

# **Inquiry into framework legislation and Henry VIII powers**

## **Note of discussion with Natasha Maclaren-Jones, Chair of the New South Wales Legislative Council Regulation Committee, Wednesday 22 January 2025**

Mrs Maclaren-Jones set out the background to the Regulation Committee's work, including the two reports looking at delegated legislation in New South Wales published in 2020 and 2022.

Mrs Maclaren-Jones set out some of the principal innovations which have resulted from this work, which included a new website to make it easier for the public and parliamentarians alike to find (and scrutinise) regulations, and having a new committee secretariat (who have legal backgrounds) as well as an external legal adviser reviewing regulations on a case by case basis, and bringing issues to the attention of the Committee.

As with the DPLR Committee, the Regulation Committee can raise any concerns it has with the executive or agency which has drafted the regulation, for the issues to be either taken on board, or explained further to the Committee, with the option of disallowance (akin to annulment in Scotland) being an option in extremis where concerns are not allayed.

In New South Wales, three pieces of legislation govern the use of regulations, which stands in contrast to many other jurisdictions, including Scotland, where one piece of legislation often sets out this information.

In relation to shell (or framework) legislation, there is no process to identify or label this in New South Wales per se. Mrs Maclaren-Jones stated that some departments are better at flagging in accompanying documents the nature of legislation (where shell) and of powers (where Henry VIII).

Mrs Maclaren-Jones suggested that the lesson is perhaps that there is value to be found in more clarity around when legislation is shell in nature and / or Henry VIII powers are used.

Mrs Maclaren-Jones also stated that shell legislation is not an issue on which there are widespread overarching concerns from elected members or civic society in New South Wales.

However, there were concerns that, particularly in the context of COVID-19, legislation in place meant that regulations from the executive had had too great an ability to impinge on individual rights and freedoms, including in some instances

using Henry VIII powers. It has come to light post-COVID-19 that some of the powers which had been exercised had been “stretched”.

In relation to Henry VIII powers more generally, Mrs Maclaren Jones explained that of those the Regulation Committee had identified over the last year or so, it had not actually had cause to be concerned with any of them – and had found all to be appropriate in the context and in the way they had been drafted.

Statutory instruments cannot be amended in New South Wales. The main power of the legislature would be to “disallow” a regulation – this can be recommended by the Committee (which would make this recommendation, like DPLR, not on the basis of policy concerns but “disallowance principles”), and (even without such a recommendation) any Member can move a motion of disallowance.

Mrs Maclaren-Jones confirmed that primary legislation receives the highest level of scrutiny, but the Regulation Committee has drawn the importance of secondary legislation to Members’ attention, and its existence sends a message to those making secondary legislation that it will be closely scrutinised.

Mrs Maclaren-Jones also mooted that drivers behind the executive in New South Wales using shell legislation could include time pressures and the ability to avoid some more contentious Parliamentary negotiation over detail in primary legislation.

Finally, Mrs Maclaren-Jones also set out the process for the “Selection of Bills Committee”, which considers all Bills introduced into Parliament and can recommend further scrutiny by another Legislative Council Committee. Some straightforward bills could receive around one day’s public hearing and more complex bills would be longer. These hearing are generally a chance for stakeholders to set out their views in relation to a Bill in its entirety. It is worth noting, for complex bills there is often an extensive executive-led consultation process, and white papers prior to the introduction of a bill.