Inquiry into the Subordinate Legislation Act 1994

September 2002
54th Parliament

Inquiry into the Subordinate Legislation Act 1994

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Scrutiny of Acts and Regulations Committee

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The statutory functions of the Scrutiny of Acts and Regulations Committee as set out in section 4D of the Parliamentary Committees Act 1968 are –

(a) to consider any Bill introduced into a House of the Parliament and to report to the Parliament as to whether the Bill, by express words or otherwise –

(i) trespasses unduly upon rights or freedoms; or
(ii) makes rights, freedoms or obligations dependent upon insufficiently defined administrative powers; or
(iii) makes rights, freedoms or obligations dependent upon non-reviewable administrative decisions; or
(iiiia) unduly requires or authorises acts or practices that may have an adverse effect on personal privacy within the meaning of the Information Privacy Act 2000.
(iiib) unduly requires or authorises acts or practices that may have an adverse effect on privacy of health information within the meaning of the Health Records Act 2000.
(iv) inappropriately delegates legislative power; or
(v) insufficiently subjects the exercise of legislative power to parliamentary scrutiny; and

(b) to consider any Bill introduced into a House of the Parliament and to report to the Parliament –

(i) as to whether the Bill by express words or otherwise repeals, alters or varies section 85 of the Constitution Act 1975, or raises an issue as to the jurisdiction of the Supreme Court;
(ii) where a Bill repeals, alters or varies section 85 of the Constitution Act 1975, whether this is in all the circumstances appropriate and desirable; or
(iii) where a Bill does not repeal, alter or vary section 85 of the Constitution Act 1975, but where an issue is raised as to the jurisdiction of the Supreme Court, as to the full implications of that issue; and

(c) such functions as are conferred on the Committee by the Subordinate Legislation Act 1994; and

(ca) such functions as are conferred on the Committee by the Environment Protection Act 1970; and

(cb) such functions as are conferred on the Committee by the Co-operative Schemes (Administrative Actions) Act 2001.

(d) to review any Act where required so to do by or under this Act, in accordance with terms of reference under which the Act is referred to the Committee.
Terms of Reference - Inquiry

The specific terms of reference for this inquiry are as follows:

8 PARLIAMENTARY COMMITTEES REFERENCES — Motion made and question — That under the powers found in s 4F of the Parliamentary Committees Act 1968, the following matters are referred to the following Joint Investigatory Committees:

...  

8 To the Scrutiny of Acts and Regulations Committee -- for inquiry, consideration and report by 31 December 2000 on:

...  

(c) the Subordinate Legislation Act 1994
21. Review of statutory rules by the Scrutiny Committee

(1) The Scrutiny Committee may report to each House of the Parliament if the Scrutiny Committee considers that any statutory rule laid before Parliament —

(a) does not appear to be within the powers conferred by the authorising Act;
(b) without clear and express authority being conferred by the authorising Act —
   (i) has a retrospective effect; or
   (ii) imposes any tax, fee, fine, imprisonment or other penalty; or
   (iii) purports to shift the onus of proof to a person accused of an offence; or
   (iv) provides for the sub-delegation of powers delegated by the authorising Act;
(c) appears to be inconsistent with the general objectives of the authorising Act;
(d) makes unusual or unexpected use of the powers conferred by the authorising Act having regard to the general objectives of that Act;
(e) contains any matter or embodies any principles which should properly be dealt with by an Act and not by subordinate legislation;
(f) unduly trespasses on rights and liberties of the person previously established by law;
(g) makes rights and liberties of the person unduly dependent upon administrative and not upon judicial decisions;
(ga) unduly requires or authorises acts or practices that may have an adverse effect on personal privacy within the meaning of the Information Privacy Act 2000;
(gb) unduly requires or authorises acts or practices that may have an adverse effect on privacy of health information within the meaning of the Health Records Act 2001;
(h) is inconsistent with principles of justice and fairness;
(i) requires explanation as to its form or intention;
(j) has been prepared in contravention of any of the provisions of this Act or of the guidelines with respect to the statutory rule and the contravention is of a substantial or material nature;
(k) is likely to result in administration and compliance costs which outweigh the likely benefits sought to be achieved by the statutory rule.

(2) A report of the Scrutiny Committee under this section may contain any recommendations that the Scrutiny Committee considers appropriate, including a recommendation that a statutory rule should be —

(a) disallowed in whole or in part; or
(b) amended as suggested in the report.
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Recommendations

Scope of Subordinate Legislation Act 1994

**Recommendation 1**

The Committee recommends that the *Subordinate Legislation Act 1994* (Vic) be amended to apply to instruments which are legislative in character and that a similar definition to that contained in the Legislative Instruments Bill 1996 [No. 2] (Cth) be adopted.

*Pages 18-38*

**Recommendation 2**

The Committee acknowledges the special status of local government as a separate tier of government and recommends that local laws continue to be exempted from the *Subordinate Legislation Act 1994* (Vic). The Committee recommends that the Minister for Local Government, in consultation with local councils, give consideration to the establishment of an appropriate scrutiny process for local laws.

*Pages 25-26 + 30-38*

**Recommendation 3**

The Committee recommends that consideration be given to expanding the role of the Regulation Review Subcommittee to include the scrutiny of all legislative instruments except for local laws. The Committee notes that if this recommendation is accepted, the Regulation Review Subcommittee will take on a considerably heavier workload and the Committee therefore recommends that consideration be given to adopting the Commonwealth model of scrutiny with two separate committees, one for scrutinising bills and one for scrutinising regulations.

*Pages 18-38*

**Office of Chief Parliamentary Counsel**

**Recommendation 4**

The Committee recommends that all legislative instruments (excluding court and tribunal rules and local laws) be subject to review and certification by Chief Parliamentary Counsel against the principles contained in section 13 of the *Subordinate Legislation Act 1994* (Vic).

*Pages 39-40*
**Recommendation 5**

The Committee recommends that sections 13(b)(iii) and 21(1)(b)(iii) of the *Subordinate Legislation Act 1994* (Vic) be amended to make clear that they refer to the legal burden of proof.

*Pages 40-41*

**Recommendation 6**

The Committee recommends that an additional provision be inserted into the *Subordinate Legislation Act 1994* (Vic) allowing Chief Parliamentary Counsel to qualify section 13 certificates to indicate that the certificate does not cover material incorporated by a regulation if that material is of such a detailed technical nature that Chief Parliamentary Counsel is not qualified to advise about such matters.

*Pages 41-42*

**Recommendation 7**

The Committee recommends that the *Subordinate Legislation Act 1994* (Vic) be amended to allow Chief Parliamentary Counsel to qualify its certification by specifying that the certificate relates to the circumstances as at the date of the certificate.

*Page 42*

**Regulation Impact Statements**

**Recommendation 8**

The Committee recommends that –

(a) as a matter of urgency the provisions explaining the meaning and application of an appreciable economic or social burden on any sector of the community in the Premier’s Guidelines be reviewed to provide departments and agencies with clearer guidance as to when Regulation Impact Statements should be prepared;

(b) consideration be given to expanding the threshold test to include environmental burden.

The Committee also draws attention to the Environment Protection Authority, Protocol for the Development of Regulations and Regulatory Impact Statements, February 1996.

*Pages 42-48*

**Recommendation 9**

In order to assist the development of expertise in preparing regulations and Regulation Impact Statements amongst department and agency staff, the Committee recommends that departments and agencies be encouraged to make greater use of in-house staff.

*Pages 48-53*
**Recommendation 10**

The Committee recommends that the Office of Regulation Reform be given formal responsibility for conducting appropriate training programs for department and agency staff involved in the preparation of Regulation Impact Statements.

*Pages 48-53*

**Recommendation 11**

The Committee recommends that the Office of Regulation Reform continue to provide advice and support to agency and department staff throughout the regulation impact assessment process.

*Pages 48-53*

**Recommendation 12**

The Committee recommends that the Office of Regulation Reform develop a suitable software program for use by department and agency staff in the preparation of Regulation Impact Statements. The Committee notes that the Business Review Unit in the Department of State Development in Queensland has developed a software program for use by agency and department staff in the preparation of Regulation Impact Statements and points out that the Office of Regulation Reform may wish to evaluate this particular software package.

*Pages 48-53*

**Recommendation 13**

The Committee recommends that the Office of Regulation Reform –

(a) be given responsibility for developing and implementing effective data collection strategies; and

(b) provide advice and assistance to departments and agencies on improved research techniques in order to improve the quality of Regulation Impact Statements.

*Pages 53-58*

**Recommendation 14**

Irrespective of whether the role of the Office of Regulation Reform is altered as a consequence of the recommendations contained in this Report, the Committee believes that there is value in the Regulation Review Subcommittee scrutinising independent assessments. The Committee recommends that copies of Independent Assessments together with appropriate regulations be forwarded to the Regulation Review Subcommittee for consideration.

*Pages 59-60*
Recommendation 15

The Committee recommends that the practice of providing qualified letters of advice be discontinued and that conclusive certificates of independent assessment be provided either accepting or rejecting Regulation Impact Statements.

Pages 60-61

Recommendation 16

The Committee recommends that the Office of Regulation Reform be given sole responsibility for independently assessing Regulation Impact Statements and certifying that they have met all the Regulation Impact Statement requirements of the *Subordinate Legislation Act 1994* (Vic).

Pages 59-63

Recommendation 17

While the Committee does not consider it necessary for the Office of Regulation Reform to be established as an independent statutory authority, the Committee believes some consideration should be given to a location for the Office of Regulation Reform within government which will enhance its role.

Pages 62-63

Recommendation 18

The Committee recommends that –

(a) the regulatory performance of all departments and agencies be assessed annually;

(b) similar regulatory performance indicators to those used by Commonwealth Government departments and agencies be adopted in Victoria;

(c) the Office of Regulation Reform be responsible for assessing agency and department compliance with regulatory performance indicators which concern compliance with the Regulation Impact Statement process;

(d) departments and agencies assess their own performance in relation to regulatory performance indicators which concern other aspects of the regulation-making process;

(e) the Office of Regulation Reform be given responsibility for co-ordinating and ensuring that departments and agencies comply with these requirements;

(f) the results of this assessment be published annually in a publication produced by the Office of Regulation Reform and available on its website and on a centralised website dedicated to all legislation.

Pages 63-64
Exceptions and Exemptions from the RIS Process

Recommendation 19

The Committee recommends that the current framework of the *Subordinate Legislation Act 1994* (Vic) whereby Regulation Impact Statements must be prepared for all regulations unless excepted or exempted under the Act be retained.

*Pages 64-65*

Recommendation 20

The Committee recommends that Ministers be required to provide reasons for excepting regulations from the Regulation Impact Statement process.

*Pages 65-66*

Recommendation 21

The Committee recommends that the process of calculating fee increases to the nearest whole dollar under section 8(2) of the *Subordinate Legislation Act 1994* (Vic) be retained.

*Pages 66-67*

Recommendation 22

The Committee recommends that the *Subordinate Legislation Act 1994* (Vic) be amended to prohibit the use of the “basket” (or averaging) approach for regulations increasing fees under section 8(1)(a).

*Pages 67-68*

Recommendation 23

The Committee recommends that –

(a) department and agency staff be required to prepare a table comparing new and old fees, including an indication of the percentage increase or decrease for each fee; and

(b) departments and agencies be required to provide the Regulation Review Subcommittee with a copy of this comparative table.

*Pages 68-69*
Recommendation 24

The Committee recommends that –

(a) regulations increasing court and tribunal fees be required to comply with the rate fixed by the Treasurer for regulations made under section 8(1)(a); and

(b) section 8(1)(b) be amended to refer only to the procedures and practice of courts and tribunals so that where regulations increasing court and tribunal fees fall outside the rate set by the Treasurer, those regulations be subject to regulation impact assessment.

Recommendation 25

The Committee recommends that it be a requirement of the Subordinate Legislation Act 1994 (Vic) that –

(a) initial consultation be undertaken to determine whether an appreciable economic, social or environmental burden is imposed; and

(b) copies of all certificates of consultation be provided to the Regulation Review Subcommittee.

Recommendations concerning the Premier’s Guidelines are made later in this Report – see Recommendation 45.

Recommendation 26

The Committee recommends that –

(a) it be a requirement for the Office of Regulation Reform to independently assess Regulation Impact Statements prepared by jurisdictions other than Victoria for the purposes of national scheme regulations;

(b) when reviewing such Regulation Impact Statements the Office of Regulation Reform should consider how they will operate in Victoria. If the Office of Regulation Reform determines that there are significant differences in the Victorian regulations from the proposed national scheme ‘model’ regulations on which the national Regulation Impact Statement was prepared, then Victorian departments and agencies should prepare separate Regulation Impact Statements addressing those identified differences; and

(c) a copy of the Office of Regulation Reform’s advice to departments and agencies be provided to the Regulation Review Subcommittee.
Recommendation 27

The Committee recommends that regulations exempted from the Regulation Impact Statement process under section 9(1)(e) of the Subordinate Legislation Act 1994 (Vic) be subject to approval by the Premier.

Pages 75-76

Recommendation 28

The Committee recommends that a copy of the reasons given to the Premier by departments and agencies when seeking Premier’s certificates be forwarded by departments and agencies to the Regulation Review Subcommittee together with other relevant regulation materials.

Page 76

Notification

Recommendation 29

The Committee recommends that it continue to be compulsory to provide notification of Regulation Impact Statements in a daily newspaper circulating throughout Victoria, the Victorian Government Gazette and relevant interest group journals and that in addition it also be compulsory to provide notification in relevant regional newspapers and on an electronic website dedicated to all types of legislation.

Pages 77-78

Recommendation 30

The Committee recommends that all departments and agencies be required to post Regulation Impact Statements on their websites and that there be appropriate links to an electronic website dedicated to all types of legislation.

Pages 78-79

Recommendation 31

The Committee recommends that all departments and agencies be required to maintain electronic interested party registers and that these be linked to a centralised website dedicated to all types of legislation.

Pages 79-81
Recommendation 32

The Committee recommends that a centralised website similar to the Regulatory Town Hall website in the State of Virginia in the United States be established with a view to improving access and the efficiency and cost-effectiveness of the regulation-making process in Victoria. The Committee notes that it may be appropriate to build on the Victorian Legislation and Parliamentary Documents section of the Victorian Parliament website.

Pages 82-83

Recommendation 33

The Committee recommends that notification for all legislative instruments be consistent and that they be notified in the *Victorian Government Gazette* and on a centralised website dedicated to all types of legislation.

Pages 83-84

Consultation

Recommendation 34

The Committee recommends that it continue to be a requirement under the *Subordinate Legislation Act 1994* (Vic) for consultation to be undertaken in all circumstances.

Recommendations concerning the *Premier’s Guidelines* are made later in this Report - see Recommendation 45.

Pages 84-85

Recommendation 35

The Committee recommends that –

(a) it remain a mandatory requirement of the *Subordinate Legislation Act 1994* (Vic) for a Minister to publish his or her decision whether or not to proceed with a regulatory proposal in the *Victorian Government Gazette*, in a daily newspaper circulating throughout Victoria and in addition that such decisions also be published on a centralised website dedicated to all types of legislation;

(b) all departments and agencies be required to send a copy of the notice published in the *Victorian Government Gazette* and the advertisement published in a daily newspaper to the Regulation Review Subcommittee along with other relevant regulation materials.

Pages 85-86
Recommendation 36

The Committee recommends the *Subordinate Legislation Act 1994* (Vic) be amended to provide the public with a minimum of 42 days to comment on Regulation Impact Statements.

Pages 86-88

Recommendation 37

The Committee recommends that all Regulation Impact Statements feature a summary of key issues.

Page 88

Recommendation 38

The Committee recommends that –

(a) the current test for consultation be broadened from an ‘economic or social burden’ to an ‘economic, social or environmental burden’;

(b) the certificate of consultation provided to the Regulation Review Subcommittee (see recommendation 25(b)) list those organisations and individuals who have been consulted;

(c) as part of Recommendation 10, the Office of Regulation Reform be required to make training available on consultation to department and agency staff.

The Committee also draws attention to the Environment Protection Authority, Protocol for the Development of Regulation and Regulatory Impact Statements, February 1996.

Recommendations concerning the *Premier’s Guidelines* are made later in this Report – see Recommendation 45.

Pages 88-94

Recommendation 39

The Committee recommends that –

(a) departments and agencies consider the provision of detailed reasoning in support of final regulations; and

(b) to promote a better understanding, that these details be publicly available on a centralised website dedicated to all types of legislation.

Pages 94-95
Regulatory Plans

**Recommendation 40**

The Committee recommends that –

(a) it be a requirement that all departments and agencies provide details of their anticipated regulatory activity annually for inclusion in the *Victorian Regulation Alert* or some similar publication;

(b) departments and agencies be able to make changes to these plans throughout the year and that these changes be recorded as soon as practicable in the *Victorian Regulation Alert* or similar publication;

(c) the *Victorian Regulation Alert* or similar publication be available from a centralised website dedicated to all types of legislation.

*Pages 95-97*

Publication

**Recommendation 41**

The Committee recommends that all legislative instruments be subject to the same publication requirements and that they be available in printed form for purchase from the Victorian Government Bookshop and for inspection from Government departments and agencies, all public libraries including major regional libraries and in electronic form on a website dedicated to all types of legislation.

*Pages 97-101*

**Recommendation 42**

The Committee recommends that consideration be given to providing access electronically to authorised versions of all legislation.

*Page 101*
Tabling Requirements

Recommendation 43

The Committee recommends that the Subordinate Legislation Act 1994 (Vic) be amended to provide that where a legislative instrument has not been tabled in accordance with the requirements of section 15 of the Act, a notice of a resolution to disallow the legislative instrument may be given in a House of the Parliament up to the sixth sitting day after notice of the making of the legislative instrument has been published in the Victorian Government Gazette.

Page 102

Incorporated Documents

Recommendation 44

The Committee recommends that –

(a) departments and agencies refrain from the practice of incorporating documents and materials into regulations unless absolutely necessary;

(b) where documents and materials such as Australian Standards are incorporated into regulations, those documents and materials be subject to the RIS process;

(c) there be a prohibition on incorporating documents and materials which are subject to changes over time and that where it is absolutely necessary for documents to be incorporated that they only be incorporated as at a particular date.

Pages 102-105

Premier’s Guidelines

Recommendation 45

The Committee recommends –

(a) that the current Premier’s Guidelines be amended and updated so that one set of comprehensive Guidelines is made to assist departments and agencies with the preparation of Regulation Impact Statements and compliance with other aspects of the Subordinate Legislation Act 1994 (Vic);

(b) to reflect a whole of government approach, this comprehensive set of Guidelines be made by the Governor-in-Council on the recommendation of the Premier and that prior to submission to the Governor-in-Council there be an opportunity for input from the Office of Regulation Reform, the Executive Council, the Office of Chief Parliamentary Counsel, the Regulation Review Subcommittee and departments and agencies; and
(c) this comprehensive set of guidelines be accessible from a centralised website dedicated to all types of legislation.

Pages 105-109

Disallowance

Recommendation 46

The Committee recommends that the disallowance provisions contained in the Subordinate Legislation Act 1994 (Vic) be retained.

Pages 111-112

Sunsetting

Recommendation 47

The Committee recommends that regulations continue to sunset at 10 years.

Pages 112-113

Recommendation 48

Given that regulations continue to exist for a period of 10 years, the Committee considers that it is essential that there be a review of the effectiveness of regulations part way through their 10 year existence and therefore recommends that –

(a) all departments and agencies be required to produce a Report on the Effectiveness and Impact of Regulations at the end of five years;
(b) the Office of Regulation Reform be responsible for developing criteria for all departments and agencies to use to monitor and measure the effectiveness and impact of regulations;
(c) the Office of Regulation Reform be available to provide advice and assistance to departments and agencies when they are preparing reports on the Effectiveness and Impact of Regulations;
(d) the Office of Regulation Reform have oversight over the preparation of reports on the Effectiveness and Impact of Regulations;
(e) all Reports on the Effectiveness and Impact of Regulations be tabled in Parliament and be publicly available from department and agency websites as well as a centralised website dedicated to all types of legislation as soon as practicable after they have been completed.

Pages 114-115
Recommendation 49

The Committee recommends that –

(a) departments and agencies be able to continue to seek a once only 12 month extension on the operation of regulations;

(b) departments and agencies be required to seek approval for a 12 month extension from the Premier; and

(c) it continue to be a requirement to provide a copy of the section 5(3) certificate to the Regulation Review Subcommittee and in addition it also be a requirement to provide a copy of the section 5(3) certificate to the Governor-in-Council.

Pages 115-118

Recommendation 50

The Committee recommends that the Subordinate Legislation Act 1994 (Vic) be amended to make clear that –

(a) when principal regulations expire, any regulations which amend those principal regulations cease to operate on the same day as the principal regulations are revoked; and

(b) extension regulations automatically cease to exist the day after the principal regulations (which they extended) expire.

Pages 118-119

Recommendation 51

The Committee recommends that the Subordinate Legislation Act 1994 (Vic) be amended to make clear that regulations expire at the end of the day that is the tenth anniversary of the making of the legislative instrument.

Page 119

Competition Policy Requirements

Recommendation 52

The Committee recommends that –

(a) the Office of Regulation Reform be required to make training available to department and agency staff on how to carry out competition policy analyses;

(b) it be made clear in the new comprehensive set of guidelines that department and agency staff must send competition policy analyses and certificates to the Regulation Review Subcommittee.

Pages 119-120
Explanatory Memoranda

**Recommendation 53**

The Committee recommends that –

(a) strict requirements for explanatory memoranda be contained in the new comprehensive set of Guidelines;

(b) all departments and agencies be required to provide explanatory memoranda to the Office of Chief Parliamentary Counsel as well as the Regulation Review Subcommittee;

(c) explanatory memoranda be tabled in Parliament along with other relevant regulation materials; and

(d) explanatory memoranda be available on a centralised website dedicated to all types of legislation.

Pages 121-122

Certificates

**Recommendation 54**

The Committee recommends that –

(a) all certificates (including recommendations for regulations to be made) be provided to the Regulation Review Subcommittee within 7 days of the relevant regulations being made; and

(b) it be compulsory for all certificates to be dated with the date of the day of signing.

Page 122

References to the Subordinate Legislation Act 1962

**Recommendation 55**

The Committee recommends that a review be conducted of all references to the repealed *Subordinate Legislation Act 1962* (Vic) with a view to making appropriate amendments.

Page 123
In March 2000 the Scrutiny of Acts and Regulations Committee (the Committee) received a reference to inquire into the operation of the Subordinate Legislation Act 1994. The Regulation Review Subcommittee conducted this Inquiry on behalf of the Committee. In this Report the Committee examines the effectiveness of the regulation-making system in Victoria and makes recommendations to improve that system to enable Victoria to achieve best practice standards set by the Organisation for Economic Co-operation and Development (OECD).

The Committee has a role set out in the Subordinate Legislation Act 1994 of scrutinising regulations against criteria set out in that Act. As part of its Inquiry, the Committee found that Victoria is well-regarded in the area of regulatory scrutiny and that the basic framework of the current Act should be retained. However, the Committee takes the view that there is scope for improvement and the Report makes a number of recommendations relating to extending the scrutiny role of the Committee over the many types of legislative instruments that do not currently come within the scope of the Act.

The Report is premised on the basis that the ‘rule of law’ requires that all Victorians be able to easily access the various laws that regulate many aspects of their lives and that they have an opportunity to be consulted on those laws. The Report makes a number of recommendations relating to utilising modern information and communication technology, such as the internet to improve access to legislative instruments and Regulation Impact Statements (RISs) and to strengthen consultation processes.

The Committee found that the quality of RISs varied and makes a number of recommendations to improve them including expanding the role of the Office of Regulation Reform (ORR) to conduct independent assessment of RISs and to provide advice and training to departments and agencies. The Report also makes recommendations relating to performance assessments of departments and agencies as to compliance with the requirements of the Act and as to reviewing the effectiveness of legislative instruments during their period of operation.

The Committee also makes a number of recommendations relating to broadening the circumstances in which a RIS and consultation would be required to reflect a ‘triple bottom line’ approach – a consideration of economic, social and environmental impacts. The Committee found that departments and agencies were not always clear as to the extent of consultation required because of ambiguity contained in the current Premier’s Guidelines. The Committee makes a number of recommendations relating to updating the Premier’s Guidelines.

In April 2001 the Committee held public hearings. All the evidence received in submissions and from witnesses has been carefully evaluated by the Committee. On behalf of the Committee, I wish to thank those organisations and individuals who made written submissions or appeared at the hearings. All those contributions to the Inquiry are greatly appreciated.

On behalf of the Committee, I also wish to thank Mr. Rex Deighton-Smith for his excellent analysis of how the RIS process is working. Mr. Deighton-Smith’s comments provided Committee members with insight into the RIS process enabling the Committee to put forward a number of recommendations for improvement to the existing system.
In order to enhance its understanding of regulation-making practices in other Australian jurisdictions, in June 2000 a delegation of the Committee visited Brisbane, Sydney and Canberra and met with members of counterpart scrutiny committees as well as key stakeholders in those regulatory systems. These meetings were extremely rewarding and useful to the Committee. On behalf of the Committee, I wish to thank those individuals and organisations who met with us during this interstate visit.

In July 2001 a delegation from the Regulation Review Subcommittee met with key players in the regulatory systems of selected jurisdictions in the United States of America. These meetings were invaluable and have influenced some of the Committee’s recommendations. On behalf of the Committee, I wish to thank those individuals and organisations who met with us in the United States for their wonderful hospitality and enormous assistance.

I take this opportunity to thank previous and current members of the Subcommittee for their work and contribution to the Inquiry. These members include Ms. Mary Gillett MLA, Mr. Tony Robinson MLA, the Hon. Robert Maclellan MLA and the Hon. Andrew Olexander MLC. I note that part way through the Inquiry Mr. Martin Dixon, MLA and the Hon. Maree Luckins, MLC resigned from the Committee and I wish to thank them for their participation and contribution to this Inquiry.

Finally, I wish to thank our Legal Adviser, Ms Jenny Baker, for her excellent research, analytical and organisational work during the course of the Inquiry and the preparation of this Report. I also wish to thank Mr Simon Dinsbergs for his excellent work in formatting the final Report and Ms. Mignon Turpin for her excellent work in proofreading the final Report.

The Subcommittee has found the Inquiry to be both challenging and worthwhile. I believe that the Committee’s recommendations, if adopted, will make significant improvements to the regulatory system in Victoria and will enable Victoria to be a world leader in regulatory reform and regulatory scrutiny.

Hon. Jenny Mikakos, MLC  
Chair,  
Regulation Review Subcommittee  
August 2002

Ms Mary Gillett, MLA  
Chair,  
Scrutiny of Acts and Regulations Committee  
August 2002
On 14 March 2000, Parliament requested the Scrutiny of Acts and Regulations Committee (the Committee) to inquire into, consider and report on the *Subordinate Legislation Act 1994* (Vic). As the *Subordinate Legislation Act 1994* (Vic) concerns regulations, the Regulation Review Subcommittee took responsibility for conducting the Inquiry on behalf of the Committee.

The *Inquiry into the Subordinate Legislation Act 1994* (Vic) required the Committee to carry out a comprehensive evaluation of the effectiveness of the regulation-making process in Victoria and of the scrutiny functions performed by the Regulation Review Subcommittee.

As part of this Inquiry, the Committee circulated a *Discussion Paper*¹ in November 2000 and invited public submissions. Thirty-four submissions were received in response to this invitation. Appendix A contains a list of all the submissions received by the Committee. On 26 and 27 April 2001, the Committee held public hearings in order to obtain further evidence from some of those who made submissions. Appendix B contains a list of all those who appeared as witnesses before the Committee at these public hearings.

In order to keep Victoria in the forefront of regulatory scrutiny, the Committee carefully examined the regulation-making systems in all other Australian jurisdictions and in selected jurisdictions in the United States. Committee members learned that, in many respects, Victoria has a reputation for leading the way with regulation reform and its regulatory system.² A delegation of the Committee visited Brisbane, Sydney and Canberra and met with counterpart scrutiny committees and other key stakeholders in the regulation-making process. Appendix C contains a list of all interstate meetings.

A delegation of the Committee also visited selected jurisdictions in the United States. Appendix D contains a list of all meetings in the United States. These jurisdictions included California, Arizona, Utah, Virginia, Pennsylvania and the Federal system in Washington DC. The comments which follow concerning the United States relate only to these selected jurisdictions. Before choosing the United States, the Committee, examined other jurisdictions in Europe and Canada. The United States was ultimately selected due to its comparative federal political system and because some of its jurisdictions are regarded as being at the forefront in the use of technology as part of their regulation-making processes. The Committee identified early in this Inquiry that many members of the Victorian community have difficulty finding and accessing regulations and that one way of dealing with this problem is to make much more effective use of new information and communication technology.

The Committee found that, within Australia, in many respects Victoria leads the way with its regulation-making process. Professor Pearce and Mr. S. Argument have commented that “… it is

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difficult not to conclude that the [Victorian] Scrutiny Committee is setting the example for committees in the other Australian jurisdictions”.

While this may be so, the Committee was particularly impressed with some aspects of the regulation-making systems in other Australian jurisdictions and in the selected jurisdictions studied in the United States. This Report summarises the key features of those jurisdictions’ approaches to regulatory scrutiny and regulation-making as this research constituted a large component of evidence that was considered by the Committee.

Scope of the Subordinate Legislation Act 1994

The current scope of the Subordinate Legislation Act 1994 (Vic) is limited to ‘statutory rules’ which are commonly known as regulations. The Committee found that a major criticism of the Victorian regulatory system is the increasing proliferation of legislative instruments outside the scope of the Subordinate Legislation Act 1994 (Vic) which are therefore not subject to any consistent regulation-making procedures and not subject to scrutiny by the Regulation Review Subcommittee. The Committee considers that a key element of a transparent and accountable regulatory system is the application of standard procedures to all types of legislative instruments.

In deciding the most appropriate recommendations to deal with this issue, the Committee had to weigh competing claims of making legislative instruments quickly, efficiently and with minimal cost against the need for all legislative instruments to be subject to rigorous and standard procedures which ensure that appropriate approaches are adopted and people’s rights are protected. The Committee heard evidence that legislative instruments outside the scope of the Subordinate Legislation Act 1994 (Vic) do adversely affect people’s rights and there is often little recourse, except through costly litigation in the courts.

The Committee considers that the procedures for making legislative instruments which fall outside the scope of the Subordinate Legislation Act 1994 (Vic) lack transparency and accountability and often result in inconsistencies and confusion for those affected. Although the Commonwealth Legislative Instruments Bill 1996 [No. 2] has not yet completed its passage in the Federal Parliament, the Committee sees merit in the approach taken by its application to all instruments which are ‘legislative in character’ ensuring that those instruments are subject to consistent and transparent regulation-making procedures.

The Committee considers that in order to provide appropriate protection to people’s rights, the Regulation Review Subcommittee should, on behalf of the Parliament of Victoria, be responsible for reviewing all types of legislative instruments, excluding local laws. The Committee recognises the special status of local government as a separate tier of government and believes that local laws should not be subject to scrutiny by the Regulation Review Subcommittee. The Committee considers that a more effective scrutiny process for local laws than currently exists needs to be established. The Committee considers that the establishment of a special committee for reviewing local laws should be considered by the Minister for Local Government in consultation with local government.

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Executive Summary

Australian and United States Regulatory Approaches Contrasted

The Committee found that regulatory systems in the United States operate quite differently to those in Australia. In the United States the regulation-making process is more time consuming, taking much longer for regulations to be finalised. The Committee found that members of the public in the United States are given a much greater opportunity to participate in the regulation-making process than in Australia. There are mandatory procedures in place for notifying members of the public about regulatory proposals, with electronic and printed form notification. People may register with agencies to receive personal notification of regulatory proposals generally or only those dealing with particular issues. Agencies must personally notify all those who are registered to receive such notification and this is usually done electronically or by mail. In this way people are able to remain well informed about regulatory initiatives and cannot complain that they were unaware of regulatory proposals.

In the United States, members of the public often have an opportunity to present their views verbally either to the agencies responsible for promulgating regulations or to those committees responsible for overseeing the regulatory process. For example, agencies in Arizona must hold public hearings even if the request has been made by one person only and members of the public have a further opportunity to verbally present their views when a regulatory proposal goes to the Governor’s Regulatory Review Council (GRRC) for final approval. In Pennsylvania, people have the opportunity to address the Independent Regulatory Commission and in Utah they have an opportunity to address the Administrative Rules Review Committee when they are examining regulatory proposals.

The Committee notes that this stands in contrast to Australia where there is no absolute right for members of the public to verbally present their views either to departments and agencies or to Parliamentary scrutiny committees. Whether the public may verbally present their views lies at the discretion of agencies and departments. In relation to Parliamentary scrutiny committees, the public or representatives of organisations may be invited to attend committee meetings to present evidence but these meetings are not generally open to the public. Where Parliamentary Committees hold public hearings those invited have the opportunity of giving evidence, while other members of the public may attend and observe the proceedings.

In the United States, scrutiny of regulations is not always performed by Parliamentary Committees but is sometimes performed by those in the executive arm of government or by an authority consisting of various representatives of the community. Unlike Australia, scrutiny usually occurs well before regulations have been made. In Arizona, for example, GRRC must approve the majority of regulations made in that State and there is no Parliamentary Committee with responsibility for scrutinising regulations. GRRC consists of members representing various ‘interests’ such as the public, the legal profession and the business community. In Virginia and Utah, for example, in addition to review by Parliamentary Committees, regulations are also subject to review by the Governor’s Office.

While the Committee is impressed with other aspects of the regulation-making systems in the United States, it considers that many of those features could not easily be adopted in Victoria unless major changes are made to the current Victorian regulatory system. The Committee considers that while the opportunity for the public to make verbal presentations to agencies and departments at public hearings does allow greater community input to regulatory proposals and may foster greater public commitment, to adopt this requirement in Victoria would unnecessarily extend the time, cost and litigiousness of the regulation-making process. Evidence given to the
Committee by Victorian departments and agencies indicated that some departments and agencies engage in informal consultation with stakeholders prior to releasing a RIS for comment or in ‘scoping’ a proposed regulation. The Committee considers that its recommendations will make significant improvements especially in terms of public access and participation in the regulatory system without going down the path of compulsory public hearings for agencies and departments. The Committee’s conclusions concerning the strengths and weaknesses of regulatory systems in the United States are contained at the end of each chapter on each jurisdiction studied.

Regulation Impact Statements

A crucial part of this Report is the Committee’s examination of how the Regulation Impact Statement (RIS) process is working. The Committee engaged the services of Mr. Deighton-Smith, who has significant experience in the Victorian RIS process, to conduct a review and analysis of the quality of RISs in Victoria. A total of 53 RISs were reviewed, including 32 completed during 1999 (representing all RISs undertaken in that year) and a selection of RISs completed during the period 1995 to 1998. RISs were chosen from this earlier period on the basis of regulatory significance and from a broad range of policy areas. Appendix E contains a table showing a breakdown of RIS reviewed by subject area. Mr Deighton-Smith’s findings have been incorporated into this Report.

The Committee found that the RIS process is not working as effectively as it should be and needs improvement in order to achieve OECD ‘best practice’ standards. In particular, the Committee was concerned to find that many RISs failed to adequately analyse alternative options and their costs; were based on poor quality quantitative data; failed to analyse trends in problems over time and were not supported by in-depth research. The Committee was also concerned to find that rather than being used as a tool to stimulate policy discussion and development, RISs are sometimes used to justify policy decisions long since made. The Committee considers that it is essential that ORR be given responsibility for developing and implementing effective data collection strategies and that it should assist departments and agencies to develop improved research techniques.

RISs must be prepared where regulations impose an appreciable economic or social burden on a sector of the community. The Committee considers that the threshold test could be improved by broadening it to apply also where a burden is imposed on the environment. The Committee considers that the major problem with the threshold test is the lack of guidance provided to department and agency staff as to the application of that test and this sometimes results in uncertainty as to whether or not RISs need to be prepared. The Premier’s Guidelines provide guidance concerning the application of this test. However, the Committee heard evidence that the guidance on the threshold test provided in the Premier’s Guidelines is based on dictionary definitions and is unclear and confusing. The Committee considers that the provisions in the Premier’s Guidelines concerning the threshold test are in urgent need of clarification. The Committee notes that this should be done in the context of a general review of the Premier’s Guidelines.

In this Report the Committee examines the issue of the Premier’s Guidelines noting that the advice they provide on many aspects of the Subordinate Legislation Act 1994 (Vic) is inadequate, inconsistent and confusing. The Committee concludes that in their current format

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4 Department of Premier & Cabinet (DPC), Premier’s Guidelines, December 1997, paragraph 4.4.
they provide little practical assistance to regulators. The Committee considers that this problem is exacerbated by the existence of various guidance documents that provide inconsistent advice. The Committee considers that there should be one set of Guidelines providing comprehensive, consistent and clear advice on all aspects of the regulation-making process.

The Committee notes that under the current system independent assessments may be conducted by consultants or by ORR. The possibility exists that the use of consultants to carry out independent assessments of RISs may compromise the results, in that they may be reluctant to be too critical. The Committee considers that in the interests of strengthening quality control, consistency and accountability, ORR should be given sole responsibility for conducting independent assessments. The Committee also draws attention to the inability of the Regulation Review Subcommittee to scrutinise independent assessments under the current system. The Committee considers that in the interests of promoting a more transparent and accountable system it is essential that the Regulation Review Subcommittee be provided with copies of independent assessments. Another related issue is the provision of qualified letters of advice instead of conclusive certificates of independent assessment. The Committee notes that qualified letters of advice allow departments and agencies to proceed with regulatory proposals without making changes even though problems have been highlighted with RISs. The Committee does not support this practice and considers that conclusive certificates of independent assessment should be provided either accepting or rejecting RISs and subsequently requiring departments and agencies to make appropriate changes.

Exceptions and Exemptions from the RIS Process

As part of this Inquiry, the Committee has also carefully examined the system of obtaining exceptions and exemptions from the RIS process. The Committee considers that the current framework of the Subordinate Legislation Act 1994 (Vic) whereby RISs are prepared for all regulations unless excepted or exempted should be retained. However, the Committee considers that some aspects of the exception and exemption process require modification to make it more effective and transparent.

The Committee notes that under the current system it is only necessary for Ministers to provide reasons when exempting regulations from the RIS process. The Committee considers that it is equally important for Ministers to provide reasons for regulations excepted from the RIS process as this provides consistency and accountability.

The exception provided to regulations which relate to the procedure, practice or costs of a court or tribunal requires reconsideration given that under that exception court fees can be increased without preparing a RIS and above the rate set by the Treasurer, and the Regulation Review Subcommittee is powerless to comment. The Committee has recommended that regulations increasing court fees be required to fall within the rate set by the Treasurer or be subject to RIS requirements if they fall outside this rate.

The Committee draws attention to the exemption from the RIS process provided to regulations where the regulatory proposal is required under a national uniform legislation scheme and an assessment of the costs and benefits has already been undertaken as part of that scheme. The Committee considers that there is merit in retaining this exemption. The Committee notes that on many occasions Victoria may provide for local variations to ‘model’ regulations agreed to nationally, on which a RIS may have been based. The Committee takes the view that ORR should carefully review RIS prepared at the national level to determine the impact in Victoria of
any Victorian variations and consider whether a separate Victorian RIS should be prepared to consider the Victorian variations.

The Committee notes that it received some adverse comments on section 9(1)(e) which allows regulations to be exempted from the RIS process on the basis that notification and advertising of the proposed regulations would render the regulations ineffective or would unfairly advantage or disadvantage persons likely to be affected by the proposed regulations. The Committee notes that this exemption is very rarely used and usually only in circumstances where there is a need to protect scarce natural resources. To ensure that this exemption is not misused, the Committee has recommended that the use of this exemption be subject to approval by the Premier, as the Minister responsible for the Subordinate Legislation Act 1994 (Vic).

The Committee considers that it is appropriate for regulations to be exempted from the RIS process where the Premier (as the Minister responsible for the Subordinate Legislation Act 1994 (Vic)) certifies that there are ‘special circumstances’ which make it in the public interest to grant that exemption. However, the Committee notes that under the current requirements there is no requirement for reasons to be provided as to why regulations have been exempted under section 9(3). The Committee considers that in the interests of improving transparency and accountability in the regulation-making process, departments and agencies should be required to provide the Regulation Review Subcommittee with a copy of the reasons they put forward to the Premier in seeking exemption under section 9(3).

Incorporated Documents

The incorporation of documents and materials into regulations is an issue of concern and one that is subject to a number of recommendations in this Report. The Committee considers that incorporation of documents reduces accountability, unnecessarily adds to the complexity of regulations and includes information which has not necessarily been subject to cost-benefit analysis. The Committee notes that often these documents and materials are incorporated in such a way that changes can be made to them over time without subjecting them to further consultation or cost-benefit analysis, with the consequence that the impact of these changes remains unknown. The Committee notes that even though there are requirements for notification of changes, those affected may remain unaware of the changes. The Committee considers that this raises a serious ‘rule of law’ issue, that is the right of people to know what the law is so that they can comply with its requirements. The Committee considers that the optimum solution is for departments and agencies to refrain from incorporating documents. However the Committee recognises that there may be occasions when technical materials need to be incorporated, in which circumstances the Committee considers that these documents should only be incorporated as at a particular date and that they should be subject to the Victorian RIS process.

Sunsetting and 12 Month Extensions

The Committee also considered the sunsetting process and the ability to extend the life of regulations for a period of 12 months. After carefully considering all the evidence, the Committee considers that 10 years is a satisfactory period of time for regulations to exist and that any shorter period of time would be resource intensive and substantially add to the administrative costs of departments and agencies.
Executive Summary

The Committee considers that 10 years is a long period of time and that departments and agencies need to establish a consistent and formal monitoring process so that it can be determined whether regulations are achieving their objectives or whether they are ineffective and require modification. The Committee has therefore recommended that departments and agencies be required to produce a Report on the Effectiveness and Impact of Regulations at the end of 5 years. The Committee recognises that this will impose an additional burden on departments and agencies but considers such reviews to be an integral part of ensuring that regulatory reform occurs in a timely fashion. In the interests of consistency the Committee considers that it is appropriate for ORR to take the lead in this area and to develop criteria for all departments and agencies to use and to have oversight over the preparation of these Reports. The Committee also considers that in the interests of transparency and accountability these Reports should be tabled in Parliament and be available on agency and department websites and on a centralised website dedicated to all types of legislation.

In relation to 12 month extensions, the Committee considers that unnecessary extensions defeat the purpose of the Subordinate Legislation Act 1994 (Vic), which requires regulations to sunset at the end of 10 years. The Committee considers that in recent years departments and agencies have been increasingly seeking to extend the life of regulations. The Committee considers that extensions should only be sought in exceptional circumstances, such as where there is a national competition policy review or where national standards are being developed. The Committee considers it is totally inappropriate for extensions to be sought for administrative convenience. In order to minimise the use of these extensions, the Committee considers that approval for extensions should be obtained from the Premier (as the Minister responsible for the Subordinate Legislation Act 1994 (Vic)).

Role of Office of Regulation Reform

At the Commonwealth level, the Committee found that the Office of Regulation Review (the Commonwealth ORR) plays a key role of reviewing the RISs prepared by department and agency staff. To avoid any confusion as to whether or not a RIS needs to be prepared, the Commonwealth ORR has been given responsibility for making this decision, thus ensuring a more consistent approach across the Commonwealth Government. The Commonwealth ORR also has responsibility for reviewing RISs before they proceed to Cabinet. The Commonwealth ORR has fostered strong working relationships with department and agency staff, working alongside them to achieve the most appropriate outcome (whether regulatory or non-regulatory). The Committee notes that the Commonwealth ORR also provides regular and ongoing training to department and agency staff, thus ensuring that new and existing staff familiarise themselves and remain up-to-date with the best methods of preparing RISs. The Committee was particularly impressed with the work done by the Commonwealth ORR and would like to see the Victorian ORR similarly strengthen and enhance its role.

One of the major recommendations in this Report is to give the Victorian ORR an expanded role in the RIS process. The Committee found that in jurisdictions where regular in-depth training on the RIS process is provided better quality regulations are enacted and more appropriate solutions (whether regulatory or non-regulatory) are put in place. The Committee considers that in order to produce consistent and better quality RISs, ORR needs to play a more integral role in the RIS process. The Committee considers that ORR should provide advice and training on RISs and should be solely responsible for independent assessment of RIS compliance with the requirements of the Subordinate Legislation Act 1994 (Vic). While the Committee does not
consider that there is any need for ORR to be an independent statutory authority, the Committee
does believe that consideration should be given to an appropriate location within government
which will enhance its role.

Assessment of Regulatory Performance

The Committee found that Commonwealth departments and agencies responsible for producing
regulations which impact on business are subject to assessment of their regulatory performance.
A series of regulatory performance indicators have been developed, with department and agency
staff responsible for assessing their department’s performance against most indicators and the
Commonwealth ORR having responsibility for assessing each department’s performance against
indicators which relate to compliance with the RIS process. The Committee notes that this
information is published annually and is available to the public in printed form and from the
Office of Small Business website.\(^5\) The Committee considers that this assessment of regulatory
performance in the Commonwealth is not as effective as it could be because its application is
limited to departments and agencies which produce regulations which impact on business. The
Committee sees merit in having this type of assessment of regulatory performance applied to all
departments and agencies regardless of the subject matter of the regulations. The results should
be published annually in a publication produced by the Victorian ORR and be accessible on a
centralised website dedicated to all types of legislation.

Regulatory Plans

Both the Commonwealth and the ACT require departments and agencies which produce
regulations which impact on business to publish Annual Regulatory Plans. In the
Commonwealth, departments and agencies post these plans on their website and the Office of
Small Business provides centralised access. In the ACT, the Microeconomic Reform Division in
the Department of Treasury publishes these plans electronically and in printed form. In the
Committee’s opinion a significant difference between the Commonwealth and the ACT is the
ability in the Commonwealth for these plans to be changed throughout the year. The Committee
notes that in Victoria, departments and agencies may provide details of regulatory proposals to
the Victorian ORR for publication in the \textit{Victorian Regulation Alert}. However, the Victorian
system is not mandatory and there is no ability to make changes to it throughout the year. The
Committee considers that the Victorian system could be significantly improved by making it
mandatory for all departments and agencies to annually provide details of proposed regulations
to the Victorian ORR, requiring these plans to be updated as changes occur, and by making this
information accessible to the public from a centralised website dedicated to all types of
legislation.

Use of Software for Preparing RISs

The Committee considers that good regulatory systems are dependent on the ability of
department and agency staff to understand the regulation-making process and in particular to

\(^{5}\) The Office of Small Business has recently become part of the Department of Industry, Tourism and
Resources (DITR). A new website is under development on DITR’s website at <www.industry.gov.au> and
currently there is a link from the DITR website to the previous Office of Small Business website where all
the information regarding regulatory indicators can be found.
understand how to carry out cost-benefit analyses. While in Queensland, the Committee had the opportunity of seeing a demonstration of a software program developed by the Business Regulation and Reform Unit (BRU) to assist department and agency staff with the preparation of RISs. BRU conducts regular training programs for agency and department staff on how to use this program and comply with the RIS process generally. The software program does not require department and agency staff to rigidly adhere to its requirements but is flexible, allowing for variations in the nature of the information required. The Committee considers that similar software should be used in Victoria to make it easier for department and agency staff to prepare RISs and to achieve more consistency in the quality of RISs.

Information and Communication Technology

The Committee was particularly impressed with the use of information and communication technology in the United States to improve the transparency and accountability of regulatory systems and to enable the public to access the law easily and efficiently. The most outstanding use of information and communication technology was the development of the Regulatory Town Hall website by Mr. William Shobe and Mr. Stewart Lagarde in the Department of Planning and Budget (DPB) in the State of Virginia. The Regulatory Town Hall provides secure access for agency staff, allowing them to automatically transmit completed regulatory proposals to DPB for review; providing automatic emails of approaching deadlines; providing access to mail lists; and so on. The Regulatory Town Hall has significantly improved public awareness of regulatory proposals and participation in the regulatory process.

The Committee considers that for Victoria to be a world leader with its regulatory system, it needs to make similar use of information and communication technology, thereby providing the Victorian public with significantly enhanced opportunities to participate in and understand the regulation-making process. It is the Committee’s strong view that there needs to be one centralised website dedicated to all types of legislation. This centralised website could be used to improve the effectiveness of notification, participation and publication processes. A significant problem in Victoria is the difficulty experienced by many members of the Victorian public in finding and accessing legislative instruments after they have been made. This raises a serious ‘rule of law’ issue, that is the right of people to know what the law is so that they can comply with it. The Committee considers that a centralised website which incorporated aspects of the Regulatory Town Hall could be used to provide the Victorian public with simple and cost-effective access to all Victorian laws as well as facilitating public consultation in respect of proposed legislative instruments.

Access to Authorised Legislation on a Centralised Website

The Committee notes that a recent development in the ACT is the availability of authorised versions of Acts and regulations from a centralised website. This is a first in Australia, with legislation on other websites being for information purposes only. The benefit of this is that authorised legislation is able to be referred to in legal proceedings.

Notification that regulations have been made now occurs electronically in the ACT in the ACT Register. The Committee considers that regulatory procedures are enhanced by the public being

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6 BRU is part of the Department of State Development in Queensland.
7 <www.townhall.state.va.us>.
able to access the law electronically and would like to see Victoria move in the direction of providing access to authorised versions of legislation and electronic notification of the enactment of legislative instruments from a centralised website dedicated to all types of legislation.

Consultation

The Committee received some submissions expressing dissatisfaction with the preliminary consultation processes as currently undertaken by departments and agencies. The Committee considers that this is partly caused by the inadequate guidance provided in the Premier’s Guidelines. The Committee also considers that there is no systematic approach to identifying key stakeholders. The extent to which consultation is adequately undertaken varies across each department and agency. The Committee considers that broad consultation is absolutely essential to achieving the best regulatory or non-regulatory outcome. The Committee has recommended that the Premier’s Guidelines be updated so that departments and agencies have clearer guidance on complying with the requirements of the legislation, including the consultation requirements.

The Committee considers that the current test for consultation needs to be changed from an “economic or social burden” to an “economic, social or environmental burden”. The Committee considers that the broadening of this test will ensure that all relevant groups in the community are consulted from the commencement of the regulatory process. The Committee also draws attention to the Protocol for the Development of Regulations and Regulatory Impact Statements produced by the Environment Protection Authority (EPA). The Committee considers that this Protocol sets out useful procedures to ensure that consultation is carried out thoroughly and at an early point in the regulation-making process. The Committee also considers that when ORR is providing training on the RIS process, part of that training should also focus on the consultation process.

Similarly the Committee notes that it received some submissions expressing some dissatisfaction with the public submission process. The Committee notes that some community groups highlighted the difficulty of meeting the 28 day time limits for making submissions, particularly where regulatory proposals are complex or where they have to canvass the views of their members. The Committee also notes the comments made by departments and agencies that they are sometimes under tight deadlines and a longer comment period may make it difficult for them to meet those deadlines. Given that some regulatory proposals involve particularly complex issues and that representative organisations may seek to canvass the views of their members, the Committee considers that it is fairer to provide additional time for comment and recommends that the time for comment be extended to 42 days. The Committee notes that the current public submission process in the United States’ jurisdictions investigated were made more transparent by requiring departments and agencies to provide written reasons for their decisions. Although the Committee considers that the approach in the United States can be overly prescriptive and litigious, it considers that the Victorian system could be improved by departments and agencies providing reasons for proceeding in a particular regulatory or non-regulatory direction at the time of notifying the final regulations and making these reasons available on a website dedicated to all types of legislation.
Parliamentary Oversight

The Regulation Review Subcommittee has responsibility for reviewing regulations, after they have been made, to determine whether they comply with the principles specified in section 21 of the Subordinate Legislation Act 1994 (Vic). The Regulation Review Subcommittee’s examination does not involve consideration of policy issues but focuses solely on the technical criteria contained in the Subordinate Legislation Act 1994 (Vic). The Committee considers that these scrutiny principles enable effective protection of the rights and freedoms of all Victorians.

When the Regulation Review Subcommittee has concerns with regulations, it corresponds with responsible Ministers. The Committee notes that this process works very effectively, with Ministers usually providing undertakings to make appropriate changes. Where the Regulation Review Subcommittee is dissatisfied with the explanation it receives it can prepare a Report to Parliament and submit this to the Committee for approval and adoption.

The Committee has power to recommend that a regulation be disallowed but must do so within 18 sitting days of tabling of the regulation in that House. This means that the Regulation Review Subcommittee must review regulations within strict time limits. The Committee considers that these time limits provide the Regulation Review Subcommittee with sufficient time in which to review regulations. The Committee notes that while the disallowance provisions are rarely used it is important for these provisions to be retained so that Parliament can perform appropriate scrutiny of the executive arm of government.
Historical Overview

Scrutiny of regulations has been entrenched in Victoria for some time, with the first committee to scrutinise regulations being created in 1956 by the Subordinate Legislation Subcommittee Act 1956 (Vic). From 1982 to 1992 the Legal and Constitutional Committee was responsible for scrutinising regulations. In 1992 the Scrutiny of Acts and Regulations Committee (the Committee) was created by the Parliamentary Committees (Amendment) Act 1992 (Vic) and it took over the scrutiny of regulations. The Regulation Review Subcommittee\(^8\) examines all regulations within the meaning of ‘statutory rule’ in the Subordinate Legislation Act 1994 (Vic) on behalf of the Committee.

Early Reforms

In 1983 the Hon. Alan Hunt introduced a private member’s bill – the Subordinate Legislation (De-regulation) Bill with the aim of reducing the volume and complexity of Victorian regulations. The Legal and Constitutional Committee was requested to examine the Bill in detail and it produced a report with 101 recommendations.\(^9\) Many of the Legal and Constitutional Committee’s recommendations were adopted in the Subordinate Legislation (Review and Revocation) Act 1984 (Vic).

The Subordinate Legislation (Review and Revocation) Act 1984 (Vic) commenced operation in July 1985, introducing major changes to the Subordinate Legislation Act 1962 (Vic) and thereby the Victorian regulatory system. Some of these changes included automatic sunsetting of regulations at the end of ten years; staged repeal requiring regulations made prior to 1984 to be reviewed and remade and the preparation of regulatory impact statements with an opportunity for members of the public to comment on the regulations prior to them being made.

In 1989, in the Legal and Constitutional Committee’s Sixteenth Report on Subordinate Legislation, the Committee suggested that a thorough review of the Subordinate Legislation Act 1962 (Vic) was required so that “dissatisfaction with the Act” and “appropriate solutions” could be discussed.\(^10\) In 1992 the Administrator in Council requested the Legal and Constitutional Committee to inquire into the Subordinate Legislation Act 1992 (Vic). However the Legal and Constitutional Committee’s review was cut short by the dissolution of Parliament in August 1992 and the election of a new Government, after which the conduct of the Inquiry was taken over by the newly created Scrutiny of Acts and Regulations Committee (December 1992). The Committee made a number of recommendations,\(^11\) some of which were adopted in the Subordinate Legislation Act 1994 (Vic).

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\(^8\) Prior to 1 May 2000, the Regulation Review Subcommittee was referred to as the Subordinate Legislation Subcommittee.


The *Subordinate Legislation Act 1994* (Vic), which repealed and replaced the *Subordinate Legislation Act 1962* (Vic), retained the existing heads of scrutiny but introduced significant changes to the regulation-making process in Victoria. The major purposes of the *Subordinate Legislation Act 1994* (Vic) are to ensure that regulations are made subject to Parliament’s authority and control; to regulate the preparation, making, publication and scrutiny of regulations and to provide for public participation in the regulation-making process. Some of the changes introduced by the *Subordinate Legislation Act 1994* (Vic) included –

- A requirement that responsible Ministers consult with other Ministers as well as with members of the public upon whom an appreciable social or economic burden may be imposed;
- A requirement that responsible Ministers ensure that independent advice is obtained as to the adequacy of RISs;
- Increased emphasis on the need to prepare RISs unless the regulation falls within an exception or exemption to that requirement;
- A requirement that responsible Ministers ensure that the requirements of the *Subordinate Legislation Act 1994* (Vic) have been met and that RISs adequately assess the impact of regulations.
Victorian Regulatory System

Key Features

1. **Oversight of Regulations**
   - Office of Chief Parliamentary Counsel (OCPC) drafts and/or settles regulations and rules of courts and tribunals.
   - OCPC checks regulations within the meaning of ‘statutory rule’ in the *Subordinate Legislation Act 1994 (Vic)* (but not rules of courts and tribunals) against the principles of review contained in section 13 of the Act. The Governor-in-Council may not make regulations without a section 13 certificate.
   - After enactment, regulations within the meaning of ‘statutory rule’ in the *Subordinate Legislation Act 1994 (Vic)* are reviewed by the Regulation Review Subcommittee.

2. **Notification Prior to Enactment**
   - Regulatory proposals made with a Regulation Impact Statement (RIS) must be notified in the *Victorian Government Gazette*, a daily newspaper circulating throughout Victoria and in any special interest group journals.
   - There are no legislative requirements for notification for regulatory proposals exempted or excepted from the RIS process.
   - For all regulations outside the scope of the *Subordinate Legislation Act 1994 (Vic)*, notification varies depending on the requirements of their authorising legislation.

3. **Consultation and Participation**
   - For regulatory proposals subject to the *Subordinate Legislation Act 1994 (Vic)* consultation must occur with any sector of the public on which an appreciable economic or social burden may be imposed.
   - Where regulations are made with RISs there is an additional requirement that the general public be given an opportunity to comment. The public must be provided with a minimum of 28 days in which to provide written submissions.

4. **Regulation Impact Statements (RISs)**
   - RISs must be prepared for all regulations which impose an appreciable burden, cost or disadvantage on a sector of the community.
5. **Oversight of RISs**
   - Independent Assessment of RISs by consultants chosen by departments and agencies or by ORR.

6. **Publication**
   - For all regulations subject to the requirements of the *Subordinate Legislation Act 1994 (Vic)* a notice must be published in the *Victorian Government Gazette*.
   - Regulations must be available for purchase from the Victorian Government Bookshop (Information Victoria) and from departments and agencies free of charge. Regulations are also available from Anstat on subscription.
   - Regulations (and Acts) are available electronically from the Victorian Legislation and Parliamentary Documents’ website – <http://www.dms.dpc.vic.gov.au/>. Electronic versions of legislation are not authorised – authorised legislation (that is legislation which may be relied upon in court) may only be obtained in printed form.
   - Regulations not subject to the requirements of the *Subordinate Legislation Act 1994 (Vic)* are generally only published in the *Victorian Government Gazette*.

7. **Tabling Requirements**
   - All regulations subject to the requirements of the *Subordinate Legislation Act 1994 (Vic)* must be tabled in both Houses of Parliament within 6 sitting days of notification in the *Victorian Government Gazette*.

8. **Disallowance**
   - Either House may pass a resolution of disallowance and must do so within 18 sitting days of tabling of the regulation in that House.
   - The Scrutiny of Acts and Regulations Committee, may on the recommendation to it from the Regulation Review Subcommittee, recommend disallowance and must do so within 18 sitting days of tabling of the regulation in that House.

9. **Sunsetting**
   - Regulations subject to the requirements of the *Subordinate Legislation Act 1994 (Vic)* sunset after 10 years.
   - Regulations may be extended for a further 12 months where a Minister certifies that due to ‘special circumstances’ there is insufficient time to undertake a RIS.

**Scope of Subordinate Legislation Act 1994**

The *Subordinate Legislation Act 1994 (Vic)* sets out the procedures for making regulations and the scrutiny functions of the Committee. Only those regulations which come within the
definition of ‘statutory rule’ as contained in section 3 of the Subordinate Legislation Act 1994 (Vic) are subject to its procedures and to scrutiny by the Regulation Review Subcommittee. Section 3 defines ‘statutory rule’ to include –

- Regulations made, approved or consented to by the Governor-in-Council;
- Regulations which may be disallowed by the Governor-in-Council excluding regulations made by local authorities;
- Rules relating to a court or tribunal or the procedure, practice or costs of a court or tribunal;
- Instruments prescribed to be statutory rules by the Governor-in-Council; and
- Instruments deemed to be statutory rules by their authorising Acts.

Regulations in the form of statutory rules constitute only a small portion of the continually growing number of different types of regulations made each year. In the Discussion Paper released for this Inquiry, the following types of regulations were given as examples of regulations falling outside the definition of ‘statutory rule’ –

- Fees payable to the Optometrists Registration Board of Victoria under the Optometrists Registration Act 1996 (Vic);
- Guidelines concerning fees payable to the Building Practitioners Board under the Building Act 1993 (Vic);
- Declarations of classes of food premises and food vehicles under the Food Act 1984 (Vic);
- All local laws under the Local Government Act 1989 (Vic);
- Murray Valley Wine Grape Industry Development Order (Victoria) under the Agricultural Industry Development Act 1990 (Vic);
- Order declaring certain programs to be a declared training program under the Accident Compensation Act 1985 (Vic).

During the Inquiry, the Committee received and heard further evidence of the increasing use of regulations outside the definition of ‘statutory rule’. The Australian Dental Association – Victorian Branch (ADAVB) indicated that there are matters previously provided for in regulations, now being dealt with in Codes of Practice and Guidelines, for example –

- Fees payable to the Dental Practice Board of Victoria (DPBV) under the Dental Practice Act 1999 (Vic);
- Code of Practice regarding Infection Control in dental practices;
- Code of Practice regarding anaesthesia and sedation for dental procedures;
- Code of Practice regarding dental records;

12 Subordinate Legislation Act 1994 (Vic), s. 3.
14 Mr. Garry Pearson, ADAVB, Submission No. 11.
• Code of Practice regarding use of rubber dam for routine endodontic treatment;
• Code of Practice regarding the supervision and duties of dental auxiliary personnel;
• Code of Practice regarding specialist dental laboratory work;
• Guideline on Minimum Terms and Conditions for Professional Indemnity Insurance under the *Dental Practice Act 1999 (Vic).*

Some other examples cited to the Committee include –

• Use of licence conditions rather than regulations by the Department of Natural Resources and Environment (DNRE) to regulate the fishing industry;\(^{15}\)
• Declarations of aquatic invertebrates to be fished under section 5(2) of the *Fisheries Act 1995 (Vic).*\(^{16}\)
• Management Plans under Part 3 of the *Fisheries Act 1995 (Vic).*\(^ {17}\)
• Ministerial Guidelines concerning Management Plans under section 28(1) of the *Fisheries Act 1995 (Vic).*\(^ {18}\)
• Ministerial Directions in respect of developing fisheries under section 50 of the *Fisheries Act 1995 (Vic).*\(^ {19}\)
• Initial Quota Orders by the Minister under section 64 of the *Fisheries Act 1995 (Vic).*\(^ {20}\)
• Fisheries Notices issued by the Minister under section 152 of the *Fisheries Act 1995 (Vic).*\(^ {21}\)
• Declarations by the Secretary of the Department of Human Services (DHS) that food premises of a particular class are to have food safety programs;\(^ {22}\)
• Code of Tendering which applies to all Councils;\(^ {23}\)
• Best Practice Guidelines for Audit Committees and Internal Audit;\(^ {24}\)
• Best Value – Frameworks, Codes and Guidelines;\(^ {25}\)
• Competitive Neutrality Guidelines.\(^ {26}\)

As these types of regulations fall outside the definition of ‘statutory rule’, they do not have to comply with the regulation-making procedures contained in the *Subordinate Legislation Act 1994 (Vic)* and they are not subject to scrutiny by the Regulation Review Subcommittee.

\(^{15}\) A. Allen, East Gippsland Estuarine Fisherman’s Association Inc. (EGEFA), *Submission No. 12.*

\(^{16}\) Mr. R. Hodge, Seafood Industry Victoria, (SIV) *Submission No. 29.*

\(^{17}\) ibid.

\(^{18}\) ibid.

\(^{19}\) ibid.

\(^{20}\) ibid.

\(^{21}\) ibid.

\(^{22}\) P. Clark, *Submission No. 23.*

\(^{23}\) Mr. T. Brown, City of Yarra, *Submission No. 15.*

\(^{24}\) ibid.

\(^{25}\) ibid.

\(^{26}\) ibid.
Regulations Not Subject to the Procedures of the Subordinate Legislation Act 1994

In the *Discussion Paper*, for this Inquiry, regulations outside the *Subordinate Legislation Act 1994* (Vic) is the difficulty for people to find out about the existence of these types of regulations. After enactment, regulations which are subject to the requirements of the *Subordinate Legislation Act 1994* (Vic) must be available for purchase from the Victorian Government Bookshop and copies must be available for inspection at the relevant Government Department or Agency. Regulations outside the scope of the *Subordinate Legislation Act 1994* (Vic) are not subject to these requirements and are often only found in the *Victorian Government Gazette*. Copies of the *Victorian Government Gazette* may be purchased from the Victorian Government Bookshop or from Craftsman Press. Copies may be obtained free of charge from the Craftsman Press website at <www.craftpress.com.au/> and are also available from the Victorian State Library and those public and university libraries which have subscriptions. In 1989 the Legal and Constitutional Committee remarked that publication in the *Victorian Government Gazette* was “not a satisfactory means of making significant laws available to the public”. The Committee considers that the *Victorian Government Gazette* is not easy for all members of the community to find and access, making it difficult for people to familiarise themselves with and comply with certain Victorian laws.

While regulations outside the *Subordinate Legislation Act 1994* (Vic) are not subject to its procedures, they are subject to any requirements contained in legislation which empowers them to be made.

In evidence at Public Hearings, DNRE indicated that the majority of legislative instruments made by the Department are outside the *Subordinate Legislation Act 1994* (Vic) but are still subject to formal consultation and internal department reviews depending on the requirements of their empowering legislation. In later correspondence with the Committee, Mr. Taylor, the Manager, Executive Services, DNRE provided a list of legislative instruments not subject to the *Subordinate Legislation Act 1994* (Vic) and made by DNRE for the financial year 1999-2000. Appendix F contains a list of these legislative instruments. Mr. Taylor noted that the range and number of legislative instruments represents “a typical year”.

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29 Craftsman Press is located in Burwood and there is also a city office at level 1, 520 Bourke Street, Melbourne.
31 Mr. J. Taylor, DNRE, *Minutes of Evidence*, 27 April 2001, p. 121 indicated that during 1999, 70 regulations were subject to the *Subordinate Legislation Act 1994* (Vic) and another 300 instruments fell outside that Act.
32 Ibid.
34 Ibid.
35 Ibid.
Where a Declaration for a Management Plan is proposed under the *Fisheries Act 1995* (Vic), there is a requirement for mandatory consultation with the relevant consultative body and publication of a notice of intention to declare a management plan in a newspaper for at least 60 days prior to being made. For an Order made under the *Agricultural Industry Development Act 1990* (Vic) there must be a public meeting of persons affected by the order and the order must be approved by a poll. These Orders are also subject to disallowance by either House of Parliament.

The Committee received other evidence to suggest that many regulations outside the *Subordinate Legislation Act 1994* (Vic) may be subject to little consultation; are not subject to any cost-benefit analysis; may not automatically expire at a given point of time and may generally lack justification.

The East Gippsland Estuarine Fisherman’s Association indicated that there have been changes to the fishing industry which have been made through the use of licence conditions rather than by regulations. 36 For example, the *Fisheries (Scallop) Regulations 2000* introduced new conditions for the scallop industry in this manner. The use of licence conditions rather than regulations eliminates the requirement for the RIS process, prevents the Regulation Review Subcommittee from performing its scrutiny role and leaves consultation in the hands of the particular department or agency. While the East Gippsland Estuarine Fisherman’s Association highlights inadequacies in the RIS process, that process at least provides an opportunity for comment and scrutiny by the Regulation Review Subcommittee.37

The City of Yarra highlighted that there is often lack of consultation with local government on regulations which affect their interests.38 The City of Yarra expressed particular concern about the lack of consultation with councils during the development of the *Best Practice Guidelines for Audit Committees and Internal Audit*, August 2000.39 More generally the City of Yarra indicated that without legislative requirements, the level of consultation varied considerably –

> While commitment to consultation is often promised, there is rarely any statutory or other requirements for that, and methods of consultation vary from case to case, leading to inconsistencies and confusion.40

The Committee notes that as well as confusion and inconsistencies arising from lack of consultation, there can also be increased costs arising from the need to review and keep up-to-date with various codes and guidelines rather than one set of regulations.

The ADAVB highlighted this problem in relation to an increasing use of Codes of Practice and Guidelines by health practitioner registration boards with the potential for increased costs to the public “arising from practitioner compliance with an ever-increasing list of codes and guidelines”.41

In relation to dentistry, matters previously dealt with by regulations (and subject to the *Subordinate Legislation Act 1994* (Vic)) are now being dealt with by Codes of Practice developed by DPBV.42 Evidence received from ADAVB suggests that not only does this impose

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36 A. Allen, EGEFA, Submission No. 12.
37 ibid.
38 Mr. T. Brown, City of Yarra, Submission No. 15.
39 ibid.
40 ibid.
41 Mr. Garry Pearson, ADAVB, Submission No. 11.
42 ibid.
additional costs but also allows for inconsistent approaches across the health professions, which means that different health professions will be subject to different standards. ADAVB commented –

The present ad hoc arrangements allow widely disparate approaches to exactly the same provisions in equivalent legislation affecting various health care providers. This observation can be made, both with respect to the developmental processes employed and to the content of the regulatory instruments developed. The existence of a health practitioner model was evident during the development of the Dental Practice, Optometrists, Physiotherapists and Medical Practice Acts. There is no evidence however, that any detailed thought has been given to the need for consistency in the approaches taken by the various health practitioner registration boards to similar matters across their various jurisdictions.  

The ADAVB gave evidence to the Committee that they were advised by DPBV that at a meeting on 1 July 2000 various policies and regulations of the previous Dental Board of Victoria had been adopted as Interim Codes of Practices. Provisions of the repealed *Dentists Regulations 1992* (Vic) which were adopted by the Board included –

- Regulation 401 – Prevention of Infection;
- Regulation 402 – Identification of a Dentist;
- Regulation 403(b) – Special branches of dentistry;
- Regulation 501 – Training Examinations and Standards Relating to Dental Therapists;
- Regulation 502 – Duties of a Dental Therapist;
- Regulation 503 – Identification of a Dental Therapist;
- Regulation 504 – Training Examinations and Standards Relating to Dental Hygienists;
- Regulation 505 – Duties of a Dental Hygienist;
- Regulation 506 – Identification of a Dental Hygienist

In addition, various provisions of the repealed *Dentists Act 1972* (Vic) were also adopted. ADAVB criticised the adoption of these Interim Codes of Practice on the basis that they were not easily accessible and there had been no consultation with the dental industry –

There has not been any publication of those codes. There is not a document, either printed or published electronically, which somebody could go to read what those interim codes mean and the nature of them. They are effectively saying one should go back to the old regulations which have expired …

When the review of the Interim Codes of Practice dealing with hygiene was commenced the ADAVB was notified, but there was no RIS, no public notification and no opportunity for the public to comment –

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43 ibid.
44 DPBV, *Notice to Dental Health Care Providers*, undated but received by ADAVB on 24 July 2000.
We have raised the issue that there is no public consultation. What we have been given is not a regulatory impact statement. It does not pretend to be. It is nothing like a regulatory impact statement. There was no public notification in a newspaper or in any other way alerting the community at large to the existence of this review of interim codes. Indeed, you cannot find the interim codes published anywhere unless you happen to receive this particular correspondence.\(^{46}\)

This meant that in relation to the adoption of the Interim Codes of Practice there was no opportunity for broad community input. ADAVB also expressed confusion about what DPBV was trying to achieve –

> There is almost a sense at the moment that, unlike the Premier’s Guidelines, this statutory body is simply reinventing what was. It does not say, ‘Let us find what the problem is that justifies a regulatory solution. Let us be sure that there is one’. What we have in the material attached is not a draft code with a problem statement and a cost-benefit analysis. .... We have advice from the board that they intend to canvass a range of general issues about this particular code, but also codes generally. So there is confusion in their document about what their current exercise is about.\(^{47}\)

More recently the Committee received further evidence from ADAVB about the making of Codes of Practice by DPBV.\(^{48}\) A new Code of Practice – the Practice of Dentistry by Dental Hygienists and Dental Therapists (Auxiliaries Code) was recently adopted. Appendix G contains a copy of the Auxiliaries Code. Prior to the adoption of the Auxiliaries Code, an Issues Paper was circulated to stakeholder groups and sufficient time was provided to these groups to comment. However ADAVB indicates that while they were given ample time to comment, their comments were restricted to “no longer than 2 pages” and to “minor editorial adjustments”.\(^{49}\) ADAVB was thus limited in the response it could make to the Auxiliaries Code. The Committee is concerned that consultation was restricted in this manner as the Committee believes that it is only through broad discussion that the best regulatory outcomes can be achieved.

ADAVB also highlighted that while these Codes of Practice are not mandatory, breach of one of these codes may constitute unprofessional conduct and may consequently lead to dismissal from practice.\(^{50}\) The Committee notes the seriousness of the consequences of non-compliance with these Codes of Practice.

In its submission, DPBV indicated that when it makes Codes of Practice and Guidelines, it does so in accordance with the National Health & Medical Research Council Guidelines, which require consultation with appropriate stakeholders and interested persons.\(^{51}\) In its view, the enactment of Codes of Practice and Guidelines under this process “allows for comprehensive scrutiny of a code of practice” by providing opportunities for input and comment. DPBV argues that subjecting the industry to formal regulatory requirements such as the RIS process would result in additional costs for the Board and these costs would be passed on to the profession by way of higher registration fees.\(^{52}\)

\(^{46}\) ibid, p. 87.
\(^{47}\) ibid, p. 88.
\(^{49}\) ibid.
\(^{50}\) Mr. Garry Pearson, ADAVB, Minutes of Evidence, 26 April 2001, p. 89.
\(^{51}\) Mr. A. Dickinson, DPBV, Submission No. 28.
\(^{52}\) ibid.
The Victorian Workcover Authority (VWA) uses Codes of Practice to provide assistance to stakeholders on how to comply with various regulations or the requirements of particular acts. Appendix H provides a list of Codes of Practice that have been issued by VWA under the Occupational Health and Safety Act 1985 (Vic) and the Dangerous Goods Act 1985 (Vic). Prior to making these Codes of Practice, consultation takes place with key stakeholders. VWA noted that where Codes of Practices are associated with regulations which are subject to the Subordinate Legislation Act 1994 (Vic), the Codes may be reviewed on the same 10 year cycle as the regulations to which they relate. However, there is no legislative requirement that Codes be reviewed regularly and consequently they tend to be reviewed when a problem arises –

At the moment we are looking where things come to our attention. We are reviewing Codes of Practice on a needs basis and there is no regular cycle. One of the issues we have is that we have limited resources and there have been years in the life of regulation development where a lot of regulations were developed – 1988-89 is an example and 1992 is another year – and we are working through these humps at the moment.

The Committee notes that there may be occasions where minimal procedural requirements for certain types of regulations (ie low level administrative type instruments) are appropriate because it enables them “to be made with minimum delay and compliance costs”. The Committee considers that the lack of consistent guidelines and procedures applying to legislative instruments outside the Subordinate Legislation Act 1994 (Vic) results in inconsistencies and lack of access.

Local Laws

Local laws are not subject to the requirements of the Subordinate Legislation Act 1994 (Vic) but must comply with the procedures contained in the Local Government Act 1989 (Vic). The Committee received evidence from some local councils indicating that they are subject to strict requirements when making local laws.

The Local Government Act 1989 (Vic) gives local councils broad powers to make laws for their local communities. Section 111(1) of the Local Government Act 1989 (Vic) provides –

A Council may make local laws for or with respect to any act, matter or thing in respect of which the Council has a function or power under this or any other Act.

Councils may make laws, for example concerning shop trading hours, permits, licences, fees, charges and the imposition of penalties. Local laws may also incorporate codes, standards and other documents by reference. Local laws are subject to some similar requirements to those imposed by the Subordinate Legislation Act 1994 (Vic) such as the requirement for councils to keep copies of local laws and make them available for inspection.

53 Mr. G. Radley, VWA, Minutes of Evidence, 27 April 2001, p. 159.
54 Mr. M. Little, VWA, Minutes of Evidence, 27 April 2001, p. 160.
55 ibid.
56 ibid, p. 161.
57 DPC, Victorian Government, Submission No. 27.
58 Mr. S. Goldsworthy, Manningham City Council, Submission No. 6; Mr R. Wilkinson, City of Whittlesea, Submission No. 16 and Ms Noelene Duff, City of Whitehorse, Submission No. 18.
59 Local Government Act 1989 (Vic), s. 112.
When making local laws, Councils must comply with the notification and participation requirements contained in the *Local Government Act 1989* (Vic). Notice of the intention to make a local law must be given in the *Victorian Government Gazette*. This notice must include details of the purpose of the law, notification that a copy is available from the council offices and must advise of the ability for any person affected by the proposal to make submissions.\(^{60}\) Those affected by the proposal who wish to comment have the right to make a written submission and to orally address the Council at one of its meetings.\(^{61}\) Councils are obliged to consider all submissions when making a decision and to advise all submitters, not only of the decision but of the reasons for the decision.\(^{62}\)

After a local law has been enacted, notice must be published in the *Victorian Government Gazette* indicating the purpose of the local law and that copies may be obtained from the council offices.\(^{63}\) Copies of all local laws must be available for inspection and purchase at council offices during business hours.\(^{64}\)

The *Local Government Act 1989* (Vic) does impose obligations on councils concerning notification, publication and participation. However, as the Victorian Bar indicated there are no legislative requirements for local laws to be subject to the RIS process.\(^{65}\) There are also inconsistencies in the procedures applying to regulations subject to the *Subordinate Legislation Act 1994* (Vic) and local laws. For example –

- Only those affected by a proposed local law may make a submission, whereas under the *Subordinate Legislation Act 1994* (Vic) anyone may make a submission;
- For local laws there is no requirement that a minimum amount of time be given for making submissions, while under the *Subordinate Legislation Act 1994* (Vic) at least 28 days must be allowed;
- Where regulations are made with a RIS, in addition to notification in the *Victorian Government Gazette* there must be notification in a daily newspaper circulating throughout Victoria and in relevant special interest group journals. Notification for proposed local laws need only be in the *Victorian Government Gazette*.

The Committee agrees with comments made by the Victorian Bar which argues that local laws should be subject to the same kind of procedures as regulations subject to the *Subordinate Legislation Act 1994* (Vic) so that there is consistency and uniformity of standards.\(^{66}\)

### Regulations Not Subject to Scrutiny by the Subcommittee

Regulations which fall outside the definition of ‘statutory rule’ in the *Subordinate Legislation Act 1994* (Vic) are not subject to scrutiny by the Regulation Review Subcommittee. Some regulations outside the *Subordinate Legislation Act 1994* (Vic) are subject to Parliamentary scrutiny but not scrutiny by the Regulation Review Subcommittee –

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60 *Local Government Act 1989* (Vic), s. 119(2).
61 ibid, s. 223.
62 ibid, s. 223.
63 ibid, s. 119(3).
64 ibid, s. 120.
66 ibid, p. 4.
For example, the Planning and Environment Act 1987 provides for Parliamentary scrutiny of the making and amending of planning schemes. These must be tabled in Parliament for ten sitting days. The Minister has power to approve any scheme or amendment, and either House of Parliament may move to disallow any approved scheme or amendment.\(^\text{67}\)

The Committee notes, however, that generally regulations outside the Subordinate Legislation Act 1994 (Vic) are not subject to Parliamentary scrutiny.

One submission indicated that while there is a clear need for the use of Ministerial Orders, Ministerial Directions and Guidelines to introduce immediate changes for minor matters, these types of regulations are sometimes used to “circumvent the current extensive and costly process” of making regulations.\(^\text{68}\) The Committee is concerned that it also allows the possibility for regulations to be made which impact adversely on rights and freedoms, without the opportunity of challenge except through costly litigation.

Seafood Industry Victoria (SIV), which represents the general fishing industry, pointed out that regulations outside the scope of the Subordinate Legislation Act 1994 (Vic) provide those to whom power has been delegated with considerable discretion to make decisions which impact on the livelihood of its members.\(^\text{69}\) While SIV recognises the need for regulation-making powers to be delegated, it emphasises the need for these other types of instruments (ie orders, declarations, directions, guidelines etc) to be subject to scrutiny so that there can be transparency, accountability and protection of the interests of its members –

\begin{quote}
It should also be borne in mind that many of the instruments by which industry is managed can carry penalties yet they are instruments which fall outside the scrutiny of the sub-committee which avoids the checks and balances so important in maintaining the fine balance between certainty and flexibility of management.\(^\text{70}\)
\end{quote}

Other submissions received by the Committee highlighted similar sorts of concerns.

Mr. Fitzpatrick on behalf of the Victorian Abalone Divers’ Association (VADA) drew the attention of the Committee to Directions which may be made by the Minister under section 61 of the Fisheries Act 1995 (Vic) which provides –

\begin{quote}
(1) The Minister may give a direction on any matter relating to the management of one or more fisheries or one or more zones of a fishery including (without limiting the scope of this power) –

(a) the eligibility criteria that must be met before a person may be issued with a particular category or class of fishery licence or permit, or to have a particular category or class of fishery licence renewed or transferred;

(b) licence reduction arrangements;

(c) requiring the Secretary to cancel licences.
\end{quote}

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\(^{67}\) DPC, Victorian Government, Submission No. 27.

\(^{68}\) Mr. K. Dare, Solicitor, Submission No. 33.

\(^{69}\) Mr. R. Hodge, SIV, Submission No. 29.

\(^{70}\) ibid.
While there are requirements for publication in the Victorian Government Gazette\(^7\) and for consultation with the Fisheries Co-Management Council and other relevant consultative bodies,\(^2\) these Directions are not subject to scrutiny by the Regulation Review Subcommittee.

Another example is section 67 of the Fisheries Act 1995 (Vic) which allows either a regulation or fisheries notice to be issued to fix open and closed seasons for fish; prohibit the taking, landing, processing, selling or possessing of fish or to prohibit the use of specified fishing methods. The prohibition powers which may be exercised under section 67 are extensive – they may, for example, be absolute or conditional or they may apply to certain species of fish or certain specified waters.\(^3\) Again the Minister is required to consult with relevant consultative bodies,\(^4\) but there is no Parliamentary scrutiny. Another example is the various quota orders which may be issued under sections 64 and 64A of the Fisheries Act 1995 (Vic). As with the other examples, the Minister must consult with relevant consultative bodies and the commercial peak body\(^5\) but these orders are not subject to any Parliamentary scrutiny.

Directions, quota orders and notices may all significantly impact upon fishermen, and while there are requirements for consultation there is no Parliamentary oversight of any of these processes. VADA argues that all these types of legislative instruments should be subject to some form of Parliamentary scrutiny in order to protect the rights of people affected.\(^6\)

Another example is the power delegated to DPBV to create Codes of Practice regulating dentistry standards.\(^7\) ADAVB recently criticised the use by DPBV of the power delegated to it to make Codes of Practice –

> While we know that Parliament must delegate powers to statutory bodies, it usually does so in a way that prevents the organisation from passing that delegation on to anybody other than formally appointed office bearers. In this case, the DPBV appears to have done just that, by requiring dentists, employers and indemnifiers to decide what should constitute appropriate supervision of 2-year trained auxiliaries, and what limits should be placed on the treatment they are allowed to provide the public.\(^8\)

These comments relate specifically to the newly adopted Auxiliaries Code and in particular the failure by DPBV to adequately define “standards of supervision and duties to be performed by registered auxiliaries”.\(^9\) DPBV has issued some general guidelines but requires individual dentists to enter into agreements with dental auxiliaries which set out the roles and responsibilities of the auxiliary, the dentist, working relationships and procedures and protocols for the operation of the dental team.\(^10\) ADAVB indicates that there is no pro forma agreement attached to the Auxiliaries Code and instead DPBV has suggested that professional associations

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71 Fisheries Act 1995 (Vic), s. 61(2).
72 ibid, s. 62. Mr. Fitzpatrick indicated that “other relevant consultative bodies” is defined elsewhere in the Act and that the Minister must consult with the peak commercial industry body, SIV – see Minutes of Evidence, 26 April 2001, p. 65.
73 ibid, s. 67(2).
74 ibid, s. 152.
75 ibid, s. 64B(1).
77 Dental Practice Act 1999 (Vic), s. 69.
79 ibid.
80 DPBV, Practice of Dentistry by Dental Hygienists and Dental Therapists, Part 1.
and indemnifiers prepare pro forma agreements to assist practitioners. The Guild Insurance Limited which is ADAVB’s preferred professional indemnity insurer suggests that the agreements will increase liabilities for dentists and this may result in increased premiums. ADAVB is also concerned that these agreements may create some liabilities for dentists under the Trade Practices Act 1974 (Cth). As Codes of Practice are outside the Subordinate Legislation Act 1994 (Vic) they are not subject to scrutiny or comment by the Regulation Review Subcommittee. The Committee is concerned about these types of instruments because without scrutiny delegated power may be exercised with unfettered discretion.

Mr. Clark, an interested member of the public with degrees in science and economics and with many years experience in reviewing proposed legislation, drew attention to declarations which may be made by the Secretary of DHS that food premises of a particular class have food safety programs. In 1987 the Food Act 1984 (Vic) was amended in order to require food industries to meet appropriate food quality standards and to avoid food poisoning outbreaks. Mr Clark highlighted that the Secretary used this delegated power to include “every food sale activity in Victoria, including once-a-year scout sausage sizzles and the like”. Mr Clark argued that this decision caused significant costs for community organisations. Mr. Clark also pointed out that not only did the amendment “not contemplate inclusion of food activities by voluntary organisations”, but that “it specifically excluded single fund raising events held by the community or charitable organisations”. On the other hand, Dr Carnie, Acting Assistant, Disease Control and Research, Public Health Division, DHS, gave evidence that something needed to be done to prevent food poisoning arising from preparation and handling of food by volunteer groups and that since the declarations had been issued there has been a decline in the number of food poisoning incidents. Dr Carnie also pointed out that these changes were accompanied by community wide publicity and education programs –

The department engaged in an education program aimed at not just the general public but volunteer groups, charity groups, scout groups and those sorts of people. A huge pile of literature, pamphlets, brochures and posters has been produced in the department to educate the groups that do not usually have much technical knowledge on the very basis of safe food preparation – that is the basics such as keeping food hot or refrigerated. A lot of that material has been prepared and has gone out to those groups.

These declarations are outside the application of the Subordinate Legislation Act 1994 (Vic) and therefore not subject to any of its requirements nor to scrutiny by the Regulation Review Subcommittee. The Committee notes that there are important balancing requirements at play here. On the one hand the need for departments and agencies to be able to make regulations quickly in response to situations which require immediate review and on the other hand the need for the public to feel they have adequately participated in the decision-making process and for any changes to address both the particular situation and meet community expectations.

The Committee considers that there are valid reasons for not subjecting all regulations to scrutiny by the Regulation Review Subcommittee. One submission indicated that there are “low

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82 ibid.
83 Mr. P. Clark, *Submission No. 23*.
84 *Food (Amendment) Act 1997 (Vic)*.
85 Mr. P. Clark, *Submission No. 23*.
86 ibid.
88 ibid.
level administrative” instruments such as Orders in Council, determinations, declarations and revocations which need to be made quickly and cost efficiently. That same submission indicated that to subject these types of regulations to scrutiny would not result in any real benefits and would result in delays and costs. The submission cited declarations and revocations of approved insurers under the *Stamps Act 1958* (Vic) as an example –

*A business currently applies to the State Revenue Office (‘SRO’) to be approved as an approved insurer, or to have that approval revoked. As this process is a mere formality for a business but affects the capacity of the business to trade, any declaration must be made promptly. When the SRO receives a request it arranges an Order in Council to give effect to the declaration or revocation. This involves seeking written Ministerial approval, submitting the Order to the Governor in Council and gazetting the Order.*

**Local Laws**

Local laws are not subject to scrutiny by the Regulation Review Subcommittee. In its evidence, the Victorian Bar noted that in relation to local laws there is “no clear process to monitor the adequacy of public participation in the law-making process”.

While there is no Parliamentary Committee or other independent body with responsibility for scrutinising local laws, they are subject to review by the Minister. The Minister may recommend to the Governor-in-Council that a local law be revoked where there has been a substantial breach of the principles contained in Schedule 8 of the *Local Government Act 1989* (Vic) or on the basis of any other matter which the Minister deems appropriate. The principles contained in Schedule 8 of the *Local Government Act 1989* (Vic) are very similar to those contained in the *Subordinate Legislation Act 1994* (Vic). These principles require local laws –

- To be consistent with the purpose of the authorising Act;
- To clearly set out the objectives of the local law and the provision which gives authority for making the local law where the local law is a principal local law;
- Not to go beyond the objectives of the authorising Act;
- To set performance standards rather than prescribe details for achieving objectives;
- Not to exceed the powers conferred by the authorising Act;
- Without clear and express authority, not to have a retrospective effect; not to impose any tax, fee, fine, penalty or imprisonment; not to shift the onus of proof to the person accused of an offence and not to provide for any further delegation of powers delegated by the Act;
- To be consistent with the principles and objectives of the authorising Act;
- Not to make unusual or unexpected use of powers granted by the authorising Act;

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89 DPC, Victorian Government, *Submission No. 27*.
90 ibid.
91 ibid.
93 *Local Government Act 1989* (Vic), s. 123. The Minister may also recommend revocation if the contents of the local law should be more appropriately contained in a planning scheme.
94 ibid, Schedule 8.
• Not to contain substantive provisions which deal with matters or issues which should be contained in an Act;
• Not to unduly trespass on rights and freedoms of a person previously established by law;
• Not to unduly make the rights and liberties of the person dependent upon administrative rather than judicial decisions;
• To be consistent with principles of justice and fairness; and
• Not to duplicate or conflict with other regulations or Acts.

In addition, local laws must comply with competition policy requirements and they must not restrict competition unless the objectives can only be achieved by restricting competition and the benefits to the community outweigh the costs.\(^95\)

Councils are required to lodge all local laws with the Governance and Legislation Branch (GLB) in the Local Government Division of the Department of Infrastructure. A Legal Officer checks the *Victorian Government Gazette* to ensure that councils forward copies of all local laws after they have been made to GLB.\(^96\) Currently GLB keeps a copy of all local laws in printed form. Shortly all local laws will be available on-line and accessible through the Department of Infrastructure’s website.\(^97\) This same legal officer also ensures that local laws are within power and consistent with authorising legislation.

The principles of review contained in the *Local Government Act 1989* (Vic) are very similar to the principles of review contained in section 21 of the *Subordinate Legislation Act 1994* (Vic). The Victorian Bar argues that local laws are subject to similar scrutiny as that received by regulations examined by the Regulation Review Subcommittee and consequently that may constitute sufficient scrutiny of local laws.\(^98\)

**Conclusion and Recommendations**

The Committee finds that there in an increasing proliferation of regulations not subject to the procedures of the *Subordinate Legislation Act 1994* (Vic) and not subject to scrutiny by the Regulation Review Subcommittee.

The Committee received evidence that to subject certain types of regulations (‘low level administrative’ instruments such as Orders in Council, determinations, declarations) to scrutiny by the Regulation Review Subcommittee and to the regulation-making procedures in the *Subordinate Legislation Act 1994* (Vic) may increase the cost of and lead to delays in making these types of regulations. The Committee heard evidence that there may be situations which require a quick response in order to deal with a particular crisis or urgent situation, such as the declarations made by the Secretary of DHS to prevent food poisoning.

However against this must be balanced the need for regulatory responses to be carefully thought through so that there can be appropriate responses to particular situations and to the needs of the

\(^95\) ibid, Schedule 8.
\(^96\) *Telephone Discussion*, Ms J. Baker, Legal Adviser, Regulation Review Subcommittee and Ms K. Cusack, Legal Officer, Governance and Legislation Branch, Local Government Division, Department of Infrastructure, 15 May 2002.
\(^97\) ibid.
community. For example, the declarations issued by the Secretary of DHS to prevent food poisoning outbreaks apply to all food sales in Victoria including food activities run by various voluntary organisations throughout Victoria, increasing the costs involved in conducting these sorts of activities for those organisations. While the Committee has not had the opportunity to seek views from voluntary organisations on this issue, it did hear evidence from Mr Clark to the effect that there is dissatisfaction concerning those additional costs. The Committee notes that where those affected are not part of the regulation-making process, they are more likely to feel dissatisfaction and discontent with the regulatory outcome imposed upon them. At public hearings Mr. Stephen Argument commented –

My fundamental point is I think that if a particular initiative is subject to a process that requires it to go through a series of stages and be looked at by different people from outside, it is almost as if you are forcing people not to act quickly and immediately but to think things through. Any regime that forces that sort of discipline on bureaucracy is a good idea because it is simply the case that a lot of things happen that are not thought through properly and those things require amendment down the track because people had not thought through the consequences of them. The fundamental point is whether there is the opportunity for Parliamentary committees to look at something and whether there is the opportunity for public and industry consultation that can only improve the end product.99

The Committee is concerned about how those given power to make regulations use that power. The Committee notes that in circumstances where delegated power is not subject to any type of Parliamentary review nor to any consistent regulation-making procedures, the potential for powers to be used improperly and for rights to be adversely affected is much greater.

The Committee finds that many regulations outside the Subordinate Legislation Act 1994 (Vic) are subject to little consultation, not subject to any cost-benefit analysis and are not necessarily subject to any form of review. The Committee heard evidence from various organisations expressing dissatisfaction with the regulatory process for regulations not subject to the Subordinate Legislation Act 1994 (Vic). The Committee heard evidence from ADAVB that the adoption of Interim Codes of Practice by DPBV involved no consultation with the dental industry and were not easily accessible. While consultation took place prior to the adoption of the Auxiliaries Code, comments were restricted in size and in scope causing frustration for ADAVB. In addition there is the issue of how delegated power is used. ADAVB expressed concern that instead of setting out appropriate standards in the Auxiliaries Code, that responsibility has been delegated to dentists who must enter into individual agreements meeting the loose guidelines enunciated in the Auxiliaries Code. Consequently ADAVB members remain very dissatisfied with the entire process for making these Codes of Practice and the Codes themselves. The Committee considers that the most appropriate regulatory or non-regulatory response can only be achieved after subjecting regulatory proposals to adequate consultation and cost-benefit analysis.

The Committee notes that regulations which are subject to minimal procedures may be made quickly and with less cost for those empowered to make regulations. The Committee considers that better regulatory outcomes and public knowledge of the law are achieved through the application of consistent procedures for making regulations.

The Committee notes that regulations outside the Subordinate Legislation Act 1994 (Vic) are usually only available in the Victorian Government Gazette. The Committee believes that

99 Mr. S. Argument, Solicitor, Minutes of Evidence, 27 April 2001, p. 139.
accessing the *Victorian Government Gazette* is difficult for many members of the community and consequently some people may be unaware of laws with which they should be complying.

The Committee’s fundamental concern remains with the potential for rights to be adversely affected. Guidelines, Codes of Practice, Ministerial Directions, etc can, for example, impact on people’s livelihoods by imposing additional costs or unfair penalties. Parliamentary scrutiny offers protection of these rights and provides an avenue through which adverse impacts may be resolved at no cost to those affected. Where there is no Parliamentary scrutiny, the only option available to those adversely affected by regulations is to challenge them through costly litigation in the court system. At public hearings Mr. Upjohn from the Victorian Bar commented on the costliness of the court proceedings –

*The trouble with a court doing it is that it requires someone to launch a proceeding, which costs a fair amount of money. A person would have to go to their lawyer and seek advice and find out how much it would cost and whether they can afford it. There are sections that can relatively afford it. If it involves a lucrative business like abalone, they probably would launch such a proceeding. But a person affected by a local law or something smaller – a concerned ratepayers’ association or whatever – may take the view that it is just too expensive and they will have to find some other way of doing it.*

The Committee considers that the most appropriate means of protecting people’s rights is through Parliamentary scrutiny.

The Committee considered the following options –

1. Partial Application of *Subordinate Legislation Act 1994* (Vic);
2. Parliamentary Review of all Regulations which Impose Penalties;
3. Subject all Regulations to Consistent Procedures;
4. Subject all Regulations to Scrutiny by the Regulation Review Subcommittee;
5. Subject all Regulations to Consistent Procedures and Scrutiny.

**Partial Application of the Subordinate Legislation Act 1994 (Vic)**

Some empowering legislation applies specified provisions of the *Subordinate Legislation Act 1994* (Vic) to certain types of regulations. For example –

- Bulk Water Entitlement Orders made under the *Water Act 1989* (Vic). Sections 23, 24 and 25 of the *Subordinate Legislation Act 1994* (Vic) apply to an order as if it were a regulation;
- Closure Notices made under the *Wildlife Act 1995* (Vic). Sections 15, 22, 23 and 24 of the *Subordinate Legislation Act 1994* (Vic) apply to a notice as if it were a regulation.

At public hearings, the Chair of the Regulation Review Subcommittee requested OCPC to provide further examples of legislation which deems some instruments to be statutory rules within the meaning contained in the *Subordinate Legislation Act 1994* (Vic) or which provide

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for instruments to be subject to disallowance by Parliament. Appendix I provides a list of the examples provided to the Committee by OCPC.\textsuperscript{101}

The Committee considers that this approach allows the application of inconsistent procedures to certain types of regulations. It also requires constant monitoring of new legislation (and therefore additional time and resources) to determine whether and if so which provisions of the \textit{Subordinate Legislation Act 1994 (Vic)} apply. The Committee considers that the continued use of this approach adds to the complexity of the regulatory process and does not assist in making the regulatory system more accessible and transparent to the public.

\textbf{Review of Subordinate Legislation which Imposes Penalties}

This would empower the Regulation Review Subcommittee to review all regulations which impose penalties for non-compliance. Some submissions strongly supported this proposal.\textsuperscript{102} This is because regulations which imposes penalties affect rights and liberties and need to be monitored carefully to ensure that the penalties imposed are fair and just. ADAVB submitted that they have been advised by DPBV that breaches of Codes of Practice created by DPBV will constitute grounds for a finding of unprofessional conduct.\textsuperscript{103} A finding of unprofessional conduct could result in the imposition of various penalties “including cancellation of registration, which effectively means removal of livelihood”.\textsuperscript{104}

The Committee agrees that imposition of penalties is a serious matter and that all regulations which impose penalties should be subject to review by the Regulation Review Subcommittee.

\textbf{Subject all Regulations to Consistent Procedures}

All types of regulations would be subject to consistent regulation-making procedures, that is the same notice, consultation, publication, cost-benefit analysis etc requirements. The Committee believes that the application of standard procedures to all regulations is essential to ensure that there is greater access and transparency in the regulation-making process for regulations which fall outside the \textit{Subordinate Legislation Act 1994 (Vic)}. This approach is supported by many of the submissions received by the Committee.\textsuperscript{105} However not all submissions supported this approach. DPBV commented –

\begin{quote}
To treat guidelines and codes of practice as if they were statutory instruments (in the same defined sense as Regulations) would be a retrograde step.\textsuperscript{106}
\end{quote}

\textsuperscript{101} This information was originally provided to the Committee by a letter dated 14 May 2001 from Mr. E. Moran, Chief Parliamentary Counsel, OCPC addressed to the Hon. Jenny Mikakos, Chair, Regulation Review Subcommittee. This information was subsequently updated and provided to the Committee by a letter dated 29 May 2002 from Ms. S. McInnes, Assistant Chief Parliamentary Counsel, OCPC addressed to Ms. Jenny Baker, Legal Adviser, Regulations.

\textsuperscript{102} Mr Garry Pearson, ADAVB, Submission No. 11 and Commander P. Hornbuckle, Victoria Police, Submission No. 21.

\textsuperscript{103} Mr Garry Pearson, ADAVB, Submission No. 11.

\textsuperscript{104} ibid.

\textsuperscript{105} ibid and Mr. B. Sturman, Submission No. 4; Mr. J. Hawkless & Mr. P. Mooney, Hawkless Consulting, Submission No. 13; Mr. T. Brown, City of Yarra, Submission No. 15; Mr. R. Wilkinson, City of Whittlesea, Submission No. 16; Mr. S. Argument, Solicitor, Submission No. 17; Mr. M. Derham, The Victorian Bar, Submission No. 20; Mr. D. Fitzpatrick, VADA, Submission No. 24 and Mr. B. Bottomley, Bryan Bottomley & Associates, Submission No. 26.

\textsuperscript{106} Mr. A. Dickinson, DPBV, Submission No. 28.
DPBV opposes subjecting other types of regulations to the Subordinate Legislation Act 1994 (Vic) because in their view this would subject codes and guidelines to rigid, inflexible enactment procedures instead of allowing more autonomy to health related statutory authorities. Instead of broadening the definition of ‘statutory rule’, DPBV favours the development of a set of standard procedures for codes of practice, guidelines and other similar documents.

Subject all Regulations to Scrutiny by the Regulation Review Subcommittee

This would subject all types of regulations, including local laws to scrutiny by the Regulation Review Subcommittee. A similar proposal was considered by the Legal and Constitutional Committee in 1989, in the context of the Subordinate Legislation Act 1962 (Vic), but rejected on the basis that it “would considerably expand the Committee’s workload, thus putting strain on its resources”. Some submissions indicated that increased workload and additional funding are issues which must be carefully considered by the Committee before recommending a broader scrutiny role for the Regulation Review Subcommittee. The Victorian Bar noted –

In terms of the options for expanding the role of the Regulation Review Subcommittee, a simple widening of the definition of ‘statutory rule’ in s.3 of the Act could bring the scrutiny of all subordinate legislation within the Subcommittee’s domain. It is a question for the Parliament how much resources it is able to devote to the committee in order to effectively perform such a task.

Many submissions support Parliamentary scrutiny of all types of regulations on the basis that all regulations may potentially have an adverse impact on rights and there is a need for some protection of those rights. The Victoria Police commented –

It appears that the use of the regulation making power is increasing often in areas that have direct impact on the general community of Victoria. Since these regulations are not subject to the scrutiny of Parliament prior to being made, it is important that with as few exceptions as reasonably possible, SARC have the ability to review such subordinate legislation, including regulations made by local authorities.

Mixed views were expressed on whether the Regulation Review Subcommittee should also scrutinise local laws. Some submissions supported this. Victoria Police pointed out that local laws can adversely affect rights through the imposition of penalties and there is therefore a need for these to be subject to Parliamentary oversight. There are often inconsistencies between local laws of different local areas –

107 ibid.
108 ibid.
110 Mr. J. Hawkless and Mr P. Mooney, Hawkless Consulting, Submission No. 13 and Mr. M. Derham, The Victorian Bar, Submission No. 20.
111 Mr. M. Derham, The Victorian Bar, Submission No. 20.
112 Mr. B. Sturman, Submission No. 4; Mr. Garry Pearson, ADAVB, Submission No. 11; A. Allen, EGEFA, Submission No. 12; Mr. S. Argument, Solicitor, Submission No. 17; Commander P. Hornbuckle, Victoria Police, Submission No. 21; Mr. P. Clark, Submission No. 23; Environment Liaison Office, Submission No. 25 and Mr. B. Bottomley, Bryan Bottomley and Associates, Submission No. 26.
113 Commander P. Hornbuckle, Victoria Police, Submission No. 21.
114 ibid and Mr. J. Frigo, Victoria Police, Minutes of Evidence, 27 April 2001, p. 144.
115 Commander P. Hornbuckle, Victoria Police, Submission No. 21.
Simple things like restrictive drinking laws regulating drinking from open packages impact broadly across Victoria, although they are made at a local level. Perhaps someone could try to ensure that there is a greater degree of consistency in those laws.\textsuperscript{116}

This means that people visiting local areas may be unfamiliar with the local laws of a particular area and their rights may be adversely affected through ignorance of local variations in the law. This also makes police enforcement more difficult –

\textit{The police in the area would be made aware of what the local laws are. However, it becomes difficult if the local laws are not consistent between municipalities, particularly adjoining municipalities, when police can be asked to enforce one law on one side of the divide and another law on the other side.}\textsuperscript{117}

Submissions received from local councils were strongly opposed to the Regulation Review Subcommittee taking on responsibility for reviewing local laws.\textsuperscript{118} Local councils indicated concern that scrutiny by the Regulation Review Subcommittee would constitute interference with the autonomy of local councils and that it would make the process of making local laws lengthier and more complex thereby limiting the ability of councils to respond to issues of concern quickly and effectively.\textsuperscript{119}

The Committee considers that local laws are important and may adversely impact on rights. The Committee notes that scrutiny committees in South Australia and Western Australia have responsibility for reviewing local laws. At public hearings, Mr. Argument commented –

\textit{I think the fundamental issue is that if local laws are to come within the ambit of what the Committee does, that is going to be such a significant increase in the Committee’s workload that it is both a decision that should not be taken lightly, and if the Committee is to take on that role, clearly it will need greater resources. I think there is a much more fundamental point sitting behind all of that, which is trying to ascertain the way those local laws are dealt with at the moment and whether there is problem with what comes out of the local process, I suppose.}\textsuperscript{120}

The Committee considers that scrutiny of all other types of regulations is essential to provide adequate protection of rights and freedoms.

\textit{Adopt Consistent Regulation-making Procedures and Broaden Scrutiny}

This would involve the application of consistent regulation-making procedures and Parliamentary scrutiny to all types of regulations. Many submissions received by the Committee support this, indicating that the approach taken by the Commonwealth in the Legislative Instruments Bill 1996 [No. 2] (Cth) is most appropriate.\textsuperscript{121} The Legislative Instruments Bill 1996 [No. 2] (Cth) is discussed in detail at pp. 138-141 in this Report and is currently under review by

\textsuperscript{116} Mr. J. Frigo, Victoria Police, \textit{Minutes of Evidence}, 27 April 2001, p. 144.

\textsuperscript{117} ibid.

\textsuperscript{118} Mr. S. Goldsworthy, Manningham City Council, \textit{Submission No. 6}; Mr R. Wilkinson, City of Whittlesea, \textit{Submission No. 16} and Ms Noeline Duff, City of Whitehorse, \textit{Submission No. 18}.

\textsuperscript{119} ibid.

\textsuperscript{120} Mr. S. Argument, Solicitor, \textit{Minutes of Evidence}, 27 April 2001, p. 138.

\textsuperscript{121} Mr. B. Sturman, \textit{Submission No. 4}; Mr Garry Pearson, ADAVB, \textit{Submission No. 11}; Mr. S. Argument, Solicitor, \textit{Submission No. 17}; Mr. M. Derham, The Victorian Bar, \textit{Submission No. 20}; Mr. P. Clark, \textit{Submission No. 23} and Environment Liaison Office, \textit{Submission No. 25}. It is also supported by Mr. S. Goldsworthy, Manningham City Council, \textit{Submission No. 6} subject to the exclusion of local laws.
the Commonwealth Government. However, it is worthwhile examining whether the Bill as it currently stands should be adopted by Victoria.

As it now stands, the Commonwealth Legislative Instruments Bill 1996 [No. 2] (Cth) applies to all instruments of ‘a legislative character’. The definition of ‘legislative instruments’ contained in the Legislative Instruments Bill 1996 [No. 2] (Cth) is set out in Appendix J of this Report. ‘Legislative character’ is defined in the Bill to include an instrument which determines or alters the content of the law, rather than applying the law and which has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right.122

The Victoria Police indicated that they found the definition of ‘legislative instruments’ “wordy and unwieldy”.123 The Committee did not receive or hear any other evidence of similar opinions. Professor Pearce and Mr Argument commented that this definition would make various types of regulations “subject to an ordered and stringent regime in relation to drafting, publication, registration, Parliamentary scrutiny and, in some cases public consultation”.124 The Victorian Bar also welcomed the approach indicating that its adoption “would apply a disciplined management process to all instruments of a ‘legislative character’ and if both Victoria and the Commonwealth proceed, will create a uniform approach between the two”.125 Evidence received by the Committee indicates that the major problem with the regulatory system in Victoria is that the Subordinate Legislation Act 1994 (Vic) only applies to ‘statutory rules’, thereby excluding many other types of regulations –

As I have previously indicated, the Victorian approach to subordinate legislation is something close to ‘world’s best practice’. The fundamental flaw, however, is that it only operates in relation to ‘statutory rules’. If the Subordinate Legislation Act were to be amended to incorporate a provision along the lines of the definition of ‘instrument of a legislative effect … that flaw would be removed.126

The Committee notes Mr. Argument’s comments that the major problem with the current Victorian regulatory system is the failure of the Subordinate Legislation Act 1994 (Vic) to apply to all types of regulations. As indicated by Mr. Argument in his submission, use of the term ‘legislative instrument’ would apply consistent procedures and Parliamentary scrutiny to all regulations, no matter what they are called –

Nomenclature is irrelevant. Variations in bureaucratic practices and preferences, drafting approach or in what the Parliament might be prepared to allow at a particular time is irrelevant. All that is important is the judgment about whether or not an instrument is legislative in its effect.127

After evaluating all the evidence the Committee concludes that the regulation-making system in Victoria could be significantly improved by applying consistent and rigorous procedures to all regulations, including local laws. The Committee believes that the best way of doing this is to replace the existing definition of ‘statutory rule’ and to adopt a broader definition such as that contained in the Legislative Instruments Bill 1996 [No. 2] (Cth). This would subject all instruments which are ‘legislative in character’ to consistent and more rigorous procedures.

122 Subclause 5(2).
123 Commander P. Hornbuckle, Victoria Police, Submission No. 21.
124 Professor Pearce & Mr S Argument, op. cit., p. 14.
125 Mr. M. Derham, The Victorian Bar, Submission No. 20.
126 Mr. S. Argument, Solicitor, Submission No. 17 and Minutes of Evidence, 27 April 2001.
127 ibid.
Recommendation 1

The Committee recommends that the Subordinate Legislation Act 1994 (Vic) be amended to apply to instruments which are legislative in character and that a similar definition to that contained in the Legislative Instruments Bill 1996 [No. 2] (Cth) be adopted.

The Committee acknowledges the strong opposition expressed by local councils to Parliamentary scrutiny and that local councils represent a separate tier of government. The Committee considers that the Regulation Review Subcommittee should not take on the role of scrutinising local laws. However the Committee notes that the current scrutiny of local laws provided for in Schedule 8 of the Local Government Act 1989 (Vic) does not adequately protect people’s rights and that a specialist committee should be established similar to the Regulation Review Subcommittee to specifically examine local laws.

Recommendation 2

The Committee acknowledges the special status of local government as a separate tier of government and recommends that local laws continue to be exempted from the Subordinate Legislation Act 1994 (Vic). The Committee recommends that the Minister for Local Government, in consultation with local councils, give consideration to the establishment of an appropriate scrutiny process for local laws.

The Committee concludes that a broader range of regulations should be subject to Parliamentary scrutiny by the Regulation Review Subcommittee. The Committee as currently formed examines bills and regulations. The only other Australian jurisdictions to examine bills and regulations are the ACT, Commonwealth and Queensland. In New South Wales, Northern Territory, South Australia, Tasmania and Western Australia scrutiny committees focus only on the scrutiny of regulations.

The Committee notes that in the Commonwealth there are two separate committees – the Senate Scrutiny of Bills Committee and the Senate Committee on Regulations and Ordinances (SCRO). The Committee is impressed by this model because it allows each committee to focus on a particular area, either bills or regulations. SCRO examines a broad range of instruments including regulations and disallowable instruments such as determinations, rules, notices, orders, guidelines and other similar instruments. SCRO examines approximately 1800 instruments each year. The Committee notes that if the Regulation Review Subcommittee is given responsibility for examining legislative instruments (excluding local laws), as currently composed, it will be unable to do justice to that task. The Committee considers that the Commonwealth model works extremely well and would like to see something similar adopted in Victoria.

Recommendation 3

The Committee recommends that consideration be given to expanding the role of the Regulation Review Subcommittee to include the scrutiny of all legislative instruments except for local laws. The Committee notes that if this recommendation is accepted, the Regulation Review Subcommittee will take on a considerably heavier workload and the Committee therefore recommends that consideration be given to adopting the Commonwealth model of scrutiny with two separate committees, one for scrutinising bills and one for scrutinising regulations.
Office of Chief Parliamentary Counsel

Role

The Office of Chief Parliamentary Counsel (OCPC) drafts bills and drafts or settles regulations and rules of courts and tribunals. OCPC also certifies whether regulations made, approved or confirmed by the Governor-in-Council comply with the principles set out in section 13 of the Subordinate Legislation Act 1994 (Vic). Those principles require OCPC to specify whether a proposed regulation –

- appears to be within the powers conferred by the authorising Act;
- appears without clear and express authority from the authorising Act to –
  - have a retrospective effect;
  - impose a tax, fee, fine, imprisonment or other penalty;
  - shift the onus of proof to a person accused of an offence; or
  - sub-delegate powers delegated by the authorising Act;
- appears to be consistent with the general objectives of the authorising Act;
- appears to be consistent with and to achieve the objectives set out in the proposed regulation and of any regulation which it amends;
- appears to be inconsistent with principles of justice and fairness;
- appears significantly or substantially to overlap or conflict with any other regulation or legislation;
- is expressed as clearly and unambiguously as is reasonably possible.

The Governor-in-Council may not make, confirm or approve regulations if they are not accompanied by a section 13 certificate from OCPC. OCPC does not review rules of courts against these principles. Nor are any other regulations outside the scope of the Subordinate Legislation Act 1994 (Vic) subject to review by OCPC against the section 13 principles.

All of the principles in section 13 of the Subordinate Legislation Act 1994 (Vic) will already have been examined by OCPC when settling drafts of regulations. This means that when OCPC certifies compliance with section 13 principles, there should be no surprises. From one perspective section 13 certificates may be seen as duplicating work which has already been done. However OCPC pointed out that it is essential to retain section 13 certificates because they can be used to force departments and agencies to make appropriate modifications –

You can make a strong argument in favour of retaining the certificate, because while in the course of settling the statutory rule with the department we may raise issues as to power because of this certificate we have to give, the reality is the department has to agree to

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128 Subordinate Legislation Act 1994 (Vic), s. 13.
take all those provisions out. If we do not have them, they can easily say to us, ‘thank you very much for your advice’, send the statutory rule to the Governor-in-Council and to you and leave it to you to try to determine whether there is an issue, whereas under this system the Governor has a copy of our advice in the front of him and so do you.\textsuperscript{129}

While there is an overlap between some of the principles examined by the Regulation Review Subcommittee with those examined by OCPC, the examination and emphasis of the principles is different. Examination of these principles by OCPC occurs during the regulation-making process, which means that it is more likely that problems (ie non-compliance with section 13 principles) can be rectified before regulations commence operating. This stands in contrast to the Regulation Review Subcommittee’s review, which takes places after regulations have been made. The Committee considers that OCPC’s review during the regulation-making process is essential to minimise the potential for regulations with problems to be made. As court rules are not reviewed by OCPC against section 13 principles, the Regulation Review Subcommittee’s review against similar principles contained in section 21 is crucial.

The Committee is also concerned that regulations outside the definition of ‘statutory rule’ are not subject to review by OCPC. The Committee considers that the potential exists for these regulations to be made without complying with either the principles contained in section 13 or section 21 with the possibility that rights may be adversely affected.

**Recommendation 4**

The Committee recommends that all legislative instruments (excluding court and tribunal rules and local laws) be subject to review and certification by Chief Parliamentary Counsel against the principles contained in section 13 of the *Subordinate Legislation Act 1994* (Vic).

**Shift in the Onus of Proof**

One difficulty which has been experienced by OCPC concerns its certification of whether there has been a shift in the onus of proof. OCPC is uncertain whether the ‘onus of proof’ refers to the legal or evidentiary onus of proof. While OCPC has taken the view that the provisions in the *Subordinate Legislation Act 1994* (Vic) probably refer to the legal burden,\textsuperscript{130} as currently worded there can be no certainty. In criminal cases the legal burden of proof rests with the prosecution to prove all the elements of the offence beyond reasonable doubt, while the evidentiary burden rests with the defendant to prove any defence upon which the defendant intends to rely. Section 130 of the *Magistrates Court Act 1989* (Vic) requires defendants to bear the evidentiary burden in relation to any defence or excuse. OCPC points out that regulations may create offences to which there are exceptions and in so doing shift significant evidentiary burdens of proof to defendants.\textsuperscript{131} As currently interpreted by OCPC –

- if the legal burden of proof is shifted, the section 13 certificate will state that the regulations are outside the powers conferred by the authorising Act;

\textsuperscript{129} Mr. E. Moran, OCPC, *Minutes of Evidence*, 26 April 2001, p. 51.
\textsuperscript{130} Mr. E. Moran, OCPC, ibid, p. 49 and Submission No. 9.
\textsuperscript{131} Mr. E. Moran, OCPC, Submission No. 9.
if the evidentiary burden of proof is shifted, the section 13 certificate will state that the regulations are within the powers conferred by the authorising Act and OCPC will qualify that with the following comment –

Onus of proof – Offences created by the statutory rule under the powers conferred by the Act are subject to exceptions to which section 130 of the Magistrates’ Court Act 1989 apply (evidential burden on the defendant).\(^\text{132}\)

OCPC points out that instead of the current practice of qualifying the certificate, it would be better if the provision concerning the onus of proof was clarified to make clear that it refers to the legal and not the evidentiary burden of proof.\(^\text{133}\) The Committee agrees with the views expressed by OCPC and in recommending amendment of that provision highlights the need to also amend the same principle which must be reviewed by the Regulation Review Subcommittee and which is contained in section 21 of the Subordinate Legislation Act 1994 (Vic).

\begin{center}
Recommendation 5
The Committee recommends that sections 13(b)(iii) and 21(1)(b)(iii) of the Subordinate Legislation Act 1994 (Vic) be amended to make clear that they refer to the legal burden of proof.
\end{center}

Incorporated Materials

Another problem OCPC experiences with providing section 13 certificates relates to incorporated material. As discussed at pp. 102-105 in this Report, many regulations incorporate other information and documents, many of which are very technical and complex. OCPC indicates that they do not have sufficient knowledge of the incorporated material to evaluate it against the principles contained in section 13 –

\begin{quote}
We feel it is beyond our capacity to fully understand, appreciate and comment on that material and therefore we do not want in any way the certificate to be regarded as saying that we have read everything that is in that material and are satisfied that people can comply with it.\(^\text{134}\)
\end{quote}

OCPC suggests that instead where regulations incorporate material, section 13 certificates should be qualified –

\begin{quote}
In those circumstances I believe it would be appropriate to qualify the section 13 certificate to indicate that the certificate does not cover material incorporated by a statutory rule if that material is of such a detailed technical nature that the Chief Parliamentary Counsel is not qualified to advise about such matter.\(^\text{135}\)
\end{quote}

The Committee agrees with OCPC that often the documents and other material incorporated into regulations is exceedingly complex and technical and that in those circumstances it is unfair to require OCPC to certify that material against the principles contained in section 13.

\(^\text{132}\) ibid.
\(^\text{133}\) ibid.
\(^\text{134}\) Mr. E. Moran, OCPC Minutes of Evidence, 26 April 2001, p 50 and Submission No. 9.
\(^\text{135}\) Mr. E. Moran, OCPC, Submission No. 9.
Recommendation 6

The Committee recommends that an additional provision be inserted into the Subordinate Legislation Act 1994 (Vic) allowing Chief Parliamentary Counsel to qualify section 13 certificates to indicate that the certificate does not cover material incorporated by a regulation if that material is of such a detailed technical nature that Chief Parliamentary Counsel is not qualified to advise about such matters.

Impact of Delays in Making Regulations on Section 13 Certificate

Another concern OCPC has with section 13 certificates is that there is often a delay between the issuing of the section 13 certificate and the making of the regulation. Where there is a delay there may be a change in circumstances and consequently the section 13 certificate may need to be revised. OCPC suggests that it should be made clear on section 13 certificates that OCPC’s certification relates only “to circumstances as at the date of the certificate”. The Committee agrees that given there may be delays between the issuing of section 13 certificates and the making of regulations, which may result in changes, for the purposes of accuracy it should be clear on the certificate that the certification applies as at a particular date.

Recommendation 7

The Committee recommends that the Subordinate Legislation Act 1994 (Vic) be amended to allow Chief Parliamentary Counsel to qualify its certification by specifying that the certificate relates to the circumstances as at the date of the certificate.

Environment Protection Authority – RIS Process

The Regulation Review Subcommittee has responsibility for reviewing policies made under Part 3 of the Environment Protect Act 1970 (Vic). These policies are referred to as State Environment Protection Policies (SEPPs) and Waste Management Policies and they include –

- Policies concerning the environment generally;
- Policies concerning Waste Management;
- Policies concerning the removal, disposal or reduction of litter in the environment; and
- Policies concerning the re-use and recycling of substances.

Policies. Part of that process involves the preparation of an impact assessment or RIS. To assist it with the development of RISs, the EPA in conjunction with business, ORR and environmental groups developed a Protocol for the preparation of RISs.\textsuperscript{142} That Protocol is set out in its entirety in Appendix K of this Report.

The Protocol is divided into four sections –

- Key Principles
- Key Steps in Regulation Development
- Consultation Program
- Assessing Costs and Benefits

\textit{Key Principles}

The Protocol is based on a number of major principles. Some of these principles include –

- A requirement for RISs to identify and assess major economic, environmental and social costs and benefits, including those which are difficult to assess;
- Commitment by the EPA to maximising public input into the RIS process and to work closely with ‘interested’ stakeholders;
- A major role to be played by peak representative bodies – to work with their members to assess the potential costs and benefits and convey that information to the EPA;
- RISs to be a tool to make better regulations and to support informed comment;
- Focus of discussion to be on significant issues and issues where there are divergent views.

\textit{Key Steps in Regulation Development}

As a first step the EPA determines the nature and significance of the problem to be addressed and whether there is a need for regulatory action –

\textit{This initial “needs analysis” will establish whether the issue is significant enough to warrant EPA taking action. EPA will only initiate the process if this needs analysis demonstrates a clear need to take action.}\textsuperscript{143}

Once the EPA determines that there are significant issues to be addressed, it identifies all the various options – both regulatory and non-regulatory and conducts a preliminary evaluation of these options.

Where the EPA decides that the most satisfactory approach is to pursue a regulatory option it then proceeds to the next step of developing a plan. A plan developed by the EPA includes a


\textsuperscript{143} ibid.
statement of objectives, identification of management options, reasons for preferring a regulatory approach, a proposed impact assessment methodology (including a preliminary identification of the costs and benefits) and a consultation program.\textsuperscript{144} The Protocol indicates that EPA will consult with key stakeholders where adjustments to the Plan are necessary. Once the Plan is in place the EPA will allow at least 28 days for public comment. The Protocol also indicates that EPA will consider stakeholder input throughout the entire process and that it will formally document its response to public comment.

**Consultation Program**

The Protocol makes a commitment to early consultation. The Protocol makes clear that in determining consultation techniques consideration will be given to various factors such as the location and number of stakeholders potentially affected; the degree to which stakeholders may be affected; potential impediments to identifying stakeholders and the use of a range of networks to identify parties. The Protocol indicates that the EPA will use various consultation techniques such as advertising; informing stakeholders in writing; organising briefing sessions; releasing discussion papers and organising public meetings and/or workshops. The Protocol also indicates the range of actions which may be taken by the EPA after regulations have been made, such as sending out explanatory documents; mail outs; presentations; media promotion etc.

**Assessing the Costs and Benefits**

The Protocol makes clear that the EPA will work closely with stakeholders in order to assess the costs and benefits. The Protocol provides examples of the information and assessment techniques which will be used by the EPA such as using historical evidence; conducting surveys and/or case studies; using scientific information; using risk assessment techniques; obtaining the views of and information from affected parties etc. The Protocol indicates that a range of assessment techniques will be used by the EPA based on consideration of such things as the types of information needed for assessment; the range of information available; the cost and time involved in applying various assessment techniques; the reliability of the resulting information etc. To determine which techniques are most appropriate the Protocol requires the EPA to consult with stakeholders.

**Comments about the Protocol**

At public hearings, Mr. R. Joy, the Executive Director of the EPA commented on the usefulness of the Protocol –

\begin{quote}
We have found this to be a particularly useful regime to augment the statutory requirements in the Act. We have also found it to be a useful way of ensuring maximum contact with stakeholders and the best possible outcome in terms of the specific regulation that we are dealing with.\textsuperscript{145}
\end{quote}

Environmental groups highlighted the EPA as an agency with which they are very satisfied and as one which is on top of the consultation process.\textsuperscript{146} In the submission made on behalf of all

\textsuperscript{144} ibid.
government departments and agencies the EPA Protocol was highlighted as warranting serious consideration. Evidence from EPA officers at public hearings indicated that RISs are not meant to be economic theses; stakeholders want consultation to focus on the most important and contentious issues rather than the biggest impacts – and that a mix of techniques should be used to assess potential costs and benefits. Importantly, as Mr. A’Hearn indicated the focus is not on economic techniques –

*Finally another important point was that a mix of assessment techniques should be used to identify and assess potential costs and benefits. … What was important was we used impact assessment techniques which best captured the impacts and best enabled people to comment rather than hiding it behind economic techniques that did not give you a good indication of what the impact on your industry would be, or your part of the community would be and so on.*

EPA officers emphasised that the Protocol does not contain rigid principles which must be adhered to but rather contains flexibility so that the most appropriate approach is adopted to allow stakeholders to play an integral part in the development of regulations –

*The two key things are that opportunity at the start to negotiate with stakeholders on how we are going to run the process and the flexibility. It would not work if the Protocol was very prescriptive and said we had to consult in a set way, that we had to put out a discussion paper and run these sorts of meetings. It works because it sets out a series of possible techniques and then a series of criteria to judge which techniques we use in the first place.*

### Regulation Impact Statements

RISs must be prepared for all regulations unless they fall within an exception or exemption under the *Subordinate Legislation Act 1994* (Vic). The requirement for departments and agencies to produce a RIS was first introduced by the *Subordinate Legislation (Review and Revocation) Act 1984* (Vic). There is strong support for the continuation of the RIS process.

A RIS is an assessment of the economic and social costs and benefits of a proposed regulation. It is not supposed to be complex but “a commonsense document which provides an honest assessment of the foreseeable impact of a proposed regulation”. A RIS does not need to ‘sell’ a proposed regulation but it does need to provide a clear explanation of the reasons for the regulatory change –

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147 DPC, Victorian Government, *Submission No. 27.*
149 ibid, p. 111.
150 *Subordinate Legislation Act 1994* (Vic), s. 8.
151 ibid, s. 9.
152 Mr. H. Race, *Submission No. 3*; Mr. B. Sturman, *Submission No. 4*; Mr. D. Trafford, Insurance Council of Australia (ICA), *Submission No. 8*; Mr. Garry Pearson, ADAVB, *Submission No. 11*; Mr. J. Hawkless & Mr. P. Mooney, Hawkless Consulting, *Submission No. 13*; Mr. R. Wilkinson, City of Whittlesea, *Submission No. 16*; Mr. M. Derham, The Victorian Bar, *Submission No. 20*; Commander P. Hornbuckle, Victoria Police, *Submission No. 21*; Environment Liaison Office, *Submission No. 25* and Mr. B. Bottomley, Bryan Bottomley & Associates, *Submission No. 26.*
It is important that when the Parliament, the Committee, industry and the general public pick up a RIS that it has a compelling argument for what it is proposing. It should be that straightforward. When you read what the objective and the extent of the problem is, even at that stage we should understand that there is a problem and the supporting evidence in that part of the RIS demonstrates the need to do something. The rest of the document should outline the proposals and/or the alternatives. If a thorough cost-benefit analysis has been undertaken the reader should conclude that the proposed solution is the best possible course of action to address the problem.\footnote{Mr. M. Oakley, ORR, Minutes of Evidence, 27 April 2001, p. 95.}

A RIS should carefully consider and evaluate the impact of a proposed regulation on those affected and the competing interests involved. It should also contain an evaluation of alternatives to a proposed regulation and the reasons for the rejection of those alternatives. A person reading a RIS should be able to conclude that the proposed regulatory change is justified and that the benefits of the particular regulation outweigh the potential costs which may be imposed on the community. Of course there will be some circumstances where the costs outweigh the benefits, however the RIS should demonstrate that despite these costs, there is a clear need for the particular regulation. The Office of Regulation Reform\footnote{ORR is located in the Business Group in the Department of Innovation, Industry and Regional Development. ORR encourages and implements regulatory reform in Victoria. ORR plays an important role in the assessment of the costs and benefits of regulations. ORR discusses regulatory proposals with departments and agencies and provides them with advice on the preparation of RISs.} (ORR) summed up the RIS process in the following terms –

\begin{quote}
For a regulation to represent the “most efficient” solution to an identified problem it must not only be shown to be likely to yield benefits greater than the costs it imposes but also to yield greater net benefits (ie benefits less costs) than any of the feasible alternative approaches. It is for this reason that the RIS must include cost/benefit analysis of not only the proposed regulation but of all of the identified alternatives.\footnote{ORR, Regulatory Impact Statement Handbook, Melbourne, July 1995, paragraph 1.2.}
\end{quote}

The Committee notes that while some RISs are extremely well written, clear and easy to understand others are confusing, fail to adequately consider alternative options, or fail to provide an appropriate analysis of competition principles. Its view is shared by a number of those who made submissions\footnote{This comment was made by many of those who made submissions – Mr. Garry Pearson, ADAVB, Submission No. 11; Mr. M. Derham, The Victorian Bar, Submission No. 20; Commander P. Hornbuckle, Victoria Police, Submission No. 21 and Environment Liaison Office, Submission No. 25. Mr. J. Hawkless & Mr. P. Mooney, Hawkless Consulting, Submission No. 13 made similar comments concerning interstate RISs.} and has been confirmed by the review of a sample of RISs conducted for this Report –

\begin{quote}
... the overall standard of RIS currently being prepared in Victoria is best described as moderate. There is little evidence that the standard is improving over time. Equally, there is no evidence of decline.\footnote{Mr. R. Deighton-Smith, The Quality of the Regulatory Impact Assessment Process in Victoria, February 2001, p. 3.}
\end{quote}

**Number of RISs**

The average number of RISs completed over the years 1997 to 1999 is 37, with the maximum number during that time being 42 and the minimum being 35. Figures concerning the number of
RISs produced in earlier years were not available. However, it is estimated that in the early 1990’s, 60 to 65 were prepared, while in years involving major ‘sunsettings’ as many as 80 were prepared.\(^{159}\) There are several possible reasons for the decline in the number of RISs. The current trend is for a small total number of regulations to be enacted. In the five years to 2000 the average number of regulations enacted was 161, with a low of 141 and a high of 175.\(^ {160}\) This stands in contrast to the 1990’s when 300 or more regulations were made in a single year and sometimes rose as high as 500.\(^ {161}\) A possible cause of this may be that policy makers are choosing to use legislative and quasi legislative instruments rather than regulations within the meaning of the *Subordinate Legislation Act 1994* (Vic) to implement policies –

\begin{quote}
Alternatives adopted to some degree seem to include both the inclusion of more detail in primary legislation and the creation, through primary legislation, of a wide range of “quasi-legislative instruments”, such as Ministerial directives and guidelines.\(^ {162}\)
\end{quote}

Threshold Test

RISs must be prepared where regulations impose an appreciable economic or social burden on a sector of the community (the threshold test). There is inadequate guidance on what this actually means, which sometimes results in confusion as to whether RISs need to be prepared –

\begin{quote}
The Premier’s Guidelines on this … largely present the dictionary definitions of the terms ‘appreciable’ and ‘burden’ and therefore by and large it is left up to the agency to interpret those in the context of the regulatory proposal.\(^ {163}\)
\end{quote}

RISs are resource intensive and it is important that they be prepared for significant rather than ‘trivial’ regulations. It is sometimes difficult where small amending regulations are involved to determine whether RISs are required.\(^ {164}\) In examining the RISs chosen for this Report it was found that –\(^ {165}\)

- 21 per cent of 1995 –1998 sample had a minor impact;
- Over 70 per cent of all the RISs prepared in 1999 had a moderate or major impact.

This suggests that there is little evidence “that the RIS process has led to a major diversion of resources to the justification of minor and insignificant policy proposals”.\(^ {166}\) Comments were made by one consultant who prepares RISs that departments and agencies take a fairly conservative approach to whether regulations should be subject to the RIS process and that sometimes RISs are prepared for minor matters.\(^ {167}\) This comment suggests that there may be some uncertainty in some circumstances as to the need to prepare RIS.

Mr. Deighton-Smith discussed various tests which have been adopted in OECD countries to ensure that RISs are only prepared for significant regulations. At the federal level in the United States, RISs are prepared only if preliminary research indicates that the compliance costs will

\(^{159}\) ibid, p. 15. Mr. Deighton-Smith’s estimate is based on personal knowledge and experience in the RIS area.

\(^{160}\) ibid.

\(^{161}\) ibid.

\(^{162}\) ibid, p. 16.

\(^{163}\) Mr. G. Radley, VWA, *Minutes of Evidence*, 27 April 2001, p. 158.

\(^{164}\) ibid.

\(^{165}\) Mr. R. Deighton-Smith, op.cit., p. 12.

\(^{166}\) ibid, pp. 12 and 32.

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exceed $100 million per annum.\textsuperscript{168} This means that only a small number of regulations are subject to RISs. In the Netherlands, regulations are examined individually to determine whether a RIS should be undertaken.\textsuperscript{169} The test used in the Netherlands is based on a series of questions which concern business and environmental impacts and issues of feasibility and enforceability.\textsuperscript{170} A Ministerial Committee determines which questions will be applied and this depends on the nature of the particular regulation under consideration –

\begin{center}
A Ministerial Committee determines which of these questions will be applied in conducting the RIA\textsuperscript{171} of a particular regulatory proposal, thus ensuring that redundancies are avoided and RIA effort is targeted toward the key issues in the individual case.\textsuperscript{172}
\end{center}

As RIS are resource intensive it is important to ensure that RIS are only prepared for regulations which are significant. The Committee notes the comments by Mr Deighton-Smith that one way of achieving this is to adopt the ‘multiple choice’ option as used in the Netherlands. The Committee notes that in Victoria there does not seem to be any evidence that RISs are being prepared for insignificant regulatory proposals. The Committee considers that the major problem is the lack of guidance provided to department and agency staff as to the application of the threshold test. The Committee considers that the threshold test could be improved by broadening it to also apply in circumstances where there is an environmental impact.

\begin{center}
\begin{table}
\textbf{Recommendation 8}

\begin{tabular}{|l|
\hline
\textbf{The Committee recommends that –}

\hline
(a) as a matter of urgency the provisions explaining the meaning and application of an appreciable economic or social burden on any sector of the community in the Premier’s Guidelines be reviewed to provide departments and agencies with clearer guidance as to when Regulation Impact Statements should be prepared; 

(b) consideration be given to expanding the threshold test to include environmental burden.

\hline
\textbf{The Committee also draws attention to the Environment Protection Authority, Protocol for the Development of Regulations and Regulatory Impact Statements, February 1996.}
\end{tabular}
\end{table}
\end{center}

Drafting of RISs

RISs may be drafted by officers in departments and agencies or by consultants. When the RIS requirements were first introduced, department and agency staff were encouraged to draft RISs themselves –

\textit{Importantly, departments were encouraged to write RIS themselves, rather than contract this task out to consultants. This was seen as both enhancing the degree of perceived responsibility for the resulting document within departments and contributing to policy learning and the development of a better policy process.}\textsuperscript{173}

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{168}] Mr. R. Deighton-Smith, op.cit., p. 31.
\item[\textsuperscript{169}] ibid.
\item[\textsuperscript{170}] ibid.
\item[\textsuperscript{171}] Regulation Impact Assessment.
\item[\textsuperscript{172}] Mr. R. Deighton-Smith, op.cit., p. 31.
\item[\textsuperscript{173}] ibid, p. 26.
\end{itemize}
\end{footnotesize}
However this has not been the recent trend and departments and agencies tend to make greater use of consultants to draft RISs. In DHS, staff always have some input into the RIS process but do not necessarily prepare RISs. Dr Carnie from the Department commented –

… the actual writing of the regulatory impact statement would depend on whether we are writing a new set of regulations or reviewing an existing set of regulations. With a brand new set of regulations it also depends on the speed with which the writing of it is required. As an example, with the recent Legionella Regulations there was an urgent need to have them prepared quickly. In that instance the departmental officers provided the technical input but there was a project officer appointed, brought in from outside, to co-ordinate the process.\textsuperscript{174}

Dr Carnie indicated that where consultants are used to prepare RISs they always work closely with department staff\textsuperscript{175}

In DNRE, RISs are prepared almost exclusively in-house.\textsuperscript{176} DNRE covers diverse portfolios including agriculture, energy and resources, environment and conservation and Aboriginal affairs and consequently employs staff with diverse and broad experience. DNRE staff usually prepare RISs and the Executive Services Branch contributes to and has oversight over this process and in particular makes sure that RISs are prepared consistently and timely –

We work with the relevant division on each set of regulations. Some divisions tend to do more of it themselves and we have more of an overseeing role; others will draft the regulations and do all the dealing with Parliamentary Counsel … The RISs are generally done by the divisions.\textsuperscript{177}

VWA uses their own staff and consultants to prepare RISs, with consultants used to carry out economic analysis while in-house staff edit and have oversight over the process –

We may call upon consultants to assist us in doing some of the formal economic analysis if we are looking at the cost-benefits of producing the net present value assessments, undertaking sensitivity analysis and possible impacts. The authority is involved in writing and editing the documents and overseeing their development.\textsuperscript{178}

One possible problem with the use of consultants, is that departments and agencies may not “feel a strong sense of responsibility for the outcome”.\textsuperscript{179}

Training

In the early 1990’s ORR regularly conducted training courses on the regulation-making procedures –

\textit{The training courses conducted by ORR covered the whole of the regulation-making process and frequently included contributions from the Chair of the relevant Parliamentary Scrutiny Committee, as well as from the Office of Chief Parliamentary}

\textsuperscript{174} Dr Carnie, DHS, \textit{Minutes of Evidence}, 27 April 2001, p. 100.
\textsuperscript{175} ibid, p. 101.
\textsuperscript{176} Mr. J. Taylor, DNRE, \textit{Minutes of Evidence}, 27 April 2001, p. 126.
\textsuperscript{177} ibid, p. 121 and Mr. S. Green, DNRE, \textit{Minutes of Evidence}, 27 April 2001.
\textsuperscript{178} Mr. G. Radley, VWA, \textit{Minutes of Evidence}, 27 April 2001, p. 156.
\textsuperscript{179} Mr. R. Deighton-Smith, op. cit., p. 27.
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Counsel. Up to 200 people were training at these sessions with their frequency being determined, in essence, by demand.\textsuperscript{180}

ORR also produced and regularly updated a guidebook on regulations (the RIS Handbook).\textsuperscript{181} One submission indicated that some parts of the RIS Handbook are confusing, with different sections requiring the same information to be repeated –

The sequence in which information must be given under the requirements is not logical. Overlap of the information required in different sections provides confusion and repetition in many cases. Costs and benefits often run into each other and are difficult to separate. For example, what is a benefit to one sector may be a cost to another sector on a particular issue.\textsuperscript{182}

This same submission also suggested that as a consequence of following the guidelines in the RIS Handbook, RISs sometimes end up being more complicated and repetitive than they need to be –

An example of recent problems I have had with drafting an RIS relates to the proposed Legionella Regulations for the changes to the Plumbing Regulations 1998. It could have been written in less than 20 pages in precise and clear terms. Trying to cope with the handbook guidelines, it ended up with what I could only call a fairly confused mess with unnecessary repetition and nothing really fitting in anywhere.\textsuperscript{183}

The RIS Handbook also calls for precise economic data. However, precise economic data may be unknown and may not be able to be obtained. Mr. Dare noted that he experienced this problem when drafting the RIS for a regulatory proposal dealing with Legionella –

The essential issue was the introduction of the installation and repair of mechanical plumbing parts by competent people under specified standards and how that would reduce the incidence of contracting Legionnaires’ disease being under regulation. The precise economic impact data called for by the RIS handbook is unknown but the cost is so obviously small compared to the human suffering. Economic and financial considerations are essential but forcing the requirement to the point where guesswork is taken as fact should not be necessary.\textsuperscript{184}

In recent years little training has been offered to department and agency staff and the RIS Handbook has not been updated. This may partly be explained by the increased use of outside consultants to prepare RISs.\textsuperscript{185} Given the generally high turnover of department and agency staff, this lack of training means that there may be a number of department and agency staff who lack the appropriate skills to prepare good quality regulations and RISs.

While one submission questioned the benefit of training on the basis that preparing RISs “is usually a one-off project in the career of a public servant”,\textsuperscript{186} most submissions received by the Committee strongly support the need for further training to be provided to department and agency staff –

\textsuperscript{180} ibid.
\textsuperscript{182} Mr. K. Dare, Solicitor, Submission No. 33.
\textsuperscript{183} ibid.
\textsuperscript{184} ibid.
\textsuperscript{185} Mr. R. Deighton-Smith, op. cit., p. 27.
\textsuperscript{186} Mr. H. Race, Submission No. 3.
Training of key personnel in the area of preparing an RIS is essential for providing consistency and improved quality documentation. Some RIS reports lack essential detail, or are difficult for an unskilled reader to follow. Training would provide an opportunity to assist public sector employees not only about preferred modes of presentation but should also consider incorporating training about the reasons for the RIS process, and its potential benefits for the agency and its stakeholders.\(^{187}\)

Some submissions indicated that the ORR is the most appropriate agency to conduct training programs on the regulation-making system and more importantly on the RIS process.\(^{188}\) One submission suggested that ORR could not play a dual role of reviewing RISs and providing training as this might compromise ORR’s objectivity.\(^{189}\) Hawkless Consulting supported ORR taking on a training role but suggested that they may lack adequate resources (human and financial) to also take on responsibility for reviewing RISs.\(^{190}\) Another alternative is that training programs could be run by consultants who have built up expertise in the area.\(^{191}\)

The Business Regulation and Reform Unit (BRU) in Queensland has developed a special computer software program which department and agency officers use when preparing RISs.\(^{192}\) BRU runs special training programs for government and agency officers on how to use this program and also provides back-up assistance. The aim of this software package is to assist department and agency officers with the production of uniform, comprehensive and easy to understand RISs. Most submissions agreed that the introduction of a similar sort of computer software program in Victoria would be extremely useful.\(^{193}\) The Environment Liaison Office noted that the use of such software would be an invaluable resource and –

\[\ldots \text{would have the likely effect of reducing the time taken to produce an RIS, as well as increasing the quality of RISs across the different departments and agencies. In addition, a standard guiding format for RISs including headings and subheadings would ensure that all the information relevant to the RIS was included, and would greatly assist in assessing the costs and benefits of the regulation.}\]^{'^{194}}

\(^{187}\) Mr. J. Hawkless & Mr. P. Mooney, Hawkless Consulting, Submission No. 13. Similar comments were also made by – Ms. S. Sanders, Victorian Community Council Against Violence (VCCAV), Submission No. 1; Mr. B. Sturman, Submission No. 4; Mr. S. Goldsworthy, Manningham City Council, Submission No. 6; Mr. Garry Pearson, ADAVB, Submission No. 11; Commander P. Hornbuckle, Victoria Police, Submission No. 21; Mr. P. Clark, Submission No. 23; Mr. D. Fitzpatrick, VADA, Submission No. 24; Environment Liaison Office, Submission No. 25; DPC, Victorian Government, Submission No. 27; Mr. J. Manias, Submission No. 30 and Mr. K. Dare, Solicitor, Submission No. 33. Mr. Taylor, DNRE, Minutes of Evidence, 27 April 2001, p. 126, noted that department staff would be sent to training courses run by ORR if ORR offers them.

\(^{188}\) Ms. S. Sanders, VCCAV, Submission No. 1; Mr. Garry Pearson, ADAVB, Submission No. 11; Commander P. Hornbuckle, Victoria Police, Submission No. 21 and Mr. G. Morris, DHS, Minutes of Evidence, 27 April 2001, p. 106.

\(^{189}\) Mr. B. Sturman, Submission No. 4.

\(^{190}\) Mr. J. Hawkless & Mr. P. Mooney, Hawkless Consulting, Submission No. 13.

\(^{191}\) ibid.

\(^{192}\) This software program is also referred to briefly at p. 175 of this Report.

\(^{193}\) Ms. S. Sanders, VCCAV, Submission No. 1; Mr. B. Sturman, Submission No. 4; Mr. S. Goldsworthy, Manningham City Council, Submission No. 6; Mr. Garry Pearson, ADAVB, Submission No. 11; Mr. J. Hawkless & Mr. P. Mooney, Hawkless Consulting, Submission No. 13; Mr. I. Graham, Office of the Chief Electrical Inspector (OCEI), Submission No. 19; Commander P. Hornbuckle, Victoria Police, Submission No. 21; Environment Liaison Office, Submission No. 25 and DPC, Victorian Government, Submission No. 27. Ms. Wiltshire, DPC, Minutes of Evidence, 26 April 2001 also agreed that a similar computer program would be useful as long as there is flexibility to take account of different types of regulations.

\(^{194}\) Environment Liaison Office, Submission No. 25 and Ms. M. Bowman, Environment Defenders’ Office, Minutes of Evidence, 26 April 2001, p. 79.
However it was also pointed out that it is important to leave scope for innovation and for differences in application and impact of regulations –

While there are advantages to uniform presentation standards, differences in the type, application and impact of various pieces of subordinate legislation need to be reflected in each RIS. For example, a proposal to amend regulations affecting an industry but with no public impact, should be treated differently to a change that affects a wide proportion of the population.195

The Committee notes the poor quality of many of the RISs prepared. The Committee notes that while some departments and agencies prepare RISs in-house, others use consultants to do this work. While the Committee acknowledges the usefulness of using consultants on certain occasions, the Committee considers that the trend towards using consultants is not in the best interests of the Victorian regulatory system because it makes it difficult to achieve consistency in the quality of RISs.

The Committee notes that there is a high turnover of agency and department staff and consequently there may be many staff who lack the appropriate skills and knowledge to prepare good quality RISs. The Committee also notes that in recent years ORR has conducted very little in the way of formal training programs on the preparation of RISs and the RIS process. Mr Deighton Smith commented –

A vigorous training effort is identified as a “best practice” principle by the OECD and constitutes a key area in which Victorian practice currently lags. Renewed training efforts could enable regulatory agencies to take back a greater degree of responsibility for developing their own RIS, improving accountability as well as the prospects of furthering the cultural changes that the RIA processes seek to achieve.196

The Committee notes that its review of regulatory systems in the United States indicated that those which worked most effectively were those where agency staff were provided with regular and ongoing training. Arizona and Virginia were particularly notable in this regard. The Committee notes that in Australia, the Commonwealth ORR provides excellent ongoing training to staff, as does BRU in Queensland. The Committee was impressed with the software program developed by BRU. The Committee considers that a similar software package should be developed for the Victorian RIS process to make it easier and more efficient for agency and department staff to prepare RISs. The Committee notes that the development of any computer software program should, while promoting consistency, be flexible, allowing innovation and taking into account the different nature and impacts of various regulations.

The Committee considers that the most appropriate organisation to conduct training programs is ORR given its previous and continuing involvement in the RIS process and in order to promote a consistent and more uniform process and one which contributes to the production of better quality RISs.

While the RIS Handbook is available to departments and agencies to provide them with assistance on how to prepare RISs, the Committee notes that this has not been updated recently and that some of the advice which it provides is unclear. The Committee considers that there needs to be one guidance document providing advice on all issues concerning regulations. This is discussed later at pp. 105-109 in this Report.

195 Mr. J. Hawkless & Mr. P. Mooney, Hawkless Consulting, Submission No. 13. Similar comments were also made by Ms. Wiltshire, DPC, Minutes of Evidence, 26 April 2001, p. 36.
196 Mr. R. Deighton-Smith, op. cit., p. 43.
The Committee notes that in the Commonwealth, agencies and departments must consult with the Commonwealth ORR as to the necessity of preparing RISs. This has helped achieve a consistent approach to the determination of the necessity of the preparation of RISs. The Committee has decided not to recommend that all departments and agencies consult with ORR to find out whether they need to prepare RISs. The Committee considers such a recommendation unnecessary as some of its other recommendations concerning the role of ORR as independent assessor of compliance with RIS requirements and provider of training and advice to department and agency staff will enhance the existing system and ensure greater consistency. The Committee’s recommendations concerning the Premier’s Guidelines will also ensure that department and agency staff have clear guidelines when making decisions about whether or not to prepare RISs.

Recommendation 9

In order to assist the development of expertise in preparing regulations and Regulation Impact Statements amongst department and agency staff, the Committee recommends that departments and agencies be encouraged to make greater use of in-house staff.

Recommendation 10

The Committee recommends that the Office of Regulation Reform be given formal responsibility for conducting appropriate training programs for department and agency staff involved in the preparation of Regulation Impact Statements.

Recommendation 11

The Committee recommends that the Office of Regulation Reform continue to provide advice and support to agency and department staff throughout the regulation impact assessment process.

Recommendation 12

The Committee recommends that the Office of Regulation Reform develop a suitable software program for use by department and agency staff in the preparation of Regulation Impact Statements. The Committee notes that the Business Review Unit in the Department of State Development in Queensland has developed a software program for use by agency and department staff in the preparation of Regulation Impact Statements and points out that the Office of Regulation Reform may wish to evaluate this particular software package.

Consideration of Problem

RISs are supposed to clearly set out and analyse the nature of the problem to be overcome by the regulatory action. Generally the descriptions of the nature of the problem were found to be
adequate but the analysis of the extent of the problem tended to be inadequate. Quantitative data used in RISs was found to be of a generally poor quality –

*Quantitative data on matters such as the numbers of people injured or the financial losses sustained were often absent, meaning the question of whether the proposed regulatory response was necessary and proportionate could not be made with confidence.*

Similarly RISs need to be based on strong research and relevant authorities so that the policy option adopted is the most suitable. Mr Deighton-Smith argues that analysis of trends in the problem over time and a comparison of policy options considered and adopted in other jurisdictions “can form a powerful element of the discussion of the need for regulatory action”. In analysing the RISs chosen for this Report, Mr Deighton-Smith concluded –

*Only 25 RIS were regarded as adequate on this criterion, with 14 regarded as having provided a partial discussion and 14 citing no authorities whatsoever. … In general, an apparently high degree of ignorance of the comparative policy context is indicated by these results, compromising both the quality of the RIS and, more importantly, the quality of policy development.*

One submission pointed out that not many agencies or departments monitor the effectiveness of any previous regulations –

*Perhaps the issue that strikes me most that is lacking in the regulatory review process is an assessment of the actual impact of the regulation. … Very few agencies appear to monitor the compliance with regulations and keep records of infringements, penalties on the one hand and evidence of achievement of objectives on the other hand. I think this is not easy but nonetheless important.*

Without a thorough understanding of how a current regulation is working, it is difficult to know the most appropriate way to proceed.

Where data is inadequate it makes it more difficult to judge the extent to which regulatory action is really necessary or whether some other option would be more viable. A weakness in the Victorian system is the lack of strong data justifying the need for regulatory action and as a consequence this tends “to compromise stakeholders’ ability to reach a view on the necessity and proportionality of intervention”.

Where the problem to be resolved is not properly identified, it also makes it difficult for those who have responsibility for drafting the RIS and regulation –

*Some proposed regulations have been known to be based on opinion formed on vague anecdotal evidence insufficient to prove there is a problem warranting rectification.*

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197 ibid, p. 10.
198 ibid.
199 ibid.
200 ibid.
201 ibid.
203 Mr. R. Deighton-Smith, op. cit., pp. 10-11.
204 Mr. K. Dare, Solicitor, Submission No. 33.
Integration with Policy Making Process

The OECD indicated that regulation impact assessment must be used to develop policy rather than being used to justify a policy decision long since made.\textsuperscript{204} Proper policy development requires a strong analysis of alternatives. In reviewing the sample of RISs chosen for this Report, Mr. Deighton-Smith indicated that Victoria rates poorly in this regard –

\textit{The review of Victorian RIS conducted for this report shows clearly that, despite Victoria’s long history of RIA implementation, the goal of integrating RIA and the policy process has not been achieved. This is made apparent in particular in the poor performance of RIS in identifying and analysing alternatives to the proposed regulation.}\textsuperscript{205}

More specifically, Mr Deighton-Smith indicated that of the RISs he reviewed –

\textit{Only 8, or 15 per cent, were judged as adequate, while 29 were regarded as providing only partial analyses and, of particular concern, 16, or 30 per cent, provided either a cursory overview of alternatives or none at all.}\textsuperscript{206}

Mr Deighton-Smith also commented that –

\textit{… it is apparent in most RIS that the alternatives described have not been properly developed or considered and that they were not seriously reviewed as a means of achieving the identified objective.}\textsuperscript{207}

One submission pointed out that consideration should, for example, be given to commercial incentives rather than regulations –

\textit{It is submitted that ‘commercial incentives’ are more likely than regulation to be acceptable to the community and to be effective. The ‘commercial incentive’ approach could usefully be applied to minimise the conflicting signals between Victorian WorkCover compensation and OH&S legislation.}\textsuperscript{208}

In the RISs reviewed by the Regulation Review Subcommittee’s legal adviser over the last two years, there has never been any mention of ‘commercial incentives’ as an alternative option to regulatory action. This weakness in the Victorian system may be partly explained by a lack of awareness amongst regulators of the different policy tools available.\textsuperscript{209} Hawkless Consulting, which has been involved in the RIS process in the Commonwealth and New South Wales, noted that one major problem is that departments and agencies often fail to review their strategic and business plans at the time regulations are made –

\textit{I believe the RIS process provides a good opportunity for agencies to consider whether a regulation is effective, and to either:}

\begin{itemize}
  \item Consider alternatives to direct regulation (eg self regulation, performance contracts, etc);
\end{itemize}

\textsuperscript{205} Mr. R. Deighton-Smith, op. cit., p. 33.
\textsuperscript{206} ibid, p. 11.
\textsuperscript{207} ibid, p. 33.
\textsuperscript{208} Mr. P. Clark, \textit{Submission No. 23}.
\textsuperscript{209} Mr. R. Deighton-Smith, op. cit., p. 33.
Inquiry into the Subordinate Legislation Act 1994 (Vic)

- To consider new ways in which regulations can be applied to meet the objectives of Government and Agencies.

Such changes could be made without unduly increasing the burden on those organisations and individuals subject to regulation.\(^{210}\)

One conclusion that may be drawn is that “consideration of alternatives clearly seems to be an ex post exercise, rather than a documentation of a policy analysis process conducted prior to choosing the regulatory proposal”.\(^{211}\) Lack of consideration and analysis of alternatives, coupled with poor analysis of the problems to be overcome, means that those RISs cannot contribute to better policy outcomes nor to the development of new and innovative policy.

The Committee received other evidence to suggest that RISs are not being used to create and develop policy. One submission from a retired public servant stated –

\textit{An RIS is really the end, not the start, of the consultative process. Normally an early part of the process (certainly in the case of regulations which are likely to have a significant impact) involves informal discussions, or perhaps information sessions or some other form of meeting ... In my experience, an RIS is only prepared after these steps have been undertaken. By the time an RIS is published, policy has been established.}^{212}

Another submission from a consultant who often conducts independent assessments of RISs expressed the view that many RISs which he has seen are not used to create and determine policy but are tacked on at the end of the process –

\textit{Having undertaken many independent assessments of RISs it is apparent that the RIS is tacked on at the end and there has been little discussion of policy alternatives. The RIS becomes an “end of pipe” process and does not influence policy options.}^{213}

Cost-Benefit Analysis

One of the most important aspects of RIS is the cost-benefit analysis. The OECD emphasises the importance of cost-benefit analysis and for a decision to proceed with a particular regulatory or non-regulatory choice to be based on obtaining the maximum net social benefit.\(^{214}\) The Premier’s Guidelines make clear that the benefits of regulations must outweigh the costs –

\textit{Regulatory action should not normally be undertaken unless the potential benefits from the proposed statutory rule outweigh the potential costs to business and the wider community.}^{215}

In terms of its legislative requirements Victoria ranks highly, as the Subordinate Legislation Act 1994 (Vic) places strong emphasis on cost-benefit analysis. However in terms of actual cost-benefit analysis, Victoria does not do so well.

\(^{210}\) Mr. J. Hawkless & Mr. P. Mooney, Hawkless Consulting, Submission No. 13.
\(^{211}\) Mr. R. Deighton-Smith, op. cit., p. 11.
\(^{212}\) Mr. H. Race, Submission No. 3.
The accuracy of the cost-benefit analysis is crucial because it will be on the basis of the cost-benefit analysis that a final decision is made to proceed with a particular regulatory or non-regulatory option. In reviewing the RISs chosen for this Report, Mr Deighton-Smith examined quantification of costs, quantification of benefits and use of quantitative methodological tools and found –

... slightly fewer than one third of the RIS (17 of 53) were judged as having quantified costs to an adequate degree, while a slightly smaller number were judged as having quantified benefits adequately. Approximately 60 per cent were regarded as having made sufficient use of quantitative methodological tools.\textsuperscript{216}

Mr Clark also indicated that in his opinion there are inadequacies in some of the cost-benefit analyses prepared such as concealed assumptions, unqualified assumptions of expertise or authoritative advice, undocumented assumptions of external advice, assumptions made without factual bases (eg with undocumented claims that appropriate information is unavailable).\textsuperscript{217}

These deficiencies with the quantification of costs and benefits have consequences for the ability of RISs to improve policy outcomes and for scrutiny by the Regulation Review Subcommittee. Where RISs are deficient, there can be no ‘real’ public participation and consequently there is little likelihood that there will be policy improvements. In reviewing the RISs chosen for this Report, Mr Deighton-Smith found –

The results of the analysis showed that in slightly over half of the RIS considered (27.5 of 53) the RIS was found to have little ability to improve the policy outcome. In many cases this was due to the poor quality of the RIS analysis while in others it was due to the lack of a real policy choice. .... 20 RIS were regarded as having moderate ability to improve policy outcomes, while only 5.5 were regarded as having major ability to effect improvements.\textsuperscript{218}

Mr. Deighton-Smith concludes –

These results suggest that the RIS process is able to make significant improvements to policy outcomes in only about half of all cases at present, and that the key reason for this situation is the continued poor quality of many RIS.\textsuperscript{219}

Data Collection Strategies

The OECD indicates that there should be specific policies setting out strategies for collecting data and the quality standards applying to that data.\textsuperscript{220} Some OECD countries, such as Canada and Denmark, have introduced programs to improve the collection of data.\textsuperscript{221} In 1995 Canada trialed the use of a software based Business Impact Test to determine cost impacts on business.\textsuperscript{222} This system was upgraded and formally adopted in 1997.\textsuperscript{223} Denmark uses a system

\textsuperscript{216} Mr. R. Deighton-Smith, op. cit., p. 11.
\textsuperscript{217} Mr. P. Clark, Submission No. 23.
\textsuperscript{218} Mr. R. Deighton-Smith, op. cit., p. 13.
\textsuperscript{219} ibid.
\textsuperscript{221} Mr. R. Deighton-Smith, op. cit., p. 29.
\textsuperscript{222} ibid.
\textsuperscript{223} ibid.
of Business Test Panels to obtain input from and assess the impact on business.\(^\text{224}\) In the Netherlands the Ministries of Justice and Economic Affairs manage a Helpdesk which provides “specific expertise, including statistical assistance, to guide regulators through all phases of RIA including the design and collection of data requirements”.\(^\text{225}\) While some OECD countries have adopted these specific strategies for improving the collection of data, “the implementation of data collection strategies remains relatively undeveloped in OECD countries”.\(^\text{226}\)

Victoria does not rate highly on the development of data collection strategies –

\textit{This seems to be a significant area of weakness, given the long standing nature of Victoria’s RIS requirements and the fact that this appears to be an important area of innovation and policy learning in some OECD countries that are seeking to improve RIS performance and thus enhance regulatory quality.}\(^\text{227}\)

The Committee is concerned about the inadequacy of quantitative data and the lack of research in many RISs. The Committee considers that one way of improving the quality of data would be to develop appropriate data collection strategies, which make clear the acceptable standards of data. The Committee notes Mr Deighton-Smith’s comments that Victoria has never really given much consideration to this issue –

\textit{This is an area that has never received significant attention in Victoria, with brief discussions in some editions of ORR guidebooks being the only notable efforts made. A concerted effort to provide technical assistance in this area – perhaps on a case by case basis, as well as through generic guidance material – would have the potential to improve quality significantly.}\(^\text{228}\)

The Committee considers that in order to improve the quality of data relied upon and used in RISs, it is important for consideration to be given to developing appropriate data collection strategies in Victoria. The Committee considers that ORR is in an ideal position, given the regulatory expertise of its staff, to develop these strategies for Victoria and that in doing so ORR should examine current OECD developments and the experience of OECD countries such as Canada and the Netherlands who have already taken steps in this direction.

**Recommendation 13**

The Committee recommends that the Office of Regulation Reform –

(a) be given responsibility for developing and implementing effective data collection strategies; and

(b) provide advice and assistance to departments and agencies on improved research techniques in order to improve the quality of Regulation Impact Statements.

\(^{224}\) ibid.

\(^{225}\) ibid.

\(^{226}\) ibid.

\(^{227}\) ibid.

\(^{228}\) ibid, p. 43.
Independent Assessment

When the requirement to prepare RISs was first introduced by the *Subordinate Legislation (Review and Revocation) Act 1984* (Vic), it included a requirement that RISs be independently assessed.\(^\text{229}\) The Department of Management and Budget (now the Department of Treasury and Finance) took responsibility for this role.\(^\text{230}\) In 1989 the role was transferred to the Regulation Review Unit (which later became ORR) “thus strengthening this quality control measure by ensuring it was exercised by a specialist regulatory reform body”.\(^\text{231}\)

However, the enactment of the *Subordinate Legislation Act 1994* (Vic) changed this. There is no longer a requirement that independent advice be obtained from ORR but instead it can “be obtained from any competent (and independent) source”.\(^\text{232}\) The *Premier’s Guidelines* also reflect this –

*The Office of Regulation Reform in the Department of State Development is available to provide an assessment service to other agencies. It is also open to the responsible Minister to engage the services of qualified individuals or firms external to government.*\(^\text{233}\)

All that is required is that the advice be ‘independent’, that is that the persons responsible for providing the advice should not have played any role in developing the policy, the proposed regulation or the RIS.

Prior to 1996, ORR was a small office and its work focussed on the independent assessment of RISs.\(^\text{234}\) Now ORR employs many more staff and 90% of its work involves industry sector reviews.\(^\text{235}\) Traditionally many of the staff working at ORR had an economics background, but since taking on industry sector reviews the staff come from various backgrounds, with the most important skills for carrying out independent assessments being strong analytical skills.\(^\text{236}\) All staff have the opportunity to review RISs and carry out industry sector reviews so that they develop broad skills.\(^\text{237}\) It appears that many departments and agencies continue to request ORR to provide independent assessments rather than relying on independent consultants.\(^\text{238}\) VWA tends to use private consultants who have had extensive experience in the RIS process to provide independent assessments as they are able to provide advice in the time frame stipulated –

*From a practical point of view we often found that there were lengthy delays in obtaining advice from them, and we were receiving fundamental advice very late in the negotiating process. We would have gone down a track with them to a certain point, and then new issues would arise very close to when we were seeking to finalise the agreement. We find that under the current arrangement, where we can commission persons outside of*
government to review the RIS, we have greater control over the time frame and when that advice is provided."

DNRE mostly uses outside consultants rather than ORR to provide independent assessments.

Where private consultants are used “their competence for and independence in providing the advice is known only to the agency, and presumably the responsible Minister”. There is no opportunity for either the public or the Regulation Review Subcommittee to scrutinise the independent advice received because there is no requirement under the Subordinate Legislation Act 1994 (Vic) for that advice to be published as part of the RIS or to be forwarded to the Regulation Review Subcommittee. As a consequence there is no means of either verifying the competency of the adviser or the extent to which the advice is truly independent. The Committee heard evidence, for example, that one consultant had been asked to prepare a RIS and later the independent advice certificate, but refused on the basis that he thought this was totally inappropriate. As the Chair of the Regulation Review Subcommittee noted, while the Premier’s Guidelines discourage this practice, neither they nor the Subordinate Legislation Act 1994 (Vic) contain an express prohibition of this practice.

The Committee is concerned that the system of independent assessment under the Subordinate Legislation Act 1994 (Vic) is not subject to any form of scrutiny either by the public or by the Regulation Review Subcommittee. Irrespective of whether independent assessment is conducted by ORR or independent consultants, the Committee considers that in the interest of promoting a more transparent and accountable regulatory system there needs to be some oversight of the independent assessment process.

Recommendation 14

Irrespective of whether the role of the Office of Regulation Reform is altered as a consequence of the recommendations contained in this Report, the Committee believes that there is value in the Regulation Review Subcommittee scrutinising independent assessments. The Committee recommends that copies of Independent Assessments together with appropriate regulations be forwarded to the Regulation Review Subcommittee for consideration.

Advice provided by consultants may not be of the same standard as that provided by ORR. Where RISs do not comply with all the requirements of the Subordinate Legislation Act 1994 (Vic), qualified letters of advice may be sent to the relevant department or agency. In relation to the sample of RISs reviewed for this Report, 34 letters of advice were provided, 12 of which were qualified (ie approximately one-third), with the remaining 22 being unqualified. Of the qualified letters, only two came from consultants, with the remainder coming from ORR. This suggests that ORR is more likely to make some sort of comments concerning the quality of a RIS. Mr. Deighton-Smith considers –

239 Mr. G. Radley, VWA, Minutes of Evidence, 27 April 2001, pp. 161 and 155-156.
240 Mr. S. Green, DNRE, Minutes of Evidence, 27 April 2001, p. 126.
241 Mr. P. Clark, Submission No. 23 and Minutes of Evidence, 26 April 2001, p. 45.
243 The Hon. J. Mikakos, MLC, Chair, Regulation Review Subcommittee, Minutes of Evidence, 26 April 2001, p. 17.
244 This practice was commenced by ORR in 1991, when it sent a qualified letter of advice to a particular agency. This practice later became widespread.
245 Mr. R. Deighton-Smith, op. cit., p. 18.
It may be tentatively concluded that the rigour of the advice being provided by the ORR is superior to that of advice provided by consultants in general. This is unsurprising, given that consultants have a disincentive to the use of such qualifications in terms of their hopes for repeat business from the regulator.  

Part of the difficulty for private consultants is that competition amongst them for RIS assessment work “may compromise the quality of the advice given”. Private consultants may provide assessments that RISs are adequate in order to obtain further RIS assessment work. While many agencies and departments continue to use ORR, there is the possibility that if ORR is seen as taking a more rigorous approach, its advice will be avoided. There is a suggestion that two agencies who were unhappy with the robustness of the analysis provided by ORR have continued to use private consultants for independent advice. Mr Martin Oakley suggested that he had seen no evidence of agencies and departments using consultants “as an easy option” and that sometimes the independent assessment provided by private consultants was more rigorous than that undertaken by ORR –

*I have not had problems with agencies taking the easy option of using a consultant rather than our office. I have thought there have been occasions when a consultant has taken a more vigorous role than my office on some regulatory impact statements, so I do not see it as a big issue.*

VWA however, noted that some years ago they experienced some difficulties with ORR concerning methodology and policy issues and that since that time they have used independent consultants –

*When we used ORR many years ago we experienced some difficulties with them in reaching agreement about what were methodological problems and what were issues of policy that should remain within the Minister’s portfolio. We found difficulty in reaching agreement with them on where their role in reviewing the methodology of the RIS ended and where the policy issues began.*

The Committee notes Mr. Deighton-Smith’s comments that qualified advice was “initially conceived as a device to defuse prolonged and unproductive disputes between ORR and regulators over major regulation”. The Committee considers that the use of qualified letters of advice may allow regulations to be enacted which have defects in their cost-benefit analysis. This is because instead of agencies and departments being required to make appropriate changes, qualified letters of advice allow them to proceed with the RIS and regulatory proposal without making changes. The Committee considers that to improve the quality of RISs, conclusive certificates of independent assessment need to be provided, with departments and agencies being required to make appropriate changes.

**Recommendation 15**

The Committee recommends that the practice of providing qualified letters of advice be discontinued and that conclusive certificates of independent assessment be provided either accepting or rejecting Regulation Impact Statements.

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246 ibid.
247 ibid. p. 26. Similar views were also expressed by Mr. P. Clark, Submission No. 23.
248 ibid.
249 Mr. M. Oakley, ORR, Minutes of Evidence, 27 April 2001, p. 97.
250 Mr. G. Radley, VWA, Minutes of Evidence, 27 April 2001, p. 161.
Some submissions suggested that ORR should provide advice to departments and agencies throughout the RIS process and also have a mandatory role in certifying the adequacy of RISs. Others suggested that ORR play an advisory role only. Victoria Police believe that ORR should work closely with departments and agencies providing assistance with the preparation of RISs, while “not stifling free expression” and should not have a mandatory certification role –

There are times when a department/Minister and the ORR may disagree over the content of an RIS. This may not mean that the RIS is fatally deficient but rather that the ORR believes that the focus of the RIS should be different.

As an alternative, Victoria Police suggest that where ORR is dissatisfied with regulations it be empowered to make a report to the Regulation Review Subcommittee so that departments and agencies will be reluctant to ignore ORR’s advice but not bound to follow it.

A question which arises about ORR and its ability to provide advice is the extent to which a government agency can truly provide ‘independent’ advice to another government agency. Some commentators adopt the view that although ORR is a government agency it does in fact provide ‘independent’ advice and that it “does not merely rubber-stamp RISs provided by government departments and agencies”.

Another important question is the most appropriate location for ORR. In 1997, Professor Allan Fels, Chairman of the Australian Competition and Consumer Commission suggested to the VLRC that the functions of ORR could be merged with the competition review functions of the Economic Development Branch of the Cabinet Office and that this merged agency could be located within the Department of Premier and Cabinet. Presumably such a merged entity would have a significant focus on additional competition policy compliance.

In 1997 in its submission to the VLRC’s Inquiry into Regulatory Efficiency Legislation, the Committee supported the establishment of ORR as an independent statutory authority, commenting that ORR “would then be able independently to advise Ministers from a position outside a Minister’s Department”. It could be argued that in this way ORR would be seen to be completely independent when providing advice to Ministers on the adequacy of the RIS and the RIS process. Some submissions also support this view, suggesting that the only way ORR can give truly independent advice is as an independent statutory authority. There was also

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251 Mr. R. Deighton-Smith, op. cit., p. 40.
252 Mr. Garry Pearson, ADAVB, Submission No. 11; Mr P. Clark, Submission No. 23 and Mr. K. Dare, Solicitor, Submission No. 33. Mr. B. Sturman, Submission No. 4 supports this but suggests that different individuals should provide advice and final certification. Mr. J. Hawkless & Mr. P. Mooney, Hawkless Consulting, Submission No. 13 also support this but only if ORR is given sufficient financial and human resources to adequately perform the task. See also Mr. P. Clark, Minutes of Evidence, 26 April 2001, p. 45.
253 Mr. S. Goldsworthy, Manningham City Council, Submission No. 6 and Commander P. Hornbuckle, Victoria Police, Submission No. 21.
254 Commander P. Hornbuckle, Victoria Police, Submission No. 21 and Mr. J. Frigo, Victoria Police, Minutes of Evidence, 27 April 2001, p. 143.
255 Commander P. Hornbuckle, Victoria Police, Submission No. 21.
259 Mr. B. Sturman, Submission No. 4; Mr. S. Goldsworthy, Manningham City Council, Submission No. 6 and Environment Liaison Office, Submission No. 25.
some support for ORR being located in the Department of Premier and Cabinet.\textsuperscript{260} The overriding concern of those who commented on this issue is that ORR should be located where the “independence and the seriousness of its role” can best be emphasised.\textsuperscript{261}

The Committee considers that it is essential for Victoria to renew its commitment to regulatory reform. As part of this process the Committee considers that a number of changes need to be made to the current role of ORR to enhance and strengthen its role in the RIS process. The Committee envisages that ORR play an integral role in the RIS process through the provision of advice and training and the assessment of whether RISs have complied with all the requirements of the \textit{Subordinate Legislation Act 1994} (Vic). Recommendations 10-13, 16-17, 26, 38, 48 and 52 in this Report go part way to enhancing ORR’s role. However, in the interests of strengthening quality control, consistency and accountability, the Committee considers that ORR should be solely responsible for conducting independent assessments. The Committee has carefully considered whether ORR should be established as an independent statutory authority and concludes that this is not necessary. However, the Committee notes that further consideration should be given to a location for ORR within government which will further enhance its role.

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\textbf{Recommendation 16} \\
\textbf{The Committee recommends that the Office of Regulation Reform be given sole responsibility for independently assessing Regulation Impact Statements and certifying that they have met all the Regulation Impact Statement requirements of the \textit{Subordinate Legislation Act 1994} (Vic).} \\
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\textbf{Recommendation 17} \\
\textbf{While the Committee does not consider it necessary for the Office of Regulation Reform to be established as an independent statutory authority, the Committee believes some consideration should be given to a location for the Office of Regulation Reform within government which will enhance its role.} \\
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\section*{Assessment of Regulatory Performance}

In the Commonwealth, all departments and agencies which produce regulations which impact on business must monitor their performance against a series of regulatory performance indicators (RPIs). RPIs examine such issues as the availability of consultation guidelines; publication of annual plans; communication strategies; whether RISs adequately address the net benefit to the community; whether RISs adequately justify the compliance burden on business etc. The assessment results are published by the Office of Small Business in the \textit{Annual Review of Small Business}. Appendix L contains an extract from the Office of Small Business, \textit{Annual Review of Small Business}, showing the results of the assessment of the performance of departments and agencies against the regulatory performance indicators for 1999.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{260} Mr. Garry Pearson, ADAVB, \textit{Submission No. 11} and Mr. P. Clark, \textit{Submission No. 23} and \textit{Minutes of Evidence}, 26 April 2001, p. 45. Mr. S. Goldsworthy, Manningham City Council, \textit{Submission No. 6} supports the creation of ORR as a separate independent authority but expressed a preference for it to be located in the Department of Premier and Cabinet.
\item \textsuperscript{261} Mr. B. Sturman, \textit{Submission No. 4}.
\end{itemize}
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The Committee considers the assessment of regulatory performance is important as it makes the regulation-making system more transparent and accountable. It enables departments and agencies to self-assess their performance against regulatory performance indicators which concern general aspects of the regulation-making process and allows independent scrutiny of their compliance with RIS requirements. The Committee received a number of submissions which support this proposal. Victoria Police noted that they believe this may be unnecessary if ORR takes on the role of ensuring all RISs comply with the appropriate requirements. The Committee considers that by assessing regulatory performance annually, departments and agencies can receive an indication of the standard of their regulatory work, providing an opportunity for constructive improvements to be made to the way in which they make regulations and prepare RISs. The Committee notes that in the Commonwealth, the system of monitoring regulatory performance is limited to departments and agencies which make regulations which impact on small business. The Committee considers that in the interests of consistency and transparency the assessment of regulatory performance should apply to all departments and agencies irrespective of the impact of the regulations which they prepare.

Recommendation 18

The Committee recommends that –

(a) the regulatory performance of all departments and agencies be assessed annually;

(b) similar regulatory performance indicators to those used by Commonwealth departments and agencies be adopted in Victoria;

(b) the Office of Regulation Reform be responsible for assessing agency and department compliance with regulatory performance indicators which concern compliance with the Regulation Impact Statement process;

(c) departments and agencies assess their own performance in relation to regulatory performance indicators which concern other aspects of the regulation-making process; and

(d) the results of this assessment be published annually in a publication produced by the Office of Regulation Reform and available on its website and on a centralised website dedicated to all legislation.

Exceptions and Exemptions from the RIS Process

RISs do not have to be prepared for regulations which are excepted under section 8 or exempted under section 9 of the Subordinate Legislation Act 1994 (Vic).

The Committee did not receive a great deal of feedback on how the exception and exemption process is working. The Victorian Bar commented that “a regime for exceptions and exemptions” is essential, recognising that it is not always appropriate for a cost-benefit

Mr. B. Sturman, Submission No. 4; Mr. S. Goldsworthy, Manningham City Council, Submission No. 6; Mr. Garry Pearson, ADAVB, Submission No. 11; Mr. J. Hawkless & Mr. P. Mooney, Hawkless Consulting, Submission No. 13 and Mr. P. Clark, Submission No. 23.

Commander P. Hornbuckle, Victoria Police, Submission No. 21.

Mr. M. Derham, The Victorian Bar, Submission No. 20. This comment was also made by Mr. J. Hawkless & Mr. P. Mooney, Hawkless Consulting, Submission No. 13; Commander P. Hornbuckle, Victoria Police, Submission No. 21 and Mr. R. Hodge, SIV, Submission No. 29.
analysis to be undertaken for all regulations, especially those which are minor in nature. However, the Committee notes the comments made by the Environment Liaison Office, that while it is not possible to undertake a cost-benefit analysis for all regulations, RISs play an important role in the development of regulations by ensuring “that regulations are well thought out and analysed, and that all possible effects on the community are noted before implementation of the regulation”.265

Those who did comment indicated that it is often difficult determining whether a regulation falls within an exception or exemption –

While I have never personally experienced any problems with the process, I suggest that, if possible, the Subordinate Legislation Act should be made clearer as to whether or not certificates of exemption are required in the case of all regulations.266

The Premier’s Guidelines provide inadequate assistance in this regard. Victoria Police pointed out that they believe it is more difficult for the public to understand how regulations fit within particular exceptions or exemptions and they suggest that a publicly available explanation should be provided as to “the basis on which the exception or exemption applies”.267

The Committee considers that it is important to maintain the current exception and exemption system recognising that some regulations are minor in nature and there should be no requirement to prepare cost-benefit analyses for those sorts of regulations.

Recommendation 19

The Committee recommends that the current framework of the Subordinate Legislation Act 1994 (Vic) whereby Regulation Impact Statements must be prepared for all regulations unless excepted or exempted under the Act be retained.

Exceptions

Where a regulation is excepted from the RIS process the reasons for this exception do not have to be provided, although the Minister must certify to the Regulation Review Subcommittee that the regulation falls within a relevant exception. Regulations are excepted under section 8 of the Subordinate Legislation Act 1994 (Vic) where the regulations –

- increase fees by an annual rate which does not exceed the annual rate approved by the Treasurer in relation to the state budget. Currently the rate is 2.5% and this rate can be found in the publication, Guidelines for Setting Fees and Charges Imposed by Departments and Budget Sector Agencies;268

- relate only to the procedure, practice or costs of a court or tribunal. These regulations concern the updating of court rules, the introduction of new tribunals, the introduction of new court procedures, court fees and so on;

265 Environment Liaison Office, Submission No. 25.
266 Mr. H. Race, Submission No. 3. Similar comments were also made by – Mr. B. Sturman, Submission No. 4; Mr. Garry Pearson, ADAVB, Submission No. 11; Mr. P. Clark, Submission No. 23; Mr. D. Fitzpatrick, VADA, Submission No. 24 and Environment Liaison Office, Submission No. 25.
267 Commander P. Hornbuckle, Victoria Police, Submission No. 21.
268 Department of Treasury and Finance, Melbourne. The current Guidelines are dated 27 December 2000 and they apply to the financial year 1 July 2001 to 30 June 2002.
Inquiry into the Subordinate Legislation Act 1994 (Vic)

- only prescribes an equalisation factor for the purposes of the Land Tax Act 1958. These regulations state the number by which the land value of Victorian properties must be multiplied for the purposes of calculating land tax;

- prescribes an instrument or class of instruments as a ‘statutory rule’ for the purposes of the Subordinate Legislation Act 1994 (Vic);

- exempts an instrument or class of instruments from the operation of the Subordinate Legislation Act 1994 (Vic);

- extends the operation of a regulation which would otherwise be revoked by virtue of the automatic sunsetting provisions contained in section 5 of the Subordinate Legislation Act 1994 (Vic). Under this exception a Minister certifies that due to ‘special circumstances’, there is insufficient time to comply with the RIS process and that the existing regulation should be extended. A regulation may only be extended once under this provision and only for a maximum period of up to 12 months.

Submissions received by the Committee support a requirement that Ministers be required to provide reasons for regulations excepted from the RIS process and not just those which fall within exemptions –

It is suggested that for purposes of consistency, a Minister should be required to provide reasons (either during the creation of the statutory rule or when the rule is tabled in Parliament) in both instances. ... there is a need for some form of justification process (eg a report explaining why an RIS was not needed) to ensure transparency of decision-making in relation to such exceptions. Such a report would provide an opportunity for other Members of Parliament to be informed about the reasons why an RIS was not needed, and could be used to address concerns raised by persons affected by the new rule.  

The Committee considers that the practice of not providing reasons for excepting regulations from the RIS process contributes to inconsistency and lack of transparency in that part of the regulation-making process.

Recommendation 20

The Committee recommends that Ministers be required to provide reasons for excepting regulations from the Regulation Impact Statement process.

Section 8(1)(a) – Fee Increases

Many comments related to the exception concerning regulations which increase fees by an annual rate which does not exceed the annual rate approved by the Treasurer in relation to the State Budget.

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269 Mr. J. Hawkless & Mr. P. Mooney, Hawkless Consulting, Submission No. 13. Similar comments were also made by – Mr. B. Sturman, Submission No. 4; Mr. Garry Pearson, ADAVB, Submission No. 11; Commander P. Hornbuckle, Victoria Police, Submission No. 21; Mr. P. Clark, Submission No. 23; Mr. D. Fitzpatrick, VADA, Submission No. 24 and Environment Liaison Office, Submission No. 25.

270 Subordinate Legislation Act 1994 (Vic), s. 8(1)(a).
Section 8(2) of the Subordinate Legislation Act 1994 (Vic) allows departments and agencies to round off to the nearest whole dollar, with the consequence that some fees are increased by more than the Treasurer’s approved rate. Some submissions indicated that rounding up to the nearest whole dollar is an acceptable practice or is not of “major” concern –

This is an acceptable alternative to what would otherwise create accounting difficulties for both departments and persons affected by the regulations.271

The Phillip Island Nature Park commented that rounding up would only impose a burden on the community if the rounding up related to fees paid regularly and if the resulting increase was significant.272 Only one submission expressed significant concern about the practice of rounding up suggesting that it can result in businesses, organisations or individuals paying additional costs, costs not intended by the Subordinate Legislation Act 1994 (Vic).273

OCPC highlighted the inconsistency between 8(1)(a) and 8(2), with one provision requiring fee increases to be within the rate set by the Treasurer and the other allowing fee increases to fall outside that rate by the practice of rounding up –

There seems little point to section 8(2) unless fees can be increased by more than the approved rate in cases where the “extra” increase is made for the purpose of rounding up the fee to the nearest $1. This Office is of the view that section 8 could be amended to make this clearer. Alternatively, section 8(2) could be repealed if it is Parliament’s intention that fees cannot in any circumstances be increased by more than the Treasurer’s approved rate without an RIS.274

The Committee notes that the practice of calculating fee increases to the nearest whole dollar does not appear to be of concern to those who made submissions or who gave evidence at public hearings. The Committee considers that given this lack of concern and the limited availability of coins of small denominations, it is more practical to allow this practice to continue.

Recommendation 21

The Committee recommends that the process of calculating fee increases to the nearest whole dollar under section 8(2) of the Subordinate Legislation Act 1994 (Vic) be retained.

The Committee notes that under the Treasurer’s Guidelines, it is acceptable for fee increases to be viewed as a package, so that individual fees can exceed the set rate, provided that the total package of fees in a regulation does not.275 This means that while some increases in the package may fall outside the rate set by the Treasurer, averaged out as a whole the fees do not exceed the set rate. In its 1999 Annual Report, the Committee commented on the growing use of the

271 Commander P. Hornbuckle, Victoria Police, Submission No. 21. Other submissions which support or do not see any significant problems arising from rounding up include – Mr. B. Sturman, Submission No. 4; Mr. Garry Pearson, ADAVB, Submission No. 11 and Mr. J. Hawkless & Mr. P. Mooney, Hawkless Consulting, Submission No. 13.
272 Mr. R. Lievers, Phillip Island Nature Park, Submission No. 2.
273 Mr. S. Goldsworthy, Manningham City Council, Submission No. 6.
274 Mr. E. Moran, OCPC, Submission No. 9.
275 Department of Treasury and Finance, Guidelines for Setting Fees and Charges Imposed by Departments and Budget Sector Agencies, Melbourne, 27 December 2000, p. 4.
‘basket’ approach which enabled some individual fees to increase by an amount far in excess of the Treasurer’s Guidelines. 276

The basket approach has little support from those who commented on fee increases –

... I would be concerned about the potential impact of the “basket of fees” process, whereby the overall increase in a set of fees is confined to the inflation rate, but some individual fees could be raised substantially. Such fees could have a significant impact on certain businesses or in certain communities. I believe the relevant stakeholders need the opportunity to become aware of and make comment on the potential impact of any fee increase beyond the inflation rate.277

For regulations which are not subject to the requirements of the Subordinate Legislation Act 1994 (Vic), fee increases may be very significant and may adversely impact upon those affected. For example, the Committee received evidence from the ADAVB that registration fees for dentists had increased substantially –

Rounding up is of little consequence compared to the problem of some agencies not being obliged to justify their fee increases at all. In the case of the Dental Practice Board, there appears to be no requirement that they justify their new fee structure, and this caused particular concern when they increased dentists’ registration fees by over 100% in December 2000 – without any detailed explanation.278

The Committee considers its recommendation to subject all legislative instruments to the procedures of the Subordinate Legislation Act 1994 (Vic) will alleviate the types of problems highlighted by ADAVB. The Committee is concerned that the basket approach allows some individual fee increases to fall outside the rate set by the Treasurer, as the possibility exists for some of these fees to have a significant and adverse impact on the community and business.

Recommendation 22

The Committee recommends that the Subordinate Legislation Act 1994 (Vic) be amended to prohibit the use of the “basket” (or averaging) approach for regulations increasing fees under section 8(1)(a).

The Committee notes that some departments and agencies provide the Regulation Review Subcommittee with a table providing a comparison of new fees with old fees. The Committee considers this practice to be very helpful and useful to the Regulation Review Subcommittee.


277 Mr. J. Hawkless and Mr. P. Mooney, Hawkless Consulting, Submission No. 13. Other submissions which do not support the basket approach include – Mr. B. Sturman, Submission No. 4 and Mr. P. Clark, Submission No. 23.

278 Mr. Garry Pearson, ADAVB, Submission No. 11.
Recommendation 23

The Committee recommends that –

(a) department and agency staff be required to prepare a table comparing new and old fees, including an indication of the percentage increase or decrease for each fee; and

(b) departments and agencies be required to provide the Regulation Review Subcommittee with a copy of this comparative table.

Section 8(1)(b) – Court Rules

Regulations made under section 8(1)(b) of the Subordinate Legislation Act 1994 (Vic) are excepted from the RIS process on the basis that they relate to the procedure, practice or costs of a court or tribunal. This exception allows judges, magistrates and rules committees to make rules which increase court fees and which increase the scale of costs. Court fees and the scale of costs need to be carefully distinguished. The scale of costs concerns the costs that a winner obtains from a loser –

\[ \text{It is a little like medicare, you do not get all your costs back, you get about 60 per cent. The party-party situation is a fee struck by the courts to compensate the person for actual legal costs.}^{279} \]

The Scale of Costs is fixed after consultation through a committee appointed by the courts –

\[ \text{The Supreme Court has a committee chaired by the Chief Justice of the Supreme Court of Victoria called the Costs Co-ordination Committee. The committee comprises the Chief Justice of the Supreme Court, the Chief Judge of the County Court, the Chief Magistrate, representatives of the Law Institute and the Victorian Bar as well as Professor Williams from the University of Melbourne, who is an expert economist and general adviser on matters economic.}^{280} \]

The Committee heard evidence that the Costs Co-ordination Committee meets several times each year to consider “whether there should be an increase in costs awarded to parties as a result of cost orders made by judges in proceedings”.\(^{281}\) The Costs Co-ordination Committee acts efficiently and effectively enabling the impact of inflation or the GST, for example, to be factored into an award of costs against another party –

\[ \text{It operates reasonably and effectively and does not slow unnecessarily the expeditious process that should be followed; that is to say, it acts fairly quickly when it is persuaded there should be an increase because, for example, of the impact of inflation the increase is passed on fairly quickly.}^{282} \]

\(^{279}\) Mr. I. Upjohn, The Victorian Bar, Minutes of Evidence, 26 April 2001, p.10.

\(^{280}\) Mr. M. Derham, The Victorian Bar, Minutes of Evidence, 26 April 2001, p. 4.

\(^{281}\) ibid.

\(^{282}\) ibid.
The Victorian Bar is opposed to the Regulation Review Subcommittee being able to review and comment on increases in the scale of costs because the process “might be bogged down and work against the interests of the parties and the profession”.\footnote{ibid.}

On the other hand, court fees involve, for example, the costs of filing originating process, daily hearing fees, stamp duty payable on originating process etc. Court fees concern the community generally and affect all those people involved in proceedings before the courts. The Victorian Bar informed the Committee that it is concerned about continuous increases in court fees –

\begin{quote}
\textit{In the County Court they are $176 a day. That is not a great deal as County Court litigation costs a great deal more than that, but when you add up the incremental fees the costs and access to justice starts to be affected.}\footnote{Mr. I. Upjohn, The Victorian Bar, \textit{Minutes of Evidence}, 26 April 2001, p. 10.}
\end{quote}

The Committee is also seriously concerned about the frequency with which court fees are increased and the impact those fees have on access to justice. The Regulation Review Subcommittee remains powerless to comment on the amount of those fee increases because they are made under section 8(1)(b) of the \textit{Subordinate Legislation Act 1994 (Vic)} which does not restrict the making of such rules nor set any limit on the amount of increases. The Victorian Bar noted –

\begin{quote}
\textit{In the past 5 years the costs of filing originating process in the courts and the imposition of daily hearing fees has substantially increased the cost of litigation. These changes have occurred without much in the way of notice or comment from the Executive or the Parliament.}\footnote{Mr. M. Derham, The Victorian Bar, Submission No. 20. Similar comments were made by – Commander P. Hornbuckle, Victoria Police Submission No. 21.}
\end{quote}

Other regulations which increase fees are either subject to the RIS process (and the rigors which that assessment imposes) or may be excepted under section 8(1)(a) as long as the fee increases do not exceed the amount set by the Treasurer. Regulations increasing court fees made under section 8(1)(b) do not have to comply with the rate set by the Treasurer nor does a RIS need to be undertaken.

The Victorian Bar indicated that subjecting regulations increasing court fees to the RIS process would add significantly to the administrative costs of courts and tribunals –

\begin{quote}
\textit{One concern would be that if the RIS process per se was introduced to court fees the already strapped administrative side of the courts would be further strained by an expense they could not bear.}\footnote{Mr. M. Groves, The Victorian Bar, \textit{Minutes of Evidence}, 26 April 2001, p. 10.}
\end{quote}

The Victorian Bar suggested that it is more appropriate if increases in court fees are required to comply with the rate set by the Treasurer under section 8(1)(a) –

\begin{quote}
\textit{In 1994 Court fees went up substantially, for example from $235 to $500 for issuing a Writ (see Statutory Rules No. 5 of 1993 and No. 137 of 1994). Ordinarily annual or periodic increases are more modest, such that we think that if increases are kept at or below the rate approved by the Treasurer under section 8(1)(a) of the Subordinate Legislation Act,}
\end{quote}
the time and expense of an RIS under section 7 could be saved without any undue effect on access to justice in Victoria.²⁸⁷

This would mean that while a cost-benefit analysis would not be undertaken, the amount by which court and tribunal fees would increase would be restricted to the rate set by the Treasurer. It would also give the Regulation Review Subcommittee the opportunity to comment, if the increases were above the specified rate.

The Committee acknowledges the comments made by the Victorian Bar that if the Regulation Review Subcommittee was to get involved in commenting on increases in the scale of costs, this may slow down the process of determining those increases and adversely affect the rights of the parties involved and the legal profession. However, the Committee remains concerned about increases in court and tribunal fees generally and considers that these fee increases should either fall within the rate set by the Treasurer or be subject to the RIS process.

Recommendation 24

The Committee recommends that –

(a) regulations increasing court and tribunal fees be required to comply with the rate fixed by the Treasurer for regulations made under section 8(1)(a); and

(b) section 8(1)(b) be amended to refer only to the procedures and practice of courts and tribunals so that where regulations increasing court and tribunal fees fall outside the rate set by the Treasurer, those regulations be subject to regulation impact assessment.

Exemptions

Where a regulation is exempted from the RIS process under section 9 of the Subordinate Legislation Act 1994 (Vic), the Minister must specify reasons for granting that exemption. Regulations are exempt from the RIS process under section 9 of the Subordinate Legislation Act 1994 (Vic) where regulations –

- do not impose an appreciable economic or social burden on a sector of the public. The Premier’s Guidelines offer guidance on the meaning of ‘an appreciable economic or social burden’.²⁸⁸ In its May 1999 Report, the Committee indicated that this is the most frequently used exemption and that it applies where a regulation has a minor impact on a small sector of the public;²⁸⁹

- are required under a national uniform legislation scheme where an assessment of costs and benefits has already been undertaken for that scheme. Where a national scheme assessment of the costs and benefits has already been undertaken, the impact on Victoria has presumably already been considered and it is therefore wasteful of resources to prepare an additional RIS assessment;

²⁸⁷ Mr. R. Redlich, Chairman, The Victorian Bar, Letter to Ms Jenny Baker, Legal Adviser, 6 May 2002. This comment was also made by Mr. M. Groves, The Victorian Bar, Minutes of Evidence, 26 April 2001, p. 10.
• are of a fundamentally declaratory or machinery nature. In other words, the changes are of a minor nature. In its May 1999 Report, the Committee noted that there were many examples of regulations falling within this category.\textsuperscript{290}

• deal with administrative procedures between departments or declared authorities;

• deal with administrative procedures within the departments of Parliament;

• the preparation of a RIS would render a regulatory proposal ineffective or would unfairly advantage or disadvantage any person likely to be affected by a proposed regulation. This exemption allows a regulation to be introduced without notice where the circumstances are such that notice to the public would render the regulations useless. In its May 1999 Report, the Committee noted that there were two examples of these types of regulations, both of which related to public access to forests.\textsuperscript{291}

Regulations can also be exempted from the RIS process under section 9(3) of the \textit{Subordinate Legislation Act 1994 (Vic)} where the Premier certifies that in the ‘special circumstances’ of the case the public interest requires the proposed regulations to be made without a RIS. There is no legislative requirement for the Premier to specify what those ‘special circumstances’ are or explain why it is in the ‘public interest’ to grant an exemption under this section.

\textbf{Section 9(1)(a) – Appreciable Economic or Social Burden}

Section 9(1)(a) of the \textit{Subordinate Legislation Act 1994 (Vic)} allows regulations to be exempted from the RIS process where Ministers certify that no economic or social burden will be imposed on any sector of the public.

The Regulation Review Subcommittee’s legal adviser has received a significant number of enquiries from department and agency officers as to when to use this exemption. Part 6 of the \textit{Premier’s Guidelines} provides advice on whether regulations impose an appreciable cost or burden on a sector of the public. However the advice provided in the \textit{Premier’s Guidelines} largely repeats dictionary definitions, is confusing and inadequate, frequently leaving department and agency staff with doubt as to whether or not regulations impose such a burden. The most which can be gleaned from the \textit{Premier’s Guidelines} is that this exemption should be used where regulations affect a small group and have only a minor impact on that group. The Committee is concerned about the confusing and inadequate guidance provided by the \textit{Premier’s Guidelines} on this issue.

There is also confusion amongst department and agency staff about the level of consultation, if any, which should be undertaken to determine whether an appreciable economic or social burden is imposed. The \textit{Premier’s Guidelines} lack clarity on this issue. Paragraph 5.30 of the \textit{Premier’s Guidelines} provides –

\begin{quote}
\textit{In the case of such a rule, consultation is only required under section 6(b) if it is necessary to determine whether an appreciable burden would be imposed by the rule and the sector of the public on which that burden would fall. The level and nature of the consultation required in each case is a matter for the relevant responsible Minister.}\textsuperscript{292}
\end{quote}

\textsuperscript{290} ibid, pp. 36-38.
\textsuperscript{291} ibid, p. 39 and pp. 15-18.
Paragraph 5.31 of the Premier’s Guidelines requires Ministers to give reasons as to why regulations do not impose an appreciable economic or social burden and to provide a copy of the certificate of consultation to the Regulation Review Subcommittee. The Regulation Review Subcommittee found that it has been the past practice of many departments and agencies not to undertake consultation and not to provide certificates of consultation where regulations are exempted under section 9(1)(a) of the Subordinate Legislation Act 1994 (Vic). The Regulation Review Subcommittee sought an opinion from the Department of Premier and Cabinet, being the Department responsible for producing the Premier’s Guidelines. The Regulation Review Subcommittee was informed that its interpretation of the Premier’s Guidelines was valid and it was suggested that this issue be dealt with as part of the Inquiry into the Subordinate Legislation Act 1994.

The Committee is concerned that there is confusion amongst agency and department staff as to whether regulations impose an appreciable economic or social burden on a sector of the public. The Committee is puzzled as to how some Ministers can certify regulations as being exempt from the RIS process on the basis that they do not impose any appreciable economic or social burden without first conducting some form of consultation. The Committee considers that this problem is exacerbated by inadequate guidance in the Premier’s Guidelines and by confusion amongst agency and department staff concerning the extent to which they have to comply with the Premier’s Guidelines. The Committee makes a number of recommendations concerning the Premier’s Guidelines later in this Report which it considers will improve the clarity and usefulness of those guidelines. The Committee considers that consultation should be undertaken to determine whether an appreciable economic, social or environmental burden is imposed and that copies of all certificates of consultation should be provided to the Regulation Review Subcommittee.

**Recommendation 25**

The Committee recommends that it be a requirement of the Subordinate Legislation Act 1994 (Vic) that –

(a) initial consultation be undertaken to determine whether an appreciable economic, social or environmental burden is imposed; and

(b) copies of all certificates of consultation be provided to the Regulation Review Subcommittee.

Recommendations concerning the Premier’s Guidelines are made later in this Report – see Recommendation 45.

**Section 9(1)(b) – Uniform Legislation**

Section 9(1)(b) of the Subordinate Legislation Act 1994 (Vic) allows a regulation to be exempted from the RIS process where that regulatory proposal is required under a national uniform legislation scheme and an assessment of the costs and benefits has already been undertaken as part of that scheme. The Premier’s Guidelines make clear that Ministers must ensure that the impact of the scheme “particularly on Victorian business, has been properly assessed” and that there has been adequate consultation with the business community. 293

293 ibid, paragraph 5.33.
The National Road Transport Commission (the Commission), which is formally constituted under the *National Road Transport Commission Act 1991* (Cth), has prepared RISs “for all proposals for road transport regulatory reform that have been submitted to the Australian Transport Council”. RISs prepared by the Commission conform with “Guidelines for the Preparation of Regulatory Impact Statements”, approved by the Ministerial Council in April 1992 and with the “Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard Setting Bodies” endorsed by the Council of Australian Governments (COAG) in 1995. The Commission has recently revised the 1992 Guidelines, with the assistance of the Commonwealth ORR and transport agencies in other jurisdictions. The new Guidelines require RISs prepared by the Commission to “minimise duplication of effort and resources through harmonising the Commission’s regulatory impact standards and development processes with those of states and territories as far as practicable”. In its submission to the Committee, the Commission strongly supports the retention of exemption from the Victorian RIS process where a national assessment of the costs and benefits has already been undertaken, on the basis that this reduces duplication and is cost-effective –

*Where the national assessment has been performed rigorously and accords with the COAG Principles and Guidelines there are compelling grounds for exempting State and Territory agencies from the preparation of their own regulatory impact statements.*

The Commission points out that the current exemption could be improved. As currently worded the exemption applies to ‘uniform’ legislation which implies that a regulation will only be exempt if it is absolutely identical to the national regulation. The Commission notes this is rare –

*It is the Commission’s experience that uniform adoption of national regulation is rare, simply because local variations in legislative conventions, criminal justice policy and so forth, mean that the states and territories are not able to adopt the national regulatory reforms without some changes to accommodate these variations.*

The Commission points out that these national variations have little impact on the cost-benefit assessment. The Commission suggests that the Committee consider extending the exemption to apply to “nationally consistent regulatory schemes”, which may vary in style but which keep the policy positions. The Commission makes clear that any unilateral changes made by a jurisdiction should not be covered by the exemption and would need to be subject to a separate regulatory impact assessment.

The Committee received another submission which suggests that the cost-benefit analyses undertaken at a national level, at least in the areas of Occupational Health & Safety, environmental and food safety standards, are not necessarily valid in Victoria. Mr Clark suggests that as an added precaution ORR could be given responsibility for assessing the validity of the national assessment of costs and benefits.

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294 Mr. P. White, National Road Transport Commission, *Submission No. 22.*
295 ibid.
296 ibid.
297 ibid.
298 ibid.
299 ibid.
300 ibid.
301 Mr. P. Clark, *Submission No. 23.*
302 ibid.
The Committee considers that this exemption should be retained where a rigorous assessment of the costs and benefits has been undertaken at the national level as this prevents duplication of effort and waste of resources. The Committee notes that there should be independent oversight of nationally prepared RISs to ensure that they meet Victorian RIS requirements and adequately take into account the impact on Victoria. The Committee considers that ORR is the most appropriate authority for conducting this oversight.

Recommendation 26

The Committee recommends that –

(a) it be a requirement for the Office of Regulation Reform to independently assess Regulation Impact Statements prepared by jurisdictions other than Victoria for the purposes of national scheme regulations;

(b) when reviewing such Regulation Impact Statements the Office of Regulation Reform should consider how they will operate in Victoria. If the Office of Regulation Reform determines that there are significant differences in the Victorian regulations from the proposed national scheme ‘model’ regulations on which the national Regulation Impact Statement was prepared, then Victorian departments and agencies should prepare separate Regulation Impact Statements addressing those identified differences; and

(c) a copy of the Office of Regulation Reform’s advice to departments and agencies be provided to the Regulation Review Subcommittee.

Section 9(1)(e) – No Advance Notice

Section 9(1)(e) of the Subordinate Legislation Act 1994 allows regulations to be exempted from the regulation impact assessment process on the basis that notification and advertising of the proposed regulations would render the regulations ineffective or would unfairly advantage or disadvantage persons likely to be affected by proposed regulations. Regulations are usually made under this sub-section where there is a need to protect scarce resources and where notice “would allow a scarce resource to be exploited pending operation of the proposed statutory rule.”

There is no requirement for consultation for regulations exempted under this sub-section. One submission points out there will be occasions when regulations may need to be enacted without notice, because to provide notice may defeat the objects of some regulations. The Committee received another submission which strongly opposes the retention of this exemption on the basis that it may be open to misuse.

The Committee notes that only a very small number of regulations are exempted under section 9(1)(e) of the Subordinate Legislation Act 1994 (Vic). During the 54th Parliament, the Regulation Review Subcommittee has only reviewed two sets of regulations falling within this exemption and both of these concerned the fishing industry and the need to enact regulations without notice in order to protect scarce fishing resources. However, the Committee notes the comments by the Environment Liaison Office that the potential for misuse of this exemption

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303 DPC, Premier’s Guidelines, December 1997, paragraph 5.36.
304 Mr. R. Leivers, Phillip Island Nature Park, Submission No. 2.
305 Environment Liaison Office, Submission No. 25.
306 SR No. 138 — Fisheries (Commercial Licences) Regulations 2000 (Vic) and SR No. 43 — Fisheries (Mallacoota Top Lake) Regulations 2001 (Vic).
exists. The Committee considers that one way of providing greater accountability with the use of this exemption is for its use to be subject to approval by the Premier.

**Recommendation 27**

The Committee recommends that regulations exempted from the Regulation Impact Statement process under section 9(1)(e) of the *Subordinate Legislation Act 1994 (Vic)* be subject to approval by the Premier.

**Section 9(3) – Premier’s Certificates**

There is an additional exemption under section 9(3) of the *Subordinate Legislation Act 1994*, that is where the Premier certifies that in the ‘special circumstances’ of the case the public interest requires that proposed regulations be made without a RIS. Regulations made under this exemption may only exist for a period of up to 12 months. The **Premier’s Guidelines** indicate that regulations should only be made under this exemption where it is an emergency or where there is a clear overriding public interest –

> There is a need in each case to balance the public interest in the consultation and cost assessment involved in the RIS process and the need to make regulations without delay in emergency situations.

The **Premier’s Guidelines** indicate that Premier’s certificates should not be issued merely for administrative convenience and that there is a need to carefully balance the public interest involved in the RIS process and the need to make regulations without delay in emergency situations. SIV suggests that the use of Premier’s certificates and the avoidance of the RIS process provides an opportunity for regulations to be made which have little support of industry. It submits that the use of Premier’s certificates limits scrutiny and removes accountability.

There is no requirement for the Premier to provide reasons as to why regulations have been granted an exemption under section 9(3).

The Committee notes the comments made by SIV and considers that in order to improve transparency of the use of this exemption, departments and agencies should be required to provide the Regulation Review Subcommittee with a copy of the reasons given to the Premier when seeking a Premier’s Certificate.

**Recommendation 28**

The Committee recommends that a copy of the reasons given to the Premier by departments and agencies when seeking Premier’s certificates be forwarded by departments and agencies to the Regulation Review Subcommittee together with other relevant regulation materials.

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308 Mr. R. Hodge, SIV, *Submission No. 29*. 
Notification

Notification requirements differ for regulations which come within the definition of ‘statutory rule’ in the Subordinate Legislation Act 1994 (Vic), depending on whether they are made with or without a RIS. Notification requirements for regulations outside the scope of the Subordinate Legislation Act 1994 (Vic) depend on provisions in their authorising legislation but generally there is no notification until after they have been made.

Regulations made with a RIS

Notice including a summary of the results of the RIS, the objectives of the regulatory proposal, specifying where the RIS may be obtained and inviting public comments, must be published in the Victorian Government Gazette, a daily newspaper circulating throughout Victoria and in any special interest group journals.\(^\text{309}\)

Most submissions received by the Committee indicated that the current means of notification of regulatory proposals made with RISs is inadequate –

> When we first started we were not subscribing to the Government Gazette, and searching for information on proposed government regulations was rather a hit-and-miss affair of checking weekend newspapers and trying to inform the right groups in time for them to respond to any RIS for regulations that were being prepared. That meant that together with the lack of direct notification from government departments, the groups missed opportunities to respond to RISs.\(^\text{310}\)

Advertising in newspapers circulating throughout Victoria is generally seen as beneficial. However, newspaper advertisements may be overlooked or missed, for example, if a person does not buy a newspaper on the day a RIS is advertised –

> If you are aware that an RIS has been advertised, it is generally easy to obtain a copy from the officer responsible who is generally identified in the advertisement. However, if an interested party does not read the paper each day then notice of release of an RIS will not come to the attention of that person.\(^\text{311}\)

Advertising under the ‘Public Notices’ section of the newspaper is not necessarily the section that people may consider looking at for notices of regulatory proposals.\(^\text{312}\) Even if people are vigilant, the possibility remains that advertisement of RISs may go unseen, with the consequent loss of opportunity to comment –

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\(^{309}\) Subordinate Legislation Act 1994 (Vic), s. 11.

\(^{310}\) Ms J. Henty, Environment Liaison Office, Minutes of Evidence, 26 April 2001, p. 75. Other submissions which made similar comments include – Ms. S. Sanders, VCCAV, Submission No. 1; Mr. R. Lievers, Phillip Island Nature Park, Submission No. 2; Mr. B. Sturman, Submission No. 4; Mr. S. Goldsworthy, Manningham City Council, Submission No. 6; Mr. J. Bayley, Submission No. 7; Mr. D. Trafford, ICA, Submission No. 8; Mr. Garry Pearson, ADAVB, Submission No. 11; Mr. J. Hawkless & Mr P. Mooney, Hawkless Consulting, Submission No. 13; Mr. I.K. Graham, OCEI, Submission No. 19; Commander P. Hornbuckle, Victoria Police, Submission 21; Mr. P. Clark, Submission No. 23; Environment Liaison Office, Submission No. 25 and Mr. K. Dare, Solicitor, Submission No. 33.

\(^{311}\) Commander P. Hornbuckle, Victoria Police, Submission No. 21 and Mr. J. Frigo, Victoria Police, Minutes of Evidence, 27 April 2001, p. 147.

\(^{312}\) Mr. K. Dare, Solicitor, Submission No. 33.
The present method is a small paid ad somewhere in the middle pages of the daily papers. I have taken a keen interest since retirement in 1989, but guess what I missed the last two, and probably the most important in 2000, the general changes to bring Victoria in line with others and the present 50 km laws. If I with an interest and time miss them, I suggest that wider coverage is non-existent.\(^{313}\)

People living in country areas may not necessarily purchase daily newspapers but may be more inclined to purchase local regional newspapers –

\[\text{It would also be appropriate to consider widening the advertising provision under section 11(1)(c) of the Act to include placement of advertisements in major regional newspapers, as well as a single statewide publication. While this action will create some additional costs, that cost will be marginal, as it would provide an opportunity for more citizens and businesses to be made aware of changes to statutory rules.}\(^{314}\)

The Committee received evidence that the current system of notification of RISs should be retained but enhanced by the use of electronic media.\(^{315}\) The Committee considers that the current system of notification needs to be retained as not all members of the community have access to electronic media and that in those circumstances traditional methods of notification (and publication) will need to be maintained and enhanced to ensure that those people are not unfairly disadvantaged. The Committee considers that broader notification needs to occur in regional areas and one way of doing this is to provide notification in major regional newspapers.

**Recommendation 29**

The Committee recommends that it continue to be compulsory to provide notification of Regulation Impact Statements in a daily newspaper circulating throughout Victoria, the *Victorian Government Gazette* and relevant interest group journals and that in addition it also be compulsory to provide notification in relevant regional newspapers and on an electronic website dedicated to all types of legislation.

Many submissions suggested that departments and agencies should advertise and provide access to RISs on their websites –

\[\text{All agencies undertaking a regulatory impact assessment should be required to place all relevant documents relating to the making of new subordinate legislation ... on their websites. This would enable citizens using the internet to access all immediately relevant information from a single website.}\]\(^{316}\)

\(^{313}\) Mr. J. Bayley, Submission No. 7.

\(^{314}\) Mr. J. Hawkless & Mr. P. Mooney, Hawkless Consulting, Submission No. 13. This suggestion was also made by Mr. T. Brown, City of Yarra, Submission No. 15 and Mr. P. Clark, Submission No. 23.

\(^{315}\) Ms. S. Sanders, VCCAV, Submission No. 1; Mr. R. Lievers, Phillip Island Nature Park, Submission No. 2; Mr. B. Sturman, Submission No. 4; Mr. S. Goldsworthy, Manningham City Council, Submission No. 6; Mr. J. Bayley, Submission No. 7; Mr. D. Trafford, ICA, Submission No. 8; Mr. Garry Pearson, ADAVB, Submission No. 11; Mr. J. Hawkless & Mr. P. Mooney, Hawkless Consulting, Submission No. 13; Mr. T. Brown, City of Yarra, Submission No. 15; Mr. I.K. Graham, OCEI, Submission No. 19; Commander P. Hornbuckle, Victoria Police, Submission 21 and Environment Liaison Office, Submission No. 25.

\(^{316}\) Mr. J. Hawkless & Mr. P. Mooney, Hawkless Consulting, Submission No. 13. Other submissions which support this approach include – Ms. S. Sanders, VCCAV, Submission No. 1; Submission No. 2; Mr. B. Sturman, Submission No. 4; Mr. D. Trafford, ICA, Submission No. 8; Mr. Garry Pearson, ADAVB, Submission No. 11; Mr. I.K. Graham, OCEI, Submission No. 19; Commander P. Hornbuckle, Victoria Police, Submission 21 and Mr. P. Clark, Submission No. 23.
Some departments and agencies do make use of their websites to advertise and provide access to RISs but there is no compulsion for them to do so. In its submission, the Office of the Chief Electrical Inspector indicated that it has made use of its website in this way but is of the view that while the process should be encouraged, it should not be made compulsory –

*During the consultation period for the Electricity Safety (Installation) (Amendment) Regulations 2000, we advertised the RIS on our website as well as providing a link to the RIS and proposed regulations. Unfortunately we don’t have the statistics for how many times these links were accessed. However, I think it is increasingly beneficial to provide such information on the internet.*\(^{317}\)

While there are many benefits in notifying and placing RISs on department and agency websites, some people may still have difficulty finding RISs in this way –

*If they only appear on the relevant Departmental/Statutory Authority website, a member of the public has to have knowledge of the Government’s administrative arrangements to find a RIS.*\(^{318}\)

Even if websites are found, there is evidence that searching various department and agency websites is difficult and time consuming, depending on how the information is organised and indexed on particular websites –

*It seems that information on regulation review is uncoordinated and relies on individual department websites to provide the information to the public. Searching those departmental websites for specific information on regulations can be time consuming and a very frustrating task.*\(^{319}\)

The Committee considers that it should be compulsory for departments and agencies to post RISs on their websites. The Committee notes comments received that some members of the community have experienced problems searching for RISs on department and agency websites either because of the way the information on those websites is organised or because they are unaware of which department or agency has responsibility. The Committee considers that departments and agencies should be encouraged to review their websites to ensure that information is organised so that it is simple for the public to access information quickly.

**Recommendation 30**

The Committee recommends that all departments and agencies be required to post Regulation Impact Statements on their websites and that there be appropriate links to an electronic website dedicated to all types of legislation.

Some submissions support a requirement that departments and agencies maintain a ‘stakeholder’ register and provide written or electronic notification of regulatory proposals to affected stakeholders.\(^{320}\) The Insurance Council of Victoria commented –

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\(^{317}\) Mr. I.K. Graham, OCEI, *Submission No. 19.*

\(^{318}\) Environment Liaison Office, *Submission No. 25.*


\(^{320}\) Mr. B. Sturman, *Submission No. 4,* Mr. S. Goldsworthy, Manningham City Council, *Submission No. 6,* Mr. D. Trafford, ICA, *Submission No. 8,* Mr. Garry Pearson, ADAVB, *Submission No. 11,* Mr. I.K. Graham, OCEI, *Submission No. 19* and Environment Liaison Office, *Submission No. 25.*
Where there are obvious stakeholders in the subject of an RIS, especially representative industry bodies who can promote the unanimous views of large numbers, individual contact about the proposed regulation should be maintained.\textsuperscript{321}

Environmental groups gave evidence at public hearings that it is essential that departments and agencies adopt a more systematic approach to identifying ‘key stakeholders’ and that one way of doing this is through a consultation register “whereby key stakeholders are notified and asked to comment on proposed regulations in a certain field”.\textsuperscript{322} Ms Bowman drew the Committee’s attention to the successful operation of such a register in the Commonwealth under the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBCA). Section 266A EPBCA requires a public consultation register to be established in relation to permit applications which may impact on migratory, marine or threatened species. The Minister is required to invite people to register by placing a notice in the Commonwealth Government Gazette and a daily newspaper which circulates throughout each State and Territory.\textsuperscript{323} Section 266A(2) EPBCA requires the Minister to register any person who applies for registration. The register is renewed every 12 months. Ms Bowman commented that 12 months renewal is “an excellent idea because it ensures that the register is kept up to date, at least on an annual basis”.\textsuperscript{324} Ms Bowman explained how the register works –

\begin{quote}
Once registered, persons and organisations are sent permit applications. It is not merely a note saying, ‘By the way, this thing is happening, would you like to respond?’, but is actually a whole application for them to peruse. They are then invited to respond, if they choose to do so. Another important thing is that the environment Minister must take into account all the submissions from those registered persons when making the decision, so it is actually a genuine process of consultation which occurs and involves an end result.\textsuperscript{325}
\end{quote}

While Victoria Police commented in its submission that all “obvious and identifiable stakeholders should be notified either individually or in a manner that could reasonably be expected to bring the issue to their attention”, it also pointed out that it may be difficult to notify affected stakeholders individually because they may be difficult to identify or the affected stakeholder group may be too large.\textsuperscript{326} The Office of the Chief Electrical Inspector also expressed support for notification of all affected stakeholders but indicated that there can never be certainty that the affected stakeholder list is complete –

\begin{quote}
I do not think it too impractical to suggest that affected stakeholders be notified in writing of a proposed regulation. The accuracy of this could be questioned however, as a list of potentially affected stakeholders can never be entirely complete. As part of the public consultation process conducted by this Office, letters accompanied by the proposed regulation and a copy of the RIS are sent to stakeholders whose details are kept on a database maintained by this Office. This ensures that the industry and other interested parties are kept up to date with proposed regulations, their progress and any potential impact upon them.\textsuperscript{327}
\end{quote}

\textsuperscript{321} Mr. D. Trafford, ICA, Submission No. 8.
\textsuperscript{322} Ms. M. Bowman, Environmental Defenders’ Office, Minutes of Evidence, 26 April 2001, p. 77.
\textsuperscript{323} EPBCA, s. 266A(1).
\textsuperscript{324} Ms. M. Bowman, Environmental Defenders’ Office, Minutes of Evidence, 26 April 2001, p. 78.
\textsuperscript{325} ibid.
\textsuperscript{326} Commander P. Hornbuckle, Victoria Police, Submission No. 21.
\textsuperscript{327} Mr. I.K. Graham, OCEI, Submission No. 19.
Mr. Howard Race, a retired public servant, also indicated that it is not always possible to identify all affected stakeholders and suggests that where individual stakeholders are not known, written notification be sent to representative organisations –

In itself, publication of the notice of an RIS is not necessarily sufficient. Nor is it always practical to notify every affected stakeholder because it may not be possible to identify each and every stakeholder concerned. … However if the members of a profession or industry are not known, what is important, in my view, is that copies of a RIS are sent to peak representative bodies. This in itself tends to have a “ripple” effect and other members of the organization concerned will subsequently ask for their own copies. 328

Some departments and agencies already maintain on an informal basis databases of stakeholders likely to be affected by regulatory proposals. VWA maintains “a mailing list of between 50 and 500 people to whom” they send RISs. 329 The mailing list includes peak organisations and individuals who have expressed interest in particular issues. 330 DNRE indicated support for the proposal and suggested that it would not be too difficult to administer. 331 Dr Carnie, from DHS, suggested that a register would not be useful because it would be difficult to maintain given the large number of organisations and individuals affected by regulations generated by the Department. 332 However, Dr Carnie agreed under questioning from the Committee that the Department already maintains an informal register. 333

While not all affected stakeholders or representative organisations may be able to be easily identified, it is important that agencies and departments make best efforts to provide opportunities for comment to a broad cross-section of the community. The Committee received evidence that sometimes “only peak employer and employee organisations” are notified and considered to be appropriate stakeholders. 334

The Committee considers that departments and agencies should maintain electronic interested party registers and that when RISs are ready for public release those on the register should be notified electronically. The Committee notes the comments made that it is not possible for departments and agencies to identify all affected stakeholders. The Committee considers that rather than attempting to identify all affected stakeholders, departments and agencies should simply allow interested parties to receive notification of regulatory proposals in which they are interested so that they have an opportunity to participate in the regulatory process. The Committee notes that some departments already maintain informal mailing lists and registers so this should not impose any additional burden on departments and agencies.

Recommendation 31

The Committee recommends that all departments and agencies be required to maintain electronic interested party registers and that these be linked to a centralised website dedicated to all types of legislation.

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328 Mr. H. Race, Submission No. 3.
330 ibid.
331 Mr. J. Taylor, DNRE, Minutes of Evidence, 27 April 2001, p. 124.
332 Dr J. Carnie, DHS, Minutes of Evidence, 27 April 2001, p. 103.
333 ibid.
334 Mr. P. Clark, Submission No. 23.
While there was some support for RISs to be tabled in Parliament, most evidence received by the Committee indicated that if the current means of notification was broadened to include electronic media there would be no need to table RISs in Parliament –

\[\text{If departments and agencies are required to advertise the publication of an RIS, advise obviously interested parties and publish details of the RIS on a centralised website, tabling in Parliament should be unnecessary, particularly when the entire RIS/regulation making process may occur during a Parliamentary recess.}\]

One advantage of tabling RISs is that it would bring regulatory proposals to the attention of Members of Parliament and provide them with easy and quick access to the relevant information. A disadvantage of tabling is that it requires more paperwork to be processed and stored by Parliament.

The Committee considers that while the tabling of RISs in Parliament is useful in that it draws the attention of Members of Parliament to new regulatory proposals, it would create additional administrative work for Parliamentary staff and require additional storage space. The Committee considers that the use of a centralised website and interested parties register alleviates the need to table RISs in Parliament.

Most submissions indicated that the best approach for improving access to and knowledge about all types of regulations is by the creation of a central electronic register. The Victorian Bar commented –

\[\text{A central, up-to-date and comprehensive electronic database should be a priority in any reform of the matter in which subordinate legislation is proposed, scrutinised, made and sunsettled in Victoria.}\]

The Insurance Council of Australia indicated an electronic register would “speed communications between the private and government sectors”.

For example, the current website which contains Acts and Regulations and which can be accessed from the Victorian Parliament website is suggested as an ideal location –

\[\text{In effect the repository of Acts and Regulations on the Parliament’s homepage should be augmented to include lists of all legislative instruments proposed or created under Parliamentary delegation, and providing full public access.}\]

The Committee considers that the best way of improving the notification and regulation-making process generally is through the use of electronic media and the creation of a central website.

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335 Mr. B. Sturman, Submission No. 4; Mr. Garry Pearson, ADAVB, Submission No. 11; Mr. J. Hawkless & Mr. P. Mooney, Hawkless Consulting, Submission No. 13 and Mr. D. Fitzpatrick, VADA, Submission No. 24.
336 Commander P. Hornbuckle, Victoria Police, Submission No. 21.
337 Ms. S. Sanders, VCCAV, Submission No. 1; Mr. R. Lievers, Phillip Island Nature Park, Submission No. 2; Mr. H. Race, Submission No. 3; Mr. B. Sturman, Submission No. 4; Mr. S. Goldsworthy, Manningham City Council, Submission No. 6; Mr. D. Trafford, ICA, Submission No. 8; Mr. L. Foster, Country Fire Authority, Submission No. 10; Mr. Garry Pearson, ADAVB, Submission No. 11; Mr. J. Hawkless & Mr. P. Mooney, Hawkless Consulting, Submission No. 13; Mr. R. Wilkinson, City of Whittlesea, Submission No. 16; Mr. M. Derham, The Victorian Bar, Submission No. 20; Commander P. Hornbuckle, Victoria Police, Submission No. 21; Mr. P. Clark, Submission No. 23 and Environment Liaison Office, Submission No. 25.
338 Mr. M. Derham, The Victorian Bar, Submission No. 20.
339 Mr. D. Trafford, ICA, Submission No. 8.
340 Mr. Garry Pearson, ADAVB, Submission No. 11.
containing information on all types of legislation. The Committee considers that it is probably preferable for this site to be linked to the Victorian Parliament.

The Committee was impressed by the use of electronic media in the United States. Particularly impressive is the Regulatory Town Hall System developed by the Department of Planning and Budget in the State of Virginia. This is discussed in detail at pp. 283-285 and 302-304 in this Report. The Regulatory Town Hall has made it easier for the public to find out about regulatory proposals and final regulations and improved the efficiency and cost effectiveness of the regulation-making system. The Committee is impressed by the ability of agency staff to securely access the system and make ongoing changes to regulatory proposals and by the ability of the community to be informed about regulatory proposals throughout the entire regulation-making process. The Committee considers that the Regulatory Town Hall is by far the most impressive use of electronic media it has examined and considers that serious consideration should be given to adopting a similar system in Victoria.

Recommendation 32

The Committee recommends that a centralised website similar to the Regulatory Town Hall website in the State of Virginia in the United States be established with a view to improving access and the efficiency and cost-effectiveness of the regulation-making process in Victoria. The Committee notes that it may be appropriate to build on the Victorian Legislation and Parliamentary Documents section of the Victorian Parliament website.

Other Regulations

There are no legislative requirements for notice to be given prior to the enactment of regulations excepted or exempted from the RIS process. For regulations outside the scope of the Subordinate Legislation Act 1994 (Vic), notification varies depending on the requirements of their authorising legislation.

There is therefore no uniform or coherent system of notification in Victoria. The Victorian Bar noted that while some commonality of approach is achieved for regulations subject to the RIS process, with other regulations the process is fragmented.\textsuperscript{341}

Many of the submissions received by the Committee support the implementation of a standard system of notification for all regulatory proposals prior to enactment.\textsuperscript{342} For example, the Insurance Council of Australia commented –

\textit{Unquestionably, a major concern of the private sector is to receive timely advice of pending legislation which may affect it. A standard approach to announcements would assist the public in identifying legislative activity.}\textsuperscript{343}

\textsuperscript{341} Mr. M. Derham, The Victorian Bar, Submission No. 20.
\textsuperscript{342} Mr. B. Sturman, Submission No. 4; Mr. S. Goldsworthy, Manningham City Council, Submission No. 6; Mr D. Trafford, ICA, Submission No. 8; Mr. Garry Pearson, ADAVB, Submission No. 11; Mr. J. Hawkless and Mr P. Mooney, Hawkless Consulting, Submission No. 13; Mr. R. Wilkinson, City of Whittlesea, Submission No. 16; Mr. M. Derham, The Victorian Bar, Submission No. 20; Commander P. Hornbuckle, Victoria Police, Submission No. 21; Mr. P. Clark, Submission No. 23 and Environment Liaison Office, Submission No. 25.
\textsuperscript{343} Mr. D. Trafford, ICA, Submission No. 8.
These comments are typical of the comments received by the Committee during this Inquiry. Comments made concerning the best means of providing notice of and access to RISs apply equally to regulations not made with RISs or outside the scope of the Subordinate Legislation Act 1994 (Vic). Evidence received by the Committee indicates that there is a need to use various communication methods in order to ensure that there is greater opportunity for people to find out about regulatory proposals.

The Committee is concerned that there is no consistent or coherent system of notification for legislative instruments made without RIS. The Committee considers that to improve access to legislative instruments it is essential to adopt a consistent system of notification.

**Recommendation 33**

The Committee recommends that notification for all legislative instruments be consistent and that they be notified in the *Victorian Government Gazette* and on a centralised website dedicated to all types of legislation.

**Consultation and Participation**

The OECD has indicated that public consultation is an essential part of the RIS process because it highlights unanticipated impacts and faulty reasoning in RISs, providing an opportunity for changes to be made prior to enactment.

Opportunities for comment in relation to regulatory proposals outside the scope of the Subordinate Legislation Act 1994 (Vic) depend upon the requirements set out in authorising legislation. For regulations subject to the Subordinate Legislation Act 1994 (Vic) the requirements concerning consultation are as follows –

1. For all regulations a requirement under section 6 for consultation with any sector of the community upon whom an appreciable economic or social burden is imposed; and
2. Where RISs have been prepared a requirement under section 11 that the public be given the opportunity to make submissions.

**Consultation under Section 6**

Section 6 of the Subordinate Legislation Act 1994 (Vic) sets out general requirements for consultation. These requirements apply to regulations made with or without RISs. Responsible Ministers must ensure that there is consultation “where the guidelines require consultation” with any sector of the community on which an appreciable economic or social burden may be imposed and other Ministers whose area of responsibility may be affected. Paragraph 5.20 of the Premier’s Guidelines provides –

> 5.20 If the proposed statutory rule is likely to impose any appreciable burden, cost or disadvantage on any sector of the public, consultation should take place with that sector,
eg business groups, community groups, special interest groups. The consultation should include discussion of the need for and method of the proposed regulation.

While the Subordinate Legislation Act 1994 (Vic) itself provides that consultation “must occur in accordance with the Guidelines”, the Premier’s Guidelines themselves provide that consultation “should take place”. The provisions in the Premier’s Guidelines concerning consultation create uncertainty by being inconsistent with the requirements of the Subordinate Legislation Act 1994 (Vic) and by not being sufficiently prescriptive. This means that in relation to consultation, the Premier’s Guidelines “lack any mandate needed to ensure that thorough consultation occurs” and they are at odds with the spirit and intention of the Subordinate Legislation Act 1994 (Vic). OCPC suggests that the current provisions be reworded to indicate that consultation is required in all cases unless the Minister certifies that no consultation is necessary.

The Committee notes the inconsistency between the requirements of the Subordinate Legislation Act 1994 (Vic) and the Premier’s Guidelines concerning whether or not consultation should take place. The Committee considers that the Premier’s Guidelines are ambiguous and require clarification.

Recommendation 34

The Committee recommends that it continue to be a requirement under the Subordinate Legislation Act 1994 (Vic) for consultation to be undertaken in all circumstances.

Recommendations concerning the Premier’s Guidelines are made later in this Report – see Recommendation 45.

Public Participation under Section 11

The general public also have an opportunity to comment where RISs have been prepared. At least 28 days must be provided for the public to make written submissions. There is no requirement for agencies or departments to hold public hearings nor to allow the public to present their views orally. After consideration of all the submissions, the Minister must make a decision whether or not to proceed with a regulatory proposal. The Minister’s decision must be published in the Victorian Government Gazette and a daily newspaper circulating throughout Victoria. If the Minister fails to comply with these requirements (ie publish his or her decision) it is unclear whether the validity of a regulation is affected. OCPC suggests that this needs to be clarified.

The Committee notes OCPC’s comments that the Subordinate Legislation Act 1994 (Vic) does not make clear whether the validity of a regulation is affected where a Minister fails to publish his or her decision whether or not to proceed with a regulatory proposal. The Committee considers that it is important for the community to know whether or not a regulation is going to proceed. The Committee draws attention to section 21(1)(j) of the Subordinate Legislation Act

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348 Mr. E. Moran, OCPC, Submission No. 9.
349 ibid.
350 Subordinate Legislation Act 1994 (Vic), s. 11(2).
351 ibid, s. 12.
352 Mr. E. Moran, OCPC, Submission No. 9.
1994 (Vic) which allows the Committee to recommend disallowance on the basis that a regulation “has been prepared in contravention of any of the provisions of this Act or of the guidelines with respect to the statutory rule and the contravention is of a substantial or material nature”. The Committee considers that failure by the Minister to publish his or her decision whether or not to proceed with a regulatory proposal constitutes a material contravention of the Subordinate Legislation Act 1994 (Vic).

**Recommendation 35**

The Committee recommends that –

(a) it remain a mandatory requirement of the Subordinate Legislation Act 1994 (Vic) for a Minister to publish his or her decision whether or not to proceed with a regulatory proposal in the Victorian Government Gazette and in a daily newspaper circulating throughout Victoria and in addition that such decisions also be published on a centralised website dedicated to all types of legislation;

(b) all departments and agencies be required to send a copy of the notice published in the Victorian Government Gazette and the advertisement published in a daily newspaper to the Regulation Review Subcommittee along with other relevant regulation materials.

**Time for Submissions**

Some submissions indicated that 28 days is sufficient time in which to provide departments and agencies with formal written comments –

*The minimum 28 day period within which to make comments does allow sufficient time for making submissions. As a general rule, we note if a submission was late but still take it into consideration.*

DNRE suggested that if more than 28 days is provided for making submissions, this would cause problems for departments and agencies where they are under tight deadlines to complete regulations and might lead to a trend to seek more exemptions from the RIS process.

Other evidence received by the Committee indicated that 28 days is not always sufficient time within which to make written comments. Interested parties may only find out about RISs part way through the 28 day comment period and there may be delays in departments and agencies sending out copies of RISs to interested parties. Hawkless Consulting suggested that departments and agencies be required to forward RISs within a specified period of time and that they be required to provide reasons if they cannot send them out within that time.

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353 Mr. I.K. Graham, OCEI, Submission No. 19. Other submissions which support a minimum of 28 days include – Mr. B. Sturman, Submission No. 4; Mr. S. Goldsworthy, Manningham City Council, Submission No. 6; Mr. J. Hawkless and Mr. P. Mooney, Hawkless Consulting, Submission No. 13 and Mr. D. Fitzpatrick, VADA, Submission No. 24.


355 Mr. H. Race, Submission No. 3; Mr. Garry Pearson, ADAVB, Submission No. 11; Commander P. Hornbuckle, Victoria Police, Submission No. 21; Mr. P. Clark, Submission No. 23; Environment Liaison Office, Submission No. 25; Mr. R. Hodge, SIV, Submission No. 29 and K. Bartaska, Fisheries Co-Management Council, Submission No. 31.

356 Commander P. Hornbuckle, Victoria Police, Submission No. 21.

357 Mr. J. Hawkless & Mr. P. Mooney, Hawkless Consulting, Submission No. 13.
While 28 days provides sufficient time to comment on RISs which are simple and uncontroversial, it is “totally inadequate in the case of more complex or far reaching statutory rules”. To make appropriate and well thought through comments on complex RISs requires a significantly longer period of time. Where representative organisations are involved, they need to canvass their members and to obtain feedback and 28 days does not provide sufficient time within which to do this –

\begin{quote}
In cases such as ours it is necessary to canvass the issues raised as widely as possible throughout our membership to ensure that any submission we make is fully developed and will contribute value to the particular proposals. ICA believes that other representative bodies with a wide range of members will also experience difficulty in meeting the present requirement.
\end{quote}

Representative organisations often represent members located throughout Victoria and it is essential that adequate time be allowed for these organisations to obtain input and response. SIV pointed out that it is not only geographical location which slows down response but also the nature of the industry and language skills –

\begin{quote}
Depending upon the season, some boats are operating around the clock. Others may be away from the home port for days at a time. There are issues of English as a second language.
\end{quote}

Some submissions suggested 45 days while others suggested 60 days as a more appropriate period of time for making submissions.

The Committee notes that sometimes 28 days provides the community with sufficient time to comment on regulatory proposals, particularly where people obtain copies of these proposals early in the process. The Committee notes that sometimes interested parties find out about RISs part way through the 28 day comment period and that sometimes agencies and departments are slow in forwarding out RISs. The Committee considers that where RISs involve complex and more substantive issues, additional time is needed for parties to make balanced and well thought through comments. The Committee notes comments by representative organisations that they sometimes experience difficulty in distributing regulatory proposals and obtaining feedback within the current time constraints and that consequently they are not able to adequately canvass the views of their members. While the Committee’s recommendations on notification will, if adopted, enable people to find out about RISs more quickly, the Committee considers that 28 days is still insufficient time to comment, particularly where proposals involve significant issues or where representative organisations need to canvass the views of their members.

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358 Mr. H. Race, Submission No. 3. This comment was also made by Mr. D. Trafford, ICA, Submission No. 8; Mr. Garry Pearson, ADAVB, Submission No. 11; Mr. J. Hawkles & Mr. P. Mooney, Hawkless Consulting, Submission No. 13; Mr. P. Clark, Submission No. 23 and Environment Liaison Office, Submission No. 25.
359 Mr. D. Trafford, ICA, Submission No. 8. This comment was also made by Mr. Garry Pearson, ADAVB, Submission No. 11; Environment Liaison Office, Submission No. 25 and K. Bartaska, Chairperson, Fisheries Co-Management Council, Submission No. 31.
360 Mr. R. Hodge, SIV, Submission No. 29.
361 Mr. D. Trafford, ICA, Submission No. 8.
362 Mr. Garry Pearson, ADAVB, Submission No. 11 and Environment Liaison Office, Submission No. 25.
Recommendation 36

The Committee recommends the Subordinate Legislation Act 1994 (Vic) be amended to provide the public with a minimum of 42 days to comment on Regulation Impact Statements.

Summary of Key Issues

Currently there is no requirement for RISs to be accompanied by a summary of key issues and a list of key questions. Most submissions indicated that a summary of key issues would be extremely useful as it would assist people to identify important issues upon which to focus their comments –

This would help interested members of the public to identify issues and would help the responsible department to alert interested parties to the breadth of discussion on which specific comment is invited or encouraged.\(^{363}\)

However it would need to remain flexible so that people are not prevented from commenting on other important issues not raised in the summary –

There must be flexibility however to allow those making submissions to argue that certain key issues have been overlooked by the department or agency concerned. Without this, the process would be manipulated to avoid inconvenience to agencies.\(^{364}\)

The Committee considers that it would be useful for RISs to be accompanied by a summary of key issues so that those making comments can focus those comments on issues which are significant. The Committee notes that it would be important for that summary to simply be available to help people and that it should not be used to restrict public comment to issues raised only in that summary.

Recommendation 37

The Committee recommends that all Regulation Impact Statements feature a summary of key issues.

Preliminary Consultation

Initial consultation is crucial in determining the most appropriate regulatory or non-regulatory solution for the problem or problems to be addressed. Where initial consultation is limited to certain stakeholders, departments and agencies will get a one-sided view of the problems and the solutions. The Premier’s Guidelines indicate that initial consultation with those potentially affected by a regulatory proposal is designed to identify and develop the range of policy options

\(^{363}\) Commander P. Hornbuckle, Victoria Police, Submission No. 21. Other submissions which support this idea include – Ms. S. Sanders, VCCAV, Submission No. 1; Mr. B. Sturman, Submission No. 4; Mr. D. Trafford, ICA, Submission No. 8; Mr. Garry Pearson, ADAVB, Submission No. 11; Mr. J. Hawkless & Mr. P. Mooney, Hawkless Consulting, Submission No. 13; Mr. I. Graham, OCEI, Submission No. 19; Mr. P. Clark, Submission No. 23; Environment Liaison Office, Submission No. 25 and Mr. R. Hodge, SIV, Submission No. 29.

\(^{364}\) Mr. Garry Pearson, ADAVB, Submission No. 11.
available and to determine the need for and scope of the regulatory proposal.\textsuperscript{365} The \textit{Premier’s Guidelines} also reinforce the need for broad consultation in order to achieve the most effective solution –

\textit{If the RIS and the consultation process is properly undertaken any resulting statutory rule should represent the most balanced, cost effective and least intrusive solution to an actual problem.}\textsuperscript{366}

Whether consultation is ultimately effective in achieving the most satisfactory resolution –

\ldots depends on a number of factors – who will or will not be involved, in what environments, the timing and duration of consultation, the revealed and concealed agendas of all the parties involved, what information will be available or made available to them, what matters will be included or excluded from the consultation, external agendas and influences.\textsuperscript{367}

Where consultation takes place early and with a broad group of stakeholders, the final outcome is much better for those affected by the regulatory proposal. SIV noted that it had recently been consulted early in the regulatory process, with the result that a number of its concerns were addressed –

\textit{Industry recently had the opportunity of discussing proposed regulatory change in advance of the document being introduced and, whilst the document was still not exactly as industry would have preferred, it nonetheless did address a major number of industry concerns.}\textsuperscript{368}

Early consultation with those affected enables objectives to be discussed and allows input to the problem to be resolved and also allows a wider range of options to be considered and discussed.

In reviewing the sample of RISs for this Report, Mr. Deighton-Smith found that the majority of them complied with the consultation requirements and that many “document quite extensive stakeholder consultation, ranging across many interested parties”.\textsuperscript{369} Mr. Deighton-Smith noted that there was some uncertainty as to the impact of that consultation and at least anecdotally “it appears possible that there has been some decline in the incidence of proposed regulations being amended following RIS based consultation”.\textsuperscript{370}

However, in practice this does not always happen. Where preliminary consultation does not involve a breadth of stakeholders, those affected are less likely to be satisfied with the final outcomes. Mr P Clark commented –

\ldots the present initial consultation practices involving a limited number of vested interest ‘stakeholder’ parties, including regulators, potential regulatees and the ‘independent’ advisers to both parties each with their own agendas, does not automatically ensure that the public interest or externalities are adequately considered.\textsuperscript{371}

\textsuperscript{365} DPC, \textit{Premier’s Guidelines}, December 1997, paragraphs 5.18 and 5.19.

\textsuperscript{366} ibid, paragraph 5.41.

\textsuperscript{367} Mr. P. Clark, \textit{Submission No. 23}.

\textsuperscript{368} Mr. R. Hodge, SIV, \textit{Submission No. 29}.

\textsuperscript{369} Mr. R. Deighton-Smith, op.cit., p. 34.

\textsuperscript{370} ibid.

\textsuperscript{371} Mr. P. Clark, \textit{Submission No. 23} and \textit{Minutes of Evidence}, 26 April 2001, pp. 46-47.
The Committee received some evidence of dissatisfaction with how departments and agencies determine “sectors of the public” who may be subject to “an appreciable economic or social burden”. The Environment Liaison Office indicated that the current process for determining who falls into “sectors of the public” is haphazard and lacks uniformity and depends on the department or agency involved. Victoria Police commented that there have been occasions when they have not been consulted on regulations which indirectly impact on their operations. VADA noted that in their experience there is insufficient preliminary consultation and where consultation does occur it is not always genuine. The City of Yarra suggested that while there have been repeated commitments to consult with local government where they are affected by regulatory proposals, often the consultation with local government is fairly minimal.

Mr Clark highlighted that often potential beneficiaries of regulatory proposals are excluded from consultation even though those potential beneficiaries may have a worthwhile contribution to make in that they may comment upon “the benefits to be achieved, how they might be achieved and delivered and the timing of their achievement”. If, as suggested, potential beneficiaries are excluded from consultation, this is at odds with provisions in the Premier’s Guidelines which state that consultation should also occur with “the wider community potentially affected by the rule or in whose interests the proposed rule is directed”. While unable to comment specifically on the Victorian situation, Hawkless Consulting noted that it has been their experience that sometimes consultation is adequate, while in other cases it has been rushed “either as a result of a need to address an issue quickly, or because of delays in completing preliminary work”.

Some departments and agencies are very organised with the way in which they conduct preliminary consultation. In DHS, careful consideration is given to the particular groups affected by regulatory proposals so that the competing interests involved can be carefully balanced and the most appropriate outcome can be achieved –

To give you an example, the infectious diseases regulations covers groups including tattooists, acupuncturists, body piercers, doctors, environmental health officers, nurses and beauticians. It covers a huge range of interests, and part of the RIS process is us trying to balance these competing interests, some of which want more stringent regulations and some of which want much less stringent regulations.

DHS maintains a database of groups they need to consult –

Because we are working with these subject areas all the time we have a good idea of whom these things will impact upon, so there are industry bodies and so on that we would go to on a routine basis to talk about these things, as well as the learned colleges of physicians, pathologists and so on.

In addition, DHS continually monitors the operation and effectiveness of various regulations and discusses issues with various interest groups as problems arise. It is recognised by DHS

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373 Commander P. Hornbuckle, Victoria Police, Submission No. 21.
374 Mr. D. Fitzpatrick, VADA, Submission No. 24.
375 Mr. T. Brown, City of Yarra, Submission No. 15.
376 Mr. P. Clark, Submission No. 23.
377 DPC, Premier’s Guidelines, December 1997, paragraph 5.17.
378 Mr. J. Hawkless & Mr. P. Mooney, Hawkless Consulting, Submission No. 13.
380 ibid, p. 102.
381 Dr J. Carnie and Mr. G. Morris, DHS, Minutes of Evidence, 27 April 2001, p. 102.
officers that early and ongoing consultation with affected groups results in better quality regulations and increased satisfaction from those affected.\footnote{382} VWA often conducts preliminary consultation through the release of Discussion and Issues Papers –

\begin{quote}
A particular example is an issues paper that we produced in the preparation for the introduction of regulations on falls which unveiled considerable debate on the issue of ladders. Because of that we produced a subsidiary paper specifically dealing with ladders and invited comment. Sometimes we give an indication of our view. However, it is just as common for us not to given any indication but simply to call for comment on particular issues that we think may be of interest to the community.\footnote{383}
\end{quote}

VWA staff indicated that they also run various discussion groups with key stakeholders and that all comments made are seriously taken into account.\footnote{384}

The Committee is concerned about the general lack of a systematic approach to identifying key stakeholders, the lack of guidance available to departments and agencies to assist them in determining whether ‘an appreciable economic or social burden’ is imposed and the potential for interested parties to be denied the benefits of consultation.

Evidence highlighting these issues was given to the Committee concerning the \textit{Forests (Miscellaneous) Regulations 2000}. These Regulations set out various offences and penalties for offences with the aim of discouraging behaviour which may harm forests or endanger persons visiting forests and they also imposed restrictions on camping in specified areas.

Prior to making these Regulations, consultation took place with Forestry Officers from Forestry Victoria, Forest Planning Staff from the Forests Service of DNRE and a copy of the draft Regulations was sent to the Victorian Association of Forest Industries, the Mountain Cattlemen’s Association of Victoria, the Barmah Forest Cattlemen Association, the Victorian Farmers’ Federation, the Federation of Victorian Walking Clubs, the Victorian Association of Four Wheel Drive Clubs and the Outdoor Recreation Centre. Notably there was no consultation with any environmental groups –

\begin{quote}
We are extremely alarmed to see these regulations get to this stage without our seeing them. Not only that, we were also concerned to see that some of those consulted really are groups that were born to oppose the role that we play as an advocate for the protection of wilderness and forest areas. The Victorian Association of Forest Industries, for example, is a group that was established to promote native forest logging ... We believe that ... to consult the pro-logging and native forest logging lobby without consulting the pro-protection and biodiversity conservation side of that debate was really quite a serious omission.\footnote{385}
\end{quote}

Mr Clark pointed out that in contrast to the Victorian practice of consultation with key stakeholders, Canadian Federal Regulatory Policy requires agencies and departments to “carry out timely and thorough consultations with interested parties” and also provides that the level of consultation undertaken should coincide with the magnitude of the impact of the regulatory proposal.\footnote{386} Mr Clark suggests that the consultation system in Victoria could be improved by redefining the “sector of the public” to include “sectors of the business and wider community

\footnotesize{\begin{itemize}
\item \footnote{382} Mr. G. Morris, DHS, \textit{Minutes of Evidence}, 27 April 2001, p. 103.
\item \footnote{383} Mr. M. Little, VWA, \textit{Minutes of Evidence}, 27 April 2001, p. 157.
\item \footnote{384} ibid.
\item \footnote{385} Mr. G. McFadzean, Wilderness Society, \textit{Minutes of Evidence}, 26 April 2001, p. 79.
\item \footnote{386} Mr. P. Clark, \textit{Submission No. 23}.  
\end{itemize}}
potentially affected by the rule or in whose interests the proposed rule is directed”. 387 Environmental groups also support widening the test so that consultation takes place with a much broader range of ‘interest’ groups. Ms. Bowman suggested the current test could be broadened by changing it from an ‘economic or social burden’ to an ‘economic, social or environmental burden’. 388

The final outcome of consultation may also be restricted by limiting the number of options discussed in the RIS or by excluding certain information from the RIS. Mr Clark noted –

The recent VicRoads 50 km/h regulation RIS did not include relevant injury location information which may have enabled identification of more effective and cost-beneficial alternatives than the selected regulatory objective. 389

It is important for a wide range of options to be canvassed and discussed so that the best course of action can be adopted. Canadian regulatory policy, for example, requires departments and agencies to give positive consideration to alternative options suggested by interested parties and to provide an explanation as to why those proposals have been rejected. 390 Mr Clark suggests that Victoria could adopt a similar approach, thereby improving the final outcomes of consultation. 391

The depth of consultation undertaken varies with the subject matter of the regulatory proposal and the extent to which the area was previously regulated. The Premier’s Guidelines recognise this –

5.44 The procedures to be adopted will vary with the nature of the proposed rule. Where the area was previously unregulated, consultation may take the form of the issue of a discussion paper calling for a response from interested groups, or where the proposed rule is only fine tuning, minimal consultation may be required. 392

No guidance is provided as to what ‘minimal consultation’ involves. The Committee notes the comments made by the Environment Liaison Office that ‘minimal consultation’ requires comments to be obtained from all relevant stakeholders. 393 Even though an area may previously have been regulated, over 10 years there may have been significant changes and/or the ‘sectors of the public’ affected may be different. Ms. Bowman highlighted an example of this –

A perfect example are the Forests (Miscellaneous) Regulations 2000. Those regulations themselves have effectively been [around] … for about 10 or 12 years. However the sectors to which they apply and the sectors they affect have changed over that time. So it used to be just issues of farmers’ rights, forest protection, safety and so forth, but now it has grown into forest visitors and campers and environment groups. 394

In 1997, the VLRC recommended that the consultation provisions in the Subordinate Legislation Act 1994 (Vic) be strengthened by introducing a requirement that Ministers take ‘reasonable

387 ibid. Similar comments were also made by Ms. M. Bowman, Environment Defenders’ Office, Minutes of Evidence, 26 April 2001, p. 77.
388 ibid, p. 83.
389 ibid.
390 Mr. P. Clark, Submission No. 23.
391 ibid.
392 DPC, Premier’s Guidelines, December 1997, paragraph 5.44
efforts’ to ensure appropriate consultation, meaning that Ministers must ensure that there is consultation. Many submissions expressed strong support for the introduction of this requirement. VADA suggested that rather than Ministers being required to take ‘reasonable’ efforts there needs to be some sort of independent oversight of the consultation process.

The Committee notes that there is dissatisfaction amongst some groups with preliminary consultation processes as currently undertaken by departments and agencies. The Committee also finds that the Premier’s Guidelines provide inadequate guidance as to the depth of consultation required. The Committee considers that there is no systematic approach to identifying key stakeholders and a lack of guidance available to departments and agencies to assist them to determine whether an appreciable economic or social burden is imposed. The Committee notes that under the current system those affected are sometimes denied the opportunity of consultation. The Committee considers that consultation is very important and that it should take place with a broad cross-section of the community. The Committee considers that the current test for consultation should be broadened from an ‘economic or social burden’ to an ‘economic, social or environmental burden’. The Committee again draws attention to the Protocol for the Development of Regulations and Regulatory Impact Statements produced by the EPA. The Committee considers that this Protocol is extremely useful on many aspects of the RIS process and in particularly in relation to the approach taken to consultation. Earlier in this Report the Committee recommended that ORR be given formal responsibility for conducting training programs on the RIS process. The Committee considers it important for ORR to provide guidance and training on consultation as part of these training programs.

The Committee notes that under section 6 of the Subordinate Legislation Act 1994 (Vic), the Committee is entitled to receive a certificate of consultation. However, certificates of consultation do not provide details of those who have been consulted. Sometimes departments and agencies automatically provide this information to the Regulation Review Subcommittee. However, on many occasions the Regulation Review Subcommittee has to request further information from departments and agencies concerning the nature of consultation undertaken. The Committee considers it is important for the Regulation Review Subcommittee to be provided with details of those who have been consulted so that it can ensure that the requirements of the Subordinate Legislation Act 1994 (Vic) have been met.

Recommendation 38 (continued on next page)

The Committee recommends that –

(a) the current test for consultation be broadened from an ‘economic or social burden’ to an ‘economic, social or environmental burden’;

(b) the certificate of consultation provided to the Regulation Review Subcommittee (see recommendation 25(b)) list those organisations and individuals who have been consulted;

(c) as part of Recommendation 10, the Office of Regulation Reform be required to make training available on consultation to department and agency staff.

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396 Ms. S. Sanders, VCCAV, *Submission No. 1*; Mr. B. Sturman, *Submission No. 4*; Mr. S. Goldsworthy, Manningham City Council, *Submission No. 6*; Mr. Garry Pearson, ADAVB, *Submission No. 11*; Mr. J. Hawkless & Mr. P. Mooney, Hawkless Consulting, *Submission No. 13*; Commander P. Hornbuckle, Victoria Police, *Submission No. 21*; Mr. P. Clark, *Submission No. 23* and Mr. R. Hodge, SIV, *Submission No. 29*.
397 Mr. D. Fitzpatrick, VADA, *Submission No. 24*. 
Public Submissions

The Premier’s Guidelines provide that Ministers have a duty under section 11(3) of the Subordinate Legislation Act 1994 (Vic) “to consider all submissions and comments received on a draft statutory rule where a RIS has been prepared”. The Premier’s Guidelines also indicate that the RIS process is designed to give –

Business and wider community an opportunity to communicate to government any concerns it may have about regulations affecting its activities. One of the aims of the RIS and the consultation process is to provide a mechanism whereby it is possible to draw on information and comment from the widest possible sources thereby exposing any subjectivity or faulty reasoning in the regulatory proposal and ensuring that competing interests are recognised and considered.

The importance of community wide consultation is crucial to the effectiveness of the regulatory system.

The Committee notes that some submissions expressed discontent with the current process of community consultation, indicating that in their view comments are not adequately taken into account by departments and agencies –

There is a need for writers of Subordinate Legislation to be more open and transparent in the preparation of Regulations by adequately informing appropriate stakeholders and the public of the preparation of new or amending Regulations.

The extent to which public comments are taken into account varies between agencies and departments and on whether they are well informed and motivated –

That is, does a department know of all key stakeholders for a proposed regulation; is the regulation-making process perceived as an opportunity to have dialogue with key stakeholders and therefore create a balanced and thorough regulation or is it perceived as merely an administrative process to be done as quickly as possible with minimum fuss?

Mr. J. Bayley commented –

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398 DPC, Premier’s Guidelines, December 1997, paragraph 5.42.
399 ibid, paragraph 5.40.
400 Mr. S. Goldsworthy, Manningham City Council, Submission No. 6. Similar comments were made by Mr. B. Sturman, Submission No. 4; Mr. J. Bayley, Submission No. 7; Mr. D. Trafford, ICA, Submission No. 8; Mr. Garry Pearson, ADAVB, Submission No. 11; A. Allen, EGEFA, Submission No. 12; Mr. T. Brown, City of Yarra, Submission No. 15; Mr. P. Clark, Submission No. 23; Environment Liaison Office, Submission 25; Mr. R. Hodge, SIV, Submission No. 29 and Mr. J. Manias, Submission No. 30.
401 Environment Liaison Office, Submission 25. Similar comments were also made by – Mr. D. Trafford, ICA, Submission No. 8, Mr. Garry Pearson, ADAVB, Submission No. 11 and Mr. J. Hawkles & Mr. P. Mooney, Hawkless Consulting, Submission No. 13.
Over the past years I have made a number of submissions on Rules, no acknowledgment, no replies, nothing. I do not know if they even read them...

One way of dealing with this may be to require departments and agencies to provide explanations of why comments made in submissions have been rejected and for these to be publicly available. The Insurance Council of Australia supported this approach –

If our recommendations are not accepted as being valid and relevant for incorporation in the end product, we would like to know the reasons why. If that practice was adopted by departments and agencies, ICA would accept that the consultation process was entered into in good faith. This has particular relevance when insurance requirements are being mandated in regulations, for example, building practitioners insurance and insurance for bodies corporate.

The Committee notes that departments and agencies may undertake consultation meeting all the requirements of the Subordinate Legislation Act 1994 (Vic) and still leave stakeholders and other community groups feeling dissatisfied with the final outcome. It is inevitable that submissions made to departments and agencies may be contradictory in nature and that as a result not all interested parties may be satisfied with the final outcome. Nevertheless the Committee takes the view that where departments and agencies make a greater effort to explain the reasons for rejecting particular suggestions there is usually greater acceptance of final regulations. The Committee considers that it is important for departments and agencies to make a greater effort to provide more detailed explanations for proceeding in a particular direction but does not consider it necessary for explanations to be provided to every individual who has made a submission, for instance where the comments made are outside the scope of the regulatory proposal.

Recommendation 39

The Committee recommends that –

(a) departments and agencies consider the provision of detailed reasoning in support of final regulations; and

(b) to promote a better understanding, that these details be publicly available on a centralised website dedicated to all types of legislation.

Regulatory Plans

In the Commonwealth, departments and agencies which produce regulations that impact on business must publish annual regulatory plans which provide details of regulatory activities undertaken over the previous 12 months and anticipated regulatory activity over the next 12 months. These plans must be posted on department and agency websites and the Office of Small Business provides access through its website.

402 Mr. J. Bayley, Submission No. 7.
403 Mr. D. Trafford, ICA, Submission No. 8. Similar comments were made by Commander P. Hornbuckle, Victoria Police, Submission No. 21.
In Victoria, ORR publishes the *Victorian Regulation Alert*. This publication contains details of all regulations which are due to sunset and also proposals for new regulations, but only where the relevant department or agency chooses to notify ORR.

The *Victorian Regulation Alert* does not provide a comprehensive guide to all new regulatory proposals because it is not compulsory for government departments or agencies to notify ORR of proposed regulations. Even though it is not comprehensive the *Victorian Regulation Alert* is regarded as useful and informative –

*The practice by which the Office of Regulation Reform publishes the Victorian Regulation Alert each year on the Department of State Development website provides a valuable resource for the public to access contemplated change.*

Most submissions received by the Committee expressed strong support for the introduction of a compulsory requirement that departments and agencies produce annual plans. Annual plans keep the public informed about proposed regulatory changes and enable those who may wish to make submissions to do so more efficiently and effectively –

*It would assist organisations such as ours if we were able to access a calendar of upcoming regulatory proposals which would allow ICA to conduct preliminary enquiries and background research which is a prerequisite to any response to government. If this information could be funnelled into a central repository by relevant departments and agencies, it should lead to an improvement in the management of government business and response from the private sector.*

Victoria Police indicated that regulatory plans are a good idea as long as there is flexibility to allow for changes which may occur during the year –

*… there are going to be a number of occasions where that plan can be thwarted just by competing needs. For example, you may intend to pass something in April but because of other pressures you just have not had the chance to do so or an urgent situation may arise where you need to push things through.*

Some submissions suggested that regulatory plans be located on a centralised website and that there be scope for modification of those plans throughout the year and the opportunity for interested parties to sign up for automatic notification of new regulatory proposals –

*A system could be incorporated where interested persons could register themselves on an email list so that they were automatically notified when any new regulations were proposed. Alternatively interested parties could register for a sub-group, whereby they would be notified when particular regulations are proposed that would be likely to be of interest to them.*

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404 Commander P. Hornbuckle, Victoria Police, *Submission No. 21*.


408 Environment Liaison Office, *Submission No. 25*.  

The Committee compliments ORR for producing and publishing the Victorian Regulation Alert. However the Committee notes that in the Commonwealth and in the ACT all departments and agencies which produce regulations which impact on business must publish annual regulatory plans. In the Commonwealth, relevant departments and agencies post these plans on their websites and the Office of Small Business provides centralised access through its website. The Committee is impressed with this system because it not only provides centralised access but it is also flexible, requiring changes to the plans to be recorded as they are made throughout the year.

In the Committee’s view the limitation of the Commonwealth system is that it does not apply to all departments and agencies. The Committee considers that it would be beneficial for the Victorian Regulation Alert to continue to be produced by ORR and that it should be compulsory for all departments and agencies to provide details of their anticipated regulatory activity to ORR for publication in the Victorian Regulation Alert.

The Committee considers that centralised access should be provided to the Victorian Regulation Alert from a website dedicated to all types of legislation. This would allow flexibility for departments and agencies to update their plans during each 12 month period.

**Recommendation 40**

The Committee recommends that –

(a) it be a requirement that all departments and agencies forward details of their anticipated regulatory activity annually for inclusion in the Victorian Regulation Alert or some similar publication;

(b) departments and agencies be able to make changes to these plans throughout the year and that these changes be recorded as soon as practicable in the Victorian Regulation Alert or similar publication;

(c) the Victorian Regulation Alert or similar publication be available from a centralised website dedicated to all types of legislation.

**Publication**

Publication requirements for regulations subject to the Subordinate Legislation Act 1994 (Vic) are the same (whether made with or without a RIS). Notice that a regulation has been made must be published in the first general Victorian Government Gazette after the regulation has been made and details of where copies may be obtained must also be notified in the Victorian Government Gazette as soon as practicable after a regulation has been made.

It is the responsibility of the Government Printer to ensure that copies of regulations are available for purchase from the Victorian Government Bookshop. Ministers must also ensure that regulations are either available for inspection free of charge from department offices during normal business hours or available for inspection free of charge or for purchase from specified public offices. Where copies of regulations are not available for inspection or purchase, the

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409 Subordinate Legislation Act 1994 (Vic), s. 17(2).
410 ibid, s. 17(3).
411 ibid, s. 20(1).
412 ibid, s. 20(2). Where a Minister specifies public offices, details of these public offices must be published in the Victorian Government Gazette.
Subordinate Legislation Act 1994 (Vic) specifically provides that a person cannot be convicted of an offence or prejudicially affected.\(^{413}\)

Whether failure to comply with these provisions affects the validity of the regulations is not clear. OCPC suggests that the Subordinate Legislation Act 1994 (Vic) should be clarified so that the effect of non-compliance is clear.\(^{414}\) The Committee notes OCPC’s comments. The Committee draws attention to section 21(1)(j) of the Subordinate Legislation Act 1994 (Vic) which allows the Committee to recommend disallowance on the basis that a regulation “has been prepared in contravention of any of the provisions of this Act or of the guidelines with respect to the statutory rule and the contravention is of a substantial or material nature”. The Committee considers that failure to comply with the publication provisions constitutes a material contravention of the Subordinate Legislation Act 1994 (Vic).

Regulations and Acts are published in printed form and electronically. Printed form regulations may be obtained from Anstat on subscription and over the counter from the Victorian Government Bookshop. The Victorian Legislation and Parliamentary Documents website\(^{415}\) contains regulations, Acts and other information. This website is located on the Department of Premier and Cabinet’s website and links are provided from the Victorian Parliament and OCPC websites. More specifically it contains –

- All bills, which are under consideration by the Parliament of Victoria (Parliamentary Documents);
- All Acts and regulations enacted or made after 1 January 1996 (Victorian Statute Book);
- Consolidated Principal Acts and regulations operating in Victoria at a given point in time (from 1 July 1997 onwards) (Victorian Law Today).

OCPC maintains the Victorian Statute Book and Victorian Law Today databases.

OCPC is responsible for producing reprints which include all the amendments made to a regulation as at the date of publication.

OCPC also produces other documents in printed form and electronically to assist the public in finding out about Victorian legislation such as –

- An index to the subject matter of Victorian legislation, bound volumes of regulations published as at 1 July and 1 January etc.
- Current Principal Statutory Rules and amendment history. This includes an alphabetical listing of all current principal regulations affected by legislation since the date the regulations were made. Details are given of how each regulation has been amended, inserted, substituted or revoked.
- An Index to Subject Matter of Victorian Legislation published as at 1 September 1999. This provides access to the subject matter of Acts and Regulations and people without special knowledge may find Acts and Regulations quickly.

\(^{413}\) ibid, s. 20(3).
\(^{414}\) Mr. E. Moran, OCPC, Submission No. 9.
Regulations which fall outside the definition of ‘statutory rule’ in the *Subordinate Legislation Act 1994* (Vic) are generally only published in the *Victorian Government Gazette*. As discussed earlier in this Report at p. 21, the Committee considers that this is not a satisfactory means of providing the community with access to new laws.

Many submissions received by the Committee indicated that it is not easy to find and access regulations after they have been enacted, particularly regulations which fall outside the scope of the *Subordinate Legislation Act 1994* (Vic). In its submission, the Victorian Bar indicated that inaccessibility of regulations outside the scope of the *Subordinate Legislation Act 1994* (Vic) is a serious problem.

In some areas such as dentistry and similar health professions, there is a move towards increasingly using Codes of Practice and Guidelines rather than regulations. The Committee considers it is important for practitioners who must abide by these Codes of Practice and Guidelines to be able to find them quickly and easily. In its submission to the Committee, ADAVB suggested that this is currently not the case – dentistry practitioners submit that they are not able to easily find and access relevant Codes of Practice and Guidelines.

Road Rules are an example of regulations which may be difficult to find and yet they have an impact on most Victorian citizens. The Committee heard evidence from the Victorian Bar that they have experienced difficulty in finding copies of Victorian Road Rules. Road Rules are contained in a booklet entitled *Road Rules – Victoria* and are incorporated by reference into the *Road Safety (Road Rules) Regulations 1999* (Vic) and therefore are to be read and construed as if they form part of the regulations. *Road Rules – Victoria* is available on the VicRoad’s website at <www.vicroads.vic.gov.au> and is also available for purchase in printed form from the offices of VicRoads and the Victorian Government Bookshop.

Lawyers, public servants and others familiar with regulatory processes also reported experiencing difficulty in finding certain types of regulations. In his submission to the Committee, Mr Howard Race, a retired public servant, commented –

> While it might be relatively easy for a person to find out from a local council what its by-laws on a particular matter might be, it can be a nightmare trying to determine what regulations or by-laws have been made by some of the more esoteric Government and semi-government agencies …

Lawyers provide legal advice on the impact of regulations on their clients’ obligations and it is crucial that they be able to access quickly and efficiently all relevant regulations. Mr. Ken Dare, a solicitor, commented on the difficulties he has experienced in finding regulations outside the *Subordinate Legislation Act 1994* (Vic) –

> As a legal practitioner providing advice, the problem I have encountered (and many other legal practitioners) is giving advice on Ministerial orders, local government by-laws,
water boards rules etc that are not accessible in the public domain. Circumstances may have occurred prior to an amendment being made to the order or rule.\textsuperscript{421}

It is important for lawyers and others to be able to access this information electronically –

\textit{Nobody can afford to have all the laws of Australia ... in their chambers; only the big firms can afford to have them in hard copy. You only have the ones you use most often in hard copy. But then somebody comes along with a problem that is a narrower matter than your library has; you go onto the Internet and it is all there.}\textsuperscript{422}

The Victorian Bar gave evidence of the difficulties their members have experienced in finding certain types of regulations –

\textit{Finding administrative arrangement orders made up under the Administrative Arrangements Act is extremely difficult. They are published in the Victorian Government Gazette and I think are generally available if you can find the right person in the Department of Premier and Cabinet but they are not, as we understand it, statutory rules, and indeed it would be completely inappropriate for them to be the subject of the review procedure contained in the Act. However, there ought to be a requirement that they are published and publicly available and they ought to be available on the website – the Parliamentary website, we would think – via and linked to the particular act in question.}\textsuperscript{423}

Inaccessibility also raises a serious ‘rule of law’ issue, that is the right of people to know what the law is so that they can comply with its requirements.\textsuperscript{424} It is very difficult for people to comply with the law if they do not know what it is because they are unable to find it.

The Committee also heard evidence that not everybody has access to electronic media. The Environment Liaison Office gave evidence to the Committee that not all their staff have access to computers and as their computers do not have the latest software, access and downloading information from websites is difficult and slow –

\textit{I wanted to raise this because websites are not always available, especially to poorly resourced not for profit groups which have problems acquiring the latest computer technology and software and which might not have the training necessary to access the information. That is the case at Environment Victoria, where I am located. .... Until recently at Environment Victoria there was one computer with internet access between 16 part-time and full-time staff members and downloading lengthy government documents was either impossible or very slow.}\textsuperscript{425}

The consensus amongst those who gave evidence and made submissions is that access to final versions of all types of regulations should be provided in printed form and through electronic media. The Committee heard evidence that electronic media is an important means of access for “ordinary members of the public, particularly people who either through remote location or disability or a lack of access to transport cannot access things that are available in physical hard copy”.\textsuperscript{426}

\textsuperscript{421} Mr. K. Dare, Solicitor, Submission No. 33.
\textsuperscript{422} Mr. I. Upjohn, The Victorian Bar, Minutes of Evidence, 26 April 2001, p. 8.
\textsuperscript{423} Mr. M. Derham, The Victorian Bar, Submission No. 20.
\textsuperscript{424} Professor D. Pearce & Mr. S. Argument, op. cit., p. 11, citing Blackpool Corporation v. Locker [1948] 1 KB 349.
\textsuperscript{425} Ms. J. Henty, Environment Liaison Office, Minutes of Evidence, 26 April 2001, p. 76.
\textsuperscript{426} Mr. M. Groves, The Victorian Bar, Minutes of Evidence, 26 April 2001, p. 8.
The Committees considers that it is essential that all members of the community be able to easily access regulations. The Committee notes the comments that difficulties have been experienced by some people in finding different types of regulations, particularly those outside the scope of the *Subordinate Legislation Act 1994* (Vic).

The Committee considers that while it is important for regulations to continue to be available in printed form for inspection from Government departments and agencies and for purchase from the Victorian Government Bookshop, greater access should be provided by making all legislative instruments available using information and communication technology. The Committee considers that there should be access to all legislative instruments from one centralised website dedicated to all types of legislation.

However, the Committee notes that not everybody in the community has access to information and communication technology and that access will still need to be provided by traditional methods, that is through the Victorian Government Bookshop and Government departments and agencies. The Committee considers that these traditional methods could be further enhanced by a requirement that all legislative instruments be available at public libraries, including public libraries in major regional centres. The Committee notes that this suggestion can be achieved relatively simply by making use of information and communication technologies.

**Recommendation 41**

The Committee recommends that all legislative instruments be subject to the same publication requirements and that they be available in printed form for purchase from the Victorian Government Bookshop and for inspection from Government departments and agencies, all public libraries including major regional libraries and in electronic form on a website dedicated to all types of legislation.

The Committee notes that only the printed form regulations are authorised and may be used in court.\footnote{Interpretation of Legislation Act 1984 (Vic), s. 54(2A).} This is the same for all other types of legislation in Victoria. This means that electronic forms of legislation must be verified against the printed form. The Committee notes that the ACT has recently established an electronic Register which contains authorised versions of new legislation. This is also discussed at pp. 151-152 in this Report. The Committee considers that it is wasteful of time and resources for electronic versions of legislation to require verification against printed forms. The Committee notes that the ACT Register is a secure site and that legislation is in locked portable document format to prevent tampering to that legislation. The Committee considers that it is important for all electronic versions of all Victorian legislation to be authorised so that people can presume that the legislation correctly shows the law as at the date of publication.

**Recommendation 42**

The Committee recommends that consideration be given to providing access electronically to authorised versions of all legislation.
Tabling Requirements

Section 15(1) of the Subordinate Legislation Act 1994 (Vic) requires all regulations (within the meaning of 'statutory rule') to be tabled in both Houses of Parliament within 6 sitting days of notification of making in the Victorian Government Gazette. Tabling of regulations is an important requirement because it gives Parliament the power to review regulations. In addition once regulations have been tabled, a copy must be delivered to each Member of Parliament who requests a copy. While the validity of regulations is not affected by the failure to comply with the tabling requirements, that failure may be subject to a report by the Committee and subject to disallowance.

As currently worded, however, a disallowance motion would not be able to be moved for a regulation which has not been tabled. Section 23(2) Subordinate Legislation Act 1994 (Vic) allows a notice of a disallowance resolution to be given in a House within 18 sitting days “after the rule is laid before that House”. As pointed out by OCPC, where a regulation has not been tabled it is “impossible for section 23(2)(a) to operate”. OCPC suggests an amendment be made to make it clear that if a regulation is not tabled in accordance with section 15, disallowance runs from the date of the last day on which the regulation should have been tabled, that is the sixth sitting day after notice of the making of the regulation has been published in the Victorian Government Gazette.

The Committee notes that the Subordinate Legislation Act 1994 (Vic) as currently worded does not allow for disallowance of a regulation which has not been tabled. The Committee agrees with the comments made by OCPC that this provision needs rewording so that where a regulation is not tabled it can be disallowed.

Recommendation 43

The Committee recommends that the Subordinate Legislation Act 1994 (Vic) be amended to provide that where a legislative instrument has not been tabled in accordance with the requirements of section 15 of the Act, a notice of a resolution to disallow the legislative instrument may be given in a House of the Parliament up to the sixth sitting day after notice of the making of the legislative instrument has been published in the Victorian Government Gazette.

Incorporated Documents

Some regulations incorporate various documents and materials which are not necessarily legislative in character but which have a significant impact on those affected. Section 32(2)(b) of the Interpretation of Legislation Act 1984 (Vic) allows the incorporation by reference of various instruments as long as the empowering legislation expressly authorises that incorporation. Section 32 of the Interpretation of Legislation Act 1984 (Vic) sets out the procedural requirements which must be followed when regulations incorporate documents by reference. Australian Standards are one of the most common types of incorporated documents.
Incorporated documents must be tabled in Parliament as soon as practicable after the tabling of the relevant regulation.\textsuperscript{432} In addition, notice of the incorporated documents must be placed in the Victorian Government Gazette as soon as practicable after they have been tabled and a copy of that notice must also be tabled in Parliament.\textsuperscript{433} Failure to comply with these tabling requirements does not affect the validity or operation of the particular regulation.\textsuperscript{434} Incorporated material must also be available at department and agency offices for inspection (free of charge) during normal office hours.\textsuperscript{435} The requirements concerning incorporated documents are designed to provide people with access to the laws with which they must comply. The Committee heard evidence that Australian Standards are not particularly easy to find and are costly to purchase. Australian Standards can be purchased from Standards Australia. The Victorian Bar commented –

\textbf{As a rule you cannot purchase Australian Standards from Information Victoria. You have to go to the Australian Standards Association. It is impossible to comply with the regulations unless you know the standards, so you have to go to a third party to obtain the Australian Standards.}\textsuperscript{436}

Dr Pearson from ADAVB gave evidence that it cost $93.50 plus $5.50 for postage for the purchase of one standard from Standards Australia.\textsuperscript{437} Standards Australia is an independent company and is not directly associated with Government. Australian Standards are “maintained by approximately 9,000 voluntary experts serving on around 1,700 technical committees, supported by a full-time staff of 280”.\textsuperscript{438} Australian Standards may be purchased in printed form or electronically from Standards Australia. Standards Australia suggests that the average price of purchasing an Australian Standard is $37.00.\textsuperscript{439}

Incorporated documents usually contain very technical information and are written by those with specialist knowledge of the subject matter. For example they may relate to electricity, gas, the building industry, hazardous materials, dangerous goods and so on. Australian Standards may provide details on how particular tasks are to be performed, may set out the relevant standard of equipment to be used and so on. VWA indicated that they are reluctant to incorporate Australian Standards into their regulations because they are prescriptive, lack clarity, are not readily available, poorly drafted and do not clearly distinguish between advice and mandatory requirements.\textsuperscript{440} However, VWA does sometimes use Australian Standards to assist with definitions of items such as equipment and plant.\textsuperscript{441}

Often the incorporated material is significantly longer than the regulations into which the material has been incorporated. There are a number of problems which arise from the incorporation of documents into regulations –

- It reduces transparency and accountability;

\textsuperscript{432} Interpretation of Legislation Act 1984 (Vic), s. 32(3)(a)(i).
\textsuperscript{433} ibid, s. 32(3)(a)(ii) & (iii).
\textsuperscript{434} ibid, s. 32(5).
\textsuperscript{435} ibid, s. 32(3)(b).
\textsuperscript{436} Mr. M. Derham, The Victorian Bar, Minutes of Evidence, 26 April 2001, p. 4.
\textsuperscript{437} Mr. Garry Pearson, ADAVB, Minutes of Evidence, 26 April 2001, p. 90.
\textsuperscript{439} ibid.
\textsuperscript{440} Mr. M. Little, VWA, Minutes of Evidence, 27 April 2001, p. 155.
\textsuperscript{441} ibid.
\textsuperscript{442} Mr. R. Deighton-Smith, op. cit. 158, p. 39.
• The manner in which these are drafted is inconsistent with legislative drafting standards and this may pose problems with enforceability as well as compliance;

• It makes regulations into which they are incorporated unnecessarily complex, which may result in more non-compliance;

• Incorporated documents are often not subject to necessity tests nor to impact assessment processes.

There has been some attempt to deal with some of these problems at the Commonwealth level. The Council of Australian Governments (COAG) has indicated that before a standard is adopted by a standard setting body, the standard must be subject to regulatory impact assessment.\textsuperscript{443} The RIS should demonstrate the need for the standard; discuss alternatives; explain the objectives; discuss groups adversely affected as well as those who benefit; demonstrate that the benefits outweigh the costs; demonstrate that the proposed standard is consistent with international standards and set a date for review.\textsuperscript{444} The public must be provided with an opportunity to comment and appropriate consultation must also take place.\textsuperscript{445} Even though these COAG requirements apply to Australian Standards and other standard setting organisations, the Productivity Commission indicated that only three RISs were prepared by standard setting bodies during 1999-2000.\textsuperscript{446} This means that most standards are not subject to cost-benefit analysis prior to being made, leaving assessment to the RISs relating to the specific regulations into which they are incorporated.\textsuperscript{447} Mr. Deighton-Smith expressed the view that RISs perform very poorly in their analysis of incorporated documents.\textsuperscript{448} OCPC also expressed serious concern about the lack of cost-benefit analysis for incorporated materials and indicated that given the impact of those materials on people’s rights and obligations, consultation and RIS requirements should apply in their entirety to all incorporated documents.\textsuperscript{449}

Another problem with incorporating documents into regulations is that they are often incorporated as ‘AS1234’ or ‘as amended from time to time’. Incorporation by either of these methods allows changes to be made to these standards over time. The COAG requirements for impact assessment are only for the initial standard – there are no requirements that subsequent changes be subject to impact analysis. COAG commented adversely on this –

\textit{A disadvantage of only referencing the title of a standard (eg AS1234) is that the impact assessment is carried out only on the initial instrument and referenced standard. The standard, however, may be subsequently changed or updated. This may result in significant changes to the costs or benefits of regulation, with no opportunity to review the implications of such a change. This can have the effect of transferring regulatory power from governments to standard setters.}\textsuperscript{450}

COAG suggests that the way to avoid this is to incorporate standards by reference to a particular date, for example, AS1234, November 1997. In this way, if there are changes to the standard it

\begin{footnotes}
\footnote{ibid, pp. 12-13.}
\footnote{ibid, p. 13.}
\footnote{Mr. R. Deighton-Smith, op. cit., p. 39.}
\footnote{ibid.}
\footnote{Mr. E. Moran, OCPC, \textit{Submission No. 9}.}
\end{footnotes}
will have to be subject to regulation impact assessment requirements. Changes to Australian Standards also raise concerns about the ability of people to find out about and access those changes. While there are requirements for changes to be notified, tabled in Parliament and available at the relevant department for inspection, those affected may not necessarily be aware of these changes. Incorporation of standards ‘as amended from time to time’ provides inadequate protection of the rights of those directly affected by those documents and standards.

The Committee considers the incorporation of documents into regulations reduces accountability, adds to the complexity of regulations and includes information which has not necessarily been subject to impact assessment. The Committee notes that while COAG has set up a regulatory impact assessment process for Australian Standards and standards created by other national bodies, the Productivity Commission’s Report for 1999-2000 indicated that only three RISs had been prepared. The Committee notes that departments and agencies incorporate these standards into Victorian regulations without subjecting them to any rigorous impact analysis nor to any consultation, with the consequence that rights and obligations can be adversely affected. The Committee is concerned about the process of incorporating these Standards whereby changes can be made to them over time without subjecting them to any further consultation or any sort of impact assessment at either the national or state level. Consequently the significance of these changes remains unknown. The Committee notes that even though there are requirements for notification of changes, those affected may remain unaware of the changes. The Committee considers that lack of access to Australian standards and other incorporated documents raises a serious ‘rule of law’ issue, that is the right of people to know what the law is so that they can comply with its requirements.

**Recommendation 44**

The Committee recommends that –

(a) departments and agencies refrain from the practice of incorporating documents and materials into regulations unless absolutely necessary;

(b) where documents and materials such as Australian Standards are incorporated into regulations, those documents and materials be subject to the RIS process;

(c) there be a prohibition on incorporating documents and materials which are subject to changes over time and that where it is absolutely necessary for documents to be incorporated that they only be incorporated as at a particular date.

**Premier’s Guidelines**

The *Premier’s Guidelines* are made under section 26 of the *Subordinate Legislation Act 1994* (Vic). The *Premier’s Guidelines* are made by the Minister responsible for administering the *Subordinate Legislation Act 1994* (Vic). Currently the Premier has this responsibility and therefore the guidelines are referred to as the *Premier’s Guidelines*. The most recent set of

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451 ibid.
452 *Interpretation of Legislation Act 1984* (Vic), s. 4(a)(i).
453 ibid, s. 4(a)(ii).
454 ibid, s. 4(a)(c).
guidelines were gazetted on 30 October 1997 and came into effect on 1 December 1997. A copy of the *Premier’s Guidelines* may be obtained from ORR’s website.\(^{456}\)

Schedule 1 of the *Subordinate Legislation Act 1994* sets out matters to be included in the *Premier’s Guidelines*. The *Premier’s Guidelines* are designed to assist departments and agencies with regulation-making procedures by providing information on the application and interpretation of the *Subordinate Legislation Act 1994* (Vic).

Some of the information contained in the *Premier’s Guidelines* includes –

- guidance for the making of regulations;
- an explanation of when consultation should take place;
- guidance on obtaining independent advice as required by section 10(3) *Subordinate Legislation Act 1994* (Vic);
- an explanation of the meaning of an appreciable economic or social burden on a sector of the public;
- details on the exemption process and the use of Premier’s certificates;
- guidance on sunsetting and extension of regulations;
- general notes on RISs;
- information on competition policy principles and details of how to conduct a competition policy assessment; and
- sample certificates.

Some people experience difficulty in finding copies of the *Premier’s Guidelines*. The Manager of Corporate Support at the Manningham City Council indicated that he could not locate the *Premier’s Guidelines* on ORR’s website.\(^{457}\) The Committee’s legal adviser has received many inquiries over the past two years concerning difficulties finding the *Premier’s Guidelines*.

The *Premier’s Guidelines* provide advice on almost all aspects of the *Subordinate Legislation Act 1994* (Vic). However the guidance provided by the *Premier’s Guidelines* is not always useful –

*It is doubtful whether additional comment is required in all cases. In some cases in which regulators would be expected to seek guidance, little apparent benefit can be seen in the material provided.*\(^{458}\)

The Regulation Review Subcommittee’s Legal Adviser has received numerous requests from department and agency staff over the last 2 years for advice on the meaning of particular aspects of the *Subordinate Legislation Act 1994* (Vic) and the *Premier’s Guidelines*. For example, Part 6 of the *Premier’s Guidelines* provides guidance on whether regulations impose an appreciable cost or burden on a sector of the public. The explanation provided in Part 6 contains dictionary


\(^{457}\) Mr. S. Goldsworthy, Manningham City Council, *Submission No. 6*.

\(^{458}\) Mr. R. Deighton-Smith, op. cit., p. 42.
definitions of ‘burden’ and ‘appreciable’ and restatements of provisions from the Subordinate Legislation Act 1994 (Vic) and the Regulation Review Subcommittee’s Legal Adviser has frequently been asked to provide further explanation.\textsuperscript{459} Mr. Deighton-Smith concludes –

\begin{quote}
This material would seem to have limited ability to inform or assist a regulator wondering whether a RIS was required. Discussion with the ORR, on the other hand, would be likely to be more fruitful.\textsuperscript{460}
\end{quote}

Another example is on the need for and the level of consultation to be undertaken. Mr Taylor from DNRE suggested that the Premier’s Guidelines need to provide more specific advice on consultation so that departments and agencies understand the requirements.\textsuperscript{461} It is a matter of concern that the Premier’s Guidelines are not providing appropriate assistance and guidance to regulators and it means that as currently drafted they are of limited practical use –

\begin{quote}
In sum, the guidelines made under the act would appear to have become largely counter-productive in practice, with little consideration apparently being given to their purpose and likely practical effect during drafting.\textsuperscript{462}
\end{quote}

Comments were also made about the number of different documents which exist to provide assistance with the regulation-making process and the confusion which arises from having so many different guidance documents. In addition to the Premier’s Guidelines, these include –

\begin{itemize}
\item Notes for the Guidance of Legislation Officers;\textsuperscript{463}
\item Guidelines for Setting Fees and Charges;\textsuperscript{464}
\item Principles of Good Regulation;\textsuperscript{465}
\item Regulatory Impact Statement Handbook;\textsuperscript{466}
\item Guidelines for the Application of the Competition Test to New Legislative Proposals;\textsuperscript{467}
\item Executive Council Handbook.\textsuperscript{468}
\end{itemize}

Suggestions were made that there should be only one set of Guidelines providing comprehensive advice on all aspects of the regulation-making process –

\begin{itemize}
\item ibid, p. 42 and Mr. K. Dare, Solicitor, Submission No. 33.
\item Mr. R. Deighton-Smith, ibid, p. 42.
\item Mr. J. Taylor, DNRE, Minutes of Evidence, 27 April 2001, p. 126.
\item Mr. R. Deighton-Smith, op. cit., p. 42.
\item Department of Treasury and Finance, Guidelines for Setting Fees and Charges Imposed by Departments and Budget Sector Agencies, Melbourne. This is published annually and the latest version is dated 27 December 2000. These Guidelines are made available on the intranet for ease of access to public sector entities for whom the guidelines apply. The Committee understands that these guidelines are not publicly available.
\item ORR, Principles of Good Regulation, 1999. This publication is available on ORR’s website at <http://www.dsd.vic.gov.au/regreform>.
\item Competition Policy Taskforce, Guidelines for the Application of the Competition Test to New Legislative Proposals, December 1995.
\end{itemize}
All of these guidelines have similarities and common features, yet they stand apart from each other at present, causing possible confusion or conflict at the agency level, not to mention extra paperwork for regulatory agencies.\textsuperscript{469} There is no requirement that the \textit{Premier’s Guidelines} be updated and reviewed regularly. OCPC suggested that there should be a requirement for the \textit{Premier’s Guidelines} to be updated regularly.\textsuperscript{470} OCPC also suggested that the \textit{Premier’s Guidelines} should be made by the Governor-in-Council in order to emphasise their significance and to reflect a whole of government approach –

\textit{It is reasonable that the Minister responsible for administering an act issue the guidelines, but the guidelines affect departments as well as others. It reflects a whole of government approach.}\textsuperscript{471}

There is uncertainty as to the extent to which the \textit{Premier’s Guidelines} are mandatory. Some submissions indicated that they should be mandatory.\textsuperscript{472} Paragraph 3 of the \textit{Premier’s Guidelines} indicates that they are designed to “advise and assist Ministers in exercising their responsibilities under the Act and officers responsible for the preparation of statutory rules and regulatory impact statements to comply with the Act”\textsuperscript{473}. Emphasis is on guidance rather than compulsion. However, in the same paragraph the \textit{Premier’s Guidelines} state –

\textit{The Act imposes certain obligations on Ministers to comply with the Guidelines in matters such as consultation and in preparation of the regulation impact statement. Thus, it is necessary for officers to familiarise themselves with both the Act and the Guidelines in order to properly inform their Minister of his or her responsibilities under the Act.}\textsuperscript{474}

This makes unclear whether departments and agencies can be compelled to comply with the \textit{Premier’s Guidelines}. It appears that when consultation and the preparation of RISs is involved, departments and agencies can be compelled. Paragraph 4 of the \textit{Premier’s Guidelines} adds further uncertainty to the status of the guidelines –

\textit{Failure to comply with the Act and the Guidelines may result in an adverse report from the Scrutiny of Acts and Regulations Committee … or may result in a finding by the Courts that the statutory rule is invalid.}\textsuperscript{475}

On one reading this paragraph suggests that departments and agencies can be compelled to comply with the \textit{Premier’s Guidelines} or risk an adverse finding by the Committee. On another reading, the Committee may only report where there is failure to comply with both the Act and the \textit{Premier’s Guidelines}. The Environment Defenders’ Office suggested that a major problem with the \textit{Premier’s Guidelines} is that they “lack compulsion” and that this arises from the inconsistency between the \textit{Subordinate Legislation Act 1994 (Vic)} and the \textit{Premier’s Guidelines}–

\textsuperscript{469} Mr. Garry Pearson, ADAVB, \textit{Submission No. 11} and \textit{Minutes of Evidence}, 26 April 2001, p. 88. Similar comments were also made by Commander P. Hornbuckle, Victoria Police, \textit{Submission No. 21}, Mr. R. Deighton-Smith, op. cit., p. 42 and Mr. M. Oakley, ORR, \textit{Minutes of Evidence}, 27 April 2001, p. 98.

\textsuperscript{470} Mr. E. Moran, OCPC, \textit{Submission No. 9}.

\textsuperscript{471} Ms. S. McInnes, OCPC, \textit{Minutes of Evidence}, 26 April 2000, p. 59.

\textsuperscript{472} Mr. E. Moran, OCPC, \textit{Submission No. 9}; Mr. P. Clark, \textit{Submission No. 23} and \textit{Minutes of Evidence}, 26 April 2000, p. 44 and Ms. Megan Bowman, Environment Defenders’ Office, \textit{Minutes of Evidence}, 26 April 2000, p. 77.


\textsuperscript{474} ibid.

\textsuperscript{475} ibid, paragraph 4.
... section 6(b) of the Act stipulates that consultation “must” occur in conformity with the guidelines. However, when we look at the guidelines, particularly paragraph 5.20, it states that consultation “should” take place with affected groups. There is disparity in the language between the two. One says consultation must take place in conformity with the guidelines whereas the guidelines themselves say consultation should take place.\(^{476}\)

The Committee notes that some people experience problems finding and accessing the Premier’s Guidelines. The Committee is concerned about the inadequate and inconsistent guidance provided in the Premier’s Guidelines. The Committee considers that in their current format the Premier’s Guidelines provide little practical assistance to regulators. The Committee notes that there is no requirement to regularly review and update the Premier’s Guidelines and that there is confusion over whether or not agencies and departments must comply with their requirements. The Committee notes the existence of various guidance documents and considers that there should be one set of Guidelines providing comprehensive and consistent advice on all aspects of the regulation-making process.

**Recommendation 45**

The Committee recommends –

(a) that the current Premier’s Guidelines be amended and updated so that one set of comprehensive Guidelines is made to assist departments and agencies with the preparation of Regulation Impact Statements and compliance with other aspects of the Subordinate Legislation Act 1994 (Vic);

(b) to reflect a whole of government approach, this comprehensive set of Guidelines be made by the Governor-in-Council on the recommendation of the Premier and that prior to submission to the Governor-in-Council there be an opportunity for input from the Office of Regulation Reform, the Executive Council, the Office of Chief Parliamentary Counsel, the Regulation Review Subcommittee and departments and agencies; and

(c) this comprehensive set of guidelines be available from a centralised website dedicated to all types of legislation.

**Parliamentary Oversight**

The Regulation Review Subcommittee has responsibility for assessing regulations, but only after they have been made, to determine whether they comply with the legislative principles specified in the Subordinate Legislation Act 1994 (Vic).\(^{477}\) These principles require the Regulation Review Subcommittee to ensure that regulations do not unduly trespass on rights and freedoms and that they comply with the procedural and practical requirements of the Subordinate Legislation Act 1994 (Vic). The Regulation Review Subcommittee does not comment on matters involving government policy – its review focuses on the technical criteria contained in the Subordinate Legislation Act 1994 (Vic). More specifically, under section 21 of the Subordinate Legislation Act 1994 (Vic), the Regulation Review Subcommittee ensures that regulations –

- Are within the powers of the authorising Act;

\(^{476}\) Ms. M. Bowman, Environment Defenders’ Office, Minutes of Evidence, 26 April 2001, p. 77.

\(^{477}\) Subordinate Legislation Act 1994 (Vic), s. 21.
Do not, without clear and express authority –
- have a retrospective effect;
- impose a tax, fee, fine, imprisonment or other penalty;
- purport to shift the onus of proof to a person accused of an offence;
- provide for the sub-delegation of powers delegated by the authorising Act;

• Are consistent with the general objectives of the authorising Act;

• Do not make unusual or unexpected use of the powers conferred by the Authorising Act having regard to the general objectives of the Authorising Act;

• Do not contain any matters which should be contained in an Act of Parliament rather than subordinate legislation;

• Do not unduly trespass on rights and liberties of the person previously established by law;

• Do not make rights and liberties of the person unduly dependent on administrative rather than judicial decisions;

• Are consistent with principles of justice and fairness;

• Do not require explanation as to form or intention;

• Do not substantially or materially contravene the practical requirements of the Subordinate Legislation Act 1994 (Vic) or the Premier’s Guidelines;

• Are not likely to result in administration and compliance costs which outweigh the benefits sought to be achieved.

Recently two new principles of review were incorporated into section 21 of the Subordinate Legislation Act 1994 (Vic) and these require the Regulation Review Subcommittee to ensure that regulations –

• Do not authorise or require any acts or practices which may have an adverse effect on personal privacy within the meaning of the Information Privacy Act 2000 (Vic);\(^{478}\) and

• Do not authorise or require any acts or practices which may have an adverse effect on privacy of health information within the meaning of the Health Records Act 2000 (Vic).\(^{479}\)

The Regulation Review Subcommittee also has responsibility for reviewing State Environment Protection Policies and Directions made under the Public Sector Management and Employment Act 1998 (Vic).

The Regulation Review Subcommittee meets at least twice each month to discuss regulations. Meetings of the Regulation Review Subcommittee are not open to the public. However the Regulation Review Subcommittee may invite members of the public or representatives from

\(^{478}\) This principle is incorporated as paragraph (ga) of section 21.

\(^{479}\) This principle is incorporated as paragraph (gb) of section 21.
various organisations or departments and agencies to address it at one of its meetings. At its meetings the Legal Adviser presents the Regulation Review Subcommittee with written and verbal advice regarding each regulation. The Regulation Review Subcommittee members discuss each regulation and any issues and concerns. When the Regulation Review Subcommittee is satisfied that a regulation complies fully with the requirements of the Subordinate Legislation Act 1994 (Vic), it passes a motion approving the regulation. Where there are any matters which require clarification or with which the Regulation Review Subcommittee is dissatisfied, it corresponds with the responsible Minister pointing out its concerns and seeking an explanation or amendment of the regulation.

If the Regulation Review Subcommittee does not receive a satisfactory explanation and it has ongoing concerns, it may prepare a Report to Parliament and submit this to the Committee for approval and adoption. The Committee may adopt or reject the Report or part of it or make any changes it thinks necessary. A Report to Parliament may include a recommendation that a regulation be amended or disallowed in whole or in part or it may simply provide information to Parliament as to the Committee’s concerns. As a regulation has already commenced operation by the time it comes before the Regulation Review Committee, the power to recommend disallowance of regulations is only used in exceptional cases and where all other efforts of resolving the issue have failed.

Where the Committee decides to Report to Parliament and where it is of the opinion that considerations of justice and fairness require it, it may also recommend that a regulation be suspended while Parliament considers the issues contained in the Report. When regulations are suspended in this manner they are deemed not to have been made, which means that they have no effect and people are not required to comply with them during the period of suspension.

**Disallowance**

Any Member of either House of Parliament may give notice of a disallowance motion but must do so within 18 sitting days of the tabling of the regulation in that House. Disallowance will not be effective unless that House passes a disallowance resolution within 12 sitting days of disallowance notice. If the Committee wants to Report to Parliament recommending disallowance, it must also comply with the 18 sitting days requirement. This means that the Regulation Review Subcommittee must review and discuss all regulations within strict time limits. Appendix M contains a list of reports made to Parliament by the Legal and Constitutional Committee since 1985 pursuant to section 14(1) of the Subordinate Legislation Act 1962 (Vic) and reports made to Parliament by the current Committee under section 21(1) of the Subordinate Legislation Act 1994 (Vic). Fourteen of the Legal and Constitutional Committee’s reports to Parliament resulted in disallowance. While the current Scrutiny of Acts and Regulations Committee has reported to Parliament on a couple of occasions, it did not recommend disallowance on these occasions, instead resolving issues directly with departments and agencies concerned. The Committee notes that generally issues are resolved with departments and agencies. The Committee also notes that while the disallowance provisions are rarely used they

480 As a subcommittee, the Regulation Review Subcommittee has all the powers and privileges of the Committee, however it cannot report directly to Parliament.

481 Parliamentary Committees Act 1968 (Vic), s. 4L(5).

482 Subordinate Legislation Act 1994 (Vic), s. 22(1).

483 ibid, s. 22(5).

484 ibid, s. 23(2)(a).

485 ibid, s. 23(2)(b).
remain an important provision in the Act allowing for appropriate Parliamentary oversight over the executive arm of government.

**Recommendation 46**

The Committee recommends that the disallowance provisions contained in the *Subordinate Legislation Act 1994 (Vic)* be retained.

### Sunsetting

Regulations subject to the requirements of the *Subordinate Legislation Act 1994 (Vic)* automatically expire at the end of 10 years.\(^486\) This process is often referred to as ‘automatic sunsetting’. Sunsetting is an important part of the regulation-making process because it enables regulations to be subject to regular review. Responsibility for monitoring regulations and their expiry date rests with agencies and departments. The *Premier’s Guidelines* make clear that it is vital that sufficient time is allowed for a proper evaluation and review of regulations to take place.\(^487\)

However, there is an exception to this rule which allows a Minister to certify that due to ‘special circumstances’ there is insufficient time to undertake a RIS.\(^488\) The Governor-in-Council may on the certificate of the Minister, extend the period of operation of a regulation for a period not exceeding 12 months. A regulation may only be extended once under section 5 of the *Subordinate Legislation Act 1994*. The *Premier’s Guidelines* indicate that administrative oversight is not a ‘special circumstance’ warranting extension of a regulation.\(^489\) On the other hand, where there are legislative changes or other investigations which will impact upon the remaking of a regulation after it expires, it is appropriate for an extension to be sought.

Many submissions support the current sunsetting system, that is expiry of regulations at the end of 10 years.\(^490\) The Victorian Bar expressed strong support for automatic expiry and retention of the existing 10 year period –

> *The Bar Council supports the “automatic sunsetting” as a process preventing the persistence of antiquated regulation. There is the apocryphal story of the only recent repeal of an ancient road traffic regulation requiring motor vehicles going down St. Kilda Road to be preceded by a man carrying a red flag. Automatic sunsetting provides a chance to comprehensively review regulations, without which, many regulations would not be reviewed for long periods.*\(^491\)

Many submissions oppose a reduction in automatic expiry from the current 10 years to five years. From the government perspective, five years is seen as resource intensive and as adding substantial costs –

\(^{486}\) ibid, s. 5(1).


\(^{488}\) *Subordinate Legislation Act 1994*, s. 5(3).


\(^{490}\) Mr. R. Lievers, Phillip Island Nature Park, *Submission No. 2*; Mr. H. Race, *Submission No. 3*; Mr. D. Trafford, ICA, *Submission No. 8*; Mr. M. Derham, The Victorian Bar, *Submission No. 21*; Mr. P. Clark, *Submission 23*; Environment Liaison Office, *Submission No. 25* and DPC, Victorian Government, *Submission No. 27*.

\(^{491}\) Mr. M. Derham, The Victorian Bar, *Submission No. 21* and *Minutes of Evidence*, 26 April 2001, p. 5.
Five years is far too short – from my experience, the rewriting of a major set of regulations can take up to 2 years and sometimes longer from planning to completion. A five year turn around would impose an even more significant burden on limited Departmental resources.  

From the perspective of all those who must comply with regulations, five years is seen as adding costs and contributing to uncertainty, with little opportunity to obtain long term benefits –

In recent years compliance costs to business in meeting federal and state/territory legislative requirements has been brought into sharper focus. Provided that any inherent weakness or unintended consequences of a regulation are remedied early in its lifetime, ICA suggests that a reduction to 5 years has the potential to financially disadvantage the business sector.

While most submissions support the current sunsetting system, there is some support for five year sunsetting –

A shorter sunset period (such as five years as is currently practiced in NSW) would provide greater scope for review processes generally. More importantly, it would provide an opportunity for major changes to be introduced without the need to develop potentially complicated amending regulations and rules.

Two other submissions support six years as a more appropriate sunsetting time –

Recognising that the ADAVB supports extension of the RIS process to all quasi-legislation, a six year period with provision for extension for a further year is more appropriate. The areas subject to codes of practice are likely to be dynamic, and most are going to be subject to significant changes due to research and technological development. Ten years would be too long for these regulations.

The Committee considers that the current 10 year sunsetting system should be retained and that the adoption of a shorter expiry period would be resource intensive and substantially add to the administrative costs of departments and agencies and would also impose additional costs on those required to comply with regulations.

**Recommendation 47**

The Committee recommends that regulations continue to sunset at 10 years.
Effectiveness and Impact Report

While 10 year sunsetting seems to be more appropriate in terms of costs and long term benefits, there is evidence that there should be some sort of review of effectiveness and relevance at the end of five or six years –

*If the 10-year sunset period were to remain I would recommend that after 5 years agencies provide a regulatory effectiveness report that includes an opportunity for stakeholders to comment on compliance.*

An effectiveness report would indicate whether a regulation is continuing to achieve the objectives it set out to achieve or whether it is ineffective and requires modification. To do this in a timely and cost effective manner, agencies and departments would need to set up some sort of continuous monitoring program. DNRE representatives gave evidence that they monitor regulations regularly and their expiry dates carefully so that reviews can be commenced well in advance of expiry dates –

*We keep a running list for regulations that sunset or requirements for regulations as new legislation is enacted. So we look forward all the time, and on that basis the timeliness of RISs is identified. Sometimes they take longer, but usually we start the process 12 months out. Hopefully most of the details are settled within six months before the regulation is required to be renewed …*  

Victoria Police gave evidence that they monitor regulations which they enforce and take a proactive role in pursuing departments and agencies to ensure that review takes place within time limits. Victoria Police suggested that this role of actively pursuing departments would be better performed from within Government –

*It would obviously be beneficial to us from a management perspective if that role could be performed within government, rather than my having to task one of my people to spend some time on it.*

The Committee notes the comments concerning the need for ongoing review and monitoring of the impact and effectiveness of regulations, so that modification can be made, if necessary, before the expiry of 10 years. The Committee considers that this could best be achieved by requiring departments and agencies to produce a Report on the Effectiveness and Impact of Regulations at the end of 5 years and for this Report to be publicly available from a centralised website dedicated to all types of legislation.

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496 Mr. B. Bottomley, Bryan Bottomley & Associates, Submission No. 26. Similar comments were also made by Mr. R. Lievers, The Phillip Island Nature Park, Submission No. 2 and Environment Liaison Office, Submission No. 25.

497 Mr. J. Taylor, DNRE, Minutes of Evidence, 27 April 2001, pp. 120 and 122.

498 Acting Superintendent S. Leane, Victoria Police, Minutes of Evidence, 27 April 2001, p. 147.

499 ibid.
Recommendation 48

Given that regulations continue to exist for a period of 10 years, the Committee considers that it is essential that there be a review of the effectiveness of regulations part way through their 10 year existence and therefore recommends that –

(a) all departments and agencies be required to produce a Report on the Effectiveness and Impact of Regulations at the end of five years;

(b) the Office of Regulation Reform be responsible for developing criteria for all departments and agencies to use to monitor and measure the effectiveness and impact of regulations;

(c) the Office of Regulation Reform be available to provide advice and assistance to departments and agencies when they are preparing reports on the Effectiveness and Impact of Regulations;

(d) the Office of Regulation Reform have oversight over the preparation of reports on the Effectiveness and Impact of Regulations;

(e) all Reports on the Effectiveness and Impact of Regulations be tabled in Parliament and be publicly available from department and agency websites as well as a centralised website dedicated to all types of legislation as soon as practicable after they have been completed.

12 Month Extensions

The Subordinate Legislation Act 1994 (Vic) allows regulations which are due to expire to be extended for a further 12 months where the Minister certifies that due to ‘special circumstances’ there is insufficient time to undertake a RIS. Over recent years, extensions of 12 months have increasingly been granted. OCPC pointed out that were 5 in 1998, 10 in 1999 and 19 in 2000.500 As pointed out by OCPC, in effect this allows regulations to have a life span of 11 years rather than 10 years.501 It also appears that often extensions are used for regulations which are minor in nature and which could easily have been remade before the expiry of 10 years but may simply have been overlooked –

I deal with some that have done the 12 months extension and people are still running to get it done. They are not complex. One of the ironies is it is often the little machinery ones that get left in my experience.502

Four submissions expressed lack of support for the extension system as it now operates –

Departments and agencies usually give no leeway to those who have to comply with their requirements, and they should be subject to the same rigour. The fact that regulations are due to ‘sunset’ should come as no surprise to the departments or agencies concerned, and

500 Mr. E. Moran, OCPC, Submission No. 9.
501 ibid.
Inquiry into the Subordinate Legislation Act 1994 (Vic)

they should be working towards meeting the deadline. Extensions give an opportunity for procrastination.  

The City of Whittlesea pointed out that where reviews of regulations commence well before their expiry date, there should not be any need to request extensions and the final regulations are more likely to be well thought through and to provide appropriate solutions to deal with problems –

*It is also considered that an adequate review process should be incorporated into all regulations, to take place well before their termination or sunset clauses. This would eliminate the hasty introduction of replacement measures such as occurred with the Cleanliness Regulations for Food Premises 1984 which were replaced in short order with a Code of Practice which was difficult to enforce. This approach should eliminate the need for extension periods …*  

Approximately 12 to 18 months prior to their expiry date, OCPC often sends departments and agencies reminder letters that regulations are due to expire. OCPC has recently found that it has not had to do this so much because of the existence of the *Victorian Regulation Alert* which provides details of all sunsetting regulations over the next 12 months. In OCPC’s opinion, review of regulations needs to commence at least 12 to 18 months prior to expiry so that proper consideration can be given to all the issues involved and so that they can be drafted appropriately.  

OCPC noted that the power to extend regulations should not be used “unless there are very good reasons for doing so” and suggests that there should be a requirement in the *Subordinate Legislation Act 1994 (Vic)* for Ministers to provide reasons for extending regulations for a further 12 months. As an alternative, OCPC suggests that as the Premier is responsible for administering the *Subordinate Legislation Act 1994 (Vic)*, power to grant extensions should be vested in the Premier.  

Many submissions support extensions of 12 months for regulations which are about to expire –

*There is certainly a need for a provision enabling the life of existing regulations to be extended. Many things (often unforseen) can go wrong during the development of new regulations even though adequate time may have been allowed initially for the drafting of the statutory rule, the consultation process and the preparation of a RIS. The availability of extension certificates is a reassuring fall back position when this happens. I know of no situation where an extension has been sought of choice but rather each application for an extension is made of necessity.*

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503 Mr. B. Sturman, *Submission No. 4*. Similar comments were also made by Mr. E. Moran, OCPC, *Submission No. 9* and Mr. Wilkinson, City of Whittlesea, *Submission No. 16*. Mr. P. Clark, *Submission No. 23* indicated that he did not support the extension system as currently operating and that extensions should only be granted in rare circumstances.

504 Mr. Wilkinson, City of Whittlesea, *Submission No. 16*.


506 Mr. E. Moran, OCPC, *Submission No. 9*.

507 Mr. H. Race, *Submission No. 3*. Other submissions which support the retention of 12 months extension include – Mr. S. Goldsworthy, Manningham City Council, *Submission No. 6*; Mr. D. Trafford, ICA, *Submission No. 8*; Mr. Garry Pearson, ADAVB, *Submission No. 11*; Mr. J. Hawkless & Mr. P. Mooney, Hawkless Consulting, *Submission No. 13*; Mr. M. Derham, The Victorian Bar, *Submission No. 20*; Environment Liaison Office, *Submission No. 25* and DPC, Victorian Government, *Submission No. 27*. 

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Evidence from DNRE indicated that national competition policy (NCP) requires reviews of a significant amount of legislation and that often NCP reviews coincide with regulatory reviews and there is insufficient time to adequately review everything.\textsuperscript{508} VWA pointed out that national standards may be being developed and the time requirements for developing the national standards may be very different to those for reviewing regulations –

\textit{The National Occupational Health and Safety Commission develops national standards. For example, we recently replaced our dangerous goods storage and handling regulations which were sunsetting. At the same time, the national commission was introducing a national standard for dangerous goods storage and handling. The difficulty for us was that its time lines were not in tandem with ours. They are the difficulties we have to deal with.}\textsuperscript{509}

Most agree that extensions should only be granted for ‘special circumstances’ (such as reform at a national level) and not for administrative convenience. For example, the Insurance Council of Australia commented –

\textit{If the extension is being granted to overcome poor administrative planning or lack of urgency then it could be perceived to be in conflict with the sunset concept. To a large extent the requirement for extensions should become less necessary if regulatory programs were flagged well in advance.}\textsuperscript{510}

Hawkless Consulting indicated that while they support a temporary extension of the life of regulations where there are ‘special circumstances’, it is important to limit the reasons for granting such extensions in order “to avoid the risk of abuse”.\textsuperscript{511}

There is general agreement that if extensions are allowed, they should only be granted once –

\textit{Extensions for longer than 12 months however, should not be allowed. The Premier’s Guidelines state that administrative oversight is not a reason to extend time, thus departments and agencies should have at least begun initial procedures before the expiry date. 12 months after this date should give ample time for any further investigation to be completed. Any further extension of time would lead to increased delays and uncertainty in the regulation-making process.}\textsuperscript{512}

Extensions for longer than 12 months are generally seen as undermining the sunsetting process although the Committee did receive evidence that there may be some exceptional circumstances, such as a delay in developing uniform regulations, which require longer extensions than 12 months.\textsuperscript{513}

The Committee is concerned that the practice of seeking 12 months extensions has been increasingly relied on over the past few years and that often it results from poor management procedures rather than ‘special circumstances’. The Committee considers that there are occasions when there are ‘special circumstances’, such as the development of national scheme

\begin{thebibliography}{99}
\end{thebibliography}
legislation or national competition policy reviews, where departments and agencies will not be able to meet the time deadlines. The Committee considers that one way of making it more difficult for departments and agencies to obtain extensions other than in ‘special circumstances’ is to require them to seek approval of that extension from the Premier.

The Committee notes the comments by OCPC that there is no requirement for section 5(3) certificates to be sent to the Governor-in-Council. The Committee considers it is appropriate for the Governor-in-Council to receive copies of section 5(3) certificates.

Recommendation 49

The Committee recommends that –

(a) departments and agencies be able to continue to seek a once only 12 month extension on the operation of regulations;

(b) departments and agencies be required to seek approval for a 12 month extension from the Premier; and

(c) it continue to be a requirement to provide a copy of the section 5(3) certificate to the Regulation Review Subcommittee and in addition it be a requirement to provide a copy of the section 5(3) certificate to the Governor-in-Council.

Amending Regulations

When regulations expire at the end of 10 years only the principal regulations cease to exist. Regulations which made amendments to those principal regulations over the previous 10 years continue to exist. The Subordinate Legislation Act 1994 (Vic) does not include an express requirement for Amending Regulations to cease operation at the same time as principal regulations. This means that Amending Regulations continue to operate until their 10 year sunset date, “even though they have done their task and have no more effect”. However, the predecessor to the Subordinate Legislation Act 1994 (Vic) contained an express requirement which provided as follows –

Where a statutory rule is revoked by virtue of this section any statutory rule which amends that statutory rule and any provision in a statutory rule which is a provision that amends that statutory rule shall also be revoked.

OCPC suggests that the omission of this provision from the Subordinate Legislation Act 1994 (Vic) may have been based on the assumption that all Amending Regulations are automatically revoked at the same time as principal regulations.

The current practice to remove these obsolete regulations from the statute book is for another regulation to be made to expressly remove them. OCPC suggests that instead a provision should be included in the Subordinate Legislation Act 1994 (Vic) to provide that Amending Regulations cease to operate on the same day as Principal Regulations are revoked.

514 Mr. E. Moran, OCPC, Submission No. 9.
515 Subordinate Legislation Act 1962 (Vic), s. 3A(4).
516 Mr. E. Moran, OCPC, Submission No. 9.
517 ibid.
Similarly regulations which extend the operation of regulations also continue to exist for 10 years. OCPC suggests that the best way of removing these is for the Subordinate Legislation Act 1994 (Vic) to provide that they automatically cease to exist the day after the principal regulations (which they extended) expire.\textsuperscript{518}

The Committee agrees with these comments.

\begin{recommendation}
\textbf{Recommendation 50}

The Committee recommends that the Subordinate Legislation Act 1994 (Vic) be amended to make clear that –

(a) when principal regulations expire, any regulations which amend those principal regulations cease to operate on the same day as the principal regulations are revoked; and

(b) extension regulations automatically cease to exist the day after the principal regulations (which they extended) expire.
\end{recommendation}

\textbf{Time of Sunsetting}

Section 5(1) of the Subordinate Legislation Act 1994 (Vic) provides –

\quad (1) \textit{Subject to sub-sections (2) and (4), unless sooner revoked a statutory rule is by virtue of this section revoked on the day which is 10 years after the making of the statutory rule.}

OCPC submitted that there is confusion over how to calculate the time of expiry.\textsuperscript{519} The Committee agrees with comments made in that submission that the exact point of expiry is not clear and considers that it is appropriate for expiry to occur at the end of the day that is the tenth anniversary of the making of the regulation.

\begin{recommendation}
\textbf{Recommendation 51}

The Committee recommends that the Subordinate Legislation Act 1994 (Vic) be amended to make clear that regulations expire at the end of the day that is the tenth anniversary of the making of the legislative instrument.
\end{recommendation}

\textbf{Competition Policy Requirements}

Regulations accompanied by a RIS must also be accompanied by an assessment of whether or not a proposed regulation contains a restriction on competition. Part 14 of the Premier’s Guidelines sets out the requirements for this competition assessment.

The requirement to carry out an analysis of competition principles gives effect to an agreement reached between the Commonwealth, States and Territories in April 1995 to implement National Competition Policy. The overall aim of competition policy requirements is to improve economic

\textsuperscript{518} ibid. \textsuperscript{519} ibid.
efficiency and competitiveness and to discourage restrictions on competition where the benefit to the community cannot be demonstrated.

Where a proposed regulation does not contain a restriction on competition, the responsible Minister must certify that it does not contain a restriction and this certification should be accompanied by an analysis in accordance with step 1 contained in Attachment B to the Premier’s Guidelines.

Where a proposed regulation does restrict competition, the responsible Minister must certify that it restricts competition, that the objectives of the proposed regulation can only be achieved by restricting competition and the benefits of the restriction to the community outweigh the costs. This certification should be accompanied by an analysis carried out in accordance with steps 2 to 5 of Attachment B to the Premier’s Guidelines.

In the Regulation Review Subcommittee’s experience competition policy certificates are not always worded in accordance with the wording contained in the Premier’s Guidelines. Also, where a regulation does impose a restriction on competition, there appears to be some difficulty in analysing that regulation in accordance with the principles set out in Attachment B to the Premier’s Guidelines. For example, some competition policy analyses simply repeat verbatim the words of the RISs. It also appears to the Regulation Review Subcommittee that there is a lack of understanding of competition principles and how to adequately assess these principles. The Legal Adviser has also had to request department and agency officers to forward copies of the competition policy certificates and analyses to the Regulation Review Subcommittee.

The City of Yarra commented that there is a lack of understanding of competition principles and pointed out this problem is exacerbated by the lack of current guidelines (applying specifically to local government) being available from the Department of Infrastructure’s website –

We support that view and would point out that each year, the Chief Executive Officers of Councils are required to certify that their council has complied with the requirements of the Competition Principles Agreement. Despite this, and the release late in 2000 of “Competitive Neutrality – Guide to Implementation”, the specific requirements that apply to local government have not been updated, the DOI website indicating they are “currently being revised”. It is clearly unreasonable that council should be expected to certify compliance when the relevant guidelines are not available.520

The Committee considers that additional training should be provided to department and agency staff to enable them to obtain a greater understanding of how to carry out competition policy analyses.

Recommendation 52

The Committee recommends that –

(a) additional training be provided to department and agency staff on how to carry out competition policy analyses;

(b) it be made clear in the new comprehensive set of guidelines that department and agency staff must send competition policy analyses and certificates to the Regulation Review Subcommittee.

520 Mr. T. Brown, City of Yarra, Submission No. 15.
Miscellaneous Matters

Explanatory Memoranda

Explanatory Memoranda should provide a clear explanation of the extent and nature of changes brought about by a regulation. Part 8 of the Premier’s Guidelines provides that an Explanatory Memorandum should provide –

• A brief outline of each provision;
• An explanation of the changes effected by each provision;
• A statement of the reasons for making the rule;
• Where applicable, the reasons why no RIS was prepared;
• A statement as to whether consultation has taken place, and if it has not taken place, an explanation as to why a decision was made not to consult.

Explanatory Memoranda must be sent with proposed regulations to the Governor-in-Council. The Regulation Review Subcommittee also receives copies of Explanatory Memoranda. OCPC does not receive copies nor are they available to members of the public. Explanatory Memoranda are designed to provide a simple and clear explanation of regulations, which is crucial where regulations are particularly complex. OCPC commented –

The main purpose of explanatory memoranda is to assist the readers of the statutory rules. Despite the application of the plain English policy and the best intentions of the Departments and this office, statutory rules are often quite complicated documents. Members of the public who are not familiar with reading and interpreting legislation may find it easier if they had access to the accompanying explanatory memoranda.

The Regulation Review Subcommittee has found that the standard of many explanatory memoranda is not good and that they often repeat regulatory provisions verbatim rather than providing a clear explanation of what regulations are about. The Committee is concerned about the standard of explanatory memoranda currently produced. The Committee considers that a deficiency in the Victorian system is the lack of availability of explanatory memoranda to the general public and to OCPC. OCPC suggests that explanatory memoranda either be tabled in Parliament at the same time as regulations or alternatively that they be printed and published with regulations.

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522 Mr. E. Moran, OCPC, Submission No. 9.
523 ibid.
Recommendation 53

The Committee recommends that –

(a) strict requirements for explanatory memoranda be contained in the new comprehensive set of Guidelines;

(b) all departments and agencies be required to provide explanatory memoranda to the Office of Chief Parliamentary Counsel as well as the Regulation Review Subcommittee;

(c) explanatory memoranda be tabled in Parliament along with other relevant regulation materials; and

(d) explanatory memoranda be available on a centralised website dedicated to all types of legislation.

Certificates

The Committee notes that under the Subordinate Legislation Act 1994 (Vic) various certificates need to be prepared. The Committee notes that there is sometimes confusion amongst departments and agencies concerning which certificates should be forwarded to the Regulation Review Subcommittee. The Committee considers that given that the Regulation Review Subcommittee has the serious role of scrutinising regulations, it cannot perform that role effectively if it is not provided with copies of all certificates. The Committee also notes that when regulations are made on the basis of a recommendation or report etc, the Regulation Review Subcommittee needs to be provided with a copy of that recommendation or report etc. The Committee notes that there are many occasions when the Regulation Review Subcommittee has to chase up missing paperwork. The Committee considers that this is wasteful of Regulation Review Subcommittee time and resources. The Committee also notes that there is sometimes a failure to date certificates. The Committee emphasises the importance for all certificates to be signed and dated.

Recommendation 54

The Committee recommends that –

(a) all certificates (including recommendations for regulations to be made) be provided to the Regulation Review Subcommittee within 7 days of the relevant regulations being made; and

(b) it be compulsory for all certificates to be dated with the date of the day of signing.
References to the Subordinate Legislation Act 1962

The Committee notes evidence received from OCPC that there are still a number of references to the repealed *Subordinate Legislation Act 1962 (Vic)* on the statute book and these are listed in Appendix N of this Report.\(^{524}\) OCPC indicates that many of these references “require more than statute law revision because they involve matters of policy”. The Committee agrees with comments by OCPC that as these references involve policy issues they should be examined to make them relevant to the current *Subordinate Legislation Act 1994 (Vic)* or any amendments made to that Act as a consequence of this Inquiry.

**Recommendation 55**

The Committee recommends that a review be conducted of all references to the repealed *Subordinate Legislation Act 1962 (Vic)* with a view to making appropriate amendments.
Other Australian Jurisdictions
Commonwealth

Key Features of the Regulatory System

1. **Oversight of Regulatory Proposals**
   - Drafted and checked by Office of Legislative Drafting (OLD).
   - After enactment, reviewed by the Senate Committee on Regulations and Ordinances (SCRO).

2. **Public Notification**
   - Prior to enactment there are no legislative requirements for notification.
   - After enactment notice is placed in *Commonwealth Government Gazette*.

3. **Public Participation**
   - For regulatory proposals made with RISs, there are Cabinet requirements for consultation to take place.
   - For regulatory proposals made without RISs, there are no legislative or other requirements for consultation unless specifically provided for in empowering legislation. Where empowering legislation makes no provision, the consultation undertaken is at the discretion of departments and agencies.

4. **Regulation Impact Statements (RISs)**
   - RISs must be prepared where there is a direct or significant indirect impact on business or restriction on competition.
   - Requirements for RISs are contained in 1997 Cabinet Directive; no legislative requirement to prepare RISs.
   - Two RISs must be prepared; one prior to a policy decision on the necessity of regulating and a separate one for tabling.
5. **Oversight of RISs**
   - Agencies and departments must consult with the Office of Regulation Review (Commonwealth ORR) on the necessity of preparing and the adequacy of RISs.

6. **Tabling Requirements**
   - Most regulations and disallowable instruments must be tabled in both Houses within 15 sitting days of being made.

7. **Disallowance**
   - Any Senator or Member may give notice of disallowance within 15 sitting days of tabling.
   - SCRO may also recommend disallowance.
   - Where there is inaction on the disallowance motion, it is deemed to have been disallowed and the regulation ceases to operate.

8. **Sunsetting**
   - There is no automatic expiry of subordinate legislation in the Commonwealth.

9. **Publication**
   - Available in printed form from Government Information Shops and electronically on the Federal Legislative Instruments Database or SCALEplus.
   - Register of Quasi Regulations created and maintained by ORR, available on its website.

10. **Regulatory Performance Indicators**
    - Regulatory Performance Indicators (RPIs) are used to assess regulatory performance.
    - Only applies to agencies and departments with responsibility for regulating business.
    - Mostly based on self assessment, but RPIs dealing with RISs must be assessed by ORR.

11. **Regulatory Plans**
    - Applies to all departments and agencies with responsibility for regulating business.
    - Provides details of regulatory activities over last 12 months and future 12 months.
    - Plans must be posted on websites by August of each year and access is also provided through Office of Small Business.
    - Agencies and departments must modify plans as changes are made to regulatory proposals.
Introduction

Regulations are made by the Governor-General acting on the advice of the Federal Executive Council. Key legislation governing regulation-making processes in the Commonwealth includes the Acts Interpretation Act 1901 (Cth) and the Statutory Rules Publication Act 1903 (Cth).

Office of Legislative Drafting

The Office of Legislative Drafting (OLD) drafts most Commonwealth subordinate legislation, including regulations, amendments, rules of court and other legislative instruments. OLD is also responsible for the gazettal, tabling and publication of legislative instruments, including Acts. OLD publishes legislation in printed and electronic form. OLD advises departments and agencies about procedures and drafting and puts together the SCALEplus database.

Office of Regulation Review

The Commonwealth ORR is located in the Productivity Commission. ORR provides advice to departments and agencies on the necessity of preparing RISs and advice to the government on compliance by departments and agencies with the RIS process. Even though it is technically located within the Treasurer’s portfolio, the Commonwealth ORR discharges its role independently, providing departments and agencies with a critical review of the RIS work undertaken. The Commonwealth ORR’s role in the regulatory process is discussed below at pp. 128-132.

Regulation Reform Unit

The Regulation Reform Unit (RRU) is located in the Office of Small Business, Department of Industry, Tourism and Resources. RRU has responsibility for implementing and overseeing a number of government initiatives concerning small business which arose out of the Federal Government’s 1998 election platform, Small Business Agenda for the New Millenium. Some of these initiatives, such as regulatory indicators and annual regulatory plans, are discussed below at pp. 132-138.

Senate Committee on Regulations and Ordinances

SCRO was created in 1932 and is one of the oldest Senate Committees. SCRO consists of six senators, three from the government and three from the non-government parties.

Meeting Notes, Meeting with staff from the Commonwealth ORR, Canberra, 21 June 2000.

Previously the Office of Small Business was located in the Department of Employment Workplace Relations and Small Business.

Quasi Regulation

Quasi regulation refers to rules where the government influences compliance such as codes of practice, guidelines, rules of conduct, advisory notes. Quasi regulation can impose burdens similar to those imposed by ‘black letter law’, ie primary or subordinate legislation. Quasi regulation is used quite extensively in the Commonwealth and is often difficult to identify and monitor.\(^{528}\) As at the end of 2001, it appears that the use of quasi regulation in the Commonwealth is still widespread.\(^{529}\)

In 1996 the Small Business Deregulation Taskforce recommended that quasi regulation should be subject to the RIS process.\(^{530}\) An interdepartmental committee carried out a further investigation of quasi regulation on behalf of the Government and noted that quasi regulation is often used to avoid formal regulation-making processes.\(^{531}\)

In response the Government made it mandatory for quasi regulation to be subject to the RIS process.\(^{532}\) As with other regulations subject to the RIS process, government departments and agencies are required to report every six months to the Commonwealth ORR. The Commonwealth ORR believes that quasi regulation is currently being under reported, possibly because of confusion over the nature of quasi regulation.\(^{533}\) In 2000-2001 only 15 quasi regulations were reported to the Commonwealth ORR.\(^{534}\) The Commonwealth ORR has also found that there is no consistent approach taken to recording quasi regulation and this makes it difficult for the Commonwealth ORR to assess whether the RIS requirements have been met.\(^{535}\) To assist with monitoring quasi regulation, the Commonwealth ORR is developing a register of quasi regulation which is maintained at its website.\(^{536}\) There are no legislative requirements for agencies or departments to table or gazette quasi legislation. Some agencies and departments publish some quasi-legislation on their websites, but whether they do so is at their discretion.

Regulation-making Process

Regulation Impact Statements

All departments, agencies, statutory authorities and boards must prepare RISs for proposed new or amending regulations, reviews of existing regulations and proposed treaties involving regulations which have a direct or significant indirect impact on business or which restrict competition.\(^{537}\) Regulations include statutory rules approved by the Governor-General in Federal Executive Council, legislative instruments (disallowable and non-disallowable), international treaties and quasi regulations such as guidance notes, industry codes and

\(^{530}\) ibid.
\(^{531}\) ibid.
\(^{532}\) Interdepartmental Committee on Quasi Regulation, op. cit., p. xii.
\(^{534}\) Productivity Commission, op. cit., p. 53.
\(^{535}\) ibid, p. 55.
\(^{536}\) ibid.
\(^{537}\) <www.pc.gov.au>.
\(^{538}\) Commonwealth ORR, op. cit., p. A3.
industry-government agreements. In effect, all statutory rules, disallowable instruments and non disallowable instruments may be subject to the RIS process where there is an impact on business.

RISs are prepared because of a directive issued by Cabinet in 1997. The lack of legislative backing for the preparation of RISs has been criticised. The purpose of preparing a RIS is to ensure that all alternatives and their costs and benefits are considered and that the alternative chosen is the one that achieves the best impact. The Commonwealth ORR has produced a publication known as A Guide to Regulation which is based on the Cabinet directive and which contains mandatory procedures to be followed when preparing RISs –

A Guide to Regulation has been endorsed by the Commonwealth Government, and compliance with the outlined procedures and processes is mandatory for all Commonwealth departments, agencies, statutory authorities and boards making, reviewing and reforming regulations.

RISs must be prepared at two stages of the regulatory process. Initially a RIS is prepared after a decision has been made to make a regulation but before a policy decision has been made that a regulation is necessary. In this way agencies and departments can consider a range of options – regulatory and non-regulatory – and can achieve a better result –

If we get them to do this sort of analysis at an early stage then you get a better quality regulation. If you don’t get the right option you don’t get consultation on the right issues.

Ultimately this RIS proceeds to Cabinet where a decision is made whether to proceed. If a decision is made to proceed a second RIS is prepared for tabling in Parliament.

Agencies and departments must consult with the Commonwealth ORR as to the necessity of preparing RISs and after they have been prepared, the adequacy of RISs. The Commonwealth ORR makes all the decisions on whether RISs should be prepared or whether particular regulatory proposals should be exempt from the RIS process and this helps achieve consistency.

RISs must examine the impact of regulatory proposals on all sectors of the community, not just business. Once it has been determined that a RIS is necessary, agencies and departments must consult with all groups likely to be affected by the options under consideration –

Government policy is to ensure that those affected by proposed regulations are consulted at an early stage of the development of the regulation, with comments.

538 ibid.
539 Meeting Notes, Meeting with Professor Dennis Pearce, Mr S. Argument and Mr J. McMillan, Faculty of Law, Australian National University, 23 June 2000.
540 Statement by the Prime Minister, the Hon. John Howard MP, More Time for Business, Canberra quoted in the Productivity Commission, op. cit., p. xiv.
541 Commonwealth ORR, op. cit.
544 Meeting Notes, Meeting with ORR staff, Canberra, 21 June 2000.
received in response to consultation to be taken into account in determining the most appropriate regulatory option."\(^{546}\)

RISs must include details of the consultation undertaken.\(^{547}\) The Commonwealth ORR does not monitor the consultation process, however RISs are not approved where there has been inadequate consultation.\(^{548}\) Some agencies post submissions on their websites. The Commonwealth ORR staff are confident that consultation is carried out thoroughly and systematically in the Commonwealth.\(^{549}\)

Once consultation has been completed, a draft RIS is prepared for submission to the Commonwealth ORR. Rather than being seen as an independent monitor, the Commonwealth ORR is developing a process of working with and alongside agencies and departments in the development and finalisation of RISs.

The Commonwealth ORR provides training to department and agency staff on how to prepare good quality RISs. There is often a lack of consistency between departments and agencies in the way that RISs are prepared.\(^{550}\) This is because those who prepare RISs come from different backgrounds (such as lawyers, engineers, chemists, food nutritionists etc) and have very different styles and approaches. Most training is provided individually on the basis of specific RISs, however formal training programs are also conducted –

Training takes many forms, from providing advice over the phone, by email or at meetings, to formal training sessions. Manuals on RIS requirements are on the Commission’s website (www.pc.gov.au/orr) and are available in hard copy from the ORR.\(^{551}\)

The Commonwealth’s ORR has devoted a great deal of time and resources to working with agency and department staff to provide them with constructive feedback on RISs –

We train people on the basis of each RIS. We train individual officers to do it. We try to establish really good relationships with the departmental officers and we work really hard with them. We don’t send back a notice with a letter saying this is not adequate. We might send back 5 pages of matters they need to address and then we do the analysis with them. In that way we are training them up.\(^{552}\)

Use of consultants is another barrier to consistency and optimum outcomes. Agencies and departments need to be involved in the RIS process so that they understand the requirements and how the process works; use of consultants impedes this.

It is important for the Commonwealth ORR to be involved early in the development of the initial RIS so that a broad range of regulatory and non-regulatory options can be considered from the outset –

\(^{546}\) ibid, p. A8.
\(^{547}\) ibid, p. A6.
\(^{548}\) Meeting Notes, Meeting with ORR staff, Canberra, 21 June 2000.
\(^{549}\) ibid.
\(^{550}\) ibid.
\(^{551}\) ibid.
\(^{552}\) Meeting Notes, Meeting with ORR staff, Canberra, 21 June 2000.
I have a particular agency at the moment and the next step for me is to meet with them next week. What I am finding is that a technical group is coming up with options – but not a broad enough range of options. We sometimes have to add options that they have not considered. This makes it very difficult. We are pushing for an earlier introduction of the options and analysis.\footnote{ibid.}

Sometimes non-regulatory options provide a better solution for solving particular problems, but some agencies and departments prefer an interventionist approach and avoid consideration of non-regulatory alternatives –

\textit{What we are promoting here is the option that you regulate as the last resort. If you can fix a problem by leaving it to industry to sort out themselves then that is preferable to taking a heavy handed approach. We do run into resistance from those departments where the ethos is interventionist. We have a real philosophical problem when we are trying to deal with them. We get them to question their approach.}\footnote{ibid.}

The Commonwealth ORR’s review of RISs focuses on the issues sought to be resolved and whether the best option has been chosen to resolve those issues –

\textit{We are not policy police. We might pass a RIS which meets our requirements but we might dislike the policy.}\footnote{ibid.}

The Commonwealth ORR does not formally certify RISs but rather it enters into an ongoing exchange with departments and agencies until the required standard is met.

When a RIS is lodged with Cabinet it is accompanied by comments made by the Commonwealth ORR. Cabinet will not proceed unless there is a letter from the Commonwealth ORR indicating whether RISs are adequate. If a RIS fails to adequately review all the alternatives, the Commonwealth ORR will make that comment in the letter which goes to Cabinet.\footnote{ibid.}

Once Cabinet has made a decision, a second RIS is prepared for tabling in Parliament.\footnote{ibid.} Sometimes the RIS tabled in Parliament is identical to the RIS sent to Cabinet and sometimes a different RIS is prepared. Departments and agencies can table RISs and there will be no indication of their adequacy or whether any changes have been made or of the Commonwealth ORR’s views –

\textit{The problem we have is that when it comes to the tabling part, if a regulation has been gutted or has never reached an adequate stage in the first place the department can still put it in. There is nothing to say it is inadequate or that it has been changed.}\footnote{ibid.}

This means that RISs can be tabled and the presumption is that they have been passed by the Commonwealth ORR, when in fact that may not be the case at all. This is a weakness in the Commonwealth system.

\footnote{meeting notes, meeting with the commonwealth ORR staff, canberra, 21 June 2000.}
Departments and agencies are required to report every six months to the Commonwealth ORR so that the Commonwealth ORR can monitor and provide constructive feedback on the extent to which they are complying with RIS procedures. Where a regulation is made with an inadequate RIS, the regulation remains valid. The Assistant Treasurer may draw the inadequacy to the attention of the relevant Minister. The inadequacy will also be noted in the Productivity Commission’s Annual Report with the consequence that non-compliance by departments and agencies will become public knowledge.

In its Annual Report 2000-2001, the Productivity Commission indicates that while overall compliance with the RIS process is satisfactory, there is room for improvement –

While there has been an improvement over recent years in aggregate compliance with the Government’s RIS requirements, there are still some deficiencies including: a wide variation in compliance performance across agencies, relatively low compliance for significant regulatory proposals and a lack of timeliness in preparing RISs.

Exemptions from the RIS Process

The Commonwealth ORR provides advice to departments, agencies, statutory authorities and boards on whether RISs need to be prepared. RISs do not have to be prepared where regulations result from an election commitment and there is no alternative means of meeting that commitment and where regulations –

- Are not likely to have a direct or substantial indirect impact on business nor to restrict competition;
- Are of a minor machinery nature and do not substantially alter existing arrangements;
- Involve consideration of specific Government purchases;
- Are required in the interests of national security;
- Meet obligations of the Commonwealth under international agreements by repeating or adopting the terms of all or part of instruments for which those agreements provide;
- Are regulations of a state or self governing territory that apply in a non-self governing territory.

Notification and Participation

There are no legislative requirements to provide notice of or advertise regulatory proposals or call for public comments prior to enactment. For regulatory proposals made with RISs there

Productivity Commission, op. cit., p. 43.
ibid.
are Cabinet requirements that consultation take place with those affected at an early stage in the development of regulations. For all other regulatory proposals there may be specific requirements for notification and consultation in empowering legislation, if not, consultation is at the discretion of departments and agencies.

Once regulations have been made, notice must be placed in the *Commonwealth Government Gazette* which is published weekly by the Department of Finance and Administration. Regulations commence operation on the date of notification, unless another date is specified and may not commence prior to notice being placed in the *Commonwealth Government Gazette*. Additional requirements are contained in the *Statutory Rules Publication Act 1903* (Cth), which applies to regulations, by-laws and rules made by the Governor-General, a Minister or Department. Notice in the *Commonwealth Government Gazette* must include details of where copies may be obtained and those copies must be available either at the time the Notice is published or as soon as practicable thereafter. These requirements also apply to disallowable instruments.

**Tabling Requirements**

Most regulations and disallowable instruments must be tabled in both Houses of Parliament within 15 sitting days of being made. Some instruments must be tabled within a shorter period of time.

Regulations and instruments not tabled on time cease to have effect from the last day on which they could have been tabled. Instruments and regulations which have ceased because of failure to meet tabling requirements cannot be remade within 7 days after the last day on which they could have been tabled. SCRO notes on its website that late tabling of instruments in the Senate is often a problem because of the large number of sitting days, which means that departments and agencies have to be more efficient and vigilant in ensuring that instruments are tabled on time.

Statutory Rules, ordinances and regulations are automatically gazetted by OLD within 5 working days after they are made and are also automatically tabled by OLD. Explanatory statements and RISs are tabled with these legislative instruments. Agencies and departments are responsible for gazettal and tabling of all other disallowable instruments, although they may seek OLD’s assistance with this.

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564 See discussion at pp. 149-150.
565 *Acts Interpretation Act 1901* (Cth), s. 48(1).
566 ibid, s. 48(2).
567 *ibid*, s. 48(2).
568 *Statutory Rules Publication Act 1903* (Cth), s. 5(3) and (3A).
569 *Acts Interpretation Act 1901* (Cth), s. 46A(1)(c).
570 ibid, s. 48(1).
571 ibid, s. 48(3).
572 ibid, s. 48A.
Parliamentary Oversight

Regulations and disallowable instruments (such as determinations, rules, notices, orders, guidelines and other similar instruments) are subject to Parliamentary scrutiny. SCRO’s scrutiny power only arises after regulations and disallowable instruments have been made and tabled in Parliament. Senate Standing Order 23 gives SCRO power to review all regulations, ordinances and other instruments which are subject to disallowance by the Senate and which are legislative in character. SCRO examines these legislative instruments to ensure that rights and freedoms are protected and more specifically that they –

- Are made in accordance with the authorising Statute;
- Do not trespass unduly on personal rights and liberties;
- Do 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
- Do not contain matters more appropriate for Parliamentary enactment.

SCRO does not examine policy issues, but focuses solely on the technical criteria specified in the Standing Order. SCRO does not review RISs nor the consultation undertaken but it uses RISs to enhance its understanding of regulatory proposals under review by it. SCRO considers approximately 1800 disallowable instruments each year.

The Standing Orders give SCRO the power to summon witnesses to give evidence and to call for submissions, although this power is not used very often. SCRO’s ultimate power lies in its ability to recommend disallowance of regulations and this is discussed in more detail immediately below.

SCRO produces the following publications –

- An Annual Report on its work;
- The Delegated Legislation Monitor which provides details of all disallowable instruments tabled in Parliament; and
- A Disallowance Alert which provides current information on the status of notices of motion to disallow delegated legislation.

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573 Acts Interpretation Act 1901 (Cth).
574 Commonwealth Parliament, Senate, Standing Order 23(3).
575 Meeting Notes, Meeting with staff and members of SCRO, Canberra, 21 June 2000.
576 ibid.
577 Commonwealth Parliament, Senate, Standing Order 23(5).
Disallowance

Any Senator or Member of the House of Representatives may give notice of a motion to disallow a regulation within 15 sitting days after it has been tabled.\(^{578}\) The time for giving notice of disallowance is less for some instruments; for example, notice of disallowance for amendments to the National Capital Plan must be given within 6 sitting days.\(^{579}\) In its *Annual Report 1999-2000*, SCRO notes that in practice it is rare for a member of the House of Representatives to seek disallowance.\(^{580}\)

Where SCRO believes a regulation should be disallowed it will report to the Senate, recommending disallowance. In these circumstances one of SCRO’s members moves the disallowance motion. SCRO tries to resolve any issues with Ministers and it is rare for it to recommend disallowance.\(^{581}\) While the power to disallow rests with the Senate itself, the Senate has always accepted the disallowance recommendations of SCRO.\(^{582}\) During the period 1999-2000, SCRO scrutinised 1655 instruments and raised concerns about 265. Of those 265, SCRO issued notices of disallowance for 70 and after resolution, 68 of those notices were withdrawn; one was transferred to another Senator and the other remained unresolved.\(^{583}\)

Once the Notice has been given it must be resolved or withdrawn within 15 sitting days. Where the motion is debated and the instrument is disallowed, it ceases to have effect from the date of disallowance.\(^{584}\) If there is inaction, the regulation will be deemed to have been disallowed and ceases to have effect.\(^{585}\) A motion may be withdrawn by the relevant Senator or Member of the House of Representatives, however notice must be given of this and if there is an objection by another Senator or Member it can be transferred to their name. Regulations which are disallowed are in effect repealed and if the disallowed regulations repealed earlier regulations, then after disallowance those earlier regulations will be revived.

Where an instrument is disallowed or deemed to have been disallowed, an instrument which is the same in substance may not be made within 6 months of the date of disallowance unless the relevant House agrees to rescind the resolution of disallowance or in the case of deemed disallowance where the relevant House approves the making of such an instrument.\(^{586}\)

Sunsetting

There is no automatic expiry of subordinate legislation in the Commonwealth. One of the changes that was to be introduced by the Legislative Instruments Bill 1996 [No. 2] (Cth) was automatic expiry of legislative instruments at the end of five years. However there is a great

\(^{578}\) *Acts Interpretation Act 1901* (Cth), s. 48(4).
\(^{580}\) ibid, p. 2.
\(^{581}\) ibid, p. 5.
\(^{584}\) *Acts Interpretation Act 1901* (Cth), s. 48(4).
\(^{585}\) ibid, s. 48(5)
\(^{586}\) ibid, s. 49.
deal of opposition to automatic expiry from the Australian Public Service. One of the amendments made by the Senate to the Legislative Instruments Bill 1996 [No. 2] (Cth) was to replace automatic expiry with annual reports to Parliament by individual Ministers outlining review of subordinate legislation. However, these amendments were rejected by the House.

## Access to Legislation

The **Federal Legislative Instruments Database** (FLID) has been set up by OLD on the Attorney-General’s website and may be accessed from - <http://frli.law.gov.au/>. FLID was set up as a precursor to the proposed **Federal Register of Legislative Instruments** to be established under the Legislative Instruments Bill 1996 [No. 2] (Cth). FLID is for information purposes and provides access to various legislative instruments. The information is updated daily. FLID provides quick access to the most recently added instruments. The majority of instruments accessible on the database are regulations. Regulations made by the Executive Council are added on the date of gazettal. FLID also includes *Family Court Rules 1984; Australian Industrial Relations Commission Rules 1998; Aged Care Principles; Quarantine Proclamation 1998* and amendments; *Export Control Orders* and a range of *Native Title Determinations*.

Other instruments are posted on the SCALEplus website.

After they have been notified in the **Commonwealth Government Gazette**, copies of regulations may be obtained in printed form from Commonwealth Government Information Shops. Electronic copies of regulations are available from the NUMRUL database in SCALEplus or FLID website. Consolidated versions of Regulations may be obtained electronically from the PASTEREG database in SCALEplus.

## Regulatory Performance Indicators

In March 1997 the Prime Minister announced a policy for reform of the small business sector aimed at reducing the paperwork burden and compliance costs for business. These policy initiatives included monitoring regulatory performance by departments and agencies through the development of regulatory performance indicators (RPIs). RRU worked with departments and agencies to develop nine RPIs which include –

- Proportion of regulations for which the RIS adequately addressed the net benefit to the community.
- Proportion of regulations for which the RIS adequately justified the compliance burden on business.

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587 Meeting Notes, Meeting with Professor Dennis Pearce, Mr S. Argument and Mr J. McMillan, Faculty of Law, Australian National University, 23 June 2000 and B. Bennett, Legislative Instruments Bill 1996 [No. 2], Bills Digest Services, 5 March 1998, p. 15.
588 B. Bennett, Legislative Instruments Bill 1996 [No. 2], Bills Digest Services, 5 March 1998, p. 15.
• Proportion of regulations which provide business and stakeholders with some appropriate flexibility to determine the most cost-effective means of achieving regulatory objectives.

• Proportion of cases in which external review of decisions led to a decision being reversed or overturned.

• Proportion of regulatory agencies that have mechanisms for internal review of decisions which meet standards for complaints handling outlined in *Principles for Developing a Service Charter*, published by the Department of Finance and Administration.

• Proportion of regulatory agencies having communications strategies for regulations or formal consultative channels for communicating information about regulations.

• Proportion of regulatory agencies publishing an adequate forward plan for the introduction and review of regulations.

• Proportion of regulations for which the RIS included an adequate statement of consultation.

• Proportion of regulatory agencies with organisational guidelines outlining consultation processes, procedures and standards.

All departments and agencies with responsibility for regulating business must monitor their performance against the RPIs for all regulations made with RISs. The Office of Small Business is responsible for producing the *Annual Review of Small Business* (the Annual Review) which discusses agency and department performance in relation to the RPIs based on information obtained from the Commonwealth ORR, departments and agencies. While most of the information contained in the *Annual Review* is based on self assessment by the agencies and departments of their performance against the RPIs, RPIs dealing with RIS compliance are assessed by the Commonwealth ORR. The first *Annual Review* was produced for the financial year 1 July 1998 to 30 June 1999. The *Annual Review* reveals how departments and agencies are performing in relation to regulatory work and is expected to provide incentive for agencies and departments to improve their performance –

*We would expect that once people have the opportunity to see how they compare with other agencies, there should be some improvement in the level of performance. It is very public and very visible – not only to the public but to the bureaucracy and the Parliament. We expect that there will be greater attention paid so that you don’t draw negative attention to poor performance against the indicators.*

### Regulatory Plans

The Government’s 1998 small business election policy, *A Small Business Agenda for the New Millennium*, included a requirement that all departments and agencies responsible for business

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regulations publish annual regulatory plans making it easier for individuals and organisations to find out about changes to regulations and to participate in the regulation-making process. Plans include information on what regulatory activities have been undertaken by departments and agencies over the previous 12 months and what is intended over the next 12 months, including a description of the issue, consultation opportunities and a proposed timetable. Departments and agencies are required to post their plans on their websites by August of each year and the Office of Small Business provides easy access to these plans through its website. Where there are any changes to proposed activities, agencies and departments are expected to modify the plans on their website.

**Legislative Instruments Bill**

The Legislative Instruments Bill 1996 [No. 2] (Cth) (1996 No. 2 Bill) provided for significant reforms to be made to the Commonwealth regulation-making processes. The 1996 No. 2 Bill has a long legislative history reflecting the seriousness of the proposed reforms and “a degree of bureaucratic trepidation”. A similar bill, the Legislative Instruments Bill 1994 (Cth) (the 1994 Bill), was first introduced by the ALP in 1994 in response to a 1992 report prepared by the Administrative Review Council (the ARC), *Rule Making by Commonwealth Agencies*. In that Report the ARC recognised the significant impact of subordinate legislation on all sectors of the community and recommended various reforms to the Commonwealth regulation-making process in order to apply consistent and standard procedures to that process for all types of legislative instruments. Some of the ARC’s recommendations included –

- The creation of a single piece of legislation dealing with making, publication and scrutiny of all legislative instruments;
- A reduction in the different types of instruments;
- Mandatory consultation for all legislative instruments;
- All legislative instruments to be subject to scrutiny and disallowance;
- Creation of a public register for all legislative instruments so that they are more easily accessible by members of the public;
- All legislative instruments to be subject to a 10 year sunsetting clause.

The 1994 Bill was made in response to the ARC’s report. The 1994 Bill was referred to SCRO which, after reviewing the Bill, indicated it supported the general approach but with
On 9 November 1994, the 1994 Bill was given a second reading but debate was deferred and the Attorney-General asked the House of Representatives Standing Committee on Legal and Constitutional Affairs (LCA) to report on it. In 1995, LCA responded indicating that it approved the 1994 Bill but suggested some major changes including mandatory consultation for, and sunsetting of, all legislative instruments. The Government did not deliver a response until 25 September 1995. The 1996 election was called before the 1994 Bill could be passed.

After the coalition was elected it confirmed its commitment to reforming regulation-making processes and introduced the Legislative Instruments Bill 1996 (Cth) (the 1996 Bill) on 26 June 1996. The 1996 Bill incorporated many of the changes recommended by the Senate Committee Report (1994) and the Legal and Constitutional Committee Report (1995) as well as amendments which had been agreed by both Houses. The 1996 Bill placed a greater emphasis on business with the requirement for consultation to apply to “legislative instruments likely to have a direct, or a substantial indirect, effect on business”. Unfortunately the Bill was never enacted. While it was passed by the House of Representatives on 11 September 1996, it was only passed in the Senate after a number of amendments. The House of Representatives (the government) did not accept many of the amendments as they were seen as substantially weakening the impact of the legislation by, for example, removing sunsetting requirements and restricting consultation requirements. As agreement could not be reached between the House of Representatives and the Senate, the 1996 Bill was finally put aside on 5 December 1997.

On 5th March 1998, a further attempt was made to introduce regulatory reforms with the introduction of the Legislative Instruments Bill 1996 [No. 2] (Cth), which was in the same form as the first 1996 Bill. Key features of the 1996 No. 2 Bill included –

- A broader definition of legislative instruments to include instruments which are “legislative in character” and “made in the exercise of a power delegated by the Parliament”. Legislative character is explained by sub-clause 5(2) to include instruments which determine or alter the content of the law and which have a direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right or varying or removing an obligation or right. In effect it extends the application of publication, registration, scrutiny and consultation provisions to all instruments which are legislative in character.

- A register of all legislative instruments (existing and future) with the ability for people to access instruments electronically and with failure to register resulting in

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605 B. Bennett, Legislative Instruments Bill 1996 [No. 2] (Cth), Bills Digest Services, 5 March 1998, p. 15.

606 Legislative Instruments Bill 1996 [No. 2] (Cth), clause 17.


609 Legislative Instruments Bill 1996 [No. 2] (Cth), clause 35.
inability to enforce the particular legislative instrument. The Attorney-General commented that inability to enforce unregistered legislative instruments would ensure that “no more important documents, retained in bottom drawers of public servants without publicity, can be used against unsuspecting citizens”.

- Mandatory consultation and procedures for legislative instruments which affect business and encouragement of consultation for all other legislative instruments. Where business is affected, a Legislative Instrument Proposal, setting out the reasons for the regulatory proposal, the costs and benefits and alternatives, must be prepared and made available. Also, mandatory public notification by advertising in one or more newspapers circulating in each State.

- Sunsetting (automatic repeal) of legislative instruments after 5 years of operation, so that unnecessary and out of date legislation is removed. An extension of time may be obtained in certain circumstances where the legislative instrument cannot be remade by its expiry date.

- Legislative instruments to be tabled in Parliament within 6 sitting days rather than the current 15 sitting days. As with the current Commonwealth legislation, failure to table would result in the legislative instrument ceasing to have effect.

- Deferral of consideration of a disallowance motion for a period up to six months to enable amendment or remaking.

- Documents incorporated by reference to be tabled at the same time as the legislative instrument and while the legislative instrument is subject to disallowance, incorporated documents to be available for inspection by the House.

- Principal Legislative Counsel to be responsible for ensuring that legislative instruments are of a high standard, that is legally effective, clear and easily understandable. To fulfil this role OLD may become involved in drafting or supervising the drafting of legislative instruments, carefully examine preliminary drafts or provide training to department and agency staff.

Again the 1996 No. 2 Bill was subject to a number of amendments in the Senate which were unacceptable to the Government and unfortunately its enactment never proceeded.

Once again the recently re-elected coalition government has confirmed its commitment to improving the regulatory system. The Attorney-General recently stated –

610 ibid, clauses 55 and 56.
612 Legislative Instruments Bill 1996 [No. 2] (Cth), Part 3.
613 ibid, clause 21.
614 ibid, clause 24.
615 ibid, Part 6.
616 ibid, clause 58.
617 ibid, clause 58.
618 ibid, clause 61.
619 ibid, clause 59.
620 ibid, clause 60.
621 ibid, Part 2.
As you are aware, the LIB has had a somewhat tortured history, and has occupied quite a lot of Parliamentary time over the past seven years. Nonetheless, I am still convinced that it would be a valuable reform that would increase the accountability of the Executive and provide for more effective Parliamentary scrutiny of the Executive.622

Over the past few months, the Civil Justice Division in the Attorney-General’s department has been working on improvements to the 1996 No. 2 Bill and making the processes “more streamlined and less prescriptive”.623 A draft of the Bill has been sent to Commonwealth Government Departments for comment but is not publicly available.624

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622 D. Williams, Attorney-General, Portfolio Priorities in the Howard Government’s Third Term, Address to Senior Officers of the Attorney-General’s Department, Robert Garran Offices, Canberra, 5 February 2002.

623 ibid.

624 Telephone Discussion, Friday 8 March 2002 between Ms J. Baker, Legal Adviser, Regulation Review Subcommittee and Ms. J. Selward, Senior Legal Officer, Civil Justice Division, Attorney-General’s Department.
Key Features of the Regulatory System

1. Oversight of Regulatory Proposals
   - Drafted and checked by Parliamentary Counsel’s Office (PCO).
   - After enactment, reviewed by the Standing Committee on Legal Affairs (CLA).

2. Public Notification
   - Prior to enactment, there are no legislative requirement for public notification of regulatory proposals.
   - After enactment, notification occurs electronically in the ACT Register or where not practicable in the ACT Government Gazette.

3. Public Participation
   - There are no legislative requirements for public participation.
   - Cabinet requires some consultation to be undertaken and details of that consultation must be provided in Cabinet Submissions.

4. Regulation Impact Statements (RISs)
   - RISs must be prepared where appreciable costs will be imposed on the community or a part of the community.
   - Requirements for RISs contained in the ACT Cabinet Handbook and the Legislation Act 2001 (ACT).
   - RISs are not public documents because they form part of Cabinet Submissions.

5. Oversight of RISs
   - While not compulsory, departments and agencies are supposed to seek advice early in the development of regulatory proposals from the Microeconomic Reform Division (MRD) in the Department of Treasury and where there is an impact on business, from the Business Support and Employment Unit in the Chief Minister’s Office.
   - MRD reviews RIS as part of the Cabinet Submission process, but has no power to force changes.
   - Final decision whether to proceed rests with Cabinet.
6. **Tabling Requirements**
   - Subordinate legislation and disallowable instruments must be tabled within 6 sitting days after notification.

7. **Disallowance**
   - Notice may be given by any Member of the Legislative Assembly within 6 sitting days of tabling.
   - Automatically deemed to be disallowed if motion has not been dealt with within 6 sitting days of notice.
   - CLA may recommend disallowance and must do so within 6 sitting days of tabling.

8. **Sunsetting**
   - No sunsetting requirements.
   - Subordinate legislation which restricts competition must be reviewed at least every 10 years under the Competition Policy Agreement agreed to by all Australian governments in 1995.

9. **Publication**
   - Available in printed form and electronically.
   - Authorised legislation may be obtained electronically through the *ACT Register*.

10. **Regulatory Plans**
    - Details of agency and department plans for regulations which impact on business for the year ahead and achievements against the previous year’s plans are available annually in a publication produced by MRD entitled *Agency Regulatory Plans*.
    - No ability to update regulatory plans throughout the year.

**Introduction**

Prior to the *Legislation Act 2001* (ACT), procedural laws for making legislation were scattered throughout various legislative provisions and were difficult to find and use.\(^\text{625}\) The *Legislation Act 2001* (ACT) brings together various procedures such as notification, commencement, publication, disallowance, amendment and repeal into one Act. The key terms under the *Legislation Act 2001* (ACT) are ‘subordinate law’ and ‘disallowable instrument’. A subordinate law includes regulations, rules and by-laws (whether or not

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\(^\text{625}\) ACT Government, Legislative Assembly, *Debates*, 30 November 2000, p. 3475. **Note:** On 1 March 2001 the name of the *Legislation (Access and Operation) Bill 2000* (ACT) was changed to the *Legislation Bill 2001* (ACT) and on that same day it was passed.
legislative) and a disallowable instrument is a statutory instrument (whether or not legislative) that is declared to be a disallowable instrument.

Unlike other Australian jurisdictions, statutory instruments are made by the Executive, allowing any two Ministers who are members of the Executive to sign and make them.

Parliamentary Counsel’s Office

Parliamentary Counsel’s Office (PCO) drafts bills, subordinate legislation, amendments, rules of the Supreme Court and provides advice on policy, legal and constitutional implications for legislative proposals. Most of the subordinate legislation drafted by PCO consists of regulations. PCO reviews subordinate legislation to ensure that:

- It is clear and simple;
- It gives effect to the intended policy;
- It is consistent with other ACT laws;
- It is in a form which makes compliance easy.

PCO is also responsible for making legislation available in printed form and electronically and this is discussed below at pp. 151-152.

Standing Committee on Legal Affairs

Bills and subordinate legislation were originally scrutinised by the Standing Committee on the Scrutiny of Bills and Subordinate Legislation. However, after the 1998 ACT election, responsibility for examining bills and subordinate legislation was given to the Standing Committee on Justice and Community Safety (JCS) which also examined matters such as the administration of justice, legal policy and services, consumer affairs, fair trading, police services etc.

After a general election on 20 October 2001, scrutiny of bills and legislative instruments was vested in a new Committee, the Standing Committee on Legal Affairs (CLA). In addition to scrutinising bills and legislative instruments, CLA also examines, for example, matters concerning the community and individual rights, consumer rights, courts, police, emergency services, industrial relations, administrative law, civil liberties and human rights, criminal law etc. This is fairly similar to its predecessor, JCS.

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626 *Legislation Act 2001* (ACT), s. 8. Section 8 overcomes a difficulty experienced by the courts in distinguishing between ‘legislative’ and ‘administrative’ and in particular the time at which an ‘administrative’ instrument becomes ‘legislative’ and the reverse.

627 *Legislation Act 2001* (ACT), s. 9.

628 *Legislation Act 2001* (ACT), s. 41. In other Australian jurisdictions statutory rules (or regulations) are made by the Governor-in-Council or Governor-General-in-Council.


630 ibid.


CLA consists of three Members of Parliament representing all political parties. CLA’s role in reviewing legislative instruments is discussed below at pp. 149-150.

**Regulation-making Process**

**Regulation Impact Statements**

The requirements for subordinate legislation and disallowable instruments to be made with Regulation Impact Statements (RISs) are contained in the *Cabinet Handbook* and the *Legislation Act 2001 (ACT)*. MRD within the Economic Management Branch in the Department of Treasury has produced a Guide which agencies and departments are expected to use when preparing RISs. When the Committee met with staff of MRD in June 2000, the requirement to prepare RISs was a Cabinet requirement only, whereas with the enactment of the *Legislation Act 2001 (ACT)* RISs now have legislative backing.

RISs must be prepared where subordinate legislation or disallowable instruments are likely to impose appreciable costs on the community or a part of the community. The Chief Minister, who is responsible for administering the *Legislation Act 2001 (ACT)* may issue guidelines on ‘appreciable costs’ but must do so within 6 months of the commencement of the Act. As yet no guidelines have been issued. In a recent report, the CLA has indicated that the obligations to prepare RISs “arise whether or not guidelines have been made”.

RISs must include an explanation of how the policy objectives of the regulatory proposal will be achieved; an assessment of the costs and benefits; a comparison of the costs and benefits of any reasonable alternatives and an assessment of compliance with scrutiny committee principles. RISs must also consider the impact on business activity and development and on the environment. The *Cabinet Handbook* makes clear that regulatory action should only be considered where all other alternatives have been demonstrated to be “inefficient and/or ineffective”.

RISs in the ACT are not public documents but are instead part of a Cabinet Submission (which is strictly confidential) and this means that they do not play a role in the public consultation process.

**RIS Oversight Prior to Enactment**

Agencies and departments are advised to consult with MRD during the early stages of the RIS process “to ensure that appropriate steps are undertaken and all options are considered”.

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635 *Legislation Act 2001 (ACT)*, s. 34(1).
636 *Legislation Act 2001 (ACT)*, s. 33.
638 *Legislation Act 2001 (ACT)*, s. 35.
640 ibid, p. 44.
641 MRD, op. cit., p. 5.
Where regulatory proposals impact or potentially impact on business, advice should be sought from the Business Support and Employment Unit in the Chief Minister’s Department. 642

MRD assesses all RISs before they proceed to Cabinet as part of the Final Cabinet Submission. Where there is non-compliance with the principles contained in the Guide to Regulation in the ACT, 643 MRD sends it back to the departments and agencies to make appropriate changes. However MRD does not have authority to force agencies and departments to make changes. Where agencies and departments refuse to make requested changes, the final decision as to whether to proceed is made by Cabinet.

When the Committee met with staff at MRD in June 2000, there was not much support for creating an independent agency with responsibility for oversight of RISs –

*The aim of a RIS is to ensure a level of information and integrity in the submissions which go forward to empower Cabinet to make rational decisions. It seems that if we go down the step of making things mandatory we start to treat the RIS as the objective in itself. It is not – it should be a tool for Government to make better decisions and that’s all. At the end of the day Government is responsible for making decisions. If they want to accept a RIS or not – that is the Government’s right. At the end of the day it is the Government that has to make the right decision.* 644

**Exemptions from the RIS Process**

RISs need not be prepared where regulatory proposals provide for – 645

- Matters which are not legislative in nature such as machinery, administrative or drafting matters;
- Matters which do not disadvantage anyone by adversely affecting a person’s rights or by imposing liabilities;
- Legislative amendments to take account of current legislative drafting practices;
- Commencement of an act or statutory instrument;
- Amendments which do not fundamentally affect the law’s operation;
- Transitional matters;
- Uniform or complementary legislation;
- Matters involving the adoption of Australian or international protocols, standards, codes or inter-governmental agreements where an assessment of the costs and benefits has already been made;
- Proposals to make, amend or repeal rules of court;

643 MRD, op. cit.
644 *Meeting Notes*, Meeting with staff of MRD, Canberra, 23 June 2000.
645 *Legislation Act 2001* (ACT), s. 36.
• Matters in which advance notice would result in someone gaining an unfair advantage;
• An amendment of a fee, charge or tax consistent with announced government policy.

In addition, RISs are not required where it is against the public interest because of the nature of the regulatory proposal.\textsuperscript{646} For example, a law may need to be made urgently to deal with the control of terrorists.

### Notification and Participation

There are no legislative requirements to provide notice of or advertise regulatory proposals or call for public comments prior to enactment. The only requirements for consultation are those contained in the Cabinet Handbook and those suggested by MRD in its Guide.\textsuperscript{647} All Cabinet Submissions are required to provide details of consultation undertaken and to adequately address the views and likely reaction of “stakeholders outside Government, especially where these views are strategically important”.\textsuperscript{648} In developing regulatory proposals, the Cabinet Handbook makes clear that some form of consultation must take place to ensure that “all relevant factors are taken into account”.\textsuperscript{649}

During the early stages of development of regulatory proposals, consultation is likely to be more informal such as discussions, correspondence, electronic mail. Departments and agencies may advertise regulatory proposals and call for public comments, however whether they do so is entirely up to them. Discussions should take place within government and with external organisations.

Subsequently more formal consultation takes place. At this stage policy papers are circulated to other agencies and departments. Formal consultation may also take place with external stakeholders. The final Cabinet Submission must list all external organisations consulted, indicate whether or not they agree to the regulatory proposal and whether there are any unresolved issues.\textsuperscript{650} The Cabinet Submission itself is a strictly confidential document and may not be released or circulated to external organisations to generate discussion or to obtain feedback. Instead, external organisations are briefed on particular issues or policy options and separate discussion papers may be prepared to assist in this process.

Once statutory instruments have been made, the maker must ask PCO to notify the making of the instrument.\textsuperscript{651} Last year the ACT introduced new requirements and instead of notification in the ACT Government Gazette, notification occurs electronically in the ACT Register unless this is not practicable. Notification includes a statement that the statutory instrument has been made and the entire text of the instrument.\textsuperscript{652} Where notification is made in the ACT Government Gazette, copies of the instrument must be available for purchase on the day of

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\textsuperscript{646} Legislation Act 2001 (ACT), s. 36(2).
\textsuperscript{647} MRD, op. cit.
\textsuperscript{649} ibid, p. 40.
\textsuperscript{650} ibid, p. 43.
\textsuperscript{651} Legislation Act 2001 (ACT), s. 61(1).
\textsuperscript{652} ibid, s. 61(2).
publication or as soon as practicable after that date.\footnote{ibid, s. 61(6).} Failure to notify statutory instruments results in them being unenforceable.\footnote{ibid, s. 62.}

Statutory instruments commence operation on the day of notification unless another date is specifically provided for in the legislation itself.\footnote{ibid, s. 62.} Statutory instruments which are not registrable generally commence operation on the day they are made.\footnote{ibid, s. 73(4).}

**Tabling Requirements**

All subordinate legislation and disallowable instruments must be tabled in the Legislative Assembly within 6 sitting days after notification.\footnote{ibid, s. 64(1).} Failure to table subordinate legislation and disallowable instruments results in automatic expiry.\footnote{ibid, s. 64(2).} RISs must be tabled in the Legislative Assembly at the same time as subordinate legislation or disallowable instruments.\footnote{ibid, s. 37.} However, in contrast to the tabling of instruments, failure to comply with the RIS tabling requirements or any of the other RIS requirements does not affect the validity of the instrument and it continues to operate.\footnote{ibid, s. 38.} The tabling of regulations, by-laws and rules is an important requirement because it gives Parliament the power of review.\footnote{Professor D. Pearce & S. Argument, op. cit., p. 58.}

**Parliamentary Oversight**

As with the other scrutiny committees, CLA does not comment on matters involving government policy – its review focuses on the technical criteria contained in the Resolution of the ACT Legislative Assembly on 11 December 2001. More specifically, CLA considers whether legislative instruments –

- Are consistent with the general objects of their authorising Acts;
- Unduly trespass on rights previously established by law;
- Make rights and liberties or obligations unduly dependent upon non-reviewable decisions;
- Contain matters which should have been contained in Acts.

CLA also considers whether explanatory memoranda and RISs meet the technical or stylistic standards expected by the Committee.\footnote{ACT Government, Legislative Assembly, \textit{Resolution}, 11 December 2001.} The requirement to examine RISs and explanatory memoranda is new. In a recent report the CLA expressed concern about the lack of information provided to it concerning the reasons for not preparing RISs –
In no instance is there any indication in the relevant Explanatory Memorandum as to whether consideration was given to the need to comply with the provisions of the Act concerning preparation of an RIS. This would involve consideration of whether an obligation arose, including, where relevant, reference to any exemption, or to any reason why an exception applies.\textsuperscript{664}

The CLA has indicated that in future it expects explanatory memoranda to discuss these issues.

Since being formed on 11 December 2001, the CLA has already produced five reports which contain details of its review of bills, subordinate legislation and disallowable instruments. These reports are available to the public from the ACT Parliament website.\textsuperscript{665} In addition to expressing concern about the lack of explanation for the failure to prepare RISs, some of the other issues which the CLA has raised are – the failure of explanatory memoranda to provide details of consultation undertaken; the failure of explanatory memoranda to adequately identify the instruments they relate to; the failure to provide explanatory memoranda at all etc.

CLA may report to the Legislative Assembly making any recommendations its members consider appropriate, including a recommendation that a legislative instrument be disallowed on the basis that there has been non-compliance with any of the scrutiny principles. As the CLA was only recently formed it has not yet had the opportunity to recommend disallowance of any subordinate legislation or disallowable instruments.

### Disallowance

Any member of the Legislative Assembly may give notice of a disallowance motion but must do so within 6 sitting days of the tabling of the subordinate legislation or disallowable instrument.\textsuperscript{666} Where the Legislative Assembly passes a disallowance resolution, the instrument will be disallowed on the day disallowance is notified unless the resolution provides that it is to cease operation on the day the resolution is passed.\textsuperscript{667}

A disallowance motion is automatically deemed to have been passed at the end of 6 sitting days after the notice has been given, if the notice has not been withdrawn and the motion has not been called on or the motion has been called but has not been withdrawn or disposed of.\textsuperscript{668} In effect, the disallowance automatically operates unless it is dealt with by the Legislative Assembly.

Notification of disallowance must be made by PCO in the ACT Register or, if this is not practicable, in the ACT Government Gazette.\textsuperscript{669} Once subordinate legislation has been disallowed it cannot be remade in similar substance for 6 months unless the Legislative Assembly has rescinded the resolution or has passed a resolution allowing the remaking of similar legislation.\textsuperscript{670}

\textsuperscript{664} CLA, Scrutiny Report No. 2, 19 February 2002, p. 27.
\textsuperscript{666} Legislation Act 2001 (ACT), s. 65(1).
\textsuperscript{667} ibid, s. 65(2).
\textsuperscript{668} ibid, s. 65(3).
\textsuperscript{669} ibid, s. 65A.
\textsuperscript{670} ibid, s. 66.
**Sunsetting**

There are no specific requirements for subordinate legislation or disallowable instruments to cease operation after the expiration of a specified period of time. Unless amended or repealed by new legislation, these legislative instruments continue to operate. However, for subordinate legislation or disallowable interests which restrict competition, there are requirements under the Competition Policy Agreement for that legislation to be reviewed at least once every 10 years.\(^\text{671}\)

**Access to Legislation**

The *ACT Register* commenced operation on 12 September 2001 and is compiled and maintained by PCO and is available on the web at <www.legislation.act.gov.au>.\(^\text{672}\)

Legislation is still available in printed form. The main purpose of the *ACT Register* is to make legislation more accessible to the public by providing access through the internet. Internet access provides cost savings to the government and the private sector by providing fast, efficient, reliable and free access to legislation. The *ACT Register* includes screen reader technology which provides access to people with disabilities.

The *ACT Register* contains **authorised** versions of new and up-to-date ACT legislation and provides notification of new legislation, replacing the previous system of notification in the *ACT Government Gazette*. More specifically the *ACT Register* includes –\(^\text{573}\)

- Unauthorised republications of laws in force;
- Acts as made;
- Subordinate laws as made;
- Notifiable instruments as made;
- Commencement notices as made;
- Resolutions passed by the Legislative Assembly to disallow or amend subordinate laws or disallowable instruments;
- Bills presented to the Legislative Assembly.

Unauthorised versions of legislation are also available on the *ACT Register*. Authorised versions of legislation must be authorised by PCO and be in a format which is authorised.\(^\text{674}\)

To ensure security, authorised legislation is posted on the web in locked portable document format (PDF) and contains a digital signature permitting authentication –

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\(^{672}\) *Legislation Act 2001* (ACT), s. 18.

\(^{673}\) Ibid, s. 19.

\(^{674}\) Ibid, s. 24(2).
The legislation register will display ACT legislation and related information in PDF format. PDF (portable document format) is used extensively for internet publication by both the public and private sectors. It is a simple, well-proven, low cost and highly effective publishing format that has the additional benefit of preserving the printed form of documents. PDF documents display and print consistently regardless of the kind of computer used. They are also highly secure.\textsuperscript{675}

As with printed legislation, authorised legislation on the ACT Register will attract the same presumptions, including a presumption that such legislation correctly shows the law as at the date of republication.\textsuperscript{676}

\section*{Regulatory Plans}

Each year MRD publishes information on regulatory proposals which have an impact on business for the year ahead in a document called Agency Regulatory Plans. This information is published in printed form and electronically.\textsuperscript{677} In addition to providing information on new regulatory proposals, Agency Regulatory Plans also contains information on amendments to legislation and achievements against the objectives contained in the previous year’s plans. Unlike the Commonwealth, there is no facility for amending or updating the plans throughout the year. However the plans are useful because they provide advance notice of regulatory proposals.

\textsuperscript{676} \textit{Legislation Act 2001} (ACT), s. 25(2).
\textsuperscript{677} This information is available on MRD’s website <www.competition.act.gov.au/>.
Key Features of the Regulatory System

1. **Oversight of Regulatory Proposals**
   - Drafted and checked by Parliamentary Counsel’s Office (PCO).
   - After enactment, review of statutory rules and RISs by the Regulation Review Committee (RRC).

2. **Public Notification**
   - Prior to the enactment of statutory rules made without RISs, there are no legislative requirements for notice to be given.
   - Prior to enactment of statutory rules made with RISs, notice must be published in the *New South Wales Government Gazette*, a daily newspaper and appropriate interest group journals.
   - After enactment, the entire text of statutory rules made, approved or confirmed by the Governor must be published in the *New South Wales Government Gazette*.

3. **Public Participation**
   - Prior to enactment, for statutory rules made with RISs, copies of statutory rules and RISs must be available for at least 21 days – providing the public with an opportunity to make written submissions.

4. **Regulation Impact Statements (RISs)**
   - RISs must be prepared for statutory rules which impose an appreciable burden, cost or disadvantage on any sector of the public.

5. **Oversight of RISs**
   - There is no oversight of RISs during the regulation-making process.

6. **Tabling Requirements**
   - For all statutory rules made, approved or confirmed by the Governor, written notice must be tabled in each House of Parliament within 14 days of publication in the *New South Wales Government Gazette*.
   - For all other statutory rules, notice and a copy of the statutory rule must be tabled.
Inquiry into the Subordinate Legislation Act 1994 (Vic)

- Failure to comply with tabling requirements does not affect validity but may be the subject of a report by RRC.

- RISs are supposed to be tabled in the same sitting week as notice of the making of the statutory rule is tabled. As this is not a legislative requirement, departments and agencies frequently do not comply with this requirement.

7. Disallowance

- Either House may pass a resolution of disallowance and must do so within 15 sitting days after notice of making is tabled.

- RRC may also recommend disallowance and must do so within 15 sitting days after notice of making is tabled.

8. Sunsetting

- Statutory rules sunset after 5 years.

9. Access to Legislation

- Authorised versions of legislation are available in printed form from New South Wales Government Information Service.

- Legislation for information purposes only is available electronically from a website maintained by PCO.

Introduction

Statutory rules, which include regulations, by-laws and ordinances\(^{678}\) are the major form of subordinate legislation in New South Wales. Statutory rules are made by the Governor acting on the advice of the Executive Council or by another body but subject to approval or confirmation by the Governor-in-Council.\(^{679}\)

Inter-government and Regulation Reform

The Inter-government and Regulatory Reform Branch (IRRB), which is located in the Cabinet Office provides strategic and policy advice to the Premier for meetings of the Council of Australian Governments. In particular it identifies issues which involve inter-governmental relations, including co-ordination and implementation of National Competition Policy and provides advice on regulatory review. Most of IRRB’s work focuses on competition policy reviews.

\(^{678}\) *Subordinate Legislation Act 1989* (NSW), s. 3.

\(^{679}\) ibid and *Interpretation Act 1987* (NSW), s. 3.
Parliamentary Counsel’s Office

PCO drafts bills and subordinate legislation, including regulations, statutory rules, proclamations and orders. PCO does not draft RISs nor does it review or evaluate RISs. Before statutory rules are submitted to be made by the Governor-in-Council, PCO must certify whether they are legally made.680

Regulation Review Committee

RRC was established by the Regulation Review Act 1987 (NSW) and examines all statutory rules as defined in the Regulation Review Act 1987 (NSW), which including regulations, by-laws, rules, ordinances and court rules.681 RRC consists of 9 Members of Parliament representing both Houses and all political parties. It was established because of public concerns that statutory rules were interfering with business and personal freedoms.682

RRC’s role in reviewing statutory rules is discussed below at pp. 162-163.

Regulation-making Process

All statutory rules made, approved or confirmed by the Governor are subject to the procedures contained in the Subordinate Legislation Act 1989 (NSW). Before any statutory rules are made, Ministers must ensure that there is compliance with all the requirements contained in Schedule 1 of the Subordinate Legislation Act 1989 (NSW).683 This Schedule requires an assessment of the costs and benefits of alternatives and a comparison of those costs and benefits with those of the proposed statutory rule. This preliminary assessment allows a determination to be made as to whether a statutory rule imposes an appreciable burden, cost or disadvantage on any sector of the public and if so a RIS must be prepared. ‘Appreciable burden’ has been interpreted broadly and on many occasions, RISs have been prepared for statutory rules which have an insignificant or minor impact.684 There is also a requirement that the benefits of proposed statutory rules outweigh the costs.685

To what extent this preliminary analysis is undertaken is not really clear –

In practice, it is not possible to say whether such a preliminary analysis is routinely, or even frequently, carried out in any formal sense. Certainly, the Parliamentary Counsel’s office, which provides all such advice in practice, does not receive copies of these preliminary analyses.686

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680 Subordinate Legislation Act 1989 (NSW), s. 7.
681 Regulation Review Act 1987 (NSW), s. 3(1).
683 Subordinate Legislation Act 1989 (NSW), s. 4.
684 Meeting Notes, Meeting with members and staff of RRC and Professor Margaret Allars, Faculty of Law, University of Sydney, 20 June 2000.
685 Subordinate Legislation Act 1989 (NSW), Schedule 1.
RRC often asks for copies of these analyses and has found that the detail and quality varies. As there is no oversight of these procedures, the possibility exists for statutory rules to be made which are unjustified. The Public Management Service of the OECD (PUMA) recommended that the determination of the necessity for RISs should be given to an authority with economic expertise such as the IRRB.

Regulation Impact Statements

RISs must be prepared for all principal statutory rules made, approved or confirmed by the Governor with certain specified exceptions.

One notable exemption from the RIS process is that of amending statutory rules. This means that statutory rules which make amendments to existing statutory rules do not have to go through the RIS process even though those amendments may deal with substantive issues which impact significantly on the community. In its 1999 Report, PUMA noted that this exemption undermines the coverage of the Subordinate Legislation Act 1989 (NSW).

Schedule 2 of the Subordinate Legislation Act 1989 (NSW) sets out the matters which RISs must address. In particular, RISs must include an assessment of the costs and benefits of regulatory proposals; an assessment of the costs and benefits of alternative options; an assessment of which option provides the greatest net benefit and a statement of the consultation to be undertaken. While failure to comply with the RIS requirements does not invalidate statutory rules, RRC may report this failure to Parliament.

Sometimes RISs are prepared by departments and agencies at the same time as PCO is drafting the relevant statutory rules. The problem with this practice is that it suggests that RISs are being used to support decisions which have already been made, rather than being used to decide whether particular regulatory proposals are the best way of proceeding. On other occasions RISs are prepared in advance of the formal consultation process rather than being prepared in response to consultation –

*It is difficult to understand how an RIS could effectively address the question of impact on the community when there may have been no detailed discussions with or written submissions from the relevant parties. There is certainly no point in preparing an elaborate RIS if its purpose has already been compromised by the preparation of a regulation fully covering all the details being canvassed in the RIS.*

The quality of RISs varies in New South Wales. PUMA conducted a review of a sample of RISs produced between 1994 and 1998 and concluded that many of these were poor. PUMA found that many of these RISs did not adequately identify the problems sought to be
addressed and failed to give appropriate consideration to regulatory alternatives. RRC has drawn Parliament’s attention to the failure to identify alternatives on a number of occasions. More recently, in discussing its Report on Road Transport (Safety and Traffic Management) (Road Rules) Regulation 1999, Mr Martin, the Chair of the Committee, commented –

In this case it would seem that the repealed regulations were subject to minimal change but that does not alter the fact that other alternatives to remake the regulation should have been examined and assessed in the impact statement. The lack of inclusion of alternatives other than the re-writing of the regulation is not unusual.

PUMA found that the failure to adequately identify the problems sought to be overcome was partly caused by the Subordinate Legislation Act 1989 (NSW) because it does not contain any requirement that these issues be discussed.

It also appears that the standard of RISs is about the same irrespective of whether they are prepared by department or agency staff or by outside consultants. One suggestion for improving the quality of RISs is to provide training. In 1999, PUMA found that since the end of 1992 no in-depth training on the RIS process and in particular how to produce good quality RISs has been provided to agency and department staff. In 1998 the head of the IRRB indicated that there was some need to provide training and to produce new guidance documents. Unfortunately this has not happened and agency and department staff have not received any further training or guidance.

As yet there has been no response from the New South Wales Government to the recommendations made by PUMA for improvements to the RIS process. As a consequence the problems highlighted by PUMA continue to exist.

RIS Oversight Prior to Enactment

There is no oversight of RISs during the regulation-making process. IRRB has no power to oversee the RIS process and consequently cannot request improvements or changes to any particular RISs; its role in improving the quality of RISs is therefore limited. IRRB can and does make suggestions for how the overall quality of RISs may be improved. Most of its work however focuses on competition policy reviews, while RISs take a back seat.

694 ibid, pp. 30 & 35.
696 New South Wales, Legislative Assembly, Debates, 5 December 2001, p. 19672.
697 PUMA, op. cit., p. 35.
698 Meeting Notes, Meeting with members and staff of RRC and Professor Margaret Allars, Faculty of Law, University of Sydney, 20 June 2000.
699 PUMA, op. cit., p. 22.
700 ibid.
701 Telephone Discussion, Ms. J. Baker, Legal Adviser, Regulation Review Subcommittee and Mr. G. Hogg, Senior Project Officer, RRC, 18 March 2002.
702 ibid.
703 Meeting Notes, Meeting with members and staff of RRC and Professor M. Allars, Faculty of Law, University of Sydney, 20 June 2000.
One possibility is to give IRRB responsibility for examining and approving RISs prior to enactment, allowing open dialogue and changes to be made before statutory rules are finalised and relieving RRC of sole responsibility for regulatory appraisal –

_I think we could say we were disappointed that the NSW Cabinet Office has not involved itself in the day to day quality control of regulation review. They have involved themselves in issues of best practice in terms of looking at the quality of regulations themselves. As a result we have been left to carry the can for the total regulatory appraisal._

However, while the location of the IRRB in the Cabinet office gives it political clout and therefore more ability to persuade agencies and departments to make changes, that location may make it less independent than a stand-alone statutory authority.

**Exemptions from the Regulation Impact Statement Process**

Statutory rules are exempt from the RIS process where —

1. The responsible Minister certifies on advice from the Attorney-General or PCO that a statutory rule deals with matters contained in Schedule 3 of the _Subordinate Legislation Act 1989_ (NSW). In practice it is usually PCO that provides this advice;

2. The responsible Minister certifies that for public interest reasons the statutory rule should be exempt from the RIS process;

3. It is impracticable to comply with the RIS requirements. Under this exemption, once the statutory rule is made there must be compliance with all RIS requirements within 4 months.

Under Schedule 3 of the _Subordinate Legislation Act 1989_ (NSW) exemptions are granted to statutory rules which involve –

- Machinery matters;
- Direct amendments or repeals;
- Matters of a savings or transitional nature;
- Matters arising under substantially uniform legislation;
- Matters involving the implementation of the _Heavy Vehicles Agreement_ or the _Light Vehicles Agreement_ set out in the _National Road Transport Commission Act 1991_ (Cth) and which have already been subject to RIS assessment;
- Matters involving the adoption of international or Australian standards or codes of practice where an assessment of the costs and benefits has already been made;

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704 Meeting Notes, Meeting with members and staff of RRC and Professor M. Allars, Faculty of Law, University of Sydney, 20 June 2000.

705 _Subordinate Legislation Act 1989_ (NSW), s. 6(1)(a).
• Matters which are not likely to impose an appreciable burden, cost or disadvantage on any sector of the public;

• A Management plan for a share management of a fishery made under the *Fisheries Management Act 1994* (NSW);

• Matters that implement protection of the environment policies under the *Protection of Environment Operations Act 1997* (NSW) or the *National Environment Protection Council (New South Wales) Act 1995* (NSW) or other matters under the *Protection of Environment Operations Act 1997* (NSW) which have undergone similar public consultation.

In addition, certain types of statutory instruments are not subject to RIS requirements. For example—

• Standing rules and orders of the Parliament;

• Rules of Court;

• Regulations under the *Constitution Act 1902* (NSW);

• Regulations under Companies legislation resulting from agreement between the States and the Commonwealth.

**Notification and Participation**

There are no legislative requirements for notification or public comment on regulatory proposals made without RISs.

Notice and participation requirements for proposed statutory rules made with RISs are different. Notice must be published in the *New South Wales Government Gazette*, a daily newspaper circulating throughout New South Wales and where appropriate any relevant trade, business, public interest or professional journals or publications.  

Copies of proposed statutory rules and RISs must be available to the public so that people can fully inform themselves of these proposals and a minimum of 21 days must be provided for written submissions. There is no requirement for agencies or departments to hold public hearings nor to allow the public to present their views orally.

However, there are requirements for all statutory rules made with RISs that consultation take place with special interest groups which are likely to be affected and that the depth of consultation be equal to the expected impact of the regulatory proposal. Departments and agencies are also required to give appropriate consideration to all comments made. RRC carefully reviews the breadth of consultation and the extent to which comments have been

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706 ibid, Schedule 4.
707 ibid, s. 5(2).
708 ibid, s. 5(2).
709 ibid, s. 5(2).
710 ibid, s. 5(2)(b).
711 ibid, s. 5(3).
712 ibid, s. 5(2)(c).
incorporated into the final form of statutory rules, often entering into discussions with the participants.\textsuperscript{713} Where there is inadequate acknowledgment of comments, RRC writes to the Minister seeking clarification. RRC believes that consultation processes are working effectively and have been used to make improvements to regulatory proposals.\textsuperscript{714}

In its 1999 Report, PUMA found that organised groups tend to participate more in the regulatory process than individuals.\textsuperscript{715} Unfortunately not all groups communicate effectively with the individuals they represent which means that group members may be unaware of regulatory proposals –

\begin{quote}
There is also a presumption that the responding body or the advising body talks to their members. I have received many representations from people who are members of professional associations who said they were not told about legislation. It was not set out in their monthly bulletin. This is a serious concern.\textsuperscript{716}
\end{quote}

PUMA also noted that a comparison of RISs for 1990-1991 and 1995-1998 indicated that there was no change in the average number of submissions received from the public.\textsuperscript{717} While the sophistication and quality of submissions has improved, it appears that not as many members of the public are participating as should be –

\begin{quote}
I met with some community day care centres last time they had an issue with regulations. People in the private industry were very awake to what was going on, made submissions and had changes made to the regulations to suit their business but community based business were not up on it and missed out and saw the changes as being detrimental to their centres.\textsuperscript{718}
\end{quote}

More recently the issue of consultation arose with the \textit{Road Transport (Safety and Traffic Management) (Road Rules) Regulation 1999} (NSW) and the \textit{Boxing and Wrestling Control Regulation 2000} (NSW). RRC found that the only body consulted for the \textit{Boxing and Wrestling Control Regulation 2000} (NSW) was the NSW Boxing Authority and that there had been no consultation with medical practitioners or persons involved in boxing or wrestling.\textsuperscript{719}

All statutory rules made, approved or confirmed by the Governor must be published (ie the entire text) in the \textit{New South Wales Government Gazette} and commence operation on the day of publication or on the date specified in the statutory rule.\textsuperscript{720} Statutory rules not published by their commencement date, retain their validity, but do not commence operation until published.\textsuperscript{721}

\begin{footnotes}
\item PUMA, op. cit., p. 14.
\item PUMA, op. cit.
\item Meeting Notes, Meeting with members and staff of RRC and Professor Margaret Allars, Faculty of Law, University of Sydney, 20 June 2000.
\item PUMA, op. cit., p. 31.
\item Meeting Notes, Meeting with members and staff of RRC and Professor Margaret Allars, Faculty of Law, University of Sydney, 20 June 2000.
\item Interpretation Act 1987 (NSW), s. 39.
\item ibid, s. 39(2A).
\end{footnotes}
Tabling Requirements

For all statutory rules made, confirmed or approved by the Governor, written notice, including the gazette number, date and page reference, must be tabled in each House of Parliament within 14 days of publication in the *New South Wales Government Gazette*.

For all other statutory rules, written notice must be tabled within 14 days of the making of those rules and must include a copy of the statutory rule. Failure to comply with these requirements does not affect the validity of statutory rules, but of course, it may always be subject to a Report by RRC. As with other jurisdictions, tabling is an important requirement because it gives Parliament the power of review. Through initiatives taken by RRC, the Premier issued a Memorandum indicating that all RISs should be tabled in Parliament in the same sitting week as notice of the making of statutory rules is tabled. However, this Memorandum is not binding on departments and agencies and as a consequence very few RISs are tabled in Parliament. The same Memorandum also urges Ministers to table other documents which may assist Members of Parliament to obtain a greater understanding of particular statutory rules.

Incorporation of Documents

Statutory rules frequently incorporate information drafted by organisations outside government. For example, codes and standards produced by Standards Australia are frequently incorporated into statutory rules. The problem with this is that they are not subject to formal regulation-making procedures, nor are they subject to the RIS process nor to any sort of oversight or scrutiny. Australian Standards are often incorporated ‘as amended from time to time’ which means that there is no control over or input into any changes. Those responsible for drafting Australian Standards and codes are usually technicians or engineers, with practical experience in the field but little experience in drafting. Often there are inconsistencies and inaccuracies in these codes and Australian Standards, and RRC is powerless to do anything.

There is no requirement in New South Wales for any of this incorporated information to be tabled in Parliament and brought to the attention of members and even if it is brought to the attention of members they do not have any power to disallow it because it is not actually part of the regulation. RRC remains concerned about the incorporation of codes, Australian Standards and other similar documents –

*The Committee views with concern the fact that under the law as it stands a very brief regulation of one page or less can be made which incorporates into the law codes which are many hundreds of pages in length. By way of example, the Regulation Review Committee considered a regulation made under the Dangerous Goods Act which*

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722 ibid, s. 40(1) & (2).
723 ibid, s. 40(2) & (3).
724 ibid, s. 40(4).
726 Telephone Discussion, Ms. J. Baker, Legal Adviser, Regulation Review Subcommittee and Mr G. Hogg, Senior Project Officer, RRC, 18 March 2002.
727 For example, explanatory notes and incorporated materials such as codes of practice, guidelines and standards.
incorporated by reference the Australian code for the transport of dangerous goods by road and rail. That code is a 400 page document but the regulation making it law is only two pages in length.\textsuperscript{729}

Codes, Australian Standards and other incorporated information can have a substantial impact on rights and obligations. Many of these documents are very difficult to find – they are not located on a central website and no comprehensive list is available. Further, the relevant departments and agencies do not always have copies available for the public to inspect.\textsuperscript{730} As many of these materials are produced by commercial publishers, fees must be paid to obtain copies.

**Parliamentary Oversight**

Once statutory rules have been enacted, RRC must review them to determine whether there are any issues which should be brought to the attention of Parliament. RRC has 15 sitting days from the tabling of notification of the making of statutory rules to complete its examination.\textsuperscript{731} Where statutory rules are made with RISs, RRC also examines RISs and all comments and submissions. These documents must be forwarded to RRC within 14 days of publication in the *New South Wales Government Gazette*.\textsuperscript{732} Where there are a small number of sitting days, the time for review is short.

The grounds of review include – \textsuperscript{733}

- Undue trespass on personal rights and freedoms;
- Adverse impact on the business community;
- Not within the general objects of the authorising act;
- Failure to accord with the spirit of the legislation under which it is made;
- Object could have been achieved more effectively by alternatives;
- Duplication, overlap or conflict with another statutory rule or act;
- Further explanation required;
- Non-compliance with the requirements of sections 4, 5 and 6 of the *Subordinate Legislation Act 1989* (NSW), Guidelines or Schedules 1 and 2.

The only oversight of the RIS process is conducted by RRC and their power to review RISs only arises after statutory rules have been enacted. RRC may report to Parliament where RISs do not comply with the requirements of the *Subordinate Legislation Act 1989* (NSW). There is evidence that RRC carefully reviews RISs, reports regularly to Parliament and has had


\textsuperscript{730} ibid.

\textsuperscript{731} *Regulation Review Act 1987* (NSW), s. 9(1).

\textsuperscript{732} *Subordinate Legislation Act 1987* (NSW), s. 5(4).

\textsuperscript{733} *Regulation Review Act 1987* (NSW), s. 9(1).
some success in bringing about changes. However RRC remains unhappy that there is no independent review of RISs during the regulation-making process. RRC also feels that it lacks the resources, staff and time to do real justice to RIS appraisal and analysis. Review of statutory rules and RISs at the end of the regulation-making process means that there is no opportunity for discussion, feedback and changes prior to finalisation of statutory rules –

Parliamentary scrutiny is undertaken after regulations are finalised and is thus a less flexible and interactive process. By contrast, scrutiny at the administrative level can be conducted as a dialogue, with expert feedback and advice available on technical issues and therefore able to improve the quality of analysis and the consideration of alternatives prior to final commitments to a particular regulatory course being made.

RRC has power to report to Parliament with any appropriate recommendations, including a recommendation for disallowance. It is expressly excluded from commenting on matters which involve government policy; its review must focus on the technical criteria contained in the Regulation Review Act 1989 (NSW). In the early years of the operation of the Subordinate Legislation Act 1989 (NSW), one or two recommendations were made for disallowance each year, but since 1993 no motions for disallowance have been recommended. RRC prefers to negotiate resolutions directly with Ministers rather than recommending disallowance and it has found that it has been successful in resolving issues using this method. Where RRC determines that further evidence is required, department or agency officers may be invited to informally brief RRC on the issues. Where RRC determines that the issues are still not resolved it has power to call for formal evidence and on these occasions the proceedings must be held in public. RRC has held these formal proceedings on a number of occasions. RRC does not produce an annual report, but reports on aspects of its proceedings as part of the Legislative Assembly’s Annual Report.

**Disallowance**

Either House of Parliament may pass a resolution disallowing statutory rules either before notice of the statutory rule is tabled in the House or within 15 sitting days after notice is tabled in the House. If the motion passes, the statutory rule ceases to have effect.
Statutory rules which have been disallowed may not be remade within four months of disallowance, unless the House which passed the motion rescinds it.\textsuperscript{746}

Sunsetting

Statutory rules have a life of five years, ceasing to exist on 1 September, five years after the commencement of operation.\textsuperscript{747} Repeal may be postponed up to five times by order of the Governor and published in the \textit{New South Wales Government Gazette}.\textsuperscript{748} However on the third and subsequent occasions, at least one month’s notice must be given to RRC, which may comment on postponement to the Minister and the Parliament. In 1997 guidelines were issued by the Premier\textsuperscript{749} indicating that postponement will only be considered in the following circumstances –

- Cabinet has approved a review, including a National Competition Policy review, of the primary legislation or the regulations themselves;

- The statutory rules to be reviewed are lengthy and complex. In these circumstances postponement will only be allowed where the review is expected to result in new statutory rules within the 12 months’ extension;

- The principal legislation or statutory rules are subject to national review and the timetable does not extend beyond 1 September the following year.

PCO, IRRB, RRC, agencies and departments have indicated that five years is “unreasonably short” for the life of statutory rules.\textsuperscript{750} Often the changes which have taken place during the five years are not significant enough to warrant a substantial review of the existing legislation.\textsuperscript{751} There is strong evidence that the postponement mechanism has been used repeatedly and in doing so has frustrated the intent of the \textit{Subordinate Legislation Act 1989} (NSW) for statutory rules to automatically cease at the end of five years.\textsuperscript{752} In 1998, of the 101 regulations which were sunsetting, 70% were postponed “for the third, fourth, fifth or sixth time”.\textsuperscript{753} The average life span of statutory rules is thus much longer than five years and is probably somewhere between eight and ten years. This suggests that ten years is a more appropriate time for the life of statutory rules.

Access to Legislation

New Acts, consolidated authorised editions of Acts and statutory rules and new statutory rules are produced in printed form by PCO and are available for sale and subscription from the Government Information Service. Authorised legislation must still be obtained in printed form. PCO is progressively making this legislation available in electronic form on its website

\textsuperscript{746} \textit{Subordinate Legislation Act 1989} (NSW), s. 8.
\textsuperscript{747} ibid, s. 10.
\textsuperscript{748} ibid, s. 11.
\textsuperscript{749} Premier of New South Wales, \textit{Memorandum 98-34}, 18 November 1998.
\textsuperscript{750} PUMA, op. cit., p. 40.
\textsuperscript{752} PUMA, op. cit., pp. 39-40.
\textsuperscript{753} ibid, p. 39.

PCO is in the process of developing a new drafting and publishing system based on Standard Generalised Markup Language (SGML) and Extensible Markup Language (XML) to broaden access to legislation and make it quicker and simpler. This system will also enable the incorporation of new products such as point in time searching and the automatic incorporation of amendments into legislation.\footnote{754}

PCO also produces various publications which provide information about Acts and statutory instruments. For example –\footnote{755}

- Legislation in Force includes information about public and private acts and their latest amendments; statutory rules including their date of gazettal and automatic repeal and Acts repealed since 1986;
- Monthly Acts Tables provides information on bills introduced, Acts passed, amended or repealed, assent dates for Acts, proclamations to commence Acts and information about Acts reprinted;
- Monthly Statutory Instruments Tables provides information on statutory instruments made, amended and repealed, details of instruments reprinted and of environmental planning instruments made;
- Weekly Acts Tables contains information about the commencement of Acts;
- Weekly Bulletin contains information about including Bills introduced, amended, passed or enacted, statutory instruments gazetted and reprints. The Weekly Bulletin can be emailed to individuals automatically each week free of charge through PCO’s list server.

\footnote{755}{ibid.}
Key Features of the Regulatory System

1. **Oversight of Regulatory Proposals**
   - Drafted and checked by the Office of Parliamentary Counsel (OPC).
   - After enactment, reviewed by the Subordinate Legislation and Publications Committee (SLPC).

2. **Public Notification**
   - Prior to enactment, there are no legislative requirements for notice.
   - After enactment, notice of making must be placed in the *Northern Territory Government Gazette.*

3. **Public Participation**
   - Prior to enactment there are no legislative requirements for public participation.

4. **Regulation Impact Statements (RISs)**
   - There is no requirement to prepare RISs.

5. **Tabling Requirements**
   - All regulations must be tabled within 3 sitting days after they have been made.
   - Failure to table results in them ceasing to operate.

6. **Disallowance**
   - Notice of disallowance must be given within 12 sitting days of tabling.

7. **Sunsetting**
   - There are no sunsetting requirements.

8. **Access to Legislation**
   - Authorised versions of legislation are available in printed form from Northern Territory Government Printer.
• Legislation for information purposes only is available electronically on the Register of Legislation.

Introduction

Regulations are the major form of subordinate legislation in the Northern Territory. Regulations include rules or by-laws made under an Act and they are made by the Administrator of the Territory.\(^\text{756}\)

Office of Parliamentary Counsel

OPC drafts bills, regulations and other legislative instruments.

Subordinate Legislation and Publications Committee

A committee with responsibility for reviewing regulations was established with the creation of the first Parliament in the Northern Territory in 1974 and was known as the Subordinate Legislation and Tabled Papers Committee. Two years ago the committee changed its name to the Subordinate Legislation and Publications Committee (SLPC).\(^\text{757}\) SLPC consists of five Members of Parliament representing all political parties. SLPC reviews all instruments of a legislative or administrative character and it has the power to recommend disallowance. SLPC’s examination of instruments is discussed below at p. 169.

Regulation-making Process

Regulation Impact Statements

There is no requirement to prepare RIS in the Northern Territory.

Notification and Participation

Prior to the enactment of regulatory proposals, there are no legislative requirements for notice to be given nor is there any opportunity for people to comment.

Notice of enactment of regulations must be placed in the Northern Territory Government Gazette.\(^\text{758}\) Regulations commence operation on the date of notification in the Northern Territory Government Gazette or any date specifically provided for in the regulations.\(^\text{759}\) By-laws and rules must be sent by councils or statutory authorities to the relevant Minister who is

\(^{756}\) Professor D. Pearce & Mr. S. Argument, op. cit., p. 83.

\(^{757}\) Telephone Discussion, Ms. J. Baker, Legal Adviser, Regulation Review Subcommittee and Mr T. Hanley, Secretary, SLPC, 22 March 2002.

\(^{758}\) Interpretation Act (NT), s. 63(1)(a).

\(^{759}\) ibid, s. 63(1)(b).
responsible for notifying enactment in the *Northern Territory Government Gazette*.\(^{760}\) Notice of enactment of regulations, by-laws and rules need only state that they are made and provide details of where copies may be purchased.\(^{761}\)

The Minister may request amendments to be made to rules and by-laws and may send them back to the relevant Council or Statutory Authority.\(^{762}\) It is up to the person responsible for making the rules or by-laws to decide whether to amend the rules or by-laws or return them without amendment.\(^{763}\)

**Tabling Requirements**

All regulations, by-laws and rules must be tabled within 3 sitting days after they have been made.\(^{764}\) Failure to table regulations, by-laws and rules in accordance with these provisions results in them ceasing to operate.\(^{765}\) As with other jurisdictions, tabling of regulations, by-laws and rules is an important requirement because it gives Parliament the power of review.

**Parliamentary Oversight**

SLPC does not comment on matters involving government policy – its review focuses on the technical criteria contained in section 20 of the Standing Orders. SLPC examines legislative and administrative instruments and considers whether those instruments –

\begin{itemize}
  \item Are in accordance with the objectives of their authorising Acts;
  \item Trespass unduly on personal rights and liberties;
  \item Unduly make rights and liberties dependent upon administrative decisions;
  \item Contain matters which should be contained in Acts;
  \item Make unusual or unexpected use of powers; and
  \item Are in a form which requires clarification.
\end{itemize}

SLPC also considers whether there has been an unjustifiable delay in tabling instruments in the Legislative Assembly. SLPC may report to the Legislative Assembly making any recommendations it thinks appropriate. SLPC has power to summon witnesses and documents and to decide whether to hold hearings publicly or privately.\(^{767}\) SLPC does not produce an annual report and its Committee proceedings are confidential. However, SLPC does report on some aspects of its work as part of the Legislative Assembly’s Annual Report.

\(^{760}\) ibid, s. 63(2) & (3).
\(^{761}\) ibid, s. 63(6).
\(^{762}\) ibid, s. 63(4).
\(^{763}\) ibid, s. 63(5).
\(^{764}\) ibid, s. 63(1)(c) and 3(c).
\(^{765}\) ibid, s. 63(8).
\(^{766}\) Legislative Assembly, *Standing Orders*, s. 20(2).
\(^{767}\) ibid, s. 20(7).
Disallowance

Members of the Legislative Assembly must give notice of a disallowance motion within 12 sitting days of tabling.\(^{768}\) The effect of disallowance is that the regulation, by-law or rule ceases to exist.\(^{769}\) Regulations, rules and by-laws which have been disallowed may not be remade in similar form or effect for a period of six months.\(^{770}\)

Sunsetting

There are no specific requirements that regulations or legislative instruments cease operation after the expiration of a specified period of time. Unless amended or repealed by new legislation, these legislative instruments continue to operate.

Access to Legislation

The Northern Territory has a Register of Legislation which contains various information relating to Bills and Acts. The Register of Legislation and a separate database of current consolidated Acts, regulations and by-laws can be accessed through the Legislative Assembly website under the heading “Hansard and Legislation”. The database has been produced by Parliamentary Counsel, the Legislative Assembly, the Attorney-General’s Department and the Department of the Chief Minister. The legislation contained in this database is for information purposes only. Authorised versions of legislation must be obtained in printed form from the Northern Territory Government printer.

\(^{768}\) Interpretation Act (NT), s. 63(9).
\(^{769}\) ibid, s. 63(9).
\(^{770}\) ibid, s. 64.
Queensland

Key features of regulatory system

1. **Oversight of Regulatory Proposals**
   - Drafted in accordance with fundamental legislative principles by the Office of Chief Parliamentary Counsel (OCPC).
   - OCPC certifies whether there is compliance with fundamental legislative principles and whether regulations are legally valid.
   - After enactment, reviewed by the Scrutiny of Legislation Committee (SLC).

2. **Public Notification**
   - Prior to enactment, there is no legislative requirement for public notification of regulatory proposals which are exempt from the RIS process.
   - Prior to enactment for regulatory proposals made with RISs, notice must be published in the *Queensland Government Gazette* and in newspapers likely to be read by those affected.
   - After enactment, all regulations must be notified in the *Queensland Government Gazette*.

3. **Public Participation**
   - For regulatory proposals made with RISs, at least 28 days must be provided for public comment.

4. **Regulation Impact Statements (RISs)**
   - RISs must be prepared where regulations are likely to impose appreciable costs on the community or a part of the community.

5. **Oversight of RISs**
   - Prior to enactment, departments and agencies should seek advice from the Business Regulation and Reform Unit (BRU) on the necessity of and how to prepare RISs.
   - BRU has access to Cabinet Submissions and will comment to Cabinet if it has not been consulted.
6. **Tabling Requirements**

- Must be tabled within 14 sitting days of notice of enactment in the *Queensland Government Gazette*.
- Where regulations are not tabled they cease to operate.

7. **Disallowance**

- Notice may be given by any Member of the Legislative Assembly within 14 sitting days after tabling of regulations.
- SLC may recommend disallowance but must do so within the 14 sitting day period.

8. **Sunsetting**

- Regulations expire at the end of 10 years.
- 12 months’ extensions may be obtained.

9. **Access to Legislation**

- Authorised versions available in printed form only.
- Consolidated versions of Acts and regulations and Acts and regulations as passed since 1991 are available on a database on OCPC’s website. Legislation on this site is for information purposes only.

**Introduction**

Statutory rules are the major form of subordinate legislation in Queensland and are made by the Governor or Governor-in-Council. They may be made by another body but must be subject to approval or disapproval by the Governor or Governor-in-Council.

**Business Regulation Reform Unit**

BRU is located in the Department of State Development and it is responsible for advising the Deputy Premier and Ministers for Trade and for State Development on whether RISs need to be prepared. BRU also reviews RISs produced by agencies and departments but it only gets this opportunity if departments and agencies seek BRU’s advice. Advice on RISs is one aspect only of BRU’s work. BRU’s role concerning RISs is discussed below at p. 175.

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771 *Statutory Instruments Act 1992* (Qld), s. 8.

772 ibid.
Office of Chief Parliamentary Counsel

OCPC drafts all bills and subordinate legislation and must do so in accordance with fundamental legislative principles.\(^{773}\) When drafting, OCPC works closely with departments and agencies and provides advice on alternative ways of achieving policy objectives, the application of fundamental legislative principles and the subordinate legislation process.\(^{774}\) A notable difference from other jurisdictions is the requirement that OCPC draft legislation in accordance with fundamental legislative principles.\(^{775}\) Subordinate legislation is defined in section 9(1) of the *Statutory Instruments Act 1992* (Qld) and includes, for example, regulations, rules, by-laws, ordinances and statutes, but excludes such things as local laws, rules, orders, directions or practices of the Legislative Assembly.\(^{776}\) OCPC also prepares certified copies of subordinate legislation for submission to Executive Council.\(^{777}\)

Scrutiny of Legislation Committee

SLC which was established by the *Parliamentary Committees Act 1995* (Qld)\(^{778}\) scrutinises subordinate legislation and Bills. Between 1975 and 1995, subordinate legislation was scrutinised by the Committee of Subordinate Legislation. SLC consists of 6 Members of Parliament representing all political parties. SLC was established to protect the rights of Queenslanders from intrusive legislation with adverse impacts –

> This committee will be a major safeguard of Queenslanders’ rights and liberties against Governments that want to equip themselves with unwarranted and excessive powers. The committee will alert Ministers and the House to breaches of civil and legal rights in proposed legislation which it considers to be ill conceived or dangerous.\(^{779}\)

SLC reviews subordinate legislation after it has been made to determine whether it complies with fundamental legislative principles\(^{780}\) as defined in the *Statutory Instruments Act 1992* (Qld)\(^{781}\) and it also considers the lawfulness of subordinate legislation.\(^{782}\) SLC’s role in reviewing subordinate legislation is discussed below at pp. 178-180.

Regulation-making Process

Regulation Impact Statements

The requirement to prepare RISs for proposed subordinate legislation which is “likely to impose appreciable costs on the community or a part of the community” commenced in 1995

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\(^{773}\) ibid, s. 7.
\(^{775}\) Professor D. Pearce & Mr. S. Argument, op. cit., p. 48.
\(^{776}\) *Statutory Instruments Act* (Qld), s. 9(2).
\(^{777}\) Queensland Government, op. cit., paragraph 7.4.4.
\(^{778}\) *Parliamentary Committees Act 1995* (Qld), s. 4.
\(^{780}\) *Parliamentary Committees Act 1995* (Qld), s. 22 gives the Committee responsibility for assessing bills and subordinate legislation against fundamental legislative principles.
\(^{781}\) *Statutory Instruments Act 1992* (Qld), s. 4.
\(^{782}\) *Parliamentary Committees Act 1995* (Qld), s. 22.
under an amendment made to the Statutory Instruments Act 1992 (Qld).\textsuperscript{783} The aim of the RIS process is to “enhance the decision-making process for new regulations”,\textsuperscript{784} and to give the public a greater opportunity for input into the subordinate legislation-making process. RIS Guidelines suggest that ‘appreciable costs’ exist where proposed subordinate legislation –\textsuperscript{785}

- Involves major Government expenditure which has not previously been approved by Cabinet;
- Imposes or is likely to impose annual costs of $500,000 or more;
- Affects sensitive policy areas;
- Impacts significantly on particular groups;
- Impacts significantly on the legal rights of particular groups;
- Has significant environmental or social impacts.

Section 44 of the Statutory Instruments Act 1992 (Qld) sets out the issues which RISs must address. In particular, RISs must include an assessment of the costs and benefits of proposed subordinate legislation; a brief statement of any reasonable alternative for achieving the policy objectives; a statement of the reasons for rejection of any reasonable alternative and a comparison of the costs and benefits of that alternative.

A major issue with RISs is the small number prepared –

\textit{Regrettably the number of RISs prepared during the 2000-2001 financial year did not rise significantly from the low levels recorded in previous years. This matter continues to concern the committee.}\textsuperscript{786}

It appears that the main cause of this is the threshold test and the restrictive interpretation given to ‘appreciable cost’.\textsuperscript{787}

While it is Parliament’s intention that RISs be prepared for subordinate legislation which imposes appreciable economic, social or environmental costs,\textsuperscript{788} there is no penalty for failing to do so – the failure cannot be legally challenged\textsuperscript{789} and the subordinate legislation remains valid.\textsuperscript{790}

\begin{footnotes}
\textsuperscript{783} The amendment was made by the \textit{Statutory Instruments and Legislative Standards Amendment Act 1994 (Qld)}. The requirement to prepare RISs is contained in s. 43 of the \textit{Statutory Instruments Act 1992 (Qld)}.
\textsuperscript{785} BRU, Department of State Development, \textit{Discussion Paper}, Improvements to the Regulatory Impact Statement (RIS) Process, 1999. These guidelines are also available in the software package developed by BRU to guide agency and department staff preparing RISs.
\textsuperscript{786} SLC, \textit{Annual Report}, 1 July 2000 – 30 June 2001, October 2001, p. 18. SLC will continue to comment adversely on this.
\textsuperscript{787} ibid.
\textsuperscript{788} \textit{Statutory Instruments Act 1992 (Qld)}, s. 40(3).
\textsuperscript{789} ibid, s. 41(2).
\textsuperscript{790} ibid, s. 41(1).
\end{footnotes}
RIS Oversight Prior to Enactment

In the preliminary stages of developing subordinate legislation, departments and agencies may seek advice from BRU on the necessity of and how to prepare RISs. Whether departments and agencies seek BRU’s advice is voluntary, which means that BRU does not always get the opportunity to discuss RIS issues –

We don’t have mandatory powers in that we can’t say to agencies you must do a RIS. We encourage agencies to consult us when there is a question in their minds whether to do a RIS.  

Representatives of BRU indicated that most departments and agencies are now seeking BRU’s advice and assistance at an early stage in the making of new subordinate legislation which makes it easier for BRU to evaluate and also allows more consideration to be given to regulatory alternatives.

Where BRU’s assistance is sought, its advice is provided formally in writing to agencies and departments and also to the Deputy Premier, Ministers for State Development and for Trade. BRU has access to the Cabinet bag which provides it with the opportunity of checking whether there is subordinate legislation with significant cost implications which it has not been consulted upon. In these circumstances BRU indicates to the relevant Minister and the Minister for State Development that it should have been consulted. It is then up to Cabinet to decide whether to proceed with the enactment of the particular subordinate legislation.

BRU provides training on the RIS process to agency and department staff and has developed an excellent software package which makes it much easier to understand and complete RISs.

Once RISs have been completed, chief executives of departments and agencies are required to certify to Cabinet and the Executive Council that they considered the RIS obligations under Part 5 of the Statutory Instruments Act 1992 (Qld) and the likely recommendations of SLC. Cabinet approval must be obtained before RISs are advertised calling for public comments.

Exemptions from the RIS Process

Most subordinate legislation is exempt from the requirements of the RIS process on the basis that it does not impose significant economic, social or environmental costs and that it would be unnecessarily burdensome to require RISs to be prepared for all subordinate legislation –

It is estimated that the proposed RIS procedures will affect about 10 to 15 per cent of subordinate legislation made each year. The majority of instruments will not be affected as these do not impose substantial costs on the community. As over 500 instruments are made in the course of the year, it would be administratively intolerable and unnecessary to produce an RIS for all of them.
Section 46 of the Statutory Instruments Act 1992 (Qld) exempts from the RIS process regulatory proposals which involve –

- Non-legislative issues or changes which are machinery or administrative in nature;
- Matters which do not disadvantage any person;
- Amendment of subordinate legislation to take account of current Queensland drafting practices;
- Commencement of Acts or subordinate legislation or provisions of Acts or subordinate legislation;
- Amendment of subordinate legislation that does not affect their application or operation;
- Savings or transitional matters;
- Matters arising under substantially uniform or complementary legislation;
- Adoption of Australian or international protocols, standards, codes or intergovernmental agreements or instruments where an assessment of the costs and benefits has already been made and the assessment is relevant for Queensland;
- Matters of advance notice where someone would gain an unfair advantage;
- Amendment of fees, charges and taxes which are consistent with Government policy;
- Notice about a code of practice approved under section 34 of the Workplace Health and Safety Act 1989 (Qld).

In addition, RISs need not be prepared where it is against the public interest because of the nature of the regulatory proposal or the circumstances in which it is made. For example, subordinate legislation may be required urgently to prevent the spread of a contagious disease.

**Notification and Participation**

Prior to the enactment of proposed subordinate legislation which is exempt from the RIS process, there are no legislative requirements for notice to be given and no opportunity for the public to comment.

Notice and participation requirements for proposed subordinate legislation accompanied by RISs are different because this legislation is seen as having a more significant impact on the community. Notice must be published in the Queensland Government Gazette and in newspapers likely to be read by those people affected. The notice must be easily understood by those people affected. Copies of RISs must be available at a reasonable price or free of charge at the place or places specified in the notice.

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797 Statutory Instruments Act 1992 (Qld), s. 46(2).
798 ibid, s. 45(1).
799 ibid, s. 45(2).
800 ibid, s. 45(5).
At least 28 days must be provided for the public to make written submissions. There is no requirement for agencies or departments to hold public hearings nor to allow the public to present their views orally.

After enactment, the same notice and availability requirements apply to all subordinate legislation – all subordinate legislation must be notified in the *Queensland Government Gazette*. This may be done by publishing a notice including details of where copies may be obtained or by publishing the entire text of subordinate legislation in the *Queensland Government Gazette*.

Copies of subordinate legislation must be available (for purchase or free of charge) either on the day after or as soon as practicable after notification in the *Queensland Government Gazette*. Where copies of subordinate legislation are not available on the day of notification, the Minister must table within 14 sitting days a written statement explaining why copies were not available. Failure to comply with the requirements concerning the availability of copies does not affect the validity of regulations.

**Oversight Prior to Enactment**

Prior to enactment all proposed subordinate legislation must be submitted to OCPC to ensure that it is legally valid and to examine compliance with fundamental legislative principles. OCPC will not certify regulatory proposals which are not legally valid and which do not comply with fundamental legislative principles. The final decision as to whether to proceed with enactment is left with Cabinet.

**Tabling Requirements**

Section 49 of the *Statutory Instruments Act 1992* (Qld) requires all subordinate legislation to be tabled in the Legislative Assembly within 14 sitting days after notification of enactment in the *Queensland Government Gazette*. Tabling of subordinate legislation is an important requirement because it gives Parliament the power to review subordinate legislation. Subordinate legislation which fails to comply with the tabling requirements ceases to have effect.

Where subordinate legislation is significant, an explanatory note must also be tabled. The Explanatory Note must include various details such as a brief statement of how the policy objectives will be achieved; a statement of how it is consistent with the authorising Act; a

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801 ibid, s. 45(4).
802 ibid, s. 47.
803 ibid, s. 48.
804 ibid, s. 48(3).
805 ibid, s. 48(4).
806 *Legislation Standards Act 1992* (Qld), s. 7.
807 There is only a requirement to table in the Legislative Assembly because Queensland only has one House of Parliament.
808 *Statutory Instruments Act 1992* (Qld), s. 49(2).
809 Significant subordinate legislation means legislation for which a RIS is prepared – *Legislative Standards Act 1992* (Qld), s. 2.
810 ibid, s. 22(2).
brief assessment of the costs and benefits and details of any consultation carried out, including an outline of results of that consultation and any changes made as a result of that consultation.\textsuperscript{811} If there was no consultation an explanation must be given as to why there was no consultation.\textsuperscript{812} The explanatory note must be accompanied by the RIS.\textsuperscript{813} Failure to comply with requirements concerning explanatory notes does not affect the validity of the subordinate legislation.\textsuperscript{814}

Parliamentary Oversight

As mentioned above, SLC has responsibility for assessing subordinate legislation, but only after it has been made, to determine whether it complies with the legislative principles specified in the \textit{Legislative Standards Act 1992} (Qld).\textsuperscript{815} These fundamental legislative principles require SLC to examine whether subordinate legislation adequately takes into account the rights and liberties of individuals and the institution of Parliament.\textsuperscript{816} SLC does not comment on matters involving government policy – its review focuses on the technical criteria contained in the \textit{Legislative Standards Act 1992} (Qld).

Section 4(3) of the \textit{Legislative Standards Act 1992} (Qld) provides examples of legislation which adequately takes into account the rights and liberties of individuals –\textsuperscript{817}

- Makes rights and liberties dependent on administrative power only if that administrative power is sufficiently defined and subject to review;
- Consistent with principles of natural justice;
- Allows the delegation of administrative power only in appropriate cases and to appropriate persons;
- Does not reverse the onus of proof in criminal proceedings without adequate justification;
- Confers power to enter premises and search for or seize documents or other property only with a warrant issued by a judge or other judicial officer;
- Provides appropriate protection against self-incrimination;
- Does not adversely affect rights and liberties or impose obligations retrospectively;
- Does not confer immunity from proceeding or prosecution without adequate justification;
- Provides for the compulsory acquisition of property only with fair compensation;

\begin{footnotes}
\item[811] ibid, s. 24(1) & (2).
\item[812] ibid, s. 24(2).
\item[813] ibid, s. 24(3).
\item[814] ibid, s. 25.
\item[815] \textit{Parliamentary Committees Act 1995} (Qld), s. 22(1).
\item[816] \textit{Legislative Standards Act 1992} (Qld), s. 4(1).
\item[817] ibid, s. 4(3).
\end{footnotes}
• Has sufficient regard to Aboriginal tradition and Island custom;\textsuperscript{818}

• Unambiguous and drafted in a sufficiently clear and precise way.

Section 4(5) of the \textit{Legislative Standards Act 1992} (Qld) provides examples of subordinate legislation which adequately takes into account the institution of Parliament – \textsuperscript{819}

• Within the power of the authorising Act;

• Consistent with the policy objectives of the authorising Act;

• Contains only matters appropriate to subordinate legislation;

• Only makes amendments to statutory instruments;

• Allows sub-delegation of a power delegated by an Act in appropriate cases and to appropriate persons and if authorised by an Act.

The \textit{Legislative Standards Act 1992} (Qld) does not contain an exhaustive list of scrutiny criteria. Instead it provides examples of legislation which adequately take into account the rights and liberties of individuals and the institution of Parliament. This gives SLC flexibility to consider other matters which may infringe those principles even though they are not specifically listed in the Act. This has allowed SLC, for example, to report to Parliament “on the abrogation of the right to silence, the protection of privacy and adherence to rights recognised in international treaties”.\textsuperscript{820}

SLC also monitors explanatory notes; compliance with subordinate legislation-making procedures; automatic expiry of subordinate legislation; forms and transitional provisions.\textsuperscript{821}

Initially SLC raises any concerns with the relevant Minister. Usually matters are resolved by Ministers providing undertakings or additional information. Where, after negotiation with Ministers, matters remain unresolved, SLC may report to Parliament with or without a recommendation for disallowance. Where a notice of disallowance is given by a Member of Parliament who is not a member of SLC, SLC will prepare a report.\textsuperscript{822}

In 2000 – 2001 financial year SLC examined 276 pieces of subordinate legislation and raised issues in relation to 76 pieces of legislation. Major concerns for SLC during this period were poor drafting (such as typographical errors, lack of certainty and failure to effectively implement intended policy) and insufficient regard to the rights and liberties of individuals.\textsuperscript{823} SLC has also commented adversely on the lack of explanatory notes accompanying subordinate legislation – which makes the Committee’s task more difficult.\textsuperscript{824} SLC has not recommended disallowance over the last few years because concerns appear to be adequately

\textsuperscript{818} ‘Island custom’ refers to the customs, traditions, observances and beliefs of Torres Strait Islanders. See \textit{Acts Interpretation Act 1954} (Qld), s. 36.

\textsuperscript{819} \textit{Legislative Standards Act 1992} (Qld), s. 4(5).

\textsuperscript{820} SLC, op. cit., p. 2.

\textsuperscript{821} \textit{Parliamentary Committees Act 1995} (Qld), s. 22.

\textsuperscript{822} SLC, op. cit., p. 13.

\textsuperscript{823} ibid, p. 15.

\textsuperscript{824} ibid, p. 16.
dealt with through discussion and negotiation with relevant Ministers. However, Professor Pearce and Mr. Argument noted in their book, *Delegated Legislation in Australia*, that from another perspective this may indicate that SLC is not being as ‘tough’ in its scrutiny as it could be.

SLC’s meetings are not open to the public. However SLC produces annual reports which discuss the work of the Committee over the previous year. These annual reports and other reports produced by the Committee are available in printed form and on its website.

**Disallowance**

Any member of the Legislative Assembly may give notice of a disallowance motion within 14 sitting days after the subordinate legislation is tabled in the Legislative Assembly. The motion lapses if it is not moved for consideration on the day notice is given. Once the resolution is passed, the subordinate legislation ceases to have effect.

While the 14 sitting days provided to give notice of a disallowance motion appears to provide sufficient time to SLC to review subordinate legislation, at times it is a little tight.

**Sunsetting**

Subordinate legislation expires at the end of 10 years, ending on 1 September after its first anniversary. OCPC is required to give departments and agencies at least six months’ notice of approaching expiry dates; although failure to do this will not prevent subordinate legislation from automatically expiring. Exemptions may be obtained from automatic expiry for 12 months at a time for the following reasons:

- Replacement subordinate legislation is being drafted and will be made before the 12 months extension ends;
- The subordinate legislation is not going to be replaced by other subordinate legislation;
- The Authorising Act is undergoing review.

**Access to Legislation**

OCPC is responsible for arranging for the printing and publication of Bills, subordinate legislation and information concerning Queensland legislation in printed and electronic forms.
form. In 1991 OCPC created a database of legislation on its website and OCPC has maintained that database since that time. The database provides access to consolidated versions of Acts and subordinate legislation and Acts and subordinate legislation as passed since 1991. Legislation available in this database is not authorised but is for information purposes only. Authorised legislation may only be obtained in printed form.

834 Legislative Standards Act 1992 (Qld) s. 7.
South Australia

Key Features of the Regulatory System

1. **Oversight of Regulatory Proposals**
   - Drafted and checked by the Office of Parliamentary Counsel (OPC).
   - After enactment, reviewed by the Legislation Review Committee (LRC).
   - LRC also responsible for reviewing local laws after they have been made.

2. **Public Notification**
   - Prior to the enactment of regulatory proposals, there are no legislative requirement for public notification.
   - After enactment, regulations must be published in *South Australian Government Gazette*.

3. **Public Participation**
   - No legislative requirements for public participation.

4. **Regulation Impact Statements (RISs)**
   - No requirement to prepare RISs.

5. **Tabling Requirements**
   - Regulations must be tabled within 6 sitting days after they have been made.
   - Failure to table does not affect the validity of regulations, but may be subject to a report by LRC.

6. **Disallowance**
   - Notice may be given by any Member of either House within 14 sitting days of tabling.
   - LRC may recommend disallowance and must do so within 14 sitting days of tabling.

7. **Sunsetting**
   - Regulations automatically expire at the end of 10 years.
   - Regulations may be extended for a total of 4 years.
8. **Access to Legislation**

- Authorised legislation is available in printed form from the Attorney-General’s department.
- Legislation may be accessed electronically from the South Australian Parliament website but is for information purposes only.

**Introduction**

The examination of regulatory processes in South Australia covers how those processes worked during the 49th Parliament under the leadership of the liberal government. As a result of an election held on 9 February 2002, South Australia has a new labor government. As a consequence there may, at some time in the near future, be changes to the Parliamentary Committee system or the regulation-making process discussed in the following pages.

Regulations are the major form of subordinate legislation in South Australia and unless the authorising Act specifies otherwise, they are made by the Governor on the advice of the Executive. Regulations are defined to include regulations, rules and by-laws.

**Office of Parliamentary Counsel**

OPC drafts all bills, regulations, proclamations, notices and other instruments of a legislative character on instructions from departments and agencies. When drafting OPC works closely with departments and agencies. Once OPC has finalised the draft, departments and agencies must prepare a cabinet submission and report for LRC. The Report to LRC must include:

- Policy considerations which led to the development of the regulation;
- A summary of legal, administrative and other arrangements established under the regulation;
- An outline of the consultation undertaken during the development of the policy underlying the regulation;
- The basis on which any fee or charge has been varied.

Before submission to Cabinet, OPC must certify that the proposed regulations are within the powers of the authorising Act.

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836 *Subordinate Legislation Act 1978* (SA), s. 10(1).
837 ibid, s. 4.
838 South Australian Government, *Cabinet Handbook*, 1997. Note – the *Cabinet Handbook* is currently being reviewed and an updated version will be produced in the next few months.
839 ibid.
840 ibid.
Legislation Review Committee

LRC, which replaced the Joint Committee on Subordinate Legislation, was established in 1992 by the Parliament Committees Act 1991 (SA). LRC consists of 6 Members of Parliament representing all political parties and both Houses of Parliament. LRC examines and reports on:

- Regulations;
- Matters concerned with legal, constitutional or Parliamentary reform;
- Matters concerned with inter-governmental relations; and
- Acts and regulations which are going to expire at a particular point of time to determine whether that expiry is appropriate.

LRC’s role in reviewing subordinate legislation is discussed below at pp. 186-188.

Regulation-making Process

Regulation Impact Statements

There is no requirement to prepare RISs.

Notification and Participation

Prior to the enactment of proposed regulations, there is no legislative requirement for notice to be given.

After enactment, regulations must be published in the South Australian Government Gazette and this is usually done by the Cabinet Clerk on the same day as they are made by the Governor. Regulations which must be tabled in Parliament commence operation four months after the day of making or an earlier date specified in the regulation itself if the Minister certifies that it is necessary or appropriate for the regulation to commence at that earlier date. Regulations which are not tabled in Parliament commence operation on the day they are made or a later date if that is specified in the regulation.

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841 The Joint Committee had operated since 1938.
842 Parliamentary Committees Act 1991 (SA), s. 12.
843 Subordinate Legislation Act 1978 (SA), s. 11.
844 Professor D. Pearce & Mr. S. Argument, op. cit., p. 58.
845 Subordinate Legislation Act 1978 (SA), s. 10AA(1) & (2)(a).
846 ibid, s. 10AA(3).
Tabling Requirements

All regulations must be tabled within 6 sitting days after they have been made.847 As with other jurisdictions, tabling is important because it gives Parliament the power to review subordinate legislation. While failure to comply with the tabling requirements does not affect the validity of regulations,848 LRC may report the failure to Parliament.849 Where LRC makes a Report on the failure to table, if Parliament wants to disallow the particular regulation it must do so within 6 sitting days of the making of the report to Parliament.850

Parliamentary Oversight

As mentioned above, LRC has responsibility for reviewing all regulations tabled in Parliament. LRC does not comment on matters involving government policy – its review focuses on the technical criteria adopted by the Committee on 27 May 1998 and reported on to the Parliament on 3 June 1998.851 After an election held on 9 February 2002, the current LRC adopted the same principles of review at a meeting to be held on 29 May 2002.852 These principles of review require LRC to determine whether –

- The regulations are consistent with the general objectives of the Act under which they are made;
- The regulations unduly trespass on rights previously established by law or are inconsistent with principles of natural justice or make rights and liberties or obligations dependent on non-reviewable decisions;
- The regulations deal with matters which should be contained in Acts;
- The regulations are consistent with the intent of the legislation under which they are made and do not have any unforeseen consequences;
- The regulations are unambiguous and drafted in a sufficiently clear and precise way;
- The objective of the regulations could have been achieved by alternative and more effective means;
- Whether the regulator has assessed if the regulations are likely to result in costs which outweigh the likely benefits sought to be achieved.

LRC also reviews by-laws and it reviews these against the principles contained in sections 247 and 248 of the Local Government Act 1999 (SA). By-laws must –853

847 Subordinate Legislation Act 1978 (SA), s. 10(3).
848 ibid, s. 10(4).
849 ibid, s. 10(5).
850 ibid, s. 10(5b)(b).
851 South Australia, Legislative Assembly, Debates, 3 June 1998.
852 Email, Ms Jenny Baker, Legal Adviser, Regulation Review Committee from Mr George Kosmas, Legal Adviser, LRC, 18 March 2002.
• Be consistent with authorising provisions and in accordance with the intention of the authorising Act;

• Be consistent with the objectives of the authorising Act;

• Adopt a means of achieving the objectives that does not unreasonably burden the community or make unusual or unexpected use of the power conferred by the authorising Act;

• Avoid restricting competition to any significant degree unless the council is satisfied that the benefits to the community outweigh the costs and that the objectives of the by-law can only be reasonably achieved by the restriction;

• Avoid unreasonable duplication or overlap with other statutory rules or legislation;

• Avoid contradicting an express policy of the State that provides for deregulation;

• Avoid breaching principles of justice and fairness; and

• Be expressed plainly and in gender-neutral language.

The Local Government Act 1999 (SA) expressly provides that by-laws cannot be challenged for non-compliance with any of the above principles.

In addition, by-laws —

• Must not exceed the power of the authorising Act;

• Must be consistent with the Local Government Act 1999 (SA), other Acts and the general laws of South Australia;

• Must not without clear and express authority have a retrospective effect, impose a tax; purport to shift the onus of proof to a person accused of an offence and provide for the further delegation of powers delegated under an Act;

• Must not unreasonably interfere with rights established by law; or

• Must not unreasonably make rights dependent on administrative rather than judicial decisions.

LRC has indicated that its review of by-laws and rules made by statutory authorities and local government is much more stringent than its examination of regulations made by Government departments and agencies. This is because regulations made by Government departments and agencies are drafted by OPC and are more likely to comply with scrutiny principles.

854 ibid, s. 248.
855 Professor D. Pearce & S. Argument, op. cit., p. 61 and Telephone Discussion, Ms. J. Baker, Legal Adviser Regulation Review Committee and Mr. G. Kosmas, Legal Adviser, LRC, 18 March 2002.
856 Telephone Discussion, Ms. J. Baker, Legal Adviser Regulation Review Committee and Mr. G. Kosmas, Legal Adviser, LRC, 18 March 2002.
Where LRC has issues with regulations or by-laws, these concerns are raised with the relevant Minister or Council and are usually resolved through undertakings and the provision of additional information by the Minister or Council.\textsuperscript{857} How successful LRC is in this regard is not clear as LRC does not produce an Annual Report discussing its work nor does it provide access to any of its deliberations. However, one of LRC’s legal advisers indicated that LRC reviews a significant number of regulations each year and that it is very successful in negotiating positive outcomes with Ministers and Councils.\textsuperscript{858}

**Disallowance**

Any member of either House may give notice of a disallowance motion within 14 sitting days of tabling a regulation in that House.\textsuperscript{859} This means that LRC has 14 sitting days after tabling within which to review regulations and report to Parliament. Where LRC believes that a regulation should be disallowed it must report to both Houses of Parliament explaining the reasons for its opinion.\textsuperscript{860} Disallowance takes effect after a disallowance resolution is passed in either House.

**Sunsetting**

Regulations exist for 10 years, ceasing to exist on 1 September, 10 years after they are made, that is 10 years after publication in the *South Australian Government Gazette*.\textsuperscript{861} Expiry may be postponed for up to four years in total and may be done in two year blocks.\textsuperscript{862}

**Access to Legislation**

Access to South Australian consolidated legislation, that is Acts and Regulations and an Index, are available on the “Legislation” site of the South Australian Parliament.\textsuperscript{863} The site has menu assisted search facilities and alphabetical listings. The electronic versions of legislation available on this site are not recognised as official or authorised versions of legislation. Authorised versions are produced in printed form by the South Australian Attorney-General’s department.

\textsuperscript{857} ibid.
\textsuperscript{858} ibid.
\textsuperscript{859} *Subordinate Legislation Act 1978* (SA), s. 10(5b)(a).
\textsuperscript{860} ibid, s. 10A.
\textsuperscript{861} ibid, s. 16B(1)(g) and (2).
\textsuperscript{862} ibid, s. 16C.
Key Features of the Regulatory System

1. Oversight of Regulatory Proposals
   - Usually drafted by Chief Parliamentary Counsel (CPC).
   - CPC must certify whether criteria contained in section 7 of the *Subordinate Legislation Act 1992* (Tas) have been met.
   - Regulation Review Unit (RRU) in the Department of Treasury and Finance provides advice on preparation of subordinate legislation.
   - After enactment, reviewed by the Subordinate Legislation Committee (SLC).

2. Public Notification
   - Where regulatory proposals are prepared without RISs, there is no legislative requirement for notification prior to enactment.
   - Where regulatory proposals are prepared with RISs, notice must be published in the *Tasmanian Government Gazette* and at least 3 daily newspapers circulating throughout Tasmania.
   - After enactment, notice of all ‘statutory rules’ must be published in the *Tasmanian Government Gazette*. The full text of subordinate legislation which falls outside the definition of ‘statutory rules’ must be published in the *Tasmanian Government Gazette*.

3. Public Participation
   - For regulatory proposals without RISs, there are no legislative requirements for public participation.
   - For regulatory proposals with RISs, the public must be given at least 21 days to make submissions.

4. Regulation Impact Statements (RISs)
   - RISs must be prepared for all subordinate legislation which imposes a significant burden, cost or disadvantage on any sector of the public.

5. Oversight of RISs
   - RRU provides advice on preparing RISs.
Draft RISs must be submitted to the Secretary of Department of Treasury and Finance for approval.

6. Tabling Requirements

- Subordinate legislation must be tabled in each House within 10 sitting days after notification in the *Tasmanian Government Gazette*.
- Failure to table as required results in the subordinate legislation being void.

7. Disallowance

- Notice may be given by any Member of either House within 15 sitting days of tabling.
- SLC may recommend disallowance and must do so within 15 sitting days of tabling.

8. Sunsetting

- Subordinate legislation automatically expires at the end of 10 years.
- May be extended for an additional 12 months through amending regulations but after that can only be extended by an Act of Parliament.

9. Access to Legislation

- Authorised versions available in printed form.
- Legislation may be accessed electronically from the EnAct database but is for information purposes only.

Introduction

Subordinate legislation includes a regulation, rule or by-law made by the Governor or approved, confirmed or consented to by the Governor.\(^{864}\) Professor Pearce and Mr. Argument note that the various pieces of legislation dealing with subordinate legislation use the terms – ‘subordinate legislation’, ‘statutory rules’ and ‘regulations’ in a confusing way.\(^{865}\)

**Regulation Review Unit**

RRU in the Department of Treasury and Finance is responsible for administering the *Subordinate Legislation Act 1992* (Tas). RRU assists departments and agencies with the preparation of subordinate legislation by providing them with advice on the procedures and requirements of the *Subordinate Legislation Act 1992* (Tas). RRU also provides advice on assessing the impact of proposed subordinate legislation and the preparation of RISs. While it is not compulsory to seek advice from RRU, departments and agencies are encouraged to seek its advice –

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\(^{864}\) *Subordinate Legislation Act 1992* (Tas), s. (3)(1).

\(^{865}\) Professor D. Pearce & Mr. S. Argument, op. cit., p. 70.
All Agencies and Authorities are strongly encouraged to consult with staff of the RRU should they need guidance at any stage in the process of preparing subordinate legislation. In particular, they are encouraged to liaise with the RRU as early as possible in relation to proposed subordinate legislation. This should help ensure that the RRU is aware of the issues surrounding the proposed subordinate legislation and is satisfied with the manner in which it has been developed.\textsuperscript{866}

RRU provides agencies and departments with training on regulation-making procedures, has produced an Administrative Handbook to provide assistance to those involved in the regulation-making process\textsuperscript{867} and has developed a Regulatory Impact Assessment Model which can be used when preparing RISs.

**Chief Parliamentary Counsel**

CPC is not required by statute to draft subordinate legislation but in practice CPC frequently drafts regulations, rules, by-laws, orders, proclamations and other instruments when requested by departments and agencies. CPC also drafts all Bills.

**Subordinate Legislation Committee**

SLC was established by the *Subordinate Legislation Committee Act 1969* (Tas) and consists of 6 Members of Parliament representing all political parties and both Houses of Parliament. SLC reviews all subordinate legislation for compliance with the principles contained in section 8 of the *Subordinate Legislation Committee Act 1969* (Tas). SLC’s role in reviewing subordinate legislation is discussed below at pp. 195-196.

**Regulation-making Process**

Procedures for making subordinate legislation are contained in the *Subordinate Legislation Act 1992* (Tas),\textsuperscript{868} the *Acts Interpretation Act 1931* (Tas) and the *Rules Publication Act 1953* (Tas). The *Subordinate Legislation Act 1992* (Tas) requires departments and agencies to comply as far as is reasonably practicable with any guidelines produced by the Treasurer under section 3A.\textsuperscript{869} As the Treasurer has not issued any guidelines, the provisions in Schedule 1 of the *Subordinate Legislation Act 1992* (Tas) apply. When developing subordinate legislation, departments and agencies must comply with the guidelines contained in Schedule 1, unless the regulatory proposal falls within an exemption under section 6. Some of the requirements contained in Schedule 1 are –

- There must be a clear statement of objectives;
- The objectives must be reasonable;

\textsuperscript{867} ibid.
\textsuperscript{868} While the *Subordinate Legislation Act 1992* (Tas) was passed in December 1992, it was not proclaimed and did not commence until certain amendments were passed in 1994.
\textsuperscript{869} *Subordinate Legislation Act 1992* (Tas), s. 4.
• Alternative options must be considered;
• Advantages and disadvantages must be considered;
• Impact on competition must be considered;
• Consultation should take place with other agencies and departments.

In other words, a qualitative assessment of the need for a regulatory proposal is required. Once this is completed, drafting instructions are sent to CPC, a final draft should be agreed on and CPC certifies whether the requirements of section 7 of the *Subordinate Legislation Act 1992* (Tas) have been met. This is discussed below at p. 194.

**Regulation Impact Statements**

Where subordinate legislation is not exempt under section 6 of the *Subordinate Legislation Act 1992* (Tas), it must be examined to determine whether it has a significant impact. RISs must be prepared for all subordinate legislation which imposes “a significant burden, cost or disadvantage on any sector of the public”.\(^{870}\) Whether or not a RIS is required is a decision which rests ultimately with the Secretary of the department responsible for administering the *Subordinate Legislation Act 1992* (Tas),\(^{871}\) that is the Department of Treasury and Finance. Agencies and departments submit their view as to whether subordinate legislation is exempt and why and the Secretary must then make a decision. Where it does not have a significant impact, a certificate must be obtained from the Secretary and then the proposed subordinate legislation may be submitted to the Governor to be made.

Schedule 2 of the *Subordinate Legislation Act 1992* (Tas) requires RISs to assess the costs and benefits of regulatory proposals, the costs and benefits of alternatives, the impact on competition and the option which provides the greatest benefit or the least cost to the community. RISs must also specify what consultation has been undertaken and what future consultation will be undertaken.\(^{872}\) RRU has developed a Regulatory Impact Assessment model to assist departments and agencies with the preparation of RISs.

**RIS Oversight Prior to Enactment**

Once a draft RIS has been prepared it must be submitted to the Secretary of the Department of Treasury and Finance who must certify compliance with the requirements contained in Schedule 2 of the *Subordinate Legislation Act 1992* (Tas) and that the proposed consultation process is appropriate.\(^{873}\) Once RISs have been approved by the Secretary, the consultation process then proceeds. After consultation, the RIS or the draft subordinate legislation may need to be changed. Where there are changes, the final draft will have to be submitted to CPC for a new certificate under section 7. While not compulsory, RRU suggests in its *Subordinate Legislation Act 1992* (Tas), s. 5(1D).

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870 ibid, s. 5.
871 ibid, s. 5(1C).
872 ibid, Schedule 2.
873 *Subordinate Legislation Act 1992* (Tas), s. 5(1D).
Legislation Users’ Guide, that they be notified of any changes so that they are in a position to provide advice to SLC should a request be made.\textsuperscript{874}

Exemptions from the RIS Process

Some subordinate legislation is exempt from the requirement to comply with the guidelines and from the RIS process. The Treasurer may exempt subordinate legislation from the RIS process where there are special circumstances which make it in the public interest for the legislation to be made without preparing a RIS.\textsuperscript{875} The Secretary may exempt subordinate legislation from the RIS process where it deals with, for example -\textsuperscript{876}

- Corrections to existing subordinate legislation;
- Savings or transitional matters;
- Matters arising under uniform legislation;
- Matters involving the adoption of international or Australian standards or codes of practice where an assessment of the costs and benefits has already been made;
- Declaratory, machinery or procedural matters;
- Matters involving relations between bodies which are departments;
- Fees increases which do not exceed the Consumer Price Index;
- Court procedures and practices;
- Where a Government Business Enterprise is responsible for administering the subordinate legislation and that legislation relates to setting of fees, charges or tariffs.

Subordinate legislation which is exempt from these requirements need a certificate from the Secretary or the Treasurer and then may be submitted to the Governor to be made, accompanied by all the relevant paperwork.

Notification and Participation

There is no legislative requirement for notice to be given prior to the enactment of proposed subordinate legislation which is exempt from the RIS process, nor is there any opportunity for the public to comment on this legislation.

Where subordinate legislation is made with a RIS, notice must be published in the Tasmanian Government Gazette and at least 3 daily newspapers published and circulating throughout Tasmania.\textsuperscript{877} The Notice must include the objects of the proposed subordinate legislation,
details of where a copy of the RIS and subordinate legislation may be obtained and must invite comments.\footnote{ibid, s. 5(2).}

At least 21 days must be provided for the public to make submissions. Departments and agencies are also required to ensure that all comments are given appropriate consideration and that consultation takes place with consumers, the public, interest groups and any sector of industry likely to be affected by the regulatory proposal.\footnote{ibid, s. 5(2).} There is no requirement for agencies or departments to hold public hearings nor to allow the public to present their views orally.

The \textit{Rules Publication Act 1953} (Tas), which requires notification only, applies to all statutory rules including regulations, by-laws, rules made by the Governor or a rulemaking authority, proclamations, notices and orders-in-council which fix the date of commencement of an Act which appeals, amends, extends, restricts or varies an Act. This Notice must include that the statutory rules have been made and details of where copies may be obtained and must be published in the \textit{Tasmanian Government Gazette}.\footnote{Rules Publication Act 1953 (Tas), s. 5(2).} The \textit{Acts Interpretation Act 1931} (Tas) provides that regulations which fall outside the definition of ‘statutory rules’ must be published in their entirety in the \textit{Tasmanian Government Gazette}.\footnote{Acts Interpretation Act 1931 (Tas), s. 38A(2)(a).} For example, notices fall outside the definition of ‘statutory rules’ and need to be published in their entirety.

\section*{Oversight Prior to Enactment}

CPC plays an important role in the oversight of subordinate legislation. All proposed subordinate legislation must be submitted to CPC for advice as to whether –\footnote{Subordinate Legislation Act 1992 (Tas), s. 7.}

\begin{itemize}
\item It appears to be within the powers conferred by the relevant Act;
\item It has a retrospective effect; imposes a tax, fee, fine, imprisonment or other penalty or sub-delegates powers delegated by the relevant Act – and there is no clear authority to do any of these things;
\item Appears to be within the general objectives of the relevant Act;
\item Is expressed in as clear and unambiguous language as is reasonably possible.
\end{itemize}

The Governor cannot make, approve or confirm proposed subordinate legislation unless he or she receives advice from CPC that the criteria in section 7 have been met.\footnote{ibid, s. 8.} SLC must also receive a copy of CPC’s advice.\footnote{ibid, s. 9.}
Tabling Requirements

All subordinate legislation must be tabled in each House of Parliament within 10 sitting days after they have been notified or published in the *Tasmanian Government Gazette*. Subordinate legislation which is not tabled in accordance with these requirements is void. As with other jurisdictions, tabling of subordinate legislation is an important requirement because it gives Parliament the power to review subordinate legislation.

Parliamentary Oversight

As mentioned above, SLC has responsibility for examining whether subordinate legislation complies with the principles contained in the *Subordinate Legislation Committee Act 1969* (Tas). As with the other Australian scrutiny committees, SLC does not receive subordinate legislation to review until after it has been made.

Departments and agencies must send copies of any certificates, RISs, submissions and CPC’s certificates to SLC within 7 days of notification or publication in the *Tasmanian Government Gazette*. SLC found that departments and agencies were not always complying with these requirements and from 1 January 1996 failure to provide the relevant documents within 7 days results in an automatic Notice of Disallowance.

SLC examines whether subordinate legislation –

- Is within the regulation-making power conferred by the Authorising Act;
- Through its form requires further explanation;
- Unduly trespasses on personal rights and liberties;
- Unduly makes rights dependent on administrative decisions rather than judicial decisions;
- Contains matters that in the opinion of SLC should be dealt with in an Act.

SLC also ensures that subordinate legislation complies with the regulation-making procedures contained in the *Subordinate Legislation Act 1992* (Tas). SLC takes particular note of consultation and the comments received and if these do not correspond, it may recommend disallowance. SLC may report to Parliament making any appropriate recommendations including a recommendation for disallowance. Usually concerns about subordinate legislation are resolved by Ministers providing undertakings or additional information. In recent years SLC has not recommended that any subordinate legislation be disallowed. One of the issues

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885 *Acts Interpretation Act 1931* (Tas), s. 47(3).
886 ibid, s. 47(3A).
887 *Subordinate Legislation Act 1992* (Tas), s. 9.
888 RRU, op. cit., p. 25.
889 *Subordinate Legislation Committee Act 1969* (Tas), s. 8.
which has concerned SLC recently has been the use of exemptions to avoid preparing RISs.\textsuperscript{890} SLC does not produce an Annual Report and the Committee’s proceedings are confidential.

When Parliament is not sitting, SLC has power to suspend the operation of subordinate legislation until there is an opportunity for Parliament to conduct a review and it can also require departments and agencies to make specific amendments or rescind the subordinate legislation.\textsuperscript{891}

SLC may summon witnesses to appear before it and give evidence, and when it does so its proceedings must be open to the public.\textsuperscript{892}

**Disallowance**

Either House may give notice of a disallowance motion within 15 sitting days after tabling\textsuperscript{893} When Parliament is sitting, SLC may make disallowance recommendations to either House. Subordinate legislation which is disallowed is void and of no effect from the date the disallowance resolution is passed.\textsuperscript{894} Once a subordinate law has been disallowed a similar subordinate law cannot be remade for 12 months unless the House passes a resolution to allow it to be remade or it is tabled and 30 sitting days have elapsed.\textsuperscript{895}

**Sunsetting**

Subordinate legislation has a maximum life of 10 years.\textsuperscript{896} Subordinate legislation may be extended for an additional 12 months by the Governor\textsuperscript{897} through amending regulations but any further extensions after that must be granted under an Act.

**Access to Legislation**

CPC compiles and maintains an electronic database of consolidated Acts and statutory rules.\textsuperscript{898} The legislation on the site is for information purposes only and does not contain authorised versions of legislation but it does provide people with free access to legislation. The site will be subject to extensive testing and eventually it will become a source of authorised legislation in accordance with the *Legislation Publication Act 1996* (Tas).

The database (which is known as EnAct) was initially loaded with Acts current at 1 February 1997 and statutory rules current at 1998. Some statutory rules made before this date have been

\textsuperscript{890} *Telephone Discussion*, Ms. J. Baker, Legal Adviser, Regulation Review Subcommittee and Ms. W. Peddle, Secretary, Subordinate Legislation Committee, 21 March 2002.

\textsuperscript{891} *Subordinate Legislation Committee Act 1969* (Tas), s. 9.

\textsuperscript{892} ibid, ss. 10 and 6.

\textsuperscript{893} *Acts Interpretation Act 1931* (Tas), s. 47(4).

\textsuperscript{894} ibid, s. 47(4).

\textsuperscript{895} ibid, s. 47(7).

\textsuperscript{896} *Subordinate Legislation Act 1992* (Tas), s. 11(2).

\textsuperscript{897} ibid, s. 11(5).

\textsuperscript{898} It is a requirement under the *Legislation Publication Act 1996* (Tas) that CPC maintain an electronic database of all subordinate and primary legislation, s 5. The electronic database can be found at <http://www.thelaw.tas.gov.au/>.
loaded onto the system, but this is only done when time permits. The database contains sessional and historical versions of legislation. Sessional versions include Acts as passed by Parliament and statutory rules as notified in the *Tasmanian Government Gazette*. Historical versions are fragmented versions of legislative documents. The sessional versions of new Acts are available as soon as they receive royal assent and for statutory rules as soon as they are notified in the *Tasmanian Government Gazette*.

Some of the key features of EnAct are:

- automatic consolidation of amendment legislation on commencement;
- 'point-in-time' searching of consolidated legislation;
- innovative automated tools for drafting amendment legislation;
- presentation of legislation in various formats;
- advanced searching and browsing capabilities.

Western Australia

Key Features of the Regulatory System

1. **Oversight of Regulatory Proposals**
   - Drafted by Parliamentary Counsel’s Office (PCO).
   - After enactment, reviewed by the Delegated Legislation Committee (DLC).
   - DLC also reviews local laws after they have been made.

2. **Public Notification**
   - Prior to enactment, there is no legislative requirement for notice to be given.
   - After enactment, all subsidiary legislation must be published in the *Western Australian Government Gazette*.

3. **Public Participation**
   - Prior to enactment, there is no legislative requirement for public participation.

4. **Regulation Impact Statements (RISs)**
   - There is no requirement to prepare RISs.

5. **Tabling Requirements**
   - Only regulations (ie rules, local laws and by-laws) must be tabled and this must be done within 6 sitting days of publication in the *Western Australian Government Gazette*.
   - Failure to comply with the tabling requirements results in regulations ceasing to operate.

6. **Disallowance**
   - Notice may be given by any Member of either House within 14 sitting days after tabling.
   - DLC may recommend disallowance and must do so within 14 sitting days after tabling.

7. **Sunsetting**
   - There are no requirements for subsidiary legislation to automatically expire.
8. Access to Legislation

- Authorised versions available in printed form only.
- Legislation may be accessed electronically on a database maintained by the State Law Publisher but is for information purposes only.

Introduction

Subsidiary legislation is the major form of subordinate legislation in Western Australia. ‘Subsidiary legislation’ includes proclamations, regulations, rules, local laws, by-laws, orders, notices, rules of court, town planning schemes, resolutions or other instruments having legislative effect.\(^{900}\) Subsidiary legislation is made by the Governor acting on the advice of the Executive Council\(^ {901}\) but it may also be made by the Minister responsible for the Act or a statutory body or officer.

Delegated Legislation Committee

Subsidiary legislation was first reviewed by the Legislative Review and Advisory Committee (LRAC), a statutory committee created by the \textit{Legislative Review and Advisory Committee Act 1976 (WA)}. The LRAC carried out this function until replaced by the Joint House Delegated Legislation Committee (DLC) in 1987. The DLC’s power and authority came from Joint Rules contained in the Standing Orders of the Legislative Assembly. DLC’s examination of subsidiary legislation was restricted to ‘regulations’ as defined by section 42(8) of the \textit{Interpretation Act 1984 (WA)} and included regulations, rules, by-laws and local laws. This meant that many types of subsidiary instruments were excluded from scrutiny by DLC –

\begin{quote}
As the committee grew in experience, its ability and confidence increased. It has expressed frustration with the narrowness of its current terms of reference, which largely confine it to examining subsidiary legislation that is subject to disallowance by either House. These disallowable instruments are only one species of subsidiary legislation that is made by Executive Government.\(^ {902}\)
\end{quote}

DLC did make use of its power to review local laws, recommending disallowance on a number of occasions. DLC ceased operation on 10 January 2001.

The thirty-sixth Parliament\(^ {903}\) established a new committee to scrutinise subsidiary legislation, the Delegated Legislation Committee (DLC). DLC consists of 8 Members of Parliament representing both Houses and all political parties. DLC is subject to the same standing orders as other committees of the Legislative Council. Unlike its predecessor, DLC is able to review a much broader range of subsidiary legislation and this is discussed below at pp. 202-204.

\(^{900}\) \textit{Interpretation Act 1984 (WA)}, s. 5.
\(^{901}\) \textit{ibid}, s. 40.
\(^{903}\) This Parliament commenced after elections held on 10 February 2001.
Parliamentary Counsel’s Office

PCO drafts Bills, subsidiary legislation and publishes an annual index to the legislation of Western Australia. Where it is made by the Governor in Executive Council, it must be accompanied by an Explanatory Note prepared by the instructing officer and a draft Executive Council minute prepared by PCO. When PCO has finished drafting subsidiary legislation, it is returned to the relevant department or agency with a certificate certifying that the regulations are consistent with the authorising Act.

Regulation-making Process

Regulation Impact Statements

There is no requirement to undertake a cost-benefit analysis for subsidiary legislation.

Notification and Participation

Prior to enactment, there is no legislative requirement for notice to be given nor for the public to comment on proposed subsidiary legislation. In formulating subsidiary legislation, however, departments and agencies may consult with key stakeholders.

After enactment, all subsidiary legislation must be published in the Western Australian Government Gazette. Subsidiary legislation commences operation on the date of publication unless another date is specified in the legislation. The instructing officer from the department or agency responsible for the subsidiary legislation must arrange for publication with the State Law Publisher. The State Law Publisher will only publish regulations, rules and by-laws if they are accompanied by a certificate from PCO.

Tabling Requirements

In contrast to the requirement that all subsidiary legislation be published in the Western Australian Government Gazette, only regulations (that is rules, local laws and by-laws), must be tabled. As with other jurisdictions, tabling of regulations is an important requirement because it gives Parliament the power to review them. Regulations must be tabled in both Houses of Parliament within six sitting days after being published in the Western Australian Government Gazette. Failure to comply with the tabling requirements results in the regulations ceasing to operate.

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904 PCO, Getting Legislation Drafted and Enacted – Guidelines and Procedures.
905 Interpretation Act 1984 (WA), s. 41(1)(a).
906 ibid, s. 41(1)(b).
907 PCO, op. cit.
908 Interpretation Act 1984 (WA), s. 42(1) and s. 42(8).
909 ibid, s. 42(1).
910 ibid, s. 42(2).
Parliamentary Oversight

DLC’s opportunity to review subsidiary legislation only arises after it has been made and publicised. DLC’s new terms of reference enable it to examine any instrument which falls within the definition of subsidiary legislation as well as any instrument that is subject to disallowance by either House of Parliament. However DLC may only make recommendations of disallowance in relation to ‘regulations’ as defined in section 42 of the Interpretation of Legislation Act 1984 (WA), that is to regulations, rules, local laws and by-laws or to other instruments which are deemed to be ‘regulations’ for the purposes of disallowance or which are subject to special disallowance procedures as provided in their authorising acts.

This means that DLC may review subsidiary legislation which its predecessor had no power to examine such as orders, codes, town planning schemes –

*The committee may now report to Parliament on a broader range of instruments due to the definition of the instrument in clause 6.7(a). It should be understood that the clause does not require the committee to look at every instrument referred to it under the subclause. How much time and attention it gives is a matter for the judgment of the committee.*

While the terms of reference empower DLC to examine most subsidiary legislation, it is up to the committee to determine what time, if any, will be allocated to reviewing these various instruments. It is unlikely that DLC will be able to critically examine all instruments which are referred to it for consideration. DLC’s focus of review is on regulations and local laws because with these types of instruments it may use its ultimate power, that is, it may recommend disallowance –

*However, I am assured that some 99 per cent of the committee’s time will be taken up with regulations and local laws because of their importance and because they are instruments that are subject to disallowance. I must stress that the subclause is no more than an automatic referral mechanism. It is for the committee to decide the level and type of consideration that it will give to those instruments, that is, those instruments that are not subject to disallowance.*

DLC staff spend about 50% of their time reviewing local laws. However, local laws generate about 75% of follow-up work, queries and concerns. Local Government has been given broad legislative powers which means that local laws need to be drafted carefully by those with specialist expertise. While most subsidiary legislation is drafted by PCO, local laws are drafted by various individuals who may or may not have specialist expertise in drafting local government laws. As a consequence, a number of local laws do not meet the standards expected by DLC.

912 ibid.
913 ibid, pp. 1444.
914 ibid.
915 Telephone Discussion, Ms. J. Baker, Legal Adviser, Regulation Review Subcommittee and Mr. N. Pratt, Principal Advisory Officer, DLC, 22 March 2002.
916 ibid.
The new terms of reference generally give DLC a much broader range of principles against which to review subsidiary legislation than its predecessor. These principles include whether the instrument:

- Is authorised or contemplated by the empowering Act;
- Has an adverse effect on existing rights, interests, or legitimate expectation beyond giving effect to a purpose authorised or contemplated by the authorising Act; \(^917\)
- Removes or modifies rules of procedural fairness;
- Deprives a person who is unhappy with a decision of the ability to obtain review on the merits or judicial review;
- Imposes terms and conditions on review which would be likely to result in that review being illusory or impracticable;
- Contains provisions which should more appropriately be contained in an Act.

As with other scrutiny committees, DLC does not comment on matters involving government policy – its review focuses on the technical criteria contained in its terms of reference.

DLC has power to report to Parliament making any recommendations it thinks appropriate, including a recommendation that a regulation be disallowed. As a preliminary step, DLC enters into discussions with Ministers and local authorities and obtains undertakings and commitments to make amendments. Where DLC has ongoing concerns, it may conduct inquiries and summons witnesses and documents and these proceedings are generally open to the public. Where it has issues which can’t be resolved with local authorities, DLC approaches the Minister for Local Government. Where DLC is unable to negotiate resolutions with Ministers or with local authorities it may report to Parliament with or without a recommendation for disallowance.

Sometimes departments, agencies and local authorities are slow to provide DLC with the required documentation, making it difficult for DLC to fulfil its scrutiny functions. To deal with this problem DLC issues a protective notice of motion of disallowance which “preserves the Committee’s capacity to recommend disallowance of delegated legislation after the disallowance period has expired”. \(^919\) A protective motion of disallowance does not necessarily mean that DLC will disallow the subsidiary legislation, but it will do so if departments, agencies or local authorities persist in failing to provide required documentation.

DLC’s general meetings and deliberations are not open to the public. To make its work more publicly accessible, DLC will be producing reports containing details of its work at the end of

\(^{917}\) Western Australia, Legislative Council, Debates, 27 June 2001, pp. 1442-1443.

\(^{918}\) This principle has replaced “unduly trespasses on established rights, freedoms or liberties” which gave much greater scope to the Committee to deal with subsidiary legislation which tampered with rights and freedoms.

each sitting session of Parliament. At its meetings, DLC must determine whether correspondence is ‘public’ or ‘private’. Most of its correspondence is ‘public’ and is available on request to members of the public. However, many people may be unaware of this right.

### Disallowance

Not all subsidiary legislation is disallowable. Disallowable instruments fall into two broad categories –

- Disallowable instruments under section 42 of the *Interpretation Act 1984* (WA), namely regulations, rules, by-laws and local laws;
- Other instruments such as codes, notices, orders, town planning schemes etc will only be disallowable where their authorising Act deems them to be disallowable for the purposes of section 42 or provides a specific procedure for disallowance.

Either House may give notice of a disallowance motion within 14 sitting days after tabling. In practice, notice of disallowance is always given in the Legislative Council. The disallowance procedure is dealt with in the *Interpretation Act 1984* (WA) and Legislative Council Standing Orders 152 and 153. The motion must be moved within two sitting days after notice, debated during the next 10 sitting days and put to the vote on the day after the expiry of 10 sitting days. In practice the debate is usually adjourned to the 11th sitting day after the motion is moved. Where the matter is not dealt with on the 11th sitting day the motion is deemed to be resolved in the affirmative and the instrument is disallowed.

Once a disallowance motion has been passed, notice must be published in the *Western Australian Government Gazette* within 21 days of the passing of the resolution. Both Houses have the power to amend regulations which have been disallowed but only by resolution of both Houses. In these circumstances, once a resolution has been passed the amending regulations must be published in the *Western Australian Government Gazette* and commence operation at the expiration of seven days after publication.

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920 Telephone Discussion, Ms. J. Baker, Legal Adviser, Regulation Review Subcommittee and Mr. N. Pratt, Principal Advisory Officer, DLC, 22 March 2002. The first session of Parliament is due to end in early August 2002 and a report of DLC’s activities should be available shortly after this time.
921 Ibid.
922 *Interpretation Act 1984* (WA), s. 42(2).
923 Telephone Discussion, Ms. J. Baker, Legal Adviser, Regulation Review Subcommittee and Mr. N. Pratt, Principal Advisory Officer, DLC, 22 March 2002.
924 Legislative Council, Standing Orders, 152(b).
925 Ibid, 153(c).
926 Telephone Discussion, Ms. J. Baker, Legal Adviser, Regulation Review Subcommittee and Mr. N. Pratt, Principal Advisory Officer, DLC, 22 March 2002.
927 *Interpretation Act 1984* (WA), s. 42(5).
928 Ibid, s. 42(4).
929 Ibid, s. 42(4).
Sunsetting

There are no specific requirements that subsidiary legislation cease operation after the expiration of a specified period of time. Unless amended or repealed by new legislation, subsidiary legislation continues to operate.

Access to Legislation

An electronic database of legislation is maintained by the State Law Publisher and is based on a database compiled by PCO. The electronic database includes statutes and regulations. The legislation contained in the electronic database is for information purposes only and authorised versions of legislation must be purchased from the State Law Publisher. Those who subscribe to the unauthorised electronic database are automatically kept up-to-date with legislative developments. The electronic database is updated several times a day from PCO’s database and the legislation is consolidated automatically. Those who subscribe also get access to Acts by Year (which provides the final version of Acts at the end of the year), Index to Statutes and Access to Parliamentary Bills and Bills Progress. Subscribers may also conduct point of time searches back to 1998, enabling them to get copies of legislation as made.

United States’ Jurisdictions

Arizona

Key features of regulatory system

1. **Oversight of Regulations**
   - Regular regulations must be approved by the Governor’s Regulatory Review Council (Council) or they cannot proceed.
   - Courtesy reviews by Council before drafting of proposed regulations, enabling early resolution of issues or problems.
   - Review of regulations and regulation packages by Council for compliance with criteria in the Administrative Process Act (APA).
   - Council liaison and discussion with agencies throughout the regulatory process to ensure the enactment of good quality regulations.

2. **Public Notification**
   - Notification of opening of docket, i.e., commencement of regulation-making in the Arizona Administrative Register (the Register).
   - Notification of proposed regulation in the Register, including text and preamble of proposed regulation.
   - Availability of the Register on the internet, in paper form and at all major law libraries. Some agencies also use their websites to make regulatory information available.
   - Throughout the regulation-making process, updates of dockets, such as public hearing dates, deadlines for submissions, proposed timetable etc.
   - Notification in the Register of changes made by agencies after public comments.
   - Notification in the Register of decisions not to proceed with proposed regulations.
   - Notification in the Register of Council approval or disapproval of proposed regulations.
   - Publication of final regulation in the Register.
3. Public Participation

- Once regulation-making has commenced, agencies are required to notify all people who have requested notification of proposed regulations.

- Members of the public may make written and oral submissions to the agency. They have a minimum of 30 days to comment. Even if only one person wants to make an oral submission, the agency must hold an open public hearing for that person.

- Members of the public may make written and oral submissions to Council. Council meetings are open to the public and members of the public have an opportunity to present their views at Council meetings.

4. Impact Analysis

- Economic, Small Business and Consumer Impact Statements (EISs) examining costs and benefits prepared for most regulations.

- Specific requirements for EISs to analyse the impact on employment, state revenues and small business.

- Where proposed regulation affects small business, agencies must show what consideration has been given to reducing the impact on small business.

5. Sunsetting and Review of Regulations

- All regulations must be reviewed by responsible agencies every five years.

- Five Year Review Report must be submitted to Council.

- Failure to conduct review and submit report results in expiry of regulations.

- Annual report by all agencies on their progress with five year review, submitted to Council on or before 30 June each year.

6. Public Appeals

- Public right to appeal against agency practices, guidelines or substantive policies on the basis that they constitute regulations.

- The public must appeal to the agency first. If that fails they may appeal to Council and ultimately may take the matter to the courts.

- The public have the right to appeal against EIS up to 2 years after a regulation has commenced.

- Grounds of EIS appeal – impact greater than that originally estimated or the actual impact not estimated and that impact imposes a significant burden on persons subject to the regulation.
Governor’s Regulatory Review Council

The Council was established in 1981 by Executive Order. Previously Council’s role of reviewing regulations took place in the middle of the regulation-making process and its focus was more on the removal of redundant and irrelevant regulations. In these early years the Attorney-General had responsibility for final approval of regulations. This process allowed agencies to ignore the comments made by Council because what agencies really needed was approval by the Attorney-General.931

In 1995 Council’s role changed dramatically – Council became the final step in the regulation-making process, taking over responsibility for approval of most regulations from the Attorney-General.932 Council has a powerful role in the regulation-making process because its approval is necessary for regulations to proceed. Council staff described Council’s role as not to eliminate regulations which agencies are authorised by statute to make but to facilitate the enactment of good quality regulations by ensuring that any problems are resolved before regulations commence operation –

*The emphasis has been on improving regulations, in making sure that they are not onerous, they are not duplicative, that the benefits outweigh the costs and those kinds of things …* 933

Council members may not like a particular regulation and may disagree with the policy it enacts but they will still approve a regulation as long as it meets all the statutory requirements for good quality regulations –

*I think that the process here in Arizona is the best process that I have seen over the years. Part of the reason that makes it so good is that it is not a policy-making role. The Legislature sets the policy and then this group looks at how the agency is implementing it. Number one, I think, is to make sure that they are staying within the limitations that the Legislature established. Just as the agency cannot go outside of that, this group cannot go outside of that as well. In many respects there are a lot of final decisions to make on rules, but it is based on very specific criteria that the Legislature has given for the group to work with. Although we may have strong opinions one way or another about an issue, we have to look to see whether it fits within each of these narrow criteria.* 934

The statutory criteria which Council uses to evaluate regulations are discussed below at pp. 218-219. Of course, regulations once enacted, may always be changed by the Legislature even if those regulations have complied with all the statutory requirements and procedures for good regulations.

Council employs a small team of staff who carefully review regulations, negotiate changes to regulations with agencies and who provide advice to Council members. The role of Council staff is discussed below at pp. 218-219.

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931 Meeting Notes, Meeting with Council staff, Phoenix, Arizona, Wednesday 18 July 2001.
932 The Attorney-General and not the Council must give final approval to emergency regulations (discussed below at p. 211) and regulations which are part of the regular regulation-making process but which are made by certain agencies (discussed below at p. 215-216).
933 Meeting Notes, Meeting with Council staff, Phoenix, Arizona, Wednesday 18 July 2001.
There are six Council members who are appointed by the Governor for three years. While Council members serve at the Governor’s pleasure, as yet no members have been removed for expressing particular views or for any other reasons.\textsuperscript{935} Members of Council represent various ‘interests’, for example the public interest, the legal profession, the business community and at least one represents the House and at least one represents the Senate.\textsuperscript{936} As representatives of different groups, when reviewing regulations Council members tend to do so from the perspective of the group they represent –  

\begin{quote}
When I come to the meetings I am there with a clear conscience and if I do not like it or understand it, I, maybe somewhat egotistically, believe that I represent every businessman out there.\textsuperscript{937}
\end{quote}

Council members also pride themselves on remaining politically neutral and in voting to approve or disapprove regulations according to their conscience and not along party political lines –  

\begin{quote}
I am heavily involved in party politics .... When I come to the Council I do not think that I have ever thought a political thought one time in the stuff that we have done. I look at it as – I am a taxpayer and a citizen of the State. I don’t know whether its conscience or not. I look at the rules and examine how they will affect us as individuals, not just as businesses. What is this rule going to do? I don’t ever think I have thought consciously about whether something is a Republican or Democrat issue. I felt honoured to be appointed and look at my role as having responsibility to look at issues objectively ...
\end{quote}

Council is required to meet at least once each month.\textsuperscript{939} Council is also required to establish a list of filing deadlines and regular meeting dates for each calendar year by 31 October of the preceding year.\textsuperscript{940}

\section*{Regulation-making Process}

There are four regulation-making processes in Arizona –  

1. Emergency;  
2. Regular;  
3. Summary;  
4. Exempt.

\textsuperscript{935} The comment was made that a council member would need to do something really wrong in order to be removed – \textit{Meeting Notes}, Meeting with Council staff, Phoenix, Arizona, Wednesday 18 July 2001.  
\textsuperscript{936} At least one member of Council must be chosen from a list of three submitted by the Speaker of the House and at least one from a list of three submitted by the President of the Senate.  
\textsuperscript{937} \textit{Meeting Notes}, Meeting with Council members, Phoenix, Arizona, Wednesday 18 July 2001.  
\textsuperscript{938} ibid.  
\textsuperscript{939} §41-1051(B).  
\textsuperscript{940} §1-6-102 and R1-6-103
Emergency Regulations

The emergency regulation-making procedure is used where an agency makes a finding that the regulation is necessary as an emergency measure. Emergency regulations are approved by the Attorney-General rather than Council. Failure by agencies to make regulations does not allow agencies to use the emergency regulation-making procedure. Some examples of emergency regulations are – regulations required to protect public health, safety or welfare; regulations to avoid serious prejudice to the public interest; regulations to avoid violation of state or federal laws.

Summary Regulations

Summary regulation-making is used where regulations are out of date. The Legislature may, for example, have superseded or repealed an agency’s authority for a regulation, repealing the authorising statute but omitting to repeal the regulation. In these circumstances the agency may repeal the regulation using the summary procedure.

Exempt Regulations

Exempt regulations are not subject to the public comment process or to Council oversight; all the agency has to do is to write the regulation and file it with the Secretary of State. §41-1005 lists the types of regulations which are exempt, such as regulations concerning fishing, possession limits for wildlife, speeding, parking infringements, public works such as streets and highways, emergency medical services and so on.

The Legislature also has power to exempt agencies from normal regulation-making procedures. When an agency is seeking to be exempt, it often describes a ‘worse case scenario’ highlighting the long period of time it will take to enact the regulation given the regulation’s controversial nature and the need for public participation. Some agencies in Arizona are able to obtain exemptions from the Legislature much more easily and frequently than other agencies. For example, the Department of Corrections has obtained exemptions from normal regulation-making processes on a number of occasions which has meant that there are no regulations dealing with important issues such as prisoner rights nor the rights of prisoners’ families –

… they don’t have any rules – there is nothing published in the Code and the Legislature just lets them get away with it.

A move to remove the exemptions granted to the Department of Corrections in the last Legislative session was of limited success, with the only result being the appointment of a
Study Committee.\textsuperscript{947} Council staff indicated that they are very much in favour of restricting the use of exemptions, however this will not occur unless the Legislature agrees.\textsuperscript{948}

**Regular Regulations**

The ‘regular’ regulation-making process is used for the majority of regulations and the discussion which follows focuses on this procedure.

**Notification**

Each time an agency wants to enact a regulation, it must open and maintain a docket.\textsuperscript{949} Notice of the opening of a docket must be published in the Register. A docket is a publicly available document which provides information about a proposed regulation and its current status in the regulation-making process. A docket includes such things as information about the subject matter, the responsible agency, deadlines for written and oral submissions, current status of the proposed regulation, where to obtain a copy of the economic, small business and consumer impact statement and a timetable for agency decisions.\textsuperscript{950}

Notice of the proposed regulation must be filed with the Secretary of State for publication in the Register\textsuperscript{951} within 12 months of the publication of notice of the opening of the docket, otherwise the proposed regulation lapses.\textsuperscript{952} The notice filed with the Secretary of State must include the preamble and the full text of the proposed regulation.\textsuperscript{953}

At the same time as the agency files notice of the proposed regulation with the Secretary of State, it must also notify all members of the public who have requested notification of proposed regulations.\textsuperscript{954} The agency may also meet informally with any ‘interested’ parties.\textsuperscript{955}

**Drafting Regulations**

Council staff have been running training sessions on regulation-making procedures and drafting every month for two years – there is such a high turnover of agency staff involved in this process that the training sessions have to be held quite frequently.\textsuperscript{956} Often those asked to participate in the regulation-making process have other policy jobs and so they “frequently come to the process kicking and screaming because they have heard that it’s horrendous and they don’t even know how to begin”.\textsuperscript{957} There has also been an increase in the use of consultants, which is financially costly to agencies and which means that Council staff are frequently dealing with people who are inexperienced with the regulation-making process –

\textsuperscript{947} ibid.  
\textsuperscript{948} ibid.  
\textsuperscript{949} §41-1021(A).  
\textsuperscript{950} §41-1021(B).  
\textsuperscript{951} §41-1022.  
\textsuperscript{952} §41-1021(A)(2).  
\textsuperscript{953} §41-1022(A).  
\textsuperscript{954} §41-1022(C).  
\textsuperscript{955} §41-1023(A).  
\textsuperscript{956} Meeting Notes, Meeting with Council staff, Phoenix, Arizona, Wednesday 18 July 2001.  
\textsuperscript{957} ibid.
We would much rather deal with an agency rule writer who is an administrative assistant and knows the program as opposed to a contract rule writer who doesn’t know the program .... It takes two kinds of knowledge to write a rule – knowledge of the program and knowledge of rule writing. It doesn’t often happen that they reside in one person.\(^{958}\)

It is much easier and less time consuming for Council staff to negotiate and explain changes to experienced agency staff.

**Advisory Committees and Courtesy Reviews**

Prior to filing a notice of the proposed regulation with the Secretary of State, an agency may appoint an advisory committee to comment on the subject matter of the proposed regulation.\(^{959}\) If as a consequence of discussions with the advisory committee a decision is made not to proceed with the proposal, notice of that decision must be published in the Register.\(^{960}\)

Agency staff may prepare a preliminary draft of regulations and obtain a ‘courtesy’ review from Council. Agencies do not employ staff who specialise in regulation-making and drafting of regulations.

There is no compulsion for agencies to seek the views of Council at this early stage of the regulation-making process; whether agencies seek ‘courtesy’ reviews is entirely dependent on the agency staff member responsible for writing the regulation. Where asked for assistance, Council staff will examine draft regulations, indicating potential problems and issues, thus providing agencies with an opportunity to produce better quality regulations from the beginning.\(^{961}\)

Agencies value ‘courtesy’ reviews more than any other service provided by Council because it enables them to avoid problems and delays further down the track in the regulation-making process.\(^{962}\) Courtesy reviews also save time for Council staff when they are doing a final review, enabling them to review the final proposed regulation and accompanying package more quickly and efficiently –

> We have discovered that if we have not done a courtesy review, doing a final review takes more time. So doing a courtesy review is really an act of interest because when more packages come in for the agenda we are always under a tremendous time crunch and so if packages have been through a courtesy review life is easier for everybody.\(^{963}\)

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\(^{958}\) ibid.

\(^{959}\) §41-1021(D).

\(^{960}\) §41-1021(A).

\(^{961}\) Meeting Notes, Meeting with Council staff, Phoenix, Arizona, Wednesday 18 July 2001.

\(^{962}\) ibid.

\(^{963}\) ibid.
Public Participation in Agency Process

An agency must allow a minimum of 30 days after notice has been filed with the Secretary of State for members of the public to make written comments\(^\text{964}\) and must provide an opportunity for oral presentation of those comments if a written request to make oral comments is made within those 30 days.\(^\text{965}\) Notice of oral hearings must be published in the Register and the oral hearings may not take place until at least 30 days after publication of that notice.\(^\text{966}\)

Individuals or associations may request notification of proposed regulations generally or in relation to specific subjects, and agencies must provide personal notification at all stages of the regulation-making process. This has assisted with increasing public participation in the regulation-making process in Arizona.\(^\text{967}\)

There is a move by some agencies to make regulatory information available on their websites. As this is not compulsory not all agencies utilise the internet in this way. Council members and staff indicated that they would like it to be compulsory for agencies to use their websites to provide people with regulatory information –

\[
\text{I would hope that eventually all agencies are required to have it and all of them are required to post on there. Just like they do with the Secretary of State. It is difficult to go through the registry to find things because you are constantly looking ….} \quad \text{\cite{968}}
\]

This would make it much easier for everybody to find out about proposed regulations and to participate in the regulatory process. Not all members of the public may be able to find out about proposed regulations through the Register. Although the Register is available on the internet and is distributed to all major law libraries in Arizona, it is possible that some people are simply unaware of proposed regulations, because they do not have the time or resources to keep track of the register or are not represented by a professional association or a lobbyist –

\[
\text{I am a small business person and I am associated with a large organisation that protects me. However, there are a lot of people in my profession who do not have that association and do not know what is going on or that they have an opportunity for input.} \quad \text{\cite{969}}
\]

Unfortunately, where people are unaware of proposed regulations the benefit of their input to the regulatory process is lost.

Oral hearings must be open to the public\(^\text{970}\) and must provide people with a reasonable opportunity to comment on, discuss and ask questions about proposed regulations. Agencies must hold oral hearings even if only one person requests the opportunity to make an oral submission. Further public participation opportunities exist when regulations come before Council for approval. This is discussed below at pp. 220-221.

\(^{964}\) §41-1023(A).

\(^{965}\) §41-1023(B).

\(^{966}\) §41-1023(D).

\(^{967}\) Meeting Notes, Meeting with Council staff, Phoenix, Arizona, Wednesday 18 July 2001.

\(^{968}\) Meeting Notes, Meeting with Council members, Phoenix, Arizona, Wednesday 18 July 2001.

\(^{969}\) ibid.

\(^{970}\) §41-1023(E).
Agency Review of Proposed Regulations and Public Comments

After written submissions have been received and public hearings have been held, the regulation-making record is closed giving agencies an opportunity to carefully examine the comments made and the economic, small business and consumer impact statement. Agencies have 120 days from the close of the regulation-making record to decide whether or not to proceed with proposed regulations.

Often agencies make substantial modifications to regulations after reviewing public comments, so that regulations are more palatable to the community and to obtain Council approval. Where agencies decide to make changes to proposed regulations, those changes must be published in the Register and the public participation processes must recommence.

Submission to Council

Once agencies are satisfied with proposed regulations, they must be submitted to Council for approval unless the agency is exempt under §41-1057, in which case they must be submitted to the Attorney-General for approval. Agencies which are exempt include –

- An agency headed by a single elected official, for example, Treasury and the Secretary of State;
- Corporation Commission;
- State Board of Directors for community colleges;
- State Board of Education;
- Industrial Commission when incorporating by reference the federal occupational safety and health standards as published in Title 29 Code of Federal Regulations, Parts 1910, 1926 and 1928;
- Arizona State Lottery where the regulations relate to the design, operation or prize structure of a lottery game.

While there is a potential conflict of interest in that under the exemption process the Attorney-General is responsible for approving regulations which originate in the Attorney-General’s department, this conflict seldom arises because not many regulations originate from the Attorney-General’s department –

You would think that the Attorney-General certifying the Attorney-General’s rules would have inherent conflict but with the other special agencies, you know, the Treasurer, the Secretary of State, that conflict would not be there, and the truth of the

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971 §41-1024(C).
972 §41-1024(B).
973 Meeting Notes, Meeting with Council staff, Phoenix, Arizona, Wednesday 18 July 2001
974 §41-1022(E).
Agencies must submit regulation packages to Council which include –

- the preamble;
- the exact words of the regulation;
- a concise explanatory statement; and
- an economic, small business and consumer impact statement.

Council members indicated that the concise explanatory statement filed as part of the regulatory package is extremely useful in helping members obtain an understanding of the issues concerning particular regulations.

Agencies cannot file proposed regulations with the Secretary of State until regulation packages have been approved by Council. Council has 90 days from receipt of regulation packages to review regulations and packages and approve them or return them to agencies with a request for changes to be made.

**Economic, Small Business and Consumer Impact Statements**

An EIS must be prepared for most regulations with the following exceptions –

- Emergency regulations (but not renewal of emergency regulations);
- Summary regulations which only repeal existing regulation language;
- Any regulations which decrease monitoring, record keeping or reporting burdens on agencies, political subdivisions, persons or businesses unless the agency determines that increased implementation or enforcement costs may equal or exceed the reduction in burdens.

There has been some discussion about removing the requirement for EISs where regulations make minimal changes. Not everybody supports this, given that all changes no matter how small have an impact on people –

*I do not know if it is necessarily a good idea to exempt small things because small things involve people. For instance if we exempted the one with the hunting, the total average economic impact was probably less than $100,000 clear but it was important to the people involved in it.*

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975 Meeting Notes, Meeting with Council staff, Phoenix, Arizona, Wednesday 18 July 2001.
976 §41-1024(E).
977 Meeting Notes, Meeting with Council members, Phoenix, Arizona, Wednesday 18 July 2001.
978 §41-1052(A).
979 §41-1052(B).
980 §41-1055(D).
981 Meeting Notes, Meeting with Council staff, Phoenix, Arizona, Wednesday 18 July 2001.
982 ibid.
EISs must demonstrate that the benefits of a particular regulation are greater than the costs. In accordance with §41-1055(B) an EIS must include the following –

1. **Identification of the proposed regulation.**

2. **Identification of the persons who will be directly affected by, bear the costs of or directly benefit from the proposed regulation.**

   This requires identification of those people who will benefit from the enactment of the regulation and identification of those people who will bear the costs. For example, if an additional fee is imposed on business, the EIS should estimate the number of businesses affected and who will ultimately pay the fee, ie the customer, the business owner etc.

3. **A cost-benefit analysis.**

   This requires an analysis of the costs and benefits to all sectors and analysis of how the benefits exceed the costs. It should be noted that Council will not approve a regulation unless the benefits outweigh the costs.

4. **A description of the probable impact on private and public employment in businesses, agencies and political subdivisions.**

   This requires an analysis of all possible impacts on employment.

5. **A statement of the probable impact on small business, including –**

   (a) A description of businesses affected by the proposed regulation, including those businesses which are only marginally affected;

   (b) Identification of the administrative and other costs involved in complying with the regulation.

   (c) A description of the methods that the agency may use to reduce the impact on small businesses. This includes reasons why these alternative methods were not incorporated into the regulation.

   (d) Identification of the probable costs and benefits to private individuals and consumers who are directly affected by the proposed regulation. This may involve a quantitative estimate of the additional annual costs to private individuals and consumers as a whole or if this is not possible a qualitative explanation.

6. **A statement of the probable effect on state revenues.**

   This requires identification of additional or reduced costs to state agencies and increases or decreases in business costs.

7. **A description of any less intrusive or less costly alternative methods of achieving the objectives of the proposed regulation.**

   This requires identification of alternatives to the proposed regulation and identification of the costs and benefits of those alternatives.
Sometimes an agency may have difficulty in obtaining data to comply with all the requirements for EISs. In these circumstances the EIS will not be challenged as long as the agency explains the limitations on the data.\textsuperscript{983}

As most of Arizona’s economy is based on small business, the Legislature is concerned with ensuring that small business can operate effectively and efficiently. Part of this concern is reflected in the requirement that EISs examine the impact of proposed regulations on small business and how that impact can be reduced. Where proposed regulations affect small business, agencies must, in accordance with §41-1035, give consideration to reducing the impact on small business using one of the following methods –

- Establish less stringent compliance or reporting requirements.
- Establish less stringent schedules or deadlines.
- Consolidate or simplify the compliance or reporting requirements for small business.
- Establish performance standards.
- Exempt small businesses from any or all of the requirements of the regulation.

Small business is defined as an independently owned and operated business which employs less than 100 full-time employees or which receives gross annual receipts of less than $4 million. Written analysis of these issues must be provided as part of the EIS.

Sometimes the agencies focus on the impact of regulations upon the regulated public and forget to examine the impact on the public in general. This is more likely to happen where there have been major changes to the regulation as originally proposed and in its final form. In these situations Council staff remind agencies of the need to carefully review how the general community will be affected.\textsuperscript{984}

Notably there is no requirement for EISs to include an analysis of the environmental impact.

\textit{Role of Council Staff}

A regulation package is first reviewed by Council staff,\textsuperscript{985} who examine the package for compliance with the statutory criteria contained in §41-1052(C) –

- The economic, small business and consumer impact statement must contain the information required by the APA.
- The economic, small business and consumer impact statement must be generally accurate.
- The probable benefits of the regulation must outweigh the probable costs of the regulation.

\textsuperscript{983} §41-1055(C).
\textsuperscript{984} Meeting Notes, Meeting with Council staff, Phoenix, Arizona, Wednesday 18 July 2001.
\textsuperscript{985} §1-6-104(C).
• The regulation must be clear, concise and understandable.

• The regulation must not be illegal, inconsistent with legislative intent or beyond the agency’s statutory authority.

• The agency must have adequately addressed the comments on the proposed regulation and any supplemental proposals.

• The regulation must not constitute a substantial change from the proposed regulation and any supplemental notices.

Where Council staff are uncertain as to whether agencies have adequately taken into account comments made in submissions, council staff may contact particular commentators to find out if the agency’s response adequately resolves the issues raised.

Council staff also examine the regulation package for compliance with §41-1052(D) which requires regulations imposing fees to comply with the provisions of §41-1008. Regulations imposing fees may not be enacted unless there is specific authority in Statute for the creation of those fees. In addition, regulations imposing fees may not be created where those fees are based solely on a statute which generally authorises an agency to recover its costs. When making regulations imposing fees, agencies must clearly identify the authorising statute.

Council staff work very closely with agency staff and may suggest changes to the agency. Where Council staff are uncertain as to whether agencies have adequately taken into account the comments made in written submissions, they may contact those who made submissions to find out if what the agency has done in response to their comments resolves the issues raised in their submissions. Where Council staff encounter difficulties with agencies in getting them to amend regulations, an approach is made to the Governor for assistance.

Council staff prepare written advice on the regulation stating whether it complies with statutory criteria contained in §41-1052(C) and making a recommendation as to whether or not they think the regulation should be approved. This written advice is submitted to Council members for their consideration. The written advice prepared by Council staff and other documents produced in their office are all considered to be public records, which means that any member of the public may request a copy of any of these documents and it will be provided to them.

**Role of Council Members**

Council members carefully review regulation packages, consider written comments made by Council staff and may receive oral evidence at their Council meetings. Council meetings are public meetings. A representative of the agency is expected to appear at Council meeting at

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986 §41-1008(1).
987 §41-1008(2).
988 §1-6-104(C).
990 Meeting Notes, Meeting with Council staff, Phoenix, Arizona, Wednesday 18 July 2001.
which the agency regulation or five year review report (see below) is to be considered and to respond to any questions posed by Council members.\footnote{991}{§1-6-110(A).}

\textbf{Council and Public Comment}

A member of the public may submit written comments for consideration by Council members and Council may also allow oral comments to be made.\footnote{992}{§41-1052(F).} A person making written or oral comments must ensure that their comments relate to a regulation on Council’s meeting agenda and must show clearly how the regulation falls short of the statutory criteria in §41-1052(C) or (D) – §1-6-111. A person making oral comments must also provide details of what efforts he or she made to discuss these issues with the particular agency.\footnote{993}{§1-6-111(4).}

If a person submits written comments less than six days before Council meeting to discuss the particular regulation, that person must explain why they were unable to submit those written comments earlier.\footnote{994}{§1-6111(7).}

The Chair of Council has the power to limit the time given to each speaker and to preclude repetitious comments.\footnote{995}{§1-6111(D).} The current Chair believes that it is crucial for members of the public to have the opportunity to be heard and does not always impose a time limit on speakers.\footnote{996}{Meeting Notes, Meeting with Council staff, Phoenix, Arizona, Wednesday 18 July 2001.} This has meant that some Council meetings have gone on for hours and days –

\begin{quote}
\textit{I mean, we have people coming from all over the state to comment about these rules that well, we have very controversial rules, and that’s another reason that our Chair will let them speak. I mean, if they’ve driven four hours to get here, he’s going to give them five minutes on the stage.}\footnote{997}{ibid.}
\end{quote}

The number of people who comment on regulations varies with the nature of the regulation under consideration – sometimes there are as few as 10 and at other times there is standing room only.\footnote{998}{ibid.} Most regulations proceed through regulatory process with little public comment–

\begin{quote}
\textit{In most cases the rules just go through with no comment whatsoever, no-one shows up.}\footnote{999}{ibid.}
\end{quote}

Allowing members of the public to comment not only provides the opportunity of being heard but also helps to diffuse contentious issues; people feel their ideas have been listened to and considered.\footnote{1000}{ibid.} If Council approves a regulation and members of the public remain unhappy they may approach the Legislature to make changes.

\begin{footnotes}
\item[991] §1-6-110(A).
\item[992] §41-1052(F).
\item[993] §1-6-111(4).
\item[994] §1-6-111(7).
\item[995] §1-6111(D).
\item[996] Meeting Notes, Meeting with Council staff, Phoenix, Arizona, Wednesday 18 July 2001.
\item[997] ibid.
\item[998] ibid. Regulations concerning plumbing, electricity and hunting result in large attendances at Council meetings.
\item[999] ibid.
\item[1000] ibid.
\end{footnotes}
Council members find public and agency input at Council meetings invaluable, as it assists members to obtain a better and more in-depth understanding of particular regulations and is particularly beneficial where members lack experience or expertise in the subject matter of a regulation –

*I feel fairly comfortable in my world and maybe a little bit outside my world. But you start talking about a mining operation and ground water contamination relative to that, then boy I need some help. This type of dialogue is especially inviting, coming to us with the public asking questions or clarification and the agency responding can quite often be very helpful.*

Open dialogue between members of the public and agencies provides Council members with a much greater understanding of particular regulations and contentious issues; which they may not previously have recognised. It also enables Council members to focus their attention on the issues which are really important. This facilitates an informed decision when Council members decide whether or not to approve regulation packages in whole or in part.

Sometimes these public hearings also provide a final opportunity for the resolution of outstanding issues between an agency and the public. While some agencies are receptive to public comment and alternative ways of proceeding, others are difficult to work with –

*Some bury their head in the sand and think that they are right, they are not going to listen to anybody else, and if somebody does not like it, then that is tough.*

Council staff work extremely hard, negotiating with the agencies to try and resolve these issues before they go before Council members. At the public hearing, Council members may decide that the agency and commentators should be given additional time to discuss matters further and then it is up to them whether they proceed with good faith negotiations. Where the regulations are really essential, the agencies usually come back before Council with modifications satisfactory to all parties.

**Council Rejection**

Where a regulation is rejected by Council, the agency may resubmit the package after having made the necessary changes. If the agency decides not to proceed, notice of termination must be published in the Register. Generally agencies are co-operative when asked to review certain aspects of a regulation as it is in the interest of the agencies to make a good quality regulation and receive Council approval so that the regulation may be enacted.

**Council Approval**

Once a regulation has been approved by Council, the agency must file the regulation package with the Secretary of State for publication in the Register. The regulation commences from

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1002 ibid.
1003 ibid.
1004 §41-1052(B).
1005 §41-1021(A).
the moment the Secretary of State affixes the time and date of filing to it. A regulation may commence at a later date where:

- a later commencement date is specified in a court order, statute or the regulation; or
- a person has petitioned an agency for a later date and the agency determines that there is good cause for the later date and the public interest will not be harmed by a later commencement date.

### Sunsetting and Review of Regulations

Agencies must review all of their regulations every five years to determine whether any regulations should be amended or repealed. Council staff and members indicated that they think it is essential for regulations to be reviewed every five years because many legislative changes take place during five years and regulations can become quickly out of date as a consequence:

> ... Five years is a very long time in the life of a rule, because the Legislature is constantly messing with agency statutes, and so in five years the rules can become out of sync with the statutes ...

Failure to review regulations in a timely fashion in accordance with the five year review requirements results in the expiration of agency regulations. While automatic expiry for failure to comply may seem harsh, it works as a very effective tool in ensuring agency compliance:

> If the agency does not do their five year review on schedule then all those rules become null and void. It is not like a sunset – that is, if you do not do the five year review they go away. We are finding that we are getting a lot more compliance with the five year schedule – not quite 100%, but darn close.

Automatic expiry has resulted in agencies carrying out five year reviews in an efficient and timely manner. Prior to automatic expiry, Council had no means of enforcing five year reviews and many agencies either did not do these reviews properly or did not do them at all.

In accordance with §41-1056(A), agencies must prepare and submit reports to Council and these reports must examine the following:

- Whether the regulation effectively achieves its objectives. Data must be submitted to support these conclusions.
- Criticisms of the regulation received over the last 5 years.

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1007 §41-1031(A).
1008 §41-1032.
1009 §41-1056.
1010 Meeting Notes, Meetings with Council members and staff, Phoenix, Arizona, Wednesday 18 July 2001.
1012 Meeting Notes, Meeting with Council staff, Phoenix, Arizona, Wednesday 18 July 2001.
• Details of statutes which authorise the regulation.

• Whether the regulation is consistent with other regulations made by the agency, the agency’s current enforcement policy and current agency views of the regulation.

• Whether the regulation is clear, concise and understandable.

• A comparison of the current estimated and previous\textsuperscript{1013} economic, small business and consumer impact of the regulation.

Where the information is the same for a group of regulations, the agency shall discuss that information only once for the group of regulations.\textsuperscript{1014}

Once a Five Year Review Report is placed on Council agenda, Council staff review the Report for compliance with the requirements of §41-1056 and may suggest any changes to the agency.\textsuperscript{1015} The Five Year Review Report is then submitted to Council members for consideration and approval. Council members may approve the Reports in whole or in part.\textsuperscript{1016} Council must provide the agency with details of any inadequacies contained in the Report and in such circumstances the agency is given the opportunity to revise its Report and resubmit it to Council. If an agency finds that it cannot provide the written Report to Council by the due date, the agency may seek an extension of up to 120 days.\textsuperscript{1017}

If an agency fails to submit its Report or file an extension before the due date or if it fails to meet the extension period deadline, the regulations which are the subject of the Report automatically expire.\textsuperscript{1018} In these circumstances Council must file a notice in the next Register; notify the Secretary of State and notify the agency that the regulations have expired. Where regulations expire in this manner and the agency wants the regulations reinstated, the regulation-making process has to be re-commenced.\textsuperscript{1019}

All agencies are also required to produce an Annual Report on their progress with five year reviews and this Annual Report must be submitted to Council on or before 30 June each year.\textsuperscript{1020} The information contained in annual reports enables Council staff to assess whether timely progress is being made with the review and enactment of regulations and indicates which agencies are performing well and which agencies are falling behind.

**Public Appeals Against Regulations**

Any person may appeal to an agency for the review of an existing agency practice, guideline or substantive policy statement that the person alleges constitutes a regulation and the agency has 60 days within which to respond.\textsuperscript{1021} If the person’s agency appeal fails, that person may

\textsuperscript{1013} The Economic, small business and consumer impact statement prepared when the regulations were last made.
\textsuperscript{1014} §1-6-112(B).
\textsuperscript{1015} §1-6-112(E).
\textsuperscript{1016} §41-1056(B).
\textsuperscript{1017} §41-1056(D).
\textsuperscript{1018} §41-1056(E).
\textsuperscript{1019} §41-1056(F).
\textsuperscript{1020} §41-1056(H).
\textsuperscript{1021} §41-1033(A).
appeal against the agency’s decision within 30 days to Council. The grounds of the appeal are limited to whether the agency practice or policy constitutes a regulation.

Council must notify the agency head of the appeal by 5.00 pm on the day after receipt of the appeal and the appeal will be considered at a Council meeting if three Council members request it. Council must make a decision on whether the practice amounts to a ‘regulation’ and if it determines that it does constitute a regulation, then the practice will be void. This means that if the agency wants to continue with that practice, it will have to be converted to a regulation, and will thus have to go through the entire regulation-making process.

Council staff remarked that this public appeals procedure works extremely well and is used about twice each year. Agencies are also increasingly aware that regulations will be enforced by the courts, whereas policies, practices and guidance documents may not be enforced –

... you would probably win if it was just based on the agency’s whims, because an agency is not allowed to act in an arbitrary or capricious manner. Without a statute or rule setting forth how is it supposed to act, it could be argued that it was just arbitrary and capricious.

While court proceedings are costly, citizens affected by practices which they consider unfair often appeal to courts for relief. Knowing that courts may not enforce agency policies, practices and guidance documents, has encouraged agencies to enact regulations instead, thus ensuring compliance and enforcement. Once a regulation goes through the regulation-making process it is much more difficult to successfully challenge in the courts.

**EIS Appeals**

A person affected by a regulation may also appeal against EISs for up to two years after a regulation has commenced. §41-1056.1 provides that the grounds of appealing against a regulation include –

1. The actual economic, small business or consumer impact significantly exceeded the impact estimated in the economic, small business and consumer impact statement submitted during the making of the regulation.

2. The actual economic, small business or consumer impact was not estimated in the economic, small business and consumer impact statement submitted during the making of the regulation and the actual impact imposes a significant burden on persons subject to the regulation.

The person appealing against a regulation on the above grounds must demonstrate that either or both of the above grounds have been met. In effect, the appeals provision means that even if an EIS has been properly prepared, a regulation may still be re-examined within two years if the actual costs are higher than those originally predicted.

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1022 §41-1033(B).
1023 §1-6-302(B).
1024 §1-6302(D).
1025 Meeting Notes, Meeting with Council staff, Phoenix, Arizona, Wednesday 18 July 2001.
1026 ibid.
The appeal must be made to the agency and within 30 days of receipt the agency must file a
notice of the Appeal in the Register.\textsuperscript{1027} The agency must allow a minimum of 30 days for
members of the public to make written submissions on the impact of the regulation.\textsuperscript{1028} At the
close of the written comments, the agency has 30 days within which to re-evaluate the
regulation and its impact and to publish a written summary of all comments received, the
agency’s response to those comments and its final decision.\textsuperscript{1029}

If a person affected by the regulation is dissatisfied with the agency’s decision, that person
may appeal to Council and Council has the power to order the agency to amend or repeal the
regulation if it finds that either or both the grounds of appeal (discussed above) have been
met.\textsuperscript{1030}

\textbf{Conclusion}

\textbf{Strengths}

\textit{Council Oversight}

The majority of proposed regulations cannot be enacted without Council approval, giving
Council a very powerful role in the regulation-making process. Council plays a key role in
ensuring that good quality regulations are made, that regulations enacted reflect a satisfactory
outcome for all those affected and in protecting the public from compliance with unnecessary,
unfair and burdensome regulatory requirements. As Council members come from diverse
backgrounds, proposed regulations are able to be evaluated and discussed objectively, flexibly
and from different perspectives –

\begin{displayquote}
It seems that we have healthy debate, interaction and involvement on what appear to be
substantial issues.
\end{displayquote}

This is crucial to facilitating the enactment of good quality regulations. Throughout the
regulation-making process Council staff work very closely with agency staff highlighting
problems and suggesting modifications. Council staff offer ‘courtesy’ reviews for preliminary
proposals and while not compulsory many agencies avail themselves of this service because it
enables potential issues to be dealt with from the outset and it saves Council staff time when
performing final evaluations. One difficulty in this area is the high turnover of agency staff
involved in the regulation-making process, which means that Council staff are often dealing
with agency staff who, because of their inexperience, require more assistance and training –

\begin{displayquote}
You point out exactly what the problem with the rule may be. I spend an awful lot of
time going through a final submission and I go through it and I go through it and tell
the you need to answer these additional requests which you ignored or didn’t say
anything about. A lot of these people are inexperienced.\textsuperscript{1031}
\end{displayquote}

\begin{flushright}
\textsuperscript{1027} §41-1056.01.
\textsuperscript{1028} §41-1056.01(C).
\textsuperscript{1029} §41-1056.01(C).
\textsuperscript{1030} §41-1056.01(G).
\textsuperscript{1031} Meeting Notes, Meeting with Council staff, Phoenix, Arizona, Wednesday 18 July 2001.
\end{flushright}
Council staff have worked extremely hard at building strong and effective working relationships with agencies, making a major contribution to the enactment of better quality regulations in Arizona.

**Public Participation**

Members of the public have an opportunity to participate at various stages of the regulation-making process in Arizona. Once a proposed regulation has been filed with the Secretary of State they have an opportunity to make written submissions to the agency and may present their views orally at public hearings. To ensure that the public have an opportunity to ‘have their say’ agencies must hold public hearings even if only one person makes such a request. The public have another opportunity to participate in the regulation-making process when a regulatory proposal comes before Council. The opportunity for people to participate in these various aspects of the regulation-making process allows controversial issues to be openly debated and assists agencies and Council to achieve a resolution which is more likely to be satisfactory from all perspectives. People feel that they have been listened to and that they have played an important role in the process, and agencies and Council obtain an in-depth insight into the nature and impact of proposed regulations.

**Notification**

People can find out about proposed regulations, public hearing dates, deadlines for submissions etc by obtaining a copy of the Register which is available on-line and in all major law libraries in Arizona. Well informed people may request agencies to keep them personally informed at all stages of the regulation-making process. Agencies with foresight are creating their own websites to keep the public up-to-date with proposed regulations. Over the last six years there has been an increase in the number of people participating in the regulation making process.

**Five Year Reviews and Automatic Expiry**

Agencies are required to review regulations every five years. Five years is viewed as sufficient time for the life of regulations so that they reflect current practices and trends. Automatic expiry is used as a very effective tool to ensure that agencies review regulations timely and efficiently. Since the introduction of automatic expiry there is almost 100% compliance with these review requirements. Another useful tool is the requirement that agencies produce annual reports on their progress with five year reviews. This enables the progress of agencies to be regularly monitored by Council staff, making it less likely that agencies will forget to review regulations within the five year deadline. It also serves as a public record of the performance of agencies, providing impetus to agencies to be seen as one of the better performers.

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1032 ibid.
Weaknesses

Exemptions

One weakness in the regulatory system in Arizona is the ability of some agencies to regularly obtain exemptions from the Legislature from oversight and public participation requirements. While recognising the inherent power of the Legislature to grant these exemptions, this leaves open the possibility that exempted regulations may not adequately address the needs and rights of those affected nor of the community generally. A good example of this is the frequent exemptions granted to the Department of Corrections, which means that regulations concerning the rights of prisoners and their families are not subject to scrutiny nor to public comment.

Notification

There is concern that some people are not well informed about regulatory proposals, particularly people not represented by associations or lobbying groups. It is also likely that some people do not understand the regulatory process itself and that they lack knowledge of the existence of Council and the opportunity to make comments before it –

*There is a real, say, inside baseball into the process. If you know the process of how regulations go on, you know the importance of Council. The industry groups, chambers of commerce, the cities and towns, county associations – these are the people who are down here trying to change the law and who know the Council.*

Improvements could be made to public knowledge of and participation in the regulatory process in Arizona by compelling agencies to create and use their websites to inform the public about regulatory proposals and by distributing the Register to public libraries rather than major law libraries.

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*Meeting Notes, Meeting with Council members, Phoenix, Arizona, Wednesday 18 July 2001.*
Key features of regulatory system

1. **Oversight of Regulations**
   - Office of Administrative Law (OAL) makes sure that agencies comply with procedural requirements when enacting regulations.
   - OAL does not review or change the content of proposed regulations. OAL may request agencies to make changes if proposed regulations are unclear, lack statutory authority, are inconsistent with other legislation etc.
   - OAL has 30 days to review proposed regulations.
   - Agency may seek review of OAL’s decision from the Governor’s office.

2. **Public Notification**
   - California Regulatory Notice Register (the Register), available in paper form and online. Published weekly.
   - Agencies must notify all interested persons.
   - Notification also posted on agency websites where agencies have websites.

3. **Public Participation**
   - May petition agency to make regulation.
   - May be involved in development of regulation.
   - 45 day comment period.
   - Public hearings discretionary but agencies generally hold them.

4. **Impact Analysis**
   - Must be prepared for all regulations.
   - Must assess whether there is an adverse economic impact on business or private individuals and the impact on employment, business expansion, housing, agencies and school districts.
5. **Public Appeals**

- Public may seek judicial review.

### Office of Administrative Law

In 1979, amendments made to the Administrative Procedure Act (APA) introduced major changes to the regulation-making process in California.\(^{1034}\) The creation of OAL was an essential element of these changes and it was vested with responsibility for scrutinising all regulations made in the State in order “to reduce the number of administrative regulations and to improve the quality of those regulations which are adopted”.\(^{1035}\)

The APA defines ‘regulation’ broadly to mean –

\[
\text{every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one which relates only to the internal management of the state agency.}\(^{1036}\)
\]

The broad definition of ‘regulation’ in the APA, while excluding rules concerning the internal management of agencies, does encompass non-legislative rules or guidance documents created and used by agencies to provide assistance to the public and agency staff with interpreting the law. As a consequence, all regulations and guidance documents included are not only subject to scrutiny by OAL but also to the other regulation-making procedures of the APA. Guidance documents are discussed in more detail below at pp. 231-232 and 241-242. OAL also reviews emergency regulations to determine whether the circumstances support enactment using emergency procedures.

OAL plays an extremely significant role in the regulation-making process as regulations cannot proceed to final enactment without its approval. OAL only approves regulations when it is satisfied that all the procedural requirements of the APA have been met and there is compliance with the six principles contained in §11349.1 – necessity, authority, clarity, consistency, reference and duplication. OAL review of regulations is discussed below at pp. 236-239.

### Regulation-making Process

#### Compliance Requirements

When making regulations, agencies must follow the procedures contained in the APA (Government Code §11340)\(^{1037}\) and any regulations made by OAL (California Code of

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\(^{1035}\) §11340.1.

\(^{1036}\) §11342.

\(^{1037}\) §11346 and Compliance with the requirements of the APA are mandatory – *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 149, Cal.Rptr.1.
Regulations, Title, 1 R1-90) unless expressly exempted by statute from these requirements.\textsuperscript{1038} Where there is any doubt as to whether the APA applies, the APA has precedence.\textsuperscript{1039} The regulatory process in California is subject to constant changes, with the two most recent enactments being passed in 2000.\textsuperscript{1040} While some of the changes (such as the use of electronic communications and the ability to limit presentations at oral hearings) improve the regulation-making process, they also add to the complexities of an already difficult system.\textsuperscript{1041} One commentator noted that the regulation-making system in California is probably the most involved and complex in the United States –

*California rulemaking procedure probably surpasses that of any other state, and far surpasses the federal government, in the number of steps required, the rigor with which the law is enforced, and in breadth of application.*\textsuperscript{1042}

### Exemptions

The APA applies broadly to almost all regulations, with some limited exemptions such as –

- **Internal Management Regulations.** These affect only the employees of the issuing agency and do not involve any matters with serious consequences or involve any important public interest issues.\textsuperscript{1043}

- **Forms.** These are exempted only if they consist of existing, specific legal requirements. If the agency adds language to the form which satisfies the definition of ‘regulation’, then the agency must enact a formal regulation.\textsuperscript{1044}

- **Audit Guidelines.** These include procedures or guidelines for conducting audits, investigations or inspections where disclosure of the guidelines would enable a person breaking the law to avoid detection or would facilitate disregard of the requirements of the law or would give an unfair advantage to a person in an adverse position.\textsuperscript{1045}

Also, some agencies are exempt from complying with the APA, such as the Workers’ Compensation Appeals Board.\textsuperscript{1046}

### Guidance Documents

As mentioned briefly above, the APA includes non-legislative rules or guidance documents within its definition of ‘regulation’. In California, guidance documents are subject to the same rigorous process as normal regulations, including notice, comment, public hearings and

\textsuperscript{1038} 11346 and *Engelmann v. State Board of Education* (1991) 2 Cal.App.4th 47, 3 Cal.Rptr.2d 264.
\textsuperscript{1039} *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244.
\textsuperscript{1040} Stats. 2000 ch. 1059 (A.B. 505) and ch. 1060 (A.B. 1822) on 30 September 2000 as noted by M. Asimow, *Chapter 2 Rulemaking*, Unpublished, Draft handed to Regulation Review Subcommittee Delegation at Meeting with Professor Asimow and other academics at the University of California, Los Angeles, 16 July 2001, p. 6.
\textsuperscript{1041} ibid.
\textsuperscript{1043} §11340.9(d).
\textsuperscript{1044} §11340.9(c).
\textsuperscript{1045} §11340.9(e).
\textsuperscript{1046} §11351.
scrutiny by OAL. Agencies are expressly prohibited from enforcing, using or issuing any guidance documents which have not been through the appropriate regulation-making processes.\textsuperscript{1047} While California is not unique in subjecting guidance documents to the rigours of normal regulation-making processes, it is probably unique “in strongly enforcing rulemaking requirements for such rules”.\textsuperscript{1048} Once OAL becomes aware that an agency is enforcing a guidance document it may issue a public determination as to whether that guidance document actually constitutes a ‘regulation’.\textsuperscript{1049} OAL’s decision is reviewable by the courts.\textsuperscript{1050} OAL has issued many determinations and most of these have found guidance documents to constitute ‘regulations’ and to be therefore subject to the requirements of the APA.\textsuperscript{1051}

Public Petition for Enactment of Regulations

Anyone may petition a state agency for the enactment of a regulation.\textsuperscript{1052} The petition must include –\textsuperscript{1053}

- a statement of the substance or nature of the regulation, amendment, or repeal requested;
- a statement of the reason for the request;
- a reference to the authority under which the proposed regulation would be made.

The agency has 30 days from the receipt of the petition within which to deny the petition and must provide the petitioner with written reasons for the basis of its decision.\textsuperscript{1054} The petitioner may request the agency to reconsider its decision within 60 days of the agency’s decision. If the agency accepts the petition, it must schedule public hearings.\textsuperscript{1055}

A decision by an agency to grant or deny a petition must be in writing and must be submitted as soon as practicable to OAL for publication in the Register. The written decision must identify the agency, the petitioner, the regulations affected in the Code, the reasons for the agency’s decision, the agency contact person and the right of interested persons to obtain a copy of the petition from the agency.\textsuperscript{1056}

Administrative Record

Once an agency has made a decision to initiate the regulation-making process it must create a file for that particular regulation.\textsuperscript{1057} At the end of the regulation-making process the agency

\begin{itemize}
  \item \textsuperscript{1047} §11340.5(a).
  \item \textsuperscript{1048} M. Asimow, California Underground Regulations, \textit{ALR}, Winter 1992, volume 44, no. 1, p. 45.
  \item \textsuperscript{1049} §11340.5(b).
  \item \textsuperscript{1050} §11340.5(d).
  \item \textsuperscript{1051} M. Asimow, California Underground Regulations, \textit{ALR}, Winter 1992, volume 44, no. 1, p. 52.
  \item \textsuperscript{1052} §11340.6
  \item \textsuperscript{1053} §11340.6
  \item \textsuperscript{1054} §11340.7.
  \item \textsuperscript{1055} §11340.7.
  \item \textsuperscript{1056} §11340.7.
  \item \textsuperscript{1057} §11347.3(a).
\end{itemize}
must keep the file in an easily accessible location or send it to archives. This file is deemed to "be the record for that rulemaking proceeding" and is relied upon by OAL and the courts. Not only must the agency maintain the file, but it must be available for public inspection during normal business hours from the date that Notice of the Proposed Regulation is published in the Register. The file includes everything from public notices and comments to all the information relied upon to justify the enactment of the regulation. Agencies are not allowed to add anything to the file once the public comment period and hearings have finished, unless that new material is subject to comment.

Public Involvement in Preliminary Development

For most proposed regulations it is optional whether agencies involve the public in the preliminary development stage. However if the proposed regulation involves complex issues or consists of a large number of proposals which would not be easily reviewed during the comment period, then agencies must engage in discussions with persons affected. This is a relatively new requirement coming into effect in 2001. In effect, it codifies what most agencies already do at the preliminary stage of developing regulatory proposals, that is consult with interest groups and people affected by proposals. Agencies which do not comply with these preliminary discussion requirements must provide written reasons on the regulation-making record. Agency decisions about whether or not to involve the public in preliminary discussions are not subject to review by OAL or the courts.

Notification

Agencies must develop four documents to initiate the formal regulation-making process under the APA –

1. a proposed regulation;
2. an initial statement of reasons;
3. a Fiscal Impact Statement;
4. a Notice of Proposed Regulation-making.

Once the agency is ready to proceed with a proposed regulation, it must file a Notice of Proposed Regulation-making (the Notice) with OAL for publication in the Register. The Register is officially published every Friday by OAL and is available by subscription and on-

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1058 §11347.3(a).
1059 §11347.3(a).
1060 §11347.3(b).
1061 §11346.8(d) and §11347.1.
1062 §11346.45(a).
1063 M. Asimow, Chapter 2 Rulemaking, Unpublished, Draft Handed to Regulation Review Subcommittee Delegation at Meeting with Professor Asimow and other academics at the University of California, Los Angeles, 16 July 2001, p. 7.
1064 §11346.45(d) and OAL, How to Participate in the Rulemaking Process, 31 July 2001, p. 4.
1065 §11346.4(5).
line. The Register has been available on-line since July 2000, facilitating notification to a much wider audience.\textsuperscript{1066}

OAL may refuse to publish a Notice if it does not comply with the requirements of the APA.\textsuperscript{1067}

Government Code §§11346.4-§11346.5 set out in what has been described as “dizzying detail” the notice requirements, including the timing and content.\textsuperscript{1068} The Notice must include an examination of the costs and benefits of the proposed regulation, other regulatory alternatives and whether it is the best means of achieving the desired outcomes.\textsuperscript{1069} The Notice must provide a detailed examination of the impact on small business; costs to state and local government; compliance costs for individuals and business; housing costs and so on.\textsuperscript{1070} Some of the other important matters which must be included in a Notice are –\textsuperscript{1071}

- a statement of the time, place and nature of proceedings;
- the legal authority for making the proposed regulation;
- ‘an informative digest’ ie a summary of existing regulations and the impact of the proposed regulation;
- a policy statement explaining the broad objectives of the proposed regulation;
- details of agency contact persons;
- a deadline for submissions.

While there is no need to include details of the rationale behind a proposed regulation, a copy of an initial statement of reasons and a draft of the proposed regulation must be available to the public if requested.\textsuperscript{1072}

Agencies must ensure that at least 45 days’ notice of close of submissions and public hearings are provided to the public and to those ‘interested’ parties who receive copies of the Notice in the mail.\textsuperscript{1073} While there is no requirement in the APA for agencies to mail the text of a proposed regulation and a statement of reasons, agencies will often do this\textsuperscript{1074} to make it easier for people to participate in the regulation-making process. In addition, agencies must post the notice, text of the proposed regulation and statement of reasons on their website where they have a website.\textsuperscript{1075} Where agencies do not have websites a copy of the text of

\textsuperscript{1066} M. Asimow, M. Asimow, \textit{Chapter 2 Rulemaking}, Unpublished, Draft Handed to Regulation Review Subcommittee Delegation at Meeting with Professor Asimow and other academics at the University of California, Los Angeles, 16 July 2001, p. 7.
\textsuperscript{1067} §11346.4(d).
\textsuperscript{1068} M. Asimow, M. Asimow, \textit{Chapter 2 Rulemaking}, Unpublished, Draft Handed to Regulation Review Subcommittee Delegation at Meeting with Professor Asimow and other academics at the University of California, Los Angeles, 16 July 2001, p. 6.
\textsuperscript{1069} §11346.2.
\textsuperscript{1070} §11346.5.
\textsuperscript{1071} §11346.5.
\textsuperscript{1072} §11346.2.
\textsuperscript{1073} §11346.6.
\textsuperscript{1074} OAL, \textit{How to Participate in the Rulemaking Process}, 31 July 2001, p. 5.
\textsuperscript{1075} §11346.4(6).
proposed regulations and statements of reasons may be obtained by contacting the responsible agency person.

Professor Asimow notes that the ‘informative digest’ and the ‘initial statement of reasons’ are essential features which greatly assist the public to understand and comment on regulatory proposals.\textsuperscript{1076}

**Public Participation**

The APA requires a minimum of 45 days for people to make comments on a proposed regulation.\textsuperscript{1077} Agencies are not required to hold public hearings unless required by their authorising statute or where any interested person submits a written request 15 days before the close of the written comment period.\textsuperscript{1078} As far as practicable the agency must give notice of the date, time and place of the hearing, by mailing a notice to every person who has filed a Request for Notice with the agency.\textsuperscript{1079} Generally agencies schedule public hearings whether requested or not on the expectation that someone will invariably make a request.\textsuperscript{1080}

Agencies must summarise all comments and make a written response to all comments.\textsuperscript{1081} This can be quite an onerous task especially where a regulatory proposal is controversial and hundreds of comments have been made. These documents are used to demonstrate that the agency understood and considered all relevant issues. In responding to comments an agency must explain how it has amended the proposal or the reasons for making no changes to the proposal.

**Impact Analysis**

§11346.3 requires an Impact Analysis to be prepared for all regulatory proposals. The Impact Analysis must assess whether the proposed regulation has an adverse economic impact on business or on private individuals and the impact on employment, business expansion, housing, agencies and school districts. Where there is an adverse economic impact on business, the Impact Analysis must examine the types of businesses affected and seek submissions on alternatives.\textsuperscript{1082}

**Changes to Proposed Regulations**

Before adopting, amending or repealing any proposed regulation, agencies must give careful consideration to all comments received on the initial proposal.

\textsuperscript{1076} M. Asimow, M. Asimow, *Chapter 2 Rulemaking*, Unpublished, Draft Handed to Regulation Review Subcommittee Delegation at Meeting with Professor Asimow and other academics at the University of California, Los Angeles, 16 July 2001, p. 8.

\textsuperscript{1077} §11346.4.

\textsuperscript{1078} §11346.8(a).

\textsuperscript{1079} §11346.8(a).


\textsuperscript{1081} ibid, p. 9.

\textsuperscript{1082} §11346.5(a)(7)(C).
Agencies may decide to change initial proposals in the light of all the comments received. Agencies may proceed to the adoption stage if the changes are non-substantial or grammatical or sufficiently related to the original text that the public has already had adequate notice that the change may result.\textsuperscript{1083}

If the changes are substantial, agencies are required to make the changes available for public comment at least 15 days before adopting those changes.\textsuperscript{1084} Agencies must mail a notice of opportunity to comment and the text of the proposed changes to each person who has made a written submission, given evidence at public hearings or who has requested to receive notice of modification.\textsuperscript{1085} In addition, the notice must be posted on the agency’s website where the agency has a website. Agencies are not required to hold public hearings.

Where at the close of the public comment period an agency decides to rely on different documents to that relied upon initially, an agency must make the document/s available for comment for at least 15 days.\textsuperscript{1086} The agency must also mail a notice identifying the added document and where it can be inspected to all persons who gave evidence at public hearings, all people who made submissions and persons who requested notification from the agency.\textsuperscript{1087}

\textbf{Review by OAL}

An agency must submit a certified copy of a proposed regulation\textsuperscript{1088} and other documents\textsuperscript{1089} to OAL for examination and approval within 12 months from the date of publication of the Notice in the Register; failure to do so means the whole regulation-making process must be recommenced.\textsuperscript{1087} The Final Statement of Reasons must include a summary of all objections, what changes were made in response to those objections or reasons for not making any changes.\textsuperscript{1091}

OAL plays a very powerful role in the regulation-making process because regulations cannot be enacted without OAL approval. §11340.1 makes clear that OAL must not substitute its own judgment concerning the content of regulatory proposals.

OAL reviews proposed regulations against the following standards –\textsuperscript{1092}

\textit{1. Necessity}

Necessity means that “the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation to effectuate the purpose of statute, court decision, or other provision of law that the regulation implements ...”.\textsuperscript{1091}

\textsuperscript{1083} §11346.8(c).
\textsuperscript{1084} §11346.8(c).
\textsuperscript{1086} §11347.1.
\textsuperscript{1087} ibid.
\textsuperscript{1088} The agency head certifies that the regulation-making record is complete and closed - §11343 and §11343.6. Failure to certify the regulation-making record honestly may result in a charge of perjury - OAL, \textit{How to Participate in the Rulemaking Process}, 31 July 2001, p. 22.
\textsuperscript{1089} Other documents include a Final Statement of Reasons and the Informative Digest - §11346.9.
\textsuperscript{1090} §11343.4(b).
\textsuperscript{1091} §11346.9(a)(3).
\textsuperscript{1092} §11349.1.
\textsuperscript{1093} §11349(a).
What this means is that the record of the regulation-making process, that is the facts, the studies, the opinions etc must show to a reasonable person that the regulation is necessary. The regulation does not have to be the ‘right’ regulation or the best decision but it has to be a reasonable choice.\textsuperscript{1094} This principle of review has been the most controversial, with agencies being very resentful at what they saw as “chronic substitutions of judgment by OAL.”\textsuperscript{3,1095}

2. Authority

Authority means “the provision of law which permits or obligates the agency to adopt, amend or repeal a regulation”.\textsuperscript{1096}

OAL makes sure that regulations are in fact authorised by statutes and are within an agency’s express or implied regulation-making authority.

3. Clarity

Clarity means that the regulation is “written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them.”\textsuperscript{1097}

This means that a proposed regulation should be easily understood by any reasonable person and in particular by those people who are affected by regulations. This includes people who benefit from a regulation, who must comply with it, who must enforce it or who incur a detriment. OAL presumes that a regulation is unclear where, for example, the regulation has more than one meaning; language is used incorrectly; the format is difficult to understand or the language of the regulation conflicts with the description of its effect.\textsuperscript{1098}

Agencies initially found OAL’s enforcement of this standard irritating because agencies tended to focus on whether regulations could be easily understood by the regulated community rather than the consuming public.\textsuperscript{1099} More recently there has been a change in the relationship between agencies and OAL, with agencies seeing OAL as helpful and co-operative.\textsuperscript{1100}

4. Consistency

Consistency means “being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law”.\textsuperscript{1101}


\textsuperscript{1095} M. Asimow, M. Asimow, \textit{Chapter 2 Rulemaking}, Unpublished, Draft Handed to Regulation Review Subcommittee Delegation at Meeting with Professor Asimow and other academics at the University of California, Los Angeles, 16 July 2001, p. 1037.

\textsuperscript{1096} \S 11349(b).

\textsuperscript{1097} \S 11349(c).

\textsuperscript{1098} OAL, \textit{How to Participate in the Rulemaking Process}, 31 July 2001, p. 20.


\textsuperscript{1100} M. Asimow, Rulemaking Under the California Administrative Procedure Act; Proposals for reform 4-5, Report to the California Law Revision Commission, 16 September 1996 quoted in M. Asimow, ibid, p. 14.

\textsuperscript{1101} \S 11349(d).
OAL ensures that the provisions contained in regulations assist statutory objectives and do not contradict any statutory provisions.

5. Reference

Reference means “the statute, court decision, or other provision of law which the agency implements, interprets, or makes specific by adopting, amending or repealing a regulation”. 1102

OAL ensures that all regulations cite the specific statutory authority under which they are enacted and the specific statute or other provision of law that the regulation is implementing or interpreting.

6. Non duplication

Non duplication means “a regulation does not serve the same purpose as a state or federal statute or another regulation”. 1103

OAL examines regulations to ensure they do not repeat what is contained in federal or state statutes or other regulations. Duplication may be allowed if the duplication is identified and justified. OAL notes that duplication is justified if it is “necessary to satisfy the clarity standard”. 1104

OAL Powers

OAL has no power to review or change the substantive content of a proposed regulation.

OAL must review a proposed regulation within 30 days after submission and either approve the proposed regulation and forward it to the Secretary of State for filing or disapprove the proposed regulation. 1105 If OAL fails to act within 30 days, OAL will be deemed to have approved the proposed regulation. 1106

Where OAL disapproves a proposed regulation, OAL must return the proposed regulation to the agency before the end of the 30 day review period together with a notice specifying the reasons for disapproval and within 7 days of that OAL must provide the agency with detailed reasons for its decision. 1107 The agency then has 120 days within which to review and resubmit the proposed regulation. 1108 Where the agency makes substantive changes or does not comply with the 120 day adoption period, the proposed regulation will have to go through the entire regulation-making process again. 1109

Agencies may seek a review of a decision by OAL not to approve a regulation by filing a written Request for Review with the Governor’s Legal Affairs Secretary within 10 days of

1102 §11349(e).
1103 §11349(f).
1105 §11349.3(a).
1106 §11349.3(a).
1107 §11349.3(b).
1108 §11349.4.
1109 §11349.4.
receipt of the written opinion from OAL.\footnote{\ref{section:11349.5(a)}} Apparently appeals to the Governor are extremely rare.\footnote{\ref{section:11349.5(c)}} The Governor’s Office must review the regulation within 15 days of receipt of the Request for Review and send its written decision to the agency and OAL.\footnote{\ref{section:11349.5(c)}} OAL must publish the agency’s Request for Review, OAL’s response and the Governor’s decision in the Register.\footnote{\ref{section:11349.5(c)}} Where the Governor overrules OAL’s decision, OAL must immediately forward the regulation to the Secretary of State for filing\footnote{\ref{section:11349.5(e)}} and the Governor must forward his or her written decision to the Committees on Rules of both Houses of the Legislature.\footnote{\ref{section:11349.5(f)}}

**Adoption**

Regulations commence operation on the 30th day after filing with the Secretary of State, unless a later date has been prescribed by the state agency or the authorising statute provides for a later date.\footnote{\ref{section:11343.4}}

**Emergency Regulation-making Procedure**

Emergency regulations may be enacted where there is a need for urgent action, such as the need to preserve public peace, health or safety.\footnote{\ref{section:11346.1(b)}}

As with all other regulatory proposals, emergency regulations must be submitted to OAL for review and approval.\footnote{\ref{section:11346.1(b)}} OAL must review the proposed regulation within 10 days of receipt to determine whether –

\begin{itemize}
\item An agency's statement of facts demonstrates that an emergency exists;
\item It complies with the six principles of review contained in the Government Code (see principles discussed above at pp. 236-238);
\item The emergency regulation-making file is procedurally complete.
\end{itemize}

Members of the public have an opportunity to comment on proposed emergency regulations. Written comments must be submitted to both the agency and OAL within 5 days of the filing of the emergency regulation.\footnote{\ref{section:11349.6(b)}} Sometimes OAL may receive comments by telephone. In these circumstances OAL must contact the agency and make sure that they have also received

\footnotesize
\hspace{1em}\footnote{\section*{Notes}
\ref{section:11349.5(a)} §11349.5(a).
\ref{section:11349.5(c)} M. Asimow, M. Asimow, *Chapter 2 Rulemaking*, Unpublished, Draft Handed to Regulation Review Subcommittee Delegation at Meeting with Professor Asimow and other academics at the University of California, Los Angeles, 16 July 2001, p. 12.
\ref{section:11349.5(c)} §11349.5(c).
\ref{section:11349.5(e)} §11349.5(e).
\ref{section:11349.5(f)} §11349.5(f).
\ref{section:11343.4} §11343.4.
\ref{section:11346.1} §11346.1.
\ref{section:11346.1(b)} §11346.1(b).
\ref{section:11349.6(b)} §11349.6(b).
\ref{section:11349.6(b)} OAL, *How to Participate in the Rulemaking Process*, 31 July 2001, p. 3.
the comments. If it so desires, the agency may respond to the comments within 8 days of filing of the comments.\textsuperscript{1121}

Once OAL has approved an emergency regulation it is filed with the Secretary of State and commences operation on the date of filing or on the date specified in the regulation.\textsuperscript{1122}

Where OAL disapproves an emergency regulation it must provide detailed reasons for its disapproval.

An emergency regulation is not a permanent regulation and is not an exception to the normal regulation-making processes; “it simply allows the rule to be adopted immediately”.\textsuperscript{1123} Agencies have 120 days in which to proceed with the regulation through the normal regulation-making process, after which time the regulation lapses unless OAL approves readoption of the emergency regulation.\textsuperscript{1124}

**Public Appeals Against Regulations**

Members of the public may seek judicial review of regulations. The courts may declare a regulation invalid where the procedural requirements have not been followed or if the evidence in the regulation-making file does not support the necessity for the enactment of the regulation.\textsuperscript{1125}

**Conclusion**

**Strengths**

*Notification and Participation*

The regulation-making process in California provides excellent opportunities for people to find out about regulatory proposals and to participate in the regulation-making system.

Essential elements of the regulation-making process include notice, opportunities to comment, oral hearings and the requirement that agencies respond to every comment made; all of which contribute to effective and strong public participation. This means that issues can be openly debated, people have the right to freely express their views and as they feel they have had an opportunity to contribute to the process, they are more likely to comply with the final regulation. Debate also raises agency awareness of issues which they may have been unaware of and of changes which may need to be made. Ultimately it enables the enactment of better quality regulations which are more likely to achieve the specified outcomes. Without doubt these are the strengths of the Californian system.

\textsuperscript{1121} ibid.
\textsuperscript{1122} §11346.1(d).
\textsuperscript{1124} §11346.1(e). This provides agencies with more time so that they can complete the regulation-making process.
\textsuperscript{1125} §11346.8(d), §11347.3(c) and §11350(b).
Weaknesses

Complex and Costly

The regulation-making system in California is complex and time consuming. While the process provides excellent opportunities for the public to become aware of and participate in the regulation-making system, it may take several years for regulations to be enacted –

However, it is not uncommon for the process to consume several years where the regulation is controversial, the agency must perform an extensive study to generate documentation or expert testimony to satisfy the “necessity” requirement, the agency makes significant changes in proposed rules and thus must repropose them, or it encounters rejection of the rule at the hands of OAL.\(^{1126}\)

As a consequence, when regulations are finally enacted they may be out of date and no longer relevant. An enormous amount of agency time and effort goes into ensuring that the regulation and the administrative record are without mistakes so as to obtain approval by OAL.\(^{1127}\)

An additional burden on agencies is the obligation to respond to every comment which is made which has encouraged those opposing regulatory proposals “to file numerous and voluminous comments requiring the expenditure of large resources just to analyze and respond to them”.\(^{1128}\)

The end result of all of this is that the enactment of regulations in California is financially costly for agencies –

One agency cited a recent example: to adopt a set of relatively brief regulations took 1000 hours of staff time (6.4 person-months) and roughly $30,000 in direct cost of staff working on the rule. This figure does not count indirect costs.\(^{1129}\)

Guidance Documents

Guidance documents are subject to the rigors of the normal regulation-making procedure in California and while this process is complex and time consuming, most agencies comply\(^{1130}\) so that their guidance documents will not be challenged and declared unenforceable. As with regulations, it may take several years for guidance documents to be enacted, at which time circumstances may have changed and they may then be obsolete.\(^{1131}\) This also means that regulations may be operating without guidance documents to assist agency staff and the public to interpret and apply the provisions of the regulations. The inflexibility of this process makes it very difficult for agencies to respond quickly to court cases, new statutes or arising

\(^{1127}\) ibid, p. 57.
\(^{1128}\) ibid.
\(^{1129}\) ibid, footnote 79, p. 57.
\(^{1130}\) ibid, p. 56
\(^{1131}\) ibid.
problems. Guidance documents may only be enacted quickly if they meet the requirements for emergency regulations but they will still be subject to OAL review and must still eventually proceed through the entire regulation-making process.

As with regulations, the enactment of guidance documents is an expensive process for agencies. The question must be asked whether the costs justify the benefits. In the case of regulations which deal with substantive issues, there are many benefits involved in a system which encourages participation and which subjects regulations to careful scrutiny and review. However, for guidance documents, which often deal with minor matters, “it is difficult to justify the expenditure of extremely scarce resources”.

There is evidence that as a consequence of the difficulties experienced with enacting guidance documents, agencies often avoid adopting them and make decisions not to revise those which are out of date. This also means that rather than developing generalised policies which apply across the board, agencies provide specific advice upon request and give oral directions to staff rather than written instructions. Alternatively, agencies may develop nothing at all in the way of guidance documents, preferring to “muddle” their way through and not assisting the public in any way.

Guidance documents play a crucial role in the regulatory process because they help people to obtain a greater understanding of regulations by clarifying issues which are uncertain or ambiguous and they enable agency staff to interpret and apply the law consistently. Unfortunately it appears that in California agencies have moved away from making guidance documents because of the complexities involved, and this means that both agencies and the public lose –

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\text{The more an agency tells the public and its staff how it intends to interpret or apply the law, the better. Similarly, the more the agency goes public with guidelines that constrain its statutory discretion, the better. The regulated public has an intense interest in obtaining reliable, generalized guidance from regulations. The staff of an agency also needs to know how the agency thinks the law should be interpreted and how the discretion should be exercised, lest the law be inconsistently applied.}\]

As Professor Asimow notes, the most important aspect of guidance documents is not that they should be subject to the rigours of the regulation-making process but that they should be available to and easily accessible by the public –

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\text{Even if California decides to follow the federal model by dispensing with rulemaking procedure for non-legislative rules, it would be imperative to maintain the requirement that all generally applicable non-legislative rules be made accessible in some convenient manner (not necessarily by publication in the California Code of Regulations).}\]

\[\text{ibid.}\]
\[\text{ibid, p. 58.}\]
\[\text{ibid.}\]
\[\text{ibid.}\]
\[\text{ibid.}\]
\[\text{ibid, p. 59.}\]
\[\text{ibid.}\]
\[\text{ibid.}\]
\[\text{ibid, p. 66.}\]
Pennsylvania

Key Features of Regulatory System

1. Oversight of Regulations
   - Review and approval of draft regulations by Attorney-General and General-Counsel.
   - Review of final form regulations by Committees.
   - IRRC review of final form regulations at public meetings. IRRC cannot prevent enactment but can delay process.

2. Public Notification
   - Publication of proposed regulations and preamble in the Pennsylvania Bulletin (the Bulletin).
   - The Bulletin is available on-line and in paper form and is updated weekly.

3. Public Participation
   - Sometimes agencies consult the public early in the development of regulations.
   - 30 days to comment on proposed regulations.
   - Agencies must respond to all commentators.
   - After proposed regulations are finalised (ie final form regulations), agencies must send all changes to all those who requested notification of changes.
   - When IRRC is reviewing final form regulations at public meetings, public may address IRRC.

4. Impact Analysis
   - Prepared for all regulations.
   - IRRC carefully reviews Impact Analysis to determine the impact of proposed regulation on the community.
5. Sunsetting and Review

- Regulations do not sunset and are only subject to review when problems are highlighted by the community, the Committees or IRRC.

- Some agencies conduct reviews every five or ten years, but this is voluntary, with some agencies taking the view that such reviews substantially add to their workload.

Independent Regulatory Review Commission

In 1982 the Regulatory Review Act (RRA) commenced with the aim of providing legislative oversight of regulatory processes and to ensure that the executive branch is accountable in the exercise of the legislative power delegated to it –

*It is the intent of this act to establish a method for ongoing and effective legislative review and oversight in order to foster executive branch accountability; to provide for primary review by a commission with sufficient authority, expertise, independence and time to perform that function; to provide ultimate review of regulations by the General Assembly; and to assist the Governor, the Attorney General and the General Assembly in their supervisory and oversight functions.*

A system of oversight was necessary to prevent excessive regulation and the imposition of unnecessary and unwarranted costs and burdens on the Pennsylvanian community.

IRRC is responsible for examining proposed and final form regulations from state agencies for consistency with the standards contained in the RRA. IRRC’s role is not about preventing regulations from being enacted but “to reach out to people who have an interest in these regulations including agencies, committees of the Legislature and the interested public to find a consensus so when they are enacted they can be easily understood and followed and so that they reflect the intent of the authorising statute”.

IRRC consists of five commissioners, each of whom is appointed by a different person – the Governor, the President Pro Tempore of the Senate, the Minority Leader of the Senate, the Speaker of the House of Representatives and the Minority Leader of the House. IRRC employs a dedicated and hardworking team of staff who provide the commissioners with detailed advice.

Regulation-making Process

Agencies and Boards and Commissions have discretion to make, amend or repeal regulations. When enacting regulations, agencies must comply with the requirements of the Commonwealth Documents Law (CDL) (45 PS §§ 1201 – 1208); the Commonwealth Attorneys Act (71 PS §§ 732-101 – 732-506); and the Regulatory Review Act (RRA) (71 PS §§ 745.1 – 745.15).

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1139 Regulatory Review Act (RRA); 71 P.S. §745.2(a).
Boards are made up of representatives of professional groups such as dentists, nurses, accountants, doctors etc. Boards have the same discretion as agencies and once appointed they tend to operate very independently, sometimes forgetting that “they are not writing the laws and that they are writing regulations which interpret the law”.\textsuperscript{1141} There is a tendency for members of Boards to see things which are missing from authorising statutes and they often try and include these matters in regulations.\textsuperscript{1142} It is much more difficult to exert control over independent boards and commissions because unlike agencies they are not subject to direct control by the Governor’s Office.\textsuperscript{1143} The Office of General Counsel can exert some influence over independent boards. However, ultimately the Legislature has control over all regulations made and if there is dissatisfaction the Legislature can pass a statute overriding any regulation.

\textbf{Public Participation in Development of Regulations}\\

Agencies may allow the public to comment on preliminary drafts of regulations. Unless required by statute, it is at the agency’s discretion whether it does so. Often agencies invite interested persons to review preliminary drafts of proposed regulations. Agencies also often work closely with various associations and organisations to ensure that they are proceeding in the right direction. For example –

\textit{In many cases we do work with the trade associations prior to promulgating a regulation. We call in the insurance federation, we call in the agency associations and ask them what problems they may have with the regulations before we usually move towards it.}\textsuperscript{1144}

Open dialogue with all those potentially affected by regulatory proposals is seen as critical to ensure that the most effective and least intrusive regulations are enacted. The amount of preliminary consultation undertaken in Pennsylvania means that it is much rarer for proposed regulations to be rejected as they proceed through the regulation-making process.\textsuperscript{1145} Sometimes the reason for initiating regulatory change comes from the comments made by the regulated community –

\textit{Sometimes we have over 40 individuals who do nothing but handle consumer complaints in the Department. Sometimes our decision to go forward with a regulation is because of concerns that our consumer area has brought forth.}\textsuperscript{1146}

Early and meaningful input from the regulated community allows agencies to keep on top of regulatory issues and to ensure that the regulations enacted are achieving the outcomes they set out to achieve.

Every six months agencies are required to put together a list of regulatory proposals under consideration over the next six months.\textsuperscript{1147} Stakeholders groups and organisations know about this publication and it keeps them informed about what is on the regulatory agenda. Agencies

\textsuperscript{1141} ibid.  
\textsuperscript{1142} ibid.  
\textsuperscript{1143} ibid.  
\textsuperscript{1144} ibid.  
\textsuperscript{1145} ibid.  
\textsuperscript{1146} ibid.  
\textsuperscript{1147} ibid.
are not bound to follow the agenda as published but it is useful because it gives people an idea of what might be happening.\textsuperscript{1148}

**Review by Attorney-General and General Counsel**

The Attorney-General and General Counsel review preliminary drafts of proposed regulations. Both also review final form regulations against the same standards. Proposed regulations will not be published in the Bulletin until they have been approved by the Attorney-General and General Counsel; in effect, the regulation-making process cannot proceed.

General Counsel may raise policy and legal questions about any part of a proposed regulation. General Counsel may take as much time as it likes in conducting this review. In particular, General Counsel will examine whether –\textsuperscript{1149}

1. A regulation is clearly drafted;
2. The preamble satisfactorily explains the statutory authority for making the regulation and the objects and need for the regulation; and
3. The Regulatory Analysis Form is completed correctly.

The Attorney-General reviews regulations for matters of legality. The Attorney-General has 30 days within which to conduct this review.\textsuperscript{1150} Where no response has been received from the Attorney-General’s office within 30 days, the regulation is deemed approved. Where the Attorney-General has concerns, these must be forwarded to the General Counsel or the agency’s counsel. At this point the Attorney-General’s review period is put on hold while the agency and the Attorney-General work together to achieve a resolution of the issues concerning the regulation.

Where issues of concern to the Attorney-General’s office are not resolved, the Attorney-General may disapprove of the regulation. When disapproving a regulation, the Attorney-General must notify the General Counsel or independent agency, the Secretary of the Senate and the Chief Clerk of the House of Representatives of the reasons for the disapproval.\textsuperscript{1151} A regulation which has been disapproved may still be published, with or without the revisions, but the Attorney-General’s reasons for objection must be published along with the regulation.\textsuperscript{1152}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{1148} ibid.
\item \textsuperscript{1150} ibid, p. 3.
\item \textsuperscript{1151} ibid, p. 3.
\item \textsuperscript{1152} ibid.
\end{itemize}
\end{footnotesize}
The Proposed Stage

Notification

Once a proposed regulation has been approved by the Attorney-General, it must be submitted to the Legislative Reference Bureau (LRB) for publication in the Bulletin1153 and at the same time it must also be submitted to IRRC and the Committees.1154 While the proposed regulation must be accompanied by a preamble and a regulatory analysis, only the proposed regulation and preamble are published in the Bulletin.1155 Interested persons may obtain copies of regulation analyses from agencies or IRRC.

The Bulletin is published weekly in paper form and is available on-line. It is distributed to all libraries throughout the State. The Bulletin contains Governor’s Proclamations, court rules, Executive Orders, Actions by the General Assembly and notices of regulation-making activities by agencies – enabling people to follow government activities and providing opportunities for public participation. Associations and lobbying firms representing various interests monitor regulatory proposals carefully and keep their members informed about important issues. While there is no statutory requirement to do so, many agencies also keep mail lists of people who have expressed interest in being kept informed about regulations either generally or on specific issues.1156

Impact Analysis

Agency staff estimate the benefits and costs of proposed regulations but these are not rigorous cost-benefit analyses.1157 Agencies must ensure that the costs of regulations do not exceed the benefits and they must carefully examine the costs imposed on the regulated community. The regulated community have an opportunity to respond during the public comment period as to whether they agree or disagree with the agency’s view of the impact and those comments will be reviewed by IRRC and the Committees.

Public Participation

Generally the public are given 30 days within which to comment on a proposed regulation.1158 Deadlines may be shorter if there are exceptional circumstances and may be longer if required. During the public comment period, comments must be submitted to the agency and the agency must forward all comments received to IRRC and the Committees within five days of receipt.1159 Agencies are also required to notify all those who have made comments of the procedure for obtaining additional information on the final form regulation.

1153 ibid, p. 4.
1154 ibid and RRA, 71 P.S. §745.5(a).
1156 Meeting Notes, Meeting with IRRC staff and others involved in regulatory system in Pennsylvania, Monday 30 July 2001.
1157 ibid.
1159 ibid and RRA, 71 P.S. §745.5(c).
Agencies are confident that those people who are interested are aware of and informed about proposed regulations and potential issues.\textsuperscript{1160} The general feeling is that most individuals in Pennsylvania are represented by an association, organisation, union, professional group etc and that if they are uninformed, “it is because they do not read the boring newsletters from the organisations”.\textsuperscript{1161} There are also groups representing consumers, the poor and disadvantaged.\textsuperscript{1162} For example, there are workers’ rights organisations, the Pennsylvania Consumer Advocate representing citizens on public utility rate increases, human rights organisations, welfare groups etc. Some of these groups are even funded by Pennsylvania taxpayers.\textsuperscript{1163} The National Insurance Association holds quarterly meetings and it actually funds consumer representatives to attend its meetings and have an input into regulatory proposals.\textsuperscript{1164} Many of these groups and associations contact and lobby members of the Legislature to ensure that their views are heard.\textsuperscript{1165}

\textit{Committee Review}

At the end of the public comment period, the Committees have 20 days to file comments or objections with the agency and IRRC.\textsuperscript{1166} The Committees examine the agency’s statutory authority for making a regulation and any deviation from the Legislature’s intention.\textsuperscript{1167} Committees have a choice whether or not to formally file comments and if they choose not to file comments they still retain the right to disapprove of a final form regulation.\textsuperscript{1168}

\textit{IRRC Review}

IRRC reviews all regulations except those made by the Game Commission and Fish and Boat Commission.

IRRC has ten days from the close of the Committees’ review period to submit comments.\textsuperscript{1169} In practice, once a proposed regulation is published in the Bulletin, IRRC commences its review, particularly if it is a complicated regulation. Agencies forward copies of all comments made at the end of and during the public comment period.

IRRC examines a regulation against the following standards –\textsuperscript{1170}

1. whether the agency has the statutory authority to promulgate the regulation;
2. whether the regulation is consistent with the intent of the Legislature;

\textsuperscript{1160} Meeting Notes, Meeting with IRRC staff and others involved in regulatory system in Pennsylvania, Monday 30 July 2001.
\textsuperscript{1161} ibid.
\textsuperscript{1162} ibid.
\textsuperscript{1163} ibid.
\textsuperscript{1164} ibid.
\textsuperscript{1165} ibid.
\textsuperscript{1166} IRRC, \textit{The Regulatory Review Process in Pennsylvania}, August 2000, p. 5 and RRA, 71 P.S. §745.5(d).
\textsuperscript{1167} ibid and RRA, 71 P.S. §745.5(d).
\textsuperscript{1169} ibid and RRA, 71 P.S. §745.5(g).
\textsuperscript{1170} RRA, §745.5(a)(h) and (i).
3. whether the regulation is in the public interest. To determine whether the regulation satisfies these criteria, IRRC examines –

(a) the economic or fiscal impact of a regulation including –

(i) direct and indirect costs to the Commonwealth, political subdivisions and private sector;

(ii) adverse effects on prices, productivity or competition;

(iii) the extent to which reports, forms or other paperwork are required and the estimated preparation cost incurred by individuals, businesses and organizations in the private and public sectors;

(iv) the nature and estimated costs of legal, consulting or accounting services which the private or public sector may incur; and

(v) the legality, desirability and feasibility of exempting or setting lesser standards of compliance for individuals or small businesses;

(b) the protection of the public health, safety and welfare, and the effect on the Commonwealth’s natural resources;

(c) the clarity, feasibility and reasonableness of the regulation to be determined by considering the following –

(i) possible conflict with or duplication of statutes or existing regulations;

(ii) clarity and lack of ambiguity;

(iii) need for the regulation; and

(iv) reasonableness of the requirements, implementation procedures and timetables for compliance by the public and private sector;

(d) whether the regulation represents a policy decision of such a substantial nature that it requires legislative review;

(e) approval or disapproval by the Committees.

While IRRC’s first priority is to ensure that there is statutory authority for enacting proposed regulations it also assesses the impact of proposed regulations and seeks comments from those affected on the impact and whether compliance will be overwhelming. IRRC also discusses these issues with agencies.\footnote{Meeting Notes, Meeting with IRRC staff and others involved in regulatory system in Pennsylvania, Monday 30 July 2001.}

Where IRRC receives a regulation and regulation analysis without any comments made by the public or interest groups, it make inquiries with individuals and groups it thinks would be interested or affected by the proposed regulation –
No comments come in, we look at it and we think – ‘Boy you would think there would have been comments on this. Who do you think might be interested since nobody commented?’ We will reach out to the best of our ability to determine who might be interested, we will call people.\textsuperscript{1172}

In this way IRRC tries to reach all those affected, including those who have perhaps been overlooked, to ensure that the estimated impact is not too burdensome or intrusive. There are no economists employed at IRRC. Some Impact Analysis Statements are straightforward to review while others involve complexities and the costs and benefits cannot be easily measured or reviewed. In these circumstances IRRC relies on the regulated community to point out the issues and difficulties.\textsuperscript{1173}

IRRC has developed excellent working relationships with agencies, and information flows back and forth throughout the regulatory process.\textsuperscript{1174} IRRC staff do not claim to be experts in any particular area. When a regulatory proposal is complex or technical, IRRC values comments from the regulated community which highlight potential problems and issues.\textsuperscript{1175} Where IRRC thinks there is a potential problem they meet with interested parties and agency staff, acting as a ‘go-between’ to try and resolve those issues.\textsuperscript{1176} Sometimes people ask to attend meetings between IRRC and particular agencies. Where the regulatory proposal has been particularly controversial and involved adversarial discussions, IRRC meets with the various parties separately –

\textit{Our standard response is – ‘We are not referees, we are going to take what the department gives us. We are going to analyse it, we are going to think on it and then you are certainly welcome to come in and give us your point of view’}.\textsuperscript{1177}

In this way IRRC can evaluate what the competing parties are saying rather than mediate heated discussions. Where the parties have been involved in non-adversarial discussions, IRRC may meet with the parties together.\textsuperscript{1178}

Agencies also value the comments they receive from IRRC because often there are issues which they have overlooked or regulatory proposals may not be as clear as they think –

\textit{One of the things which I think is very important for us is that we like to think we are the experts in insurance but may be sometimes we are a little too technical because we understand too well what we are trying to say. We have read it so many times, so we put out the regulation and how can somebody not understand it! It is very beneficial to us when we sit down with the IRRC staff because they are very knowledgable people and they read it and come back to us and ‘I am not sure if this makes sense’}.\textsuperscript{1179}

The independent assessment provided by IRRC is extremely valuable to agencies because it draws their attention to problems and gives them an opportunity to deal with these and it is beneficial to the public because they obtain better quality regulations with better outcomes.

\textsuperscript{1172} ibid.
\textsuperscript{1173} ibid.
\textsuperscript{1174} ibid.
\textsuperscript{1175} ibid.
\textsuperscript{1176} ibid.
\textsuperscript{1177} ibid.
\textsuperscript{1178} ibid.
\textsuperscript{1179} ibid.
Regulatory proposal files, including all comments received, are available to any member of the public who wants to examine them.\textsuperscript{1180} This fosters debate and discussion and allows regulatory proposals to be made in the open under the scrutiny of the public eye. IRRC’s working papers and evaluations of regulatory proposals are not accessible by the public, but may be obtained by subpoena.

IRRC must raise all its objections to the regulation at this stage of the review process. The RRA makes it clear that if IRRC fails to object to any part of a proposed regulation, IRRC will be deemed to have approved that part of a regulation.\textsuperscript{1181}

Once IRRC’s review has been completed, its comments are forwarded to the agency and posted on IRRC’s website.\textsuperscript{1182}

The Final Stage

When preparing a regulation in its final form, the agency must consider and respond to every comment it has received, whether those comments are from the Committees, the public or IRRC.\textsuperscript{1183}

An agency has up to two years from the close of the public comment period to prepare a regulation in final form.\textsuperscript{1184} Where an agency fails to meet the two year deadline, the regulation is deemed to be withdrawn.\textsuperscript{1185}

In formulating a regulation in final form, the agency may meet with IRRC, Committees and any other interested parties so that consensus can be reached on any matters of concern.

Once the final regulation is ready it must be submitted to IRRC and the Committees along with the agency’s response to all comments.\textsuperscript{1186} The agency must also provide a list of all commentators who requested information on the final regulation. On the same day, the agency must send a copy of the final form regulation or a summary of the changes to all those commentators who requested such notification.\textsuperscript{1187}

Committee Review

Committees must approve or disapprove of a final regulation and notify IRRC and the agency of their decision within 20 days after receipt of the final form regulation.\textsuperscript{1188} Committees may disapprove the final form regulation where, for example, the regulation lacks statutory authority or deviates significantly from the Legislature’s intention or for any other issue which is thought to be important.\textsuperscript{1189} Where a Committee does not approve a final regulation within the 20 day time period, the regulation is deemed to have been approved by the

\begin{itemize}
  \item \textsuperscript{1180} ibid.
  \item \textsuperscript{1181} ibid. \textit{IRRC, The Regulatory Review Process in Pennsylvania}, August 2000, p. 6 and RRA, 71 P.S. §745.5(g).
  \item \textsuperscript{1182} ibid, p. 6.
  \item \textsuperscript{1183} RRA, 71 P.S. §745.5a(a).
  \item \textsuperscript{1184} ibid.
  \item \textsuperscript{1185} ibid.
  \item \textsuperscript{1186} ibid.
  \item \textsuperscript{1187} ibid.
  \item \textsuperscript{1188} ibid.
  \item \textsuperscript{1189} ibid and RRA, 71 P.S. §745.5a(d).
\end{itemize}
Committee. Committee comments do not constitute comments of the Committee unless they have voted on the comments. If comments are received from the Chair of a Committee and there is no indication whether the Committee has voted, then the comments will not be accepted until there is an indication that the Committee has actually adopted them as their own.

IRRC Review and Public Meetings

IRRC has ten days after the expiration of the committee review period or until its next public meeting, whichever is later, to approve or disapprove the regulation. If IRRC fails to make a decision within the time period, the regulation is deemed to have been approved.

IRRC votes to approve or disapprove final regulations at public meetings. These meetings are usually held twice each month on Thursdays. The transparency and openness of these meetings allows everyone to contribute to the regulation-making process and assists the development of better quality regulations.

IRRC is required to give ten days’ notice of any rescheduled meetings. Prior to these public meetings there is a 48 hour blackout period as required by the RRA. During this period IRRC is not allowed to have any contact with outside parties concerning the substance of a regulation. Discussions between Commissioners and staff and Committees and staff is permitted during this blackout period. Any comments received by IRRC must be sent to the agency within 24 hours of receipt, however the comments are not distributed to the Commissioners until the commencement of the public meeting.

At the public meeting, IRRC staff present a short summary of each regulation. A Commissioner moves an approval or disapproval motion. Agencies, legislators and interested members of the public are given an opportunity to address the Commissioners and the Commissioners may ask any questions. This enables the Commissioners to clarify any outstanding issues.

The Commissioners must vote to approve or disapprove the regulation in its entirety. A copy of the Commissioners’ decision is distributed to the agency, Committees and LRB, and is posted on IRRC’s website.

Committee and/or IRRC Disapproval

If IRRC disapproves the regulation, it must state which regulatory criteria have not been complied with.

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1190 ibid and RRA, 71 P.S. §745.5a(d).
1191 Meeting Notes, Meeting with IRRC staff and others involved in regulatory system in Pennsylvania, Monday 30 July 2001.
1192 ibid and RRA, 71 P.S. §745.5a(e).
1193 ibid and RRA, 71 P.S. §745.5a(e).
1195 ibid.
1196 ibid.
1197 ibid.
1198 ibid.
Where a Committee disapproves a regulation, the Committee must submit a report to the agency and IRRC, stating its objections. IRRC may approve a regulation which has been disapproved by a Committee. It must deliver its approval Order to the disapproving Committee within two business days. This completes IRRC’s role in the review process, however the disapproving Committee may be further involved.

IRRC may decide to disapprove a regulation. While this does not prevent the regulation from being enacted it does delay the regulation-making process. After IRRC disapproval, the agency must choose whether to resubmit the regulation with or without changes or to withdraw the regulation. If the agency chooses to resubmit a regulation, with or without changes, the agency must submit a statutory report within 40 days of receipt of IRRC’s disapproval Order.

Within the first 7 days of the 40 day statutory reporting period, the agency must notify the Committees, IRRC or the Governor’s office of whether or not it intends to resubmit the regulation with or without changes, otherwise the regulation will be deemed to be withdrawn. If the agency wants to proceed with a regulation after it has been withdrawn it has to submit a new form regulation to the Committees and IRRC. The agency must do this within two years of the close of the public comment period otherwise it must restart the entire process.

The agency may decide to maintain the status quo. In these circumstances copies of the report must be sent to IRRC and the Committees. The agency must address each of IRRC’s concerns in this report. Even though IRRC receives a copy of the report, it does not play any part in the review proceedings.

The agency may decide to revise the regulation and resubmit it to the Committees and IRRC for further review. The agency must indicate how the changes made to the regulation meet the concerns raised by IRRC. The Committees and IRRC both review the report.

**Tolling**

Once a final regulation has been submitted to the Committees and IRRC, no changes can be made to the regulation by the agency unless the review period is ‘totted’. Tolling provides agencies with additional time within which to correct minor errors. Agencies are given additional time if:

1. the Committees have not yet made a decision and their review period has not expired; and
2. the revisions are recommended by a Committee or IRRC and IRRC does not object.

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1199 ibid, p. 12.
1200 ibid.
1201 ibid.
1202 ibid.
1203 ibid.
1204 ibid.
1205 ibid.
1206 ibid.
1207 ibid, p. 7.
1208 ibid.
Agencies may not make any changes which are recommended by internal review or an outside source. IRRC will object to tolling if the conditions in the RRA are not satisfied. Agencies may not use this process to introduce substantial changes and if they do IRRC will object and the agency will have to withdraw the regulations and resubmit it and start the regulation-making process again. The introduction of tolling has made it easier and quicker for agencies to fix up minor problems, enabling them to avoid restarting the regulatory process.

An agency has 30 days from the commencement of the tolling period to deliver the revised regulation to IRRC and the Committees. Where agencies fail to meet this deadline the proposed final form regulation will be deemed to be withdrawn. Once the revised regulation is received by the Committees and IRRC, the review resumes.

Once the tolling period has finished, agencies may only make changes to a regulation in response to IRRC disapproval or by withdrawing the regulation and submitting a new final form regulation. If the agency decides to withdraw a final form regulation it must be revised and resubmitted within two years of the public comment period and the agency must provide all interested parties who requested notification with a copy of the final regulation.

Adoption and Commencement

Once a regulation has been approved by the Committees and IRRC, it is submitted to the Attorney-General for final review. Unlike IRRC, the Attorney-General’s office has power to direct agencies to make changes. After the Attorney-General has approved the regulation, the agency submits the regulation to LRB for publication in the Bulletin. The regulation commences operation on the date of publication or a later date specified by the agency in its order adopting the regulation.

Guidance Documents

Statements of policy or other documents which agencies use to assist with the interpretation of regulations are referred to as ‘internal policies’. Agencies sometimes incorporate substantive matters into policy documents instead of regulations so as to avoid the regulation-making process. This is the one area where agencies may find themselves in conflict with IRRC –

To the extent that there is any tension at all between an agency and this administration – generally it revolves around the issue of an agency putting forward a policy statement or a guideline instead of putting forward a regulation. Instinctively a state agency would if they can, prefer the route of a guideline or policy statement where there is not
a very detailed process that is involved in putting something forward. This is one area where things sometimes do get a little tense.\footnote{Meeting Notes, Meeting with IRRC staff and others involved in regulatory system in Pennsylvania, Monday 30 July 2001.}

It is not in the best interests of agencies to incorporate substantive issues into internal policy documents because internal policy documents are not legally binding and compliance cannot be enforced –

If there is going to be an enforcement action where we can penalise … we need to have that in a regulation; a statement of policy does not have a key at that point. It is just guidance. …. When it is mandated we need it in a regulation so that we have that force and we can go after them if necessary.\footnote{ibid.}

Where an agency is enforcing a guideline as a regulation, IRRC may request the Joint Committee on Documents (the Joint Committee) to examine them and make a determination. If the Joint Committee concludes that the matters dealt with by the guideline are ‘regulatory’ in nature, then it may order the agency to enact a regulation “within 180 days, or desist from using it in carrying out agency business”.\footnote{IRRC, The Regulatory Review Process in Pennsylvania, August 2000, p. 18.}

\section*{Other Regulation-making Procedures}

\subsection*{Final-Omitted Regulations}

Final-omitted regulations may be enacted by agencies where – \footnote{ibid, p. 17.}

\begin{itemize}
  \item It is inappropriate for the public to comment such as agency practice, military business etc.
  \item People who must comply with the proposed regulation receive personal notice, such as licence fees.
  \item It is impracticable, unnecessary or contrary to the public interest to give notice. For example, regulations which have a significant fiscal impact.
\end{itemize}

This process enables agencies to introduce changes quickly, without going through the whole regulation-making process and it recognises that there will be occasions when to go through the entire regulation-making process would defeat the purpose sought to be achieved –

We also believe that one of the other good things is that the process recognises that there are occasions or situations where going through the full process may somewhat defeat the purpose and that there needs to be an opportunity for what is called Final-Omitted Regulations that do not go through the entire process. …. The beauty of the
situation as determined here is that not only is there a process but there is recognition that on occasions there needs to be ways for doing it on a more expedited basis.\textsuperscript{1220} The whole process takes about 30 days, saving a considerable amount of time.\textsuperscript{1221} A final-omitted regulation proceeds through the final stage of the regulation-making process only and so is not subject to notice requirements or public comments. One difference from the final stage of regulation-making is that review by the Attorney-General, IRRC and the Committees occurs at the same time.\textsuperscript{1222}

The discretion for making a final-omitted regulation lies solely with the agency. Where IRRC does not agree with the use of that procedure, it may suggest to the agency not to use that procedure, however it cannot force the agency not to proceed.\textsuperscript{1223} The Attorney-General’s office has the power to stop a final-omitted regulation, but that has occurred very rarely.\textsuperscript{1224} Agencies only use the procedure when there is a real need to do so as to do otherwise would impact adversely on relationships with the community and with the Legislature.\textsuperscript{1225}

Emergency Certified Regulations

Agencies are allowed to enact emergency regulations where the Governor or Attorney General certifies that it is necessary to respond to an emergency.\textsuperscript{1226} As soon as the regulation is published in the Bulletin, it commences operation. Unlike final-omitted and regular regulation-making processes, review by IRRC and the Committees takes place after the regulation is already operating. Once the regulation is approved by IRRC and the Committees it remains in effect for 120 days.\textsuperscript{1227}

Sunsetting and Review of Regulations

Regulations do not sunset and are only revised when problems are highlighted by the community, the Committees or IRRC. Some agencies have imposed upon themselves 5 and 10 year review cycles, at which time regulations are subjected to rigorous reviews within those agencies.\textsuperscript{1228} Under the current government there has been more emphasis on reviewing and removing outdated and outmoded regulations –

\textit{I think that this administration in particular is very concerned that there is full on effort at the agencies to go back over all of the regulations and we did that for every single regulation affecting insurance and we determined that about one third were outdated and outmoded and had been so for 20 years and we eliminated that third.}\textsuperscript{1229}

\begin{itemize}
  \item \textsuperscript{1220} Meeting Notes, Meeting with IRRC staff and others involved in regulatory system in Pennsylvania, Monday 30 July 2001.
  \item \textsuperscript{1221} ibid.
  \item \textsuperscript{1222} IRRC, The Regulatory Review Process in Pennsylvania, August 2000, p. 17.
  \item \textsuperscript{1223} Meeting Notes, Meeting with IRRC staff and others involved in regulatory system in Pennsylvania, Monday 30 July 2001.
  \item \textsuperscript{1224} ibid.
  \item \textsuperscript{1225} ibid.
  \item \textsuperscript{1226} IRRC, The Regulatory Review Process in Pennsylvania, August 2000, p. 17.
  \item \textsuperscript{1227} ibid, p. 18.
  \item \textsuperscript{1228} Meeting Notes, Meeting with IRRC staff and others involved in regulatory system in Pennsylvania, Monday 30 July 2001.
  \item \textsuperscript{1229} ibid.
\end{itemize}
This places enormous pressure on agencies because they still have to keep up with the work of enacting new regulations –

It is a difficult process as you will appreciate, to go back and redo a number of regulations. At the same time, there are new laws that are being passed which require new regulations. I think that our agency has been busier with regulations than in a long time.\textsuperscript{1230}

Public Appeals Against Regulations

Where people have issues with regulations, they must contact the agencies to try and seek a resolution. Where they are unsuccessful in negotiating any changes with an agency, they may approach IRRC for consideration by the Commissioners, but only after the regulation has been in place for three years.\textsuperscript{1231} Sometimes a member of the House of Representatives or the Senate will approach IRRC and request them to evaluate a regulation, in which case IRRC will have to expedite a review as quickly as possible.\textsuperscript{1232}

Conclusion

Strengths

Oversight

While IRRC has no power to prevent regulatory proposals from being enacted, its views on regulations are carefully noted and considered by agencies. IRRC has gone out of its way to foster strong working relationships with agencies so that information flows openly, back and forth and so that any concerns or issues can be dealt with. While IRRC does not act as a mediator in the strict sense of the word, it does play a crucial role in resolving matters upon which agencies, the public and the regulated community cannot agree. This role of negotiator is highly regarded by agencies and the public.\textsuperscript{1233}

The criteria against which IRRC must evaluate proposed regulations takes into account everything from legal authority and clarity to economic impact. IRRC takes a proactive role and where it has concerns about regulations, or where few comments have been made, IRRC staff will make inquiries and seek out relevant individuals and organisations to ensure that proposed regulations will not have adverse consequences on the regulated community and the community in general.

\textsuperscript{1230} ibid.
\textsuperscript{1231} ibid.
\textsuperscript{1233} Meeting Notes, Meeting with IRRC staff and others involved in regulatory system in Pennsylvania, Monday 30 July 2001.
Participation

There is ample opportunity for the public to participate in the regulation-making process in Pennsylvania – at the very least the public may comment on regulatory proposals and may address IRRC when it is conducting its final review. Many agencies also seek public comment on preliminary proposals so as to enhance the quality and effectiveness of regulations finally enacted. There is a general feeling that most people in Pennsylvania, even the poor and disadvantaged, are represented by associations and that these associations actively participate in the regulation-making process, voicing their concerns about regulatory issues.\(^\text{1234}\)

Weaknesses

Impact Analysis

The focus of Impact Analyses is on the impact on the regulated community and the costs of the regulations generally. While regulatory proposals are not subject to rigorous cost-benefit analyses, agencies are required to provide answers to approximately 30 questions before submitting regulatory proposals to IRRC. There was some discussion about introducing a more rigorous cost-benefit impact analysis but it was thought that this would not be helpful, that it would make the process more complicated and that it would be subject to guessing.\(^\text{1235}\)

Sunsetting and Review

As regulations do not sunset and there is no requirement for agencies to review regulations, regulations which are outdated and ineffective may remain on the books. While reliance on the community, regulated public, IRRC or Committees to raise concerns about ineffective regulations undoubtedly results in reviews, it would be more efficient if all regulations were subject to review after the expiry of a set period of time.

\(^\text{1234}\) ibid.\(^\text{1235}\) ibid.
Key Features of Regulatory System

1. Oversight of Regulations

A. Review of Regulation-making Procedures

• The Division of Administrative Services (DAR) ensures that agencies comply with regulation-making procedures contained in the Utah Administrative Rulemaking Act (UARA).

• DAR has power to prevent the regulation-making process from proceeding where agencies do not comply with UARA procedures.

• DAR has no power to change the substance or content of regulations.

• DAR assists agencies to comply with the regulation-making process through –
  - Rulemaking Time Frames Tables
  - Administrative Rules Calendar of Events
  - Rulemaking Manual
  - Administrative Rules Index of Changes
  - Electronic Forms.

B. Executive Branch Review of Regulations

• Review of regulations by Governor’s Office of Planning and Budget (GOPB).

• Regulations cannot proceed without GOPB approval.

• GOPB resolves issues directly with agencies.

• Where GOPB and agencies are unable to reach agreement, the Governor has to resolve the outstanding issues.

C. Legislative Review of Regulations

• Permanent Legislative Committee – Administrative Rules Review Committee (ARRC)

• ARRC reviews proposed and existing regulations.
1. **ARRC may request agencies to make changes to regulations.**

2. **ARRC has no power to force agencies to make changes or to delay regulations but may Report its findings to the Legislature or use the threat of not reauthorising regulations.**

2. **Public Notification**

   - Agencies must notify all interested parties who have requested advance notice.
   - Publication of proposed regulation and regulations analyses in the *Utah State Bulletin* (the Bulletin) and the *Utah State Digest* (the Digest).
   - The Bulletin is available at major libraries, by subscription and on DAR’s website.
   - The Digest is distributed to agencies and legislators, available by subscription, in paper form or by automated email service and on DAR’s website.
   - All regulations are contained in the Utah Administrative Code (UAC) which is updated monthly by DAR and is available on-line.

3. **Public Participation**

   - Prior to filing regulatory proposals, agencies meet with members of the public and representatives of various groups.
   - Where the issues are contentious, proposed regulations are mailed out to all those affected.
   - Members of the public may make oral or written submissions to agencies.
   - A minimum of 30 days must be allowed for the public to comment.
   - Public hearings are compulsory only where mandated by state or federal law or requested by 10 or more people, but agencies recognise the importance in the eyes of the public of holding public hearings.

4. **Impact Analysis**

   - No requirement for rigorous cost-benefit analysis.
   - Estimate of anticipated costs and savings.
   - When requested by agencies, GOPB economists prepare a rigorous cost-benefit analysis.

5. **Reauthorisation Scheme**

   - All regulations must be reauthorised annually or they cease to exist.
   - ARRC responsible for issuing the Bill reauthorising regulations.
Governor has substantial power and may reauthorise any regulation not reauthorised by the Bill and may reauthorise all regulations if the reauthorisation Bill fails to pass.

6. **Sunsetting and Review of Regulations**

- Agencies must review all regulations every five years.
- Failure to carry out review results in the expiry of regulations.
- DAR provides at least 180 days notice of impending expiry.

7. **Public Appeals Against Regulations**

- People may appeal to agencies to amend, repeal or make regulations and agencies must consider these requests, even if made by only one person.
- Agencies must keep a record of comments on a file for the relevant regulation.
- An alternative right of appeal exists to the District Court.
- Appeal on procedural non-compliance must be initiated within 2 years of commencement of regulation.
- Appeal on basis that regulation not supported by substantial evidence must be initiated within 4 years of commencement of regulation.

### Division of Administrative Rules

The UARA 1973\textsuperscript{1236} was created to establish consistent procedures for making regulations, to create an administrative code containing all regulations and to give the State Archivist authority over the regulation-making process.\textsuperscript{1237} In late 1984 the State Archivist created the Office of Administrative Rules (OAR) to oversee the regulation-making process. As a consequence, regulation-making procedures were simplified and regulation-making oversight was centralised in OAR. In 1985 the Legislature unanimously passed a new version of the UARA\textsuperscript{1238} containing these simplified regulation-making procedures. In 1987 further changes were made to the UARA, creating an administrative code containing all regulations and renaming OAR as the Division of Administrative Rules (DAR).

DAR is an executive branch agency within the Department of Administrative Services and it consists of a small team of staff who are responsible for ensuring compliance with the procedural requirements of the regulation-making process. While DAR is the smallest division in the Department it is seen as the “most innovative and amazingly creative division, given the resources” available for its use.\textsuperscript{1239} DAR’s authority is limited to ensuring that agencies comply with the procedural requirements for making regulations such as filing, publication and hearing procedures. This leaves agencies with the responsibility for

\textsuperscript{1236} Utah Code, §63-46.
\textsuperscript{1238} §63-46a.
\textsuperscript{1239} *Meeting Notes*, Meeting with DAR Staff and Raylene Ireland, Executive Director, Department of Administrative Services, Friday 20 July 2001.
determining the substance of regulations. DAR has no authority regarding the content of regulations.

Where an agency fails to comply with the procedural requirements of the UARA, DAR may refuse to publish the regulation in the Bulletin and the Utah Administrative Code (UAC). This means that the agency will not be able to proceed with the regulation until it complies with the procedural requirements of the UARA.

The UAC contains the full text of all the regulations in force in Utah. Courts and agencies recognise the UAC as the official compilation of all regulations and courts are required to take judicial notice of the UAC and its provisions. DAR codifies changes to the UAC on a monthly basis and all of these changes are available on-line on the first day of each month. It is easy for members of the public to find relevant regulations, with titles being arranged alphabetically by the authoring department. The UAC has significantly expanded public access to government activities –

Imagine that only ten years ago Archives employees filed and microfilmed rules, storing them in cabinets and loose leafs – only a detective could ferret out an agency’s current rules! Now, even people from Koosharem (Sevier County) to Qatar (a peninsula located halfway along the western coast of the Arabian Gulf) or from Myton (Duchesne County) to Macau (located in southeast China on the western bank of the Pearl River Delta) can (and do) access Utah’s administrative rules.

DAR assists agencies to comply with the requirements of the UARA –

1. DAR has created a Rulemaking Time Frames Table which includes closing dates and times, publication dates, public comment period ending dates, first possible effective dates and last possible effective dates. This alerts agencies to filing deadlines and publication dates.

2. DAR has also created the Administrative Rules Calendar of Events which includes such things as filing deadlines, meetings of the Administrative Rules Review Committee, conferences and seminars on regulations and so on.

3. A Rulemaking Manual (the Manual) created by DAR assists agency staff with drafting regulations. The Manual includes an explanation of administrative law and administrative rulemaking, and agency authority to regulate, a brief history of regulation-making in Utah, descriptions of the regulation-making process, the legislative review and reauthorisation processes and a style guide. The Manual also includes information concerning five-year reviews and electronic filing.

4. DAR has also created electronic forms to assist agency staff completing a regulation analysis as required by §63-46a-4(5). These forms are available on-line to anyone who has a state assigned IP address.

5. DAR also publishes annually the Administrative Rules Index of Changes, a document which contains details of all changes to the UAC. The Index is usually available by April and is available on-line and in paper form.

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1240 §63-46a-16.
Regulation-making Process

There are nine different regulation-making processes in Utah –

1. Proposed;
2. Changes in Proposed Regulations;
3. Emergency Regulations;
4. Non-Substantive Changes;
5. Five Year Review;
6. Five Year Review Extensions;
7. Five Year Review Expirations;
8. Legislative Expirations; and
9. Governor’s Extensions.

Proposed Regulations

The ‘proposed’ regulation-making process is used for the majority of regulations\textsuperscript{1242} and the discussion which follows focuses on this procedure.

Preliminary Steps

Before an agency can develop a regulatory proposal, the agency must ensure that it has power to proceed under the Utah Constitution, state statutes, federal law and court orders. Agencies must also ensure that when enacting regulations they comply with the requirements of the UARA, state and federal laws and any rules made by the DAR.\textsuperscript{1243} The UARA sets out the minimum procedures which must be followed by agencies when enacting or re-enacting regulations.\textsuperscript{1244} As the UARA only prescribes minimum standards, agencies may adopt more elaborate standards as long as these standards are consistent with the UARA.

Creation of Administrative Record

Each time an agency wants to enact a regulation, it creates an administrative record. The administrative record includes: copies of the proposed regulation; changes in the proposed regulation; the regulation analysis; public comment received and recorded by the agency during the public comment period; the agency’s response to the public comment; the agency’s

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\textsuperscript{1242} The proposed regulation-making process is used for making a new regulation, amending an existing regulation, removing an obsolete or unnecessary regulation and completely rewriting an existing regulation.

\textsuperscript{1243} §63-46a-4(1).

\textsuperscript{1244} §63-46a-4(2).
analysis of the public comment; and the agency’s report of its decision-making process.\textsuperscript{1245} The administrative record documents the development of a regulation and also constitutes substantial evidence of the validity of a regulation in court. A court may invalidate a regulation where the administrative record demonstrates inadequacies in the regulation-making process.\textsuperscript{1246}

**Drafting Regulations**

Once a decision has been reached to make, amend or repeal a regulation, a draft of the regulation and a regulation analysis must be prepared and forwarded to DAR. Where the information provided to DAR is incomplete, DAR may refuse to publish the regulation in the Bulletin until the deficiencies are corrected.\textsuperscript{1247}

DAR runs training sessions for agency staff responsible for drafting regulations and preparing regulation packages. Large agencies, where regulations are enacted more frequently, tend to have staff with more regulatory experience while small agencies where three or four regulations are enacted each year tend to have fewer staff with less experience and expertise.\textsuperscript{1248} This coupled with a high turnover of staff working with regulations at agencies means that DAR has to conduct a large number of training sessions each year.\textsuperscript{1249}

**Impact Analysis**

The regulation writer must also prepare a regulation analysis containing details of the anticipated costs of a proposed regulation. §63-46a-4(5) requires a regulation analysis to contain –

- a summary of the regulation or change;
- the purpose of the regulation or change;
- the statutory authority for the regulation;
- the anticipated cost or savings to the state budget, local governments and other persons;
- compliance costs for affected persons;
- how interested persons may review the full text of the regulation;
- how interested persons may present their views on the regulation;
- the time and place of any scheduled public hearing;
- the name and telephone number of the agency employee who may be contacted about the regulation;

\textsuperscript{1246} ibid.
\textsuperscript{1247} ibid.
\textsuperscript{1248} ibid, p. 18.
\textsuperscript{1249} *Meeting Notes*, Meeting with DAR Staff and Kent Bishop, Rules Analyst, GOPB, Friday 20 July 2001.
\textsuperscript{ibid.}
• the name of the agency head who authorised the regulation;
• the date on which the regulation becomes effective; and
• comments by the department head on the fiscal impact the regulation may have on business.

There is no requirement for a cost-benefit analysis to be undertaken for regulations. A fiscal note examining the costs and benefits is prepared for all Bills, which means that the cost impact of the authorising statute of a regulation will have been considered and this may include in general terms some of the costs of regulations made under it. A regulation analysis is not as stringent as a cost-benefit analysis. In effect, what the regulation analysis requires is an estimate of anticipated costs or savings –

... those words are much softer than a cost-benefit analysis in our perspective. The anticipated cost or savings impact doesn’t rise to the level of a cost-benefit analysis. A cost-benefit analysis would be much more involved. So, this is more or less a good faith effort on the part of the agency to try and identify what the costs would be, what the savings would be. They have to look at the costs and savings to state government, to local government and to other persons, then they’re required to provide the compliance costs for affected persons.\(^\text{1250}\)

Sometimes agencies may contact GOPB for assistance with working out the estimated costs and savings. On these occasions qualified economists from GOPB will work closely with the agency staff to produce a rigorous estimate. While GOPB does have final responsibility for signing off on regulations (see discussion below), their view is that there is no conflict of interest in economists from their area estimating the costs and savings –

Would it be independent enough? We think so. Our Office is known for its objectivity, that’s one of the hallmarks of our office. And we have gained a lot of respect in the community for being able to keep the data clean.\(^\text{1251}\)

The general feeling is that the cost impact of proposed regulations should not be made more stringent because then the regulation-making process will lose its flexibility, become more time consuming and agencies will be discouraged from enacting regulations –

So if you put cost impact statements and all the formality in there is a trade off but right now regulation is easier than legislation and we have specific delegation and the legislature is comfortable with that process – it isn’t fraught with the same level of formality as legislation. If you make the regulatory process more complicated you are going to have much less flexibility and less enthusiasm on the part of the agency to go through that process.\(^\text{1252}\)

The view was also expressed that where economic analysis is involved – agency staff are faced with clarifying and choosing between contradictory impact evidence and that this only makes the whole process more controversial and does not necessarily provide the community with greater protection or better outcomes.\(^\text{1253}\)

\(^{1250}\) Meeting Notes, Meeting with DAR Staff and Kent Bishop, Rules Analyst, GOPB, Friday 20 July 2001.
\(^{1251}\) ibid.
\(^{1252}\) Meeting Notes, Meeting with DAR and representatives from Utah State Agencies, Friday 20 July 2001.
\(^{1253}\) ibid.
Prior to filing a proposed regulation and regulation analysis with DAR for publication, an agency must send a copy of the regulation analysis to all interested persons who have requested advance notice. Agencies are required to maintain mailing lists of persons who have requested notification and they are also required to notify anyone or any organisation they think would be ‘interested’ in the proposed regulation.

Before formally filing a proposed regulation, many agencies seek input from the public and from professional and other associations. This is often referred to as ‘prescoping’. For example, in the Division of Occupational and Professional Licensing in the Department of Commerce, prescoping plays a crucial role in the development of regulations. In that Division, licensing representatives from boards representing various professional groups (such as doctors, nurses, contractors etc) and representatives from independent professional associations are all involved in the preliminary development of regulations which directly impact upon them –

We have a built in mechanism for public input and professional licensing. Not only do we have the boards for each of the professions, but each of the professions have an independent professional association. ... They send a representative who is not a member of the board but who attends each and every board meeting. So when there’s a rules proposal, there’s a huge amount of what we call prescoping and it takes place before the formal filing, in that the professional association, the board and all of their membership have heavily contributed to, if not dictated the content of the rule long before it is ever filed for official comment.

Agencies also use focus groups, inviting representatives of special interest groups to participate in the preliminary discussions concerning regulatory proposals. Sometimes with really contentious issues or where significant changes are proposed, a draft of the proposed regulation will be mailed out to all those affected. Agency representatives indicated that this mail out serves a dual purpose. Firstly, it educates those involved about proposed changes. Secondly, it provides individuals with the opportunity to comment as individuals rather than relying on the views expressed on their behalf by a particular organisation which may have a very different agenda to the individuals it represents.

Agency representatives indicated that they are fairly confident that the public have ample opportunity to be involved in the regulation-making process and that they are actively involved from the outset in the development of regulations –

They come out – we don’t have to seek them out, it’s a process, at least in our experience, that if they want involvement, we know who they are and they’re heavily involved even before the rule-making process.

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1254 §63-46a-4(7).
1255 Meeting Notes, Meeting with DAR Staff and Kent Bishop, Rules Analyst, GOPB, Friday 20 July 2001.
1256 Meeting Notes, Meeting with DAR and representatives from Utah State Agencies, Friday 20 July 2001.
1257 ibid.
1258 ibid.
1259 ibid.
1260 ibid.
Involvement in the early stages of the development of regulations helps deal with any contentious issues and means that there is more likely to be consensus in the later stages of the regulatory process.

However, there is evidence that special interest groups are not always involved in preliminary discussions of regulatory proposals to the extent that they would like to be and that the process sometimes proceeds so quickly that their views are not adequately taken into account—

... we met for a very long time, but our recommendations didn’t get voted into that and then when the rule-making process happened it felt pretty hurried, the rule-making process itself, so as a member of the complaining public, it doesn’t ever seem good enough.\textsuperscript{1261}

It is also difficult for these organisations and associations which represent various people to communicate with and reach all the individuals they represent—

\textit{So I think that it’s a pretty small community and I think on an individual basis it’s tough to get word out to individuals but it’s a small enough state that we know who is out there and we try and communicate either through email or regular meetings.}\textsuperscript{1262}

\section*{Notification}

The regulation and the regulation analysis must be filed with DAR for publication in the Bulletin.\textsuperscript{1263} Prior to publication, DAR staff ensure that the proposed regulation is properly formatted and that the regulation analysis contains all the appropriate information. Once DAR staff are satisfied that these requirements have been met, they record the date and time of filing, register the regulation and send a copy to the GOPB for executive review. Review by GOPB is discussed below at pp. 269-270.

The proposed regulation and the regulation analysis are then published in the next issue of the Bulletin and the Digest.

The Bulletin is issued on the first and fifteenth of each month and provides members of the public with an opportunity to make comments. The Bulletin is forwarded to major state libraries, may be obtained by subscription and is available on DAR’s website – \texttt{<http://www.rules.state.ut.us/>}.

DAR permits filing by email. In its \textit{Rulemaking Manual}, DAR makes a number of suggestions to agencies as to how to use this procedure.\textsuperscript{1264} Agencies are responsible for delivery of regulations and regulation analyses by the due date; ‘sent’ is not the same as ‘delivered’—

\textit{In one instance the Division is aware of, it took almost four weeks (or two Bulletin cycles) for an email message to travel from a department in the Heber Wells Building to}

\begin{footnotesize}
\textsuperscript{1261} ibid.
\textsuperscript{1262} ibid.
\textsuperscript{1263} §63-46a-4(3)(a).
\end{footnotesize}
the Division. The Division is not responsible for documents it does not receive because of faulty computer network connections, or email problems.\textsuperscript{1265}

Agencies are advised that they will receive a reply by email from DAR acknowledging receipt. If this message is not received the onus is on the agency to contact DAR to ensure that the regulation and regulation analysis have in fact been received.\textsuperscript{1266}

In addition, DAR also provides a summary of all proposed regulations in the Digest. The Digest is published at the same time as the Bulletin. The Digest contains a summary of the information published in the Bulletin but, unlike the Bulletin, it does not include the actual text of regulations. The Digest is distributed to agencies, legislators, private subscribers and is also available on DAR’s website.\textsuperscript{1267}

On 1 July 2000, DAR introduced an automated email service, making the Digest automatically available to anyone who joined that service. DAR uses a Listserv to automatically distribute issues of the Digest by email to all those who have registered on the List. Those who register on the list are able to receive a copy of the Digest on the day of publication.\textsuperscript{1268} The Listserv provides the public with the opportunity of controlling their own subscription, with the subscription being easily cancelled at any time. The electronic distribution of the Digest has enabled communication “to a broader audience – well beyond the scope of traditional subscribers”.\textsuperscript{1269}

Public Participation in Agency Process

Any person may submit comments concerning a proposed regulation directly to the agency. Agencies must allow a minimum of 30 days to comment after the date of publication of the proposed regulation in the Bulletin.\textsuperscript{1270}

Members of the public may make written (including email) or verbal comments to the agency. While the agency must give careful consideration to public comments there is no requirement that the agency change a proposed regulation as a result of public input.\textsuperscript{1271}

Except in certain specified circumstances, the UARA does not impose mandatory requirements on agencies to hold public hearings. §63-46a-5(2) requires agencies to hold public hearings where –

1. public hearings are mandated by state or federal laws; or

2. another agency or ten interested persons or an association of ten or more persons makes a written request within 15 days after publication in the Bulletin.

\begin{flushleft}
\textsuperscript{1265} ibid, p. 19. \\
\textsuperscript{1266} ibid. \\
\textsuperscript{1267} ibid, p. 20. \\
\textsuperscript{1268} That is, on the 1st and 15th of each month. \\
\textsuperscript{1269} DAR, Press Release, 11 July 2000. \\
\textsuperscript{1270} §63-46a-4(8). \\
\end{flushleft}
Where these circumstances are not met, it is the agency’s choice whether to hold a public hearing or not, although agencies recognise that it is a good public relations exercise to do so.\footnote{1272}{Meeting Notes, Meeting with DAR and representatives from Utah State Agencies, Friday 20 July 2001.}

Compulsory public hearings, ie those which fall into the circumstances contained in §63-46a-5(2), must be held within 30 days of the receipt of the request.\footnote{1273}{§63-46a-5(3).} When conducting public hearings in these circumstances, agencies are required to follow the procedures issued by DAR, whereas when voluntarily conducting public hearings, agencies may choose whether to follow DAR procedures or some other process. Public hearings are supposed to be conducted in a relaxed manner so that ideas can be openly exchanged –

\textit{In either case, the proceeding should be an informal, relaxed, non-adversarial exchange of information meant to enlighten both the agency and the attending public.}\footnote{1274}{DAR, Rulewriting Manual for Utah, 1998, p. 22.}

Agency representatives indicated that the public hearing process is extremely useful for ensuring that proposed regulations incorporate all essential matters. Comments at public hearings highlight things that may have been accidentally omitted or which could be improved –

\textit{That is what the public hearing process is about – to ensure that your policy choices were accurate, you drafted it in a way that is enforceable and legal and understandable and all that comes out during the rulemaking hearing to the extent that the final review process did not reveal it.}\footnote{1275}{Meeting Notes, Meeting with DAR and representatives from Utah State Agencies, Friday 20 July 2001.}

\textbf{Review by GOPB}

GOPB performs executive branch review of regulations as required by Executive Order dated 22 March 1988. That order requires agency directors to co-operate with GOPB in implementing executive review of regulations. Gubernatorial review (as it is often referred to) provides a means of addressing public concerns. Currently this executive review is performed by one person, a Rules Analyst.

A proposed regulation cannot proceed until it has GOPB approval.

Executive review operates parallel with the filing of regulations. After a regulation is filed with DAR, DAR forwards a copy of that regulation to GOPB for review. Agencies may file a draft of the regulation with GOPB before filing it with DAR so that they can receive immediate feedback and so that potential problems can be dealt with at an early stage.\footnote{1276}{Meeting Notes, Meeting with DAR and representatives from Utah State Agencies, Friday 20 July 2001.} The Rules Analyst also acts as a mediator between agencies where one agency has issued regulations which conflict with another agency’s regulations.\footnote{1277}{Meeting Notes, Meeting with DAR Staff and Kent Bishop, Rules Analyst, GOPB, Friday 20 July 2001. ibid.}

GOPB review takes one to three weeks and does not result in a delay in the regulation-making process.
When reviewing a regulation GOPB examines –

- what statute the regulation implements;
- whether the regulation is necessary to implement the statute;
- what problems the regulation will resolve;
- the fiscal and non-fiscal impact on citizens, businesses, state government, and local government;
- whether the length of the regulation can be reduced through incorporation by reference;
- whether the regulation is organised in a logical, understandable fashion, using concise, everyday language; and
- whether the regulation is in the format prescribed in the Utah Rulewriting Manual.

Where GOPB has concerns with a regulation, it will always attempt to resolve these issues directly with the agency. Where GOPB is unable to resolve its concerns, the Governor’s office itself will be asked to resolve the issue with the agency.

Changing a Proposed Regulation

UARA contemplates enactment of regulations in the same form as originally published in the Bulletin. Special provision is made for changes which agencies wish to make to proposed regulations. These changes usually result from comments made by members of the public. DAR estimates that 8% of all proposed regulations are changed after publication in the Bulletin. There are special mark-up procedures which must be followed by the agency and agencies must comply with these procedures.

DAR publishes the changes to the proposed regulation in the next edition of the Bulletin. The agency must then submit a Notice of Effective Date. The change and the proposed regulation commence on the same date. If an agency fails to notify DAR of the effective date for the change in the proposed regulation, the change and the proposed regulation both lapse.

Adoption

The agency must notify DAR of a regulation’s effective date. That date must not be less than 31 days and not more than 120 days after publication of the proposed regulation in the Bulletin. Where DAR does not receive a Notice of Effective Date, the regulation will lapse.
within 120 days from the date of publication in the Bulletin. If the agency still wants to proceed with a lapsed regulation, it must start the regulation-making process over again.

**Recording and Codifying a Proposed Regulation**

DAR keeps a permanent record of all documents submitted for regulation-making. In addition DAR keeps a register of all proposed regulations and records the date on which they become effective. On or shortly after the regulation’s effective date, DAR staff verify the text and then incorporate the regulation into the UAC.

**Administrative Rules Review Committee**

In 1983 ARRC was established to oversee the regulation-making process. ARRC cannot force agencies to change regulations, nor does it have the power to delay a regulation but it may report its findings to the Legislature. It is then up to the Legislature whether it amends or revokes the particular regulation.

Originally ARRC consisted of six legislators but changes in 1997 increased its membership to ten legislators – five senators and five representatives. In addition, when existing regulations are being reviewed, the Senate and House Chair of the Standing Committee and the Senate and House Chair of the appropriation subcommittee are invited to participate in the review, but only as non-voting participants.

ARRC members describe themselves as fair and impartial in their analysis of the issues which are raised before them. Although they represent particular political parties, they indicated that they do not vote along party lines but rather from the perspective of the citizens they represent—

*The Committee wants it done right for their citizens and it's far less adversarial than the Executive branch thought it would be when the process was started.*

Members engage in healthy debate on issues and while they do not always agree, ultimately they are able to achieve consensus so that the most satisfactory outcome for all concerned can be achieved.

ARRC reviews regulations against the standards set out in §63-46a-11(3) which include—

- whether or not a regulation is authorised by Statute;
- whether not a regulation complies with the legislative intent;

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1284 §63-46a-4(9)(e).
1285 ibid, p. 22.
1286 ibid, pp. 22-23.
1287 ARRC is a permanent legislative committee – §63-46a-11.
1288 That is the appropriation subcommittee which has jurisdiction over the agency whose regulations are under consideration.
1289 §63-46a-11(1)(d)
1290 *Meeting Notes, Meeting with Administrative Rules Review Committee Members, Friday 20 July 2001.*
the impact of a regulation on the economy and government operations;

the impact of a regulation on affected persons.

ARRC usually meets twice each month and discusses proposed regulations and existing regulations brought to its attentions by its members, its staff, other legislators or the public. ARRC provides members of the public with a forum in which to raise and discuss any concerns. When a member of the public is concerned about a regulation, that person may contact a member of ARRC and request a hearing before it. The person and representatives of the agency will be invited to attend ARRC meeting at which the regulation is to be discussed. If the member of the public wants to remain anonymous, that person’s concerns may be presented at ARRC meeting by an ARRC member. Members of the public do not have to give ARRC notice of their intention to come to a meeting. At the end of every meeting the Chair always asks if there is anyone present in the room who wishes to make some comments.²⁹¹

ARRC hears both sides of the issue and if ARRC members agree that there is a problem, agency representatives will be asked to modify the regulation to resolve the issue –

_I think we’ve been very successful both in hearing both sides and trying to mediate where there was a clear difference that was apparent and to mediate what could have been unfair and encouraging strongly the agencies or the departments to look at what the citizens were saying and to see how they could amend that._²⁹²

Agencies don’t have to make an immediate decision; they are given an opportunity to go away and reflect on what modifications should be made. Agencies usually co-operate with ARRC and make the requested changes.

One of the problems has been making people aware of the regulation-making process and ARRC and its role in that process so that the public can participate as intended –

_I think one of the challenges that we’ve had is simply making people aware of the process and the Committee and the role they play. About seven years ago the Administrative Rules Review Committee issued a press release to describe their process and to let the public know that they could come and sit in on meetings._²⁹³

While this has been effective to a certain extent, there is evidence that some people are still often unaware of regulations until later in the regulation-making process.²⁹⁴ Members of the community and special interest groups frequently turn up at ARRC meetings with complaints just before a regulation is to be enacted or after a regulation has already been enacted.²⁹⁵ Even where proposed regulations have a significant impact and they are represented by special interest associations, people often don’t find out about the regulations until it is too late –

_There are associations representing subcontractors and these groups are very powerful but they are not really monitoring the rules being made by the people that enforce them,

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²⁹¹ ibid.
²⁹² ibid.
²⁹³ Meeting Notes, Meeting with DAR Staff and Raylene Ireland, Executive Director, Department of Administrative Services, Friday 20 July 2001.
²⁹⁴ ibid.
²⁹⁵ ibid.
and we don’t really hear from them until it’s too late. They say to us ‘We didn’t know about the rules being written, we didn’t have any input to them’.

Once regulations are about to be enacted or have been enacted there is no opportunity for ARRC to negotiate with agencies. However ARRC can still make a Report to the Legislature and it also may threaten not to reauthorise particular regulations in the yearly reauthorisation Bill. Reauthorisation is discussed in more detail immediately below. As members of ARRC are also legislators they authorise budgets. Authorisation of the budget and reauthorisation are used as effective tools to persuade agencies to make changes to regulations –

Our other hammer, so to speak, as legislators we also authorise and prepare budgets for the different departments of government divisions, so they listen to us. They listen to us and they work with us. We don’t want to be overbearing on them so we try to work with them with an understanding that we’re going to work together or we will revoke their rules.

While ARRC process is viewed as useful and helpful, there are also occasions when the perception is that ARRC members are trying to satisfy the demands of their constituents. Agency representatives indicated that they have been called before ARRC a number of times to justify the policy choice made even though there was legislative authority to proceed down the path chosen –

It frequently ends up with the Administrative Rules Review Committee for us to explain the justification for the policy choice we made – with clear delegation of authority to have made a policy choice but it does not satisfy their policy choice. And it is driven by a constituent.

ARRC and its Role in the Reauthorisation of Administrative Rules

ARRC has been vested with responsibility for introducing a bill into the Legislature each year, reauthorising all regulations. Under the reauthorisation scheme, all regulations in existence on 28 February expire on 1 May each year unless reauthorised by the Legislature. During each legislative session ARRC files a bill reauthorising all regulations except for those listed as ‘not reauthorised’. The reauthorisation process does not apply to regulations mandated by federal legislation or regulations based on provisions in Utah’s constitution. The reauthorisation scheme was put in place so that the Legislature has the power to veto regulations which are unsatisfactory.

Agencies whose bills are listed as ‘not reauthorised’ have the opportunity to respond before the bill is passed. The Governor may reauthorise any regulation which the Legislature fails to reauthorise by publishing his or her reasons in the Bulletin. Any such reauthorisation by the Governor must be based on a finding that the regulation is necessary and that the

1296 ibid.
1297 ibid.
1298 Meeting Notes, Meeting with DAR and representatives from Utah State Agencies, Friday 20 July 2001.
1299 §63-46a-11.5(3).
1300 §63-46a-11.5(2)(a).
1301 §63-46a-11.5.
1302 §63-46a-11.5(2)(b).
1303 §63-46a-11.5(5)(c).
petitioning agency does in fact have authority for making the regulation. In addition, if the bill reauthorising regulations fails to pass, the Governor has power to reauthorise all regulations by simply publishing a notice in the Bulletin. The UARA vests the Governor with a powerful role by enabling the Governor to overturn the veto of a regulation by the Legislature. While the reauthorisation scheme “has been controversial”, the courts have not yet had the opportunity of examining its constitutionality.

Other Regulation-making Procedures

Emergency Regulations

Emergency regulations require urgent enactment and may be enacted, for example, in response to a natural disaster or to avoid placing an agency in violation of federal or state law etc. In these ‘emergency’ circumstances, the UARA allows the enactment of immediate but temporary 120 day regulations. Neglect on the part of the agency to make a regulation does not constitute ‘emergency’ circumstances and would almost certainly be invalidated by any court. This allows agencies to deal with the emergency situation and also provides time to enact permanent legislation if required.

As required with proposed regulation-making procedures, agencies enacting emergency regulations must file the proposed emergency regulation and regulation analysis with DAR and notify interested persons. Emergency regulations become effective on the date of filing with DAR, unless the agency has requested a later date. Emergency regulations are published by DAR in the next edition of the Bulletin but do not become part of the UAC. At the expiration of 120 days, emergency regulations automatically expire. To make emergency regulations permanent, agencies must initiate regular regulation-making procedures.

Non-substantive Changes

This process is used to make non-substantive changes to proposed or existing regulations such as correcting typographical or grammatical errors or making minor changes to wording. Regular regulation-making procedures do not have to be followed to make non-substantive changes. Agencies must file a copy of the regulation containing marked-up changes with DAR and DAR sends a copy of the changes to GOPB, where the Rules Analyst reviews the changes to ensure that they are in fact non-substantive changes. Where the Rules Analyst thinks the changes are substantive, the Analyst will discuss the changes with the agency. Once

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1304 §63-46a-11.5(5)(b).
1305 §63-46a-11.5(5)(d).
1307 §63-46a-7(1).
1308 §63-46a-7(2)(d).
1310 The most common procedure for making regulations in Utah.
1311 §63-46a-7(2)(d).
1312 §63-46a-7(3).
1313 ‘Substantive Change’ is defined by the UARA to mean any change in a rule which affects the application or results of agency action – §63-46a-2(19).
the Rules Analyst informs DAR that the changes are non-substantive, the changes become effective and are codified in the UAC.\textsuperscript{1315}

### Sunsetting and Review of Regulations

Agencies must review all regulations within five years of a regulation’s commencement date or the date of the last five year review.\textsuperscript{1316} Regardless of whether the agency decides to repeal or amend or simply keep the regulation, a Five Year Notice of Review and Statement of Continuation must be filed with DAR.\textsuperscript{1317} In providing this statement to DAR, the agency must make clear the reasons for amendments or retaining the status quo. The agency is required to provide –\textsuperscript{1318}

- a statement of the statutory authority for the regulation;
- a summary of all written comments received about the regulation during the last five years; and
- reasons for the continuation of the regulation.

Failure to file the Notice within the five year time period results in the expiry of the regulation and DAR will remove the regulation from the UAC and notify the agency that the regulation is no longer enforceable.\textsuperscript{1319} In addition, DAR is required to publish a notice in the next issue of the Bulletin stating that the regulation has expired and is no longer enforceable.\textsuperscript{1320} Automatic expiry serves as a useful tool for ensuring agencies comply with the five year review requirements.\textsuperscript{1321}

Each quarter, DAR must send out notices to agencies providing at least 180 days advanced notice of regulations due to expire.\textsuperscript{1322} The agency may apply for an extension of 120 days if it finds that it is difficult to comply with the five year review requirements.\textsuperscript{1323} As a result of the review the agency may decide to repeal or amend the regulation. DAR does not review the reasons in support of a request for extension, it simply records the extension and publishes a notice in the next issue of the Bulletin.

### Public Appeals Against Regulations

Any person may petition an agency to make, amend or repeal a regulation.\textsuperscript{1324} The petition must include the precise wording of the proposed change as well as the name, address and any association that the petitioner represents.
The agency has 30 days from the receipt of the petition to mail the petitioner a reply, either denying the petition or agreeing to commence the regulation-making process. Where the agency agrees to the change, the agency is not bound to the precise wording suggested by the petitioner but any new wording should be discussed with the petitioner.

Even if only one person petitions for a change the agency must give appropriate consideration to the proposed change –

We had an attorney here recently who practices before our labour commission, and they were changing some of their rules and, she didn’t like the way they were changing it, so she actually wrote a letter and said, I think you should take your changes in this direction. She actually wrote out the proposed language that she would recommend. In that case the commission considered it and said, no thank you.

Agency review of regulations often occurs on a much more informal basis. The petitioner may approach the agency and enter into informal discussions with agency representatives –

In practice it typically happens much more informally. Someone will say, we’ve got a problem with this rule, can we talk about it. They will sit down with somebody from the agency and typically they are either able to come to a better understanding of what’s involved in the process and why the rule is there, the way it is. That way the agency may see something it has not been aware of before and it may initiate rule making before it gets to the point of the person actually drafting a letter petitioning the agency to make a change.

Evidence from agency representatives indicates that this informal process works reasonably well and that they may be approached by either individuals or representatives from associations. As the informal discussions progress, drafts incorporating the changes will be produced until finally everybody feels comfortable with commencing the formal regulation-making process.

There are of course occasions when agencies decide that they don’t want to make any changes. Irrespective of this they must give consideration to the comments made and note those down on a file. Ultimately, however, it remains a decision for the agency and if they have legitimate reasons for not accepting the proposed change then it should be rejected –

You have to listen to them and you have to put their points in the file. But after good consideration, if you find good reason not to change the rule, then by all means tell them. That’s a responsibility you have. We see that as part of due process here in this country.

Appendix O contains a list of some legitimate reasons why an agency may reject a suggested regulatory change.
Persons who are dissatisfied with a regulation, or with an agency’s failure to enact a regulation, may also appeal to the District Court. §63-46a-12.1 regulates judicial review of regulations. Before making a complaint to the court, the person must first petition the agency to resolve the issue unless:

(a) the person has already attempted to do this during the comment period of the regulation making process; or

(b) the delay involved in petitioning the agency would cause irreparable harm.

Where the court agrees with the petitioner, the court may order:

(a) the regulation be declared invalid;
(b) the regulation not to apply to the petitioner;
(c) the agency to comply with proper regulation-making processes;
(d) issue an injunction to prevent irreparable harm to the petitioner.

A declaration of invalidity by the court must be based on a finding that:

(a) a regulation breaches statutory or constitutional law or the agency did not have legal authority to enact the regulation;
(b) a regulation is not supported by substantial evidence when viewed in the light of the whole administrative record;
(c) the agency did not follow proper regulation-making procedures.

This highlights the importance for agencies to keep accurate and detailed administrative records for all regulations because courts examine the administrative record very carefully and will uphold the regulation if it is substantially supported by the administrative record –

*If the rule is not substantially supported by the record, the rule may be invalidated even if it is otherwise legal.*

A person challenging a regulation on the basis of non-compliance with the procedural requirements of the UARA must do so within two years of the commencement date of the regulation. A person challenging a regulation on the basis that it is not supported by substantial evidence when viewed in the light of the administrative record must do so within 4 years of the commencement date of the regulation.

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1332 §63-46a-12.1(1)(a).
1333 §63-46a-12.1(2).
1334 §63-46a-12.1(4).
1335 §63-46a-12.1(4)(a).
1337 §63-46a-14.
1338 §63-46a-14.
Conclusion

Strengths

Efficient Regulation-making Process

An important feature of the regulation-making process in Utah is that regulations can be enacted or amended quickly and efficiently. The various stages of review do not result in any long delays in the enactment of regulations. Those involved in the regulation-making process in Utah are proud of the flexibility and efficiency of their system –

\[\text{The biggest advantage of our system is that it is streamlined – it is efficient, it is responsive and when we go around amongst our own states at national conferences – they don’t have that.}\]^{1339}

The flexibility and efficiency of the regulation-making process makes life easier and simpler for those involved and means that regulations can be changed up to three to four times a year without any difficulties.

Public Participation

People have an opportunity to participate at various stages of the regulation-making process. Prescoping, focus groups and mail outs of draft regulations to all those affected are used to obtain public comments on preliminary proposals. Once a draft regulation has been published in the Bulletin, people have the opportunity to make written submissions to agencies. Unlike Arizona, there is not necessarily the opportunity to make oral submissions at public hearings, with public hearings only being required where mandated by law or whether another agency or ten interested persons request it. Even so, agencies may still decide to hold public hearings without these requirements being met, so that people feel that their comments have been heard. Finally, people have an opportunity to make oral comments to ARRC. While ARRC prefers to receive prior notification of the desire to make oral comments, the opportunity is always afforded to members of the public to make comments on issues not on the agenda for that meeting. Thus people are provided with ample opportunity to be heard on issues concerning regulations, although it could be said that the threshold for agencies holding public hearings should be lowered to ensure that agencies do in fact give people the opportunity of making a verbal presentation to them.

Notification

Agencies are required to maintain mailing lists of all interested persons and to provide advanced notice to those persons as well as to anyone they think would be interested. Some agencies also use their websites to keep people informed. People can also find out about proposed regulations and all other relevant information by obtaining a copy of the Bulletin which is available on-line at DAR’s website, in major libraries and by subscription. One

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1339 Meeting Notes, Meeting with DAR and representatives from Utah State Agencies, Friday 20 July 2001.
excellent feature is that people can register on-line with DAR to automatically receive the Digest which provides a summary of information contained in the Bulletin and for those who have registered it means that they are provided with up-to-date information.

**Use of Technology**

Utah has taken many steps to use technology to enable people to be better informed as well as to assist agencies with the regulation-making process. To assist agencies, DAR has produced various documents such as a Rulemaking Time Frames Table, Administrative Rules Calendar of Events, Rulemaking Manual, Administrative Rules Index of Changes and forms for regulation analysis – all of which are available on-line. The process has been further facilitated by the ability of agencies to file rule packages on-line, making it easier for them to produce regulation packages and to be aware of and meet time deadlines. The creation of these documents and their availability on-line contributes greatly to the efficiency and effectiveness of the regulation-making system in Utah.

**Weaknesses**

**Review of Regulations**

The emphasis on efficiency means that there is less time to consider regulatory proposals, to discuss changes and less evaluation. To incorporate more checks and balances into the system and longer review times is seen by those involved in the system as costly and as not improving the final results –

_We have weaknesses. Sometimes the solution is just more expensive than they want to pay for. We have checks and balances and everyone is coming up against each other – it works. Everybody would like to have more time to review things, write it better, get more input – at what cost and is that cost worth it. … I think that we do the best we can with what we have._

**Notification**

One difficulty in all of this is ensuring that the public are aware of regulatory proposals. There is concern that some people miss out on participating in the regulatory process. While a lot of effort goes into informing people and getting them involved in the process there is evidence that some people miss out on that opportunity because they lack time and resources to acquire knowledge of regulatory processes or because they are not represented by an association or group –

_One weakness I can identify – if you don’t have an organisation – you don’t have an association – you don’t have a group – you don’t have a voice for the most part – that is legislatively and regulatory. It’s rare indeed that you come to a Legislative Committee_
or to a rulemaking hearing as an individual and have enough time, enough resources to get apprised of the issue and make a difference in that participation process.\textsuperscript{1341}

Even where people are represented by an organisation, it appears that sometimes those organisations do not find out about regulatory proposals until very late in the regulatory process, at which point the opportunity of preventing enactment of the regulation has been lost. ARRC can negotiate with agencies for changes to be made, but ARRC needs to be made aware of any issues early in the regulation-making process so that it can enter into negotiations with agencies. Often this does not happen. However, where people do voice their concerns to ARRC late in the regulation-making process, it can still make a Report to the Legislature and it can also threaten not to reauthorise a particular regulation in the Annual Reauthorisation Bill. While reauthorisation is a useful tool in persuading agencies to make changes, it would be better if people and the organisations which represent them participated earlier in the regulation-making process.

\textbf{Politics}

While the regulation-making system in Utah is efficient, the tension between the three branches responsible for oversight is at times tense.\textsuperscript{1342} There are three players in the oversight process, two of which operate in the Executive Branch – DAR and GOPB – and one which operates from the Legislative Branch – ARRC. There is a perception that ARRC sometimes engages in politics and exceeds its terms of reference by considering policy issues –

\begin{quote}
... then from the Legislative arena you have this Administrative Rules Review Committee who use their role much greater than simply – have you exceeded the scope of your rulemaking authority. They view their role as very much a policy making direction of the Executive Branch – almost supervision or overview of the Executive Branch – micro management of rulemaking and it becomes extraordinarily political and you have two masters – a legislative master and an executive branch master.\textsuperscript{1343}
\end{quote}

While ARRC cannot delay regulations, it can use reauthorisation and budgetary allocation to put pressure on agencies to agree to its views. While members of ARRC maintain that they act only in accordance with the statutory criteria, the existence of a contrary perception amongst some agencies indicates that at times the process may be too political.

\textbf{Impact Analysis}

Another drawback in the Utah regulatory system is the lack of cost-benefit analysis. While a regulation analysis examines anticipated costs and savings, it lacks the precise economic analysis necessary to determine the real cost impact of regulations. Economists in GOPB may work out more precise figures in relation to some regulations,\textsuperscript{1344} but this means that there are still regulations missing the benefit of this process. There is also a conflict of interest\textsuperscript{1345} in having an analysis of costs and savings prepared within GOPB and then having GOPB

\textsuperscript{1341} ibid.
\textsuperscript{1342} ibid.
\textsuperscript{1343} ibid.
\textsuperscript{1344} Where requested by agencies.
\textsuperscript{1345} This view was rejected by DAR staff and Mr. K. Bishop, Meeting Notes, Meeting with DAR Staff and Mr. Kent Bishop, Rules Analyst, GOPB, Friday 20 July 2001.
examine and authorise regulations. While on the face of it this system of review appears to work satisfactorily, there always exists the possibility of a decision not based on the best economic outcome. In addition, without the preparation of a detailed cost-benefit analysis, including social and environmental costs, there is always the chance that the impact on some segment of the community may be accidentally overlooked.
Virginia

Key Features of Regulatory System

1. **Oversight of Regulations**
   - Attorney-General confirmation of legal authority to make regulations.
   - Prior to notice, information concerning regulatory proposals must be provided to the Department of Planning and Budget (DPB) and Governor’s office.
   - Review of proposed regulations and regulation packages by DPB and Governor’s office.
   - At final regulation-making stage, review by Governor’s office and Committees.

2. **Public Notification**
   - Maintenance by agencies of lists of interested persons and notification of people on those lists.
   - Notification at all stages of regulation-making process in the Virginia Register (the Register). The Register is published every two weeks, is available on-line, in public libraries and by subscription.
   - The Register includes comprehensive information about regulations and regulation-making procedures. Innovative website – the Virginia Regulatory Town Hall Website (the Town Hall) – providing comprehensive information on regulations throughout the regulation-making process.
   - Notification in the Register that regulatory changes are under consideration and invitation to comment. Minimum of 30 days in which to comment.
   - Notification in the Register of proposed regulations, full text etc available and 60 day comment period.
   - Notification in the Register of final regulations and 30 day adoption period.
   - Maintenance of list of guidance documents by each agency. Available from agency, published in the Register and on the Town Hall.

3. **Public Participation**
   - The Town Hall, facilitating greater public participation in all aspects of the regulation-making process.
Public may petition agencies, to make or amend regulations.

Agencies must develop public participation guidelines and these are subject to normal regulation-making procedures.

30 day comment period during the preliminary regulation-making stage.

60 day comment period on proposed regulations.

4. Impact Analysis

Economic Impact Analysis (EIA) prepared by DPB economists for all regulations, no matter how small.

EIAs prepared within 45 days of receipt of regulation-making packages.

EIAs are an overall estimate of the impact of proposed regulations.

5. Sunsetting and Review of Regulations

No sunsetting of regulations.

All regulations subject to periodic review every three years and a Periodic Review Report to be completed. Not all agencies take this seriously as there is no enforcement of this process.

6. Public Appeals Against Regulations

Right of appeal (with some exceptions) to agency for informal and formal hearing presided over by Hearings Officer.

Right of appeal to the Supreme Court of Virginia.

Department of Planning and Budget

DPB is headed by a director who is appointed by the Governor and confirmed by the General Assembly. The Director reports to the Governor through the Secretary of Finance. DPB is divided up into Budget and other divisions.

The Economic and Regulatory Analysis Division is the Division of DPB responsible for reviewing regulations proposed by state agencies and for assessing the policy implications and estimating the economic impact on Virginia of all proposed regulations. It coordinates the regulation-making process and advises the Governor's Secretary and Policy Office concerning regulatory matters.

Throughout this report this Division will be referred to as DPB.
Virginia Regulatory Town Hall Website

DPB has developed an innovative web-enabled system for conducting regulatory review within the Executive Branch. This is known as the Virginia Regulatory Town Hall Website (the Town Hall). The Town Hall provides a central place for accessing regulations, regulatory proposals and other related information and enables fast and efficient access to this information. It was called the Town Hall so that people feel that it is a user friendly place where they can come and participate in the regulation-making system.\(^{1347}\) It was initially set up to assist DPB by minimising the paperwork received at their office and to allow agencies to know what stage of the regulatory process a regulatory proposal has reached.\(^{1348}\) The foresight of its creators\(^ {1349}\) has enabled the Town Hall to become an important source of regulatory information for everybody –

*We realised we were going to have all this information in our system. We thought this is very rich information – it could be used by the public and so the next part of the site would be to provide this information to the public. The benefits are enhanced transparency and public access to the process. One of the benefits is to know where the regulation is throughout the whole process. We provide complete accountability. We can also find out where regulations are getting held up in the process.*\(^ {1350}\)

Once a regulatory proposal has completed its way through the system, it remains on the Town Hall. At some time in the future, when time is available, DPB will develop an archive system, but developing this has low priority at the moment.\(^ {1351}\) Another innovation which DPB hopes to add in the near future is a complex search engine which will enable people to search for board minutes, guidance documents etc.\(^ {1352}\)

Agency access to the Town Hall is separate to public access. Every agency has its own log in and its own secure site within the system so that the information it puts onto the website cannot be interfered with. Approval information is confidential so agencies may only access approval information concerning their own regulations. As regulatory proposals proceed through the regulation-making process and receive approval, this information is locked into the system and cannot be changed. The law in Virginia allows a well designed, computerised approval process to substitute for a hard signature and there is no requirement for the Governor to sign and stamp a final regulation. A more recent innovation is to offer multiple levels of security so that different people within an agency have access to different documents and information, depending on a person’s responsibilities. A member of the public cannot view approval information. While DPB manages the site, agencies are responsible for managing information concerning their own regulatory proposals. The public does not have access to any of this information. The major benefits of the Town Hall for agencies are –

\(^{1347}\) *Meeting Notes, Meeting with DPB staff, Richmond, Virginia, Monday 23 July 2001.*

\(^{1348}\) ibid. Prior to this, DPB staff were receiving constant telephone calls from agencies concerning the progress of their regulatory proposals.

\(^{1349}\) Credit for the creation of this system belongs to Mr William Shobe, Director, DPB and Mr. Stewart Lagarde, Senior Policy Analyst, DPB who have both put a lot of personal time and effort into setting up this excellent system. Detailed design and coding was provided by HiTech Solutions in Annandale, Virginia. The web site is <www.townhall.state.va.us>.

\(^{1350}\) *Meeting Notes, Meeting with DPB staff, Richmond, Virginia, Monday 23 July 2001.*

\(^{1351}\) ibid.

\(^{1352}\) ibid.
Enables agencies to automatically transmit completed regulatory proposals and accompanying documentation to DPB;

Provides information to agencies on the steps which must be followed to change regulations;

Provides friendly reminders by automatic email of approaching deadlines;

Allows agencies to find out how their regulations are progressing through the regulatory process, quickly and without interrupting DPB staff;

Allows agencies to download mail lists and to send out paper copies to people where necessary.

For members of the public, the Town Hall provides all the information they need concerning regulations, such as agency contact information, text of proposed changes, agency background discussions, meeting information, EIAs, historical tracking information and agency guidance documents. The major benefits of the Town Hall for the public are –

Provides quick and easy access to regulatory proposals and related information –

So if you’re a member of the public you can download copies of EIAs, you can see background information that is part of the process. This is a revolution for members of the public. Before that we had to rely on public libraries having copies of the Virginia Register or hiring a lawyer.¹³⁵³

Allows people to log in under their own personal accounts and to sign up on agency mail lists so that they will be informed about regulatory proposals and have the opportunity to make comments. People can take themselves off these lists at any time. This is a recent innovation and is seen as ‘a very powerful tool’ in increasing public participation;

Allows the public to track regulations through the regulation-making process. The public may sign up for advanced notification by email of regulatory actions and meetings – this provides the public with fast, convenient and reliable access;

Provides the public with greater opportunity for input. Comment forums enable the public to voice their opinions about new regulatory actions on-line and to view comments that other people have made. However, the number of comments that people may make has been restricted so that the site is not used as a ‘chat room’ and so that the comments made are well considered and based on substantive issues;

Provides access to agency discussion of a proposed regulation, the proposed text, the EIA and the agency response to the EIA;

Contains information about all public meetings concerning regulations;

Enables people to sign up to receive an email automatically whenever a regulation’s status has changed;

¹³⁵³ ibid.
United States’ Jurisdictions – Virginia

- Allows people to create individual webpages – ‘My Town Hall’ – which enables them to keep personalised lists of meetings and regulatory actions;

- Provides access to official Board meeting minutes as soon as agencies are able to provide this information;

- Locates guidance documents in a central repository and provides the public and agencies with improved access to official guidance documents.

Users of the Town Hall may read, print or save documents on their own computer. Downloadable documents are provided in Adobe PDF format.

**Virginia Code Commission**

In 1950 the Virginia Code Commission (the Commission) was set up to codify the Acts of the Assembly of 1948 and all Acts created prior to that time. The Commission continues to do that work and each year codifies the statutes after each session of the General Assembly.

In 1992 the Commission was given authority to create Virginia’s first administrative code of regulations by compiling and codifying all of the administrative regulations of state agencies into the Virginia Administrative Code (VAC).

The Commission also has responsibility for the publication of the Register, which is published every two weeks. Copies of the Register are sent to public libraries, are available by subscription or on the Commission’s website. The Register provides the public and agencies with a comprehensive source of information concerning regulations. Indexes for the Register are published each quarter. The Register provides the text of proposed and final regulations, EIA statements and summaries of the basis, purpose, substance and issues concerning each regulation. The Register also provides a comprehensive list of forms used by agencies as they proceed through the regulation-making process; guidance documents; a newsletter on regulations which provides agencies with up-to-date information on changes to the regulatory process; the Virginia Manual; the Administrative Process Act (APA); the Virginia Register Act; regulations made by the Commission concerning the regulatory process and Governor’s Executive Orders which must be followed when enacting regulations.

The Register also contains other information concerning state government, such as emergency regulations, state lottery regulations and director's orders, State Corporation Commission orders and regulations, Virginia Tax Bulletins from the Department of Taxation, and notices of public hearings and open meetings of state agencies.

The Commission also monitors the operation of the APA and the Virginia Register Act, ensuring that both Acts provide the most useful and practical assistance to agencies.

**Administrative Law Advisory Committee**

The Administrative Law Advisory Committee (ALAC) was created in 1994 to assist the Commission with its oversight of the operation and effectiveness of the APA and the Virginia Register Act. The ALAC includes representatives of business, local government, the state bar, state agencies, academics, public interest associations and so on. The ALAC does not review
regulations but provides advice to the Commission on the regulatory process and how that process can be improved. One of the most valuable aspects of the ALAC’s work is the studies undertaken by staff on the regulatory system. But the big difficulty faced by ALAC is that its members provide their services free of charge which means that meetings are often held during lunch times and there is often little time to give adequate consideration to some of the issues which are raised.

**Regulation-making Process**

Making, amending or repealing regulations takes about 18 months to complete. The discussion which follows focuses on the regulation-making process used for most regulations.

Members of the public may petition an agency for a new regulation or amendment to an existing regulation. An agency has 180 days from receipt of the petition to give consideration to it but there is no obligation on the agency to initiate regulation-making in response to the request. An agency’s decision on whether or not to initiate the regulation-making process is not subject to judicial review.

Regulation-making authority really lies with Boards rather than agencies – the citizens’ boards propose the regulations. Boards are appointed by the Governor for 4 year terms for each agency. Appointments to Boards are staggered, which means that not all members of the Board are appointed by the same Governor. Boards consist of volunteer citizens. Agency heads are appointed by the Governor and serve at the Governor’s pleasure. In a practical sense, agency heads have a great deal of influence over Boards and their decisions and they are the driving force in the regulatory process. Ultimately Boards can force agencies to promulgate regulations which they do not support but this only happens very occasionally.

With the exception of emergency and exempt regulations, all regulations go through three stages –

1. **Notice of Intended Regulatory Action (NOIRA),**
2. **Proposed regulation,** and
3. **Final regulation.**

Responsibility for drafting regulations and preparing regulation packages lies with agency staff. DPB provides training to agency staff on the regulatory process but does not provide any training on the preparation of EIAs because these are prepared by DPB staff.

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1354 Meeting Notes, Roundtable discussion with various participants in the Virginian regulatory process, Richmond, Virginia, Monday 24 July 2001.
1355 ibid.
1356 §2.2-4007.A.
1357 ibid.
1358 ibid.
1359 Meeting Notes, Meeting with DPB staff, Richmond, Virginia, Monday 23 July 2001.
1360 ibid.
Compliance Requirements

When adopting, amending or repealing regulations, agencies must ensure that they comply with –

- Administrative Process Act (§2.2-4000 et seq. (effective from 1 October 2001) of the Code of Virginia) (the APA);
- Governor's Executive Orders 24(98) and 25(98) and;
- Virginia Register Act (§9-6.15 et seq. of the Code of Virginia);
- Virginia Code Commission Regulations Implementing the Virginia Register Act;
- The Virginia Register Form, Style and Procedure Manual (the Virginal Manual);
- Public Participation Guidelines developed by Agencies; and
- Guidance documents filed by agencies with the Registrar.

Public Participation Guidelines

Agencies are required to develop public participation guidelines, which are procedures for obtaining public input into the regulation-making process from interested individuals. Agencies may not enact regulations until they have developed these public participation guidelines. These public participation guidelines constitute regulations and as such are subject to normal regulation-making procedures including the review process.

The Public Participation Guidelines must include –

- Methods for identifying and notifying persons interested in the regulation under consideration and how this input will be sought;
- Policy for using advisory committees and consulting with interested individuals who would like to work with the agency in developing the regulation; and
- Provisions for offering interested persons an opportunity to submit comments, either orally or in writing.

The Guidelines may also include requirements for public hearings and may specify the time for public comment after publication of the Notice of Intended Regulatory Action. The content of public participation guidelines varies between agencies, with some agencies using technical advisory committees to bring all the stakeholders together to achieve some sort of consensus amongst stakeholders. These groups have been found to be extremely effective in achieving long term agreement –

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1361 §2.2-4007.D.
1363 §2.2-4007.D.
Environmental agencies have the most involved stakeholders and they routinely use technical advisory committees to bring all stakeholders together. They enforce a sort of consensus process in these groups to make them hammer out something that’s agreeable to everyone. They have found that this works very well, partly because the stakeholders’ representatives have essentially had to agree by the time it gets out to the public domain.1364

Agency Guidelines

Each year all agencies must file with the Registrar for publication in the Register, any guidance documents which they have developed. Guidance documents provide assistance with implementing and complying with certain aspects of regulations.1365 For example, if the Department of Social Services has to make decisions on eligibility for welfare, a checklist might be provided to the case workers responsible for interviewing potential recipients of that welfare. The checklist used by the case worker would be classed as a guidance document. In other words, it is based on and consistent with the regulation and is not designed for a legal purpose but to assist Department staff. Guidance documents do not constitute ‘regulations’ and are not subject to the APA which means that they can be changed easily and at any time. Another example is that many forms are made as guidance documents instead of being included as part of regulations. This makes it easier for agencies to change their forms and modify the information collected because they don’t have to go through the entire regulation-making process.

To be enforceable before the courts, substantive policy issues must be promulgated as regulations and not as guidance documents. The ALAC conducted a study of guidance documents in 2000 to find out whether substantive issues were being made as guidance documents rather than as regulations and could not find any significant instances of that occurring.1366 Availability on various websites will make it much easier for people to find out if agencies are avoiding the APA procedures by including matters in guidance documents which should be enacted as regulations.

Guidance documents have been made much more accessible to the public in recent years in Virginia. Previously guidance documents were difficult to find, agencies did not know where all the guidance documents were located, there were guidance documents in binders which had not been looked at for some time and they were not generally accessible by the public. This has been changed by the requirements for agencies to file all guidance documents with the Registrar, maintain a list of their guidance documents, make this list available for public inspection,1367 and most important of all, include guidance documents (including full text) on the Town Hall. It costs a lot less to download a guidance document from the Town Hall than to approach an agency to make a copy. It is also much easier to find all guidance documents, which means that guidance documents now provide more effective assistance to agencies implementing regulations and members of the public who must comply with them. One question which arises and which may need clarification is whether by posting guidance

1364 Meeting Notes, Meeting with DPB staff, Richmond, Virginia, Monday 23 July 2001.
1365 §2.2-4008.
1366 Meeting Notes, Roundtable discussion with various participants in the Virginian regulatory process, Richmond, Virginia, Monday 24 July 2001.
1367 §2.2-4008.
documents on websites courts will alter their perception of them and view them as legally binding.\footnote{Meeting Notes, Roundtable discussion with various participants in the Virginian regulatory process, Richmond, Virginia, Monday 24 July 2001.}

\textit{Liaison with Attorney-General’s Office}

An agency must ensure that it has statutory authority to make a regulation or amendments to a regulation. An agency must consult with the Attorney-General’s office and obtain a letter stating that the agency has statutory authority to enact the regulations.\footnote{DPB, \textit{The Virginia Manual}, paragraph 3.1.} A copy of this letter must be included with all regulatory packages filed with the Registrar of Regulations.

\textit{Virginia Manual}

The Virginia Manual is an essential resource containing guidelines and procedures to be used by agencies when enacting regulations and guidance as to when agencies are exempt from complying with all or part of the APA. The requirements set out in the Virginia Manual apply to all agencies. The Virginia Manual is issued by the Commission under the authority of §9-6.20 APA.

\textit{Preliminary Review by DPB and Governor’s Office}

Prior to providing the Registrar of Regulations with NOIRA, the agency head must submit information concerning the proposed regulation to the Governor’s Secretary and to DPB.\footnote{Governor’s Executive Order 25(98).} The information which must be submitted includes –\footnote{ibid.}

\begin{itemize}
  \item A statement identifying the source of the state and/or federal legal authority to enact the regulation and the extent to which making the regulation is mandatory or discretionary;
  \item A statement describing potential issues to be dealt with by the proposed regulation;
  \item A statement setting forth the reasoning by which the agency has concluded that the proposed regulation is essential to protect the health, safety or welfare of the public;
  \item A statement describing less burdensome and less intrusive alternatives and the reasoning why the agency has rejected any of the alternatives.
\end{itemize}

DPB reviews the submission to determine whether the proposed regulation complies with the requirements of Executive Order 25(98) and other State policy and must advise the Secretary of the Governor’s Office of its determination.\footnote{ibid.}

The Secretary must then make a decision whether to authorise the agency to proceed.\footnote{ibid.} Where the Secretary determines that there are inadequacies with the agency’s submission, the
agency will be unable to proceed with the proposed regulation until the inadequacies are rectified.

Notice of Intended Regulatory Action

NOIRA gives the public notice that a regulatory change is under consideration and includes a description of the changes being considered. NOIRA must be filed with the Registrar of Regulations for publication in the Register. The Registrar of Regulations may reject the NOIRA if it does not meet the requirements of the APA. Reasons for rejection must be provided to the agency and the agency has to rectify any problems and resubmit the NOIRA.

The public must be given at least 30 days within which to make comments to the agency. The comment period begins on the date of initial publication in the Register and must end prior to filing a regulation package with the Registrar of Regulations.

All agencies are required to maintain a list of interested persons and are required to give notice of regulatory actions to people and groups on those lists. People and groups on those lists have an expectation that they will be informed, and if they are not they usually telephone the agency. Whether agencies advertise in newspapers is now an option – mailing lists, the availability of the Register on the Code Commission’s website and information available on the Town Hall provide broader and more cost-effective notification than newspaper advertisements. Agencies rarely use their own websites to advertise regulatory proposals because they lack the resources to set these up and maintain them.

NOIRA provides the public with an opportunity to make comments to the agency at an early stage in the regulation-making process. Agencies recognise the importance of allowing stakeholders to be involved in the regulatory process – it highlights issues of concern and assists agencies with choosing the best regulatory option –

I tell my project managers that my goal is to always end up with the best, clear, most readily understood regulation that shows what they need to do, but gives administrative flexibility for day to day decisions ... and which doesn't have to be changed, revisited, opened up year after year.

Most agencies have internalised these public consultation obligations and make a great deal of effort to ensure that everyone who should comment has that opportunity. Where stakeholders are not consulted, they may approach the Governor’s office, DPB and members of the Legislature requesting that something be done. Also, the agency gets a bad reputation and may be the subject of adverse comment in newspapers –

It has been my experience that if people are working on something that they felt should be kept quiet, then they usually live to regret the day because something comes to light.

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1374 §2.2-4007.B
1375 ibid.
1376 Meeting Notes, Meeting with DPB staff, Richmond, Virginia, Monday 23 July 2001.
1377 Meeting Notes, Roundtable discussion with various participants in the Virginian regulatory process, Richmond, Virginia, Monday 24 July 2001.
1378 ibid.
1379 Meeting Notes, Meeting with DPB staff, Richmond, Virginia, Monday 23 July 2001.
and when it does the consequences are not always pretty on the front page of the paper.1380

Agencies are confident that notice of regulatory proposals reaches all those affected, including those who are poor or disadvantaged and that they are provided with ample opportunity to comment.1381 The poor and disadvantaged, are represented by special advocate groups. For example, the Virginia Poverty Law Centre, is an advocate group for welfare recipients and it is signed up for notification of all regulatory proposals in the Department of Social Services.1382 There is a view that when agencies don’t hear from people that it is not because they are unaware of a regulatory proposal or cannot obtain access to information but because the proposal is not of sufficient interest to warrant comment.1383

The public comment during this period (ie after the NOIRA is filed) must be distinguished from the 60 day comment period given to the public after the proposed regulation is published in the Register.

Agencies must state in the NOIRA whether or not the agency intends to hold public hearings on proposed regulations during the 60 day comment period.1384

§2.2-4007.C provides that agencies must hold public hearings where –

- required by law;
- the agency has stated in the NOIRA that it will hold a public hearing;
- the agency's public participation guidelines require that a public hearing be held;
- the agency is directed by the Governor to hold a public hearing; or
- the agency receives a request for a public hearing from at least 25 persons.

Further Review by DPB and Governor’s Office

Within 180 days of the close of the public comment period of the NOIRA, the agency must submit the regulatory package to the Secretary and DPB for further review.1385 The regulatory package must include –

- a copy of the proposed regulation;
- a copy of all the documents required to be filed with the Registrar, details of which are provided below, under the heading, ‘Proposed Stage’;
- a statement identifying the source of legal authority;

Meeting Notes, Roundtable discussion with various participants in the Virginian regulatory process, Richmond, Virginia, Monday 24 July 2001.

ibid.

ibid.

ibid.

§2.2-4007.C.

Governor’s Executive Order 25(98).

ibid.
• a statement from the Attorney-General that the agency has legal authority to make the regulation;
• a summary of public comments received and agency comments in response;
• a statement detailing any changes;
• a statement indicating why the regulation is essential to protect health, safety or welfare of citizens or for the efficient economic performance of government;
• a statement describing less burdensome and intrusive alternatives for achieving the objectives and reasons why the agency has rejected those alternatives;
• a statement indicating that the agency has determined that the regulation is clearly written and easily understandable;
• a statement setting forth when the agency will re-evaluate the regulation to determine whether it should be continued, amended or repealed. This review must be no later than three years after the commencement date of the regulation;
• a statement identifying anticipated regulatory impact.

DPB must review the regulatory package to ensure that it complies with all the requirements of Executive Order 25(98), applicable statutes and state policies and advise the Secretary to the Governor of its determination. DPB staff look for inconsistencies, failure to consider all the consequences, legal uncertainty, lack of clarity, inadequate notice to the public and failure to adequately consider public comments. The overriding presumption is that “the regulation promulgated must represent the least burdensome and intrusive solution for the identified need”.

DPB staff perform a technical review of proposed regulations and their packages, distancing themselves from political decisions –

*My primary goal is to keep us out of partisan politics so we maintain a reputation as a credible technical advisory group. We do not view regulations through any sort of political lenses. We look at them purely in terms of whether they are effective, their aggregate impact in terms of their benefits and their cost to the state and so we are very careful about maintaining distance from political issues.*

DPB has a reputation of not being biased and this has contributed to the high value placed on the work performed by DPB by the Governor, agencies and the public.

The quality of regulations produced varies between agencies, and DPB staff estimate that they request agencies to make changes to one out of every three regulations. Although many of the regulations are small, some of them require substantial attention and very careful evaluation –

*We really have to make an independent read of a regulation. We will sometimes find agencies have neglected to mention very important changes in regulations. We don’t*
know whether it was on purpose or not. We couldn’t determine that, but nonetheless that means we have to read everything that comes through and that in itself can be quite a challenge.\textsuperscript{1391}

DPB has no authority to prevent regulations from being enacted, however it does have an important role in that it provides advice to the Governor’s office –

All regulations need to come to us for analysis. As part of that analysis the Governor’s Chief Executive wants to know that every regulation is of a certain minimum standard.\textsuperscript{1392}

Prior to providing that advice to the Governor’s Office, DPB staff negotiate changes and solutions directly with agency staff. When DPB took on its current regulatory review role, there was at first some animosity from the agencies as they could not always proceed as intended because DPB does not automatically approve every proposal and package which comes before it.\textsuperscript{1393} However, DPB’s regulatory review role is now much more widely accepted by agencies and seen as helpful in pointing out issues and consequences which were overlooked at the agency level.\textsuperscript{1394} On most occasions DPB staff resolve any issues and recommend approval of regulations and it is only a very low proportion which are not recommended –

To this day we are very careful about sending a recommended denial forward. We do that rarely. We prefer to go through negotiation with the agency and to come to some common understanding, but we do use that authority when necessary and, to date, the Governor has never not supported our recommendation, has never not gone with our recommendation. We’re very careful about what we send forward to the Governor’s office and we don’t use that authority glibly.\textsuperscript{1395}

Most of the documents produced by DPB are public documents and available on their website. However, the memorandum of advice outlining DPB’s concerns, which is provided to the Governor, is not a public document – it is up to the Governor to determine which comments and objections made by DPB should be made public.\textsuperscript{1396} DPB support this confidentiality as it gives staff the freedom to express their views honestly, without fear of litigation or other challenge from the public.

If the Governor’s office determines that the agency has legal authority to make the regulation and that it complies with all applicable requirements,\textsuperscript{1397} the Governor’s office shall authorise the agency to deliver the proposed regulation to the Registrar.\textsuperscript{1398} If the Governor’s office determines that the regulatory review package is inadequate to satisfy applicable requirements, the agency will be asked to rectify these inadequacies and will not be able to submit the proposed regulation to the Registrar until it has done so.\textsuperscript{1399}

\textsuperscript{1391} ibid. \\
\textsuperscript{1392} ibid. \\
\textsuperscript{1393} ibid. \\
\textsuperscript{1394} ibid. \\
\textsuperscript{1395} ibid. DPB staff estimated that less than 5% of proposed regulations do not receive their recommendation of approval. \\
\textsuperscript{1396} ibid. \\
\textsuperscript{1397} Namely the APA, Governor’s Executive Order 25(98), any applicable state or federal statutes and any other government policies. \\
\textsuperscript{1398} Governor’s Executive Order 25(98). \\
\textsuperscript{1399} ibid..
Impact Analysis

When DPB receives regulatory packages from agencies, in addition to reviewing regulations (as described immediately above), DPB must also prepare EIAs. EIAs are prepared by skilled economists with strong forecasting and economic analysis skills and this work forms a substantial part of the work of DPB. DPB must prepare EIAs within 45 days of receipt of regulatory packages from agencies. An EIA must include:

- the estimated number of businesses falling within the scope of the regulation;
- identification of the types of businesses particularly affected;
- the estimated number of persons and employment positions affected;
- the impact on the use and value of private property;
- the estimated implementation and compliance costs for affected businesses, localities and other entities; and
- identification of sources of potential funds to cover implementation and compliance costs.

EIAs are prepared for all regulations, no matter how small, which means that sometimes only trivial amounts are at stake. In preparing EIAs, DPB relies on information provided to it by agencies and contained in current literature, as there is insufficient time for DPB staff to produce their own data. Agencies are directed by the Governor to “work with DPB and endeavour to provide DPB with the information and data requested in as timely a manner as practicable”.

The EIA must be DPB’s best estimate of the impact and costs of a proposed regulation – the accuracy of DPB’s estimate does not in any way affect the validity of a regulation. The EIAs prepared are more an overall estimate of the impact of proposed regulations rather than a mathematical technical analysis –

Everyone is happy with our educational approach to economic analysis rather than our numerical approach to economic analysis. … Our EIA’s contain more discussion of the general tendencies rather than the actual numbers. Now, that said, when you do have numbers available we would try to use them.

While the importance of scientific economic analysis is not overlooked, the aim is to provide people with a good understanding of proposed regulations, their consequences and unintended

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Meeting Notes, Meeting with DPB staff, Richmond, Virginia, Monday 23 July 2001.
§2.2-4007.G.
Meeting Notes, Meeting with DPB staff, Richmond, Virginia, Monday 23 July 2001.
ibid.
Governor’s Executive Order 25(98).
§2.2-4007.G.
Meeting Notes, Meeting with DPB staff, Richmond, Virginia, Monday 23 July 2001.
consequences. Sometimes there are unintended consequences which agencies have not considered at all –

For example, we had a regulation for the licensing of people who teach sign language in schools. The regulation as written was going to reduce them by regulating the training and supposed qualifications for these people. It was going to reduce the supply of sign language teachers by 50 per cent. We felt this was a serious, unintended consequence of the regulation. They couldn’t provide us with any data that indicated there had been problems, but they wanted to license these people and they were going to cut the supply by a large amount.

In these particular circumstances, negotiations took place so that the proposed regulation could be redesigned to avoid these serious consequences. Generally business costs are easiest to measure but even then difficulties may be encountered because businesses do not necessarily keep accounts or records in a way that can be easily used as a basis for EIAs. Environmental costs and benefits are difficult to measure and DPB economists take special care to ensure that they examine these as accurately as possible, although they would like more time and resources to do a more in-depth analysis of these consequences. DPB has not experienced any political pressure to prepare EIAs that are more favourable to business or environmental groups or health groups etc. DPB staff take special care to ensure that EIAs reflect a fair and impartial analysis of the costs and benefits and recognise that no matter how hard they try, someone will always be unhappy with the final outcome.

Proposed Stage

After the 30 day comment period has ended the agency may file the proposed regulation submission package with the Registrar for publication in the Register. This provides the public with access to the full text of the regulation, a statement explaining the substance of the regulatory action and an EIA.

More specifically, the regulatory package must include –

- notice of comment period;
- transmittal sheet;
- statement of basis, purpose, substance, issues, and agency response to the EIA;
- EIA;
- summary of the regulation;
- double-spaced text of proposed regulation;
- reporting forms used in administering the regulation, if any;

1407 ibid.
1408 ibid.
1409 EIAs are prepared by skilled economists with strong forecasting and economic analysis skills.
1410 Meeting Notes, Meeting with DPB staff, Richmond, Virginia, Monday 23 July 2001.
1411 §2.2-4007.H.
a copy of the letter from the Attorney General's office indicating that the agency has statutory authority to enact the regulation;

• a copy of any documents being incorporated by reference; and

• a disk containing the text of the regulation; a summary of the basis, purpose, substance, issues and impact statement; and the agency's response to the EIA.

Before publishing the regulatory package in the Register, the Commission staff review the regulation package carefully to ensure that all requirements have been met.\(^\text{1412}\)

**Notice of Comment Period**

Agencies must give members of the public the opportunity to comment either orally or in writing on proposed regulations.\(^\text{1413}\) The Notice of Comment Period indicates to the public the closing dates for comments.

The Notice must be published in the Register and may also be published in newspapers.\(^\text{1414}\) The Notice is published in a separate section of the Register which provides information on public comment periods and public hearings to be held on proposed regulations.

**Summary of proposed regulation**

Agencies are required to submit a summary of the object, substance, issues and response to DPB’s EIA.\(^\text{1415}\) The summary is designed to provide the public with simple and easy to understand information about a proposed regulation. The Summary Statement is published along with the proposed regulation in the ‘Proposed Regulations’ section of the Register.

**Gubernatorial review**

The Governor is required to review proposed regulations to determine whether they are –\(^\text{1416}\)

1. necessary to protect the public health, safety and welfare; and

2. clearly written and easily understandable.

Where the Governor decides to comment on a proposed regulation, those comments must be forwarded to the agency and the Registrar no later than 15 days following the completion of the 60 day public comment period.\(^\text{1417}\) Those comments must be published in the Register. The agency may not proceed to the final stage of the regulation-making process until 15 days

\(^\text{1412}\) ibid.

\(^\text{1413}\) §2.2-4007.F.

\(^\text{1414}\) ibid. Agencies have a discretion whether or not to use newspapers or press releases to notify the public about opportunities for making written and oral comments.

\(^\text{1415}\) §2.2-4007.H.

\(^\text{1416}\) §2.2-4013.A.

\(^\text{1417}\) ibid.
have elapsed after the 60 day comment period so that the Governor has time to comment.\textsuperscript{1418} At the end of the 15 day period the agency may –\textsuperscript{1419}

- adopt the proposed regulation if the Governor has no objection to the regulation;
- modify and adopt the proposed regulation after considering and incorporating the Governor's suggestions, if any; or
- adopt the regulation without changes despite the Governor's recommendations for change.

\textit{Legislative Review}

During the regulation-making process, legislative committees may meet, consider a proposed regulation and file an objection with the Registrar and the agency. This objection will be published in the Register. The agency has 21 days from the receipt of an objection to file a response with the Registrar, the objecting legislative committee and the Governor. The agency’s response will be published in the next issue of the Register.

\textbf{Final Stage}

Once the agency has adopted the final regulation, it must submit the regulation in final form, highlighting all changes in the final regulation and explaining any substantial changes to the proposed regulation. The agency must also file a revised summary, current objectives, substance and issues and EIA.

Upon publication of the final regulation in the Register, a 30 day final adoption period commences. At the same time as the agency files a final regulation package with the Registrar, the agency must also submit that package to the appropriate Cabinet Secretary, DPB and the Governor’s Policy Office.\textsuperscript{1420}

Final regulations filed with the Registrar must also include a signed statement specifying that the regulations are full, true, and correctly dated.\textsuperscript{1421} The last page of the final regulation must be certified and include the signature of the certifying official, the printed name and title of the certifying official, the printed name of the agency, and the date of signing.\textsuperscript{1422} The Virginia Manual indicates that a signature stamp or other facsimile may be used for certification in place of an original signature.\textsuperscript{1423}

Once a regulation has been filed and checked to ensure that all the appropriate requirements have been met, it will be published. Publication may be stopped if a request to withdraw a regulation from publication is made in writing in time to remove it from publication.\textsuperscript{1424} The final regulation, the summary, agency contact, and availability of the summary of public

\textsuperscript{1418} ibid.  
\textsuperscript{1419} ibid.  
\textsuperscript{1420} §2.2-4012.E and Governor's Executive Order 25(98).  
\textsuperscript{1421} §9-6.18.  
\textsuperscript{1422} DPB, The Virginia Manual, paragraph 3.2.8.  
\textsuperscript{1423} ibid.  
\textsuperscript{1424} ibid, paragraph 3.39.
comments and agency response are published in the ‘Final Regulation’ section of the Register.

A final regulation commences operation 30 days after it is published in the Register or a later date, if specified.

**Suspension of 30 Day Adoption Period**

**Objection by Governor**

During the 30 day adoption period, the Governor may object to part or all of a proposed final regulation on the basis that the changes to the proposed regulation have a substantial impact.\(^{1425}\) The Governor must forward notice of objection to the Registrar and agency prior to the conclusion of the 30 day adoption period. In these circumstances the Governor may request the agency to provide an additional 30 day comment period.\(^{1426}\) Gubernatorial suspension occurs rarely\(^{1427}\) and when it does it is unlikely that agency heads will not comply with the Governor’s request because agency heads serve at the pleasure of the Governor.\(^{1428}\) The Registrar must publish the Governor’s objection and notice of the additional 30 day comment period in the Register.\(^{1429}\) If the Governor fails to object or to suspend the effective date of the regulation, the Governor is deemed to have agreed to the enactment of the regulation.

**Objection by Legislative Standing Committee**

A legislative standing committee may also object to a final regulation during the 30 day adoption period.\(^{1430}\) The objection must be forwarded to the Registrar and the agency and the Registrar must publish the objection in the Register.\(^{1431}\) The agency has 21 days after receiving the objection to file a response.\(^{1432}\)

**Objection by Legislative Committee and Governor**

A legislative committee and the Governor may suspend the operation of all or part of a regulation until the end of the next regular General Assembly session.\(^{1433}\) To do this a Directive must be issued signed by a majority of the members of the standing committee and the Governor.\(^{1434}\) This action must be taken before the expiration of the 30 day adoption period.

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\(^{1425}\) §2.2-4013.D.

\(^{1426}\) §2.2-4013.C.

\(^{1427}\) Meeting Notes, Meeting with Code Commission staff, Richmond, Virginia, Monday 23 July 2001. It was suggested that gubernatorial suspension has not occurred at all within the last eight years and has probably only occurred on about four occasions before that.

\(^{1428}\) ibid.

\(^{1429}\) §2.2-4013.C.

\(^{1430}\) §2.2-4013.C.

\(^{1431}\) ibid.

\(^{1432}\) ibid.

\(^{1433}\) §2.2-4014.A.

\(^{1434}\) ibid.
period, and the directive must be published in the Register after being forwarded to the Registrar.

At the next regular session of the General Assembly, legislation must be enacted to repeal all or a portion of the regulation.\textsuperscript{1435} Where no such legislation is enacted –

- the agency may enact the regulation according to the public participation requirements of the APA; or

- the agency may claim an exemption from the APA pursuant to §9-6.14:4.1.

\textit{Request for additional comment by 25 individuals}

Where there have been one or more substantial changes to a regulation (as between its proposed and final form), any person may petition the agency requesting an opportunity to make written or oral comments.\textsuperscript{1436} Where the agency receives 25 or more requests, the agency must suspend the 30 day adoption process and allow an additional 30 day period for comments. The agency must file a notice of the additional 30 day public comment period with the Registrar.\textsuperscript{1437}

\textbf{Changes and Refiling}

After the conclusion of the comment period, the agency shall make any necessary changes to the final regulation submission package and file the package with the Registrar of Regulations. The package filed with the Registrar must include the final form of the regulation, a current summary and statement as to the basis, purpose, substance, issues and the EIA and the agency’s summary of oral and written comments.\textsuperscript{1438} The Registrar must keep all of these documents as a permanent record and make them available for public inspection.\textsuperscript{1439} A regulation commences at the conclusion of the 30 day final adoption period unless that process has been suspended (as discussed above) or any other date specified by the agency.\textsuperscript{1440}

\textbf{Withdrawal of Regulation by Agency}

The agency may withdraw the regulation at any time prior to the date the regulation becomes effective.\textsuperscript{1441} After the regulation becomes effective it can no longer be withdrawn, but may be repealed.\textsuperscript{1442}

\textsuperscript{1435} ibid.
\textsuperscript{1436} §2.2-4007.K.
\textsuperscript{1437} ibid.
\textsuperscript{1438} §2.2-4012.E.
\textsuperscript{1439} ibid.
\textsuperscript{1440} §2.2-4015.A.
\textsuperscript{1441} §2.2-4016.
\textsuperscript{1442} ibid.
Other Regulation-making Procedures

Emergency Regulations

Emergency regulations are enacted where there is an immediate threat to the public’s health or safety or where a federal or state law requires regulations to be enacted in a shorter time frame than the usual regulation-making procedures.\textsuperscript{1443} Emergency regulations are exempt from the usual regulatory procedures and are only effective for up to 12 months.\textsuperscript{1444} Usually agencies commence permanent regulation-making procedures once emergency regulations are in place. Emergency regulations commence operation upon adoption and filing with the Registrar of Regulations unless an alternative commencement date has been specified.\textsuperscript{1445}

Exempt Regulations

Some agencies are exempt from compliance with usual regulation-making procedures. For example, the Department of Game and Inland Fisheries, the Housing Development Authority, the Resources Authority, the War Memorial Foundation, the Small Business Financing Authority and so on.\textsuperscript{1446} Also exempt from usual regulation-making procedures are certain types of regulatory actions such as technical changes, changes made to conform with changes in federal or state laws, regulations fixing rates or practices, regulations establishing internal procedures and so on.\textsuperscript{1447} The Legislature can also determine whether regulations will be exempt from usual regulation-making procedures, in which case the authorising statute will make express provision for that exemption. While agencies may be exempt from complying with normal regulation-making procedures in certain instances, many agencies still choose to follow the procedures contained in the APA so that people feel that they have had the opportunity to participate in the regulatory process –

\begin{quote}
I am not really exactly sure about whether there is a rule for all that except that I think that there is a need for public comment to promote transparency and a feeling that the regulations are not being handed down but are rather being thoughtfully developed with the consultation with the public …. Even though we do have so many exemptions the number of agencies actually utilising their exemption power is not as great as that.\textsuperscript{1448}
\end{quote}

Sunsetting and Review of Regulations

Regulations do not sunset but instead are subject to periodic review. Periodic review requires every regulation to be reviewed once every three years. When enacting new regulations or amending regulations, agencies have to specify a review date and state how they are going to

\begin{flushleft}
\textsuperscript{1443} §2.2-4011 and DPB, The Virginia Manual, paragraph 4.1.
\textsuperscript{1444} §2.2-4011 and ibid, paragraph 4.3.
\textsuperscript{1445} §2.2-4011 and ibid.
\textsuperscript{1446} §2.2-4002.
\textsuperscript{1447} §2.2-4006.
\textsuperscript{1448} Meeting Notes, Meeting with Code Commission staff, Richmond, Virginia, Monday 23 July 2001.
\end{flushleft}
evaluate each regulation.\textsuperscript{1449} When the review date is approaching agencies have to publish a Notice of Periodic Review in the Register and have to provide the public with at least 20 days within which to make their comments.\textsuperscript{1450} Once the periodic review has commenced agencies have 90 days within which to complete a Periodic Review Report, which essentially is an assessment of the effectiveness of a regulation. This Report must address the following –\textsuperscript{1451}

- the legal authority for the regulation and the extent to which that has been exceeded;
- a summary of agency and public comment on the effectiveness of the regulation;
- the extent to which the regulation achieves its stated objectives;
- an explanation of why the regulation is essential to protect the health and safety or welfare of citizens or for the efficiency and economical performance of a government function;
- less burdensome and intrusive alternatives considered and the reasons for the rejection of these;
- whether the regulation is clear and easy to understand by those affected; and
- reasons for keeping, amending or removing the regulation.

DPB and the Secretary of the Governor’s office evaluate the Periodic Review Report to ensure that it complies with all the requirements of Executive Order 25(98).

Some agencies take periodic review seriously and others do not – outside the agency there is very little enforcement of the process –

\textit{If the agency takes it seriously it happens. If they don’t, it doesn’t.}\textsuperscript{1452}

DPB indicated that they lack the resources and the time to monitor the effectiveness of regulations and the initiation of the periodic review process –

\textit{We don’t have subject area expertise to go in and tell an agency that they shouldn’t have a regulation in this area or that they need to dramatically revise it without spending quite a lot of time developing expertise. We just don’t have that.}\textsuperscript{1453}

If DPB had more staff and resources they probably could play a useful role in providing advice on how to improve the effectiveness of regulations.\textsuperscript{1454} However, this additional responsibility would substantially add to an already enormous workload and would increase the costs of the regulation-making process.

\textsuperscript{1449} Governor's Executive Order 25(98).
\textsuperscript{1450} ibid.
\textsuperscript{1451} ibid.
\textsuperscript{1452} Meeting Notes, Meeting with DPB staff, Richmond, Virginia, Monday 23 July 2001.
\textsuperscript{1453} ibid.
\textsuperscript{1454} ibid.
Public Appeals Against Regulations

People can appeal against regulations either directly to the relevant agency or to the courts.

Some agency actions are exempt from review at the agency level and these include assessment of taxes or penalties; award or denial of workers’ compensation claims; grant or denial of public assistance; temporary injunctive orders; determination of claims for unemployment and suspension of licences, certificates of registration etc.\textsuperscript{1455} As a preliminary step, agencies are required to hold informal conferences unless there is agreement between the parties to proceed directly to formal proceedings.\textsuperscript{1456} Even at informal hearings parties have the right to reasonable notice and the right to be represented.\textsuperscript{1457} Where an informal hearing fails to resolve the issue, the parties may proceed to formal hearings. Formal hearings are governed by strict procedural rules such as the right to reasonable notice, the right to be represented, the right to cross examine etc.\textsuperscript{1458} Formal hearings are conducted by Hearings Officers who must be respected members of the Virginia State Bar; must have actively practised law for at least five years and completed a course of training approved by the Executive Secretary of the Supreme Court.\textsuperscript{1459} When agencies want to appoint a Hearings Officer, they make a request to the Executive Secretary of the Supreme Court who selects an appropriate officer based on geographic location and specialist knowledge and expertise.\textsuperscript{1460}

Any person who is dissatisfied with a decision of a Hearings Officer or who is affected by and claims the unlawfulness of a regulation has a right to seek a review by the Supreme Court of Virginia.\textsuperscript{1461} The party lodging the appeal bears the burden of proof and must demonstrate an error of law such as lack of statutory authority; breach of constitutional right, power or privilege; non procedural error which constitutes more than a harmless error etc.\textsuperscript{1462} The Supreme Court determines the facts on the basis of the Formal Hearing Record or agency files, minutes and records.\textsuperscript{1463} Where the Supreme Court finds that there has not been an error of law, the review action shall be dismissed and the regulation shall be affirmed.\textsuperscript{1464}

Conclusion

Strengths

Efficient Technology Enhanced Regulation-making System

The Town Hall website has not only greatly enhanced public involvement in the regulation-making process, it has improved the efficiency and cost-effectiveness of the system. Users are

\textsuperscript{1455} §2.2-4018.
\textsuperscript{1456} §2.2-4019.
\textsuperscript{1457} ibid.
\textsuperscript{1458} §2.2-4020-4023.
\textsuperscript{1459} §2.2-4024.
\textsuperscript{1460} ibid.
\textsuperscript{1461} §2.2-4026.
\textsuperscript{1462} §2.2-4027.
\textsuperscript{1463} ibid.
\textsuperscript{1464} §2.2-4028.
able to track regulations from their beginning to their final enactment. The Town Hall provides an electronic system of communication, enabling people to monitor regulatory progress and activities much more easily.

The Town Hall has streamlined the regulatory process, shortening the time taken to enact regulations. The advent of the Town Hall means that regulatory proposals move through the regulatory process quickly and efficiently. The Town Hall has improved agency management of regulatory information and productivity. Without leaving their own office, agency staff may make, amend and create information, have instant access to approval information, can automatically transmit regulatory proposals and can receive email reminders about approaching deadlines. The Town Hall shifts the regulatory system away from the burden of the paper office, allowing the web to be used to conduct regulatory business in an efficient and cost effective manner –

Rather than "pushing paper," essential regulatory business can now be conducted on the web. The Town Hall uses web commerce technology to reduce the cost of the regulatory process, reduce delays in implementing regulatory changes and increase the productivity of state employees.\(^{1465}\)

**Notification and Participation**

New technology aside, there has always been opportunity to comment and participate in the regulatory system in Virginia. During the preliminary stage of regulation-making, people have 30 days to comment and during the proposal stage people have 60 days to comment. These comment periods provide ample time for the public to review regulatory proposals and to make well thought through comments.

Another feature which enhances public participation is the use of public participation guidelines. Public participation guidelines must be made by all agencies so that people understand how they will have an opportunity to participate in the regulation-making process. The public participation guidelines, which must themselves go through the normal regulation process, provide information about opportunities to comment, use of advisory committees, public hearing requirements and so on.

Prior to the creation of the Town Hall, people had to search through the Register or contact departments to find out about regulations and to participate in the regulation-making process. The Town Hall has had a significant impact on public participation and its creators describe it as the “first comprehensive regulatory participation website in the country [United States]”.\(^ {1466}\) The Town Hall links all the key players\(^ {1467}\) in the regulatory system and empowers the public to take a more active role in the regulation-making process. Secretary of Technology, Mr. Donald Upson commented –


\(^{1466}\) *Meeting Notes*, Meeting with DPB staff, Richmond, Virginia, Monday 23 July 2001.

\(^{1467}\) These include agencies, DPB, Cabinet Secretaries, the public, the Governor’s Office, the Registrar.
Citizens have a right to know what their government is doing and to participate in the decision making process. The Town Hall harnesses the Internet not only to receive information but to push information directly to interested citizens.\textsuperscript{1468}

Users are able to track regulatory actions; access all relevant documents; access meeting information; sign up for automatic emails of agency promulgation plans, changes to regulations, public meetings and so on. The major hurdle for people to overcome with the Town Hall is familiarising themselves with how it works and all the information which is available –

\textit{The regulatory process itself is so complicated it would be almost impossible to capture and reflect a process that is so complicated with something that is simplistic. It wouldn’t do it justice, and it would leave out huge chunks of it. So it’s almost a necessity that the Town Hall has to be complex. I think that it is going to be a function of folks progressively mastering it and that will take a little time. But I think that once they do they will readily appreciate all the information that is available at their fingertips.}\textsuperscript{1469}

\textbf{Impact Analysis

Highly skilled economists in DPB prepare all EIAs. While the EIAs prepared are underpinned by scientific economic analysis, the final analysis provides people with an overall estimate of the impact of a proposed regulation, with a discussion of general tendencies rather than pure statistical analysis. This makes it easier for those not familiar with the subject dealt with by a regulatory proposal to understand its consequences. DPB staff take special care to provide an impartial and balanced analysis of the impact of proposed regulations, so that legislators can proceed down the best regulatory path –

\textit{Well, I certainly am a firm believer in scientific underpinning of economic analysis. And I think it is very valuable, but with very large regulations and large projects it is very difficult to make these numerical assessments. I think as long as you’re honest about our uncertainties because there are many, and an economist is not in a position to make a final choice and that is – how do you choose between this set of benefits for society and that set of benefits. In the end the choices have to be offered to the people who are the representatives of the voters and those are the choices we cannot make. So what we try to do is to provide an essay about the impacts and unintended consequences it might have.}\textsuperscript{1470}

\textbf{Weaknesses

\textbf{Length of Regulation-making Process

The regulation-making process in Virginia is lengthy and fairly complicated, taking a good 18 months to enact most regulations. Providing the public with greater opportunities for


\textsuperscript{1469} \textit{Meeting Notes}, Roundtable discussion with various participants in the Virginian regulatory process, Richmond, Virginia, Monday 24 July 2001.

\textsuperscript{1470} DPB staff take special care to provide an impartial and balanced analysis of the impact of proposed regulations.
comment (ie the 30 day and 60 day comment periods) adds to the time it takes to enact regulations and makes the whole process more complex –

The long painful way is the public – telling them that you are going to make the change and then putting the change out there and the 60 day comment period and then bringing it back in for a final. That is what is referred to lovingly as the long painful way.\textsuperscript{1471}

There is at least five months of ‘dead time’ during the regulation-making process, taking into account filing a regulatory proposal with the Registrar, publication of the regulatory proposal and the various comment periods –

So, no matter how good I am at my job, no matter how hard I work, or how quickly I work or how I beg and plead – ‘Here is my regulatory package. Please put it ahead of the 15 or so others that you’ve got!’ No matter how hard I do that, I can’t do anything to affect those prescribed periods of time, and that adds up to four or five months right there.\textsuperscript{1472}

While this is a downside of the regulation-making process in Virginia, it does encourage agencies to enact good quality regulations from the outset, regulations which will not require constant changes and which can remain on the books for longer.\textsuperscript{1473}

\textit{Periodic Review of Regulations}

While regulations are supposed to be reviewed by agencies every three years and a Periodic Review Report prepared and submitted to DPB and the Governor’s Office, the extent to which review actually occurs depends on the agency involved. Evidence suggests that not all agencies take the review process seriously, which means that some regulations may remain on the books indefinitely without being re-examined to see whether they are working effectively. DPB lacks the resources to identify which regulations are not working properly and relies on agencies to bring these issues to its attention in the Periodic Review Report. This is one aspect of the regulation-making process which requires improvement because the possibility exists for regulations which are outdated and ineffective to remain on the books –

In general, I wouldn’t disagree with sunsetting provisions as a hypothetical possibility. I would have to think of some of the other consequences, but taking a good hard look at regulations in our view is often a good thing because circumstances change and rules changes and our thinking about what’s efficient and the management mechanisms that are available change, so I think it might add value.\textsuperscript{1474}

\textsuperscript{1471} Meeting Notes, Roundtable discussion with various participants in the Virginian regulatory process, Richmond, Virginia, Monday 24 July 2001.

\textsuperscript{1472} ibid.

\textsuperscript{1473} ibid.

\textsuperscript{1474} Meeting Notes, Meeting with DPB staff, Richmond, Virginia, Monday 23 July 2001.
Federally, somewhere between 4,000 and 6,000 regulations are made each year. It is estimated that the total cost of federal regulations each year exceeds $800 billion.\textsuperscript{1475} While many regulations have beneficial impacts, others “are ill conceived, arbitrary, needlessly burdensome, duplicative, or just plain silly”.\textsuperscript{1476} Thus the need for careful oversight and review of the Federal regulatory process is absolutely crucial.

**AEI Brookings Joint Center for Regulatory Effectiveness**

In response to increased concern about the impact of regulation on the economy, the American Enterprise Institute (AEI) and the Brookings Institution established the AEI-Brookings Joint Center for Regulatory Studies (the Joint Center) in 1998.\textsuperscript{1477} The Joint Center builds on AEI's and Brookings' work over the past three decades that evaluated the economic effect of regulation and suggested reforms to improve productivity.\textsuperscript{1478}

The Joint Center helps fund the research of new and established regulatory scholars, thus stimulating further scholarship in the area of public policy. Its three primary missions include publishing –

1. timely, objective analyses of a selected number of important regulatory proposals before agencies formally adopt them;

2. analyses of existing regulations with recommendations for modifications, including recommendations to strengthen rules where the benefits appear to justify the costs and recommendations to relax or eliminate rules where the reverse may be true; and

3. essays that evaluate the impact of regulatory policies and suggest ways to improve the regulatory process.

The Joint Center monitors and evaluates the regulatory activities of the government and organises roundtable discussions and conferences on current regulatory issues, allowing any interested persons to attend.


\textsuperscript{1476} McIntosh, Clinton’s ‘Regulation without Representation’, *Speech to the Committee for Economic Development*, The National Press Club, Washington, DC, 1 April 1998.

\textsuperscript{1477} Joint Center website <http://www.aei.brookings.org/about/default.asp>.

\textsuperscript{1478} ibid.

\textsuperscript{1479} ibid.
Cato Institute

The Cato Institute was created in 1977 as a non-partisan public policy research organisation offering people the opportunity to participate in debate on policy issues and the role of government.\textsuperscript{1480}

The Cato Institute publishes a wide range of materials examining issues such as defence, environment, resources, social security and so on and it is internationally recognised for its research.\textsuperscript{1481} Its budget for 2001 was $13.8 million.\textsuperscript{1482} The Cato Institute is not funded by government but receives funding from corporations and individuals and also raises money from the sale of publications.\textsuperscript{1483} It employs approximately 90 full-time employees, 60 adjunct scholars, and 15 fellows.\textsuperscript{1484} Cato holds conferences, most of which are broadcast live on the web, providing the public with an insight into current policy issues.

Center for Regulatory Effectiveness

The Center for Regulatory Effectiveness (CRE) was created in 1996 “at the request of House and Senate leadership to aid them in the implementation of the Congressional Review Act”\textsuperscript{1485}. It plays an important and very influential role in the development of federal regulations. CRE analyses regulations\textsuperscript{1486} and makes recommendations to Congress on how the federal regulatory process may be improved.

Many of CRE’s staff have served at the Office of Management and Budget (OMB) and other federal agencies and they understand technical and procedural issues and have a network of contacts which allows identification and discussion with key decision-makers. CRE may be engaged to provide assistance on particular regulatory issues and in these circumstances provides the following services –\textsuperscript{1487}

- Representation before federal agencies;
- Strategy development;
- Technical analysis of regulatory issues of concern;
- Preparation of analytical papers and relevant correspondence;
- Coverage of issues on the CRE website, as appropriate;
- Identification of and consultation with other interested stakeholders, as appropriate.

\textsuperscript{1480} Cato Institute website <http://www.cato.org/about/about.html>.
\textsuperscript{1481} ibid.
\textsuperscript{1482} ibid.
\textsuperscript{1483} ibid.
\textsuperscript{1484} ibid.
\textsuperscript{1486} CRE analyses may be obtained from its website at <http://thecre.com/>.
\textsuperscript{1487} <http://thecre.com/>.
CRE activities are transparent and accessible to stakeholders, agencies and the public, with almost all of its regulatory work posted on its website. CRE has created a regulatory forum on its website with information on the background of regulations; opportunities for public comment; details of the scientific and economic analyses and underpinnings of proposed regulations; other sources of information and the opportunity to comment on the issues as part of the CRE regulatory forum. The CRE regulatory forum enables people to exchange information and discuss issues and to formulate better comments for submission to agencies as part of the regulatory process.

CRE maintains a Watch List of regulations which may impose unnecessary burdens on business, local government and the public. This Watch List is available on CRE’s website and it provides information on the issues involved and informs people of how to participate in the debate.

CRE also maintains information on Emerging Regulatory Issues so that people can develop an awareness of potential problems and social developments which may or may not require regulatory action at some time in the future.

**House Regulatory Affairs Subcommittee**

The Energy Policy, Natural Resources and Regulatory Affairs Subcommittee (the House Regulatory Affairs Subcommittee) provides advice on issues concerning economic growth, competitiveness, natural resources, regulation reform and paperwork reduction. Currently the House Regulatory Affairs Subcommittee is controlled by the Republicans. It has oversight over various government departments and the Executive Office of the President, namely the Office of Information and Regulatory Affairs (OIRA), the Council of Economic Advisors and the Council on Environmental Quality. The House Regulatory Affairs Subcommittee reviews proposed regulations and makes recommendations to Congress on whether to approve or disapprove regulatory proposals. It is the only Subcommittee in Congress devoted exclusively to regulatory issues. This is discussed in more detail below at pp. 320-21.

**Senate Committee on Governmental Affairs**

The Senate Committee on Governmental Affairs (SCGA) focuses on the process of government. SCGA first became involved in the regulatory area in the late 1970’s and its responsibility for regulatory issues has continued to expand. SCGA has oversight over and can conduct public hearings into the activities of OMB and agencies. SCGA pushed for legislation to be passed imposing best practices on agencies when preparing regulatory impact analyses but this legislation was not passed. SCGA is overseeing the implementation of the Government Performance and Results Act which introduces a management framework aimed at getting agencies to focus on results. Agencies have to develop performance plans and strategic plans and show how they are using their budgeted dollars and other resources to meet the goals in their strategic plans. SCGA is also working on legislation which will allow the Government to use the internet and information technology much more effectively, including providing the public with greater access to information and allowing them to

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1488 Meeting Notes, Meeting with staff of SCGA, Thursday 26 July 2001.
1489 ibid and Regulatory Improvement Bill S981.
1490 ibid.
interact with the Government more effectively. This is discussed in more detail below at pp 315-316.

Office of Management and Budget

OMB was created in 1921 and is part of the Executive Office of the President. While OMB’s primary role is to assist with the preparation of the federal budget, it also evaluates the effectiveness of agency programs, policies and procedures and oversees and co-ordinates regulatory policies. OMB has broad regulatory authority but does not have any responsibility for regulatory issues concerning “money supply, nuclear plant safety, and certain antitrust matters”. OIRA was established by statute in 1980 by the Paperwork Reduction Act and is the division within OMB which has responsibility for the review of federal regulations. Its power to review regulations from all Executive Branch agencies came with the Reagan Administration and the issue of Executive Order 12291. Independent agencies agreed to comply with this Executive Order but their compliance was voluntary only. Under the Paperwork Reduction Act 1980 (and amendments made to it) almost all regulations are reviewed by OIRA.

OIRA employs a staff of approximately 40 career public servants with expertise in economics, policy analysis, technology, law and statistics. Currently OIRA is in the process of employing additional staff with expertise in science and engineering “in order to perform more rigorous reviews of agency proposals”.

Under the Bush Administration, OIRA is developing a number of new initiatives designed to make further improvements to the regulation-making process and to the quality of regulations—

In this Administration, OMB’s regulatory office is pursuing an agenda of smarter regulation. Despite what some of our critics charge, there is no grandiose plot to roll back safeguards or attempt an across-the-board sunset of existing regulations. What the President seeks is a smarter regulatory process based on sound science and economics: a smarter process adopts new rules when market and local choices fail, modifies existing rules to make them more effective or less costly, and rescinds outmoded rules whose benefits no longer justify their costs.
Some of these initiatives are as follows –

1. Prompt Letters

OIRA has decided that it will send ‘prompt letters’ to agencies suggesting regulatory initiatives which OIRA thinks agencies should be undertaking. Agencies are expected to respond to prompt letters within 30 days. While the final decision of whether to proceed with a suggested regulatory initiative remains with agencies, prompt letters are a useful tool designed to stimulate agency and public discussion on particular regulatory issues –

Our first four prompt letters … address potential opportunities to save lives and improve health through cost-effective regulation. One OMB letter has accelerated FDA’s deliberations on a rule that would require labelling of foods for their trans-fatty acid content, an important risk factor for coronary heart disease … And our most recent letter, to EPA, has encouraged targeted research to better understand the health benefits of reducing different types of particle pollution from power plants, industry, and motor vehicles.

2. Government-Wide Guidelines

Government-wide guidelines have been issued by OMB with the aim of improving the quality of information relied upon by agencies to justify regulatory decisions and with disseminating this information to the public. The guidelines apply to all information relied upon by agencies to make decisions. Under these guidelines, technical information-research design, assumptions and statistical method must be transparent and accessible by the public. Of particular importance is the ability for members of the public to challenge the quality of information relied upon by agencies –

A distinctive feature of these guidelines is a new opportunity for the public to challenge the quality of information disseminated by agencies. If the information is shown to be of poor quality, the agency must promptly acknowledge the problem and make any necessary corrections on web sites, reports, and in rulemaking notices.

3. Carrot and Stick Approach

In reviewing regulations, OIRA is taking a carrot and stick approach to encourage agencies to produce better quality regulations. On the carrot side, where agencies have subjected regulatory proposals to independent peer review, OIRA will seriously defer to those comments. On the stick side, OIRA is relying on ‘return letters’ to indicate that it is dissatisfied with regulatory proposals. These return letters are publicly available and some

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1498 ibid.
1501 ibid.
1502 ibid.
agencies have been withdrawing their proposals rather than receive public return letters. \[^{1503}\] It appears that OIRA’s current approach is encouraging agencies to liaise and work much more closely with OIRA in the development of regulatory proposals –

> Knowing that we care, agencies are beginning to invite OMB into the early stages of regulatory deliberations, where our analytical approach can have a much bigger impact. \[^{1504}\]

### 4. Use of Internet

OIRA is in the process of developing a new computerised tracking system which is expected to be completed late in 2002. The new system will allow access to OIRA review records; electronic submission of documents from federal agencies; electronic processing of documents within OIRA; electronic record-keeping and archiving; a single comprehensive database for regulatory review and Unified Agenda process; access for people with disabilities and improved search functions. \[^{1505}\] These changes will make it easier for people to participate in the regulation-making process and to learn about the regulatory changes which are taking place and it will increase the transparency of OIRA’s review processes.

### Regulation-making process

#### Opening a Docket

When commencing the regulation-making process, a public docket is created which contains all relevant information, including relevant studies and data concerning the regulatory proposal. \[^{1506}\] It is essential that dockets contain all relevant information because federal court judges rely on that information where regulations become subject to litigation. Some agencies are now using electronic processes to store all relevant evidence concerning regulations. \[^{1507}\]

#### Preliminary Public Participation

Public comment is an essential part of the federal regulation-making process. Agencies must provide the public with an opportunity to make a meaningful contribution to the regulation-making process. \[^{1508}\] Before filing notice of a proposed regulation in the Federal Register, agencies usually enter into discussions with those affected. \[^{1509}\] While not compulsory, agencies often find it advantageous to discuss proposed initiatives with the public because by doing so they are more likely to develop public support and mitigate concerns and objections.

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\[^{1504}\] ibid.

\[^{1505}\] J.D. Graham PhD, Administrator, OIRA, OMB, Memorandum for OIRA Staff, 18 October 2001.


\[^{1507}\] ibid.

\[^{1508}\] Executive Order 12866, section 6(a).

\[^{1509}\] Section 6(a)(1) of Executive Order 12866 requires agencies, where appropriate, to discuss regulatory proposals with people who will benefit and who will be adversely affected.
especially where a proposal is particularly contentious. Sometimes agencies approach private organisations which produce their own newsletters, requesting them to publicise proposed regulatory initiatives; in response agencies receive feedback which may be useful in deciding whether to proceed or not.\footnote{Meeting Notes, Meeting with Randall Lutter, Resident Scholar, AEI Brookings Joint Center for Regulatory Studies (the Joint Center), 26 July 2001.} Many agencies also publish important proposed initiatives on their websites. Some agencies establish advisory committees with responsibility for meeting with public interest groups, discussing proposed initiatives and reaching a consensus with how to proceed. However these advisory groups are not being used so often because some participants remain silent and others walk out in disgust and in these situations agencies are worse off because of the existence of an identifiable group who disagree with the proposed initiative.\footnote{ibid.}

**Notification**

The APA requires the public to be given notice of proposed regulations.\footnote{5 USC § 553.} This notice must include the text of proposed regulations and an opportunity for the public to comment. Notice is generally provided in the Federal Register, which is published daily.\footnote{ibid.} The Federal Register contains regulations, proposed regulations and notices, executive orders, proclamations and other Presidential documents. The Federal Register is available in printed format, on microfiche and on the web at \(<http://www.access.gpo.gov/nara>\). There is a perception that it is not as easy to access as it should be.\footnote{Meeting Notes, Meeting with staff of SCGA, Thursday 26 July 2001.} Some special interest groups and organisations pay firms to monitor the Federal Register for them and in this way keep up to date with new developments. However, the average person may not read the Federal Register regularly and may be unaware of new regulatory proposals.

SCGA is pushing for the enactment of new legislation,\footnote{E-Government Bill 2001.} under which agencies will be required to post certain types of regulatory information on their websites and will become involved in electronic regulation-making, in order to make it easier to find out what is happening in government –

*The goal of the legislation generally is to use the internet and information technology to allow the Government to work more efficiently and more effectively and that includes providing the public with greater access to information and allowing them to interact with their Government more effectively.*\footnote{Meeting Notes, Meeting with staff of SCGA, Thursday 26 July 2001.}

Under the E-Government Bill 2001,\footnote{This Bill was introduced by Senator Lieberman on 1 May 2001 and Senate Committee hearings were held on 11 July 2001. As yet it has not been enacted.} agencies will be required to post all information concerning regulatory proceedings which is required to be published in the Federal Register on their websites.\footnote{Title 1 Section 206.} Agencies will be required to make electronic dockets which contain notices, publications and statements concerning regulations available on-line, and they will
have to accept submissions electronically. Agencies will be able to opt out of the electronic regulation-making process where under particular circumstances it is too difficult for agencies to comply.

Some agencies are already using technology in this way, but only for the enactment of particular regulations. The Department of Transport has gone further with electronic regulation-making processes and is already applying it to all regulatory proposals. The Department of Transport consists of many agencies, each of which enacts regulations. Prior to the implementation of centralised electronic regulation-making, each agency within the Department of Transport maintained its own files and records within the agency. This meant that if people wanted to find out about particular regulatory proposals they had to contact the relevant agency. Under the new electronic system everything is centralised –

*The way the Department of Transport’s system now works is that any notice of proposed rule making, in addition to the Federal Register, is also put on the internet on the Department of Transport’s electronic docket website.*

This makes it much easier for people to find out about proposed regulations concerning the trucking industry – all they have to do is check one website –

*So if you are a trucker then you know this is the only thing you have to look at and it is also searchable by certain words, key words that you might be interested in.*

In addition, the Department of Transport’s website enables people to see comments made by other people and organisations and to submit their comments over the internet. Feedback on the electronic regulation-making system implemented by the Department of Transport indicates that the system is working well and that it is much easier for people to be informed on current developments.

**Regulatory Review by OIRA**

OIRA has responsibility for reviewing all ‘significant’ regulatory proposals before they are released for public comment or issued in final form. ‘Significant’ regulatory proposals include those which have an annual impact on the economy of $100 million or more; or have an adverse affect on the economy as a whole or a sector of it; or are seriously inconsistent with another agency’s regulations; or materially alter the budget impact of entitlements, grants or fees; or raise novel legal or policy issues. OIRA reviews ‘significant’ regulatory proposals and accompanying Regulatory Impact Analyses (RIAs) to ensure that they comply with Executive Order 12866, Presidential policies and priorities, relevant laws and that there is no conflict with policies or actions taken or planned by other agencies.

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1519 ibid.
1520 ibid.
1521 Meeting Notes, Meeting with staff of SCGA, Thursday 26 July 2001.
1522 ibid.
1523 ibid.
1524 ibid.
1525 ibid.
1526 Executive Order 12866, section 6(a)(3)(A).
1527 Executive Order 12866, section 3(f).
1528 Executive Order 12866, section 2(b).
Regulatory proposals received by OIRA have already been reviewed by legal counsel so OIRA is not so concerned with issues such as whether there is legal authority for making proposed regulations. OIRA’s review focuses more on whether agencies have adequately assessed regulatory alternatives, whether the benefits justify the costs, whether the most appropriate option has been chosen, etc.1529 In examining the quality of regulatory proposals and whether they are supported by all the evidence etc, OIRA, to a certain extent, reviews policy.1530 While OIRA does not review non-significant regulatory proposals, agencies must still ensure that all such proposals meet the principles contained in Executive Order 12866,1531 other relevant laws and the President’s priorities.

By the time regulatory proposals come to OIRA for review, often agencies have spent years collecting information and consulting with those affected by regulatory proposals, which means sometimes OIRA may be confronted with strong resistance to any criticisms raised by it –

... once a regulatory proposal is formally submitted to OMB, there is already powerful organizational momentum behind the proposal. Not only have agency staff devoted potentially years of work to data collection and analysis; policy officials at agencies may have managed delicate relationships among stakeholders. At this stage, OMB review is destined to make waves and bruise egos, which means that it will be resisted, sometimes fiercely and effectively.1532

OIRA must review all significant regulatory proposals within 90 days of receipt of the regulatory submission, unless OIRA has previously reviewed the information and there has been no material change, in which case it has 45 days within which to conduct its review.1533

**Regulatory Impact Analysis**

RIAs are prepared for ‘economically significant’ regulations which are likely –

> to have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal government in communities.1534

RIAs must assess the costs, benefits and alternatives to proposed regulations1535 and in doing so they assist agencies in implementing the most appropriate regulatory action –

> By analyzing alternate ways to structure a rule, agencies can select the best option while providing OIRA and the public with a broader understanding of the ranges of issues that may be involved.1536

1529 Meeting Notes, Meeting with Jeff Hill, Chief, Commerce and Lands Branch, Office of Information and Regulatory Affairs, Office of Management and Budget, 27 July 2001.
1530 ibid.
1533 Executive Order 12866, section 6(b)(2)(B).
1534 Executive Order 12866, section 3(f)(1).
1535 Executive Order 12866, section 6(a)(3)(c).
Some costs and benefits such as those concerning safety, protection of the environment, health etc cannot be quantified and are analysed qualitatively. OIRA examines issues of fairness and equity as well as economic efficiency, evaluates whether a reasonable number of alternatives have been considered and considers whether the regulatory option chosen is the best option in the light of all the evidence.\textsuperscript{1537}

There is a perception that cost-benefit analyses done under the federal system are not always done very well and do not always properly inform decision-makers about the direction which they should be taking.\textsuperscript{1538}

\textit{Risk Assessments}

OIRA also reviews any technical risk assessments which have been carried out. When conducting this type of review it sometimes consults with the Office of Science and Technology Policy.\textsuperscript{1539}

\textit{Impact on Energy Supply, Production and Consumption}

Agencies must also give careful consideration to the impact on the supply, distribution and use of energy. When a proposed significant regulation impacts on energy, agencies must provide OIRA with a Statement of Energy Effects.\textsuperscript{1540}

\textit{Impact on Other Federal Agencies}

OIRA also carefully considers the impact on programs run by other Federal agencies – \textsuperscript{1541}

\textit{This evaluation often involves an inter-agency review by specialists from affected agencies and the co-ordination of agency positions, as necessary.}

This is to ensure regulations made by various agencies are consistent and do not adversely impact on the activities, programs and regulations of other agencies. Where agencies find themselves in conflict with other agencies concerning regulatory proposals, OIRA helps resolve these disputes so that the regulatory process can proceed.\textsuperscript{1542}

\textit{Impact on Small Business}

Executive Order 12866 requires agencies to enact regulations which impose the “least burden …. on businesses of different sizes”.\textsuperscript{1543} Congress also specifically requires OIRA to carefully

\textsuperscript{1538} Meeting Notes, Meeting with Randall Lutter, Resident Scholar, AEI Brookings Joint Center for Regulatory Studies, 26 July 2001.
\textsuperscript{1539} OMB, \textit{Memorandum for the President’s Management Council}, 20 September 2001.
\textsuperscript{1540} ibid.
\textsuperscript{1541} ibid.
\textsuperscript{1543} Executive Order 12866, section 1(11).
consider the impact on small businesses and State and local governments. In determining the impact on small business, OIRA often consults with the Small Business Administration and its Chief Counsel for Advocacy.

**External Peer Review**

OMB has recommended that prior to sending RIAs and proposed regulations to OIRA, that agencies seek independent, external review by appropriate specialists (ie Peer Review). OMB makes clear that it will seriously take into account and make ‘deference’ to any peer review. In a Memorandum to the President’s Management Council, OMB set out the criteria for selecting appropriate peer reviewers, emphasising the need to employ qualified professionals with expertise relevant to the particular area under review and the need for them to disclose all sources of personal and institutional funding in order to avoid conflict of interest issues. A further requirement of peer review is that it be conducted in a rigorous manner and be subject to public scrutiny.

**Liaison with Agencies and Outside Parties**

When reviewing regulatory proposals, OIRA works very closely with agency staff. Once OIRA has completed its review and is satisfied with the proposal, agency staff will be notified and they can then proceed through the regulation-making process.

When OIRA staff are reviewing regulations at either the proposed or final stages, they may not have any contact with anybody except staff at federal agencies. However, the Administrator (or his or her designee) of OIRA may have discussions with organisations or individuals, and representatives from the affected agency will be invited to attend.

**Public Availability of Information**

All information concerning meetings, participants, dates, times, relevant correspondence and documents are placed in OIRA’s public docket. Once a regulation has been enacted all relevant written communications between OIRA and relevant agencies and drafts of the regulation are also placed in the public docket. One commentator suggested that OIRA’s public docket is deliberately difficult for people to access and find –

*The public never sees the before and after OMB review except if you go to the OMB docket which is obscure and deliberately left that way.*

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1546 ibid.
1547 ibid.
1548 ibid.
1549 ibid.
There are indications that under the Bush administration OIRA’s review process may be more easily accessible to the public. Public access to all information concerning the enactment of regulations allows OIRA to be open and accountable and is strongly supported by the current Administration –

> We support and practice this extraordinary degree of openness because it helps boost public understanding of and confidence in the process of cost-benefit review. If instead our office were to operate in secrecy, questions would be raised about whether nefarious political deals were being made in ways that favor certain interest groups at the expense of the public interest.

**Rejection by OIRA**

Where OIRA determines that an agency’s analysis is inadequate or a regulatory proposal is inconsistent with Executive Order 12866, the President’s policies and priorities or other relevant laws, OIRA may return the regulation to the agency for reconsideration. There is a general perception that during the Clinton administration OIRA’s review process became a rubber stamp. The new Bush Administration appears to be taking regulatory review very seriously and in the last 6 months OIRA has returned 16 regulatory proposals to agencies for further work and analysis –

> The regulatory review process under President Bush is somewhat different than it was under President Clinton. In the last three years of the Clinton Administration, there were exactly zero rules returned to agencies because of poor quality analysis. In the last six months alone, I have returned 16 significant proposals to agencies for further consideration.

Regulatory proposals cannot proceed without OIRA approval. Where there are issues which OIRA and agencies cannot agree on, they are referred higher up the political scale (eg Administrator or Assistant Secretary, sometimes Cabinet) until they are finally resolved.

**Other Regulatory Review**

All proposed regulations must be submitted to Congress for review under the Congressional Review Act 1996 (CRA). The CRA introduced a significant change to the regulatory

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1552 ibid.
1555 Meeting Notes, Meeting with Jeff Hill, Chief, Commerce and Lands Branch, Office of Information and Regulatory Affairs, Office of Management and Budget, 27 July 2001.
process by giving Congress the power to disallow regulations (including guidance documents), thus providing “Congress with a powerful trump card against agencies that go too far”\(^{1557}\). Agencies must submit a report including a copy of the regulation and a general statement about the regulation to each house of Congress and at the same time must submit the RIA to the Comptroller General and make the RIA and other information available to the Congress.\(^{1558}\) The Comptroller General has 15 days from the receipt of the RIA to provide a report to relevant committees in each house of Congress.\(^{1559}\) Proposed regulations cannot be enacted until they have been approved by Congress, giving Congress the opportunity to disallow regulatory proposals which are unfair. To disapprove regulations, a resolution must be passed by a majority of both houses or by two thirds of both houses where the President disagrees with the disapproval resolution. It would appear that Congress has not made effective use of its veto power under the CRA and has only used that power once since the enactment of the CRA and that was to strike down Ergonomics Regulations.\(^{1560}\)

The House Regulatory Affairs Subcommittee reviews regulations and makes recommendations to Congress on whether to approve or disapprove regulations. It has 60 days within which to review regulations and it conducts its own hearings.\(^{1561}\) During the Clinton administration, the House Regulatory Affairs Subcommittee recommended to Congress that it disapprove Ergonomics Regulations and Congress disapproved them on the basis that the RIA was inadequate and flawed.\(^{1562}\) Currently the House Regulatory Affairs Subcommittee is reviewing regulations concerning airports and runways.\(^{1563}\)

**Guidance Documents**

Guidance documents are not subject to review by OIRA and do not need to be published in the Federal Register. One of the issues with guidance documents at the federal level is that they are often lengthy, complex, difficult to understand and subject to multiple interpretations.\(^{1564}\) Sometimes OIRA, on finding out about proposed guidance documents, has negotiated with agencies to obtain draft copies and has provided feedback to agencies on how these guidance documents could be improved; but this only happens occasionally –

*But if OMB found out about pending guidance that established a precedent or had adverse socio-economic effects in the judgment of OMB staff, then they would ask for a copy of that for review and sometimes their relations were good with the agencies. We would get that even unsolicited on the grounds that, ‘We are doing something some*

\(^{1556}\) Title 5 Chapter 8.

\(^{1557}\) McIntosh, Clinton’s ‘Regulation without Representation’, *Speech to the Committee for Economic Development*, The National Press Club, Washington, DC, 1 April 1998.

\(^{1558}\) Title 5 Chapter 8 Section 801.

\(^{1559}\) ibid.


\(^{1561}\) Title 5 Chapter 8 Section 801. *Meeting Notes*, Meeting with Barbara Kahlow, Deputy Staff Director, Energy Policy, Natural Resources and Regulatory Affairs Subcommittee, House Government Reform Committee, Washington DC, 26 July 2001.

\(^{1562}\) ibid.

\(^{1563}\) ibid.

\(^{1564}\) *Meeting Notes*, Meeting with Randall Lutter, Resident Scholar, the Joint Center, 26 July 2001.
people will find controversial and we will consider your advice’. And of course there are many instances where OMB has this understanding.\textsuperscript{1565}

But there are also instances where OMB does not have this understanding with agencies and it has no power to compel agencies to make changes to guidance documents.

The broad definition of regulations in the CRA\textsuperscript{1566} means that all guidance documents must be submitted to Congress for approval. An investigation by the Committee on Government Reform in 1999-2000 indicated that OMB had failed to issue guidance to federal agencies on how to implement the CRA and its impact on guidance documents.\textsuperscript{1567} As a consequence, many agencies were confused about the status of guidance documents and failed to submit them to Congress for review.\textsuperscript{1568} Some agencies were also using guidance documents to enact policy requirements and to avoid public comment and participation and were not making clear in their guidance documents that they are not legally binding.\textsuperscript{1569} In these circumstances not only does Congress miss out on the opportunity of granting approval but also people may be adversely and unfairly affected by these guidance documents and yet feel compelled to comply. For example,\textsuperscript{1570} the Department of Labour issued guidance documents for the Family and Medical Leave Act, providing that a ‘serious health condition’ included a common cold, ear-aches and upset stomachs where an employee was absent for more than 3 consecutive days. The House Regulatory Affairs Subcommittee heard evidence that this guidance, allowing the absence of employees under these circumstances, impacted adversely on co-workers and customers –

When employees are legitimately on leave we find a way to cover for them; however, under DOL opinion letters, unscheduled and unplanned absences and illegitimate leave hurt us. They threaten our ability to serve our clients who are counting on us to be there 24 hours a day.\textsuperscript{1571}

This and other guidance documents were withdrawn after the threat of legal action for not following appropriate regulation-making processes.\textsuperscript{1572} The Chair for the House Regulatory Affairs Subcommittee wrote to all major agencies requesting details of all non-codified documents. Instead of producing these details, negotiations were entered into and the agencies agreed to release standardised letters indicating that guidance documents will not be used as substitute regulation-making and that the public can rely on guidance in any enforcement action.\textsuperscript{1573} The House Regulatory Affairs Subcommittee continues to carefully monitor guidance documents to ensure that agencies are not attempting to regulate through the

\begin{footnotesize}
\textsuperscript{1565} ibid.
\textsuperscript{1566} The definition includes statements “designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency” - 5 USC §§ 804(3) and 551(4).
\textsuperscript{1567} Committee on Government Reform, Seventh Report, Non-Binding Legal Effect of Agency Guidance Documents, 26 October 2000, p. 2.
\textsuperscript{1568} ibid.
\textsuperscript{1569} ibid, p. 9.
\textsuperscript{1570} ibid, p. 7.
\textsuperscript{1571} Evidence given by Ms Dugan at the House Regulatory Affairs Subcommittee public hearings held in February 2000 discussed in the Committee on Government Reform, Seventh Report, Non-Binding Legal Effect of Agency Guidance Documents, 26 October 2000, p. 7.
\textsuperscript{1572} Committee on Government Reform, Seventh Report, Non-Binding Legal Effect of Agency Guidance Documents, 26 October 2000, p. 7.
\textsuperscript{1573} ibid, p. 8.
\end{footnotesize}
backdoor.\textsuperscript{1574} The House Regulatory Affairs Subcommittee’s role in this regard is to be commended.

Public Participation

Once a notice of a proposed regulation has been published in the Federal Register, a comment period of at least 60 days must be provided,\textsuperscript{1575} so that there is plenty of time for people to make a constructive contribution to the regulation-making process. Where regulatory proposals are significant, agencies may receive 20,000 public comments or more, many of which may have been prepared by professional organisations.\textsuperscript{1576} Where agencies receive a large number of comments they often employ someone to go through all the comments and to create a database and this process is very costly –

\ldots they will spend $100,000 with one contractor whose sole purpose is to prepare a database so that they can punch in key words to find out who supports the proposal and who doesn’t support it. It is all tremendously automated but I am not sure that it leads to a better outcome.\textsuperscript{1577}

Agencies are required to respond to all these comments and their response is contained in the preamble to the regulation, which sometimes may be 200 or 400 pages in length.\textsuperscript{1578}

Final Form Regulations

Final form regulations must be published again in the \textit{Federal Register} accompanied by an explanation of any changes which have been made and official responses to public comments.

Regulatory Plans

Executive Order 12866 also requires agencies to set regulatory priorities by preparing regulatory agendas and plans providing details of priorities.\textsuperscript{1579} Agencies are required to prepare an agenda of all regulations under review and a Regulatory Plan detailing significant regulations which will be issued in proposed or final form during the following financial year.\textsuperscript{1580} Regulatory Plans must be forwarded to OIRA by 1 June each year for circulation to affected agencies, advisers and the Vice President. Where the Administrator of OIRA believes that planned regulatory action conflicts with proposed regulations from other agencies or is inconsistent with the principles contained in Executive Order 12866 and any other applicable laws or priorities, the administrator must notify the affected agencies, advisers and the Vice-President.\textsuperscript{1581} Agency heads who detect a conflict also have similar rights to be given written

\textsuperscript{1574} ibid, p. 9.
\textsuperscript{1575} \textit{Executive Order} 12866, section 6(a)(1).
\textsuperscript{1576} \textit{Meeting Notes}, Meeting with Randall Lutter, Resident Scholar, the Joint Center, 26 July 2001.
\textsuperscript{1577} ibid.
\textsuperscript{1578} ibid.
\textsuperscript{1579} \textit{Executive Order} 12866, section 4.
\textsuperscript{1580} ibid.
\textsuperscript{1581} \textit{Executive Order} 12866, section 4(c)(5).
notification of that conflict. These plans are published in the Unified Regulatory Agenda in October of each year.

**Conclusion**

For people who are well informed, know how the notification process works or who are members of organisations which monitor regulatory developments, finding out about regulatory proposals is straightforward. However there is evidence that this notification process is not as effective as it could be in making average people aware of new developments. If the enactment of the E-Government Bill 2001 proceeds, with the requirement that agencies use their websites to post all information concerning proposed regulations, this will make it much easier for people to be informed and keep up to date with regulatory developments. The use by the Department of Transport of their website in this manner indicates that the centralisation of regulatory information on Department websites works really well in providing people with easy and fast access to regulatory information and provides enhanced opportunity to think about and comment on regulatory proposals. CRE provides comprehensive regulatory information on its website and opportunities to participate in regulatory forums therefore providing members of the public with excellent access to current regulatory proposals. OIRA is also in the process of developing a centralised computerised system which will facilitate access to regulatory information as well as greater accountability and openness.

As with other jurisdictions, the use of guidance documents by agencies is common place. Some of these guidance documents are lengthy and complex. Others deal with substantive issues which should have been contained in regulations but have been incorporated into guidance documents in order to avoid notification and public participation requirements. This makes the regulatory system less transparent and more difficult for people to be aware of and comply with all the necessary requirements. As OIRA does not have the power to review guidance documents, it is up to agencies whether they make any changes requested by OIRA. However the CRA provides a strong tool to deal with guidance documents by giving Congress the power to review and veto them. Many agencies were unclear about the need to submit guidance documents to Congress for review and Congress missed the opportunity of reviewing many of these documents. The House Regulatory Affairs Subcommittee played a key role in rectifying this situation and still plays a significant role by continuing to monitor agencies and their guidance documents. Agencies can no longer argue that they are unclear about the requirement to submit guidance documents to Congress for review. Nor can they argue that they are unaware that substantive issues must be dealt with in regulations. It will be interesting to monitor the extent to which agencies comply with these requirements in the future.

There is some doubt about the effectiveness of the process of oversight and review by both OIRA and Congress. OIRA only has responsibility for reviewing ‘significant’ regulations, which in effect means regulations which have an impact on the economy of $100 million or more. This excludes thousands of regulations from review by OIRA each year and means that

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1582 Executive Order 12866, section 4(c)(4).
1583 Executive Order 12866, section 4(c)(7).
1584 See discussion above at p. 319.
1585 Committee on Government Reform, Seventh Report, Non-Binding Legal Effect of Agency Guidance Documents, 26 October 2000.
non-significant regulations are not subject to independent oversight or review. While Congress does have the power to veto all regulations, this power has only been used once and that was to strike down the Ergonomics Regulations. While the CRA gives Congress a powerful tool to protect the public from unfair regulations, the lack of use of its power makes it little more than a ‘paper tiger’.\textsuperscript{1586} This leaves the potential for non-significant regulations to be enacted which are costly and which impact adversely on the public. For example,\textsuperscript{1587} a businessman successfully started Environment First Inc to recycle asthma inhalers, preventing chlorofluorocarbons (CFCs) from escaping into the atmosphere. The EPA introduced a new anti-recycling regulation, which required CFCs to be incinerated, effectively releasing them into the atmosphere. This regulation was introduced without notice and without the opportunity for public comment, was not subject to OIRA review and was never approved by Congress.

Another problem with the review process is that while OIRA has strong review powers over ‘significant’ regulatory proposals, there is evidence that it may not have been making effective use of these powers, particularly during the last eight years. While those inside OIRA indicate that the review process works very effectively, there is a perception that OIRA has simply been rubber stamping many of these regulations, at least during the Clinton administration.\textsuperscript{1588} Some commentators suggest that in order to make the oversight system more accountable and independent, an organisation outside the Executive Branch should be created with responsibility for oversight of regulatory proposals.\textsuperscript{1589} The oversight powers given to an outside agency could be further tightened by requiring those responsible for evaluating RIAs to replicate the figures contained in those RIAs.\textsuperscript{1590} One of those commentators suggested that the Council on Competitiveness (the Council), which was established by the first Bush administration and which was outside the Executive Office of the President, should be reinstated, as it played an effective role in the review of regulatory proposals.\textsuperscript{1591} However, there is also evidence to the contrary concerning the Council and in particular the extent to which it was independent –

\textit{In the two years Vice President Dan Quayle chaired the Council on Competitiveness, the Council interfered in, stalled, or killed dozens of regulatory programs and issued sweeping policy reports.}\textsuperscript{1592}

There was also evidence that the Executive Director had interests in an Indiana chemical company and owned stock in a utility company, placing him in a conflict of interest in carrying out his role at the Council.\textsuperscript{1593} The Council aside, there is a need for stronger oversight and review at the federal level.

\begin{itemize}
\item \textsuperscript{1586} McIntosh, Clinton’s ‘Regulation without Representation’, \textit{Speech to the Committee for Economic Development}, The National Press Club, Washington, DC, 1 April 1998.
\item \textsuperscript{1587} ibid.
\item \textsuperscript{1588} Refer to Footnote 1553 at p. 320 in this Report.
\item \textsuperscript{1589} \textit{Meeting Notes}, Meeting with Randall Lutter, Resident Scholar, the Joint Center, 26 July 2001 and \textit{Meeting Notes}, Meeting with Mr Edward Hudgins, Director of Regulatory Studies, Cato Institute, Washington DC, 27 July 2001.
\item \textsuperscript{1590} \textit{Meeting Notes}, Meeting with Randall Lutter, Resident Scholar, the Joint Center, 26 July 2001.
\item \textsuperscript{1591} \textit{Meeting Notes}, Meeting with Mr Edward Hudgins, Director of Regulatory Studies, Cato Institute, Washington DC, 27 July 2001.
\item \textsuperscript{1593} ibid.
\end{itemize}
There is evidence that with the new Bush administration, OIRA is taking a much tougher approach, has implemented a number of changes designed to improve the regulation-making process and is sending more regulatory proposals back to agencies for changes to be made. If this continues, OIRA will play a much more effective review and oversight role.
# Appendix A – List of Submissions

<table>
<thead>
<tr>
<th>No.</th>
<th>Date</th>
<th>Name/Position</th>
<th>Organisation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>4.1.2001</td>
<td>Ms S. Sanders Acting Manager</td>
<td>Victorian Community Council Against Violence (VCCAV)</td>
</tr>
<tr>
<td>2</td>
<td>2.1.2001</td>
<td>Mr. R. Lievers General Manager</td>
<td>Philip Island Nature Park, Australia</td>
</tr>
<tr>
<td>3</td>
<td>12.1.2001</td>
<td>Mr. H. Race</td>
<td>Private Citizen</td>
</tr>
<tr>
<td>4</td>
<td>22.1.2001</td>
<td>Mr. B. Sturman</td>
<td>Private Citizen</td>
</tr>
<tr>
<td>5</td>
<td>25.1.2001</td>
<td>Mr. S. Olesnicky Finance &amp; Administration Manager</td>
<td>Frankston City Council</td>
</tr>
<tr>
<td>6</td>
<td>29.1.2001</td>
<td>Mr. S. Goldsworthy Manager, Corporate Support</td>
<td>Manningham City Council</td>
</tr>
<tr>
<td>7</td>
<td>31.1.2001</td>
<td>Mr. J. Bayley</td>
<td>Private Citizen</td>
</tr>
<tr>
<td>8</td>
<td>31.1.2001</td>
<td>Mr. D. Trafford Group Manager, Southern Division</td>
<td>Insurance Council of Australia (ICA)</td>
</tr>
<tr>
<td>9</td>
<td>31.1.2001</td>
<td>Mr. E. Moran Chief Parliamentary Counsel</td>
<td>Office of Chief Parliamentary Counsel (OCPC)</td>
</tr>
<tr>
<td>10</td>
<td>25.1.2001</td>
<td>Mr. L. Foster Executive Chairman</td>
<td>Country Fire Authority</td>
</tr>
<tr>
<td>11</td>
<td>31.1.2001</td>
<td>Mr. G. Pearson Chief Executive Officer</td>
<td>Australian Dental Association Victoria Branch Inc. (ADAVB)</td>
</tr>
<tr>
<td>12</td>
<td>1.2.2001</td>
<td>Mr. A. Allen Secretary</td>
<td>East Gippsland Estuarine Fishermans’ Assoc. Inc. (EGEFA)</td>
</tr>
<tr>
<td>13</td>
<td>1.2.2001</td>
<td>Mr. J. Hawkless Managing Director Mr. P. Mooney Senior Consultant</td>
<td>Hawkless Consulting Pty Ltd</td>
</tr>
<tr>
<td>14</td>
<td>31.1.2001</td>
<td>Mr. H. Pfeifer The Secretary</td>
<td>Geelong Gun &amp; Rod Association</td>
</tr>
<tr>
<td>15</td>
<td>16.1.2001</td>
<td>Mr. T. Brown Manager Governance Support</td>
<td>City of Yarra</td>
</tr>
<tr>
<td>16</td>
<td>2.2.2001</td>
<td>Mr. R. Wilkinson Director Corporate Services</td>
<td>City of Whittlesea</td>
</tr>
<tr>
<td>17</td>
<td>5.2.2001</td>
<td>Mr. S. Argument Solicitor</td>
<td>Private Citizen</td>
</tr>
<tr>
<td>No.</td>
<td>Date</td>
<td>Name</td>
<td>Organisation</td>
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<tr>
<td>-----</td>
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<td>-----------------------------</td>
<td>-------------------------------------------------------</td>
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<tr>
<td>18</td>
<td>6.2.2001</td>
<td>Ms. N. Duff</td>
<td>City of Whitehorse</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Chief Executive Officer</td>
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</tr>
<tr>
<td>19</td>
<td>24.1.2001</td>
<td>Mr. I. Graham</td>
<td>Office of the Chief Electrical Inspector (OCEI)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Chief Electrical Inspector</td>
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</tr>
<tr>
<td>20</td>
<td>13.2.2001</td>
<td>Mr. M. Derham</td>
<td>The Victorian Bar</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Chair</td>
<td></td>
</tr>
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<td>21</td>
<td>16.2.2001</td>
<td>Commander P. Hornbuckle</td>
<td>Victoria Police</td>
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<td></td>
<td></td>
<td>Chief of Staff</td>
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<tr>
<td>22</td>
<td>19.2.2001</td>
<td>Mr. P. White</td>
<td>National Road Transport Commission</td>
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<tr>
<td></td>
<td></td>
<td>Acting Chief Executive</td>
<td></td>
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<tr>
<td>23</td>
<td>15.2.2001</td>
<td>Mr. P. Clark</td>
<td>Private Citizen</td>
</tr>
<tr>
<td>24</td>
<td>27.2.2001</td>
<td>Mr. D. Fitzpatrick</td>
<td>Victorian Abalone Divers’ Association (VADA)</td>
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<tr>
<td></td>
<td></td>
<td>Solicitor</td>
<td></td>
</tr>
<tr>
<td>25</td>
<td>10.3.2001</td>
<td>Ms. J. Henty</td>
<td>Environment Liaison Office</td>
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<tr>
<td></td>
<td></td>
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<td>26</td>
<td>14.3.2001</td>
<td>Mr. B. Bottomley</td>
<td>Bryan Bottomley &amp; Associates</td>
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<tr>
<td></td>
<td></td>
<td>Director</td>
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<td>28</td>
<td>11.4.2001</td>
<td>Mr. A. Dickinson</td>
<td>Dental Practice Board of Victoria (DPBV)</td>
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<td>President</td>
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<td>21.5.2001</td>
<td>Mr. R. Hodge</td>
<td>Seafood Industry Victoria (SIV)</td>
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<td></td>
<td>Executive Director</td>
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<td>30</td>
<td>4.6.2001</td>
<td>Mr. J. Manias</td>
<td>Private Citizen</td>
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<td>31</td>
<td>20.6.2001</td>
<td>K. Bartaska</td>
<td>Fisheries Co-Management Council</td>
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<td></td>
<td>Chairperson</td>
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<td>32</td>
<td>22.6.2001</td>
<td>Mr. N. McShane</td>
<td>Stenning &amp; Associates</td>
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<td>33</td>
<td>6.9.2001</td>
<td>Mr. K. Dare</td>
<td>Private Citizen</td>
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<td></td>
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<td>34</td>
<td>11.10.2001</td>
<td>Mr. P. Gazzana</td>
<td>Private Citizen</td>
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</table>
## Appendix B – List of Witnesses

<table>
<thead>
<tr>
<th>No.</th>
<th>Hearing Date</th>
<th>Witness</th>
<th>Organisation</th>
</tr>
</thead>
</table>
| 1   | 26.4.2001    | Mr. M. Derham, Chair  
Mr. I. Upjohn, Barrister  
Mr. M. Groves, Legal Officer | The Victorian Bar |
| 2   | 26.4.2001    | Mr. B. Bottomley, Director | Bryan Bottomley & Associates |
| 3   | 26.4.2001    | Ms. H. Holt, Legal Officer | Country Fire Authority |
| 4   | 26.4.2001    | Ms. A. Wiltshire, Principal Legal Adviser | Department of Premier & Cabinet |
| 5   | 26.4.2001    | Mr. P. Clark | Private Citizen |
| 6   | 26.4.2001    | Mr. E. Moran, Chief Parliamentary Counsel  
Ms. S. McInnes, Assistant Chief Parliamentary Counsel | Office of Parliamentary Counsel |
| 7   | 26.4.2001    | Mr. D. Fitzpatrick, Solicitor | Victorian Abalone Divers’ Association |
| 8   | 26.4.2001    | Ms. M. Bowman, Solicitor  
Ms J. Hent, Liaison Officer  
Mr. G. McFadzean, Campaign Manager | Environment Defenders’ Office  
Environment Liaison Office  
Wilderness Society |
| 9   | 26.4.2001    | Mr. G. Pearson, Chief Executive Officer  
Ms. P. Dalgliesh, President | Australian Dental Association (Victorian Branch) |
| 10  | 27.4.2001    | Mr. M. Oakley, Director | Office of Regulation Reform |
| 11  | 27.4.2001    | Mr. G. Morris, Assistant Director  
Dr. J. Carnie, Acting Assistant Director | Legal Services, Portfolio Services Division  
Disease Control & Research, Public Health  
Department of Human Services |
| 12  | 27.4.2001    | Mr. R. Joy, Executive Director  
Mr. T. O’Hearn, Senior Economist | Environment Protection Authority |
| 13  | 27.4.2001    | Mr. J. Taylor, Manager  
Mr. S. Green, Legislation Officer  
Ms. E. Achilingam, Legislation Officer | Executive Services  
Department of Natural Resources and Environment |
| 14  | 27.4.2001    | Ms. K. McDonald, Cabinet & Legislation Officer  
Mr. P. Dedrick, Manager Tafe Legislation | Department of Education |
| 15  | 27.4.2001    | Mr. S. Argument, Solicitor | Private Citizen |
| 16  | 27.4.2001    | Acting Superintendent S. Leane, Officer in Charge  
Mr. J. Frigo, Senior Legal Research Officer | Policy & Research Division  
Legislative Review & Proposals Division  
Victoria Police |
<table>
<thead>
<tr>
<th>No.</th>
<th>Hearing Date</th>
<th>Witness</th>
<th>Organisation</th>
</tr>
</thead>
</table>
| 17  | 27.4.2001    | Mr. G. Radley, Manager  
Mr. M. Little, Director  
Mr. G. Parsons, Manager Legislation | Regulatory Support & Assessment Strategy, Health and Safety Business Unit  
Victorian WorkCover Authority  
Department of State Revenue |
| 18  | 27.4.2001    | Mr. B. Sturman | Private Citizen |
# Appendix C – Interstate Meetings – June 2000

<table>
<thead>
<tr>
<th>No.</th>
<th>Date</th>
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</thead>
<tbody>
<tr>
<td>1</td>
<td>19.6.2000</td>
<td>Brisbane</td>
<td>Office of Parliamentary Counsel, Queensland</td>
</tr>
<tr>
<td>2</td>
<td>19.6.2000</td>
<td>Brisbane</td>
<td>Queensland Scrutiny of Legislation Committee</td>
</tr>
<tr>
<td>3</td>
<td>19.6.2000</td>
<td>Brisbane</td>
<td>Business Regulation Reform Unit Department of State Development, Queensland</td>
</tr>
<tr>
<td>4</td>
<td>20.6.2000</td>
<td>Sydney</td>
<td>New South Wales Regulation Review Committee and Professor M. Allars, University of Sydney</td>
</tr>
<tr>
<td>5</td>
<td>20.6.2000</td>
<td>Sydney</td>
<td>Office of Parliamentary Counsel, New South Wales</td>
</tr>
<tr>
<td>6</td>
<td>21.6.2000</td>
<td>Canberra</td>
<td>Senate Scrutiny of Bills Committee</td>
</tr>
<tr>
<td>7</td>
<td>21.6.2000</td>
<td>Canberra</td>
<td>Regulation Reform Unit, Office of Small Business (Commonwealth)</td>
</tr>
<tr>
<td>8</td>
<td>21.6.2000</td>
<td>Canberra</td>
<td>Senate Committee on Regulations &amp; Ordinances</td>
</tr>
<tr>
<td>9</td>
<td>21.6.2000</td>
<td>Canberra</td>
<td>Office of Regulation Review (Commonwealth)</td>
</tr>
<tr>
<td>10</td>
<td>22.6.2000</td>
<td>Canberra</td>
<td>Senate Committee on Regulations &amp; Ordinances</td>
</tr>
<tr>
<td>11</td>
<td>22.6.2000</td>
<td>Canberra</td>
<td>Structural Reform Division, Treasury (Commonwealth)</td>
</tr>
<tr>
<td>12</td>
<td>22.6.2000</td>
<td>Canberra</td>
<td>ACT Standing Committee on Justice and Community Safety, Scrutiny of Bills and Legislation Committee</td>
</tr>
<tr>
<td>13</td>
<td>23.6.2000</td>
<td>Canberra</td>
<td>Professor D. Pearce, Mr. S. Argument and Mr. J. McMillan Australian National University</td>
</tr>
<tr>
<td>14</td>
<td>23.6.2000</td>
<td>Canberra</td>
<td>Mr. G. Humphries, MLA Independent Competition &amp; Regulatory Commission, ACT</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Department of Justice, ACT</td>
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<td></td>
<td>Department of Treasury &amp; Infrastructure, ACT</td>
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## Appendix D – Overseas Meetings – July-August 2001

<table>
<thead>
<tr>
<th>No.</th>
<th>Date/Place</th>
<th>Representative</th>
<th>Organisation</th>
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</thead>
<tbody>
<tr>
<td>1</td>
<td>16.7.2001</td>
<td>Professor Asimow&lt;br&gt;Professor Gary Schwarz&lt;br&gt;Professor Jon Zaslof</td>
<td>University of California</td>
</tr>
<tr>
<td></td>
<td>Los Angeles, California</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>18.7.2001</td>
<td>Jeanne Morrison Hann Administrator&lt;br&gt; Jeri Auther, Attorney&lt;br&gt; Allen Malanowski, Economist&lt;br&gt; Theresa Blankenstein, Rules Analyst&lt;br&gt; William Hylen, Attorney&lt;br&gt; Scott Cooley, Attorney</td>
<td>Governor’s Regulatory Review Council – Staff</td>
</tr>
<tr>
<td></td>
<td>Phoenix, Arizona</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>18.7.2001</td>
<td>Tim Boncoskey, Chair of Council&lt;br&gt; Assistant Director, Department of Administration&lt;br&gt; Elliott Hibbs, Director&lt;br&gt; Department of Administration&lt;br&gt; Thomas McKinley, Vice President and GM, Enterprise Rent-A-Car&lt;br&gt; Keith Russell, Real Estate Appraiser&lt;br&gt; Ephram Cordova</td>
<td>Governor’s Regulatory Review Council – Members</td>
</tr>
<tr>
<td></td>
<td>Phoenix, Arizona</td>
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<td></td>
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<td></td>
<td>Phoenix, Arizona</td>
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<tr>
<td>5</td>
<td>19.7.2001</td>
<td>Mr. C. Martinez, Public Services Director&lt;br&gt; Mr. S. Cancelosi</td>
<td>Office of Secretary of State</td>
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<td></td>
<td>Phoenix, Arizona</td>
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<td></td>
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<td>6</td>
<td>20.7.2001</td>
<td>Raylene G. Ireland, Executive Director&lt;br&gt; Department of Administrative Services&lt;br&gt; Ken Hansen, Director&lt;br&gt; Michael G. Broschinsky&lt;br&gt; Nancy L. Lancaster</td>
<td>Division of Administrative Rules (DAR)</td>
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<td></td>
<td>Salt Lake City, Utah</td>
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<td>7</td>
<td>20.7.2001</td>
<td>Rep. David Ure, House Chair&lt;br&gt; Rep. Judy Ann Buffmire&lt;br&gt; Senator Byron Harward&lt;br&gt; Senator Eddie P. Mayne&lt;br&gt; Committee Staff&lt;br&gt; Arthur L Hunsaker, Research Analyst&lt;br&gt; Susan C Allred, Associate General Counsel</td>
<td>DAR and Administrative Rules Review Committee</td>
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<td></td>
<td>Salt Lake City, Utah</td>
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<td>8</td>
<td>20.7.2001</td>
<td>Mr. K. Bishop, Rules Analyst and staff from DAR</td>
<td>DAR</td>
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<td></td>
<td>Salt Lake City, Utah</td>
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<td>9</td>
<td>20.7.2001</td>
<td>W. Ray Walker, Enforcement Counsel Department of Commerce</td>
<td>DAR and representatives from State agencies</td>
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<tr>
<td></td>
<td>Salt Lake City, Utah</td>
<td>Lyle Odendahl, Legal Counsel Department of Health</td>
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<td></td>
<td></td>
<td>Susan Pixton, Legal Counsel Department of Workforce Services</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Gina Cornia, Utahns Against Hunger</td>
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<td>10</td>
<td>20.7.2001</td>
<td>Ken Hansen, Director (DAR) Michael G Broschinsky Nancy L. Lancaster</td>
<td>DAR</td>
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<td></td>
<td>Salt Lake City, Utah</td>
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<td>11</td>
<td>23.7.2001</td>
<td>Richard D. Brown, Acting Director</td>
<td>Department of Planning &amp; Budget (DPB)</td>
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<td></td>
<td>Richmond, Virginia</td>
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<tr>
<td>12</td>
<td>23.7.2001</td>
<td>William Shobe, Director Stewart J. Lagarde, Snr Policy Analyst Melanie Kielb West, Policy Analyst</td>
<td>DPB Economic &amp; Regulatory Analysis Division</td>
</tr>
<tr>
<td></td>
<td>Richmond, Virginia</td>
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<td>Richmond, Virginia</td>
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<td>14</td>
<td>23.7.2001</td>
<td>E.M. Miller, Director, Division of Legislative Services Jane D. Chaffin, Registrar of Regulations Bess Hodges, Program Director, Administrative Law Advisory Committee</td>
<td>Virginia Code Commission</td>
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<td>Richmond, Virginia</td>
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<td>24.7.2001</td>
<td>Mr. J. Forbes, Secretary of Finance &amp; Chair</td>
<td>Administrative Law Advisory Committee</td>
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<td>Richmond, Virginia</td>
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<td>16</td>
<td>24.7.2001</td>
<td>William Shobe, Director, DPB Stewart Lagarde, Snr Policy Analyst, DPB Melanie Kielb West, Policy Analyst, DPB Jane Chaffin, Registrar of Regulations Bess Hodges, Program Director, Administrative Law Advisory Committee Charles Koch, Dudley Warner Woodbridge Professor of Law, College of William and Mary Keith West, President EGO E.M. Miller, Director, Division of Legislative Services Vicki Simmons, Regulatory Co-ordinator, Department of Medical Assistance Services Stacey Tharp, Research Assistant, Administrative Law Advisory Committee</td>
<td>Roundtable Discussion</td>
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<td>17</td>
<td>26.7.2001 Washington DC</td>
<td>Mr. R. Lutter, Resident Scholar</td>
<td>AEI Brookings Joint Center for Regulatory Studies</td>
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<tr>
<td>18</td>
<td>26.7.2001 Washington DC</td>
<td>Ms. B. Kahlow, Deputy Staff Director</td>
<td>Energy Policy, Natural Resources &amp; Regulatory Affairs Subcommittee, House Government Reform Committee</td>
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<tr>
<td>19</td>
<td>26.7.2001 Washington DC</td>
<td>Mr Larry Novey, Counsel, Mr Kevin Landy, Counsel, Mr Paul Noe, Senior Counsel</td>
<td>Senate Committee on Government Affairs (SCGA)</td>
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<tr>
<td>20</td>
<td>27.7.2001 Washington DC</td>
<td>Mr Jeff Hill, Chief</td>
<td>Commerce and Lands Branch, Office of Information and Regulatory Affairs, Office of Management &amp; Budget</td>
</tr>
<tr>
<td>21</td>
<td>27.7.2001 Washington DC</td>
<td>Mr Jim Tozzi, President, Mr Eric Stas, Attorney</td>
<td>Center for Regulatory Effectiveness</td>
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<tr>
<td>22</td>
<td>27.7.2001 Washington DC</td>
<td>Mr. E. Hudgins, Director of Regulatory Studies</td>
<td>Cato Institute</td>
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<td>24</td>
<td>30.7.2001 Harrisburg, Pennsylvania</td>
<td>Maryjane Phelps, Attorney</td>
<td>Independent Code Commission</td>
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Appendix E – Regulation Impact Statements
Reviewed By Subject Area

The following table shows a breakdown by subject area of the RISs reviewed by Mr. R. Deighton-Smith for the purposes of this Report.

<table>
<thead>
<tr>
<th>Subject Area</th>
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<td>Health and Safety</td>
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<td>Justice or Social Policy</td>
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<td>Environment</td>
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<td>Machinery</td>
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<td>TOTAL</td>
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Appendix F – Legislative Instruments Made by DNRE

The following is a list of legislative instruments outside the scope of the Subordinate Legislation Act 1994 (Vic) and made by the Department of Natural Resources & Environment for the financial year 1999-2000. Other departments and agencies also have legislative instruments outside the scope of the Subordinate Legislation Act 1994 (Vic), however this list is provided by way of illustration of the scope of such legislative instruments, the level of consultation and scrutiny undertaken by DNRE in each instance.

<table>
<thead>
<tr>
<th>Date</th>
<th>Act</th>
<th>Subject</th>
<th>Consultation</th>
</tr>
</thead>
<tbody>
<tr>
<td>13/7/99</td>
<td>Water Industry Act 1994</td>
<td>s.139(1A) specifying 0.269 cents per dollar net annual value or $42.70 which ever is the greater amount that the Minister may levy re land specified as areas which rate may be levied for the 1999/2000 financial year.</td>
<td>Requires the Recommendation of the Minister and the Treasurer.</td>
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<tr>
<td>31/8/99</td>
<td>Livestock Disease Control Act 1994</td>
<td>ss.6, 73 and 74 – revokes OIC made on 24/6/97 published in GG No 25 on 26/6/97 (p. 1518) declaring cattle compensation; and fixes amounts of compensation payable for cattle ordered to be destroyed.</td>
<td>Advice from the Cattle Compensation Advisory Committee, which includes stakeholder interests.</td>
</tr>
<tr>
<td>31/8/99</td>
<td>Livestock Disease Control Act 1994</td>
<td>ss.6 and 79D – (a) revokes OIC made on 2/9/98 published in GG No S91 on 2/9/98; and (b) fixes amount of compensation for sheep and goats which are ordered to be destroyed.</td>
<td>Advice from the Sheep and Goat Compensation Advisory Committee, which includes stakeholder interests.</td>
</tr>
<tr>
<td>23/11/99</td>
<td>Royal Botanic Gardens Act 1991</td>
<td>s.24(2)(a) – GIC approval to RBG Board to grant a lease to Conservation Catering Pty Ltd in relation to RBG kiosk.</td>
<td>None</td>
</tr>
<tr>
<td>7/12/99</td>
<td>Livestock Disease Control Act 1994</td>
<td>ss.6, 73 and 74 – fixes amounts of compensation payable for cattle ordered to be destroyed.</td>
<td>Advice from the Cattle Compensation Advisory Committee, which includes stakeholder interests.</td>
</tr>
<tr>
<td>14/12/99</td>
<td>Domestic (Feral and Nuisance) Animals Act 1994</td>
<td>s.5 – exempts greyhounds adopted under the Greyhound Adoption Program and adopted under contract with the Greyhound Racing Control Board from the operation of s.27(1)(a) of the Act.</td>
<td>None</td>
</tr>
<tr>
<td>21/12/99</td>
<td>Forests Act 1958</td>
<td>s.52 – Grant of sawlog licence to Crick Bros Sawmills Pty Ltd</td>
<td>None</td>
</tr>
<tr>
<td>18/1/00</td>
<td>Plant Health and Plant Products Act 1995</td>
<td>s.9 – declaration of control area at Cobram to prevent spread of QLD fruit fly</td>
<td>None</td>
</tr>
<tr>
<td>1/2/00</td>
<td>Forests Act 1958</td>
<td>s.52 – grant of sawlog licence to Dormit Pty Ltd</td>
<td>None</td>
</tr>
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</table>
### Inquiry into the Subordinate Legislation Act 1994 (Vic)

<table>
<thead>
<tr>
<th>Date</th>
<th>Act</th>
<th>Subject</th>
<th>Consultation</th>
</tr>
</thead>
<tbody>
<tr>
<td>15/2/00</td>
<td>Prevention of Cruelty to Animals Act 1986</td>
<td>Section 7 (a) revocation of Code of Practice for the Operation of Wildlife Shelters approved by GIC 11/3/92 and published in GG 30 30/9/92 (pp 2867 – 2881) (b) preparation of Revised Code of Practice for the Welfare of Wildlife during Rehabilitation</td>
<td>A copy of the Code must be laid on the table of both the Legislative Assembly and the Legislative Council for fourteen sitting days, during which time the Code may be disallowed by resolution of the Legislative Assembly or of the Legislative Council.</td>
</tr>
<tr>
<td>22/2/00</td>
<td>Plant Health and Plant Products Act 1995</td>
<td>s.9 – declaration of control area at Mildura to prevent spread of QLD fruit fly</td>
<td>None</td>
</tr>
<tr>
<td>29/2/00</td>
<td>Plant Health and Plant Products Act 1995</td>
<td>s.9 – declaration of control area at Yarrawonga to prevent spread of QLD fruit fly</td>
<td>None</td>
</tr>
<tr>
<td>10/3/00</td>
<td>Wildlife Act 1975</td>
<td>s.15(2) – Classification of State Wildlife Reserves as State Game Reserves from 14/3/2000 to 10/3/2001</td>
<td>None</td>
</tr>
<tr>
<td>21/3/00</td>
<td>Livestock Disease Control Act 1994</td>
<td>s.6 – declaration of control area (being Victoria) for Bovine Johne’s disease and the requirements and prohibitions which operate in the control area.</td>
<td>None</td>
</tr>
<tr>
<td>21/3/00</td>
<td>Livestock Disease Control Act 1994</td>
<td>s.6 – declaration of control area (being Victoria) for Bovine Johne’s disease and the requirements and prohibitions which operate in the control area</td>
<td>None</td>
</tr>
<tr>
<td>21/3/00</td>
<td>Fisheries Act 1995</td>
<td>s.64 1594 – sets abalone quota year 1/4/2000 to 31/3/2001 and individual quotas</td>
<td>The Minister must not recommend the making, revocation or amendment of a notice unless he or she has consulted with the commercial peak body and any other relevant consultative bodies and has considered any comments made by those bodies concerning the proposed recommendation.</td>
</tr>
<tr>
<td>28/3/00</td>
<td>Plant Health and Plant Products Act 1995</td>
<td>s.5 – declaration of <em>Bursaphelenchus hananensis</em> to be an exotic pest</td>
<td>None</td>
</tr>
<tr>
<td>28/3/00</td>
<td>Plant Health and Plant Products Act 1995</td>
<td>s.5 – declaration of <em>Xanthomonas campestris</em> pv. graminis to be an exotic disease</td>
<td>None</td>
</tr>
<tr>
<td>18/4/00</td>
<td>Fisheries Act 1995</td>
<td>s.64 – quota order re Scallop (Ocean) Fishery 1/5/00 – 31/5/00</td>
<td>The Minister must not recommend the making, revocation or amendment of a notice unless he or she has consulted with the commercial peak body and any other relevant consultative bodies and has considered any comments made by those bodies concerning the proposed recommendation.</td>
</tr>
</tbody>
</table>

1594 Section 64 of the *Fisheries Act 1995* (Vic) has since been amended by Act No. 80/2000, s. 9.
<table>
<thead>
<tr>
<th>Date</th>
<th>Act</th>
<th>Subject</th>
<th>Consultation</th>
</tr>
</thead>
<tbody>
<tr>
<td>2/5/00</td>
<td>Fisheries Act 1995</td>
<td>s.64 – quota order re Scallop (Ocean) Fishery</td>
<td>The Minister must not recommend the making, revocation or amendment of a notice unless he or she has consulted with the commercial peak body and any other relevant consultative bodies and has considered any comments made by those bodies concerning the proposed recommendation.</td>
</tr>
<tr>
<td>1/6/00 – 30/6/00</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>23/5/00</td>
<td>Plant Health and Plant Products Act 1995</td>
<td>s.9 – declaration of control area at Koonoomoo for purpose of preventing spread of Queensland Fruit Fly</td>
<td>None</td>
</tr>
<tr>
<td>23/5/00</td>
<td>Prevention of Cruelty to Animals Act 1986</td>
<td>s.7(1) – revoke Code of Practice for Operation of Wildlife Shelters approved by GIC 11/3/92 and make Revised Code of Practice for welfare of Wildlife during rehabilitation</td>
<td>A copy of the Code must be laid on the table of both the Legislative Assembly and the Legislative Council for fourteen sitting days, during which time the Code may be disallowed by resolution of the Legislative Assembly or of the Legislative Council.</td>
</tr>
<tr>
<td>30/5/00</td>
<td>Fisheries Act 1995</td>
<td>s.64(1) – quota order re Scallop (Ocean) Fishery</td>
<td>The Minister must not recommend the making, revocation or amendment of a notice unless he or she has consulted with the commercial peak body and any other relevant consultative bodies and has considered any comments made by those bodies concerning the proposed recommendation.</td>
</tr>
<tr>
<td>22/6/00</td>
<td>Livestock Disease Control Act 1994</td>
<td>s.6 – declaration of Control Area for Newcastle disease and the requirements and prohibitions that are to operate in the Control Area</td>
<td>None</td>
</tr>
<tr>
<td>Date</td>
<td>Act</td>
<td>Section</td>
<td>Subject</td>
</tr>
<tr>
<td>------------</td>
<td>------------------------------------------</td>
<td>---------</td>
<td>--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>6/7/99</td>
<td>Fisheries Act 1995</td>
<td>s. 48</td>
<td>Notice of requirement to hold a Recreational Fishing Licence to take fish in marine waters.</td>
</tr>
<tr>
<td>13/7/99</td>
<td>Livestock Disease Control Act 1994</td>
<td>s. 29</td>
<td>Order declaring Victoria to be a control area relating to feeding of mammalian material to ruminants for 60 days.</td>
</tr>
<tr>
<td>30/8/99</td>
<td>Melbourne Cricket Ground Act 1984</td>
<td>s. 3</td>
<td>Order specifying days, times and purposes of use of floodlight towers at the MCG and controlling vehicle entry to Yarra Park Reserve.</td>
</tr>
<tr>
<td>15/9/99</td>
<td>Melbourne Cricket Ground Act 1984</td>
<td>s. 3</td>
<td>Order specifying days, times and purposes of use of floodlight towers at the MCG and controlling vehicle entry to Yarra Park Reserve.</td>
</tr>
<tr>
<td>4/10/99</td>
<td>Melbourne Cricket Ground Act 1984</td>
<td>s. 3</td>
<td>Order specifying days, times and purposes of use of floodlight towers at the MCG and controlling vehicle entry to Yarra Park Reserve.</td>
</tr>
<tr>
<td>8/11/99</td>
<td>Livestock Disease Control Act 1994</td>
<td>s. 29</td>
<td>Order declaring Victoria to be a control area relating to feeding of mammalian material to ruminants for 60 days.</td>
</tr>
<tr>
<td>23/11/99</td>
<td>Melbourne Cricket Ground Act 1984</td>
<td>s. 3</td>
<td>Order specifying days, times and purposes of use of floodlight towers at the MCG and controlling vehicle entry to Yarra Park Reserve.</td>
</tr>
<tr>
<td>20/12/99</td>
<td>Agricultural Industry Development Act 1990</td>
<td>Part 2</td>
<td>Order continuing the Northern Victoria Fresh Tomato Industry Development Committee to carry out or fund research on fresh tomatoes and to market fresh tomatoes.</td>
</tr>
<tr>
<td>22/12/99</td>
<td>Plant Health and Plant Products Act 1995</td>
<td>s. 24</td>
<td>Order restricting the entry or importation of any plant or plant product of <em>Lupinus</em> species or any associated used agricultural equipment or package, to prevent the spread of the exotic disease Lupin anthracnose.</td>
</tr>
<tr>
<td>6/1/00</td>
<td>Livestock Disease Control Act 1994</td>
<td>s. 29</td>
<td>Order declaring Victoria to be a control area relating to feeding of mammalian material to ruminants for 60 days.</td>
</tr>
<tr>
<td>11/1/00</td>
<td>Fisheries Act 1995</td>
<td>s. 61</td>
<td>Ministerial Direction specifying eligibility criteria for engagement in fishing activities and transfer of licences.</td>
</tr>
</tbody>
</table>

1595 Does not include Ministerial guidelines or management plans under *Fisheries Act 1995* (Vic), management plans under the *National Parks Act 1975* (Vic) or the *Wildlife Act 1975* (Vic), Coastal Action Plans under the *Coastal Management Act 1995* (Vic) as these documents are not of a legislative character and are therefore not considered to be subordinate legislation.
<table>
<thead>
<tr>
<th>Date</th>
<th>Act</th>
<th>Section</th>
<th>Subject</th>
<th>Consultation</th>
</tr>
</thead>
<tbody>
<tr>
<td>17/2/00</td>
<td>Fisheries Act 1995</td>
<td>s. 67 &amp; s. 152</td>
<td>Fisheries Notice to fix a closed season for the taking of banded morwong from 25/2/00 to 30/4/00</td>
<td>Under s.152 of the Act, the Minister is required to consult the relevant consultative bodies (see s. 3 of the Act) before making a Fisheries Notice.</td>
</tr>
<tr>
<td>23/2/00</td>
<td>Melbourne Cricket Ground Act 1984</td>
<td>s. 3</td>
<td>Order specifying days, times and purposes of use of floodlight towers at the MCG and controlling vehicle entry to Yarra Park Reserve.</td>
<td>None</td>
</tr>
<tr>
<td>2/3/00</td>
<td>Livestock Disease Control Act 1994</td>
<td>s. 29</td>
<td>Continuation of Order declaring Victoria to be a control area relating to feeding of mammalian material to ruminants for a further 60 days.</td>
<td>None</td>
</tr>
<tr>
<td>6/3/00</td>
<td>Wildlife Act 1975</td>
<td>s. 86</td>
<td>Order prohibiting the taking etc of certain taxa of duck during specified periods, and setting bag limits for the 2000 open season for duck</td>
<td>At least 72 hours before publishing a notice under s.86(1), the Minister must publish a notice in a newspaper circulating generally in the area likely to be affected by the notice under sub-section (1) stating that he or she intends to publish that notice. The Notice must be laid before each House of Parliament and may be disallowed by resolution of either House of Parliament.</td>
</tr>
<tr>
<td>14/4/00</td>
<td>Fisheries Act 1995</td>
<td>s. 67 &amp; s. 152</td>
<td>Fisheries Notice to fix an open season for the taking of scallops from eastern Bass Strait from 1/5/00 to 31/7/00</td>
<td>Under s.152 of the Act, the Minister is required to consult the relevant consultative bodies (see s. 3 of the Act) before making a Fisheries Notice.</td>
</tr>
<tr>
<td>2/5/00</td>
<td>Livestock Disease Control Act 1994</td>
<td>s. 29</td>
<td>Continuation of Order declaring Victoria to be a control area relating to feeding of mammalian material to ruminants for a further 60 days.</td>
<td>None</td>
</tr>
<tr>
<td>16/5/00</td>
<td>Fisheries Act 1995</td>
<td>s. 67 &amp; s. 152</td>
<td>Fisheries Notice to fix a closed season for banded morwong from 18/5/00 to 31/8/00.</td>
<td>Under s.152 of the Act, the Minister is required to consult the relevant consultative bodies (see s. 3 of the Act) before making a Fisheries Notice.</td>
</tr>
<tr>
<td>Date</td>
<td>Act</td>
<td>Section</td>
<td>Subject</td>
<td>Consultation</td>
</tr>
<tr>
<td>---------</td>
<td>-----------------------------------------------</td>
<td>---------</td>
<td>-------------------------------------------------------------------------</td>
<td>------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>29/5/00</td>
<td>Agricultural Industry Development Act 1990</td>
<td>Part 2</td>
<td>Making of an Order establishing a Committee to carry out or fund research on tomatoes and to market tomatoes.</td>
<td>Public meeting of persons who would be affected by the proposed Order must be held. A poll of all affected growers must be held and majority support is required to make the Order. The Order must be laid before each House of Parliament. The Order may be disallowed by resolution of either House of Parliament.</td>
</tr>
<tr>
<td>22/6/00</td>
<td>Melbourne Cricket Ground Act 1984</td>
<td>s. 3</td>
<td>Order specifying days, times and purposes of use of floodlight towers at the MCG and controlling vehicle entry to Yarra Park Reserve.</td>
<td>None</td>
</tr>
<tr>
<td>28/6/00</td>
<td>Agricultural Industry Development Act 1990</td>
<td>Part 2</td>
<td>Making of an Order establishing a Committee to carry out or fund promotion of strawberries and to conduct research on strawberries.</td>
<td>Public meeting of persons who would be affected by the proposed Order must be held. A poll of all affected growers must be held and majority support is required to make the Order. The Order must be laid before each House of Parliament. The Order may be disallowed by resolution of either House of Parliament.</td>
</tr>
<tr>
<td>30/6/00</td>
<td>Livestock Disease Control Act 1994</td>
<td>s. 29</td>
<td>Continuation of Order declaring Victoria to be a control area relating to feeding of mammalian material to ruminants for a further 60 days.</td>
<td>None</td>
</tr>
</tbody>
</table>
### Governor in Council Orders Under Various Lands Acts For Year 1999/2000

<table>
<thead>
<tr>
<th>Nature of Order</th>
<th>Number Made</th>
<th>Consultation Scrutiny required by statute</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section 10 Crown Land (Reserves) Act 1978-Excision/Revocation of reserves</td>
<td>471</td>
<td>At least fourteen days before any temporary reservation is revoked notice of intention to revoke the reservation shall be published in the Government Gazette.</td>
</tr>
<tr>
<td>Section 349 Land Act 1958 – Road closures</td>
<td>146</td>
<td>Concurrence in writing of the council of any municipality in whose municipal district the same is wholly or partly situate and of the owners (if any) of any land adjoining the said road or portion thereof.</td>
</tr>
<tr>
<td>Section 4(1) Crown Land (Reserves) Act 1978- Creation of reservations</td>
<td>141</td>
<td>At least 30 days before any land is permanently reserved, notice of the intention to so reserve it shall be published once in a newspaper circulating generally in the area in which the land is situated.</td>
</tr>
<tr>
<td>Section 25(3)(c) Land Act 1958 – Road proclamations</td>
<td>30</td>
<td>None</td>
</tr>
<tr>
<td>Section 14A(1) Crown Land (Reserves) Act 1978 – Incorporation of Committees of Management</td>
<td>61</td>
<td>None</td>
</tr>
<tr>
<td>Various Lands Acts - Lease approval</td>
<td>15</td>
<td>Varies depending on the Act.</td>
</tr>
<tr>
<td>Section 25(3)(d) Land Act 1958 – Amendment of Township boundary</td>
<td>8</td>
<td>None</td>
</tr>
<tr>
<td>Section 22A(1) Land Act 1958 – Surrender to the Crown of land vested in an Authority</td>
<td>13</td>
<td>Agreement of relevant authority</td>
</tr>
<tr>
<td>Act 391/1871 – Application to dispose of Church site</td>
<td>20</td>
<td>Advertise notice of application in Government Gazette and local newspaper.</td>
</tr>
<tr>
<td>Section 131 Water Act 1989 – Crown land placed under management</td>
<td>5</td>
<td>None</td>
</tr>
<tr>
<td>Section 26 Environment Conservation Council Act 1997 - Amendment to approved LCC recommendation</td>
<td>6</td>
<td>None</td>
</tr>
<tr>
<td>Section 4(1) Crown Land (Reserves) Act 1978- Creation of reservations – Amendment to purpose of reservation(^{\text{1596}})</td>
<td>9</td>
<td>At least 30 days before the purpose of any permanently reserved land is amended, notice of the intention to so amend it shall be published once in a newspaper circulating generally in the area in which the land is situated.</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>945</strong></td>
<td></td>
</tr>
</tbody>
</table>

\(^{1596}\) Interpretation of Legislation Act 1984 (Vic), s. 27.
Appendix G – Practice of Dentistry by Dental Hygienists and Dental Therapists

The following is the Code of Practice for Dental Hygienists and Dental Therapists recently adopted by the Dental Practice Board of Victoria. It is reproduced in this Report as an illustration of the scope of industry codes of practice which do not come within the scope of the *Subordinate Legislation Act 1994* (Vic).

**DENTAL PRACTICE BOARD OF VICTORIA**

**CODE OF PRACTICE**

**PRACTICE OF DENTISTRY BY DENTAL HYGIENISTS AND DENTAL THERAPISTS**

**PREAMBLE**

This Code of Practice has been developed, pursuant to s.69(1)(e) of the Dental Practice Act 1999, to provide a framework for the practice of dentistry by dental therapists and dental hygienists. In exercising its obligations, the Board will use this code to determine if a practitioner is acting within or outside the framework approved by the Board.

The Code will be subject to continuing review in the context of –

- evolving dental workforce needs;
- new technological developments; and
- the objectives of the Dental Practice Board.

There will be a formal review process within five years. In further developing the boundaries of this Code the Board will promote and support appropriate research into the scope of practice of dental auxiliaries, including into the utilization of dental therapists for the provision of dental health care to persons over the age of 18 years.

It is fundamental to this Code that, within the defined range of skills, dental therapists and dental hygienists must practise only those skills for which they have been formally educated (in courses approved by the Board) and in which they are registered and competent. The Board requires registered dental care providers to possess at least the level of competence expected of a graduating final year dental auxiliary student in a course of study approved by the Board. It may take into account such matters as educational preparation, acquired skills within the parameters set out in Part 3, recency of practice and continuing professional development.

Individuals may extend their range of skills by undertaking training programs that the Board has approved.
Part 1
This Code requires a team approach in the delivery of dental services, with a registered practising dentist or dentists adopting the role of clinical team leader(s) with overall responsibility for patient care. The dental therapist and dental hygienist work with the dentist(s) in a consultative and referral relationship to provide any or all of the following: preventive, periodontal, restorative and orthodontic dental services. A dental auxiliary may not engage in independent practice.

A dental auxiliary must only practise –

• in the employ of a registered practising dentist or dentists who shall be the team leader(s); or

• in the employ of a registered practising dentist or dentists who employ a registered practising dentist who shall be the team leader; or

• in an entity that employs a registered practising dentist or dentists who shall be the team leader(s).

Any other employment arrangement would require the specific approval of the Board.

The parties mentioned in the preceding paragraph must enter into a written agreement that outlines the professional relationships and activities that affect clinical care. That agreement must specify –

• roles and responsibilities of the auxiliary;

• roles and responsibilities of the dentist or dentists;

• competencies achieved within the areas listed in Part 3 of the Code of Practice;

• working relationships between team leader and auxiliary, including procedure and protocols for the operation of the dental team and quality assurance systems.

All parties must ensure that the written agreements are consistent with the terms and conditions of their professional indemnity insurance.

Part 2
Dental therapists may provide dental care, as specified in Part 3, for persons up to and including 18 years of age and, on the prescription of a practising dentist, for persons between the ages of 19 and 25 years of age. There is no age restriction on the provision of orthodontic procedures by dental therapists within the parameters set out in Part 3.

Part 3
Dental hygienists and dental therapists may perform only those tasks for which they have been formally educated (in courses approved by the Board), within the following areas:
DENTAL THERAPISTS AND DENTAL HYGIENISTS

• Oral examination including intra-oral dental radiography.

• Extra-oral dental radiography on the prescription of a dentist.

• Impression taking (for other than prosthodontic or prosthetic treatment)

• Local anaesthesia for dental procedures

• Application of therapeutic solutions to teeth, but not including “in-surgery” bleaching of teeth

• Orthodontic procedures under the supervision of a dentist, except for
  - Diagnosis and treatment planning for orthodontic treatment
  - Initial fixation of bands and brackets
  - Design of orthodontic appliances
  - Activation and adjustment of orthodontic appliances

DENTAL THERAPISTS

• Preventive dental procedures including fissure sealants and removal of deposits from teeth;

• The restoration of coronal tooth structure damaged by or at risk from caries or damaged by trauma, including pulpotomies, but excluding indirect restorations and endodontics;

• Extraction of deciduous teeth

DENTAL HYGIENISTS

• Management of periodontal disease (excluding surgical management) within the context of an overall treatment plan undertaken by a dentist;

• Preventive dental procedures including, on the prescription of a practising dentist, fissure sealants.
Appendix H – Codes of Practice Issued by the Victorian Workcover Authority

The Codes of Practice listed below are Codes issued by the Victorian WorkCover Authority under the Occupational Health and Safety Act 1985 (Vic) and the Dangerous Goods Act 1985 (Vic). They are reproduced as an illustration of the number and scope of codes developed by one agency which fall outside the scope of the Subordinate legislation Act 1994 (Vic).

<table>
<thead>
<tr>
<th>Date commenced</th>
<th>Title</th>
<th>COP No.</th>
<th>Act Regulation or Guidance</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>30/6/88</td>
<td>Foundries</td>
<td>2</td>
<td>A</td>
<td>Apart from a few redundant references, the code appears current. Relevant industry program to advise if a review is warranted.</td>
</tr>
<tr>
<td>30/6/88</td>
<td>Workplaces</td>
<td>3</td>
<td>A</td>
<td>Given its age, propose that this code be reviewed by WorkCover with a view to revocation or replacement.</td>
</tr>
<tr>
<td>30/6/88</td>
<td>First Aid in the Workplace</td>
<td>4</td>
<td>A</td>
<td>Revoked 1/6/1995. Replaced by COP No. 18.</td>
</tr>
<tr>
<td>1/7/89</td>
<td>Safe Work on Roofs (excluding Villa Constructions)</td>
<td>10</td>
<td>A</td>
<td>The code will be superseded by the proposed OHS (Prevention of Falls) Regulations 2002 and the Code of Practice: Prevention of Falls in General Construction. Code to be revoked to coincide with phase-in of the new Falls Regulatory package later this year.</td>
</tr>
<tr>
<td>Date commenced</td>
<td>Title</td>
<td>COP No.</td>
<td>Act Regulation or Guidance</td>
<td>Comments</td>
</tr>
<tr>
<td>----------------</td>
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<td>----------------------------</td>
<td>----------</td>
</tr>
<tr>
<td>1/3/90</td>
<td>Safe Use of Cranes in the Building and Construction Industry</td>
<td>11</td>
<td>A</td>
<td>WorkCover considers the code to be outdated and superseded by guidance in Australian Standards AS 2500 series – <em>Selection and safe use of cranes</em>. The code is scheduled for revocation following completion of consultation with relevant stakeholders.</td>
</tr>
<tr>
<td>1/3/90</td>
<td>Safety in Forest Operations</td>
<td>12</td>
<td>A</td>
<td>Code widely used in the forest industry. New guidance material for the industry came into effect late 2001. No intention to replace the code.</td>
</tr>
<tr>
<td>1/10/90</td>
<td>Building and Construction Workplaces</td>
<td>13</td>
<td>A</td>
<td>Currently being considered by WorkCover to determine whether the code should be revised or revoked.</td>
</tr>
<tr>
<td>1/10/91</td>
<td>Demolition</td>
<td>14</td>
<td>A</td>
<td>Reasonably current state of knowledge on demolition. The code will complement new codes on fall protection expected later this year. WorkCover to determine if code requires updating.</td>
</tr>
<tr>
<td>1/1/92</td>
<td>Manual Handling (Occupational Over-use Syndrome)</td>
<td>15</td>
<td>R</td>
<td>Revoked 20 April 2000. Replaced by COP No. 25.</td>
</tr>
<tr>
<td>1/10/92</td>
<td>Provision of Occupational Health and Safety Information in Languages other than English</td>
<td>16</td>
<td>A</td>
<td>Current state of knowledge. The code provides specific guidance on meeting the requirements of s 21(4)(e) of the Occupational Health and Safety Act 1985 in respect of OHS information in languages other than English.</td>
</tr>
<tr>
<td>1/10/92</td>
<td>Noise</td>
<td>17</td>
<td>R</td>
<td>Noise Regulations and Noise Code under review. The Code will be replaced by a new code.</td>
</tr>
<tr>
<td>1/6/95</td>
<td>First Aid in the Workplace</td>
<td>18</td>
<td>A</td>
<td>Current state of knowledge. Other States have used the code as the basis for their legislative instrument for first aid.</td>
</tr>
<tr>
<td>1/3/97</td>
<td>Confined Spaces</td>
<td>20</td>
<td>R</td>
<td>WorkCover uses the code as the current state of knowledge. The Confined Spaces Regulations sunset in 2007.</td>
</tr>
<tr>
<td>Date commenced</td>
<td>Title</td>
<td>COP No.</td>
<td>Act Regulation or Guidance</td>
<td>Comments</td>
</tr>
<tr>
<td>---------------</td>
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</tr>
<tr>
<td>26/2/98</td>
<td>Demolition (Amendment No. 1)</td>
<td>21</td>
<td>A</td>
<td>The code amended the principal Demolition code (COP No. 14) to provide more current advice on fall arrest systems. As new guidance on this issue is being developed for the construction industry in the proposed Falls codes, consideration will be given to the need to revise the amending code.</td>
</tr>
<tr>
<td>26/2/98</td>
<td>Safe Work on Roofs (excluding Villa Constructions) (Amendment No. 1)</td>
<td>22</td>
<td>A</td>
<td>The code will be superseded by the proposed Code of Practice: Prevention of Falls in General Construction. Code to be revoked to coincide with phase-in of the new Falls Regulatory package later this year.</td>
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<tr>
<td>19/11/98</td>
<td>Plant (Amendment No. 1)</td>
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<td>Current state of knowledge.</td>
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<td>Lead</td>
<td>26</td>
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<td>Current state of knowledge.</td>
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</table>
Appendix I – Deemed Statutory Instruments and Instruments Subject to Disallowance

The following is a list of legislative provisions which are deemed to be statutory rules or instruments subject to disallowance by Parliament –

1. *Agricultural Industry Development Act 1990*
   
   Section 8(4) and (5).

2. *Crown Lands (Reserves) Act 1978*
   
   Section 17DA(3).

3. *Electricity Industry Act 2000*
   
   Section 7.

4. *Electricity Industry Act 1993*
   
   Section 4A.

   
   Section 4A.

   
   Section 18D(6).

7. *Forests Act 1958*
   
   Section 52E(3).

8. *Gaming Machine Control Act 1991*
   
   Section 78(6).

   
   Section 48TA.

10. *Gas Industry Act 2001*
    
    Sections 7(1), (2) and (3) and 100(3) and (4)
11. *Heritage Rivers Act 1992*
   Section 8(9).

12. *Legal Practice Act 1996*
   Sections 113 and 337.

   Section 8.

14. *Melbourne and Metropolitan Board of Works Act 1958*
   Section 241.

15. *National Parks Act 1975*
   Section 32N.

   Section 40(2).

17. *Road Safety Act 1986*
   Section 96(3).

18. *Tertiary Education Act 1993*
   Section 10(13).

19. *Tobacco Act 1987*
   Section 20(2) and (3).

20. *Transport Act 1983*
   Sections 81(6) and 102A.

21. *Victims of Crimes Assistance Act 1996*
   Section 57.

22. *Water Act 1989*
   Sections 34(2) and 32A(9).

23. *Wildlife Act 1975*
   Section 86(5) and (6).
Appendix J – Definition of Legislative Instruments in the Commonwealth Legislative Instruments Bill 1996 [No. 2]

The definition of ‘legislative instrument’ contained in the Commonwealth Legislative Instruments Bill 1996 [No. 2] is reproduced as an illustration of a possible definition that could be incorporated into the Subordinate Legislation Act 1994 (Vic), allowing for appropriate amendment to meet Victorian requirements. As at the date of publication the Commonwealth Parliament has not yet adopted this Bill.

Section 5 – Definition of a legislative instrument

(1) Subject to subsection (4) and to section 7, a legislative instrument is an instrument in writing:

(a) that is of a legislative character; and

(b) that is or was made in the exercise of a power delegated by the Parliament.

(2) Without limiting the generality of subsection (1), an instrument is taken to be of a legislative character if:

(a) it determines the law or alters the content of the law, rather than applying the law in a particular case; and

(b) it has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right.

(3) Without limiting the generality of subsection (1), each of the following instruments is, subject to subsection (4) and to section 7, a legislative instrument:

(a) an instrument:

(i) made in the exercise of a power delegated by the Parliament before, on or after the commencing day; and

(ii) described as a regulation by the enabling legislation;

(b) an instrument, other than a regulation:

(i) made in the exercise of a power delegated by the Parliament before the commencing day; and
(ii) required to be printed and sold as a statutory rule under subsection 5(1) of the Statutory Rules Publication Act 1903 as in force at any time before the commencing day;

(c) an instrument:

(i) made in the exercise of a power delegated by the Parliament before, on or after the commencing day in an Act providing for the government of a non self-governing Territory; and

(ii) described in that Act as an Ordinance or as a rule, regulation or by-law made under such an Ordinance;

(d) an instrument made in the exercise of a power delegated by the Parliament before the commencing day and, in accordance with a provision of the enabling legislation:

(i) declared to be a disallowable instrument for the purposes of section 46A of the Acts Interpretation Act 1901 as in force at any time before the commencing day; or

(ii) otherwise able to be disallowed under Part XII of the Acts Interpretation Act 1901 as in force at any time before the commencing day;

(e) a Proclamation made under enabling legislation;

whether the instrument is made before, on or after the commencing day.

(4) An instrument is not a legislative instrument if:

(a) it is of a kind listed in the table set out in Schedule 1; or

(b) it is made under an Act or a legislative instrument or a part of an Act or legislative instrument:

(i) that first authorised the making of the first-mentioned instrument on or after the commencing day; and

(ii) that declared the first-mentioned instrument not to be a legislative instrument for the purposes of this Act.

(4A) A declaration in a legislative instrument (whether the declaration is included in the instrument, before, on or after the commencing day) to the effect that another instrument will not be, or is not, a legislative instrument for the purposes of this Act is of no effect unless:

(a) the Attorney-General has given the rule-maker a certificate, in writing, before the inclusion of the declaration in the first-mentioned instrument, that he or she agrees to the inclusion of the declaration in the first-mentioned instrument; and

(b) the certificate sets out the reasons for so agreeing.
(5) The inclusion of a kind of instrument in the table set out in Schedule 1 does not imply that such an instrument would, if it were not so included, be a legislative instrument under subsection (1).

(6) If:

(a) the making of an instrument is authorised before the commencing day; and

(b) the instrument is of a kind included in the table set out in Schedule 1 or is not otherwise a legislative instrument; and

(c) the instrument is required:

(i) to have its text, or particulars of its making, published in the Gazette; or

(ii) to be laid before either or both of the Houses of the Parliament without provision for its disallowance;

that requirement is unaffected by this legislation whether the instrument is made before, on or after the commencing day.
Appendix K – EPA Protocol

The Committee received impressive evidence from the Victorian Environment Protection Authority as to the development of a ‘protocol’ to assist their own staff in preparing a RIS. The protocol has been reproduced in its entirety.

EPA INFORMATION BULLETIN
Publication 484, February 1996

PROTOCOL FOR DEVELOPMENT OF REGULATIONS AND THE PREPARATION OF REGULATORY IMPACT STATEMENTS

This protocol has been adopted by the Environment Protection Authority (EPA) to document its approach to the development of regulations and regulatory impact statements (RISs). It was developed in consultation with the Australian Chamber of Manufacturers and EPA’s Economics Working Group and represents, in the opinion of this Group, current best practice.

The protocol supplements existing requirements for the development of regulatory impact statements (RISs) contained in the Subordinate Legislation Act 1994 and associated guidelines. It is designed to guide the development of future environmental regulations and the preparation of associated RISs.

EPA is committed to best practice environmental regulation. This means that EPA will consider all practicable management options, both regulatory and non-regulatory, when addressing environmental issues. The protocol reflects this commitment by highlighting the steps EPA will take to develop and consider a range of these options, particularly the steps that EPA will follow if a regulatory option is pursued.

The protocol is divided into four sections:
- key principles
- key steps in regulation development
- consultation program
- assessing costs and benefits.

KEY PRINCIPLES

The protocol is based on the following key principles.

- When proposing a regulation, EPA has a responsibility to prepare an RIS which contains an adequate assessment of the costs and benefits of that regulation.
- All key economic, environmental and social costs and benefits of the proposed regulation must be identified and assessed, including those which are difficult to assess (for example, non-financial values such as environmental benefits and issues of considerable uncertainty such as those involved in ecosystem protection).
- Regulations generate benefits and impose costs. In developing a regulation and preparing an RIS, EPA will endeavour to make such costs and benefits transparent.
- EPA is committed to maximising the opportunity for public input and will work with interested stakeholders throughout the regulation development process.
- Peak representative bodies should play a key role in the consultative process by working with their members to help identify and assess potential costs and benefits, and conveying that information to EPA.
- An RIS is not an end in itself, but a tool to support:
  - better regulation making and
  - stakeholders and decision-makers making informed comment and judgements on the proposed regulations.
- The regulation development, impact assessment and consultation process should reflect the significance, complexity and potential impact of the proposed regulation.
- All parties should focus on issues of key importance and on issues about which there are divergent views.
In order to provide the best and most comprehensive information to stakeholders and decision makers, a mix of assessment techniques should be used to identify and assess potential costs and benefits.

An RIS should:
- establish that the proposed regulation represents the best practicable option
- document the information gathered, including noting those stakeholders who have contributed information
- document, in a common-sense manner, the economic, environmental and social costs and benefits of the proposed regulation and other options
- include all important quantitative and qualitative information
- provide a description of the methodology used, including comment on any problems in gathering information and the limitations of any assessment techniques used
- be user-friendly and accessible to all stakeholders and
- facilitate informed judgements about the merits of the proposed regulation.

KEY STEPS IN REGULATION DEVELOPMENT

Needs analysis

Before initiating a regulation development process, EPA will analyse the nature and significance of the issue being addressed. This initial “needs analysis” will establish whether the issue is significant enough to warrant EPA taking action. EPA will only initiate the process if this needs analysis demonstrates a clear need to take action.

In conducting this needs analysis, EPA will:
- review relevant data on the nature and significance of the issue
- seek information about approaches used interstate or overseas and
- consult key stakeholders (for example, community groups, environment groups, industry groups, other government agencies).

If it is found that a significant issue exists that needs to be addressed, EPA will identify the full range of feasible management options, both regulatory and non-regulatory.

A preliminary evaluation of these options takes place during this phase. If EPA decides to pursue a regulatory option (i.e. a statutory rule) as the likely preferred option, then a development plan is prepared (as outlined below). If regulatory options are ruled out, processes other than those specified in this protocol will be followed.

Developing a plan

Having decided that a regulatory approach is a likely preferred option, EPA will prepare a development plan stating:
- objectives to be achieved
- identified management options
- reasons for proposing a regulatory approach as a likely preferred option
- proposed impact assessment methodology, including the preliminary identification of the set of costs and benefits to be considered in developing and assessing the identified management options and
- a consultation program.

EPA will ensure that the preliminary set of costs and benefits is comprehensive and includes those impacts which, by their nature, may be difficult to assess (for example, environmental impacts). This initial identification of costs and benefits will assist EPA in planning the information gathering and consultation processes.

EPA will use the plan to guide the development and consideration of the identified management options and the RIS. EPA will consult with key stakeholders if adjustments to the plan are necessary (for example, in response to issues or stakeholder input).

Public comment and finalising the regulation

Where a regulation is proposed, EPA will, unless there is a pressing urgency, allow a period of public comment on the proposed regulation and RIS which is longer than the minimum twenty-eight day statutory comment period (for example, to allow for formal comment from groups which only meet monthly).

EPA will consider stakeholder input throughout the process. In the final stage, EPA will formally document its response to public comment on the proposed regulation and associated RIS. This response to public comment will clearly document any remaining divergent views amongst stakeholders. EPA will respond to everyone who comments on the proposed regulation and RIS.

CONSULTATION PROGRAM

Consultation will begin early in the process and continue throughout. If a regulation is made, the consultation process will be supplemented by a range of actions to explain and promote the regulation.
In order to choose which consultation techniques suit a particular proposed regulation, EPA will consider factors such as:

- the number and location of stakeholders potentially affected
- the degree to which stakeholders may be affected
- potential impediments to identifying and involving relevant stakeholders and, in particular, the restrictions on the ability of some stakeholders to participate (especially poorly resourced individuals and groups) and
- making use of a range of networks (including networks of stakeholders) to identify interested parties, including EPA’s own networks.

During the early consultation, a number of techniques are available, including:

- advertising EPA’s intention to develop a regulatory option
- informing stakeholders in writing of the objective(s), seeking input and asking stakeholders to identify key issues of interest
- organising briefing sessions for key stakeholders
- releasing discussion papers (for example, to canvass the nature of the issue and possible responses) and
- organising workshops/public meetings with stakeholders.

EPA should ensure that the party which is engaged to provide independent advice on the adequacy of the RIS is involved early in the process.

During the development of the proposed regulation and RIS, a number of consultative mechanisms are available, including:

- regular meetings with key stakeholders
- establishment of contact groups of stakeholders (for example, peak bodies)
- information updates for stakeholders
- using questionnaires
- releasing discussion papers
- public workshops and
- using broad reference groups or working groups to address particular issues.

Where a regulation is made a range of actions may be taken by EPA to promote and explain the regulation including:

- explanatory documents
- mail-outs
- workshops
- presentations to key interested parties
- presentations to parties who must comply with the regulation (for example, via peak industry bodies) and
- media promotion (for example, media kits).

**ASSESSING COSTS AND BENEFITS**

In order to judge the merits of the proposed regulation and the identified alternative management options, EPA will work with stakeholders to assess costs and benefits. This will be done through the application of a mix of information gathering and assessment techniques, including:

- using historical evidence (for example, case studies of environmental problems, EPA’s internal records and information, reviewing similar approaches used elsewhere)
- conducting surveys and/or case studies of costs and benefits of compliance
- using scientific information
- using risk assessment techniques
- obtaining the views of, and information from, affected parties
- using focus groups and market research techniques
- using sensitivity analysis and
- applying an appropriate range of economic valuation techniques (for example, travel cost, contingent valuation).

In each case, the mix of assessment techniques used will be appropriate for the impacts being assessed. In selecting and using the assessment techniques, the factors which will be considered include:

- the types of information needed for assessment
- the range of information available
- the nature and significance of the potential costs and benefits (i.e., the effort put into the assessment should be proportionate to the level of the potential impacts)
- the need to ensure that costs and benefits which cannot be expressed in quantitative terms (for example, environmental impacts) are adequately assessed
- the extent to which the technique captures key aspects of the issue
- the cost and time involved in applying various assessment techniques
- the degree to which the incidence of the impacts can be identified (recognising that those who benefit may be different to those who bear the cost)
- the reliability of the resulting information
the ability of the technique to deal with the uncertainty involved in environmental decision-making

the attribution of costs and benefits to the proposed regulations (for example, whether the costs and benefits flow only from the proposed regulations, or from other influences such as primary legislation or commercial considerations as well)

the need to ensure consistency in attribution (a consistent approach should be used in deciding which costs and benefits are attributable to the proposed regulation)

whether the technique generates information which can be conveyed to a range of stakeholders

the ability of the technique to help make costs and benefits transparent and

the degree to which the technique can be practically applied to assist decision making.

While no single assessment technique will satisfy all of the above factors, the aim will be to use a mix of techniques which best fits these factors. In determining the appropriate mix of techniques to use, EPA will consult with stakeholders. EPA has a responsibility to obtain information and assess costs and benefits. EPA will seek information from stakeholders and will work with stakeholders in the application of the selected assessment techniques.

FURTHER INFORMATION

EPA Customer Service and Information Centre
477 Collins Street, Melbourne 3000
Telephone: (03) 9628 5622
Appendix L – Commonwealth – Regulatory Performance Indicators

The Commonwealth Office of Small Business worked with departments and agencies to develop a series of regulatory performance indicators against which Commonwealth departments and agencies, which produce regulations impacting on business, are assessed. The performance assessment contained in the Annual Review of Small Business 1999 is reproduced as an illustration of how this assessment works.

Table 1: RPIs 1, 2, 3 & 8

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<th>RPI 3</th>
<th>RPI 8</th>
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<td></td>
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<th>RP 2</th>
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<th>RPI 8</th>
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<td><strong>90%</strong></td>
<td><strong>9%</strong></td>
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<td><strong>91%</strong></td>
<td><strong>39%</strong></td>
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3 Based on data provided by ORR
4 Based on data provided by agencies
* Separate data on these agencies not provided by ORR
† Agency indicated that, for a large proportion of its regulations, flexibility was either inappropriate or not applicable
‡ No data provided from this agency
5 The percentage given in RPIs 1, 2 and 8 do not take into account the agencies for which data was not provided by either the ORR or the agency.
Table 2: RPIs 4, 5

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<td>Proportion of cases in which external review of decisions led to a decision being reversed or overturned</td>
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<td>0</td>
<td>0</td>
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<tr>
<td>• ATO</td>
<td>270</td>
<td>88(^6)</td>
</tr>
<tr>
<td>• APRA</td>
<td>-†</td>
<td>-†</td>
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<tr>
<td>• ASIC</td>
<td>25</td>
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<td><strong>Portfolio Total</strong></td>
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<tr>
<td><strong>Department of Education, Training &amp; Youth Affairs</strong></td>
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<td><strong>Department of Transport and Regional Services</strong></td>
<td>0</td>
<td>0</td>
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<tr>
<td>• National Capital Authority</td>
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<td>• CASA</td>
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<tr>
<td><strong>Portfolio Total</strong></td>
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<tr>
<td><strong>Attorney-General’s Department</strong></td>
<td>2</td>
<td>2</td>
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<tr>
<td>• Australian Customs Service</td>
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<td><strong>Portfolio Total</strong></td>
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<tr>
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<td><strong>Department of Finance and Administration</strong></td>
<td>0</td>
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<tr>
<td><strong>Department of the Prime Minister and Cabinet</strong></td>
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<td>-†</td>
</tr>
<tr>
<td><strong>Department of Employment, Workplace Relations and Small Business</strong></td>
<td>0</td>
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<tr>
<td>• AAA</td>
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<tr>
<td><strong>Portfolio Total</strong></td>
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<tr>
<td><strong>Whole of Government</strong></td>
<td>386</td>
<td>121</td>
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</tbody>
</table>

* Percentages based on figures supplied by the agencies themselves
† No data provided from this agency
\(^6\) Some of the decisions only partially adverse to the ATO. A number of the matters are subject of further appeal.
\(^7\) Figure represents the proportion of responding regulatory agencies who registered ‘yes’ responses
Table 3: RPIs 6, 7 & 9

<table>
<thead>
<tr>
<th>PORTFOLIO</th>
<th>RPI 6</th>
<th>RPI 7</th>
<th>RPI 9</th>
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</thead>
<tbody>
<tr>
<td></td>
<td>Are there communications strategies for regulation or formal consultative channels for communicating information about regulation?</td>
<td>Was an adequate forward plan for introduction and review of regulation published?</td>
<td>Does your agency have organisational guidelines outlining consultation processes, procedures, and practices?</td>
</tr>
<tr>
<td>Department of the Environment and Heritage</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Department of Industry, Science and Resources</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
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<tr>
<td>• IP Australia</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
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<tr>
<td>Agriculture, Fisheries and Forestry Australia</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
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<tr>
<td>• AQIS</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>• AFMA</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Department of Health and Aged Care</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
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<tr>
<td>• ANZFA</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
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<tr>
<td>Department of Communications, Information Technology and the Arts</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
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<tr>
<td>• ABA</td>
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<td>&quot;*&quot;</td>
<td>&quot;*&quot;</td>
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<td>Yes</td>
<td>Yes</td>
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<tr>
<td>Department of the Treasury</td>
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<td>No</td>
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<tr>
<td>• ATO</td>
<td>Yes</td>
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<td>No</td>
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<td>&quot;*&quot;</td>
<td>&quot;*&quot;</td>
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<td>• ASIC</td>
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<td>Yes</td>
<td>Yes</td>
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<tr>
<td>Department of Education, Training &amp; Youth Affairs</td>
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<td>No</td>
<td>No</td>
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<tr>
<td>Department of Transport and Regional Services</td>
<td>Yes</td>
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<td>Yes</td>
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<tr>
<td>• NCA</td>
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<td>&quot;*&quot;</td>
<td>&quot;*&quot;</td>
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<tr>
<td>• CASA</td>
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<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Attorney-General’s Department</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>• Australian Customs Service</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Department of Immigration and Multicultural Affairs</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Department of Finance and Administration</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
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<td>Department of the Prime Minister and Cabinet</td>
<td>&quot;*&quot;</td>
<td>&quot;*&quot;</td>
<td>&quot;*&quot;</td>
</tr>
<tr>
<td>Department of Employment, Workplace Relations and Small Business</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>• AAA</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Whole of Government(^a)</td>
<td>91%</td>
<td>27%</td>
<td>59%</td>
</tr>
</tbody>
</table>

\(^a\) No data provided from this agency
\(^b\) Data represents proportion of responding agencies that registered ‘yes’ answers
Appendix M – Reports to Parliament

Reports made to Parliament pursuant to section 14(1) of the Subordinate Legislation Act 1962

---

<table>
<thead>
<tr>
<th>Rpt No</th>
<th>Statutory Rule/Report by Legal and Constitutional Committee</th>
<th>Section 14(1) criteria used as basis for report</th>
<th>Disallowed</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>SR 406/85 Police (Charges, Expenses and Allowances) Regulations 1985</td>
<td>x</td>
<td>Disallowance not recommended</td>
</tr>
<tr>
<td></td>
<td>SR 414/85 Port of Melbourne Authority (Superannuation) (Amendment) Regulations 1985</td>
<td>x</td>
<td>Yes. LA 8.5.86, p.1955 LC 30.4.86, p.921</td>
</tr>
<tr>
<td></td>
<td>SR 429/85 Professional Indemnity Insurance Regulations 1985</td>
<td>x</td>
<td>Disallowance not recommended</td>
</tr>
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<td></td>
<td>SR 431/85 Food (Miscellaneous) Regulations 1985</td>
<td>x</td>
<td>Disallowance not recommended</td>
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<tr>
<td></td>
<td>SR 433/85 Health (Radiation Safety)(Large Aperture Scanners – Amendment) Regulations 1985</td>
<td>x</td>
<td>Yes. LA 8.5.86, p.1955 LC 30.4.86, p.921</td>
</tr>
<tr>
<td></td>
<td>SR 5/86 Motor Boating (Lake Boga) Regulations 1986</td>
<td>x</td>
<td>Yes. LA 8.5.86, p.1955 LC 30.4.86, p.921</td>
</tr>
<tr>
<td>2</td>
<td>SR 382/85 Occupational Health and Safety (Foundries) Regulations 1985</td>
<td>x</td>
<td>Yes. LA 8.5.86, p.1955 LC 30.4.86, p.921</td>
</tr>
<tr>
<td></td>
<td>SR 383/85 Occupational Health and Safety (Nitro-Cellulose) Regulations 1985</td>
<td>x</td>
<td>Yes. LA 8.5.86, p.1955 LC 30.4.86, p.921</td>
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<td></td>
<td>SR 384/85 Occupational Health and Safety (Explosive-Powered Tools) Regulations 1985</td>
<td>x x x</td>
<td>Yes. LA 8.5.86, p.1955 LC 30.4.86, p.921</td>
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<tr>
<td></td>
<td>SR 385/85 Occupational Health and Safety (Building Industry) Regulations 1985</td>
<td>x</td>
<td>Yes. LA 8.5.86, p.1955 LC 30.4.86, p.921</td>
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<tr>
<td></td>
<td>SR 386/85 Occupational Health and Safety (Spray Painting) Regulations 1985</td>
<td>x</td>
<td>Yes. LA 8.5.86, p.1955 LC 30.4.86, p.921</td>
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<tr>
<td></td>
<td>SR 387/85 Occupational Health and Safety (Timber Industry Forest Operations) Regulations 1985</td>
<td>x</td>
<td>Yes. LA 8.5.86, p.1955 LC 30.4.86, p.921</td>
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</tbody>
</table>

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Section 14(2) of the Subordinate Legislation Act 1962 (Vic) gave power to the Legal and Constitutional Committee to recommend disallowance for non-compliance with the principles contained in s. 14(1). These principles are contained in Appendix P of this Report.

Since the operation of Subordinate Legislation (Review and Revocation) Act 1984 (Vic) (1 July 1985), from 1985 to the present.

* LA refers to the Legislative Assembly & LC refers to the Legislative Council of the Victorian Parliament.
<table>
<thead>
<tr>
<th>Rpt No</th>
<th>Statutory Rule/Report by Legal and Constitutional Committee</th>
<th>Section 14(1) criteria used as basis for report</th>
<th>Disallowed</th>
</tr>
</thead>
<tbody>
<tr>
<td>3</td>
<td>SR 35/86 Adoption (Inter-Country Adoption Fees) Regulations 1986 rr.6, 7, 8</td>
<td>x x</td>
<td>No. Withdrawn because Rule revoked - LA 8.10.86, p.1166 LC 8.10.86, p.503</td>
</tr>
<tr>
<td>5</td>
<td>SR 14/86 Films (Amendment) Regulations 1986</td>
<td>x</td>
<td>Disallowance not recommended. Rule revoked before report made to Parliament.</td>
</tr>
<tr>
<td></td>
<td>SR 49/86 Health (Radiation Safety) (Amendment) Regulations 1986</td>
<td>x</td>
<td>Yes LA 8.10.86, p.1167 LC 8.10.86, p.502</td>
</tr>
<tr>
<td></td>
<td>SR 53/86 Births Deaths and Marriages (Prescribed Fees) Regulations 1986</td>
<td>x</td>
<td>Disallowance not recommended</td>
</tr>
<tr>
<td>6</td>
<td>SR 71/86 County Court (Bailiff’s Fees) Order 1986</td>
<td>x</td>
<td>Disallowance not recommended</td>
</tr>
<tr>
<td></td>
<td>SR 79/86 Fishing (General)(Amendment) Regulations 1986</td>
<td>x</td>
<td>Disallowance not recommended</td>
</tr>
<tr>
<td></td>
<td>SR 126/86 Coroners Regulations 1986 r.5</td>
<td>x</td>
<td>Yes LA 5.12.86, p.2963 LC 3.12.86, p.1420</td>
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<tr>
<td></td>
<td>SR 148/86 Melbourne and Metropolitan Board of Works By-law No.222: Water Supply</td>
<td>x</td>
<td>Disallowance not recommended</td>
</tr>
<tr>
<td>Rpt No</td>
<td>Statutory Rule/Report by Legal and Constitutional Committee</td>
<td>Section 14(1) criteria used as basis for report</td>
<td>Disallowed</td>
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<tr>
<td>--------</td>
<td>-------------------------------------------------------------</td>
<td>-----------------------------------------------</td>
<td>------------</td>
</tr>
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<td>8</td>
<td>SR 284/86 Metropolitan Fire Brigades Superannuation (Board Scheme)(Further Amendment) Regulations 1986</td>
<td>a b c d e f g h i j k</td>
<td>x No. Undertaking given by Minister to amend.</td>
</tr>
<tr>
<td>9</td>
<td>SR 65/87 Fishing (Abalone Licence Fee) Regulations 1987</td>
<td>x x</td>
<td>Disallowance not recommended.</td>
</tr>
<tr>
<td>10</td>
<td>Report on The Issue of Premier’s Certificates</td>
<td>—</td>
<td>—</td>
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<tr>
<td>11</td>
<td>SR 266/87 Freedom of Information (Exempt Offices) Regulations 1987</td>
<td>x x x x x</td>
<td>x No. Disagreed with in LA 31.3.88, pp.1131-1144. Disallowed in LC 23.3.88, pp.297-319.</td>
</tr>
<tr>
<td></td>
<td>SR 275/87 Public Service (Unauthorised Disclosure) Regulations 1987</td>
<td>x x x x x</td>
<td>x x No. Disagreed with in LA 31.3.88, pp.1131-1144. Disallowed in LC 23.3.88, pp.297-319.</td>
</tr>
<tr>
<td>12</td>
<td>SR 231/87 Melbourne and Metropolitan Board of Works By-law No.235: Melbourne and Metropolitan Board of Works Employees’ Superannuation Fund Regulations</td>
<td>Report on the basis of s.5 Subordinate Legislation Act</td>
<td>Disallowance not recommended.</td>
</tr>
<tr>
<td>13</td>
<td>SR 73/88 Police Gaols Regulations 1988</td>
<td>x</td>
<td>Disallowance not recommended. Amendment to Act recommended.</td>
</tr>
<tr>
<td></td>
<td>SR 292/88 Corrections (Firearms Amendment) Regulations 1988</td>
<td>x</td>
<td>Disallowance not recommended. Regulations amended.</td>
</tr>
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</table>
### Inquiry into the Subordinate Legislation Act 1994 (Vic)

<table>
<thead>
<tr>
<th>Rpt No</th>
<th>Statutory Rule/Report by Legal and Constitutional Committee</th>
<th>Section 14(1) criteria used as basis for report</th>
<th>Disallowed</th>
</tr>
</thead>
<tbody>
<tr>
<td>14</td>
<td>SR 285/88 Melbourne and Metropolitan Board of Works By-law No.250: Trade Waste</td>
<td>a, b, c, d, e, f, g, h, i, j, k</td>
<td>Disallowance not recommended. By-law revoked.</td>
</tr>
<tr>
<td>16</td>
<td>Report on Scrutiny of Subordinate Legislation: Principles and Practice</td>
<td></td>
<td>—</td>
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<tr>
<td>17</td>
<td>SR 77/89 Environment Protection (Scheduled Premises and Exemptions)(Amendment) Regulations 1989</td>
<td>x</td>
<td>No. Disallowed in LC 1.11.89, pp.1099-1102 and 1160-1168 Disagreed with in LA 16.5.91, p.2357-2364</td>
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<tr>
<td>18</td>
<td>SR 64/90 Local Government Regulations 1990</td>
<td>x</td>
<td>Disallowance not recommended.</td>
</tr>
<tr>
<td>19</td>
<td>SR 104/90 Alpine Resorts (Leasing)(Amendment) Regulations 1990</td>
<td>x</td>
<td>Yes. LA 30.11.90, p.2906 LC 30.11.90, p.1869</td>
</tr>
</tbody>
</table>

---

The Second-Hand Dealers and Pawnbrokers Act 1989 (Vic) (s.31(3) and (4) allowed disallowance in either House of Parliament).

---

1599
<table>
<thead>
<tr>
<th>Rpt No</th>
<th>Statutory Rule/Report by Legal and Constitutional Committee</th>
<th>Section 14(1) criteria used as basis for report</th>
<th>Disallowed</th>
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</thead>
<tbody>
<tr>
<td>21</td>
<td>SR 50/91 Water (Subdivisional Easements and Reserves) Regulations 1991</td>
<td></td>
<td>x</td>
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<td></td>
<td></td>
<td></td>
<td>Disallowance not recommended.</td>
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<tr>
<td>22</td>
<td>SR 79/91 Alpine Resorts (Cross Country Trail Fees) Regulations 1991</td>
<td></td>
<td>x</td>
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<td></td>
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<td>No. Disagreed with in L.A 31.10.91 pp.51-54 Disallowed in LC 22.10.91 pp.10-11 and 23.10.91 pp.53-55</td>
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<tr>
<td></td>
<td>SR 80/91 Alpine Resorts (Entry) (Amendment) Regulations 1991</td>
<td></td>
<td>x</td>
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<td>Disallowance not recommended</td>
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<tr>
<td>23</td>
<td>SR 127/91 Police (Charges, Expenses and Allowances) (Sporting and Entertainment Events) Regulations 1991</td>
<td></td>
<td>x</td>
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<td>Disallowance not recommended</td>
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</table>

<table>
<thead>
<tr>
<th>Rpt No</th>
<th>Statutory Rule/Report by Scrutiny of Acts and Regulations Committee</th>
<th>Section 14(1) criteria used as basis for report</th>
<th>Disallowed</th>
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<tbody>
<tr>
<td>1</td>
<td>Annual Report concerning Statutory Rules Series 1991</td>
<td></td>
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<tr>
<td>2</td>
<td>SR 207/92 Port of Melbourne Authority (Transport, Handling and Storage of Dangerous Substances and Oils) Regulations 1992</td>
<td></td>
<td>x</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Disallowance not recommended</td>
</tr>
<tr>
<td>4</td>
<td>SR 173/93 Land Tax (Further Amendment) Regulations 1993</td>
<td></td>
<td>x</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Disallowance not recommended</td>
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</table>
Inquiry into the Subordinate Legislation Act 1994 (Vic)

<table>
<thead>
<tr>
<th>Rpt No</th>
<th>Statutory Rule/Report by Scrutiny of Acts and Regulations Committee</th>
<th>a</th>
<th>b</th>
<th>c</th>
<th>d</th>
<th>e</th>
<th>f</th>
<th>g</th>
<th>h</th>
<th>i</th>
<th>j</th>
<th>k</th>
<th>Disallowed</th>
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<tbody>
<tr>
<td>5</td>
<td>Annual Report concerning Statutory Rules Series 1993</td>
<td></td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td>–</td>
</tr>
<tr>
<td>6</td>
<td>SR 66/94 Stock (Hormonal Growth Promotants Status Declarations) Regulations 1994</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>x</td>
<td></td>
<td>Disallowance not recommended</td>
</tr>
<tr>
<td>7</td>
<td>SR 200/94 Environment Protection (Scheduled Premises and Exemptions) Regulations 1994</td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>x</td>
<td></td>
<td>Disallowance not recommended</td>
</tr>
</tbody>
</table>

All Reports made to Parliament pursuant to section 21(1) of the Subordinate Legislation Act 1994

<table>
<thead>
<tr>
<th>Rpt No</th>
<th>Statutory Rule/Report by Scrutiny of Acts and Regulations Committee</th>
<th>a</th>
<th>b</th>
<th>c</th>
<th>d</th>
<th>e</th>
<th>f</th>
<th>g</th>
<th>h</th>
<th>i</th>
<th>j</th>
<th>k</th>
<th>Disallowed</th>
</tr>
</thead>
</table>

* There were no reports made by SARC in 1995 or 1996, but an Information Paper entitled *Abalone — Taking Stock*, a Review of the Fisheries (Abalone) Regulations 1996 was tabled in December 1996.
Appendix N – References to the Subordinate Legislation Act 1962

The following Acts still retain references to the *Subordinate Legislation Act 1962 (Vic)* –

1. *Accident Compensation Act 1985*  
   Section 253(3) and (4).

2. *Agricultural and Veterinary Chemicals (Control of Use) Act 1992*  
   Section 76(6) and (7).

3. *Agricultural Industry Development Act 1990*  
   Section 8(4) and (5).

4. *Australian Grands Prix Act 1994*  
   Section 51(3) and (4).

5. *Cancer Act 1958*  
   Section 62(11) and (12).

6. *Catchment and Land Protection Act 1994*  
   Section 95(3) and (4).

7. *Club Keno Act 1993*  
   Section 15(4).

   Section 311(2).

9. *Control of Weapons Act 1990*  
   Sections 12(2), (3) and (4) and 13(3)(a).

10. *Corporations (Victoria) Act 1990*  
    Section 80(6).
11. *Country Fire Authority Act 1958*
   Section 110(2AA).

12. *Courts (Case Transfer) Act 1991*
   Section 34(3) and (4).

   Section 17DA(2), (3) and (4).

   Section 3(1), in the definition of "statutory rule".

15. *Docklands Authority Act 1991*
   Sections 55(6), (7) and (8) and 56(3) and (4).

16. *Domestic (Feral and Nuisance) Animals Act 1994*
   Section 100(3) and (4).

17. *Emergency Services Superannuation Act 1986*
   Section 31(3).

18. *Environment Protection Act 1970*
   Section 71(4) and (5).

   Section 69(3) and (4).

20. *Forests Act 1958*
   Section 52E(3).

21. *Guardianship and Administration Board Act 1986*
   Section 58A(4).

22. *Health Services Act 1988*
   Section 158(3) and (4).

23. *Heritage Rivers Act 1992*
   Sections 8(9) and 18(3) and (4).
24. *House Contracts Guarantee Act 1987*
   Section 33(4) and (5).

25. *Livestock Disease Control Act 1994*
   Section 139(3).

   Section 169(3) and (4).

27. *Marine Act 1988*
   Sections 108(5) and (6) and 109(5) and (6).

   Section 78(3).

29. *Melbourne Sports and Aquatic Centre Act 1994*
   Section 32(3) and (4).

   Section 48(2) and (3).

   Section 124(4), (5) and (6).

32. *Murray Valley Citrus Marketing Act 1989*
   Section 91(3) and (4).

33. *Museums Act 1983*
   Section 31(3) and (4).

34. *National Parks Act 1975*
   Section 48(5) and (6).

35. *Occupational Health and Safety Act 1985*
   Section 59(8) and (9).

36. *Partnership Act 1958*
   Section 80(3) and (4).
37. Pathology Services Accreditation Act 1984  
Section 30A(3) and (4).

38. Petroleum (Submerged Lands) Act 1982  
Section 152(5), (6) and (7).

39. Pipelines Act 1967  
Section 47(3), (4) and (5).

40. Pollution of Waters by Oil and Noxious Substances Act 1986  
Sections 31(2), 36(4), 42(4), 49(4) and 51(4).

41. Private Agents Act 1966  
Section 51(2), (3) and (4).

42. Renewable Energy Authority Victoria Act 1990  
Section 21(2), (3) and (4).

43. Royal Botanic Gardens Act 1991  
Section 51(3).

44. Second-Hand Dealers and Pawnbrokers Act 1989  
Section 31(3) and (4).

45. State Electricity Commission Act 1958  
Section 111(4), (5) and (6).

46. State Employees Retirement Benefits Act 1979  
Section 72(3).

47. State Owned Enterprises Act 1992  
Section 90(3).

Section 92(3) and (4).

49. Subdivision Act 1988  
Section 43(4) and (5).
50. *Surveyors Act 1978*
   Section 34.

51. *Transport Superannuation Act 1988*
   Section 52(3) and (4).

52. *Treasury Corporation of Victoria Act 1992*
   Section 44(2) and (3).

53. *Trustee Companies Act 1984*
   Sections 7(5A) and (5B) and 36(4A) and (4B).

54. *Victoria State Emergency Service Act 1987*
   Section 31(1).

55. *Victorian Funds Management Corporations Act 1994*
   Section 40(2) and (3).

56. *Victorian Relief Committee Act 1958*
   Section 8(3) and (4).

57. *Water Act 1989*
   Section 324(5) and (6).

58. *Wheat Marketing Act 1989*
   Section 11(2) and (3).

59. *Wildlife Act 1975*
   Section 85A(3) and (4), 86(5), (6), (7) and (8) and 87(4A) and (4B).
In Utah any person may petition an agency to amend or make a regulation. Ultimately the decision rests with the agency which may decide that there are legitimate reasons for not accepting a proposal. The following is a list of legitimate reasons why an agency may reject a suggested regulatory change.

**Reasons for Agencies Rejecting Regulatory Changes**

1. A suggested regulation change may appear to be contrary to federal law – the most common reason.

2. A suggested change may appear to exceed the scope of state law, the agency’s own enabling-act, the Administrative Rulemaking Act or other state agency regulations, or the state’s rules of evidence.

3. The suggested change may be contrary to the “intent” of the regulation.

4. Suggested changes may not be consistent with practices in other states.

5. The suggested change may be contrary to regulation writing procedures.

6. An agency’s analysis may find the cost of a suggested change to be more costly than the estimated amount of benefit that can be obtained.

7. Agencies may not be budgeted to provide services or functions associated with suggested regulation changes; or agency may lack sufficient manpower.

8. An agency’s current workload or internal policies may result in some staff confusion and they may not be able to enforce the function adequately.

9. The Governor’s policy may not correspond with such a change in function.

10. An agency head, or the Governor, may determine that a particular change would not be “good public policy”.

11. The implementation of a particular change in a regulation may result in some affected parties being given undue advantage.

12. The Legislature may have previously amended a statute to eliminate a similar function, or portion of that function, in prior legislation.

13. A proposed change may conflict with pending legislation.

14. A proposed change for one regulation may be better handled in another regulation.
Section 14 of the *Subordinate Legislation Act 1962* (Vic) provides as follows –

14. Review of Statutory rules by the Legal and Constitutional Committee

(1) Where the Legal and Constitutional Committee considers that a statutory rule laid before Parliament under section 5 –

(a) does not appear to be within the powers conferred by the Act under which the statutory rule was made;

(b) without clear and express authority being conferred by the Act under which the statutory rule was made –

(i) has a retrospective effect;

(ii) imposes any tax, fee, fine, imprisonment or other penalty;

(iii) purports to shift the onus of proof to a person accused of an offence; or

(iv) provides for the sub-delegation of powers delegated by the Act;

(c) does not appear to be within the general objectives, intention or principles of the Act under which the statutory rule was made;

(d) makes unusual or unexpected use of the powers conferred by the Act under which the statutory rule was made having regard to the general objectives, intention or principles of that Act;

(e) contains any matter or embodies any principles, which matter or principles should properly be dealt with by an Act and not by subordinate legislation;

(f) unduly trespasses on rights and liberties of the person previously established by law;

(g) unduly makes rights and liberties of the person dependent upon administrative and not upon judicial decisions;

(h) is inconsistent with principles of justice and fairness;

(i) requires explanation as to its form or intention;

(j) has been prepared in contravention of any of the provisions of this Act or of the guidelines prepared under section 11 and the contravention is of a substantial or material nature; or
(k) is likely to result in costs being incurred directly and indirectly in the administration of and compliance with the statutory rule which outweigh the likely benefits sought to be achieved by the statutory rule –

the Legal and Constitutional Committee may report to each House of Parliament as provided in sub-section (2).

(2) A report of the Legal and Constitutional Committee under this section may contain any of the following:

(a) Such recommendations as the Legal and Constitutional Committee considers appropriate, including a recommendation that a statutory rule should be –

(i) disallowed in whole or in part; or

(ii) amended as suggested in this report;

(b) A declaration that the statutory rule should be suspended in accordance with section 6 pending consideration by Parliament.
## Abbreviations

### AUSTRALIA

#### Victoria

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>ADAVB</td>
<td>The Australian Dental Association – Victorian Branch</td>
</tr>
<tr>
<td>DHS</td>
<td>Department of Human Services</td>
</tr>
<tr>
<td>DNRE</td>
<td>Department of Natural Resources &amp; Environment</td>
</tr>
<tr>
<td>DPBV</td>
<td>Dental Practice Board of Victoria</td>
</tr>
<tr>
<td>DPC</td>
<td>Department of Premier &amp; Cabinet</td>
</tr>
<tr>
<td>EGEFA</td>
<td>East Gippsland Estaurine Fisherman’s Association</td>
</tr>
<tr>
<td>EPA</td>
<td>Environment Protection Authority</td>
</tr>
<tr>
<td>ICA</td>
<td>Insurance Council of Australia</td>
</tr>
<tr>
<td>OCEI</td>
<td>Office of the Chief Electrical Inspector</td>
</tr>
<tr>
<td>OCPC</td>
<td>Office of Chief Parliamentary Counsel, Victoria</td>
</tr>
<tr>
<td>ORR</td>
<td>Office of Regulation Reform, Victoria</td>
</tr>
<tr>
<td>RIS</td>
<td>Regulation Impact Statement</td>
</tr>
<tr>
<td>SARC</td>
<td>Scrutiny of Acts and Regulations Committee</td>
</tr>
<tr>
<td>SIV</td>
<td>Seafood Industry Victoria</td>
</tr>
<tr>
<td>VADA</td>
<td>Victorian Abalone Divers’ Association</td>
</tr>
<tr>
<td>VCCAV</td>
<td>Victorian Community Council Against Violence</td>
</tr>
<tr>
<td>VLRC</td>
<td>Victorian Law Reform Committee</td>
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<tr>
<td>VWA</td>
<td>Victorian Workcover Authority</td>
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### Commonwealth

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<tbody>
<tr>
<td>COAG</td>
<td>Council of Australian Governments</td>
</tr>
<tr>
<td>DITR</td>
<td>Department of Industry, Tourism and Resources</td>
</tr>
<tr>
<td>FLID</td>
<td>Federal Legislative Instruments Database</td>
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<tr>
<td>OLD</td>
<td>Office of Legislative Drafting, Commonwealth</td>
</tr>
<tr>
<td>ORR</td>
<td>Office of Regulation Review, Commonwealth</td>
</tr>
<tr>
<td>RRU</td>
<td>Regulation Reform Unit, Department of Industry Tourism and Resources</td>
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<tr>
<td>SCRO</td>
<td>Senate Committee on Regulations and Ordinances</td>
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### Inquiry into the Subordinate Legislation Act 1994 (Vic)

#### Australian Capital Territory

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<th>Acronym</th>
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<tr>
<td>CLA</td>
<td>Standing Committee on Legal Affairs</td>
</tr>
<tr>
<td>JCS</td>
<td>Standing Committee on Justice and Community Safety</td>
</tr>
<tr>
<td>MRD</td>
<td>Microeconomic Reform Division, Department of Treasury</td>
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<tr>
<td>PCO</td>
<td>Parliamentary Counsel’s Office</td>
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#### New South Wales

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<td>Parliamentary Counsel’s Office</td>
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<td>Regulation Review Committee</td>
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#### Northern Territory

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<td>OPC</td>
<td>Office of Parliamentary Counsel</td>
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<td>SLPC</td>
<td>Subordinate Legislation and Publications Committee</td>
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#### Queensland

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<td>Business Regulation &amp; Reform Unit, Queensland</td>
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<tr>
<td>OCPC</td>
<td>Office of Chief Parliamentary Counsel</td>
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<td>SLC</td>
<td>Scrutiny of Legislation Committee</td>
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#### South Australia

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<td>Legislation Review Committee</td>
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<tr>
<td>OPC</td>
<td>Office of Parliamentary Counsel</td>
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#### Tasmania

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<td>CPC</td>
<td>Chief Parliamentary Counsel</td>
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<tr>
<td>RRU</td>
<td>Regulation Review Unit, Department of Treasury and Finance</td>
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<td>SLC</td>
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#### Western Australia

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<td>DLC</td>
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<tr>
<td>LRAC</td>
<td>Legislative Review and Advisory Committee</td>
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<td>PCO</td>
<td>Parliamentary Counsel’s Office</td>
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**UNITED STATES**

**Arizona**

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<td>APA</td>
<td>Administrative Process Act</td>
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<tr>
<td>EIS</td>
<td>Economic, Small Business and Consumer Impact Statement</td>
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<tr>
<td>GRRRC</td>
<td>Governor’s Regulatory Review Council</td>
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**California**

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<td>APA</td>
<td>Administrative Procedure Act</td>
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<td>OAL</td>
<td>Office of Administrative Law</td>
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**Pennsylvania**

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<td>CDL</td>
<td>Commonwealth Documents Law</td>
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<tr>
<td>IRRC</td>
<td>Independent Regulatory Review Commission</td>
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<tr>
<td>LRB</td>
<td>Legislative Reference Bureau</td>
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<td>RRA</td>
<td>Regulatory Review Act</td>
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**Utah**

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<tr>
<td>ARRC</td>
<td>Administrative Rules Review Committee</td>
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<td>DAR</td>
<td>Division of Administrative Services</td>
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<tr>
<td>GOPB</td>
<td>Governor’s Office of Planning and Budget</td>
</tr>
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<td>OAR</td>
<td>Office of Administrative Rules</td>
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<td>UAC</td>
<td>Utah Administrative Code</td>
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<td>Utah Administrative Rulemaking Act</td>
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**Virginia**

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<td>ALAC</td>
<td>Administrative Law Advisory Committee</td>
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<tr>
<td>DPB</td>
<td>Department of Planning &amp; Budget</td>
</tr>
<tr>
<td>EIA</td>
<td>Economic Impact Analysis</td>
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<tr>
<td>NOIRA</td>
<td>Notice of Intended Regulatory Action</td>
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<tr>
<td>VAC</td>
<td>Virginia Administrative Code</td>
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### Washington

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<tr>
<td>AEI</td>
<td>American Enterprise Institute</td>
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<tr>
<td>CFCs</td>
<td>Chlorofluorocarbons</td>
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<tr>
<td>CRA</td>
<td>Congressional Review Act</td>
</tr>
<tr>
<td>CRE</td>
<td>Center for Regulatory Effectiveness</td>
</tr>
<tr>
<td>OIRA</td>
<td>Office of Information and Regulatory Affairs</td>
</tr>
<tr>
<td>OMB</td>
<td>Office of Management and Budget</td>
</tr>
<tr>
<td>RIA</td>
<td>Regulatory Impact Analysis</td>
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<tr>
<td>SCGA</td>
<td>Senate Committee on Government Affairs</td>
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### EUROPE

<table>
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<th>Acronym</th>
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<tr>
<td>PUMA</td>
<td>Public Management Services of the OECD</td>
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<tr>
<td>OECD</td>
<td>Organisation for Economic Co-operation and Development</td>
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</tbody>
</table>
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Rules Publication Act 1953
Subordinate Legislation Act 1992
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Regulatory Review Act

Utah

Utah Administrative Rulemaking Act
Utah Administrative Code

Virginia

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