

**STANDING COMMITTEE ON SCRUTINY OF BILLS AND
SUBORDINATE LEGISLATION**

**REPORT ON THE
FOURTH AUSTRALASIAN AND PACIFIC CONFERENCE
ON DELEGATED LEGISLATION
AND
FIRST AUSTRALASIAN AND PACIFIC CONFERENCE
ON THE SCRUTINY OF BILLS**

**28-30 JULY 1993
HELD AT PARLIAMENT HOUSE
MELBOURNE**

26 AUGUST 1993

ROLE OF THE COMMITTEE

The Committee examines all Bills and subordinate legislation presented to the Legislative Assembly. The Committee does not make any comments on the policy aspects of the legislation. The terms of reference contain the customary principles of scrutiny that enable the Committee to operate in the best traditions of totally non-partisan, non-political technical scrutiny of legislation that have been adopted, without exception, by all scrutiny committees in Australia. Such non-partisan, non-policy scrutiny allows the Committee to assist the Assembly passing into law Acts and subordinate legislation that comply with the high ideals set out in the terms of reference.

STANDING COMMITTEE FOR THE SCRUTINY OF BILLS AND SUBORDINATE LEGISLATION

MEMBERS OF THE COMMITTEE

Mrs E Grassby, MLA (Presiding Member)
Mr G Humphries, MLA
Ms H Szuty, MLA

Legal Advisor: Emeritus Professor D Whalan
Secretary: Mr T Duncan
Deputy Secretary: Ms B Irvin

TERMS OF REFERENCE

- (1) a Standing Committee for scrutiny of bills and subordinate legislation shall be appointed;
- (2) the Committee shall with respect to any instrument of a legislative nature which is subject to disallowance and/or disapproval by the Assembly (including a regulation, rule or by-law) made under an Act consider whether the instrument -
 - (a) is in accord with the general objects of the Act under which it is made;
 - (b) unduly trespasses on rights previously established by law;
 - (c) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or
 - (d) contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly;
- (3) the Committee shall with respect to the clauses of Bills introduced into the Legislative Assembly consider whether such Bills -
 - (a) unduly trespass on personal rights and liberties;
 - (b) makes rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
 - (c) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
 - (d) inappropriately delegate legislative powers; or
 - (e) insufficiently subject the exercise of legislative power to parliamentary scrutiny;
- (4) the Committee shall consist of three members;
- (5) if the Assembly is not sitting when the Committee is ready to report on Bills and subordinate legislation, the Committee may send its report to the Speaker, or, in the absence of the Speaker, to the Deputy Speaker, who is authorised to give directions for its printing and circulation;
- (6) the majority of members constitutes a quorum of the Committee;
- (7) the Committee be provided with the necessary additional staff, facilities and resources; and
- (8) the foregoing provisions of the resolution, so far as they are inconsistent with the standing orders, have effect notwithstanding anything contained in the standing orders.

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INTRODUCTION

This is a report on the Australian Capital Territory's Standing Committee on Scrutiny of Bills and Subordinate Legislation attendance at the Fourth Australasian and Pacific Conference on Delegated Legislation and the First Australasian and Pacific Conference on the Scrutiny of Bills. The Conference was held at Parliament House in Melbourne from 28-30 July 1993 and was hosted by the Scrutiny of Acts and Regulations Committee of the Parliament of Victoria.

The conference was attended by representatives of all scrutiny committees at both the federal and state level (with the exception of Western Australia who have not as yet formed a new committee following the recent State Election), as well as representatives from the New Zealand Parliament's committee. In addition, the conference was attended by two delegates from the Province of Saskatchewan, Canada. The ACT's Committee was represented by the Presiding Member, Mrs Ellnor Grassby, MLA, and Ms Helen Szuty, MLA, a member of the Committee, together with the Committee Secretary, Mr Tom Duncan. Emeritus Professor Douglas Whalan also attended in his dual capacity as Legal Adviser to this Committee and to the Senate Standing Committee on Regulations and Ordinances. Attached to this report at Attachment 1 is a full list of delegates and observers to the conference.

The conference was held over three days from Wednesday 28 July to Friday 30 July 1993 in the Legislative Council Chamber at Parliament House in Melbourne. In addition, a number of workshops were held in the Legislative Assembly Chamber, and other functions were held in the Queens Hall of the Parliament building.

RESOLUTIONS PASSED

The conference agreed to the following resolutions:

1. That this Conference calls on the Standing Committee of Attorneys-General (Premiers Conference) to

Establish and fund a working party representing each Parliamentary Subordinate Legislation and Scrutiny of Bills Committee to report:
 - i) on the possibility and/or desirability of establishing uniform principles on
 - scrutiny of regulations
 - scrutiny of bills; and
 - ii) on the method and means of ensuring proper public consultation and parliamentary scrutiny of statutes and/or instruments of delegated legislation developed as part of the process of mutual recognition and harmonisation of statutes and regulations.
2. That the Conferences of Delegated Legislation and Scrutiny of Bills Committees continue to meet bi-annually but notes the desirability of meetings between Committees on a more frequent basis at a Chairman and Deputy Chairman level (providing bi-partisan representation) and more extensive exchange of materials prepared by and for Committees and notes the invitation of the Queensland delegation to a meeting in Brisbane early in 1994.
3. That the representatives of Parliamentary Delegated Legislation and Scrutiny of Bills Committees resolve to propose to their respective Committees that their Committee Report to its respective House or Houses on the issues relating to:
 - i) the possibility and/or desirability of establishing uniform principles on
 - scrutiny of regulations
 - scrutiny of bills; and

- ii) the method and means of ensuring proper public consultation and parliamentary scrutiny of statutes and/or instruments of delegated legislation developed as part of the process of mutual recognition and harmonisation of statutes and regulations.

And that their Committee consult with other relevant Committees in the preparation of such a Report.

4. “Quasi-Legislation: Greasy pig, Trojan Horse or unruly child?”

That this Conference —

- (1) recognises the problems involved in quasi-legislation;
- (2) notes and endorses the recommendations contained in the ARC Report into Rule Making by Commonwealth Agencies except that criteria for determining whether or not an instrument is legislative in character should be provided in primary legislation;
- (3) requests that each jurisdiction investigate the matter further and report back to the next conference on Delegated Legislation, or at any earlier meeting of Chairmen or their nominee of the various Subordinate Legislation Committees;
- (4) seeks early introduction of uniform legislation relating to quasi-legislation in every jurisdiction; and
- (5) supports an increased level of education in the legislative process at the tertiary level, by Law Societies and their equivalents, and throughout government bureaucracies in each jurisdiction noting, in particular, that such education should address the role of parliamentary scrutiny committees.

5. That the 1993 Conference on Delegated Legislation and on Scrutiny of Bills recommend that, prior to Ministerial Councils agreeing to the introduction of uniform or complementary bills or delegated legislation:

- (a) details of the proposals as draft legislation;
- (b) supporting discussion papers etc;
- (c) the opportunity for comment in response;

be provided to relevant Parliamentary Committees in participating jurisdictions and others, as standard practice.

6. This Conference resolves that—

Delegated legislation should be drafted and/or settled by a specialist drafting office.

7. This Conference requests that each jurisdiction investigate as a matter of urgency:

- (1) The range of instruments that should be subject to impact assessment of their economic and social costs and benefits and public consultation; and
- (2) the degrees of assessment that will be required for the different types of such instruments.

THE CONFERENCE PROCEEDINGS

Detailed below is a short description of the conference proceedings. The full conference agenda is attached at Attachment 2. Copies of the conference papers may be inspected by contacting the Committee Secretary.

Opening by the Chief Justice of the Supreme Court of Victoria

The Chief Justice of the Supreme Court of Victoria, the Honourable John Phillips, opened the conference with a comprehensive and enlightening speech that was as entertaining as it was informative. His Honour informed delegates that, as far as he was aware, no Judge from the Supreme Court had made a speech in the Victorian Parliament for the last 140 years, with the

exception in 1964 when a very long serving Judge was invited to attend at the Bar of the Legislative Assembly and thereby thanked for his services. His speech in response was simply to say:

"I am obliged", after which he bowed and withdrew.

His Honour commented that perhaps there is a case for all judicial utterances to be similarly curtailed.

His Honour also drew attention to several of his predecessors, and the fact that perhaps their personalities prevented their presence in the Parliament to make similar speeches. He noted that the first Chief Justice, Mr Justice Willis, was an unusual gentleman who evinced a profound hatred for barristers with whiskers, and as most of the Bar at that time possessed whiskers he rapidly quarrelled with the entire Bar. Before long, his Honour had commenced libel actions in his own Court against several distinguished citizens, and had summarily commenced libel actions against several distinguished citizens, and had summarily imprisoned a number of others for contempt. When the Full Court in Sydney set aside one of his judgements on appeal, Willis read out their judgements in open Court and heaped scorn on the Judges responsible, declaring that the Chief Justice "had the brains of a cavalry officer"!

The remainder of the speech touched upon the long history of the use of delegated legislation (dating back to the 14th century), and, in particular, the use of such legislation during periods of war. His Honour described how subordinate legislation was used in England in 1940 to intern all Germans and Austrians over the age of sixteen, 6,000 of whom were subsequently transported to Australia for detention. Upon reaching Australia, the internees were subject to an order made under the National Security (Aliens Control) Regulations, made pursuant to the *National Security Act 1939*. Whilst many of the internees were released in Britain, those who had been sent to Australia remained in custody for periods up to 3 years. Thus the important and far reaching effects of delegated legislation were to be noted.

His Honour opened the conference with the observation that such conferences involve vitally important activity and study for the advancement of our parliamentary institutions and the societies they are designed to serve.

Reports from the Various Delegated Legislation Committees

Each Chairperson was then invited to report on developments within their jurisdiction since the last conference was held in Perth in 1991. Mrs Ellnor Grassby addressed the conference on developments in the A.C.T., and a copy of that speech is attached as Attachment 3.

New South Wales

Mr Adrian Cruickshank, MLA, Chairman of the Regulation Review Committee of the Parliament of New South Wales reported that, since their establishment in 1987, they have been performing the various statutory functions under the Regulation Review Act 1987. A further function that the committee has initiated, pursuant to the Subordinate Legislation Act 1989, is a staged repeal of regulations, over a 5 year period, of all the State's existing regulations. As a result, all regulations published up to 1964 have been repealed or replaced with new regulations. The procedures governing the making of all new regulations require an impact assessment to be carried out so as to objectively demonstrate the need for the regulation, with public consultation being a strong feature of the procedures.

Mr Cruickshank also reported on the Committee's trip to United Kingdom, France and the United States in June of this year to examine overseas regulatory processes and practices.

New Zealand

The Hon. David Caygill, MP, Chairman of the Regulations Review Committee of the House of Representatives in New Zealand reported on the activities of the Committee over the past two years. He presented the conference with a copy of the Report of the Committee on its activities for the period 28 November 1990 to 31 March 1992, which was presented in the New Zealand parliament. The Committee undertook an inquiry in 1991 on the statutory powers of entry in regulations, with particular reference to 4 regulations which did not conform with the principles normally required by the Committee. During the period mentioned the Committee considered 509 regulations.

The Chairman observed that in the 7 years that the Committee had existed, the disallowance power had only been exercised once, and that most work carried out by the Committee was done in a conciliatory mode, with the committee trying to be as non political as possible.

Northern Territory

Mr Rick Setter, MLA, Chairman of the Subordinate Legislation and Tabled Papers Committee of the Legislative Assembly of the Northern Territory reported on the operations of that Committee over the past two years. In the period of 1991-92 the committee had met 7 times and presented 7 reports, examined 94 regulations and 4 by laws, as well as 92 annual reports. In the period 1992-93 the Committee had examined 72 regulations and 4 by-laws as well as 45 other instruments.

The Chairman noted that the Committee was one of the few in Australia that did not have the services of an independent legal adviser, and that, despite representations to the Attorney-General on the matter, the issue remained unresolved.

The Chairman also remarked upon the recent visit by the ACT Committee to Darwin, and noted that such visits assist the members and staff of both committees in performing their respective roles.

Queensland

Mr Len Stefan, MLA, Deputy Chair of the Committee of Subordinate Legislation of Queensland reported on recent developments. The Committee consists of 4 Labour Members, 2 National Members and 1 Liberal member, with a Government Chairman and an Opposition Deputy Chairman. Since 1991 a Legislative Standards Act has been passed by the Parliament, and it relates to standards of legislation, drafting of legislation and the establishment of the Office of Queensland Parliamentary Counsel. The Act also sets out "fundamental legislative principles"

As yet, Queensland has no committee scrutinising Bills, but the Electoral and Administrative Review Commission has recommended in a recent report the creation of such a committee.

The Committee appointed an independent legal adviser in February this year, and also appointed a part time research officer in June to assist the committee in dealing with its increasing workload. The Committee has continued to monitor the staged review and repeal of out-dated subordinate legislation, as set out in the Regulatory Reform Act.

The Committee also was involved in the use of approved forms and the introduction of a Subordinate Legislation Series. The Committee examines 700 pieces of subordinate legislation each year, as well as other instruments published in the Gazette.

Senate

Senator Mal Colston, Deputy Chairman of the Senate Standing Committee on Regulations and Ordinances reported on the activities of the Committee since 1991.

Since that time the Committee had examined 3214 disallowable legislative instruments, finding prima facie defects in 317 instruments. The Committee had written to various Ministers concerning the defects and received undertakings to amend either Acts or delegated legislation to meet its concerns. Although the Committee gave dozens of notices of motion of disallowance of delegated legislation, not one of these motions was put, as Ministers in every case satisfied the Committee by undertakings or explanations.

The Committee continued its practice of meeting with statutory officers and departmental officials to discuss subordinate legislation they have made, including the President of the Administrative Review Council (ARC), the Commonwealth Ombudsman, the Privacy Commissioner and the Public Service Commissioner.

The Committee presented 7 reports in the last 2 years, 2 of which were Annual Reports.

South Australia

The Hon. Mario Feleppa, MLC, Deputy Chair of the Legislative Review Committee of South Australia informed the conference of recent developments in his State. With the establishment of 4 new committees since 1991 in the South Australian Parliament, the previous committee that was established in 1938 was replaced. The committee had examined 371 regulations, rules and by-laws and moved 2 disallowance motions which had been passed by the Legislative Council.

The Committee was also working formally with the office of the Ombudsman and was also conducting an inquiry into access to justice.

Tasmania

The Hon. Hugh Hiscutt, MLC, Chairman of the Parliamentary Standing Committee on Subordinate Legislation of Tasmania reported on the operation of his committee. The Committee, which has been established by statute since 1969 has 6 members, comprising 3 Members of the Legislative Assembly and 3 from the Legislative Council. In 1991-92 the committee examined 319 pieces of delegated legislation. The Committee is not obliged to report but does so from time to time.

In 1992 the Subordinate Legislation Act was passed, and this Act has had the effect of deregulating the making of subordinate legislation. The Act will also allow for more public input through advertising in the media calling for comment before the Regulations are drafted and submitted to Cabinet for approval. The Act also provides for a complete repeal of all

existing subordinate legislation over a time frame of approximately a decade, all new subordinate legislation being given a 10 year sunset period, and the requirement for a Regulatory Impact Statement to be prepared for each new Regulation (with some exceptions) prior to the submission of the legislation before Parliament.

Victoria

Mr Victor Perton, MLA, Chairman of the Scrutiny of Acts and Regulations Committee of the Parliament of Victoria reported on recent developments in that State. The Committee has 3 functions, namely:

- to review Acts of Parliament referred to it (eg. Subordinate Legislation Act 1962);
- scrutinise Bills; and
- scrutinise regulations.

In 1991 the Committee examined 339 statutory rules, and queried about one-sixth of these. Four of these rules were the subject of a Committee Report. As a result of the automatic sunsetting of regulations made between 1972 and 1892, the Committee examined many new regulations. The Committee also held a number of meetings with departmental officials to clarify details contained in regulations.

Saskatchewan, Canada

Mr Don Toth, MLA, Chairman and Mr Myron Kowalsky, MLA, Vice Chair of the Special Committee on Regulations, Parliament of the Province of Saskatchewan, Canada, gave a report on the operation of their committee. The committee is similar to those operating in Australia, except that the committee's chair is an Opposition Member. The delegates congratulated their Australian counterparts for holding a conference such as this, and they indicated that they hoped to establish a similar conference in Canada.

PAPERS AND WORKSHOPS

The High Court and the Committee

Senator Amanda Vanstone gave a paper from the Senate Standing Committee for the Scrutiny of Bills on the High Court and the Committee. The session was chaired by Ms Helen Szuty, MLA. The paper discussed the implications of the recent decision of the High Court in relation to the Broadcasting Act and the role that the Senate Scrutiny of Bills had in that process. The paper also discussed the right of freedom of speech, and how parliaments and the courts act to preserve that right.

The Victorian Experience of Scrutiny of Bills

Mr Victor Perton, MLA, gave a paper on the Victorian experience of scrutiny of Bills. The paper gave the history of scrutiny of Bills in Victoria, and the establishment of the scrutiny function in 1992. It pointed out that the committee had an independent legal adviser and had held public hearings on 4 Bills, with one more to be held in early August on the Victorian "Mabo" Bill. The new committee has already been the subject of study by an academic, and vigorous debate in Parliament and the media on the significance of the committee's findings and the government's reactions to them. He expressed the view that whilst the first six months of operation had been somewhat stormy, the future will see the committee's deliberations becoming an essential part of the democratic process.

The New Zealand Approach to the Scrutiny of Bills

The Hon. David Caygill MP gave a paper on the New Zealand approach to the Scrutiny of Bills, noting that although the Parliament had no separate Scrutiny of Bills committee, the 13 select committees examine almost 80% of all government Bills. Once referred to a select committee most Bills are advertised and public submissions are called for and heard. Bills are frequently rewritten extensively as a result of this process. However, there is no committee with a specialist "civil liberties" jurisdiction. An important constraint on Parliament's ability to erode personal liberties is the New Zealand *Bill of Rights Act 1990*.

The Regulations Review Committee does have a limited power with respect to Bills in that it can review those clauses which would empower the executive to make subordinate legislation. In 1988 that committee conducted an inquiry into all regulations then in force and found that

there existed 3,945 regulations being administered by 39 agencies. Of these, the agencies themselves identified 400 regulations (ie 10%) which could be revoked immediately, with the committee finding a further 106.

Mr Caygill also identified what he considered to be a fundamental problem facing NZ committees as to what degree of independence from the government can be achieved, pointing out that in a unicameral parliament committee decisions and recommendations can be ignored if they are controversial or inconvenient if the government commands a majority in Parliament.

He also highlighted the problem that the Regulations Review Committee is often involved in making the awkward distinction between the policy behind the legislation and, on the other hand, the question whether the Bill or regulation trespasses unduly on rights and liberties, especially in the case that the Bill has as its policy to trespass on those rights to that extent. He concluded by stating that such committees require a difficult balance to be struck between losing the respect and support of colleagues and officials on whose co-operation we are ultimately dependent to have any effect and, on the other hand, being regarded either as a rubber stamp of the executive or a powerless irrelevance. Striking a balance effectively depends on the dedication of Members and their commitment to the liberties the terms of reference seek to uphold.

Resolutions of Third Conference held in Perth 1991

The Conference discussed the resolutions of the third conference held in Perth in May 1991. The resolutions are shown at attachment 4.

Mutual recognition of regulatory standards between states

Mr John Sullivan, MLA, of the Queensland Committee of Subordinate Legislation gave a paper on proposed mutual recognition legislation made under the combined power of the States, Territories and the Commonwealth. It highlighted the problems that in any amendment to the Mutual Recognition Act there does not seem to be any opportunity for the Parliaments of the States and Territories to scrutinize the proposed amendment.

Workshop — That Delegated Legislation Committees be allowed to suspend regulations during any time when Parliament is not sitting

The workshop discussed the above mentioned resolution which was passed by the Third Conference in Perth in 1991. The workshop was led by the Hon. Hugh Hiscutt, MLC, of the Tasmanian Subordinate Legislation Committee. The Tasmanian and Victorian Committees already have this power, but no other committee does. No resolutions emanated from this workshop.

Workshop — Why is regulatory scrutiny so far in advance of the scrutiny of Bills?

This workshop was led by the New South Wales committee.

Cocktail Party Address

The Honourable Vin Heffernan, Victorian Minister for Small Business, gave a speech at the cocktail party held in honour of the conference delegates. The speech concentrated on the impact on business of trends in legislation making, noting that the volume and complexity of legislation and regulation passed by both Federal and State governments over the past 10 years had increased significantly. The Minister indicated that it was his government's intention to identify areas in which major reductions in the regulatory burden on business could be achieved, and by ensuring that new regulation proposals are adequately assessed in terms of the costs and benefits on business and the community generally.

Workshop — Quasi-Legislation: Greasy pig, Trojan Horse or Unruly child?

Stephen Argument, Secretary to the Senate Standing Committee on Scrutiny of Bills (currently on secondment to the Department of Social Security) gave a paper on quasi legislation in which he demonstrated the difficulties Parliaments have with such legislation. As a result of discussions held in this workshop, the conference subsequently passed Resolution No. 4.

Rule Making by Commonwealth Agencies: Proposals for reform in the Commonwealth jurisdiction and recommendations of the Administrative Review Council's Report No. 35.

Dr Susan Kenny, President of the Administrative Review Council (ARC), gave a paper on the above mentioned report. The report sought to deal with one of the basic problems of the law making and democratic process - the departure between the principle that the laws which govern the lives of Australian citizens be made, or at least authorised, by an elected parliament and the fact that much law making is not directly made by Parliament at all. The report recommended a new regime for delegated instruments via the introduction of a Legislative Standards Bill. This Bill, if passed, would prescribe procedures for the making, publication and supervision of delegated legislation in accordance with the report. Another feature of the report was the idea of a Legislative Instruments Register, whereby all delegated legislation would be accessible to the public via a register.

Dr Kenny ended her remarks by quoting from George Ade who said:

“The music teacher came twice each week to bridge the awful gap between Dorothy and Chopin”.

Dr Kenny concluded that ARC does not wish to see the gap between the law makers and the citizen be such as this. The conference made reference to this paper in Resolution No. 4.

Workshop — When should a matter be seen as more appropriately handled by an Act rather than by a Regulation?

The Honourable Don Wing, MLC, of the Parliamentary Standing Committee on Subordinate Legislation, Tasmania, led this workshop. The discussion centred on the difficulties of setting standards as to what should be dealt with by primary legislation and what should be dealt with in secondary legislation. David Caygill from New Zealand pointed out that their practice was, in the case of determining fees, if the fee was just to cover the cost of service it was alright to do it by way of a regulation. If, however, it was above that amount, then it should be done in an Act. Another delegate pointed to the relative ease of making regulations as opposed to getting a Bill through a Parliament. No resolution was passed in relation to this workshop.

Workshop — Drafting: should delegated legislation be drafted by a specialist drafting office?

Rowena Armstrong, QC, the Chief Parliamentary Counsel for Victoria gave a paper on the role of specialist drafting officers and their role in the scrutiny and review of delegated legislation. As a result of the discussions held in this Workshop the conference agreed to resolution No. 6.

Fundamental Legislative Principles

Mr John Sullivan, MLA, Chairman of the Queensland Committee of Subordinate Legislation, gave a paper outlining the fundamental legislative principles contained in the *Legislative Standards Act 1992*. Fundamental legislative principles were defined by the Electoral and Administrative Review Committee as those principles that uphold the sovereignty of parliament and the democratic principle, that preserve fundamental political, civil and legal rights and provide for appropriate avenues of review of administrative decisions. The object of the Act which contains these principles is to ensure that these basic tenements of our democratic society are preserved when Parliament seeks to pass a Bill or subordinate legislation is enacted. The remainder of the paper outlined the effect this legislation had on the operation of the Queensland Committee.

Do Parliamentary Review Committees achieve anything worthwhile for the public?

Mr Adrian Cruickshank, MLA, Chairman of the Regulation Review Committee of New South Wales gave a paper on the above mentioned topic. He pointed out that it was a legislative requirement in NSW that in preparing subordinate legislation consultation with persons and bodies likely to be affected should occur, as well as giving a cost benefit analysis of statutory rules. Partly as a result of the operation of their committee, there had been a 15% reduction in the number of statutory rules and a 19% reduction in the number of pages of rules over the last 3 years. He concluded his remarks by stating that Committees do help the public, and by stating that:

“Parliamentary scrutiny is like democracy: you can’t have too much of it”.

Overseas Practices in Regulation Review — Towards Effective Rule Making

Mr Cruickshank also gave a paper based on his Committee's recent trip to France, Great Britain and the United States of America to examine their practices in relation to regulation review.

Who takes care of the caretakers daughter? — The Victorian Supreme Courts Approach to the Subordinate Legislation Act 1962.

Mr Ken Jasper, MLA, Member of the Scrutiny of Acts and Regulations Committee of Victoria gave a paper on the role of the courts in relation to subordinate legislation. In his paper he outlined two recent cases where the courts became involved in firstly, what should be included in a Regulatory Impact Statement which accompanies the subordinate legislation and secondly that the Act required a hearing to be held to determine whether a certificate of exemption could be given.

However, the most interesting case was that of Keppel v Patterson in 1991 where a Judge took the unusual step of granting a declaration on a draft rule.

The paper concluded by stating that in the past Parliament has had to fight off the attentions of the Executive, but is the caretakers daughter now at risk from the judges!

Incorporation of Third Party Documents in Regulation — Issues of Accessibility, Compliance and Accountability

Mr Rex Deighton-Smith, from the Office of Regulation Reform, Victoria, gave a paper concerning the use of third party documents in legislation. It argued that the lack of any guidance as to the use of such documents in legislation has led to their over use by regulators, both as a matter of convenience and as a means of avoiding proper scrutiny. Because of the absence of adequate scrutiny and their ease of adoption there had been an explosion in the volume of the law. The solution lies in enhancement of the process of scrutiny and the issuance of guidance or formal limitations as to the circumstances of their use.

Justice Delayed and Denied — A case study

Senator Stephen Loosely, Chairman of the Senate Standing Committee on Regulations and Ordinances, gave a paper concerning the committee's consideration of 2 determinations under which justice was not only delayed but denied. The concerns centred around a problem with credits received in lieu of recreation leave for a number of public service officers who had joined the service before 1966 and who had retired after 1973, in that, due to a combination of factors, they received less money than that to which they were fairly entitled. As a result of the committee's actions, \$4.1 million was included in the 1992 Budget to meet the concerns of the committee.

Reversal of Onus of Proof in Primary Legislation

Senator Amanda Vanstone, Acting Chair of the Senate Standing Committee on Scrutiny of Bills gave a paper on her committee's dealings with this particular issue. She outlined a number of instances where Bills proposed to be passed into law had reversals of onus of proofs contained within them. Had the Bills passed, it would have increased the burden of proof on the individual and away from that of the Government. These examples highlighted the need for review committees such as the Senate Scrutiny of Bills.

**DELEGATES ATTENDING
FOURTH CONFERENCE OF AUSTRALASIAN AND PACIFIC DELEGATED
LEGISLATION COMMITTEES WITH SCRUTINY OF BILLS COMMITTEES**

THE HON. MARIO S. FELEPPA MLC

Chairman

MR. DAVID PEGRAM

Secretary

Legislative Review Committee, South Australia

ADRIAN CRUICKSHANK MLA

Chairman

PAUL O'GRADY MLC

STEPHEN MUTCH MLC

Staff

GREGG HOGG

DAVENDER JAIN

JIM DONOHOE

Regulation Review Committee, New South Wales

SENATOR STEPHEN LOOSELY

Chair

SENATOR MAL COLSTON

SENATOR W. O'CHEE

SENATOR A.O. ZAKHAROV

Staff

PROFESSOR DOUGLAS WHALAN

DAVID CREED

M/S JANICE PAULL

M/S DIANNE SIMPSON

Senate Standing Committee on Regulations & Ordinances, Canberra

SENATOR BERNARD COONEY

SENATOR ROBERT BELL

SENATOR AMANDA VANSTONE

Staff

PETER CRAWFORD

Acting Secretary

Senate Standing Committee on the Scrutiny of Bills, Canberra

STEPHEN ARGUMENT

Senate Standing Committee on the Scrutiny of Bills

On Secondment to the Department of Social Security, CANBERRA

MR. RICK SETTER MLA

Chairman

MR. SYD STIRLING MLA

Staff

MRS. HELEN ALLMICH

Secretary,

Subordinate Legislation & Tabled Papers Committee, Northern Territory

THE HON. HUGH HISCUIT MLC

Chairman

THE HON. CHARLES BATT MLC

Deputy Chairman

THE HON. DON WING MLC

Staff

MISS WENDY PEDDLE

Secretary

Parliamentary Standing Committee on Subordinate Legislation, Tasmania

MR. JON SULLIVAN MLA

Chairman

MR. LEN STEPHAN MLA

MR. GORDON NUTTALL MLA

MR. PETER PYKE MLA

MR. DENVER BEANLAND MLA

Staff

M/S MADELINE COOK

Secretary

M/S HELEN GRANT

Research Officer

DR. DONALD GIFFORD

Legal Advisor

Committee on Subordinate Legislation, Queensland

ELLNOR GRASSBY MLA

Presiding Member

HELEN SZUTY MLA

Staff

MR. TOM DUNCAN

Secretary

Standing Committee on Scrutiny of Bills and Subordinate Legislation,
Australian Capital Territory

THE HON. DAVID CAYGILL

Chairman

WARREN KYD

BILL OGIER

Regulations Review Committee, New Zealand

MR. DON J. TOTH M.L.A

Chair

MR. MYRON KOWALSKY

Vice-Chair

Special Committee on Regulations, Saskatchewan, Canada

VICTOR PERTON MP

Chairman

THE HON. B.A.E. SKEGGS MLC

Deputy Chairman

THE HON. L. ASHER MLC

THE HON. J.M. BRUMBY MLC

DR K.A.COGHILL MP

MR K.S. JASPER MP
THE HON. T.W. ROPER MP
MR M.H. THOMPSON MP
MR J.W. THWAITES MP

Staff

TANYA COLEMAN

HEATHER HOLT

HELEN ROBERTS

RICHARD KINGS

Scrutiny of Acts and Regulations Committee, Victoria

**OBSERVERS ATTENDING
FOURTH CONFERENCE OF AUSTRALASIAN AND PACIFIC DELEGATED
LEGISLATION COMMITTEES WITH SCRUTINY OF BILLS COMMITTEES**

DR. LESLEY CLARK MLA
MR. BOB AHERN,
Research Director
Electoral and Administrative Review Committee, Queensland

JEAN M. BAKER
Principal Legislative Counsel
LINDSAY KING
JEREMY WAINWRIGHT
Office of Legislative Drafting,
Attorney Generals Department, Canberra

GRANT LIDDELL
Faculty of Law
University of Otago, New Zealand

RAY SIEBUHR
ELIZABETH FEDUNIK
Parliamentary Counsel, Queensland

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SALLY GILLIS
TOM O'FARREL
Premier and Cabinet, Victoria

WEDNESDAY 28 JULY 1993

MORNING

9.15 *Registration*

10.00 *Opening and Welcome to Delegates*

Chairman: Victor Perton, MP, Chairman, Scrutiny of Acts and Regulations Committee, Victoria

Keynote address by the Honourable John Phillips, Chief Justice of Victoria

Response to the Chief Justice by Victor Perton, MP, Chairman, Scrutiny of Acts and Regulations Committee, Victoria

Open Forum

10.45 *Housekeeping Arrangements followed by Morning Tea, Queen's Hall*

11.10 *Reports from the Various Delegated Legislation Committees*

Chairman: B.A.E. Skeggs, MLC, Deputy Chairman, Scrutiny of Acts and Regulations Committee, Victoria

Australian Capital Territory:

Standing Committee on the Scrutiny of Bills and Subordinate Legislation

New South Wales:

Regulation Review Committee

New Zealand:

Regulations Review Committee

Northern Territory:

Subordinate Legislation and Tabled Papers Committee

Queensland:

Committee of Subordinate Legislation

Senate:

Standing Committee on Regulations and Ordinances

South Australia:

Legislative Review Committee

Tasmania:

Parliamentary Standing Committee on Subordinate Legislation

Victoria:

Subordinate Legislation Sub-committee of the Scrutiny of Acts and Regulations Committee

1.00 *Lunch, Members' Dining Room*

WEDNESDAY 28 JULY 1993

AFTERNOON

2.00 *Conference photographs.*

Delegates and observers to assemble on front steps of Parliament House

Scrutiny of Bills

Chair: Ms Helen Szuty MLA, Standing Committee on Scrutiny of Bills and Subordinate Legislation

2.15 Senator Amanda Vanstone, Acting Chairman of Australian Senate Standing Committee for Scrutiny of Bills
The Courts and the Committee.

2.45 Victor Pertou, Chairman, Scrutiny of Acts and Regulations Committee, Victoria
The Victorian Experience of Scrutiny of Bills.

3.00 The Honourable David Caygill, New Zealand
The New Zealand Approach to the Scrutiny of Bills.

Discussion

4.00 *Afternoon Tea*

4.15 *Workshop:*

Why is regulatory scrutiny so far in advance of the scrutiny of Bills?
To be led by New South Wales

5.30 *Cocktail Party at Queen's Hall, Parliament House (entry via rear courtyard)*

THURSDAY 29 JULY 1993

MORNING

9.15 *Resolutions of Third Conference*

9.30

Mutual recognition of regulatory standards between States.

Discussion to be led by Queensland Committee of Subordinate Legislation

Chairman: A.J. Cruickshank, Chairman, Regulation Review Committee, New South Wales

11.00 *Morning Tea, Queen's Hall*

11.30 *Workshops**

1. *That Delegated Legislative Committees be allowed to suspend regulations during any time when Parliament is not sitting. ((Resolution from Third Delegated Legislation Conference).
(Council Chamber)*

Chairman: The Hon. H.J. Hiscutt, Chairman, Subordinate Legislation Committee, Tasmania

or

2. *Quasi-Legislation: Greasy pig, Trojan Horse or unruly child?
(Assembly Chamber)*

Stephen Argument, Secretary to the Australian Senate Standing Committee for Scrutiny of Bills (on secondment to the Department of Social Security)

Chairman: Ken Jasper, MP, Chairman, Sub-committee of the Subordinate Legislation Act Inquiry, Scrutiny of Acts and Regulations Committee, Victoria,

1.00 p.m. *Lunch, Members' Dining Room*

* The two workshops listed will be run concurrently

THURSDAY 29 JULY 1993

AFTERNOON

2.00 *Reports and Resolutions on Workshops*

2.30 *Report of Delegates from Saskatchewan, Canada*

2.45 Dr Susan Kenny, President, Administrative Review Council, introduced by Senate Standing Committee on Regulations and Ordinances

"Rule Making by Commonwealth Agencies": Proposals for reform in the Commonwealth jurisdiction and recommendations of the Administrative Review Council's Report No. 35.

Chairman: Senate Standing Committee on Regulations and Ordinances

3.45 *Afternoon Tea, Queen's Hall*

4.10 *Workshops**

1. *When should a matter be seen as more appropriately handled by Act rather than by Regulation.*
(Council Chamber)

The Hon. Don Wing, Subordinate Legislation Committee,
Tasmania

or

2. *Drafting: should delegated legislation be drafted by a specialist drafting office?*
(Assembly Chamber)

Rowena Armstrong, Chief Parliamentary Counsel, Victoria

Chairman: Dr Ken Coghill MP, Scrutiny of Acts and Regulations
Committee, Victoria,

6.30 *Dinner at Queen's Hall, Parliament House (entry via rear courtyard)*

After dinner speaker, Mr Padraic P. McGuinness, Columnist, 'The Australian'.

* The two workshops listed will be run concurrently

FRIDAY 30 JULY

MORNING

9.15 *Reports and Resolutions from Workshops*

9.45 Queensland Committee of Subordinate Legislation.
Fundamental Legislative Principles

10.45 *Morning Tea, Queen's Hall*

11.00 NSW Regulation Review Committee

- (i) *Do Parliamentary Review Committees achieve anything worthwhile for the public?*
- (ii) *Overseas practices in regulatory review.*

Discussion

12.00 Victorian Scrutiny of Acts and Regulations Committee

"Who Takes Care of the Caretaker's Daughter?"
- The Victorian Supreme Court's Approach to the Subordinate Legislation Act 1962.

12.20 Office of Regulation Reform

Incorporation of Third Party Documents in Regulation - Issues for Compliance, Accessibility and Accountability.

Discussion

1.00 *Lunch, Members' Dining Room*

FRIDAY 30 JULY

AFTERNOON

Chairman: Victor Perton, MP, Chairman, Scrutiny of Acts and Regulations Committee

2.15 **Senate Standing Committee on Regulations and Ordinances**

Justice Delayed and Denied - a case study.

3.00 **Senator Amanda Vanstone, Deputy Chair, Senate Standing Committee on Scrutiny of Bills**

Reversal of Onus of Proof in Primary Legislation.

3.45 ***Afternoon Tea, Queen's Hall***

4.15 ***Conference Resolutions***

Formal Close

Victor Perton, Chairman, Scrutiny of Acts and Regulations Committee

FOURTH AUSTRALASIAN AND PACIFIC CONFERENCE ON DELEGATED
LEGISLATION IN CONJUNCTION WITH FIRST AUSTRALASIAN AND PACIFIC
CONFERENCE ON THE SCRUTINY OF BILLS

REPORT FROM THE AUSTRALIAN CAPITAL TERRITORY STANDING
COMMITTEE ON SCRUTINY OF BILLS AND SUBORDINATE LEGISLATION

MRS ELLNOR GRASSBY, MLA
PRESIDING MEMBER

FELLOW DELEGATES, LADIES AND GENTLEMEN. AS PRESIDING MEMBER OF THE AUSTRALIAN CAPITAL TERRITORY'S STANDING COMMITTEE ON SCRUTINY OF BILLS AND SUBORDINATE LEGISLATION I AM PLEASED TO REPORT ON THE OPERATION OF THE COMMITTEE SINCE THE LAST CONFERENCE THAT WAS HELD IN PERTH 2 YEARS AGO. BEFORE DOING SO, I WOULD LIKE TO CONGRATULATE THE VICTORIAN SCRUTINY OF ACTS AND REGULATIONS COMMITTEE FOR THE ORGANISATION OF THIS CONFERENCE. THE PROGRAM THAT THEY HAVE PREPARED LOOKS TREMENDOUS, AND I AM SURE THAT DELEGATES ATTENDING WILL BENEFIT FROM PARTICIPATING IN THIS CONFERENCE.

I BECAME THE PRESIDING MEMBER OF OUR COMMITTEE SHORTLY AFTER THE LAST CONFERENCE HELD IN PERTH. IN JUNE 1991 THE THEN ALLIANCE GOVERNMENT FELL, AND THE LABOR OPPOSITION REGAINED GOVERNMENT.

SINCE THAT TIME A GENERAL ELECTION HAS BEEN HELD IN THE A.C.T. IN FEBRUARY 1992, AFTER WHICH I WAS RE-ELECTED AS PRESIDING MEMBER. THE COMMITTEE CONSISTS OF THREE MEMBERS. MY COLLEAGUES ARE MR GARY HUMPHRIES, A LIBERAL MEMBER WHO UNFORTUNATELY COULD NOT ATTEND THIS CONFERENCE, AND MS HELEN SZUTY, AN INDEPENDENT MEMBER WHO YOU WILL ALL MEET OVER THE NEXT FEW DAYS.

THE COMMITTEE CONTINUES TO BE ASSISTED BY THE LEGISLATIVE ASSEMBLY SECRETARIAT IN THE FORM OF A SECRETARY AND DEPUTY SECRETARY. WE CONTINUE TO RECEIVE VALUABLE ASSISTANCE FROM AN INDEPENDENT LEGAL ADVISER. THIS TASK HAS BEEN PERFORMED EXCEPTIONALLY WELL SINCE THE COMMITTEE'S INCEPTION BY PROFESSOR DOUGLAS WHALAN, WHO MANY DELEGATES WILL KNOW.

I KNOW FROM TALKING WITH OTHER MEMBERS THAT NOT ALL COMMITTEES HAVE AN INDEPENDENT LEGAL ADVISER. WHILST I CAN APPRECIATE THAT THERE CAN BE PROBLEMS, PERHAPS WITH FUNDING, WITH HAVING AN ADVISER, I CAN HIGHLY RECOMMEND IT. I KNOW THAT THE PRESENCE OF AN INDEPENDENT LEGAL ADVISER HAS GREATLY HELPED OUR COMMITTEE IN CARRYING OUT OUR TASKS.

THE COMMITTEE HAS CONTINUED IN ITS ROLE OF EXAMINING BOTH SUBORDINATE LEGISLATION AND BILLS. THE COMMITTEE PRESENTS AROUND 23 REPORTS EACH YEAR.

IN RELATION TO BILLS, THE WORKLOAD HAS INCREASED FROM THE FIRST YEAR WE COMMENCED EXAMINING THEM. IN 1990 THE COMMITTEE EXAMINED 88 BILLS. IN 1991 THIS INCREASED TO 171 BILLS AND IN 1992 THERE WERE 111. THIS YEAR WE HAVE EXAMINED 70 BILLS.

GENERALLY SPEAKING, WE HAVE BEEN VERY SUCCESSFUL IN RELATION TO OUR CONCERNS WITH BILLS. MANY OF THE CONCERNS THAT WE RAISED EARLY IN THE LIFE OF THE COMMITTEE HAVE BEEN RECTIFIED. THESE RELATED TO:

- . RETROSPECTIVITY;
- . REVERSALS OF ONUS OF PROOF; AND
- . MAKING RIGHTS, LIBERTIES AND/OR OBLIGATIONS UNDULY DEPENDENT UPON NON - REVIEWABLE DECISIONS.

THE GOVERNMENT HAS A PROCEDURE WHEREBY ALL RESPONSES ARE CO-ORDINATED BY THE ATTORNEY-GENERAL. I THINK THAT THE SUCCESS OF THE COMMITTEE REFLECTS THE VERY GOOD RELATIONSHIP THE COMMITTEE HAS HAD WITH ATTORNEY-GENERALS SINCE ITS INCEPTION. ANY CONCERNS RAISED BY THE COMMITTEE ARE USUALLY ADDRESSED. IN MANY CASES AMENDMENTS ARE MOVED BY THE GOVERNMENT BASED ON ISSUES THAT THE COMMITTEE HAS RAISED IN ITS REPORTS. IT SHOULD BE NOTED THAT BOTH ATTORNEY-GENERALS WERE MEMBERS OF THE COMMITTEE PRIOR TO BECOMING A MINISTER.

IN RELATION TO SUBORDINATE LEGISLATION THE COMMITTEE'S WORKLOAD CONTINUES TO INCREASE EACH YEAR. IN 1990, THE COMMITTEE'S FIRST FULL YEAR OF OPERATION, WE EXAMINED 84 PIECES OF SUBORDINATE LEGISLATION. THE FOLLOWING YEAR THIS INCREASED TO 175, AND IN 1992 IT WENT UP TO 232. THIS YEAR THE FIGURE HAS REACHED 127.

AS WITH BILLS, THE SUCCESS RATE WITH SUBORDINATE LEGISLATION HAS BEEN VERY GOOD. HOWEVER, THE RATE OF SIMPLE ERRORS CONTAINED IN SUBORDINATE LEGISLATION IS ONE AREA THAT THE COMMITTEE STILL WISHES TO SEE SOME IMPROVEMENT. THESE ERRORS RANGE FROM SIMPLE TYPOGRAPHICAL ONES TO INVALIDITY DUE TO AN ERROR IN DRAFTING THE INSTRUMENT OR DETERMINATION.

THE COMMITTEE HAS BEEN INSTRUMENTAL IN TAKING STEPS TO FIX THIS PROBLEM IN RECENT MONTHS. LATE LAST YEAR WE HELD A MEETING WITH OFFICERS OF THE ATTORNEY-GENERAL'S DEPARTMENT TO DISCUSS OUR CONCERNS ABOUT THE AMOUNT OF ERRORS WE WERE CONTINUALLY FINDING IN SUBORDINATE LEGISLATION. AS A RESULT OF THESE DISCUSSIONS THE ATTORNEY-GENERAL'S DEPARTMENT PRODUCED A SET OF GUIDELINES FOR THE PREPARATION OF DISALLOWABLE INSTRUMENTS IN MAY 1993. THESE WERE CIRCULATED WIDELY THROUGHOUT THE A.C.T. GOVERNMENT SERVICE.

AT THIS STAGE IT IS TOO EARLY TO TELL WHETHER IT HAS BEEN A SUCCESS, AND THE COMMITTEE WILL AWAIT WITH INTEREST TO SEE IF ANY IMPROVEMENT OCCURS. IF ANY DELEGATES ARE INTERESTED IN OBTAINING A COPY OF THE GUIDELINES, THE SECRETARY OF THE COMMITTEE, MR TOM DUNCAN, WOULD BE HAPPY TO GIVE YOU ONE.

THE COMMITTEE HAS ALSO CHANGED ITS TERMS OF REFERENCE SINCE THE LAST CONFERENCE. IN JUNE 1992 THE COMMITTEE'S TERMS OF REFERENCE WERE AMENDED TO ALLOW IT TO EXAMINE AND COMMENT ON THE EXPLANATORY MEMORANDUM THAT ACCOMPANY BILLS AND THE EXPLANATORY STATEMENTS THAT ACCOMPANY SUBORDINATE LEGISLATION. THE EFFECT OF THIS CHANGE MEANT THAT THE COMMITTEE COULD COMMENT ON WHETHER THE EXPLANATORY MEMORANDUM OR EXPLANATORY STATEMENT ADEQUATELY EXPLAINED THE EFFECT OF THE LEGISLATION. IT ALSO ALLOWED THE COMMITTEE TO COMMENT ON SUCH MATTERS AS THE USE OF SEXIST LANGUAGE. HOWEVER, THE COMMITTEE IS ALWAYS MINDFUL OF NOT COMMENTING ON MATTERS OF POLICY.

THE COMMITTEE ALSO DERIVED GREAT BENEFIT FROM VISITING TWO OF ITS TWIN COMMITTEES IN DARWIN AND BRISBANE IN MAY THIS YEAR. OUR COMMITTEE WAS ABLE TO SEE FIRST HAND HOW BOTH THE NORTHERN TERRITORY AND QUEENSLAND COMMITTEES OPERATE, AND WE ENJOYED BEING ABLE TO DISCUSS MATTERS OF MUTUAL INTEREST. WE LOOK FORWARD TO RENEWING THOSE ACQUAINTANCES THAT WE MADE THEN, AS WELL AS MEETING ALL THE OTHER SCRUTINY COMMITTEES DURING THE COURSE OF THIS CONFERENCE.

ATTACHMENT 4

Resolutions of Third Conference held in Perth 1991

The resolutions were as follows:

- (1) That Delegated Legislation Committees should be allowed to scrutinise regulations during periods of prorogation of Parliament.
- (2) That the following topic be the subject of a workshop at the Delegated Legislation Conference to be held two years from now -

That Delegated Legislation Committees be allowed to suspend regulations during any time when Parliament is not sitting.

*Workshop on the effect of prorogation on committees
Chaired by the Hon HJ Hiscutt*

- (3) While noting that there may be a rare, justifiable use of a Henry VIII clause where such use would be subject to tabling and disallowance, this conference believes that Henry VIII clauses have no legitimate general application in the legislative process.

*Workshop on Henry VIII clauses
Chaired by Mr Barber*

- (4) That there must be safeguards built into primary legislation to ensure that all subordinate instruments of a legislative nature should be subject to the scrutiny of Parliament and the option of disallowance and that in addition there be ample opportunity provided for the instrument to be available for public access and scrutiny.

*Workshop entitled "A regulation by any other name"
Chaired by Mr Bob Wiese*

- (5) A future agenda item should include an analysis of the arguments for and against the power to amend delegated legislation, including papers on experiences of committees which have that power.
- (6) That the next Delegated Legislation Conference consider and report on the issues raised by the forthcoming Administrative Review Council's report on rule-making.
- (7) That the next conference be held in Victoria in 1993.
- (8) The participants in the workshop on "*The impact of delegated legislation on the community and the public profile of review committees*" resolved to present a final summary of what they had discussed rather than any formal resolutions.
 - (i) Regulations must be available because of their impact and volume. New technologies eg. computers should be used to make them available immediately. Community access to regulations must be protected and improved.
 - (ii) Delegated Legislation Committees play a very valuable role. They need to be adequately resourced to do this.
 - (iii) The community needs to be aware of what the Committees do. They need to know how to get access to the Committee. The Committee's role includes being a facilitator, the last arbiter between departments and community groups.
 - (iv) Publicity of the Committee as such is not desirable. It should "bubble along in obscurity". The bipartisan work is to be commended. Intervention in the area of "policy" must be avoided.
 - (v) Greater community participation is required in framing/changing regulations. Regulation Impact Statements appear to help this situation.
 - (vi) Community education about regulations is needed.

*The impact of delegated legislation on the community
and the public profile of review committees
Chaired by Dr Judy Edwards*

