

Submission to the Legislation Review Committee

29 November 2017

Inquiry into the operation of the *Legislation Review Act 1987*

Legislation Review Committee

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The NSW Young Lawyers Public Law and Government Committee makes this Submission following the Legislation Review Committee's invitation to make a submission on Legislation Review Committee inquiry into the operation of the *Legislation Review Act 1987*.

NSW Young Lawyers supports a strong and vibrant Committee system, which ensures that Parliament exercises its key duties of scrutiny and control over the conduct of the Executive. The Legislation Review Committee plays a key role in ensuring that all legislation is subject to appropriate oversight by the Parliament.

However, while the *Legislation Review Act 1987 (the Act)* is a vital check on undue trespass on individual rights and liberties, and inappropriate delegation of legislative power to the Executive, NSW Young Lawyers considers that the Act could be further strengthened.

NSW Young Lawyers

NSW Young Lawyers is a division of the Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 15 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has approximately 15,000 members.

The Public Law and Government Committee is comprised of a group of over 850 members, which includes a diverse range of practising lawyers from the public and private sectors, barristers and students. The Public Law and Government Committee aims to foster a social and educational environment for those who wish to keep abreast of developments in the law, develop their skills, and gain awareness of potential career paths in these areas. The Public Law and Government Committee's areas of focus include, but are not limited to, administrative law, constitutional law and the work of government lawyers.

Summary of Recommendations

In summary, the Public Law and Government Committee makes the following recommendations:

1. The Act be amended to restrict membership of the Legislation Review Committee to members of the Legislative Council in recognition of its role as the House of Review. In the alternative, the majority of members of the Legislation Review Committee should be drawn from the Legislative Council. The current size of the Legislation Review Committee should be maintained.
2. Membership of the Legislation Review Committee should include representation across political parties and experience, with all members provided with training on the role and requirements of the Committee when they are first appointed.
3. The Act be amended to require the Legislation Review Committee to consider all Bills introduced into Parliament, as well as to grant the Legislation Review Committee the power to consider draft Bills not yet introduced into Parliament in an advisory capacity.

4. The Act be amended to provide for a procedure that a Minister responsible for a Bill is required to undertake to bypass the Legislation Review Committee on the basis that the Bill is urgent, including to:
 - (a) provide written reasons why the Bill is urgent and cannot be delayed, and
 - (b) produce an Impact Statement on the Bill that details how the Bill affects the issues that would normally be considered by the Committee.
5. The proposed Impact Statement for any Bill should also be required for all subordinate legislation that is disallowable by the Parliament, and should detail:
 - (a) the instrument's impact on individual rights or liberties, including compatibility with core human rights, and any administrative discretion to determine rights, liberties or obligations, and where this discretion is non-reviewable,
 - (b) the regulatory impact of the instrument on business,
 - (c) the ambit of delegation of legislative power to the Government and why it is appropriate,
 - (d) how the exercise of legislative power is subject to parliamentary scrutiny, and
 - (e) if the instrument is to commence by proclamation, when the instrument is likely to commence.
6. Consideration should be given to the provision of additional resources to the Legislation Review Committee to allow for two separate Independent Legal Officers – one for Bills and one for subordinate legislation.

Changes to the constitution of the Committee will improve its capacity to scrutinise legislation

The Legislation Review Committee is constituted under, and operates according to, the *Legislation Review Act 1987* (NSW). The Committee was established in response to recommendations made by the Legislative Council's Law and Justice Committee in its 2001 report *A New South Wales Bill of Rights*, which noted the need for a parliamentary scrutiny committee to protect against inappropriate burdens on individual rights.¹

The Act provides that the Legislation Review Committee is a joint committee; constituted of members from both the Legislative Assembly and Legislative Council.

The Legislative Council's Law and Justice Committee 2001 report called for the a joint committee to ensure that the scrutiny of legislation was seen as a joint responsibility of Parliament, as well as an effective use of parliamentary resources.²

While noting that proper scrutiny of legislation remains the responsibility of all parliamentarians, the Public Law and Government Committee recommends that the Act be amended to restrict membership of the Legislation Review Committee to members of the Legislative Council. The Legislative Council, as the House of Review, is best placed to undergo detailed scrutiny of legislation due to its separation from the electoral politics of the Legislative Assembly. Members of the Legislative Council are required to represent the State

¹ New South Wales Parliament Legislative Council, Standing Committee on Law and Justice, *A NSW Bill of Rights*, October 2001, <<https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=1737#tab-reports>>.

² Standing Committee on Law and Justice, above n 1, 132.

as a whole, rather than individual electorates, which allows for a more objective assessment of the overall impact of legislation on the State.

While the Legislative Council is not immune to the political considerations surrounding a particular Bill, it is appropriate that the members of the parliamentary scrutiny committee are removed from the 'People's House', and are instead drawn from the chamber that the New South Wales Constitution has endowed with the responsibility of review and scrutiny. This approach has been highly successful in the Australian Parliament, with the Senate Standing Committee for the Scrutiny of Bills able to serve as a powerful custodian of individual rights, the rule of law and parliamentary scrutiny.

In the alternative, the majority of members of the Legislation Review Committee should be drawn from the Legislative Council.

Recommendation 1

The Act be amended to restrict membership of the Legislation Review Committee to members of the Legislative Council in recognition of its role as the House of Review. In the alternative, the majority of members of the Legislation Review Committee should be drawn from the Legislative Council. The current size of the Legislation Review Committee should be maintained.

To ensure that the Legislation Review Committee continues to operate as a non-partisan committee, the Public Law and Government Committee supports representation on the Legislation Review Committee from across the political spectrum, to ensure not only fair representation of the Legislative Council but also a fair representation of views about how to best protect and promote individual rights and liberties.

All members of the Legislation Review Committee should be provided with a structured training program upon appointment to the Committee, which should detail the role and requirements of the Committee, as well as how those responsibilities operate in practice. For example, section 8A(b)(i) of the Act provides that the Committee is required to review whether a Bill "trespasses unduly on personal rights and liberties". In order to understand whether this has occurred, a member must understand what personal rights and liberties are, their source, the meaning of 'trespasses' in this context, and the appropriate methods to determine whether a trespass is disproportionate.

This balancing act is often difficult, even for experienced practitioners, and additional training to unpack these ideas will ensure that the Legislation Review Committee continues to be well-placed to provide detailed scrutiny of Bills.

Recommendation 2

Membership of the Legislation Review Committee should include representation across political parties and experience, with all members provided with training on the role and requirements of the Committee when they are first appointed.

Committee consideration of all Bills is critical to ensuring effective parliamentary oversight

The Act provides that the Legislation Review Committee is to consider 'any' Bill introduced into Parliament.³ The Public Law and Government Committee supports an amendment to the Act to replace 'any' with 'all'.

The proposed amendment is not intended to extend the power of the Legislation Review Committee, which already includes the power to consider any Bill placed before Parliament, but rather is intended to extend its obligation to consider all Bills that are introduced into Parliament, not just those that the Committee elects to consider.

While the amendment is minor, the Public Law and Government Committee considers it appropriate that the Act reflect that all Bills impact on individual rights, liberties and obligations in some form, and that effective parliamentary scrutiny would be enhanced by the requirement that the Legislation Review Committee consider all legislation.

The Public Law and Government Committee also recommends that the Act be amended to provide the Legislation Review Committee with power to issue an advisory opinion on Bills not yet introduced into Parliament. The Public Law and Government Committee considers that this will allow more parliamentary business to be conducted outside of parliamentary sitting periods, allowing parliamentary debate to be more informed, effective and subject to more detailed scrutiny.

The Public Law and Government Committee also considers that granting the Legislation Review Committee an advisory role will improve the way in which Private Member Bills are developed. Private Member Bills are not required to go through a detailed departmental or Cabinet development process, which risks unintended consequences on individual rights (including common law rights), unintended delegation of legislative power or the removal of parliamentary scrutiny. Allowing the proponents of Private Member Bills to consult with the Legislation Review Committee will allow potential impacts to be more readily understood, and amendments made before introduction into Parliament.

Recommendation 3

The Act be amended to require the Legislation Review Committee to consider all Bills introduced into Parliament, as well as to grant the Legislation Review Committee the power to consider draft Bills not yet introduced into Parliament in an advisory capacity.

The Committee must be given adequate time to consider all Bills

The Public Law and Government Committee understands that one of the key restraints on the work of the Legislation Review Committee, and its review of Bills before they are passed by Parliament, is that it is often given limited and in some cases, arguably inadequate, time to carry out its work.

³ The Act, s 8A(1)(a).

While current Standing Orders require that debate on a Bill must be adjourned for five calendar days following introduction,⁴ in circumstances where there are multiple Bills introduced, or where the Minister responsible for the Bill is able to suspend Standing Orders as the Bill is considered 'urgent', the timeframes given to the Legislation Review Committee to conduct its work are often unrealistic. There is no requirement for either House to defer consideration of a Bill only because the Legislation Review Committee has not yet reported.⁵

The Public Law and Government Committee supports the Minister retaining the discretion to designate a Bill 'urgent', however, proposes that the Act be amended to include procedures that a Minister is required to undertake where a Bill is designated as 'urgent'.

The Act and Standing Orders do not currently include a definition of 'urgent', nor provide guidance on when a Bill should be considered 'urgent'. While the Public Law and Government Committee does not support introducing a definition for 'urgent', it remains concerned that a desire for quick decisions has been used to justify why a Bill is 'urgent' and should not be subject to proper scrutiny.

Rather the Public Law and Government Committee supports creating guidance on what constitutes an 'urgent' Bill, as well as creating checks to ensure that only Bills that are 'urgent' are passed before the Legislation Review Committee has had time to consider the Bill. The Public Law and Government Committee considers that a Bill should only be considered 'urgent' if there would be a significant, unacceptable or disproportionate impact on the NSW community if the Bill is not dealt with immediately.

The Public Law and Government Committee recommends that where a Minister wishes to bypass the Legislation Review Committee, or secure passage of a Bill before the Legislation Review Committee has had time to report, the Minister should be required to:

- (a) provide written reasons why the Bill is urgent and cannot be delayed, and
- (b) produce an Impact Statement on the Bill that details how the Bill affects the issues that would normally be considered by the Committee.

Urgency or necessity should be used by exception, rather than as a rule.

Bills that are designated as 'urgent' often trespass on individual rights, delegate legislative power to the Executive, or impact on parliamentary and judicial scrutiny of the Executive.⁶ It is appropriate, in circumstances where a Bill is considered urgent, that the Minister responsible for the Bill still takes the time to properly inform the Parliament about the impact of the Bill upon rights, liberties and the ambit of executive power. The intended benefit of this process is to ensure not only that the Parliament is informed of the likely impact of the reform, but also that the public is informed of what is proposed on its behalf.⁷

⁴ Legislative Assembly Standing Orders, Order 189; Legislative Council Standing Orders, 137.

⁵ Legislative Assembly Standing Orders, Order 189; Legislative Council Standing Orders, 138.

⁶ See, eg, the *Inclosed Lands, Crimes and Law Enforcement Legislation Amendment (Interference) Act 2016* (NSW). The Committee also notes the importance of bills such as the Crimes (Criminal Organisations Control) Bill 2009 (NSW), which was introduced and passed within 24 hours.

⁷ Lord Chief Justice, *Speech to the Lord Mayor's Dinner for Her Majesty's Judges* (Speech delivered at Mansion House, 13 July 2000).

Recommendation 4

The Act be amended to provide for a procedure that a Minister responsible for a Bill is required to undertake to bypass the Legislation Review Committee on the basis that the Bill is urgent, including to:

- (a) provide written reasons why the Bill is urgent and cannot be delayed, and**
- (b) produce an Impact Statement on the Bill that details how the Bill affects the issues that would normally be considered by the Committee.**

A new Impact Statement process will enhance the scrutiny functions of the Committee

The proposed Impact Statement should complement the existing Explanatory Note and draw attention to specific provisions that impact on personal rights and liberties, administrative powers and delegation of legislative powers. While it is proposed that the Impact Statement be used only on Bills that are designated 'urgent' by the Minister responsible, the Public Law and Government Committee proposes that it be used on all subordinate legislation that is subject to disallowance.

Currently, when a Bill is drafted by the Parliamentary Counsel's Office, an Explanatory Note is drafted which explains how the Bill operates and the objects of the Bill. An Explanatory Note is also provided for all Regulations to which the Governor provides assent. However, there is currently no requirement that the Explanatory Note specifically deal with issues relevant to responsibilities of the Legislation Review Committee. Nor is it appropriate that the Parliamentary Counsel's Office prepare such a statement, as these issues will invariably require policy analysis and rationale.

To remedy the gap created by Bills not being reviewed by the Legislation Review Committee, and to ensure the ongoing effective use of delegated legislative power by the Executive, the Public Law and Government Committee proposes that the Impact Statement provide a short overview of how the legislative instrument affects the issues that would normally be considered by the Legislation Review Committee.

The proposed Impact Statement would operate in a similar way to the 'Statement of Compatibility' required for Bills and disallowable legislative instruments in the Commonwealth,⁸ Victoria,⁹ ACT,¹⁰ and for certain legislative instruments overseas,¹¹ except that it would not be limited to human rights. It would also build on the existing work undertaken by the NSW Government through the Regulatory Impact Statement and Better Regulation processes.¹² The proposed Impact Statement would extend to:

⁸ *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), s 9(1).

⁹ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 28.

¹⁰ *Human Rights Act 2004* (ACT), s 37.

¹¹ See, generally, David Hamer, *Can Responsible Government Survive in Australia?* (Department of the Senate, 2nd ed, 2004), 312.

¹² Department of Finance, Services & Innovation, *Regulatory Impact Assessments* (2017) <

- (a) the instrument's impact on individual rights or liberties, including compatibility with core human rights, and any administrative discretion to determine rights, liberties or obligations, and where this discretion is non-reviewable,
- (b) the regulatory impact of the instrument on business,
- (c) the ambit of delegation of legislative power to the Government and why it is appropriate,
- (d) how the exercise of legislative power is subject to parliamentary scrutiny, and
- (e) if the instrument is to commence by proclamation, when the instrument is likely to commence.

Section 8A(1)(a) of the Act provides that the Committee must report as to whether a Bill, by express words or otherwise, trespasses unduly on personal rights and liberties. Currently, personal rights and liberties are not defined in the Act. In the absence of a bill or charter of rights in NSW, it is imperative that human rights concerns be adequately considered when the Committee is conducting its reviews. To address this, the Public Law and Government Committee recommends that the Act be amended to require the Committee to consider all Bills for compatibility with core human rights, including those under international human rights treaties to which Australia is a party.

The Public Law and Government Committee also wishes to draw particular attention to paragraphs (c) – (e) of the proposed Impact Statement detailed above.

The delegation of legislative power by the Parliament to the Government may be necessary where something needs to be done to remedy an issue or problem but the Parliament does not have time or knowledge to do it – giving the Government the authority to work out the details of how the law operates.¹³ Where Parliament delegates legislative power, however, it should do so knowing the extent to which that delegation will be used.

The Public Law and Government Committee notes, however, that while Parliament retains the power to disallow legislative instruments made under delegated legislative power, it is critical that the delegation of legislative power not be granted too broadly, but rather be subject to clear limits. It remains appropriate that broad delegations of legislative power be used only where necessary, to retain Parliament's oversight of the use of legislative power.

The Public Law and Government Committee considers that any Bill that introduces a 'Henry VIII' clause,¹⁴ or other similarly broad delegation of power, should be accompanied by an Impact Statement that details why a less broad grant of power could not achieve the same results.¹⁵ This will ensure that where Parliament has delegated its legislative power, it does so only in circumstances where the delegation is narrowly prescribed

[https://www.finance.nsw.gov.au/better-regulation/regulatory-impact-assessments>](https://www.finance.nsw.gov.au/better-regulation/regulatory-impact-assessments)

¹³ Christopher Forsyth and Elizabeth Kong, 'The Constitution and Prospective Henry VIII clauses' (2004) 9 *Judicial Review* 17, 22.

¹⁴ Henry VIII clauses are provisions in primary legislation that empower subordinate legislation to amend, alter, or in substance repeal provisions of the Act without further parliamentary scrutiny. For example s 44 of the *Drug Misuse and Trafficking Act 1985* (NSW), which allows the Governor to amend the primary Act by Regulation.

¹⁵ Committee on Ministers' Powers, United Kingdom Parliament, *Report of the Committee on Ministers' Powers* (1932), 65; Dennis Morris, 'Henry VIII clauses: Their birth, a late 20th century renaissance and a possible 21st century metamorphosis' (2007) March *The Loophole* 14,16.

by the purpose which it was delegated to achieve.

While the Public Law and Government Committee remains broadly supportive of the continued use of delegated legislative power, where a Regulation is made under a 'Henry VIII' clause it is appropriate that the Parliament is made aware of the use of the grant of legislative power, especially in circumstances where the subordinate legislative instrument is inconsistent with or overrides the primary Act. The proposed Impact Statement would provide guidance to Parliament on the use of delegated legislative power, and better inform debate on whether a disallowance motion is appropriate.

The Public Law and Government Committee also considers that the proposed Impact Statement should, where a Bill does not commence on assent, set out why a Bill will commence by proclamation. Granting the Government the power to determine when a legislative scheme commences is a common delegation of legislative power.

The use of commencement by proclamation is often necessary to ensure that complex legislative regimes are properly implemented to reduce undue inconvenience to individuals, business and government. However, it is also appropriate that the Minister provide timeframes to Parliament on when a legislative scheme will commence. This will enhance the capacity of the Legislation Review Committee to understand how a Bill will impact on rights, liberties or obligations by understanding when the impact will occur, and what steps will be taken in the interim.

Recommendation 5

The proposed Impact Statement for any Bill should also be required for all subordinate legislation that is disallowable by the Parliament, and should detail:

- (a) the instrument's impact on individual rights or liberties, including compatibility with core human rights, and any administrative discretion to determine rights, liberties or obligations, and where this discretion is non-reviewable,**
- (b) the regulatory impact of the instrument on business,**
- (c) the ambit of delegation of legislative power to the Government and why it is appropriate,**
- (d) how the exercise of legislative power is subject to parliamentary scrutiny, and**
- (e) if the instrument is to commence by proclamation, when the instrument is likely to commence.**

The Committee should continue to have access to an appropriate level of funding and support

The Public Law and Government Committee understands that the Legislation Review Committee is currently supported by the Office of the Legislative Assembly,¹⁶ and is provided with an independent legal advisor. The Public Law and Government Committee supports ongoing consideration of whether current resourcing is sufficient, including consideration of whether a dedicated independent legal advisor for subordinate

¹⁶ Department of the Legislative Assembly, NSW, Submission No 18 to Legislative Council Select Committee on the Legislative Council Committee System, *Inquiry into the Legislative Council Committee System*, 12 April 2016.

legislation is appropriate. A dedicated independent legal advisor for subordinate legislation would partially offset the need for an additional Regulation Review Committee, which has been proposed in the past.¹⁷

Recommendation 6

Consideration should be given to the provision of additional resources to the Legislation Review Committee to allow for two separate Independent Legal Officers – one for Bills and one for subordinate legislation.

Concluding Comments

NSW Young Lawyers and the Public Law and Government Committee thank you for the opportunity to make this submission. If you have any queries or require further submissions please contact the undersigned at your convenience.

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¹⁷ New South Wales Parliament Legislative Council, Standing Committee on Law and Justice, *A NSW Bill of Rights*, October 2001, <https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=1737#tab-reports>, [8.54].