



Senator John Williams  
Committee Chair  
Senate Standing Committee on Regulations and Ordinances  
Parliament House  
Canberra ACT 2600

13 February 2019

Dear Senator John Williams,

**The Legislative Review Committee of the South Australian Parliament's  
Submission to the Senate Standing Committee on Regulations and Ordinances'  
Parliamentary Scrutiny of Delegated Legislation Inquiry**

*Background*

1. I refer to your email dated 29 November 2018 inviting me to make a submission in relation to the Senate Standing Committee on Regulations and Ordinances' ('the Senate Committee') Inquiry into the Parliamentary Scrutiny of Delegated Legislation ('the Inquiry'). On 5 December 2018, the Legislative Review Committee of the South Australian Parliament ('the SA Committee') met and resolved to make a submission to the Inquiry. This submission is accordingly a submission of the SA Committee.
2. In response to a request from the SA Committee's Secretary on 15 January 2019, the Senate Committee's Secretary, Ms. Coles, granted the SA Committee an extension for the receipt of a submission to the Inquiry until 14 February 2019. The extension enabled the SA Committee to resolve to approve its submission on the 13 February 2019; the SA Committee's first meeting for 2019.
3. Given the Inquiry's terms of reference, the SA Committee acknowledges that the Inquiry may have broader implications for the work of scrutiny committees operating in other jurisdictions, including South Australia.
4. As the Senate Committee would be aware, South Australia established a similar Parliamentary Committee 6 years after the establishment of the Senate Committee; the Joint Committee on Subordinate Legislation. The Joint Committee on Subordinate Legislation adopted scrutiny principles drawn directly from the Senate Committee's scrutiny principles set out in Senate Standing Order 23. Following the commencement of the *Parliamentary Committees Act 1991* (SA), the SA Committee replaced the Joint Committee on Subordinate Legislation.

5. The membership of the SA Committee, which is determined in accordance with section 11 (Membership of Committee) of the *Parliamentary Committees Act 1991* (SA), currently comprises the following members of the South Australian Parliament:

The Hon. Terry Stephens MLC (the Committee's Presiding Member);  
The Hon. Irene Pnevmatikos MLC;  
The Hon. Connie Bonaros MLC;  
Mr. Josh Teague MP (Member for Heysen);  
Mr. Dan Cregan MP (Member for Kavel);  
Ms. Susan Close MP (Member for Port Adelaide).

6. The functions of the SA Committee, which are set out in section 12 (Functions of Committee) of the *Parliamentary Committees Act 1991* (SA), state as follows:

**'12—Functions of Committee**

The functions of the Legislative Review Committee are—

- (a) to inquire into, consider and report on such of the following matters as are referred to it under this Act:
  - (i) any matter concerned with legal, constitutional or parliamentary reform or with the administration of justice but excluding any matter concerned with joint standing orders of Parliament or the standing orders or rules of practice of either House;
  - (ii) any Act or subordinate legislation, or part of any Act or subordinate legislation, in respect of which provision has been made for its expiry at some future time and whether it should be allowed to expire or continue in force with or without modification or be replaced by new provisions;
  - (iii) any matter concerned with inter-governmental relations;
- (b) to inquire into, consider and report on subordinate legislation referred to it by the *Subordinate Legislation Act 1978*;
- (c) to perform such other functions as are imposed on the Committee under this or any other Act or by resolution of both Houses.'

7. The SA Committee has adopted the following scrutiny principles in relation to instruments referred to it under section 10A (Regulations to be referred to the Legislative Review Committee) of the *Subordinate Legislation Act 1978* (SA):

- (a) whether the regulations are in accord with the general objects of the enabling legislation;
- (b) whether the regulations unduly trespass on rights previously established by law or are inconsistent with the principles of natural justice, or make rights liberties or obligations dependent on non-reviewable decisions;
- (c) whether the regulations contain matter which, in the opinion of the Committee, should properly be dealt with in an Act of Parliament;



- (d) whether the regulations are in accord with the intent of the legislation under which they are made and do not have unforeseen consequences;
- (e) whether the regulations are unambiguous and drafted in a sufficiently clear and precise way;
- (f) whether the objective of the regulations could have been achieved by alternative and more effective means;
- (g) whether the regulator has assessed if the regulations are likely to result in costs which outweigh the likely benefits sought to be achieved.

8. The references to 'regulations' in the above scrutiny principles needs to be understood in light of the definition of 'regulation' in section 4 (Interpretation) of the *Subordinate Legislation Act 1978* (SA), which defines 'regulation' to mean any regulation, rule or by-law made under an Act. The effect of the definition means that the SA Committee also reviews delegated instruments including Court Rules and Council by-laws. However, the SA Committee does not review quasi legislation. It also has no role in relation to the scrutiny of Bills unless the South Australian Parliament refers a Bill to it for inquiry and report under the *Parliamentary Committees Act 1991* (SA).

9. The members of the SA Committee receive support from a Committee Secretariat. The Committee Secretariat comprises a Secretary and a Research Officer. While the Committee does not engage an independent legal adviser, both the Secretary and Research Officer have tended to hold legal qualifications.

#### *The Inquiry*

10. Accounting for the continuing effectiveness of the work of a scrutiny committee is a vexed issue. Arguments that point to the number of disallowance motions a scrutiny committee has successfully secured through a House of Parliament, as the sole measure of their effectiveness, miss much of the work a scrutiny committee does to effect changes to the content of instruments without resorting to a disallowance process for an instrument in a House of Parliament. A focus merely on those concerns a scrutiny committee has identified in instruments presented before it in a year, a month or a sitting period also do not fully capture the effectiveness of that scrutiny committee. This is, in part, because a measure of effectiveness would also need to consider the nature, response and outcome of the concerns raised. Questions may also arise in relation to those instruments not subject to concern by the scrutiny committee. In other words, has the scrutiny committee adequately screened those instruments against its criteria for evaluating instruments presented before it? Further, is the very criteria that the scrutiny committee uses to evaluate instruments adequate?

11. In addition, a scrutiny committee's effectiveness ought to take into account those matters the Executive addresses leading up to, and during, the instrument making processes. This is at least partly attributable to the notice that a scrutiny committee gives of those issues that are likely to attract the scrutiny committee's attention. In this respect, scrutiny principles function as advanced notice of a scrutiny committee's concerns to the Executive and play a useful part in safeguarding against abuse of power by the Executive. However, the need for the kind of professionalism

that staff in a drafting office bring to the drafting of instruments, which a scrutiny committee reviews, cannot be underestimated.

12. Ultimately, a scrutiny committee's continuing effectiveness is its ability to safeguard against the abuse of power by the Executive. Safeguarding against the abuse of power by the Executive requires a scrutiny committee to rigorously demand the Executive's adherence to the kind of limitations and boundaries articulated by a committee's scrutiny principles.

13. In the SA Committee's view, the adequacy or otherwise of a committee's scrutiny principles is directly related to the kinds of matters that arise for the consideration of the scrutiny committee. If a scrutiny committee's work leads the committee to conclude that its scrutiny principles are not giving adequate advanced notice of its concerns, the scrutiny principles may need updating. That said, while scrutiny principles are a useful guide to what action a scrutiny committee may take in relation to an instrument, they do not constrain the scrutiny committee to take whatever action it may consider appropriate in a particular case.

14. Further, compliance with a scrutiny committee's content requirements for reports or explanatory material, which are provided to the scrutiny committee in connection with instruments it reviews, is also an important aid to the work of a scrutiny committee. For this reason, the SA Committee is currently reviewing its content requirements for reports provided to the SA Committee by government agencies. A particular focus for the SA Committee is the early commencement of regulations in South Australia, the consultation undertaken in relation to regulations and fees and charges in regulations.

15. Content requirements for many of the reports provided to the SA Committee in relation to instruments it reviews are set out in the South Australian Department of Premier and Cabinet Circular PCO34 'Procedures in relation to the referral of subordinate legislation to the Legislative Review Committee'. For those instruments made by Courts or other bodies not subject to requirements in the Department of Premier and Cabinet Circular PCO34, the SA Committee relies on a summary of the effect of the provisions of these instruments provided by the regulator. To date, reports to the SA Committee about instruments made by Courts and other bodies have proven adequate for its purposes. However, the SA Committee has, from time to time, raised concerns in relation to the adequacy of reports from government agencies.

16. In 1998, the Hon. Angus Redford MLC tabled a paper in the Legislative Council of South Australia setting out the SA Committee's policy for its examination of regulations and noted that 'some reports have been inadequate'. In relation to consultation, Hon. Angus Redford MLC stated the following in the paper:

'The Committee considers that it is not adequate for the authors of the report to merely advise that consultation has taken place. It requires further information including the way the consultation was carried out; the results of the consultation; the issues raised; and a brief explanation of any changes to legislation because of the consultation. It is an aim of the Committee to ensure that, where practicable, parties affected by proposed regulations are consulted and given an opportunity to voice their concerns. The Committee should be made aware of those concerns and any objections at the time when it first considers the regulations'.



The SA Committee continues to receive some reports from government agencies advising no more than that consultation has taken place with particular organisations or bodies affected by a particular regulation. While the Committee Secretariat follows up on inadequate reports, the SA Committee is reviewing whether to strengthen its requirements for information about consultation and stipulate the form in which information about consultation is to be provided to the Committee.

17. At present, the SA Committee is of the view that the powers available to it under the *Parliamentary Committees Act 1991* (SA) are adequate for its purposes. However, the SA Committee would be interested in the Senate Committee's assessment of the range of matters set out in the terms of reference for its Inquiry, including whether the Senate Committee's powers remain adequate.

18. The SA Committee is open to further communications that may assist the Senate Committee to complete its Inquiry.

Yours sincerely,

**Hon. Terry Stephens MLC**  
**PRESIDING MEMBER**