

**INQUIRY INTO MAKING OF DELEGATED LEGISLATION  
IN NEW SOUTH WALES**

**Organisation:** NSW Council for Civil Liberties

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New South Wales  
Council for Civil Liberties

**NSWCCL SUBMISSION**

**NSW PARLIAMENT  
LEGISLATIVE COUNCIL  
REGULATION COMMITTEE**

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### **About NSW Council for Civil Liberties**

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

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## Inquiry into the making of delegated legislation in New South Wales

### Introduction

1. The New South Wales Council for Civil Liberties (NSWCCL) welcomes the opportunity to make submissions to the Legislative Council Regulation Committee Inquiry concerning the making of delegated legislation in NSW. It has proved to be particularly timely and the main focus of this submission will be the delegated legislation generated in NSW during the COVID-19 health crisis.
2. In this submission, delegated legislation is taken to mean an instrument that is legislative in effect and has been delegated by parliament to a non-parliamentary body to make.<sup>1</sup> Reference to delegated legislation will include, unless specified, a statutory rule as defined in s.3(1) of the *Subordinate Legislation Act 1989 (SLA)* which is a regulation, bylaw, rule or ordinance either made or approved by the Governor. There are a number of delegated instruments that are not statutory rules and therefore not subject to the usual scrutiny processes of parliament such as disallowance.<sup>2</sup>

### General Principles

3. Although the separation of powers at the State level has little constitutional existence,<sup>3</sup> the application of that principle to the extent consistent with constitutional arrangements is clearly desirable, given it prevents the accumulation of excessive power and is thereby solicitous of civil liberties. From these principles is derived the notion that legislative power should not be inappropriately delegated; it is Parliament's role to make legislation. Of course, the reason Parliament has this role is not to be forgotten; Parliament is the organ of state which represents the electorate, and as such it must be supreme. This is connected to the principle that the Executive must be restrained by and subject to the law, otherwise known as the rule of law. The rule of law is threatened where the Executive obtains excessive legislative power.<sup>4</sup>
4. Delegated legislation has for many years been a major source of legislation, and the modern state depends on regulation.<sup>5</sup> NSWCCL acknowledges that there are advantages in using delegated legislation, but when parliament is sitting and in appropriate circumstances. In particular, Andrew Edgar notes that the Donoughmore Committee<sup>6</sup> regarded broad regulation-making powers as legitimate when:

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<sup>1</sup> Angus, C (July 2019) Delegated legislation: Flexibility at the cost of scrutiny? *NSW Parliamentary Research Service e-brief 5/2019* p.2,

<<https://www.parliament.nsw.gov.au/researchpapers/Documents/Delegated%20legislation%20e-brief.pdf>>

<sup>2</sup> Parliament of NSW, Delegated Legislation Ch 14, p.425

<[https://www.parliament.nsw.gov.au/lc/proceduralpublications/DBAssets/wppbook/15%20NSW%20LC%20Prac%20Ch14%20\(press\).pdf](https://www.parliament.nsw.gov.au/lc/proceduralpublications/DBAssets/wppbook/15%20NSW%20LC%20Prac%20Ch14%20(press).pdf)>

<sup>3</sup> *Kable v DPP* (1996) 189 CLR 51; Parliament of NSW, The Doctrine in the Australian States, accessed 13 May 2020

<<https://www.parliament.nsw.gov.au/about/Pages/The-Doctrine-in-the-Australian-States.aspx>>

<sup>4</sup> Australian Law Reform Commission (2015) *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws (ALRC Interim Report 127)* p.442 <[https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc\\_127\\_interim\\_report.pdf](https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_127_interim_report.pdf)>

<sup>5</sup> *ibid*

<sup>6</sup> The recommendations from which underpin the modern attitude to regulation-making.

- parliamentary committees can scrutinise bills for the inclusion of overly broad regulation-making powers;
- parliamentary committees can scrutinise regulations;
- statutory provisions require public consultation; and
- judicial review is possible.<sup>7</sup>

It may be especially convenient and reasonable to use delegated legislation for highly technical and expert legislation or for rapidly changing or uncertain situations. In an emergency such as the COVID-19 health crisis, it has proved much faster to implement amendments through delegated legislation rather than primary legislation.

5. However, NSWCCCL also notes that at the Commonwealth level, the *Legislation Handbook* states that, without special justification, the following matters should be included in primary legislation:
- (a) appropriations of money;
  - (b) significant questions of policy including significant new policy or fundamental changes to existing policy;
  - (c) rules which have a significant impact on human rights and personal liberties;
  - (d) provisions imposing obligations on individuals or organisations to undertake certain activities (e.g. to provide information or submit documentation, noting that the detail of the information or documentation required may be included in subordinate legislation) or desist from activities (e.g. to prohibit an activity and impose penalties or sanctions for engaging in an activity);
  - (e) provisions creating offences or civil penalties which impose significant criminal penalties (imprisonment or fines equal to more than 50 penalty units for individuals or more than 250 penalty units for corporations);
  - (f) provisions imposing administrative penalties for regulatory offences (administrative penalties are imposed automatically by force of law instead of being imposed by a court);
  - (g) provisions imposing taxes or levies;
  - (h) provisions imposing high or substantial fees and charges;
  - (i) provisions authorising the borrowing of funds;
  - (j) procedural matters that go to the essence of the legislative scheme;
  - (k) provisions creating statutory entities (noting that some details of the operations of a statutory entity would be appropriately dealt with in subordinate legislation);
  - (l) amendments to Acts of Parliament (noting that the continued inclusion of a measure in an Act needs to be examined against these criteria when an amendment is required),<sup>8</sup> and
  - (m) provisions conferring enforceable rights on citizens or organisations.<sup>9</sup>

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<sup>7</sup> Edgar, A. (30 March 2020) Law-making in a crisis: Commonwealth and NSW coronavirus regulations *Australian Public Law* <<https://auspublaw.org/2020/03/law-making-in-a-crisis-commonwealth-and-nsw-coronavirus-regulations/>>

<sup>8</sup> Commonwealth of Australia, Department of the Prime Minister and Cabinet, (2017) *Legislation Handbook*. P.2

<sup>9</sup> On the original list in Commonwealth of Australia, Department of the Prime Minister and Cabinet, (1999) *Legislation Handbook*. P.3

6. NSWCCCL considers that this list is a good place for the NSW government to start when it weighs up what to include in delegated legislation.
7. The use of delegated legislation in the context of the COVID-19 pandemic has exploded, with many of the most important changes in NSW society introduced in the form of Public Health Orders.<sup>10</sup> These orders are having a significant impact on individual rights and liberties, concern significant questions of policy, effectively contain serious offences, and impose obligations to do or desist from certain activities. As such, they should rightly be contained in primary legislation.
8. By deferring important decisions to delegated legislation the level of scrutiny of these processes is significantly reduced. At the moment, without State Parliament resuming normal sitting until September 2020, there is no continuing parliamentary oversight.
9. NSWCCCL considers the nature and quantity of delegated legislation, in these circumstances, to be worrying, when parliament cannot review delegated legislation because of strict time constraints or because parliament has adjourned. These circumstances mean that, during the COVID-19 health crisis, the citizens of NSW can rightly feel a loss of confidence in responsible government and the parliamentary process.

**Extent to which the Parliament has delegated power to make delegated legislation to the executive government.**

10. As NSW Parliament has substantial freedom to delegate legislative power- for example, to statutory officers and independent boards, the governor and the judiciary, mechanisms are available to monitor its use. However, these mechanisms can be easily circumvented.
11. First and foremost, parliament must retain its power to control the delegation. “[A] law which purports to confer a power exclusively on the Executive while denying that power to the Legislature is an abdication of power, rather than a delegation of power.”<sup>11</sup>
12. Regulation-making power, during the COVID-19 health crisis needs to be limited in time. *S.7 of the Public Health Act 2010 (PHA)* allows the Minister to take such action, and by order give such directions, as the Minister considers necessary to deal with the public health risk. An order is limited to 90 days. However, there is concern that every change to an existing order resets the limit of the previous order, extending the sunset clause once more.<sup>12</sup>
13. Concerns have also been raised about the seeming instability of Public Health Orders, undermining legal certainty, which is a fundamental aspect of the rule of law.<sup>13</sup> Furthermore, at least initially, there were reported issues with accessing the Orders online.<sup>14</sup>

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<sup>10</sup> NSW Department of Health, Public Health Orders and restrictions

<<https://www.health.nsw.gov.au/Infectious/covid-19/Pages/public-health-orders.aspx>>

<sup>11</sup> Twomey, A. (2004) The Constitution of New South Wales, *The Federation Press* pp 211-212.

<sup>12</sup> Wright, P. Law Council in Allmann, K. (April 2020) Police state or safety net? How NSW entered a sinister ‘new normal’ *Law Society Journal* <<https://lsj.com.au/articles/police-state-or-safety-net-how-nsw-entered-a-sinister-new-normal/>>

<sup>13</sup> Edgar op.cit.

<sup>14</sup> ibid

14. Giving the Executive wide-ranging authority, as set out in s.7 PHA, to formulate social and political policy, risks the impairment of the sovereignty of parliament and the necessary consideration and approval of laws by our elected representatives. Any right to delegate legislation to the executive is predicated on there being mechanisms to monitor the use of delegated powers serving to ensure proportionality.
15. The usual safeguards for introducing delegated legislation should be emphasised and utilised by a reconvened parliament immediately. These include:
- i) Adherence by the Minister to the guidelines for the preparation of statutory rules and with the procedures in the Ministerial Handbook, including publication and tabling before both Houses.
  - ii) Regulatory impact statements (RIS) permitting government agencies to consult with stakeholders likely to be affected by the delegated legislation and forwarding of submissions to the Legislation Review Committee within 14 days of publication.
 

An RIS is not required in all cases. Exceptions include direct amendment or repeal, complementary legislation of the Commonwealth, or matters unlikely to impose an appreciable cost or disadvantage to the public. This is problematic.

For example, the Commonwealth COVIDsafe Bill applies to State and Territory health authorities in relation to COVIDsafe app data. However, there is some uncertainty as to achievement of the application of the COVIDsafe Bill in every jurisdiction. It is intended that the states and territories will sign a Memorandum of Understanding to ensure they abide by the privacy rules around the use of the data for contact tracing.<sup>15</sup> Any NSW MOU will contain sections that affect the rights and liberties of NSW citizens. Its scrutiny and publication must be paramount.
  - iii) Disallowance of statutory rules. Either House can pass a resolution disallowing a statutory rule.<sup>16</sup> A disallowed statutory rule cannot be remade within 4 months of the disallowance.<sup>17</sup> Disallowance of a statutory rule is a rare occurrence and this power should be exercised by parliament more diligently.<sup>18</sup>
  - iv) The Legislation Review Committee reports to both Houses as to whether a bill inappropriately delegates legislative power and reviews regulations. The Committee has time constraints and only reports on regulations that fall within the criteria of s9 of the *Legislation Review Act 1987*, a small proportion of total statutory rules.

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<sup>15</sup> Taylor, J. (13 May 2020) Covidsafe app: how Australia's coronavirus contact tracing app works, what it does, downloads and problems *The Guardian* <<https://www.theguardian.com/australia-news/2020/may/13/covid-19-safe-app-australia-how-download-does-it-work-australian-government-covidsafe-tracking-downloads>>

<sup>16</sup> s41(1) *Interpretation Act 1987*

<sup>17</sup> s8 SLA

<sup>18</sup> Angus op.cit. p.16

The Committee has also made sparing use of disallowance of regulations. The Committee's powers in this regard should be strengthened and measures taken to increase its resources to enable greater scrutiny.<sup>19</sup>

### Henry VIII clauses- the amendment of primary legislation by delegated instruments

16. 'Henry VIII clauses' allow delegated legislation to amend or override primary legislation. These clauses are considered an appropriate delegation of power in most States and the Legislation Review Committee has tended to affirm these clauses unamended.<sup>20</sup>
17. Although State parliament is not prevented from delegating part of its power to the executive it may not abdicate its legislative powers. Parliamentary oversight and disallowance provisions are key, as observed by Gageler J. 'That parliamentary oversight, together with the scope of judicial review of the exercise of regulation-making power, diminishes the utility of the pejorative labelling of the empowering provisions as "Henry VIII clauses."' <sup>21</sup>
18. The laws introduced recently by both the Australian and NSW governments during the COVID-19 health crisis may be legitimate exercises of the statutory powers conferred, but they are also prime examples of laws that confer Henry VIII powers. There are a number of regulation-making powers conferred on the executive in the *Covid-19 Legislation Amendment (Emergency Measures) Act 2020*. Most notable are:
  - i) **s10.17 of the *Environment Planning and Assessment Act (1979)***- the Minister for Planning may make an order authorizing development without the need for any approval under the EPA Act or consent from any other person, and such an order is valid despite any inconsistency with environmental planning instruments, which are laws of Parliament. The Minister has already made orders relating to extended hours of operation of retail premises, development for health services facilities and for temporary workers' accommodation on power station sites.
  - ii) **s. 747B of the *Local Government Act (1993)*** allows for the making of regulations to modify the application of the LGA "for the purposes of responding to the public health emergency".
  - iii) **S366 of the *Criminal Procedure Act (1986)*** gives the Attorney General unprecedented powers which are broad in scope, allowing regulations made under that section to "override the provisions of any Act or other law."

All these amendments apply while parliament is not sitting and require that the Minister must be reasonably satisfied that the order is necessary to "protect the health, safety and welfare of members of the public" following consultation with the Minister for Health and Medical Research. These powers are extraordinarily broad.

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<sup>19</sup> Parliament of NSW, Delegated legislation op.cit. p.441

<sup>20</sup> Angus op.cit p.9

<sup>21</sup> ADCO Constructions Pty Ltd v Goudappel [2014] HCA 18  
<<http://www.austlii.edu.au/au/cases/cth/HCA/2014/18.html>>



The Minister must form a subjective belief in regard to the orders, making them highly discretionary.

19. Henry VIII clauses should be used exceptionally, not routinely, with sunset clauses for both the Henry VIII clause and the regulations created by them.

### **The adoption of certain laws by means of delegated rather than primary legislation**

20. S.7 of the *PHA* states that orders made are to be published in the NSW Government Gazette but failure to do so does not invalidate the order. These orders are made by the Minister and are therefore not statutory rules to which the tabling, disallowance powers and parliamentary scrutiny laws apply.<sup>22</sup>
21. Numbers of orders have been made, repealed and replaced pursuant to s.7. The instability of these orders is concerning and the uncertainty it creates for NSW citizens, both in interpretation and as to currency, is counterproductive.<sup>23</sup> Orders have been signed into law almost daily, often unknown to many Australians.<sup>24</sup> The law should be clear and known to all rather than in sparse and general terms leaving citizens to interpret them for themselves and giving the police wide discretion.
22. *The Public Health (COVID-19 restrictions on Gathering and Movement) Order 2020*, is an example of an order that carries substantial penalties coupled with a rarely successful appeal process (see items 5-7 of this Submission).<sup>25</sup>

### **Related matters**

23. Large volumes of delegated legislation make oversight by Parliament difficult and resources (including extra staffing) need to be available to ensure proper scrutiny is achieved. High level scrutiny is a significant challenge.
24. Parliamentary committees may highlight potentially problematic delegations, but parliamentarians must have the will to make themselves aware of the potential impact of tabled delegated legislation.<sup>26</sup>
25. Measures should be introduced to limit inappropriate delegations of legislative power with a non-exhaustive list of powers and matters which should not be delegated, unless in the public interest (see item 5 of this Submission).<sup>27</sup>
26. The life of a statutory rule is 5 years, although its life may be extended for a further 5 years if approved by the regulations committee. S.2.20 of the *Covid-19 Legislation Amendment (Emergency Measures) Act 2020* has amended the *SLA* to postpone the repeal of a number of statutory rules until March and September 2021. This delay is undesirable as repeal is an

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<sup>22</sup> Edgar op.cit.

<sup>23</sup> ibid

<sup>24</sup> Blanks, S. NSWCCCL in Allmann op.cit.

<sup>25</sup> Samantha Lee, Redfern Legal Centre, ibid.

<sup>26</sup> ALRC op.cit.

<sup>27</sup> ibid

important mechanism in eliminating outdated delegated legislation and increases opportunities for community consultation.

### **Recommendations**

- 1.** Parliament must retain its control over and oversight of delegated legislation and resume its normal sitting schedule. NSWCCCL considers the nature and quantity of delegated legislation, in these circumstances, to be worrying.
- 2.** The usual safeguards for introducing delegated legislation should be utilised by a reconvened parliament immediately, including measures to encourage renewed diligence in the exercise of disallowance motions and to reduce the exceptions to the requirement for Regulatory Impact Statements.
- 3.** The powers of the Legislation Review Committee in relation to the extent of delegated legislation reviewed and disallowance of delegated legislation should be strengthened and measures taken to increase its resources to enable greater scrutiny.
- 4.** Henry VIII clauses should be used exceptionally, not routinely, with clear, objective sunset clauses for both the Henry VIII clause and the regulations created by them.
- 5.** Delegated legislation, such as the recent Public Health Orders, should be clear and known to all rather than in sparse and general terms leaving citizens to interpret them for themselves and giving the police wide discretion.
- 6.** Measures should be introduced to limit inappropriate delegations of legislative power with a non-exhaustive list of powers and matters which should only be contained in primary legislation.

This submission was prepared by Michelle Falstein and Jared Wilk on behalf of the New South Wales Council for Civil Liberties. We hope it is of assistance to the Committee.

Yours sincerely,

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