Regulation Review Committee
Parliament of New South Wales

REPORT ON THE UNIVERSITY OF SYDNEY AMENDMENT BY-LAW 2001

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Regulation Review Committee Members

Legislative Assembly

Mr Peter Nagle MP, Chairman
Dr Liz. Kernohan MP
Mr Gerard Martin MP
Ms Marianne Saliba MP
Mr Russell Turner MP

Mr Peter Nagle MP
Chairman

Hon Janelle Saffin MLC
Vice-Chairman

Legislative Council

Hon Janelle Saffin MLC, Vice Chairman
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Hon Malcolm Jones MLC

Dr Liz Kernohan MP

Mr Gerard Martin MP

Ms Marianne Saliba MP

Mr Russell Turner MP

Hon Don Harwin MLC

Hon Malcolm Jones MLC

SECRETARIAT

Mr Jim Jefferis - Committee Manager
Mr Greg Hogg - Project Officer
Mr Don Beattie - Committee Officer
Ms Rachel Dart - Assistant Committee Officer

Functions of Regulation Review Committee

The Regulation Review Committee was established under the *Regulation Review Act 1987*. A principal function of the Committee is to consider all regulations while they are subject to disallowance by Parliament. In examining a regulation the Committee is required to consider whether the special attention of Parliament should be drawn to it on any ground, including any of the following:

(a) that the regulation trespasses unduly on personal rights and liberties;

(b) that the regulation may have an adverse impact on the business community;

(c) that the regulation may not have been within the general objects of the legislation under which it was made;

(d) that the regulation may not accord with the spirit of the legislation under which it was made, even though it may have been legally made;

(e) that the objective of the regulation could have been achieved by alternative and more effective means;

(f) that the regulation duplicates, overlaps or conflicts with any other regulation or Act;

(g) that the form or intention of the regulation calls for elucidation; or that any of the requirements of sections 4, 5 and 6 of the *Subordinate Legislation Act 1989*, or of the Guidelines and requirements in Schedules 1 and 2 to that Act, appear not to have been complied with, to the extent that they were applicable in relation to the regulation.

The Committee may, as a consequence of its examination of a regulation, make such reports and recommendations to each House of Parliament as it thinks desirable, including reports setting out its opinion that a regulation ought to be disallowed.

Chairman's Foreword

This report sets out the Committee's consideration of the University of Sydney Amendment By-law 2001. The object of this By-law is to provide that the Chancellor and the Deputy Chancellor of the University of Sydney hold office on condition that they retain the confidence of the Senate of the University. The By-law extends to the persons holding those offices on the commencement of the By-law.

The Committee considered that that the regulation may trespass unduly on personal rights and liberties and that the regulation may not accord with the spirit of the legislation under which it was made. It sought the attendance of the Ministers officers to discuss this .

The Minister declined this request and relied instead on the Solicitor Generals advice as to the legality of the regulation. He appears to indicate that it is now policy that University independence be maintained.

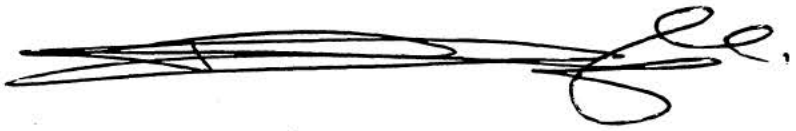
If this is the case then the by-law does not implement that policy and the Committee considers that in accordance with section 9 (1) (b) (v) of the Regulation Review Act that the objective of the by-law could have been achieved by the alternative and more effective means of amending Section 37 of the University of Sydney Act 1989 to include by-laws under section 10 (2) in the rule making powers.

The Act was amended in 1994 to enable the Senate to make rules instead of by-laws on a wide variety of issues with the exception of a few matters, such as those under section 10(2), which were considered of central importance and which were to remain subject to public scrutiny.

The Committee remains of the view that when the Act was made in 1989 the spirit of it, in relation to the introduction of new provisions governing a Chancellors tenure, was to save vested rights.

The Committee considers that in accordance with section 9 (1) (b) (i) and (iv) of the Regulation Review Act, that the regulation may trespass unduly on personal rights and liberties and that the regulation may not accord with the spirit of the legislation under which it was made, even though it may have been legally made.

The Committee recommends that this by-law should not be used as a precedent in respect of other Universities. Instead consideration should be given to amending the principal Acts to accord with the current policy of University independence by extending the rule making powers to include the matter of the tenure of elected members of the governing bodies.



Peter R. Nagle, MP
Chairman

University of Sydney Amendment By-law 2001

The object of this By-law is to provide that the Chancellor and the Deputy Chancellor of the University of Sydney hold office on condition that they retain the confidence of the Senate of the University. The By-law extends to the persons holding those offices on the commencement of the By-law. This By-law is made under the *University of Sydney Act 1989*, including sections 10 (2), 11 (2) and 36 (1).

The Amendments are as follows:

"[1] Clause 9 Term of office and election procedure *Insert after clause 9 (2):*
(2A) It is a condition on which the Chancellor holds office that he or she retains the confidence of the Senate and the Chancellor shall cease to hold office if the Senate decides, by resolution passed at two consecutive ordinary meetings of the Senate, that the Chancellor does not have the confidence of the Senate.
(2B) Subclause (2A) applies to:
(a) the Chancellor holding office at the date on which that subclause comes into effect, and
(b) all subsequent holders of that office.

[2] Clause 11 Term of office and election procedure
Insert after clause 11 (2):
(2A) It is a condition on which the Deputy Chancellor holds office that he or she retains the confidence of the Senate and the Deputy Chancellor shall cease to hold office if the Senate decides, by resolution passed at two consecutive ordinary meetings of the Senate, that the Deputy Chancellor does not have the confidence of the Senate.
(2B) Subclause (2A) applies to:
(a) the Deputy Chancellor holding office at the date on which that subclause comes into effect, and
(b) all subsequent holders of that office."

Prior to these amendments clauses 9 and 11 read:

"9 Term of office and election procedure

(1)Subject to section 10 of the Act, an election to the office of Chancellor must take place at an ordinary meeting of the Senate held between 1 January and 31 May:
(a) in 2003, and
(b) every fourth year after that year.
(2) A Chancellor holds office for a term of 4 years, commencing on 1 June following election, and is eligible for re-election
(3) Elections for Chancellor are to be held in accordance with those procedures prescribed by resolution of the Senate for an election to the office of Chancellor.

11 Term of office and election procedure

Subject to section 11 of the Act, an election to the office of Deputy Chancellor must take place at an ordinary meeting of the Senate held:
(a) in February 2000, and
(b) in February of every second year after that year.
(2) The Deputy Chancellor holds office until his or her successor is elected, and is eligible for re-election.
(3) Elections for Deputy Chancellor are to be held in accordance with those procedures prescribed by resolution of the Senate for election to the office of Deputy Chancellor."

At its Meeting on 7 June 2001 The Committee noted that the amendments apply to the present Chancellor and Deputy Chancellor and enable their current terms of office to be terminated by resolutions of the Senate.

This contrasts with the approach taken when the principal Act was passed in 1989.

Sections 10(2) and 11(2) enable the period and conditions of office of the Chancellor and Vice Chancellor to be prescribed by the by-laws. However the exercise of these powers was qualified by a specific savings provision protecting the rights of the existing Chancellor (there was no Deputy Chancellor at that time). The relevant provisions are as follows:

"Chancellor

10 (1) Whenever a vacancy in the office of Chancellor occurs, the Senate must elect a person (whether or not a Fellow) to be Chancellor of the University.

(2) The Chancellor, unless he or she sooner resigns as Chancellor or ceases to be a Fellow, holds office for such period (not exceeding 4 years), and on such conditions, as may be prescribed by the by-laws.

(3) The Chancellor has the functions conferred or imposed on the Chancellor by or under this or any other Act.

Deputy Chancellor

11 (1) Whenever a vacancy in the office of Deputy Chancellor occurs, the Senate must elect a Fellow to be Deputy Chancellor of the University.
(2) The Deputy Chancellor, unless he or she sooner resigns as Deputy Chancellor or ceases to be a Fellow, holds office for such period (not exceeding 2 years), and on such conditions, as may be prescribed by the by-laws.
(3) In the absence of the Chancellor, or during a vacancy in the office of Chancellor or during the inability of the Chancellor to act, the Deputy Chancellor has all the functions of the Chancellor.

Schedule 3

Chancellor
2. (1) The person who, immediately before the commencement of this clause, held office as the Chancellor of the University of Sydney:
(a) remains Chancellor of the University; and
(b) continues to hold office as such (unless he or she sooner resigns) for the residue of the term for which he or she was appointed as Chancellor.

(2) Section 10 (2) does not apply to or in respect of the Chancellor referred to in this clause."

In accordance with this approach a similar savings provision was made for the Chancellor and Deputy Chancellor when the by-laws were remade in 1999:

"14 Savings and transitional provisions
(1) The person who, immediately before the commencement of this By-law, held office as Chancellor of the University:
(a) remains Chancellor of the University, and
(b) continues to hold office as such for the residue of the term for which that person was appointed as Chancellor, subject to the Act and this By-law.

(2) The person who, immediately before the commencement of this By-law, held office as Deputy Chancellor of the University:
(a) remains Deputy Chancellor of the University, and
(b) continues to hold office as such for the residue of the term for which that person was appointed as Deputy Chancellor, subject to the Act and this By-law."

In summary therefore the approach since 1989 has been on both occasions to save the term of office of an existing Chancellor whenever new provisions governing their appointment have been introduced.

This indicates that when the Act was made in 1989 the spirit of it, in relation to the introduction of new provisions governing a Chancellors tenure, was to save vested rights. To that extent the amending by-law gazetted on 1 July 2001 , although legally made departs from the spirit of that Act.

The Committee noted that the principal Act was part of a package of university legislation passed in 1989 and that identical savings of the terms of office of the Chancellors of the University of New South Wales, the University of Wollongong and Macquarie University were made at that time.

No amendments of a similar nature to the present by-law have yet been made in respect of those Universities. Under other University by-laws Chancellors generally have a term of office of four years and there are no provisions which enable them to be removed by no confidence resolutions of the respective Senates.

In terms of its functions under the *Regulation Review Act 1987* the Committee is required to consider whether the special attention of Parliament should be drawn to a regulation on any ground, including whether the regulation trespasses unduly on personal rights and liberties and whether the regulation may not accord with the spirit of the legislation under which it was made, even though it may have been legally made.

The Committee noted that a motion for disallowance of the by-law had been moved and defeated in the in the Legislative Council.

The Committee resolved to write to the Minister for Education and Training as follows:

"At its meeting on 7 June 2001 the Regulation Review Committee resolved to request you to make available the relevant officers of your administration

to discuss this by-law with the Committee at its next meeting. If this course is acceptable to you your officers may contact Ms Rachel Dart of the Committee Secretariat on phone number 9230 3418 for details of the meeting time and venue.

The issues of concern to the Committee are as follows:

The object of the by-law is to provide that the Chancellor and the Deputy Chancellor of the University of Sydney hold office on condition that they retain the confidence of the Senate of the University. The By-law extends to the persons holding those offices on the commencement of the By-law.

This contrasts with the approach taken when the principal Act was passed in 1989. While Sections 10(2) and 11(2) enabled the period and conditions of office of the Chancellor and Vice Chancellor to be prescribed by the by-laws the exercise of these powers was qualified by a specific savings provision protecting the rights of the existing Chancellor (there was no Deputy Chancellor at that time).

This said that the person who, immediately before the commencement of the clause, held office as the Chancellor of the University of Sydney continued to hold office as such (unless he or she sooner resigned) for the residue of the term for which he or she was appointed as Chancellor. and that Section 10 (2) did not apply to that Chancellor.

In accordance with this approach a similar savings provision was made for the Chancellor and Deputy Chancellor when the by-laws were remade in 1999. This provided that they continued to hold office as such for the residue of their terms but subject to the Act and the By-law.

In summary therefore the approach since 1989 has been on both occasions to save the term of office of an existing Chancellor whenever new provisions governing their appointment have been introduced.

This indicates that when the Act was made in 1989 the spirit of it, in relation to the introduction of new provisions governing a Chancellors tenure, was to save vested rights. To that extent the amending by-law gazetted on 1 July 2001 , although legally made departs from the spirit of that Act.

In terms of its functions under the *Regulation Review Act 1987* the Committee is required to consider whether the special attention of Parliament should be drawn to a regulation on any ground, including whether the regulation trespasses unduly on personal rights and liberties

and whether the regulation may not accord with the spirit of the legislation under which it was made, even though it may have been legally made.

My Committee noted that the principal Act was part of a package of university legislation passed in 1989 and that identical savings of the terms of office of the Chancellors of the University of New South Wales, the University of Wollongong and Macquarie University were made at that time.

No amendments have yet been made in respect of those Universities which enable the Chancellor to be removed by no confidence resolutions of the respective Senates.

My committee notes that it has been argued that this by-law is an internal matter for the University alone to determine and that Parliament should not review it except to determine whether it was legally made.

Clearly this view is inconsistent with the Regulation Review Act, which enables the Committee to draw the by-law to the attention of Parliament on any ground and the Committee's powers in this regard are no more extensive than any individual member of Parliament.

More importantly the view that this is an internal matter for the University alone is inconsistent with the policy of the University of Sydney Act itself.

That Act, together with the Acts of the other New South Universities, was amended in 1994 to deregulate certain aspects of university administration and to provide the universities with greater flexibility and autonomy. In her second reading speech on the University Legislation (Amendment) Bill the then Minister said as follows:

"Currently, the university Acts provide that each university may make by-laws in relation to various matters. The matters about which universities may make by-laws are listed throughout each of the Acts and vary from matters that are central to the operations of universities to matters that are minor in nature or best decided by the universities themselves because they are essentially academic or scholastic. Currently, the university Acts also provide that the universities may make rules in relation to any matter about which they are permitted to make by-laws. These provisions are aimed at ensuring that the universities are able to control and manage their affairs efficiently and to the benefit of the university as a whole. Unfortunately, the wording of the sections which provide this power is such that the universities have not had sufficient confidence in their ability to make rules.

The current rule-making powers do not provide the universities with anything like the reach and certainty of the by-law making powers. Consequently, essentially minor matters of university governance and administration are too often the subject of by-laws requiring the services of several public sector institutions, including the universities themselves, and involving extensive public expense. The bill will clarify the capacity of a by-law to authorise the making of rules. This clarified rule-making provision will confirm the status of rules made by university governing bodies so that universities do not feel the need to involve the Government in the time consuming and expensive process of making by-laws.

While this particular amendment will allow the universities to govern most aspects of their own administration and management, it will also exclude from the clarified rule-making provisions several significant matters considered crucial to the continued public accountability of the universities. The clarified rule-making provisions will not allow the universities to make rules about the classification of people within or associated with the universities as graduates, academic staff, general staff or students because of the impact this has on eligibility to vote in university elections; university elections; the tenure of elected members of university governing bodies; borrowing or investment of funds; designation of the financial year; and the filling of casual vacancies on university governing bodies.

These matters will continue to be the subject of by-laws and will not be included in the rule-making powers. They are of central importance and should remain the subject of by-laws alone and thus subject to public scrutiny and disallowance."

Section 37 of the Act expressly excludes the matters under section 10(2) from this rule making power to reflect the policy of the Act that the tenure of elected members of university governing bodies is of central importance and should remain the subject of by-laws alone and thus subject to public scrutiny and disallowance.

Even if it was now Government policy that the tenure of elected members is a purely internal matter for the University, then Section 37 would have to be amended to implement that policy by enabling rules to be made in respect of the matters under section10(2). If that Government Policy was not implemented by such an amendment, then the Committee would have to report in accordance with section 9 of the Regulation Review Act that any by-law under section10(2) fails to implement government policy and that its

objective could have been achieved by alternative and more effective means.

As it stands the by-law, although legally made, departs from the spirit of the University of Sydney Act and may trespass unduly on personal rights and liberties."

The Minister responded on 20 June 2001 as follows:

"I note that the issues of concern in relation to the by-law are primarily legal ones relating to whether the by-law related to the "spirit" of the enabling legislation.

I have made it clear publicly that given the need for University independence to be maintained, and the fact that my Department can locate no precedent for a lawfully made by-law having not been submitted for the Governors assent, the only question for me to consider in submitting the matter to the Governor is whether it was lawfully made.

In this regard I sought the advice of the Solicitor General on the by-laws lawfulness. He advised me that in his opinion "the proposed amendments are authorised by section 10(2) (of the University of Sydney Act) and are not inconsistent with the act."

Given that the relevant advice in relation to the decision was not from my administration, I do not think that there are "relevant officers" within my administration to appear before the committee."

The Minister appears to be saying that because he chose to obtain the advice of the Solicitor General on the legality of the regulation, a point which the Committee did not contend, there are no "relevant officers" within his administration to address the committee on the other issues it raised.

This is clearly not the case. The New South Wales Government Directory states that the Higher Education Policy Directorate under the Ministers administration has the function of consolidating the Department's policy and planning functions in higher education. and of providing the point of contact for liaison with the university sector, and with the Commonwealth and other states and territories on higher education matters.

It states that, among other things, the directorate deals with university legislation and appointments to governing bodies.

The Minister also seems to be saying that because of the need for University independence to be maintained, and the fact that his Department could locate no precedent for a lawfully made by-law having not been submitted for the Governors assent, the only question for him and implicitly the Parliament and the Regulation Review Committee to consider is whether the by-law was lawfully made.

Indeed a similar argument was raised in the debate on the motion for disallowance referred to above.

The Committee considers that the absence or indeed the presence of a precedent is an unreliable basis for determining the extent of Ministerial and Parliamentary powers.

Merely because a by-law or any other regulation of a particular kind hasn't been challenged in the past doesn't mean that this is not within the competence of the Minister or the Parliament if the relevant legislation permits it and the circumstances require it.

In the present case the extent of the Parliaments and Ministers powers are determined by the Interpretation Act 1987 and the University of Sydney Act 1989. The by-law is subject to disallowance under the Interpretation Act and Section 37 of the University of Sydney Act 1989 makes it quite clear that by-laws under section 10 (2) are intended to be subject to the full scrutiny of Parliament and its Committee's. If this were not the case and they were left to be independently determined by the University, then section 37 would have included them in the rule making powers. The Ministers Second Reading Speech on the University Legislation (Amendment) Bill 1994 made it abundantly clear that by-laws under section 10 (2) are of central importance and should remain subject to public scrutiny and disallowance.

It would therefore be undesirable if the Ministers deliberation and the Parliamentary debate on the by-law proceeded on the basis that the only issue that could be considered was the legality of the regulation. As indicated above this view is inconsistent with the Regulation Review Act, which enables the Committee to draw the by-law to the attention of Parliament on any ground and the Committee's powers in this regard are no more extensive than any individual member of Parliament.

The Minister seems to indicate that it is now policy that University independence be maintained.

If this is the case then the by-law does not implement that policy and the Committee considers that in accordance with section 9 (1) (b) (v) of the Act that the objective of the by-law could have been achieved the by alternative and more effective means of amending Section 37 of the University of Sydney Act 1989 to include by-laws under section 10 (2) in the rule making powers.

The Committee remains of the view that when the Act was made in 1989 the spirit of it, in relation to the introduction of new provisions governing a Chancellors tenure, was to save vested rights. The Committee accordingly considers that that the regulation may trespass unduly on personal rights and liberties and that the regulation may not accord with the spirit of the legislation under which it was made, even though it may have been legally made.

The Committee recommends that this by-law should not be used as a precedent in respect of other Universities. Instead consideration should be given to amending the principal Acts to accord with the current policy of University independence by extending the rule making powers to include the matter of the tenure of elected members of the governing bodies.

APPENDIX

Letter dated 20 June 2001 from the Minister for Education and Training.

MINISTER
FOR
EDUCATION AND TRAINING

[redacted]

Level 2, 35 Bridge Street, Sydney NSW 2000
GPO Box 33, Sydney 2001
Tel: (02) 9561 8100 Fax: (02) 9561 8185

20 JUN 2001

Mr Peter Nagle MP
Chairman
Regulation Review Committee
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Mr Nagle

I refer to your recent letter (your reference 3334) inviting "relevant officers" of my administration to discuss the University of Sydney Amendment By-law 2001.

I note that the issues of concern in relation to the by-law are primarily legal ones relating to whether the by-law related to the "spirit" of the enabling legislation.

I have made clear publicly that, given the need for university independence to be maintained, and the fact that my department can locate no precedent for a lawfully made by-law having not been submitted for the Governor's assent, the only question for me to consider in submitting the matter to the Governor was whether it was lawfully made.

In this regard, I sought the advice of the Solicitor General on the by-law's lawfulness. He advised me that in his opinion "the proposed amendments are authorised by section 10 (2) [of the University of Sydney Act] and are not inconsistent with the act."

Given that the relevant advice in relation to the decision was not from my administration, I do not think that there are "relevant officers" within my administration to appear before the committee.

Yours sincerely

John Aquilina

John Aquilina, MP
Minister