

## CHAPTER 14

### DELEGATED LEGISLATION

Delegated legislation, or subordinate legislation as it is sometimes called, is legislation made by authority of an Act of Parliament. It includes statutory rules, by-laws, ordinances, orders in council and various other 'instruments' made by the executive. By delegating the power to make rules of a technical nature the Parliament is better able to debate significant matters of policy and principle. However, the delegation of legislative power to the executive raises questions regarding the separation of powers, including the prospect of executive over-reach, necessitating the adoption of mechanisms to superintend the exercise of the delegated legislative power. In New South Wales and many comparable jurisdictions, such mechanisms include directions as to the manner and form of making of delegated legislation, the staged repeal of delegated legislation after a certain time, provision for the disallowance of instruments by resolution of either House of Parliament, and parliamentary committee review.

#### EXECUTIVE LAW-MAKING

The British Parliament has a long-established practice of delegating its power to make rules and regulations to a third party that can be traced as far back as 1385.<sup>1</sup> An early high point in that practice occurred in 1539 during the reign of Henry VIII, when the Statute of Proclamations authorised the King with the advice of his Council to make proclamations which were to be observed 'as though they were made by Act of Parliament'.<sup>2</sup> Such enactments later gave rise to the use of the term 'Henry VIII clause' to describe provisions authorising the amendment of primary legislation by the executive.

From the late 17th century through to the 19th century the executive was relatively inactive in exercising delegated legislative power. However, the growth in delegated legislation increased in the early 20th century during a period of

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1 Pearce D and Argument S, *Delegated Legislation*, 3rd edn, LexisNexis Butterworths, Australia, 2005, p 5.

2 *Ibid.*

sustained technological and social development, and has now become commonplace.<sup>3</sup> In the Council, for example, 408 statutory rules were tabled during 2007, as compared to 99 bills passed by the Parliament.<sup>4</sup>

The sheer volume of delegated legislation makes parliamentary oversight of the executive problematic and raises the possibility of the executive usurping the constitutional function of the democratically elected Parliament. As far back as 1929, the Lord Chief Justice of England warned that the growth in the power of the executive threatened the hard won liberties of the English people:

The paradox which is in the course of being accomplished is, indeed, rather elaborate. Writers on the Constitution have for a long time taught that its two leading features are the sovereignty of Parliament and the Rule of Law. To tamper with either of them was, it might be thought, a sufficiently serious undertaking. But how far more attractive to the ingenious and adventurous mind to employ one to defeat the other, and to establish a despotism on the ruins of both.<sup>5</sup>

Nevertheless, too strict an adherence to the separation of powers would present practical difficulties for the administration of government. The complexity of the modern state renders it impossible for parliaments to deal with the mass of technical detail which is usually contained in delegated legislation. In this context effective oversight of the exercise of the delegated legislative power is essential. Undertaking this function is a significant feature of the role of the Council as a House of review.

## MAKING DELEGATED LEGISLATION

The power to make delegated legislation is conferred by a primary Act, the operative provision usually being couched in a generic form of words. For example, a common provision authorising the making of regulations states: 'The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient for carrying out or giving effect to this Act'.<sup>6</sup>

Aside from the primary Act, the *Subordinate Legislation Act 1989* contains extensive requirements applicable to the making of delegated legislation. This is examined below, together with the role of the Parliamentary Counsel in making delegated legislation and statutory requirements concerning the publication and commencement of such instruments.

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3 *Ibid.*

4 In 2006, 415 statutory instruments were tabled, 128 Acts passed; in 2005, 484 statutory instruments were tabled, 119 Acts passed; in 2004, 390 statutory instruments were tabled, 115 Acts passed; in 2003, 456 statutory instruments were tabled, 104 Acts passed.

5 *The New Despotism*, London, 1929, p 17, cited in Reid GS, 'Parliament and Delegated Legislation' in Nethercote JR (ed), *Parliament and Bureaucracy: Parliamentary Scrutiny of Public Administration in the 1980s*, Hale and Ironmonger, Sydney, 1982, p 152.

6 See, for example, section 60(1) of the *Central Coast Water Corporation Act 2006*.

### *Subordinate Legislation Act 1989*

The *Subordinate Legislation Act 1989* regulates the making and duration of ‘statutory rules’ as defined in the Act. It was enacted with the aim of avoiding duplication and inconsistency, allowing adequate opportunities for public consultation and ensuring effective legislative review.<sup>7</sup> It includes requirements to be observed both before and after the making of statutory rules, and provision for the automatic repeal of such rules after a certain time.

Under the Act a ‘statutory rule’ is defined as a regulation, by-law, rule or ordinance that is made by the Governor or that is made by a person or body other than the Governor, but is required by law to be approved or confirmed by the Governor, but does not include any instruments specified or described in Schedule 4. The instruments specified in Schedule 4 include rules of court, the standing orders of both Houses, and regulations and by-laws made under certain Acts.

The Act imposes a number of requirements. These include:

- compliance with specified guidelines (as far as practicable);<sup>8</sup>
- preparation of a regulatory impact statement;<sup>9</sup>
- consultation with stakeholders and the public;<sup>10</sup>
- provision of an opinion from the Attorney General or Parliamentary Counsel as to whether a proposed statutory rule may legally be made, at the time the rule is submitted for making or approval by the Governor.<sup>11</sup>

Aside from these requirements, the *Subordinate Legislation Act 1989* also provides that a statutory rule which is the same in substance as one which has been disallowed by either House of Parliament may not be made within four months of disallowance, unless the House has rescinded the resolution of disallowance.<sup>12</sup>

Following the making of a statutory rule, a copy of the rule must be provided to the Legislation Review Committee of the Parliament, a joint committee of both Houses. The Committee is also to be provided with a copy of the Regulatory Impact Statement, and all submissions received in the course of public consultation.<sup>13</sup>

The Act provides for the staged repeal, or ‘sunsetting’, of statutory rules (subject to earlier disallowance by either House of Parliament), generally after five years.<sup>14</sup> This mechanism ensures that the attention of the executive is regularly turned to the utility of keeping particular regulations in force. It also increases opportunities for community consultation given that any replacement rules will also be subject to

7 *LC Debates* (10/10/1989) 10552-10555.

8 *Subordinate Legislation Act 1989*, s 4 and Sch 1.

9 *Ibid*, s 5(1).

10 *Ibid*, s 5(2) and (3).

11 *Ibid*, s 7(c).

12 *Ibid*, s 8(2).

13 *Ibid*, s 5(4).

14 *Ibid*, s 10(2). Repeal may be postponed in certain circumstances: s 11.

the requirements of the Act. Difficulties can arise, however, where the disallowance of a rule by either House of Parliament following the sunseting of its predecessor under the Act leaves a 'regulatory void' (see 'Disallowance procedure' below).

As the Act only applies to 'statutory rules' as defined, it fails to capture forms of delegated legislation made under more recent Acts, such as 'guidelines', which lie outside the scope of the definition.<sup>15</sup> For example, the *Motor Accidents Compensation Act 1999* authorises the Motor Accidents Authority to issue 'guidelines' regarding compulsory third party motor accident insurance premiums and procedures to be followed by the Motor Accidents Assessment Service. While such 'guidelines' are akin to rules of court and undoubtedly are delegated legislation, they are not subject to the requirements of the *Subordinate Legislation Act 1989*. At the Commonwealth level, by contrast, the problem of ensuring uniformity in the making of delegated legislation has been solved by defining delegated legislation by reference to what it does rather than what it is called.<sup>16</sup>

### Role of the Parliamentary Counsel

The Parliamentary Counsel is responsible for drafting regulations, statutory rules, proclamations and environmental planning instruments,<sup>17</sup> after taking instructions from the agency concerned. It also advises agencies on the legality of delegated legislation.<sup>18</sup> It discourages agencies from preparing their own drafts of delegated legislation.<sup>19</sup>

As previously noted, a certificate from the Parliamentary Counsel or Attorney General must be obtained as to the legality of a proposed statutory rule before the rule can be submitted for making or approval by the Governor.<sup>20</sup>

### Publication and commencement

The *Interpretation Act 1987* provides for the publication of 'statutory rules' as defined in the Act and specifies the time at which such rules come into effect. The definition of 'statutory rule' provided by the Act differs from that contained in the *Subordinate Legislation Act 1989* noted earlier, in that it includes rules of court and is not subject to a specified list of exceptions. In the *Interpretation Act 1987*,

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15 See Regulations Review Committee, New Zealand House of Representatives, *Ninth Australasian and Pacific Conference on Delegated Legislation & Sixth Australasian and Pacific Conference on the Scrutiny of Bills*, April 2005, p 12.

16 The *Legislative Instruments Act 2003* (Cth) applies to 'legislative instruments', being an instrument that is of a 'legislative character': s 5(2).

17 Parliamentary Counsel, *Manual for the Preparation of Legislation*, 8th edn, August 2000, p 19.

18 *Ibid*, p 22.

19 *Ibid*, p 23.

20 *Subordinate Legislation Act 1989*, s 7(c). See also *Manual for the Preparation of Legislation*, above n 17, p 24.

‘statutory rule’ means a regulation, by-law, rule or ordinance that is made by the Governor, or that is made by a person or body other than the Governor, but is required by law to be approved or confirmed by the Governor, or a rule of court.<sup>21</sup>

The Act also includes definitions of ‘regulation’, ‘by-law’, ‘rule’ and ‘ordinance’.<sup>22</sup>

Section 39(1)(a) of the *Interpretation Act 1987* provides that a statutory rule must be published in the Gazette. Certain exceptions are set out in section 39(3)-(5), including the standing orders of either House of the Parliament. In 2006, section 39 was amended to require publication of statutory rules on the New South Wales legislation website, instead of the Gazette,<sup>23</sup> but the amendment has not yet come into effect. When the new provision commences, publication on the website will occur on Fridays, as is now the case with the Gazette, or earlier as required, as is the case with special supplements to the Gazette. Further, publication in the Gazette will follow the online publication.<sup>24</sup>

Section 39(1)(b) of the Act provides that a statutory rule takes effect on the day on which it is so published or, if a later day is specified in the rule for that purpose, on the later day so specified. Most statutory rules therefore take effect on the day they are published in the Gazette.

Certain other Acts include provisions relating to the publication or commencement of instruments made under their own provisions. In some cases, the Act provides that the provisions of the *Interpretation Act 1987* concerning publication and commencement apply,<sup>25</sup> while in others the time of commencement is specified in the Act itself.<sup>26</sup> In some cases, the relevant instrument does not come into force until the period for disallowance by either House of Parliament has expired without a resolution of disallowance being passed.

## DISALLOWANCE OF DELEGATED LEGISLATION

Many forms of delegated legislation are required to be tabled in each House of Parliament and are subject to disallowance by either House under Part 6 of the *Interpretation Act 1987* or under the provisions of the primary Act.

### Disallowance under the *Interpretation Act 1987*, Part 6

The disallowance mechanisms provided by the *Interpretation Act 1987* apply to ‘statutory rules’ within the definition provided by the Act.

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21 *Interpretation Act 1987*, s 21.

22 *Ibid*, s 20.

23 *Interpretation Amendment Act 2006*, s 3 and Sch 1[7].

24 *Interpretation Amendment Bill 2006*, Explanatory Note, pp 1 and 4.

25 See, for example, the *Poisons and Therapeutic Goods Act 1966*, s 46.

26 For example, under the *Aboriginal Housing Act 1998*, regulations containing savings or transitional provisions take effect from the date of assent to the Act or a later date: Sch 3[1(1)].

Section 40(1)-(2) provides that written notice of the making of a statutory rule must be laid before each House within 14 sitting days of publication in the Gazette or, in any other case, within 14 sitting days of the date on which the rule was made. In 2006, the Act was amended to replace these provisions with a new requirement that written notice of the making of a statutory rule be laid before each House within 14 sitting days of the day the rule is published on the New South Wales legislation website.<sup>27</sup> However, as with the change to section 39 noted earlier, the amendment to section 40 has not yet come into effect.

Notice of the making of a statutory rule may be laid before the House by a minister or by the Clerk.<sup>28</sup> Until 1993, all statutory rules were required to be tabled by the responsible minister, but in that year the *Interpretation Act 1987* was amended to provide for tabling by the minister or the Clerk.<sup>29</sup> Notice must by law be laid before each House, although failure to do so does not affect the validity of the statutory rule.<sup>30</sup> In practice, the Parliamentary Counsel prepares a list of statutory rules for tabling following publication in the Gazette and forwards the list to the Clerk of each House. The Clerk generally tables statutory rules published in the Gazette on the Tuesday of each sitting week.

Section 41 of the Act provides that either House may pass a resolution disallowing a statutory rule either before notice of the rule is laid before the House, or at any time after the notice is laid before the House, provided that, in the latter case, notice of the disallowance motion is given within 15 sitting days after the notice was laid before the House.<sup>31</sup> On the passing of a disallowance resolution the statutory rule in question 'shall cease to have effect'.<sup>32</sup> The disallowance of a statutory rule has the same effect as a repeal of the rule.<sup>33</sup> Where a statutory rule which amends or repeals an earlier statutory rule or Act is disallowed, the disallowance has the effect of 'restoring or reviving the other Act or statutory rule, as it was immediately before it was amended or repealed, as if the rule had not been made'.<sup>34</sup> A statutory rule which is substantially the same as a disallowed statutory

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27 *Interpretation Amendment Act 2006*, s 3 and Sch 1[8].

28 *Interpretation Act 1987*, s 40(3A).

29 *Subordinate Legislation (Amendment) Act 1993*, s 4 and Sch 2.

30 *Interpretation Act 1987*, s 40(4). During the second reading speech on the Interpretation Bill 1987 the Hon Kevin Rozzoli argued against such a procedure as follows: 'It is important that these matters be brought to the direct attention of the Parliament. Failure to do so is an abrogation of the responsibility of the Government to address a matter to Parliament. Abrogation of that responsibility should attract the sanction or penalty of rendering that statutory rule invalid. I consider it a gross omission from the Bill that the situation has been allowed to stand', *LA Debates* (18/2/1987) 8481. Practice in other jurisdictions varies. For example, the UK uses both 'negative' and 'affirmative' procedures, affirmative procedures requiring a vote to approve delegated legislation before it can come into force, depending on the level of scrutiny thought appropriate in any given case.

31 *Interpretation Act 1987*, s 41(1).

32 *Ibid*, s 41(2).

33 *Ibid*, s 41(3).

34 *Ibid*, s 41(4).

rule may not be made within four months of the date of disallowance unless the House has rescinded the resolution disallowing the regulation.<sup>35</sup>

Before the enactment of the *Interpretation Act 1987*, a statutory rule had to be laid before each House within 14 sitting days of its publication in the Gazette, either House being able to disallow the rule if notice of a disallowance motion had been given within 15 sitting days of the rule being laid before the House.<sup>36</sup> An advantage of the current procedure is that it provides for disallowance prior to notice being laid before the House.<sup>37</sup> However, unlike in some other jurisdictions, there is no provision for automatic disallowance where a notice of motion for disallowance is not dealt with. For example, section 42(2) of the *Legislative Instruments Act 2003* (Cth) provides for the automatic disallowance of a legislative instrument where a notice of disallowance has not been dealt with within 15 sitting days.

To assist members with the statutory time limits applicable to motions for disallowance, the Clerk produces a Statutory Rules and Instruments paper which shows all statutory rules and instruments subject to disallowance, their Gazette reference, the date of tabling in the House (where this has occurred), and the time within which notice of disallowance may be given. The paper is issued on the Tuesday of each week that the Council is sitting, and on the first Tuesday of each month when the Council is not sitting. It was first produced in 1987 following the commencement of the *Interpretation Act 1987*.

### Disallowance under the empowering Act

Some Acts provide that instruments made under their own provisions must be tabled in Parliament and are subject to disallowance by either House.<sup>38</sup> Certain Acts provide that disallowance is to be in accordance with provisions in Part 6 of the *Interpretation Act 1987*,<sup>39</sup> while in others the disallowance mechanism is set out in the Act itself.<sup>40</sup>

In some cases, the period for disallowance specified by the Act determines the date at which the instrument takes effect. For example, the *Sydney Water Act 1994* provides that amendments to the operating licence of Sydney Water cannot come into force until 15 sitting days after being laid before each House or the failure or withdrawal of a disallowance motion within that time.<sup>41</sup> A similar provision is

35 *Subordinate Legislation Act 1989*, s 8.

36 *LA Debates* (3/12/1986) 7924 per the Hon Terry Sheahan.

37 However, it should be noted that in *Dignan v Australian Steamships Pty Ltd* (1931) 45 CLR 188, the High Court held that requirements as to tabling contained in Commonwealth legislation and which were expressed as a condition precedent to disallowance were directory and not mandatory.

38 A list of instruments disallowable under Acts other than the *Interpretation Act 1987* is provided in the *Manual for the Preparation of Legislation*, above n 17, Appendix 5, at pp 46-47.

39 For, example, the *Poisons and Therapeutic Goods Act 1966*, s 46.

40 For, example, the *National Parks and Wildlife Act 1974*, s 35.

41 *Sydney Water Act 1994*, s 16(2).

contained in the *Food Act 2003* with respect to regulations establishing food safety schemes.<sup>42</sup> Under the *Anti-Discrimination Act 1977* regulations take effect 14 sitting days after they have been tabled in each House, unless disallowed by either House, or on such later date as is specified in the regulation.<sup>43</sup>

As with instruments subject to disallowance under the *Interpretation Act 1987*, details of instruments disallowable under other Acts are also published in the Statutory Rules and Instruments paper.

## Disallowance procedure

### *Background*

Before 1988, there was no provision in the standing or sessional orders regarding the procedure to be followed for the disallowance of statutory instruments. Notice of a motion to disallow a statutory rule was set down on the business paper for consideration as general business. In 1988, however, a sessional order was adopted, on a motion by a cross-bench member, the Hon Elisabeth Kirkby, which provided that notice of a disallowance motion was to be placed on the Notice Paper as business of the House and take precedence over government and general business.<sup>44</sup> The same sessional order was adopted in August 1988,<sup>45</sup> 1990<sup>46</sup> and 1991,<sup>47</sup> on motions by the Government, and in 1995 on the motion of an opposition member, the Hon John Jobling.<sup>48</sup> In the latter instance, when moving the adoption of the sessional order, Mr Jobling argued that in the intervening years the provision had ‘slipped off the books’, to which the Leader of the Government, the Hon Michael Egan, replied: ‘[I]t did not slip off; it was pushed off by the previous Government ... it was not an oversight by the previous Government; it was a deliberate measure’.<sup>49</sup>

In 1996, Mr Jobling again moved the adoption of the sessional order but this time with the addition of time limits for debates, which were designed to ensure that matters would be dealt with expeditiously while also allowing members a reasonable time to speak. On that occasion, however, Mr Egan moved an amendment to the motion which proposed that, instead of giving automatic precedence to disallowance motions and observing time limits on debates, the House should be required to decide the question: ‘That the motion proceed forthwith’, without amendment or debate, before a motion of disallowance could be moved.

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42 *Food Act 2003*, s 102(8).

43 *Anti-Discrimination Act 1977*, s 127(3).

44 *LC Minutes* (28/4/1988) 26.

45 *LC Minutes* (18/8/1988) 24.

46 *LC Minutes* (8/5/1990) 118.

47 *LC Minutes* (21/2/1991) 28.

48 *LC Minutes* (18/10/1995) 230.

49 *LC Debates* (18/10/1995) 1878.



According to Mr Egan, this procedure would give the House ‘an opportunity to test whether there is sufficient support for a disallowance motion to be debated immediately’, in much the same way as an urgency motion under (former) standing order 13, and avoid the possibility of a one and a half hour debate taking place on a motion that only one or two members would support.<sup>50</sup>

The motion as amended by Mr Egan was ultimately passed by the House (despite concerns expressed by the Hon Elisabeth Kirkby), with a further amendment by the Revd the Hon Fred Nile reintroducing the time limits proposed in the original motion.<sup>51</sup> In that form, the sessional order continued to be adopted by the House until October 2003 when it was replaced by a sessional order in the terms of the future standing order 78. The sessional order was eventually superseded by standing order 78 in May 2004.

### *Standing order 78*

Under standing order 78, a notice of motion for disallowance under section 41 of the *Interpretation Act 1987* or any other Act is to be placed on the Notice Paper as business of the House (SO 78(1)). When the item is called on, the House must decide the question, without amendment or debate, whether the matter will be given precedence and proceed as business of the House (and thus have precedence) (SO 78(2)).<sup>52</sup> If the question is agreed to, the House then decides on a motion by the member when the matter will proceed (SO 78(3)), the terms of the motion usually being: ‘That the matter proceed forthwith’. If, however, the House decides that the disallowance motion is not to proceed as business of the House, the motion is set down as private members’ business outside the order of precedence (SO 78(5)). If this occurs, it is unlikely that the motion will be dealt with for a significant period of time, if at all.

Debates on disallowance motions are subject to certain time limits under standing order 78(4). The member moving the motion and the minister first speaking may speak for 15 minutes, while any other member and the mover in reply may speak for 10 minutes. The total time for debate is one and a half hours, after which the President interrupts debate to allow the mover to speak in reply, and put all motions necessary to dispose of the motion.

### *Impact of prorogation on disallowance*

If a motion for disallowance is on the Notice Paper when the House is prorogued, the motion lapses. However, the lapsing of a motion in these circumstances does not defeat the House’s power to disallow the rule providing that notice of the motion is given within 15 days of the relevant notice being laid before the House

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50 *LC Debates* (18/4/1996) 172-173.

51 *LC Minutes* (18/4/1996) 44-47.

52 Business of the House, together with motions for special adjournments and motions relating to privilege, has precedence over all other motions or orders of the day (SO 74(3)).

as required by the *Interpretation Act 1987*. Where a disallowance motion is interrupted by prorogation the appropriate procedural course is for the House in the new session to proceed on a motion incorporating by reference the terms of the original, lapsed notice. While the giving of a notice of motion is a condition precedent to the disallowance of a rule, it is not necessary for the House to disallow the rule on the same notice.<sup>53</sup>

### *'Regulatory void'*

If the House disallows a statutory rule and there is no prior rule to be revived because of the staged repeal of the prior rule under the *Subordinate Legislation Act 1989*, the effect of disallowance is to create a 'regulatory void'. The solution to this might appear to be to create a new statutory rule to fill the void, but the impact of section 8 of the *Subordinate Legislation Act* on such a course needs to be considered. As noted previously, section 8 requires that a statutory rule which is the same in substance as a disallowed statutory rule may not be made within four months of the disallowance unless the resolution of disallowance has been rescinded by the House. The likelihood of a regulatory void occurring is the greater where a new rule is tabled less than 15 days before the staged repeal of the rule which is being replaced. There have been at least two occasions on which the Council has rescinded resolutions of disallowance in view of legal advice that, in the absence of such rescission, section 8 would prevent a new rule being published for four months.<sup>54</sup>

## **Use of the disallowance procedure**

### *Early years*

In the early years of responsible government disallowance of subordinate legislation by the Parliament was sporadic. The *Acts Shortening Act 1852* (16 Vic No 1) contained a provision that the power to make rules, by-laws, orders or regulations implied a power to rescind, revoke or vary them.<sup>55</sup> This Act was later replaced by the *Interpretation Act 1897* which contained a similar provision.<sup>56</sup> However, the provisions of the *Acts Shortening Act 1852* were not strictly observed.

Some Acts as made did not require subordinate legislation to be tabled in Parliament, while some which did provide for tabling did not include a provision for disallowance by Parliament. For example, section 38 of the *Metropolitan Water and Sewerage Act 1880* provided a regulation-making power but did not include a requirement for tabling in Parliament, while section 34 of the Act provided for by-

53 Crown Solicitor's Advice, 'Disallowance of regulations following prorogation of Parliament', 1 September 1999.

54 *LC Minutes* (30/10/1996) 410; *LC Debates* (30/10/1996) 5477-5481 (concerning the *Centre Based and Mobile Child Care Services Regulation 1996*); *LC Minutes* (12/11/1998) 864; *LC Debates* (12/11/1998) 9800-9801 (concerning the *Security Industry Regulation 1998*).

55 *Acts Shortening Act 1852*, s 11.

56 *Interpretation Act 1897*, s32(2).

laws to be tabled in Parliament but such instruments were not subject to disallowance. Similarly, section 30 of the *Pastures and Stock Protection Act 1880* required that any regulation made by the Governor was to be tabled in Parliament within 14 days after publication in the Gazette, but again there was no provision for disallowance.<sup>57</sup> In 1887 there was an unsuccessful attempt to pass an Address to the Governor stating that the Council disapproved of a new regulation under the *Pastures and Stock Protection Act 1880*, because it was believed that the regulation imposed obligations and penalties not authorised by the Act.<sup>58</sup>

In 1908 the Council amended the Prisoners Detention Bill,<sup>59</sup> and the Theatres and Public Halls Bill,<sup>60</sup> inserting provisions for the tabling and disallowance of regulations which were agreed to by the Assembly. A similar amendment to the Fire Brigades Bill in 1909<sup>61</sup> met with disagreement by the Assembly which requested omission of the disallowance provision.<sup>62</sup> The Council insisted on its amendment and a select committee appointed to draw up reasons for insistence on the Council's amendment reported that either House should have the right to negative any by-law or regulation made by an Act, that it was undesirable for Parliament to delegate the power of legislation by regulation without power of revision by Parliament, and that similar provisions had been included in other bills passed in 1908 and 1909.<sup>63</sup> Ultimately, the Assembly did not insist on its disagreement.

While there was an attempt to disallow a by-law in 1916,<sup>64</sup> it appears that the Council first exercised its power of disallowance in 1925. On that occasion the Council did not assent to the proposed revocation of dedication of Crown land as part of the Moree common.<sup>65</sup> Then in 1930 the Council disallowed an ordinance under the *Local Government Act 1919*.<sup>66</sup> There were two further attempts in 1930 to disallow regulations under the *Metropolitan Traffic Act 1900*. The first was debated and withdrawn<sup>67</sup> and the second was negatived on the voices.<sup>68</sup> From that time until the 1980s motions for disallowance of statutory rules continued to be sporadic.

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57 For other examples, see *Consolidated Index to the Minutes of Proceedings (1914-1934)* Vol 4, pp 442-443.

58 *LC Minutes* (15/6/1887) 110; *LC Debates* (15/6/1887) 2093-2099.

59 *LC Minutes* (12/11/1908) 74; *LC Debates* (12/11/1908) 2360.

60 *LC Minutes* (25/11/1908) 90-91.

61 *LC Minutes* (27/10/1909) 98-99.

62 *LC Minutes* (4/11/1909) 106.

63 See the *Prisoners Detention Act 1908*, the *Theatres and Public Halls Act 1908*, the *Crown Lands Amendment Act 1908*, the *Pure Food Act 1908*, the *Forestry Act 1909*; and the *Motor Traffic Act 1909*.

64 *LC Minutes* (23/11/1916) 196, 199 (a motion to disallow a by-law under the *Meat Industry Act 1915* was debated and withdrawn).

65 *LC Minutes* (17/9/1925) 24. Section 25 of the *Crown Lands Consolidation Act 1913* required that notice of a proposed revocation of dedication of Crown Land was to be tabled in Parliament within one month of publication in the Gazette, and that Parliament could declare by resolution that it does not assent to the proposal.

66 *LC Minutes* (5/3/1930) 182.

67 *LC Minutes* (26/3/1930) 214.

68 *LC Minutes* (8/5/1930) 254.

*1980s onwards*

Since the 1980s, the use of the disallowance procedure in the Council has ebbed and flowed. For example, 12 disallowance motions were moved in the 1999-2001 session, while there were no such motions in the 1991-1992, 1992-1993, and 1995-1996 sessions. Other sessions have seen between two and six disallowance motions.

Of all the disallowance motions moved since 1988 approximately 30 per cent have been carried.<sup>69</sup> Opposition and cross-bench members have moved about the same number of disallowance motions, and have enjoyed success in roughly equal measure.<sup>70</sup>

Unusual uses of the procedure have included:

- disallowance of a portion of a regulation (*District Court Amendment (Court Fees) Regulation 2003*);<sup>71</sup>
- disallowance of a regulation which had no prospective effect (*Police Service Amendment (Transit Police) Regulation 1999*);<sup>72</sup>
- disallowance not opposed by the Government (clause 16A(1) of the *Pawn-brokers and Second-hand Dealers Amendment (Records and Goods) Regulation 1998*);<sup>73</sup>
- withdrawal or defeat of disallowance motions following assurances by the Government (*Sydney Harbour Foreshore Authority Regulation 1999*;<sup>74</sup> *Consumer Claims Tribunals Regulation 1995*);<sup>75</sup>
- disallowance brought on for discussion despite disallowance being opposed (*Environment Planning and Assessment Amendment Regulation 1998*);<sup>76</sup>
- disallowance decided by the House before a report by the Regulation Review Committee (*University of Sydney Amendment By-law 2001*).<sup>77</sup>

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69 Since 1988, 71 disallowance motions have been moved, of which 21 were passed, 44 negatived, three withdrawn by leave, two referred to committees and one interrupted by prorogation.

70 Of the 70 disallowance motions moved since 1988, 33 were moved by cross-bench members (8 passed) and 37 by the opposition (13 passed).

71 *LC Minutes* (20/11/2003) 447-449.

72 *LC Debates* (1/6/1999) 630-637; *LC Minutes* (1/6/1999) 113.

73 *LC Debates* (13/10/1998) 8077-8078 per the Hon Jeff Shaw; *LC Minutes* (13/10/1998) 743-744.

74 *LC Debates* (11/4/2000) 4368; *LC Minutes* (11/4/2000) 380 (motion discharged).

75 *LC Debates* (21/11/1995) 3523-3525 and following; *LC Minutes* (21/11/1995) 336-337 (motion narrowly defeated after Government assurance to review the regulation to address concerns raised in debate).

76 *LC Minutes* (30/6/1998) 620-622.

77 *LC Minutes* (6/6/2001) 1009-1010 (disallowance motion defeated); *LC Minutes* (27/6/2001) 1063 (report of Regulation Review Committee tabled). See also *LC Debates* (29/6/2001) 16012 per the Hon Don Harwin concerning the Committee's views on the by-law.

Debates on disallowance motions lend themselves to further analysis. While scrutiny of regulations by committees specifically appointed to that task has largely focused on 'technical' aspects of the regulation, debate in the House has tended to focus on larger policy questions or to intertwine the questions of process and policy. This can be seen, for example, in the debate on disallowance of the *Centre Based and Mobile Child Care Services Regulation 1996*, which included both assertions that the government had failed to properly consult as required by the *Subordinate Legislation Act 1989* and allegations that the regulation was unacceptable to the child care industry in a substantive sense.<sup>78</sup> Further, the debate on disallowance of the *Aboriginal Land Rights Amendment (Elections) Regulation 2005* included allegations of a failure to consult as well as the wider objection that the Regulation would have the effect of 'disempowering and disenfranchising Aboriginal people by denying them an elected voice on the peak State council'.<sup>79</sup>

Other debates have raised aspects of the relationship between regulations and their primary Acts. In one case, for example, the House disallowed a regulation which attempted to implement a policy that members considered had been rejected during debate on the primary Act.<sup>80</sup> In another, a member argued that a regulation was *ultra vires*, as it did not achieve the object of the Act,<sup>81</sup> but the House was subsequently informed that the Parliamentary Counsel had advised the regulation was not *ultra vires*,<sup>82</sup> and the motion failed.<sup>83</sup> In another case, although disallowance was moved on the basis of a failure to comply with technical requirements, during debate concerns were raised in relation to the empowering Act, one member arguing that the regulation should be disallowed 'because the Act is deeply flawed'.<sup>84</sup> The motion was negated.<sup>85</sup>

In some cases, disallowance has been moved to express dissatisfaction with a particular issue even though the regulation in question did not go directly to that issue,<sup>86</sup> or to enable concerns to be raised even though the members raising such concerns did not support disallowance.<sup>87</sup> There have also been suggestions that

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78 *LC Debates* (23/10/1996) 5183-5195.

79 *LC Debates* (12/10/2005) 18360.

80 See comments concerning the Food Amendment (MSG) Regulation 2002, *LC Debates* (13/11/2002) 6567 per the Hon Dr Brian Pezzutti and (13/11/2002) 6590 per the Revd the Hon Fred Nile. The Regulation was ultimately disallowed, *LC Minutes* (13/11/2002) 475, 477.

81 *LC Debates* (20/6/1996) 3260-3261 per the Hon Richard Jones.

82 *LC Debates* (19/9/1996) 4341 per the Hon Janelle Saffin.

83 *LC Minutes* (19/9/1996) 332-333.

84 *LC Debates* (30/6/1998) 6777 per the Hon Richard Jones.

85 *LC Minutes* (30/6/1998) 620-622.

86 See debate on the disallowance of the *Fisheries Management (General) Amendment (Inland Restricted Fishery) Regulation 1999*, *LC Debates* (1/7/1999) 1786-1790, 1803-1812. One of the main concerns was the impact of a notification under section 8 of the principal Act. The disallowance motion was negated on division, *LC Minutes* (1/7/1999) 185, 186-187.

87 See comments by the Hon John Ryan during the debate on a motion to disallow a proposed amendment to the operating licence of Sydney Water Corporation, *LC Debates* (24/11/1999) 3585.

the House should adopt differing degrees of scrutiny depending on the independence and autonomy of the maker of the delegated legislation in question.<sup>88</sup>

Some of the debates have included references to constitutional issues. Most of these have concerned the question of whether the disallowance of regulations imposing fees improperly interferes with the budget. For example, this was argued in debate on the disallowance of a regulation increasing court fees in 1996,<sup>89</sup> and debate on the disallowance of the *Road Transport (Vehicle Registration) Further Amendment (Fees) Regulation 1999*.<sup>90</sup> Another constitutional issue arose during debate on disallowance of the *Parliamentary Remuneration Amendment (Deputy Speaker) Regulation 2004* which provided for additional remuneration for the Deputy Speaker of the Legislative Assembly. In that debate, a cross-bench member stated that, while he considered it 'inappropriate to give a pay rise' to the Deputy Speaker, he had been 'advised by the Clerk that there is independence between the Houses'. The member also referred to conventions in the Commonwealth Parliament preventing either House interfering in the staffing, finances and administration of the other.<sup>91</sup> Another cross-bench member made a similar point.<sup>92</sup> The motion was negated on division.<sup>93</sup>

## SCRUTINY OF DELEGATED LEGISLATION BY COMMITTEE

### Background

The first committee for the scrutiny of subordinate legislation in the Council was established in 1960, by resolution of the House. The Committee of Subordinate Legislation was required to consider all regulations, rules, by-laws, orders or proclamations which were subject to tabling in either House and disallowance by either House or both Houses. In doing so, the Committee was directed to apply certain criteria, such as whether the regulations were in accordance with the objects of the principal Act, and whether or not they unduly trespassed on personal rights and liberties.<sup>94</sup>

In moving the establishment of the Committee, an opposition member, the Hon Collin Begg, argued that the volume and complexity of regulations produced by the executive at the time made it difficult for the House to conduct effective scrutiny, which necessitated 'an effective instrument for reviewing the exercise of

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88 See comments by the Hon Ian Macdonald in the debate on disallowance of the *Sydney University Amendment By-law 2001*, *LC Debates* (6/6/2001) 14423. The disallowance motion was negated on division, *LC Minutes* (6/6/2001) 1009-1010.

89 *LC Debates* (16/5/1996) 1088 per Revd the Hon Fred Nile.

90 *LC Debates* (9/9/1999) 185 per the Hon Ian Macdonald.

91 *LC Debates* (17/3/2004) 7381-7382 per the Hon Peter Wong.

92 *LC Debates* (17/3/2004) 7384 per the Hon Jon Jenkins.

93 *LC Minutes* (17/3/2004) 614-616.

94 *LC Minutes* (27/9/1960) 58.

these executive powers'.<sup>95</sup> Mr Begg also noted that similar committees had been established in other Parliaments including the House of Commons and the Australian Senate.<sup>96</sup>

The majority of the reports produced by the Committee during its 27 years of operation concluded that the instruments considered did not infringe any of the criteria which the Committee was required to take into account. This may reflect one of the aims of the Committee's creation, as outlined by Mr Begg in 1960, namely, to act as a preventive measure to deter the executive from abusing its legislative powers (as much as to cure any defects).<sup>97</sup> In a number of reports, however, the Committee did raise issues of concern. These included the failure to table regulations contrary to requirements of principal Acts,<sup>98</sup> the incorrect description in certain Acts of regulations as 'resolutions' thus excluding the regulations from requirements concerning tabling and disallowance,<sup>99</sup> and the need for disallowance of certain Supreme Court rules.<sup>100</sup>

In at least one case, the referral of particular instruments to the Committee by the House enabled evidence to be taken in relation to the effect of those instruments, and detailed consideration to be given to the question of disallowance.<sup>101</sup>

In 1987, the Assembly's Select Committee on Small Business tabled a report, which focused on the impact of government regulation on small business, and included a recommendation for the establishment of a joint parliamentary committee to review all new regulations.<sup>102</sup> The Select Committee envisaged that the joint committee would replace the Council's Committee of Subordinate Legislation,<sup>103</sup> which it considered was more concerned with 'ensuring that regulations are tabled ... than assessing or reviewing regulations'.<sup>104</sup>

The Select Committee's recommendation was adopted by the Government with the introduction of the Regulation Review Bill 1987. This bill provided for the establishment of a joint parliamentary committee, the Regulation Review Com-

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95 *LC Debates* (27/9/1960) 727-728.

96 *LC Debates* (27/9/1960) 730.

97 *LC Debates* (27/9/1960) 731.

98 Committee of Subordinate Legislation, *Second Report*, 3rd session of the 39th Parliament, March 1961, p 2; *Second Report*, 3rd session of the 42nd Parliament, November 1970, p 1.

99 Committee of Subordinate Legislation, *Second Report*, 3rd session of the 42nd Parliament, November 1970, p 1.

100 Committee of Subordinate Legislation, *First Report*, 2nd session of the 40th Parliament, April 1964, p 5.

101 Committee of Subordinate Legislation, *First Report*, 3rd session of the 42nd Parliament, November 1969 (concerning three notifications under the *Fluoridation of Public Water Supplies Act 1957*).

102 Legislative Assembly Select Committee on Small Business, *Report Number One: Business Regulation and Licensing*, January 1987.

103 *Ibid*, p 52.

104 *Ibid*, p 17.

mittee. The role of the committee, as outlined in the second reading speech on the bill, was to be:

[To] determine whether Parliament's attention should be drawn to a regulation on any grounds, and in particular ... possible adverse impact on business, or [that] the regulation trespasses unduly on personal rights and liberties; report to Parliament as it sees fit, for example, on its opinion that a regulation should be disallowed; initiate a systematic review of regulations based on the staged repeal of regulations; inquire into and report to Parliament on any question referred by a Minister; and review its own functions after two years to ascertain its effectiveness and future role.<sup>105</sup>

In the Council, opposition and cross-bench members protested against the creation of the joint committee, on the grounds that the task of reviewing delegated legislation properly belonged to the Council in its function as a House of review.<sup>106</sup> For example, the Hon Max Willis and the Hon Elisabeth Kirkby pointed out that until April 1986 the Committee on Subordinate Legislation had not had the benefit of a legal adviser, but that since then the Committee had become more effective in scrutinising delegated legislation. Mr Willis stated in that regard that:

[S]ince the Committee on Subordinate Legislation got the necessary support staff, it has been doing its job just a little too effectively and causing some embarrassment to the Government and, indeed, some powerful Ministers, to the extent that it might be convenient to bury its role in a new committee totally dominated by the lower house and the Government control that involves. I refer to the increasing criticism of members of the Government for the use of what are called Henry VIII clauses.<sup>107</sup>

Despite these concerns, however, the bill passed the Council.<sup>108</sup>

The Regulation Review Committee operated from 1987 to 2003, when its functions were assumed by the joint Legislation Review Committee, which remains in operation today.

### ***Legislation Review Act 1987 and the joint Legislation Review Committee***

The genesis of the current joint Legislation Review Committee can be traced to a report by the Council's Standing Committee on Law and Justice in October 2001 entitled *A NSW Bill of Rights*. In that report, while concluding that the introduction of a bill of rights would be problematic, the Committee recommended that a joint committee be established to scrutinise all bills before the Parliament on human

105 *LC Debates* (23/11/1987) 16791.

106 See *LC Debates* (23/11/1987) 16797 per the Hon Max Willis, citing a letter from the Hon Ron Dyer, Chair of the Committee on Subordinate Legislation, to the Premier.

107 *LC Debates* (23/11/1987) 16799.

108 *LC Minutes* (23/11/1987) 1364, (24/11/1987) 1388.



rights grounds. The Committee considered that the new committee should be separate from, and in addition to, the existing Regulation Review Committee, given evidence from other jurisdictions suggesting that if the scrutiny of bills and regulations were combined, one of the two functions would suffer.<sup>109</sup>

In response to the Committee's report, the Government introduced amendments to the *Regulation Review Act 1987* which provided for the Regulation Review Committee to be reconstituted as the Legislation Review Committee, and for the Act to be renamed the *Legislation Review Act 1987*.<sup>110</sup> The Legislation Review Committee was to undertake the scrutiny of both bills and regulations, contrary to the intention of the report of the Law and Justice Committee. In that regard, the Government's position was explained in the following terms:

The Government does not agree with the Standing Committee's recommendation that the scrutiny of legislation committee should be separate from the Regulation Review Committee. The Government notes that the Standing Committee's observation that the criteria for an effective scrutiny committee are already reflected in the way the Regulation Review Committee works ... The Government believes that the Standing Committee's concern about the Regulation Review Committee's workload can be addressed by the methods adopted in the Bill. In particular, the membership of the committee will be expanded from 8 members to 12. Also, if the Government's proposal is accepted, the Government is prepared to allocate additional funding to the renamed Regulation Review Committee to enable it to carry out this new function.<sup>111</sup>

Despite the concerns regarding workload noted above, in the Assembly the Bill was amended to maintain the membership of the Committee at eight members rather than 12.<sup>112</sup> The membership remains at eight today.<sup>113</sup> Three of the members are nominated by the Council and five by the Assembly.<sup>114</sup> The composition of the Committee is expressed in the Act to be 'in accordance with the practice of Parliament with reference to the appointment of members to serve on joint committees of both Houses of Parliament'.<sup>115</sup> At present there are four Government members, three opposition members and one cross-bench member. Both the Chair and Deputy Chair are members of the Government and members of the Assembly, although in the past the Chair has been a Council member.<sup>116</sup>

The Committee commenced operations in September 2003. The functions of the Committee include to consider all regulations while they are subject to disallow-

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109 Standing Committee on Law and Justice, *A NSW Bill of Rights*, Report No 17, October 2001, p 132.

110 Legislation Review Amendment Bill 2002.

111 *LC Debates* (25/9/2002) 5289.

112 *LA Debates* (27/6/2002) 4157-4158.

113 *Legislation Review Act 1987*, s 5(1).

114 *Ibid.*

115 *Ibid.*, s 5(2).

116 The Hon Peter Primrose was elected Chair of the Committee on 26 October 2004.

ance by resolution of either or both Houses of Parliament and to consider whether the Parliament's attention should be drawn to any such regulation on any ground.<sup>117</sup> The grounds on which the Parliament's attention may be drawn to a regulation include that:

- the regulation trespasses unduly on personal rights and liberties;
- the regulation may have an adverse impact on the business community;
- the regulation may not have been within the general objects of the legislation under which it was made;
- the regulation may not accord with the spirit of the legislation under which it was made even though it may have been legally made;
- the objective of the regulation could have been achieved by alternative and more effective means;
- the regulation duplicates, overlaps or conflicts with any other regulation or Act;
- the form or intention of the regulation calls for elucidation;
- 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.<sup>118</sup>

The Committee is empowered to recommend the disallowance of any regulation. It may report after the regulation has ceased to be subject to disallowance under section 41 of the *Interpretation Act 1987* provided the Committee resolves to do so during the disallowance period, being 15 days from the tabling of the notice of publication of the regulation.<sup>119</sup> The Committee may initiate a systematic review of regulations based on the staged repeal of regulations, and inquire into and report on any matter in connection with regulations. It may also consider whether a bill before the Parliament 'inappropriately delegates legislative powers' or 'insufficiently subjects the exercise of legislative power to parliamentary scrutiny'.<sup>120</sup>

As with the former Regulation Review Committee, the Legislation Review Committee is precluded from considering the merits of government policy.<sup>121</sup> This limitation reflects the 'orthodox view' shared in other Australian jurisdictions that primary legislation should contain matters of principle and policy while 'secondary legislation should be confined to matters of implementation and detail'.<sup>122</sup>

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117 'Regulation' is defined in section 3 of the Act as 'a statutory rule, proclamation or order that is subject to disallowance by either or both Houses of Parliament'.

118 *Legislation Review Act 1987*, s 9.

119 *Ibid*, s 9(1A).

120 *Ibid*, s 8A(1B).

121 *Ibid*, s 9(3).

122 Regulations Review Committee, New Zealand House of Representatives, *Ninth Australasian and Pacific Conference on Delegated Legislation & Sixth Australasian and Pacific Conference on the Scrutiny of Bills*, April 2005, p 11.

Since its formation, the Legislation Review Committee has tabled a weekly Legislative Review Digest during sitting weeks, bringing concerns regarding bills to the attention of members in time for debate on the bill. In respect of regulations, however, the Committee has adopted a different procedure:

Rather than flagging issues for debate in the House, the Committee usually enters into correspondence with the responsible Minister to seek further information regarding any concerns the Committee may have on a regulation. If a regulation requires further investigation, the Committee may seek submissions from, and hold hearings with, interested parties.<sup>123</sup>

The Committee publishes its correspondence in the Legislative Review Digest and, if it has ongoing concerns in respect of a regulation, makes a brief report drawing the attention of the regulation to the Parliament.<sup>124</sup>

In 2005-2006, the Committee reported that it had considered 397 regulations, of which 73 were the subject of detailed analysis by the Committee. Fifteen regulations were subject to follow-up action comprising correspondence between the Committee and the relevant minister.<sup>125</sup> The Committee raised the following issues in respect of regulations:

- trespasses on rights and liberties (5 regulations);
- excessive punishment (3);
- reversal of the onus of proof (3);
- access to justice (2);
- erosion of property rights (2);
- adverse impact on business (4);
- not within the general objects of the legislation under which it was made (3);
- objective of the regulation could have been reached by more effective means (5);
- form or intention of regulation requires elucidation (3);
- Regulatory Impact Statement requirements not complied with (1).<sup>126</sup>

In 2006-2007, the Committee considered 184 regulations, of which 29 were the subject of detailed analysis, and eight follow-up action.

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123 Legislative Review Committee, *Operation, Issues and Future Directions: September 2003-June 2004*, June 2004, p 2.

124 For example, the Committee brought the *Occupational Health and Safety Amendment (Accreditation and Certification) Regulation 2003* and the *Environment Planning and Assessment Amendment (Certifier Accreditation) Regulation 2003* to the attention of the Parliament on the basis that the scope of the administrative discretions conferred was too broad. In respect of the second of these Regulations the relevant Minister undertook to amend the offending provision. See *Operations, Issues and Future Directions*, above n 123, p 7.

125 Legislative Review Committee, *Annual Review 2005-2006*, August 2006, p 11.

126 *Ibid.*, pp 11-12.

#### DELEGATED LEGISLATION

The Committee has made sparing use of the power to recommend disallowance. It did not recommend the disallowance of any regulation in 2004-2005,<sup>127</sup> 2005-2006,<sup>128</sup> or 2006-2007.

There are signs that, as foreshadowed by the Standing Committee on Law and Justice in 2001, the combination of regulation and bills in the jurisdiction of the Committee may have had an adverse impact on the scrutiny of regulations. In its 2003-2004 report the Legislation Review Committee recommended that the Act be amended to permit it to appoint a sub-committee to report on regulations.<sup>129</sup> The same point was made by an opposition member of the Committee, the Hon Don Harwin, in a speech to the House in 2006, in which he also expressed the view that the Committee's function relating to regulations was 'gradually diminishing'.<sup>130</sup>

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127 Legislation Review Committee, *Annual Review 2004-2005*, September 2005, p 13.

128 *Annual Review 2005-2006*, above n 125, p 11.

129 *Operations, Issues and Future Directions*, above n 123, p 10.

130 *LC Debates* (5/4/2006) 22060.