Regulatory Impact Statements and the Staged Repeal of Regulations

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For some years the states of NSW, Victoria and Tasmania have required the preparation of regulatory impact statements before proposals to make regulations are finally approved The essential features of regulatory impact statements are a comparison of the costs and benefits of the regulation with other alternatives that can wholly or substantially achieve the objectives of the regulation, and a public consultation programme

In NSW these requirements had their origin in the establishment of the Regulation Review Committee in 1987 under the *Regulation Review Act*

The Regulation Review Committee has the function of examining regulations to ensure that they will comply with the provisions of its Act The principal functions are to inquire into and report to Parliament on whether a regulation trespasses unduly on personal rights and liberties or has an adverse impact on business Other functions are to determine whether the regulation complies with the objects of the Act under which it was made, ie, whether it is ultra vires, whether it accords with the spirit and intent of that Act, whether it requires elucidation or whether it conflicts with other legislation

One of its most important functions required the Committee to develop a systematic review of current regulations on a chronological basis according to the date of the introduction of the regulations

In 1989, to implement the staged repeal requirement of its terms of reference, the Committee brought forward proposals for the *Subordinate Legislation Act* That Act requires departments to carry out an assessment of the costs and benefits of every regulation If the regulation is what is called a "principal statutory rule", that is a regulation that contains provisions apart from just amendments or repeals of existing regulations, then the assessment must be documented in a regulatory impact statement and made available for public comment

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 The Committee notices a more cautious and careful approach to the making of regulations on the part of government departments It is now clear to those government departments that they will be held accountable through the Committee for their regulatory proposals 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

Staged Repeal Process

The staged repeal process involves the automatic repeal of existing regulations made before 1 September 1990 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 Regulations or statutory rules, are only infrequently tested by debate before both Houses of Parliament Nevertheless these regulations often affect the citizen just as much as acts of Parliament

Some of the current regulations are outdated, unnecessary, inconsistent with other regulations and may perhaps result in a net cost to the community rather than in a net benefit Under the mandatory review process, these regulations, depending on when they were gazetted, successively die out The mandatory repeal of the State's regulations is arranged in a way to give departments sufficient time to examine the regulations administered by them

Regulatory Impact Statements

Any Minister wishing to re-introduce a regulation in the staged repeal programme or to make an entirely new regulation has to do so on the basis of a cost/benefit analysis The Act also contains guidelines for the preparation of regulations and provisions for regulatory impact statements Regulatory impact statements are required in the case of principal statutory rules This excludes regulations that are direct amendments or repeals

The essential features of a regulatory impact statement (RIS) are an identification of the objectives of the regulatory proposal, identification of 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 programme undertaken with the public and relevant interest groups These requirements are set out in Schedule 2 of the *Subordinate Legislation Act*

The purpose of a regulatory impact statement is to ensure that the economic and social costs and benefits of a regulatory proposal are fully examined so that the Minister proposing the regulation and the public can be satisfied that the benefits of a regulation exceed the costs The Act sets out in detail the matters to be included in an RIS

The Act is flexible in that provisions exist for a regulation, which would normally require an impact statement, to be made without one if the Attorney General believes that special circumstances warrant such action However, in such cases an RIS must be prepared within four months of the making of the regulation

If the impact statement subsequently prepared disclosed a deficiency in the regulation then the responsible Minister would be expected to correct it The Regulation Review Committee receives a copy of all regulatory impact statements and is in a position to draw that situation to the attention of Parliament Similarly, the Committee can make an adverse report to Parliament if the Minister fails to produce any impact statement at all or otherwise fails to comply with the *Subordinate Legislation Act*. The Committee has made a large number of reports to Parliament highlighting departures of this kind and making positive recommendations to correct them

Section 9 of the *Regulation Review Act* requires the Regulation Review Committee to report to Parliament from time to time in relation to the staged repeal process that it initiated under the *Subordinate Legislation Act*.

The Parliamentary Counsel of NSW constantly monitors the numbers of regulations in each stage to ensure they are not overlooked with respect to the requirement for a regulatory impact statement Figures supplied by the Parliamentary Counsel show that the numbers of regulations have been reduced by 30% from the date of commencement of the Act on 1 July 1990 to 1 January 1995. This is a reduction in numbers of regulations from 976 to 641, and the total number of pages in the regulations has been reduced from 15075 to 9476

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, with no calculations at all, which merely sets 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

Consultation

All of the assessment carried out under the regulatory impact statement would be of little value if it were not subject to public scrutiny as required under the *Subordinate Legislation Act*. Section 5 requires a proposed consultation programme to be set out in the regulatory impact statement itself Under section 5 the Minister must also actively seek the comments of groups that he knows will be affected by the regulation, such as industry representative organisations, public interest advocacy groups, and environment groups. The Minister must provide the Committee with a copy of the RIS and any submissions on it within 14 days of the regulation having been made If the Minister receives any comments from these groups he must give

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them appropriate consideration before taking any further action. Ideally, the Minister takes into account the submissions and makes appropriate amendments to the draft regulation. It is sometimes the case that the whole regulation has to be reconsidered as a consequence of the public submissions. All too often though the Committee notes that despite well-reasoned and extensive public submissions the Minister proceeds with the regulation as originally drafted. The Committee must therefore frequently request additional details of the consideration the Minister gave to the submissions.

One aspect of the consultation programme that has caused the Committee some concern is recourse to consultative committees by Ministers in substitution of a more broader public consultation programme. It is not uncommon for Ministers to constitute consultative committees for the purpose of discussing with the relevant industry sector and public interest groups controversial proposals arising under their administration. Such committees have been the feature of government for many years. They do not however, constitute sufficient consultation for the purpose of the *Subordinate Legislation Act*. The Administrative Review Council of the Commonwealth in its 1992 report on *Rule Making by Commonwealth Agencies* (no.35 of 1992) saw the danger of relying solely on consultation with these committees. They termed this 'captured consultation'. Often the advice of these committees is coloured by the interaction of individual members and the compromises they have reached over a number of years. It does not necessarily reflect the views of the individual organisations represented on the committee nor for that matter the public in general. Accordingly, the Committee insists that a broad public consultation programme be undertaken on any proposal under the *Subordinate Legislation Act*.

Use of RISs as Extrinsic Material in the Interpretation of Legislation

Regulatory impact statements are a new source of extrinsic evidence as to the purpose of regulatory provisions. Section 34 of the NSW *Interpretation Act 1987* states that in the interpretation of a provision of legislation, if any material not forming part of it is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material -

a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision (taking into account its context in the legislation, the purpose or object underlying the legislation); or
b) to determine the meaning of the provision -
   i) if the provision is ambiguous or obscure; or
   ii) if the ordinary meaning conveyed by the text of the provision (taking into account its context and purpose) leads to a result that is manifestly absurd or is unreasonable

The section goes on to provide specific cases of the material that may be considered in the interpretation of a provision.

While RISs do not come within these specific cases they nevertheless come within the general words of the section. In fact, as RISs are the instruments which decide whether a regulatory proposal or another alternative should be proceeded with, they are the prime source of extrinsic evidence on the purpose of a regulation. Section 34 is similar to provisions in interpretation legislation of other states and law librarians should be aware of this new aid to construction of legislation.

Regulation Review in Other Australian Legislatures

COMMONWEALTH

The Senate Standing Committee on Regulations and Ordinances scrutinises subordinate legislation to ensure:

i) that it is in accordance with the statute;
ii) that it does not trespass unduly on personal rights and liberties;
iii) that it does not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal; and
iv) that it does not contain matter more appropriate for parliamentary enactment

Apart from one alteration its terms of reference have been unchanged since the establishment of the Committee in 1932. The Committee has argued against any change in these terms of reference though a strong case for greater detail along the lines of the scrutiny committees in New South Wales and Victoria was put by the Administrative Review Council in its report on *Rule Making by Commonwealth Agencies* (no 35 of 1992). The Council has recommended that the Senate give consideration to elaborating on its terms of reference having regard to its own experience and to the developments that have taken place in other jurisdictions.

The Administrative Review Council in its report also recommended the introduction of a *Legislative Instruments Bill*. This Bill was recently introduced in the Commonwealth and referred to the Senate Regulations and Ordinances Committee for inquiry. The main features of the Bill were outlined in an article by Richard Griffith in the August 1994 edition of the *Australian Law Librarian* entitled "Canberra Rules: With a Register of Legislative Instruments". The main purpose of this Bill is to require mandatory consultation with respect to subordinate legislation affecting business. The main problem with the Bill is that it omits the staged repeal programme for subordinate legislation which was specifically recommended by the Administrative Review Council after it had reviewed the position in Australian states.

The Business Council of Australia in a submission to the Regulation and Ordinances Committee of the Senate said that this was a major defect. The Government believes that the staged repeal programme will be too costly and that this requires further investigation after the Bill is passed. The Bill was also referred to the Legal and Constitutional Affairs Committee of the House of Representatives. The Regulation Review Committee of NSW has made a submission to the Legal and Constitutional Affairs Committee. The Chairman's submission said:

"A scheme for simply back capturing certain legislative instruments without mandatory sunsetting is far from cost effective From the perspective of Government it may well appear that sunsetting is a costly process but from the perspective of the community and industry any scheme which regularly tests the need for particular legislative instruments on a five, seven, or ten year cycle is clearly cost effective This was the philosophy behind the *Subordinate Legislation Act* of NSW and the Premier of the day in proposing that Act stated that the onus should be cast onto those persons who wish to maintain regulations to establish that they are objectively in the best interests of the community

Imposing cost benefit assessments on new regulations alone, is in my view, only doing half the job The vast numbers of existing regulations which continue to burden the public and industry must necessarily be subject to a mandatory scheme for testing their merits

It has been argued that if sunsetting is introduced, Government will run the risk of major regulations being repealed without being replaced within the sunset period Similar concerns were raised when the *Subordinate Legislation Act* of NSW was passed No such case has eventuated Such concerns are groundless if an effective monitoring regime is introduced In NSW the Parliamentary Counsel regularly publishes a document entitled *'Status of Statutory Rules'* which lists all regulations in their respective stages There is accordingly no justification for any department to overlook the forthcoming repeal of a regulation

Based upon my experience in the cost benefit assessment of legislation in NSW, a scheme for review of subordinate legislation is only cost effective if it is coupled with a staged repeal programme based on the sunsetting of regulations

My other reservations with respect to the Bill are that there are no guidelines as to the content of the required cost benefit analysis and there is no requirement for quantification of that analysis As I indicated in my letter to the Senate Committee the definition of "legislative instrument" will necessitate a form of cost benefit analysis to determine whether a regulation imposes, varies or removes an obligation or right I am also concerned that the breadth of exemptions in clause 19, particularly clause 19(1)(ii), (iv), (v) and (vii) will tend to defeat the purpose of the Bill

In conclusion I would say that your Committee should call for an additional financial impact statement to that contained in the explanatory memorandum for the Bill. As I indicated in my letter to the Senate Committee the present impact statement has only dealt with costs to government not the costs to the community These costs would have to be assessed to determine whether the Bill was cost effective This statement should include a comparison of the respective costs and benefits of the original Administrative Review Council proposals with the Bill in its present form "

Queensland

In Queensland two major pieces of legislation have been introduced following recommendations of the Electoral and Administrative Review Commission on Parliamentary Committees These are the *Legislative Standards Act* and the *Statutory Instruments Act* The *Legislative Standards Act* lays down fundamental legislative principles which must be adopted in all legislation The *Statutory Instruments Act* defines statutory rule and subordinate legislation and provides for notification, tabling and disallowance of subordinate legislation The definition of statutory rule embraces a number of instruments which are of a "legislative" character As this term is undefined the breadth of the Act is uncertain

In Queensland there is a Committee of Subordinate Legislation which consists of not less than 5 nor more than 9 members of the Queensland Legislative Assembly. The Committee has the power to consider regulations, rules, by-laws, ordinances, orders-in-council or proclamations. It reviews approximately 700 pieces of subordinate legislation each year. Its review grounds of subordinate legislation are:

(a) whether the Regulations are in accord with the general objects of the Act pursuant to which they are made;
(b) whether the Regulations trespass unduly on rights previously established by law;
(c) whether the Regulations contain matter which in the opinion of the Committee should properly be dealt with in an Act of Parliament;
(d) whether for any special reason the form or purport of the Regulations calls for elucidation;
(e) whether the Regulations unduly make rights dependent upon administrative and not upon judicial decisions

The supporting staff consists of a legal consultant and a part time research officer. The Electoral and Administrative Review Commission in its October 1992 Report recommended that this Committee be replaced by a Parliamentary Scrutiny of Legislation Committee to review each bill introduced into the Legislative Assembly as well as any subordinate legislation laid before that Assembly. The Government has not yet decided whether to implement that recommendation

SOUTH AUSTRALIA

In South Australia the former Joint Select Committee has been replaced by a Legislation Review Committee set up under the *Parliamentary Committees Act 1991*. The Committee has a broad power to review regulations. Regulations are required to contain a sunrise clause indicating their date of commencement and requirements are contained within the *Subordinate Legislation Act* for the sunset of regulations. There are no formal requirements for regulatory impact statements.

TASMANIA

In Tasmania the Subordinate Legislation Committee was established in 1969. It is a joint committee comprising three members from each House. The Committee examines approximately 200 regulations each year along with over 150 local government by-laws

A major development has been the passage of the *Subordinate Legislation Act 1992*. That Act provides for repeal of all existing subordinate legislation over a period of ten years. New regulations expire after ten years and there is a requirement for a regulatory impact statement to be prepared for each new regulation where it is likely to have an appreciable impact on the community

VICTORIA

The Scrutiny of Acts and Regulations Committee of Victoria comprises three members appointed from the Legislative Council and six members from the Legislative Assembly It has three functions One is to review Acts of Parliament referred to it, another is to scrutinise bills and the third function, which is performed by a subcommittee, is to review regulations It scrutinises the validity of regulations, their compliance with guidelines, the need and justification for the regulation and its financial and social implications

WESTERN AUSTRALIA

In Western Australia the Joint Select Committee on Delegated Legislation considers all regulations while they are subject to disallowance The grounds for review of regulations are limited to the traditional review grounds followed by the Senate Committee

AUSTRALIAN CAPITAL TERRITORY

The Standing Committee on Scrutiny of Bills and Subordinate Legislation of the ACT consists of three members supported by a secretary, deputy secretary and an independent legal adviser The Committee examines bills and subordinate legislation and presents approximately 20 reports each year

NORTHERN TERRITORY

The Northern Territory Committee on Subordinate Legislation principally examines regulations Their terms of reference enable them also to inquire into annual reports and other papers produced by government departments There is no requirement for preparation of regulatory impact statements The Committee does not have the benefit of a legal adviser in preparing its reports

Uniform Scrutiny Principles

At the end of October 1994 the Regulation Review Committee convened a meeting of all Australian Scrutiny of Legislation Committees The purpose of the meeting was to develop a discussion paper for public comment on means to develop common scrutiny principles among committees The work of the meeting is of great importance given that the current trend is towards a greater amount of uniform legislation between the states and the Commonwealth and most of that legislation passes without adequate scrutiny on the part of the states Development of common scrutiny principles would enable committees to rapidly exchange information on uniform legislation and to develop a common view A further meeting is scheduled for Melbourne in 1995 to finalise the paper

Regulatory Impact Statements for Bills

The Regulation Review Committee has for a number of years made recommendations for the introduction of regulatory impact statements for bills It suggested this be done in connection with the formation of a Scrutiny of Bills Committee While a number of other legislatures now have scrutiny of bills committees there are no requirements for impact statements to accompany bills The Committee has heard that the NSW Council for Civil Liberties has proposed that a Scrutiny of Bills Committee be constituted in the NSW Parliament

In its 11th Report to Parliament of March 1991 p.66-67, the Committee said:

> "The Regulation Review Committee believes the government should move as a matter of priority to correct the lack of assessment criteria in relation to the presentation of principal legislation The existence of an assessment procedure for bills would also permit a proper examination of the regulation making power in bills which would in turn improve the quality of regulations
>
> The Government only needs to adapt the assessment procedures that are already carefully set out for regulations in the *Subordinate Legislation Act* It could do this by formally incorporating them in legislation relating to the making of bills or by re-stating them in the Cabinet Guidelines to Ministers when preparing legislation
>
> Such an action would produce a more informed Parliament, a more informed public and a reliable base for decision making
>
> If the existing method of presenting legislative proposals is altered to require a more professional assessment of the impact of the particular measures, that action should be accompanied by the setting up of a Scrutiny of Bills Committee to monitor the new requirements
>
> A Scrutiny of Bills Committee should have the role of monitoring compliance with any impact assessment requirements (including matters relating to hierarchy for the content of legislation) in a manner similar to that of the Regulation Review Committee under the *Subordinate Legislation Act* It should also have the traditional review grounds presently held by the Scrutiny of Bills Committee in the Senate These authorise it to examine whether Bills -
>
> i) trespass unduly on a person's rights and liberties;
> ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
> iii) make such rights, liberties or obligations unduly dependent upon non-reviewable decisions;
> iv) inappropriately delegate legislative powers; or
> v) insufficiently subject the exercise of legislative power to parliamentary scrutiny
>
> This would bring New South Wales into the forefront of parliamentary scrutiny of legislation in Australia."

Recently discussions were held between the Chairman of the Committee and the Cabinet Office of NSW concerning forthcoming government regulatory initiatives The Chairman was advised that two government initiatives being considered for early introduction are:

1 A requirement for Ministers to provide to the Parliament a cost benefit assessment of their legislative proposals at the time of their introduction;

2 The publication of best practice guidelines to assist government departments/ authorities in the preparation of an assessment of regulatory proposals

These initiatives follow closely the Committee's past recommendations for the scrutiny of bills and for a regulatory impact training programme for government departments

Conclusion

Regulatory impact statements provide the community with a unique opportunity to participate in the regulation making process Even so the public cannot be complacent in relying on the Minister to give due weight to their submissions on every occasion but with the passage of time, industry and community groups are likely to become more expert in presenting their views and ensuring these are appropriately considered before a regulation is made The Staged Repeal Programme ensures that all regulations are reviewed in orderly stages Only those regulations which are of greater benefit than cost to the community are retained In NSW this has resulted in a 30% reduction in the amount of regulations From the perspective of the law librarian, the regulatory impact statement will provide far greater detail on the background to regulatory proposals and a new source of extrinsic evidence as to their purpose and operation

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Internet Access at Parliament...

Senator Alston (Victoria - Deputy Leader of the Opposition) - "I want to say a few words about Internet, which most people who follow communications issues and increasingly the general media would recognise as the quintessential example of the information superhighway We have a Prime Minister (Mr Keating) who likes to fancy himself as someone who is up to date in that area When it comes to parliamentarians having access to the Internet, let me simply say that what we have at the moment is no highway, it is more a goat track"

(Extract from Senate Hansard Wednesday, 22 March 1995, p 1897)