters the content of the law, rather than determining particular cases or particular circumstances in which the law, as set out in an Act or another legislative instrument or provision, is to apply, or is not to apply; and
 - (ii) has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right.'

In South Australia, the SA Committee examines delegated legislation that is called, or deemed to be, a 'regulation, rule or by-law' and that is required to be tabled in the Parliament².

8. An Inquiry into the making of delegated legislation in New South Wales is an Inquiry into a much larger class of delegated legislation than regulations. As such, it may be useful for the Regulation Committee to report on the range of other categories of delegated legislation being made in New South Wales and the

¹ See Pearce, D. C. and Argument, S. (2017) *Delegated Legislation in Australia*. 5th edition, pp. 2-3. Published by Lexis Nexis.

² See sections 10 (Making of regulations) and 10A (Regulations to be referred to the Legislative Review Committee) of the *Subordinate Legislation Act 1978* (SA).

way in which other classes of delegated legislation determine, or alter, the content of the law in New South Wales.

9. Second, who is directly involved in making delegated legislation in New South Wales? Reporting on who is directly involved in the making of delegated legislation in New South Wales is intentionally a different question than a focus on who makes delegated legislation in New South Wales. While it should not be supposed that the maker of delegation legislation has little to do with the final legislative product, the making of delegated legislation often raises such complex legal and policy questions that demand a coming together of subject matter experts. These subject matter experts often play a vital role in determining how best to achieve objectives determined by the relevant authority that makes the delegated legislation. The processes adopted by subject matter experts in assisting to determine, or in some cases determining, the content of delegated legislation is under examined.
10. A focus on the differing roles of participants and the contrasting practices adopted by these participants to make delegated legislation in New South Wales would give the Regulation Committee useful information to guide best practice. For example, as a specialist drafting agency, it may be evident that the processes adopted by the New South Wales Office of Parliamentary Counsel show a high degree of professionalism in ensuring that the legislative products that are produced by them are of a high standard. However, an examination of these processes should not occur in isolation from processes adopted by executive agencies, or others, that instruct that Office about new or amending delegated legislation. Further, an examination of the practices of those participants directly involved in the making of delegated legislation who do not rely on a specialist drafting agency to produce delegated legislation may also be beneficial.
11. Third, how much delegated legislation is there in New South Wales and is the delegated legislation accessible? For a jurisdiction that provides for a register of their delegated legislation it may be an easier task to determine how much delegated legislation exists in the jurisdiction than in South Australia. In South Australia no such register of delegated legislation exists and the prospect of locating all delegated legislation in South Australia not published on www.legislation.sa.gov.au would be challenging. That said, even with a register of delegated legislation, the issue may come back to how the jurisdiction determines what is delegated legislation and what is not, and whether the approach taken by the jurisdiction may be relied upon.
12. Reporting on how much delegated legislation there is in New South Wales would give the Regulation Committee useful information, including into the resources that may be needed for the New South Wales Parliament to have effective oversight of delegated legislation in that State. There is surprisingly little research that offers a comparison between the amount of primary and delegated legislation in each of the jurisdictions in Australia. The former Senate Standing Committee on Regulations and Ordinances in its 'Parliamentary scrutiny of delegated legislation' Inquiry report tabled in the Senate on 3 June 2019 states in the Chair

and Deputy Chair's forward to the Inquiry report that '...around half the law of the Commonwealth is delegated legislation...' ³.

Specific matters raised by the Terms of Reference

13. The SA Committee acknowledges that each of the specific matters raised in the terms of reference for the Inquiry, including the use of Henry VIII clauses and 'shell legislation', are matters of interest to the SA Committee. In the SA Committee's view, discussion on these matters may be most useful on a case by case basis so that the context of their use may be examined. The SA Committee also notes the interest that a Scrutiny of Bills Committee of Parliament may have in examining Henry VIII clauses and 'shell legislation' before an Act comes into force.

Yours sincerely,

Mon. Nicola Centofanti MLC
PRESIDING MEMBER

³ See Senate Standing Committee on Regulations and Ordinances Inquiry Report (2019) *Parliamentary scrutiny of delegated legislation*, p. ix, Accessible at www.aph.gov.au.