



The Honourable Don Harwin MLC

Leader of the Government in the Legislative Council
Special Minister of State, Minister for the Public Service and Employee Relations,
Aboriginal Affairs, and the Arts
Vice-President of the Executive Council

Ref: A4437133

Mr David Blunt
Clerk of the Legislative Council
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Mr ^{David} Blunt

Inquiry into the making of delegated legislation in NSW – Government response

I refer to Report 7 of the Legislative Council's Regulation Committee ("the Committee") dated 22 October 2020 entitled *Making of delegated legislation in New South Wales*.

I enclose the Government response to the Committee's report.

Yours sincerely

Don Harwin MLC

Leader of the Government in the Legislative Council
Special Minister of State
Minister for the Public Service and Employee Relations, Aboriginal Affairs, and the Arts
Vice-President of the Executive Council

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Received on behalf of the Clerk of the Parliaments
on Monday 19 April 2021



**REPORT OF THE REGULATION COMMITTEE –
MAKING OF DELEGATED LEGISLATION IN NEW SOUTH WALES
(REPORT 7, OCTOBER 2020)**

GOVERNMENT RESPONSE

On 26 February 2020, the Legislative Council referred terms of reference to the Regulation Committee (the **Committee**) to inquire into and report on the making of delegated legislation in New South Wales.

In particular, the inquiry considered the extent to which the Parliament has delegated power to make delegated legislation to the Executive government, including through the passage of so-called "shell legislation", "quasi legislation" and extraordinary regulation making powers (the so-called "Henry VIII clauses"). The inquiry also considered the use of delegated legislation making power, including any instances of Executive government overreach.

The Committee tabled its report (the **Report**) on 22 October 2020. The Report contains six recommendations relating to the making of delegated legislation, three of which are directed to the Government.

The Government supports or supports in principle two of the Committee's recommendations and does not support the other recommendation. Enclosed is a table which details the Government's response to each of the Committee's recommendations.

COMMITTEE RECOMMENDATION

- 1 That NSW Government agencies give priority to identifying more effective ways of communicating legislative instruments to the public, particularly instruments which impact on personal rights and liberties, and facilitating ready access to all such instruments by the public.

GOVERNMENT RESPONSE

Supported.

The Government recognises that communicating legislative instruments to the public is particularly important where legislative instruments impact on personal rights and liberties.

Given the range of subject matters covered and stakeholders affected by legislative instruments, the Government considers that individual agencies are best placed to determine how to target their communications most effectively with the resources available to them, for example, by including plain English guidance material on the agency's website and/or distributing links to the Parliamentary Counsel website using other targeted means.

The Government notes that the Parliamentary Counsel's Office (**PCO**) maintains the NSW legislation website, which provides a consolidated source of access to NSW legislation. The NSW legislation website is currently being refreshed to make it easier for the public to navigate. The first stage of the refresh was delivered in 2020 and further improvements to increase accessibility are aimed to be delivered in 2022.

The Government notes the Committee's comments regarding stakeholder concerns about the accessibility of the COVID-19 public health orders. The Government implemented numerous measures to ensure that communication of new public health orders to the public was immediate and clear. Links to all public health orders are made available on the NSW legislation website, which is updated with any new orders as soon as they are gazetted.

The NSW legislation website also includes a dedicated page for all COVID-19 legislative instruments (see <https://www.legislation.nsw.gov.au/information/covid19-legislation>). Unlike other jurisdictions, PCO publishes consolidated versions of amended public health orders to make them more accessible and easier to understand.

COMMITTEE RECOMMENDATION

GOVERNMENT RESPONSE

<p>2 That the Attorney General consider referring to the NSW Law Reform Commission the following terms of reference:</p> <ol style="list-style-type: none">1. Pursuant to section 10 of the Law Reform Commission Act 1967, the NSW Law Reform Commission is to review and report on:<ol style="list-style-type: none">(a) the extent and use of delegated legislative powers in New South Wales(b) powers and safeguards relating to delegated legislation in other jurisdictions(c) suggestions for improvements in the use of delegated legislative powers to prevent executive overreach.2. In particular, the Commission is to consider:<ol style="list-style-type: none">(a) the merits of extending statutory provisions regarding disallowance and committee scrutiny to all instruments of a legislative character including quasi-legislation(b) the adequacy of current requirements for consultation in the development of delegated legislation(c) the need to ensure that all forms of delegated legislation can be easily accessed by the public as soon as they commence	<p>Separately, plain English guidance on the impact of each new public health order, including what members of the public can and can't do under the orders, is published on the NSW Government website and social media channels after the gazettal of a new order (see https://www.nsw.gov.au/covid-19/what-you-can-and-cant-do-under-rules).</p> <p>Not supported.</p> <p>The Government notes the Committee's statement in its Report that it is a matter for the Parliament to determine what safeguards are required to minimise the risk of Executive overreach in the use of delegated legislation.</p> <p>The Government also notes that the Legislation Review Committee (LRC), which is a joint statutory Parliamentary committee, has oversight responsibilities in relation to delegated legislation. Under section 8A(1)(b)(iv) of the <i>Legislation Review Act 1987</i> (the LR Act), the LRC has the function of reporting to Parliament on whether any bill inappropriately delegates legislative powers. Further, under section 9 of the LR Act, the LRC's functions with respect to regulations include assessing whether proposed regulations comply with the requirements of the <i>Subordinate Legislation Act 1989</i>, including requirements regarding community consultation, and considering whether proposed regulations trespass on personal rights and liberties, adversely impact business, or overlap with or duplicate other regulations.</p> <p>The Government notes that in 2018, the LRC conducted an inquiry into the operation of the LR Act. The Government's response to the report on that inquiry will be provided separately.</p> <p>In relation to the need to ensure that all forms of delegated legislation can be easily accessed by the public as soon as they commence, the Government refers to its response to recommendation 1 above.</p>
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COMMITTEE RECOMMENDATION	GOVERNMENT RESPONSE
<ul style="list-style-type: none"> (d) the need for additional safeguards in relation to the use of Henry VIII provisions, shell legislation and quasi legislation (e) the merits of consolidating into a single statute the <i>Subordinate Legislation Act 1989</i>, the <i>Legislation Review Act 1987</i> and the relevant provisions of the <i>Interpretation Act 1987</i> (f) the merits of adopting a comprehensive statutory framework for primary and secondary legislation similar to the <i>Legislative Standards Act 1992</i> (Qld) (g) the merits of extending the time limits for the disallowance of delegated legislation (h) the merits of extending the 4-month time limit on remaking a disallowed statutory rule (i) any other matters the Commission considers relevant. 	
<p>3 That, following the report of the NSW Law Reform Commission, the House refer further terms of reference to the Regulation Committee to inquire into and report on the Commission's findings and recommendations.</p>	<p>No Government response required.</p>
<p>4 That, to foster greater transparency in the use of delegated legislative power, the NSW Government ensure that explanatory notes to bills:</p> <ul style="list-style-type: none"> • highlight the presence in the bill of any Henry VIII clauses, shell legislation or quasi legislation • include an explanation as to why such a broad delegation of legislative power is considered necessary. 	<p>Supported / supported in principle.</p> <p>The Government supports the use of explanatory notes in bills to highlight the presence of any Henry VIII clauses, shell legislation or quasi legislation.</p> <p>The Government supports in principle explaining why the use of Henry VIII clauses, shell legislation or quasi legislation is necessary. However, in NSW, legislative drafters prepare explanatory notes to bills, which means the notes generally offer an explanation of the legal effect of a provision rather than an explanation of its policy rationale. This is in contrast to</p>

COMMITTEE RECOMMENDATION	GOVERNMENT RESPONSE
	<p>some other jurisdictions, where policy officers are responsible for drafting explanatory notes. An explanation of the rationale for a Henry VIII clause, shell legislation or quasi legislation may therefore be appropriately addressed in the second reading speech for the bill.</p>
<p>5 That the resolution establishing the Regulation Committee be amended to make it clear the committee may consider:</p> <ul style="list-style-type: none"> • all instruments of a legislative nature regardless of their form • draft delegated legislation. 	<p>No Government response required.</p> <p>The Government notes that the resolution establishing the Committee was amended as proposed on 20 November 2020. In relation to the review of draft delegated legislation, the Government notes that the Committee’s Report makes clear that it is intended that the Committee have power to examine published exposure drafts of delegated legislation.</p>
<p>6 That the resolution establishing the Regulation Committee be amended to enable the committee to self-refer inquiries.</p>	<p>No Government response required.</p> <p>The Government notes that the resolution establishing the Committee was amended as proposed on 20 November 2020.</p>