



## **Australia-New Zealand Scrutiny of Legislation Conference**

**11-14 July 2016, Perth Western Australia**

### **Jurisdiction Report – New South Wales**

## **1 Scrutiny of legislation committee in New South Wales**

The New South Wales Parliament's scrutiny of legislation committee is the Legislation Review Committee. The Committee is established under the *Legislation Review Act 1987*.

### **1.1 Committee membership**

The Legislation Review Committee is a joint committee with three Members of the Legislative Council and five Members of the Legislative Assembly. The current members of the Committee are as follows:

Mr Michael Johnsen MP, Member of the National Party, Chair

Mr Lee Evans MP, Member of the Liberal Party, Deputy Chair

Ms Melanie Gibbons MP, Member of the Liberal Party

Mr Alister Henskens MP, Member of the Liberal Party

Mr David Mehan MP, Member of the Labor Party

The Hon. Shaoquett Moselmane MLC, Member of the Labor Party

The Hon. Gregory Pearce MLC, Member of the Liberal Party

Mr David Shoebridge MLC, Member of The Greens.

### **1.2 Supporting staff**

The Committee is supported by a Director, Committee Manager, Research Officer, Committee Officer and an Administration Officer. All of these staff also work on other Legislative Assembly or Joint Committees. They are not solely dedicated to the Legislation Review Committee. Three of the staff have legal qualifications.

### **1.3 Committee's main functions**

The Committee has functions with respect to all Bills introduced into Parliament and all regulations. The Committee is required to consider any Bill introduced into Parliament and report on whether the Bill:

- 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 (see section 8A of the *Legislation Review Act 1987*).

The full text of the Committee's functions with respect to Bills is in Attachment A.

The Committee's main functions with respect to delegated legislation are to consider all regulations while they are subject to disallowance and determine whether the special attention of Parliament should be drawn to a regulation on any ground, including the following:

- the regulation trespasses unduly on personal rights and liberties,
- the regulation may have an adverse impact on the business community,
- the regulation may not have been made within the general objects of the legislation under which it was made,
- the regulation may not accord with the spirit of the legislation under which it was made, even though it may have been legally made,
- the objectives of the regulation could have been achieved by alternative and more effective means,
- the regulation duplicates, overlaps or conflicts with any other regulation or Act,
- the form or intention of the regulation calls for elucidation, or
- any of the requirements of sections 4, 5 and 6 of the *Subordinate Legislation Act 1989*, or of the guidelines and requirements in Schedules 1 and 2 to that Act, appear not to have been complied with, to the extent that they were applicable in relation to the regulation (section 9 of the *Legislation Review Act 1987*).

The Committee has additional functions with respect to regulations which are described in Attachment B.

In 2004, the Legislation Review Committee publicly reported that, when exercising its scrutiny functions, it takes into account:

- the common law, as developed by the courts;
- statutory rights, liberties and traditions;
- international conventions ratified by Australia;
- rights recognised in other jurisdictions;
- academic and public debate; and



- the Committee Members' views.<sup>1</sup>

#### **1.4 Processes for considering Bills and regulations in New South Wales**

The Committee commences its review of a Bill once the Bill is introduced into either House of Parliament. In New South Wales Parliament, once a Bill is introduced, the relevant Minister or Private Member usually proceeds to the second reading speech immediately.

The Chair and Committee staff review all Bills and produce a draft report on each Bill for the Committee Members to deliberate on.

New South Wales Parliament usually sits on Tuesdays to Thursdays for around twenty or so weeks a year. This often occurs in blocks of two or three back-to-back sitting weeks. Bills may be introduced right up until the Thursday of a sitting week.

The Committee generally meets on the Tuesday of each sitting week. The Committee Members finalise the report on the Bills reviewed for that past week. The report, known as the *Legislation Review Digest*, is tabled in Parliament later that day. The *Digest* also contains any comments the Committee has made on regulations since the Committee's last report. Where the Committee has commented on a Bill, the Committee will then write to the relevant Minister to advise them of the Committee's comments.

The New South Wales Parliament can pass a Bill even if the Committee has not reported on it yet. However, the Committee aims to consider and report on all Bills before they are passed.

The Chair and Committee staff review every new or amended regulation once it is published. However, the Committee only comments on those regulations the Committee believes contain issues which should be drawn to the Parliament's attention.

The Committee is required to consider regulations while they are subject to disallowance by either House of Parliament, which allows for a timeframe of 15 sitting days. In practice, the Committee generally reviews most regulations well before the deadline.

In preparing reports on Bills and regulations, where time permits, the Committee will carry out additional research and may seek further information from the relevant Minister or Government Department.

#### **1.5 How often the Committee reports to Parliament**

The Committee tables its report to Parliament, the *Legislation Review Digest*, every Tuesday of each sitting week. The Committee has tabled nine reports in Parliament this year.

#### **1.6 Activities since the last conference**

The Committee has published a number of *Legislation Review Digests* since the conference in 2011:

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<sup>1</sup> New South Wales Legislation Review Committee, *Operation, issues and future directions September 2003 – June 2004*, report no 1, Parliament of New South Wales, 24 June 2004, p 3.



2016 – 9 reports so far  
2015 – 11 reports  
2014 – 17 reports  
2013 – 20 reports  
2012 – 21 reports  
2011 – 8 reports

## 1.7 Challenges

One of the main challenges for the Legislation Review Committee is time. This is particularly an issue when the Committee has back-to-back sitting weeks. In those cases, a Bill may be introduced on a Thursday and the Committee will report on the Bill in the *Legislation Review Digest* on the following Tuesday.

In addition, the Members and staff of the Committee are also generally working for other committees. Of course, Members also have a number of other roles and responsibilities in addition to their committee work.

## 2 Trends in legislation

Some trends in New South Wales legislation for 2016 are as follows:

- *Commencement of Acts by proclamation*

There have been a number of Bills in 2016 where some or all of the provisions commence by proclamation. The Committee generally prefers legislation to commence on a fixed date or on assent rather than leaving the commencement date to the Executive to determine. However, in relation to several of the Bills, the Committee has acknowledged that Government Departments may need to adopt new processes or systems to support the legislation, or provide employees with additional training. In such cases the Committee has noted that it may be useful for there to be some flexibility with respect to the commencement of the relevant Act.

- *Legislation dealing with public safety or terrorism concerns*

There have been several Bills this year which are in response to public safety or terrorism concerns. Such Bills generally require the Committee to grapple with a number of different rights and liberties issues. In some cases, the Committee has determined that the proposals in question appeared reasonable in the circumstances. In other cases, the Committee has referred issues to Parliament for further debate and consideration.

- *Skeletal legislation*

Recently, there have been a few Bills where the Committee has questioned whether certain matters should be contained in principal legislation, rather than left to the regulations or other policy documents. In some instances, the Committee has referred these issues to Parliament for further debate and consideration. In other instances, the Committee considered the measures appeared reasonable.



- *Other matters frequently considered*

This year, the Committee has continued to regularly comment on various issues relating to criminal processes, privacy and the retrospective application of laws. As with many of the other issues just mentioned, the Committee has sometimes referred these issues to Parliament for further debate and consideration. In other instances, the Committee was satisfied that the proposals appeared reasonable.



## ATTACHMENT A

### Legislation Review Committee's functions with respect to Bills

#### Extract from section 8A of the *Legislation Review Act 1987*

(1) *The functions of the Committee with respect to Bills are:*

(a) *to consider any Bill introduced into Parliament, and*

(b) *to report to both Houses of Parliament as to whether any such Bill, by express words or otherwise:*

- (i) *trespasses unduly on personal rights and liberties, or*
- (ii) *makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, or*
- (iii) *makes rights, liberties or obligations unduly dependent upon non-reviewable decisions, or*
- (iv) *inappropriately delegates legislative powers, or*
- (v) *insufficiently subjects the exercise of legislative power to parliamentary scrutiny.*

(2) *A House of Parliament may pass a Bill whether or not the Committee has reported on the Bill, but the Committee is not precluded from making such a report because the Bill has been so passed or has become an Act.*



## ATTACHMENT B

### Legislation Review Committee's functions with respect to regulations

#### Extract from section 9 of the *Legislation Review Act 1987*

(1) *The functions of the Committee with respect to regulations are:*

(a) *to consider all regulations while they are subject to disallowance by resolution of either or both Houses of Parliament,*

(b) *to consider whether the special attention of Parliament should be drawn to any such regulation on any ground, including any of the following:*

- (i) *that the regulation trespasses unduly on personal rights and liberties,*
- (ii) *that the regulation may have an adverse impact on the business community,*
- (iii) *that the regulation may not have been made within the general objects of the legislation under which it was made,*
- (iv) *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,*
- (v) *that the objectives of the regulation could have been achieved by alternative and more effective means,*
- (vi) *that the regulation duplicates, overlaps or conflicts with any other regulation or Act,*
- (vii) *that the form or intention of the regulation calls for elucidation, or*
- (viii) *that any of the requirements of sections 4, 5 and 6 of the Subordinate Legislation Act 1989, or of the guidelines and requirements in Schedules 1 and 2 to that Act, appear not to have been complied with, to the extent that they were applicable in relation to the regulation, and*

(c) *to 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.*

(1A) *The Committee is not precluded from exercising its functions under subsection (1) in relation to a regulation after it has ceased to be subject to disallowance if, while it is subject to disallowance, the Committee resolves to review and report to Parliament on the regulation.*

(2) *Further functions of the Committee are:*



- (a) to initiate a systemic review of regulations (whether or not still subject to disallowance by either or both Houses of Parliament), based on the staged repeal of regulations and to report to both Houses of Parliament in relation to the review from time to time, and*
  - (b) to inquire into, and report to both Houses of Parliament on, any question in connection with regulations (whether or not still subject to disallowance by either or both Houses of Parliament) that is referred to it by a Minister of the Crown.*
- (3) The functions of the Committee with respect to regulations do not include an examination of, inquiry into or report on a matter of Government policy, except in so far as such an examination may be necessary to ascertain whether any regulations implement Government policy or the matter has been specifically referred to the Committee under subsection (2)(b) by a Minister of the Crown.*