REGULATION REVIEW COMMITTEE

PARLIAMENT OF NEW SOUTH WALES

Report Upon:

REGULATIONS

- Nurses Act 1991 Regulation (Nurses Regulation 1992)
- Factories, Shops and Industries Act 1962 - Regulation - (relating to fees)
- Legal Profession Act 1987
  Legal Profession (Solicitor Corporations) Regulation 1991
- Partnership Act 1892, Partnership Regulation 1992

Report No. 17

REGULATION REVIEW COMMITTEE

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The Regulation Review Committee was established under the Regulation Review Act 1987. A principal function of it 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

(h) 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 or portion of a regulation ought to be disallowed and the grounds on which it has formed that opinion.

CHAIRMAN'S FOREWORD

In this report the Committee demonstrates the detailed examination it gives to regulations particularly with respect to the requirements of the Subordinate Legislation Act, 1989.

In the case of the Nurses Regulation 1992 considerable confusion resulted from the preparation of one Regulatory Impact Statement for 3 separate regulations by the Health department. As a result none of the regulations were properly assessed.

In the case of the Legal Profession (Solicitor Corporations) Regulation the Regulatory Impact Statement failed to consider relevant alternative options which were permitted by the enabling Act, the Legal Profession Act.

The RIS for the Partnership Regulation 1992 made a similar omission. This identification of alternative options is a fundamental requirement of the Subordinate Legislation Act. As a result of its omission in the latter case the major requirement of the Act for assessment of costs and benefits of the regulation and the alternatives to determine which will produce the greatest net benefit or least net cost to the community has not been carried out. There is also no statement of the consultation process to be undertaken with the community.

The Subordinate Legislation Act requires no greater detail to be provided in the RIS than the Department should itself require, in order to assess the effectiveness of its own administration. The RIS process was in part based on the Treasury guidelines for appraisal of assets by Departments. The sad fact of the matter is that at present, Departments are not discharging the onus of proof that the former Premier indicated should be placed upon them. When addressing the Regulation Review Bill 1987, which constituted my Committee and led to the Subordinate Legislation Act, the then leader of the Opposition, the Hon. Nick Greiner, MP said:

> "*The onus should shift to those who wish to perpetuate the existence of a particular regulation, those who argue that a particular form of government intervention is either necessary or desirable. the onus should shift to the regulators to ascertain why a particular regulation should exist rather than those who wish to rid themselves of the regulation.*"

In far too many cases the departments have shifted this onus to the community or Parliament itself to disprove the need for the regulation. My Committee will address this more fully in its next report.

NURSES ACT 1991 - REGULATION (Nurses Regulation 1992)
Gazette of 13.3.92 at p. 1699

This Regulation supplements the Nurses Act 1991, providing for fees, qualifications, exemptions and remuneration with respect to nurses. It also prescribes forms for certificates of nurses registration and enrolment. This regulation together with the Nurses (Election) and the Nurses (Last Board Examination) Regulation which were made at the same time were the subject of one common Regulatory Impact Statement (RIS). The RIS for the regulation is attached to this report.

The Committee considers that the regulations should have been dealt with in separate RISs. In this instance, the preparation of one RIS to cover the three regulations has resulted in a departure from certain of the requirements of the Subordinate Legislation Act:

Firstly, the costs and benefits of the Nurses Regulation and its alternatives have not been quantified.

The Election regulation has only been assessed in terms of the objectives of the regulation and the impact of the regulation. Alternative options have not been considered.

The Last Board Examination Regulation has not been assessed at all - even the mandatory do nothing option which must be considered under Schedule 2 of the Subordinate Legislation Act has been omitted.

As part of the consultation programme on the RIS the Department of State Development was consulted. That Department's criticisms of the standard of the RIS are analogous to the Committee's view.

The Department's submission on the RIS states:

> "*It is apparent that there is considerable interdependence between the three proposed regulations and perhaps this explains the attempt to combine the regulatory impact statements as a single document. An unfortunate consequence of this decision, however, is that it is not clear which elements of the impact statement relate to particular regulations.*

As you would be aware, the provisions of the Subordinate Legislation Act, 1989 require that a regulatory impact statement be produced on each of the principal statutory rules. As the RIS which has been prepared relates substantially to the Nurses Regulation of 1991 and explicitly fails to undertake an analysis of the Nurses (Last Board Examination) Regulation 1991, for example, it remains questionable that the provisions of the Act have been met. At the very least, some discussion of the benefits of permitting such an examination to proceed deserve noting.

Although the statement of objectives is adequate, the options presented within the RIS are flawed. Of particular significance is the failure to identify a do nothing option. This is a requirement under the Act. In addition, there is no indication of the number of nurses in each of the fee categories listed (page 9) and no consideration of a longer term registration period than 12 months. I would suggest that it would be quite consistent with the Nurses Act and may help reduce the apparently very high costs of the Nurses Registration Board given on pages 10 and 11 to move to a five year registration renewal period with an obligation upon nurses to notify a change in relevant circumstances.

Unfortunately, the RIS fails to provide sufficient quantification to accurately estimate the level of savings to the profession and the community of this option.

Finally, the RIS asserts but fails to make a convincing case that the principle of mutual recognition would be adversely affected by either a longer registration period or by an investigation of qualifications by potential interstate employers. Again, there is no attempt to quantify, for example, the current level of interstate movement by nurses to convey any concept of the dimension of that potential cost."

The NSW Health Department responded on these issues as follows:

"I refer to your recent letter concerning the Regulatory Impact statement for the proposed Nurses Regulation 1991, Nurses (Election) Regulation 1991 and Nurses (Last Board Examination) Regulation 1991 prepared by PPK Consultants Pty Ltd.

Individual Regulatory Impact Statements for the regulations relating to elections and the last board examination would have been very brief. The objectives of these Regulations are discussed under 2.2 and 2.3 on pages 5 and 6 of the Regulatory Impact Statement. These sections give a simple explanation of the purpose of each of these regulations. The Nurses (Election) regulation enables the election of the Board to take place. The Nurses (Last Board Examination) Regulation enables candidates trained under the old system to gain registration or enrolment.

The benefit of the Nurses (Last Board Examination) Regulation 1991 is stated in section 2.3. It allows candidates who have previously completed the old hospital based pre-registration and enrolled nurse training programs to gain registration or enrolment.

This Regulation is mechanical and designed for a specific purpose. The Department does not believe that it requires detailed assessment.

The Nurses (Last Board Examination) Regulation was originally a minor matter within the draft Nurses Regulation 1991. The Parliamentary Counsel decided to separate it to simplify its repeal once its usefulness is over. This will enable the repeal to take place without distorting the structure of the main regulation.

As the Nurses Regulatory Impact Statement was to be released as a public document, it seemed sensible to combine the assessments of the three Regulations in the one Regulatory Impact Statement to cover the regulation of the nursing profession as a whole.

It was always the intention of the Department to cover all the requirements of the Subordinate Legislation Act for each regulation. We firmly believe that these requirements have been met.The Subordinate Legislation Act provides that the responsible Minister is required to ensure that as far as is reasonably practicable, a Regulatory Impact Statement complying with Schedule 2 is prepared in connection with the substantive matters proposed to be dealt with by the statutory rules.

Surely the number of Regulatory Impact Statements prepared is irrelevant, provided the requirements of the Act are met for each regulatory proposal.

Your concerns with the clarity of the document have not been expressed by any other parties who have examined the document. The table of contents at the beginning of the Regulatory Impact Statement and the headings allocated to each section clarify which elements of the statement relate to each regulation. Sections 2.1, 2.2, and 2.3 cover the objectives of the regulatory proposals and are headed with the name of each regulation to enable the reader to make a clear distinction between the three.

Your letter questions the adequacy of the options presented. In the Regulatory Impact Statement the "do nothing" option you refer to is titled "No Regulation" and is introduced on page 7 along with the other options. It involves introducing the Act without a regulation. The impact assessment of this option is discussed under section 5 headed "Impact Assessment of Alternative Options" on pages 13 and 14. This section discusses the benefit of reducing operating costs of the Board and the costs to various parties of shifting the responsibility for monitoring education standards of nurses to individual hospitals and institutions. The impact of the "No Regulation" option is summarised in the "Overall Assessment" on pages 15 and 16 of the Regulatory Impact Statement. The Department has endeavoured to comply with the clear intent of the Subordinate Legislation Act 1989; that is, that no unnecessary regulations be introduced. This Department was initially assured that the Government, through the Regulatory Impact Statement process, did not require Departments to expend large sums of money or direct scarce resources to the preparation of documentation to comply with the Act. Nevertheless, the Department of Health has allocated considerable resources to this important work and has given it a priority.

It is considered that the RIS prepared on this occasion meets not only the letter but the spirit of the Government's intent with respect to this process."

The Regulation Review Committee believes the Department of State Development is correct in its statement concerning the lack of consideration of the "do nothing" option and confusion of the three regulations. This is shown in the Health Department's own reply where it said that the "do nothing" option is introduced on page 7 of the RIS. Page 7 of the RIS only relates to the Nurses Regulation. The other pages cited as constituting an impact assessment of the "do nothing" option, pages 13 to 16, also only relate to the Nurses Regulation. The Act requires the substantive provisions of each regulation to be assessed as well as the "do nothing" option in each case. If the Department believed that the Election and Last Board Examination regulations were merely "mechanical" and "did not require detailed assessment" it could have recommended to the Minister that he seek the advice of the Attorney-General on whether those regulations were exempt from the requirement to prepare a RIS on the grounds that they were machinery provisions in terms of section 6(1)(a) and schedule 3 of the Subordinate Legislation Act. As it did not take that view at the time the regulation was prepared, a full assessment was required under the Act.

In its letter the Department of Health states that it was initially assured, through the Government,that the Regulatory Impact Statement process would not require the expenditure of large sums or use of scarce resources to comply with the Subordinate legislation Act.It is true that the Act requires adherence as far as reasonably practicable to its requirements. This is intended to recognize the practical constraints arising for available departmental resources.However,in the present case,it is clear that departures from those requirements have proceeded not from inadequate resources but from an inadequate Regulatory Impact statement.

FACTORIES SHOPS AND INDUSTRIES ACT, 1962 - REGULATION
(Relating to fees)
(Government Gazette of 14.6.91 at p. 4581

The object of this regulation is to prescribe a new basis for determining fees for the examination of certain boilers and pressure vessels. Fees were previously based on the dimensions of boilers and pressure vessels. The new fees are to be charged either at an hourly rate or, where the designs are submitted with an independent reviewer's report, at a (reduced) flat rate.

As the regulation brought about a major change in the manner of imposing fees under the regulations, the Committee sought the Minister's advice on whether the costs and benefits of the new system were assessed and compared with the existing systems, as required under section 4 and schedule 1 of the Subordinate Legislation Act, 1989. The Committee also asked if the relevant manufacturers were consulted before the regulation was made.

The Attorney-General and Minister for Industrial Relations in his letter of 17 September 1992 said:

> "*I refer to your letter of 20 August 1992 concerning a Regulation under the Factories, Shops and Industries Act 1962 to increase the fees charged for the review of plans for boilers and pressure vessels.*
>
> *Attached for your information is a schedule outlining the compliance with requirements under the Subordinate Legislation Act 1989. I am advised that the proposal to increase inspection fees was circulated to industry groups including the Australian Chamber of Manufactures, Metal Trades Industry Association, Boiler and Pressure Vessel Manufacturers Association, as well as a number of private boiler manufacturers and that no objections to the new fees were raised by industry.*
>
> *I trust that information is of assistance.*"

The schedule shows that the new system was in compliance with the method of levying fees in other states.

The schedule is also an assessment under section 4 and Schedule 1 of the Subordinate Legislation Act 1989. That schedule requires an internal departmental assessment of statutory rules. The schedule provided by the Minister is a reasonable attempt at the level of assessment required under the section 4 and Schedule 1 of the Act although quantification of the costs and benefits would have been preferable. The schedule provides as follows:

"*REQUIREMENTS RELATING TO THE SUBORDINATE LEGISLATION ACT*

Section 4 of the Subordinate Legislation Act requires the responsible Minister to ensure that, as far as is reasonably practicable, the guidelines in Schedule 1 of the Act are complied with before an amendment of a statutory rule is made. With reference to the Schedule, the following information is supplied (further relevant details are herewith):

OBJECTIVES

1. *To redress the anomalous falling behind in the levy of fees, due in part to a price freeze under the previous government.*

2. *To restructure the process of design review to accommodate the use of private design reviewers.*

ALTERNATIVE OPTIONS

1. *Leaving fees at the present level. This would be contrary to the Government's policy of user pays. Note that similar fees in other states are at comparable or higher levels than those in the proposed amendments.*

2. *Increase fees to allow for cost recovery - do not change method of design review. This would allow cost recovery, but mean that the WorkCover Authority did not adopt the national standard, creating difficulties with interstate approvals, and delays associated with intrastate approvals.*

3. *Increasing fees and restructuring approval system. This allows for cost recovery and the adoption of the national*

standard. Interstate approvals will become easier, and a maximum ten day waiting period will apply for approvals in any event.

CONSULTATION

Overlapping, duplication, or conflict with other acts, rules or policies does not arise in this situation. Relevant industry groups have been informed and are expecting fee increases.

COST/BENEFIT

The Authority's administrative costs are met by a levy on premiums paid by employers generally, if they are not met by users of the Authority's services. If fees reflect the actual cost of services, the greatest equity for the majority of employers is achieved. The increased burden on users is minimal, and is accompanied by a speedier more flexible service."

LEGAL PROFESSION ACT 1987 - LEGAL PROFESSION (SOLICITOR CORPORATIONS) REGULATION 1991
Gazette of 8.3.91 at p. 1930

The object of this regulation is to provide for the incorporation of solicitor corporations by adapting the relevant provisions of the Companies Code. The Committee reviewed the regulatory impact statement for the regulation, a copy of which is attached. It will be noted that the RIS is largely an explanatory memorandum in respect of the Legal Profession (Solicitor Corporations) Amendment Act 1990 and a statement of the benefits of incorporation. The RIS doesn't touch on the requirements of the regulation itself, let alone contain an assessment of the regulation in the terms required under section 5 and schedule 2 of the Subordinate Legislation Act. The Committee accordingly wrote to the Minister requesting the preparation of a RIS as required under the Act. The letter stated as follows:

Form of the Regulatory Impact Statement

Schedule 2 of the Subordinate Legislation Act requires a regulatory impact statement to include, among other things, a discussion of the regulation's objectives (and the reasons for them), an examination of the alternative options for achieving those objectives, and an assessment, quantified wherever possible, of the costs and benefits of both the regulation and each of the alternative options.

(a) Objectives

This section should contain details not only of the objectives to be sought and also of the reasons for them. This entails giving a brief account of the background to the regulation and of the problems which the legislation aims to address and of the provisions of the enabling Act. In the case of solicitor corporations, a brief account might have been provided, for example, of the administrative and financial problems faced by solicitors before the legislation was introduced. This would have provided a context for the objectives, which should be listed in a clear and succinct fashion. Words such as "better structure" and "more effective management" should be avoided in favour of more precise alternatives; explanation for the layman of somewhat technical terms such as "income splitting" should also be provided.

(b) Alternatives

These are more fully discussed in section 2 below. There are two kinds of alternatives. First, alternatives to making a regulation at all. These would include self-regulation or no regulation at all. Second, alternative ways of framing the individual clauses of the regulation. Both of these kinds of alternatives need to be addressed. Examples of the second of these two types may be found in Part 2 below.

(c) Costs and Benefits

The costs the RIS should have attempted to estimate, would be -

(i) for an average practice, the costs of complying with the Companies Code in its modified and unmodified forms;

(ii) The costs of administering the regulation (e.g. for the Law Society or the Department);

(iii) any wider social or economic costs.

The benefits in this case are likely to be largely those occasioned by the removal of the unsatisfactory practices outlined in the objectives section.

These again should have been listed in clear and succinct fashion, and an effort made to quantify them where possible for an average solicitor corporation. If quantification is impossible, that should be pointed out and justified.

2. SPECIFIC MATTERS REQUIRING EXPLANATION AND JUSTIFICATION

As well as matters relating to the general form of the RIS such as those discussed above, there are other, more specific items which the Committee would like to draw to your attention. Unlike other matters in the regulation which are largely of a machinery nature, these are the ones which do require explanation in the RIS and justification (because alternatives might have been possible) on costs benefit grounds. They appear in Clause 5 under the heading "modification etc. of Companies

Code." They are discussed hereunder in the order in which they appear in the Regulation:-

(a) Section 79(4)

The regulation provides that section 79(4) of the Companies Code does not apply to solicitor corporations. Section 79(4) provides that a copy of any agreement referred to in section 251 of the Companies Code should be lodged with the Corporate Affairs Commission. Unlike the cases of, for example, s. 39 or s. 71, the reason why solicitor corporations are exempt is not given in the explanatory note in the regulation, nor is any explanation provided in the RIS. Discussion on this matter might be appropriate in the Objectives and the Costs and Benefits section of the RIS.

(b) Section 124(1)

The regulation provides that section 124(1) of the Companies Code should not apply to solicitor corporations. Section 124(1) requires a company to lodge with the Commission notice of special rights attached to shares which are not provided for in its articles. No explanation is provided for this. Again, appropriate sections in the RIS for dealing with this matter might be the Objectives and the Costs and Benefits sections.

(c) Part IV Division 3A

The regulation omits Part IV Division 3A, which permits "buy-backs" of shares by companies. The present explanatory note merely says that this is not to apply to solicitor corporations. This, however, is a clear case when the RIS should have provided an explanation. Indeed the July issue of the Law Society Journal foreshadows an amendment to the regulation to permit the buy back of shares in certain circumstances. Clearly the issue was not fully considered when the regulatory impact statement was prepared.

(d) Section 251(1)

This is a similar case to that of section 79(4) above.

(e) Section 263

Section 263 requires a company to lodge annual and other returns with the Commission. However, this regulation exempts solicitor corporations from the requirement to lodge documents tabled at the annual general meeting of a solicitor corporation under section 275 of the Code, namely copies of accounts, director's reports and auditors' reports.

There is no explanation of why this exemption has been granted, or of what alternatives were considered.

(f) Model Provisions

The regulations omit section 75 of the Companies Code, which provides for adoption by companies of model articles in table A or B of the Companies Code. The explanatory note states that these model provisions do not reflect the special provisions that apply to solicitor corporations. Nevertheless my Committee notes that the July issue of the Law Society Journal states that the Law Society itself is preparing model memorandum and articles. Clearly these should be included in the regulation.

The Committee recommended the preparation of a new RIS taking into account the above matters. The Attorney General in his response to the committee of 27 July 1992 said:

> "*I refer to your letter to my predecessor in which you note the observations of the Regulation Review Committee in relation to the Legal Profession (Solicitor Corporations) Regulation 1991. You conclude by noting the Committee's opinion that a further regulatory impact statement should be prepared.*
>
> *Before considering this request there are a number of points that I would appreciate the Committee taking into consideration.*
>
> *First, I note that in this matter the regulatory structure was established by the Legal Profession (Solicitor Corporations) Amendment Act 1990. That Act provided for the formation of solicitor corporations under the Legal Profession Act 1987. The Act further provides that the Companies (NSW) Code is to be*

applied to solicitor corporations, with the necessary modifications to account for the unique characteristics of solicitor corporations established by the Act.

This legislation, which is, of course, open to public and Parliamentary scrutiny, sets the regulatory structure it is not necessary, or indeed appropriate, to canvass the objectives of the legislation and alternatives to the regulatory structure established by that legislation in a regulatory impact statement. This is particularly true where the legislation has only recently been considered by the Parliament. To suggest otherwise misconstrues the operation of the Subordinate Legislation Act 1989 which is concerned with the objectives of and alternatives to proposed statutory rules and not the underlying substantive legislation. The alternatives which may be explored are those which are consistent with the substantive legislation and the regulation making power contained in the legislation.

It was therefore not appropriate to consider not applying the Code or applying it in an unmodified form as these options are inconsistent with the legislation.

Before turning to the specific matters you have raised in relation to the application of the Code I would also point out that solicitor corporations are a voluntary option which solicitors may care to choose for the purpose of providing services. The Act does not impose any mandatory obligations and the benefit of adopting a corporate form is a matter for each solicitor firm to determine. A corporate structure does not affect the solicitor's duty or liability to a client and poses no risk to the public. It is essentially a matter for the profession and the regulation was drafted in full consultation with the profession.

The Committee has raised six particular sections where the Code has been modified by the Regulation. I refer firstly to sections 79(4), 124(1), 251(1) and 263 of the Code, which have been expressed not to apply to solicitor corporations.

A solicitor corporation has two classes of shareholders, being voting shareholders who must be the holders of unrestricted practising certificates and non-voting shareholders who are limited

to a class of persons specified in the legislation. Voting shareholders have unlimited liability and non-voting shareholders have liability limited to the unpaid contributions to share capital.

To take account of this unique arrangement the Act provides that the Companies Code and Regulations apply as if a solicitor corporation were an unlimited company having a share capital and an exempt proprietary company. The sections referred to above do not apply to an unlimited company and their exclusion is therefore a matter of conforming to the structure established by the Act.

So far as Part IV, Division 3A is concerned this Part of the Code was excluded by the regulation to prevent the buy back of shares by solicitor corporations. The exclusion of buy-back provisions was the subject of extensive consultation with the Law Society. The fact that the Society has foreshadowed an amendment in the July, 1991 issue of the Law Society Journal does indeed suggest that the Society had not fully considered the issue when the regulation was made. However, while this is clear in hindsight there was nothing at the time the regulation was made to suggest that the issue was not properly considered.

Similarly in relation to the model articles it is clearly appropriate to exclude the model articles set out in tables A and B of the Companies Code as they do not reflect the special provisions that apply to solicitor corporations. Should the Law Society prepare model articles then I will consider the inclusion of these in the regulation. However, such a proposal was not raised at the time the regulation was made. The future inclusion of model articles has no bearing on the consideration of the regulation at the time it was made.

I trust the information is of assistance, and satisfactorily answers the concerns of the Regulation Review Committee."

Committee's further consideration of the regulation

The Committee agrees with the Minister's initial comment that "*the operation of the Subordinate Legislation Act 1989 is concerned with the objectives of and alternatives to proposed*

statutory rules and not the underlying substantive legislation" and "*that the alternatives which may be explored are those which are consistent with the substantive legislation and the regulation making power contained in the legislation.*"

However the Committee believes that this does not support the Minister's comment that "*It was therefore not appropriate to consider not applying the code or applying it in an unmodified form as these options are inconsistent with the legislation.*"

Options

The relevant part of Section 172(K) of the Legal Profession Act provides:

"*That regulations under this Act may provide that specified provisions of the Companies Code, the Companies Code Regulations or Part 80 of the Supreme Court Rules do not apply to a solicitor corporation or apply to a solicitor corporation with specified modifications.*"

The section clearly provides for a number of options. Firstly the word "may" indicates that regulations need not be made. Secondly if regulations are made they may provide that:

(1) specified provisions don't apply

(2) specified provisions apply with modifications.

In addition under section 216(6)(c) of the Legal Profession Act the regulations may authorise any matter or thing to be from time to time determined, applied or regulated by a specified person or body.

The self-regulation option

The Committee notes the Minister's advice that solicitor corporations are "*essentially a matter for the profession.*" In that case a major option that should have been considered in the Regulatory Impact Statement was self regulation by the Law Society. Self regulation was one of the options recommended for consideration in the Committee's letter of 24th September 1991. Because section 216(6)(c)

provides that the regulations may authorise any matter or thing to be from time to time determined applied or regulated by a specified person or body, the regulations under 172K(3) could have provided that the Law Society determine the specified provisions of the companies code that don't apply to a solicitor corporation, or that they determine any modifications that apply, or both.

Another alternative would be that they do so subject to some reporting requirement. This alternative would have been a form of co-regulation.

Do Nothing Option

It can be seen that there are a full range of alternatives available under the empowering provision in the Act and these have not been considered. The other alternative was making no regulation at all. This is the mandatory "do nothing" option that must be considered when preparing a RIS under Schedule 2(1)(d) of the Subordinate Legislation Act. This would mean that the companies code would apply unmodified to solicitor corporations. Clearly this would be within the power of section 172K(3) which says that the regulations may provide that specified provisions of the code do not apply to solicitor corporations or apply with specified modifications.

Specific matters of concern

The specific matters raised by the Committee have not been adequately dealt with. Although the Minister has provided an explanation of these matters in his letter the issue the Committee raised was that there was no explanation of these matters in the RIS itself which means that the public were not properly informed. On the one hand the Minister says that the regulation was the subject of extensive consultation with the Law Society, yet it appears that he was not aware of their proposal for further amendment of the buy-back provisions or the preparation of draft model articles. These proposals for amendment were referred to in the July 1991 issue of the Society's journal only 4 months after the regulation was made. It would seem that the preparation of these new amendments was very much led by the Society although involving further public expense in drafting and administration by the Attorney-General's Department. From a

cost/benefit perspective it may well have been more appropriate to adopt a self regulation option.

RIS for new regulations

To take the Minister's argument for the limitation of consideration of options to its logical conclusion it would mean that the Subordinate Legislation Act could never require consideration of alternatives to a regulation when that regulation may be foreshadowed at the time that an Act was passed by Parliament. This clearly is not the case as the Subordinate Legislation Act applies equally to totally new regulations as well as regulations replacing those repealed under the Subordinate Legislation Act.

The stance adopted by the Minister is viewed with concern by the Committee in view of the serious implications for the effective operation of the Subordinate Legislation Act. It should be noted that the Minister has adopted a similar approach in the subsequent regulation, the Partnership Regulation 1992. In that case the Minister has also excluded consideration of alternatives even though these are clearly contemplated by the empowering provision of the Limited Partnerships Amendment Act.

The Committee remains of the opinion that a further RIS should be prepared by the Minister this time addressing the regulation and the requirements of section 5 and schedule 2 of the Subordinate Legislation Act. It may be necessary, as a result of that RIS, to decide whether further public comment should be sought on the various matters covered by the RIS or whether the regulation should be appropriately modified.

PARTNERSHIP ACT 1892 - REGULATION
(Partnership Regulation 1992)
Gazette of 1.5.92 at p. 3009

The objects of this Regulation are to prescribe certain matters relating to applications for registration of limited partnerships following on the adoption of laws relating to limited partnerships similar to those in force in certain States of the United States of America.

The Committee found the Regulatory Impact Statement (RIS) for the Statutory Rule departed from the requirements of the Subordinate Legislation Act in the following respects.

1. OPTIONS

The RIS does not comply with the Subordinate Legislation Act in that options for implementing the RIS have not been identified. Schedule 2 of the Act - Provisions Applying to Regulatory Impact Statements and Section 5 state that:

"*A regulatory impact statement must include the following matters:*

(a) A statement of the objectives sought to be achieved and the reasons for them.

(b) An identification of the alternative options by which those objectives can be achieved (whether wholly or substantially)."

These statements are critical for the impact assessment which is required to follow. Instead, the R.I.S. in this case states:

"*<u>REGULATORY OPTIONS</u>*

There are no regulatory options to be determined by Regulation as the structure and operation of limited partnerships is governed by the Partnership Act as amended and the general law. This Statement will therefore examine only the individual requirements introduced by the Regulation."

This statement is incorrect. Taking the objectives one by one and comparing them with their empowering provision in the Partnership Act 1892 as amended by the Partnership (Limited Partnership) Amendment Act, 1991, it can be seen that there is clearly room for identifying alternative options to the regulation.

(1) FEES Section 81 (2) of the Partnership Act states that regulations may make provision for or with respect to fees.

Clearly, the mandatory "do nothing" option can be assessed. Making provision "with respect to fees" rather than fees themselves can also be assessed - for example incorporating by reference fees in some other legislative instrument or by having them determined from time to time by some specified person.

There is no actual costing of the fees provided in the RIS. Instead there is merely a statement that the fees are based on an assessment of cost recovery for the estimated time involved in providing the registration service. There is also no comparison with the fees in other states or with the corresponding law jurisdictions in the United States. There has been no attempt to identify whether those fees in other states and the corresponding law jurisdictions have been themselves the subject of a cost benefit analysis.

This is particularly important, as Regulatory Impact Statements are commonly required for regulatory proposals in the United States.

As for the proposed review after two years to determine whether fees remain appropriate for cost recovery, there is no evidence that the fees are appropriate for cost recovery other than the unquantified statement that they are based on the speculative cost of the estimated time for providing the registration service.

2. PRESCRIBED PARTICULARS ON APPLICATION FOR REGISTRATION

The RIS deals with this matter as follows:-

"*Section 54(1) of the Act provides for certain information to be included in an application for registration of a limited partnership. Section 54(1) (b) permits additional information to be prescribed.*

It is proposed to require an application to include:

1. *The date and place of birth of applicants;*
2. *The terms of the partnership, if any, and*
3. *any special conditions of existence of the partnership.*

The date and place of birth of applicants is a requirement of all comparable legislation, most particularly the Corporations Law. It allows the Registrar to verify the bona fides of the application and clearly identify the applicants, should questions be raised about the operation of a limited partnership and the circumstances of its creation.

Information on the term of the partnership and any special conditions of existence are required to allow creditors and other persons dealing with the partnership to have information which may be relevant to those dealings."

This statement is misleading as section 54(2) (h) of the Act provides that the statement must contain such other particulars as are required by the regulations or by the approved form of statement.

The approved statement is merely that form approved by the Registrar. Accordingly, there was no need to make this provision at all. The additional particulars could simply have been included in the approved form by the Registrar.

The Act clearly makes the consideration of this alternative of inclusion in the approved form essential, yet there has been no consideration of it in the RIS.

3. HOURS FOR RESTRICTED SERVICE

The RIS states:

"*Section 76(2) allows the Regulations to prescribe the hours during which a registered office of a limited partnership must be open and accessible to the public. It is proposed that this be between the hours of 9.00 am to 5.00 pm on all business days. This is consistent with the requirement of comparable legislation.*"

There has been no consideration of the mandatory do nothing option or alternative hours of opening.

4. CORRESPONDING LAW

The RIS states:

> "*Section 64(4) of the Act permits the law of another country to be declared by the regulations to be corresponding law. Any limitation under a corresponding law on the liability of a limited partner in a recognised limited partnership extends to any debt or obligation incurred in connection with the conduct of the partnership's business in New South Wales.*
>
> *It is proposed to declare the law of the States of the United States referred to in Clause 6 of the Regulation to be corresponding law. In the United States partnership law is governed by individual State law. The States listed in Clause 6 have adopted the Revised Uniform Limited Partnership Code 1985. The law of these States provides for the limitation of liability for partners in certain partnerships and , in accordance with section 64(3) (b) may therefore be declared to be a corresponding law.*"

Section 64(4) also indicates that regulations are discretionary.

All the possible options have not been considered nor has the mandatory "do nothing" option.

Again, there has been no attempt to identify any RIS done in the United States on the Uniform Limited Partnership Code 1985 or relevant state laws.

NON-COMPLIANCE WITH SUBORDINATE LEGISLATION ACT

In conclusion the RIS for the Partnership Regulation 1992 departs from the Subordinate Legislation Act in that the following requirements of schedule 2 have not been carried out.

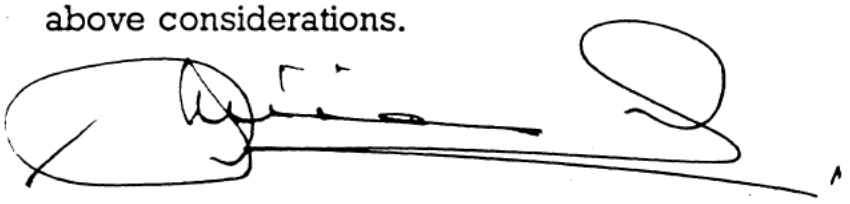
1. There is no assessment of the costs and benefits of the proposed statutory rule, including the costs and benefits relating to resource allocation, administration and compliance.

2. There is no similar assessment of the costs and benefits of each alternative option to the making of the statutory rule (including the option of not proceeding with any action).

3. There is no assessment as to which of the alternative options involves the greatest net benefit or the least net cost to the community.

4. There is no statement of the consultation program to be undertaken.

As with the Solicitor Corporations Regulation the Committee believes that a proper RIS should be prepared taking into account the above considerations.



Adrian Cruickshank, MP
Chairman
Regulation Review Committee

9.3.95.

REGULATORY IMPACT STATEMENT

- NURSES REGULATION 1991
- NURSES (ELECTION) REGULATION 1991
- NURSES (LAST BOARD EXAMINATION) REGULATION 1991

NOVEMBER 1991

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2 December 1991

Mr C Bentley
Parliamentary Services Section
Executive Support Unit
NSW Health Department
Level 8
73 Miller Street
NORTH SYDNEY NSW 2060

Dear Mr Bentley,

REGULATORY IMPACT STATEMENT
- NURSES REGULATION 1991
- NURSES (ELECTION) REGULATION 1991
- NURSES (LAST BOARD EXAMINATION) REGULATION 1991

PPK Consultants present our Regulatory Impact Statement for regulations under the Nurses Act 1991.

We would be pleased to discuss any aspect of this report with you and understand that it will be available for public scrutiny and comment over the next three weeks.

Yours sincerely,
PPK CONSULTANTS PTY LTD

G.E. RICHARDS
Manager, Management Consulting

1. INTRODUCTION

This report is a Regulatory Impact Statement for the regulations under the Nurses Act 1991, No. 9.

Regulatory Impact Statements are designed to outline the impact, including both costs and benefits of a regulation. The Subordinate Legislation Act 1989 requires that a Regulatory Impact Statement be prepared and appropriate consultation be undertaken before a regulation is introduced.

The analysis required to be undertaken in Regulatory Impact Statements is directed only at the subordinate legislation, ie. the regulations, by-laws etc. and do not apply to the Act and its provisions. Thus when examining the impact and identifying alternative options to the measures outlined in the regulation it is not appropriate to consider options that are in conflict with the Act. For example, the regulations under the Nurses Act deal with nurses education and training. In developing options it is not appropriate within the scope of the Regulatory Impact Statement to consider options relating to (e.g.) whether or not nurses should have to satisfy certain education and training criteria. Rather the Regulatory Impact Statement focusses on options to achieve education and training objectives.

This point is made because it narrows the scope of the analysis that follows. In addition, many of the points raised by the individuals and organisations that were consulted during the preparation of Regulatory Impact Statement raised issues which were considered to be directed at provisions of the Act and not the regulations. Thus they were not considered in this analysis.

1.1 Title of Regulatory Proposal

The regulatory proposal addresses regulations under the Nurses Act 1991. There are three sets of regulations:

1. Nurses Regulation 1991
2. Nurses (Election) Regulation 1991.
3. Nurses (Last Board Examination) Regulation 1991.

1.2 Name of Proponent and Responsible Minister

Proponent: NSW Health Department
Minister: The Minister for Health and Community Services.

2. OBJECTIVES OF REGULATORY PROPOSALS

The objective of the Nurses Act 1991 as stated in the Act is to "regulate the practice of nursing". The overall objective is to maintain a high standard of practice within the nursing profession to protect the health and safety of the public. The 1991 Act will replace the Nurses Registration Act 1953.

The Act contains provisions in respect of:

- Requirements for registration and enrolment of nurses.
- Procedures for registration and enrolment of nurses.
- Establishment and operation of the Nurses Registration Board.
- Procedures for complaints and disciplinary action.
- Miscellaneous matters.

The 1991 Act sets up a Nurses Registration Board to exercise certain powers and to administer various provisions of the Act. Although these are similar to that of the Board under the 1953 Act some of the functions and powers of the Board have been changed. The additional functions of the Board under the new Act include:

- Promotion of education of nurses and of educational programmes for nursing.
- Administration of the registration and enrolment of nurses.
- Approval of courses and curricula which are acceptable qualifications for registration and enrolment.

These powers are designed to give the Board the ability to set and enforce conditions and requirements relating to the registration and enrolment of nurses, including nurse education and professional behaviour.

The Board can still set examinations. However, the currently approved courses for registration and enrolment have been exempted from the Board's examinations.

Other major changes include a reduction in the number of Board members from 18 to 10 and the introduction of a new disciplinary structure.

The regulations support the Act in its overall objective of maintaining a high standard of practice in the nursing profession.

The main aspects of the regulations and the specific objectives of each are outlined in the following paragraphs.

2.1 Nurses Regulation 1991

This regulation is designed to specify the procedures for regulation of the practice of nursing. Significant aspects are discussed below:

2.1.1 Approval of Educational Institutions and Courses

The proposed regulation sets out the mechanisms for the Nurses Registration Board to approve the educational courses and institutions which are suitable pre-requisites for registration as a nurse. The regulations deal with how the Board will recognise educational institutions and qualifications. Thus the regulations include procedures and criteria by which universities and other educational and health institutions apply for and are granted recognition by the Board.

2.1.2 Registration, Enrolment and Other Fees and Charges

The regulation sets out the fees payable for registration and enrolment and their annual renewal, for various alterations and amendments to the register/roll and for various administrative procedures, such as viewing the register/roll. Fees have been set to cover the costs of the Board's operations. Since July 1990 the Board has been required to be self-financing.

2.1.3 Certificates

The regulation sets out the form of certificates to practise as a nurse. Separate forms are required for registered and enrolled nurses and midwives and for temporary registration.

2.1.4 Disciplinary Procedures

The Act sets out the procedures for the Board in handling complaints about nurses and in taking disciplinary action against nurses, where appropriate. A Nurses Tribunal is set up, under the Act, to inquire into complaints and to impose disciplinary measures for serious matters where appropriate. The Board may also direct complaints to a Professional Standards Committee, which has the power to investigate complaints for lesser matters and to refer cases to the Nurses Tribunal. Allowance is made in the Act to appeal against decisions of a Professional Standards Committee or Tribunal on points of law or the determination of disciplinary action.

The regulation deals with payment rates for members of the Professional Standards Committees and the Nurses Tribunal. It also deals with minor procedural matters such as the length of the period within which appeals against Tribunal and Committee decisions can be made. These are not areas where alternative options are available.

2.1.5 Functions not requiring Registration

The regulation prescribes three types of functions that do not require registration. These include functions exercised to meet the needs of organ transplant patients and patients donating organs; functions exercised as a member of a retrieval team which enters New South Wales to pick up a patient; and functions exercised during the period a nurse is on escort duty accompanying a patient on a journey within New South Wales if the origin or destination of the journey is outside New South Wales.

2.1.6 Notice of Incapacity

The regulation prescribes the persons required to notify the Board if a nurse becomes mentally incapacitated and the time in which the notification is to be made.

2.1.7 Badges and Letters After Name

The regulation prescribes the design of badges and the letters that may be placed after the names of accredited nurses.

2.2 Nurses (Election) Regulation 1991

2.2.1 The Nurses Registration Board - Membership and Elections

The Board, under the 1953 Act, consisted of 18 members. There was provision for seven registered nurses and for one enrolled nurse or enrolled mothercraft nurse to be elected to the Board.

The proposed Board is to consist of 10 members appointed by the Governor. Of these, three are to be registered nurses and one is to be an enrolled nurse or enrolled mothercraft nurse, elected in accordance with the regulations. The Nurses (Election) Regulation 1991 is concerned with the conduct of these elections of nurses every 3 years.

The objectives of electing members of the nursing profession to the Board would appear to be twofold:

1) To ensure the Board has an appropriate level of expertise to carry out its functions.

2) To ensure participation of nurses of all classes in the operations of the Board and hence in the regulation of the profession.

The objective of the election regulation is to provide a fair and workable method of election of representatives to the Board. All registered and enrolled nurses are eligible to vote, but voting is not compulsory. The system adopted is a preferential system. The elections are conducted by a Returning Officer who, in this case, is the Electoral Commissioner of New South Wales or his/her nominee.

The regulation sets out the manner of nomination of candidates for election, the conduct of the electoral ballot and associated matters. Candidates are allowed to provide personal information about their candidature to the Electoral Office for distribution to voters.

2.3 Nurses (Last Board Examination) Regulation 1991

The Nurses Registration Board no longer conducts examinations for the currently approved courses conducted in NSW which lead to registration and enrolment. However, one further examination will be conducted in June 1992 for eligible multiple attempt candidates who have previously completed the old hospital based pre-registration and the enrolled nurse training programmes.

This regulation sets out the procedures and eligibility of candidates for this last Nurses Registration Board examination. It is only available to certain previous candidates at Board exams for registration or enrolment. There will be no more exams after June 1992.

We do not consider there is an alternative option for this regulation and have not commented further on the last Board examination.

3. OPTIONS TO ACHIEVE OBJECTIVES

3.1 Nurses Regulation 1991

Options considered by this analysis for achieving the objectives of maintaining standards of practice within the nursing profession and protecting the health and safety of the public are discussed below. The only area covered in the regulation for which options can be considered is in the approval of Educational Institutions and Courses.

3.1.1 Approval of Educational Institutions and Courses

Option 1:
Proposed Regulation - Approval by the Nurses Registration Board of educational institutions and courses.

Option 2:
No Regulation - No approval system for educational standards - hospitals and health care operators would then check qualifications.

Option 3:
Self Regulation - Nursing bodies would be responsible for the approval of educational institutions and courses.

These options could all be implemented. However, our consultations with the industry suggest there is little support for any option other than for Option 1, which reflects the existing situation of legislation with statutory rule to regulate the profession. This acceptance of the legislative/statutory rule approach would seem to support the view that there is a need for significant government involvement in setting and maintaining the standards of practice for nurses. Setting standards for training and for professional conduct are important means of maintaining these standards.

The Board and nursing profession see themselves as having a duty of care in maintaining standards in the practice of nursing. It is important therefore, from the public perspective, that there are standards for nursing education. Government regulation of education institutions and courses appears to be the preferred method of regulation.

Self regulation of education institutions and curricula by the nursing profession and by the education institutions themselves is a possible option. However we have not been able to detect any support for this option. This may be a reflection of the Nurses Registration Board already containing significant representation from nursing bodies, industrial bodies, educators and professional associations as well as containing a large proportion of registered nurses. Eight of the ten members of the proposed Board are required to be accredited nurses.

4. IMPACT ASSESSMENT OF THE PROPOSED STATUTORY RULE

4.1 Nurses Regulation 1991

The regulations affect the following people and groups:

- Registered and Enrolled Nurses.
- Nursing Education Institutions and Bodies.
- Nurses Registration Board.
- General Community as users of the health system.

4.1.1 Impact of Fees and Charges

The main cost of the regulation is in the fees and charges paid by nurses. The registration fees and associated fees and associated charges set under the regulation are shown in the table below.

	Current Fees & Charges
Annual Renewal	$32
Registration/Enrolment	$42
Restoration	$42
Temporary	$42
Duplicate Certificate	$20
Register Inspection	$10
Add Additional Qualifications	$12
Verification	$15
Overseas Nurse Registration	$50

The annual renewal fees paid by all registered and enrolled nurses have the greatest financial impact on nurses. Fees for duplicate certificates, restoration to the register and register inspections are primarily generated by users of the register, such as hospitals, nursing homes and the Department of Health. The publicly available register displays only names and qualifications and does not allow access to addresses and other confidential information.

The financial impact of these fees and charges is borne by nurses both existing and those proposing to join the industry and to a lesser extent by hospitals, nursing homes and other users of the register. Over 90% of the fees are estimated to be borne by nurses and the remainder by hospitals, nursing homes, the Department of Health and other users of the register. Importantly, fees and charges are tax deductible.

The Health Professional Boards Legislation (Amendment) Act 1990 amended the Nurses Registration Act 1953 to enable the Board to become self-funding. In previous years the Board was fully funded by the State Government (fees received were paid into Consolidated Revenue) but the intention of the above Act was to make the Board self-sufficient and responsible for its own financial operations. Now the government requires the Board to be responsible for its own financial operations. This approach is based on a user pays philosophy, whereby the users of the services are required to meet the costs of providing the services. In this case the Nurses Registration Board is providing a regulatory service which controls standards in the industry.

The estimated annual operating cost of the Nurses Registration Board (including salaries and on-costs and all operating expenses and an allocation of $315,000 for the Education and Research Account) is estimated to be $2.75 million in 1992. The Board's budget for 1992 is shown below:

INCOME	($)
Annual Roll Fee	2,492,000
Other Fees	260,000
Total	2,752,000

EXPENDITURE	($)
Salaries	1,120,959
Overtime	1,925
Meal Allowance	335
Payroll Tax	78,467
Leave	24,661
Superannuation	381,835
Rent	212,412
Building Expenses	4,484
Alterations	4,484
Cleaning	5,593
Travel	14,944
Subsistence	12,026
Fuel	2,420
Vehicle Insurance	1,088
Vehicle Expenses	876
Freight	4,239
Advertising	2,000
Fees for Service	201,787
Members Fees	16,651
Examination Fees	2,100
Legal Fees	30,000
Postal Charges	178,840
Communication Charges	27,119
Printing	37,590
Stationery	4,015
Equipment	14,046
Maintenance	1,557
Minor Expenses	657
Vehicle Purchases	0
Computer Equipment	22,420
Major Stores	14,045
Electricity	8,968
Insurance	11,658
Staff Training	4,484
Reserve	0
Education and Research	315,000
Total	2,763,685

The Board may recommend amendment of the regulation to increase or decrease fees to achieve its financial and operational objectives. The Board could recommend adjustment of fees when the financial impact of self financing becomes clearer.

In summary the major cost impact of the regulation falls on nurses in the fees paid for registration and enrolment.

4.2 Impact of the Election of Nurses to the Board

The election regulation specifies the procedures to be used for the election of the three registered nurses and one enrolled nurse to the Board. The system specified is a preferential system. Apart from this, the regulation is essentially procedural and is unlikely to have major impact. There is little difference from the system under the 1953 Act.

The cost of holding elections to the Board are approximately $100,000 or $33,000 per annum over the 3-year term of the elected members. Simpler methods would be less expensive but would not achieve the election objectives noted earlier. A first past-the-post method may simplify, but is unlikely to significantly reduce the cost of elections since the majority of costs is associated with mail out to voters.

The elections are designed to allow the nursing community to have input into the Board. Past elections have generated a reasonable level of response from nurses, compared with other non-compulsory elections. Voting responses are received from approximately 17% of registered and 26% of enrolled nurses.

The cost of the elections is to be met by the Board, which is ultimately funded by nurses and users of the nursing register.

5. IMPACT ASSESSMENT OF ALTERNATIVE OPTIONS

The options available to the proposed regulation are limited as outlined in Section 4. The impact of these options is outlined below.

5.1 Nurses Regulation 1991

Available options concerning this regulation relate to the regulation of education requirements for nursing registration. The impact of options of "industry self regulation" or "no regulation" is very difficult to quantify as the major effect would be on the standard of education required for nurses and on the resulting impact of this on health care.

The "no-regulation" option would shift the responsibility for monitoring education standards of nurses to the individual hospitals and institutions. This option would save the direct cost of that part of the operating costs of the Nurses Registration Board, which is involved in approving institutions and curricula. It is likely that a register of nurses would no longer be required and the Board's main role would then be in regulating professional conduct. Significant savings in the Board's operating cost would, however, probably be more than offset by the cost of investigations of qualifications needed to be carried out by the employers of nurses in the health system. Savings would be small compared with the extra costs potentially borne by the system.

It would be reasonable to expect with a "no-regulation" option that the insurance and litigation costs in the health system would be adversely affected. This option could leave the health and hospital systems open to litigation as a result of a failure to maintain standards of care. This could increase the cost of insurance for hospitals and health care operators. Insurance costs could be significant across the whole system and probably amount to more than the costs of the relevant part of the existing regulatory system.

Secondly, the "no-regulation" option would merely transfer the cost of regulation to the hospitals and health care operators, as they would become responsible to check on the qualifications and training of individual nurses. Such a system would be less efficient than the existing centralised system, as it would involve more checking and review throughout the system. Each nurse would need to have their qualifications approved individually and the costs incurred would be much greater than under the present system. Secondly it would open up the possibility of variations in standards of education and hence standards of care in different parts

of the health care system. This system could also adversely affect nurses who may lose "portability" of their qualifications. If the full responsibility for education standards was not met by hospitals and health care operators the result would be a fall in the standard of health care. The result of a less effective system operated by hospitals and health care operators is again an adverse impact on health care standards.

The option of no regulation and, to some extent, self regulation contradicts the Government's policy of mutual recognition of qualifications between states. If hospitals and health care operators had to check qualifications themselves, mutual recognition would be unworkable. Industry self regulation would also make mutual recognition more difficult. Should all hospitals/educational institutions be responsible for approval of educational institution and courses they would in the first instance be required to confer on a national basis and this would, in effect, duplicate the Nurses Registration Board role or at least ensure that the Nurses Registration Board resources continued to be utilised in a similar manner.

The "industry self regulation" option would be likely to operate in much the same way as the current system as there would be a need for centralised review and monitoring of nursing education standards. There is already significant involvement of the industry in the membership and decision making of the Nurses Registration Board. The costs and other impacts of this system, therefore, are not expected to be significantly different from those of the existing system. There are clear benefits associated with Government regulation compared with industry regulation. Users of the health system can be confident that the approval of educational institutions and courses is in their interest rather than the professions interest. Also, nurses will benefit from having their qualifications officially recognised and easily portable between States.

6. OVERALL ASSESSMENT

A summary of each option discussed is shown below:

Option 2
No Regulation - No approval system for educational standards - hospitals and health care operators check qualifications.

The only benefit of having no approval system for educational standards would be a reduction in the fees paid by nurses as a result of reduced operating costs of the Board. The costs of this option include administrative costs to hospitals and health care operators in checking and assessing educational qualifications of nurses. As this system would be less efficient there may be a reduction in health care standards. The advantages to be gained from mutual recognition of nursing qualifications between States would also be lost. In addition, the Board would have difficulty in regulating professional conduct.

Option 3
Self Regulation - Nursing bodies responsible for the approval of educational institutions and courses.

The same benefit of reduced fees to nurses would be gained under this option. However, the nursing profession would need to raise funds to establish a system of approval for educational institutions and courses. Again the Board would have difficulty in regulating professional conduct if there was no official registration system for accredited nurses. The benefits in terms of public health and safety of the regulation of professional conduct could not be gained under this system.

Option 1
Proposed Regulation - Approval of educational institutions and courses by the Nurses Registration Board.

The proposed regulation that provides for the approval of educational institutions by the Board will result in a net benefit for the community. The fees paid by nurses and users of the register are outweighed by the public health benefits resulting from an efficient system to approve educational institutions and courses for nurses.

Options	Benefits	Costs
Option 1 Proposed Regulation - Approval of educational institutions and courses by the Nurses Registration Board	Benefit of an efficient system to approve qualifications	Fees paid by nurses and users of the register.
Option 2 No Regulation - No approval system for educational standards, hospitals and health care operators check qualifications	Lower fees paid by nurses (through removal of cost to Board of regulating educational requirements)	Cost to the health system of checking qualifications. Cost of hindering mutual recognition of qualifications. Possible reduction in health care standards. Difficulty for Board in regulating professional conduct without any approval of qualifications.
Option 3 Self Regulation - Nursing bodies responsible for the approval of educational institutions and courses	Lower fees paid by nurses (through removal of cost to Board of regulating educational requirements)	Cost to the profession of setting up a system to regulate educational requirements. Difficulty for Board in regulating professional conduct without official approval of qualifications.

7. CONSULTATION

In accordance with the requirement of the Subordinate Legislation Act 1989, consultation has taken place with representative groups of the nursing profession and relevant interest groups likely to be affected by the proposed statutory rule.

Groups consulted were:

- NSW Nurses Association
- NSW College of Nursing
- Institute of Nursing Administrators
- NSW Midwives Association (Branch of ACMI)
- National Office of Overseas Skill Recognition
- School of Health Studies - University of Western Sydney
- School of Nursing Studies - University of Technology
- Officers of the NSW Nurses Registration Board
- NSW Health Professional Registration Boards
- Nursing Branch, NSW Department of Health
- Complaints Unit, NSW Department of Health
- Medical Services Committee (Health Administration Act 1982)

The consultation process, in the first instance, involved contact with executives of the above groups to outline the Regulatory Impact Statement process and requirements and to provide each group with a copy of the Nurses Act 1991 - Proposed Regulations, for their review.

Responses on content and potential options were invited from each of the user groups. All responses were considered in the preparation of this Regulatory Impact Statement. However many of the responses involved comments on the provision of the Act. These comments have been passed onto the Department of Health.

Consultation Program

The following groups will be formally invited to comment on both the draft Regulations and the Regulatory Impact Statement:

- NSW Nurses Association
- NSW College of Nursing
- Institute of Nursing Administrators
- NSW Midwives Association (Branch of ACMI)
- National Office of Overseas Skill Recognition
- School of Health Studies - University of Western Sydney
- School of Nursing Studies - University of Technology
- Medical Services Committee
- Health and Research Employees Association of NSW
- NSW Professions Advisory Board
- Economic Change and Regulatory Efficiency Unit, State Development
- Australian Medical Association (NSW)
- Australian Consumer's Association
- Faculty of Nursing and Community Studies - University of Western Sydney.
- NSW Nurses Registration Board

*** END OF DOCUMENT ***

SOLICITOR CORPORATIONS

REGULATORY IMPACT STATEMENT

The Legal Profession (Solicitor Corporations) Amendment Act 1990 (the Act) amended the Legal Profession Act 1987 to provide for:

- the incorporation, under the Act, of corporations which may, subject to the issue of a practising certificate by the Law Society, carry on business as solicitors in New South Wales;
- the issue of a practising certificate to a corporation formed under the Act;
- the issue of a practising certificate to a reciprocal corporation;
- amendments to the Act to accommodate the fact that solicitors may be either natural persons or incorporated practitioners; and
- the application of the Companies (NSW) Code and Regulations to corporations formed under the Act.

Incorporation of legal practices will provide benefits both to solicitors and the general public in their dealings with solicitors.

A company will provide a better structure for the conduct of a solicitor's practice, and will facilitate the efficient management of legal firms and thus enable them to provide a better service to clients. To illustrate, incorporation will allow for easier retention of profits for the purpose of reinvestment and will allow for a more effective management structure for larger firms through control by a board of directors. Incorporation will allow for easier transfer of an individual solicitor's equity in the firm upon retirement of death by provisions for share transfer or company buy-back. It will also allow for easier valuation of the solicitor's equity for estate valuation purposes.

Incorporation will provide some personal benefits to solicitors as a company structure will enable solicitors to organise their income so that they can set aside a more substantial superannuation provision for their retirement than has previously been the case under the arrangements permitted by the Deputy Commissioner of Taxation. Incorporation will not provide a mechanism to allow solicitors to limit their liability, nor, under the Deputy Commission of Taxation's rulings, will it allow for tax minimisation through income splitting.

The personal advantages to solicitors is no more than that which can be obtained by any other professional or tradesperson who provide a service through a company structure. The real benefit is in the more efficient management of legal firms.

The Act provides for the incorporation of corporations under the Legal Profession Act and allows such corporations to carry on the business of a Solicitor in New South Wales, subject to the issue of a practising certificate by the Law Society.

It is important however to recognise that corporations formed under the Act will not be companies incorporation under the Companies (NSW) Code, although nearly all of the provisions of the Companies Code and the Regulations will apply to such corporations. This will mean that the regulation of corporations formed under the Act will, subject to additional requirement to allow a corporation to practice law, be in the hands of the Corporate Affairs Commission.

The Act provides that if any one or more person wishes to form a corporation under the Act, they may also do so on the basis that the corporation meets certain prescribed criteria, including that the Memorandum and Articles of the proposed corporation will have to be first approved by the Law Society Council.

The corporation must be formed on the basis that the members holding voting shares have no limit placed on their liability, and thus in the case of the company being insolvent, the voting shareholders will be personally liable for the debts of the company. The liability of members holding non-voting shares held by them.

The right to hold voting shares in the corporation will be limited to the holders of an unrestricted practising certificate and only persons who hold voting shares are permitted to be directors of the corporation. Thus the voting shareholders in the corporate structure can be equate to partners in a law firm under the present structure. It is also proposed that no person other than the holder of an unrestricted practising certificate, shall own or have any beneficial or relevant interest in any voting share. This is to prevent a corporation being formed in which a solicitor acts as legal owner, but in which de-facto control is exercised by another person. By ensuring that directors and voting shareholders can only be persons with unrestricted practising certificates, the Law Society will be able to more strictly control the activities of the corporation.

The right to holder non-voting shares will be limited to eligible person being;

(i) the holder of a practising certificate;
(ii) a prescribed relative;

(iii) an approved person;
(iv) a trustee of a trust, the only beneficiaries or potential beneficiaries of which, are eligible persons.

The prescribed relative category is consistent with that currently approved by the Law Society for the purpose of assignment of partnership receipts.

The category of approved person allows, by permission of the Law Society, a corporation to have wider group of non-voting shareholders. It is considered this mechanism will be used to allow profit sharing with employees who provide accounting and clerical services.

The corporation will be prohibited from making any invitation to the public to subscribe for any shares in or debentures of the corporation. This limitation is consistent with restricting shareholders to eligible person.

While a public company formed under the Code can, subject to the prospectus provisions, invite members of the public to deposit money with the Corporation, a legal corporation may only do so with the permission of the Law Society. This is consistent with legal firms mortgage practices, and the deposit and investment of monies held in trust.

The mechanism for incorporation provides for an application to be lodged with the Law Society Council, which, upon being satisfied that the corporation complies with the prescribed requirements, will issue a certificate of approval. Upon issue of that certificate, the incorporation process would follow the normal practice for incorporation of companies under the Companies (NSW) Code. The applicants will be required to provide necessary documentation and comply with the requirements of the Corporate Affairs Commission for issue of a certificate of registration.

The Act redefines solicitor in the Legal Profession Act to include an incorporated practitioner. Thus, a legal corporation will be able to apply for the issue of a practising certificate.

Consistent with the requirements which apply for the issue of a practising certificate to a natural person, the Act provides a condition precluding an incorporated practitioner from carrying on any business, other than the practice of law and incidental activities, than so may be approved by the Law Society Council.

The grounds on which the Law Society may refuse to issue, cancel or suspend a practising certificate, are expanded to include, in the case of an incorporated practitioner, when a receiver, manager or liquidator has been appointed; and where the corporation is being contrary to the requirements for

incorporation under the Act or contrary to its Memorandum of Association.

The Act also provides for what is called "reciprocal corporations". This allows New South Wales to recognise and carry on business as solicitors in New South Wales, bodies incorporated in other States, where the laws of those States allow corporations formed under the Act to carry on business on terms and conditions substantially the same as applies in New South Wales.

It is therefore provided that a practising certificate may be issued to a reciprocal corporation on the same grounds and subject to the same requirements as for the issue of a practising certificate to a corporation formed under the Act.

To carry on business as a solicitor in New South Wales, the reciprocal corporation will be required to hold a New South Wales practising certificate. The management of the reciprocal corporation in New South Wales must be under the supervision of a solicitor, being a natural person who holds an unrestricted practising certificate in New South Wales.

To account for the fact that a solicitor may be an incorporated practitioner, it will be necessary to make a number of consequential amendments to the Legal Profession Act.

These include limiting the admission of solicitors and the right of audience to natural person, although a solicitor may be employed by an incorporated practitioner. It also involves providing the Law Society Council with additional powers in respect of the investigation of affairs of incorporated practitioners.

All other requirements of the Legal Profession Act in relation to such matters as conduct, maintenance of trust accounts, compulsory indemnity insurance and fidelity fund contributions will apply to incorporated practitioners in the same manner as is applicable to other practitioners.

REGULATORY IMPACT STATEMENT

PARTNERSHIP REGULATION 1992

under the

PARTNERSHIP ACT 1892 AND BY THE PARTNERSHIP (LIMITED PARTNERSHIP) AMENDMENT ACT 1991 (NO 2)

1. RESPONSIBLE MINISTER:
The Hon P J Collins, QC, MP, Attorney General

2. COMMENTS ON THE REGULATION

The final date for comment on the draft Regulation and the Regulatory Impact Statement is 17 April 1992. Submissions should be sent to the Director General, Attorney General's Department, Goodsell Building, 8 - 12 Chifley Square, Sydney.

3. OBJECTIVES OF THE REGULATION.

1. To set fees for the registration of a limited partnership and associated fees for matters such as registration of change of details, notice of dissolution or cessation of the partnership, and search of the register.

2. To provide for additional particulars to be lodged with an application for registration.

3. To prescribe the hours during which a registered office must remain open.

4. To declare the law of certain States of the United States to be corresponding law for the purpose of recognition of limited partnerships formed in those States.

4. BACKGROUND

The Partnership (Limited Partnership) Amendment Act 1991 was passed by Parliament during the Budget Session 1991.

The Act provides for the formation of limited partnership upon registration with the Register of Business Names. The Act also provides for the regulation of limited partnerships. For details on the operation of the legislation reference is made to the Second Reading

Speech when the legislation was first introduced. (Hansard 18 April 1991 pages 2522 to 2525.)

5. REGULATORY OPTIONS

There are no regulatory options to be determined by Regulation as the structure and operation of limited partnerships is governed by the Partnership Act as amended and the general law. This Statement will therefore examine only the individual requirements introduced by the Regulation.

6. PRESCRIBED PARTICULARS ON APPLICATION FOR REGISTRATION

Section 54(1) of the Act provides for certain information to be included in an application for registration of a limited partnership. Section 54(1)(b) permits additional information to be prescribed.

It is proposed to require an application to include:

1. The date and place of birth of applicants;
2. The terms of the partnership, if any; and
3. any special conditions of existence of the partnership.

The date and place of birth of applicants is a requirement of all comparable legislation, most particularly the Corporations Law. It allows the Registrar to verify the bona fides of the application and clearly identify the applicants should questions be raised about the operation of a limited partnership and the circumstances of its creation.

Information on the term of the partnership and any special conditions of existence are required to allow creditors and other persons dealing with the partnership to have information which may be relevant to those dealings.

7. FEES

The proposed fees introduced by the Regulation are attached (Schedule 1). The fees are based on an assessment of cost recovery for the estimated time involved in providing the registration service. This is necessarily speculative as it is impossible to confidently predict the number of partnerships which may be registered. Registration levels in other States which have limited partnerships are of limited assistance as registrations have been low. It is anticipated that registration levels will be higher in New South Wales due to the fact that the legislation is clearer in its effect and the business community is openly responsive to this development.

The proposed fees are also consistent with fees under comparable law, and in particular to the fees under the Corporations Law.

The Registrar of Business Names will review the fee levels after 2 years to determined whether the fees remain appropriate for the purpose of cost recovery taking into account the number of registrations.

8. REGISTERED OFFICE

Section 76(2) allows the Regulations to prescribed the hours during which a registered office of a limited partnership must be open and accessible to the public. It is proposed that this be between the hours of 9.00 am to 5.00 pm on all business days. This is consistent with the requirement of comparable legislation.

9. CORRESPONDING LAW

Section 64(4) of the Act permits the law of another country to be declared by the regulations to be corresponding law. Any limitation under a corresponding law on the liability of a limited partner in a recognised limited partnership extends to any debt or obligation incurred in connection with the conduct of the partnership's business in New South Wales.

It is proposed to declare the law of the States of the United States referred to in Clause 6 of the Regulation to be corresponding law. In the United States partnership law is governed by individual State law. The States listed in clause 6 have adopted the Revised Uniform Limited Partnership Code 1985. The law of these States provides for the limitation of liability for partners in certain partnerships and, in accordance with section 64(3)(b) may therefore be declared to be a corresponding law.

10. FORMS

The Act provides that applications to the Registrar are to be made in a manner approved by the Registrar. While the forms are outside the scope of the regulation copies of the draft forms are attached for information.

REGULATION REVIEW COMMITTEE
Parliament of New South Wales

Report

on

MICROBIAL CONTROL UNDER PART 6 OF THE PUBLIC HEALTH REGULATION 1991 PERTAINING TO THE SPREAD OF LEGIONNAIRES' DISEASE THROUGH WATER-COOLING SYSTEMS IN NEW SOUTH WALES

REPORT NO. 16
October 1992

REGULATION REVIEW COMMITTEE

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Ms R Pope, Assistant Committee Officer

The Regulation Review Committee was established under the Regulation Review Act 1987. A principal function of it 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

(h) 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 or portion of a regulation ought to be disallowed and the grounds on which it has formed that opinion.

PUBLIC HEALTH ACT 1991 - PUBLIC HEALTH REGULATION 1991

Background information

This regulation provides for the notification and registration of scheduled medical conditions and adopts a number of procedures to help control the spread of serious diseases notably in:

(a) the operation of a public swimming pool or spa:

(b) the installation and operation of large air-conditioning and water-heating systems;

(c) procedures that may involve the penetration of a client's skin (for example testing for blood cholesterol or blood sugar, acupuncture, tattooing, ear-piercing and the removal of hair);

(d) the handling of bodies for burial or cremation and the exhumation of bodies.

The regulation was initially published on 15th November 1991 in Government Gazette No. 159 at pages 9530 to 9557. That publication omitted part of the regulation comprising clause 73 (b), (c), (d) and (e), the whole of Division 6 comprising clauses 74 and 75, the whole of Division 7 comprising clause 76 and that part of Division 8 comprising clause 77 and clause 78(1), (2), (3) (a), (b), (c) and (d).

On 22 November 1991, the regulation was republished in full by way of an erratum. However certain clauses of that regulation purported to commence on 18th November 1991 notwithstanding that they were not published until 22 November 1991.

The Committee considered the regulation on 5th March 1992 and wrote to the Minister on 6th March 1992 advising that the proper course that should have been followed was to remake and republish the regulation in full with appropriate changes to the commencement clause. The Committee also recommended that the Department of Health should seek the advice of the Parliamentary Counsel as to the validity of the Public Health Regulation and on any remedial action that should be taken.

The advice of the Parliamentary Counsel was taken and the Minister wrote back on 7 August 1992 advising that the Regulation had been remade on 19th June 1992. He also said action taken under the Regulation until the date of remaking would be

validated by legislation in the next sessions of Parliament.

Microbial Control

This report is specific to part 6 of the Regulation - Microbial Control.

The objectives of this part are to reduce the incidence of Legionnaires' disease. The Regulatory Impact Statement (RIS) states that in Australia major outbreaks of the disease have been traced to water-cooling systems (cooling towers and evaporative condensers) associated with airconditioning refrigeration systems.

For water-cooling systems the regulation principally provided that:

1. All new installations are to comply with section 4 of AS3666 which specifies the design and installation of cooling towers and associated equipment.
2. All liquid discharges are to be made into a waste water system. A system is to be operated only if equipped with a disinfection process of a kind approved by the Director-General.
3. Each system is to be inspected monthly by the owner/occupier of the building and any maintenance work found to be necessary is to be carried out within a reasonable time before the next inspection.
4. Whether or not it is found to be necessary, the system is to be cleaned at three-monthly intervals.
5. Each system is to be drained as soon as practicable after being shut down.
6. When a system is re-commissioned after being shut down, it is to be inspected and any maintenance work found to be necessary as a result of the inspection is to be carried out.
7. Each local authority is to maintain a register of water-cooling systems, evaporative cooling systems and warm water systems installed on regulated premises (all premises other than dwelling) in its area.

Lack of an inspection regime for water-cooling systems

While the regulation prescribes requirements for local authorities to maintain a register of these systems on regulated premises in their areas and obtain information from owners/occupiers of premises where a system is installed (Clause 76), the

regulation does not prescribe a regime for regular or random inspections by local authorities of these systems to ensure compliance with the clauses pertaining to **installation, disinfection and maintenance**. Section 82 (2) (e) of the Public Health Act 1991 states:

> *"In particular the regulation may make provision for or with respect to any of the following:-(e)the functions (including the power of entry and inspection) of local authorities and authorised officers in relation to a regulated system within the meaning of part 4;"*

Although Inspectors have the legal authority to enter certain premises, the regulations do not specify any system for carrying out inspections either on a routine or random basis.

The Regulatory Impact Statement (RIS) under "Costs to Local Authorities and State Government" on page 30 states:

> *"The proposed regulations impose no requirement on local authorities to inspect or monitor equipment except for the purpose of maintaining the register".*

However, it includes in its assessment of costs to the local authorities and State Government the cost of inspection and sampling checks of $1.5 million per annum based on an assumption of 30,000 inspections per annum at $50 per inspection.

Total costs of compliance by the local authorities are estimated in the Regulatory Impact Statement at $5.40 million in the first year which include the initial compliance cost of establishing registers, and the cost of site visits, interviews and inspections, completion of questionnaires and data base entries. There is an estimated 50% continuing compliance cost of $3.69 million annually. The cost of staff already in place and overheads to approve and administer the regulation are assumed as being met by the NSW Health Department.

While the Code of Practice prepared by Legionella Advisory Committee of the NSW Health Department does elaborate on the role of the local authorities in the control of Legionella, it has no legal status other than under Clause 79 of the regulation where compliance with the Code can be used as a defence to prosecution under the

regulation.

In the absence of a regime for regular or random inspections by the local authorities, the effectiveness of the regulation in terms of being able to control the spread of the Legionnaires' disease is considerably reduced.

Technical Standards

There is considerable concern on the likely inadequacy of the prescribed technical standards on installation, maintenance and disinfection of the water-cooling system to control the spread of Legionnaires' disease. University researchers as well as representatives of the Cooling Tower Manufacturer's Association have confirmed that major manufacturers could supply cooling towers which meet with more stringent standards (such as standards on drift loss) than those prescribed in AS3666. The technical standards for cleaning, disinfection etc also have considerable scope for improvement and will need to be re-examined. Representatives from the Health Department have told the Committee that the various technical standards need to be re-examined.

Regulatory Impact Statement

The Regulatory Impact Statement does not include in its assessment the following costs:

i) The cost of equipping the water-cooling systems (and warm-water systems) with a disinfection process (of a kind approved by the Director General), where not already equipped.

ii) The cost of altering cooling towers/evaporative condensers and associated systems that are inaccessible to cleaning.

The annual maintenance costs are based on the information provided by the Victorian Department of Property and Services and the RIS on page 26 states:

"*These costs covered monthly inspections, chemical treatment programs, and cleaning on a three or six monthly cycle.*" It needs to be pointed out that the cleaning costs on a three monthly cycle (as required in NSW regulation) would be twice that of cleaning on a six monthly cycle, and therefore the RIS should have used costs for a three

monthly cleaning cycle.

Code of Practice

A Code of Practice was prepared by the Legionella Advisory Committee set up by the Department of Health. Although a guideline, it states on page 5:

> "*This Code is to be read in conjunction with the Australian Standard AS 3666 which is to be complied with. The provision of this Code, however, shall take precedence over the Standard where it indicates stricter requirements or higher standards.*"

This is incorrect as the Code of Practice has no legal status except as a defence to prosecution under clause 79. There are a number of other inconsistencies. For example the Code under the heading "Legal Requirements", sets out obligations in respect of installation and maintenance of cooling towers. However these requirements are not as strict as the detailed provisions in Clause 63 of the regulation which incorporates Section 4 of AS3666.

The Committee has for some time been concerned about the application of Codes and other standards in conjunction with regulations.

The 10th Report of the Regulation Review Committee stated on page 3:

> "*It would seem to the Regulation Review Committee that in cases such as this where the particular codes are being prepared for statewide adoption that some thought should be given to legal drafting representation. A review of these codes, at a later stage, when the Committee members have completed their task is probably too late.*"

Legal drafting representation would have helped considerably in this case.

On 17th September 1992 the Committee wrote to the Minister and asked him to arrange for the following matters to be examined by the Task Force which had recently been set up in the Department of Health:

i) ways for improving the enforcement of the regulation;

ii) the relationship between the regulation, Code of Practice and the ASA Standard;

iii) the adequacy of the prescribed standards of installation, maintenance and

disinfection of the cooling-water system;

iv) the cost of any course of action (as well as alternative options) proposed by the Task Force to rectify standards of installation, maintenance and disinfection, and of ensuring compliance.

The Committee will be following this matter up with the Minister and subsequently reporting the outcome of it to Parliament.