

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY
(LEGISLATIVE SCRUTINY ROLE)

2016 Australia–New Zealand
Scrutiny of Legislation Conference

AUGUST 2016

Report 48

COMMITTEE MEMBERSHIP

Mr Steve Dospot MLA (Chair)

Mr Jayson Hinder MLA (Deputy Chair)

Ms Joy Burch MLA

Mrs Giulia Jones MLA

SECRETARIAT

Ms Janice Rafferty (Acting Secretary)

Ms Anne Shannon (Assistant Secretary)

Mr Peter Bayne (Legal Adviser—Bills)

Mr Stephen Argument (Legal Adviser—Subordinate Legislation)

CONTACT INFORMATION

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ROLE OF 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.

RESOLUTION OF APPOINTMENT

The Standing Committee on Justice and Community Safety when performing its legislative scrutiny role shall:

- (1) 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):
 - (a) is in accord with the general objects of the Act under which it is made;
 - (b) unduly trespasses on rights previously established by law;
 - (c) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or
 - (d) contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly;
- (2) 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;
- (3) consider whether the clauses of bills (and amendments proposed by the Government to its own bills) introduced into the Assembly:
 - (a) unduly trespass on personal rights and liberties;
 - (b) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
 - (c) make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
 - (d) inappropriately delegate legislative powers; or
 - (e) insufficiently subject the exercise of legislative power to parliamentary scrutiny;
- (4) 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*;
- (5) 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.

Introduction

This is a report on the Committee's attendance at the 2016 Australia—New Zealand Scrutiny of Legislation Conference. The Conference was held from Monday, 11 July to Thursday 14 July 2016 at Parliament House, Perth, Western Australia. The Western Australian Joint Standing Committee on Delegated Legislation hosted the Conference.

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

The ACT was represented by Mr Doszpot MLA, Mr Hinder MLA, Ms Burch MLA and Ms Rafferty (Acting Secretary). Mr Argument, Legal Adviser (Subordinate Legislation) also attended the Conference as a keynote speaker.

The Conference proceedings

The theme of this year's conference was *"Parliamentary Scrutiny, Parliamentary Sovereignty: Where are we now and where are we headed?"* 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 parliament website <http://www.parliament.wa.gov.au/conference> 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 Her Excellency the Honourable Kerry Sanderson AC, Governor of Western Australia.

Papers delivered to the Conference

The first session was themed *"Too Many cooks? Parliament, the Courts and the scrutiny of delegated legislation"*. In it, The Hon Wayne Martin AC Chief Justice of Western Australia, argued that the sheer volume of delegated legislation in most parliaments increased the risk of significant matters being overlooked. He cited the circumstances relating to Section 70 of the 1889 Constitution Act (abolition of the Aborigines Protection Board).

The second session featured a presentation by Professor George Williams titled *How effective is the Federal Parliament's new scrutiny regime for human rights?* which focused on the difficulty the Federal Parliament scrutiny committees have in trying to address all 7 international conventions on human rights. These conventions are very broad and constantly evolving. He suggested a possible way forward was to develop an Australian list of human rights issues against which competing stakes can be addressed.

Tim Workman (Principal Clerk (Legislation)) New Zealand House of Representatives, presented a paper on the impact the *New Zealand Bill of Rights Act 1990* has had on the legislative process in New Zealand, including the effectiveness of referring to subject select committees, with emphasis on civil and political rights.

The role of human rights advisors under the Victorian *Charter of Human Rights and Responsibilities Act 2006* was discussed by the Hon Richard Dalla-Riva, MLC, Deputy Chair of the Scrutiny of Acts and Regulations Committee, Parliament of Victoria. Sarala Fitzgerald, Human Rights Advisor to the Committee also contributed to the discussion and they both acknowledged that the human rights advisors provided much needed expertise in the complex area of human rights law.

Session three contained a discussion of the concept of the “same in substance” rule and the impact of the *Perrett* judgment of 2015; a survey of approaches to legislative scrutiny and case study from Western Australia where a second chamber was established to consider a significant public health bill. The “second” chamber allowed advisors to be present and amendments to be proposed before being drafted and finalised.

Safeguarding parliamentary sovereignty was the topic for Session four and included a presentation by officers of the Senate Standing Committee for the Scrutiny of Bills and the Senate Standing Committee on Regulations and Ordinances. A panel discussion on the principles and challenges of the scrutiny on primary legislation considered the pitfalls of national uniform legislation.

Day two began with a presentation by Mr Stephen Argument entitled *Executive Law Making in the 21st Century: delegation not subordination* which reinforced the particular role of the disallowance mechanism to remind the Executive of both the role and power of parliamentary scrutiny committees. He firmly expressed his view that the term “delegated” legislation more accurately reflected that the power to make the legislation was delegated to the Executive by the Parliament and in no way was it subordinated by the Executive. His paper also spent some time discussing the UK Government’s “Strathclyde Review”.

Andrew Bayly MP, Deputy Chair, Regulations Review Committee, House of Representatives, Parliament of New Zealand gave delegates an overview of the development of the New Zealand legislation web site.

Session 6 – Challenges in scrutinising delegated legislation – focused on use of Australian Standards in delegated legislation and national uniform legislation. Mr Peter Abetz, MLA , Western Australia presented a strong case for the reconsideration of the access to the Australian Standards in view of the extremely high costs and restrictions on usage and dissemination of the standards. He referred delegates to Report 84 of the Joint Standing Committee on Delegated Legislation entitled *Access to Australian Standards Adopted in Delegated Legislation*, June 2016. The Hon Tania Rattray, MLC, Parliament of Tasmania, spoke of some of the difficulties in considering uniform nation laws, in particular, heavy vehicle regulations.

This was followed by Session 7 which provided delegates with different perspectives and challenges faced. The delegate from Nepal gave a brief presentation on the Constitution of Nepal 2015, which expressed the determination of the state to build an equitable society. The constitution contains human rights matters in articles 16 to 48 and are discussed in more detail in his paper.

The final session on Wednesday (Session 8) was presented by the three delegates from Fiji. The delegates included the Secretary to the Standing Committee on Public Accounts, the Assistant Minister, Local Government, Housing and Environment and an opposition member of the Standing Committee on Justice, Law and Human Rights. The papers presented provided background information and commentary on the current situation in Fiji since the re-establishment of Parliament in 2014. During the question and answer section, discussion drifted onto the current political climate in Fiji, and concern expressed that the process of scrutiny of legislation was not being observed with Bills being fast tracked.

The last day of the Conference commenced with presentations on the roles of international bodies in statutory interpretation and the use of parliamentary material in fixing ambiguity in legislation.

Representatives of all parliaments present at the conference provided brief jurisdiction reports and copies are available with the papers.

On behalf of the Committee, the Chair, and in addition to the jurisdiction report for the ACT that had been prepared by Mr Kiermaier, made the following comments:

In presenting the ACT Jurisdiction Round Up, I think it is important to mention the contributions of all members of the ACT Justice and Community Safety Committee and secretariat during the past four years and for the way it operated in the best traditions of non partisan, non political technical scrutiny of legislation.

Current members are Mr Jayson Hinder MLA, Mrs Giulia Jones MLA, Ms Joy Burch MLA and myself as Chair. While past members during the life of the current 8th ACT Assembly were Mr Jeremy Hanson MLA, Ms Mary Porter MLA, Mr Mick Gentleman MLA, Dr Chris Bourke MLA and Ms Yvette Berry MLA. The Secretariat–Secretary Mr Max Kiermaier, who I also thank for his contribution to this Jurisdiction Round Up, Acting Secretary, Ms Janice Rafferty, Assistant Secretary, Ms Anne Shannon, Legal Adviser – Bills, Mr Peter Bayne, Legal Adviser – Subordinate Legislation, Mr Stephen Argument. Over the past four years, to date, the Scrutiny Committee has examined 221 Bills; 1238 items of subordinate legislation; 129 Government responses; 9 Regulatory impact statements and amendments to 12 Government Bills.

Next Conference

The Victorian Scrutiny of Acts and Regulations Committee informed the Conference that it would host the next Conference in 2018.

Steve Doszpot MLA
Chair
10 August 2016

Attachment 1**Delegates
Australia****Conference Delegates****AUSTRALIA****Western Australia****Joint Standing Committee on Delegated Legislation**

Mr Peter Abetz MLA, Chair
Hon Robin Chapple MLC, Deputy Chair
Hon John Castrilli MLA, Member
Ms Simone McGurk MLA, Member
Hon Martin Pritchard MLC, Member
Mr Stephen Brockway, Advisory Officer
Ms Sarah Costa, Advisory Officer

Standing Committee on Legislation

Hon Lynn MacLaren, Member

Procedure and Privileges Committee

Hon Adele Farina, Deputy President
Legislative Council Committee Office
Ms Suzanne Veletta, Clerk Assistant (Committees)
Mr Alex Hickman, Advisory Officer
Mr Andrew Hawkes, Advisory Officer
Ms Denise Wong, Advisory Officer
Ms Anne Turner, Advisory Officer

Legislative Council

Mr Paul Grant, Deputy Clerk of the Legislative Council
Mr Colin Huntly, Clerk Assistant (Procedure)

Parliament of Western Australia

Prof David Black, Parliamentary History Advisor
Dr Harry Phillips, Parliamentary Education Advisor

Legislative Assembly

Ms Isla Macphail, Sergeant-at-Arms

Australian Capital Territory**Standing Committee on Justice and Community Safety**

Mr Steven Doszpot MLA, Chair

Mr Jayson Hinder MLA, Member
Ms Joy Burch MLA, Member
Mr Stephen Argument, Legal Adviser
Ms Janice Rafferty, Acting Secretary

Commonwealth of Australia

Senate Standing Committee for the Scrutiny of Bills

Ms Toni Dawes, Secretary
Mr Glenn Ryall, Principal Research Officer

Senate Standing Committee on Regulations and Ordinances

Mr Ivan Powell, Committee Secretary
Ms Jessica Strout, Principal Research Officer

New South Wales

Select Committee on the Legislative Committee System

Hon Scott Farlow MLC, Chair
Legislation Review Committee
Mr Michael Johnsen MP, Chair
Mr Alister Henskens SC, MP, Member
Ms Jessica Falvey, Research Officer

Legislative Council Committee Office

Ms Teresa McMichael, Director
Ms Sharon Ohnesorge, Principal Council Officer

Queensland

Members of Parliament

Mr Craig Crawford MLA, Member for Barron River
Mr Glenn Butcher MLA, Member for Gladstone
Mr Jim Madden MLA, Member for Ipswich West

Scrutiny of Legislation Secretariat

Ms Renee Easten, Research Director

South Australia

Legislative Review Committee

Hon Gerry Kandelaars MLC, Presiding Officer
Hon Andrew McLachlan MLC, Member
Mr Matt Balfour, Secretary

Tasmania

Joint Standing Committee on Subordinate Legislation

Hon Tania Rattray MLC, Chair
Hon Leonie Hiscutt MLC, Deputy Chair
Ms Julie Thompson, Executive Assistant

Victoria**Scrutiny of Acts and Regulations Committee**

Mr Richard Dalla-Riva, Deputy Chair

Mr Nathan Bunt, Executive Officer

Ms Sarala Fitzgerald, Human Rights Advisor

Legislative Council

Ms Vivienne Bannan, Manager, Chamber Support

Mr Anthony Walsh, Research and Legislation Officer

INTERNATIONAL**Nepal**

Hon Tula Rana, Constituent Assembly Member

Hon Keshari Gharti Magar, Constituent Assembly Member

Mr Hem Bahadur Thapa, Human Rights Activist

Mr Sunil Gurung, Party Worker

Mr Janak Raj Giri, Former Minister/Political Leader

Kiribati Parliament

Mr Kouraiti Beniato, Member of Parliament

Mr Emil Schutz, Member of Parliament

Mr Airata Naunta, Hansard Editor

Fiji**Ministry of Local Government, Housing & Environment**

Hon Lorna Eden Assistant Minister

Standing Committee on Public Accounts

Mr Joeli Ditoka Director Legislature

Standing Committee on Justice, Law and Human Rights

Hon Niko Nawaikula Member

New Zealand**Regulations Review Committee**

Hon David Cunliffe, Chairperson

Mr Andrew Bayly, Deputy Chairperson

Miss Tamara Polglase, Deputy Clerk of Committee

Office of the Clerk – House of Representatives

Mr Tim Workman, Principal Clerk (Legislation)

Mrs Elizabeth Grant, Legislative Counsel 38

NON-PARLIAMENTARY

Supreme Court of Western Australia

Hon Chief Justice Wayne Stewart Martin AC

University of New South Wales Law

Professor George Williams, Professor

Department of the Attorney General

Ms Pauline Bagdonavicius, Acting Director General

Mr Dominic Fernandes, Legal Policy Officer

Ms Karen O’Sullivan, Legal Policy Officer

Ms Lai Yee Woo, Senior Policy Officer

Parliamentary Counsel’s Office

Mr Geoff Lawn, Parliamentary Counsel

Ms Daphne Andersen, Assistant Parliamentary Counsel

Ms Alison Corke, Assistant Parliamentary Counsel

Ms Una Couper, Assistant Parliamentary Counsel

Mr Michael Cuomo, Assistant Parliamentary Counsel

Ms Rebecca Eldred, Assistant Parliamentary Counsel

Ms Lee Harvey, Assistant Parliamentary Counsel

Mr Roger Jacobs, Assistant Parliamentary Counsel

Ms Johanna Lynch, Assistant Parliamentary Counsel

Ms Elaine O’Hare, Assistant Parliamentary Counsel

Ms Peta Santoro, Assistant Parliamentary Counsel

Mr David Taylor, Assistant Parliamentary Counsel

Department of Local Government and Communities

Ms Geneveve Cornejo, Senior Legislation Officer

Mr Steven Elliott, Acting Senior Legislation Officer

WorkCover WA

Mr Kevin Gillingham, Manager Policy & Legislative Services

Mr Tom Samuels, Senior Policy Officer

Main Roads WA

Mr Peter Williams, Manager – Legislation

Department of Lands

Ms Sze-Hwei Yen, Senior Solicitor

Ms Rebecca Chan, Senior Solicitor

Shire of Christmas Island

Mr Kelvin Matthews, CEO

Western Australian Local Government Association (WALGA)

Mr James McGovern, Governance Manager

Ms Elizabeth Kania, Governance Advisor

University of Western Australia

Assistant Professor Jacinta Dharmananda

Murdoch University

Ms Lorraine Finlay, Lecturer

Edith Cowan University

Ms Fiona Low, Lecturer

Program

Monday, 11 July 2016

6.00pm – 7.30pm

Welcome Reception
Government House, St Georges Terrace, Perth

Delegates welcomed by Her Excellency the Honourable Kerry Sanderson AC, Governor of Western Australia

Day 1: Tuesday, 12 July 2016

8.00 – 9.00

Registration and refreshments — Forrest Foyer, Parliament House

Session 1

Conference opening and keynote speaker

9.00

Welcome to Country Dr Robert Francis Isaacs AM OAM JP

9.10

Opening of Conference

Her Excellency the Honourable Kerry Sanderson AC
Governor of Western Australia

9.20

Introduction of keynote speaker

Hon Adele Farina MLC, Deputy President, Legislative Council,
Parliament of Western Australia

9.25

Keynote speaker

The Honourable Wayne Martin AC, Chief Justice of Western
Australia

*Too many cooks? Parliament, the Courts and the scrutiny of
delegated legislation*

(The Chief Justice will take questions after his presentation)

10.00

Morning tea

Session 2

Rights and freedoms and their role in scrutiny

Session Chair: Mr Alister Henskens SC MP

10.25 **Keynote speaker** Professor George Williams AO
How effective is the Federal Parliament's new scrutiny regime for human rights?

(Professor Williams will take questions after his presentation)

11.00 *Parliamentary Bill of Rights scrutiny in New Zealand*

Mr Tim Workman, Manager (House), House of Representatives,
Parliament of New Zealand

11.25 *The role of human rights advisors under Victoria's Charter*

Hon Richard Dalla-Riva MLC, Deputy Chair, and Ms Sarala
Fitzgerald, Human Rights Advisor, Scrutiny of Acts and Regulations
Committee, Parliament of Victoria

11.50 Questions for speakers and general discussion

12.10 Lunch — Members' Dining Room

1.10 Conference Photo — Assemble at the front of Parliament House

Session 3 **Safeguarding parliamentary sovereignty**

Session Chair: Dr Harry Phillips AM

1.20 *The concept of 'the same substance': What does the Perrett
judgment mean for parliamentary scrutiny*

Mr Ivan Powell, Committee Secretary, Senate Standing Committee
on Regulations and Ordinances, Parliament of Australia

1.45 *Comparative approaches to legislative scrutiny* Mr Michael Johnsen
MP, Legislation Review Committee, Parliament of New South
Wales

2.10 *A case study in legislative scrutiny: Legislative consideration in a
second Legislative Assembly chamber*

Ms Janine Freeman MLA, Legislative Assembly, Parliament of
Western Australia

2.35 Questions for speakers and general discussion

3.00 Afternoon tea

Session 4 **Safeguarding parliamentary sovereignty and facilitated panel discussion**

Session Chair: Hon Robin Chapple MLC

3.25 *Scrutiny committees: A vehicle to safeguarding the Constitution, federalism and parliamentary sovereignty*

Mr Glenn Ryall, Principal Research Officer, Senate Standing Committee for the Scrutiny of Bills and Ms Jessica Strout, Acting Principal Research Officer, Senate Standing Committee on Regulations and Ordinances, Parliament of Australia

3.50 *Dangerous trends in legislation*

Hon Adele Farina MLC, Deputy President, Legislative Council, Parliament of Western Australia

4.15 – 5.00 **Facilitated panel discussion**

Scrutiny of primary legislation principles and challenges: Where are we now and where are we headed?

Facilitator: Hon Adele Farina MLC

Panel Members: Professor George Williams AO, Mr Michael Johnsen MP, Hon Richard Dalla-Riva MLC

Day 2: Wednesday, 13 July 2016

8.30 **Refreshments**

Session 5 **Delegated legislation in the 21st century**

9.00 Introduction of keynote speaker Senator Linda Reynolds, Parliament of Australia

9.05 **Keynote speaker** Mr Stephen Argument

Executive law making in the 21st century: Delegation not subordination

(Mr Argument will take questions after his presentation)

9.50 *The evolution of the New Zealand Regulations Review Committee: Systems, scrutiny and complaint*

Hon David Cunliffe MP, Chairperson, Regulations Review
Committee, House of Representatives, Parliament of New Zealand

10.20

Morning tea

Session 6

Challenges in scrutinising delegated legislation

Session Chair: Mr Paul Grant

10.45

A gap in scrutiny? Access to Australian Standards adopted in delegated legislation Mr Peter Abetz MLA, Chair, Joint Standing Committee on Delegated Legislation, Parliament of Western Australia

11.10

Uniform legislation and parliamentary sovereignty — the case of heavy vehicle regulations in Tasmania

Hon Tania Rattray MLC, Chair, Parliamentary Standing Committee on Subordinate Legislation, Parliament of Tasmania

11.35

Questions for speakers and general discussion

12.00

Lunch — Parliament Courtyard

Session 7

Perspectives on delegated legislation

Session Chair: Mr Stephen Argument

1.00

Supporting reports to regulations

Hon Gerry Kandelaars MLC, Presiding Member, Legislative Review Committee, Parliament of South Australia

1.25

Facilitated panel discussion

Scrutiny of delegated legislation: The appropriate delegation of legislative power, the rise of subdelegation and other challenges

Facilitator: Mr Stephen Argument

Panel Members: Mr Peter Abetz MLA, Hon Gerry Kandelaars MLC, and Hon Tania Rattray MLC

An international perspective

2.25

Nepal's new Constitution, its federal system, human rights and peace building agendas

Mr Janak Raj Giri, former Minister and MP, Bajura District, Federal Democratic Republic of Nepal

2.50 Afternoon tea

Session 8 Scrutiny in the Pacific

Session Chair: Hon John Castrilli MLA

3.15 *Lawmaking in the Fijian Parliament since 2014 — a snapshot of the constitutional and procedural framework*

Mr Joeli Ditoka, Director Legislature, Parliament of the Republic of Fiji

3.35 *The law making process in the Parliament of Fiji since 2014*

Hon Lorna Eden MP, Assistant Minister for Local Government, Housing and Environment, and Chair, Standing Committee on Economic Affairs Hon Niko Nawaikula MP, Member, Standing Committee on Justice, Law and Human Rights Parliament of the Republic of Fiji

4.15 – 4.40 Questions for speakers and general discussion

6:30 Pre dinner drinks — Members' Lounge

7.00 CONFERENCE DINNER — Members' Dining Room

Introduction of dinner speaker: Professor David Black

Dinner speaker: Mr Peter Kennedy, Political Journalist
Electioneering: Then and now

Day 3: Thursday, 14 July 2016

8.45 Refreshments or optional tour of Parliament House (meet at front entrance)

Session 9 The role of international bodies and statutory interpretation

Session Chair: Dr Colin Huntly

9.15 *It's a small world (after all): The role of international bodies in legislative scrutiny*

Ms Lorraine Finlay, Law Lecturer, Murdoch University
(Time allocated includes time for questions)

9.50 *How far can Hansard help? The use of Parliamentary material in fixing ambiguity*

Assistant Professor Jacinta Dharmananda, University of Western Australia

(Time allocated includes time for questions)

10.25 Morning tea

Session 10 Jurisdiction round up and conference close

10.55 Introduction to session

Hon Adele Farina MLC

Jurisdiction round up

11:00 Commonwealth of Australia

11.10 New Zealand

11.20 Australian Capital

11.30 Queensland

11.40 South Australia

11.50 New South Wales

12.00 Victoria

12.10 Tasmania

12.20 Western Australia

12.30 **Conference close**

Conference concludes with drinks in the Library, Parliament House, at 12.45pm