

**REGULATION REVIEW COMMITTEE**  
**PARLIAMENT OF NEW SOUTH WALES**

---

---

---

---

**REPORT UPON THE OPERATION OF THE SUBORDINATE  
LEGISLATION ACT 1989 WITH RESPECT TO THE POSTPONEMENT OF  
THE STAGED REPEAL OF PRINCIPAL STATUTORY RULES**

---

---

---

---

Report No. 28  
September 1994

**Members:**

- . Mr. A. J. Cruickshank, M.P. [Chairman]
- . The Hon. S. B. Mutch, M.A., LL.B., M.L.C. [Vice Chairman]
- . Mr. M. Iemma, B.E.C., M.P.
- . Dr. Elizabeth Kernohan, M.Sc. Agr., Ph.D.
- . Mr. J.S.P. Kinross, LL.B., B.Com., A.C.A., F.T.I.A., M.P.
- . Mr. C. J. Knowles, M.P.
- . The Hon. P.F. O'Grady, M.L.C.
- . Mr. W. B. Rixon, M.P.
- . Mr. K.M. Yeadon, B.A., M.P.

**Staff:**

- . Mr. J. B. Jefferis, B.A. LL.B., Director
- . Mr. G.S. Hogg, Dip. Law [B.A.B.], Dip. Crim., Legal Officer
- . Mr. J. H. Donohue, B.A., Dip. F.H.S. Committee Clerk

---

---

REPORT UPON THE OPERATION OF THE SUBORDINATE LEGISLATION ACT  
1989 WITH RESPECT TO THE POSTPONEMENT OF THE STAGED REPEAL OF  
PRINCIPAL STATUTORY RULES

Under the Subordinate Legislation Act 1989 all regulations currently in force in New South Wales are being re-examined, on cost benefit and cost effectiveness principles, over a 5 year period starting on a chronological basis with the oldest of the regulations.

That stage repeal process involves the automatic repeal of existing regulations 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 Regulations made after 1 September 1990 will be automatically repealed five years after they are made.

Section 11 of the Subordinate Legislation Act enables departments to seek postponement of this Staged Repeal process. When the Regulation Review Committee first developed its proposals for the staged repeal it had in mind that regulations such as the Local Government Act Ordinances which had been under active review within a department for a considerable time might require a provision permitting the extension of the time for their review.

In its proposals for the Subordinate Legislation Act published in July 1989 the Committee said:

*"Clause 10 provides that 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order published in the Gazette, from time to time postpone by one year the date on which a specified statutory rule is repealed by Clause 9.*

*The reason for such a postponement is that the Local Government Act 1919 has been under detailed and active review for some time. The review is being conducted in stages and a package of legislation is scheduled for introduction into Parliament later this year. A review of local government ordinances under the Act will follow the revision of the Act. In view of the progress already made in this area, the Regulation Review Committee believes that it might be inappropriate to impose a new set of procedures for the review of local government ordinances at this stage. There might also be practical difficulties in revising the ordinances within the time frame of the draft Bill.*

*The Secretary of the Local Government and Shires Association of NSW, Mr W Henningham, felt that it would be premature for the Association to comment on the proposals until the current review of the Local Government Act has been completed and the effect of the review on the related regulations could be assessed.*

---

---

*In its response on this matter, the Government indicated that the Attorney-General and the Minister for Business and Consumer Affairs will consult with the Minister for Local Government, in order to determine whether such a postponement of ordinances from the first stage should actually take place. Accordingly, the Regulation Review Committee has agreed that until a Government decision is reached, the local government ordinances should be included in the first stage of the proposed timetable, as would ordinarily be the case."*

Clause 10 of the Bill was passed as Section 11 of the Act and this enabled postponement by the Governor of the Staged Repeal of the Regulation for one year. Such a postponement could only be made on a maximum of two occasions.

In 1993 a number of regulations had been postponed on two occasions and were found to be approaching their staged repeal without any substantive review having been completed. Significantly the Local Government Ordinances were not such a case. Their review had been completed and new regulations were in fact made in 1993 within the time permitted by the Act. In 1993 without prior notice to the Committee amendments to the Subordinate Legislation Act was introduced to permit a further postponement of up to five occasions to enable these outstanding reviews to be completed.

That amendment increased from 2 years to 5 years the maximum number of occasions on which the automatic repeal of a statutory rule could be postponed. The Premier on 15 May 1993 informed the Committee as follows:

*"The Bill also amends s.11 of the Subordinate Legislation Act 1989 to provide that the repeal of a particular statutory rule can be postponed on a further three occasions in addition to the present two occasions on which postponement of repeal is permitted. However, on the occasion of a third, fourth or fifth postponement, the responsible Minister is required to notify the Regulation Review Committee of that fact as soon as possible.*

*It is envisaged that on receipt of such notification the Committee would review the reasons for the postponement and, if considered appropriate, report to the Parliament on the matter. The type of circumstances in which it is considered that additional postponements would be appropriate are where there are proposals for the enabling legislation under which a statutory rule is made to be replaced or repealed, or where proposals for uniform regulations with other jurisdictions are under consideration. In these circumstances, it would be wasteful of both Government resources and those of the Regulation Review Committee to be involved in the making and considering of statutory rules which would only have a limited lifespan before being repealed."*

---

The Committee was concerned over the possible abuse of this power. It wrote to the Premier on 18th May 1993 after the amending bill had been introduced.

*"I would like to propose 2 changes to this legislation. The first relates to the increase from 2 years to 5 years of the maximum number of occasions on which the automatic repeal of a statutory rule may be postponed. Under the Bill, the responsible Minister must cause notice of the postponement to be given to the Regulation Review Committee as soon as possible. In your letter you said that following that notification the Committee would be in a position to review the reasons for the postponement and, if it considered appropriate, to report to the Parliament on the matter.*

*The notice to the Committee necessarily occurs after the statutory rule has been formally postponed. It will therefore give the Committee no effective opportunity to put its viewpoint to the Parliament on the merits of the postponement. Once the order has been postponed there is no authority in the legislation that could revoke the effect of that order. Consequently even if the Committee presents its viewpoint to the Parliament, no action can be taken.*

*I therefore propose that the Bill be amended so as to afford the Committee at least one month's notice of any recommendation to the Governor for postponement beyond the 2 year period. It would also be necessary, I think, to formalize the Committee's intended role by including a suitable head of authority in Section 9 of the Regulation Review Act. My Committee is concerned that the power to grant extensions for compliance with the requirements of the Subordinate Legislation Act is a matter for suitable and effective review by my Committee. It notes that in Queensland and Victoria similar exemption provisions have been abused."*

The Bill was subsequently amended by adding the following clauses to Section 11:

"(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."

---

---

**Postponement of repeal of Clean Air Regulations**

On 14 February 1994 the Minister for the Environment wrote to the Committee advising of the proposed third postponement of the Clean Air Regulations. This was requested because the whole regulatory framework of the Environment Protection Act was under review and was anticipated to be completed during 1994.

**Postponement of repeal of Occupational Health and Safety (Fumigation and Pesticides) Regulation**

On 17 June 1994 the Minister for Industrial Relations advised of the postponement of the Occupational Health and Safety (Fumigation and Pesticides) Regulation for a third time as they are transitional regulations and will be replaced by the Workplace Hazardous Substances Regulation in mid 1995.

**Postponement of repeal of Traffic Regulations**

While these third postponements may be justifiable, the Committee considers that the circumstances requiring the postponement of a regulation should be more formally stated so that they can be examined and monitored by the Committee and by Parliament. As an example of a regulation where the Committee has received inadequate information in respect of a third and fourth postponement, Parliament's attention is drawn to the current review of the Motor Traffic Regulations.

The Minister for Transport and Minister for Roads wrote to the Committee on 29 July 1994 as follows:

*"As you are aware, the Motor Traffic Regulations 1935, the General Traffic (Pedestrian) Regulations 1917, and the General Traffic Regulations 1916 made under the Traffic Act 1909, are due to be repealed from 1 September 1994 pursuant to Section 11 of the Subordinate Legislation Act 1989.*

*These regulations were all originally due to be repealed on 1 September 1991. The repeal has been deferred for three separate periods of 12 months each.*

*The deferral of the repeal of the above Traffic Regulations was based on the proposed implementation of the National Road Transport law which is intended to substantially replace these Regulations.*

---

*The Roads (Weight of Loads on Main Roads) Transitional Regulations 1993 and the Road (Weight of Loads on Roads other than Main Roads) Transitional Regulations 1993 are, like the Traffic Regulations referred to above, to be replaced by the National Road Transport Law.*

*In my view it is essential that the existing Regulations continue while efforts continue to finalise the National Road Transport Law."*

The Committee considers it appropriate to report to Parliament expressing its concern that the national timetable for review of legislation departs from the State's timetable established under the Subordinate Legislation Act, and that the need for adequate scrutiny of instruments of this kind requires attention.

### **Postponement of repeal of Factories (Health & Safety) General Regulations and the Child Welfare Regulations**

On the 26th and 30th July 1993 the Committee received notification of the proposed postponement of the staged repeal for a third time of the Factories (Health and Safety) General Regulations 1913 and the Child Welfare Regulations 1940.

With respect to the Factories (General) Regulations the Minister advised that:  
*"The timetable for the development of National Occupational Health and Safety Regulations is not compatible with the Subordinate Legislation Act Program of Staged Repeals. The WorkCover Authority's Regulation Development Program requires the flexibility of the postponement of provisions to reconcile the competing obligations.*

*The Factories (Health and Safety) General Regulations are of continuing utility in protecting health and safety in the workplace and must be retained until a National Working Environment Regulation is finalised. The development of this Regulation will commence in late 1993".*

The Committee considered that this was a further case where the national scheme for review of regulations is not synchronous with the Staged Repeal programme in the New South Wales Subordinate Legislation Act.

### **Recommendation No. 1**

The statutory life of a regulation (excluding postponement) is 5 years. The Committee recommends that where there is no reasonable likelihood of the national review of a regulation being completed and acted upon within those 5 years that the Minister should not seek postponement but should carry out the required review under the Subordinate Regulation Act.

---

---

### **Postponement of repeal of Animal Trades Regulations**

In a letter of 25 January 1994 the Minister for Agriculture gave the Committee notice of the proposed postponement of repeal under the Subordinate Legislation Act for the third occasion of these regulations. The regulations in force pending completion of the ministerial review of the Cruelty to Animals Act.

The group of regulations known as the Animal Trades Regulations comprise:

- Prevention of Cruelty to Animals (Animal Boarding Establishments and Pet Shops) Regulations 1954
- Prevention of Cruelty to Animals (Kennels) Regulations 1954
- Prevention of Cruelty to Animals (Livery Stables) Regulations 1953
- Prevention of Cruelty to Animals (Riding Schools) Regulations.

In its letter of reply dated 17 February 1994 (copy attached) the Committee advised the Minister that the postponement of repeal of the regulations to keep them in force was undermined by the continuing policy of New South Wales Agriculture not to enforce them. The Committee advised the Minister that, as a result of that policy, no animal trade licences were now in force in New South Wales.

The Committee drew the Minister's attention to the disallowance by Parliament in 1990 of a regulation which had repealed the Animal Trades Regulations.

The Committee advised the Minister that the current non-enforcement of these Regulations was unsupported on legal grounds and was contrary to the intention of Parliament.

In December 1993 the Committee reported to Parliament upon the matter (Report No 24) reiterating that the current Ministerial policy and departmental practice on the matter was contrary to the specific intention of Parliament.

In a letter dated 4 May 1994 the Minister for Agriculture has responded to the Committee's letter of 17 February 1994. The Minister advises that the recently completed review of the Prevention of Cruelty to Animal Act recommends the retention of the Animal Trades Regulations. However, the Minister argues that the existing regulations are outdated and ineffective and would be expensive to enforce. These arguments were previously the basis for the repeal of the regulations in 1990 and were taken into account in the debate on disallowance. The Minister's letter is confusing as he is arguing both for keeping the regulations on foot but at the same time refusing to enforce them.

---

Two issues need to be taken into account by Parliament. The first is that the stance taken by NSW Agriculture must undermine Parliament's most important safeguard on the abuse of delegated legislation, that is, its power of disallowance.

The second issue is whether the stance by NSW Agriculture has adverse consequences in terms of the objects of the Prevention of Cruelty to Animals Act. In debate on Report No 24 (Hansard 3 March 1994) the chairman stated that the failure to enforce the regulations could seriously compromise any proceedings taken under the Cruelty to Animals Act against persons carrying on animal trades. The Chairman also made the following remarks:

*"During December 1993, in the television program "A Current Affair" it was stated that there is an increasing incidence of animals dying within days of their purchase from pet shops. In that program Mr Charles Wright, head of the Royal Society for the Prevention of Cruelty to animals, called for stricter laws to regulate the sale of animals.*

*The program made out a substantial case that existing laws were failing to give adequate customer protection. It mentioned the frustration of the RSPCA and gave one example of a person still legally able to sell animals even after being convicted 19 times of offences under the Prevention of Cruelty to animals Act. If the licensing regulations had been enforced it is quite likely that such a person could have been compelled to cease trading. During the program the statement was made that New South Wales does not require the licensing of pet shops. That is not the intention of Parliament. It is rather a case of NSW Agriculture deciding to go its own way regardless of the wishes of this Parliament."*

### **Recommendation No 2**

Positive action needs to be taken by the Government to resolve the continuing departure by New South Wales Agriculture from Parliament's clear intention.

---

---

### **Postponement of repeal of Child Welfare Regulations**

With respect to the Child Welfare Regulations, the Minister advised the Premier as follows:

*"I am writing to you as the Minister responsible for the Subordinate Legislation Act 1989, seeking a third postponement of the repeal of the Child Welfare Regulations 1940. Those regulations control the employment of children below school age and also the licensing of occupational centres for the disabled.*

*In relation to the first of these matters, the Department has released a draft regulation and Regulatory Impact Statement on the Children (Care and Protection - Child Employment) Regulation 1993. The consultation period concludes on 14 August 1993 but there is some doubt whether all the necessary processes can be completed before the existing regulations would cease to operate on 1 September 1993.*

*A third postponement of the repeal of the existing regulations has become possible by a recent amendment to the Subordinate Legislation Act. However, that amendment requires that postponement can only be made if the Minister gives the Regulation Review Committee at least one month's written notice of the proposed postponement. Effectively, that means that notice must be given to the Committee before 1 August 1993.*

*The consequence of not postponing the existing regulations would be a hiatus in the regulatory control of children's employment pending the commencement of the new regulation. That is not a desirable position for the Government to be in, given the potential for criticism if a sensitive area such as children's employment is left unregulated.*

*In relation to the licensing of occupational centres for the disabled, this function has now passed to the Commonwealth as a result of the Commonwealth/State Disability Agreement which was triggered shortly after the Disability Services Act 1993 commenced on 8 April 1993. These clauses of the regulation could now be repealed. This will be done as a routine exercise after the repeal of the existing regulation has been postponed.*

*For the reasons indicated, I would be grateful to have your early reply to this request. Because of the time constraints I have let the Chairman of the Regulation Review Committee know that I have sought your approval to the postponement of the repeal of the regulations."*

---

Leaving aside the repeal of the provisions now to be administered by the Commonwealth, there appears to be no reason why the drafting of the new regulation has been left to this late date. The date for the staged repeal of these regulations has been known by the Department since the Subordinate Legislation Act was passed in 1989. The Minister is essentially saying that it is not possible to comply with the Staged Repeal Programme as it stands because of the deadline imposed by the programme itself.

The Minister has had 4 years in which to produce new regulations, and given that a new regulation will only have a natural life of 5 years, there should be no excuse for this delay in the present circumstances.

### **Postponement of repeal of Water Regulations**

A further case where inadequate information has been provided is the current review of the Water Regulations. These regulations comprise the following:

- +Water (Part 2) Regulations (1946)[+ Third extension requested
- \*Water (Part 3) Regulations (1930) \* Fourth extension]
- \*Water (Part 5) General Regulations (1930)
- Water (Part 5) Drillers' Licences Regulations (1966)
- \*Drainage Regulations 1939
- Private irrigation Districts (First election of Boards of Management) Regulation (1975)
- Water (Part 8) Regulations

The Minister for Land and Water Conservation wrote to the Committee on 5 July 1993 in the following terms:

*"As part of its Legislative Reform Program, the Department of Water Resources has had legislation drafted which will supersede the Drainage Act, 1939 and (so far as is relevant to this letter) Parts 3 and 5 of the Water Act, 1912.*

*The current position with the draft legislation is that it has been forwarded to Cabinet Office, which is awaiting the finalisation of several current Inquiries affecting the water industry before the final Cabinet Minute is considered by Cabinet. One of the Inquiries involves a Parliamentary Sub-Committee.*

---

*To date, two postponements of the 'sunset' provisions under Section 11(1) of the Subordinate Legislation Act have been granted by the Governor. Under recent amendments to that Act (copy attached), I am required to give you notice that I have applied to Parliamentary Counsel for a further postponement, on the grounds that:*

- (a) the regulations under the draft legislation will vary significantly from the current regulations;*
- (b) the department has carried out extensive consultation at considerable expense with user groups regarding the draft legislation and the theme of future regulations under that legislation; and*
- (c) the processes for complying with the Subordinate Legislation Act for regulations under the current legislation (coupled with the knowledge that the users want different regulations not possible under the current legislation) would result in a duplication of effort and expenditure.*

*Copies of the relevant regulations are enclosed for your information. I note that recent Statute Law Revision amendments will enable the 'forms' in the regulations to be removed."*

On 20 July 1993 the Committee responded as follows:

*"I refer to the letter of 5th July 1993 sent by the Acting Minister, concerning the proposed third postponement of the staged repeal of the Water (Part III) Regulations, Water (Part V) General Regulations and the Drainage Regulations, 1939.*

*My Committee is concerned at the delay in reviewing these regulations particularly as their pending staged repeal must have been known by your Department since the Subordinate legislation Act was passed in September 1989. My Committee accordingly seeks your advice as to the reasons why the review of the Regulations could not have been completed much earlier and prior to the current review of the principal Acts. Secondly, my Committee seeks your advice as to the timetable for the review of the Acts and whether the Regulations will require a further postponement in 1994."*

The Minister responded on 12 August 1993 as follows:

*"I refer to your letter of 20 July 1993 concerning the Regulations under the Drainage Act and the Water Act and querying whether the Department of Water Resources should have carried out the review process - required by the Subordinate Legislation Act for regulations under the existing legislation - rather than seek a postponement of the expiry provisions of that latter Act.*

---

*The department informs me that, prior to 1989 - when the Subordinate Legislation Act was passed, it carried out an extensive review of the Drainage Act, Part 3 of the Water Act and the respective Regulations, and conferred with the relevant Drainage Unions and Irrigation and Bore Water Trusts on the subject. Discussions were held with some 150 bodies spread over the whole state at considerable expense to the department and members of the unions and trusts.*

*The result of the review was that the legislation had significant deficiencies which carried through to the regulations. The scope of the deficiencies in the legislation went far beyond the matters capable of amendment by statute law revision. The upshot is that the unions and trusts want the legislation and regulations changed as a single package and the department receives frequent enquires on the subject.*

*Part 5 of the Water Act and the Regulations under that Part were, at the same time, the subject of a similar review and consultative process with peak groups, including the NSW Irrigators' Council. Legislation, replacing the Drainage Act and the Water Act, has been drafted following that review.*

*Accordingly, the department considered that there seemed to be little point in carrying out a further review under the Subordinate Legislation Act, particularly as it had complied with the spirit of the Act as regards consultation. It is also difficult to see how the department could seriously prepare a regulatory impact statement for regulations under the current legislation which advocated adoption of those regulations as, clearly, they would not confer the greatest net benefit to the community as specified by the Act.*

*Regarding the timetable for review of the matters affecting the draft legislation, the Parliamentary Sub-Committee has commenced its review. It is anticipated that its findings will be presented to Cabinet by November 1993. It is possible that the legislation will be presented in the Budget Session, failing which it will be carried over to the following Session.*

*Accordingly, it is not expected that a further extension will be required."*

On 24 May 1994 the Minister gave the Committee notice that he had applied to the Parliamentary Counsel for further postponement of the staged repeal of the regulations. His letter states:

*"As part of its Legislative Reform Program, the Department of Water Resources has had legislation drafted which will supersede the Drainage Act, 1939 and (so far as is relevant to this letter) Parts 3 and 5 of the Water Act, 1912.*

---

*The current position with the department's Legislative Reform Program is that all agencies have signed off a recent draft Cabinet Minute. However, the Cabinet Office has now decided that a further Cabinet Minute is required, but details of the requirements remain to be decided.*

*To date, two or three postponements of the 'sunset' provisions under Section 11(1) of the Subordinate Legislation Act have been granted for some of the Regulations by the Governor (see attached list). Under that Act, I am required to give you notice that I have applied to Parliamentary Counsel for a further postponement, on the grounds that:*

- a) the regulations under the draft legislation will vary significantly from the current regulations*
- b) the department has carried out extensive consultation at considerable expense with user groups regarding the draft legislation and the theme of future regulations under that legislation' and*
- c) the processes for complying with the Subordinate Legislation Act for regulations under the current legislation (coupled with the knowledge that the users want different regulations not possible under the current legislation) would result in a duplication of effort and expenditure (the latter would be at least \$50,000).*

*Although I indicated in my letter to you of 12 August 1993 that a Parliamentary Sub-Committee would complete its review in November 1993, the review was completed considerably later, contributing significantly to difficulty in finalising the Bills in time for the Autumn 1994 session of Parliament."*

The Minister's current advice is that the Parliamentary Committee's review was delayed which has in turn delayed the review of the regulations. Although the Minister has referred to the consultation undertaken to date on the new legislation and the costs that would be incurred in an assessment of the regulations as they currently exist the Committee believes that a definite statement from the Minister as to whether this will be the final postponement of the regulations is required. In future cases in order to save the time of the Committee and the Ministers a more formal approach is required. This is addressed by the following recommendation.

**Recommendation No 3**

The Committee recommends that in future cases the schedule set out in the table below should be completed and sent to the Committee with each notification of a proposed postponement.

**SCHEDULE**

1. Name of Principal Statutory Rule:
2. Original Gazettal Date:
3. Date of 1st postponement and reasons for postponement:
4. Date of 2nd postponement and reasons for postponement:
5. Date of notification of Committee of proposed 3rd postponement and reasons for postponement
6. Date of notification of Committee of proposed 4th postponement and reasons for postponement:
7. Date of notification of Committee of proposed 5th postponement and reasons postponement:
8. Attach a statement indicating the progress made in reviewing the regulation to date and the proposed timetable for completion of the review. Indicate approximate date for repeal of regulation. If a timetable has been previously advised and has been departed from state reasons for departure.
9. If the Act under which the regulation is made is being reviewed indicate the stage the review has reached i.e. initial Cabinet approval, Discussion Draft, subsequent Cabinet approval, first reading etc.
10. Indicate the name, objectives and gazettal date of any amendments made to the regulation during all periods of postponement:
11. Indicate whether the review is being conducted within the department or authority, or by consultants, or as part of a review with other States.
12. Name of any intergovernmental agreement relating to the review:
13. Indicate approximate cost of review to date: \$
14. Indicate approximate cost of staged repeal and replacement of regulation if postponement was not made: \$
15. Name and phone number of a contact officer who could brief the Committee on the review:

The Committee believes that this schedule will provide Ministers, the Parliament and the Committee with comprehensive information on the review of delegated legislation when that review is postponed beyond the staged repeal timetable in the Act.



**Adrian Cruickshank**  
**Chairman**  
**Regulation Review Committee**

# LEGISLATIVE ASSEMBLY

## REGULATION REVIEW COMMITTEE

Member to say -

Mr. SPEAKER:

I table report No. 28 of the Regulation Review Committee entitled "Report upon the operation of the Subordinate Legislation Act 1989 with respect to the postponement of the staged repeal of the principal statutory rules" dated September, 1994.

I move: That the report be printed.

Question put.

.