Submission
No 8

INQUIRY INTO MAKING OF DELEGATED LEGISLATION IN NEW SOUTH WALES

Organisation: New South Wales Bar Association

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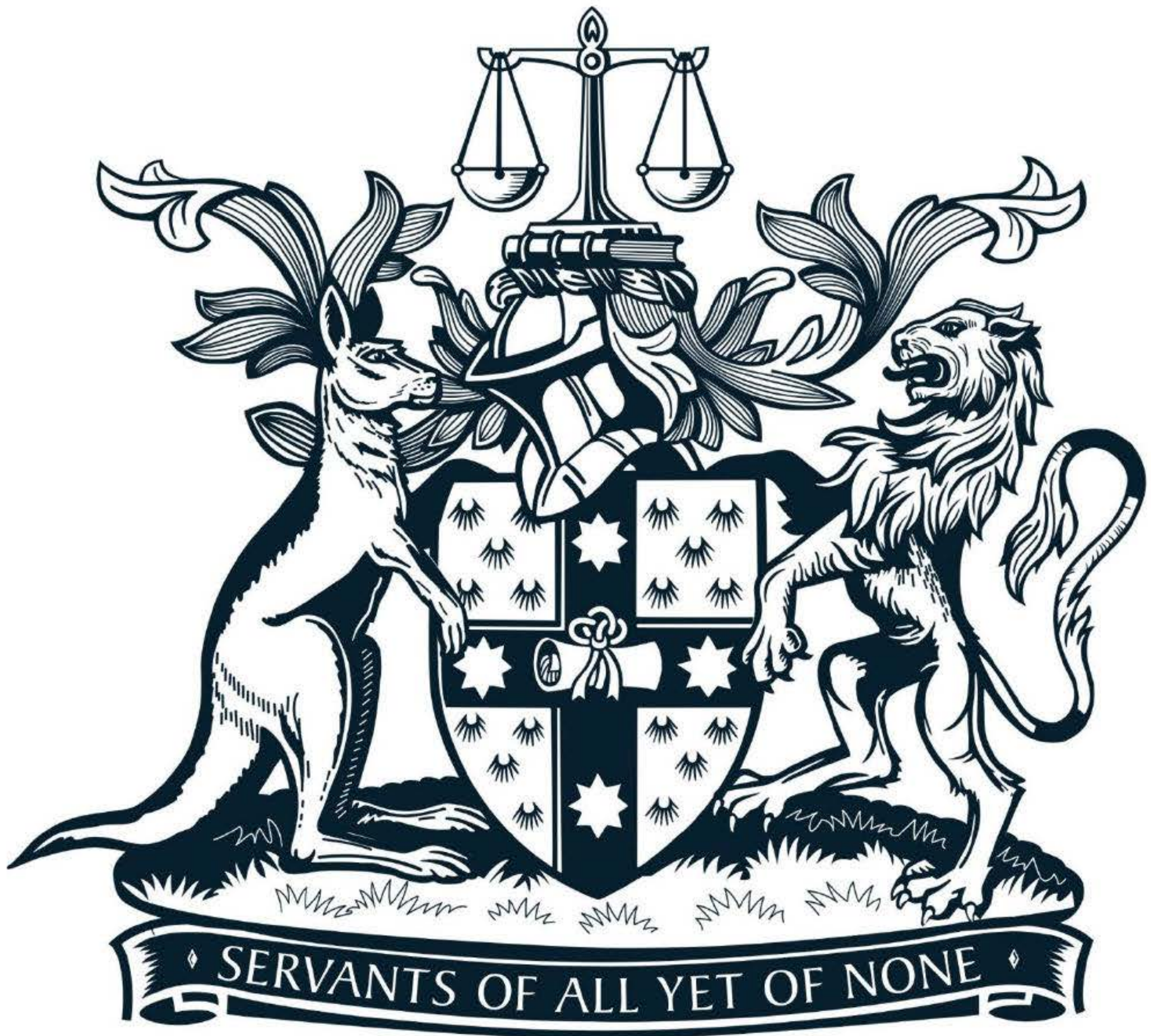

SUBMISSION | NEW SOUTH WALES

BAR ASSOCIATION

Legislative Council Regulation Committee Inquiry into the Making of Delegated Legislation in NSW

5 June 2020

Promoting the administration of justice

The NSW justice system is built on the principle that justice is best served when a fiercely independent Bar is available and accessible to everyone: to ensure all people can access independent advice and representation, and fearless specialist advocacy, regardless of popularity, belief, fear or favour.

NSW barristers owe their paramount duty to the administration of justice. Our members also owe duties to the courts, clients, and colleagues.

The Association serves our members and the public by advocating to government, the Courts, the media and community to develop laws and policies that promote the Rule of Law, the public good, the administration of and access to justice.

The New South Wales Bar Association

The Association is a voluntary professional association comprised of more than 2,400 barristers who principally practice in NSW. We also include amongst our members judges, academics, and retired practitioners and judges. Under our Constitution, the Association is committed to the administration of justice, making recommendations on legislation, law reform and the business and procedure of Courts, and ensuring the benefits of the administration of justice are reasonably and equally available to all members of the community.

This Submission is informed by the insight and expertise of the Association's members, including its Human Rights and Common Law Committees. If you would like any further information regarding this submission, please contact the Association's Department of Policy and Public Affairs, Ms Elizabeth Pearson, via

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A. Executive Summary

1. The New South Wales Bar Association (**the Association**) thanks the Legislative Council Regulation Committee (**the Committee**) for the opportunity to make a submission to its inquiry into the Making of Delegated Legislation in NSW (**the Inquiry**).

2. The Association has consistently raised concerns over the use of Henry VIII clauses in NSW. These clauses allow key matters to be provided for in subsequent regulations rather than in the substantive drafting of a bill, circumventing the ordinary process of parliamentary scrutiny and debate. The subject matter of these clauses has varied substantially, including but not limited to the Motor Accidents Scheme, Emergency Services Levy and drug trafficking. Recently, the Association has raised concern over the heavy reliance on regulation and Henry VIII clauses in health and justice responses to the COVID-19 pandemic.

3. It is undesirable that such significant issues be dealt with by regulation, rather than included in a substantive bill so there can be proper consideration and debate by the NSW Parliament. The High Court has noted that the use of regulations to deal with substantive issues, although within legislative power of the NSW Parliament, has attracted criticism "for good reason".[1]

4. The Association considers that wherever possible, Parliament should avoid a regulation-based approach and ensure substantive matters are dealt with in principal legislation. If exigencies do arise that require a response by regulation, appropriate safeguards must be in place to ensure that regulation does not impermissibly erode human rights, is still subject to appropriate scrutiny and contains sunset clauses to ensure repeal at the earliest possible opportunity. This submission considers three issues: first, Executive overreach; second, the importance of safeguards on Executive law-making; and third, improvements to better protect human rights.

B. Recommendations

5. The Association makes eleven recommendations:

    i. rules governing NSW subordinate legislation should be consolidated in a single statute;

    ii. consideration should be given to creating a statutory requirement that a bill containing a Henry VIII clause, "shell legislation" or conferring regulation-making powers on matters generally considered inappropriate for delegated legislation must be accompanied by an explanatory report to the Parliament and Legislation Review Committee (**LRC**) outlining why such a drafting choice is necessary and appropriate;

    iii. provision should be made to allow Parliament to sit remotely to ensure appropriate scrutiny of legislation can continue during crises such as the COVID-19 pandemic;

    iv. further guidance should be issued on the use of Henry VIII clauses, "shell legislation" and matters that are generally inappropriate for delegated legislation;

[1] *ADCO Constructions Pty Ltd v Goudappel* (2014) 254 CLR 1, [31] (French CJ, Kiefel and Keane JJ).

v. a statutory Bill of Rights should be enacted for NSW to:

   a. require all legislation to be interpreted in accordance with Australia's international human rights obligations;

   b. provide for all proposed legislation and subordinate legislation to be scrutinised by Parliament against these standards;

   c. strengthen the mandate of the Parliament's LRC to carry out such scrutiny; and

   d. allow for a declaration that legislation is incompatible with such standards;

vi. consideration should be given to whether a Bill of Rights, if enacted, should permit striking down non-compliant subordinate legislation, unless the parent Act makes it impossible for compliance to occur;

vii. a parliamentary committee should be established to scrutinise whether legislation complies with relevant rights and freedoms (including those protected by the common law, the Constitution, a NSW Bill of Rights (if enacted), the seven principal United Nations (**UN**) human rights treaties, other rights treaties to which Australia is a party and the UN Declaration on the Rights of Indigenous Peoples);

viii. consideration should be given to requiring Ministers to adhere to a statutory framework similar to that provided by the *Legislative Standards Act 1992* (Qld) and Bills of Rights in Queensland, the ACT and Victoria. This could require Ministers to:

   a. actively consider the effect a statutory rule may have on rights and freedoms;

   b. provide to the LRC and table in Parliament with every piece of legislation an accompanying human rights assessment that identifies whether any relevant rights and freedoms may be encroached and whether that encroachment is necessary and proportionate to the legislation's purpose; and

   c. include a human rights impact assessment for consideration as part of any public notification or consultation on a proposed statutory rule;

ix. the Committee should consider, as part of its remit, underuse of disallowance motions and the adequacy of guidance available to Parliamentarians on delegated legislation;

x. consideration should be given to extending from four to six months the period in which a statutory rule disallowed by Parliament cannot be made validly made again;

xi. a reference should be made to the NSW Law Reform Commission to examine the extent and use of delegated legislative powers, undertake a comparative study of powers and safeguards in other jurisdictions, and suggest improvements to prevent overreach.

C. Executive overreach

6. The separation of powers doctrine provides important checks and balances on the three arms of government in NSW. The Legislature serves a critical role in publicly scrutinising and putting to proof laws proposed by the Executive. When the Legislature delegates its law-making function to the Executive, rules created are not subject to the same oversight and are therefore open to the risk of overreach, whether deliberate or unintentional, both of which undermine public confidence in the government.

7. The Terms of Reference (**TOR**) refer specifically to "shell legislation" and "Henry VIII clauses" as means by which Parliament may delegate its powers to the Executive. The term "shell legislation" refers to an Act of Parliament that usually has no substantive provisions, with the detail set out later in delegated legislation.[2] The term "Henry VIII clause" usually refers to a provision of an Act of Parliament that enables regulations to be made, or Executive action to be taken, that modifies the operation of the Act. Such clauses take their name from King Henry VIII who, under the 1539 Statute of Proclamations, was invested with the power to issue laws through Royal Proclamation without consulting Parliament.[3]

8. While the High Court has held that such provisions are not unlawful as long as Parliament retains the right to repeal or amend the primary statute,[4] it has nonetheless recognised that these have attracted criticism "for good reason".[5] There may be rare instances where delegated legislation may be advantageous,[6] such as when the law deals with rapidly changing or uncertain situations and requires flexibility and responsiveness that ordinary Parliamentary processes cannot provide. However, the Association considers these powers should only be used as a last resort and regulation replaced at the earliest opportunity with legislation considered and passed by the Parliament.

9. The Association notes the TOR's focus on "executive overreach". To assist the Committee, this submission identifies four working examples of legislation where concern has been raised over the use of Henry VIII clauses and wide-ranging powers.

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[2] D Pearce and S Argument, *Delegated Legislation in Australia* (2017, 5th ed) 11.

[3] The origins of such clauses are explained in a paper by Professor Douglas Whalan delivered at the Third Commonwealth Conference of Delegated Legislation Committees, Westminster, 1989. See also, Queensland Law Reform Commission, *Henry VIII Clauses* (Report No 39, 1990) 1.

[4] See eg, *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73; *Capital Duplicators Pty Ltd v Australian Capital Territory (No 1)* (1992) 177 CLR 248; *The Public Service Association and Professional Officers' Association Amalgamated of NSW v Director of Public Employment* (2012) 250 CLR 343; *ADCO Constructions Pty Ltd v Goudappel* (2014) 254 CLR 1.

[5] *ADCO Constructions Pty Ltd v Goudappel* (2014) 254 CLR 1, [31] (French CJ, Kiefel and Keane JJ).

[6] D Pearce and S Argument, *Delegated Legislation in Australia*, (2017, 5th ed) 6; see also D Hamer, *Can Responsible Government Survive In Australia?*, Department of the Senate (2004) 303.

Motor Accidents Scheme

10. The *Motor Accidents Injuries Act 2017* (NSW) (***MAIA***) illustrates the vast reach of Henry VIII clauses and their unprincipled use by the NSW Parliament. In 2016-17 the NSW Government decided to alter the legislation governing the recovery of damages in personal injury cases concerning motor vehicles. The Association made representations over an extended period opposing some of the proposed changes.

11. The change of most concern was the introduction of a threshold test for entitlement described as "minor injury". The Motor Accidents Scheme (**the Scheme**) provided for by the *MAIA* had both a statutory benefits stream and a damages stream. The Association was concerned that although technically the application of the concept might not disentitle claimants to benefits under the scheme, the practical impact of a draconian minor injury definition would be to lessen the likelihood of a claimant seeking legal advice, with the consequence that the general public would not be aware of their rights under law. Thus, while the minor injury test was overtly intended to lessen the cost of claims, the Association anticipated it would covertly lessen the number of claims.

12. The Scheme commenced on 1 December 2017. In the period that followed, up until the COVID-19 pandemic, the Association's concerns were realised as the Scheme significantly underperformed actuarial projections with fewer, smaller claims. The Association considers this underperformance is the product, directly and indirectly, of the minor injury definition and has consistently communicated with the State Insurance Regulatory Authority (**SIRA**) concerning SIRA's efforts to expand the minor injury definition by the use of regulation.

13. The minor injury concept in the *MAIA* has had an undesirable effect on the community. Injured motorists, pedestrians and cyclists are deprived of adequate compensation largely by the use of the minor injury definition. The minor injury notion is a gateway or threshold provision by which substantive legal entitlements are determined. A person's entitlement to benefits will therefore usually depend on whether his or her injury is minor or non-minor.

14. The Association has maintained for some time that it is grossly undesirable to permit SIRA or others, in place of the NSW Parliament, to determine where the threshold to entitlement is to be placed. Further, the Association considers it inappropriate for SIRA to be able to move the threshold from time to time by reference to its perception as to the level of claims attributable to a particular type of injury being undesirable.

15. While Rule of Law issues of concern arise in respect of all delegated legislation, the technique used in the *MAIA* is stark. Section 1.6 of the *MAIA* provides as follows:

    (1) For the purposes of this Act, a *minor injury* is any one or more of the following:

    (a) a soft tissue injury,

    (b) a minor psychological or psychiatric injury.

(2) A *soft tissue injury* is (subject to this section) an injury to tissue that connects, supports or surrounds other structures or organs of the body (such as muscles, tendons, ligaments, menisci, cartilage, fascia, fibrous tissues, fat, blood vessels and synovial membranes), but not an injury to nerves or a complete or partial rupture of tendons, ligaments, menisci or cartilage.

(3) A *minor psychological or psychiatric injury* is (subject to this section) a psychological or psychiatric injury that is not a recognised psychiatric illness.

16. Subsection (4), however, is problematic as it provides that:

The regulations may:

(a) exclude a specified injury from being a soft tissue injury or from being a minor psychological or psychiatric injury for the purposes of this Act, or

(b) include a specified injury as a soft tissue injury or as a minor psychological or psychiatric injury for the purposes of this Act.

17. This is compounded by subsection (5) which provides that "The Motor Accident Guidelines may make provision for or with respect to the assessment of whether an injury is a minor injury for the purposes of this Act (including provision for or with respect to the resolution of disputes about the matter by the Dispute Resolution Service)".

18. The *Guidelines* were "made" before the *MAIA* commenced.[7] Leeming JA has expressed the view that the *Guidelines* may not be delegated legislation properly so called.[8] This raises important considerations and implications for whether Parliament would ever have the opportunity to disallow the *Guideline*.

19. Before the *MAIA* commenced operation, the following amendment was also made through schedule 1 item 2 of the Motor Accident Injuries Amendment Regulation 2017:

Clause 4

Insert after clause 3:

4 Meaning of "minor injury" (section 1.6 (4) of the Act)

(1) An injury to a spinal nerve root that manifests in neurological signs (other than radiculopathy) is included as a soft tissue injury for the purposes of the Act.

(2) Each of the following injuries is included as a minor psychological or psychiatric injury for the purposes of the Act:

[7] See https://www.legislation.nsw.gov.au/regulations/2017-640.pdf

[8] *Ali v AAI Limited* [2016] NSWCA 110, [87] (Leeming JA).

1. (a) acute stress disorder,
2. (b) adjustment disorder.

> **Note.** See section 1.6 (5) of the Act in relation to the making of Motor Accident Guidelines for or with respect to the assessment of whether an injury is a minor injury.
>
> (3) In this clause *acute stress disorder* and *adjustment disorder* have the same meanings as in the document entitled *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)*, published by the American Psychiatric Association in May 2013.

20. As these demonstrate, regulations have been made which purport to amend substantive provisions of the *MAIA*.[9] The Association considers that these changes should have been more appropriately located in primary legislation subject to Parliamentary debate and scrutiny, as these directly affect the legal rights of vulnerable members of the community.

COVID-19 Legislation Amendment (Emergency Measures) Act 2020 (NSW)

21. While the Association acknowledges the exigencies of the COVID-19 pandemic, it consistently advocated to the Government that laws made in response to the public health crisis should be contained in primary, not secondary, legislation so these could receive full parliamentary scrutiny. This was especially important as the proposals directly impacted upon and restricted rights and liberties, including the right to a fair trial and the right of movement.

22. The *COVID-19 Legislation Amendment (Emergency Measures) Act 2020* (NSW) (***COVID-19 Act)*** contained unprecedented, broad regulation-making powers on a breadth of issues, which have led to the creation of a significant body of delegated legislation. The Association raised concern about the broad regulation-making powers contained in this legislation, maintaining that regulation for the sake of administrative convenience is never justifiable.

23. For example, schedule 1 item 1 of the *COVID-19 Act* inserted into the *Criminal Procedure Act 1986* (NSW) a new Division 5 titled "Regulation-making power for exceptional circumstances", which included a section 366 providing that:

> (1) The regulations under any relevant Act may provide for the following matters for the purposes of responding to the public health emergency caused by the COVID-19 pandemic—
>
> (a) altered arrangements for criminal proceedings, including pre-trial proceedings, provided for by an Act or another law,

[9] See https://www.legislation.nsw.gov.au/regulations/2019-49.pdf .

(b) altered arrangements for apprehended violence order proceedings, including provisional and interim orders, provided for by an Act or another law,

(c) matters relating to bail and sentencing,

(d) matters relating to the administration of sentences provided for by an Act or other law.

…

(3) Regulations made under this section—

(a) are not limited by the regulation-making power in a relevant Act, and

(b) may override the provisions of any Act or other law.

24. The Association strongly opposed any general regulation-making power to provide for altered arrangements for all legislatively-based criminal court trial and pre-trial procedures and matters relating to the administration of sentences. Such matters should be the province of Parliament.

25. In addition, the Association has advocated throughout the COVID-19 pandemic that any regulation enacted must contain appropriate sunset clauses, be repealed and be replaced if necessary with legislation scrutinised by Parliament at the earliest opportunity.

26. One reason put by proponents in favour of such regulation-making powers was the fact that the Parliamentary sittings were significantly disrupted during the pandemic. Parliament did not meet in April 2020 and at one time was not scheduled to meet again until August 2020 for Estimates, with a full resumption in September. Although more regular sittings have resumed, the Association recommends that provision should be made so that the Parliament can meet remotely if necessary, to ensure legislative scrutiny can continue in times of crisis. This would reduce reliance on law-making by regulation as both Houses would be available to debate and pass primary legislation and ensure disallowance could occur if unintended consequences arose. Many institutions have been able to conduct business remotely during the pandemic and it is possible for Parliament to do so.[10] If any constitutional amendment were required,[11] this should be considered.

Other examples

27. In the course of the LRC's review of the Emergency Services Levy Bill 2007 (NSW) (**the ESL Bill**), the LSC noted the presence of Henry VIII clauses that would:

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[10] See A Twomey, 'A virtual Australian parliament is possible and may be needed during the coronavirus pandemic', *The Conversation* (online) 25 March 2020 <https://theconversation.com/a-virtual-australian-parliament-is-possible-and-may-be-needed-during-the-coronavirus-pandemic-134540>.

[11] See ss 22I and 32 of the *Constitution Act 1902* (NSW); see also O'Dea, J, 'Why not a virtual Parliament? As Speaker, I don't want democracy halted by this virus', *Sydney Herald Morning* (online) 27 March 2020, which notes that amendments to the law in NSW may not be necessary for reasons similar to those given by A Twomey (see above n 10): <https://www.smh.com.au/national/nsw/why-not-a-virtual-parliament-as-speaker-i-don-t-want-democracy-halted-by-this-virus-20200326-p54e6x.html>

> Permit… regulations to amend Schedule 1, which means that the classes and relevant proportions of insurance that are subject to contributions can be determined by the Executive [; and,] insert… section 153 of the Fire and Emergency Services Levy Act, which [would] suspend […] certain key provisions of the Act during the postponement period, subject to the regulations. The section [viz. s 153] [would] also enable […] regulations to suspend a provision of another Act or regulation relating to the levy, or to further provide for the effect of a suspension or revocation.[12]

Notwithstanding the LRC's concerns that these Henry VIII clauses were "*contrary to the traditional Westminster democratic tradition of the legal primacy of Parliament*",[13] the ELS Bill passed without amendment.[14]

28. Concerningly, under section 44 of the *Drug Misuse and Trafficking Act 1985* (NSW), the Governor, acting under the advice of the Executive Council, may "*from time to time*" specify whether a substance is a "*prohibited drug*" and may amend the "*commercial quantity*" and "*indictable quantity*" of "*prohibited drug*", thus conferring on the Executive the power to create (indictable) offences and to determine the gravity of offences.

Improvements

29. The examples offered in this section are by no means exhaustive, however these illustrate concerns over Executive overreach into matters that in the Association's view should be legislated by Parliament. To minimise the risk of overreach of delegated legislation where it is used, the Association recommends that consideration should be given to requiring an accompanying explanatory report to be tabled to Parliament with any shell legislation or bill containing Henry VIII clauses to justify why it is necessary and appropriate to delegate such powers to the Executive, and why the purpose cannot be attained through a primary Act. While this would not prevent the enactment of Henry VIII clauses or "shell legislation", it would promote greater transparency and may dissuade members from sponsoring bills that overreach or relying on delegated legislation for convenience rather than necessity.

30. The Association notes that the resources and expertise of the NSW Law Reform Commission have never been brought to bear on the issue of Executive law-making powers.[15] If the Committee forms the view that this issue merits further investigation, the Association recommends that the Committee advocate for a formal reference to the Commission, including a thorough investigation of areas where "Executive government overreach" can be identified in the use of statutory rules and mechanisms to prevent such overreach.

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[12] Legislation Review Committee, *Legislation Review Digest*, No 40/56, Parliament of NSW, 3 August 2017, 19-20.

[13] Ibid, vi and 20.

[14] See C Angus, 'Delegated legislation: Flexibility at the cost of scrutiny?', NSW Parliamentary Research Service, e-brief, July 2019, 9.

[15] Cf The Queensland Law Reform Commission, which reported thirty years ago on the use of subordinate legislation in *Henry VIII Clauses* (Report No 39, 1990).

D. Strengthening safeguards on Executive law-making

31. Where regulation-making powers are used to create delegated legislation, it is important there are robust safeguards in place, in addition to judicial review, to prevent abuse of power. The examples outlined in section C of this submission suggest that stronger protections are required to prevent overreach of Executive lawmaking.

32. Safeguards in NSW are currently fragmented across the *Interpretation Act 1987* (NSW) (***Interpretation Act***), *Subordinate Legislation Act 1989* (NSW) (***Subordinate Legislation Act***) and *Legislation Review Act 1987* (NSW) (***Legislation Review Act***), which are considered in turn in this section. By contrast, Commonwealth protections are contained in the *Legislation Act 2003* (Cth). The Association recommends that consolidating existing rules concerning secondary legislation into a single statute would reduce confusion and improve clarity.

The Interpretation Act

33. The *Interpretation Act* contains three safeguards that seek to prevent Executive misuse of delegated law-making powers.

34. First, the *Interpretation Act* requires that a statutory rule must be published on the NSW legislation website[16] and commences on the day of publication on the website unless a later date is specified in the regulation itself.[17] This promotes the Rule of Law by ensuring the public is aware of and able to obey laws affecting them.

35. Second, the *Interpretation Act* requires written notice of the making of a statutory rule to be laid before each House of Parliament within 14 sittings days of that House after the day on which it is published on the NSW legislation website.[18] Theoretically, this gives Parliament the opportunity to scrutinise the statutory rule. The notice must identify the Act under which the statutory rule is made, a requirement that may assist parliamentarians to establish whether the rule is within the power to legislate conferred on a minister by the enabling Act.[19]

36. Third, the *Interpretation Act* provides that either House of Parliament may resolve to disallow a statutory rule at any time before written notice of it is laid before the House or at any time after the relevant written notice is laid before the House, but only if notice of the resolution was given within 15 sitting days of the House after the relevant written notice was so laid.[20] On the passing of such a motion, the rule ceases to have effect.[21]

37. These second and third protections can only operate effectively if the Parliament is sitting. If Parliament is not sitting for a lengthy period, this means that a problematic piece of delegated

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[16] Section 39(1)(a) of the *Interpretation Act.*
[17] Section 39(1)(b) of the *Interpretation Act.*
[18] Section 40(1) of the *Interpretation Act.*
[19] Section 40(3) of the *Interpretation Act.*
[20] Section 41 of the *Interpretation Act.*
[21] Section 41(2) of the *Interpretation Act.*

legislation may continue to operate for an unacceptably long period. It may be many months before a regulation is laid before Parliament for the disallowance period to commence.

38. The recent suspension of Parliament in response to the COVID-19 pandemic illustrates this point. There appears to be no way to move disallowance when Parliament is not sitting, which further illustrates the importance of ensuring measures are in place to allow the Parliament to continue to sit, even during times of crisis, to ensure disallowance can occur if required, such as if unintended adverse consequences arise in practice.

39. The Association notes that while the power to disallow a tabled statutory rule under the *Interpretation Act* represents Parliament's ultimate control over executive law-making, that power is rarely exercised. Between 1995 and 2018, only 158 disallowance motions were moved in the NSW Parliament, with only 20 motions resulting in an agreed disallowance.[22] Accordingly, the Association suggests that the Committee should, as part of its remit to investigate "*trends or issues that relate to regulations*", consider both the underuse of disallowance motions as a means to control executive law-making and the suitability of guidance provided to parliamentarians on delegated legislation.

The Subordinate Legislation Act

40. The *Subordinate Legislation Act* concerns itself with how "*statutory rules*"[23] should be prepared prior to being submitted to the Governor. Sections 4 to 7 provide six safeguards, additional to those in the *Interpretation Act,* to prevent executive overreach in delegated legislation.

41. First, to ensure that regulations are appropriately drafted, the Minister responsible for a secondary instrument must adhere to the guidelines for the preparation of regulations,[24] the non-exhaustive requirements of which include that:

    (a) the "economic and social costs and benefits" of any proposed statutory rule should be taken into account and given due consideration;

    (b) the objectives and reasons for the statutory rule:

    - are "reasonable and appropriate";
    - "accord with the objectives, principles, spirit and intent of the enabling Act"; and
    - are "not inconsistent with the objectives of other Acts, statutory rules and stated government policies";

    (c) "alternative options for achieving a statutory rule's objective" must be considered, including "the option of not proceeding with any action"; and

[22] C Angus, 'Delegated legislation: Flexibility at the cost of scrutiny?', NSW Parliamentary Research Service, e-brief, July 2019.

[23] Defined under section 3 as regulations, by-laws, rules or ordinances save for a scheduled list of exempted instruments ranging from parliamentary Standing Orders and court rules to regulations and by-laws promulgated under enabling acts ranging from the *Constitution Act 1902* (NSW) to the *Wellington Showground Act 1929* (NSW).

[24] Section 4 of the *Subordinate Legislation Act*.

(d) the statutory rule "is expressed plainly and unambiguously".

42. Second, the *Subordinate Legislation Act* provides that the public should be informed of proposed statutory rules through notices published in the Gazette and a daily newspaper and should be invited to make comments on the draft secondary legislation.[25] Third, interested parties should be consulted on the regulation's contents and any stakeholder submissions appropriately considered.[26] Fourth, unless exempted,[27] statutory rules ought also to be accompanied by a Regulatory Impact Statement (**RIS**), which must include an assessment of the costs and benefits of the proposed statutory rule, including relating to resource allocation, administration and compliance.[28] Fifth, to protect the integrity of the vice-regent power and to operate as a residual constitutional safeguard before a statutory rule is approved, the responsible Minister must certify whether or not, in his/her opinion, the obligations under the *Subordinate Legislation Act* have been discharged and must also provide to the Governor a copy of the Attorney General's or Parliamentary Counsel's advice as to whether a proposed regulation may legally be made.[29]

43. Importantly, adherence to the guidelines and compliance with notification, consultation and RIS requirements is not necessary, however, if it is not "*reasonably practicable*" to do so.[30] Moreover, a RIS need not be provided if, for instance, the responsible Minister certifies in writing that, in his or her opinion in the special circumstances of the case, the public interest requires that the proposed statutory rule should be made without a RIS.[31]

44. There is no legal consequence for Ministers who fail to adhere to the guidelines, comply with notice and consultation requirements, produce a RIS or provide the necessary certificates and opinions to the Governor. A statutory rule can be made in defiance of all of the obligations listed in sections 4 to 7 of the *Subordinate Legislation Act* and nevertheless remain valid.[32]

45. Only the sixth safeguard – the disallowance rule – can result in the invalidation of a secondary instrument. In recognition of parliamentary sovereignty, section 8 of the *Subordinate Legislation Act* prohibits the making of a statutory rule that is the "*same in substance*" as a previously disallowed instrument within four months of the disallowance "*unless the resolution* [of disallowance] *has been rescinded by the House of Parliament by which it was passed*". Section 8 provides an essential bar to the Executive subverting Parliament's power of disallowance by repeatedly tabling the same statutory rule, which would be effective until disallowed only to be immediately remade.

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25 Section 5 of the *Subordinate Legislation Act.*

26 Section 5(2)(b)(c) of the *Subordinate Legislation Act.*

27 See section 6 of the *Subordinate Legislation Act.*

28 Schedule 2[1] to the *Subordinate Legislation Act.*

29 Section 7 of the *Subordinate Legislation Act.*

30 See sections 4(1), 5(1) and 5(2) of the *Subordinate Legislation Act.*

31 See section 6 of the *Subordinate Legislation Act.*

32 Section 9(1) of the *Subordinate Legislation Act.*

46. By contrast, notwithstanding the shorter election cycles at the Commonwealth level than at the NSW level,[33] secondary legislation that is the same in substance as a previously disallowed legislative instrument is of "*no effect*" under the *Legislation Act 2003* (Cth) if made within six months of the disallowance without the relevant House's approval.[34]

47. The *Subordinate Legislation Act* is largely concerned with the legitimacy rather than the strict legality of statutory rules. Failure to adhere to the majority of the *Subordinate Legislation Act*'s transparency provisions and safeguards will not render a statutory rule of no effect and would not be a basis upon which to challenge a regulation's lawfulness. Ministerial compliance with drafting, notice, consultation, report and certification "requirements" is more a matter of comity between the executive and legislature rather than an enforceable obligation that is subject to judicial supervision and invalidation – a question, therefore, of politics, not of law.

48. There is, however, nothing to prevent the legislature ensuring that an enabling Act is drafted so as to make the validity of a secondary instrument dependent on compliance with some or all of the requirements under sections 4 to 7 of the *Subordinate Legislation Act* or to oblige a responsible minister to adhere to any other procedural requirements before a regulation can lawfully be made.[35]

49. The Association notes that statutory guidance in Queensland on the making of legislation (including delegated legislation) goes significantly further. Sections 4, 7 and 24 of the *Legislative Standards Act 1992* (Qld), which detail the functions of Queensland Parliamentary Counsel, including advice to ministers on "*fundamental legislative principles*" and the need for explanatory notes accompanying secondary legislation to confirm whether those principles have been adhered to and, if not, the reasons for any inconsistencies. Subsection 4(1) of the *Legislative Standards Act 1992* (Qld) defines "*fundamental legislative principles*" as the "*principles relating to legislation that underlie a parliamentary democracy based on the rule of law*", with subsections 4(2) and (3) confirming that:

> (2) The principles include requiring that legislation has sufficient regard to—
>
> > (a) rights and liberties of individuals; and
> >
> > (b) the institution of Parliament.
>
> (3) Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation—
>
> > (a) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and

[33] Three years in the House of Representatives compared with four years in the Legislative Assembly; six years in the Senate compared with eight years in the Legislative Council.

[34] Section 48 of the *Legislation Act 2003* (Cth).

[35] Section 9(2) of the *Subordinate Legislation Act* recognises the legislature's power to incorporate into enabling acts procedural requirements that may affect the validity of executive law making.

(b) is consistent with principles of natural justice; and

(c) allows the delegation of administrative power only in appropriate cases and to appropriate persons; and

(d) does not reverse the onus of proof in criminal proceedings without adequate justification; and

(e) confers power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer; and

(f) provides appropriate protection against self-incrimination; and

(g) does not adversely affect rights and liberties, or impose obligations, retrospectively; and

(h) does not confer immunity from proceeding or prosecution without adequate justification; and

(i) provides for the compulsory acquisition of property only with fair compensation; and

(j) has sufficient regard to Aboriginal tradition and Island custom; and

(k) is unambiguous and drafted in a sufficiently clear and precise way.

50. The Association suggests NSW would benefit from more fulsome guidance. Standards laid out in subsections 4(2) and (3) of the *Legislative Standards Act 1992* (Qld) pre-date the *Human Rights Act 2019* (Qld) and have not been amended since coming into force. Adopting similar principles in NSW could occur without first requiring a Bill of Rights, although as outlined below the Association considers this would be a welcome protection.

The Legislation Review Act and the Legislation Review Committee

51. In addition to statutory protections, Parliamentary oversight of delegated legislation in NSW is further enhanced by the LRC, a joint committee of members of Parliament that reviews all regulations while they are subject to disallowance to determine whether the special attention of Parliament should be drawn to any such regulation on any ground.[36] Relevant to the LRC's scrutiny of statutory rules are the requirements under the *Subordinate Legislation Act* that RISs and submissions made by interested parties must be sent to the LRC.[37]

52. The LRC is not, however, provided a statutory list of personal rights and liberties to refer to and no mention is made in the *Legislative Review Act* of NSW's obligations under international human rights instruments. There are limitations on the effectiveness of the LRC's oversight

[36] Section 9 of the *Legislative Review Act*.

[37] Section 5(4) of the *Subordinate Legislation Act*.

and scrutiny functions, including workload and resourcing. While more than 300 statutory rules were tabled in 2018, the LRC reviewed 21.[38]

53. The LRC's power to review regulations also appears to be limited by section 9(1) of the *Legislation Review Act* to consideration of regulations during the time they "*are subject to disallowance by resolution of either or both Houses of Parliament*".[39] This reflects the focus of the LRC's remit to review the process of law-making, covering bills before they are passed into law and delegated legislation in the period after they are made and before the time for Parliamentary review and possible disallowance has expired.

54. These limitations on the LRC's remit to review statutory rules mean that if problems in the operation of delegated legislation emerge after the disallowance period, the LRC may not be able to report on the matter. Often, the disallowance period will prove to be too short to allow for the effective assessment of a statutory rule's operation in practice.

The Legislative Council Regulation Committee

55. The limitations on the LRC's ability to review a sufficient number of regulations in detail is likely due to its remit, which covers both bills and statutory rules.[40] Prior to the creation of the LRC in 2003, all secondary instruments were reviewed either by a joint committee (between 1987 and 2003) or a Legislative Council committee (between 1960 and 1987). The Association notes that the Legislative Council's Regulation Committee trial creation in 2017 represents the first time since 2003 that a Parliamentary committee has been established solely to scrutinise delegated legislation.

56. A standing committee since May 2019,[41] the Committee's remit goes beyond that of the LRC and includes "*the policy or substantive content of a regulation*" and "*trends or issues that relate to regulations*". However, while the Committee has a wider remit than the LRC, there remains a lacuna in the scrutiny of regulations by parliamentary committees in NSW. There is no express requirement under its founding resolution that this Committee inquire into a regulation's compatibility with the State's obligations under international human rights instruments.

Non-statutory guidelines

57. Guidance on the preparation of statutory rules and RISs is also provided by the *NSW Ministerial Handbook* and its annexure *Guide to Better Regulation*.[42] However, no guidance is available to Ministers as to how to assess the non-economic impact of regulations,[43] nor are examples of matters more suited to primary rather than secondary legislation provided.

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[38] See C Angus, 'Delegated legislation: Flexibility at the cost of scrutiny?', NSW Parliamentary Research Service, e-brief, July 2019, Figures 2 and 4.

[39] Cf subsections 9(1A) and 9(2) of the *Legislation Review Act.*

[40] Section 8A of the *Legislation Review Act.*

[41] D Harwin, Regulation Committee, *NSW Hansard*, 8 May 2019.

[42] NSW Department of Premier and Cabinet, *NSW Government Ministerial Handbook*, June 2011, 40-43 and annexure I; see also Treasury, *NSW Government Guide to Better Regulation* (2019, 19-01).

[43] Cf Treasury, *NSW Government Guide to Better Regulation* (2019, 19-01) 13.

58. By contrast, to assist Commonwealth ministers, the Department of Prime Minister and Cabinet's *Legislation Handbook* provides guidance on matters that may be more suitable for primary legislation and lists provisions that are generally implemented only through Acts of Parliament:

> (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);**
>
> …
>
> (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); and
>
> (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)** [emphasis added].[44]

59. The Association recommends that further guidance should be issued in NSW, whether statutory or non-statutory guidance, on the use of Henry VIII clauses, "shell legislation" and matters that are generally inappropriate for delegated legislation.

[44] Department of Prime Minister and Cabinet, *Legislation Handbook* (Commonwealth of Australia, 2017) [1.10].

E. Improvements to better protect human rights

60. The Association has previously submitted that Parliamentary scrutiny of legislation in NSW, including delegated legislation, should be strengthened to include assessments of compatibility with human rights. The Association made a detailed submission to the LRC's 2017 inquiry into the *Legislation Review Act*,[45] including recommendations that the LRC:

    a. adopt an explicit statement of the human rights against which its scrutiny of bills and delegated legislation was conducted; and

    b. add content to the generally worded criterion of considering whether a bill or regulation "trespasses unduly on personal rights and liberties",[46] since this phrase is vague and does not always involve the consistent application of a stated list of human rights.

61. These recommendations were not adopted.

62. The Association considers that enacting a Bill of Rights could serve as an important protection and supports the introduction of a statutory Bill of Rights for NSW to:

    a. require all legislation to be interpreted in accordance with Australia's international human rights obligations;

    b. provide for all proposed legislation and subordinate legislation to be scrutinised by Parliament against these standards;

    c. strengthen the mandate of the Parliament's LRC to carry out such scrutiny; and

    d. allow for a declaration that legislation is incompatible with such standards.

63. The Association encourages the Committee to consider the benefits that a Bill of Rights could bring to the drafting, use and scrutiny of secondary legislation in NSW and to consider the treatment of delegated legislation in comparable common law jurisdictions that have adopted a "dialogue-model" for the protection of human rights.[47]

64. Further, the Association suggests consideration should be given to whether a Bill of Rights, if enacted, should permit a court to strike down or invalidate non-compliant secondary legislation as *ultra vires*, as is possible under the *Human Rights Act 1998* (UK). The *Human Rights Act 1998* (UK) permits courts to strike down or set aside statutory instruments that are incompatible with the *European Convention on Human Rights* unless the terms of the enabling Act making compliance with the Convention impossible.[48]

65. Parliamentary scrutiny of legislation and delegated legislation against human rights standards in NSW is less robust and human rights-focused than in other Australian jurisdictions. As a

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[45] New South Wales Bar Association, *Submission to NSW Parliament's Review of the Operation of the Legislation Review Act 1987* (1 December 2017); Transcript of Evidence by the Association to the Committee, 21 May 2018, 17-24.

[46] *Legislation Review Act* s 8A(1)(b)(i) (in relation to bills), s 9(1)(b)(i) (in relation to regulations).

[47] Including Queensland, the Australian Capital Territory, Victoria, New Zealand and the United Kingdom.

[48] Section 3(2)(c) of the *Human Rights Act 1998* (UK); see also *Rights Brought Home: the Human Rights Bill*, White Paper, October 1997, [2.13].

result of adopting statutory charters of rights, the Australian Capital Territory, Victorian and Queensland Parliaments now have provision for the explicit review by parliamentary committees of primary and delegated legislation against the human rights standards set out in their charters of rights. At the Commonwealth level, the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) established the Parliamentary Joint Committee on Human Rights, which has the mandate to review bills, delegated legislation and in some cases Acts for compatibility with seven principal UN human rights treaties to which Australia is party.

66. The Association considers that the LRC's role should include the examination of proposed and existing delegated legislation to assess its compatibility with internationally guaranteed human rights binding on Australia. The Association therefore recommends that Parliament amend the LEC's terms of reference to permit it to:

    a. explicitly scrutinise delegated legislation for compatibility with the seven principal UN human rights treaties as well as other international human rights treaties to which Australia is party, the United Nations Declaration on the Rights of Indigenous Peoples and other international instruments;

    b. take up concerns about compatibility with the responsible Minister before drawing a matter to the attention of Parliament and to report to the Parliament the Minister's response to the concerns raised by the Committee;

    c. review the operation of existing delegated legislation in light of human rights standards either on its own motion or on referral by the Attorney General;

    d. consider any national or international decisions in which the court or other adjudicatory body has found that NSW delegated legislation is inconsistent with international human rights standards and to make recommendations as appropriate on necessary changes to ensure compliance with international standards; and

    e. consider any recommendations made by international human rights bodies on the consistency of NSW delegated legislation with relevant international standards.

Conclusion

67. Thank you again for the opportunity for the Association to comment on this important matter. The Association would be pleased to assist the Committee with any questions it may have, through oral or further written submissions. Please contact the Association's Director of Policy and Public Affairs, Ms Elizabeth Pearson, at if you would like any further information or to discuss this submission.