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17 May 2021

South Australian Productivity Commission  
30 Wakefield St  
Adelaide SA 5000

**SENT BY E-MAIL TO [sapc@sa.gov.au](mailto:sapc@sa.gov.au)**

Dear South Australian Productivity Commission:

**Re: Inquiry into reform of South Australia's regulatory framework**

I would like to thank you for the opportunity to make a written submission in connection with your inquiry into the reform of South Australia's regulatory framework.

I recently authored an article, entitled "Time to Take Lawmaking Seriously: The Problem of Delegated Legislation in South Australia", which sets out my concerns with the current approach to the making of delegated legislation in South Australia. The article will be published in a forthcoming issue of the *Law Society Bulletin*. With permission from the *Bulletin's* editor, I have attached a draft of the article for your information. I hope you find this information useful in connection with your inquiry.

I would be happy to clarify or expand upon any aspect of this written submission.

Thank you again for the opportunity to contribute to this important inquiry.

Yours sincerely,

Lorne Neudorf  
Associate Professor

## **Time to Take Lawmaking Seriously: The Problem of Delegated Legislation in South Australia**

*Lorne Neudorf*

The Parliament of South Australia plays a key constitutional role as the state's lawmaker-in-chief, operating as the forum for the exercise of legislative power in a democratic society founded on the rule of law. Since its establishment in 1857, the South Australian Parliament has been at the cutting edge of some of the most important political and social changes in Australia and indeed the world. It enacted legislation that made South Australia the first colonial government to grant women both the right to vote and stand for election (1895) and the first Australian state to decriminalise sexual activity between consenting males (1975), for which the criminal law had previously prescribed severe punishments including death, life imprisonment in solitary confinement, hard labour and whipping.

Because of the important interests at stake in lawmaking, the parliamentary process is designed to help lawmakers appreciate the implications of proposed legislation. Significant measures of accountability and transparency are part of the legislative process that must be followed before a bill can become law. The process requires public readings, the publication of draft legislative text, open debate by elected members that represent constituencies across the state, committee study where the views of experts and citizens are expressed, and the recorded votes of all members in each of the two Houses. The legislative process not only helps lawmakers better understand their legislative choices, it safeguards the legitimacy of Parliament as lawmaker for a diverse society. It also enhances the quality of legislative outcomes by subjecting policy and legislative text to multiple rounds of scrutiny from diverse perspectives, including those of members of different political parties that collectively represent a cross-section of the community.

Over the past few decades, there has been a shift away from parliamentary lawmaking to an alternative lawmaking process. This trend threatens parliament's role as lawmaker-in-chief and undermines democratic values and institutions. It can be seen throughout Australia and in other Westminster parliaments including those in Canada, the United Kingdom and New Zealand. This alternative form of lawmaking side-steps the parliamentary process by having the executive branch of government make laws directly. Such laws have the same legal force as legislation enacted by parliament. It occurs through the parliamentary delegation of legislative powers. Almost all bills include significant delegations that permit the executive to

make delegated legislation directly. These delegations may allow the executive to fill in the details of a statutory scheme, but they can also be drafted in sweeping terms that authorise the executive to make and implement significant policy choices. Bills often allow the executive to make laws that are ‘necessary or expedient for the purposes of this Act’, providing little guidance on the kinds of delegated laws that might later be made and little opportunity for a reviewing court to impose meaningful limits on the scope of the delegated power.

South Australia is no exception to the general trend. Delegated legislation is the principal way that new law is made in the state. Last year, 88% of all new laws made were delegated laws.<sup>1</sup> While the pandemic has prompted an even greater reliance on delegated legislation to respond quickly to changing circumstances, the number of delegated laws overshadowed that of primary legislation in South Australia well before COVID-19: over the past three years, 86% of all new laws made in the state were in the form of delegated legislation. In terms of the total number of pages of legislative text, delegated legislation comprised nearly 70% of the statute book over the same period of time.

To be made, delegated laws need to follow only a cursory process set out in the *Subordinate Legislation Act 1978*. The Act imposes none of the robust accountability and transparency measures found in the ordinary parliamentary process: for delegated legislation, there is no public reading, no publication of draft legislative text, no open debate, no committee study to hear from experts and citizens, and no recorded vote. In fact, there is no vote at all because lawmaking decisions are made in secret, behind closed doors. Discussions and deliberations by the cabinet relating to delegated legislation are confidential and protected by legal privilege. The Act imposes no requirements for consultation of any kind before new delegated laws are made. Details of any consultation carried out are not published. It is not possible to see what information was relied upon by the executive in making legislative choices or who might have influenced them. Was the information fair and accurate? Which individuals and groups were consulted? Were any concerns raised? If so, were the concerns addressed? Under the Act, none of these questions need to be answered. In making delegated legislation, the executive is not required to publish a statement to explain the purpose of the new law, or even explain why a change to the law might be desirable.

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<sup>1</sup> See Lorne Neudorf, ‘Strengthening the Scrutiny of Delegated Legislation’ (Presentation to the South Australian Legislative Review Committee, 2 February 2021) slides and Hansard transcript available at <https://www.parliament.sa.gov.au/Committees/lrc> (located in the sub-folder ‘1 Committee Information’ / ‘Committee Performance’).

Without this context, it is sometimes difficult to work out whether a delegated law has a rational purpose and whether its text is connected to that purpose. And despite the Act imposing a default rule of four months' commencement for delegated legislation, almost all new laws invoke an exemption that permits them to come into force immediately, on the very day on which they are made. In South Australia, delegated legislation is made by the government as a *fait accompli*.

The only parliamentary oversight of delegated legislation takes place in the over-burdened and under-resourced Legislative Review Committee.<sup>2</sup> Consisting of six members drawn from both Houses, the Committee scrutinises all 'rules, regulations and by-laws' that are required to be tabled in Parliament – a Herculean task if there ever was one. Last year, more than 1,400 pages of delegated legislation were made in 324 different instruments, which does not include all the new bylaws made by the state's 68 local councils or rules of court that are also scrutinised by the Committee. With the support of one secretary in relation to its scrutiny function, the Committee is expected to examine each and every line of this morass of often highly technical legislative text against 38 different considerations, including: whether it infringes the separation of powers; is inconsistent with the rule of law; is in accordance with its enabling legislation and the requirements of any other Act; has certainty of meaning and operation; fails to protect privacy; authorises the use of force, detention or search and seizure; has retrospective effect; imposes strict or absolute liability; reverses the evidential burden of proof; abrogates privileges including the privilege against self-incrimination; interferes with property rights; intends to bring about radical changes in relationships or attitudes of people in an aspect of the life of the community; has unforeseen consequences; is inconsistent with natural justice; has costs that outweigh the benefits; imposes excessive fees and charges; authorises excessive discretionary decisions; provides adequate notice to persons who may be affected; and restricts independent merits review of discretionary decisions affecting rights, interests or obligations.

In effect, the Committee is tasked with carrying out the *entire parliamentary process* for all delegated legislation subject to scrutiny, giving it one of the most critical roles in upholding democratic values for most laws made in South Australia. Inevitably, it is snowed under by a ceaseless flurry of new delegated legislation. While the Committee does what it can within its situational and operational constraints (including occasionally introducing

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<sup>2</sup> It should be noted that the Committee is restricted by the *Subordinate Legislation Act 1978* to the kinds of instruments that it can scrutinise. Such instruments must be called a 'regulation, rule or by-law': s 4 'regulation'.

notices of motion to disallow delegated legislation), it is ultimately hamstrung by the *Subordinate Legislation Act 1978*'s paper-thin process for making delegated legislation that fails to impose adequate and meaningful controls on executive lawmaking. Under the Act's framework and with few resources, it is not possible for the Committee to achieve the minimum levels of accountability and transparency for lawmaking that are expected in a democratic society.

Three changes are urgently needed to address this problem. First, the scheme for making delegated legislation in South Australia under the *Subordinate Legislation Act 1978* needs a major overhaul to beef up the standards and requirements for making delegated laws. The delegated lawmaking schemes at the Commonwealth and in other jurisdictions provide useful comparative guidance on these necessary reforms. Second, a specialist bills committee is needed to identify and challenge inappropriate delegations of legislative power. Parliament must reassert itself as the chief lawmaking institution and prevent the continued erosion of its legislative powers and role. If Parliament is not willing to act, courts may have to. In a recent judgment of the Supreme Court of Canada, Justice Côté would have held certain legislative delegations unconstitutional on the basis that they conferred 'inordinate discretion in the executive with no meaningful checks' on their use.<sup>3</sup> The statute at issue in that case 'knows no bounds' as it 'set forth a wholly-unfettered grant of broad discretion' to the executive.<sup>4</sup> In Justice Côté's view, the delegations infringed the constitutional principles of parliamentary sovereignty, the separation of powers and the rule of law and were 'so inconsistent with our system of democracy that they are independently unconstitutional'.<sup>5</sup> Third, the Committee is in desperate need of additional staffing resources to allow it to effectively provide parliamentary oversight of the most significant source of law in South Australia. Again, comparative benchmarking against the Commonwealth and other jurisdictions will indicate the appropriate level of resources that are needed.

The Parliament of South Australia's traditional role of providing a democratic forum for the contestation of ideas and perspectives is at risk because of an alternative lawmaking process that is used to make the vast majority of laws outside Parliament. While the trend toward delegation may be unstoppable, reforms can establish an appropriately robust delegated lawmaking process that meets requisite standards of accountability and transparency for lawmaking in a democratic society. Effective parliamentary oversight

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<sup>3</sup> *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at [223].

<sup>4</sup> *Ibid*, [230], [240].

<sup>5</sup> *Ibid*, [241].

through an appropriately resourced committee is also essential to maintain the constitutional role of Parliament as lawmaker-in-chief and ultimately the legitimacy of delegated laws. Unfortunately, the Parliament of South Australia has fallen behind other jurisdictions. The erosion of Parliament's place must be reversed. It must reassert itself and reinvigorate the process by which delegated legislation is made and scrutinised. But why strive for the bare minimum or merely seek to catch-up with others? Parliament should restore its once-proud tradition to lead the way in the promotion of democratic values. Two inquiries presently underway – the inquiry of the Effectiveness of the Current System of Parliamentary Committees parliamentary committee and the South Australian Productivity Commission's inquiry into the reform of the state's regulatory framework – have the potential to initiate the process of bringing about positive change. While important, the challenges of delegated legislation are unlikely to be fully addressed by the reform recommendations of any single inquiry. To show leadership, more fundamental change is needed. It will require a wholesale re-conceptualisation of how we make laws.

*Lorne Neudorf is an Associate Professor at the Adelaide Law School, University of Adelaide.*