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Delegated legislation: Flexibility at the cost of scrutiny?

by Chris Angus

The author would like to acknowledge the research conducted on this topic by Ze Nan Ma, NSW Legislative Assembly Committee Officer.¹

1. Introduction

Delegated legislation is, in brief, a legislative instrument that Parliament delegates to another body for making. It is commonly used in all Australian Parliaments, and may include regulations, rules, by-laws and ordinances.² Ultimately, to be delegated legislation, an instrument must be 'legislative' in nature—it creates a general rule of conduct—rather than 'executive', where the law is applied in particular cases.³

Use of delegated legislation has long represented a flashpoint for the separation of powers doctrine. The issue boils down to one of balancing legislative flexibility and convenience with the need for comprehensive, effective scrutiny of the laws being made.

Scholars note that the complexity of the modern state makes it impossible for parliaments to properly deal with the voluminous technical detail often present in delegated legislation.⁴

However, the benefits of delegated legislation may come at the cost of reduced—and possibly insufficient—parliamentary scrutiny. This in turn raises the prospect of executive overreach, with some claiming that the liberties granted by the democratic system may be threatened.⁵

This e-brief outlines the purpose of delegated legislation, and how it is used in NSW. It then outlines criticisms of delegated legislation and provides key statistics for both the NSW and Commonwealth Parliaments, before discussing existing scrutiny measures in the NSW Parliament.

2. An overview of delegated legislation

Legislation—also referred to as primary legislation—is usually defined by distinguishing between legislative and executive authority. According to Chief Justice Latham in the High Court case *Commonwealth v Grunseit*:

The general distinction between legislation and the execution of legislation is that legislation determines the content of the law as a rule of conduct or a declaration as to power, right or duty, whereas executive authority applies the law in particular cases.⁶

Similarly, the Federal Court in *Minister of Industry and Commerce v Tooheys Ltd* found that the distinction between legislative and administrative acts is, respectively, “the creation or formulation of new rules of law having general application and the application of those general rules to particular cases.”⁷

More succinctly, the UK Hansard Society has stated that an administrative act is the ‘child’ of the power in the ‘parent’ Act.⁸

However, distinguishing between legislative and executive power is not always easy or logical, as evidenced by the fact that some members of the executive (the Cabinet and Government Ministers) are also members of the legislature.⁹ Such inconsistencies also apply to legislative and administrative instruments, with no ‘bright line’ separating the two.¹⁰

While the parliament¹¹, as the legislative branch of the Commonwealth and State/Territory governments, holds the ultimate authority to create legislation, it can still delegate its legislation-making powers to another body. This form of legislation is usually referred to as **delegated legislation**, along with a number of other names, such as secondary legislation, subordinate legislation, legislative instruments, or statutory rules and instruments.¹²

Essentially, delegated legislation is a general description for an instrument that:¹³

- (i) Is either legislation or is legislative in effect; and
- (ii) Has been delegated by a parliament to a non-parliamentary body to make.

3. The purpose and scope of delegated legislation

3.1 Purpose of delegated legislation

Delegated legislation exists as a matter of practical necessity, as explained in the House of Representatives Practice:

Delegated legislation is necessary and often justified by its facility for adjusting administrative detail without undue delay, its flexibility in matters likely to change regularly or frequently, and its adaptability for other matters such as those of technical detail.¹⁴

In a 2004 comparative analysis of Commonwealth parliaments, former Australian Senator David Hamer argued that there “is no doubt that delegated legislation is necessary”:

Passing an act through parliament, unless there are exceptional circumstances, is a lengthy and usually tedious business. Complex details, but not principles, are best left to experts to draft and amend, particularly if the legislation is in a field where there may be a need for urgent amendment at a time when parliament is not sitting. Delegated legislation can be extremely complex.¹⁵

Pearce and Argument have identified three situations where the use of delegation is both legitimate and desirable:¹⁶

1. To save pressure on already scarce parliamentary time;
2. The legislation is highly technical or detailed, and the parliament lacks the time and/or expertise to effectively consider it; or
3. The legislation deals with rapidly changing or uncertain situations, and requires flexibility and responsiveness that the parliamentary process cannot provide.

Despite these necessities, Argument stated that delegated legislation is, “at best, a necessary evil that is only tolerated because the growth in the functions and requirements of modern government demand it.”¹⁷ Nevertheless, he acknowledged that delegated legislation is, on its face, considerably more flexible than primary legislation. For example, it is much faster for a parliament to implement amendments through delegated legislation than primary legislation.¹⁸

Whatever the reason for its use, delegated legislation is not new practice. The need for legislatures to delegate their law-making powers to the executive has been a feature of the modern state since the 19th century, with governments dependent on the executive to fill in the details of legislative policy that are—and perhaps must be—specified in broad and general terms by the parliament.¹⁹

3.2 Scope of delegated legislation

Most Australian parliaments have substantial freedom to delegate legislation. With regard to the NSW Parliament, Twomey notes that legislative power has been delegated to statutory officers and independent boards; the Governor; and, in limited circumstances, the judiciary.²⁰ There are limits. Specifically, the NSW Parliament must retain its power to control the delegation:

The Parliament cannot abdicate its legislative function. It cannot remove its capacity to legislate upon certain subjects or its capacity to amend existing laws (although it may limit the manner and form in which amending laws are enacted). Nor can it confer upon another body exclusive power to legislate with respect to a subject, without itself retaining the power to repeal that conferral of power. Thus, a law which purports to confer a power exclusively on the Executive while denying that power to the Legislature is an abdication of power, rather than a delegation of power.²¹

At the Commonwealth level, delegated legislation is not expressly authorised or prohibited by the Australian Constitution. However, the High Court affirmed its general use in *Dignan’s Case*, albeit with two constitutional limitations:²²

- 1) Delegated legislation is unconstitutional if there is “such a width or such an uncertainty of the subject matter” that the respective enactment is not a law with respect to any particular head of legislative power; and
- 2) Parliament cannot abdicate its legislative power by delegating an entire head of power listed under the Constitution.

4. Delegated legislation in NSW

As summarised by Pearce and Argument, the delegation process is fairly similar for all jurisdictions:²³

The main instruments of delegated legislation ... are usually made by the Governor-General, or the Governor, acting with the advice of his or her Executive Council, by a minister or by a local government authority.

...

[If Governor-General/Governor consent is required,] the minister responsible for the legislation brings the matter to the attention of the Governor-General or Governor [who] acts on his or her advice, together with that of such other ministers as are necessary to constitute a quorum of the Executive Council. Instruments made by a minister or by some other authority specified in the empowering Act have only to be signed by that minister or other authority, unless some other form or procedure is required by the empowering Act.²⁴

4.1 Definition

Section 3 of the [Subordinate Legislation Act 1989](#) defines a 'statutory rule' as a regulation, by-law, rule or ordinance either made or approved by the Governor. It should be noted that statutory rules are not automatically delegated legislation; as discussed in [section 2](#), they must be legislative in effect to fall into this definition. Schedule 4 of the Act excludes certain instruments from this definition, including, but not limited to, Standing Rules and Orders of the Legislative Council and Legislative Assembly, and regulations under the *NSW Constitution Act 1902*.

4.2 Drafting and preparation

When preparing a statutory rule, section 4 of the [Subordinate Legislation Act 1989](#) requires the responsible Minister to adhere to the [guidelines for the preparation of statutory rules](#) as far as reasonably practicable. A non-exhaustive list of requirements in the guidelines include:²⁵

- 1) Economic and social costs and benefits of the statutory rule are taken into account and given due consideration;
- 2) Objectives and reasons for the statutory rule are reasonable and appropriate; accord with the objectives, principles, spirit and intent of the enabling Act; and are not inconsistent with the objectives of other Acts, statutory rules and stated government policies;
- 3) Alternative options for achieving a statutory rule's objective are considered, including the option of not proceeding with any action; and
- 4) A statutory rule is expressed plainly and unambiguously.

The NSW Parliamentary Counsel's Office (PCO) is responsible for drafting statutory rules that require Governor approval,²⁶ with the procedures for the drafting, settling and making of instruments found in the [NSW Ministerial Handbook](#).²⁷ Key steps for this process are listed below:

- Drafting instructions are forwarded to the Parliamentary Counsel.
- Draft regulations are returned by the Parliamentary Counsel with an opinion that in this form they may legally be made.

- Draft regulations are submitted to the Minister for approval, with an Executive Council Minute.
- Regulations are approved by the Governor-in-Council.
- Regulations are published on the NSW Legislation website.
- Notice of the making of the Regulations is tabled in the Legislative Assembly and the Legislative Council by the Parliamentary Counsel.²⁸

4.3 Regulatory impact statements

NSW, along with several Australian jurisdictions,²⁹ requires [Regulatory Impact Statements](#) (RIS) to be made in connection with the substantive matters being dealt with by the statutory rule.³⁰ Essentially, an RIS is a means for government agencies to consult with stakeholders who are likely to be affected by the rule.³¹ Before a statutory rule is made, section 5 of the [Subordinate Legislation Act 1989](#) outlines the following process for creating a regulatory impact statement:

- A notice is to be published in the Gazette and in a daily newspaper circulating throughout NSW stating the proposed objects of the statutory rule; where the rule can be viewed; and inviting comments and submissions;
- Consultation must take place with appropriate representatives of consumers; the public; relevant interest groups; and any sector of industry or commerce likely to be affected by the proposed rule; and
- A copy of the regulatory impact statement and all written comments and submissions received are to be forwarded to the Legislation Review Committee (see [section 7.2](#)) within 14 days of being published.

An RIS must include the following matters:

- a) A statement of the objectives sought to be achieved and the reasons for them.
- b) An identification of the alternative options by which those objectives can be achieved (whether wholly or substantially).
- c) An assessment of the costs and benefits of the proposed statutory rule, including the costs and benefits relating to resource allocation, administration and compliance.
- d) An assessment of the costs and benefits of each alternative option to the making of the statutory rule (including the option of not proceeding with any action), including the costs and benefits relating to resource allocation, administration and compliance.
- e) An assessment as to which of the alternative options involves the greatest net benefit or the least net cost to the community.
- f) A statement of the consultation program to be undertaken.³²

Regulatory impact statements are not required in all cases. Exceptions include direct amendments or repeals; matters arising under substantially uniform or complementary legislation of the Commonwealth or another State or Territory; or matters unlikely to impose an appreciable burden, cost or disadvantage to the public.³³

4.4 Publication and commencement

Under section 39(1) of the [Interpretation Act 1987](#), statutory rules must be published on the NSW legislation website and commence either on the day that they are published, or the day specified in the statutory rule. Despite this requirement, a statutory rule is not invalid if published after the specified commencement date. Instead, the rule will take effect from the date of publication.³⁴ However, as discussed in [section 7](#), a piece of delegated legislation can still be stopped from taking effect.

5. Criticism of delegated legislation

Delegated legislation has received a number of criticisms. These include general criticisms of its use, and specific criticisms of different elements and types of delegated legislation. Members of the NSW Parliament have also raised concerns about its use (see section 5.3).

5.1 General criticisms

The key criticism of delegated legislation is that giving the executive *carte blanche* authority to formulate social and political policy puts at risk fundamental democratic values and the legitimacy of law.³⁵ Pearce and Argument have identified the two primary arguments against the use—or at least increased use—of delegated legislation:

[F]irst, that if the executive has power to make laws, the supremacy or sovereignty of parliament will be seriously impaired and the balance of the Constitution altered. Second, if laws are made affecting the subjects, it can be argued that they must be submitted to the elected representatives of the people for consideration and approval.³⁶

In its 2016 report [Traditional Rights and Freedoms – Encroachments by Commonwealth Laws](#), the Australian Law Reform Commission (ALRC) noted that the executive branch of government is said to “lack the democratic credentials of Parliament”:

The framers of the Constitution vested the legislative power in the Australian Parliament ‘because they thought the people’s elected representatives particularly well-suited to the exercise of the “open-ended discretion to choose ends” which is the essence of the legislative task’.

The process of executive law making also ‘lacks the transparency and publicity of the parliamentary process’. Delegation therefore ‘reduces the accountability of the exercise of legislative power’.³⁷

Although these dangers are inherent in the delegated legislation process, Pearce and Argument argue that, since the executive has long made legislation, belief that the parliament should exclusively draft legislation flies in the face of history.³⁸ They contend that the right to delegate legislation to the executive is a *direct demonstration* of parliament’s legislative powers:

[T]he fact that the parliament chooses to delegate part of its function does not mean that the parliament ceases to be supreme. The exercise of the power can be checked and, if it is being misused, it can be withdrawn. There can be mechanisms to monitor the use of delegated powers. It must be remembered that legislative power can only be delegated with the express authority of the parliament. To deny the parliament the capacity to delegate power is, of itself, a restriction of the supremacy of the parliament.³⁹

Appleby and Howe have emphasised the benefits of delegation:

Delegation alleviates pressures of time, giving Parliament greater opportunity to debate matters of principle and importance. Delegation allows for the technicality of legislation to be completed by subject-matter experts. Delegation provides flexibility in areas of regular change or in the face of unexpected contingencies, particularly in response to crises. Delegation facilitates simpler legislative amendment in areas that require frequent modification. Delegation can also increase participation in the legislative process for groups particularly affected by a set of rules.⁴⁰

Nevertheless, Pearce and Argument believe that the challenge is to properly limit any risks through the use of safeguards and ensuring that a parliament's decision to delegate legislation considers the potential consequences.⁴¹ The [New South Wales Legislative Council Practice](#) affirms this view, stating that oversight of delegated power is needed to prevent misuse:

[T]oo strict an adherence to the separation of powers would present practical difficulties for the administration of government. The complexity of the modern state renders it impossible for parliaments to deal with the mass of technical detail which is usually contained in delegated legislation. In this context effective oversight of the exercise of the delegated legislative power is essential.⁴²

5.2 Criticisms of delegated legislation components and practices

A number of aspects of, or practices associated with, delegated legislation have also received criticism.⁴³ These include the primary legislation that facilitates the creation of delegated legislation (skeletal legislation), non-legislative documents that are given legislative status (quasi-legislation), and provisions in an Act that give considerable amending power to delegated legislation (Henry VIII clauses).

Skeletal legislation refers to primary legislation passed by the parliament that only sets out the 'bare bones' of a legislative scheme, with the detail set out later in delegated legislation.⁴⁴ Aronson discussed skeletal legislation in the context of occupational health and safety laws, noting that until the 1970s this legislation was "both highly prescriptive and extraordinarily piecemeal". Since then, this legislation has been reduced to generalised statements of principle, with the details included in delegated legislation.⁴⁵ Aronson raised a number of concerns with skeletal legislation, and outlined the challenges posed by this type of legislation:

[Concerns range] from the transfer of substantively important legislative power from the parliament to the executive, and the diminution in the transparency of a legislative process increasingly conducted without parliamentary debate.

...

The whole point of skeleton acts is that they do indeed leave for subordinate legislation many rules that fundamentally change the law, or which are lengthy and complex, or which are designed to effect radical attitudinal or relationship changes.⁴⁶

Adele Farina MLC, Chair of the Western Australian Parliament's Uniform Legislation and Statutes Review Committee, has expressed concern over the use of skeletal legislation. In a 2011 conference paper she argued that its increasing usage avoided proper parliamentary scrutiny, which could lead to loss of confidence in the machinery of responsible government and the parliamentary process:

Increased use of skeletal legislation may, arguably, move us closer to what could be termed an 'elected dictatorship', whereby the substance of laws are left to be decided by a purely administrative process by the Executive, there being little oversight by Parliament between elections. The path we appear to be going down may well leave no real role for state parliaments, making them irrelevant.⁴⁷

Quasi-legislation has been defined as a "lesser-known cousin" of delegated legislation, and is comprised of documents that are referred to within regulations.⁴⁸ Examples include guidelines, codes, policy directives and other administrative documents.⁴⁹ Quasi-legislative instruments use the authority given by an Act that delegates the power to direct, determine, notify, order, instruct, declare, issue or publish.⁵⁰ Hamer noted challenges raised by use of quasi-legislative instruments:

Many actions taken under these powers will be purely administrative, but others will involve decisions on matters of policy, which certainly should be subject to scrutiny by the legislature. The problems are threefold: to distinguish between matters of administration and those of policy; to ensure that significant policy matters are brought to the attention of the legislature, for their acceptance or disapproval; and to ensure that any such quasi-laws which affect individuals are reasonably available to them.⁵¹

Pearce and Argument also expressed concern about quasi-legislation, listing four basic reasons why these instruments pose problems:

The first three [reasons] are the proliferation, poor quality of drafting and inaccessibility of quasi-legislative instruments. The fourth problem is the tendency for legislative activity to be conducted other than by the legislature and without the scrutiny of the legislature.⁵²

Further to the latter point, Hickie has argued that quasi-legislation may be altered or varied without enacting an amending regulation.⁵³ For example, a guideline referred to in legislation could be dramatically changed, with the legislation still giving authority to that guideline in spite of the parliament not having had an opportunity to review these alterations.

One method to avoid this scenario is to 'date stamp' documents or instruments which are referred to in the legislation or regulation.

This means naming in the provision the title of the document or instrument and the date it was published in the government Gazette. The effect is to ensure that a regulation specifies the relevant version of quasi-legislation it wishes to have in force.⁵⁴ Section 69 of the [Interpretation Act 1987](#) generally requires date stamping to occur. However, Hickie noted examples of NSW legislation and regulations that have not included this information, such as the *Children and Young Persons (Care and Protection) Act 1998*, *Local Government Act 1993*, and *Work Health and Safety Act 2011*.⁵⁵

Henry VIII clause: While not a type of delegated legislation, a ‘Henry VIII clause’ in an Act is a provision that *allows* a regulation or other delegated legislation to amend either that Act or other Acts. Such provisions are considered an inappropriate delegation of power in most Australian jurisdictions,⁵⁸ as they grant the executive or relevant Minister the ability to amend or repeal primary legislation through delegated legislation.⁵⁹

Nevertheless, Seal-Pollard noted that these clauses continue to be included in bills introduced to a range of parliaments,⁶⁰ including the NSW Parliament (see right).

5.3 Commentary by NSW MPs

Members of the NSW Parliament have raised concerns about delegated legislation. A key concern has been the inability of the Parliament to properly scrutinise these instruments. Paul Green MLC commented on this in relation to the [Planning Bill 2013 and Planning Administration Bill 2013](#):

The Act is like a tree: It is above the ground and its content is there for all to see. The Act can be read. But what are not above the ground, and can be concerning, are the regulations. They often are the unseen and are unwritten at the time the Act is passed. The regulations represent the roots and when they are unseen, unwritten and untested there is a chance of rootrot.⁶¹

Other Members have also criticised Bills for leaving a significant number of issues to be resolved through regulation. In relation to the [Native Vegetation Bill 2003](#), a number of Opposition Members argued that they were forced to accept the Government’s good faith that regulations would address the issues that they raised.⁶² Former National Party leader Andrew Stoner MP made the following comment in this respect:

[One] section [of the Bill] also allows for regulations to make provision for reviews of property vegetation plans after 10 years or another specified period. Again we are asked to trust the Minister. We might trust Minister [Craig] Knowles, but he will not be in the job forever.⁶³

The use of skeletal legislation has also been raised in the Legislative Council, most recently by Adam Searle MLC, who in November 2017 commented on a “regrettable trend in recent years” towards its increasing use.⁶⁴ During the Second Reading Debate for the [Co-operatives \(Adoption of National Law\) Bill 2012](#), former Member John Kaye MLC stated that Members were “snookered” with skeletal uniform legislation created by the Council of Australian Government’s ministerial councils:

The legislation before the House is a national law that was drafted by the bureaucrats who serve the ministerial council, after a number of years of consultation with a variety of peak organisations and the public. It is that

Henry VIII clauses in NSW legislation

In August 2017 the NSW Legislation Review Committee identified two Henry VIII clauses in the [Emergency Services Levy Bill 2017](#).⁵⁶

- Section 53 of the Bill permitted the regulations to amend Schedule 1. This meant that the classes of insurance and relevant proportions of contributions could be determined by the executive; and
- Schedule 3.2[8] of the Bill inserted Part 11 into the *Fire and Emergency Services Levy Act* to postpone the introduction of the levy and suspend certain key provisions of the Act during the postponement period, subject to the regulations. Power was also granted to suspend provisions of other Acts or regulations relating to the levy, or to further provide for suspension or revocation.

While the Committee found the clauses to be “contrary to the traditional Westminster democratic tradition of the legal primacy of Parliament”,⁵⁷ the Bill passed unamended.

consultation that gives The Greens some sense of comfort in passing this measure, which I note is, in reality, an appendix to the bill. This is skeletal legislation and the real power is in the appendix, which is the national law itself.

...

The legislation has been drafted by bureaucrats. Some of them are very good—I am not reflecting in any way on their ability to undertake such a task—however, there is no question that this legislation has been drafted by bureaucrats and that it has not been subjected to the usual level of parliamentary scrutiny.⁶⁵

In 2017, David Shoebridge MLC criticised the inclusion of a Henry VIII clause in the [Crown Land Legislation Amendment Bill 2017](#). He argued it was “a blanket power to rewrite the Act”. Furthermore, he stated that while he understood why the bureaucracy would wish to rewrite legislation through regulation, this was nevertheless “offensive to responsible government in New South Wales and offensive to the idea of parliamentary oversight”.⁶⁶

Notably, these concerns appear to have been raised exclusively by Opposition Members or the Crossbench (see [section 8.3](#)).

6. Trends in delegated legislation

6.1 Measuring volumes of delegated legislation

As noted above, lawyers, scholars and MPs have all expressed concern that there is increasing usage of delegated legislation in Australian parliaments. The basis for this concern is that larger volumes of delegated legislation make it difficult for parliaments to perform effective oversight of the executive (see [section 7](#)).⁶⁷

It is not possible to identify the number of instruments that give too much power to the executive to draft legislation. Nevertheless, total volumes of delegated legislation for the Commonwealth and NSW Parliaments are available, and can be used to assess whether the sheer volume of delegated legislation is making parliamentary oversight more difficult.⁶⁸ Caution should be taken when using these figures, as not all these instruments may cause difficulties for the respective parliaments.

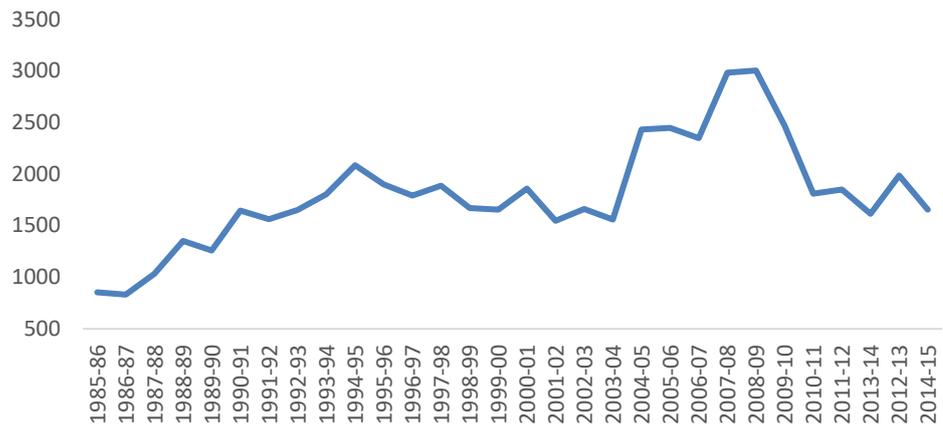
6.2 Changes in delegated legislation volume in the Commonwealth and NSW Parliaments

Pearce and Argument reported a considerable increase in the volume of Commonwealth delegated legislation after the Second World War. According to data cited by the authors, in 1949 the Commonwealth Regulations and Standing Committee reviewed **192** instruments. This increased to **284** instruments in 1971, **1,352** instruments in 1988-89, and **1,809** instruments reviewed by the Committee in 2010-11. The authors were uncertain as to the reason for this increase, but suggested that “[i]t may be no more than a reflection of the fact that ‘society’ has become more complicated over the past 20 or 30 years”.⁶⁹

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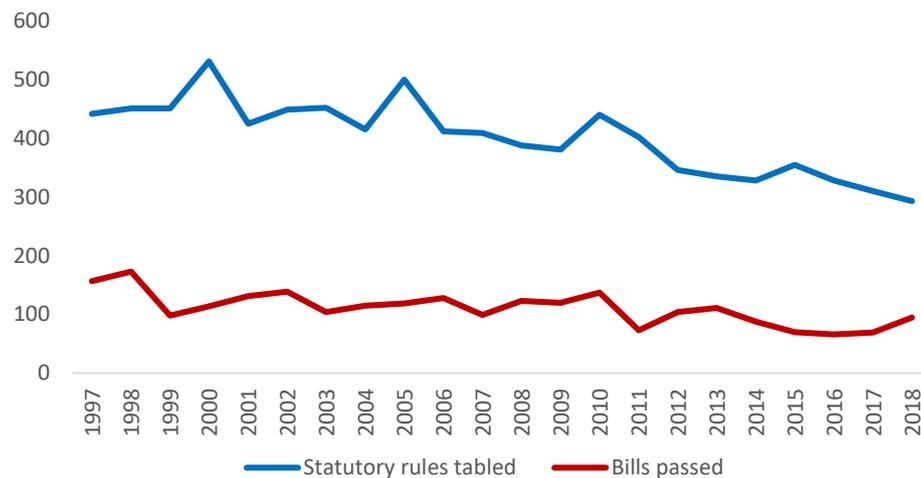
Figures from [Odger's Australian Senate Practice](#) show a similar surge in the volume of delegated legislation since 1985-86. Their number increased to a high of **3,004** in 2008-09, before changes in practice by the Civil Aviation Safety Authority resulted in a fall in volume after 2009-10.⁷⁰ Nevertheless, the volume of delegated legislation at the Commonwealth level has increased over the past three decades.

Figure 1: Volume of delegated legislation tabled in the Commonwealth Parliament, 1985-86 to 2014-15⁷¹

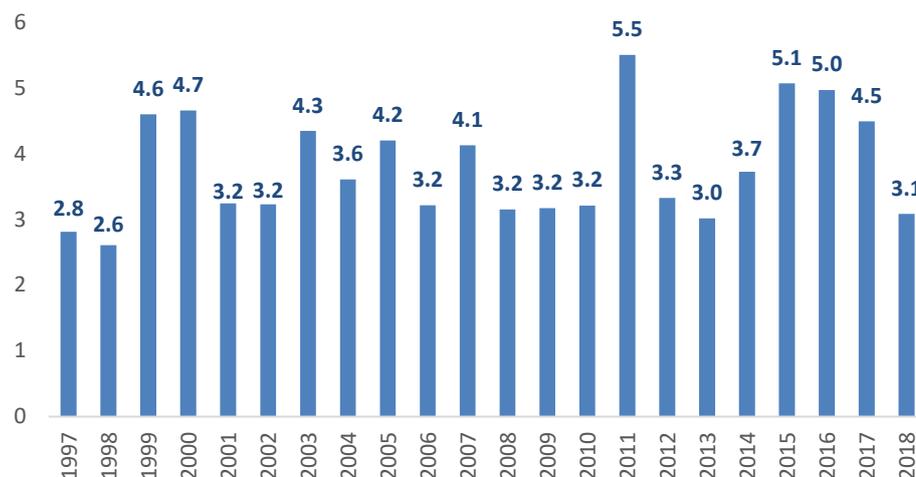


In contrast to the Commonwealth, there has been a decline in the volume of delegated legislation in NSW (referred to as 'statutory rules and instruments') from 1997 to 2018. However, as shown in Figure 2, this decline has also been accompanied by a fall in the volume of primary legislation.

Figure 2: Volume of delegated legislation tabled in the NSW Parliament vs number of bills passed, 1997 to 2018⁷²



The *ratio* of delegated legislation to assented bills in NSW is shown in Figure 3 overleaf. This ratio has fluctuated over the past two decades but in most years it has been between 3:1 and 5:1: that is, between three to five pieces of delegated legislation for each assented bill.

Figure 3: Ratio of delegated legislation to assented bills in the NSW Parliament, 1997 to 2018⁷³

7. Scrutiny measures

7.1 Parliamentary scrutiny as paramount

Although delegated legislation has some constitutional limitations (see [section 3.2](#)), they appear unlikely to stop any but the most egregious delegations of legislative power. In practice, other measures must be taken to identify inappropriately delegated legislation.

The judiciary is one arm of government that can review delegated legislation. However, Chief Justice of Western Australia, Wayne Martin, has noted that the courts are currently limited in their ability to review delegated legislation.⁷⁴ Hamer commented that the judiciary can only do so much in response to delegated legislation matters:

[The courts'] power is limited to matters such as whether the instrument is within the power delegated, whether there are inconsistencies with other acts, and whether prescribed procedures have been followed. The courts have no control over many of the potentially objectionable features of such legislation. In any case, legal remedies tend to be expensive and long delayed, and it would surely be better to ensure that the legislation is properly made in the first place.⁷⁵

There are calls for the judiciary to take a more active involvement in developing enforceable limits on delegation. For example, Appleby has called on the High Court to develop a requirement for parliamentary approval for delegated instruments prior to them coming into force.⁷⁶

The ALRC has stated that “careful and ongoing scrutiny—built into the law making process—may be the most suitable way to limit inappropriate delegations of legislative power.”⁷⁷ Currently, the Senate is conducting an inquiry into parliamentary scrutiny of delegated legislation, in order to ensure the “continuing effectiveness, role and future direction of the Senate Standing Committee on Regulations and Ordinances”.⁷⁸

7.2 Scrutiny measures and safeguards in the NSW Parliament

Written notice of statutory rules: Under s 40(1) of the [Interpretation Act 1987](#), written notice of the making of a statutory rule must be laid before each House of Parliament within 14 sitting days after being published on the NSW legislation website. A written notice must identify the statutory rule to which it relates by reference to the Act under which it is made and, if there is one, its citation. It can be laid before a House either by a Minister or the Clerk of that House.⁷⁹

Notably, failure to lay a written notice before each House of Parliament in accordance with this section *does not* affect the validity of a statutory rule. However, a notice must still be laid before each House at some stage.⁸⁰

Disallowance of statutory rules: Section 41(1) of the [Interpretation Act 1987](#) allows either House to pass a resolution disallowing a statutory rule. This can be done at any time before the relevant written notice is laid before the House or, if the notice has already been laid, within 15 sitting days. A statutory rule can be disallowed in part as well as in whole,⁸¹ with disallowance having the same effect as the repeal of a rule.⁸² *NSW Legislative Council Practice* comments that, while committee scrutiny (see following section) generally focuses on ‘technical’ aspects of the regulation, debate in the House tends to focus on larger policy questions, or intertwines questions of process and policy.⁸³

Additionally, s 8 of the [Subordinate Legislation Act 1989](#) prohibits the remaking of a disallowed statutory rule within four months of the disallowance, unless the disallowance resolution is rescinded by either House.

Legislation Review Committee: The [Legislation Review Committee](#) was established in 2003 under the [Legislation Review Act 1987](#), replacing the former Regulation Review Committee. The Committee consists of five Legislative Assembly Members and three Legislative Council Members,⁸⁴ and has the following functions with respect to bills and regulations (Table 1).

Table 1: Functions of the Legislation Review Committee⁸⁵

Bills (s 8A)	<ul style="list-style-type: none"> • Consider any bill introduced into Parliament; and • Report to both Houses as to whether any such bill, by express words or otherwise: <ul style="list-style-type: none"> ○ Trespasses unduly on personal rights and liberties; or ○ Makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers; or ○ Makes rights, liberties or obligations unduly dependent upon non-reviewable decisions; or ○ Inappropriately delegates legislative powers; or ○ Insufficiently subjects the exercise of legislative power to parliamentary scrutiny.
Regulations (s 9)	<ul style="list-style-type: none"> • Consider all regulations while they are subject to disallowance by resolution of either or both Houses of Parliament; • Consider whether the special attention of Parliament should be drawn to any such regulation on any ground, including the following:

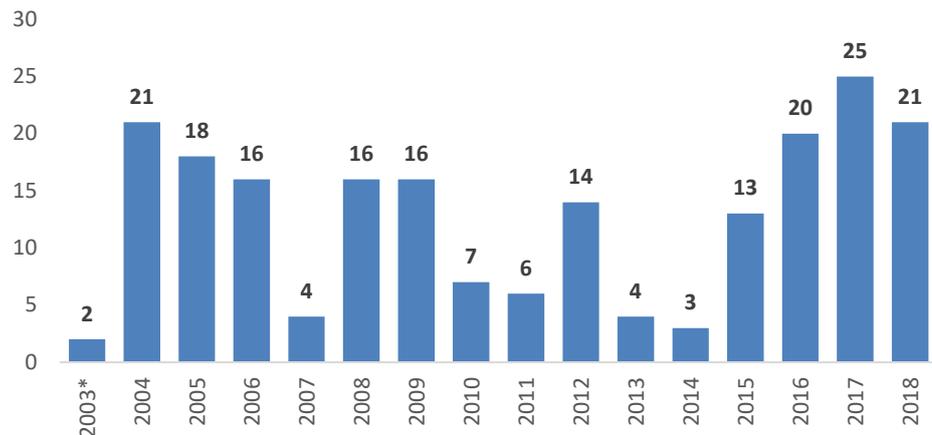
Table 1: Functions of the Legislation Review Committee⁸⁵

	<ul style="list-style-type: none"> ○ That the regulation trespasses unduly on personal rights and liberties; ○ That the regulation may have an adverse impact on the business community; ○ That the regulation may not have been within the general objects of the legislation under which it was made;
Regulations (s 9)	<ul style="list-style-type: none"> ○ That the regulation may not accord with the spirit of the legislation under which it was made, even though it may have been legally made; ○ That the objective of the regulation could have been achieved by alternative and more effective means; ○ That the regulation duplicates, overlaps or conflicts with any other regulation or Act; ○ That the form or intention of the regulation calls for elucidation; or ○ That any of the requirements of the <i>Subordinate Legislation Act 1989</i> appear not to have been complied with, to the extent that they were applicable in relation to the regulation. <ul style="list-style-type: none"> • Make such reports and recommendations to each House of Parliament as it thinks desirable as a result of its consideration of any such regulations, including reports setting out its opinion that a regulation or portion of a regulation ought to be disallowed and the grounds on which it has formed that opinion.

The findings of the Committee are reported in the [Legislation Review Digest](#). Neither the Act nor House Standing Orders oblige Ministers or other Members of Parliament to respond to Committee comments on a bill or regulation. In practice though, the Committee writes to the relevant Minister drawing their attention to the Committee's comments. These letters are noted in the Minutes of the Committee's proceedings.⁸⁶

As Figure 4 shows, the number of regulations reported on by the Committee comprise a small proportion of the total number of statutory rules and instruments tabled in the NSW Parliament (see Figure 2). This is because the Committee only reports on regulations that it considers may fall within one of the criteria in s 9 of the Act. In addition, the Committee is subject to time constraints (see [section 8](#)).

Figure 4: Number of regulations reported on by the NSW Legislation Review Committee, 2003 to 2018⁸⁷



* LRC first commenced on 15 August 2003

Section 9(3) of the Act excludes the Committee from inquiring into and reporting on matters of government policy, and so the Committee's scrutiny is of a technical nature only.⁸⁸ Despite this restriction, Pearce and Argument believe the Committee's work has significant value:

A large part of the value of the scrutiny of regulations work of the NSW Committee has been in its ability to call government authorities and agencies to account, in particular, in relation to the regulatory impact statement requirements. The fact that these requirements involve public and interest group consultation, cost-benefit analysis and consideration of alternative approaches, together with the fact that the NSW Committee has enforced these requirements and not allowed authorities and agencies to pay mere lip service to them, means that the end product tends to be better thought out and more acceptable to those persons and groups likely to be affected by the regulations.⁸⁹

Legislative Council Regulation Committee: The [Legislative Council Regulation Committee](#) (Regulation Committee) was established on a trial basis from 23 November 2017 to 9 November 2018. It was created in response to the 2016 [inquiry into the Legislative Council committee system](#), which recommended that Legislative Council committees play a greater role in scrutinising delegated legislation.⁹⁰

During its trial period, the Regulation Committee conducted two inquiries into particular pieces of delegated legislation. In the [Evaluation of the Regulation Committee trial](#), the Regulation Committee commented that its remit was broader than that undertaken by the Legislative Review Committee in recent times. The [resolution establishing the Committee](#) allows it to inquire into "the policy or substantive content of a regulation": a greater ambit than that given to the Legislation Review Committee. Nevertheless, there was minimal overlap in the functions of both committees: a point of concern when the Regulation Committee was first established.⁹¹

The Regulation Committee has since been established as a standing committee in the 57th Parliament.⁹²

8. Limitations of existing measures

While these safeguards provide at least some assurance that delegated legislation is being scrutinised in the NSW Parliament, there remain concerns about the limitations of existing safeguards and review mechanisms.

8.1 Use of disallowance motions

Although [disallowance motions](#) can be used to, in effect, repeal any statutory rule or instrument, in practice they are a rare occurrence. Between 1995 and 2018, **140** disallowance motions were moved in the NSW Legislative Council (Figure 5), and **18** disallowance motions were moved in the Legislative Assembly (Figure 6). Of these disallowance motions, just **17** were agreed to by the Legislative Council, and **3** agreed to in the Legislative Assembly.⁹³

Figure 5: Legislative Council disallowance motions, 1995 to 2018⁹⁴

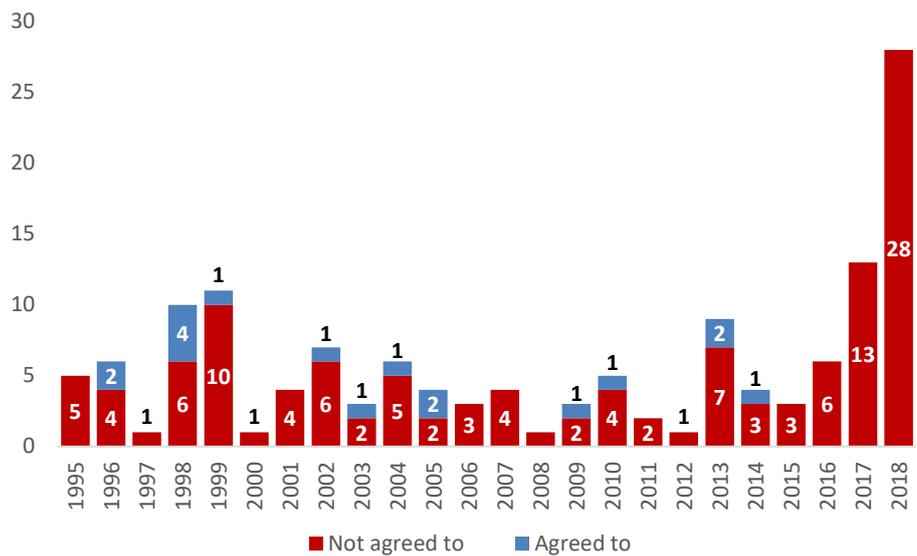
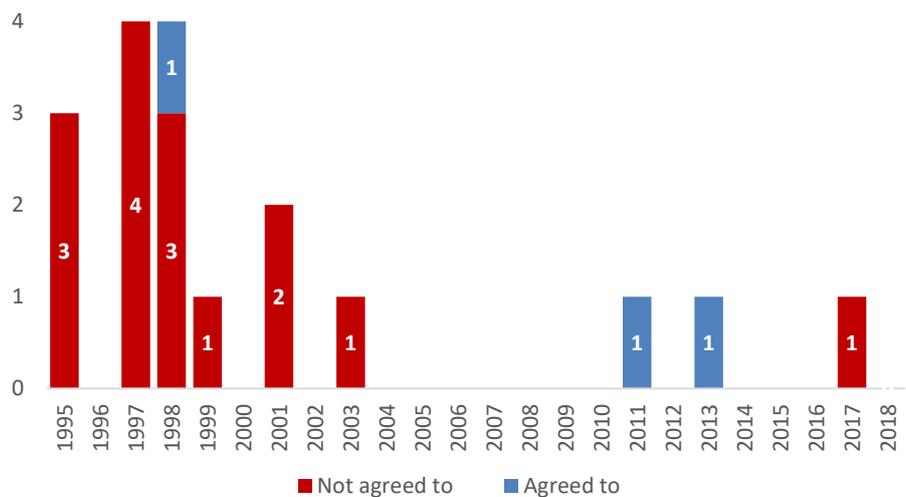


Figure 6: Legislative Assembly disallowance motions, 1995 to 2018⁹⁵



While not an exact comparison, it should nevertheless be noted that, between 1997 and 2017, **8,550** statutory rules and instruments were tabled in the NSW Parliament.

It is unclear why disallowance motions are used sparingly. One reason may be that disallowance motions often function as a 'sledgehammer', with an entire instrument rejected rather than just contentious sections. As stated by Adam Searle MLC, this can prevent critical legislation such as planning law from operating properly, and, consequently, "Parliament would be slow in disallowing regulations if they are necessary to the functioning of the planning system in particular."⁹⁶

It is also possible that Members are generally satisfied with the statutory instruments being tabled, do not have the time to scrutinise delegated legislation, or perhaps prefer to let the Legislation Review Committee perform this scrutiny function.

8.2 Legislation Review Committee time constraints

The Legislation Review Committee faces challenges when scrutinising legislation. A key difficulty is insufficient time given to conduct scrutiny.⁹⁷ Michael Johnsen MP, Chair of the Legislation Review Committee until November 2017, discussed how time constraints affected the Committee, secretariat and other stakeholders:

Parliamentarians have roles and responsibilities relating to their constituents and the broader community including the media, responsibilities to their Party (if they are a member of a political party) and work in the Parliament itself. Staff of scrutiny committees may also be balancing other responsibilities. ... As such, Committee Members and staff often work to very tight deadlines as we regularly only have several days to consider and report on Bills. ... [E]ffective scrutiny requires time for analysis and deliberation. Ideally, one has time to carry out adequate research into the relevant issues and ask questions of the relevant Ministers or Departments.⁹⁸

Negative consequences may result if there is insufficient time for the Committee to scrutinise delegated legislation, as shown in the 2008 Federal Court case of [Evans v New South Wales](#) (see box overleaf).

*Evans v New South Wales*⁹⁹

Prior to the Catholic Church's World Youth Day being held in Sydney in July 2008, the NSW Government enacted the [World Youth Day Act 2006](#) and the [World Youth Day Regulation 2008](#). Amongst other provisions, the Regulation prohibited conduct causing "annoyance or inconvenience to participants".¹⁰⁰

The applicants argued that these provisions were invalid, as they infringed upon the implied freedom of political communication under the Constitution. In its decision the Full Court of the Federal Court found that preventing conduct that causes annoyance was not authorised by the regulation-making power of the Act, and was therefore invalid "to the extent that it purports to empower an authorised person to direct a person within a World Youth Day declared area to cease engaging in conduct that causes annoyance to participants in a World Youth Day event".¹⁰¹

This decision demonstrates potential pitfalls associated with delegated legislation. While there are scrutiny measures in the NSW Parliament that could theoretically identify these legislative shortcomings, they were unsuccessful in this instance. For example, it does not appear that the Regulation was subject to any disallowance motion by either House, while the Legislation Review Committee's [analysis](#) of the Regulation occurred in September 2008: two months after the Federal Court's decision.

8.3 Limited political will for reform

When it comes to better scrutinising delegated legislation, a lack of political will may be hindering reform.

Writing about the British Parliament, Fox and Korris have stated that—at least in the UK—political culture prioritises executive decisiveness rather than executive reflection: creating "an environment that is not conducive to the production of high quality, well-considered law".¹⁰² Strict party discipline, the necessity of government control of the Parliament, and decline of "the individual MP, exercising autonomous scrutiny over the Executive" may also inhibit reform efforts.¹⁰³

Meagher goes further, arguing that a culture of 'nowism' in modern political culture, along with a constant media focus on "getting things done", makes it difficult to slow the legislative review process down in order to increase scrutiny.¹⁰⁴ Similar concerns were noted by former NSW parliamentarian Ron Dyer MLC, who stated that the culture of the NSW Legislative Assembly, with a general tendency "to put bills through the house quickly and with little time reserved for quiet reflection", is not conducive to effective scrutiny.¹⁰⁵

As shown in [section 5.3](#), criticism of delegated legislation comes primarily from the Opposition and Crossbench members, not the government. Even so, as noted by Hamer, an opposition's incentive to introduce reform once in government may be hindered by the knowledge that they will become subject to any enhanced scrutiny they wish to introduce while out of power:

As one UK delegate to the third Commonwealth Conference on Delegated Legislation put it:

The Opposition do not want to rock the boat too much, because they are waiting to get into power. They do not want too nosy a Joint Committee on Statutory Instruments with too many powers, and therefore do nothing about it. When the parties change round, the Opposition again do nothing about it because they are waiting to get back into government.¹⁰⁶

9. Conclusion

In spite of concerns and criticisms, delegated legislation is a necessary part of modern parliaments. Without these time-saving, flexible instruments, the operation of parliament would slow considerably, making it exceptionally difficult to govern. However, greater use of these instruments may make it harder to scrutinise them, with increased risk of poorly considered legislation being made. Existing safeguards may be reasonably effective at identifying examples of overreach. Yet limitations of existing oversight mechanisms mean that further reform could be required to ensure proper scrutiny of delegated legislation.

¹ Ma Z, *What lies beneath: Parliamentary scrutiny, skeleton legislation and delegated legislation*, unpublished paper, 2018.

² Pearce, D, Argument, S, *Delegated Legislation in Australia*, 5th ed, 2017, p 1-2.

³ *Ibid*; *Commonwealth v Grunseit* (1943) 67 CLR 58 at 82.

⁴ Lovelock L, Evans J, *New South Wales Legislative Council Practice*, 2008, p 423.

⁵ *Ibid* p 423; Pearce and Argument, note 2, p 10; Hewart G, *The New Despotism*, 1929, p 17.

⁶ *Commonwealth v Grunseit* (1943) 67 CLR 58 at 82.

⁷ *Minister of Industry and Commerce v Tooheys Ltd* (1982) 60 FLR 325 at 331.

⁸ Fox R, Blackwell J, Fowler B, *Taking Back Control for Brexit and Beyond*, Hansard Society, September 2017, p 9.

⁹ Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, ALRC Report 129, 2 March 2016, Ch 17.

¹⁰ Pearce and Argument, note 2, p 2.

¹¹ Or Legislative Assembly in the case of the Australian Capital Territory and Northern Territory.

¹² Evans H (ed), *Odggers' Australian Senate Practice*, 14th ed, 2016, Ch 15; Pearce and Argument, note 2, p 4-5.

¹³ Pearce, D, Argument, S, *Delegated Legislation in Australia*, 2012, p 1.

¹⁴ Wright B, Fowler P (eds), *House of Representatives Practice*, 2012, 6th ed, p 410.

¹⁵ Hamer D, *Can Responsible Government Survive In Australia?*, Department of the Senate, 2004, p 303.

¹⁶ Pearce and Argument, note 2, p 6.

¹⁷ Argument S, Delegated legislation, in Groves M and Lee H (eds), *Australian Administrative Law*, 2008, p 135.

¹⁸ *Ibid* p 135-136.

¹⁹ Gerangelos P (ed), *Winterton's Australian Federal Constitutional Law*, 2017, p 307.

²⁰ Twomey A, *The Constitution of New South Wales*, 2004, p 210-211.

²¹ *Ibid* p 211-212.

²² *The Victorian Stevedoring and General Contracting Company Proprietary Limited v Dignan* (1931) 46 CLR 73 at 101, 119, 121.

²³ Pearce and Argument, note 2, Ch 2.

²⁴ *Ibid* p 25.

²⁵ *Subordinate Legislation Act 1989* (NSW) Sch 1.

²⁶ *Ibid* p 38.

²⁷ NSW Department of Premier and Cabinet, *NSW Government Ministerial Handbook*, June 2011, s 4, Annexure J.

²⁸ *Ibid* p 42.

²⁹ The ACT, Tasmania and Victoria. See Pearce and Argument, note 2, p 144-145.

³⁰ *Subordinate Legislation Act 1989* (NSW) s 5.

³¹ Pearce and Argument, note 2, p 186.

³² *Subordinate Legislation Act 1989* (NSW) Sch 2.

³³ *Ibid* s 6, Sch 3.

³⁴ *Interpretation Act 1987* (NSW) s 39(2A).

³⁵ Meyerson D, Rethinking the Constitutionality of Delegated Legislation, *Australian Journal of Administrative Law*, 2003, 45(11), p 54.

³⁶ Pearce and Argument, note 2, p 10.

³⁷ ALRC, note 9, 17.28-17.29.

- ³⁸ Pearce and Argument, note 2, p 11.
- ³⁹ Ibid.
- ⁴⁰ Appleby G, Howe J, Scrutinising parliament's scrutiny of delegated legislative power, *Oxford University Commonwealth Law Journal*, 2015, 15(1), p 4-5.
- ⁴¹ Pearce and Argument, note 2, p 11
- ⁴² Legislative Council, [New South Wales Legislative Council Practice](#), Parliament of NSW, 2008, p 423.
- ⁴³ Pearce and Argument, note 2, Ch 1.
- ⁴⁴ Ibid p 11.
- ⁴⁵ Aronson M, [Subordinate legislation: lively scrutiny or politics in seclusion](#), *Australasian Parliamentary Review*, 2011, 26(2), p 7.
- ⁴⁶ Ibid p 5, 11.
- ⁴⁷ Farina A, [Bones without flesh - the issues with skeletal legislation](#), paper presented at the Australia-New Zealand Scrutiny of Legislation Conference, Brisbane, July 2011, p 14.
- ⁴⁸ Hickie S, [Diminishing the efficacy of disallowance motions: quasi-legislation in state jurisdictions](#), *Australasian Parliamentary Review*, 2012, 27(1), p 92-94.
- ⁴⁹ Hamer, note 15, p 304; Farina, note 47, p 7.
- ⁵⁰ Hamer, note 15; Hickie, note 48.
- ⁵¹ Hamer, note 15, p 304.
- ⁵² Pearce and Argument, note 2, p 15.
- ⁵³ Hickie, note 48, p 93, 96.
- ⁵⁴ For example, see the now-repealed [Native Vegetation Regulation 2013](#) (NSW), cl 16.
- ⁵⁵ Hickie, note 48, p 97-98.
- ⁵⁶ Legislation Review Committee, [Legislation Review Digest](#), No 40/56, Parliament of NSW, 3 August 2017, p 19-20.
- ⁵⁷ Ibid.
- ⁵⁸ Pearce and Argument, note 2, p 22, 153.
- ⁵⁹ Tudor P, Secondary legislation: Second class or crucial?, *Statute Law Review*, 2000, 21(3), p 152.
- ⁶⁰ Seal-Pollard J, [Addressing the Balance: The Executive and the Parliament](#), paper presented at the Australasian Study of Parliament Group conference, Adelaide, 2016, p 3; Pearce and Argument, note 2, p 153.
- ⁶¹ Green P, [Planning Bill 2013: Planning Administration Bill 2013 – Second Reading Debate](#), *NSW Hansard*, 26 November 2013.
- ⁶² Gay D, [Native Vegetation Bill 2003 – Second Reading Debate](#), *NSW Hansard*, 5 December 2003.
- ⁶³ Stoner A, [Native Vegetation Bill 2003 – Second Reading Debate](#), *NSW Hansard*, 19 November 2003.
- ⁶⁴ Searle A, [Environmental Planning and Assessment Bill 2017 – Second Reading Debate](#), *NSW Hansard*, 14 November 2017.
- ⁶⁵ Kaye J, [Cooperatives \(Adoption of National Law\) Bill 2012 – Second Reading Debate](#), *NSW Hansard*, 9 May 2012.
- ⁶⁶ Shoebridge D, [Crown Land Legislation Amendment Bill 2017 – Second Reading Speech](#), *NSW Hansard*, 10 May 2017.
- ⁶⁷ Lovelock and Evans, note 4; Pearce and Argument, note 2, p 15-18; Hickie, note 48, p 92.
- ⁶⁸ Lovelock and Evans, note 4.
- ⁶⁹ Pearce and Argument, note 2, p 15-18.
- ⁷⁰ Evans H (ed), [Odgers' Australian Senate Practice](#), 14th ed, 2016, p 432, fn 6.
- ⁷¹ Ibid.
- ⁷² Statutory rules and instruments figures provided by the NSW Legislative Council Table Office. For assented bills see: Parliament of New South Wales, [Assented bills 1997+](#), 2018 [accessed 11 June 2019]
- ⁷³ Ibid.
- ⁷⁴ Martin CJ, ["Too many cooks?": Parliament, the Courts and the scrutiny of delegated legislation](#), paper presented at the Australia-New Zealand Scrutiny of Legislation Conference, Perth, 2016, p 20.
- ⁷⁵ Hamer, note 15, p 304.
- ⁷⁶ Appleby G, Challenging the Orthodoxy: Giving the Court a Role in Scrutiny of Delegated Legislation, *Parliamentary Affairs*, 2016, 69, p 282.
- ⁷⁷ ALRC, note 9.
- ⁷⁸ Commonwealth Senate Standing Committee on Regulations and Ordinances, [Parliamentary Scrutiny of Delegated Legislation](#), November 2018.

- ⁷⁹ [Interpretation Act 1987](#) (NSW) s 40(2)-(3A).
- ⁸⁰ *Ibid* s 40(4).
- ⁸¹ *Ibid* s 41(6).
- ⁸² Pearce and Argument, note 2, p 73.
- ⁸³ Legislative Council, note 42, p 434.
- ⁸⁴ [Legislation Review Act 1987](#) (NSW) s 5.
- ⁸⁵ [Legislation Review Act 1987](#) (NSW) Pt 3.
- ⁸⁶ Information provided by the Legislation Review Committee Secretariat.
- ⁸⁷ Legislation Review Committee, [Legislation Review Digests](#), n.d. [accessed 12 July 2018]
- ⁸⁸ Pearce and Argument, note 2, p 74.
- ⁸⁹ *Ibid* p 75-76.
- ⁹⁰ Legislative Council of NSW Select Committee on the Legislative Council Committee System, [The Legislative Council committee system](#), November 2016, p 5.
- ⁹¹ *Ibid* p vi-vii.
- ⁹² Harwin D, [Regulation Committee](#), *NSW Hansard*, 8 May 2019.
- ⁹³ Note that the single disallowance motion agreed to on 20 October 1998 did not disallow the statutory instrument, and was effectively an amendment to the instrument.
- ⁹⁴ Legislative Council, [Motions to disallow statutory rules and regulations since 1995](#), n.d. [accessed 28 May 2019]
- ⁹⁵ Information provided by the Legislative Assembly Table Office.
- ⁹⁶ Searle, note 64.
- ⁹⁷ Johnsen M, [Comparative approaches to legislative scrutiny](#), paper presented at the Australia-New Zealand Scrutiny of Legislation Conference, Perth, 2016, p 11; Evans S, Evans C, [Australian Parliaments and the Protection of Human Rights](#), Parliament of Australia, No 47, July 2007.
- ⁹⁸ Johnsen, note 97, p 12-13.
- ⁹⁹ [2008] FCAFC 130. A more detailed summary of this case was made by Meagher D, '[The principle of legality and the judicial protection of rights – Evans v New South Wales](#)' (2009) 37(2) *Federal Law Review* 295-314.
- ¹⁰⁰ [World Youth Day Regulation 2008](#) cl 7(1).
- ¹⁰¹ *Evans v New South Wales* [2008] FCAFC 130, [7].
- ¹⁰² Fox R, Korris M, [Making Better Law](#), Hansard Society, 2010, p 21. See also: Argument S, [Leaving it to the Regs – The pros and cons of dealing with issues in subordinate legislation](#), paper presented at the Australia-New Zealand Scrutiny of Legislation Conference, Brisbane, July 2011, p 22.
- ¹⁰³ Appleby and Howe, note 40, p 18; Hickie, note 48, p 93.
- ¹⁰⁴ Meagher, note 99, p 16.
- ¹⁰⁵ Legislative Council, note 90, p 4.
- ¹⁰⁶ Hamer, note 15, p 320.

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