THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: PuLC/EPD/CLC:JBsb060126

6 January 2026

The Hon. Natasha Maclaren-Jones, BN, MHSM MLC
Chair, Delegated Legislation Committee
Legislative Council
Parliament House
SYDNEY NSW 200

By email: dlc@parliament.nsw.gov.au

Dear Ms Maclaren-Jones,

Consolidation of the provisions of the *Interpretation Act 1987* (NSW), *Subordinate Legislation Act 1989* (NSW) and *Legislation Review Act 1987* (NSW) relating to delegated legislation

Thank you for the opportunity to contribute to the Delegated Legislation Committee's inquiry into the consolidation of the provisions of the *Interpretation Act 1987*, *Subordinate Legislation Act 1989* and the *Legislation Review Act 1987* relating to delegated legislation. The Law Society's Public, Environment, Planning and Development, and Criminal Law Committees contributed to this submission.

The use of delegated legislation is necessary for the flexible and effective operation of government, but is not subject to the same processes of open deliberation and scrutiny that characterise the treatment of primary legislation in a Westminster system. We therefore consider that a cohesive and robust framework for effective parliamentary oversight is central to ensure that delegated legislation is made in accordance with rule of law principles. This is particularly important given the extent to which delegated legislation now deals with matters of policy and substance, in addition to technical and administrative matters.

Our responses to the questions raised in the Discussion Paper are set out below:

Question 1: What are the impacts of the overlapping definitions of a 'statutory rule' across the current legislative framework?

The use of overlapping definitions of the term 'statutory rule' across the legislative framework can give rise to inconsistent scrutiny requirements. Further, the different definitions mean that the application of the accountability framework is contingent on Parliament using certain formal terms, and requiring the Governor's involvement when delegating legislative power.[1] While the Parliamentary Counsel's Office and the Legislation Review Committee are alive to the significance of these drafting choices, there are some drawbacks, including a lack of clarity, and the fact that the definitions may not capture all instruments of a legislative character. This

[1] For example, see Part 6 of the *Interpretation Act 1987* (NSW), which comprises sections 39-45A, and applies to 'statutory rules', as defined in Schedule 4 Dictionary to mean a regulation, bylaw, rule or ordinance that is made by the Governor (or is required by law to be approved or confirmed by the Governor), or a rule of court.

THE LAW SOCIETY OF NEW SOUTH WALES
170 Phillip Street, Sydney NSW 2000
ACN 000 000 699 ABN 98 696 304 966
lawsociety.com.au

T +61 2 9926 0333 F +61 2 9231 5809
E lawsociety@lawsociety.com.au

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means that the current accountability framework fails to address delegated legislation in its full scale and diversity.

Question 2: What are your views on the potential creation of a consolidated Legislation Act which would instead apply to 'instruments of a legislative character'? Do you think this is the right policy setting for the application of the three Acts?

The Law Society considers that consolidation of the delegated legislation accountability framework, which is currently distributed across the provisions of the *Interpretation Act 1987*, *Subordinate Legislation Act 1989* and *Legislation Review Act 1987*, would be beneficial. We therefore support the recommendation of Professor Gabrielle Appleby, as set out in her 2022 report for the Regulation Committee, namely that:

- A consolidated Legislation Act should contain all of the provisions relating to the making, consultation, notice, tabling, publication, disallowance, remaking, sunsetting and scrutiny of primary and delegated legislation.
- A single definition should be adopted to apply to all legislative and scrutiny frameworks.[2]

A consolidated Legislation Act would assist Members of Parliament, government officials, and the public to better understand the statutory requirements. Further, it could allow exemptions from regulatory and scrutiny frameworks to be more easily identifiable, by locating these within the one statutory source e.g., as schedules to a consolidated Legislation Act. Consolidation could also facilitate clarity on the consequences of non-compliance with various framework provisions.

Question 3: How should we assess which instruments are of a legislative character, and what should the definition of 'instruments of a legislative character' be?

The Law Society considers that the accountability framework should extend to delegated legislation as understood broadly, and with reference to substantive effect as opposed to form. The definition of 'instruments of a legislative character' should encompass all legally enforceable rules, regardless of their title, made under the authority of an Act of Parliament, that affect the rights, freedoms and/or obligations of natural and/or legal persons as a class of persons.

In her 2022 report for the Regulation Committee, Professor Appleby noted that in the case of doubt or ambiguity, the Executive should seek the advice of the Regulation Review Committee. She pointed out that '[i]t is imperative for the robustness of a democratic oversight regime that it is the Parliament, and not the Executive, who has the final say as to when an instrument is or is not of a legislative character.'[3]

We agree with this view, but suggest that it may be considered preferable for the Delegated Legislation Committee to have primary carriage of this scrutiny exercise. This would align with the constitutional role of the Legislative Council with respect to responsible and accountable government.[4] Futher, the resolution

[2] Professor Gabrielle Appleby, Discussion Paper, Inquiry into options for reform of the management of delegated legislation in New South Wales, May 2022, 17.
[3] Ibid.,18.
[4] As noted in Parliament of NSW, *New South Wales Legislative Council Practice*, Federation Press, Second Edition, the Legislative Council functions as the 'House of Review by scrutinising the actions of the executive government and holding

establishing the Delegated Legislation Committee already requires it '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 s 9(1)(b) of the *Legislation Review Act 1987*'.[5]

This raises the related question as to whether the Legislation Review Committee should continue to be required to scrutinise disallowable regulations under s 9(1)(b) of the *Legislation Review Act 1987*. While this could be viewed as a duplication of work undertaken by the Delegated Legislation Committee, rather than removing the function entirely, it may be prudent to retain a discretion for the Legislation Review Committee to scrutinise disallowable instruments if no systemic review is otherwise being undertaken.

Question 4: If a set of criteria were established to assess which instruments should be exempt from regulatory and scrutiny frameworks, what should that criteria consist of?

While we appreciate that the Government requires a certain level of flexibility in applying the requirements on rule-making processes across the diverse contexts of delegated legislation, it is important to ensure that exemptions are not applied liberally without the necessary safeguards. As such, we support Recommendation 4 of the 2022 Report of the Delegation Review Committee (**2022 Report**), as follows:

- Exemptions should not be granted where instruments adversely affect rights, liberties, duties and obligations.
- Exemptions should not be granted unless there is an alternative form of accountability.
- Exemptions should not, except in exceptional circumstances, be granted for instruments made under 'Henry VIII provisions'.[6]

In considering an 'alternative form of accountability', it would be useful to consider whether safeguards such as disallowance and/or sunsetting requirements apply.

It may be desirable in any amendment to include a provision similar to s 14(2) of the *Subordinate Legislation Act 1989*, which requires consultation with the Legislation Review Committee before amending Schedule 3 (Matters not requiring Regulatory Impact Statements) and Schedule 4 (Excluded Instruments).

Question 5: Should documents that are incorporated by an instrument of a legislative character be treated as an instrument of a legislative character and therefore be subject to regulatory and oversight requirements?

Section 42(1) of the *Interpretation Act 1987* currently provides that the incorporation of non-legislative instruments by delegated legislation will result in those instruments becoming legally binding. This does not require parliamentary scrutiny of such documents. We agree with Recommendation 12 of the 2022 Report that incorporation of non-legislative documents into legislative instruments should only be permitted where the

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it to account. Although the government is made in the Lower House, under the system of responsible government in New South Wales, the government is nevertheless also accountable to the Council, as was observed by the High Court in *Egan v Willis*.'

[5] NSW, Delegated Legislation Committee, Delegated Legislation Committee resolution 58th Parliament, resolved 10 May 2023.

[6] Legislative Council, Delegated Legislation Committee, 'Options for reform of the management of delegated legislation in New South Wales' (September 2022), Recommendation 4 (**2022 Report**). A Henry VIII clause refers to provisions of an Act of Parliament that empower delegated legislation to amend that Act/another piece of primary legislation.

relevant primary legislation delegating authority expressly provides for this.[7] On balance, we consider this is a preferable approach for NSW, and note that it would bring NSW substantially in line with s 14(2) of the *Legislation Act 2003* (Cth) and s 46AA of the *Acts Interpretation Act 1901* (Cth).

Question 6: Should environmental planning instruments be treated as instruments of a legislative character and therefore be subject to regulatory and oversight requirements, for example, Regulatory Impact Statements and public consultation?

Where appropriate, the Law Society supports consistency across different classes of instruments. In our view, environmental planning instruments should be treated as instruments of a legislative character, and therefore be subject to regulatory and oversight requirements, such as Regulatory Impact Statements and public consultation. We consider such processes constitute an appropriate way of assessing instruments, maintaining accountability, and building public trust and confidence by ensuring people have a chance to be heard through proper consultation.

We note the comments in paragraph 3.21 of the Discussion Paper in relation to the consultation and review requirements for local environmental plans being 'more robust' than State environmental planning policies (**SEPPs**). Having regard to the broad implications of reforms, such as the Low and Mid-Rise Housing Policy under Chapter 6 of the *State Environmental Planning Policy (Housing) 2021*, it is difficult to justify the basis on which SEPP consultation requirements should be relaxed.[8]

We note that s 3.30 of the *Environmental Planning and Assessment Act 1979* (NSW) in Division 3.3 Environmental planning instruments—SEPPs provides:

> **3.30 Consultation requirements** (cf previous s 38)
> (1) Before recommending the making of an environmental planning instrument by the Governor, the Minister is to take such steps, if any, as the Minister considers appropriate or necessary—
> (a) to publicise an explanation of the intended effect of the proposed instrument, and
> (b) to seek and consider submissions from the public on the matter.

While the option to provide an explanation of the effect of the proposed instrument for public consultation is useful, in our view it would be preferable for public consultation to occur in relation to the more detailed provisions of the draft SEPP itself.

For this reason, we suggest Regulatory Impact Statements should be required for environmental planning instruments. In our view, s 6 of the *Subordinate Legislation Act 1989* is sufficient to ensure 'machinery' or trivial matters are not delayed by the requirement to issue a Regulatory Impact Statement.

Question 7: Are there any other classes of 'instruments of a legislative character' not explicitly referred to in this discussion paper that should be exempt from any or all the requirements of the three Acts insofar as they relate to delegated legislation?

[7] Ibid., Recommendation 12.
[8] Note that the insertion of Chapter 6 was achieved through amendment of the *State Environmental Planning Policy (Housing) 2021* rather than by the making of a new SEPP.

As noted above, the Law Society supports the suggestion by Professor Appleby, as contained in the 2022 Report, on having limited exceptions in the primary legislation to be guided by the following criteria:

- exemptions should not be granted where instruments adversely affect rights, liberties, duties and obligations;
- exemptions should not be granted unless there is an alternative form of accountability;
- exemptions should never be granted for instruments made under Henry VIII provisions.[9]

Of the above, inclusion in primary legislation is the only route by which the Parliament can exercise oversight of exempted instruments. In addition, it is critical that any exemptions are clearly defined, easily identifiable, and that provision is made for the resolution of any doubt or ambiguity. It would also be helpful for exemptions to be addressed in the Explanatory Note to the primary legislation.

Question 8: Are Regulatory Impact Statements (RIS) effective in promoting consultation with stakeholders who are likely to be impacted by proposed statutory rules? Should the RIS process be amended if it were expanded to apply to all instruments of a legislative character?

We consider that RIS are important, due to the way in which they help to ensure consultation with persons impacted by changes to proposed statutory rules, and thereby inform Government agencies of the range of views within the community, including possible unforeseen consequences of the relevant legislation. However, we suggest that it would be inappropriate for the RIS process to apply to all instruments of legislative character. For example, a RIS may not be necessary where a regulation is simply repealed or is amended in a non-substantive manner.

Question 9: Should legislative requirements in New South Wales include requirements that NSW Parliament be informed about the consultation undertaken in the making of delegated legislation?

We support the adoption of consultation requirements in NSW whereby the Parliament is informed about the consultation undertaken in the making of delegated legislation. We consider the approach adopted in s 15J(2) of the *Legislation Act 2003* (Cth) is appropriate, which provides that the Explanatory Statement for a legislative instrument must contain a description of consultation undertaken in the making of the instrument, or an explanation as to why no such consultation was undertaken.

Question 10: Should the current process of, and requirements relating to, tabling statutory rules in Parliament be amended, particularly if it were to apply to all instruments of a legislative character? If so, how?

The Law Society agrees with the recommendation of the Delegated Legislation Committee in the 2022 report that all legislative instruments be published on the NSW legislation website as soon as they are made, and that the website clearly indicates where those instruments are exempted from any part of the regulatory and scrutiny framework.[10]

[9] 2022 Report (above n 5) Recommendation 4.
[10] Ibid., Recommendation 5.

In addition, we suggest that consideration be given to enacting a provision similar to that contained within s 38 of the *Legislation Act 2003* (Cth), which would require the Parliamentary Counsel's Office, or the responsible Minister, to arrange for a copy of each registered legislative instrument to be tabled within six sitting days after its registration. If this does not occur, the instrument is repealed immediately after the last day for it to be tabled.

Question 11: Could improvements to the system of publication of delegated legislation be made, particularly in relation to instruments of a legislative character that are not currently required to be published on the NSW legislation website?

In our view, publication should apply to all instruments of a legislative character, as defined. It would be preferable for these to be published in the same place, so that they are easy to find, track and keep up to date. In addition, we suggest that it would be helpful, as occurs on the Federal Register of Legislation, to contain sections on sunsetting (including future sunsetting dates and instruments exempt from sunsetting) and disallowance (including instruments currently open for disallowance, exempt from disallowance and disallowed). We note that additional resources may need to the provided to the Parliamentary Counsel's Office to facilitate these changes, and their ongoing maintenance.

Question 12: If incorporated documents were to be treated as instruments of a legislative character, should these documents be subjected to the same publication requirements as other instruments? If so, how should such a requirement operate in practice?

As noted in our response to Question 5, we consider that incorporation of non-legislative documents into legislative instruments should only be permitted where the relevant primary legislation delegating authority expressly provides for this. In these circumstances, it is appropriate to publish such documents so that the full scope of the instrument may properly be understood.

Question 13: Would New South Wales benefit from a requirement that a period of time must pass between the publication of a delegated instrument and its commencement? (a) Would delayed commencement provisions be appropriate to apply to all classes of instruments of a legislative character? (b) If not, which classes of instruments should be exempt?

Whether NSW would benefit from a requirement that a period of time must pass between the publication of a delegated instrument and its commencement is likely to vary, depending on the nature of the delegated instrument and the circumstances of its introduction.

The Law Society has previously expressed concern about changes to the prescribed content of planning certificates appearing on the legislation website and taking effect with little or no notice. In our view, it is problematic for any amendment to the content of planning certificates to take effect without sufficient lead time. When such changes are made, councils need time to implement changes to their systems for generating planning certificates, and the time needed may vary across councils.

For vendors of residential property, changes to the content of planning certificates, without any notice, create a significant risk under the vendor warranty regime. Schedule 2, Part 1 of the *Conveyancing (Sale of Land) Regulation 2022* (NSW) (**CSLR**), as made under s 52A(2)(b) of the *Conveyancing Act 1919* (NSW), provides:

> The vendor warrants, as at the date of the contract and except as disclosed in the contract, that—
> …
> (c) the planning certificate attached to the contract **specifies the status of the land** in relation to the matters set out in the *Environmental Planning and Assessment Regulation 2021*, Schedule 2, and … (**emphasis added**)

A vendor who does not disclose the true status of a matter affecting the land runs the risk that the purchaser may rescind the contract for breach of this prescribed warranty if the purchaser can satisfy the grounds of s 21(3) of the CSLR, namely that:

> (a) the breach constitutes a failure to disclose to the purchaser the existence of a matter affecting the land, and
> (b) the purchaser was unaware of the existence of the matter when the contract or option was entered, and
> (c) the purchaser would not have entered into the contract or option had the purchaser been aware of the matter, …

We therefore suggest that consideration should be given to mandating a minimum lead time for the commencement of any changes to the prescribed content of planning certificates under s 10.7 of the *Environmental Planning and Assessment Act 1979* (NSW).

For other instruments, it may be appropriate to retain a default position of commencement on publication, with some flexibility provided in certain circumstances, for example taking account of the likely notice reasonably required by those whose rights, freedoms and/or obligations are potentially affected.

Question 14: Does the current disallowance process contained in the *Interpretation Act 1987* adequately achieve the goals of Parliamentary oversight over delegated legislation in New South Wales, particularly if the process were to apply to all instruments of a legislative character? If not, what changes should be made?

A statutory rule may be disallowed following the passing of a disallowance resolution by a House of Parliament under Part 6 of the *Interpretation Act 1987* or under the provisions of a primary Act. The consequence of a disallowance resolution is that the statutory rule is repealed, and the legislation in force before the changes made by the statutory rule are reinstated.[11] Section 8 of the *Subordinate Legislation Act 1989* prevents the remaking of a disallowed statutory rule (in substantially the same terms) for four months.

We agree with the assessment of the Delegated Legislation Committee in 2022 that these provisions serve as useful 'checks and balances' on the use of delegated power.[12] We suggest that an additional 'check and balance' would be the introduction of a provision similar to s 42(2) of the *Legislative Instruments Act 2003* (Cth), which provides for the automatic disallowance of a legislative instrument where a notice of disallowance has not been dealt with within 15 sitting days.

[11] See s 41 of the *Interpretation Act 1987* (NSW).
[12] 2022 Report (above n 5) 33.

Question 15 - Should any classes of instruments of a legislative character that are not currently subject to the disallowance process continue to be exempt from the process?

Paragraphs 3.18 and 3.19 of the Discussion Paper raise the question of whether environmental planning instruments should be disallowable under s 41 of the *Interpretation Act 1987*. We agree with the view that disallowance of environmental planning instruments has the potential to 'create uncertainty and inconsistency in the planning system'.[13] An example could be the impact on a conveyancing transaction where the planning certificate attached to the contract listed a SEPP that had been disallowed. As a result of the disallowance, unbeknown to the vendor, the planning certificate would no longer disclose the true status of the land, as at the date of the contract, for vendor warranty purposes. If the purchaser can satisfy the grounds of s 21(3) of the CSLR, there is a risk that the purchaser may rescind the contract.[14]

We therefore suggest that the potential for uncertainty in relation to the disallowance of environmental planning instruments is significant, including in relation to conveyancing. We do not support the ability to disallow environmental planning instruments.

Question 16: Could the system of automatic repeal of regulations in New South Wales after five years be improved, particularly if the application of the system was extended to apply to all instruments of a legislative character?

We suggest there may be some merit in considering a tenth anniversary repeal rule for regulations in general, as discussed at paragraph 3.61 of the Discussion Paper. This would bring NSW in line with Victoria, Queensland, South Australia, Tasmania and the Commonwealth.

Question 17: Should environmental planning instruments be subject to or exempt from the system of automatic repeals if these instruments were to be treated as instruments of a legislative character?

In our view, environmental planning instruments should be exempt from the system of automatic repeals, as this could give rise to unnecessary uncertainty in the planning system.

Question 18: What are some potential mechanisms to improve, streamline or expand the current processes for scrutinising delegated legislation in New South Wales, and how can these processes be provided for in a consolidated Legislation Act?

The Law Society notes that the legislative scrutiny function in NSW is well served by the work of the joint Legislation Review Committee and the Legislative Council Delegated Legislation Committee. However, given the apparent rise in delegated legislation making in NSW, it is important to ensure that these processes remain sufficiently robust.

[13] Paragraph 3.19 of the Discussion Paper, which references the Report of the Regulation Committee, *Environmental Planning Instruments (SEPPs)*, Report 9, August 2021.
[14] See the earlier discussion of the vendor warranty regime in our response to Question 13.

We suggest that there may be a role for the Parliamentary Counsel's Office (to the extent that it is not already involved) to review the drafting of delegated legislation for the purpose of reducing ambiguity and checking that the delegated legislation as drafted is compatible with the enabling legislation.

As a long-standing supporter of standalone human rights legislation for NSW, the Law Society notes that a NSW Human Rights Act could improve scrutiny of human rights issues raised in the context of delegated legislation.[15] We suggest that this would be of benefit to the broader culture of law-making in this state, as the human rights impacts of delegated instruments would be scrutinised in a more systematic function, for example by a legislative committee with a dedicated human rights function.

Question 19: Should there be specific requirements for a regulation, or any other instrument of a legislative character, made under a 'Henry VIII provision' to be identified? If so, what should the requirements be?

'Henry VIII provisions' are a form of delegated legislation which allow amendments to an Act of Parliament by regulation. These provisions deserve heightened scrutiny due to the power that they vest in the Executive without the oversight of the Parliament.

Legislative scrutiny committees perform the important function of reporting and commenting on the appropriateness of a proposed delegation of legislative power, including by highlighting the inclusion of Henry VIII provisions. In NSW, the NSW Legislation Review Committee typically performs this role through its Legislation Review Digests.

Requiring identification of Henry VIII provisions in the Explanatory Note to a Bill would likely draw more prominent attention to the use of such provisions, which may lead to helpful public debate. We also suggest that mandated identification of Henry VIII provisions could be accompanied by further information that could assist members of the Parliament and public to identify their breadth and scrutinise them with greater rigour, for example, by identifying the laws which are able to be amended by the Henry VIII provision, and any time limits on the exercise of the power contained in those provisions, including whether they can be extended. Further, we support inclusion of an explanatory text as to why the delegation contained in the Henry VIII provision is justified.

It may also be useful for the Parliamentary Research Service to produce educational material on Henry VIII clauses to ensure all parliamentarians are aware of their significance. The creation of a separate table on the NSW legislation website, identifying and providing links to Henry VIII clauses, might also assist in understanding their extent and continuing utility.

Question 20. How should regulation-making powers that appear to include a time limit be interpreted and scrutinised?

Regulation-making powers that contain a time limit are generally more limited in effect than those where a time limit is not prescribed. However, as identified in the Discussion Paper at paragraph 3.76, there are

[15] Law Society of NSW, 'Human Rights Legislation for NSW', updated September 2025.

examples of regulation-making powers which, on their face, appear transitional in nature but which have been relied upon beyond the contemplated time limit.

It may be useful to include a note where a regulation-making power is intended as a transitional, non-permanent measure within the timeframe specified. This would clarify, albeit in the explanatory materials, the time-limited nature of the proposed delegation and assist in clarifying uncertainties that can arise, such as those set out in the Discussion Paper in relation to s 107(5A) of *the Design and Building Practitioners Act 2020* (NSW).

Question 21: Should there be a legislated maximum percentage of the maximum penalty for an offence that may be prescribed as the amount payable for a penalty notice for that offence?

The issue of inconsistent penalty notice amounts will likely not be fixed by a maximum percentage approach alone, due to the broad range of maximum financial penalties for criminal offences. By way of example, we note that some offences, such as corporate environmental crimes, can carry maximum financial penalties in the millions of dollars, whereas at the other end of the spectrum, some summary offences carry maximum financial penalties of less than $1000.

A possible solution may be legislating the maximum percentage of the maximum penalty for an offence or a dollar amount, whichever is lower. However, we encourage broader stakeholder consultation on this issue, particularly given the disproportionate financial impact penalty notices can have on disadvantaged people.

Thank you for the opportunity to comment. Questions at first instance may be directed to Sophie Bathurst, Senior Policy Lawyer, at (02) 9926 0285 or Sophie.Bathurst@lawsociety.com.au.

Yours sincerely,

Ronan MacSweeney
President