REPORT ON PROCEEDINGS BEFORE

REGULATION COMMITTEE

INQUIRY INTO MAKING OF DELEGATED LEGISLATION IN NEW SOUTH WALES

CORRECTED

At Preston-Stanley Room, Parliament House, Sydney, on Monday 27 July 2020

The Committee met at 9:30

PRESENT

The Hon. Mick Veitch (Chair)

Ms Abigail Boyd (Deputy Chair)
The Hon. Greg Donnelly
The Hon. Scott Farlow
The Hon. Sam Farraway

PRESENT VIA VIDEOCONFERENCE

The Hon. Catherine Cusack

The CHAIR: Welcome to the hearing for the Regulation Committee inquiry into the making of delegated legislation in New South Wales. The inquiry is examining the extent to which the Parliament has delegated power to make delegated legislation to the Executive Government and the use of delegated legislation-making power including any instances of Executive Government overreach. Before I commence I would like to acknowledge the Gadigal people of the Eora nation, who are the traditional custodians of this land, and I pay my respect to Elders past and present of the Eora nation and extend that respect to other Aboriginal people present.

At today's hearing we will hear from legal peak bodies, a legal academic and the NSW Council for Civil Liberties and we will conclude with something that is a little rare: we are going to have the NSW Parliamentary Counsel's Office before us under oath. There are a whole lot of questions I know we would like to ask but we will not be allowed to. Before I commence I would like to make some brief comments about the procedures for today's hearing. While Parliament House is closed to the public at this stage, today's hearing is a public hearing and is being broadcast live via the Parliament's website. A transcript of today's evidence will be placed on the Committee's website when it becomes available.

All witnesses have a right to procedural fairness according to the procedural fairness resolution adopted by the House in 2018. There may be some questions that a witness could only answer if they had more time or with certain documents to hand. In these circumstances witnesses are advised that they can take the question on notice and provide an answer within 21 days. Witnesses are also advised that any messages should be delivered to Committee members through Committee staff. To aid the audibility of this hearing, I remind both Committee members and witnesses to speak into the microphones. Finally, could everyone please turn off their mobile phones or turn them to silent for the duration of the hearing.

ANDREW JOHN CHALK, Chair, Public Law Committee, Law Society of New South Wales, sworn and examined

MICHAEL McHUGH, Senior Vice President, New South Wales Bar Association, affirmed and examined

The CHAIR: Would either of you like to make a short opening statement that would assist the proceedings today?

Mr CHALK: Thank you, Chair. I have not prepared a written statement but there are just a few brief comments that I would like to make. Firstly, on behalf of the Law Society we certainly thank the Committee for the opportunity to speak to you this morning. We congratulate the Committee on holding this inquiry and commend it for the very important work that we believe it does. I think, certainly looking at the submissions that have been made to both this inquiry and also a similar inquiry run by the Senate recently, there is universal recognition of the importance of the parliamentary committee's role in scrutinising delegated legislation. I think it is fair to say that there is also acceptance that delegated legislation, which is really voluminous and is only likely to increase in the future despite the pandemic—in fact, obviously, the pandemic provides many extreme examples, if you like, of delegated legislative power—in a globalised world that is moving so quickly and is confronted with new technologies and complexity that we have not known in previous ages there will be, we think, an inevitable rise in the use of delegated legislation as a means of proposing and promulgating laws and supervising the administration of our societies.

But with that, obviously there are significant risks, and these have been pointed out by any number of both academic authors and professional authors and, in particular, the risk of the sovereignty of the Parliament and the constitutional mechanisms that we have to ensure that the people have a voice in how they are governed and the risks of that being undermined through inappropriate delegation of legislative power. Even within that it is often, as the courts have noted, sometimes very difficult to distinguish between what is legislation and what is administrative action, and again that is where the Parliament has a critical role in managing our system of law-making, even where the Parliament itself has delegated some of those powers. In some ways it is the very convenience and efficiency of regulation-making that also carries its risk that it is much easier to sit down with parliamentary counsel and draft up something you run by the Minister than having to negotiate it through particularly upper Houses that are not necessarily controlled by the Government, and it is that temptation to take the easy path that can sometimes be dressed up as necessity that does present a risk for how we make laws.

But, having said that, there is absolutely no doubt that our Parliaments are generally very pressed for time, that the complexity of legislation means that the timetable is already fairly full and that there is often the need for laws to be made very, very quickly and to respond to issues that have not been foreseen when the statutes were originally drafted. The Law Society is certainly not for a second suggesting that there is not a very appropriate place for regulations and even regulations that are made with quite extensive delegated power. One comment I would make—I do not mean to take up too much time here—is that it is often assumed that because the substantive policy issues are in theory addressed in the statute and the procedural, mechanical aspects are left to delegated legislation, that that is a sufficient approach, if you like, to safeguarding the interests of the public.

The comment that I would make there is that so often the manner in which rights can actually be exercised or protected depends almost entirely on procedure and what in one circumstance may be a procedure that is designed to achieve fairness can easily be turned into a situation where it causes or aggravates injury or is used abusively to harm the interests of individuals. I do not know that the distinction between substantive policy in the statute and mere procedure or mechanics is necessarily a safe demarcation if the overall objective is to ensure and protect the rights of the citizens of the State and the Parliament's constituents.

There are two last comments I would make. The first is that I think the mere existence of a regulation committee or a system of scrutiny within the Parliament of delegated legislation has a very significant deterrence effect on abusive uses of delegated powers. Just as the existence of integrity bodies like ICAC will not necessarily pick up all instances of corruption by any means, its existence serves as a very important and significant deterrent; so, too, the ability of a parliamentary committee whose sole focus is on how regulations are made, how they sit within the powers conferred by the Parliament. I think that goes a long way to providing a very significant safeguard within the system.

The other comment that I would make is that I think there is a danger in trying to propound rigid rules around what a regulation should or should not encompass, or what is an appropriate delegation of legislative power; that the circumstances with which the Parliament has to deal, with which the Government has to deal, are so broad these days that it is simply not possible, I think, to envisage in advance all of the circumstances that may

cover the delegation of legislative power. The pandemic provides a very clear example of that problem. There are, obviously, many views that exist within the society about the appropriateness of the response but I do not think anyone would disagree that the need for an extremely urgent response was necessary. For all its extraordinary values, speed is not always one of the Parliament's defining features. I think it is illustrative both of very wide powers but also in circumstances where there is obviously a very serious justification for them. I would leave my opening comments at that.

The CHAIR: Thank you. Mr McHugh?

Mr McHUGH: Thank you, Chair. Thank you, all, for the opportunity to attend and appear and seek to contribute before this important inquiry. And this is an important inquiry. The Chair referred nonchalantly to it being a bit nerdy. Look, it is but the devil is in the detail, or it certainly may be in the detail here, and that is what this Committee is looking at—is there Executive overreach or is the possibility there? And we say it is clearly there, at least the possibility, and we have been concerned about these sorts of Henry VIII clauses and the use of shell clauses regulation in place of primary legislation. We have been concerned about it—that is, the bar—for a very long time as, indeed, has the Law Society.

You have the benefit of some very excellent submissions from a range of people, including Parliamentary Counsel who, personally, I hold in the highest esteem as lawyers. There is a theme that runs through these submissions and that is a recognition that some of the detail has got to be dealt with in this sort of delegated legislation, subordinated legislation—fair enough—but that there needs to be proper oversight and that is a real concern. The Law Society has identified that there are gaps. Indeed, our submission has identified that as well—that there are gaps in this Committee's and other committees' purview. The submissions from Parliamentary Counsel and others also talk about some sort of general oversight or some sort of an explanatory memorandum so when legislation comes up it explains these are the circumstances in which this may be used. That is really important because Parliament should have this oversight.

It is the circumvention of these ordinary processes of parliamentary scrutiny and debate which occurs once this goes off to the Executive—and I will give you some examples, probably a bit later on, where that has occurred—which has been surprising. That is my characterisation, but it is a worry. When you speak to laypeople about this subject, they say, "Well, that can't be right. Parliament makes the laws." Well, it is not. We say wherever possible Parliament should avoid a regulation-based approach and ensure substantive matters are dealt with in the principal legislation. Of course, extenuating circumstances do arise and appropriate safeguards must be in place to ensure the regulation does not impermissibly erode human rights. You would have seen our submission speak of—we are running our bill of rights agenda again. Here is not the time and place for that but it is a consistent theme—that this sort of legislation, delegated legislation, ought to be checked, as, indeed, all legislation should be, against what are internationally agreed human rights. The Law Society's submissions refer to seven core principles which we would support as well.

There needs to be appropriate safeguards in place and it has got to be subject to appropriate scrutiny by this and other committees and it must contain real sunset clauses to ensure repeal at the earliest possible opportunity. The COVID regulations are a good example of that. Those sunset clauses are there. They may need to be extended but at least they are there. To assist this inquiry we have made 11 comprehensive recommendations in our written submissions. I will not repeat those now but one of our urgent recommendations is that provision should be made to allow Parliament to sit remotely to ensure appropriate scrutiny of legislation can continue during such crisis as we are experiencing now. Second, the association considers a statutory bill of rights should be enacted—I have mentioned that—and it should provide for all proposed legislation and subordinate legislation to be scrutinised by Parliament against these standards.

Third, we consider a raft of measures should be implemented to bolster the scrutiny of regulations and those would include issuing guidance on the use of Henry VIII clauses, shell legislation and so on. And that theme—that is, having guidance on the use of this—is through all of the submissions, I think. We also say the consolidation of the rules governing subordinate legislation should come into a single statute. That is in our submissions as well. And then, lastly, giving consideration to the statutory requirement that a bill containing a Henry VIII clause, or conferring regulation-making powers on matters that are inappropriate for delegated legislation, must be accompanied by an explanatory report to the Parliament and Legislation Review Committee, outlining why that drafting choice is necessary and appropriate. Lastly, establishing a parliamentary committee to scrutinise whether legislation complies with relevant rights and freedoms. Here we are before such a committee, but with that focus on looking at relevant rights and freedoms and making it properly resourced as well.

You are all busy people. There is a lot of material. I think this Committee looked at a dozen or so matters of particular delegated legislation last year, in all the thousands that are out there, and that is no criticism, but

clearly you need to be properly resourced. When you think about it, this Committee's work is right at the heart of what Parliament is about: the separation of powers. You have the judiciary, the legislature and the executive, and those last two can often merge. There can be a real problem with that, and that is the problem that this Committee is addressing now, particularly for the crossbenches and for the Opposition, and you are all opposition at some point, so that moves around. We also applaud the bipartisan approach that this Committee has shown in the past and no doubt will continue to do. That is the opening. I am happy to assist. I am no expert in this area, but I have my views about the separation of powers.

The CHAIR: I would like to explore some of those views. The way things will operate here today will be a bit more conversational because of the subject matter and the importance of the topic, and I know people want to pick up off each other's questions, so just be aware that that is how it is going to roll. I have a couple of questions to start, if I could. Firstly, I am after greater detail, if you could just flesh out, Mr McHugh, what you mean by the explanatory memorandum. If I could put that in context, as someone who has led the Opposition on a number of substantial bills in the last five or six years, there has been more than one occasion where I have said to the Minister across the table, "You have to explain to us what this is; you cannot just say 'Accept this in good faith, it is all going to be okay on the day'."

If there had been an explanatory memorandum, in my mind I have an idea of what it would look like. It may well have assisted the debate and may well have facilitated a shortening of the debate in the Chamber as well. Can you explain what you would envisage would be contained within an explanatory memorandum?

Mr McHUGH: Yes. As I say, it ought to set out what are the reasons for this. I mean what I said earlier had a characterisation in it that it was for inappropriate delegated legislation, so that is a conclusion, but often you will not know at the time. Legislation comes before you and there are savings and transitional provisions, and those have been used to real effect, affecting rights, so it would not always be clear to what use this delegated legislation can be utilised. That is why it ought, to the greatest extent possible—and we realise that circumstances change—outline why that drafting choice is necessary and appropriate. We at the Bar go to court, lawyers go to court, all day and every day, and we look at a statutory construction argument. We look at an Act and we say, "What does that mean?" It is not very clear to us.

We are allowed to look at extrinsic material, such as explanatory memoranda or second reading speeches, and they are often very helpful, but they may not be, and that is I think reflective of the Chair's concern a moment ago that you can ask the Minister for further clarification. What I think the Bar is looking for, and indeed many of the other submissions, is an explanation why that drafting choice is necessary. Why does a substantive matter need to go into delegated legislation? That is when it would be across the border into inappropriateness, when the delegated legislation can look at substantive matters or matters of policy, and we have some examples in workers compensation and motor accidents where, in effect, bureaucrats are issuing guidelines as to what minor impairment is. None of us wants to pay too much for our car insurance and so on, and Parliament is to be congratulated on reducing that in many respects, but there is a cost there, there is a balance.

That is fair enough, the people have voted for it, but you would not leave it in the hands of bureaucrats to decide who gets compensated and who does not. But—and these are my words—that is in effect what is happening now with the definition of "minor impairment". What is included and what is excluded is left to the executive or their bureaucrats, and that is very unsatisfactory. Explaining that to an injured person who has got a real injury—"Sorry, you don't qualify"; "What do you mean I don't qualify"; "There is a table of guidelines, a threshold, and you don't meet it." If the executive wants to put forward legislation such as that, which will give that sort of power, it needs to explain why. This is about transparency, and that is a theme that runs through the submissions as well.

The CHAIR: Your submission also has a recommendation that suggests that the final report of this Committee be referred to the New South Wales Law Reform Commission for comment.

Mr McHUGH: And more. That has never happened. This Committee has a history going back to I think the Second World War or its predecessors, but the subject of delegated legislation has never been to the New South Wales law commission, or at least that is what my notes say, which I will accept, so it would undertake a comparative study of powers and safeguards in other jurisdictions. There is no upper House in Queensland, but at least they have instituted some of these protections because the executive, without an upper house, could really—and there have been examples of it in the past, of course—go outside their remit, so there are now protections in a lot of other jurisdictions, not just talking about bills of rights and ACT, Victoria and now Queensland, but powerful committees such as this one, and now in the Commonwealth, with real review powers, and reviewing against a set of guidelines.

The bill of rights is probably a step too far, but those sorts of rights and freedoms should be looked at when legislation comes into Parliament. We are suggesting that the Law Reform Commission examine the extent and use of delegated legislation, undertake a comparative study of the powers and safeguards in other jurisdictions and suggest improvements to prevent overreach. We are not suggesting that this Committee cannot fulfil its terms of reference, but it does not have the resources of the New South Wales Law Reform Commission and with a referral—this is obviously an ongoing area—we think it should continue.

The CHAIR: Part of the process here, as you are probably aware, is that once the report is tabled the Government of the day has 26 weeks to respond to the report and its recommendations. If we were to recommend that the report be referred in such a manner, and I gather it would be the Attorney General on behalf of the whole of government response, it could be a further six months before the report is then referred. A mechanism may well be that, upon tabling in the House, we craft a resolution that it be tabled and at the point of tabling the House itself refers it to the Law Reform Commission as opposed to the Government. I am just trying to think of a mechanism that would expedite the response. What are your views on those suggestions?

Mr McHUGH: They sound practical, which is important, and we would commend it. As I say, this is an ongoing difficulty. There is more and more subordinate legislation every day of the week and it is something that we believe that the New South Wales Law Reform Commission is perfectly positioned to look at. Again, I stress that I am not suggesting this Committee is not, but this Committee ought to have more resources. You have a timetable, you have a deadline, and that could be one of the recommendations because, as you look into this, you will see you may not have time to explore what other jurisdictions are doing, although I see there are submissions here from interstate. It is an important area and it is an ongoing area of reform.

The CHAIR: Mr Chalk, your views?

Mr CHALK: I think explanatory memorandums are very interesting devices. I'm not aware of them being produced for regulations but they do serve a useful function as far as the bells go and in particular, they are often a plain English version of the Minister's understanding of what the legislation is meant to do. So, it provides a reference point at least for what the Government or the person introducing the bill thinks this is what is achieved by the actual words in the bill. Very often they are wrong and I think increasingly you see an approach to explanatory memorandum where they almost end up repeating the words of the bill itself to avoid inconsistencies. But where you have got complex topics, I think it is very helpful for parliamentarians to have essentially a plain English version of what, usually the Government, is intending to achieve by introduction of the legislation.

The equivalent at a regulation level is the regulatory impact statement, which has a wider function. It comes back to more of what Mr McHugh was suggesting, which is what are the objectives of this regulation? What are the choices that have gone into going this way as against another way. That is largely an internal document within the Government rather than something that ever is presented to the Parliament. I think there was potentially a lot of value in having regulatory impact statements in a form that not only explains what the regulation is intended to achieve but the choices that went into how it was prepared and drafted in the form that it was.

That provides a very helpful measure, I think, for parliamentarians to measure the delegated legislation against what the objects of the primary statute provide and a measure that allows those who have to make recommendations on whether it is an appropriate use of the delegated powers or whether disallowance should be considered, it does provide a valuable yardstick. It is also useful for those who later have to use the legislation. For example, as Mr McHugh was saying, as an extrinsic material, they are generally not available to be used in courts unless there is some ambiguity in the actual terms of the legislation. Where you find judicial interpretations, they are either at odds with what the department or the Minister thought they were doing with the legislation and it provides a sound basis to go back and review whether this is actually achieving the purposes that it was intended to.

Ms ABIGAIL BOYD: Thank you and good morning. Birth of submissions is very interesting. I have a whole host of thoughts and questions, but I would like to start with what I have not seen spoken about much in the submissions so far is the way that we publicise the passing of regulations and orders. Even before COVID we were seeing an increase in the notifications of orders being through website announcements. You can get your car towed because it has been proclaimed on a website and perhaps you did not know. There are a lot of things like that. Of course, under COVID we saw rapidly changing health orders that were publicised as best the Government could, but through websites. Can you talk about the impact on individual rights of this increase in regulation and the way that it is being rolled out?

Mr CHALK: I think that goes to the heart of one of the biggest problems around transparency and certainty that we have with regulation. If you are a lawyer you know some of the sources where you can go and find where the rules are at. I remember for example with COVID, the public reporting of what the public health order actually provided was often a long way from the text of the actual order. The former President of the Legislative Council, Don Harwin, discovered that, unhappily for him, that the order very quickly drafted and given popular interpretation that was in fact often at odds with the considered advice that people, for example in his office or the department, were giving to him as to what was allowed and not allowed. Then it gets before the court and despite obviously very serious consequences for him, the prosecution is withdrawn once a close look at the circumstances is made.

That is one person who has access to reasonable legal resources. For the ordinary member of the public, being able to know the bounds of what they can and cannot do can be extraordinarily difficult. I took a look at the department's website last night and the current rules are explained in cartoon form, which is probably a useful thing at one level, but it is not necessarily reliable guidance for people, particularly where you have laws that involve an extraordinary amount of discretion, police discretion in that case. I was poking around on the internet last night and came across another piece of quasi-legislation which was made by Bob Debus when he was Minister for the Environment. That is going back quite a number of years, but it is still in force. It was made under the Threatened Species Conservation Act. It has been carried over under the Biodiversity Conservation Act now. It provides for a fine of $200,000 or two years imprisonment for somebody who damages plant life within a critically endangered habitat.

The habitat area in question is an area of about 5,000 hectares. The difficulty is that the public is not allowed to know where that 5,000 hectares is, other than it is somewhere within the Wollemi National Park. The purpose of this little rule is to protect the Wollemi Pine, which I think everybody would agree is a very worthwhile piece of legislation, but the difficulty is that damage is defined so broadly. If you are walking in this area and you happen to break a plant or branch, that constitutes damage. Bushwalkers are not necessarily criminally minded from the outset, but to go walking with Wollemi National Park, which is a vast area, without knowing which part could render you liable to imprisonment for two years is a - I will not say it is necessarily an example of overreach, but perhaps it is drafting that might have been done urgently to address a perceived problem.

One of those problems is people going looking for the plant and wanting to, not damage it but witness it and bringing pathogens in that could indirectly cause its extinction. From a rule of law perspective, the idea that people could be imprisoned for doing something that they had no knowledge they were doing is really problematic.

Ms ABIGAIL BOYD: Mr McHugh, did you want to speak to that?

Mr McHUGH: Transparency. In the recent public health orders I saw lawyers or wanna-be lawyers on Twitter saying it is under this gazettal. So, there was a resource, but I was finding it on Twitter. Trying to find it—this is no criticism of Parliament's website—but you have really got to be a bit of a nerd to find these things. The gazettals, they are published and so on, but it is a bit of a myth that that is transparency, it is all there. That is a little bit of cart after before the horse or after the horse, something like that, because the horse has bolted - that is what I am thinking of. That is because it has already been made and now you are trying to find out what it is.

Parliamentary counsel also spoke about the need for adequate time to ensure the highest standards are brought about making laws in a representative democracy. That is an aspect of it as well. As Mr Chalk said, it seems when they were making the laws about the Wollemi Pine, they did not want people going in there and taking cuttings, so they whipped out this regulation - great. It needed appropriate deterrence. What is that? Make it an offence provision. That is fine. That can be explained to Parliament, which is what Parliamentary Counsel's Office I think is asking for, certainly we are asking for, about the need to have these explanatory memorandums or some sort of device to let Parliament know, to let the legislature know that there are these Henry VIII clauses and other pieces of delegated legislation that can have wide-ranging effect above and beyond procedure, things such as that. So transparency is important but we would like that fixed beforehand is my point there.

Ms ABIGAIL BOYD: In relation to the bill of rights idea, I understand there a form of bill of rights in some other States, does the bill in those States act to automatically override regulation or legislation that does not comply or is it more of something to check against?

Mr McHUGH: It is something to check against. It is the Clayton's bill of rights. One of these organisations whose name escapes me is pressing for a bill of rights that recognises there will not be a constitutional bill of rights, which would be the former, which would make it like the United States Bill of Rights. That is probably some way off, if at all. But what has occurred in Victoria initially and I think the Australian

Capital Territory and now Queensland, is that there would be a checklist. That is what we have advised here. We have said that:

> A statutory Bill of Rights should be enacted for New South Wales to require all legislation to be interpreted in accordance with Australia's international human rights obligations—

which the States and Territories and Federal Parliament all signed up to:

> … provide for all proposed legislation and subordinate legislation to be scrutinised against those standards and strengthen the mandate of this Committee's remit to carry out such scrutiny, and allow for a declaration of legislation is incompatible with such standards.

That is the check mechanism. So something will come before Parliament and it will say this probably does not correspond with these particular rights because under the International Covenant on Civil and Political Rights clause 1 (g) says such and such and this arguably overrides that. Here is the reason. So you are voting on something in the full knowledge that it does this. There are plenty of examples where that has occurred. Because again you have checks and balances, but it is about knowledge. You have that knowledge to be able to know that we can a debate on the floor of Parliament about. This is potentially breaching one of these fundamental rights. Why is that, Minister? That is important. That is what we are asking for at the moment. We would probably like to go further but we know the limitations.

Mr CHALK: The Law Society's position in its submission is very much in line with that as well. It makes reference to the seven core human rights instruments that have been recognised, and to varying degrees enacted by the Federal Parliament. It is not only a matter of principle and consistency with international norms but in some cases it goes to the issue of legality of either the primary statute at the State level or certainly the delegated legislation. You can often have situations where, for example, the primary statute might be within power and lawful and not contravening, for example, the Racial Discrimination Act, but where regulations made under it can have that effect. The consequences of any law that is made that later turns out to be invalid can be very significant in terms of the disruption to people who have made decisions or taken action in reliance on it or on the assumption that it is good law.

The idea of a regulation committee being able to scrutinise, particularly drafts of regulation before they are actually made, is a very practical and sensible thing, particularly where there are risks that it may have an effect that contravenes the Federal law or the international standard. One is a matter of legality, the other is also a matter of reputation of both the Parliament and the State Government that is something that should be of first order concern to the Committee and the Parliament generally.

Ms ABIGAIL BOYD: Just coming off that, there are recommendations that fall into two different categories. One is that the regulation committee should have broader enquiry powers over different types of delegated legislation, so regulations, draft regulations, orders, perhaps other types of instruments. The second thing is the disallowance provisions that currently are limited to regulations. Can you both comment on where you think we should be trying to go on both of those?

Mr CHALK: They are very good questions.

Mr McHUGH: In Victoria your committee, your doppelganger down there, has the power to suspend immediately the operation of actual rules or legislative instruments. That is the scrutiny committee of the New South Wales Parliament Legislation Review Committee "may suspend the operation of statutory rules or legislative instruments pending Parliament's consideration of them." You can see something and say this is terrible, we are going to suspend this operation. You do not have that power; Victoria does. We could not find any examples of it being used.

The Hon. SCOTT FARLOW: A quick question on that, do you know the balance of the Victorian committee in respect of its composition?

Mr McHUGH: Political composition?

The Hon. SCOTT FARLOW: Yes, in respect of Government/Opposition/Cross Bench split?

Mr McHUGH: I do not.

The CHAIR: It is chaired by government.

The Hon. SCOTT FARLOW: It would be interesting in terms of that power and how that is composed.

Mr McHUGH: It would. Thankfully—notwithstanding partisanship in many jurisdictions—these types of committees are generally non-partisan because you are looking at really fundamental principles of democracy. In any event, in answer to—I was going to say "Your Honour's question". In answer to Ms Boyd's query, that is a

difference and it is something, again, that the NSW Law Reform Commission could look at and say, "Look, in these jurisdictions they have these powers. It operates in this way. We think that is a good thing; we think it is a bad thing," and so on. Your disallowance is limited because it is limited at the start. The scope of your recommendation for a disallowance, I should say—and this is identified in our submissions but also in the Law Society's submissions—is that there is a gap in your Committee's remit, which justify an ongoing and expanded role for the Committee, because your remit does not include draft delegated legislation. It includes only those regulations subject to disallowance.

And, of course, very often the problems in this delegated legislation only arise when they are out there in the world, operating. Of course, by then it is too late, as well. I think that is a difference also in Victoria. They can bring something back and say, "Look, this has been out in the world for six months and now we can see what the Minister or what—a particular authority is now writing regulations. Hello—it is affecting my constituents and I want it brought back before Parliament." That gives you this Committee and it gives individual members of Parliament real teeth. A constituent comes to you and says, "Look, I've got these problems," and you will say, "Oh, well, that's such-and-such. We didn't make that." But you should be able to bring that back to this Committee or to Parliament itself. You ought to have real teeth. As I say, there is a specific power in Victoria to suspend the operation immediately.

Ms ABIGAIL BOYD: And, sorry, the second part of that in terms of the disallowance by Parliament—the recommendations, as I read them, are saying we should try and expand that power. Is that correct? Do other jurisdictions have a broader remit when it comes to disallowance?

Mr McHUGH: They do. Victoria does.

The Hon. SCOTT FARLOW: That is to the committee disallowance mechanism?

Mr McHUGH: Yes, and then no doubt the Executive will say, "Hold on—let's bring this back to Parliament," and it will be looked at. As I say, we have not seen an example of it being used, but it is there. This whole area is about proper oversight of the Executive. It is back to fundamental principles: separation of powers—the judiciary, the legislature and the Executive. The difficulty, as I have said earlier, is this opaqueness between the Executive in the Westminster system—unlike in the US, where the Executive is actually outside Congress, here the Executive is formed from the legislature. There is this danger, which we see, of this principle legislation allowing the subordinate legislation to affect matters of policy and substance. The Executive or government agencies, regulatory authorities—they are the ones making these rules. Why would you give up that power to "faceless bureaucrats"? It is very important work that this Committee is doing.

The Hon. SCOTT FARLOW: Thank you very much for being here today. I have to say that from a Government perspective, this Committee is very interesting. As you quite rightly pointed out at the beginning, governments will inevitably form oppositions one day. This Committee itself and its rejuvenation came out of a committee process that the Hon. Mick Veitch and myself were involved in: the Select Committee on the Legislative Council Committee System—the committee on committees, as it was colloquially known. This was one of the recommendations. I chaired that. It has been sort of a point of balance in terms of finding this Committee's role as the Regulation Committee. In the last Parliament, as I think you noted, it was, of course, a trial. Of course, it has a bit more teeth in this Parliament but I think we are still finding where it fits—part of its rise and reformation from where it was previously.

I note that the support of the Leader of the Government, the Hon. Don Harwin, in re-establishing this Committee was out of concern at the increasing scope of regulation. That is a Government concern as well as an Opposition concern. Just in looking at how you could see during COVID, as you have raised, the proliferation of public health orders and regulations, it has shown somewhat the concerns with regulations and the rise of regulations and regulation-making power, but it has also shown the need of having a quick turnaround in regulations. Considering that sort of need and imperative, what would you see as potentially a process that would not hold up the speed at which regulation could come into force, like we have seen with public health orders, but which may increase scrutiny? What would you see as an idea from your perspectives in that area?

Mr CHALK: I actually think the current system demonstrates how quickly regulations can be made. What is really required is a strengthening of the parliamentary oversight of regulations that are made. That includes, as Mr McHugh has said, the proper resourcing of committees like this and the plugging of any perceived gaps between the legislative review committee, the joint committee, and the Regulation Committee. In large part, I think the Law Society's submission is directed towards that focus. Personally, I think it is very hard to draft—as I mentioned in the opening—rigid rules as to where the boundaries are. The courts themselves have had great difficulty in defining where the lines sometimes exist.

One of the strengths of your Committee, I think, is the fact that it takes a technical approach. It leaves policy to the Parliament as a whole. That goes a long way, I think, to ensuring that if the Parliament itself is doing its job in managing the scope of the authority that it gives in its statutes to delegate legislative power, then it makes the role of this Committee much easier and much more effective because it can retain that bipartisan approach and have the measures that the Law Society is suggesting—and many of the other very fine submissions that have made to the Committee—as to what are proper principles of scrutiny. I think Dennis Pearce and Stephen Argument's book on delegated legislation, which they are constantly updating, really is an excellent starting point for a committee like this or for the Parliament in considering what the committee's role should be. I should also say that I think a lot can be learned from monitoring what is happening in other States and particularly at the Commonwealth level. The Senate committee system has run very effectively for a long time now and they have been leaders in this area.

The Hon. SCOTT FARLOW: Thank you. Unfortunately, I am going to have to ask a question and be very rude in leaving on the answer, but I will look it up in the transcript. Mr McHugh, in terms of the consolidation of all of the instruments governing delegated legislation, what would be the argument for maintaining the current status quo and not incorporating it into a single piece of legislation?

Mr McHUGH: I do not think there is any argument in favour of it. We are talking about access to justice here and an example is the COVID-19 regulation emergency powers Act—something along those lines—which gave unprecedented regulation-making power into all sorts of areas, including amending the Criminal Procedure Act, which looks after how criminal trials are run. These are fundamental principles which were just left, in effect, to the Executive. We understand the urgency of this situation and so on, but we say administratively this cannot ever be of itself enough to just give everything to regulation-making power. It has to come back before the Parliament, which is one reason we say remote sitting should be allowed.

If we need constitutional amendments, then that could be looked at. But we are in a pandemic at the moment and Parliament is not really sitting, it is coming back, which is all to the good, but there could be another lockdown coming and we would rather see legislation looked at remotely by Parliament, which is its role, rather than just giving everything to the Executive, notwithstanding the exigencies of COVID-19. Does that really answer you?

The Hon. SCOTT FARLOW: I think more in terms of your recommendation of the statutory interpretation Act and that coming together in the form of one Act was what I was looking at, and are there any arguments for keeping them all? I think there are three you have listed in your submission, and keeping them as separate pieces of legislation rather than consolidation. Would there be anything that would be lost in terms of that consolidation process?

Mr McHUGH: There could be in the Acts Interpretation Act, but having things in two places is not necessarily a bad thing, so long as they are consistent. Having one piece of legislation which is looking at this, and the Subordinate Legislation Act and so on goes some way, that may be itself amended to bring all these things together. But again, it is about transparency and open justice, being able to find out what the law is so that people can make submissions about it, people can be informed of it. They talk about sausages and legislation—I will not repeat that—but this is really at the core of legislation making, delegated legislation. We ought at least understand how it is done and what guidelines are there. The Parliamentary Counsel's Office—who again I will say we hold in the highest esteem—is saying to this Committee we need time and we need guidance and there should be an explanatory memorandum for the purposes of transparency so that the Parliament knows what the Executive is doing.

The CHAIR: The Hon. Scott Farlow is right, the colloquially referred to committee into committees went through an extensive period of reflection and constructive suggestion on rebuilding the committee system in the New South Wales Legislative Council and we drew very heavily on the Senate model, hence our budget estimates process now is not quite there but almost there to the Senate model and this Committee came out of that process. What I am saying is this Committee is maturing and finding its feet and part of this process is assisting that process. Section 41 of the Interpretation Act is where we draw upon our disallowance capacity in the House.

Drawing again upon your response, Mr McHugh, to the Hon. Scott Farlow's question around legislative change to bring everything into one Act or one instrument would potentially broaden the capacity of this Committee as well, as opposed to having them residing in two or three different locations in the statutes. I think that is where the Hon. Scott Farlow was going. Do you see where we are trying to move this toward?

Mr McHUGH: I think so, and it is a good thing. Again, having matters within various Acts makes it difficult. It is 41(1) (b) that talks about the 15 sitting days and so on, and that in itself can be a problem when

Parliament is not sitting. There could be another lockdown, Parliament would not be sitting, everyone meets by Zoom these days or by some form of video technology. The technology is there, assuming a constitutional power, then why can parliamentarians not meet and debate and analyse legislation? And that is what we would be suggesting.

The CHAIR: Essentially a recommendation from this Committee for the Parliament to look at, as one of the lessons out of COVID-19 arrangements, would be the definition of meeting or gathering or whatever it is for the Parliament under the Constitution to enable us to meet remotely to continue the scrutiny.

Mr McHUGH: Yes.

The CHAIR: Because the 15-day rule becomes quite problematic when the Parliament is not sitting.

Mr McHUGH: That is right. So I make this point again, this is a real emergency and all this legislation and delegated legislation came in, there was a new Act, COVID-19 Emergency Response Act, and so on, and there was not much scrutiny of it. That was understandable and that is because, in effect, Parliament was not sitting and it should sit to monitor and do its job.

The CHAIR: Yes, that is certainly one of the lessons.

Ms ABIGAIL BOYD: Even prior to COVID we have had a trend of declining numbers of sitting days in Parliament. I do not know if you know how that compares to other States and Territories, or if you have any comment on the impact of that?

Mr McHUGH: I do not, but it is to be abhorred.

Mr CHALK: Could I make a comment that tries to tie together the questions that you are raising, Ms Boyd, about the scope of instruments that might be subject to the Committee's function and also the issue of disallowance and the question that Mr Farlow raised about whether they should all be consolidated in one piece of legislation? I think we perhaps had a slightly different position to the Bar Association here. If you are going to widen the scope of what the Committee can look at, and I think there is good justification for that, particularly because one of your functions is to look at trends within the making of delegated legislation. I take as an example environmental planning instruments under the Environmental Planning and Assessment Act. That represents probably the largest body of delegated legislation in the State. It is extraordinarily complex and it is created under a statute that has its own provisions for public scrutiny and review and submission making.

I think there is an argument that the Committee should be able to look at trends within environmental planning instruments, for example. There are many other, what are often referred to as soft laws these days, standards and policies that have a binding effect but do not fit the definition of a statutory rule or are not subject to the Governor's intervention, but they have a very real impact on what gets done in the State. For example, the Environmental Planning and Assessment Act and the rules or the plans made under it determine who can do what on their land. So from an economic perspective it is probably outside of the revenue powers, it is perhaps even, regardless of the revenue powers, the single greatest driver of economic development within the State. It is very important delegated legislation.

If we were to try to write a single statute that covered everything from how you make rules around the administration of our hospitals, our schools, through to how the planning system operates, I actually think there would be tremendous drafting difficulties with it and it is likely to create more confusion than alleviate it. So I think there is an argument for suggesting that while, for example, the Subordinate Legislation Act has very useful purposes, trying to make it so comprehensive that it is the only path through which delegated legislation can be made could create something of a nightmare. The other issue, and it is I think picked up in one of the submissions, is where you have regulatory matters that cross boundaries. The pandemic is an example of that to some extent where you have different rules applying in different States.

I am not saying that is the cause of different outcomes at the moment, but certainly civil aviation is one that is usually given and the legal profession is another where, if you want a unified profession, you have to keep harmony across the country in terms of how things are regulated. A very rigid approach I think is going to strike problems from the outset. There is a need for flexibility and it is that contextualisation that makes the need for committee scrutiny much more important. If you could simply write rules that say regulations can only be made within these bounds and can only serve these purposes then the need for a committee would be much less, but you would be finding I think that you would be constantly stumbling with things having to be referred back to the Parliament to be dealt with by way of statute.

Ms ABIGAIL BOYD: It strikes me that it is not so much the nature of the secondary instrument, or what you call it, but the impact that it has and how connected that impact is from the primary legislation, so when we are looking at health orders and things that can create criminal offences and end up putting people in jail or giving them substantial fines, I would view that as being of a type of legislation that Parliament should have some sort of oversight over, whereas something like the planning legislation or individual administration plans for particular types of institutions would be of a very different nature. Are there other jurisdictions that refer to the oversight or disallowance powers in terms of their impact as opposed to what they are actually called?

Mr CHALK: That is always a very tricky one because you can have regulations that have a small impact on a large number of people and regulations that affect very few people but affect them in very serious or severe ways. Again, trying to write universal rules for this is a real challenge. It is why I think context is so important and it is why we have a parliament, because there are factors and considerations that go into determining what is acceptable or justifiable that cannot always be determined in advance of a problem arising.

Mr McHUGH: That is why we need high level principles to come back to, the bill of rights and so on, but short of that, just talking about the single piece of legislation, that is really because it is currently fragmented because of the Interpretation Act, Subordinate Legislation Act and the Legislation Review Act, whereas in the Commonwealth there is just the Legislation Act 2003. The Law Society itself says—and this is something that we support—in terms of the high level principles which would be there, in terms of the characterisation, Ms Boyd, it should be analysed against the seven core human rights treaties as defined by the Human Rights (Parliamentary Scrutiny) Act 2011 of the Commonwealth, and common law rights—the presumption of innocence, legal professional privilege and privilege against self-incrimination.

When there are public health orders made that have criminal sanctions, you can look at those and, notwithstanding Commissioner Fuller looking at those cases individually to begin with, which was in effect trusting the executive or the executive officers to do the right thing, which is a good thing, and we are all in this together, we are trying to help each other and so on, there is a risk in those circumstances. Now the policy has changed somewhat and people are being fined, and I understand the need for that, but again it should be against the high level principles both at common law—legal professional privilege, presumption of innocence, privilege against self-incrimination and so on—and those core human rights treaties.

Ms ABIGAIL BOYD: Given the huge number of subordinate legislative instruments that come out pretty much every day, is it the suggestion then that it should be the burden of the executive to provide a statement for each one of those things or is it something that we should be resourcing the Committee with to make sure that someone on behalf of the Committee is reviewing those?

Mr CHALK: In part this comes back to the Chair's comments about explanatory materials.

Mr McHUGH: Impact statements.

Mr CHALK: Yes. In the first instance, the onus should be on whoever is putting up the regulation to explain why it is needed and what are the choices that have been taken in fixing on this particular form, and then we think that there is a role for a scrutiny committee, like the Regulation Committee, to look at those documents and measure the drafting against that, but in a context where the underlying policy decisions might be left for the Parliament as a whole. The very important technical role that the Committee can focus on is does it actually do what it says it is meant to do, how does that sit with other laws that may affect it or impinge on its validity, how does it sit with its impact on the rights of citizens, and that is I think an extraordinarily important function and the mere existence of it will have a normative impact on how government and bureaucracies go about preparing regulations. It has a deterrence effect for those who want to take easy options and extend the powers beyond that which Parliament might have given them.

Mr McHUGH: Hear! Hear!

The CHAIR: I want to go back to the explanatory memorandum and try to get my head around what that might look like. Is there a good example in another jurisdiction that this Committee could be pointed towards?

Mr McHUGH: I will take that on notice and get something to you within 21 days. I believe there is and parliamentary counsel are suggesting something not dissimilar. Their remit is about transparency for Parliament, for the wider legislature, to understand why the Minister has made this choice and so on, specifically about Henry VIII clauses and shell legislation. We adopt that as well, but we will certainly get back to you with examples. You do not have to reinvent the wheel here. There are other jurisdictions who will look at this and as my friend says, the Commonwealth has looked at it closely as well. It is about telling Parliament, this is what we

are doing, this is why we are doing it so you can debate it and say, hold on, you should not do that or okay, that is fine.

The CHAIR: As I said, as someone who has had to lead the Opposition on some of these pieces of legislation with the Henry VIII clause in them, it would be nice to know what the Government of the day or the Minister is envisaging the regulations that will come out of that clause, what they would look like or at least what the scope may well be. Sometimes essentially all of the legislative requirement is in the regulation, it is not in the legislation. Some months later you finally think, that is what it was all about; we would not have supported the bill if we had known that.

Mr CHALK: Where legislation depends on regulations not before the Parliament to actually be operative. I would think it is not unreasonable to expect that the draft regulations are presented at the same time as the bill so that the whole package can be seen. That is not to say that the advantages of regulations, being able to amend them down the track do not continue to exist. But I think that Pearce and Stephen Argument, picking up an American—in fact it is Professor Mark Aronsen—picking up an American writer, refers to them as transitive and intransitive bills. Where previously you would have parliaments passing legislation that was immediately operative, more commonly particularly in the United States, but it is becoming an issue in Australia as well, you have got legislation that does not get a starting date until the regulations are in place. If that is the case, then it should go through the Parliament as a package.

Mr McHUGH: The explanatory memorandum and so on is good and Parliament can see at the time the bill passes in the law, that is great, but there will be examples that come up later and this Committee or a similar committee ought have power to review those as well. That is important. The High Court has said these Henry VIII clauses have been criticised for good reason. That was in the case of *ADCO Constructions Pty Limited v Goudappel* 254 CLR. That was a case where there was new workers compensation legislation. Under the old Act there was no threshold and someone was injured, and then under the savings and transitions power, that is where the regulations were made. It is something which is in every new Act.

The High Court said Parliament has got power to do this, but it was a power to ineffectively to retrospectively take away this person's rights—very, very serious. Yet, there it was, the High Court said they have got the power to do it, it is a matter for the Parliament, but no-one really contemplated it. Certainly that is my understanding of it. So it is not just about telling you we are going to do this. It is having done this when the law is out in the wild, so to speak, that this or a similar committee is able to monitor it.

The CHAIR: I take you to another topic which is essentially in establishing this Committee there were a couple of unique arrangements that were put in place in the standing and sessional orders for the upper House to create the Committee. In one of the submissions, which I do not have in front of me, talks about expanding the referral capacity to this Committee. At the moment we do not have self-referral provisions. If I could gather your views around whether or not you would see merit in a committee such as this actually having the mechanism for self-referral as opposed to waiting for a referral from the House?

Mr McHUGH: Yes and for that reason I was just discussing, which the law is out, the problem arises, the constituent comes to a member and says my water licence is now being affected. I have been pulling water out of the Murrumbidgee for years and here is this problem. You can then go to this committee and say I want you guys to look at this. So, you should certainly have that power.

Mr CHALK: The Law Society absolutely supports that position.

The CHAIR: Expansion of the referral capacities?

Mr CHALK: Yes.

The CHAIR: What I like about the idea of the explanatory memorandum is that for this Committee's work at some stage in the future, if we were to look at a regulation, you could measure that against the statement provided to the Chamber about why the regulation clause was put in place and we could actually measure to see whether the regulation meets the original intent from the Minister or the Government of the day. I can see some real benefit in something like an explanatory memorandum. Are there any closing statements arising from the comments today? I know you have taken one question on notice.

Mr McHUGH: No. We are happy to assist and the Law Society as well, but the Bar gives submissions to these committees often. We are there. We are a great resource for parliamentarians, cross benchers and so on. Call us. We are happy to help.

The CHAIR: Mr Chalk?

Mr CHALK: No, I just endorse my friend's comments there. The Public Law Committee of the Law Society is a relatively new committee. It is about three years old now. It has been created in recognition of just how important some of these issues are—the way in which laws are made, the way in which justice is administered in the broader sense. Certainly the Law Society is very conscious of just how important the Regulation Committee is in terms of the functioning of effective lawmaking in the States.

The CHAIR: Thank you very much, thank you for your attendance. Ms Cusack was on the phone. I am not sure where Catherine had any questions?

The Hon. CATHERINE CUSACK: No. Thank you very much Chair, I am fine.

The CHAIR: Thank you very much for your time here today. The Committee will now break until 11.15 a.m. when we will have Dr Lorne Neudorf from Adelaide Law School on teleconference, obviously.

(The witnesses withdrew.)

(Short adjournment)

LORNE NEUDORF, Deputy Dean of Law and Associate Professor, Adelaide Law School, affirmed and examined, before the Committee via teleconference

The CHAIR: I now welcome our next witness and please forgive me for my pronunciation, but I have Associate Professor Lorne Neudorf, I hope that is correct.

Dr NEUDORF: Yes.

The CHAIR: Would you like to make a short opening statement?

Dr NEUDORF: Yes please and with your permission, if I may, I would like to have five minutes, if that is okay, as we have a bit of a longer session this morning.

The CHAIR: Yes, that is okay.

Dr NEUDORF: Thank you. I thank the Committee for inviting me to appear here today. I also commend it for embarking on this important inquiry into the making of delegated legislation in New South Wales. This inquiry is a matter of great public importance. It relates not just to the substance of a particular law, but even more importantly, to how laws are made in the first place through the institutios of ademocratic society. I have been engaged in a comparative study of delegated legislation in a number of different countries over the past few years and I have observed a variety of models of how parliaments scrutinise delegated legislation. Some approaches seem to work better than others in terms of providing adequate parliamentary oversight of executive government. In this opening statement I will not delve into all the details of delegated legislation, but I would like to emphasise the importance of Parliament as a democratic lawmaking institution.

Parliament is unique among the institutions of government in that it was designed by its framers as an elected body. It is both representative and deliberative. These attributes give Parliament a special democratic quality that the other institutions of government lack. We entrust Parliament to make laws and we, as citizens, follow those laws, because they carry legitimacy. They are made by our elected representatives through a transparent and accountable process that consists of readings in both Houses, committee studies, open and public votes and of course, media attention. The process for making delegated legislation however, is radically different and carries very few, if any, of those attributes. It is made by the executive government, members of the same political party or coalition who draft these laws essentially behind closed doors instead of them being made in the ordinary way in Parliament.

There can be good reasons for why Parliament is leaving these legislative powers to the Government. It frees up Parliament's scarce time and resources for other more substantial matters, in addition to providing flexibility and a faster lawmaking process in the context of an emergency, such as COVID-19. So, it cannot be forgotten that Parliament is the constitutionally vested source of legislative power and it can repeal or revoke any delegation or delegated legislation whenever it sees fit. Parliamentary committees have become Parliament’s eyes and ears when it comes to delegated legislation. They are the principal mechanism by which Parliament scrutinises and maintains an awareness of new delegated legislation that has been made. So their role is critically important to providing a measure of accountability and transparency for delegated legislation.

This inquiry provides a timely opportunity to further strengthen the work of the Regulation Committee in providing this parliamentary oversight. In its 2019 report the Commonwealth Senate Standing Committee for the Scrutiny of Delegated Legislation noted that around half of Commonwealth law is delegated legislation. This got me thinking about what the proportion might be in New South Wales. Would there be more or less delegated legislation as compared to the Commonwealth? I have to say, I was surprised by what I found. It provides evidence that even before the COVID-19 pandemic, New South Wales relies to a remarkable degree on delegated legislation for the effective functioning of its legal system. There is no question that it is the principal form of lawmaking in New South Wales.

What I did is I counted up the number of enactments that are published on the New South Wales Legislation website from last year, 2019, so pre-COVID. There were 437 enactments in total. Of those, 25 were pieces of primary legislation enacted by Parliament, which is 6 per cent. The remainder, 94 per cent or 412, were Regulations. So you can see the difference there in terms of the quantity by count. That can be a bit misleading in a sense because it does not tell you exactly how much legislative text there is. Some regulations can be very short. So I actually went and counted up all the page numbers and I found that last year, in 2019, there were 3,470 pages of legislative text enacted. Of that, 462 pages, so 13 per cent, were in primary legislation and the remainder, 3,008 pages, 87 per cent, were in delegated legislation.

These regulations touched on a tremendous variety of subject matters—Aboriginal land rights, biosecurity laws, conservation of threatened species, coal mines, combat sports, elections, health services, liquor licensing, national parks, retirement villages, water management, work place injuries and pretty much everything in between. I think what this shows is it really underscores that the New South Wales Parliament is delegating tremendous lawmaking powers to the Government and the Government certainly has no hesitation in using those powers to make new laws. It more importantly reinforces the need for robust parliamentary oversight of delegated legislation as a critical check on this borrowed power which provides a backstop against executive overreach. It is really only through committees like the Regulation Committee that Parliament preserves its constitutional rules as lawmaker in chief.

I have made a number of recommendations in my written submission that I think would serve to strengthen the parliamentary oversight of delegated legislation in New South Wales and I am very happy to take any of your questions.

The CHAIR: Thank you very much for your opening statement. Was that, by chance, prepared?

Dr NEUDORF: Yes, I typed it up over the weekend.

The CHAIR: Are you able to email it to the secretariat?

Dr NEUDORF: Absolutely, that is not a problem at all.

The CHAIR: Then we can get it off to Hansard and it just makes their job a lot easier as well.

Dr NEUDORF: Sure.

The CHAIR: I will open with some questions and then move to other Committee members. To assist Associate Professor Neudorf, could you say your name and respective political parties so he has an understanding of the context potentially of your question. One of the recommendations in your submission, (d), talks about expanding scrutiny criteria applied by the committees. You speak about, "We should include questions of constitutional validity as one of the elements of the committee's remit." Can you explain why you would require that or suggest that?

Dr NEUDORF: I think one of the problems, in a way, that we encounter is that we rely on the courts to enforce constitutional terms and validity. Parliamentarians sometimes are only all too happy to let the courts do that work and themselves pull back from those kinds of questions. I think that is a mistake. I think all the institutions have an obligation to maintain constitutional standards and it is really important when it comes to preparing and enacting new legislation. There are other committees that do that kind of work. For instance, in the Canadian context, there is a joint parliamentary committee that reviews what they would consider to be compliance with the Canadian Charter of Rights and Freedoms. That is the Bill of Rights in Canada. They review those questions.

Of course, their determinations are not binding in any formal legal way but what it does is, it can give that extra layer of scrutiny. If you relied on the courts exclusively, that requires some aggrieved litigant who can fund that challenge to go to court. This way you can actually build in some of these checks within the system itself, within that lawmaking process itself. I think that is a really good way of using the Committee's resources in terms of scrutinising delegated legislation. The only limitation or drawback with that of course is some of these issues can be very contentious, but nevertheless, I think even just flagging the issue could be quite a valuable service that the Committee could provide.

The CHAIR: One of your points goes to Henry VIII clauses in legislation and the powers that are derived from that. In your submission you say that the Committee should insist on greater accountability controls in bills that include Henry VIII powers. Could you extrapolate what that means, what you envisage that would look like?

Dr NEUDORF: That is a really good question because Henry VIII provisions—and there is some debate about semantics I saw in the submissions about what a Henry VIII provision is and what it is not, but nevertheless, we are talking about delegations that authorise the executive government to amend significant portions or parts of the enabling legislation and maybe even exempting individuals, or corporations in some instances, from the scope of that law. I think Henry VIII clauses are quite dangerous because they can really get around parliamentary intent. My recommendation to add additional scrutiny controls essentially is directed at preventing or limiting those clauses in the first place.

If you look at the United Kingdom, there is a specialist committee that only looks at delegation provisions in enabling legislation and in relation to how much power they are delegating. It has flagged repeatedly these

Henry VIII clauses which are tucked into legislation very routinely in the United Kingdom. That committee will insist or at least put it to the Government that perhaps those kinds of provisions can be tailored more specifically to the circumstances that they are to be invoked in, that they can be customised in a way or read down in a way so they do not have to be so broad, which can of course be later used for a variety of purposes, which is problematic. I think it is much better if we address these things at the front end than down the road once the delegated legislation has already been made.

I think the United Kingdom committee provides a really good example of where that system works. One thing I want to mention, if I quickly can on all the United Kingdom's committees, is that they do not have the power of disallowance at all or revocation at all. They only do their work through reporting. So the Government there, interestingly, does tend to follow the recommendations of these committees. But again, it is not because they have any kind of formal threat of disallowance or revocation of the regulations or anything like that, it is really just through the quality of their reporting and the frequency of the reporting that actually plays a role in incentivising the Government to go along with the committee's recommendations.

The CHAIR: Prior to your attendance today we had the Law Society of New South Wales and the New South Wales Bar Association presenting to the Committee. We explored at length their suggestion of an explanatory memorandum with the legislation as it goes through the Parliament that would assist in some way in detailing or maybe putting a bit of colour to just what the regulations may look like, the scope of the regulation, the timeframe, so some sort of an explanatory memorandum at the time the legislation goes through the Parliament. Do you have some views about that and do you have a model that you think we could look at?

Dr NEUDORF: Absolutely. I certainly would endorse that recommendation. I think that is the first step in providing that enhanced scrutiny of Henry VIII powers. Putting the Government to explaining the rationale for why they are needed, why they have been drafted in the way they have been drafted. Just to go back to the example of the United Kingdom, that is exactly what is required in the United Kingdom context. The Government puts forward essentially a memorandum to the committee while the bill is in draft stage, it has not been enacted yet. So the committee is able to really probe the reasons for why this is thought to be necessary in this legislation. I think that is a fantastic way at least of putting it on the record. Sometimes these Acts are on the books for decades. At least you can go back and trace it back essentially to when it was first made and say why was this put in there in the first place.

That could be helpful later if there is a judicial review or something of that nature to give that insight into what was the thinking at the time. I think it is absolutely in the interests of transparency. The Committee can then engage with that rationale that is put forward in that explanatory memorandum and I think that is a very good way of at least beginning the process of scrutinising those dangerous provisions.

The CHAIR: I am going to hand over now to the Deputy Chair, Ms Abigail Boyd from The Greens.

Ms ABIGAIL BOYD: Thank you and hello to you Dr Neudorf, we have got here and then we have got Associate Professor on your submission, so I am not sure which it is.

Dr NEUDORF: You can just call me Lorne, please, that is totally fine.

Ms ABIGAIL BOYD: Okay, thank you. One of the recommendations in your submission is in relation to creating a new public complaints process for delegated legislation. I would like to talk a little bit about that. I guess it keys into the previous session, where we were hearing about the possibility perhaps of having the ability to investigate regulations long after they have been in place and we have seen how the operation works. Can you talk about that recommendation and whether it is used in other jurisdictions?

Dr NEUDORF: Thank you very much for the question, I am really happy to be able to speak about that. I think it is really an innovative practice to have a public complaints mechanism. The best example of that is in New Zealand where in fact the framework that sets up their Regulations Review Committee allows specifically for a member of the public at any time to make a complaint and if a complaint is made by a member of the public about a regulation, it actually triggers a sitting of the committee and they will have to look into that matter at a meeting that is called essentially for that purpose. It also provides an opportunity for the person who made the complaint to appear before the committee as well. So that is built into the standing orders in relation to that committee. That is a really powerful way that the committee can essentially review regulations, as you say, long after they have been made, if a problem is later discovered.

One of the issues we see in Australian jurisdictions is that there is this short time limit that the committees have to look and scrutinise delegated legislation. Realistically, it is just not feasible to do a robust totally comprehensive job of every piece of delegated legislation. I mentioned some of the numbers earlier, they are

staggering. It is just not humanly possible to do that. I think this kind of a mechanism will allow the Committee to later, even if a problem develops that maybe was not anticipated at the time the delegated legislation was made, but it is having this disproportionate impact or it is being used in a certain way that maybe was not contemplated at the time it was made. That mechanism is essentially a safety valve that would allow someone to trigger a review process. I think that is a very, very good way of preserving that accountability on an ongoing basis.

Ms ABIGAIL BOYD: Another thing I wanted to ask you about and this might be outside of the research that you have done, but we hear a lot about we are moving fast now and we need to have a whole lot of legislation made quite urgently. I have noticed even in the short time I have been in Parliament that legislation has been skipping some of the usual processes and coming to us much quicker than it might have otherwise. But at the same time we have seen a reduction in the number of sitting days from year to year. Have you done any kind of analysis of the number of sitting days the New South Wales Parliament has compared to other parliaments?

Dr NEUDORF: Just anecdotally. It has not been a formal part of my study, which was really based in a time before all of the pandemic hit. I would just say that it is an issue that certainly academics are aware of, that they are looking at this question of is Parliament able to carry out its normal processes for making laws because of these limited sitting days? That creates challenges for committees, for other parts of Parliament, for primary legislation, because the few days that they are sitting, everything is quite urgent, as you rightly pointed out. There are in other jurisdictions some ways of dealing with this challenge with technology. I know that the United Kingdom has trialled some kind of a virtual sitting in a way for some of the members of the Houses. I think there has been some mixed success with that, working at how to actually make sense of it in practice. But I think this is a challenge, particularly in the pandemic situation that we are facing.

How do we ensure that Parliament is able to do its work efficiently and effectively, that it is not just rushing through legislation? One thing I would just say on all of that is that legislation where Parliament really has to move quickly, I think it is always a good idea to put a sunsetting provision in that kind of legislation and make it subject to re-enactment or if it is delegated legislation, it needs to go through affirmative procedure. So it needs to be kind of re-endorsed essentially and re-enacted. That is not a perfect solution, but at least it is one way of preventing an accumulation of laws on the books that are really just rushed through that may just kind of hang around for years to come and can be quite problematic.

The CHAIR: I am going to move on to the Hon. Greg Donnelly from the Labor Party.

The Hon. GREG DONNELLY: Thank you, Associate Professor, and thank you for making yourself available today. Just going to your submission, which I presume you would have in front of you or nearby. On page 4 of your submission, which is picking up some commentary on the Legislation Review Committee that we have here in New South Wales, in the second last paragraph on the page, halfway down that paragraph you say, "The Committee"—this is the Legislation Review Committee—"however only reports on delegated legislation when it wishes to raise a concern." Is it your submission that having looked at the way our Legislation Review Committee operates here in New South Wales that there is scope to enhance its capacity to scrutinise regulation as well in a more detailed fashion than is currently provided for?

Dr NEUDORF: Thank you very much for the question. It is a tough question to answer because this goes to resource constraints and limitations of the Committee. How can they do their work more efficiently? The Regulation Committee is interesting because in selecting regulations it does a bit of a deeper dive into some of the problems and even policy concerns around regulations. When it comes to the Legislation Review Committee however, it is intended to be systematic. It is intended to be scrutinising all of the delegated legislation that is coming through, at least the ones that are disallowable, the regulations that are disallowable. That is a very tall task. How can it report more effectively?

One of the things that I would encourage committees to do is to publish more frequently, even if it just a running narrative of the work that they are doing. Here are the regulations we looked at today. Some of the members had concerns in these areas. They were addressed and the committee resolved to note any issue of concern. Even documenting what is happening on an ongoing basis I think is really important, because it shows that the work is being done. It shows that attention is being paid to the instruments, which are obviously important. I think that in itself is a way that we can enhance accountability.

Some of the other things I have seen done and there is a variety of practices in the jurisdictions I have looked at. Some of them use very informal ways of doing it, some are very formal. There is really a mixture of things. But using technology in a way to look for or spot issues is something that committees seem to be very interested in doing, where they can—I won't quite say artificial intelligence, we are not quite there yet, but they

can program some kind of key words and look for things and colour code delegated legislation to highlight problems at different times. So, there is some opportunity there.

But again, I would just encourage committees to do more frequent reporting, even if it is just a running narrative of what they are actually doing, the meetings that they are having. There is this tendency to want to have a nice polished report on something which is obviously great and it is a high quality product, but at the end of the day, look at the volume of the stuff coming through, I think we do need to have that, especially for a committee like the Legislation Review Committee, we just need to have that regular documentation of what it is that they are doing and what scrutiny they are applying to all that delegated legislation.

The Hon. GREG DONNELLY: Thank you for that, that is helpful. Following on then, the way in which the two committees then perhaps can enhance their level of working cooperation in the New South Wales Parliament, you have correctly identified there is a Legislation Review Committee. It has its role, responsibility and its remit and as you say, that is broadly looking at the legislation and the regulation coming through. The Regulation Committee itself, which quite specifically looks at individual regulation and drills down deep and produces a report. Is it your submission that there should be a standing relationship, if I could describe it that way, between the two committees and that they work together in some sort of co-operative way or do you see that it is better that they have their separate remit, which they have, and they simply, in effect, act independently of each other?

Dr NEUDORF: Thank you for the question. I certainly would encourage friendly co-operation to the extent that it is helpful for each of the committees to fulfil their individual remits. One of the interesting things that you have in New South Wales now is the formation of this Regulation Committee, you kind of have two different approaches—one with the Legislation Review Committee being very technical, focusing on very specific technical questions, whereas your Committee is able to look much more at policy and discuss broader issues, which I think is really fantastic. I think those are complementary roles. I do not think they are in opposition to each other. But I would say that there is the potential for your Committee looking at policy issues to potentially get into some heated discussions or debates or for politics, in a way, to come into the deliberations.

Whereas I think the other committee would probably pride itself on saying they are very non-partisan, they are really just looking at very specific technical questions when it comes to regulations. Can there be an opportunity for some co-operation, I would say yes. It would be my submission yes, but in a limited way. I think that the Legislation Review Committee would usefully flag concerns that it may identify that really do not sit within its remit properly, but it might think there is something funny going on here with this particular regulation and maybe even just through communication, alert your Committee to that and then of course it is entirely up to your Committee whether it would like to proceed with an inquiry into that delegated legislation or not. But it could be useful since they are doing that really nuts and bolts on the ground detailed work.

They are bound to uncover things that will look odd or strange or problematic that might not otherwise fit into their remit and I think it can only enhance the work of your Committee to be tipped off essentially to those kinds of discoveries.

The CHAIR: I want to follow on from those questions. We also explored with our earlier witnesses around the referral capacity of this Committee for enquiries, the self-referral mechanism, which we currently do not have. All our enquiries are resolution of the Chamber. Do you see benefit or issue with the Committee have a self-referral power?

Dr NEUDORF: Yes, it certainly would be my submission that that is desirable to have self-referral power for enquiries. If you look at the Commonwealth example, that is something that has recently changed and I think it is a very good thing because you can see that committee now having made a new inquiry into the exemption process relating to delegated legislation, which might have been a contested issue, but actually has to go through the Chamber. It is hard to say how that would go. But I think what you see there is the committee is able to really stand on its own feet much more and say here is a matter that really deserves our attention, it is of public importance, and devote some resources behind it. I think that self-reference power to initiate enquiries is absolutely essential and is very valuable, particularly in the context of your Committee's work for delegated legislation.

The CHAIR: That then challenges the terms of reference or standing sessional orders that have established the Regulation Committee and the way that it is structured. Do you then see value in expanding our reporting mechanism so we look at monitors, disallowance alerts, mechanisms for annual reporting and even the exempted instruments?

Dr NEUDORF: Yes. I think your remit at the moment, from what I understand, it is quite broad and you certainly have the power to enquire into and report on essentially any regulation that you would like to. It is not just disallowable regulations either, which is one step ahead of the Legislation Review Committee, in that you have that broader scope. I have not looked in detail at the standing orders in New South Wales on that point, but it would seem to me just from reading the remit of your Committee, that you already have a pretty broad mandate to do some of this work and essentially to report as you would see fit. I would certainly encourage you to do that. I think the Commonwealth provides a very good example of frequent, reliable, high quality reporting that is put out and it really is so essential.

I mentioned in my opening statement and it goes back to an earlier question as well, the importance of getting that information out there, that regular information, because you are essentially Parliament's eyes and ears when it comes to all this delegated legislation. So many different actors in the institution rely on these reports. I think that frequency really will enhance the work of the Committee. But as far as I understand, I think you have quite a broad remit at the moment already, so I am not sure standing orders would need to be amended in that regard.

The CHAIR: One of the other things that we have been looking at is currently in New South Wales there are three statutes, but we predominantly work under the Interpretations Act, the Subordinate Legislation Act and the Legislation Review Act. Do you see benefit in them all being consolidated under one piece of legislation or do you see benefit in them continuing to remain separate?

Dr NEUDORF: I certainly would see benefit in consolidation if that is something that the Parliament would be interested in proceeding with. There are a number of benefits, because these three different Acts that you mention, these three different pieces of legislation, have been drafted at different times. They use different kinds of language, they use different definitions, so it is not always clear what fits into which category and that is very problematic from an accountability point of view. I think the consistency of having one approach, one set of definitions, everybody has clarity around what these terms means, what is in, what is out, for example in terms of disallowance or different scrutiny processes. I think that would really go a long way to clarifying the lay of the land of delegated legislation in New South Wales and it would allow everyone to focus their energies all in one piece of legislation. I think there is certainly a lot of benefit for that, so I would support that, absolutely.

The CHAIR: I am now going to move onto the Hon. Catherine Cusack from the Liberal Party.

The Hon. CATHERINE CUSACK: Do you have any suggestions as to how committees can monitor their own performance? Are we considering the important issues that we should be considering or are we getting too swamped? How do we self-manage and look at our own performance and do you compare the performances of committees in different legislatures?

Dr NEUDORF: Thank you very much for the question, I think it is an excellent question. Committees want to know and they should be striving for doing better and benchmarking themselves against their peers. I think one of the main ways of doing that and one of the most effective ways of doing that is to look elsewhere, to do a comparative analysis of similarly situated jurisdictions. So, within Australia, what is going on with the other States? Of course, your Committee is a little bit different and the model that you have for the Regulation Committee looking at policy questions, that does not exist in every other State in Australia, so there is some limitation there. But then what I would suggest is to look at a place like the United Kingdom.

The United Kingdom has a committee in the House of Lords, Secondary Legislation Committee that looks at policy questions in relation to delegated legislation. From my point of view, it is really the gold standard. It provides an excellent benchmarking opportunity to look at its reports, the quality of its reports, the frequency of its reports. What is it actually doing in its reports, how is it reporting on the policy questions and flagging them for the attention of other parliamentarians and things of that nature. That would be a great place to start, in my view, would be that United Kingdom committee in the House of Lords that does look at these policy questions.

There are also other examples I think you are going to find where their performances may be a little bit disappointing, but again, committees have slightly different roles, such as in the Canadian context for example. The committee there does not report very frequently. It reports only a few dozen times in the last decade or so. That does not mean it is not doing any important work, it is doing a lot of important work, but most of that happens behind the scenes in camera and it is not published in its reports. It does not have that kind of running report. There are a variety of different models, but I think if you are interested in benchmarking, that United Kingdom committee would be a fantastic way to do that.

Ms ABIGAIL BOYD: In the previous session we talked a little bit about given that there are so many regulations and orders and things being made, and quite quickly, how do we best communicate that to individuals

so that they actually know what the law is at any particular time? Do you have any thoughts about that or whether there were any jurisdictions that do that sort of notification of regulation particularly well?

Dr NEUDORF: Thank you for the question. I think this is really the main challenge when it comes to delegated legislation. They are almost invisible. The media is not interested. People are not paying attention. Something that is noted in the Gazette, most people do not have a subscription, it is not their weekend reading. How do we actually communicate the law that is changing, new laws that are being made? This is a huge challenge. One of the jurisdictions that has a very interesting approach on this is New Zealand. New Zealand within the Cabinet manual has a requirement that the Cabinet should not make delegated legislation effective until 28 days after it has already been published or noted in the Gazette, which is really interesting because what that allows essentially to happen is the community to absorb the changes and the information. The regulation has been made, but it does not take legal effect for that 28-day period.

That is not always followed, but it is in the Cabinet manual as a requirement, essentially as a best practice and a requirement that the government should follow that approach. That is one way of allowing a little bit more time. One other way that may help is for the Committee itself to consider alerts or targeting particular industries or groups or individuals to try and build relationships to communicate that information that is coming out in terms of new delegated legislation. It is a difficult thing. When I made my opening statement by looking at some of those numbers, and we are talking about thousands and thousands of pages of legislation every year that are being made, of course that is a lot of detail and a lot of law.

The other thing I would just say, if I can just have one more moment on this, and I think this really underscores the importance of consultation in the first place. I think tightening up the consultation requirements, making sure they are more stringent and making sure they are actually followed. I think this is one of the problems you see at the Commonwealth level, is they are only recommended by the Legislation Act, they are advised and they do not affect the legal validity. If they do not do it, it does not really matter at the end of the day. The committee might complain, but it does not actually change anything. If we are talking about consolidating in New South Wales those three Acts into one Act, that is a great opportunity to revisit consultation.

Through consultation not only are you making better laws because you are getting more perspectives being brought in, a diverse range of views, but you are also really increasing awareness of the law changing. People are all of a sudden thinking this actually could be enacted as a regulation and my business is going to change or I am going to have to do something differently. That is a really important way of increasing that awareness, so I would strongly recommend, to the extent possible, tightening up those consultation obligations.

The Hon. GREG DONNELLY: On page 6 of your submission under Recommendation you have a (c) that says, "Clarify scrutiny criteria applied by committees" and in the paragraph underneath the heading it goes on to say, "For both committees", that is the Legislation Review Committee and the Regulation Committee, "to publish a statement on how the scrutiny criteria is interpreted." Then you go on to reference specifically New Zealand's Regulation Review Committee Digest. Will you elucidate what you understand is contained in their digest? Do they contain detailed explanation that is built up over time about the scrutiny criteria that is used by the committee?

Dr NEUDORF: Thank you very much for the question and the opportunity to comment on that. I think it is a really important point because the criteria as it is written is very broad, for both committees in a sense and it would not always be clear, for example, for the Government or for legislative drafters what exactly the committee is going to do, how is it going to apply that criteria? When you look at the Commonwealth inquiry from 2019, one of the major problems that they identified is that what they did in practice was pretty much totally out of sync with what you would think they are doing from reading their scrutiny principles. So they brought those two things in step with each other again, which I think is valuable.

We do not want committees to take people by surprise. If they all of a sudden were applying this constitutional criteria but last year did not do that and next year might do something totally different. That leaves everybody around in a state of confusion and uncertainty as to what really are the requirements, where are the concerns, where do they lie. One of the benefits of this New Zealand Regulation Review Committee Digest is what it does is it synthesises all of the many reporting and decisions of the committee into, as you said, a statement or principles that elucidate what that criteria actually means in practice. So, it provides case studies and examples and illustrations of where the committee essentially draws a line. What is acceptable and what is not acceptable in terms of its scrutiny criteria?

Of course these things do change somewhat over time, that is totally natural, but the digest is updated every so often. It is actually written by academics at the Victoria University of Wellington Faculty of Law and

they are basically taking all these raw materials, these bits of the committee and really doing a fantastic job in synthesising, analysing and really putting forward some clear statements of the scrutiny principles and what they actually might mean in practice, which I think is really helpful for all actors. I would say too, your Committee is still very new. It has really only been kicked off in the last couple of years and so I would encourage you as you build your jurisprudence over time and I would encourage you to think of your Committee reports as jurisprudence. They are creating laws in a sense. You are applying these principles, these scrutiny principles and I think developing a sense of that jurisprudence and what it means would be very valuable, particularly at the outset, at the beginning, and set a very good forward-looking kind of principle.

The Hon. GREG DONNELLY: I just take you over the page of your submission to page 7 and your point number (i) with the heading "Provide for the scrutiny of draft bills and delegated legislation". Will you expand on that particular comment you are making there.

Dr NEUDORF: Absolutely. Thank you for that question as well. One of the problems we see with delegated legislation is that once it has been made, the law has changed and the Government is not really that interested in changing it again or correcting it or addressing maybe the concerns raised by the scrutiny committees because people have moved on, it is a done deal and it is a bit embarrassing, frankly, to go back and have to clean up something that looks problematic. I think Committees looking at delegated legislation ex post facto are in a bit of a difficult position. They really are up against those barriers which are quite significant from the Government's point of view.

The opportunity to look at draft legislation and this can be bills that delegate legislation or delegate powers to make delegated legislation or the draft delegated legislation itself, can be very valuable in that regard. It can allow the Committee to identify its concerns and say here are some flaws or some problems that we see in the draft. Governments are much more receptive to actually going along and changing things at that preliminary stage. It is even part of the lawmaking process in a way. The Committee is itself, of course independent from the drafters and from the Government, but it is an important quality check in terms of the issues that the Committee is looking at. I think looking at the draft legislation is very valuable and provides that opportunity for earlier scrutiny, more effective scrutiny essentially than it does currently looking at it after it has already been made.

The CHAIR: In your recommendation (j), which is just below the one that the Hon. Greg Donnelly was talking about, you talk about to limit the use of exemptions to disallowance and scrutiny. In that paragraph you suggest that a listing of exempted delegated legislation should be maintained by the Committee in the interests of transparency. How do you see that working? Are you talking along the lines of maybe quarterly reports of the exempted legislation? Are you talking about annual reporting? Will you provide a bit of colour to that statement for the Committee.

Dr NEUDORF: Yes, thank you very much for the question. First of all, exemptions are very problematic. I made a submission to the Commonwealth inquiry on what I think is the over-reliance on exemptions. About 20 per cent of all delegated legislation in the Commonwealth are exempt, which means the committee cannot even look at it and it does not follow the normal process for parliamentary scrutiny. I think that is really problematic. There is a lot that can be done around that by strengthening the grounds on which exemptions can be claimed and that sort of thing. One of the things with the current system that your Committee can do, as you mentioned, is to just publish a listing of this exempted delegated legislation, because the Legislation Review Committee is not going to be looking at it if it is not disallowable, so who knows what this stuff is, where is it going, what is it doing?

Just maintaining a list, whether quarterly or annual, my preference would actually be for a website even to have a current list that things could be added very quickly. You do not have to publish a formal report in that sense, you can just maintain a current listing online. If you look at the Commonwealth committee with respect to COVID-19 delegated legislation, that is exactly what it is doing. It has this fantastic website that lists all the delegated legislation made under legislation that is relating to biosecurity and public health and all these things, and it is a fantastic resource that people can quickly look at and find the pieces of delegated legislation. Yes, it could be done through a quarterly report or annual report, but I think the main thing is to do it in a prospective way. I am not sure you can go back and find all of this stuff historically. There is some that may be exempt; there is just reams of it.

Moving forward, certainly delegated legislation that comes through the committee but you can see that it is exempt from disallowance, that the Legislation Review Committee itself has not been able to look at it for that reason, it is really important to at least maintain some transparency around that by publishing a list of that. That would go a long way to showing the extent of it and where the stuff is and where it can be found, in the interests of transparency.

The CHAIR: You also suggested this Committee looks at publishing guidance for legislative drafters. I am interested in how you see that working. You talk about publishing a plain English guidance to help legislative drafters. We have the New South Wales Parliamentary Counsel coming before us this afternoon and I suggest we might pose the question to them about how they would see that working. Do you see that as a one-off iteration or do you see it as a continual publication of the plain English guidance?

Dr NEUDORF: Thanks for the question. I just want to say first of all Parliamentary Counsel does a fantastic job at drafting delegated legislation, very high-quality legislation, but they do not draft all of it. There are other agencies out there, there are other regulation-making bodies, as you will that are making the stuff and it does not always get drafted by Parliamentary Counsel's Office. I think some plain language guidance would go a long way to telling everybody, putting everybody on notice of what your expectations are as a committee. Here are the things we are going to be looking at, here are things that we have flagged in the past that were problematic and we recommend drafting, for example, a Henry VIII provision or piece of delegated legislation that confers rights or something in this kind of a way.

Again, that could also build on what we talked about earlier, with the jurisprudence of the Committee, the scrutiny digest, as you continue over time and develop scrutiny principles, you put out a statement about what they mean exactly. This could also tie into that guidance and really just make it very clear to individuals, agencies that have to make delegated legislation, what the standards should be from your Committee's point of view. We are not talking about the quality of legislation in terms of this word choice over that word choice or something like that, but in terms of those scrutiny principles that you are applying to the delegated legislation.

The CHAIR: This morning with the Law Society and the New South Wales Bar Association we also spoke about Henry VIII clauses but when the primary legislation goes through the Parliament that, where possible, it would be good to have the draft regulations with the bill so that the legislators, the members could get to see what the regulations would look like, so they are making an informed decision around the legislation. I appreciate that cannot happen all of the time, but do you have some views about why that would be a good thing?

Dr NEUDORF: I think that is a little bit more difficult in a way. One of the reasons why delegations are made in the first place is because Parliament does not necessarily have the time or the resources to make all of the detailed laws and so having the regulations made at the exact same time, it can be problematic from a timing or a resource perspective. The other thing I would say about that is there is no guarantee that those particular regulations that are proposed at the time that the bill is put forward are the ones that will stay in place. They could be repealed tomorrow essentially and replaced with something new. So, Parliament, in a sense, might be misled if it thinks here is what the delegation really means because we see the Government has these draft regulations, that sounds fine and we have no concerns, let us enact the bill. Then they find out six months later that those regulations have since been replaced with completely different regulations.

I am not against the idea in principle, I think the more knowledge and information Parliament can have up front about how those powers might be used is a good thing. There is certainly nothing wrong with that. But I would not want to put too much stock in it and over-rely on that because things can change very quickly and once that delegation provision is part of the law, those powers can be exercised as they need to be by the Government, so things can change. I would not want to think that they are fixed when they are not really fixed.

The CHAIR: Catherine, have you got any more questions?

The Hon. CATHERINE CUSACK: No.

The CHAIR: Associate Professor Neudorf, that draws us to a close with your session. Thank you for your time. Thank you for your submission to the inquiry. It is quite thought provoking. As I said in my opening comments this morning, it is one of the nerds this Committee, but it is quite an important inquiry. Thank you for your time. I do not think you took anything on notice, so we do not have to worry about that. Thank you very much for your time.

(The witness withdrew.)

(Luncheon adjournment)

MICHELLE FALSTEIN, Secretary, NSW Council for Civil Liberties, affirmed and examined

JARED WILK, Co-convenor, Civil Liberties and Human Rights Action Group, affirmed and examined

The CHAIR: Welcome back everyone. I now welcome our witnesses from the NSW Council for Civil Liberties. Would either of you or both of you like to make a short opening statement?

Mr WILK: The NSW Council for Civil Liberties thanks the Committee for the invitation to appear today. First and foremost, our view is that Parliament must always retain effective oversight of delegated legislation. It is not enough to say that Parliament has the legal power to delegate its legislative power or use Henry VIII clauses and in any case, can always repeal the empowering provision. Parliament is the institution with the democratic constitution and deliberative transparent processes and the best place to apply effective scrutiny to delegated legislation. We urge Parliament to exercise its oversight and scrutiny powers to the maximum degree, including by finding ways to continue sitting regularly throughout the pandemic and using the under-utilised power of disallowance where required. This is especially needed during the current pandemic, when good regulation-making practice is sometimes being disregarded and regulations are having significant impacts on individual rights and liberties.

Secondly, we view a balanced legislative and regulative regime as one in which good regulation-making practice is respected. This includes minimising the use of shell legislation, which can confer on the executive wide-ranging authority to formulate social and political policy, Henry VIII clauses, which undermine the notion of the separation of powers and parliamentary supremacy and crucially, "enable the production of policy beyond the principles of the parent Act" without appropriate parliamentary debate and the incorporation of often fast-changing, non-legislative quasi-legislative instruments into legislation. It also includes that legislation is never exempt from disallowance, except perhaps in emergencies, though even emergencies should not preclude the instrument from later review or the implementation of other safeguards.

Good practice demands the development of guidelines—preferably legislative—for what matters are inappropriate for delegated legislation. It further includes ensuring that delegated legislation is drafted in a manner which makes the law known and knowable, in accordance with the rule of law, especially when it affects civil liberties and human rights, such as the COVID public health orders. As is evident from our submission and others, the New South Wales Parliament and Government have over-engaged in poor regulation-making practices. Finally, we say that the jurisdiction of the regulation and legislation committees should be clarified and appropriately broad or broadened to best carry out their important scrutiny functions. Having now benefited from reading the other submissions in this inquiry, we agree with many of the recommendations and we are happy to elaborate on that further.

The CHAIR: Ms Falstein, have you got anything to say?

Ms FALSTEIN: No. I think we have summarised everything.

The CHAIR: Mr Wilk, you were reading from a prepared statement?

Mr WILK: Yes, opening statement.

The CHAIR: If it is possible for you to hand that up to the secretary, that would be fantastic because the people on your left, the Hansard people, would love it. It makes their job a bit easier.

Mr WILK: Sure.

The CHAIR: The way the questioning will happen, it is a bit more conversational than normal for a parliamentary inquiry but the topic matter is so important. Also we have one member of the Committee, the Hon. Catherine Cusack, who is attending via teleconference as well. I will begin the questioning. You have had an opportunity to read all of the submissions to the inquiry?

Ms FALSTEIN: Yes, we have.

The CHAIR: You would have read the New South Wales Parliamentary Counsel's Office submission?

Ms FALSTEIN: Yes.

Mr WILK: Yes.

The CHAIR: One of those is that consideration be given to more transparency about the use of Henry VIII clauses or shell legislation by introducing a mechanism and they say, "for example, by a statement in

the explanatory notes accompanying the bill to ensure the use of such clauses or legislation is more openly brought to the attention of the Parliament." I would be keen to get your views on that statement or recommendation from the Parliamentary Counsel's Office and if you think it is a good idea, how you would see that happening.

Ms FALSTEIN: We do think it is a good idea. Perhaps we are not best placed to say how we would see it happening, but in terms of the work that we do, we rely a lot on explanatory notes. It is something that certainly makes the people that are drafting the legislation more accountable as to what they are actually putting into those bills and it makes it very clear for people who are in the public, that they can actually follow what is happening.

The CHAIR: Mr Wilk?

Mr WILKS: I agree with that.

The CHAIR: Earlier this morning we had the Law Society of New South Wales and the Bar Association and they were talking about an explanatory memorandum, so it would make it clear as the primary legislation is travelling through both Chambers, as to why a Henry VIII clause is there and what the regulation may look like, some sort of an explanatory note that could be used to measure the subsequent regulation against.

Ms FALSTEIN: I agree that that is a terrific idea. It depends on that clause being identified in the first place as being of that kind. It is not always, so that would be the main thing, for people to actually pick up on that.

Mr WILK: Also, a lot of the scrutiny mechanisms in the first place depend on whether the particular piece of delegated legislation is a statutory rule within the definition of the Subordinate Legislation Act and that is not always the case, for example, under the COVID public health orders. Then a lot of the scrutiny mechanisms are limited.

The CHAIR: Some of the submissions have spoken about this. Do you think there is merit in broadening out?

Mr WILK: Certainly.

The CHAIR: How would you envisage that happening?

Mr WILK: Just in the broadest possible terms, to include all delegated legislation really. I do not see a particular rationale why something should not be included in that definition, to at least be subject to disallowance.

Ms ABIGAIL BOYD: We heard a bit this morning from both the Law Society and the Bar Association about the benefits and dangers of restricting the types of things that can be in delegated legislation. There have been suggestions that we could have an explanatory memorandum that had to be produced when there were particular types of delegated legislation made or when a primary Act gave that power. But we also heard, I think it was from the Law Society, that you obviously do not want to be too strict because there will be times that you cannot foresee where regulations may need to be made very quickly.

In that context, I am looking in your submission where you list at Commonwealth level—and the way I read this and I would be grateful for your clarification and thoughts—is that this kind of sets up a presumption of the types of things. It is not a rigid list, because there can be exceptions to it, but the types of things that should only be included in primary legislation. Will you talk about whether you see that as being a sufficient list, whether you think in New South Wales we would add additional things and also how it works at a Commonwealth level in terms of how that special justification is disclosed and scrutinised.

Mr WILK: I do not know too much about how the special justification works but we certainly support putting a list of what matters would be inappropriate for delegated legislation. Either in some sort of guideline or in the legislation itself, which is not the case at Commonwealth level and we did recommend that in our recent submission to a Commonwealth inquiry on delegated legislation. In terms of the list itself, I think it is quite a good list. It talks about provisions creating offences which impose significant criminal penalties; that is important. Having a significant impact on human rights and personal liberties, which of course is within our remit squarely. We think it is quite a good list.

Ms ABIGAIL BOYD: But you are not sure how it works in terms of that presumption?

Mr WILK: No.

Ms ABIGAIL BOYD: Another thing I have been very interested in is the way in which these sorts of delegated legislation are notified to the public and how long the public should have to digest before they are subject to consequences. Do you have any recommendations or views on that aspect?

Ms FALSTEIN: I can certainly say, it depends on what kinds of regulations we are talking about. Certainly if you are talking about emergency regulations, it is very difficult to have a time limit on how long that is going to be scrutinised. What we would say is that the important thing is that even if you had some emergency regulations or regulations that have a very quick turnaround, they may not be subject then to disallowance but you can certainly review them further down the track. There is really no reason why that should not happen and certainly your Committee should be doing that. A number of people have made the suggestion that that is done by your Committee and that you have the power to do it. We would certainly endorse that.

The Hon. GREG DONNELLY: Thank you both for coming along today. In your submission on page number 6, if I could take you to that page, specifically on the bottom of page 6 going onto the top of page 7 (iv) some commentary there about the Legislation Review Committee, which is a joint House committee of this Parliament. You make some comments about that, particularly in the context of regulation and disallowance. Would you elucidate as best you can on your thoughts about this issue, about this particular committee exists and its role dealing with matters of regulation in the New South Wales Parliament.

Ms FALSTEIN: I can do that. I suppose when we first started this submission things were slightly different. Things have moved along very quickly. We were looking particularly at the terms of reference and those points that you made, so we took what the Legislation Review Committee and what it does, in the limited sense and what could be done. The issue is that that committee does only review regulations and bills that are subject to disallowance so that was a concern. We felt that it should have a wider remit. We have made this endorsement in other submissions that we have made at a Commonwealth level, we have since come to believe that that should also be something that this Committee does and that it should have a wider scope in the same terms as the recommendation that we have made in regard to the Legislation Review Committee.

The Hon. GREG DONNELLY: Would that provide a tension between the two committees do you think?

Ms FALSTEIN: I do not think so. I do not think it necessarily will. The scenario that has occurred lately with the fact that Parliament has not been sitting or has been adjourned and is now sitting slightly more again, is that regulations have not been the subject of disallowance and there has not been anyone to review them. That has been a bit of a problem for the Legislation Review Committee. I do not think they have used their own power of disallowance enough, but obviously in this case there was no opportunity to do that.

The Hon. SCOTT FARLOW: Are you aware of them ever using it?

Ms FALSTEIN: I do not know.

Mr WILK: I am not aware of it.

Ms FALSTEIN: I think they have used it very sparingly. I did actually see something, I think.

The Hon. SCOTT FARLOW: It happened once then.

Ms FALSTEIN: Yes, it has not been used enough. But in a situation where Parliament is not sitting, then nothing is happening.

The Hon. GREG DONNELLY: Thank you for that, I appreciate those observations. In some evidence we received earlier today from Professor Neudorf—he was very interesting, he provided an opening statement and I think in that statement he quoted a range of statistics. I wrote them down. You will be able to read them in *Hansard* when it becomes available. In looking at the Parliament of New South Wales in the calendar year 2019, he had done this analysis or had had this analysis done for him, he cited that there were 3,470 pages of law that passed through the Parliament. Law broadly defined to include statute law and regulation. With respect to the primary law, the legislation, 462 pages of that figure were statute law, 13 per cent and 3,008 pages, 87 per cent was the delegated legislation of this Parliament.

I had always thought and understood that there was a difference but in that realm of difference in percentage terms it did surprise me; which brings me to the question about the actual capacity and resources really which would be required, to use the vernacular, to give it a fair shake in terms of reviewing this. You have 462 pages of statute law. Obviously you are well aware that the bills are in the House, the politicians pick them up and all of that, there is both informal, which sometimes leads to formal scrutiny and then you have the shadow Ministers and others critiquing the law very seriously to prepare their contributions in the House. You compare it to the 3,008 pages of the delegated legislation. You could probably count on your fingers and toes—maybe I am exaggerating it—the numbers of people who are going to pore over that and provide anything like scrutiny of it.

It seems if Parliament as an institution was serious about trying to recalibrate this and get more of an equilibrium in terms of quality scrutiny, there would have to be a lot more resources put into the respective committees that have the remit to do that, would you think? That is a leading question, but given the volume of legislation, albeit delegated, churning through, that is a lot of work to be undertaken, is it not?

Ms FALSTEIN: Yes, absolutely.

Mr WILK: Yes.

Ms FALSTEIN: And you would need a lot more resources. It might be helpful, as you say, to have the people drafting the legislation doing explanatory memorandums and that might flag things a little more that are of concern. There are plenty of other mechanisms for doing that.

The Hon. GREG DONNELLY: What would you perhaps suggest, just laying your thoughts out?

Ms FALSTEIN: We made some recommendations in regard to regulatory impact statements. We did make a few there.

The Hon. GREG DONNELLY: That was in point 15, yes.

Ms FALSTEIN: I think there is probably more that can be done in terms of having inbuilt protections in regulations like sunset clauses that are really meaningful, so that they can really be reviewed at the appropriate time. I do not think that that is happening at the moment and we have seen it with orders being made lately, although they have 90 day sunset clauses, every time they are renewed that resets. That is concerning. Definitely something can be done about that and that would perhaps mean that not all the regulations that come up need to be reviewed and there might be other criteria that flags it in legislation that needs to be looked at.

The Hon. GREG DONNELLY: Just to press you a bit further on that issue, the statement you just made about not all regulation would necessarily need to be reviewed. Playing devil's advocate, how do you know, unless you look at it? With such a volume of pages, unless it is being looked at with some scrutiny, with some sort of eyes into this to think about the implications of this delegated legislation, it would be after the event, which might be a short period of time or well after the event before there is an awakening that something has passed through here that there are community concerns at large about or a specific point that has been covered that really needs some attention.

Ms FALSTEIN: All I am suggesting is that there might be ways to reduce the amount of work involved in scrutinising these things.

Mr WILK: If I could just jump on. I think what this is all emphasising is how important the pre-screening process is. I agree you do need to go back as much as possible and look at them, but this would reduce the incidence of bad regulation-making practice. We have got the regulatory impact statements. We have got the guidelines for preparation, but all of that only kicks in if it is a statutory rule, firstly. The thing we were talking about before, saying what matters are inappropriate in the first place to go there that Ms Boyd raised, that would be helpful for screening out that sort of incidence of bad practice.

The Hon. GREG DONNELLY: Just to revisit that. Are you able to be more precise or do you have a working definition perhaps that you would use that would in fact seek to create that demarcation of what matters would not receive delegated attention?

Mr WILK: I cannot give you word for word precisely, but I know at the Commonwealth level they define things according to the effect of the instrument rather than the name and that seems to be a smarter way to do it, in my view, because it was catch more.

The Hon. GREG DONNELLY: Thank you for that.

The Hon. SCOTT FARLOW: It is interesting going back in terms of the committee design. There is what is on paper and then there is the reality of it. We had evidence before from the Bar Association that in Victoria for instance, their regulatory committee equivalent to ours is able to disallow instruments, but it is a government controlled committee so it does not often do that. The same as what I would suggest with the Legislation Review Committee in New South Wales Parliament, again a government controlled committee, so is unlikely to disallow regulation.

I am interested in whether you have a view in terms of the design of the Legislation Review Committee and the design of this Committee, which is not government controlled and perhaps the different powers that each one should have, considering the political composition of those committees, namely that the Legislation Review

Committee is a government controlled committee, while this Committee is one controlled by the Opposition or the Crossbench or equal numbers but an Opposition chair.

Mr WILK: I think the main recommendations we had in respect of the ambit of the committees was the Legislation Review Committee is highly restricted by the fact that it can only review disallowable instruments; that is the first thing. The Regulation Committee, this Committee, according to Professor Appleby, there is some clarification that might need to be done in respect of what instruments can be reviewed, because it uses the word "regulation" but it is not clear whether that applies to all instruments that are delegated. Those were the main technical aspects. I am not sure if I said the political aspect.

Ms FALSTEIN: It is obviously worthwhile that this Committee looks at policy issues and I think that is important to continue to do that. That is the main aspect that we would be happy to be retained, that is really important. But we definitely think that this Committee should have perhaps more of a remit to look at things like emergency powers and the more unusual regulations, even if they do not look at all regulations.

The Hon. SCOTT FARLOW: One of the challenges in the formation of this Committee was that the Legislation Review Committee for instance, has been better resourced when it comes to legal expertise supporting the committee, which due to the constraints of the Legislative Council and our committee system, it was not really possible for this Regulation Committee. Is that something you think is essential for a Regulation Committee such as this to have?

Ms FALSTEIN: Yes.

The Hon. SCOTT FARLOW: That is effectively a Dorothy Dixer on that one I suspected.

Ms FALSTEIN: Yes, that's right.

The Hon. SCOTT FARLOW: The Bar Association made a submission earlier that potentially all of the Acts that cover regulations and statutory interpretation should be joined together in one instrument. Is that something you have a view on and is that something you are supportive of?

Mr WILK: Yes, I think the council certainly endorses that recommendation, yes.

Ms ABIGAIL BOYD: Can I ask questions going from that?

The CHAIR: You can. What I do is I will go to Ms Boyd just to follow on and then after Ms Boyd we will have the Hon. Catherine Cusack.

Ms ABIGAIL BOYD: On that topic about the Victorian Scrutiny Committee, just taking the point there about the political make up of it, when they disallow regulation is it on the basis of policy or is it on the basis of a defending specific technical requirement in relation to delegated legislation?

Ms FALSTEIN: We would not be aware of the Victorian scenario, no.

The Hon. CATHERINE CUSACK: Thank you very much. I am fascinated by your views because I see your organisation as a champion for the Parliament in the legislative process. You refer to the COVID emergency. Would you expand a bit more on your views of how the Government has handled this extraordinary situation that we are in by using public health orders, which has been very successful in achieving things like closing borders and things like that, but also the roles that parliamentarians have had to take almost by convention to get back and allow the Government to do that. Do you have any observations or thoughts on how that has all been conducted?

Ms FALSTEIN: I suppose the Government has done what it can with what it has is the short answer. I think that we have been fairly critical of the Government, of Parliament adjourning, so that would be our biggest criticism. We feel that they should have been sitting remotely. Given that that has not happened, I suppose we are grateful that the Government has passed orders that have kept us relatively free of the infection. I do not think anyone can not acknowledge that. But at the same time, I think that if you are going to engage in producing numbers of orders at fairly short notice and changing fairly often, you do have an obligation to try and make them as clear and easy to follow and non-discretionary as possible. I think that there is still a possibility for the Government to do that. I do not know that it has been done that well. It has been very confusing for the people of New South Wales, I believe. I think that is something that certainly can be improved.

The CHAIR: Mr Wilk?

Mr WILK: I agree with that. I think there certainly has been a lot of confusion, but it is hard to see how that could be avoided at times. Our concerns were more with the fact that it is not reviewable, these are not

statutory rules, they are not reviewable or subject to disallowance and they were being changed so often that it was difficult for the public. Those were our main concerns.

The Hon. CATHERINE CUSACK: One other question in relation to the submissions where they referred to the Commonwealth guidelines about what is appropriate to be considered a criteria for what is a good approach to defining delegated legislation. Do you think New South Wales has defined that clearly enough for the benefit of parliamentarians and the Parliament as to what is appropriate to be delegated and what is not?

Ms FALSTEIN: No, I do not think it has been. I think there was another submission that suggested that that definitely could be clearer and it certainly there should be a handbook that sets this out in detail, which would help parliamentarians and people drafting the regulations.

Mr WILK: The other option to potentially consider is having it in legislation itself. That would be a stronger protection. I think that is what we favoured in our submission.

The CHAIR: Referring to the Parliamentary Council's Office submission, it is quite a good submission and it picks up some of the things that you are talking about here. One of the issues that they have raised, and I will quote from the submission, 6.7:

> Aside from parliamentary scrutiny, delegated legislation also will generally attract lower levels of community consultation and public attention than primary Acts, even while it may have the effect of amending primary legislation.

This Committee, although relatively new in terms of some other committees, the small number of inquiries we have done into regulations, it would be fair to say that the first thing that just about everyone raises is the so-called lack of consultation or the poor consultation. Therefore, consultation pretty quickly gets mentioned. Is there a better way of doing this? It is about getting the balance, I understand. Do you have some suggestions if there is a better way of dealing with Henry VIII clauses and the regulations that may derive from there to ensure that people do actually understand what is happening?

Mr WILK: I was only going to add I think Lorne Neudorf's recommendation that there should be some public complaints process is a very good one. We were talking before about how there is not enough time or resources sometimes to review these things. If organisations like ours take a look and we think that a certain piece of delegated legislation might not be proportional or balanced correctly, we could complain through the process and that would draw everyone's attention to those matters, so that might help.

Ms FALSTEIN: Obviously there has to be some advertising of the regulations and it has to be tabled before Parliament, but again, you do not have a lot of the public necessarily going through the great deal of regulations, which you have mentioned. We would potentially, as the public have to go through and look at every piece of legislation to determine whether it had Henry VIII clauses or was in some way not protecting civil liberties, which is our concern.

The CHAIR: I have had to lead the Opposition on a number of bills in recent years and one of the problems that I have had and actually posed the question across the table to the Minister is we have got the legislation but there is a great swag of detail missing that we are being told, trust us, it will be in the regulation, but we do not know what is going to be in the regulation because it is not coming through at the same time as the legislation. This is about balance. Governments will put through legislation and sometimes they have to do it rapidly because of circumstance and therefore the detail will have to be left to the regulation, but people still should be consulted about that. Do you agree?

Ms FALSTEIN: Yes.

Mr WILK: Yes.

The CHAIR: So then how does that happen?

Mr WILK: There are some good consultation processes in place. The fact that the committees do the work around this is very important. As Professor Neudorf recognised, the committees play a very important constitutional function in New South Wales and at the Commonwealth level. I think the public complaints process would help with that, but there certainly needs to be more in place.

The CHAIR: When you talk about public complaints process, in your own mind can you tell the Committee what you are actually thinking of, what would that look like? How would it happen? If I was a member of the public and I wanted to lodge a complaint against the process, how do you see that happening?

Mr WILK: Some online mechanism facilitated by the Committee that you could apply to have a hearing but I would need to think about that in more detail.

The CHAIR: I am happy for you to take that on notice if you want to go away and think about it. You have 21 days to get back to the Committee so if you want some more time. I think it is important to explore that. How that mechanism would work, when people talk about it, what are they actually talking about.

Mr WILK: The only thing I am thinking is that was Professor Neudorf's recommendation.

The CHAIR: Yes, but if you think it is a good idea, how would you see it working is probably the question. I am happy for you to go away and take that on notice.

Mr WILK: Sure.

Ms FALSTEIN: Yes.

The CHAIR: One of the issues around the vast numbers that the Hon. Greg Donnelly spoke about off the back of Professor Neudorf's testimony, there are resourcing issues. There are constraints. The committee into committees, as it is colloquially referred to that was chaired by the Hon. Scott Farlow, looked at a range of committee structures and enhancements to the Legislative Council committee structure, but it did come back to resourcing and what could be done within the resources that are made available. Some of the mechanisms that have been discussed today by other people of New Zealand or Victorian or even the Commonwealth model, if you were to set aside resources as not an issue, what would you consider to be the best mechanism for us to deal with these types of issues?

Ms FALSTEIN: I think hiring more people, to start with, so that you have got that resource to engage with the public and to go through the regulations that are referred to you. I think that is something that obviously is key. Perhaps that is something that we can take on notice as well, because I had not turned my mind to exactly what would be the most appropriate use of resources, but we recognise that you cannot do a job like this and review more legislation and have a greater scope of the kind of legislation that you are looking at unless you are properly resourced.

The CHAIR: I am happy for you to take that on notice. Some of the submissions talk about the way this Committee has been established and look at the referral processes. Essentially the House has to refer inquiries to the Committee. Some of the submissions have spoken about the need to maybe expand that to self-referral capacity. What are your views on whether you think that is a good or a bad idea?

Mr WILK: I certainly support that. I just think it would enhance the scrutiny a great deal if this Committee could self-initiate inquiries. I agree with the Law Society recommendation as well that if this Committee could review draft delegated legislation, that also might help improve the process, pre-screening as it were. Self-initiating inquiries would be helpful to enhance scrutiny.

Ms FALSTEIN: That is correct.

The CHAIR: It would appear that that is the extent of the questions for the time being. You did take a couple of questions on notice. The Committee has resolved 21 days for you to get those back, but the secretariat will get in touch with you and talk to you about that. Thank you again for your submission and thank you again for your time in attending today and your views. At some stage you will get a copy of the transcript to have a look at it, so thank you very much.

(The witnesses withdrew.)

RICHARD HURFORD, Deputy Parliamentary Counsel, New South Wales Parliamentary Counsel's Office, sworn and examined

ANNETTE O'CALLAGHAN, Parliamentary Counsel, New South Wales Parliamentary Counsel's Office affirmed and examined

MARK COWAN, Deputy Parliamentary Counsel, New South Wales Parliamentary Counsel's Office, affirmed and examined

The CHAIR: We now have our next witnesses from New South Wales Parliamentary Counsel's Office. Ms O'Callaghan, would you like to make a short opening statement?

Ms O'CALLAGHAN: Thank you, yes, it will be very short. I start by thanking the Committee for the opportunity to make a submission on this very important issue and for the invitation to appear before the inquiry today. It is not often we find people who are equally interested in these topics as we are and obviously we consider it very important, so for us, this is a great opportunity to talk about these issues. For us as an office and for me as Parliamentary Counsel, there are two real priorities for us—serving Parliament by providing the highest-quality standard of legislation and providing high-quality accessibility to legislation.

For me, we cannot be said to be providing really high quality legislation if it is full of Henry VIII provisions or full of delegations of power and it is not accessible if people cannot transparently see what is happening, what Parliament has decided is going to be the law of this State and making sure people have full access to that law. So, I am very happy to be here to answer any questions you may have and we have listened to some of the submissions this morning and agree with much of what was said.

The CHAIR: Thank you for your submission and thank you for your time here today. It is quite an important inquiry. This Committee, as you would know, is not only just looking at regulations that are in place, but we have the capacity to look at policy. As the Chair, I thought this would be a very good policy area to delve into and spend a bit of time looking at how we can make the processes better and more transparent. Drawing on this morning's evidence, particularly from the Law Society and the Bar Association. They spoke about possibly an explanatory memorandum would be a good way of improving the process. I know within your submission there are some issues about balance. Do you agree that would be a good mechanism to put in place for the governance of New South Wales legislative arrangements and would you see that working?

Ms O'CALLAGHAN: I think in referring to explanatory memorandum, I have taken it that they are talking about the same thing as our explanatory notes, but the explanatory notes in a very different form to the way we currently prepare them. For me, we could make vast improvements in our explanatory notes. We have certainly had feedback from the judiciary that there is not enough information or enough useful information in those explanatory notes. I do not know if people understand how they are written here, but we are only one of two jurisdictions in Australia where the legislative drafter writes explanatory notes. It is New South Wales and South Australia. In every other jurisdiction it is the policy officers who write the explanatory memorandum or notes.

I would suggest it is better to have the policy officers writing those explanatory notes. They are much more able to explain the Minister's policy, what consultation has occurred, what they are trying to achieve in terms of a policy intent than we are. We are very much writing it as a legal document and one that, as people have commented this morning, very much reflects what is in the bill, is not really helpful in terms of giving an expansion on what the policy intent is. I would see it as a vast improvement if in fact those explanatory memorandum were much more helpful than they currently are in terms of explaining policy and alternative ways of achieving those policies that have been considered and discarded, particularly when you are looking at things like Henry VIII or shell or skeleton legislation.

The CHAIR: What sorts of things do you think should be included? Do you have a view about that?

Ms O'CALLAGHAN: I do have a view. I have to declare a bias from the very start. I have come from Queensland and I very much like the Queensland model of a Legislative Standards Act that sets out what good quality legislation looks like and in that Act sets out what should be in explanatory notes, both for bills and for subordinate legislation. I would very much recommend that model. That may just be because that is what I have gotten used to, but I think it is very transparent. It very clearly says what will be in every explanatory memorandum and it has different criteria for a bill versus subordinate legislation. So you as a Minister or the public servant preparing that for your Minister, make sure you tick off every one of those things and make sure it is included. To me, that would be what I would be seeing as a good standard. It covers a whole range of things.

For a bill, it has a brief statement of the policy objectives and the reasons for them, the way the policy objectives will be achieved, why this is the appropriate way of achieving those policy objectives, a brief statement of any reasonable alternative way of achieving the objectives and why that was not adopted, an assessment of the administrative costs, consistency with what Queensland calls fundamental legislative principles. But they are principles that underlie any good legislation in terms of making sure that we comply with the rule of law and respect the institution of Parliament. Then a brief statement about the extent to which consultation was carried out, a simple explanation of the purpose and intended operation of each clause—which we have here but ours is written very much from a legal point of view rather than a policy explanation. For subordinate legislation there is a much more fulsome list of things that should be included so that there is greater transparency and accountability for the executive.

The CHAIR: What are the downsides to the Queensland model? You have just spoke them up. If you were able to fix some of the downsides, what are the downsides, the problems?

Ms O'CALLAGHAN: I do not see any particular downsides, from a government point of view, regardless of which party is in power, there might be downsides in terms of maybe you do not want that level of transparency. I think as a public service or as an executive though, these are things you should be explaining to Parliament and to the community to give greater transparency. I do not see any particular downside. It is just making sure that you are very transparent about what you are doing and why you are doing it.

The CHAIR: If you look at the current circumstances and if you were to apply that to say, the COVID-19 arrangements in New South Wales that we are currently living through, how would that work with the current process of putting in place the health orders?

Ms O'CALLAGHAN: The health orders are a specific category I guess, very much out of the ordinary. One of the issues that arises with the public health orders is they are not statutory rules, they are not subject to disallowance and they also are being turned out at a very great rate and being replaced very quickly. But I certainly think even in very urgent circumstances, unless it is extremely urgent, and I guess some of those public health orders at the beginning were done in those circumstances, you should still be able to explain why you are doing it and give the policy intent and why it is necessary to act in such an immediate way and why this is the best way of achieving what the Government needs to in those circumstances. I think you could certainly provide that still. It may be a more truncated version.

Having a list of things to be included in an explanatory notes does not mean it needs to be pages on each of those points, it is just you have got the key points that Parliament has agreed are important to appear in an explanatory memorandum or note and each of those is addressed, whether in a very brief way or a very fulsome way, but it is very specific for Parliament to make sure all of those matters have been addressed. It is Parliament that has decided then what should be in those explanatory notes rather than a faceless bureaucrat.

The CHAIR: Some of the testimony this morning spoke about the fact that this Committee maybe needs to broaden out some of the instruments that we could look at, so not just the disallowable instruments. For instance, the health orders which are probably outside the remit of this Committee but is there any reason why they would not be brought within the remit of this Committee? Do you think that is a good idea and how do you see it working?

Ms O'CALLAGHAN: I think the more that is reviewed and scrutinised by a parliamentary committee the better. I really think at the moment only statutory rules are scrutinised and subject to that disallowance process, but a lot of instruments do have importance, despite not being statutory rules. I really think maybe we should be looking at the legislation in two ways. This is of a legislative character and therefore subject to scrutiny and disallowance and if it is purely administrative in nature, and some things are purely administrative, then maybe they are not the things you focus your time on. You have got limited resources and time obviously. But I think if we characterise things according to their nature rather than just what they were called, which is at the moment much as it is. If it is a regulation or certain orders or court rules, then yes, they are subject to disallowance. If we call them something else, then they do not fall into that category. It really should be the nature of the instrument and what it is doing that is important in that situation.

The CHAIR: Which lends itself to one of the other questions that we have been posing to people today. Currently in New South Wales the Interpretation Act, the Subordinate Legislation Act and the Legislation Review Act, I think it is the Bar Association, but I could be wrong—

The Hon. SCOTT FARLOW: It was the Bar Association.

The CHAIR: —that that should all be brought in under one. Would that be of assistance to your work, if that were to be the case? It is a big body of work to undertake, but would it be beneficial?

Ms O'CALLAGHAN: I certainly would see an advantage in having a Legislation Act, something of that nature that brought everything into one Act. At the moment those Acts are hard to read together. Some of them have been drafted at different times, they use different concepts. Some of them have become quite hollowed out and do not have a lot of substance in them. It would be really beneficial I think for a review to be done and everything pulled into one Act. If you look at something like the ACT's Legislation Act, where they have done that review, they have consolidated and brought it all into one Act, it is a modern Act. It is a much more streamlined process. Anyone wanting to know how legislation works can go to one Act and work through it and will be provided with the detail. Also conceptually it all hangs together rather than being in separate pieces of legislation and them not necessarily quite working well together.

The CHAIR: I am going to hand over to others, Deputy Chair, Ms Abigail Boyd, away you go.

Ms ABIGAIL BOYD: Thank you and good afternoon to all of you. My first question is how much of the delegated legislation would be drafted by the Parliamentary Counsel's Office and how much is drafted by other parties?

Ms O'CALLAGHAN: It is a bit variable. We certainly do all the statutory rules, so anything subject to disallowance is coming to our office. Other instruments, it varies depending on the department, depending on a lot of historical background, conventions. One of my preferences would be that if it is considered important enough to be legislative in character, really it should be drafted by professional legislative drafters. I think the quality of the legislation varies from department to department, depending on the resources they have got, the skills they have got. I really could not give you a percentage, but it varies a lot depending on the instruments and the history behind a lot of them.

Ms ABIGAIL BOYD: Are there any statistics or any experience you can speak of about some of these instruments that have not been drafted by the Parliamentary Counsel's Office, being then the subject of a court discussion or some kind of a legal dispute?

Ms O'CALLAGHAN: I would have to take that on notice, sorry. I guess just from an anecdotal point of view, we find it quite hard sometimes when we are looking at legislation that has not been drafted by a legislative drafter, to quite understand what the policy intent is, what is trying to be achieved. I think it is probably very clear to the person drafting it, but if they are not an experienced legislative drafter with all that practice and convention behind them, the understanding of the statute as a whole, it is often challenging to work out what is happening.

One of the advantages of a professional drafting office is you do have that overview of the entire statute book rather than just a very specific part, so you know how legislation fits into that statute book, whereas when it is done in a piecemeal way, it varies quite considerably. But we could certainly see what else we could find out about that and get back to the Committee.

Ms ABIGAIL BOYD: Yes, I am interested in the risk created by the drafting being done in different places. You speak in your submission about consideration being given to a mechanism that provides guidance about the appropriate use of, particularly Henry VIII clauses and shell legislation. I know from you and previous witnesses we have heard about, for example, the Commonwealth legislation has a set of guidelines. If we were to go down that route, would you recommend those presumptions, if you like, being included in statute or being included in some sort of guidelines?

Ms O'CALLAGHAN: I think either would be helpful and an improvement on what we have. But my preference certainly would be a legislative basis. I do not think you can be hard and fast about these things, you need some flexibility. But certainly even if they were guidelines, if we had a new Legislation Act for example and it said in the drafting and consideration or review of legislation here were the principles that must be had regard to. I think that would help. I think if they are guidelines people do not tend to give them the same level of gravitas as a piece of legislation. I think it much harder for a member of Parliament, a Minister to fail to follow what a piece of legislation has said should be had regard to. I think it works differently in different jurisdictions. Certainly the Commonwealth has done it as guidelines, but I think their committee is quite strong in asking people to follow those guidelines.

Queensland does it as a legislative basis. Again, it is still only guidelines but in Queensland if you depart from those guidelines you have to tell Cabinet you are departing from those guidelines and Cabinet then decides whether or not it wishes to proceed with legislation that does not comply with the guidelines. I think it just gives it an extra layer or gravitas for the public service in considering developing its policy and then putting the legislative proposal together. Being purely selfish about it, I certainly think it would make life easier for us as an office. Quite often we do question things like a Henry VIII provision, for example. At the end of the day, we are

there to implement the policy and if we are told that is the policy, that is what we have to do. Whereas if there was a legislative basis to say here is what legislation looks like, it would be much easier for us to say this piece of legislation says you should try to avoid using these things.

Ms ABIGAIL BOYD: Whether it was guidelines or some sort of provision in a statute that set out the presumption of the types of things that had to be included in primary legislation, taking the explanatory memorandum idea, you could then include in that perhaps an onus on the executive to explain why they had chosen not to follow that presumption.

Ms O'CALLAGHAN: Yes, I think that is certainly the advantage of either guidelines or a legislative basis, that you would then justify why you did not comply with those principles, why you did not have regard to those principles. It is not that you always must follow those principles. Certainly the COVID-19 pandemic has been an example of that. Where you have very good reasons to depart from that, but there needs to be a justification for Parliament and the community for that. If there is a good reason to depart from those principles, that should not scare anyone. You should be able to explain that in a policy sense.

The CHAIR: I am going to go to the Hon. Greg Donnelly and then after the Hon. Greg Donnelly it will be the Hon. Catherine Cusack, who has some questions as well.

The Hon. GREG DONNELLY: Thank you very much for coming along today to provide us with the opportunity to follow up on some very valuable information in the submission. I cited this earlier to the previous witnesses about some evidence from Associate Professor Neudorf this morning. I confess the numbers did surprise me. I knew the numbers were, dare I say, needed some reweighting or ought be considered to need some reweighting. He said some work that he had done in analysing the situation in New South Wales for the 2019 calendar period was that there were 3,470 pages of law, law in the broad sense passed through the Parliament. 462 pages of that, 13 per cent were statute law and the 3,008 other pages were delegated legislation, 87 per cent. Without asking you to go off and do your own analysis and calculations, does that number surprise you or equate to what your workload is providing to you, that sort of huge amount of drafting associated with delegated legislation vis-a-vis actual preparing bills?

Ms O'CALLAGHAN: I do not think the numbers probably surprise us. Certainly there was a lot of talk last year that we must be very quiet because there was not a lot of bill work going through Parliament. We were not quiet. There was a lot going on behind the scenes. I think even anecdotally, leaving aside the statistics around it, I have worked in Queensland, New South Wales and Victoria in the Parliamentary Counsel's Offices, New South Wales does have a lot more delegated legislation in my experience than those other two jurisdictions.

The Hon. GREG DONNELLY: Which brings me to your submission. I am a member of the Opposition and some of the few left that remember when we were in government, which was a while ago now. The Hon. Mick Veitch will recall. But even back then when the other side, if I can put it that way, was in government there was this discussion about the utilisation of regulation as an efficient way of proceeding with law. Not in any sinister way I must say, but in effect, this is something that has been happening over a period of time and both sides of politics have been participating in this. Which brings us to a situation, and not casting any aspersions on the current government with this ratio of primary legislation, i.e. statute versus delegated legislation, but in your submission in paragraph 6.8 you say, "All these factors"—referring to the above paragraph—"can tend to reweight the proper balance of power in the Australian system as between the legislature and the executive." Then you go on to say, "This legitimacy of the laws made by subordinate instruments may be adversely affected if the public perception is that this has become unbalanced."

One would have to say, if these figures are accurate, the situation currently is pretty skewed and I do not just say in New South Wales but in other legislatures around Australia. Does this in fact get us to this point that because it has actually become so skewed that if the parliaments themselves are to continue to hold their legitimacy and their—dare I say—credibility of the voting public, that those institutions, these legislatures will have to find ways and means in which they can scrutinise better this law. This law being the statute law and the regulatory law, because the issue of legitimacy may ultimately come up at some stage. Of those 3,008 pages of delegated legislation that apparently New South Wales Parliament processed last year, I did not look at many of those pages.

As legislators, I am sure we all take seriously our role when a bill comes into the House and obviously that is principally for those who might have a shadow parliamentary responsibility, whether they have carriage of dealing with a bill in the House. Obviously the Minister primarily has significant responsibility with the bill. But in terms of the regulations and scrutiny of the regulation, we have some, at least potential capacity, for the Legislation Review Committee in the Parliament, which is a joint House committee, to do some work in this area and we have this Committee. But that in some sense is scratching the surface. I am interested in your thoughts.

I am not asking you to comment on a policy matter because I appreciate your role as public servants but at least in theory elucidating on your point at 6.8, it is your belief that there does need to be this way in which there be this consideration of how a reweighting is done in a competent way so the Parliaments can be dealing with this scrutiny to retain the overall confidence of the public.

Ms O'CALLAGHAN: I would say yes. I stress we are very much apolitical, so it is not a comment on the current government, I would say in general.

The Hon. GREG DONNELLY: I make it very clear for the purpose of this inquiry, I am not asking you to be political at all, because as I said, back in the day when the other side was in Parliament there were these same issues as well. This has been a drift or a trend over somewhat many, many years, if not decades.

Ms O'CALLAGHAN: I agree, it has been a drift over time. I think it is a drift in all jurisdictions that more is being pushed out. I think it is a combination of factors. I do think New South Wales moves at a much faster pace than other jurisdictions, which is probably why the weighting is more skewed here, if the statistics this morning were correct. It is a reflection of the speed at which the New South Wales Parliament moves. But there does have to be consideration to that balance. I guess that is for you as members of Parliament, in considering the bill, are you happy that enough of the detail has gone into the bill versus what will be left for regulations or is that something you would like reweighted.

The Hon. GREG DONNELLY: That is another important point the Chair raised with the previous witness about in his role as shadow Minister dealing with bills which contain some material, some content, some substance but then all this other very relevant material, which the Minister assures that will be dealt with appropriately in the regulation.

Ms O'CALLAGHAN: I think traditionally regulations were used just to flesh out that administrative detail rather than having the bulk of the scheme in them, which is where those skeletal schemes are the most dangerous in terms of very little is in the bill and the rest of it is left for the regulations. I would think if we were just looking at having the skeleton of the bill, then really the regulation should be prepared at the same time for consideration as a package of legislation. Of course, all of that is subject to time and resources. It is getting that balance right. If you can see the scheme in the Act or the bill going into Parliament and you are leaving the executive to fill in the administrative detail or some minor legislative character, that is one thing. It is another thing when what is in the bill is so little that you cannot really tell what scheme you are going to end up with at the end of the day. I think then the balance becomes slightly skewed.

The Hon. GREG DONNELLY: Thank you for those observations.

The CHAIR: Just before I throw to the Hon. Catherine Cusack. Following on from the Hon. Greg Donnelly's question, sunset clauses that are placed in regulations. I am not sure whether you were here when the previous witnesses were talking about the rolling over of the health orders for instance.

Mr COWAN: Refresh the sunset clauses.

The CHAIR: And some of the submissions touch on this as well. If you are going to have Henry VIII clause, then the regulations that arise from that do need to have a definitive date by which they end or they will be reviewed before implementation. What is the difficulty for crafting that sort of requirement into a regulation?

Ms O'CALLAGHAN: I do not think there is a difficulty in a legal or drafting sense, it is just the time and resources again. In the same way that our office is under pressure to produce things quickly, I think the public service as a whole is under pressure to produce policy quickly. Ministers need to react to the community quickly. The community expects things done very quickly these days and that has created a whole lot of pressure for you as parliamentarians, to have quick responses to things. I think it has led to there being very little time to scrutinise things, very little time to review things, even at the end of them. The COVID legislation is a clear example where there is a Henry VIII clause in a lot of those pieces of legislation, but there is also a very clear sunset on most of it. That was the basis on which most of the members of the Legislative Council were prepared to support that legislation. One, it was an emergency; two, there was a sunset.

I think a sunset at least gives you that opportunity of review but with things like the public health orders, they are not instruments are office has traditionally drafted. We are drafting them in this case because of their widespread impact, but they really are the Minister's order at the end of the day and that is a decision for him, how much review is done, what sort of sunset we are looking at.

Mr COWAN: Those powers were put in in advance of COVID, weren't they?

Ms O'CALLAGHAN: Yes, they are there for general public health situations. One of the things that would be helpful at the end of the COVID pandemic is to have a real look at things such as the Public Health Act and those provisions in there that allow a lot of sub-delegation and actually look and say, now that we have used them and tested them extensively, are they fit for purpose? What extra scrutiny would we want in there? What extra powers does the Minister or the Chief Health Officer need in these circumstances? There is not necessarily one answer to these things, but having really tested them, it is probably a good time to have a look at them and say here is something to look at and consider for the future.

The Hon. CATHERINE CUSACK: I thank you for the amazing job that you do. I am a government backbencher and as you are aware, there is a prohibition on us having any access to Parliamentary Counsel. I jump back to my days in opposition and ask a question related to that experience, about the solar bonus legislation. A rebate for a tariff on electricity was implemented in the bill itself but there actually was no regulation or no other document in which that number appeared. Therefore, that issue, instead of being part of a delegated regulation was actually fixed in the legislation and completely inflexible. When financially it went off the rails it needed Parliament to come back and redo that number in the bill. That is what triggered basically hundreds of millions of dollars squandered to electricity consumers.

A lot of the focus is on getting things into the bill in Parliament, particularly when crossbench members—it is a political process. When they are doing deals and trying to get their matter guaranteed, they want to see those words in the Act itself. Is it not the case that sometimes it is inappropriate to put those things into the Act? We are all cogs in a bigger process here. The Act is just one piece of the puzzle. There needs to be a bigger policy document you can refer to. The Act has its role and then the delegated legislation—if you see what I am saying. If we jump over those steps then things can go horribly awry.

Ms O'CALLAGHAN: Thank you. Yes, I think we would agree. You certainly do not look at the bill in isolation. There is always going to be the need for flexibility. You cannot just fix things in an Act and then think it is going to be set for life and you do not ever need to change it. I guess it is that balance, and it is the role of Parliament to decide where that balance appropriately falls, not ours. I certainly think the bill is part of a bigger picture. There is a whole lot of policy work that goes on before that and a lot of documentation that goes with it. A lot of consultation should be occurring and generally does occur. Again, that varies. I agree you cannot just look at the bill in isolation and certainly you would want flexibility. It is just deciding how much of that detail you leave flexible and how much needs to be fixed.

In something like you are describing, you would probably set the scheme up itself but leave the percentages to be prescribed by reg because you would want some flexibility around that as you reacted to industry, stakeholders and changing financial circumstances. So it really is trying to get that balance right, and you do not always get it right. But it should be at the front of our mind that we are trying to get the balance right between parliamentary and Executive power, and that also we want to be as transparent and accountable to the community as we can be in preparing legislative frameworks. It is just—how much of the framework is in the principal Act and how much is in supporting documentation?

Mr COWAN: I suppose it also counts how important that number is. If that amount was agreed by Parliament and they did not want to change it, then that is something that should be in primary legislation. If it is something they do want to revisit then it should be moved to secondary. So it really depends on a policy call on how important that thing is—whether it is to be fixed permanently or to be variable in that case.

The Hon. CATHERINE CUSACK: I am so sorry. I really could not hear that answer, but I will read it in *Hansard* and I will look forward to it. The other question I wanted to ask—you referred to variables. You have large Government departments like Health that has a huge legal team, and then the smaller ones, like maybe the people looking after gambling or those sorts of issues. I am interested in your comment that there is a variation in the level of experience and quality of those legal people that you are dealing with. I know from a Minister's point of view, your client is not the Minister. Your client is actually represented by those legal staff in the department.

And then once the legislation has gone through Cabinet and is ready to be presented to Parliament, there is a great inflexibility in legislation [inaudible] determined by Cabinet. The Minister themselves cannot change that legislation without going back to Cabinet. I just wondered if you could expand a bit more about improvements that could be made to that process, given that it is a rigorous and a very—it is a system that served democracy very well for hundreds of years. But are there things we can do around that to get a better quality of legislation going to Cabinet in the first place? And then what flexibility might we have, beyond a crossbench member in the upper House inserting their own thoughts into a Government bill? Are there better ways that we can handle those steps?

Ms O'CALLAGHAN: I would like to start by saying that I do think the lawyers in each of those departments is doing a great job. I am not criticising the quality of their work. It is just that the experience with legislation varies from department to department. At the end of the day, they are not expected to be experts on legislative drafting. That is why we exist. I would also have to disagree with your comment, with the greatest of respect, about whether it is the Minister or the Government lawyers who are the client. I most definitely see our role as being there to serve the Minister of the day, so I see the Minister as the client. The public servants in the department who are instructing us are there to give effect to that Minister's instructions and policy intent, and to sign off on his or her behalf on the legislation. But at the end of the day, it is the Government and that Minister who form our client.

One of our roles is to say we serve the Government as a whole, not the departments. We are there to make sure the Government's agenda is represented in what goes to Cabinet. But I also think we are here to serve Parliament—not just the Government of the day—as Parliamentary Counsel. One of the important parts of democracy is that every member of Parliament can get professional legislation drafted for them that achieves what they need to. I take on board what you say about backbenchers, but how much access they get to our drafting services is a convention from the Government of the day. I do not know that I have a lot of suggestions about how we can improve the process because I think that is probably beyond our remit, other than to say that I think more time always leads to better legislative outputs, in terms of having time for departments to really develop their policy and test that. If you do not allow a department sufficient time to develop their policy, test that with stakeholders and discuss it within Government as a whole, then I do not think you get the best policy outputs. And without those best policy outputs you are not going to end up with good legislation.

I also think the other thing that is incredibly important—again, the balance is a bit askew—is the amount of consultation that goes on with the draft legislation. I think you can test the legislative policy. You can test the policy intent with stakeholders, but until they actually see the words on the page and get to think about those words, I do not think it is really reasonable for people to say that they are fully aware of what the legislation is going to do and how it is going to work. We always say that, at the end of the day, we can think it is a great piece of legislation. If people cannot actually implement it and use it—well, it is useless. It is not there to be a written legal document. People often think our job is an academic one. It is not an academic one. We are there to achieve practical outputs. So it should be something that the community and, most importantly, members of Parliament get to see and test before it is in the legislative Council and you are there just to try to do the amendments you can get done in that time.

I really think the more people who scrutinise legislation, the better output it is going to be—and a better outcome. At the end of the day, we are all here to make sure that the community of New South Wales and the people of New South Wales get the best possible outcome from you, as members of Parliament, and from us, as public servants. Whatever we can do to improve that and the process around it is really about helping people to get that best outcome for them. So I would say it is time for policy development, time for drafting and time for scrutiny. All of those things add up. As much accountability and transparency around that that you can have—in terms of documents around it, explanations, discussions with stakeholders—the better. There are always going to be exceptions for urgent circumstances, but I am talking about—the ordinary legislative process should be one that allows time for all of those things.

Mr COWAN: We also conduct training, do we not?

Ms O'CALLAGHAN: Yes. One of the things we have been doing is going out and doing a lot more training with instructing offices and legal teams from departments. The other thing we are trying to do is engage a lot more with stakeholders out there—the Law Society, the Bar Association. They are all things that feed into the type of legislation people get, and really trying to make it more accessible and to really listen to what people are saying about the quality of the legislation we are producing. We do not get to decide the policy but we certainly try to improve the process around it, to the extent we influence that, and to improve the quality of the actual legislation.

The Hon. CATHERINE CUSACK: Thank you. One last question—and it relates to exposure draft legislation that is left lying on the table. We have not had one of those bills for a very long time. I just wondered if you had any thoughts or comments about the role that that can play in certain situations?

Ms O'CALLAGHAN: I certainly think it leads to better legislation. I think it gives people a chance to comment on the actual quality of the drafting itself. If people cannot pick up the legislation and understand it—particularly the people who are going to have to use it—then you are not sure how it is actually going to operate until they are using it. You often then find there are flaws in it. But also, the policy in it—I mean, at the end of the day, if it is a beautifully written piece of legislation and yet the policy in it is not fit for purpose, then we have not

achieved what we need to. So I think an exposure draft is a very helpful process in terms of letting key stakeholders, key users of the legislation look at it but also members of Parliament to really look at it and engage with your stakeholders to make sure it meets the needs of the stakeholders you are there to represent.

The CHAIR: Ms Cusack, anything else?

The Hon. CATHERINE CUSACK: No. Thank you very much for that.

Ms O'CALLAGHAN: Thank you.

The Hon. SCOTT FARLOW: Thank you very much for your attendance today and also for your submission and how frank you were in it as well.

Ms O'CALLAGHAN: Hopefully not too frank.

The Hon. SCOTT FARLOW: Not too frank. No, it is all still consideration—it is fine.

The Hon. GREG DONNELLY: Frank and fearless.

The Hon. SCOTT FARLOW: Frank and fearless advice is what we are looking for, though, which is good. As has been noted throughout the day, it is a very bipartisan or apolitical approach that we are all taking around this table to this Committee as well. In terms of the Queensland standards legislation Act—is that correct?

Ms O'CALLAGHAN: Legislative Standards Act.

The Hon. SCOTT FARLOW: My apologies.

Ms O'CALLAGHAN: Close enough.

The Hon. SCOTT FARLOW: In your recommendation that consideration be given to introducing a mechanism to provide guidance for both consideration of Henry VIII clauses and shell legislation and regulations, would that be sufficient to address that or is there something further that would need to be envisaged to achieve that consideration aspect that you have recommended?

Ms O'CALLAGHAN: I think it would be sufficient mainly because I do not think you want to bind yourself too tightly. Parliament needs some flexibility to decide how it wants to approach specific pieces of legislation. Queensland is what I have mentioned because that is what I am most familiar with having spent a lot of my career there and it also has the difference, of course, of only having one House of Parliament, so you need a strong parliamentary committee system to deal with the fact there is no upper House. But I think it is a good halfway ground between binding yourself as a Parliament or as a government and subjecting yourself to scrutiny. So it does not stop you doing what you need to but it is just if you depart from what is considered principles of the rule of law or good government you justify it—you explain that to people.

As a citizen I do not find it unreasonable to expect a government or a Parliament to explain to me why you have needed to depart from those principles. We have recognised that these are the principles that underlie a parliamentary democracy. There are times—such as a pandemic—when you need to depart from that. You explain that to people and I think most people accept that, as we have seen recently. I think to bind yourself any more tightly is going to lead to problems and an inflexibility that you need to deal with emerging situations—not just emergencies but differences in technology that arise or different practices that arise. It is that balance—it is so hard to get that balance right and I guess that is what people elect members of Parliament to do, to get the balance, to strike the balance right for them. But I tend to like that model because I think it has the balance right.

The Hon. SCOTT FARLOW: By way of background, in Queensland are there any other mechanisms for disallowance that exist—no committee structure there?

Ms O'CALLAGHAN: No, it is much the same as the disallowance process here.

The Hon. SCOTT FARLOW: In New South Wales?

Ms O'CALLAGHAN: Yes.

The Hon. SCOTT FARLOW: To the point that I think the Hon. Mick Veitch and the Hon. Catherine Cusack raised with respect to the consideration of legislation in its totality, we very rarely see legislation that comes forward with the commensurate regulations that follow it as well. Is there any strict reason for that in terms of technical drafting why—it is largely just by practice, as you mentioned, and timing?

Ms O'CALLAGHAN: It is timing. More than anything it would be timing.

Mr COWAN: I think if the whole scheme were already thought out for the regulations then the stuff would be in the Act anyway. It is usually because we have run out of time to get the detail down.

Ms O'CALLAGHAN: That is my point: Often the regulations and the commencement of the Act take quite a bit of time after it goes through Parliament. Sometimes you could do the whole scheme and have a lot of it left for regulations, just to have flexibility. But certainly in other jurisdictions if a lot of it is to be left to the regulations the Minister will table the draft regulations with the bill so that Parliament has the whole scheme to look at even if they want to leave some of it. But here again it is a timing issue more than anything.

The Hon. SCOTT FARLOW: Thank you very much.

The CHAIR: Just following on from that, the Crown Land Management Act, that whole process from about 2016 through is a good example of where, if we had have had the regulations at the time of the Act it would have probably better informed the debate in both Houses of Parliament but certainly in our Chamber. Essentially parts of the Act were gazetted as regulations. It was quite a lengthy process. It was not until even, I think, last year before the whole Act had actually come into vogue. That is an example of having something, the regulations around there would have been a good thing. That is probably just one example of where that would have been a good arrangement or a good outcome, I would suggest.

Ms O'CALLAGHAN: I do not think it would be uncommon. I was not here for that scheme so I am not commenting on the particular scheme. But I certainly think it would be better for Parliament to be able to see the entire scheme in many cases because you do not really know what you are voting on. And sometimes you vote on something that you think it is going to be and then it turns out to be quite different once you see the regulations. I think also for stakeholders it is very hard for stakeholders to know what they are going to end up with and to contact you or inform your debate. If they are not able to see the entire scheme it must be challenging for them to know what they are going to end up with too and to plan for that and anticipate it. So I think it leads to a lot less transparency that we are having Acts that do not have that level of detail or the draft regulations are not ready and tabled at the same time.

The CHAIR: With regard to the making of the regulations, in one of the recent enquiries of this Committee, the better regulation-making principles were raised as having been followed by the public servants and then just about every witness thereafter from the public said that they did not think that was the case at all and they really bemoaned the consultation process that were followed. When it comes to drafting the regulations, do you actually get to see that the respective department has followed the better regulation-making principles?

Ms O'CALLAGHAN: It is not part of our remit. We just draft the regulations and do not look at the process around it particularly.

The CHAIR: So basically they provide the drafting instructions and then—

Ms O'CALLAGHAN: We provide advice about whether a regulatory impact statement is needed for it but we are not involved in the process around it.

The CHAIR: Okay. That is interesting. Thank you.

Ms O'CALLAGHAN: So at the end of the regulation-making process we give an opinion as to legality but our opinion is only to the legality of the regulations.

The CHAIR: Thank you.

Ms ABIGAIL BOYD: One of the negative side-effects of having so many of our laws given by way of delegated legislation is the difficulty in ensuring people can actually know what the law is at a particular time. Are there any other jurisdictions doing it better than us and do you have any recommendations in relation to how we could ensure that people perhaps have more time or are better informed when regulations and other delegated legislation is passed?

Ms O'CALLAGHAN: No. I saw that there were suggestions of delaying commencement for 28 days to allow people to be aware of what the law is. I certainly think there are risks with having delegated legislation start immediately—that people are not aware it is out there and to comply with it. Certainly a focus for us at the moment is greater accessibility of legislation and improvements to our website. So we have a beta site going at the moment which we hope to go live with the new website where we are really trying to be more transparent. But it is hard to imagine too many people spend their time poring over the legislation website in their spare time, I have to say—I know, exceptions being people in this room.

We are wanting to set up feeds. For example, if you are interested in environmental legislation you can subscribe to that and if anything new happens in environmental legislation you will be given an alert. But you have to be aware that exists and have a particular interest in it. For the average member of the community I think it is much harder. We have a hotline, for example, where people can ring us to ask about legislation. We have an email site where people can ask us about that. For COVID we have set up a special page on our homepage—a noticeboard to alert people to everything to do with COVID and when it changes.

We are very aware of accessibility but we are also very aware we are a niche market. I think really for people to be more aware of the law it is going to have to be—we can play our part but I certainly think most people in thinking about where their liquor laws come from et cetera or health laws are not looking at the legislation website. They are probably going to the relevant departmental website. I do not have any particular ideas on how we can improve people being aware of it. We certainly try to communicate much more with the Law Society, for example, and the Bar Association to let them know of things that would impact on people but that is not the average person. They are legal professionals who are going to have a particular way of looking at the law. So I do not know how you communicate it more to the average person

Mr COWAN: The demise of local newspapers and things as well where these things used to have public notices and people used to see them—now that is gone so it is much harder. People have to really go out there and look for things on websites now, which makes it much more difficult.

The CHAIR: I thought they got their advice from Facebook. I have been watching the news just recently—

Ms O'CALLAGHAN: Well, people have not taken me seriously in the office when I have said I would like a social media presence for the office—apparently we are not very interesting.

The Hon. GREG DONNELLY: Hear, hear!

Ms ABIGAIL BOYD: Even pre-COVID there was this trend, understandably, away from publicising it in newspapers to putting things on websites, but one of the notable ones I saw was in relation to the Motor Traffic Act or something. It was basically saying that you could be towed away from a particular bit of the street if it had been notified on the website, which I thought at the time was quite difficult. Of course, the response is yes, but who is looking in the paper for that kind of information anyway so perhaps it is no better.

Ms O'CALLAGHAN: I certainly think for things where it is about a particular industry or stakeholder group it needs to be specifically indicated to the group and targeted through that. We have set up a stakeholder reference committee where we have invited in stakeholders from a whole range of different areas to help us provide feedback on our website, accessibility and the way we draft when we get to that stage. That will take us a certain way with people having input but when you are talking about the average citizen like that, I am not sure how you get that through to people.

Ms ABIGAIL BOYD: Another example is in relation to the public health orders. I have a recent example where we were trying to find the actual text of the health orders. Although we could find summary information in lots of places, we could not actually find the actual text of the health orders for some time. We did find it. We found it on your website but it went through about 20 people before the inquiry got to my office. We called the Health department, they did not know. It was this long-running thing.

Ms O'CALLAGHAN: There is a bit of a worry.

Ms ABIGAIL BOYD: Are you primarily responsible for publicising the actual text? Is there any obligation on each department to put up legislation?

Ms O'CALLAGHAN: No, there is not any obligation on the specific departments. We have the authorised version of the law. We are trying to move beyond just having the authorised version to have a more helpful thing like having the notice board on the front page with things we think would be of significant interest, but how people are aware that exists—most people do not even know our office exists. There are advantages to that but at the same time you want the community to really have accessibility to the law because it is impacting on everybody.

Mr COWAN: We voluntarily publish the public health orders. They are supposed to be just published in the Gazette but we put them on the website for access.

Ms O'CALLAGHAN: Because no one is going to be looking at the Gazette.

Mr HURFORD: And that is why we have put them on the front page.

Ms O'CALLAGHAN: But you still have to know our website exists.

Ms ABIGAIL BOYD: Exactly.

Ms O'CALLAGHAN: It is hard with the public health orders. I think Service NSW is doing a very good job of letting people know about that. That is where the Government is predominantly sharing information about COVID but I think it takes a variety of sources. We have been quite an inward-looking office in the past. We are trying to be a bit more engaged with the outside world to the extent that the world wants to know about us and what we do and taking more opportunities to go out and speak to people so that they are aware of it but it is a gradual process. I do not know that for the average person it is ever going to be a high priority for them to know about our website so I think we have to look for other ways. In drafting legislation, we certainly try to think about how it is going to be communicated to people. If this is going to impact on someone's rights, how are people going to aware of that? We try to filter that through but it is a gradual process.

Mr HURFORD: But if it is delegated legislation that we have not drafted, it does not necessarily come onto our legislation website. It might only go on to the departmental website or the corporation website because it has not come through us.

Ms O'CALLAGHAN: And so how do you know what the law is on a particular day when websites change all the time? How do people access that. One of the big issues everyone knows about is standards, if something is incorporated by standard. You have to pay to buy a standard. How do you actually know the state of the law is? I think that is part of our concern about proliferation of other instruments too. If you keep sub-delegating things down to guidelines, codes of practice, et cetera, people have to read multiple pieces of legislation together to understand what the State of the law is, but also how do they access all of this legislation? For us, part of the appeal of having a legislation Act would be to sort out some of those things and for the entire public sector to be working towards the same goal in this area.

Ms ABIGAIL BOYD: Thank you.

The Hon. GREG DONNELLY: We started this topic about publications. This is slightly off topic but I just want to put it on the table because I have always been curious about this. I am not advocating anything other than just asking a question because I am curious. There are large producers of accurate information about the law which are doing so on a commercial basis—take the likes of Reuters and what used to be called CCH in the old days when I was involved with doing some industrial work. It probably has a different name now. One can go to these public companies, pay a subscription if you have enough money to do so—and might I say, the subscriptions are normally enormous in terms of thousands and thousands of dollars per annum for any one subscription.

Presumably that subscription buys you access to very up-to-date information with respect to the law at a point in time. Solicitors and law firms rely on the subscriptions all the time to provide them with accurate information. Do you have any sense about how far behind these sorts of publications are vis-a-vis what is the law at any point in time? It is almost a rhetorical question. If you are struggling, in a sense, to keep up with what is going on and being able to publish it through whatever way you do, surely there is a lag in there somewhere with these commercial enterprises producing this law and access to the regulations. I am just wondering how well they are actually doing as enterprises producing publication of the laws. They obviously can do it very efficiently. The law firms and the solicitors play thousands of dollars annually for subscriptions so it is obviously high-quality. Are there built-in lags of a couple of months or do you not know?

Ms O'CALLAGHAN: We actually provide them with all the laws. They actually scrape our website—nightly, weekly, however often they do it—to take the state of the law. Our target is that if a law is amended it will be consolidated within three days and on our website. We usually try to do it more quickly than that but—

The Hon. GREG DONNELLY: So that is an amendment to the law?

Ms O'CALLAGHAN: Yes, so if Parliament passed an Act tomorrow to amend the Crimes Act, within three days that would be up-to-date on our website. It is usually less than three days. It is usually within 24 hours but three days is our target. What we are looking to do is move to a similar system to the one Tasmania has where when you are drafting the bill, you are drafting it into the target Act so that what goes to Parliament will actually show you the law as amended in the future. You as members of Parliament would get not just the bill but what the Act as amended would look like so that when you are debating or voting, you can actually see what you are going to end up with. The commercial publishers do take all that data from us. AustLII does it, LexusNexis, and there are a few other commercial organisations. They just have a bot that comes over.

The Hon. GREG DONNELLY: Can you charge them for that?

Ms O'CALLAGHAN: We used to.

The Hon. GREG DONNELLY: I think it is a good opportunity. You are generating all of this primary material that they need for commercial ends. There should be a fee for service there, I would have thought.

The Hon. SCOTT FARLOW: AustLII is not so much a commercial operation.

Ms O'CALLAGHAN: It is not commercial, no. I guess we are seeing that as it is open data policy to provide this data and people to make use of it.

The Hon. GREG DONNELLY: Sure. I was partly taking cheek there.

Ms O'CALLAGHAN: No, no. If we could, we would.

The Hon. GREG DONNELLY: In terms of the quality, they are relying on not 99 per cent right, but 100 per right, and they are getting that from you as the benchmark.

Ms O'CALLAGHAN: Yes, and I cannot say we never make mistakes. We do.

The Hon. GREG DONNELLY: Of course. We are all human.

Ms O'CALLAGHAN: We are certainly aiming for 100 per cent.

The Hon. GREG DONNELLY: Your reputation for high standards precedes you. I was just interested.

The CHAIR: I have a question on behalf of the Hon. Catherine Cusack, and it is a good question. It relates to the second reading speech. When the legislation is presented, the Minister—or the Parliamentary Secretary on behalf of the Minister—will make the second reading speech. Hopefully, if there is a Henry VIII clause in the bill, it will scope out why it is there and what the regulation might look like.

The Hon. SCOTT FARLOW: That is optimistic.

The CHAIR: But the question is, how much can we rely upon the second reading speeches to provide the guarantees that we need around those clauses and their use?

Ms O'CALLAGHAN: We have no involvement with the second reading speeches. They are very much the Minister's or the Parliamentary Secretary's speech.

The CHAIR: I think you have answered the question.

Ms O'CALLAGHAN: I am not making any comment on that.

The Hon. GREG DONNELLY: You do not staple them to the Acts?

Ms O'CALLAGHAN: No. I think if the guidelines were or the second reading speech were to address that issue, then I am sure that would happen. At the moment, it is not part of their speech. I guess it is very much more a political speech.

Mr COWAN: I think it is an aid to interpretation. If it is played down in the second reading speech, the courts could later on read down the scope of the power to say, "That was never intended to be so broad."

The Hon. SCOTT FARLOW: I guess this comes back to the comments you made previously with respect to explanatory notes as well. In New South Wales, they are in your domain, but in other States they are usually the domain of—I cannot remember if you said it was the department or the Minister's office.

Ms O'CALLAGHAN: Yes.

The Hon. SCOTT FARLOW: Whereas in New South Wales the second reading speech very much forms, in theory, at least, the explanation of the Government in terms of bringing the legislation.

Ms O'CALLAGHAN: Yes. I mean, all jurisdictions will have a second reading speech. What role it plays will depend on what other documentation there is. I think it is not something we get involved in. Even if we were to continue doing the explanatory notes in New South Wales as a drafting office, if it was something the Committee had asked to be included in the future, that is something that could be included. It is just not something we have been asked to do in the past. We have been asked very much to keep it to a legal interpretation of what is there, rather than commenting on the policy.

The Hon. GREG DONNELLY: Yes, it is an important distinction.

The CHAIR: Thank you very, very much for your submission and for your quite frank evidence before us today. It has been very good. It will help the Committee with where we are going with this.

The Hon. GREG DONNELLY: Thank you for the great work you do.

The CHAIR: I ask this on behalf of the secretariat, essentially: Is it possible for the Committee to be supplied with a list of all Acts which exempt legislation from disallowance? Is that a possibility?

Ms O'CALLAGHAN: I am sure we can do that.

Mr COWAN: It would just be the Subordinate Legislation Act, would it not?

Ms O'CALLAGHAN: It would just be supplying the interpretation.

Mr COWAN: There is that schedule in it.

Ms O'CALLAGHAN: I suppose you could do it specifically in an Act, though. Yes, we can, certainly.

The CHAIR: I will leave you to talk to the secretariat about how that works. Questions have been taken on notice; you have 21 days to respond. Thank you very much for that. As I said, the secretariat will get in touch with you. That concludes our questioning. Thank you all very much.

Ms O'CALLAGHAN: Thank you very much. We really appreciate your time.

(The witnesses withdrew.)

The Committee adjourned at 14:57.