



**BREAKING NEW GROUND: EXPANDING THE SCRUTINY FUNCTION
OF THE NEW SOUTH WALES LEGISLATIVE COUNCIL'S
REGULATION COMMITTEE**

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Introduction

This paper tells the story of how the new technical scrutiny function of the New South Wales Legislative Council Regulation Committee was established and operationalised in 2024. Following a recommendation of the Committee's 2022 report entitled *Options for reform of the management of delegated legislation in New South Wales*, the Council resolved in late 2023 to expand the Committee's functions. This expansion required the Committee to inquire into and report on instruments of a legislative nature that are subject to disallowance against the scrutiny grounds set out in section 9(1)(b) of the *Legislation Review Act 1987* (a function that formerly sat solely with the NSW Parliament's Joint Legislation Review Committee but which now, for the first time, is also undertaken by the Legislative Council Regulation Committee). The expansion of the Committee's functions is consistent with the Council's role as a House of Review and introduces an additional level of oversight to delegation of legislative power in NSW, and the executive government more broadly.

Establishing this scrutiny function has involved significant stakeholder engagement across the NSW Government. Recruitment has been undertaken to resource a specialised secretariat, and a dedicated independent legal advisor has been appointed. The process for undertaking this significant body of work will be set out in this paper, including the research and decision-making behind delivering the Committee's first report, termed a 'monitor', and drafting guidelines that outline the Committee's approach to technical scrutiny.

This paper will also set out some early reflections on the operation of the Committee's additional scrutiny function and identify further reforms relating to delegated legislation that may be pursued in the future.

While the Committee is still in its early stages of operation, this paper examines the step-by-step process taken by the Legislative Council to give effect to the Committee's new expanded remit – working from the (scrutiny) ground up.

Background to the Regulation Committee: A brief history

This section of the paper provides a summary of how delegated legislation has been reviewed by committees of the NSW Parliament, with a specific focus on the inception and development of the Legislative Council Regulation Committee.

The model for committee scrutiny of delegated legislation in New South Wales

From 1960-1987 scrutiny of regulations in New South Wales was undertaken by an upper house committee, the Committee on Subordinate Legislation. In 1987, New South Wales shifted to a different model: a joint parliamentary committee, the Regulation Review Committee. In 2003 the

¹ The Chair acknowledges the assistance of Ms Bethanie Patch, Ms Madeleine Dowd, Ms Sharon Ohnesorge and Mr Stephen Frappell in the preparation of this paper.

Regulation Review Committee was replaced by the Legislation Review Committee, also a joint committee of both Houses, with responsibility for reviewing subordinate but also primary legislation. This model remains in place today.

Emergence of the Legislative Council Regulation Committee

In 2017, following a recommendation by the Select Committee on the Legislative Council Committee System, the Legislative Council established the Regulation Committee, on a trial basis, to inquire into and report on any regulation, including the policy or substantive content of a regulation, and trends or issues that relate to regulations. The Regulation Committee conducted two inquiries during the trial period in 2018 – both into specific pieces of delegated legislation. In 2019, at the start of the 57th Parliament, the Regulation Committee was re-established, this time as a standing committee.

2020 report into the making of delegated legislation in New South Wales

In 2020, the Regulation Committee tabled a significant report entitled *Making of delegated legislation in New South Wales*. The report canvassed numerous key issues relating to the management and oversight of delegated legislation, including:

- concerns as to the overuse of shell legislation, Henry VIII clauses, and quasi-legislation in New South Wales, and the inadequacy of the existing scrutiny processes to address this,
- concerns around the scope of delegated legislation that is subject to parliamentary scrutiny and disallowance, including definitional inconsistencies between the different pieces of legislation and a reliance on the form of the instrument, rather than its legislative nature,
- concerns relating to the timeframe for disallowance and the time limit on remaking instruments that are the same in substance,
- concerns around the consultation requirements for making of delegated legislation,
- concerns about public accessibility in respect of different forms of delegated legislation, and
- opportunities to improve the statutory framework for regulation of the making and oversight of delegated legislation in New South Wales.

While the Committee made some direct recommendations, many of the issues outlined above were not immediately resolved, given the complex nature of the laws and procedures governing delegated legislation and the variety of possible approaches to reform. The Committee's overarching recommendation was that the NSW Law Reform Commission be tasked with reviewing and reporting on the matter, including options for reform. Regrettably, this recommendation was not supported by the NSW Government. However, some important changes were made following the Committee's report, namely to the resolution establishing the Regulation Committee. The Committee's remit was expanded beyond regulations to include all legislative instruments regardless of their form, and to give the Committee the power to self-refer inquiries.

2022 report into Options for reform of the management of delegated legislation in New South Wales

In 2022 the Regulation Committee, chaired by the Hon Mick Veitch MLC, tabled its landmark report entitled *Options for reform of the management of delegated legislation in New South Wales*, drawing on a comparative analysis of the regulatory and scrutiny framework for delegated legislation contained in a Discussion Paper prepared by leading public law expert Professor Gabrielle Appleby of the University of New South Wales. Designed around the principles of simplicity, robustness and accessibility, the report recommended wide-ranging changes to the regulatory and scrutiny

framework for delegated legislation in New South Wales, including three recommendations for reform of the Regulation Committee's role and remit:

Recommendation 7

That the Legislative Council amend the resolution establishing the Regulation Committee to expand the committee's functions to include inquiring into and reporting on instruments of a legislative nature that are subject to disallowance against the scrutiny principles set out in section 9(1)(b) of the Legislation Review Act 1987.

Recommendation 8

That the Regulation Committee's secretariat be increased to support the additional work that will be required as a result of the committee's technical scrutiny function.

Recommendation 9

That a dedicated legal adviser be appointed to support the Regulation Committee in the performance of its technical scrutiny function.

At the time this scrutiny function rested solely with the Joint Legislation Review Committee. However, the Regulation Committee considered that the Legislative Council should perform this task under its own auspices.

Expansion of the Regulation Committee's functions in the 58th Parliament

The Regulation Committee was reestablished in the 58th Parliament on 10 May 2023, with the Committee's remit under its establishing resolution being substantially the same as that of the 57th Parliament. The composition of the Committee in the 58th Parliament was also similar to that of the prior parliament, being an eight-member committee, comprised of four government members, two opposition members, and two crossbench members, with a non-government Chair. On 9 June 2023, the Committee elected the Hon Natasha Maclaren-Jones MLC, a member of the Liberal Party, as Chair of the Committee and Ms Abigail Boyd MLC, a member of The Greens, as Deputy Chair.

While the establishing resolution agreed to in the House in May 2023 did not expand the Committee's functions, the Committee remained committed to the reforms proposed in the 2022 report. Following a visit by the Chair of the Committee and another member of the committee, the Hon Cameron Murphy, to the Senate to view the work of the Senate Standing Committee for the Scrutiny of Delegated Legislation, on 11 October 2023, the Committee resolved that the Chair of the Committee move a motion in the House to amend the establishing resolution of the Committee to implement recommendations 7-9 of its 2022 report, on a trial basis for 12-months, starting in 2024. Following this resolution, the relevant motion was moved by the Chair and was ultimately agreed to as formal business on 19 October 2023, indicating unanimous support in the House.

Amended establishing resolution

The amended establishing resolution of the Regulation Committee effectively expanded the Committee's functions to include inquiring into and reporting on instruments of a legislative nature that are subject to disallowance against the scrutiny grounds set out in the *Legislation Review Act 1987*, section 9(1)(b).

Specifically, paragraph (3) of the amended resolution requires that:

The committee, from the first sitting day in 2024:

- a) is to consider all instruments of a legislative nature that are subject to disallowance while they are so subject, against the scrutiny principles set out in section 9(1)(b) of the Legislation Review Act 1987,
- b) may report on such instruments as it thinks necessary, including setting out its opinion that an instrument or portion of an instrument ought to be disallowed and the grounds on which it has formed that opinion, and
- c) may consider and report on an instrument after it has ceased to be subject to disallowance if the committee resolves to do so while the instrument is subject to disallowance.

The amended resolution also provides that in relation to its additional scrutiny function under paragraph (3), the Committee may appoint a legal advisor to support it in the performance of this function. Further information about the legal advisor is provided below.

The amended resolution also requires the Committee to table an evaluation of the 12-month trial arrangements by the conclusion of the first sitting week of 2025. The evaluation will be a welcome occasion to reflect on the Committee's 12-months of operation, including consideration of what has worked well and opportunities for change. Following the tabling of the evaluation, the House is to consider whether to continue the Regulation Committee's function of considering and reporting on instruments of a legislative nature that are subject to disallowance against the scrutiny principles set out in the *Legislation Review Act 1987*, section 9(1)(b).

Initial steps: Operationalising the Regulation Committee's scrutiny function

Following the amendment of the Committee's establishing resolution, initial research and analysis was undertaken to determine how this additional function would be operationalised in the Council. This section of the paper outlines that significant body of work, which included jurisdictional comparisons, stakeholder consultation and recruitment.

Engagement with the Senate Standing Committee for the Scrutiny of Delegated Legislation

To develop an understanding of the practical operation of a scrutiny function with a similar remit to that of the Regulation Committee, a visit was undertaken by the newly appointed Director – Regulation Committee to meet with the secretariat supporting the Senate Standing Committee for the Scrutiny of Delegated Legislation (SDLC). This visit occurred in early December 2023 and involved meeting with the Committee Secretary, research staff and administrative staff to discuss the processes of the SDLC as well as reflections on the evolution of the SDLC's operation, noting it was originally established in 1932 and has served as a model for similar scrutiny committees across Australia and internationally.

The generosity of the secretariat of the SDLC in sharing their knowledge and expertise was critically important in the development of the Regulation Committee's processes. The Committee acknowledges and thanks the Department of the Senate and the SDLC secretariat for their support during this visit, as well as the secretariat's willingness to provide ongoing guidance over the course of 2024.

Establishing a dedicated secretariat

Given the significant expansion of the Regulation Committee's function, and consistent with recommendation 8 of the report *Options for reform of the management of delegated legislation in New South Wales*, it was necessary to seek funding for, and subsequently appoint, a dedicated secretariat to the Committee, initially for a 12-month period. Funding was ultimately approved for a Director, two Principal Council Officers, a Senior Council Officer and a Council Officer.

It was determined that the specialised nature of the Committee's function necessitated that secretariat members undertaking research roles have a legal background, with experience reviewing and scrutinising delegated legislation. Recruitment was undertaken in December 2023 with newly developed position descriptions reflecting this.

Currently, the secretariat is comprised of:

- a Director to provide expert support and strategic oversight of the Committee's operations and activities,
- two Principal Council Officers to undertake legislative scrutiny, analysis and research, including drafting the Delegated Legislation Monitor and meeting papers.
- a Senior Council Officer, with duties similar to those of the principal council officers, to undertake legislative scrutiny, analysis and research, including drafting the Delegated Legislation Monitor under the guidance of a Principal Council Officer, and
- a Council Officer to provide administration support to the scrutiny functions of the Committee, including maintenance of a database of disallowable instruments under scrutiny.

The Committee secretariat has been fortunate to have had two drafters from the NSW Parliamentary Counsel's Office seconded to the Committee secretariat this year, each for a period of six months. These drafters have been pivotal in setting up the Committee and providing training to other members of the secretariat to undertake legislative scrutiny. The Committee is grateful for its ongoing relationship with the Parliamentary Counsel's Office and in particular, appreciates the support of Annette O'Callaghan, NSW Parliamentary Counsel, in facilitating these secondments and providing the Committee with a valuable briefing on delegated legislation in early 2024.

Appointing an independent legal advisor

In addition to a specialised secretariat, a dedicated legal adviser was appointed to support the Committee in the performance of its technical scrutiny function in accordance with paragraph 16(a) of the Committee's amended establishing resolution. This mirrors practice in a number of other jurisdictions, including the Senate Standing Committees for the Scrutiny of Bills and Delegated Legislation.

An expression of interest process was conducted in early 2024. The Committee subsequently resolved to approve the appointment of Dr Ellen Rock for a period of 12 months. Dr Rock has extensive expertise in administrative law, judicial review and government accountability, as well as her experience with statutory interpretation in professional and academic contexts. At the time of this appointment, Dr Rock was employed as a Senior Lecturer, Faculty of Law, University of Technology Sydney, but has recently taken a position as Associate Professor at the University of New South Wales.

The legal adviser examines legislative instruments that come before the Committee and provides the Committee with an independent legal assessment as to whether they engage any of the scrutiny principles under the *Legislation Review Act 1987*, while also assisting the secretariat with the examination of complex issues. Since her appointment, Dr Rock has attended each meeting of the Committee to provide expert, independent advice on scrutiny issues coming before the Committee. The Committee extends its thanks to Dr Rock for her professional and timely legal advice over the course of the 12-month trial.

Developing additional website functionality

In preparing to operationalise the Committee's additional scrutiny function, it was determined that the existing Parliamentary website did not have sufficient capability to adequately support this new function. On this basis, the Legislative Council, with the support of the Digital Transformation team within the Department of Parliamentary Services engaged a developer, NovaWorks, to develop additional website functionality.

The development of the new website functionality commenced in late 2023 and was completed in May 2024 and includes:

- an index of instruments scrutinised by the Committee, including links to the instrument and the monitors in which the instrument has been examined,
- an index of undertakings made by ministers or bodies in response to the Committee's scrutiny concerns setting out which undertakings have been implemented and which are outstanding, including links to the instrument,
- a disallowance alerts page, which sets out all instruments subject to a notice of motion for disallowance and includes which member moved the notice, when it was given, what the motion was and what the outcome of the motion was, and
- guidelines for the operation of the Committee's technical scrutiny function, discussed further below.

The new website is being utilised in the publication of the Committee's work relating to its additional scrutiny function. Significantly, the functions of the website are unique to the Regulation Committee and ensure that information regarding the Committee's scrutiny function is readily available and accessible to users. The Committee intends to include an assessment of the website in its evaluation, including a review of user experiences and website traffic.

Next steps: Exercising the Committee's technical scrutiny function

This section of the paper focuses on how the Committee has commenced its scrutiny of disallowable statutory instruments. This includes how the Committee has initially interpreted the relevant scrutiny principles in the *Legislation Review Act 1987*, section 9(1)(b), how the Committee has engaged with Ministers and bodies when identifying scrutiny concerns and how the Committee's conclusions are reported on.

Technical scrutiny principles

As outlined above, the expanded scrutiny function of the Committee requires the Committee to assess delegated legislation against the scrutiny principles that are set out in the *Legislation Review Act 1987*, section 9(1)(b). The scrutiny principles are as follows:

- (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 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 objective 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.

In accordance with its establishing resolution, the Committee will consider any instrument that is disallowable, during the period in which it may be disallowed. This includes statutory rules, within the meaning of the *Interpretation Act 1987*, that are disallowable by virtue of section 41 of that Act, and other instruments to which section 41 applies indirectly (i.e., the Act under which an instrument is made provides that it is to be treated as if it were a statutory rule for the purposes of section 41).

In order to assist with the understanding of how the Committee will exercise its scrutiny responsibilities, the Committee has published guidelines on its webpage that provide an overview of its intended approach, including specific guidance in respect of each of the above eight grounds. Information set out in the guidelines is intended as a guide only, is non-exhaustive and is subject to review. The guidelines emphasise that the Committee's focus is technical – it analyses the form and drafting of the instrument in question rather than inquiring into matters of government policy as expressed in that instrument.

In developing the guidelines, the Committee relied on case law, research and journal articles, regarding the scrutiny principles. The Committee also referred to the guidelines developed by scrutiny committees in other Australian and international jurisdictions with similar principles, including the United Kingdom, Canada and New Zealand. In particular, the Committee acknowledges that the Consolidated Guidelines by the Senate Standing Committee for the Scrutiny of Delegated Legislation were a particularly helpful resource.

Shortly following their publication, the guidelines were sent to the Leader of the Government in the Legislative Council, the Hon Penny Sharpe MLC, Parliamentary Counsel's Office and The Cabinet Office for their information.

Commencing engagement with the Government

The Committee seeks to review all disallowable instruments during the period in which they may be disallowed. In practice, the Committee secretariat examines all new disallowable instruments and brings only those of particular concern to the Committee's attention.

Where an instrument raises a concern referable to the Committee's scrutiny principles, the Committee will write to the responsible minister or body to request information regarding the instrument or its effects. Typically, the minister or body will have two weeks in which to respond. If the information provided is not sufficient to resolve the Committee's concerns, the Committee may raise again its concerns with the relevant minister or body or draw the instrument to the attention of the Legislative Council.

As a result of raising scrutiny concerns with the responsible minister or body, the Committee may, if it has ongoing concerns, seek an undertaking for specific action to address its scrutiny concerns. Relevant undertakings are recorded on the Index of Undertakings on the Committee's website. The Committee may also recommend to the House that an instrument, or part of an instrument, be disallowed. To date, the Committee has only recommended the disallowance of one instrument, which is discussed in the case study presented later in this paper.

On occasion, where an instrument raises minor issues that do not rise to the level of engaging a scrutiny concern under the *Legislative Review Act 1987*, the Committee has written to the responsible minister to bring such issues to the minister's attention for consideration and potential revision. Minor

issues include typographical and cross-referencing errors that have the potential to affect the operation of the provision.

In order to facilitate efficient and productive engagement with the Government, the Committee wrote to the Hon Penny Sharpe MLC, Leader of the Government in the Legislative Council in early 2024 to provide an overview of how the Committee would be operating and how it intended to engage with ministers and bodies. This early engagement with the Leader of the Government and her office has been critical in ensuring this new scrutiny function has been understood by the Government, including what is expected of ministers and bodies when the Committee sends a letter identifying issues in an instrument.

The Delegated Legislation Monitor

The Committee's usual practice is to table a report, the Delegated Legislation Monitor (the monitor), each sitting week. While the structure of the monitor has evolved and changed since it was first published, the substantive content remains the same. The monitor has three main chapters:

1. Concluded scrutiny matters, which details the Committee's concluding comments on statutory instruments which raise scrutiny concerns relating to the grounds set out in the *Legislation Review Act 1987*, section 9(1)(b).
2. Instruments with no scrutiny concerns, which lists the instruments that the Committee has reviewed and in respect of which it has identified no scrutiny concerns.
3. Instruments raising scrutiny concerns, which lists the instruments in respect of which the Committee has identified scrutiny concerns and is engaging with the responsible minister or body.

In the first iterations of the monitor, there was an additional chapter which provided an outline of the Committee's preliminary comments on statutory instruments which raised scrutiny concerns. However, the Committee resolved to subsume these comments within the chapter detailing the Committee's concluding comments, so as to avoid repetition and the need for a reader to follow the instrument through multiple monitors.

To ensure transparency of communications regarding the scrutiny functions of the Committee, all correspondence sent to, and received from, responsible ministers or bodies relating to identified scrutiny concerns, as referred to in the monitors, are attached as an appendix to the monitors.

Following the tabling of a monitor, which usually takes place on a sitting Wednesday, ministers and bodies responsible for an instrument scrutinised in a monitor are advised of the committee's concluding comments.

Reflections on the Regulation Committee's operation

The final section of this paper sets out some initial reflections on how the additional scrutiny function of the Regulation Committee has operated over the course of its 12-month trial. This includes an overview of the number of instruments scrutinised, the kinds of issues identified and how the Committee has engaged with government. This section concludes by describing the circumstances surrounding the Committee's one recommendation of disallowance in 2024 and the subsequent and related legislative change addressing scrutiny issues identified by the Committee.

Scrutiny of instruments

Since the first sitting week this year, the Committee has published 12 monitors, and reviewed almost 200 disallowable instruments. Of those reviewed by the Committee, 27 instruments have engaged

one or more scrutiny principles under the *Legislation Review Act 1987*, section 9(1)(b), with subparagraph (vii), that the form or intention of the regulation calls for elucidation, being the most cited ground, referenced at least 25 times in the monitors. Undertakings have been recorded in respect of ten instruments in the Index of Undertakings.

The months of August, September and October were particularly busy for the Committee, attributable in part to the fact that many statutory rules were due for automatic repeal on 1 September. Over August and September, a total of 86 disallowable instruments were published on the NSW legislation website or in the Gazette. One of the considerations in the upcoming evaluation will be resourcing of the secretariat, noting that workload is dependent on how many disallowable instruments are published in a given week, the number of which has varied significantly at different times during the year. The Committee also recognises that the scrutiny of instruments requires a specialised skill set, and that as a consequence, the pool of trained and experienced officers is undoubtedly small.

Current and future engagement with ministers, bodies and departments

In reflecting on the operation of the Committee's additional scrutiny function, one important aspect has been the Committee's engagement with the Government. Firstly, the Committee acknowledges the assistance of the Leader of the Government in the Legislative Council, the Hon Penny Sharpe MLC and her office in communicating the role and expectations of the Committee across government. The meaningful and responsive engagement of many ministers and bodies has been heartening and demonstrates how a scrutiny function of this kind can operate effectively and ultimately improve the quality of delegated legislation in New South Wales.

This being said, the Committee does note that a small number of ministerial responses have been delayed or have not engaged substantively with the Committee's concerns. In the future, the Committee may request responsible ministers and bodies to respond to letters identifying scrutiny concerns within seven days, rather than the current 14 days, in order to avoid some of the more significant delays which could ultimately impact the ability of the Committee to conclude its scrutiny while an instrument is disallowable. However, there is an important balance to strike between providing responsible ministers or bodies with enough time to respond, such that the scrutiny concerns may be adequately considered, while also ensuring the Committee is able to report on the relevant instrument in the monitor within the required timeframes.

The Committee has also considered that once the functions of the Committee are more widely understood by the executive it may be expedient that the Committee, via its secretariat, engage with departments and agencies to informally gather information or seek clarification to identify and resolve technical scrutiny concerns, particularly in relation to more minor issues. Relatedly, the Committee and its secretariat will continue to consider any outreach that may be appropriate to further inform ministers, bodies and relevant departments about the Committee's role and operations.

A case study: The Committee's first recommendation of disallowance

Although the Committee has made strong recommendations that particular instruments be amended to address the Committee's scrutiny concerns in 2024,² the Committee has only recommended the disallowance of a portion of an instrument on one occasion: Schedule 1[12] of the *Liquor Amendment*

² See, for example, the committee conclusion in relation to the Education Amendment (Non-Government School) Assets and Income Regulation 2024 in Delegated Legislation Monitor No. 3, the Design and Building Practitioners Amendment (Miscellaneous) Regulation 2024 in Delegated Legislation Monitor No. 7, and the Public Notaries Appointment Amendment (Fees) Rules 2024 in Delegated Legislation Monitor No. 10.

(Vibrancy Reforms) Regulation 2024, as published on the NSW legislation website on 28 June 2024.³ The notice of motion was ultimately withdrawn, however, the Committee's identification of the relevant issue and its recommendation of disallowance did appear to influence the introduction of legislation that rectified the issue.

By way of background, the *Liquor Amendment (Vibrancy Reforms) Regulation 2024*, Schedule 1[12] inserted clause 44C into the *Liquor Regulation 2024*. Clause 44C made it an offence for a licensee to permit business to be conducted at a licensed premises in a way that unduly disturbs, or unreasonably and seriously disturbs, the quiet and good order of the neighborhood.

The Committee wrote to the responsible minister, the Minister for Gaming and Racing in relation to the amending regulation on 16 July 2024. An initial response was received on 12 August 2024. The Committee wrote back to the Minister seeking further information on 5 September 2024. A further response was received on 23 September 2024.

Based on the two letters from the Minister, the Committee formed the view that clause 44C either did not accord with the general objects and intention of the *Liquor Act 2007* (the Act) and significantly detracted from the operation of the scheme set out in the Act, or was inconsistent with or repugnant to the Act.⁴ The clause, inserted for the particular purpose of enabling police officers and marine authorities to issue improvement notices under the Act, section 75, raised questions of potential inconsistency with the Act that had not been resolved to the Committee's satisfaction.

The Committee further formed the view that the provision inserted by the amending regulation, Schedule 1[12] was not within the general objects of, or did not accord with the spirit of the legislation under which it was made and that the item inserting the provision should, on this basis, be disallowed.

However, upon receiving a third item of correspondence relating to the amending regulation, stating that the Government's intention was to omit clause 44C from the regulation as part of the second tranche of the Government's Vibrancy Reforms, which was to be introduced via a new bill coming before Parliament in October 2024, the Committee came to a slightly different conclusion. On the basis of the commitment set out in the third item of correspondence, the Committee considered that if clause 44C was not omitted by way of legislation introduced to Parliament in October 2024, the provision of the amending regulation inserting clause 44C should then be disallowed. The committee recommended that:

(a) the Chair of the Regulation Committee give notice of motion in the House, on or before 22 October 2024, that under the Interpretation Act 1987, section 41 the Legislative Council disallows the Liquor Amendment (Vibrancy Reforms) Regulation 2024, Schedule 1[12] as published on the NSW legislation website on 28 June 2024,

(b) if by the first sitting day of November 2024, legislation to omit clause 44C from the Liquor Regulation 2018 has not been introduced to either House, the Chair of the Regulation Committee move

³ It is noted that the on 15 May 2024, the Hon Sarah Mitchell MLC moved, that, under section 41 of the *Interpretation Act 1987*, the House disallows Schedule 1 in relation to clause 10B(1)(b) of the *Education Amendment (Non-Government School) Assets and Income Regulation 2024*, published the NSW legislation website on 1 March 2024. On the 16 May 2024, the question was resolved in the negative. Although the Committee reported on this instrument, and raised concerns that it may not have been within the general objects of the *Education Act 1990*, the Committee did not recommend disallowance on this occasion.

⁴ See Regulation Committee, NSW Legislative Council, *Delegated Legislation Monitor No. 11(2024)*, for the complete Committee's conclusion regarding the *Liquor Amendment (Vibrancy Reforms) Regulation 2024*.

the notice of motion to disallow the Liquor Amendment (Vibrancy Reforms) Regulation 2024, Schedule 1[12], and

(c) if by the first sitting day of November 2024, legislation has been introduced to omit clause 44C from the Liquor Regulation 2018, the Chair of the Regulation Committee withdraw the notice of motion to disallow the Liquor Amendment (Vibrancy Reforms) Regulation 2024, Schedule 1[12]. In accordance with Recommendation (a), the Chair of the Regulation Committee gave notice of motion to disallow the *Liquor Amendment (Vibrancy Reforms) Regulation 2024, Schedule 1[12]* on Tuesday 15 October 2024.

This notice was subsequently withdrawn on 16 October 2024, as in accordance with Recommendation (b) the Government introduced the 24-Hour Legislation Amendment (Vibrancy Reforms) Bill 2024 which proposed omitting the *Liquor Amendment (Vibrancy Reforms) Regulation 2024, clause 44C*. On 22 October 2024, this Bill passed the Legislative Council.

This series of events demonstrated the importance of the Committee's function in identifying scrutiny concerns, engaging with ministers and bodies, and reporting on these issues in a public and transparent way to ultimately improve the quality of delegated legislation in New South Wales.

Looking to the future: Other proposed reforms

The resolution of the Legislative Council of 19 October 2023 expanding the role of the Regulation Committee to include technical scrutiny of instruments of a legislative nature against the scrutiny grounds set out in the *Legislation Review Act 1987, section 9(1)(b)*, and also providing for the appointment of a legal adviser to support the committee in the performance of this function, was a watershed moment in the Legislative Council's scrutiny of the making of delegated legislation in New South Wales.

However, while the expansion of the role of the Regulation Committee in 2024 has undoubtedly been a success, it is important not to lose sight of the other important proposed reforms to the management of delegated legislation in New South Wales put forward by the Regulation Committee in its 2020 report *Making of delegated legislation in New South Wales* and its 2022 report *Options for reform of the management of delegated legislation in New South Wales*.

At the top of the list is root and branch reform the New South Wales statute book in relation to both primary and delegated legislation. Currently, there are three acts of the New South Wales Parliament dealing with the matter – the *Interpretation Act 1987*, the *Subordinate Legislation Act 1989* and the *Legislation Review Act 1987*. Consolidation of the provisions of these acts into a single "Legislation Act" which includes all provisions relating to the making, publication, tabling, disallowance, remaking, sunseting and scrutiny of primary and delegated legislation remains a priority. In its 2022 report, the Committee concluded that such a reform:

... would make it easier for members of the public, members of Parliament and government officials to understand the statutory requirements that operate in this complex area of the law. This in turn would enhance executive accountability and strengthen democratic oversight of the uses of delegated legislative power.

As an example of such reform, in 2019, the New Zealand Parliament enacted the *Legislation Act 2019*, consolidating the previous overlapping and confusing provisions of the *Legislation Act 2012* and the *Interpretation Act 1999*.

One of the immediate advantages of consolidation of the law in New South Wales concerning legislation would be the opportunity it would afford to address inconsistencies in the statutory framework for the management of delegated legislation. A notable example is the current inconsistency in how delegated legislation is defined:

- The *Interpretation Act 1987* and the *Subordinate Legislation Act 1989* both apply to 'statutory rules', but the definition of 'statutory rules' contained in each Act is in slightly different terms.
- In turn, the *Legislation Review Act 1987* applies to 'regulations' which include statutory rules and certain other instruments.

It is clear that best practice in relation to the management of delegated legislation is to define delegated legislation not according to its form (for example, a 'statutory rule' or a 'regulation'), but according to its substantive effect. This is the best practice approach that is adopted in the *Legislation Act 2003* (Cth), the *Legislation Act 2019* (NZ) and the *Subordinate Legislation Act 1994* (Vic).

Currently in New South Wales, legislative instruments that do not meet the relevant statutory definitions of delegated legislation are excluded from the accountability and oversight requirements that apply to delegated legislation generally. This should be addressed by extending regulatory and scrutiny requirements to all instruments of a legislative character. The Regulation Committee recommended such in its 2022 report, together with far stricter controls on exemptions to the regulatory regime.

Some of the other reforms posited by the Committee in its 2020 and 2022 reports included:

- requiring explanatory notes to bills to highlight the presence in the bill of any Henry VIII clauses, shell legislation or quasi-legislation, and to include an explanation as to why such a broad delegation of legislative power is considered necessary;
- addressing inconsistencies in the level of public accessibility of different forms of delegated legislation through publication of all delegated legislation on the NSW Legislation website as soon as it is made, together with an indication whether it is exempt from any part of the regulatory and scrutiny framework;
- requiring that all statutory rules be tabled in both Houses of the Parliament of New South Wales, and specifying that failure to do so invalidates the rule, as is the approach adopted in the *Legislation Act 2003* (Cth);
- publication by the Parliamentary Counsel's Office, in consultation with the Parliament, of guidance material on the preparation of primary and delegated legislation; and
- restricting the incorporation of non-legislative documents into legislative instruments, to be permitted only where the individual primary legislation delegating authority expressly provides for this.

Other reforms could also be considered, drawing on best practice from other jurisdictions in Australia and New Zealand, including:

- providing for the amendment of delegated legislation by the Parliament, rather than simply its disallowance;
- extending the protection under the *Legislation Review Act 1987*, section 9(1)(b), to ensure that statutory rules do not unduly trespass on the right and liberties of persons previously established by law;
- increasing the time period in which a disallowed statutory instrument cannot be remade from four months to six months after the instrument was disallowed;

- specifying that legislative instruments should commence 21 days after they are first published, unless otherwise permitted in the primary legislation;
- adopting of a rebuttable presumption against the use of Henry VIII clauses in New South Wales; and
- establishing a committee of the Legislative Council specifically to review national scheme legislation.

Such broader proposals for reform go beyond the Regulation Committee's role of reviewing all instruments of a legislative nature against the scrutiny grounds set out in the *Legislation Review Act 1987*, section 9(1)(b). However, reform in these areas would undoubtedly complement and enhance the Committee's review process. As such, the Regulation Committee can be anticipated to raise these matters again in the Legislative Council and with the Government through the Attorney-General in 2025. Doing so would be entirely within the Committee's terms of reference and remit 'to inquire into and report on trends or issues in relation to delegated legislation', as adopted by the House.

Conclusion

In October 2023, the NSW Legislative Council expanded the remit of its Regulation Committee to undertake for the first time the technical review of delegated legislation against the scrutiny principles set out in section 9(1)(b) of the *Legislation Review Act 1987*. The Council adopted this new function as a 12-month trial, to be reviewed at the end of 2024. It was a watershed moment! But in some ways, it was also a case of back to the future. The Council's actions returned to the Council a function that it previously undertook prior to 1960. It is also a function which many members of the Council believe is consistent with the Council's role as a 'House of Review'.

While an exciting development, the Council's resolution of October 2023 also presented a significant and immediate challenge to the Regulation Committee. In preparation for the expansion of its role, the Committee needed to recruit a full secretariat, appoint a legal adviser, develop a bespoke website for the sharing of information, and develop its systems and processes. All these tasks were successfully undertaken. But most importantly, the Committee had to develop over the course of 2024 appropriate systems and processes for engaging constructively with ministers, departments and agencies in the review of delegated legislation brought before the Parliament.

Although the Committee is yet to undertake the foreshadowed 12-month review, the committee believes that it has been successful in this endeavour. The case study presented in this paper demonstrates the value that the committee can bring to this space. Particular acknowledgement must be made of the constructive engagement and approach of the Leader of the Government in the Legislative Council, the Hon Penny Sharpe, in this regard. But many others have played a role in the successful establishment of this new function, including Annette O'Callaghan, NSW Parliamentary Counsel, and her staff, Dr Rock, the members and staff of the Senate Standing Committee for the Scrutiny of Delegated Legislation and of course the committee secretariat.

Particular note also needs to be taken of the constructive approach that all members of the committee from all political parties have brought to this task. The Committee operates very differently to most Council committees. Its sole remit is to improve the making of delegated legislation in New South Wales. In their approach to this task, the members of the committee have adopted a collaborative and apolitical approach very similar to that of the Senate Standing Committee for the Scrutiny of Delegated Legislation.

The committee looks forward to completing the review of its operations at the end of 2024, but it is very much to be hoped that the Legislative Council endorses the work of the Regulation Committee in

2024 and adopts as a permanent function of the House the technical review of delegated legislation against the scrutiny principles set out in section 9(1)(b) of the *Legislation Review Act 1987*.

The Regulation Committee also remains committed to other areas of reform of the making of delegated legislation in NSW as set out in its 2022 report. Adoption on a permanent basis of the above technical scrutiny function would be entirely consistent with this reform agenda.