

27 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 would like to make this submission in addition to my original submission of 17 May 2021 to provide further evidence of the use of delegated legislation in South Australia and to discuss some key issues.

Below is both quantitative and qualitative information relating to lawmaking in South Australia for the year 2020. This data includes only the final version of an enactment where that enactment was amended or otherwise changed over the course of the year. The data for regulations does not include bylaws made by local councils or other instruments that are not published on the SA Legislation website.

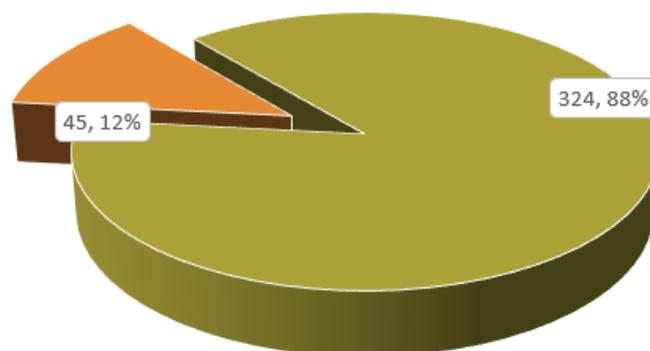
**South Australia: 2020 Acts**

- 45 total **number of Acts** made by Parliament
- 346 total **number of pages in Acts** made by Parliament
- **Subject matter of Acts**
  - Acts were made in relation to public health including COVID-19 measures; criminal law and sentencing; local government; appropriation, budget and supply; planning, development and infrastructure; coroners; fire and emergency services; charitable institutions and trusts; genetically modified crops; courts and justice; railways; labour; liquor licensing; motor vehicles and road traffic; housing and construction; emergency management; energy including electricity and gas; trading; plastics; procurement; legal practitioners; parliament; teachers; controlled substances; training and skills development; and defamation.

## South Australia: 2020 Regulations

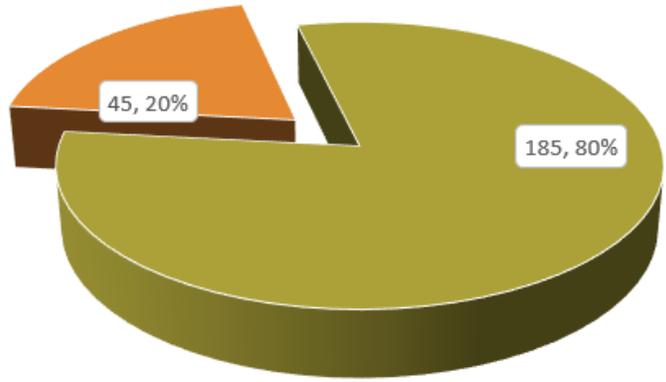
- 324 total **number of Regulations** published on SA Legislation website
  - 185 total **number of Regulations** published on SA Legislation website *excluding* those setting fees (as indicated by the title)
- 1426 total **number of pages in Regulations** published on SA Legislation website
  - 1055 total **number of pages in Regulations** published on SA Legislation website *excluding* those setting fees (as indicated by the title)
- **Subject matter of Regulations**
  - Regulations were made in relation to criminal law; energy including electricity, gas and petroleum; planning, development and infrastructure; local government; the ombudsman; freedom of information; corruption; transportation; architects; building works; pesticides; dangerous substances; plumbers, gas fitters and electricians; vehicle dealerships; health practitioners; correctional services; genetically modified crops; bushfires; public health including COVID-19 measures; delivery of goods; children and young people; emergency management; passenger transport; disability services; landscapes; gambling; heritage places; taxation; produce and agriculture; superannuation; legal practitioners; fisheries; liquor licensing; fines enforcement; courts and justice; workplace injuries; education; development; controlled substances; environment; surrogacy; land valuation and acquisition; labour; surveys; urban renewal; dolphin sanctuaries; subordinate legislation; procurement; surveillance; motor vehicles and road traffic; concessions; data sharing; native vegetation; work health and safety; railways; national parks; and mining.

2020 Total Enactments



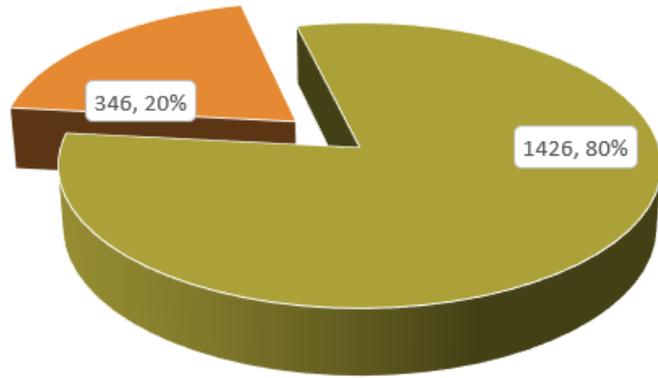
■ Primary Legislation   ■ Delegated Legislation

2020 Total Enactments  
Excluding Fee-Setting Regulations



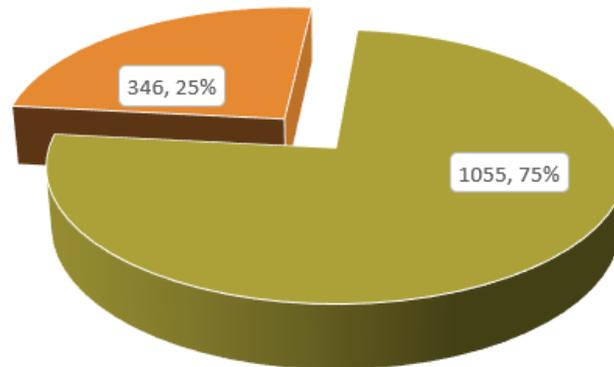
■ Primary Legislation ■ Delegated Legislation

2020 Total Pages of Legislative Text



■ Primary Legislation ■ Delegated Legislation

## 2020 Total Pages of Legislative Text Excluding Fee-Setting Regulations



■ Primary Legislation ■ Delegated Legislation

It is clear that delegated legislation is the principal way that law is already made in South Australia. It overwhelmingly and disproportionately fills the statute book (as compared to primary legislation). Its reach is vast, and it is currently used to regulate every conceivable area of law.

I understand from the Issues Paper that this inquiry is considering a recommendation to unlock key provisions regulating businesses from primary legislation by replacing them with new provisions that would delegate lawmaking authority to the executive. This would provide further executive discretion to make laws outside Parliament and allow for 'maximum flexibility' in the interests of efficiency. This approach is said to be good for business as it allows regulators to respond quickly to changing conditions and so-called 'black swan' events. The parliamentary process may be seen by regulators as too time-consuming and cumbersome for making rules that affect businesses. Parliament should therefore loosen its grip and let the executive make such laws directly.

Unfortunately, this approach evinces a fundamental misunderstanding of democratic principles and the constitutional role of Parliament as lawmaker-in-chief. If adopted, it would serve to aggrandize the role of regulators and their power and control over important areas of law in the absence of appropriate and effective measures of accountability and transparency. Without strengthened accountability mechanisms, such as enhanced parliamentary oversight, I would submit that this approach is not in the public interest.

Its premise is also questionable. It was claimed in the Issues Paper that in South Australia, there are currently more provisions regulating businesses in primary legislation as opposed to delegated legislation.<sup>1</sup> No evidence was provided in support of this empirical claim. It is also contradicted by the evidence of both the quantity and substance of lawmaking in South Australia as set out above.

There are other problems with this approach.

First, the suggestion that there should be greater use of delegated legislation in South Australia was based in part on a purported benchmarking of the state against the Commonwealth.<sup>2</sup> Again, no supporting data was provided. Further, any comparison with the Commonwealth would need to take into account the broader lawmaking context in that jurisdiction.

Unlike South Australia, the Commonwealth has in place robust parliamentary scrutiny mechanisms in relation to both delegated legislation and enabling provisions in primary legislation.

For instance, the Senate Standing Committee for the **Scrutiny of Delegated Legislation** examines each new instrument of a legislative character against a range of technical scrutiny principles. It is well-resourced in terms of staff and engages a legal advisor to assist it in its work. The Committee meets regularly, even when Parliament is not sitting. It frequently publishes detailed reports on its work, including the *Delegated Legislation Monitor*, a *Disallowance Alert*, an *Index of Instruments*, a listing of COVID-19 instruments, and annual reports that summarise its work over the past year. These publications disclose concerns that the Committee raised with ministers, departments and agencies about delegated legislation and what was done to resolve these concerns. The Committee's correspondence with ministers is also published.

Although it carries out an *ex post facto* review of delegated legislation, the Committee is effective in helping to achieve higher quality legislative outcomes. In 2019, it identified 276 issues in newly made delegated legislation.<sup>3</sup> In many cases, undertakings were made by the minister or agency to amend or revoke the instrument or publish further explanatory material. In some cases, the enabling legislation was amended.<sup>4</sup>

The Committee also carries out inquiries into matters of concern:

- In 2019, it delivered a 166-page report on its inquiry into the parliamentary scrutiny of delegated legislation in which it made 22 recommendations (most of

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<sup>1</sup> South Australian Productivity Commission, *Issues Paper: Inquiry into reform of South Australia's regulatory framework* (31 March 2021) at 16 ("SA appears to have a history of incorporating significant regulatory requirements in primary legislation").

<sup>2</sup> *Ibid.*

<sup>3</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation, *Annual Report 2019* (17 June 2020) at 16.

<sup>4</sup> *Ibid* at 17-21.

which have since been adopted) and took 11 actions to strengthen its scrutiny role and processes;<sup>5</sup>

- In 2020, it delivered a 152-page interim report on its inquiry into the use of exemptions by the government to avoid parliamentary scrutiny in which it made 18 recommendations;<sup>6</sup> and
- In 2021, it delivered a 134-page final report on its inquiry into the use of exemptions by the government to avoid parliamentary scrutiny in which it made 11 recommendations.<sup>7</sup>

The Committee has published a 38-page guideline document that provides practical information to stakeholders (including regulators) to help them better understand the scrutiny role of the Committee and how it applies its scrutiny principles in practice.<sup>8</sup>

The Senate Standing Committee for the **Scrutiny of Bills** examines each new bill introduced into Parliament. Its scrutiny principles include “whether any delegation of legislative powers is appropriate”.<sup>9</sup> Its reports demonstrate the importance of this scrutiny function by a specialist committee to identify and raise concerns with problematic delegations at the bill stage. In 2020, the most common problem encountered by the Committee was the inappropriate delegation of legislative power (making up 33 percent of its scrutiny concerns).<sup>10</sup> Its scrutiny work resulted in amendments to bills and the provision of new explanatory material.<sup>11</sup>

The two Senate committees work together as they have complementary roles. As noted in the 2020 annual report of the Scrutiny of Bills Committee:

The committee regularly draws certain matters to the attention of the Scrutiny of Delegated Legislation Committee, including provisions of bills which authorise a significant delegation of legislative power or seek to modify the usual disallowance processes for legislative instruments. In 2020, the committee drew 55 bills to the attention of the Scrutiny of Delegated Legislation Committee. When the committee draws such provisions to the attention of the Scrutiny of Delegated Legislation Committee, that committee will consider the Scrutiny of Bills Committee’s comments as part of their examination of any legislative instruments made under the relevant authorising provision.

For example, in June 2020 the committee drew to the attention of the Scrutiny of Delegated Legislation Committee its scrutiny concerns about provisions in the Coronavirus Economic Response Package Omnibus Bill 2020 which sought to include broad powers to allow delegated legislation to amend the operation of the Corporations Act 2001. When the Scrutiny of Delegated Legislation Committee considered the Corporations (Coronavirus Economic Response) Determination (No. 2) 2020 and Corporations (Coronavirus Economic Response) Determination (No. 4) 2020, made under provisions of the Corporations Act 2001 as amended by that bill, that committee was able to draw on the

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<sup>5</sup> Senate Standing Committee on Regulations and Ordinances, *Parliamentary Scrutiny of Delegated Legislation* (3 June 2019).

<sup>6</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight (Interim Report)* (2 December 2020).

<sup>7</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight (Final Report)* (16 March 2021).

<sup>8</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation, *Guidelines 1st Edition* (February 2020).

<sup>9</sup> Parliament of Australia, *Standing Orders of the Senate*, order 24(1)(a)(iv).

<sup>10</sup> Senate Standing Committee for the Scrutiny of Bills, *Annual Report 2020* (12 May 2021) at 9-10.

<sup>11</sup> *Ibid* at 10.

Scrutiny of Bills Committee's comments when setting out its own scrutiny concerns about the modification of primary legislation by delegated legislation.<sup>12</sup>

The Commonwealth's *Legislation Act 2003* also provides a much more rigorous and detailed framework for the making of delegated legislation as compared to South Australia's *Subordinate Legislation Act 1978*. The Act establishes a federal register of legislation (see Division 2), which contains legislative instruments and explanatory statements for those instruments. Among other things, the Act sets out drafting standards (see Chapter 3, Part 1) and articulates expectations in relation to consultation (see section 17).

Commonwealth delegated legislation thus operates in a very different lawmaking environment, namely one in which there is considerably more accountability and transparency than what can be said to exist under the current framework in South Australia.

Second, greater executive discretion is liable to generate more legal uncertainty and unpredictability, which is bad for business. The current framework for making delegated legislation under the *Subordinate Legislation Act 1978* allows delegated laws to be made quickly, come into force immediately on the same day they are announced, and fails to impose any requirements for consultation. This means that delegated laws can change suddenly and without warning, creating uncertainty for businesses as to what the law might be tomorrow. New laws have to be interpreted and applied, authoritatively if necessary by the courts (which is likely to take a significant amount of time and consume considerable resources, not to mention being a cumbersome way for citizens and businesses to challenge regulation that might be *ultra vires* and thus legally invalid).

Greater flexibility for executive lawmaking can therefore come at the cost of certainty and predictability when laws are frequently changed. For instance, South Australia's *Real Property Regulations 2009* have been made and re-made 20 times since coming into force in 2009. It would seem that the ease by which delegated legislation can be made in South Australia can *contribute* to 'red tape' and may be counter-productive in terms of economic efficiency.

It should also be noted that new lawmaking delegations would further consolidate power in the government. Governments can be expected to change from time-to-time. Each new government inherits existing delegated powers. A new government with a different policy orientation from the current government is likely to use delegated legislation to change the rules, including those affecting businesses. Greater executive discretion thus generates a corresponding risk of a significant future disruption in the law.

To be clear, I do not suggest that all (or even most) of South Australia's laws should be made by Parliament through primary legislation. But Parliament must play a meaningful role in making law as a democratic institution constitutionally vested with legislative power. It is the state's lawmaker-in-chief. It must be recalled that all laws made by regulators are made on legislative authority borrowed from Parliament.

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<sup>12</sup> *Ibid* at 6 [footnotes and paragraph numbers omitted].

Parliament cannot be cut out of the lawmaking equation or sidelined as a mere inconvenience. A balance must be struck between the flexibility and expertise genuinely needed by regulators and the appropriate role of an elected Parliament.

Unfortunately, the balance is already out of whack.

There is an over-reliance on executive lawmaking in South Australia in the absence of adequate parliamentary oversight to ensure that minimum democratic standards of accountability and transparency are met. While the executive has an incentive to continue the *status quo* – and to further increase its powers – the question is not about what is convenient or best for the executive. The question is how we should make laws in a democratic society and what needs to be done to preserve the legitimacy of the lawmaking process.

The good news is that much can be done to improve the current framework for making delegated legislation in South Australia. Businesses and others stand to benefit from higher quality legislative outcomes that come from an institutional environment in which laws are made openly, take into account the views of those likely to be affected and impose accountability for legislative choices.

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,

A handwritten signature in black ink, appearing to read 'Lorne Neudorf', written in a cursive style.

Lorne Neudorf  
Associate Professor