



Legislative Assembly for the ACT

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY
(performing the duties of a Scrutiny of Bills and
Subordinate Legislation Committee)

Scrutiny Report 2009 Australia—New Zealand Scrutiny of Legislation Conference

10 AUGUST 2009

Report 9

TERMS OF REFERENCE

The Standing Committee on Justice and Community Safety (when performing the duties of a scrutiny of bills and subordinate legislation committee) shall:

- (a) consider whether any instrument of a legislative nature made under an Act which is subject to disallowance and/or disapproval by the Assembly (including a regulation, rule or by-law):
 - (i) is in accord with the general objects of the Act under which it is made;
 - (ii) unduly trespasses on rights previously established by law;
 - (iii) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or
 - (iv) contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly;
- (b) consider whether any explanatory statement or explanatory memorandum associated with legislation and any regulatory impact statement meets the technical or stylistic standards expected by the Committee;
- (c) consider whether the clauses of bills introduced into the Assembly:
 - (i) unduly trespass on personal rights and liberties;
 - (ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
 - (iv) inappropriately delegate legislative powers; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny;
- (d) report to the Legislative Assembly about human rights issues raised by bills presented to the Assembly pursuant to section 38 of the *Human Rights Act 2004*;
- (e) report to the Assembly on these or any related matter and if the Assembly is not sitting when the Committee is ready to report on bills and subordinate legislation, the Committee may send its report to the Speaker, or, in the absence of the Speaker, to the Deputy Speaker, who is authorised to give directions for its printing, publication and circulation.

MEMBERS OF THE COMMITTEE

Mrs Vicki Dunne, MLA (Chair)
Ms Mary Porter AM, MLA (Deputy Chair)
Ms Meredith Hunter, MLA

Legal Adviser (Bills): Mr Peter Bayne
Legal Adviser (Subordinate Legislation): Mr Stephen
Argument
Secretary: Mr Max Kiermaier
(Scrutiny of Bills and Subordinate Legislation Committee)
Assistant Secretary: Ms Anne Shannon
(Scrutiny of Bills and Subordinate Legislation Committee)

ROLE OF THE COMMITTEE

The Committee examines all Bills and subordinate legislation presented to the Assembly. It does not make any comments on the policy aspects of the legislation. The Committee's terms of reference contain principles of scrutiny that enable it to operate in the best traditions of totally non-partisan, non-political technical scrutiny of legislation. These traditions have been adopted, without exception, by all scrutiny committees in Australia. Non-partisan, non-policy scrutiny allows the Committee to help the Assembly pass into law Acts and subordinate legislation which comply with the ideals set out in its terms of reference.

Introduction

This is a report on the Committee's attendance at the 2009 Australia—New Zealand Scrutiny of Legislation Conference. The Conference was held from Monday, 6 to Wednesday, 8 July 2009 at Parliament House, Canberra. The Senate Standing Committees on Scrutiny of Bills and Regulations and Ordinances jointly hosted the Conference.

The Conference was attended by representatives of legislative scrutiny committees from most of the Australia parliaments, New Zealand and Canada. A list of the Conference attendees is at [Attachment 1](#).

The ACT was represented by Mrs Dunne MLA, Ms Porter MLA, Ms Hunter MLA, Mr Max Kiermaier, Secretary, Ms Anne Shannon, Assistant Secretary and Mr Stephen Argument, Legal Adviser (Subordinate Legislation).

The Conference proceedings

The theme of this year's conference was "*Scrutiny and Accountability in the 21st Century*" and below is a short description of the conference proceedings. The full Conference agenda can be found at [Attachment 2](#). Copies of the conference papers are available on the Senate website http://www.aph.gov.au/senate/sl_conference/index.htm or may be inspected by contacting the Committee Secretary (Mr Max Kiermaier—telephone 6205 0171, email max.kiermaier@parliament.act.gov).

Official Opening

The Conference was formally opened by the Hon Robert French, Chief Justice of the High Court of Australia.

Papers delivered to the Conference

The first session was themed "*Legislative Scrutiny: Are the ANZACS still the leaders?*" In it Professor Dennis Pearce argued that, while Australian and NZ Scrutiny committees have been at the forefront in developing innovations such as sunset clauses and wider public availability through such things as electronic registers, there are developments elsewhere which may be useful. Professor Pearce cited as an example UK explanatory memoranda which succinctly describe the effect of an instrument, provide a government contact officer and state what consultation has been undertaken in the preparation of the instrument. Mr Stephen Argument, while agreeing that there was room for improvement with Australian explanatory statements, was of the view that various Australian parliaments already "require" certain inclusions in explanatory statements, but they are routinely not being met. If "ANZAC" parliaments enforced the existing requirements there would be no need for new requirements.

The second session featured a presentation by Mrs Julie Copley, Research Director for the Scrutiny of Legislation Committee, Queensland titled *Public deliberation on legislation: from Fitzgerald to Facebook and beyond* which largely backgrounded the parliamentary responses in Queensland to the 1989 Fitzgerald Report recommendations, and detailed some of the work of her committee. She also referred to how the public are now more involved and aware of the legislative process and how to access documents.

Incorporation of material (eg Australian Standards) in delegated legislation has been a topical issue in Australia and it was interesting gaining a Canadian insight from Mr Andrew Kania MP, House of Commons Chair of the Standing Joint Committee for the Scrutiny of Regulations during his presentation titled *Incorporation by Reference in Canadian Federal Delegated Legislation: Contention, Concerns and Possible Reform*. It is the Canadian committee's view that incorporation of material "as amended from time to time" is improper and illegal unless there is clear legislative authority for it. Mr Kania provided examples of differing provincial responses to the issue.

Day 2 started with former Senator Andrew Murray presenting a paper on *The contribution specialist legislative scrutiny committees can make to better governance* which largely was a reflection of his experiences as a member of the Senate Standing Committee for the Scrutiny of Bills. A salient point made by Mr Murray was the importance of not assuming laws will always be administered by governments of good faith. He cited examples of the Mugabe regime still using "temporary" laws introduced decades before by the Smith Government.

This was followed by Professor John McMillan, Commonwealth Ombudsman who, along with 2 others, recently conducted a review of the Commonwealth's *Legislative Instruments Act 2003*. His paper discussed the findings and recommendations of the review. Overall, it was held the Act is achieving its aims but more could be done. For instance, the electronic Register ("FRLI") was criticised as being unreliable and slow and this will be addressed by the commissioning of a new website later this year. Another issue raised was a definitional one and whether some instruments were "legislative" (and hence needed to be registered) or "administrative". One way of overcoming this uncertainty is for an Act to declare whether instruments made under it to be a legislative instrument.

Members and staff of the New Zealand Regulations Review Committee, formed in 1985, made a presentation on the evolution of parliamentary scrutiny of regulations in NZ, why it has the focus it currently has, how the system operates today and whether it meets today's needs, and ways forward to make it more relevant. An interesting aspect of the committee's work is that it investigates complaints from the public about the operation of regulations.

A panel consisting of Mr Peter Quiggin PSM, First Parliamentary Counsel, Office of Parliamentary Counsel, Professor Stephen Bottomley, Legal Adviser to the Senate Standing Committee on Regulations and Ordinances and Professor John McMillan, Commonwealth Ombudsman discussed the topic of *Appropriate delegation of legislative powers in modern circumstances*. In discussing whether the right balance existed between matters to be placed in delegated legislation and primary Acts, the emergence of what was described as "executive" instruments was noted, many of which are not subject to review. An example was the solar power rebate scheme.

Mr Joe Francis MLA, Chairman of the WA Joint Standing Committee on Delegated Legislation, delivered a paper titled *Accountability Issues in Scrutinising Subsidiary Legislation made under Skeletal Acts*. The paper highlighted contemporary issues facing his committee, such as minimal stakeholder consultation (especially when not required by legislation), an apparent increase in the number of instruments which appear to be non-disallowable and a tendency of departments to claim that because they have a "policy" it is not necessary enshrine certain matters in law as that would place a fetter on departments to use discretion.

Mrs Vicki Dunne MLA chaired a session during which Mr Allan Shearan MP, Chairperson of the NSW Legislation Review Committee detailed the role of the Legislation Review Digest in the NSW. Mr Shearan noted that, regrettably, bills rarely were amended after introduction as a result of the Committee's comments. Rather the value of the Digest was seen as assisting Members in contributing to informed debate.

In a session entitled *The role of Parliament under an Australian Charter of Human Rights*, Professor George Williams, Anthony Mason Professor of Law and Foundation Director of the Gilbert & Tobin Centre of Public Law, University of New South Wales observed that Australia is the only western democratic country without a national human rights law, either constitutionally or in the form of a Bill of Rights. His view was that it was far preferable for rights issues to be addressed early in the law making process, not for remedies to be sought afterwards. Therefore the Parliament should be the focus, not the courts, and when the courts cannot interpret then the Parliament should re-examine legislation. He offered the UK Human Rights Act as a suitable model.

Taking an alternative view was Mr Harry Evans, Clerk of the Senate in his paper *Bills of rights and legislative scrutiny: two different worlds*. He said that traditionally scrutiny committees have concentrated on concrete, process oriented rights whereas human rights charters were more nebulous things. Charters and notions of rights change over time (eg very few now mention the right to trial by jury, once regarded as sacred) and that for scrutiny committees to have regard to such rights issues would drag them into public policy issues which they have hitherto avoided.

Mr Carlo Carli MLA, Chair of the Victorian Scrutiny of Acts and Regulations Committee, in his paper *The role and work of the scrutiny committees after the introduction of a Charter of Rights and Responsibilities* made some observations on the impact that the Victorian Charter has made on the Parliament's consideration of rights issues in bills. He noted that it creates a public dialogue between the judiciary, executive and legislature by requiring the Parliament to consider whether new laws are compatible with human rights, requiring public authorities to take human rights into account in their decision making and giving courts the power to identify laws that are incompatible with human rights and for the Parliament to consider whether laws so identified should be changed. Interestingly, all bills must be accompanied by a statement of compatibility and the committee has adopted the practice of considering the quality of those statements in the same way it has considered the quality of explanatory material in the past.

Finally, Dr Jeremy Gans, Legal Adviser to the Victorian Scrutiny of Acts and Regulations Committee, presented a paper reviewing the Victorian Charter's approach to scrutiny of bills.

Notice of motion and Conference resolution

Mr Andrew Murray lodged the following notice of motion:

- (1) That this Conference resolves to request all scrutiny committees in Australia and New Zealand to review the legislation and/or regulations in their jurisdiction on a common topic and to submit a report 3 months prior to the next conference (realizing that some committees may find themselves unable to comply);

- (2) That the topic for review will be determined, after due consultation, by a working group of three persons appointed by this Conference (namely, a Chair of one of the Senate committees, the Chair of the Queensland Scrutiny Committee and a nomination from the floor) who must advise all jurisdictions of the intended topic within 3 months of the conclusion of this Conference; and
- (3) This working group will resolve and advise of any necessary protocols and processes for the manner in which reports from various jurisdictions are to be consolidated into one report by them, to be endorsed by the next Conference and then returned to each committee in each jurisdiction with a request that the report be tabled in each jurisdiction.

The motion was debated and an amendment moved, unsuccessfully, to broaden the resolution to include such things as whether instruments were being used *ultra vires* and as a means of being a tax under the guise of a fee.

The motion was carried, after a vote.

It is the ACT committee's view that, in line with the motion, the following be proposed:

- (1) That all scrutiny committees in Australia and New Zealand review:
 - (a) the legislative and non-legislative requirements (if any), in their respective jurisdictions, relating to the preparation and substance of explanatory material for primary and subordinate legislation;
 - (b) the extent to which any requirements are met; and
 - (c) the quality and usefulness of explanatory material in their respective jurisdictions.
- (2) That all scrutiny committees in Australia and New Zealand, on the basis of the review set out in clause (1), submit a report to the organisers of the Queensland conference, 3 months prior to the holding of that conference, for discussion at the conference.

Next Conference

The Queensland Scrutiny of Legislation Committee informed the Conference that it would host the next Conference in 2011.

Vicki Dunne MLA
Chair

August 2009

Delegates Australia

Australian Capital Territory

Standing Committee on Justice and Community Safety (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee)

Mrs Vicki Dunne MLA, *Chair*
 Ms Mary Porter AM MLA, *Deputy Chair*
 Ms Meredith Hunter MLA, *Member*
 Mr Stephen Argument, *Legal Adviser (Subordinate Legislation)*
 Mr Max Kiermaier, *Secretary*
 Ms Anne Shannon, *Assistant Secretary*

Senate

Standing Committee on Regulations and Ordinances

Senator Dana Wortley, *Chair*
 Senator Chris Back, *Member*
 Senator Claire Moore, *Member*
 Professor Stephen Bottomley, *Legal Adviser*
 Mr James Warmenhoven, *Secretary*
 Ms Janice Paull, *Research Officer*
 Ms Jill Sedaitis, *Administration Officer*

Standing Committee for the Scrutiny of Bills

Senator the Hon Helen Coonan, *Chair*
 Senator Mark Bishop, *Deputy Chair*
 Senator the Hon Judith Troeth, *Member*
 Senator Jacinta Collins, *Member*
 Senator Rachel Siewert, *Member*
 Senator Doug Cameron, *Member*
 Adjunct Professor Sue Tongue, *Legal Adviser*
 Ms Julie Dennett, *Secretary*
 Ms Margaret Lindeman, *Administration Officer*
 Emeritus Professor Jim Davis, *Former Legal Adviser*

New South Wales

Legislation Review Committee

Mr Allan Shearan MP, *Chair*
 Mr Paul Pearce MP, *Deputy Chair*
 Mrs Judy Hopwood MP, *Member*
 Hon Robyn Parker MLC, *Member*
 Ms Catherine Watson, *Committee Manager*

Queensland

Scrutiny of Legislation Committee

Mrs Jo-Ann Miller MP, *Chair*
 Ms Vicky Darling MP, *Member*
 Ms Grace Grace MP, *Member*
 Mr Andrew Powell MP, *Member*
 Dr Alex Douglas MP, *Member*
 Mrs Julie Copley, *Research Director*
 Mr Jason McNeil, *Principal Research Officer*

South Australia

Legislative Review Committee

Hon John Darley MLC, *Member*
 Ms Leslie Guy, *Secretary*

Tasmania

Joint Standing Committee on Subordinate Legislation

Hon Ruth Forrest MLC, *Chair*

Victoria

Scrutiny of Acts and Regulations Committee

Mr Carlo Carli MP, *Chair*
 Mr Ken Jasper MP, *Deputy Chairperson*
 Mr Colin Brooks MP, *Member*
 Ms Jaala Pulford MLC, *Member*
 Mr Telmo Languiller MP, *Member*
 Mrs Inga Peulich MP, *Member*
 Mr Andrew Homer, *Senior Legal Adviser*
 Ms Helen Mason, *Legal Adviser*
 Dr Jeremy Gans, *Adviser*

Western Australia

Joint Standing Committee on Delegated Legislation

Mr Joe Francis MLA, *Chair*
 Mr Andrew Waddell MLA, *Member*
 Mr Paul Miles MLA, *Member*
 Hon Robin Chapple MLC, *Member*
 Hon Alyssa Hayden MLA, *Member*
 Hon Jim Chown MLC, *Member*
 Hon Jock Ferguson MLC, *Member*
 Ms Andrea McCallum, *Advisory Officer (Legal)*
 Ms Christine Kain, *Advisory Officer (Legal)*
 Ms Susan O'Brien, *Advisory Officer (Legal)*
 Mr David Driscoll, *Committee Clerk*

Uniform Legislation and Statutes Review Committee

Hon Adele Farina MLC, *Chair*

Hon Liz Behjat MLC, *Member*

Hon Helen Bullock MLC, *Member*

Delegates International

Canada

Standing Joint Committee for the Scrutiny of Regulations

Mr Andrew Kania MP, *Joint Chairman*

Senator John Wallace, *Member*

Mr Serge Ménard MP, *Member*

Mr Peter Bernhardt, *General Counsel*

New Zealand

Regulations Review Committee

Mr Charles Chauvel MP, *Chair*

Mrs Amy Adams MP, *Deputy Chair*

Mrs Renée Riddell-Garner, *Legislative Counsel*

Clerk's Office

Mr Tim Workman, *Clerk-Assistant (Legal Services)*

Delegates Non-Parliamentary

Australian Quarantine and Inspection Service

Ms Leisa Richardson, *Manager, Legislation Review Unit*

Mr Adam Nott, *Senior Legislation Officer*

Department of Finance and Deregulation

Mr Gillan Topley, *Legislative Review Branch*

Mr Nat Robbins, *Legislative Review Branch*

Office of Parliamentary Counsel

Mr Peter Quiggin PSM, *First Parliamentary Counsel*

Mr John King, *Senior Assistant Parliamentary Counsel*

Mrs Alison John, *Assistant Parliamentary Counsel*

Program

DAY ONE – MONDAY, 6 JULY 2009

12.30 pm **Registration opens** **Main Committee Room**

1.45 pm **Conference welcome**

Senator the Hon Helen Coonan
Chair of the Senate Standing
Committee for the Scrutiny of Bills

Senator Dana Wortley
Chair of the Senate Standing
Committee on Regulations and
Ordinances

Resolutions regarding publication of conference papers and
media attendance

2.00 pm **Opening address**
The Hon Robert French
Chief Justice of the High Court of Australia

2.20 pm **Session 1**
Chair: Senator Dana Wortley, Chair of the Senate Standing
Committee on Regulations and Ordinances

*Legislative Scrutiny: Are the ANZACS still
the leaders?*
Emeritus Professor Dennis Pearce and Mr Stephen Argument
Authors of *Delegated Legislation in Australia*

3.05 pm **Afternoon tea**

3.25 pm **Session 2**
Chair: Mrs Jo-Ann Miller MP, Chair of the Scrutiny of Legislation
Committee, Queensland

*Public deliberation on legislation: from Fitzgerald to
Facebook and beyond*
Mrs Julie Copley, Research Director for the Scrutiny of
Legislation Committee, Queensland

4.10 pm **Session 3:**
Chair: Senator Chris Back, Member of the Senate Standing Committee
on Regulations and Ordinances

*Incorporation by Reference in Canadian Federal Delegated
Legislation: Contention, Concerns and Possible Reform*
Mr Andrew Kania MP, House of Commons Chair of the Standing Joint
Committee for the Scrutiny of Regulations, Canada

4.50 pm **End of Day One**

5.00 pm - **Welcome Cocktail Reception** **Mural Hall**
6.00 pm

DAY TWO – TUESDAY, 7 JULY 2009

9.00 am **Conference photograph** **Marble Foyer**

9.45 am **Session 4**
Chair: Senator the Hon Judith Troeth, Member of the Senate Standing Committee for the Scrutiny of Bills

The contribution specialist legislative scrutiny committees can make to better governance

Mr Andrew Murray, former Senator and member of the Senate Standing Committee for the Scrutiny of Bills (1996-2008)

10.30 am **Morning tea**

10.50 am **Session 5**
Chair: Hon Adele Farina MLC, Chair of the Uniform Legislation and Statutes Review Committee, Western Australia

Review of the Legislative Instruments Act 2003

Professor John McMillan, Commonwealth Ombudsman and Member of the Legislative Instruments Act Review Committee

11.35 am **Session 6**
Chair: Senator Claire Moore, Member of the Senate Standing Committee on Regulations and Ordinances

Learning from the past and looking to the future

Mr Charles Chauvel MP, Chair
Mrs Amy Adams MP, Deputy Chair
Mrs Renée Riddell-Garner, Legislative Counsel
Regulations Review Committee, New Zealand

12.30 pm **Lunch** **Mural Hall**

1.30 pm **Session 7: Panel discussion**
Chair: Senator the Hon Helen Coonan, Chair of the Senate Standing Committee for the Scrutiny of Bills

Appropriate delegation of legislative powers in modern circumstances

Adjunct Professor Sue Tongue, Legal Adviser to the Senate Standing Committee for the Scrutiny of Bills

Panellists:
Mr Peter Quiggin PSM, First Parliamentary Counsel, Office of Parliamentary Counsel, Commonwealth
Professor Stephen Bottomley, Legal Adviser to the Senate Standing Committee on Regulations and Ordinances
Professor John McMillan, Commonwealth Ombudsman

2.30 pm	Session 8 Chair: Hon Ruth Forrest MLC, Chair of the Subordinate Legislation Committee, Tasmania <i>Accountability Issues in Scrutinising Subsidiary Legislation made under Skeletal Acts</i> Mr Joe Francis MLA, Chairman of the Joint Standing Committee on Delegated Legislation, Western Australia	
3.15 pm	Afternoon tea	
3.35 pm	Session 9 Chair: Mrs Vicki Dunne MLA, Chair of the Standing Committee on Justice and Community Safety, Australian Capital Territory <i>The role of the Legislation Review Digest in the NSW Parliament</i> Mr Allan Shearan MP, Chairperson of the Legislation Review Committee, New South Wales	
4.20 pm	End of Day Two	
5.45 pm	Bus to conference dinner – pick up from hotels	
6.30 pm - 10.30 pm	Conference dinner Guest speaker: Mr Stephen Gageler SC Solicitor-General of Australia	The Boat House by the Lake
10.30 pm	Bus to hotels	

DAY THREE – WEDNESDAY, 8 JULY 2009

9.00 am	Tour of Parliament House (optional)	Marble Foyer
9.45 am	Session 10 Chair: Mr Andrew Kania MP, House of Commons Chair of the Standing Joint Committee for the Scrutiny of Regulations, Canada <i>The role of Parliament under an Australian Charter of Human Rights</i> Professor George Williams, Anthony Mason Professor of Law and Foundation Director of the Gilbert & Tobin Centre of Public Law, University of New South Wales	
10.15 am	<i>Bills of rights and legislative scrutiny: two different worlds</i> Mr Harry Evans, Clerk of the Australian Senate	

10.45 am	Morning tea	
11.10 am	Session 11 Chair: Mr Charles Chauvel MP, Chair of the Regulations Review Committee, New Zealand <i>The role and work of the scrutiny committees after the introduction of a Charter of Rights</i> Mr Carlo Carli MLA, Chair of the Scrutiny of Acts and Regulations Committee, Victoria	
11.40 am	<i>Scrutiny of bills under bills of rights: Is Victoria's model the way forward?</i> Dr Jeremy Gans, Legal Adviser to the Scrutiny of Acts and Regulations Committee, Victoria	
12.10 pm	General open forum discussion on the implications of bills of rights for all legislative scrutiny committees	
12.30 pm	Lunch	Members' Guests Dining Room
2.00 pm	Session 12: Open forum Chair: Senator Jacinta Collins, Member of the Senate Standing Committee for the Scrutiny of Bills <i>Where to from here?</i> General open forum discussion on issues identified during the Conference	
2.45 pm	Notices of motion by delegates Conference resolutions Next conference	
3.15 pm	Conference close	
3.30 pm	Farewell afternoon tea	