REGULATION REVIEW COMMITTEE

PARLIAMENT OF NEW SOUTH WALES

Report in relation to regulations, applying, adopting or incorporating codes or other publications.

REPORT No. 10

NOVEMBER 1990

REGULATION REVIEW COMMITTEE

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REPORT

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.

REGULATIONS APPLYING, ADOPTING OR INCORPORATING CODES OR OTHER PUBLICATIONS

Section 42(1) of the N.S.W. Interpretation Act 1987, provides:-

> "(1) If an Act authorises or requires provision to be made for or with respect to any matter by a statutory rule, such a rule may make provision for or with respect to that matter by applying, adopting or incorporating, with or without modification, the provisions of any Act or statutory rule or of any other publication, whether of the same or of a different kind."

The Regulation Review Committee is concerned that Parliament does not in most cases have an opportunity to review any publications applied, adopted or incorporated pursuant to this section. These publications, often clearly intended for statewide adoption in regulations, are generally drawn up and completed without any input or review by the Parliamentary Counsel. They are rarely printed in the body of the regulation and never tabled with the regulation.

The Regulation Review Committee recently considered a regulation made under the Dangerous Goods Act 1973 relating to references to the Australian Code for the Transport of Dangerous Goods by Road and Rail (Gazette 2 March 1990 at page 1776). That code is a 400 page document but the regulation making it law is only 2 pages in length. There is no formal mechanism for the review of these codes by the Parliament nor is there any guarantee of access to codes by the public.

The Regulation Review Committee is not aware whether it is possible for the Parliamentary Counsel to examine, to any great extent, material to be incorporated. It would certainly be difficult from a practical viewpoint for his officers to monitor in depth many of the technical codes that are regularly incorporated. Presumably however he looks at the legality of the

code and aspects of its drafting. The role of the Parliamentary Counsel will become increasingly important in the drafting of codes as the Government pursues its aim of developing national uniform standards.

The Regulation Review Committee previously examined an Ordinance made under the Local Government Act 1919 relating to caravan parks and moveable dwellings. The objects of that Ordinance were to require the standards prescribed by certain codes of practice to be observed with respect to the water supply, plumbing and sewerage of moveable dwellings. In this case the Code for Connection of Moveable Dwellings was the fifth in a series of complementary State plumbing codes produced by the Committee on Uniformity of Plumbing and Drainage Regulations (C.U.P.D.R.) within New South Wales. That particular code, itself incorporated at least 35 other codes.

The CUPDR members are drawn from the Public Works Department, the Sydney Water Board, the Hunter Water Board, Broken Hill Water Board, the Department of Local Government and the Department of Health.

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.

A publication of Standards Australia states that currently at least 1200 Australian Standards are called up in Australian legislation. Further inquiries of that organisation indicate that the precise number is by no means certain as they rely on individual government departments informing them of standards adopted within their respective jurisdictions.

The information collected in this manner is included in a legislation Handbook but that document is now out of date having

been last updated 4 years ago. Efforts are now being made by the Association to access a computerised legislation database which will greatly improve their records in this regard. Aside from any action taken by that Association and any other relevant code making body, a comprehensive list of codes and other publications applied in regulations should be available at government and parliamentary level.

At the Commonwealth Conference on Delegated Legislation held at London in November 1989 some relevant discussion took place on various forms of review of codes. There was some concern expressed as to the availability of codes which are "incorporated by reference" in legislation, both to the public and Parliament alike. It was mentioned that section 32 of the Interpretation of Legislation Act of Victoria provides that any writing incorporated by reference into a statutory rule must be tabled in Parliament at the same time as the statutory rule itself. In addition, the incorporated material must be made available at the office of the responsible authority for inspection on request by members of the public. The object of that provision was considered in the case of Sinclair v. Brown Coal Liquefaction Victoria Pty. Ltd (14 March 1989, Moe Court, unreported). The Magistrate commented that under this provision the elected representatives, and members of the public who may be affected or bound by the provisions of the legislation are to be entitled to inform themselves of the standards or requirements for breaches of which constituents or citizens may be liable, particularly if that is to involve liability for an offence. The Magistrate went on to say that materials which are in turn incorporated by reference in the code itself should also be tabled.

This is not the situation in New South Wales under section 40 of the Interpretation Act 1987. The Minister is simply required to table written notice of the statutory rule by reference to the number, date and pages of the Government Gazette in which it was published. If not published in the Gazette the notice has to be accompanied by a copy of the rule. As a result of Standing Instructions from the Attorney General's Office issued on

1 August 1987 Ministers are asked to actually table in all cases a copy of the statutory rule. This has never extended to the tabling of a copy of any code or other publication that has been applied, adopted or incorporated by the regulation.

In an address to the Conference on Rule Making (Reported in Admin. Review No. 22 of November 1989) Professor Dennis Pearce, commented that acquisition of delegated legislation could be hampered by its cost. Very Often, he said, the only form of access to a code was by its purchase. Professor Pearce commented:

> "Even where it is possible to identify the instruments concerned, acquisition is hampered by their availability or lack of it, and their cost. Social Security manuals, for example, may be acquired but at the cost of $500 per annum.
>
> One of the aspects of availability turns on the question of complexity of the instruments. This may arise in two ways. First, all the law relating to a particular matter is not necessarily contained in one document. It can be irritating to have to look at more than one legislative document to be able to find the law on a particular topic. The second aspect of complexity may arise through obscure drafting, of which the superannuation legislation and Austudy regulations are notable examples."

A further matter of importance is whether a code that is "applied, adopted or incorporated" under section 42 by a statutory rule may itself be disallowed in part or in whole as distinct from the statutory rule itself. Legally, this seems doubtful. Although such codes become enforceable they would not seem to be separately subject to review by Parliament or be subject to disallowance in whole or part otherwise than by the action of disallowing that part of the statutory rule that has applied or adopted them.

The Committee notes that section 32 of the Victorian Act has been recommended for amendment by the Legal and Constitutional Committee of Victoria in its Fifth Report to Parliament on the

Operation of section 32 (May 1990). The Report's chief recommendation is that statutory rules should be disallowable by the Parliament, at its option, rather than automatically void as a consequence of any failure to table incorporated material in Parliament.

The Regulation Review Committee also considers that as a general proposition the appropriate sanction for non compliance with requirements for the making of delegated legislation should rest with Parliament.

The Regulation Review Committee recommends to Parliament that the following action be taken:

1. Consideration should be given to amending section 42 of the Interpretation Act 1987 in line with the Victorian provision so as to require a copy of the incorporated material -

   (i) to be laid before Parliament at the same time as the tabling of the regulation;

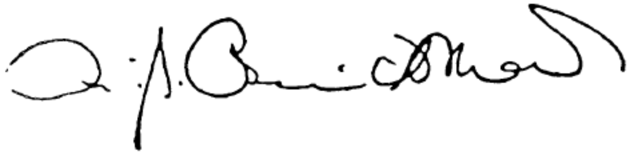
   (ii) to be kept available for inspection at the responsible department.

2. Consideration should be given to amending section 41 of the Interpretation Act 1987 so as to provide for the disallowance in whole or in part of any publication that has been applied, adopted or incorporated by a statutory rule.

3. Consideration should be given to a requirement that the advice of a legislative draftsperson be obtained when codes are being prepared which are ultimately intended for adoption in New South Wales.

4. A comprehensive list should be prepared of all publications that have been applied, adopted or incorporated in statutory rules.

Dated: 29 NOV 1990



Chairman
Regulation Review Committee.