REGULATION REVIEW COMMITTEE

Parliament of New South Wales

RE-ENGINEERING REGULATIONS

IN NEW SOUTH WALES FOR THE 21ST CENTURY

PART 1

Report No 9/52
June 2000

This report was compiled using Microsoft Word 97
and printed by Parliamentary Printing Services

Copies of this report have been distributed to all legal deposit libraries in Australia

New South Wales Parliamentary Library cataloguing-in-publication data:

New South Wales. Parliament. Regulation Review Committee.
Re-engineering regulations in New South Wales for the 21st Century. Part 1 / Regulation Review Committee, Parliament of New South Wales. [Sydney, N.S.W.] :The Committee, 2000. - 1 v. (various foliations) ; 30 cm. (Report no. 9/52, June 2000)

Chair: P.R. Nagle.

ISBN 0 7310 2274 2

1. Delegated legislation—New South Wales (LCSH)
[1]. SUBORDINATE LEGISLATION—NEW SOUTH WALES (Parl. Thesaurus)
I. Title
II. Nagle, P. R.
III. Series: New South Wales. Parliament. Regulation Review Committee. Report ; 52/9

348.944 (DDC21)
346.42-944 (Moys)

TABLE OF CONTENTS

APPENDICES

1 *Regulation Review Act 1987*

2 *Subordinate Legislation Act 1989*

3 *The Flinn Report*
Joint Committee on Administrative Rules, Illinois

DOCUMENTS TABLED WITH THIS REPORT

A City of New York Mayor's *Management Report for the Fiscal Year 1999* describing the performance of City agencies and the priorities and performance plans for Fiscal Year 2000

B The documents also include the *Report of the SWAT Team on Regulatory Reform headed Re-engineering Business Regulation*

C New York State publications relating to the New York State Governor's Office of Regulatory Reform.

D *Report to Congress on the Costs and Benefits of Federal Regulations*

E *The Information Collection Budget* of the United States Government for the year 1998

F *Agency Compliance with the* Unfunded Mandates Reform Act 1995 *Report* dated October 1999

G Publications of the AEI-Brookings Joint Center for Regulatory Studies relating to improving regulatory accountability

H Publications relating to the Better Regulation Task Force of the UK

I Documents relating to the work of the National Conference of State Legislators of the United States

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Chairman's Foreword

Part 1 Section A of this Report examines the establishment and work of the Regulation Review Committee and the legislative requirements governing the making of regulations in New South Wales. Section B presents an overview of the strengths and weaknesses of the existing arrangements. Section C examines some recent regulatory reforms in other countries. Section D is my speech presented to the World Bank on 2nd December 1999, in Washington DC USA.

Parts 2, 3 and 4 will be published separately. Part 2 will comprise the conference papers, proceedings and transcript of the International Conference on Regulatory Management, Reform and Scrutiny of Bills to be hosted by the New South Wales Regulation Review Committee in Sydney from 9 to 13 July 2001. Part 3 of the Report will deal exclusively with the Australian viewpoint on regulatory management and reform. Part 4 will contain recommendations for change to the New South Wales regulatory system.

This constitutes the most major enterprise undertaken by my Committee since its establishment in 1989.

The Regulation Review Committee, after a decade of industrious and successful operation, is in a position to build on the experience it has gained in regulatory analysis over those years by putting forward for the consideration of the Parliament changes to enhance the regulatory controls of this State.

This report sets out in plain English the strengths and weaknesses of the current New South Wales regulatory system.

The *Subordinate Legislation Act* has led to a most substantial improvement in the level of consultation undertaken by departments when formulating regulatory proposals. Time and again proposals have been refined and improved by consultation with the community.

The periodic review and cull of existing regulations put in place by legislation substantially recommended by my Committee has reduced the number of regulations in force by 48 per cent. Since the introduction of the *Subordinate Legislation Act* we now have a mandatory set of criteria to test the social and economic consequences of regulatory proposals. The OECD in a detailed report at the end of 1999 said that these provisions have a high degree of consistency with OECD best practice recommendations for regulatory impact analysis.

The Regulation Review Committee has become an increasingly important means of requiring Ministers and the Public Service to explain and justify the basis for their regulatory actions. This has raised public involvement in the regulation-making process from a previously negligible level to a point where the public is a mandatory party in the process.

The Committee has played a strong role in developing the skills of its members in regulatory matters and in providing an opportunity for them to act on a bipartisan basis. However these important achievements and strengths do not mean that the existing system is not open to improvement.

The most fundamental weakness in the current system is that impact assessment does not extend to bills. Very early in the Committee's operations it became apparent that the principal weakness in the New South Wales regulatory framework was the lack of any requirement on Ministers or their departments to carry out a cost-benefit appraisal prior to the introduction of primary legislation. The Committee has drawn this to the attention of both Parliament and the New South Wales Government on numerous occasions in both speeches and reports to Parliament.

Other Australian States have in the meantime acted to establish scrutiny of bills committees. The views of the New South Wales Regulation Review Committee that such a provision should be a legislative requirement has been fully endorsed in the OECD Report.

My Committee has analysed many regulatory impact statements. These have recurring defects and it is clear that every Government agency without exception needs more training in the RIS process.

It seems some RIS defects arise time after time from the same Department, which seems to show a lack of commitment by some public servants to the RIS process. It is often carried out by Government departments, not as a means of providing insight into the best way to implement a regulatory proposal, but merely to conform to the procedural requirements of the *Subordinate Legislation Act.* For instance, the Parliamentary Counsel draws up the regulation without even having the benefit of reading the Regulatory Impact Statement. This is because these two documents are prepared at the same time but at different places.

Section C of this reports examines what other countries are doing and it mentions some useful initiatives that are being undertaken and tested. I would refer readers to the section of the Report dealing with the work that is being done in the New York State by Governor Pataki's Office of Regulatory Reform. My Committee was advised by that office that savings resulting from its regulatory reforms total $1,780 million. This is indicative of what can be achieved by a properly designed and administered regulatory reform program, which could have huge savings for New South Wales administration.

The Regulation Review Committee now moves forward to carry on to the next stage - an international conference and then a public inquiry into regulatory reform and management.

Peter R. Nagle MP
Chairman

Regulation Review Committee Members

Legislative Assembly

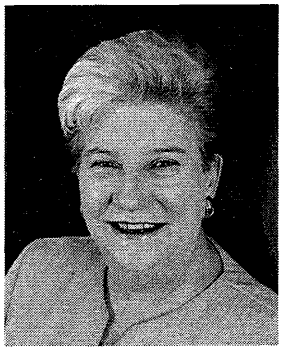
Mr Peter Nagle MP, Chairman
Dr Liz. Kernohan MP
Mr Gerard Martin MP
Ms Marianne Saliba MP
Mr Russell Turner MP

Mr Peter Nagle MP
Chairman

Hon Janelle Saffin MLC
Vice-Chairman

Legislative Council

Hon Janelle Saffin MLC, Vice Chairman
Hon Don Harwin MLC
Hon Malcolm Jones MLC



Dr Liz Kernohan MP

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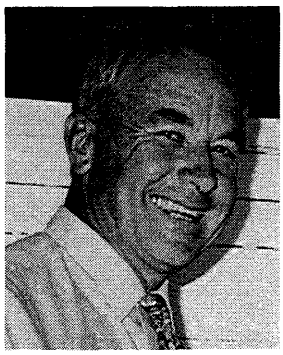
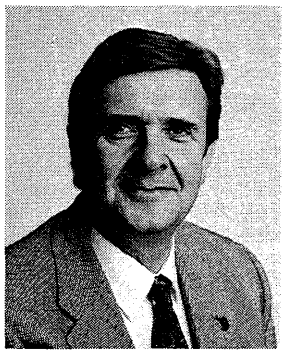


Mr Russell Turner MP

Hon Don Harwin MLC



Hon Malcolm Jones MLC

Secretariat

Mr Jim Jefferis, Committee Manager
Mr Greg Hogg, Project Officer
Mr Don Beattie, Clerk to the Committee
Ms Susannah Dale, Assistant Committee Officer

RE-ENGINEERING REGULATIONS

IN NEW SOUTH WALES FOR THE 21ST CENTURY

INTRODUCTION

Part 1, Section A of this report examines the establishment and work of the Regulation Review Committee of the New South Wales Parliament and the legislative requirements governing the making of regulations in this State.

Section B presents an overview of the strengths and weaknesses of the existing arrangements.

Section C examines some recent regulatory reforms in other countries.

Section D is the speech presented by Mr Peter R. Nagle MP, Chair of the Regulation Review Committee of the New South Wales State Parliament, Australia to the World Bank on 2nd December 1999, Washington DC USA.

Parts 2, 3 and 4 of the report will be published separately.

Part 2 will comprise the conference papers, proceedings and transcript of the International Conference on Regulatory Management, Reform and Scrutiny of Bills to be hosted by the New South Wales Regulation Review Committee in Sydney in March or July 2001.

Part 3 of the report will deal exclusively with the Australian viewpoint on regulatory management and reform.

Part 4 will contain recommendations for change to the New South Wales regulatory system.

PART 1 - SECTION A

ESTABLISHMENT OF COMMITTEE AND LEGISLATIVE REQUIREMENTS GOVERNING MAKING OF REGULATIONS IN NSW

1. ESTABLISHMENT OF COMMITTEE

The origins of the Regulation Review Committee can be found in the strong reaction against regulations that prevailed during the 1980s in New South Wales. The public had a perception of regulations as hampering business, as encroaching on individual liberties, and as being dispensed by unaccountable functionaries without the benefit of adequate Parliamentary scrutiny. It was also felt that there were huge numbers of outdated, cumbersome regulations which were still nominally valid and needed to be cleared away.

In response to these public concerns, the Government in 1984 attempted a co-ordinated review of New South Wales statutory rules. A Cabinet Sub-Committee was appointed to oversee a thorough examination of all legislative requirements (including regulations, by-laws and ordinances) which, together with administrative procedures, were inhibiting development and causing cost and inconvenience to business and the community in general.

The Premier sent a memorandum to all Ministers asking them to review their legislation so as to remove any unnecessary or conflicting regulations. A year later the Premier asked Ministers to submit quarterly reports to him on the results.

At the same time the Parliamentary Counsel's Office was requested to review Acts and statutory rules requiring repeal and amendment. The *Statute Law (Miscellaneous Provisions) Act 1985* repealed more than 1,000 outdated Acts, and the *Subordinate Legislation (Repeal) Act*

1985 had the effect of preserving, as statutory rules, only those specifically listed in Schedule A or B of the Act. Although this clarified the statutory rules now in force, no details were ever provided on the number of statutory rules, if any, that were removed by this process.

The departmental reviews led to the streamlining of regulations in a number of areas and some departments devoted staff and resources to ongoing review work.

In other departments, little or no ongoing work was done. The need for a permanent regulatory review mechanism and a central authority to co-ordinate activity was recognised by the Select Committee upon Small Business established by the New South Wales Parliament in March 1986. That Committee felt that ad hoc reviews of "problem" regulation areas suffered the weakness of not ensuring that all statutory rules were eventually reconsidered and that the process could be manipulated by vocal interest groups to promote and protect their interests.

In February 1987 the Select Committee recommended that a Parliamentary Joint Committee "be established by statute to oversee and monitor a renewed regulatory review process in New South Wales".

The Regulation Review Committee

The Committee was established under the *Regulation Review Act 1987* and comprises eight members (five from the Legislative Assembly and three from the Legislative Council). Three Members from the Legislative Assembly and one from the Legislative Council constitute a quorum. The Chairman has a deliberative vote and a casting vote. (The *Regulation Review Act* is set out in Appendix 1 to this Report.)

A principal function of the Committee is to consider all regulations while they are subject to disallowance by Parliament. In examining a regulation the Committee is required to consider whether the special

attention of Parliament should be drawn to it on any ground, including any of the following:

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

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

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

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

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

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

(g) that the form or intention of the regulation calls for elucidation; or

(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, following its examination of a regulation, make such reports and recommendations to each House of Parliament as it thinks desirable. It may inquire and report on questions about regulations referred to it by a Minister.

Secretariat

The Committee Secretariat comprises a Manager with legal qualifications, a Project Officer, a Committee Clerk and an Assistant Committee Officer.

The Committee meets weekly while Parliament is sitting and monthly when it is not.

It is the Committee's practice to consider regulations generally in the order of their gazettal so as to deal with those first that have been in force for the longest period.

Amongst these, priority is given to those regulations that have been tabled as the Committee's examination of a regulation is required to be exercised during the period of disallowance. That period expires after a lapse of 15 sitting days from the date of tabling (S. 41 (1) *Interpretation Act 1987*).

The Secretariat produces a written briefing paper on each regulation for the Committee. The content of these papers is dictated by the *Regulation Review Act 1987*. That Act requires the Committee to consider whether the special attention of Parliament should be drawn to it on any ground, including any of those listed in section 9.

Officers of the Secretariat speak on a frequent basis with officers of Government departments. The purpose of this is to obtain additional information concerning the particular regulation that is being examined.

The Secretariat has generally found government officers to be candid and helpful in discussing regulations. It is a welcome reflection of a growing openness in government that such officers willingly discuss shortcomings in particular regulations.

It is often possible at officer level to agree upon a means of correcting a defect in a regulation. This course of action can then be formally examined by the Committee and appropriate correspondence sent to the Minister. Most achievements of Regulatory Review Committees will depend on consultation rather than disallowance of the regulations.

The Secretariat has, over the life of the Committee, produced approximately 3,000 briefing papers which vary from one page to 10 or more pages. On the basis of the Secretariat's briefing the Committee decides whether to formally report a matter to Parliament, or to write to the Minister or to do nothing further.

2. THE REGULATION-MAKING PROCESS

Prior to the introduction of the *Subordinate Legislation Act 1989* it was far too easy in New South Wales to make regulations. The process was threadbare of any critical assessment at departmental level.

In the ordinary case the permanent head of a department, or even a member of the department's legal staff, with the approval of the Minister, would send a draft regulation to the Parliamentary Counsel. If that regulation could legally be made - and that surprisingly was really the only test on whether it should go ahead or not - the Parliamentary Counsel would send back a revised draft with his accompanying certificate as to the legality of the proposal.

The Minister's staff simply attached this professionally drafted regulation to an Executive Council Minute, submitted it for signature by the Minister, and sent it across to Government House. If things were managed efficiently the regulation could appear in published form on the Friday following the formal approval of it by the Governor.

This system allowed numerous regulations to come into being with only the barest, if any, evaluation being made of their expected economic and social costs and benefits.

This situation was compounded by the general failure of Ministers to provide the Parliament with any explanatory information in relation to regulations being tabled.

3. *SUBORDINATE LEGISLATION ACT 1989*

The Committee produced tangible results in a short time. On 27 July 1989 the Regulation Review Committee tabled a report recommending legislation for the staged review of New South Wales Regulations. That report was immediately acted upon by the Government. It introduced legislation into Parliament on 2 August 1989 - probably a record for the speedy implementation of any committee's recommendations. That legislation, in general, reflects the principles and terms of the legislation recommended in the Committee's report.

The impact of the *Subordinate Legislation Act* falls predominantly upon Government departments. Each department, through its Minister, is now required - perhaps for the first time - to actually demonstrate that the regulations it administers will benefit the community. This has been done by means of a set of formal procedures that have to be followed by departments and agencies whenever a regulation is made.

SUMMARY OF SUBORDINATE LEGISLATION ACT 1989

(The full text of this Act is set out in Appendix 2 of this Report)

Guidelines

Schedule 1 - must be followed before a statutory rule is made. These require identification of objectives, consideration of other options, and an evaluation of costs and benefits.

Regulatory Impact Statement (RIS)

Schedule 2 - the RIS must be prepared before a principal statutory rule is made (a principal statutory rule is one that contains provisions apart from direct amendments or repeals). The RIS must state objectives, identify options, assess costs and benefits of proposal and of alternatives and present them in a way that allows a comparison. The RIS must also contain a consultation program.

Notice Requirements

Before a principal statutory rule is made, the Minister publishes a notice in the Gazette stating the objects of the statutory rule, advising where a copy of the RIS can be obtained, and inviting submissions.

Consultation

This must take place with appropriate representatives of consumers, the public and sectors of industry. The Minister considers comments and submissions.

Regulation Published

Copy of RIS to Regulation Review Committee.

Function of Regulation Review Committee

The Committee has the authority to report to Parliament on any departures from the requirements of the *Subordinate Legislation Act.*

RIS not required in following cases

Where statutory rule relates to matters in Schedule 3:

- Machinery matters, direct amendments, repeals, savings or transitional provisions;
- Matters relating to legislation that is uniform to other States and the Commonwealth;
- Adoption of Codes where these have been costed.

Fast Tracking Procedures

The Attorney General certifies that the special circumstances of the case warrant a regulation being made without complying with the normal RIS procedures. An assessment has to be completed within four months.

Regulations excluded from operation of Act

- Standing rules and orders of the Legislative Assembly and Legislative Council - cover administrative arrangements between the Houses – not subject to disallowance.

- Regulations under the *Constitution Act 1902* - cover pecuniary interests of members - can be reviewed by a Parliamentary Committee established for that purpose.

- Regulations under the Companies legislation made as a result of the agreement between the States and Commonwealth.

- By-laws of bodies not subject to ministerial control, e.g. Australian Jockey Club, Colleges of Advanced Education.

- Rules of Court - made by Rules Committees and subject to regular review.

4. *ESSENTIAL FEATURES OF AN RIS*

Part 2 of the *Subordinate Legislation Act* contains the requirements that govern the making of regulations. These came into force on 1 July, 1990 and require, in the case of a principal statutory rule, the preparation of a regulatory impact statement.

The essential features of a regulatory impact statement are an identification of the objectives of the regulatory proposal, the alternative options for achieving those objectives, an assessment of the economic and social costs and benefits of the proposal and of the alternative options and finally a statement of the consultation program undertaken with the public and relevant interest groups. These requirements are set out in Schedule 2 of the *Subordinate Legislation Act*.

A regulatory impact statement may be a full-scale lengthy document, with detailed, calculations of costs and benefits and a full evaluation of alternative methods of achieving the policy objectives. It may instead be a page, including no calculations whatever, but merely setting out objectives, various methods of achieving them and an evaluation, in words, of their respective costs and benefits. Its scope may lie somewhere in between.

The scale of the RIS will depend on the importance of the regulation it covers, its priority and the resources available to carry it out. A major purpose of it is to provide a comparison of all costs and benefits associated with the proposed regulation and of the alternatives to it.

Definition of objectives

The Committee considers that the first and most important single task of an RIS is to identify as clearly and unambiguously as possible the objectives of the regulation.

Normally a vague statement such as "improving the efficiency of the department" will not do. Concreteness should be aimed for. For instance, one aim of a regulation may be to provide detailed safeguards to protect affected members of the public; another may be to stimulate competition in the relevant sector. Sources of the objectives (eg the relevant Act, Cabinet decisions, policy statements etc) should be included here, and, where possible, an attempt should be made to divide objectives into primary and secondary objectives. To clarify the objectives and place them in their context, a brief background statement is appropriate in this section.

Only a clear statement of objectives will allow the following stages of the RIS to be properly completed.

A list of other means of achieving these objectives

An RIS should also include a list of other means of achieving the regulatory proposal. This should generally start with the "do nothing" alternative. Possible other means are government legislation, self-regulation, community education, direct government expenditure, and administrative action. Only realistic alternatives should be included in the list. Even where a regulation is adopted as the proposed course it is usually possible to examine variations in the content of the regulation so as to increase the net benefit to the community.

An identification of those directly and indirectly affected by the regulation

The RIS should identify those persons or bodies directly and indirectly affected by the regulation. Those affected directly could include particular industries, occupations, individuals, locations, products or processes and so on. Those affected indirectly could include the community and the economy at large. Here a brief description of the regulation's direct and indirect effect on these individual sectors should be included. This information will be useful later on in the RIS.

Description of enforcement

This section should normally be short but it is often the product of extensive consultation. It should cover the methods of administering and monitoring compliance with the proposed regulation and the penalties for non-compliance. All agencies required to be involved should be consulted, and penalties should be examined to see that they are appropriate.

Specifying costs and benefits (with calculations where appropriate)

A list of costs and benefits to all the individuals and sections affected by the regulation should be drawn up. The costs and benefits should be divided into those which are direct and those which are indirect. Direct costs could include social and environmental costs to the community, economy-wide impacts due to negative linkages such as reduction in employment levels, fall in exports and so on.

Direct and indirect costs can be further broken down into tangible and intangible costs. Tangible costs are those that have a monetary value and whose price can readily be determined. These are, for example, salaries and wages, material costs, and the value of production. Intangible costs are those which are not readily valued through the market, and to which a value must be imputed.

If the importance of the regulation warrants it and resources permit an attempt should be made to quantify all tangible costs. This is generally an easy task. Quantifying seemingly intangible costs is a considerable challenge but if assumptions are clearly stated, imputations of value can often be set.

Costs and benefits should normally be considered over the five-year sunset period for regulations. Then all costs and benefits should be tabulated.

Discounting of costs and benefits and establishment of net present value (NPV)

Once values have been either determined (for tangibles) or imputed (for intangibles), the discounting procedure may be applied, according to standard discount tables. This is a simple operation commonly performed by computer or manually by the use of discount tables.

The discount rate is set by Treasury and is a real rate which already takes inflation into account. The net present value of costs incurred by compliance with the regulation in question, and of the benefits flowing from it, can now be compared.

Considering alternatives to the proposed regulation

Ideally, the same procedure should be followed for each alternative that has been identified. In practice, the whole process can sometimes be so time-consuming that it will be used in its theoretical entirety only rarely. What will be studied and analysed will vary according to the judgment of those preparing the RIS.

A comparison of all the alternatives

Considerable thought should be devoted to this section whether quantification has been carried out or not. One possible way of presenting it is in summary form, in a table. One of the options should now be explicitly selected.

Final tasks

These include -

(a) describing assumptions and methods;
(b) listing of sources and consultation; and
(c) making an executive summary of the entire RIS.

Copy of Regulatory Impact Statement (RIS) to Parliamentary Counsel

Government Departments are at present not providing the Parliamentary Counsel with a copy of the regulatory impact statement prepared in the case of principal statutory rules. This is probably happening in circumstances where departments make a request to the Parliamentary Counsel to draft a regulation at a time when the regulatory impact statement is still in course of preparation. This situation needs to be corrected.

The Parliamentary Counsel needs to be given a copy of the RIS at the same time as he receives the drafting instructions. Those impact statements are of crucial importance not just to the public but also to the Parliamentary Counsel in explaining the objects of the proposal and its surrounding impact. The current arrangements could well produce a situation where the officer drafting the regulation knows less about it than a member of the public who has read the regulatory impact statement.

5. *INTRODUCTION OF A STAGED REPEAL PROPOSAL FOR REGULATIONS*

A major reform to the regulation-making process was the introduction of a staged repeal program for all regulations. This was also part of the *Subordinate Legislation Act 1989.*

Under this program all regulations currently in force in New South Wales are re-examined, on cost benefit and cost effectiveness principles, over a five year period starting on a chronological basis with the oldest of the regulations.

The staged repeal process involves the automatic repeal of existing regulations (except where exempt) made before 1 September 1990 in a staggered process over a five year period commencing on 1 September 1991. Regulations made after 1 September 1990 are automatically repealed (unless their repeal is postponed) five years after they are made.

The success of this program can be demonstrated from the cumulative totals provided by the Parliamentary Counsel which show a 48% reduction in the number of regulations since the staged repeal began on 1 July 1990. The program continues to eliminate any regulations which cannot be demonstrated to be of greater benefit than cost to the community.

Cumulative Totals

	1 July 1990	1 May 2000
Total number of Rules	976	507
Total number of Pages	15,075	8,262

6. *EXPLANATORY NOTE TO ACCOMPANY EACH REGULATION*

Early in its work the Committee recognised the need for most, if not all regulations, to be accompanied by an explanatory note in plain English setting out their function.

This was seen as having far reaching benefits to the public particularly in understanding lengthy, technical or difficult subject matter in regulations. Such a practice would also assist the task of the Committee.

The Senate Standing Committee on Regulations and Ordinances in its 83rd Report dated April 1998 had mentioned similar difficulties. That Committee has the role of scrutinising legislation on various grounds similar to those of the Regulation Review Committee. Paragraph 3.12 of its report reads:

> *It is extremely difficult even for an expert Committee, let alone busy parliamentarians, to understand the overall significance of specialist legislative instructions without some competently written explanation... the case for all instruments to be accompanied by expertly drawn and informative explanatory statements is overwhelming.*

On 9 June 1998 the Regulation Review Committee wrote to the Parliamentary Counsel seeking his assistance in the matter. The Parliamentary Counsel, with the concurrence of the Attorney General, acted promptly to implement the Committee's suggestion.

The Committee also asked the Parliamentary Counsel to examine the possibility of making the title to each regulation more descriptive of its contents. In many cases, the title comprised only the word "Regulation", preceded by the name of the Act under which it was made. Consequently any bare list of regulations had little informative value. This suggestion was also followed up and put into practice.

7. COMMENCEMENT DATE OF REGULATIONS

Until the advent of the Regulation Review Committee it was almost habitual practice in New South Wales for regulations to be brought into force on the date of their gazettal. The Committee found on average that 82 per cent of regulations came into force immediately or within a week of their gazettal.

The text of a regulation, unlike an Act of Parliament, is not available to the public until after it has been made and, in most cases, brought into force. In contrast, an Act of Parliament does not come into force until 28 days after the date of assent except where the Act makes specific provision for its commencement (S.23 *Interpretation Act 1987*).

The Committee considered that the general practice in New South Wales of bringing regulations into force on the date of their gazettal required reconsideration by the Ministers concerned, particularly in those cases where regulations impose duties or obligations on members of the public or where an offence could be committed for breach of them. In these cases the regulation, although gazetted, should be expressed to commence at a sufficiently later date to enable members of the public to inform themselves of the content and effect of it.

The Attorney General acted on the Committee's recommendation by issuing guidelines to Ministers on the matter.

8. DRAFTING UNIFORMITY

It is important that one sole authority is responsible for the drafting of the regulations in their final form.

In New South Wales this authority is the Parliamentary Counsel. He has under his control 20 or more qualified lawyers of high academic standard who are trained in drafting regulations and Acts of Parliament.

Such an arrangement ensures a high standard of drafting that is consistent from regulation to regulation.

You do not get, for instance, major discrepancies in the quality of the drafting or an imbalance in the penalties being imposed. Experts should draft instruments that have an impact on personal rights or relate to commercial transactions. Departmental legal officers may not have adequate experience.

9. *REGULATIONS APPLYING, ADOPTING OR INCORPORATING CODES OR OTHER PUBLICATIONS*

Even though the drafting process in New South Wales is centralised in the Office of the Parliamentary Counsel there are still avenues for improvement. One of these is in connection with the adoption of codes such as Australian and international standards in regulations.

The Committee views with concern the fact that under the law as it stands a very brief regulation of one page or less can be made which incorporates into the law codes which are many hundreds of pages in length.

By way of example, the Regulation Review Committee considered a regulation made under the *Dangerous Goods Act* which incorporated by reference the Australian code for the transport of dangerous goods by road and rail. That code is a 400 page document but the regulation making it law is only two pages in length.

It is an anomaly that under the New South Wales *Interpretation Act 1987* only the regulation has to be tabled in Parliament, not the code itself. Legally, Parliament has no power to disallow any part of the incorporated code even though it can disallow the regulation that adopts it. This is because the code, although now enforceable, does not actually become part of the regulation.

There is also no comprehensive list of codes incorporated in regulations. It is of equal concern that very often these codes are made by technical experts in industry and government without any input from a legislative draftsperson.

Of prime concern is the fact that there is no guarantee to the public that the code will be available for inspection at the responsible department administering the code.

PART 1 – SECTION B

OVERVIEW OF STRENGTHS AND WEAKNESSES OF EXISTING ARRANGEMENTS

10. BENEFITS OF NSW REGULATORY CONTROLS

- **The *Subordinate Legislation Act 1989* provides a mandatory set of criteria to test the social and economic consequences of regulatory proposals.**

  This compels departments to take a wider view of the consequences of their actions. The Report by the Public Management Service of the OECD on Regulatory Impact Assessment in New South Wales, January 1999, states that the provisions contained in this Act have a high degree of consistency with OECD best practice recommendations for RIA.

- **The requirements of the *Subordinate Legislation Act* have led to an improvement in the level of consultation undertaken by departments when formulating regulatory proposals.**

  > *The major success of the Act is the consultation program that has to be carried out by the agency with those likely to be affected by the regulation. Time and again proposals have been refined and improved by consultation with the community. The Committee has had to intervene on a number of occasions to guide departments as to their responsibilities but overall the program has been a major success. Departments have been less enthusiastic to embrace the principles of cost-benefit analysis.* (Speech by Chairman of Committee, Legislative Assembly, 23 September 1998)

- **The *Subordinate Legislation Act* produces a periodic review and cull of existing regulations. The number of regulations in force has been reduced by 48% since 1990.**

- **Positive results of intervention by the Committee.**

  Many cases can be cited of beneficial changes to regulations produced by the Committee's scrutiny role. On occasions, this has involved widespread changes in both text and principles.

- **Regulations remade been drafted in accordance with the plain language policy of the Parliamentary Counsel's office.**

  Discussions will be held with the Parliamentary Counsel to see if large regulations can be simplified by breaking them down into small sets, relevant to their content.

- **The Regulation Review Committee has become an increasingly important means of requiring Ministers and the Public Service to explain and justify the basis for their regulatory actions.**

  It has, through its monitoring of the *Subordinate Legislation Act*, also been an effective means of raising public involvement in the regulation-making process from a previously negligible level to a point where the public is a mandatory party in the process.

  The public has greater access to Parliament as a result of the *Regulation Review Act* and the *Subordinate Legislation Act,* particularly as the Committee has the right to inform itself in relation to any issue by consultation with the public.

  It is now clear to government departments that they will be held accountable through the Committee for their regulatory proposals. This has been stressed even further following an instruction by the Premier to Ministers that they must table all regulatory impact statements in Parliament . This was a Committee initiative, the purpose of which was to raise the profile and quality of RISs.

  The Committee also recognises its role as a means of developing the skills of its members in regulatory matters and in providing an opportunity for them to act on a bi-partisan basis. This allows complex issues to be fairly examined on their merits.

11. WEAKNESSES OF NEW SOUTH WALES REGULATORY SYSTEM

- **Impact assessment does not extend to bills.**

  Very early in the Committee's operations it became apparent that the principal weakness in the New South Wales regulatory framework was the lack of any requirement on Ministers or their departments to carry out a cost-benefit appraisal prior to the introduction of primary legislation. The Committee has drawn this to the attention of both Parliament and the New South Wales Government on numerous occasions in both speeches and reports to Parliament.

  Other Australian States have in the meantime acted to establish scrutiny of bills committees. The views of the New South Wales Regulation Review Committee that such a provision should be a legislative requirement has been fully endorsed in the OECD Report.

- **Poor quality RIS's. Bureaucracies need more training in the RIS process.**

  In its 1993 report on Future directions for Regulatory Review in New South Wales the Committee recommended that:

  > *A Regulatory Impact Training Scheme including the preparation of a practical training manual and follow-up workshops be developed by the Committee to ensure an improvement in the quality of regulatory impact statements prepared by Government departments. Funds should be provided for this purpose so that quotations can be called from accredited organisations to develop an overall training strategy, including a manual and a course of training.*

  Although he expressed support the Premier did not implement this recommendation.

In their report the OECD strongly support the RIA training of regulators and comments that this skill is not likely to be widespread in the administration. The OECD report states that the current head of the Intergovernmental Relations and Regulation Reform Branch of the New South Wales Cabinet Office, Mr Jim Booth, has said that a review of regulatory processes currently being conducted by them has led "to an initial conclusion that there is a need to recommence training activities, including the issue of new guidance material". This is a very helpful sign although that remark was made in November 1998.

- ***Subordinate Legislation Act* may be asking too much of departmental officers.**

  Some time ago, Mr Scott Jacobs, Principal Administrator, Public Management Service, OECD, in discussions with the Secretariat, suggested that the *Subordinate Legislation Act* may be asking too much of departmental staff. He suggested, for consideration, an approach that concentrated on the satisfaction of absolutely essential requirements. His comments seem in some respects borne out by the failure of a majority of regulatory impact statements to measure up to all the requirements of the New South Wales *Subordinate Legislation Act.*

- **Insufficient consideration is given in RIS's to alternatives to regulations.**

- **Lack of assessment of incorporated materials.**

  (Comment is made on this aspect elsewhere in the Report).

- **There should be greater consultation with interest groups.**

  Many departments merely circulate the proposals without actively consulting with obvious interest groups or requesting responses from them. The Committee frequently brings together Government representatives and public interest groups to discuss their differences. This is productive. Changes to the gazetted regulations often arise from these meetings.

- **The proprietors of small businesses tend not to be consulted on RIS's.**

  They are unaware of the RIS process, and do not have time to go to meetings during business hours. The New South Wales Small Business Development Corporation is a statutory advisory body which provides guidance to the Minister for State Development on matters relative to the operation of small firms. This body has statutory functions that would make it an appropriate conduit for small business interest. However, this corporation has never raised with the Regulation Review Committee a single matter of concern arising from regulations affecting small business.

- **Each RIS should be published on the Internet to seek wider comment.**

- **Lack of commitment by public servants to the RIS process.**

  This is evident from the same RIS defects arising time after time despite the Committee having drawn them to the Minister's attention.

  On 23 September 1998, the Chairman of the Committee said in Parliament:

  > *I will start with one or two comments on regulatory impact statements. They were introduced in 1989 under the Subordinate Legislation Act. Their objective is to require administrators to take into account relevant considerations in deciding whether to recommend the making of one or more regulations to add to the 8,000 pages that New South Wales now has.*
  >
  > *The committee's reports, including this report, demonstrate that most regulatory impact statements fail to comply with substantive requirements of the Subordinate Legislation Act. This has been drawn to the attention of Ministers time after time. The committee has been assured that its views have been taken into account and will be acted upon in the future.*

However, that has not happened. The same administrations produce the same mistakes the next time. We have reached the point at which the committee needs to consider some stronger medicine, perhaps even a recommendation of disallowance for those regulations not adequately justified by a competent appraisal.

On various occasions the committee has recommended that the Government provide an adequate training forum. It even costed what was required. But no action was taken. It is interesting to note that one of the Federal Government responses to the recommendations of the small business task force has been to give the Office of Regulation Review the responsibility of developing and promoting training courses in regulation impact analysis and review. It is now time for New South Wales, belatedly, to take the same path. The reason is simple: a regulatory impact statement is intended to test and justify the need for a major new regulation. If the impact assessment is done poorly then a new regulation is on the books without adequate justification. I remind the House that the Subordinate Legislation Act exists because regulations do not receive the debate accorded to a bill. It is simply a matter of fairness to the people of New South Wales.

- **Cost benefit analysis may not be appropriate in all cases.**

  On September 30 1996, Congress directed the Office of Management and Budget (OMB) to submit a report on the costs and benefits of Federal regulations. The requirements included:

  - estimates of the total annual costs and benefits of Federal Regulatory programs, including quantitative and nonquantitative measures of regulatory costs and benefits;

  - estimates of the costs and benefits (including quantitative and nonquantitative measures) of each rule that is likely to have a gross annual effect on the economy of $100,000,000 or more in increased costs;

- an assessment of the direct and indirect impacts of Federal rules on the private sector, State and local government, and the Federal Government; and

- recommendations from the Director and a description of significant public comments to reform or eliminate any Federal regulatory program or program element that is inefficient, ineffective, or is not a sound use of the nation's resources.

The objective for seeking this report to Congress was to assemble information for the purpose of improving the quality of the debate and potential recommendations for regulatory reform.

The report acknowledges that there are enormous data gaps in the information available on regulatory benefits and costs. It says reliable data is sparse on benefits. The report says this arises firstly, from the technical difficulties of valuing qualities not generally traded in the market place and, secondly, from the cultural or philosophical barriers to reducing values, equities and physical or emotional effects to dollars and cents.

There are few agreed-upon conventions for doing this, and agencies are understandably reluctant to spend scarce time and resources on what may be perceived as a not very informative exercise. This is compounded by the belief of some that it is morally or politically difficult or wrong to engage in such seemingly uncaring calculations. Some also fear a tyranny of numbers - that is, if it is quantified, the decision will necessarily be determined solely by the numbers. Their understandable response is not to quantify or monetize. (Second Report to Congress on the Costs and Benefits of Federal Regulations, Office of Management and Budget, 1998, tabled with this Report).

Although recognising these difficulties the report affirms the merit of explicitly quantifying and monetizing benefits and costs of individual regulations in order to enhance the consideration of alternative approaches to achieving regulatory goals.

However, it said that knowing the total costs and total benefits of all regulations provides little specific guidance for decisions on reforming regulatory programs. It placed stress on the need to standardise the methodologies applied by agencies. The report recommended that:

- Office of Information and Regulatory Affairs (OIRA) lead an effort among the agencies to raise the quality of agency analyses used in developing new regulations by promoting greater use of the Best Practice Guidelines and offering technical outreach programs and training sessions on the guidelines.

- An interagency group subject a selected number of agency regulatory analyses to ex-post disinterested peer review in order to identify areas that need improvement and stimulate the development of better estimation techniques useful for reforming existing regulations.

- OIRA continue to develop a data base on benefits and costs of major rules by using consistent assumptions and better estimation techniques to refine agency estimates of incremental costs and benefits of regulatory programs and elements.

- OIRA continue to work on developing methodologies appropriate for evaluating whether existing regulatory programs or their elements should be reformed or eliminated using its Best Practices document as the starting point.

- OIRA work toward a system to track the net benefits provided by new regulations and reforms of existing regulations for use in determining the specific regulatory reforms or eliminations, if any, to recommend. These reporting requirements will be extended if the requirements of the *Regulatory Right-to-Know Act* become law. (See the section of this report covering Federal US Reform.)

- **Lack of any requirement to provide an estimate of the total annual benefits and costs of the New South Wales regulatory program.**

  Mr Robert Hahn (*Improving Regulatory Accountability*, A.E.I.-Brookings Joint Center for Regulatory Studies) argues that an annual report containing these details should be made accessible to a wide audience and that it would have large beneficial effects on the regulatory system and on the well-being of the nation.

- **The New South Wales Regulation Review Committee has often found that departments make a decision to implement a proposal by means of a new regulation before an RIS is even prepared.**

  The RIS then serves as a justification of the decision. This view is supported by the conclusion reached in the OECD Report that there is a lack of integration of the regulatory impact analysis (RIA) process into regulatory decision-making.

  This observation seems shared by the Scrutiny of Acts and Regulations Committee (Victoria) who say that RIS's tend to sell an idea to which the department is committed. It says RIS's are intended to persuade and that the purpose of an RIS appears to be to provide transparent economic argument as to why a regulatory approach should be acceptable. It says that, noting this focus, it is important that the reasons why other practicable means of achieving the objectives of the regulations are fairly presented.

- **Sunset time of five years is too short.**

  The Regulation Review Committee is considering whether the present sunset period of five years should be extended to 10 years, consistent with most other Australian jurisdictions. It is examining this course as a result of observing the working of the current provisions since 1989. The shortness of the current period has the consequence of causing many departments to seek a postponement of the staged repeal of regulations because many

of the current principal statutory rules form part of a scheme of separate but related statutory rules. As a consequence departments are often faced with a review task beyond their practical capability to carry out within a five year period. A further issue is that the changes made necessary by the lapse of five years are in many cases not substantial enough to justify a complete overhaul of the particular regulation.

- **Lack of certification of RISs.**

One of the most important recommendations in the OECD Report on NSW relates to the need for specific responsibility for reviewing and approving draft RIS to be allocated to a dedicated Office of Regulatory Reform located in the New South Wales Cabinet Office. The report says:

> *While the Parliamentary Regulation Review Committee has taken an active and thorough approach to improving the quality of RIA it has been limited in its effectiveness by the fact that it necessarily becomes involved only after regulation is in force.*
>
> *The experience of numerous OECD countries, as well as other Australian States, indicates that there is considerable value in allocating specific responsibilities in this area to a dedicated review body located in the centre of government. Certification of the adequacy of RIA prior to the completion of the regulatory process is essential if a high level of compliance with the provisions of the Subordinate Legislation Act is to be ensured.*
> (Report by the Public Management Service of the OECD on Regulatory Impact Assessment in New South Wales January 1999 p. 59)

Although the Regulation Review Committee referred the OECD Report to the New South Wales Government shortly after it was tabled in January 1999 there has not been any written response from the Cabinet Office despite follow-up action. This is disappointing, not just in respect of this particular recommendation, but also in respect of the many other productive recommendations that the Report contains.

- **The Victorian Law Reform Commission.**

  The Commission argues that in order to take more account of the needs of small business, an executive summary and list of questions should accompany an RIS. This would encourage people to make a contribution to the formulation of regulations without having to read the whole Regulatory Impact Statement. It says this approach would be particularly valuable where the RIS is lengthy and includes complex information. (Recommendation of Victorian Law Reform Committee Report October 1997).

- **Lack of statistical data bank.**

  Although the Committee has a large range of recorded data on the operation of both the *Regulation Review Act*, the *Subordinate Legislation Act* and on the performance by government departments in meeting the requirements of those Acts, it has not developed any professional data base on the results of those records.

  This was highlighted in the report of the OECD on the New South Wales regulatory impact system. At paragraphs 122 - 125 the OECD commented:

  > *High quality data is essential to useful analysis. One of the most frequently heard criticisms of RIA is that the data requirements for the conduct of adequate analysis are unduly onerous. If this is not to be the case, methodological guidance on the collection of data, as well as its analysis, is required. An explicit policy should clarify quality standards for acceptable data and suggest strategies for collecting high quality data at minimum cost within time constraints.*

In 1997, the OECD published a discussion of a range of data collection methodologies for RIA (Collecting and Using Data for Regulatory Decision-Making *Ivy E Broder & John F Morrall III in* Regulatory Impact Analysis, Best Practices in OECD Countries. *OECD/PUMA, Paris 1997)* *based largely on US experience with implementing RIA over 20 years. A number of Member countries have recently implemented specific programmes to improve their data collection for RIA based on survey methodologies. For example, Canada in 1995 commenced the pilot use of a software based Business Impact Test to obtain estimates of likely regulatory costs from affected businesses.*

In 1997 an upgraded system was released to coincide with the adoption of a formal policy requiring its systematic use. Similarly, in Denmark, the Ministry of Business and Industry administers a system of Business Test Panels which has recently been expanded to draw on input from a wider range of Danish businesses.

The European Commission has, during 1998, commenced trials on a variant of the Danish system in seven member countries, with a view to using it as a major tool in its programme to improve existing Business Impact Test Procedures for European legislation.

Another approach to the data collection issue is to provide active assistance on a case by case basis. This has been done since 1995 in the Netherlands via its Regulatory Helpdesk function. The Helpdesk is jointly run by the Ministries of Justice and Economic Affairs, both of which have specific regulatory reform responsibilities, and supported by the Ministry of Environment. It makes available specific expertise, including statistical assistance, to guide regulators through all phases of RIA including the design and collection of data requirements.

Notwithstanding the above initiatives, the implementation of data collection strategies remains relatively undeveloped in OECD countries. The New South Wales system does not currently include any such initiatives and this appears to be an area for consideration for future efforts to support reform, particularly in light of the concerns expressed that, notwithstanding the relatively lengthy experience with a system of generally high quality formal processes, the actual standard of analysis achieved and impact on regulatory quality has fallen short of expectations.

- **Lack of consistency of scrutiny principles on a national level.**

  The OECD Report on New South Wales encourages an Australia-wide effort to ensure maximum consistency between RIA, consultation and sunsetting processes at Federal and State levels.

- **RISs not seen by Parliamentary Counsel before preparation of regulation.**

  The purpose of regulatory impact statements is to analyse, on a cost benefit basis, the realistic options available to achieve major Government regulatory proposals. The RIS is intended to ensure that Government Departments address all the relevant criteria relating to a proposal, such as its impact on the community, the available options to achieve it and whether, in fact, it is in the best interests of the community.

  An essential part of the process is consultation with relevant interest groups and members of the public.

  The current practice appears to be for the Parliamentary Counsel to prepare a draft regulation without seeing, in advance, the RIS which is supposed to examine the best options.

  The process seems to be that the Parliamentary Counsel prepares the draft regulation on instructions from the Department and at the same time, or even later, the Department prepares the RIS.

This arrangement obviously pre-empts the objective of the RIS because it suggests the RIS is prepared solely to substantiate a decision already made within the Department, that is, to implement the proposal by means of a regulation.

It is of concern that the Department prepares the RIS in advance of the formal consultation process. It is difficult to understand how an RIS could effectively address the question of impact on the community when there may have been no detailed discussions with or written submissions from the relevant parties.

There is certainly no point in preparing an elaborate RIS if its purpose has already been compromised by the preparation of a regulation fully covering all the details being canvassed in the RIS. One approach would be to delay preparation of a regulation until consultation on the RIS had been concluded. This would allow a decision to be made on the best means of implementing the proposal.

- **Weaknesses in New South Wales regulatory impact assessment procedures set out in OECD Report.**

  The report examines a number of other substantial weaknesses in the New South Wales impact assessment provisions. The implementation of that report's recommendations will be dealt with in the final part of this report to be separately published.

PART 1 - SECTION C

REGULATORY REFORM IN OTHER COUNTRIES

In December 1999, a delegation from the New South Wales Regulation Review Committee, Mr Peter R Nagle MP Chair, Dr Liz Kernohan MP, Committee Member and Mr Jim Jefferis, Committee Director, travelled to Mexico City, Washington, New York City, Albany, Chicago and London to hold discussions on regulatory reform and the scrutiny of primary legislation.

U.S.A. REGULATORY REFORM

1. FEDERAL REFORM

In Washington the delegation met with U.S. regulators and commentators so as to gain an overview of the progress of current US regulatory reform.

Those persons who kindly made their time available were Mr John F. Morrall III, Branch Chief, and Mr Stuart Shapiro, Office of Information and Regulatory Affairs, a specialist regulatory agency set up in 1980 in the US Office of Management and Budget. Mr Bob Hahn, Director of the Joint Center for Regulatory Studies also had separate discussions with the NSW delegation as did Mr Louis Renjel, Associate Director, Environment and Regulatory Affairs, of the US Chamber of Commerce. These discussions covered various major reforms passed or under consideration by Congress to improve the Federal regulatory decision-making process.

MANDATES INFORMATION ACT

Mr Nagle, Dr Kernohan and Mr Jefferis were advised on the *Mandates Information Act.* A key provision of the *Mandates Information Act* is the small business impact statement which requires that members of Congress be informed about mandates and their impact on the private sector. Mandates are legislative requirements to take certain actions or provide certain services.

Mr Condit, when introducing the *Mandates Information Act* in the House of Representatives in March 1997 said:

- *The problem addressed by this bill is simple: Congress does not deliberate carefully enough before deciding whether to impose unfunded mandates on the private sector. Focusing almost exclusively on the benefits of unfunded mandates, Congress pays little heed to, and sometimes seems unaware of, the burden that unfunded mandates sometimes impose on the very groups they are supposed to help.*

- *This burden is substantial. Economists of almost every stripe agree that the costs of unfunded mandates are primarily borne by consumers, workers, and small businesses. These costs take the form of higher prices for consumers, lower wages for workers, and hiring disincentives for small businesses.*

- *The Mandates Information Act would create a process for the Congress to deliberate carefully on proposed new private-sector mandates before deciding whether to impose them. Specifically, the bill would direct the Congressional Budget Office to prepare a consumer, worker and Small Business Impact Statement for new private-sector mandates contained in bills reported out of committee.*

The *Mandates Information Act* follows on from the *Unfunded Mandates Act of 1995* which required Congress to disclose the costs of new federal mandates on State and local governments. The new legislation covers the impact of legislative proposals on the private sector.

The NSW Regulation Review Committee has for several years drawn Parliament's attention to the anomalous situation where bills are subject to less scrutiny by way of cost benefit analysis than the regulations which are made under them. The Committee has in previous reports said that Parliament should act to correct the situation by examining the issue of the need for Ministers to table before Parliament a professional assessment of the costs and benefits of the legislation they present.

The New South Wales delegation was advised that in 1988 the General Accounting Office (GAO), following a Congressional request, had reported (Report No. GGD – 98 – 30) that the *Unfunded Mandates Reform Act* appears to have had only limited direct impact on agencies' rule-making actions at least in the first two years of its implementation. The report said that during the first

two years of the Act's implementation, the requirement in Section 204 that agencies develop a process to consult with State, local, and tribal governments before promulgating any significant Federal intergovernmental mandate appears to have applied to no more than four environmental protection agency rules and no rules from other agencies. This seems to conflict with the Fourth Annual Report to Congress from the Director of the Office of Management and Budget, (October 1999).

That Report states that at the direction of the President, agencies generally have done even more consulting with State, local, and tribal governments than is required by the Act.

CONGRESSIONAL REVIEW ACT

The *Congressional Review Act* (CRA) was passed into law in 1996.

It allows Congress 60 legislative days to review a rule. During that period Congress can pass a joint resolution of disapproval which prevents the rule from taking effect. The President can veto the resolution but Congress retains the power to override the veto.

In discussions with Mr Nagle, Dr Kernohan and Mr Jefferis, Mr Renjel from the US Chamber of Commerce said that although several resolutions to disapprove a rule had been introduced into Congress not one had been passed. He said that the Act had not been used to achieve any positive result so far in terms of regulatory review. He said this was surprising as just taking one year, for example 1997, Federal agencies published more than 5,000 pages of new and proposed rules in the Federal Register. A number of commentators see the Act as having the potential to put Congress back in charge of the regulatory process.

REGULATORY FLEXIBILITY ACT

The Regulatory Flexibility Act requires US agencies to give special consideration to the impact of regulations on small business. The Act specifies that a regulatory flexibility analysis must be prepared if a screening analysis indicates that a regulation will have a significant impact on a substantial number of small entities. Major goals of the Act are:

(i) to increase government awareness and understanding of the impact of their regulations on small business;
(ii) to require agencies to communicate and explain their findings to the public; and
(iii) to encourage agencies to use flexibility and to provide regulatory relief to small entities. (A Guide to the Regulatory Flexibility Act, US Small Business Administration, May 1996.)

The US Small Business Administration, in its overview of the Regulatory Flexibility Act, made the following points about its objectives and requirements:

- Under the RFA, each agency must analyse how its regulations affect the ability of small entities to invent, to produce and to compete. Agencies are supposed to balance the burdens imposed by regulations against their benefits and propose alternatives to those regulations that create economic disparities between different-sized entities.

- The RFA establishes a procedure for looking at the effects of rules on small entities. Regulated small entities are encouraged to participate in the development and consideration of alternate means of achieving regulatory objectives. Federal agencies must consider establishing different compliance or reporting requirements, timetables, or exemptions to take into account the resources available to small entities.

- Under the 1996 amendments, whenever a small business feels adversely affected or aggrieved by an agency rule-making because of the agency's failure to comply with the RFA, the small business may seek review of the agency's RFA compliance in court.

- The chief counsel for advocacy of the US Small Business Administration has been designated to monitor agency compliance with the RFA, and possesses authority to intervene as an *amicus curiae* in court proceedings involving compliance with the RFA.

The 1996 annual report of the Chief Counsel for Advocacy on the implementation of the *Regulatory Flexibility Act* said that because of

the judicial review provisions many federal agencies have expressed a new willingness to comply with the requirements of the RFA. Mr Glover, Chief Counsel, said agencies appear to be making good-faith efforts to comply with the formulated RFA but that integration of regulatory flexibility analyses into agency decision-making process was far from complete. He said there was still a need for ongoing education and interaction with agencies in order to ensure full compliance. The Office of Advocacy will continue to work with federal agencies to provide the necessary information and guidance to advance their understanding of regulatory flexibility compliance.

The Chief Counsel's optimistic view of this Act has been borne out in his most recent Report *(Annual Report of the Chief Counsel for Advocacy on Implementation of the Regulatory Flexibility Act, Fiscal Year 1999).*

It is worth quoting the Chief Counsel's Foreword to that Report, addressed to the President and Congress of the United States, as it shows the value of this Act to small business.

> *To the President and Congress of the United States:*
>
> *The Regulatory Flexibility Act (RFA) will be 20 years old on September 19, 2000. This is the nineteenth annual report submitted by a Chief Counsel for Advocacy since enactment of that law, and the fourth report since enactment of the 1996 Small Business Regulatory Enforcement Fairness Act (SBREFA) amendments to the RFA.*
>
> *I am pleased to report that the RFA, as amended by the 1996 SBREFA amendments, is making a difference. There is a noticeable cultural change under way in agencies and here is the tangible proof:*
>
> - *As a result of RFA intervention by Advocacy, small businesses, and SBREFA panels, agencies – to their credit – made changes to final regulations in Fiscal Year 1999 that reduced potential regulatory costs by almost **$5.3 billion.***
> - *And this was accomplished **without compromising public policy objectives.***
>
> *In 1980, Congress enacted the RFA with the expectation that agencies would alter their approach to regulatory development and consider regulatory alternatives that were less burdensome on small business but equally effective in achieving public policy objectives.*

In 1996, Congress strengthened the RFA with SBREFA amendments that: authorize the courts to review agency compliance with the RFA, providing for the first time an enforcement remedy; require the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA) to convene Small Business Advocacy Review Panels to ensure real world input from affected small entities on burdensome impacts; and reaffirm the authority of the Chief Counsel to file amicus curiae *(friend of the court) briefs in regulatory appeals.*

Small Business Advocacy Review Panels – The Importance of Data
Since enactment of SBREFA, 18 Small Business Advocacy Review Panels completed work on a diverse range of EPA and OSHA regulatory proposals. Approximately 300 small entities throughout the country were consulted in the course of the panels' deliberations. Arguably the most rewarding aspect of the panel process is the fact that small entities brought real world experiences to the panels' discussions.

Small entities seldom challenged the need for regulatory solutions, but the information they provided did in fact challenge agency estimates as to cost and regulatory effectiveness. This input was important in identifying equally effective alternatives – all of which resulted in major changes to regulatory proposals. In one instance, a proposal was withdrawn in its entirety when the data showed there was no need for a national regulation.

Significantly, lessons learned through the panel process and court decisions as to the importance of data is not lost on other agencies. Agencies are beginning to appreciate how important economic impact analyses and industry input are to their public policy and regulatory efforts.

The Impact of RFA and SBREFA on Other Agencies
The fact that agency compliance with RFA may now be reviewed by the courts, coupled with the fact that small entities are taking advantage of this remedy to challenge agency compliance, provides a strong incentive for agencies to examine more carefully the small business impact of their regulatory proposals. For example, we have seen changes at agencies such as the Health Care Finance Administration and the Agricultural Marketing Service, the impact of which is not yet clear. But what we do know is that they are now seeking Advocacy's assistance early in their deliberations on how best to comply with the RFA.

Industries regulated by these agencies are dominated by small entities whose survival – or extinction – in the market place hinges on the level of regulatory burden they must bear. The RFA in such instances is a safety net for small entities.

Some agencies, still struggling with economic impact analyses, argue that the RFA imposes additional burdens on limited resources. Advocacy is of the view that if, in fact, the analytical process mandated by RFA is imposing additional burdens, it is only because agencies have not internalized the process. Some agencies have yet to accept the concept that less burdensome alternatives may be equally effective in achieving statutory mandates. Once this concept is accepted, the analytical process mandated by the RFA will be second nature and the regulatory process itself will be more efficient.

When Good News is Also Bad News
As stated above, increased compliance with the RFA resulted in changes to regulations that saved small business almost ***$5.3 billion*** *in potential costs. That is the good news. The bad news, however, is that agencies proposed regulations that – but for the RFA and the intervention of Advocacy and others – would have imposed unnecessary costs of $5.3 billion on small business.*

Data and agency resistance to the consideration of meaningful and less burdensome alternatives is the heart of the problem. Moreover, agencies do not yet clearly understand that compliance with the RFA does not mean special treatment for small business at the expense of sound public policy. Correcting these misconceptions will remain the focus of Advocacy's activities in the coming years.

In a departure from previous reports, and to be consistent with the information that must be reported each year under the Government Performance and Results Act of 1993, this year's RFA report is on a fiscal year basis rather than on a calendar year basis.

Jere W. Glover
Chief Counsel for Advocacy
March 2000

REGULATORY RIGHT-TO-KNOW ACT OF 1999

The Regulatory Right-to-Know Act of 1999 directs the Office of Management and Budget to submit to the Congress, with the Federal budget each year, an accounting statement and associated report containing: (1) an estimate of the total annual costs and benefits of Federal regulatory programs in the aggregate; by agency, and by major rule; (2) an analysis of direct and indirect impacts of Federal rules on Federal, State, local, and tribal government, the private sector, small business, wages, and economic growth; and (3) recommendations to reform inefficient or ineffective regulatory programs. Before such statements and

reports are submitted there must be public notice and an opportunity to comment and to consult with the Comptroller General. There has to be an appendix to the report addressing public and peer review comments.

It is very interesting to note that under this legislation the Director of the Office of Management and Budget will have to issue guidelines to agencies to standardize measures of costs and benefits. A further action to improve the calibre of the information is the requirement that obliges the Director to arrange for a nationally recognized public policy research organization with expertise in regulatory analysis and regulatory accounting to provide independent and external peer review of the guidelines and each accounting statement and associated report before such guidelines, statements, and reports are made final.

The Office of Management and Budget (OMB) has declared its opposition to this legislation. It argues that the expanded requirements are impossible in many cases, and would lead to misleading analysis.

OMB argues that the existing data is uneven and too limited to carry out the tasks imposed by the legislation. It says there are many significant methodological problems associated with aggregating estimates of costs and benefits of regulations. It says agencies use different assumptions and methodologies in preparing their analyses of individual rules. OMB argues that the legislation reflects a belief that there is more information available than is the case. It also believes that compliance will significantly divert the resources of agencies and that it will have a damaging effect on OIRA's ability to oversight regulations.

Robert Hahn, Director of AEI-Brookings Center for Regulatory Studies, says this legislation will improve regulatory accountability. His detailed reasons are contained in his testimony before the Committee on Governmental Affairs, US Senate, April 1999.

Mr Hahn says this Act will help ensure that regulators, lawmakers and interested parties have better information on the benefits and costs of individual regulations as well as the cumulative impact of the entire Federal regulatory effort.

He takes the view that the *Regulatory Right-to-Know Act* makes permanent a requirement that Congress has imposed on OMB over the past two years, that is, an obligation to prepare annually a report to Congress on the total benefits and costs of Federal regulations. Mr Hahn says that before those annual reports were required the American people had no idea of the cumulative impact of Federal regulatory activity. Now they know Federal regulations impose in excess of $200 billion a year. He says these reports should not be abandoned, especially now that the agency has had two years' experience in preparing them. Mr Hahn says the new requirements can be accommodated with few additional resources and to the extent that additional ones are required, that they are worth the cost. *"There is the potential to save billions of dollars annually while ensuring that consumers get better regulatory results. . . The broadest response to the critics is that the rear-guard battle over benefit-cost analysis, frankly, is over"*, said Mr Hahn in his testimony.

THE CONGRESSIONAL OFFICE OF REGULATORY ANALYSIS ACT

This Act will create a Congressional Office of Regulatory Analysis (CORA) to provide Congress with an independent analysis of existing and anticipated Federal rules. This Office will serve as the regulatory counterpart of the Congressional Budget Office. OMB also opposes this legislation, saying that no Congressional office should be involved in the Executive branch's development of new regulations prior to their formal publication. OMB argues that legislation which would directly involve Congress during the development of regulations would undermine the candid exchange of views within the Executive branch and could jeopardize the careful rulemaking process established through the Administrative Procedure Act over the past 50 years.

Mr Hahn believes the CORA proposal is beneficial for three reasons: first, because it is likely to serve as an independent check on the analysis done in the executive branch by OMB and the agencies; second, because it will help to make the regulatory process more transparent; and third, because Congress can use the independent analysis to help improve regulation and the regulatory process

2. *NEW YORK STATE: THE GOVERNOR'S OFFICE OF REGULATORY REFORM (GORR)*

In his introductory comments on the work of GORR, Governor G.E. Pataki says the goals of even worthwhile regulations can become secondary to costly procedures and unnecessary paperwork.

> *One of the results of excessive and unreasonable regulations has been the decade long decline in jobs for all New Yorkers. We had lost our competitive edge to other states who were growing jobs by working with businesses and local governments to establish a sensible regulatory environment. From the moment I took office, one of my top priorities has been making regulations in New York more reasonable and less costly without diminishing the important protections they provide.* (Remarks of George E. Pataki, Governor in Office Profile)

On 7 December 1999 the New South Wales delegation, led by Mr Peter R. Nagle, MP, Chair of the Regulation Review Committee, Dr Liz Kernohan MP, Committee member, and Mr Jim Jefferis, Director of the Committee, had the benefit of meeting with the New York State Governor's Office of Regulatory Reform (GORR). The delegation was keen to meet with GORR because of the wide recognition accorded to Governor George Pataki for his vigorous regulatory reform efforts. The delegation was also keen to discuss the very workable methods that Office had developed to oversight regulatory proposals.

Those in attendance from GORR at the discussions were: Mr Robert L. King, Executive Director, Division of Budget; Mr David Bradley, Acting Director; Ms Amelia Stern, Acting Deputy Director and Counsel; Mr Jeffrey Rosenthal, First Assistant Counsel; Ms Wendy Burns, Project Manager; and Mr David Pietrusza, Parliamentary Information Officer.

The New South Wales delegation noted that Governor Pataki signed an executive order in January 1995 placing a 3-month moratorium on the adoption of most new regulations. Subsequently

this moratorium was extended twice. The executive order required executive agencies and commissions to review their existing regulations and identify those which unduly burdened the economy, caused job losses or went beyond legislative mandates.

Agencies responded with their recommendations for repealing or revising regulations, along with plans to implement these recommendations. GORR staff then conferred with business groups and local government to solicit further suggestions for reform. Individuals and organisations across New York State also submitted their ideas for regulatory reform to GORR, using the "What's Driving You Nuts?" form that GORR had developed for this specific purpose.

In November 1995, the Governor signed another Executive Order which provided the framework for developing regulations. It recognised certain criteria by which all new regulations are evaluated. Under this order, new and existing regulations are subjected to the discipline of cost-benefit analysis, risk assessment and peer review. In New York State all major regulations are reviewed by the Office of Regulatory Reform prior to their publication, and they cannot proceed until that office is satisfied with them. The regulatory steps that have to be followed are:

1. The government department or agency develops a regulatory proposal;

2. The agency identifies groups affected by the regulation and talks to these organisations about the need for the proposal;

3. The agency produces a draft text of the regulation.

These regulations are drafted by lawyers and the particular agency according to a prescribed format. A draft regulation must be accompanied by a regulatory impact statement. A regulatory flexibility analysis must also be produced where the proposed regulation would impose an adverse economic impact on small business or local government.

There is an additional requirement of a rural area flexibility analysis where the regulation is likely to have an adverse impact on rural areas. The final requirement is for a job impact analysis where the proposal is likely to result in a decrease of more than 100 jobs. The public are given 45 days to submit comments on a proposed rule but the Governor's office can in effect exercise a moratorium on the making of new regulations until it is satisfied that they have been adequately justified.

Mr Robert L. King, Executive Director, told the New South Wales delegation that GORR's decision to look at regulations before gazettal was the most important decision they made. He said that although the system had the capacity to stifle regulations it still improved the quality of them.

Mr King told the delegation that the experience of GORR had established the benefit of having in place a cost-benefit system for the appraisal of regulatory proposals. David Bradbury advised the delegation that the Office of Regulatory Reform had put a lot of effort into cost benefit training for their regulators. He said "RIA in GORR is central to the process. It is not there to merely justify a departmental decision to proceed."

GORR has provided extensive cost benefit training for their regulators, something that the New South Wales Committee advocated to the Government in its report to Parliament of November 1999. (Report of the Regulation Review Committee on Future Directions for Regulatory Review in New South Wales, No. 23, November 1993).

GORR has produced an on-line manual headed: "Cost-Benefit Handbook: A Guide for New York State's Regulatory Agencies".

The publication "Office Profile" of the Governor's Office of Regulatory Reform states that a policy dialogue is the most commonly used process to develop regulations. This is a non-binding process that brings together the parties with a particular interest in the regulatory proposal:

The parties, either directly or through the use of a neutral third party, work to clarify issues, exchange information and develop new policy options. A policy dialogue is a less formal way of developing rules than negotiated rulemaking. Written protocols may be non-existent or minimal. The goal is not necessarily to reach consensus, but rather to achieve a certain comfort level among the parties as a result of the discussions.

Several conditions are essential for a successful policy dialogue. There must be definable public interests in order to encourage participation from parties with a strong interest in the defined issues. The decision makers of the interested parties and the agency must participate in or at least fully support the policy dialogue. There must be sufficient incentives and time to negotiate. There must also be a potential for re-ordering the parties' underlying core priorities differently so that there can be give-and-take in the process. Clearly, there must also be a willingness to negotiate.

A policy dialogue is most effective when used early in the process, before positions polarize, emotions heighten, and before costly, seemingly endless lawsuits begin. This is true of all alternative dispute resolution or alternative dispute avoidance methods.

GORR evaluates the justification for proposed rules on the basis of the following criteria contained in Order No. 20:

The rule:

(a) is clearly within the authority delegated by law;

(b) is consistent with and necessary to achieve a specific legislative purpose;

(c) is clearly written so that its meaning will be easily understood by those persons affected by it;

(d) does not unnecessarily duplicate or exceed existing federal or state statutes or rules;

(e) is consistent with existing state statutes and rules;

(f) consistent with state statutory requirements, will produce public benefits which will outweigh the costs, if any, imposed on affected parties;

(g) does not impose a mandate on local governments or school districts which is not fully funded, except as specifically required by state statute;

(h) prescribes methodologies or requirements that allow regulated parties flexibility and encourages innovation in meeting the legislative or administrative requirements and objectives underlying the rule;

(i) is based on credible assessments, using recognised standards, of the degree and nature of the risks which may be regulated, including a comparison with everyday risks familiar to the public;

(j) gives preference to the least costly, least burdensome regulatory and paperwork requirements needed to accomplish legislative and administrative objectives;

(k) is based upon the best scientific, technical and economic information that can reasonably and affordably be obtained, and

(l) if possible and practical, favors market-oriented solutions and performance standards over command-and-control regulation.

New York State regulatory reform has been supported from the top down. The New South Wales Committee was advised by the Office that savings resulting from its regulatory reforms total $1,780 million.

3. *CITY OF NEW YORK – SWAT TEAM ON REGULATORY REFORM*

While in America the Committee's delegation comprising Mr Peter R. Nagle MP, Chairman, Dr Liz Kernohan MP, Committee Member and Mr Jim Jefferis, Committee Director, was able to hold discussions in the City of New York with Mayor Giuliani's Office of Operations and Department of Business Services.

Mayor Giuliani helpfully made available for discussion the services of his experienced staff, including Mr Anthony Longo, Assistant Director, Office of the Mayor; Mr Roman Ferber, Director, Business Development; Mrs Suzi Proujan, Assistant Director Operations; Mr Eric Parker, Project Co-ordinator, City Business Assistance; and Ms Barbara R. Maggio, Office of General Services.

The delegation was told that the Mayor's approach to regulatory reform was to look at the entire process, at all its levels. Reform efforts had been made in many directions at once with the objective of creating a friendly climate for business.

The Mayor's SWAT team on regulatory reform was created to lighten the burden of regulation on New York City business. It encouraged direct participation by business groups in their discussions, and asked them what was needed for resurgence. It was stressed to the NSW delegation that New York City had the right to make regulations for itself, as distinct from the regulations made by Governor Pataki for New York State.

The delegation was told that the SWAT team targetted unnecessary rules, rationalised the enforcement process and improved customer relations. Mr Roman Ferber told the delegation that there had been a lot of improvements under the SWAT program. He said that regulations had been too harsh and that a "human factor" had not been considered. They were not government-friendly. He said that in essence regulatory agencies had forgotten that businesses were the customers. He said that New York City officers now work with this in mind. He said if harsh decisions are made on businesses, they go out of business.

The SWAT team concentrated on four main licence and permit areas:

- elimination of licence requirements when their costs outweigh the public benefit;

- enforcement - the administration is working with agencies to identify rules which can be enforced less harshly through early warning systems. This action has been taken in response to complaints by business that fines are the first notification of a violation of City rules.

- customer relations – the Department of Business Services is working with regulatory agencies and the economic policy and marketing group to produce user-friendly guides to the rules. The aim is to avoid the need for manufacturers and retailers to try to deal unaided with the rules governing their enterprises.

- self-certification – this allows licence and permit applicants to bypass the lengthy City inspection process by hiring their own licenced professionals to certify that the businesses meet inspection criteria. This also frees inspectors to concentrate on other priorities. The NSW delegation was advised that self-certification is now widely in use.

Another initiative, CityNet Access, allows agencies to share public record information with other agencies through recent networking technology. This provides agencies with direct access to public records such as building permits and regulatory violations.

It is clear from the discussions undertaken by the delegation that the New York City SWAT program provides a useful and successful precedent of a re-engineering process over four major areas of the business spectrum: licences and permits; customer relations; rule-making policy; and enforcement.

4. *REGULATORY OVERSIGHT – ILLINOIS*

On 10 December 1999 the NSW Regulation Review Committee delegation, comprising its Chairman, Mr Peter R. Nagle MP, Dr Liz Kernohan MP and the Director, Mr Jim Jefferis, met in Chicago with Senator Michael J. Madigan, Speaker of the Illinois House of Representatives, and Senator J. Philip Novak, State Representative Illinois House of Representatives and member of the Joint Committee on Administrative Rules.

Senator Novak gave the delegation full details of the operation of the Joint Committee on Administrative Rules. The Joint Committee on Administrative Rules is a bipartisan legislative oversight committee created by the General Assembly in 1977.

Under the *Illinois Administrative Procedure Act*, the committee is authorized to conduct systematic reviews of administrative rules promulgated by state agencies. The committee conducts several integrated review programs, including a review program for proposed, emergency and peremptory rulemaking, a review of new public acts and a complaint review program.

The committee is composed of 12 legislators who are appointed by the legislative leadership, and the membership is apportioned equally between the two houses and the two political parties. Members serve two-year terms, and the committee is co-chaired by a member of each party and legislative house.

Support services for the committee are provided by 25 staff members.

Two purposes of the committee are to ensure that the Legislature is adequately informed of how laws are implemented through agency rulemaking and to facilitate public understanding of rules and regulations. To that end, in addition to the review of new and existing rulemaking, the committee monitors legislation that affects rulemaking and conducts a public act review to alert agencies to the need for rulemaking.

The Committee also distributes a weekly report, the *Flinn Report,* to inform and educate Illinois citizens about current rulemaking activity, and maintains the State's database for the *Illinois Administrative Code* and *Illinois Register.* A recent copy of the *Flinn Report,* which illustrates the active efforts made by the Joint Committee to secure public involvement in the regulatory process, is included as Appendix 3.

5. *ASSEMBLY ON FEDERAL AND STATE ISSUES – JOINT MEETING OF THE NATIONAL CONFERENCE OF STATE LEGISLATORS, WASHINGTON*

The delegation from the New South Wales Regulation Review Committee would like to record the valuable assistance it obtained from attendance at the Assembly on Federal and State Issues joint meeting held in Washington, December 1 – 3, 1999.

This forum proved an excellent source of information and research on legislative reform issues supported by high quality meetings and seminars.

Members of the New South Wales delegation were able to meet and exchange constructive views on the regulatory reform programs of various legislatures of the United States. These discussions were particularly useful in the context of the controls imposed by different States on legislation and statutory rules prior to their enactment. The discussions covered such subjects as the regulatory reform programs of States, review of Bills, fiscal notes and an examination of the committee process followed in different States.

These discussions have been of great assistance to the New South Wales Committee in its subsequent examination of pertinent U.S. State legislation and precedents for regulatory reform. These precedents are likely to assist in the formulation of proposed changes to the New South Wales regulatory framework.

Peter Nagle MP, Liz Kernohan MP and Jim Jefferis would like to thank all the legislators and NCSL staff for the time they made available including:

Mr William T. Pound, Executive Director, NCSL
Mr Ronald K. Snell, Director, Economic,
Fiscal and Human Resources, NCSL
Mr Michael Bird, Federal Affairs Counsel, NCSL
Ms Ann Morse, Program Director, NCSL
Ms Kathy Wiggins, Director, International Programs, NCSL

Speaker Donna Sytek, New Hampshire
Mr Stephen A. Klein, Chief Legislative Fiscal Officer,
Vermont State Legislature
Mr Gary R. Van Landingh, Office of Program Policy Analysis,
The Florida Legislature
Mr Bill Marx, Chief Fiscal Analyst,
Minnesota House of Representatives
Mr Geoffrey Shepherd, Economic Management Unit,
The World Bank.

6. VISIT TO FBI HEADQUARTERS

Peter Nagle MP, Liz Kernohan MP and Jim Jefferis were also invited to visit and tour the FBI Headquarters in Washington DC.

7. *U.K. REGULATORY REFORM*

The New South Wales delegation led by Mr Peter Nagle MP, Dr Liz Kernohan MP and Mr Jim Jefferis had discussions in London on 14 December 1999.

In April 1999 the UK Government announced a new approach to regulatory quality and control.

One of the Government's first steps was to change the name of the Better Regulation Unit to the *Regulatory Impact Unit* to reflect the Unit's new role. The Unit is made up of civil servants under the direction of the Cabinet Office. The Unit is supported by the Better Regulation Task Force which is independent of Government.

These changes mean:

- the **Regulatory Impact Unit (RIU)** must be consulted on any policy proposals likely to impose a significant regulatory burden;
- more scrutiny of regulatory proposals at an early stage to look at the risks, costs and benefits and any non-regulatory alternatives;
- more openness in the development of the regulatory process including greater consultation with industry;
- working alongside the DTI's Small Business Service to examine pressures facing small businesses;
- developing a forward programme of regulatory proposals, including EU proposals, to help Government reduce the cumulative burden of regulation and uncertainty;
- a stronger voice in Europe to ensure that the cumulative impact of EU legislation is fully taken into account by the Council of Ministers;
- proposed changes to increase the flexibility of the *Deregulation and Contracting Out Act*;

- an increased role for the Better Regulation Task Force in spearheading the Government's drive to remove unnecessary and inefficient regulations;

- enforcement of regulation in line with the Enforcement Concordat.

> *The next initiative that we took was to introduce a system of Regulatory Impact Assessments. Since last August the Cabinet Office have required all departments to identify and publish the risks, costs and benefits of their proposals. In the past only the costs to business were published. Furthermore, we have now decided that no proposal which has an impact on business, charities and voluntary organisations will be considered by Ministers without a Regulatory Impact Assessment. This requirement applies whenever Ministers or their officials are seeking to clear a new proposal for legislation (including European legislation) or a UK negotiating line on European Union proposals. Departments will be required to submit high quality Regulatory Impact Assessments to Ministers on the likely impact of policies as soon as they are seriously considered.*
>
> *These RIAs as they are known, also require consultation with all those who are affected to help identify and solve any unforeseen problems. In addition they require departments to look at the possibility of adopting a non-regulatory approach as an alternative. This might include providing information, for example as in food labelling, to meet people's concerns.*
>
> *The RIA system is designed to provide a more rounded and inclusive approach to good regulatory practice. It is an approach which means that Ministers have a thorough assessment of the risks, costs and benefits of proposals, and who is affected, before they decide to act.* (Minister for the Cabinet Office's speech to the Social Market Foundation on 27 April 1999)

As part of the RIA procedure UK departments will now have to identify two or three typical small businesses and work out in consultation with them the practicability and cost of implementing

the regulations. This will also include the impact on competitiveness and export business.

If the regulatory proposal is likely to affect more than one sector of small business then a representative analysis of those sectors has to be undertaken. The results are built into the RIA. This type of assessment is referred to as "the Litmus test" and is probably intended to address the criticism by the Better Regulation Task Force that the impact of regulation on small business is not sufficiently recognised by policy makers. (Helping Small Firms Cope with Regulation - Exemption and Other Approaches: Report of Better Regulation Task Force 27 April 2000)

On 14 December 1999 the delegation from the New South Wales Regulation Review Committee, comprising Mr Peter R. Nagle MP, Chair, Dr Liz Kernohan MP, Committee Member and Mr Jim Jefferis, Committee Director, had the benefit of discussions with Lord Haskins, the Chairperson of the Task Force which has 18 members drawn from large and small business, consumer and citizen groups, the charity and voluntary sector, the trade union movement and regulatory enforcement sector. The Chair is appointed for three years, and members are appointed, initially, for one year on an unpaid basis.

Lord Haskins told the delegation that his Task Force has six sub-groups reviewing a series of regulatory areas, one of which was to develop strategies to help small business compliance with regulations. Lord Haskins said the Task Force could independently select the regulatory area to be reviewed and it would then discuss the review proposal with the Minister. He said sometimes tensions necessarily arose. Discussion and review of the particular area would proceed for about six months followed by a report from the Sub-group to the Task Force. If the Task Force published a report then the particular department was required, on instructions from the Prime Minister, to reply within 60 days. Lord Haskins said that the strength of the arrangement lay in the patronage of the Prime Minister. He said it would not work without that support.

Lord Haskins said that under its new role the Better Regulation Task Force will compile a forward program of regulatory proposals over

the next three years. Departments will be required to report to the Regulatory Impact Unit (RIU) on all policy proposals which might impact on business. The RIU has also been asked to examine sunset clauses.

When the Minister for the Cabinet Office was introducing the new changes he said that the previous administration had tended to focus almost exclusively on the financial costs which regulations imposed on business. He said that regulatory control came into play too late as an add-on to the policy-making process rather than forming an integral part. He said that consultation had in the past come too late in the process. He said experience shows attempts to tackle red tape at the end of the process rarely delivered.

These comments are similar in some respects to the views contained in the Report by the Public Management Service of the OECD on the NSW regulatory process. In that report the OECD has recommended intervention earlier in the process by the Regulation Review Committee.

The UK Government has also undertaken to improve the effectiveness of the 1994 *Deregulation and Contracting Out Act* by means of the Regulatory Reform Bill.

The 1994 UK *Contracting Out Act* gives a Minister of the Crown power, by order, to remove or reduce statutory burdens on business providing this would not remove any necessary protection. This has the potential to expeditiously modify the operation of a law in the interests of small business. However, a Minister cannot make such an order unless a draft of it has been laid before and approved by a resolution of each House of Parliament. That draft has to contain details of the burden proposed to be removed, how any existing protections will be preserved, the benefits from the proposal, and details of representations received.

The Minister must consult with organisations representative of interests affected by the proposal. There is a 60 day period for Parliamentary consideration of the draft order. These precautionary curbs on the power (which is really a Henry VIII provision) have severely limited the number of orders made.

On 14 December 1999, the New South Wales delegation also had an opportunity to discuss this Act with Mr Nick Montague, Head of the Regulatory Reform Bill Team. He said the process had worked well over the last five years and that concerns over safeguards had been allayed. However the view had been reached that the provisions were too narrow in their scope.

As at April 2000 there had been 46 orders made for the purpose of removing burdens from business and individuals. The Explanatory Notes with the UK Government's draft Regulatory Reform Bill confirms that the current order-making power has been found to be too limited in scope. The purpose of the Reform Bill is to extend the power.

The Explanatory Notes say that the orders, to be called "regulatory reform orders", under the new power will be capable of:

- making and re-enacting statutory provisions;
- imposing additional burdens where necessary, provided they are proportionate and they strike a fair balance between the public interest and the interests of those affected by the new burden;
- removing inconsistencies and anomalies in legislation;
- dealing with burdensome situations caused by a lack of statutory provision to do something;
- applying to legislation passed after the Bill if it is at least two years old when the order is made and has not been amended in substance during the last two years;
- relieving burdens from anyone except Ministers and government departments (where only they would benefit); and
- allowing administrative and minor detail to be further amended by subordinate provisions orders, subject to negative resolution procedure.

The Explanatory Notes to the Reform Bill state that the word "reform" is to be given its natural meaning and that it will include the codification of law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and simplification and modernisation of the law.

The extended powers of the Minister are accompanied by tests and safeguards governing its use which are set out in the flow charts contained in Annexures A, B, and C to the Reform Bill.

The Deregulation Committee in the House of Commons and the Delegated Powers and Deregulation Committee in the House of Lords have been asked by the Government to formally report on the proposals in the Bill.

House of Lords: Select Committee on Delegated Powers and Deregulation

On 14 December 1999 the NSW Parliamentary delegation also met with members of the Select Committee on Delegated Powers and Deregulation.

Those present from the Select Committee were Lord Alexander of Weedon (Chairman), Lord Mayhew, Lord Dahrendorf and staff, Ms Philipa Tudor and Ms Priscilla Hungerford. Lord Alexander provided the NSW delegation with details of the Select Committee's operations and Ms Tudor made available copies of its most recent reports.

The Select Committee was appointed to report whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny; to report on documents laid before Parliament under Section 1(4) of the *Deregulation and Contracting Out Act*; and to perform, in respect of such documents and orders, the functions performed in respect of other instruments by the Joint Committee on Statutory Instruments.

The Select Committee has introduced several procedures to streamline operations. Although operating independently of the House of Commons Deregulation Committee it has similar functions with regard to deregulation proposals. This has led both Committees to have a complete exchange of papers on these subjects, including the exchange of evidence from witnesses.

This avoids duplication of effort. The Select Committee has also introduced procedures to make its reports available on paper and electronically the day after it meets, so as to make the reports as useful as possible within the time frames of legislation. Government departments submit their memoranda on computer disc or email to help speed the process.

In examining a bill the Select Committee looks to see whether the grant of delegated power is appropriate. This includes expressing a view on whether the power is so important that it should only be one granted by primary legislation. The Committee's examination also includes commenting on whether a bill sufficiently particularises the principles on which, and the circumstances in which, secondary legislation may be passed. The Committee goes on to consider whether the legislation should provide for consultation in draft form before the instrument is laid before Parliament.

The Select Committee considers that the increasing involvement of the House of Lords Committees in pre-legislative consultation is likely to make Parliament more effective and lead to the production of better regulation. This is consistent with the recommendation of the OECD supporting earlier involvement in the review process for the NSW Regulation Review Committee. The NSW delegation were also advised that the practice was growing of some Government departments responding in writing to the Committee's recommendations.

8. REGULATORY REFORM IN MEXICO

A delegation from the New South Wales Regulation Review Committee comprising Mr Peter R. Nagle MP, Chairman, and Dr Liz Kernohan MP Committee member, attended the offices of M. Sc. Gustavo Adolfo Bello Martinez, Economic Deregulation Office, Ministry of Trade and Industrial Development on Monday 29 November 1999.

On the afternoon of Monday 29 November 1999 the Committee members met with Dr Fernando Salas, Head of the Economic Deregulation Office, Ministry of Trade and Industrial Development.

On Tuesday 30 November the Chairman met with the Speaker and Deputy Speaker of the Mexico City Legislative Assembly and attended a session of the Parliament, wherein his presence was noted by the Speaker as a guest of the Regulation Forum of the Legislative Assembly. The Chairman was invited onto the floor of the Parliament and sat with other members of the Legislative Assembly.

REPORT

For most of the 20th Century Mexico's system of government could be characterised as bureaucratic, hierarchical and centralised. This was particularly exemplified in the de facto one party system that dominated national and State politics for nearly 70 years. However since the founding of the modern Mexico State, and even though there was this one party system, the times they were a'changing.

This centralised pattern coud be seen in both a vertical division of power (between Federal, State, and local governments) and in the horizontal division of power between the legislative, executive and judicial branches.

The vertical dimension of Mexico was divided into 31 States and the Federal District of Mexico City. The Federal District of Mexico City now is an independent State. Each State had its own elected governor, Assembly and State judicial system and there were 2,377 Municipalities

governed by a Municipal President and a small rule-making Council. There was a strongly hierarchical approach to public administration which exerted a powerful and long-lasting influence on public service culture. All members of the Cabinet and the Chief Executives of regulatory agencies are directly appointed by the President. Each Minister or Chief Executive then builds a team that is personally loyal to them and not to the President or the legislative structure.

Over those 15 years many advances have been made in the modernisation and structural reform of Mexico's economy. Regulatory reform has been an integral part of this process. Inadequately regulated sectors have been deregulated or properly regulated and progress has been made in reducing the cost of regulations; combating the monopolistic practices of the public and private companies; strengthening consumer protection; and promoting co-operation between the public and private sectors in regulatory reform.

In November 1995 President Zadello took this process a step further by enacting the agreement for the deregulation of business activity which gave birth to a far-reaching deregulation program to reduce bureaucratic red tape that stifles competitive markets and limits economic growth.

The Economic Deregulation Council which was created by this agreement provides inter-Ministerial support in the implementation of the regulatory reform program, which amends or repeals outdated regulations, curbs the creation and insures the quality of any new ones, and places a burden of proof on the institutions that introduce and administer them.

The specific criteria and preconditions are:

(i) There must be a clear justification for Government involvement. Regulations must be vehicles for the processing of Government services or respond to concrete economic or social problems such as health or environmental hazards or inadequate consumer information.

(ii) Regulations must be maintained or issued only on evidence that their potential benefits exceed their potential cost. Moreover, if there is a regulatory alternative that can accomplish the same objectives at a lower cost, this must be taken into account.

(iii) Regulations must minimise the negative impact that they have on business, especially small and medium size businesses, and must be backed by sufficient budgetary and administrative resources to ensure their effective administration and enforcement.

According to a recent study on regulatory reform in Mexico by the Organisation for Economic Co-operation and Development, which was given to Dr Kernohan and the Chairman Mr Peter Nagle, regulatory reform has already produced major benefits for Mexico by improving productivity efficiencies, by reducing costs for such critical inputs as communication and transport services, and enhancing and promoting competitiveness. This has also contributed to the growth of Mexico's export sector while at the same time promoting new products and technologies and the adoption of modern low-cost methods through new entry and investment in transport, telecommunications and other sectors, privatisation and the elimination of red tape which encourages firms to invest in new technologies.

The driving force for regulatory reform is the President and through the President the President's Legal Counsel. The Legal Counsel has been the most important driver in regulatory reform. The Legal Counsel reviews all law proposals to be sent to Congress and all the implementing regulations that require the signature of the President.

The main formal functions of the Judicial Executive are to verify the constitutional adequacy of proposed regulations and act as legal adviser to the President. It also has a role of improving the quality of new regulations and enjoys a de facto power to stop any regulation if it considers it is of unsatisfactory quality. It has been instrumental in reducing duplication and overlapping among regulations and enhancing the quality of law drafting.

AGREEMENTS

In 1995 there was a co-operation agreement between the various States and the national Government of Mexico in regard to regulatory reform.

Some examples of the capacities and initiatives of this protocol can be seen in the fact that co-ordination agreements between the Federation and 31 of the States have been adopted. A co-ordination agreement between the State and Municipalities has been adopted by 25 States. The enactment of a State policy framework for regulations has been adopted by 31 States. The establishment of a Safety Regulation Council and a Deregulation Unit has been adopted by the Federal District, and 25 States.

ADMINISTRATIVE TRANSPARENCY AND PREDICTABILITY

Transparency of the regulatory system is essential to establish a stable and accessible regulatory environment that promotes competition, trade, and investment, and helps ensure against undue influence by special interests. Just as important is the role of transparency in enforcing legitimacy and fairness of regulatory processes. Transparency is a multi-facet concept that is not easy to change in practice. It involves a wide range of issues including standardised processes for making and changing regulations; consultation with interested parties; plain language in drafting; publications; codification, and other ways of making rules easy to find and understand whilst at the same time allowing an appeal process to proceed that is predictable and consistent.

The Mexicans believe that transparency is achieved in dialogue with affected groups and the use of public consultation is an important component. However, it seems it will be some time before it can be fully implemented.

Mexico's beliefs stand on the policy of having a comprehensive law or government policy requiring the use of consultation and making, modifying, or repealing the legislation and regulations. However, laws and government policy requiring consultation exist in some areas and a wide variety of forms of consultation are used to some extent including notices and comment, circulation for comment, information consultation, advisory groups and public hearings.

It is unfortunate that in Mexico the formal procedure to ensure public consultation has been limited. Moreover, the Federal administrative procedure law does not establish a specific mandatory mechanism for citizens' participation in regulation formulation.

The President of Mexico has insisted on the participation of businesses and in some respects of other interested parties to improve the openness of the process of making new regulations. There have been created a dozen or more ad hoc consultation groups organised under his umbrella to review existing regulations and the making of new regulations.

COMPLEX AND UNCLEAR REGULATIONS

Complex and unclear regulations and difficulties at the judicial level with interpretation and enforcement in the Mexican regulations have long been a source of considerable uncertainty and confusion to the citizens of the State. Aware of the negative impact of this situation on the achievement of regulatory objectives, Federal and State Governments have launched programs to improve the communication and enforcement of regulations.

In the course of this ever-increasing activity to reform the regulatory process and get people to look at and re-examine existing regulations on the creation of new regulations, the Government has directed its Ministries to look at themselves and have the Ministers report back to the President. There is now a meaningful process in place.

For example, the Trade and Industry Ministry have looked at 227 regulations which is 37% of the regulations.

The Foreign Affairs Department has looked at 24, which is about 8% of its regulations.

Health and Labour between them have looked at 187 regulations, which is about 45% of their respective regulations.

Communication and Transport which has been very active in the regulation review area has examined 736 of its regulations, which is 67% of its regulations.

BUILDING REGULATORY AGENCIES

Implementing systems of regulatory scrutiny and review is necessary but not sufficient for the successful program of regulatory management reform, so say the Mexicans. The Mexicans give primary importance to the development of well-designed regulatory institutions and a change of culture amongst regulators.

Three issues should be considered in this respect, so the Mexicans maintained to Mr Nagle and Dr Kernohan.

Firstly, how to establish mechanisms to ensure that when these bodies are creating regulations they are not caught by interest groups either public or private.

Secondly, how can the accountability of regulators be improved.

Thirdly, how can regulators be trained and equipped with the requisite skills and attitudes for the making of higher regulations.

In the interview with Dr Salas on the afternoon of 29 November, five important challenges as to regulatory reform were brought to the attention of Dr Kernohan and Mr Nagle. Dr Salas said that five important challenges should be faced so as to deepen the transformation of the regulatory environment and to improve the prospects for further reform:

(a) The most pressing concern is the implementation gap. Mexican officials have expressed concern that problems with the quality of human resources and public management continue to hamper the effective implementation of reforms. This is compounded by compliance and enforcement issues, including judicial weakness, and ensuring that regulatory reforms are translated into real benefits to society.

    This issue, Dr Salas said, was important for the range of issues beyond regulatory management and reform and needed to be built as a cultural change among regulators.

(b) Transparency, according to Dr Salas, has improved significantly at most policy and implementation levels through a series of mechanisms to release more information to clarify regulatory requirements and standardise the use of administrative discretion. He admits that Mexico still falls far short of international good practices, particularly in the use of public consultation.

(c) Dr Salas claims that regulatory reform should clearly harmonise with other structural reform policies, in particular with competition advocacy and administrative reform policies.

(d) The centre of reform which has always been instituted in the Ministry of Commerce, a Ministry may gain in power, effectiveness and efficiency if moved to a higher and more central management position. This is a policy that Dr Salas is arguing for the purposes of promoting quality regulation by transferring the central body of regulations to a location at the centre of Government with cross-cutting management and co-ordination authorities such as at the President's office.

(e) Dr Salas says that there is a need to balance the reform program between deregulation and good regulation, particularly sectorial governments and consumer protection. Notwithstanding the extensive support from the business community, a fundamental issue to sustaining regulatory reform will be to broaden its constituency to consumers and citizens. However he says it will be some time before this occurs.

(f) Dr Salas believes that there must be a strengthening of disciplines on regulatory quality in the Ministries and agencies and the training of public servants in how to use test for quality.

(g) Dr Salas believes that in Mexico Federal regulatory reform bodies should co-operate with the States and help them to develop management programs.

PART 1 - SECTION D

SPEECH PRESENTED BY MR PETER R. NAGLE MP CHAIR OF THE REGULATION REVIEW COMMITTEE OF THE NEW SOUTH WALES STATE PARLIAMENT, AUSTRALIA, TO THE WORLD BANK ON 2ND DECEMBER 1999, WASHINGTON DC, U.S.A.

HONESTY, ETHICS AND POLITICS IN NEW SOUTH WALES AUSTRALIA OR PROGRAMS, MECHANISM FOR HONEST GOVERNMENT

Speech presented by

MR PETER RICHARD NAGLE MP

TO THE WORLD BANK ON THE 2nd OF DECEMBER 1999 WASHINGTON DC USA.

(Mr Nagle is Chairman of the Regulation Review Committee of the New South Wales Parliament which oversights new and old regulations introduced by the State Government of New South Wales)

INTRODUCTION

I was formerly the New South Wales Parliament's Chairman of the Joint Parliamentary Committee on the Independent Commission Against Corruption. An anti-corruption body, which is independent of Government and Parliament, but is oversighted in its function and role by the NSW Parliament. I was also the Chairman of the New South Wales Legislative Assembly's Ethics Committee. I am now Chairman of the Regulation Review Committee.

N.B. When I refer to the term "Parliament" it means "Legislature" or "Congress".

But good and honest government needs a regulation control body to stop abuses against its citizens.

A BRIEF EXPLANATION OF THE TWO HOUSES OF THE NEW SOUTH WALES LEGISLATURE

There are two Houses of the Legislature (Parliament) in the New South Wales.

(i) The Legislative Assembly, or the Lower House, which elects its Members from geographical Electorates (Districts).

(ii) The Legislative Council, or Upper House, which selects its members from a State-wide Franchise Electorate (Senate-type House).

THE STORY

In 40BC a Greek poet named Sallust wrote of the politicians of his time:

> *In public life, instead of modesty, incorruptibility and honesty, shamefulness, bribery and rapacity prevail.*

Nearly 2040 years onwards, *The Sydney Morning Herald* (a Sydney morning newspaper) is saying the same things about public office in New South Wales. This speaks volumes about the nature of political life in Australia and demonstrates just how unsuccessful politicians have been in turning around this poor perception of their profession, and, N.B. it is only a perception, not a reality of fact. Most MPs (Legislators) work hard at their profession with a lot of abuse, treachery and limited rewards. The long-held cry that politics is exclusive of ethics and honesty is not new. It has been with us as long as society has elected representatives to government and journalists have written about those representatives.

The question: What is the politician's main function? – Answer: To make decisions. Therefore, when a decision is made it has an upside and a downside. This upside and downside concept brings into play the unpopularity of the political process, ie politicians. Nevertheless, today there is currently a worldwide trend in business, the professions, government, legislatures and parliaments, to establish codes of ethical behaviour for their members or employees - a trend, or tide, that cannot be turned. But a trend or tide that should avoid limiting the role, function and effectiveness of MPs (Legislators) in their profession as Parliamentarians.

THE RECENT HISTORY IN NSW AUSTRALIA

For State Parliamentarians (Legislators) in New South Wales, this process of anti-corruption and limitation on MPs functions, roles and effectiveness began in earnest in 1988, when the then Greiner Liberal/National (Republican type) Government introduced the Independent Commission Against Corruption Act (ICAC). This was in response to the many perceptions of State-wide corruption; and yet, may I add that of the 79 complaints made by Mr Greiner to the newly created ICAC, not one Minister nor MP of the former Labor Government were brought before the ICAC for a private or public hearing.

The events in 1993 which followed, rich in irony as they were, led to the demise of this conservative Premier, Mr Greiner, and gave impetus to the greater exposure of corruption; saw promises to root out corruption from politicians of all political complexions, changed the attitude of whole sections of the media, and culminated in the Wood Royal Commission inquiry into corruption in the New South Wales Police force.

There were astounding revelations, each and every day of the Wood Royal Commission's exposure of police corruption, splashed across the pages of the newspapers and seen on television. Each night citizens of NSW were glued to their television sets as wave after wave of corruption allegations were made against the NSW Police force. Corruption it was and corruption which was exposed and this type of corruption must never be allowed to prevail again in NSW or Australia. This inquiry put the icing on the cake for the anti-corruption movement.

THE PROBLEM WITH LACK OF ACCOUNTABILITY AND TRANSPARENCY IN GOVERNMENT

Where political ethics do not exist, despotism and tyranny find root, and corruption prevails, so say the old philosophers, or as was said in the State of Victoria Parliament: *...where there is one Counsellor the people will lose whatever they have achieved; but, where there are many Counsellors the people will prevail.*

In a democracy where there is a corrupt electoral system then there is a corrupt political system. For example, in the State of Queensland Australia, under the Conservative National Party (1954 to 1990) the electoral boundaries of the State were so distorted in favour of the National Party that it was impossible for its opponents at any election to defeat the Government. Moreover, what was lost because of this distortion of the electoral boundaries was good and honest government. Why? Because of the failure of honest MPs in Queensland to speak earnestly about this gerrymander for 26 years.

Personally, and maybe it is because of my chairmanship roles of the Independent Commission Against Corruption, the Ethics Committee and the Regulation Review Committee, I endorse as far as is possible political honesty. However, people today demand good government to respond to their wishes and this is because of an

ever-increasing hysterical media claiming that self-integrity in government is lost. Parliamentarians should adopt and embrace higher standards of honest behaviour because that is what the community is demanding. Unfortunately, some people in New South Wales unrealistically believe that corruption in our society is greater today than ever before. They also believe that all public life is riddled with self-serving individuals and this view is fuelled at times by an unreliable media. Parliament is not riddled with self-serving individuals any more than business, industry, religion and the professions.

Yes, some stupid and greedy politicians do the wrong thing and therefore as a profession we are depicted by the media as evil and self-serving individuals. Nevertheless, there is the respectability problem for politicians between their good local public image and behaviour and the perception of them as ruthless and non-caring individuals.

The truth, as I believe, (and trust me, I'm a lawyer and politician, so I know the truth) is that what is happening in the State of New South Wales today is something that parliamentarians should be proud of and embrace, as part of a changing world in the 21st century.

WHAT IS THE ROLE OF PARLIAMENTARIANS?

There is a question asked sometimes by some senior Parliamentarians - W*hat is the name of the only horse in the political race? Self interest.* This dichotomy between honesty and self-interest, cannot be resolved until we cease being politicians and become parliamentarians.

Parliamentarians in NSW make laws for peace, welfare and good government, and because of this enormous power they must show real morality and honest leadership. The downside is that people can make baseless allegations against an MP, and that MP then spends a great deal of their time refuting and fighting the allegations. If you are an MP in NSW the onus of proof is turned upon you and those making the allegations do not have to prove the allegations, the parliamentarian must disprove them. It is the view of some members that because they are a leader in the community as an elected representative, they have become a second-class citizen.

Fifty years of revelations of corruption has soured the faith of the people in parliamentarians but the people still have faith in their political and Government institutions. The new vigour that is afoot in politics will, I hope, bring the people back on side.

THE FOUR AREAS OF ACCOUNTABILITY AND TRANSPARENCY IN GOVERNMENT.

It is my opinion that within the Westminster political and parliamentary system there are four areas where politicians (Parliamentarians) and the Executive (Cabinet) can be made accountable: the Westminster system of Question Time; a compulsory voting system; Parliamentary Committees such as Regulation Review; and Parliamentary Committees such as Scrutiny of Legislation.

FIRST: QUESTION TIME IN THE WESTMINSTER SYSTEM OF PARLIAMENT.

Five hundred years of war, struggle, death, torture and slavery have given us our judicial, legislative, legal and political system. Therefore, as citizens we should cherish it and defend it with all our might and energy.

Remember today there are people dying in civil wars in a hundred countries to achieve the institution of parliamentary democracy that we now possess. **Sometimes we take what we have achieved in our democracy for granted. We must be forever vigilant for its protection.**

During each day in most Westminster Parliaments when they are in session there is one hour of Question Time. In New South Wales there are 10 questions allowed to be asked of any Minister of the Government on any topic. This system is effective because an MP can ask questions without notice to the executive Minister.

The questioning of the Premier or President, or in the USA a Governor, on the Government's rule or the bureaucracy's performance, is an enormous step in accountability. The Leader of the Government (Premier/Governor/President) must attend Parliament (Legislature) and can be questioned by the elected representatives of the people.

For example, if this system was used in the US Congress, and the President was required for one day each week for one hour to attend Congress while it is in session and to answer questions from Senators and/or Members of the House of Representatives, think of the questions that one could ask on national television. The President would be fully accountable through the elective process to the people and he must answer questions truthfully and honestly.
Let me give you an example of what it would be like for the President of the United States to answer questions on national television while in the Congress.

LET'S SET THE SCENE

The Senate Chamber and five questions allowed to each side. The Republicans and Democrats have five questions each.

Republicans, Question No. 1:
Mr President, do you through your White House staff encourage interns to take clerical positions in the White House?

President: Yes, I do.

Republicans, Question No. 2:
Mr President, does the White House have female interns coming to the White House to do work within the White House precents.

President: Yes.

Republicans, Question No. 3:
Have you in any way sexually harassed or had sexual intercourse with or in any way been involved in sexual misconduct with any female intern in the White House in the last four months?

President: No, I have not.

Republicans, Question No. 4:
Mr President, have you entertained an intern in your bathroom whilst your wife was not present in the White House?

President: No.

Republicans, last question:
Mr President, who is Monica Lewinsky?

You can see the importance of Question Time if there is a scandal to be exposed. The President has lied to the most powerful body in the United States next to the Presidency. The Congress would have impeached him not for his adulterous affair with Monica Lewinsky but for the fact that he lied to the Congress.

The same occurred in the State of New South Wales, where in 1994 the Shadow Minister for Police, the Hon. Paul Whelan, stood up in the House and said to the then Premier, "Do you have confidence in the Member for "X"? ("X" is the name of the district seat because members in Parliament do not use their personal names.)

The Premier walked confidently to the Dais and said, "I have absolute confidence in the Member for "X". The second question was then asked by the Leader of the Opposition, the Hon. Bob Carr: "Are you aware that the Member for "X" made threats to blow up "Y"? The whole debate was on and the Government eventually fell at the next election.

Question Time is an important tool in making the Executive accountable to the Parliament and to the people. Question Time is something that you, as legislators in the United States, should think about seriously.

SECOND: COMPULSORY VOTING.

In all Australian States and at the national level, Australia has adopted what compulsory voting. Compulsory voting is where everyone over the age of 18 who has registered on the Electoral Roll and who is an Australian citizen is compelled to attend the polling booth on Election Day to cast a vote. All elections, Local, State, Federal and Territory, are held on a Saturday determined by the particular Legislature (Parliament).

The term "compulsory voting" is a misnomer, because it is really only a compulsion to attend the polling booth on the day of the Election and to have your name crossed off the roll as voted.

There is no physical compulsion to cast a formal vote. However, of those who do have their names entered as having voted, about 93% cast a formal vote. The other 7% either makes a mistake in the way in which they voted or deliberately votes informal. For example, they do not number the squares; but instead they put a 'cross' or a 'tick' or some people write very interesting comments about the local Member, or other candidates or both.

Some people just get their names taken off the roll, are handed the ballot paper, and then stick it in their pocket and walk out of the polling booth. There is no one at the polling booth ensuring that one does cast a formal vote by marking the ballot paper and placing it into the ballot box.

The advantage of compulsory voting is simple. If you have compulsory voting then no particular group, person or corporation can force you to adopt their policies by sponsoring or paying for your campaign. Let the National Rifle Association of the USA take note. Your loyalty is to the Party or to that particular group that may have endorsed you and it is on their policies that you win a seat in the Legislature. In the case of myself, it is the Australian Labor Party, or in the case of Dr Liz Kernohan, who is here today, the Liberal Party.

As a party candidate you agree as part of your pledge as a candidate to follow the rules and policies of that political group. I would never have been elected to the Parliament if I had not been endorsed as the Labor candidate for the seat of Auburn.

Therefore, as an elected person I only have to put my loyalty to one group instead of a mixture of groups. For instance, I have 48 different nationalities in my electorate (district). Outside the British and Irish people, the four major nationalities are Chinese, Vietnamese, Turkish and Arab, and some are very demanding of their local Member. If there was no compulsory voting then one group could control, say, about 4,000 votes which I may need to get elected and thus I would have to assist them so that I can get their votes to the exclusion of other groups.

Compulsory voting means that if I am being stood over by a group or being bribed through support, then I do not have to obey. I can show my loyalty and obligation to the Party that endorsed me, if it was through that Party that I won my seat in the Legislature.

However, if the elected MP is in a marginal seat he or she does tend to take instructions from or be influenced by minority groups. Any seat under 4% is marginal and needs to be examined in the context of what the minority groups in the electorate are demanding and what they are desirous of achieving. In the New South Wales Electoral system there are only 12 seats which are marginal and the other 81 are not.

Compulsory voting has the added advantage that the candidate does not have to raise hundreds of thousands of dollars to get elected. Therefore, they are not beholden to any one group, corporation or person except the constituency and the political group that endorsed them. Yes, the political party could threaten me with disendorsement; however, I am in the Parliament more or less because of their endorsement than by the will of the local people.

The downside, of course, is that compulsory voting may lead to arrogance and a dictatorship within the electorate by the local Member and his or her political party. Yet the scales that balance compulsory voting mostly tilt on the side of good and honest government.

Finally, about 7% of the population do not bother to cast a vote at all and they are usually fined $100 – some pay the fine and some do not.

THIRD: SUBORDINATE LEGISLATION (REGULATION REVIEW)

Subordinate legislation is not drafted by the Parliament, but it is still legally binding upon those citizens whom it affects. The process of making subordinate legislation is largely invisible to the public even though the legislation that creates the power for the regulation is visible. Subordinate legislation has in the past been so difficult to control that the Parliament has created is an autonomous, bi-partisan joint Committee of the Legislature (State Parliament) to oversight it.

You should note that we often use the terms "subordinate legislation" and "regulations" interchangeably. This scrutiny committee performs the regulatory review function, which is assigned to Members of the Parliament. The Regulation Review Committee represents both the major political parties and both Houses of Parliament. Should the Committee adopt a political stance on issues, the likely outcome is the destruction of the bi-partisanship of the committee.

For such a body such as the New South Wales Regulation Review Committee or any regulation reform or management committee of any Parliament or the Scrutiny of Legislation Committees of the respective Parliaments, to survive and to be effective and to force Government to take note and to act on their recommendations they must be bi-partisan.

Because of the nature of these committees and the way in which they make the Government transparent and accountable they must be courageous and fiercely independent of Government and bureaucracy.

I advocate a strong Parliamentary mechanism for accountability through the scrutiny of Regulation, ie. the oversighting by MPs of bureaucracy's Regulations.

The origins of the Regulation Review Committee in New South Wales can be found in the strong reaction against Regulations that prevailed during the 1980's. The public had a perception of Regulations as hampering business, personal freedoms, or individual liberties, and being dispensed by unaccountable political bureaucratic functionaries without the benefit of adequate parliamentary scrutiny. Commerce and the professions also felt that there were a huge number of outdated and cumbersome regulations (red tape) which were nominally valid or needed to be cleared away.

In 1984 and in response to these public concerns, the then NSW Government sent a memorandum to all Ministers requesting a thorough review of all Regulations. This was to be supported by a system of quarterly reports to the Premier (= in the US, Governor) by the Minister concerned. Certain criteria were established to ensure this was accomplished without reducing or limiting those regulations that were definitely needed.

Moreover, a subcommittee of the Government Cabinet was set up to overview the departmental reviews, and the office of the Parliamentary Counsel was directed to review Acts and Regulations that may require repeal or amendment. In 1985 various Ministerial task forces were set up to review the problem areas, and in the same year the *Statute Law (Miscellaneous Provisions) Act* removed a large number of unnecessary regulations from the Statute books and this was to the joy of the business sector.

In 1986 the Government further set up the Select Parliamentary Committee upon Small Business. In its report, that Committee proposed that a joint committee of Parliament be established with adequate financial and support staff to oversee and monitor a renewed regulatory review process in New South Wales. The report of that Committee led to the statutory constitution of the Regulation Review Committee in 1987, of which I am now the Parliamentary Chairman.

Composition of Regulation Review Committee

Under the *Regulation Review Act 1987*, the Committee comprises of eight members (five from the Legislative Assembly; three from the Legislative Council). Four Members constitute a quorum but must include one Member from the Upper House. The Chairman has a deliberative vote and a casting vote; but the Committee attempts to resolve conflict by arbitration, conciliation and mediation.

Functions of The Regulation Review Committee

The function of the Regulation Review Committee generally is to examine regulations (while they are subject to disallowance) with a view to drawing Parliament's attention to them, on any grounds, including: .

a) trespass on private rights/liberties
b) adverse impact on business
c) not in accordance with the spirit of the legislation or within its objectives
d) better alternatives
e) regulation unclear or conflicts with other Regulations or Acts of Parliament
f) non compliance with Subordinate Legislation Act

The Regulation Review Committee must report and make recommendations to each House of Parliament, including recommendations for the disallowance of a regulation. The systematic review of Regulations based on their staged repeal requires the carrying out of inquiries and reporting on questions about regulations referred to it by a Minister or on its own motion.

The Regulation Review Committee requires Government Ministers and bureaucracy to prepare a Regulatory Impact Statements, which are generally statements as to why the regulation is needed etc.

A Regulatory Impact Statement (RIS) must be prepared before a principal statutory rule is made. A principal statutory rule is one that contains provisions apart from direct amendments or repeals. The RIS must (i) state objectives, (ii) identify options, (iii) assess costs and (iv) state benefits of any proposal and present them in a way that allows a comparison to be made. The RIS must also contain details of the consultation program. Consultation must take place

with appropriate consumer, business, professional groups, the public and relevant sectors of industry. Ministers must consider the RIS and invite comments and submissions on them.

Copies of the RIS with any written comments and submissions are required to be sent to the Regulation Review Committee. My Committee can report to Parliament on any departures from the requirements of the *Subordinate Legislation Act* and, if necessary, recommend disallowance of the regulation. Disallowance can also be moved by any Member of the State Legislature while the House is in session.

The most important function of the Regulation Review Committee, in my opinion, is to examine regulations while they are subject to disallowance, with a view to drawing Parliament's attention to any failure to meet the criteria eg. trespass on private rights/liberties or excessive costs as I have stated a few moments ago.

This reporting and cross-examining of bureaucracy and Ministers is an effective accountability tool that keeps the Government's operation open to the public and the media. Yet, the Sydney Press has described my Committee as a 'somewhat obscure Committee' or a "little known Committee". Nevertheless, if a good press gallery journalist kept his eye on the ball and on the Regulation Review Committee and what it does, they would find some very good stories. Some Regulations are horror stories which common sense tells us should have been thrown out the window. Therefore the Regulations themselves dictate that they should never have come into existence.

Commonwealth – The Scrutiny Of Bills (Statutory Legislation)

The Australian Commonwealth Parliament has a parliamentary program for the scrutiny of bills, but only in one House - the Senate.

The Senate Standing Committee for the Scrutiny of Bills was first established in 1981, following a recommendation in 1978 by the then Standing Committee on Constitutional and Legal Affairs of the Senate.

This Committee tabled a report outlining the potential advantages, both practical and ethical, of referring all legislation introduced into the Senate to a committee. Its aim was to establish whether any provision in the Bill unduly infringes upon the personal rights and/or liberties of citizens and affects business and/or the people of the State etc.

An aside: there is also an outstanding Senate Regulation Review Committee chaired by Senator Barney Cooney, an Opposition Senator. It does a similar job as the NSW Regulation Review Committee in scrutinising Regulations.

The operations of this Senate Scrutiny of Bills Committee are governed by Senate Standing Order 24 which provides:

> *At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, or to reject any clauses of or bills introduced into the Senate.*
>
> The Act specifically points out some areas of scrutiny, for example, does it:

a) trespass unduly on personal rights and liberties?
b) make rights, liberties or obligations unduly cumbersome upon people or insufficiently demonstrates its worth within administrative powers?
c) make rights, liberties or obligations unduly dependent upon non-revisable decisions?
d) inefficiently subject the exercise of the legislative power to Parliamentary scrutiny?

The Scrutiny of Bills Committee does not interfere in the policy objectives of the Government of the day nor make policy for the Government.

Queensland: The Scrutiny of Legislation Committee and Subordinate Legislation Committee

The Queensland Scrutiny of Legislation Committee replaces the Subordinate Legislation Committee, which was established in 1975. This Committee is responsible for scrutinising all subordinate legislation, and now the new Committee scrutinises both Regulations and Bills.

In 1989, as the result of an inquiry into corruption allegations, the Fitzgerald Royal Commission reported and recommended that an Electoral and Administrative Review Commission (EARC) should be established. The EARC was responsible for advising Parliament on the setting up of a 'comprehensive system of Parliamentary Committees to monitor the efficiency of Government' and check any potential abuse of power by any Government. In October 1992, the EARC presented its Report on a Review of Parliamentary Committees (Serial No 92-4). The report of the Commission was instrumental in the enacting of legislation establishing a new system of Parliamentary Committees in its only House the 'Lower House' of the Queensland Parliament, the Legislative Assembly.

The Scrutiny of Legislation Committee was established under Section 4 of the *Parliamentarian Committees Act* in 1995. Its main role, pursuant to Section 8 of the *Parliamentary Committees Act 1995*, is to *deal with issues within its responsibility and report to Parliament when necessary.*

The role of the Committee is outlined in Section 22, which, inter alia, states that the Committee must consider:

a) fundamental legislative principles to a particular Bill and the *Subordinate Legislation Act*

b) the lawfulness of particular subordinate legislation by examining all Bills and subordinate legislation.

The 'fundamental legislative principles' referred to in the Act are outlined in Section 4 of the *Legislative Standards Act 1992* and are similar to those of other State jurisdictions. For the purposes of this Act, fundamental legislative principles are the principles relating to legislation which aim to create a fair system for the rule of law. The fundamental principles include requiring the legislation to have regard to rights and liberties of individuals, and the institution of Parliament.

In having sufficient regard to rights and liberties of individuals the legislation must have regard to:

a) making rights and liberties, or obligations, dependent on administrative power, only if that power is sufficiently defined and subject to appropriate review; and secondly, is consistent with the principles of natural justice; and

b) allowing the delegation of administrative power in appropriate cases to protect persons; and

c) not reversing the onus of proof in criminal proceedings without adequate justification; and

d) conferring power to enter premises, and search for or seize documents or other property only with a warrant issued by a judge or other judicial officer; and provides appropriate protection against self incrimination; and

e) not adversely affecting rights and liberties, or imposing obligations retrospectively; and

f) not conferring immunity from proceedings or prosecution without adequate justification; and

g) providing for the compulsory acquisition of property with fair compensation; and

h) having sufficient regard to Aboriginal tradition and Torrens Strait Island custom.

Finally, that the legislation is unambiguous, drafted correctly and is sufficiently clear and precise in context. The above are not exhaustive and are meant only to give some insight into what this Committee does and what it achieves.

In 1995 an Amendment to the *Parliamentary Committees Act* was passed which extended the scope of the power of the Scrutiny Legislation Committee's work. The Committee continues to examine all subordinate legislation for compliance with the *Statutory Instruments Act 1992* and the fundamental legislative principles contained within *Legislative Standards Act 1992.*

The fundamental operational criteria is that the Committee is bi-partisan by Statute and no one political group has the majority vote. However the Chairman is always a Government Member. At present Linda Lavarch MP is the Chair of this Committee and she is a 'switched on', articulate, excellent mediator and Chairperson.

This Committee is a powerful body in scrutiny because it makes the process transparent and accountable, while at the same time not interfering in the policy-making power of the executive Government. Ministers and bureaucracy are now forced to think realistically about what they are doing and the impact on society of their legislative program and various regulations.

Victoria: The Victorian Scrutiny Of Acts And Regulations Committee

1. The Victorian Scrutiny of Acts and Regulations Committee is established under Section 4D of the *Parliamentary Committees Act 1968* and it must consider any Bill introduced into either House of the Parliament and to report to the Parliament as to whether the Bill, by express words or otherwise:

a) trespasses unduly upon rights or freedoms; or
b) makes rights, freedoms or obligations dependent upon insufficiently defined administrative powers; or
c) makes rights, freedoms or obligations dependent upon non-revieewle administrative decisions; or
d) appropriately delegates legislative power; or insufficiently subjects the exercise of legislative power to Parliamentary scrutiny.

The Committee must also:

a) consider any Bill introduced into a House of the Parliament and report to Parliament on any deficiency except policy objectives; and/or
b) report as to whether the Bill by express word or otherwise repeals, alters or varies section 85 of the *Victorian Constitution Act 1975*, or raises an issue as to the jurisdiction of the Supreme Court; and/or
c) where a Bill repeals, alters or varies Section 85 of the *Constitution Act 1975*, whether this is in all the circumstances appropriate and/or
d) where a Bill does not repeal, alter or vary Section 85 of the *Constitution Act 1975*, but where an issue is raised as to the jurisdiction of the Supreme Court, what are the full implications of that issue.

These are not exhaustive, but the Committee is responsible for the oversight of all legislation, including Bills, Subordinate Legislation and redundant or unclear legislation.

2. The Victorian Scrutiny of Acts and Regulations Committee has appointed a sub-committee responsible for the oversight of all subordinate legislation, which is covered by Section 21 of the *Subordinate Legislation Act 1994*. The sub-committee may report and recommend disallowance or amendment of any delegated legislation which:

a) does not appear to be within the powers conferred by the authorising Act;
b) has no clear and precise authority conferred by the authorising Act, in that,

    (i) it does not have a retrospective effect; or
    (ii) imposes any tax, fee, fine, imprisonment or other penalty; or
    (iii) purports to shift the onus of proof to a person accused of an offence; or
    (iv) interferes in the subordinate legislation of powers delegated by the authorising Act;

3. In 1994 the need for the removal of redundant legislation and the clarification of existing legislation was reiterated by the Governor-in-Council. Pursuant to section 4F(i) (a) (ii) of the Victorian *Parliamentary Committees Act 1968*, a further requirement of the Scrutiny of Acts and Regulations Committee is to inquire into, consider and make recommendations as to:

a) Acts of Parliament and provisions of Acts of Parliament that are unnecessary or redundant;
b) In conjunction with the Chief Parliamentary Counsel, to inquire into, and to consider and make recommendations as to;

   (i) Acts of parliament and provisions of Acts of Parliament which are unclear, ambiguous or useless and;
   (ii) Legislative instruments and provisions of legislative instruments made under an Act of Parliament which are unclear or ambiguous.

For a conservative State like Victoria to adopt this system of scrutiny, accountability and transparency is a far-reaching move into the prerogative power of the Executive. For the first time in 50 years power was handed back to the people's elected Parliament, to make the executive and bureaucracy accountable to Parliament.

Western Australia: The Joint Standing Committee On Delegated Legislation

In 1997 the Joint Standing Committee on Delegated Legislation was established in Western Australia. The importance of this Committee is outlined in the Second Report of the Royal Commission into Commercial Activities of Government. This inquiry resulted from allegations of massive corruption in the then Burke Labor Government and with it extensive abuse of trust by the elected officials in all political parties; but mainly in my political party, the Australian Labor Party.

The most visible law-making activity undertaken is by statutory rules which have a pervasive effect upon the lives and livelihood of the community. In 1984 the Joint Standing Committee on Delegated Legislation was established to significantly check the processes through which rules are given legal effect. The main goal of that Committee as a Standing Committee is to increase public

participation in the law-making process. Even though this was a commendable objective it never saw the light of day. Therefore in 1992, the Western Australian Parliamentary Committee took a significant step towards public awareness and involvement by holding a public conference to discuss the importance of Regulation Review in Western Australia and Scrutiny of Bills Legislation. The conference proposed new legislation for the formulation and scrutiny of subordinate legislation and scrutiny of legislation, as an accountability and transparency mechanism of Government and Parliament.

The Western Australian Joint Committee on Delegated Legislation states that extensive scrutiny of legislation is required if it:

a) appears not to be within power or not to be in accord with the objects of the legislation;
b) unduly trespasses on established rights, freedoms or liberties;
c) contains matter that ought properly to be dealt with by all Acts of Parliament;
d) make rights dependent upon administrative and not judicial decisions.

In addition to the role of the Committee outlined in the Second Report of the Royal Commission into Commercial Activities of Government and Other Matters, an important function of the Committee is contained in Standing Rule 7: *if (the Committee) is of the opinion that any other matter relating to any Regulation should be brought to the notice of the House, it may report that opinion and matter to the House.*

While the Committee has the power to recommend the disallowance of Regulations, it only does so as a last resort. On most occasions it mediates, arbitrates and conciliates on Regulations. Once all other avenues of legislative amendment have been exhausted following consultation with the relevant Government Departments and Ministers, then the Committee moves for disallowance. Only a foolish Minister or bureaucracy would buck this Committee. Both the Legislature and Regulation Committee are excellent tools for ensuring good and honest Government. It ensures accountability and transparency of Government and the Parliament.

PARLIAMENTARY COMMITTEES (SCRUTINY OF LEGISLATION)

A. COMMONWEALTH

The Commonwealth Senate Standing Committee for the Scrutiny of Bills has developed a routine level of operation with respect to the scrutiny of proposed legislation.

Copies of all bills either from the House of Representatives or commenced in the Senate are provided to the Committee by the Friday of each sitting week. A copy of each bill, together with its Explanatory Memorandum and the Minister's second reading speech, is then forwarded to the committee's legal adviser for advice.

The bill is examined against the terms of reference set out in Standing Order 24 of the Senate and a report is completed by the following Monday. This report draws the attention of the Committee to any infringements of the fundamental principles against which all legislation is examined.

Should the legislation contravene any of the terms of reference, an 'Alert Digest' immediately is drafted and is considered at the Committee's weekly meeting. The Digest outlines the provisions of each of the Bills introduced in the previous week and any concerns raised by the legal adviser. The 'Alert Digest' is then tabled in the Senate in the following week.

Where the Committee raises concerns about certain legislation, the responsible Minister is invited to respond to the concerns. The Minister's response is then documented in a Committee Report. The Report contains the relevant extracts from the Digest, the Ministerial response, and any further comments that the Committee wishes to make. Once the Committee has agreed on the content of the Report, it is tabled in the Senate the following sitting week.

It is important to note that all Committees are effectively prohibited from looking at Government policy, because that is the domain of the Government of the day. When reporting to the Senate the Committee expresses no conclusive opinion on the provisions contained within a Bill. Rather, they merely advise Senators of their concerns with the legislation, maintaining their apolitical and advisory role. The Senate is then left to decide the course of action it will take with respect to the legislation. There is no power and should be no power to interfere in Government policy except through the Parliamentary debating procedural system while the House is session or through public criticism of Government.

B. THE QUEENSLAND EXPERIENCE IN LEGISLATION AND REGULATION REFORM AND MANAGEMENT

Much in the same manner as the Commonwealth Senate Committee operates, the Queensland Scrutiny of Legislation Committee examines all Bills and compiles an 'Alert Digest', to be tabled the following sitting week. The responses made by Ministers and any subsequent comments made by the Committee are tabled in full and reproduced in the next 'Alert Digest'.

While the Committee's function of scrutiny of Bills was only introduced in 1995, the Committee has been reviewing subordinate legislation since the initial inception of the Subordinate Legislation Committee in 1975. It has the ability to separate the wheat from the straw, and therefore succeeds because of its effective non-partisan leadership and decision-making process.

The Committee examines subordinate legislation in much the same way as it does Bills. However, rather than tabling alert digests and reports, the Committee corresponds directly with the Minister concerned. Should the Minister and the Committee fail to reach an agreement, the Committee may give notice of a motion to disallow the Regulation if there are concerns in the Parliament.

Like other States Queensland requires a Regulatory Impact Statement, and if prepared correctly, these improve the cost effectiveness of regulatory decisions. *Furthermore, the preparation of regulatory impact statements ...improves the transparency of decisions.* The obligation to prepare Regulatory Impact Statements in Queensland came into effect on 1 July 1995, and is contained within the *Statutory Instruments Act 1992.* The Act requires the

preparation of a regulatory impact statement only if the subordinate legislation is likely to impose appreciable cost on the community.

There is a degree of uncertainty in that the legislation does not define what 'appreciable cost' means.

Once a regulatory impact statement is required it must contain the following information:

a) The provision of the Act or subordinate legislation under which the proposed Regulation will be made;
b) A brief statement of the policy objectives of the proposed legislation and the reasons for them;
c) A brief statement of the way the policy objectives will be achieved by the proposed legislation and why this method of achieving them is reasonable and appropriate;
d) A brief description of how the proposed legislation is consistent with the policy objectives of the authorising law;
e) An explanation of any inconsistencies with authorising legislation;

It has been determined by the Queensland Scrutiny of Legislation Committee that a regulatory impact statement is not required if the proposed legislation:

a) is not of a legislative nature;
b) is an amendment of subordinate legislation;
c) would enable someone to gain unfair advantage upon advance notice;
d) is of such a nature that the preparation of a regulatory impact statement would be against the public interest;
e) is a notice about a code of practice and is a statutory instrument made by a local government;
f) is deemed not be subordinate legislation by an Act.

Due to the controversy about when a regulatory impact statement is not required, it has been recommended that Ministers become obligated to certify in writing the specific exemption or exclusion that they rely upon for not preparing a regulatory impact statement.

NATIONAL SCHEME LEGISLATION

There is now the real challenge facing all types of Regulation and Legislation Scrutiny Committees, and it is called National Scheme Legislation.

National Scheme Legislation (NSL) is where Ministers of respective State and National Parliaments get together and agree upon a course of action. They then take that policy decision and bring it into legislation.

The National Scheme Legislation is prepared and is passed by:

a) each Parliament; or

b) one particular Parliament, and agreed upon and eventually legislated within other Parliaments;

c) if the legislation is accepted in one Parliament and is automatically adopted in each other Parliament.

Often this legislation does not come before the Parliament in its full context and therefore Members do not see the Bill but only a synopsis or summary of the Bill. It is enacted by way of one piece of legislation which says that the entire Bill as enacted in (say for example) the State of South Australia, is to be adopted in its entirety as template legislation. In my opinion NSL sets a most dangerous precedent to restrict scrutiny, transparency and accountability of the Executive and bureaucracy.

NSL does not allow effective scrutiny of the legislation as agreed by the various Government Ministers. In fact it really is an agreement by the Ministers which ensures its passage through their respective Legislatures.

If NSL is paramount then you don't need Parliaments any more. One just has to get the Ministers at the executive level agreeing amongst themselves to legislate and then adopting that piece of legislation into another jurisdiction.

This is a real challenge in the 21st Century for Scrutiny of Legislation and Regulation Review Committees throughout Australia.

CONCLUSION

There has developed over the last 10 to 15 years, as I have said, National Scheme Legislation, which is principally used, in my opinion, as abuse of power. What does it mean? It means by-passing Parliament.

It also means that in by-passing Parliament you do not get transparency and accountability of the legislative structures. NSL has been agreed to by Governments at a national and interstate level without the Parliament's view.

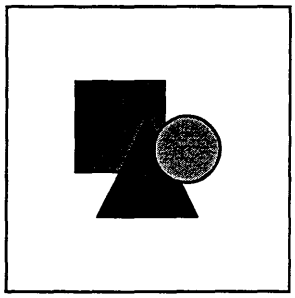
NSL avoids the accountability process and scrutiny by the Parliament through its Regulation and Scrutiny of Legislation Committees and at the same time subordinates the function of the elected representatives of the people. This cannot be allowed to happen and shall not happen.

Regulation Review and Scrutiny of Legislation Committees go forward and these Committees will examine in detail National Scheme Legislation for the purposes of advising their respective Members of Parliament of the problems that they now face.

Finally, I thank Mr Greg Hogg of my Regulation Review Committee for information on regulation review, and Mr Ben Rutland (University Intern) for his research and advice on other aspects of this speech.

APPENDIX 1

Regulation Review Act 1987



Regulation Review Act 1987

REGULATION REVIEW ACT 1987 No. 165 UPDATED 15 JUNE 1999

INCLUDES AMENDMENTS (SINCE REPRINT OF 3.6.1991) BY:

Parliamentary Committees Legislation Amendment Act 1999 No. 16

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REGULATION REVIEW ACT 1987 No. 165

[Reprinted as at 3 June 1991]

NEW SOUTH WALES

[STATE ARMS]

TABLE OF PROVISIONS

REGULATION REVIEW ACT 1987 No. 165

Reprinted under the Reprints Act 1972

[Reprinted as at 3 June 1991]

New South Wales
[STATE ARMS]

An Act to provide for a Regulation Review Committee of Parliament.

PART 1 - PRELIMINARY

Short title

1. This Act may be cited as the Regulation Review Act 1987.

Commencement

2. This Act shall commence on the date of assent to this Act.

Definitions

3. (1) In this Act:

"Chairman" means the Chairman of the Committee;

"Committee" means the Regulation Review Committee for the time being constituted under this Act;

"regulation means a statutory rule, proclamation or order that is subject to disallowance by either or both Houses of Parliament;

"statutory rule" means:

(a) a regulation, by-law, rule or ordinance:

(i) that is made by the Governor; or

(ii) 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

(b) a rule of court;

"Vice-Chairman" means the Vice-Chairman of the Committee.

(2) In this Act:

(a) a reference to a function includes a reference to a power, authority and duty; and

(b) a reference to the exercise of a function includes, where the function is a duty, a reference to the performance of the duty.

PART 2 - CONSTITUTION AND PROCEDURE OF COMMITTEE

Constitution of Regulation Review Committee

4. As soon as practicable after the commencement of this Act and the commencement of the first session of each Parliament, a joint committee of members of Parliament, to be known as the Regulation Review Committee, shall be appointed.

Membership

5.

(1) The Committee shall consist of 8 members, of whom:

(a) 3 shall be members of, and appointed by, the Legislative Council; and
(b) 5 shall be members of, and appointed by, the Legislative Assembly.

(2) The appointment of members of the Committee shall, as far as practicable, 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.

(3) A person is not eligible for appointment as a member of the Committee if the person is a Minister of the Crown or a Parliamentary Secretary.

Vacancies

6.

(1) A member of the Committee ceases to hold office:

(a) when the Legislative Assembly is dissolved or expires by the effluxion of time;
(b) if the member becomes a Minister of the Crown or a Parliamentary Secretary;
(c) if the member ceases to be a member of the Legislative Council or Legislative Assembly;
(d) if, being a member of the Legislative Council, the member resigns the office by instrument in writing addressed to the President of the Legislative Council;
(e) if, being a member of the Legislative Assembly, the member resigns the office by instrument in writing addressed to the Speaker of the Legislative Assembly; or
(f) if the member is discharged from office by the House of Parliament to which the member belongs.

(2) Either House of Parliament may appoint one of its members to fill a vacancy among the members of the Committee appointed by that House.

Chairman and Vice-Chairman

7.

(1) There shall be a Chairman and a Vice-Chairman of the Committee who shall be elected by and from the members of the Committee.

(2) A member of the Committee ceases to hold office as Chairman or Vice-Chairman of the Committee if:

(a) the member ceases to be a member of the Committee;

(b) the member resigns the office by instrument in writing presented to a meeting of the Committee; or

(c) the member is discharged from office by the Committee.

(3) At any time when the Chairman is absent from New South Wales or is, for any reason, unable to perform the duties of Chairman or there is a vacancy in that office, the Vice-Chairman may exercise the functions of the Chairman under this Act or under the Parliamentary Evidence Act 1901.

Procedure

8.

(1) The procedure for the calling of meetings of the Committee and for the conduct of business at those meetings shall, subject to this Act, be as determined by the Committee.

(2) The Clerk of the Legislative Assembly shall call the first meeting of the Committee in each Parliament in such manner as the Clerk thinks fit.

(3) At a meeting of the Committee, 4 members constitute a quorum, but the Committee shall meet as a joint committee at all times.

(4) The Chairman or, in the absence of the Chairman, the Vice-Chairman or, in the absence of both the Chairman and the Vice-Chairman, a member of the Committee elected to chair the meeting by the members present shall preside at a meeting of the Committee.

(5) The Vice-Chairman or other member presiding at a meeting of the Committee shall, in relation to the meeting, have all the functions of the Chairman.

(6) The Chairman, Vice-Chairman or other member presiding at a meeting of the Committee shall have a deliberative vote and, in the event of an equality of votes, shall also have a casting vote.

(7) A question arising at a meeting of the Committee shall be determined by a majority of the votes of the members present and voting.

(8) The Committee may sit and transact business despite any prorogation of the Houses of Parliament or any adjournment of either House of Parliament.

(9) The Committee may sit and transact business on a sitting day of a House of Parliament during the time of the sitting.

PART 3 - FUNCTIONS OF COMMITTEE

Functions
9.

(1) The functions of the Committee are:

(a) to consider all regulations while they are subject to disallowance by resolution of either or both Houses of Parliament;

(b) to consider whether the special attention of Parliament should be drawn to any such regulation on any ground, including any of the following:

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

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

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

(iv) 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;

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

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

(vii) that the form or intention of the regulation calls for elucidation; or

(viii) 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; and

(c) to make such reports and recommendations to each House of Parliament as it thinks desirable as a result of its consideration of any such regulations, 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.

(2) Further functions of the Committee are:

(a) to initiate a systematic review of regulations (whether or not still subject to disallowance by either or both Houses of Parliament), based on the staged repeal of regulations and to report to both Houses of Parliament in relation to the review from time to time; and

(b) to inquire into, and report to both Houses of Parliament on, any question in connection with regulations (whether or not still subject to disallowance by either or both Houses of Parliament) that is referred to it by a Minister of the Crown.

(3) The functions of the Committee do not include an examination of, inquiry into or report on a matter of Government policy, except in so far as such an examination may be necessary to ascertain whether any regulations implement Government policy or the matter has been specifically referred to the Committee under subsection (2) (b) by a Minister of the Crown.

Reports as to regulations
10.

(1) If, at the time at which the Committee seeks to report to either House of Parliament in accordance with section 9, the House is not sitting, the Committee shall present copies of its report to the Clerk of the House.

(2) A report so presented to the Clerk of a House shall:

(a) on presentation and for all purposes, be deemed to have been laid before the House;

(b) be printed by authority of the Clerk;

(c) for all purposes, be deemed to be a document published by order or under the authority of the House; and

(d) be recorded in the Minutes of the Proceedings of the Legislative Council or the Votes and Proceedings of the Legislative Assembly, as the case requires.

PART 4 - MISCELLANEOUS

Evidence

11.

(1) The Committee shall have power to send for persons, papers and records.

(2) Subject to section 12, the Committee shall take all evidence in public.

(3) Where the Committee as constituted at any time has taken evidence in relation to a matter but the Committee as so constituted has ceased to exist before reporting on the matter, the Committee as constituted at any subsequent time, whether during the same or another Parliament, may consider that evidence as if it had taken the evidence.

(4) The production of documents to the Committee shall be in accordance with the practice of the Legislative Assembly with respect to the production of documents to select committees of the Legislative Assembly.

Confidentiality

12.

(1) Where, in the opinion of the Committee, any evidence proposed to be given before, or the whole or a part of a document produced or proposed to be produced in evidence to, the Committee relates to a secret or confidential matter, the Committee may, and at the request of the witness giving the evidence or producing the document shall:

(a) take the evidence in private; or

(b) direct that the document, or the part of the document, be treated as confidential.

(2) Where a direction under subsection (1) applies to a document or part of a document produced in evidence to the Committee, the contents of the document or part shall, for the purposes of this section, be deemed to be evidence given by the person producing the document and taken by the Committee in private.

(3) Where, at the request of a witness, evidence is taken by the Committee in private:

(a) the Committee shall not, without the consent in writing of the witness; and

(b) a person (including a member of the Committee) shall not, without the consent in writing of the witness and the authority of the Committee under subsection (5), disclose or publish the whole or a part of that evidence.
Penalty: 20 penalty units or imprisonment for 3 months.

(4) Where evidence is taken by the Committee in private otherwise than at the request of a witness, a person (including a member of the Committee) shall not, without the authority of the Committee under subsection (5), disclose or publish the whole or a part of that evidence.
Penalty: 20 penalty units or imprisonment for 3 months.

(5) The Committee may, in its discretion, disclose or publish or, by writing under the hand of the Chairman, authorise the disclosure or publication of evidence taken in private by the Committee, but this subsection does not operate so as to affect the necessity for the consent of a witness under subsection (3).

(6) Nothing in this section prohibits:

(a) the disclosure or publication of evidence that has already been lawfully published; or

(b) the disclosure or publication by a person of a matter of which the person has become aware other than by reason, directly or indirectly, of the giving of evidence before the Committee.

(7) This section has effect despite section 4 of the Parliamentary Papers (Supplementary Provisions) Act 1975.

(8) Where evidence taken by the Committee in private is disclosed or published in accordance with this section:

(a) sections 6 and 7 of the Parliamentary Papers (Supplementary Provisions) Act 1975 apply to and in relation to the disclosure or publication as if it were a publication of that evidence under the authority of section 4 of that Act; and

(b) Division 5 of Part 3 of, and Schedule 2 to, the Defamation Act 1974 apply to and in relation to that evidence as if it were taken by the Committee in public.

Application of certain Acts etc.

13. For the purposes of the Parliamentary Evidence Act 1901 and the Parliamentary Papers (Supplementary Provisions) Act 1975 and for any other purposes:

(a) the Committee shall be deemed to be a joint committee of the Legislative Council and Legislative Assembly; and

(b) the proposal for the appointment of the joint committee shall be deemed to have originated in the Legislative Assembly.

Validity of certain acts or proceedings

14. Any act or proceeding of the Committee is, even though at the time when the act or proceeding was done, taken or commenced there was:

(a) a vacancy in the office of a member of the Committee; or

(b) any defect in the appointment, or any disqualification, of a member of the Committee,

as valid as if the vacancy, defect or disqualification did not exist and the Committee were fully and properly constituted.

Proceedings for offences

15. Proceedings for an offence against this Act shall be dealt with summarily before a Local Court constituted by a Magistrate sitting alone.

Reports as to the Committee's operations

16.

(1) The Committee shall furnish a report to both Houses of Parliament as soon as possible after the first 2 years after the commencement of this Act.

(2) The report shall relate to the past and current activities of the Committee (however constituted) and the past and current arrangements concerning its operations.

(3) The report may include such recommendations respecting the future activities of the Committee (however constituted) and arrangements as it thinks appropriate.

NOTES

Table of Acts

Regulation Review Act 1987 No. 165. Assented to, 24.11.1987.

Date of commencement, assent, sec. 2.

This Act has been amended as follows:

Subordinate Legislation Act 1989 No. 146. Assented to, 31.10.1989.

Date of commencement of sec. 15, 1.7.1990, sec. 2 and

Gazette No. 124 of 22.12.1989, p. 11035.

Parliamentary Committees Legislation Amendment Act 1999 No. 16.

Assented to, 9.6.1999. Date of commencement, assent, sec. 2.

Table of Amendments Sec. 5 - Am. 1999 No. 16, Sch. 1.4 [1]-[3].

Sec. 8 - Am. 1999 No. 16, Sch. 1.4 [4].

Sec. 9 - Am. 1989 No. 146, s. 15.

Main References From This Act:	Parliamentary Committees Legislation Amendment Act 1999
Other References From This Act:	Subordinate Legislation Act 1989

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APPENDIX 2

Subordinate Legislation Act 1989

AUTHORISED REPRINTED ACT

New South Wales

Subordinate Legislation Act 1989 No 146

Reprint No 4

As in force at 16 February 1999
Includes all amendments up to Act 1998 No 54

Not all amendments are in force: see Uncommenced amendments (p 21)

[28]

This reprint is compiled by the Parliamentary Counsel's Office, certified under the Reprints Act 1972, and published by the NSW Government Information Service

Information about this reprint

This reprint of the Subordinate Legislation Act 1989 No 146 is up to date as at 16 February 1999 and includes amendments up to and including the Statute Law (Miscellaneous Provisions) Act 1998 No 54.

The reprint contains

- Contents listing all headings
- Text of the Subordinate Legislation Act as amended and in force at 16 February 1999
- Table of Acts listing, in chronological order, the Acts amending the Subordinate Legislation Act and providing assent and commencement details (p 19)
- Table of amendments listing provisions of the Subordinate Legislation Act that have been amended, inserted, substituted or repealed since its enactment in 1989 (p 20)
- Uncommenced amendments (p 21)

A pyramid symbol (▲) indicates uncommenced amendments.

Any regulations made under the Subordinate Legislation Act 1989 are listed in the quarterly *Legislation in Force* guide.

Information about the sale and distribution of authorised NSW legislation by the NSW Government Information Service is provided on the inside back cover.

Reprint history

Reprint No 1	14 January 1992
Reprint No 2	26 October 1993
Reprint No 3	15 February 1995
Reprint No 4	16 February 1999

Reprinted as at 16 February 1999

New South Wales

Subordinate Legislation Act 1989 No 146

Contents

Contents

New South Wales

Subordinate Legislation Act 1989 No 146

An Act relating to the making and staged repeal of subordinate legislation.

Part 1 Preliminary

1 Name of Act

This Act may be cited as the *Subordinate Legislation Act 1989*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Definitions

(1) In this Act:

principal statutory rule means a statutory rule that contains provisions apart from:

(a) direct amendments or repeals, and

(b) provisions that deal with its citation and commencement.

Regulation Review Committee means the committee for the time being constituted under the *Regulation Review Act 1987*.

responsible Minister, in connection with a statutory rule, means the Minister administering the Act under which the statutory rule is or is proposed to be made.

statutory rule means a regulation, by-law, rule or ordinance:

(a) that is made by the Governor, or

(b) 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.

(2) In this Act, a reference to a direct amendment is a reference to an amendment that inserts, adds, amends or substitutes matter.

Part 2 Requirements regarding the making of statutory rules

4 Guidelines

Before a statutory rule is made, the responsible Minister is required to ensure that, as far as is reasonably practicable, the guidelines set out in Schedule 1 are complied with.

5 Regulatory impact statements

(1) Before a principal statutory rule is made, 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 to be dealt with by the statutory rule.

(2) Before a principal statutory rule is made, the responsible Minister is required to ensure that, as far as is reasonably practicable, the following provisions are complied with:

(a) A notice is to be published in the Gazette and in a daily newspaper circulating throughout New South Wales and, where appropriate, in any relevant trade, professional, business or public interest journal or publication:

(i) stating the objects of the proposed statutory rule, and

(ii) advising where a copy of the regulatory impact statement may be obtained or inspected, and

(iii) advising whether, and (if so) where, a copy of the proposed statutory rule may be obtained or inspected, and

(iv) inviting comments and submissions within a specified time, but not less than 21 days from publication of the notice.

(b) Consultation is to take place with appropriate representatives of consumers, the public, relevant interest groups, and any sector of industry or commerce, likely to be affected by the proposed statutory rule.

(c) All the comments and submissions received are to be appropriately considered.

(3) The nature and extent of the publicity for the proposal, and of the consultation regarding the proposal, are to be commensurate with the impact likely to arise for consumers, the public, relevant interest groups, and any sectors of industry or commerce from the making of the statutory rule.

(4) In the event that the statutory rule is made, a copy of the regulatory impact statement and all written comments and submissions received are to be forwarded to the Regulation Review Committee within 14 days after it is published in the Gazette.

(5) Comments and submissions received within one week before the statutory rule is submitted to the Governor (or at any time afterwards) need not be considered or forwarded to the Regulation Review Committee.

(6) Section 75 of the *Interpretation Act 1987* does not apply to notices required to be published under this Act.

6 Regulatory impact statements not necessary in certain cases

(1) It is not necessary to comply with section 5 to the extent that:

(a) the responsible Minister certifies in writing that, on the advice of the Attorney General or the Parliamentary Counsel, the proposed statutory rule comprises or relates to matters set out in Schedule 3, or

(b) the Minister administering this Act (or a Minister for the time being nominated by the Minister administering this Act for the purpose) certifies in writing that, in his or her opinion in the special circumstances of the case, the public interest requires that the proposed statutory rule should be made without complying with section 5, or

(c) the responsible Minister certifies in writing that:

(i) the proposed statutory rule has been or is to be made by a person or body (other than the Governor) who or which is not expressly subject to the control or direction of the responsible Minister, and

(ii) it was not practicable, in the circumstances of the case, for the responsible Minister to comply with section 5.

(2) If a statutory rule is made in the circumstances mentioned in subsection (1) (b), the responsible Minister is required to ensure that the relevant requirements of section 5 (with any necessary adaptations) are complied with within 4 months after the statutory rule is made.

(3) A certificate under this section may relate to either or both of the following:

(a) all or any specified requirements of section 5,

(b) all or any specified aspects of the statutory rule concerned.

7 Requirements before making statutory rules

A proposed statutory rule must not be submitted for making by the Governor, or for the approval or confirmation of the Governor, unless the following are submitted together with the proposed statutory rule:

(a) a copy of a certificate of the responsible Minister stating whether or not, in his or her opinion, the provisions of this Act relating to the proposed statutory rule have been complied with,

(b) a copy of any relevant certificate under section 6,

(c) a copy of the opinion of the Attorney General or the Parliamentary Counsel as to whether the proposed statutory rule may legally be made.

8 Remaking of disallowed statutory rule

(1) This section applies where a House of Parliament has disallowed a statutory rule under section 41 of the *Interpretation Act 1987*.

(2) No statutory rule, being the same in substance as the statutory rule so disallowed, may be published in the Gazette within 4 months after the date of the disallowance, unless the resolution has been rescinded by the House of Parliament by which it was passed.

(3) If a statutory rule is published in the Gazette in contravention of this section, the statutory rule is void.

9 Compliance with Part

(1) Except as provided by section 8, failure to comply with any provisions of this Part does not affect the validity of a statutory rule.

(2) The provisions of this Part regarding the requirements to be complied with before a statutory rule is made, approved or confirmed are in addition to, and do not affect, the provisions of any other Act.

Part 3 Staged repeal of statutory rules

▲10 Staged repeal of statutory rules

(1) Unless it sooner ceases to be in force, a statutory rule published before a date specified in Column 1 below is repealed on the date specified opposite in Column 2:

Column 1	Column 2
1 September 1941	1 September 1991
1 September 1964	1 September 1992
1 September 1978	1 September 1993
1 September 1986	1 September 1994
1 September 1990	1 September 1995

(2) Unless it sooner ceases to be in force, a statutory rule published on or after 1 September 1990 is repealed:

(a) on the fifth anniversary of the date on which it was published (in the case of a statutory rule published on 1 September in any year), or

(b) on 1 September following the fifth anniversary of the date on which it was published (in any other case).

(3) Despite subsection (1), the following regulations are repealed on 1 September 1998:

(a) the *Construction Safety Regulations 1950*,

(b) all regulations under the *Factories, Shops and Industries Act 1962* that are in force on the date of assent to the *Statute Law (Miscellaneous Provisions) Act 1997* except the *Hairdressing Regulation 1992* and the *Shops (Trading Hours) Regulation 1992*.

(4) Despite subsection (1), the following regulations are repealed on 1 September 1999:

(a) the *General Traffic Regulations 1916*,

(b) the *Motor Traffic Regulations 1935*,

(c) the *General Traffic (Pedestrian) Regulations 1937*.

▲ See Uncommenced amendments

(5) Despite subsection (1), the *Dangerous Goods Regulation 1978* is repealed on 1 September 1999.

(6) Despite subsection (1), the *Clean Waters Regulations 1972* are repealed on 1 September 1999, unless, before that date, the regulations are taken to have been made under the *Protection of the Environment Operations Act 1997*, by operation of clause 11 of Schedule 5 to that Act.

(7) Despite subsection (1), the following regulations are repealed on 1 September 1999:

(a) all regulations under the *Commercial Vessels Act 1979*, the *Marine Pilotage Licensing Act 1971*, the *Maritime Services Act 1935* and the *Navigation Act 1901* that are in force on the date of assent to the *Statute Law (Miscellaneous Provisions) Act 1998*, and

(b) the *Maritime (Short Description of Offences) Regulation 1987*.

11 Postponement of repeal in specific cases

(1) The Governor may, by order published in the Gazette, from time to time postpone by one year the date on which a specified statutory rule is repealed by section 10.

(2) Such an order is effective to postpone the repeal of the statutory rule, provided the order is published before the repeal would otherwise take effect.

(3) The repeal of a particular statutory rule may not be postponed on more than 5 occasions.

(4) The repeal of a statutory rule may not be postponed on a third, fourth or fifth occasion unless the responsible Minister has given the Regulation Review Committee at least one month's written notice of the proposed postponement.

(5) The Regulation Review Committee may make such reports to the responsible Minister and to each House of Parliament as it thinks desirable in connection with the third, fourth or fifth postponement of the repeal of a statutory rule.

(6) This section does not apply to the regulations referred to in section 10 (3)–(7).

12 Machinery provisions regarding repeal

(1) A statutory rule is, for the purposes of this Part, to be taken to have been published on the following date:

(a) if the statutory rule was required to be published in the Government Gazette or any other official gazette—the date on which it was originally so published,

(b) if the statutory rule was not required to be so published but was required to be made, approved or confirmed by the Governor—the date on which it was so made, approved or confirmed,

(c) in any other case—the date on which it was made.

(2) The repeal of a statutory rule by this Part extends to any direct amendments (whenever made) of the statutory rule and to so much of any statutory rule as makes any such amendments.

(3) A set of regulations, by-laws, rules or ordinances constituting a single instrument is, for the purposes of this Part, to be taken to be a single statutory rule.

(4) If an instrument made under one Act is by law to be treated as a statutory rule made under another Act, the date of publication is, for the purposes of this Part, the date it was originally published.

(5), (6) (Repealed)

Part 4 Miscellaneous

13 Procedure when Regulation Review Committee not in office

If the Regulation Review Committee is not in office when material is required to be forwarded to it under section 5, the material is to be forwarded to a person nominated by the Clerk of the Legislative Assembly, for the attention of the Committee after its appointment.

14 Regulations

(1) 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 to be prescribed for carrying out or giving effect to this Act.

(2) Regulations may, after consultation with the Regulation Review Committee, be made amending or replacing Schedule 3 or 4.

15 Amendment of Regulation Review Act 1987 No 165

Note. The amending provisions are not reprinted: *Reprints Act 1972*, section 6.

Schedule 1 Guidelines for the preparation of statutory rules

(Section 4)

1 Wherever costs and benefits are referred to in these guidelines, economic and social costs and benefits are to be taken into account and given due consideration.

2 Before a statutory rule is proposed to be made:

(a) The objectives sought to be achieved and the reasons for them must be clearly formulated.

(b) Those objectives are to be checked to ensure that they:

- are reasonable and appropriate, and
- accord with the objectives, principles, spirit and intent of the enabling Act, and
- are not inconsistent with the objectives of other Acts, statutory rules and stated government policies.

(c) Alternative options for achieving those objectives (whether wholly or substantially), and the option of not proceeding with any action, must be considered.

(d) An evaluation must be made of the costs and benefits expected to arise from each such option as compared with the costs and benefits (direct and indirect, and tangible and intangible) expected to arise from proceeding with the statutory rule.

(e) If the statutory rule would impinge on or may affect the area of responsibility of another authority, consultation must take place with a view to ensuring in advance that (as far as is reasonably practicable in the circumstances):

- any differences are reconciled, and
- there will be no overlapping of or duplication of or conflict with Acts, statutory rules or stated government policies administered by the other authority.

3 In determining whether and how the objectives should be achieved, the responsible Minister is to have regard to the following principles:

(a) Administrative decisions should be based on adequate information and consultation concerning the need for and consequences of the proposed action.

(b) Implementation by means of a statutory rule should not normally be undertaken unless the anticipated benefits to the community from the proposed statutory rule outweigh the anticipated costs to the community, bearing in mind the impact of the proposal on the economy and on consumers, members of the public, relevant interest groups, and any sector of industry and commerce, that may be affected.

(c) The alternative option that involves the greatest net benefit or the least net cost to the community should normally be chosen from the range of alternative options available to achieve the objectives.

4 A statutory rule must be expressed plainly and unambiguously, and consistently with the language of the enabling Act.

Schedule 2 Provisions applying to regulatory impact statements

(Section 5)

1 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).

(c) An assessment of the costs and benefits of the proposed statutory rule, including the costs and benefits relating to resource allocation, administration and compliance.

(d) An 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), including the costs and benefits relating to resource allocation, administration and compliance.

(e) An assessment as to which of the alternative options involves the greatest net benefit or the least net cost to the community.

(f) A statement of the consultation program to be undertaken.

2 (1) Wherever costs and benefits are referred to in this Schedule, economic and social costs and benefits, both direct and indirect, are to be taken into account and given due consideration.

(2) Costs and benefits should be quantified, wherever possible. If this is not possible, the anticipated impacts of the proposed action and of each alternative should be stated and presented in a way that permits a comparison of the costs and benefits.

3 A regulatory impact statement for a committee's foundation regulation (within the meaning of the *Agricultural Industry Services Act 1998*) must contain an assessment of the regulation

carried out in accordance with the principles set out in Clauses 1 (3), 5 (1) and 5 (9) of the *Competition Principles Agreement*, being the agreement between the Commonwealth, the States and the Territories that was entered into, for and on behalf of New South Wales, on 11 April 1995.

▲Schedule 3 Matters not requiring regulatory impact statements

(Section 6)

1 Matters of a machinery nature.

2 Direct amendments or repeals.

3 Matters of a savings or transitional nature.

4 Matters arising under legislation that is substantially uniform or complementary with legislation of the Commonwealth or another State or Territory.

5 Matters involving the adoption of international or Australian standards or codes of practice, where an assessment of the costs and benefits has already been made.

6 Matters that are not likely to impose an appreciable burden, cost or disadvantage on any sector of the public, having regard to any assessment of those issues by the relevant agency after the consideration and application of relevant guidelines set out in Schedule 1 to this Act.

7 A management plan for a share management fishery made under the *Fisheries Management Act 1994*.

▲ See Uncommenced amendments

Schedule 4 Excluded instruments

(Section 3)

1 Standing Rules and Orders of the Legislative Council and Legislative Assembly.

2 Rules of court.

3 Regulations under the *Constitution Act 1902*.

4 Regulations under the *Companies (Acquisition of Shares) (Application of Laws) Act 1981*, the *Companies and Securities (Interpretation and Miscellaneous Provisions) (Application of Laws) Act 1981*, the *Companies (Application of Laws) Act 1981*, the *Securities Industry (Application of Laws) Act 1981* or the *Futures Industry (Application of Laws) Act 1986*.

4A Regulations under the *Australian Mutual Provident Society Act 1988*.

5 By-laws under the *Anzac Memorial (Building) Act 1923*.

6 By-laws under the *Australian Jockey Club Act 1873*.

7 By-laws under the *Colleges of Advanced Education Act 1975*.

8 By-laws under the *Farrer Memorial Research Scholarship Fund Act 1930*.

9 Rules under the *McGarvie Smith Institute Incorporation Act 1928*.

10 By-laws under the *New South Wales State Conservatorium of Music Act 1965*.

10A By-laws under the *National Trust of Australia (New South Wales) Act 1990*.

11 By-laws under the *Private Irrigation Districts Act 1973*.

12 Rules under the *Sporting Injuries Insurance Act 1978*.

13 By-laws under the *State Bank Act 1981*.

14 By-laws under the *Sydney Turf Club Act 1943*.

15 By-laws under the *Technical Education Trust Funds Act 1967*.

16 By-laws of a university.

16A (Repealed)

17 By-laws under the *Wellington Show Ground Act 1929*.

18 An instrument containing matters of a savings or transitional nature (provided the only other provisions contained in the instrument are provisions dealing with its citation and commencement).

19 Regulations under Part 6 of the *Energy Administration Act 1987*.

20 Regulations under Part 2 of the *Essential Services Act 1988*.

21 Regulations under the *Road Obstructions (Special Provisions) Act 1979*.

22 Ordinances under Part 12A of the *Local Government Act 1919*, being:

(a) planning scheme ordinances that are deemed to be deemed environmental planning instruments under the *Environmental Planning and Assessment Act 1979*, and

(b) ordinances under section 342U (2) of the *Local Government Act 1919* that are continued in force by clause 11 of Schedule 3 to the *Miscellaneous Acts (Planning) Repeal and Amendment Act 1979*.

23 Regulations under the *Banks Mergers Act 1996*.

Notes

The following abbreviations are used in the tables of Acts and amendments:

Am	amended	pp	pages
cl	clause	Rep	repealed
cll	clauses	Sch	Schedule
Div	Division	Sec	section
GG	Government Gazette	Secs	sections
Ins	inserted	Subdiv	Subdivision
No	number	Subst	substituted
p	page		

This Act is reprinted with the omission of all amending provisions authorised to be omitted under sec 6 of the *Reprints Act 1972*.

Table of Acts

Subordinate Legislation Act 1989 No 146. Assented to, 31.10.1989.
Date of commencement of Parts 1 and 3, secs 8, 9 and 14 and Sch 4, 1.1.1990, sec 2 and GG No 124 of 22.12.1989, p 11035; date of commencement of remainder of provisions, 1.7.1990, sec 2 and GG No 124 of 22.12.1989, p 11035. This Act has been amended as follows:

1990	No 92	National Trust of Australia (New South Wales) Act 1990. Assented to 7.12.1990. Date of commencement of sec 40, 5.7.1991, sec 2 (1) and GG No 103 of 5.7.1991, p 5394.
1991	No 17	Statute Law (Miscellaneous Provisions) Act 1991. Assented to 3.5.1991. Date of commencement of the provision of Sch 1 relating to the Subordinate Legislation Act 1989, assent, sec 2.
1992	No 34	Statute Law (Miscellaneous Provisions) Act 1992. Assented to 18.5.1992. Date of commencement of the provision of Sch 1 relating to the Subordinate Legislation Act 1989, assent, Sch 1.
1993	No 48	Subordinate Legislation (Amendment) Act 1993. Assented to 15.6.1993. Date of commencement, 1.7.1993, sec 2.
	No 108	Statute Law (Miscellaneous Provisions) Act (No 2) 1993. Assented to 2.12.1993. Date of commencement of the provision of Sch 2 relating to the Subordinate Legislation Act 1989, assent, Sch 2.
1994	No 95	Statute Law (Miscellaneous Provisions) Act (No 2) 1994. Assented to 12.12.1994. Date of commencement of the provisions of Sch 2 relating to the Subordinate Legislation Act 1989, assent, Sch 2.

1995	No 13	Ports Corporatisation and Waterways Management Act 1995. Assented to 15.6.1995. Date of commencement, 1.7.1995, sec 2 and GG No 79 of 30.6.1995, p 3435.
1996	No 30	Statute Law (Miscellaneous Provisions) Act 1996. Assented to 21.6.1996. Date of commencement of the provisions of Sch 1 relating to the Subordinate Legislation Act 1989, assent, sec 2 (2).
	No 121	Statute Law (Miscellaneous Provisions) Act (No 2) 1996. Assented to 3.12.1996. Date of commencement of Sch 1.21, assent, sec 2 (2).
	No 130	Bank Mergers Act 1996. Assented to 4.12.1996. Date of commencement, assent, sec 2.
1997	No 51	Occupational Health and Safety Amendment Act 1997. Assented to 2.7.1997. Date of commencement of Sch 3.6: not in force.
	No 55	Statute Law (Miscellaneous Provisions) Act 1997. Assented to 2.7.1997. Date of commencement of Sch 1.26, assent, sec 2 (2).
	No 153	Fisheries Management Amendment Act 1997. Assented to 19.12.1997. Date of commencement of Sch 6, 1.7.1998, sec 2 and GG No 100 of 26.6.1998, p 5093.
	No 156	Protection of the Environment Operations Act 1997. Assented to 19.12.1997. Date of commencement of Sch 4.16: not in force (to commence 1.7.1999, sec 2 and GG No 178 of 24.12.1998, p 9952). Amended by Statute Law (Miscellaneous Provisions) Act 1998 No 54. Assented to 30.6.1998. Date of commencement of Sch 1.14 [3]: not in force.
1998	No 45	Agricultural Industry Services Act 1998. Assented to 26.6.1998. Date of commencement, 14.8.1998, sec 2 and GG No 120 of 14.8.1998, p 6025.
	No 54	Statute Law (Miscellaneous Provisions) Act 1998. Assented to 30.6.1998. Date of commencement of Sch 1.19, assent, sec 2 (2).

This Act has also been amended by regulations under sec 14 of this Act, published in Gazettes No 157 of 8.11.1991, p 9375 and No 108 of 26.8.1994, p 5144.

Table of amendments

Sec 5	Am 1993 No 48, Sch 1 (1).
Sec 6	Am 1994 No 95, Sch 2.
Sec 10	Am 1993 No 48, Sch 1 (2); 1996 No 30, Sch 1; 1996 No 121, Sch 1.21 (1) (2); 1997 No 55, Sch 1.26 [1]; 1998 No 54, Sch 1.19 [1] [2].

Sec 11	Am 1993 No 48, Sch 1 (3); 1993 No 108, Sch 2; 1996 No 30, Sch 1; 1997 No 55, Sch 1.26 [2]; 1998 No 54, Sch 1.19 [3].
Sec 12	Am 1992 No 34, Sch 1; 1994 No 95, Sch 2; 1995 No 13, Sch 4.
Sch 2	Am 1998 No 45, Sch 3.8.
Sch 3	Am GG No 108 of 26.8.1994, p 5144; 1997 No 153, Sch 6.5.
Sch 4	Am 1990 No 92, sec 40; 1991 No 17, Sch 1; GG No 157 of 8.11.1991, p 9375; 1996 No 30, Sch 1; 1996 No 130, sec 9.

Uncommenced amendments

The following amendments were uncommenced at the date of this reprint and are reproduced below.

Occupational Health and Safety Amendment Act 1997 No 51 (Sch 3.6)

Section 10 Staged repeal of statutory rules

Omit section 10 (3).

Protection of the Environment Operations Act 1997 No 156 (Sch 4.16)

Schedule 3 Matters not requiring regulatory impact statements

Insert at the end of the Schedule:

*7 Matters arising under the *Protection of the Environment Operations Act 1997*:

(a) that implement protection of the environment policies under that Act or national environment protection measures under the *National Environment Protection Council (New South Wales) Act 1995*, or

(b) that have undergone a public consultation process that is similar to or no less rigorous than the public consultation process for the making of such policies.

*Renumbered as clause 8 by the *Statute Law (Miscellaneous Provisions) Act 1998 No 54*, Sch 1.14 [3]. The amendment was uncommenced at the date of this reprint.

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Notice
Copyright in legislation and other material

Published in Gazette No 110 of 27 September 1996

Whereas:

(1) it is recognised that the Crown has copyright in the legislation of New South Wales and in certain other material, including but not limited to prerogative rights and privileges of the Crown in the nature of copyright, and that it is desirable in the interests of the people of New South Wales that access to such legislation and material should not be impeded except in limited special circumstances, and

(2) a notice relating to such copyright was published in Government Gazette No 94 of 27 August 1993, and

(3) it is expedient to extend the authorisation to publish and otherwise deal with such legislation and material, as provided for in that notice:

I, The Honourable J W Shaw QC, MLC, Attorney General for the State of New South Wales, make and publish this instrument on behalf of the State of New South Wales.

1 Definitions

In this instrument:

authorisation means the authorisation granted by this instrument.

copyright includes any prerogative right or privilege of the Crown in the nature of copyright.

legislative material means:

(a) Acts of the Parliament of New South Wales, and

(b) statutory rules within the meaning of the *Interpretation Act 1987*, and

(c) environmental planning instruments within the meaning of the *Environmental Planning and Assessment Act 1979*, and

(d) proclamations or orders made under an Act of the Parliament of New South Wales and published in the Government Gazette, and

(e) admission rules made under the *Legal Profession Act 1987* and rules made by the costs assessors' rules committee under section 208R of that Act, and

(f) any other instruments that are required under any law to be made, approved or confirmed by the Governor or a Minister of State for New South Wales and that are published in the Government Gazette, and

(g) provisions applying as a law of New South Wales, by virtue of an Act of the Parliament of New South Wales, and

(h) any of the above in the form in which they are officially printed or reprinted, and with or without the inclusion of further amendments duly made, and

(i) official explanatory notes and memoranda published in connection with any of the above, and

(j) tables of provisions, indexes or notes published with any of the above.

State means the State of New South Wales, and includes the Crown in right of the State of New South Wales.

2 Authorisation

Any publisher is by this instrument authorised to publish and otherwise deal with any legislative material, subject to the following conditions:

(a) copyright in the legislative material continues to reside in the State,

(b) State reserves the right at any time to revoke, vary or withdraw the authorisation if the conditions of its grant are breached and otherwise on reasonable notice,

(c) any publication of material pursuant to the authorisation must not indicate directly or indirectly that it is an official version of the material,

(d) the arms of the State must not be used in connection with the publication of material pursuant to the authorisation, except with the further authority of the Governor (acting with the advice of the Executive Council) or of the Attorney General,

(e) any publication of material pursuant to the authorisation is required to be accurately reproduced in proper context and to be of an appropriate standard.

3 Non-enforcement of copyright

The State will not enforce copyright in legislative material to the extent that it is published or otherwise dealt with in accordance with the authorisation. For this purpose, the authorisation has effect as a licence binding on the State.

4 Revocation, variation or withdrawal of authorisation

Any revocation, variation or withdrawal of the authorisation may be effected generally or in relation to specified publishers or specified classes of publishers. The authorisation may also be revoked, varied or withdrawn in relation to specified legislative material or specified classes of legislative material. Any such revocation, variation or withdrawal may be by notice in the Government Gazette, or by notice to any particular publisher, or in any other way as determined from time to time by the Attorney General.

5 Unauthorised Documents Act 1922

Attention is drawn to the *Unauthorised Documents Act 1922*, which restricts use of the State coat of arms.

6 Copyright Act 1968 of the Commonwealth

Nothing in this instrument affects the rights of any person (other than the State) under the *Copyright Act 1968* of the Commonwealth.

7 Previous instrument

This instrument is intended to replace the instrument published in Government Gazette No 94 of 27 August 1993 in relation to copyright, and accordingly the authorisation granted by the previous instrument is subsumed by the authorisation granted by this instrument. However, this instrument does not affect any rights or liabilities accrued or accruing under the previous instrument.

BY AUTHORITY

Parliamentary Counsel=s Office

Automatic Tabling Scheme

Sourced from 07/06/99

Parliamentary Counsel's Office

Automatic Tabling Scheme

List updated as at 7 June 1999

1 Statutory rules and certain other instruments (to which Part 6 of the Interpretation Act 1987 applies)

Statutory rules

to which Part 6 of the Interpretation Act 1987 automatically applies:

- **by-laws, ordinances, regulations or rules** *made, approved or confirmed* by the Governor
- **rules of court** (Compensation Court Rules, District Court Rules, Land and Environment Court Rules, Local Courts (Civil Claims) Rules, Medical Tribunal Rules, Supreme Court Rules, rules under Legal Profession Act 1987)

Other instruments

to which Part 6 of the Interpretation Act 1987 applies, by virtue of provisions of other Acts:

- **Business Licences Act 1990 No 72—orders under section 18** (made by the

Minister) fixing fees in relation to licences

- **Coal Mines Regulation Act 1982 No 67—rules under section 23** (made by the Coal Mining Qualifications Board) relating to certificates of competency

- **Compensation Court Act 1984 No 89—practice notes under section 43** (issued by or on behalf of the Court) regulating the practice or procedure of the Court, or of any class of proceedings in the Court (including any other document, however described, but excluding a decision of the Court)

- **Dangerous Goods Act 1975 No 68—orders under clause 15AB of the Dangerous Goods Regulation 1978** (made by the WorkCover Authority) relating to licence fees

- **District Court Act 1973 No 9:**
  - **practice notes under section 161** (issued by or on behalf of the Court) regulating the practice or procedure of the Court, or of any class of proceedings in the Court (including any other document, however described, but excluding a decision of the Court)
  - **proclamations under section 188** (made by the Governor) relating to references to District Court judges in existing instruments

- **Factories, Shops and Industries Act 1962 No 43—proclamations under section 5** (made by the Governor) making declarations extending the Act or creating exemptions from the Act

- **Fair Trading Act 1987 No 68:**
  - **orders under section 31** (made by the Minister) prohibiting or restricting the supply of goods
  - **orders under section 34** (made by the Minister) recalling defective goods, disclosing information to the public about defective goods or notifying persons about goods

- **Food Production (Safety) Act 1998 No 128—orders under section 69** (made by the Minister) exempting certain persons, premises, vehicles, equipment, activities or primary produce or seafood, any class of such persons, premises, vehicles or equipment or any class or description of primary produce or seafood

- **Guardianship Act 1987 No 257—rules under section 75** (made by members of the Guardianship Tribunal) for or with respect to the practice and procedure of the Tribunal

- **Land and Environment Court Act 1979 No 204—practice notes under section 74** (issued by or on behalf of the Court) regulating the practice or procedure of the Court, or of any class of proceedings in the Court (including any other document, however described, but excluding a decision of the Court)

- **Legal Profession Act 1987 No 109:**
  - **rules under section 6** (made by the Legal Practitioners Admission Board) relating to registration and admission [see section 7]
  - **rules under section 208R** (made by the costs assessors' rules committee) governing the practice and procedure of the assessment of costs

- **Local Courts (Civil Claims) Act 1970 No 11—practice notes under section 84**

(issued by or on behalf of Local Courts) regulating the practice or procedure of the Court, or of any class of proceedings in the Court (including any other document, however described, but excluding a decision of the Court)

✧ **Marine Parks Act 1997 No 64—proclamations under section 9** (made by the Governor) varying the area of a marine park

✧ **Marine Pollution Act 1987 No 299—orders made by the Minister in pursuance of regulations made by the Governor under sections 35, 40 and 61 (1) (d)** in relation to ships carrying or using oil, noxious substances in bulk, giving effect to the *International Convention for the Prevention of Pollution from Ships, 1973* (as corrected) and fixing fees in respect of certain matters [see section 62]

✧ **Medical Practice Act 1992 No 94—rules under section 158** (made by a rule committee of the Medical Tribunal) governing the practice and procedure of the Tribunal

✧ **Plant Diseases Act 1924 No 38:**
- **orders under section 5A** (made by the Minister) in relation to the treatment and eradication of diseases
- **orders under section 28A** (made by the Minister) relating to the grading or packing of fruit or vegetables or the branding or labelling of coverings containing fruit, vegetables or other plants

✧ **Poisons and Therapeutic Goods Act 1966 No 31:**
- **proclamations under section 8** (made by the Governor on the recommendation of the Minister) amending the Poisons List
- **orders under section 37** (made by the Director-General of the Department of Health) prohibiting the supply of any substance specified in the order (such as a poison, restricted substance or drug of addiction) which, in the opinion of the Director-General, should not be supplied pending the evaluation of its toxic or deleterious properties or of any substance containing any such substance.

[see section 46]

✧ **Professional Standards Act 1994 No 81—schemes published in the Gazette under section 13** (submitted to the Minister by the Professional Standards Council) limiting the occupational liability of members of an occupational association [see section 12]

✧ **Public Notaries Act 1997 No 98—rules under section 9** (made by the Legal Practitioners Admission Board) for or with respect to all or any of the following:
(a) to the qualifications for appointment as a public notary,
(b) the examination in such branches of knowledge as the Board thinks fit of candidates for appointment as public notaries,
(c) the approval of properly qualified persons to be appointed as public notaries,

Automatic tabling scheme

(d) applications for appointment as a public notary and the approval of such applications,
(e) the keeping of records concerning legal practitioners named on the roll of public notaries,
(f) the fees payable to the Board in relation to the examination of candidates for

appointment as, and the appointment of, public notaries, and certificates of appointment as public notaries,

(g) any other matters relating to the exercise of the Board's functions under the Act.

[see section 9A]

✧ **Registered Clubs Act 1976 No 31—guidelines published under section 87 (6)** (by the Minister, after consultation with the Registered Clubs Association) that determine what constitutes the application of profits derived from approved gaming devices to community development and support [see section 87 (9)]

✧ **Stock Medicines Act 1989 No 182—orders under section 46** (made by the Director-General of the Department of Agriculture) creating a supply or use ban or recalling certain stock medicines
[see section 47]

✧ **Supreme Court Act 1970 No 52:**

- **proclamations of a transitional nature under section 24 (7)** (made by the Governor) directing that the section does not apply to any power specified in the proclamation
- **practice notes under section 124** (issued by or on behalf of the Court) regulating the practice or procedure of the Court, any Division of the Court or of any class of proceedings in the Court (including any other document, however described, but excluding a decision of the Court)

2 Other statutory instruments (published in the Gazette and required to be tabled, where the disallowance provision does not operate by reference to the Interpretation Act 1987)

✧ **Civil Aviation (Carriers' Liability) Act 1967 No 64—regulations made under Commonwealth Act** [see section 7 of the Act]

✧ **Conversion of Cemeteries Act 1974 No 17—notifications under section 9** of Minister's intention to declare cemetery a public park

✧ **Crown Lands Act 1989 No 6—notifications under section 84** (made by the Minister) of a proposed revocation of dedication of land

✧ **Dairy Industry Act 1979 No 208—proclamations under section 5** (made by the Governor) adding or removing the description of a liquid, or any class of liquids, from Schedule 1

✧ **Environmental Planning and Assessment Act 1979 No 203—notices under sections 132 and 133** (made by the Director-General of Urban Affairs and Planning) constituting, altering or abolishing a development area under Division 1 of Part 7 [see section 135]

✧ **Fisheries Management Act 1994 No 38—proposed revocations or variations, under section 196, of declarations under section 194** (made by the Minister) of aquatic reserves

✧ **Imperial Acts Application Act 1969 No 30—proclamations under section 11** (made by the Governor) reviving repealed enactments

✧ **National Parks and Wildlife Act 1974 No 80:**

* **proclamations under section 33 (2) or (3)** (made by the Governor) reserving prescribed lands as, or as part of, a national park or historic site [see section 35

for tabling and disallowance provisions]

* **notices under section 47B (1)** (made by the Minister) reserving prescribed land as, or as part of, a state recreation area [see section 47D for tabling and disallowance provisions]
* **notices under section 47O (2)** (made by the Minister) reserving prescribed land as, or as part of, a regional park [see section 47R for tabling and disallowance provisions]
* **proclamations under section 49 (1) or (2)** (made by the Governor) dedicating Crown lands or lands acquired under section 145, 146 or 148 as, or as part of, a nature reserve [see section 58, applying section 35, for tabling and disallowance provisions]
* **proclamations under section 58A (1) or (2)** (made by the Governor) dedicating Crown lands or lands acquired under section 145, 147 or 148 as, or as part of, a state game reserve [see section 58J, applying section 35, for tabling and disallowance provisions]
* **proclamations under section 58K (1) or (2)** (made by the Governor) dedicating Crown lands or lands acquired under section 145, 147 or 148 as, or as part of, a karst conservation reserve [see section 58S, applying section 35, for tabling and disallowance provisions]
- **proclamations under section 71BA** (made by the Governor) declaring that the whole or part of lands listed in Schedule 14 be taken to be reserved or dedicated as part of an area reserved or dedicated under Part 4A [see section 71BB for tabling and disallowance provisions]

Note. Instruments marked with an asterisk (*) involve the tabling of notice of the relevant decision, declaration, revocation, determination etc rather than the decision itself. Parliament has the power to disallow the actual decision.

✧ **New South Wales—Queensland Border Rivers Act 1947 No 10—regulations under section 6** (made by The Dumaresq-Barwon Border Rivers Commission) relating to the practice and procedure of the Commission and to penalties

✧ ***Noise Control Act 1975 No 35*—proclamations under section 10** (made by the Governor) relating to the amendment of the Schedule describing classes of premises
Note: The Act is subject to repeal on 1 July 1999 (see Schedule 3 to the Protection of the Environment Operations Act 1997 No 156 and Government Gazette No 178 of 24 December 1998 at p. 9952)

✧ **Ombudsman Act 1974 No 68—proclamations under section 14** (made by the Governor) amending Schedule 1 in relation to any class of conduct of a public authority

✧ **Statutory and Other Offices Remuneration Act 1975 (1976 No 4)—reports under section 18 of determinations made under sections 13, 14, 15 and 15A** (made by the Statutory and Other Offices Remuneration Tribunal) [see sections 19 and 19A for tabling and disallowance provisions]

✧ **Sydney Water Act 1994 No 88—orders under section 10** (made by the Governor) varying the area of operations and specifying which systems and services the Sydney Water Corporation may provide in the whole or a part or parts of the area of operations as so varied

Contingent list:

Main list

✧ **Agricultural Livestock (Disease Control Funding) Act 1998 No 139—Orders under section 13** (given by the Minister) authorising the imposition of an industry levy to assist the funding of any designated disease control service [section 13 has

not commenced]

✧ **Sydney Water Catchment Management Act 1998 No 171—Orders under section 20** (made by the Governor) varying the area of operations of the Sydney Catchment Authority [section 20 has not commenced]

APPENDIX 3

The Flinn Report
Joint Committee on Administrative Rules, Illinois

The Flinn Report

Illinois Regulation

Joint Committee on Administrative Rules www.legis.state.il.us
700 Stratton Bldg., Springfield IL 62706 Illinois General Assembly 217/785-2254 - jcar@legis.state.il.us
VOL. 24 March 3, 2000 Issue 10

Illinois Regulation is a summary of the weekly regulatory decisions of State agencies published in the Illinois Register and action taken by the Illinois General Assembly's Joint Committee on Administrative Rules. Illinois Regulation is designed to inform and involve the public in changes taking place in agency administration.

New Regulations

☞AUCTIONEER LICENSES

The OFFICE OF BANKS AND REAL ESTATE adopted a new Part titled "Auction License Act" (68 Ill Adm Code 1440), effective 2/22/00. A companion emergency rulemaking became effective 10/25/99. The rulemaking implements Public Act 91-603, which establishes a new licensing program for Illinois auctioneers beginning 1/1/00, and sets forth definitions and licensing requirements. Topics covered include application, examination, time frames, grandfathering provisions, and reciprocity with other states. Fees for licensure and renewal are outlined, and administrative procedures are provided. Licensure exemptions are listed for not-for-profit organizations conducting charity auctions, owners auctioning their own property, licensed real estate brokers and salespersons, licensed livestock auctioneers, licensed vehicle dealers auctioning vehicles, and persons under age 18 who are supervised by a licensed auctioneer and sell items valued under $250. A change since 1st Notice requires a sponsoring auctioneer or auction firm that sponsors a temporary permittee to submit an original 45-day permit sponsor card, any other applicable documentation, and the proper fee to OBRE within 24 hours. Types of small businesses, small municipalities, and not-for-profit corporations affected by this rulemaking include those engaged in the auction business.

Questions/requests for copies: Norm Willoughby, OBRE, 500 E. Monroe, 5th Fl., Springfield IL 62701, 217/782-2798.

STATE EMPLOYEES

DEPARTMENT OF CENTRAL MANAGEMENT SERVICES adopted amendments for "Pay Plan" (80 Ill Adm Code 310), effective 2/18/00, to reflect salary changes approved by the Governor's office. These include a change in annual salary for a Department of Commerce and Community Affairs public information officer IV from $59,184 to $62,256, the addition of a private secretary II position for the State and Local Labor Relations Board at $49,008 annually, and the addition of a senior public service administrator for the Department of Human Services at $105,475 annually. The position of senior public service administrator at the Department of Insurance is deleted from the designated rate section.

(cont'd next page)

NEW REGULATIONS: Rules adopted by agencies this week.
PROPOSED REGULATIONS: Rules proposed by agencies this week, commencing a 45-day First Notice period. Public comments must be accepted by the agency for the period of time indicated.
☞: Symbol designating rules of special interest to small businesses, small municipalities, and not-for-profit corporations. Agencies are required to consider comments from these groups and minimize the regulatory burden on them.
QUESTIONS/COMMENTS/RULE TEXT: Direct mail or phone calls to the agency personnel listed below each summary. Providing volume and issue number of The Flinn Report or the Illinois Register will expedite the process. Some agencies charge copying fees. However, requests for copies do not have to be made under the Freedom of Information Act (FOIA).

Proposed Regulations

☞DIRECT CHILD WELFARE

The DEPARTMENT OF CHILDREN AND FAMILY SERVICES proposed new rules titled "Licensure of Direct Child Welfare Services Employees and Supervisors" (89 Ill Adm Code 412) to set licensing standards covering qualifications, education, and training of those who seek to practice as direct child welfare services employees. Supervisors and workers who participate in investigation, casework, intact or family preservation, permanency, or foster care licensing decisions shall obtain a license to practice as a direct child welfare services employee. Included in the rulemaking are sections on definitions, organization and administration of the licensing program, licensing requirements, and grounds for disciplinary action. Initial and formal complaints, license revocation and suspension, and license restoration are also addressed. Those affected by this rulemaking include purchase-of-service child welfare agencies.

Questions/requests for copies/comments until 4/17/00: Jeff Osowski, DCFS, 406 E. Monroe, Station #65, Springfield IL 62701-1498, 217/524-1983, TDD 217/524-3715, Fax 217/557-0692, E-mail:cfpolicy@idcfs. state.il.us

☞PLUMBING LICENSES

The DEPARTMENT OF PUBLIC HEALTH proposed amendments for "Plumbers Licensing Code" (68 Ill Adm

(cont'd page 3)

Questions/requests for copies: Michael Murphy, DCMS, 504 Stratton Bldg., Spfld IL 62706, 217/782-5601.

INSURANCE

The DEPARTMENT OF INSURANCE adopted amendments for "Required Procedure for Filing and Securing Approval of Policy Forms for Life Insurance, Annuity and Accident and Health Insurance, Voluntary Health Services Plans, Dental Service Plans, Limited Health Service Organizations and Health Maintenance Organizations" (50 Ill Adm Code 916), effective 2/18/00. Various filing requirements are modified to reflect that, beginning in January 1, 2001, DOI will require companies to file such information electronically. Prior to 1/1/01, electronic filing will be optional. These dates were originally proposed to be July 2000 but were changed to the later dates to permit industry acclimation to the changes. Coding guides for policy forms are updated with the addition of new codes, and discontinued acronyms are listed. New general transmittal instructions and a new general transmittal sheet are included in the rulemaking. References to pharmaceutical services plans are stricken from the title of the Part and the rulemaking text to reflect that the Pharmaceutical Service Plan Act was repealed. A correction since 1st Notice also removes vision service plans from the title of the rulemaking and throughout the Part because the Vision Service Plan Act was repealed by Public Act 90-177.

Questions/requests for copies: Gary Brooks, DOI, 320 W. Washington, Spfld IL 62767-0001, 217/785-6441.

☞COMMERCIAL WATERCRAFT

The DEPARTMENT OF NATURAL RESOURCES adopted amendments for "Operation of Watercraft Carrying Passengers for Hire on Illinois Waters" (17 Ill Adm Code 2080), effective 2/17/00. The amendments require that marine inspectors follow specified federal regulations for vessel stability when determining the number of passengers allowable on each deck of watercraft that have 2 or more passenger decks above the waterline. Small businesses, small municipalities, and not-for-profit corporations affected by this rulemaking include marine inspectors and watercraft operators carrying passengers for hire.

☞OPEN LAND TRUST GRANTS

DNR also adopted a new Part titled "Open Land Trust Grant Program" (17 Ill Adm Code 3050), effective 2/17/00, to provide grants to eligible local governments to acquire lands for the protection of lakes, rivers, streams, open space, parks, natural lands, wetlands, prairies, forests, watersheds, resource-rich areas, greenways, fish and wildlife resources, and endangered or threatened species' habitat. The Part also authorizes grants for public, outdoor, natural-resource-related, recreation purposes. The rulemaking includes program objectives, definitions, eligibility requirements, assistance formulae, application procedures, eligible project costs, project evaluation priorities, and program compliance requirements. The Open Land Trust (OLT) program will reimburse up to a maximum 50% of total approved project costs. Disadvantaged populations are eligible for up to a maximum of 90% funding assistance on total approved project costs. No more than $2,000,000 may be awarded to any grantee for a single project for any fiscal year. Small municipalities will be affected by this rulemaking, as they are eligible for grant assistance along with other units of local government.

Questions/requests for copies of the 2 DNR rulemakings above: Jack Price for Part 2080 and Stanley Yonkauski for Part 3050, DNR, 524 S. 2nd St., Spfld IL 62701-1787, 217/782-1809.

☞ATHLETIC TRAINERS

The DEPARTMENT OF PROFESSIONAL REGULATION adopted amendments for rules titled "Illinois Athletic Trainers Practice Act" (68 Ill Adm Code 1160), effective 2/15/00, to specify that a person seeking license restoration within 2 years after military service discharge is required to pay only the current license renewal fee and will not be required to meet the continuing education (CE) requirements. The rulemaking also changes from 12 hrs. to 26 hrs. the maximum CE credit given per licensure prerenewal period for authoring certain papers or book chapters, taking self-study courses, or training via teleconferencing. Also included among activities for which CE may be earned are certain courses taken for cardiopulmonary resuscitation (CPR) certification. Automated external defibrillation (AED) certification has been added since 1st Notice as another activity for which CE may be earned. Concerning CE requirements earned out-of-state, program approval forms must be submitted to DPR at least 90 days prior to license expiration or the licensee must pay specified additional fees. Small businesses, small municipalities, and not-for-profit corporations affected by this rulemaking include those providing athletic trainer CE services.

☞MEDICAL LICENSING

DPR adopted amendments for rules titled "Medical Practice Act of 1987" (68 Ill Adm Code 1285), effective 2/15/00, to implement Public Acts 89-702, 90-722, and 90-742 and make other changes. Rules for chiropractic physician preceptors and preceptor programs are repealed. Beginning with the 7/31/2002 license renewals, continuing medical education requirements are increased from 50 to 150 hrs./renewal, endorsement applicants must have criminal background checks, and a visiting physician permit is lengthened from 120 to 180 days. The rulemaking also strikes the current Canadian accrediting organization and adds 3 different ones. The Educational Commission for Foreign Medical Graduates is retained as the certifier of medical college graduates outside the U.S.A. or Canada, and other similar entities are stricken.

New Regulations

Certain examination requirements throughout the Part are changed, also. A proposed amendment that required chiropractic applicants to pass Part IV of their national board examination after 1/1/2001 was not included in the adopted text. Small businesses, small municipalities, and not-for-profit corporations affected by this rulemaking include those providing medical services.

☞**OPTOMETRISTS**

DPR also adopted amendments for rules titled "Optometric Practice Act of 1987" (68 Ill Adm Code 1320), effective 2/15/00, to reduce continuing education (CE) requirements for license restoration, strike the subject area called psychological optics from the required optometry curriculum, discontinue granting CE credit for the post-course evaluation, require that CE courses in cardiopulmonary resuscitation be certified by certain organizations, and allow out-of-state CE approval forms to be submitted until 90 days prior to license expiration. The rulemaking also specifies that a fee shall not be charged for visual screenings conducted by charities, strikes the requirement that medical faculty specialists conduct the therapeutic ocular training, and reduces the paperwork requirement for endorsement applicants. A change since 1st Notice reduces the CE hours required for license restoration from 30 to 24 in the 2 years preceding restoration. Small businesses, small municipalities, and not-for-profit corporations affected by this rulemaking include those providing the services of optometrists.

Questions/requests for copies of the 3 DPR rulemakings above: Jean A. Courtney, DPR, 320 W. Washington, 3rd Fl., Springfield IL 62786, 217/785-0813, Fax 217/782-7645.

☞**HEALTH DATA REPORTING**

The DEPARTMENT OF PUBLIC HEALTH adopted amendments for "Illinois Health and Hazardous Substances Registry" (77 Ill Adm Code 840), effective 2/18/00, to include the names of the various physicians who are involved in a cancer patient's diagnosis or care in the State Cancer Registry data. A statement that the Department shall not require hospitals to provide further data on cases more than 2 years old is stricken. Current patients who were diagnosed and received all first-course treatment elsewhere are added to the list of a facility's reportable patients. Terminology and diagnostic codes are revised, and form requirements for electronic data submittal are specified. A report form for the Adverse Pregnancy Outcomes Reporting System (APORS) is repealed, but the required information for APORS is specified elsewhere in the rule text and also amended. A statement that APORS data will be complemented with information from DPH's vital records database is stricken. Hospitals, clinical laboratories, ambulatory surgical treatment centers, and other facilities required to report to the Cancer Registry or APORS will be affected by this rulemaking.

Questions/requests for copies: Paul D. Thompson, DPH, 535 W. Jefferson, 5th Fl. Springfield IL 62761, 217/782-2043, E-mail:rules@idph.state.il.us

Proposed Regulations

Code 750) to implement changes in the Illinois Plumbing License Law that require licensed plumbers to complete continuing education (CE) prior to annual license renewal. Licensed plumbers found to be in repeat violations of the Plumbing Code (IPC) are required to complete additional CE. Standards for approval of CE providers, programs, and courses are added to the rules. Also added is a new section containing definitions. Standards for licensing plumbers and apprentice plumbers are added in the amendments. Plumbers must successfully pass the plumbing license examination; apprentice plumbers must be at least 16 years old, sponsored by an Illinois licensed plumber; and both categories must pay the appropriate fees. To provide uniform enforcement of the IPC, the Department is establishing a program to certify plumbing inspectors. The program provides that a plumber who has had a license for at least 7 years may take and pass the exam, pay the required fee, and become certified as a plumbing inspector. Specified CE is required for certification renewal. A certified inspector may inspect any private or public property for the purpose of investigating conditions relating to the IPC. The rulemaking does not prohibit units of local government from enacting their own minimum code of plumbing standards at least as stringent as the IPC. If the standards are more stringent, the governmental unit shall submit a copy to DPH and, if approved, the local code will prevail. The new language provides that the Department will evaluate each local government plumbing program not less than every 3 years. Retired plumbers may obtain a license, but such licenses prohibit retired plumbers from actively engaging in plumbing. The restoration fee of a plumber's expired license is reduced from $500 to $100, and new fees for retired plumbers' licenses and certified plumbing inspectors' examinations and certification are added. Fees for copies of the IPC and any amendments are increased, and the Code will also be available on CD-ROM. Modifications to existing sections of the rules are added to provide clarification of current policy concerning administration of the plumbers licensing examination, the duties of the State Board of Plumbing Examiners, and licensing requirements for plumbers and apprentice plumbers. Small businesses, small municipalities, and not-for-profit

corporations affected by this rulemaking include those that own or operate plumbing businesses.

Questions/requests for copies/comments until 4/17/00: Paul D. Thompson at the DPH address and telephone number above.

RECIPIENTS' RIGHTS

The DEPARTMENT OF PUBLIC AID proposed amendments for "Rights and Responsibilities" (89 Ill Adm Code 102) to provide for a DPA waiver of prior payment recovery from a deceased recipient's estate if such recovery would cause undue hardship to any heirs or beneficiaries. These changes are being made in response to federal provisions requiring states to establish such a waiver. The amendments require the Department to waive estate recovery if pursuing recovery would cause an heir or beneficiary to become, or remain, eligible for a public benefit program such as SSI, TANF, or food stamps. However, if the claims of other estate creditors would exhaust the decedent's estate and thus defeat the purpose of the waiver, DPA will not waive its claim. The rulemaking requires the Department to notify in writing known heirs and beneficiaries of the opportunity, time frame, and method to request the waiver.

Questions/requests for copies/comments until 4/17/00: Joanne Jones, DPA, 201 S. Grand Ave. E., 3rd Fl., Springfield IL 62763-0002, 217/524-0081.

☞LIQUOR CONTROL AMENDMENTS WITHDRAWN

The ILLINOIS LIQUOR CONTROL COMMISSION withdrew its proposed amendments to rules titled "The Illinois Liquor Control Commission" (11 Ill Adm Code 100) that were published in the 10/15/99 issue of the Illinois Register. The withdrawal is in response to an Objection issued by the Joint Committee on Administrative Rules at its February 8, 2000 meeting because the proposed rulemaking was economically burdensome on small businesses. The proposed rulemaking increased from $10 (for life) to $50 (annually) the fee for retail licensees that request a waiver from the requirement to keep invoices or invoice copies of alcoholic liquor purchases on the licensed premises for 90 days after purchase. The Commission states that it does not want to proceed with the amendment at this time. Those affected by this withdrawal include small businesses involved in the retail liquor business that are seeking a waiver in order to keep books and records at a central business location.

Questions/requests for copies: Anne T. Treonis, ILCC, 100 W. Randolph, Ste. 5-300, Chicago IL 60601, 312/814-2604, E-mail:anne.treonis@cms.state.il.us

Second Notices

The following rulemaking was moved to second notice this week by the agency listed below, commencing the JCAR review period. The rulemaking will be considered at the at the 3/7/00 meeting in Springfield.

DEPARTMENT OF INSURANCE

"Portability of Creditable Service Time for Downstate and Suburban Police Pension Funds" (50 Ill Adm Code 4404) proposed 12/10/99 (23 Ill Reg 14178)

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