CONSULTATION AND THE MAKING OF SUBORDINATE LEGISLATION – A VICTORIAN INITIATIVE

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This article is concerned with the question of consultation in the making of subordinate legislation. By "consultation" is meant a process under which steps are taken to inform those who will be affected by proposed subordinate legislation of the intention to make the measure in question, and an opportunity is afforded to such persons to comment upon the policy initiative embodied in that measure.[1]

More specifically, the article is concerned with certain provisions of the *Victorian Subordinate Legislation Act* 1962, which provide for a complex consultative scheme in respect of the making of a broad class of subordinate legislation in the State of Victoria. The scheme erected by the Act is unique among the Australian legal systems,[2] and represents an exciting development in the law relating to subordinate legislation. The relevant provisions of the Act are highly significant as comprising the deployment of a further weapon in the continuing battle to ensure the accountability of the executive not only to Parliament, but to the public at large.

Reasons of space preclude a detailed account of the relationship of the consultative scheme of the Act with the common law, or of the legislative history of the Act. As to the former, it suffices to say that, as a general rule, the common law does not require that consultation take place in connection with the making of subordinate legislation. Thus, consultation need only occur where required by specific enactment.[3]

As to the legislative history of the consultative provisions of the *Subordinate Legislation Act*, a very brief precis may be given. (That precis will

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[1] See e.g. *Rollo* v. *Minister of Town and Country Planning* [1948] 1 All E.R. 13; *Port Louis Corporal* v. *Attorney-General of Mauritius* [1965] A.C. 1111; Jergensen, A., "The Legal Requirements of Consultation" [1978] *Public Law* 290; Garner, J., "Consultation in Subordinate Legislation" [1964] *Public Law* 105.

[2] The *Delegated Legislation Review Bill* 1988, a Private Member's Bill introducing the Senate on 15 March 1988 by Senator McLean, is obviously based on the Victorian legislation. It is as yet unpassed. In South Australia, a system very much weaker than that of Victoria, which operates largely without statutory backing, is outlined in a paper entitled "South Australia – Deregulation Initiatives", prepared by the Attorney-General Mr. Sumner, and tabled in the Legislative Council on 10 March 1987.

[3] See generally Craven, G., "Legislative Action by Subordinate Authorities and the Requirement of a Fair Hearings" (1988) 16 *Melbourne University Law Review* 569, especially 570-8.

not include an account of the provisions themselves: a detailed outline appears later in this article.) These provisions had their genesis in the *Subordinate Legislation (Deregulation) Bill* 1983,[4] a private member's bill introduced by the Hon. Alan Hunt, Leader of the Opposition Liberal Party in the Legislative Council. In November 1983, that Bill was referred by resolution of the Legislative Assembly and the Legislative Council for inquiry, consideration and report to the Legal and Constitutional Committee, an all-party Parliamentary Committee drawn from both Houses of the Victorian Parliament, established under the *Parliamentary Committees Act* 1968.[5] It may be noted that the relevant provisions of the 1983 Bill were largely inspired by American initiatives such as the *Administrative Procedures Act* and the Reagan Executive Order 12291, so that the consultative scheme of the *Subordinate Legislation Act* may ultimately be traced to legislative initiatives in that country. However, this matter will not be pursued further here.[6]

The Committee tabled its *Report on the Subordinate Legislation (Deregulation) Bill* in September 1984. That report recommended, inter alia, that the consultative scheme embodied in the 1983 Bill, with some modification, be enacted into law. The Cain Labor Government accepted the great bulk of the Committee's recommendations, and these took legislative effect in the form of the *Subordinate Legislation (Review and Revocation) Act* 1984, which amended the *Subordinate Legislation Act* 1962, and which commenced operation on 1 July 1985. The background of the consultative scheme of the Act is thus somewhat singular, in that it involves American inspiration, private member initiation, the involvement of a Parliamentary Committee, and, ultimately, bipartisan support for its implementation.

The substance of this article is divided into three parts. The first comprises a detailed outline of the consultative scheme provided for by the Act. Both the consultative requirements themselves and the mechanisms for their enforcement are addressed. Secondly, an account is given of the practical operation of these requirements and mechanisms. Here, considerable reliance is placed upon relevant empirical evidence. Finally, a variety of problems and unresolved issues arising out of the provisions of the Act and their operation are briefly considered.

CONSULTATIVE SCHEME OF THE SUBORDINATE LEGISLATION ACT

The first point to note here concerns the scope of the *Subordinate Legislation Act*. Naturally, whatever the consultative procedures for which it makes

[4] As the name of the Bill suggests, one of the ends at which it was aimed was "deregulation" — i.e. reducing the amount of subordinate legislation made. To some (though to a smaller) extent, this aim also underlies the provisions considered here, quite apart from any desire to set up a consultative regime for its own sake. However, the nature of the *Subordinate Legislation Act* as a deregulatory, as opposed to a consultative mechanism, is beyond the scope of this article. For a general discussion of deregulation in the context of the 1983 Bill, see Legal and Constitutional Committee, *Report on the Subordinate Legislation (Deregulation) Bill* hereafter referred to as the *Deregulation Report* 86-103.

[5] *Parliamentary Committee Act* 1968, section 4B.

[6] For a detailed account of these and other overseas influences see *Deregulation Report* 86-142.

provision, those procedures will only operate in respect of the making of instruments which fall within the ambit of the Act.

That ambit is set by sub-section 2(1) of the Act, which provides a definition of the term "statutory rule". The provisions of the *Subordinate Legislation Act*, including those relating to consultative procedures, apply only in relation to "statutory rules" as defined. Sub-section 2(1) effectively provides that a statutory rule is any rule or regulation made by the Governor in Council; any regulation which is subject to approval or disallowance by the Governor in Council; any rule of court; and any instrument made under an Act which is of a legislative character and has been declared by the Attorney-General to be a statutory rule in a notice published in the Government Gazette. The sub-section goes on to specifically exclude from the definition of "statutory rule" regulations or rules made by local authorities unless the instrument in question is the subject of an Attorney-General's declaration.

The basic effect of sub-section 2(1) is thus that the requirements of the Act will apply to subordinate legislation made by or subject to the approval of the Governor in Council, and rules of court. As the powers of delegated legislation granted by most Victorian Acts are either conferred upon the Governor in Council, or are expressed as being subject to the approval of that body, the Act has a broad scope. Nevertheless, there are certain obvious exclusions, the most notable of which is the vast body of subordinate legislation comprised in local government by-laws, which clearly is outside the definition of a "statutory rule". It may also be noted that Acts of Parliament do sometimes confer a subordinate law-making power upon an authority other than the Governor in Council without subjecting the exercise of that power to disapproval by the latter body.[7] Again, the resulting instrument will not be a statutory rule in the absence of an express declaration in its parent legislation.[8]

Having determined the scope of the Act, it is possible to consider the consultative requirements which will attach to the making of instruments to which it applies. The starting point here must be to note that by virtue of the "Guidelines with respect to the preparation and content of statutory rules" contained in Schedule 2 of the Act, a general requirement of "consultation" will apply to the making of a wide range of statutory rules.

The guidelines set out in Schedule 2 deal with a wide variety of matters pertaining to the content and making of statutory rules. They derive their ultimate force from section 11 of the Act. Sub-section 11 (1) requires the Attorney-General (in consultation with the Legal and Constitutional Committee of the Victorian Parliament) to prepare and issue guidelines as to the preparation and content of statutory rules.[9] Sub-section 11 (5) provides that until the Attorney-General issues such guidelines, those set out in Schedule 2 shall apply. Although over three years have elapsed since the Schedule 2 guidelines took effect,[10] the Attorney-General has not yet discharged the

[7] E.g. section 240, *Melbourne and Metropolitan Board of Works Act* 1958.
[8] E.g. section 241, *Melbourne and Metropolitan Board of Works Act* 1958.
[9] Sub-section 11(1).
[10] The Schedule 2 guidelines took effect on 1 July 1985, with the commencement of the *Subordinate Legislation (Review and Revocation) Act* 1984.

obligation to issue new guidelines. Thus, by virtue of sub-section 11 (5), those set out in Schedule 2 continue to apply.

The relevant guideline in the present context is guideline 3 (e). Guideline 3 (e) (i) provides that whenever a proposed statutory rule is likely to impose any "appreciable burden, cost or disadvantage", whether direct or indirect, tangible or intangible, on any sector of industry, commerce, consumers, members of the public or the State, consultation shall take place with appropriate representatives of the sector concerned as to the need for and consequences of the action proposed. Guideline 3 (e) (ii) provides that the nature and extent of such consultation, and the publicity connected with the proposal, shall be commensurate with the likely impact of that proposal upon the relevant sector. It should be noted that guideline 1 has the effect that above reference to costs and disadvantages extends not only to financial, but also to social costs and disadvantages.

Thus, the effect of guideline 3 (e) is that consultation commensurate with the likely impact of a rule must be undertaken in connection with the making of any statutory rule likely to impose an "appreciable" burden, cost or disadvantage, whether financial or social, on any sector of the community. As will be seen, this general requirement of consultation is in addition to any other more particular consultative duties which may be imposed by the Act. The concept of an "appreciable burden, cost or disadvantage" is not elaborated upon in the guidelines or in the Act, and its meaning will be more closely considered elsewhere,[11] but it may be noted at this point that a great many rules will necessarily impose some "appreciable" disadvantage upon some sector of the community, and thus be subject to the requirement of consultation in guideline 3 (e). It may also be noted that guideline 4 reinforces the provisions of guideline 3 (e) by requiring that, in determining upon a course of regulatory action, responsible Ministers must ensure that administrative decisions are based upon adequate information and consultation as to the consequences of the action proposed.

Accordingly, whatever else may be said of the *Subordinate Legislation Act*, it clearly has the effect of imposing a general requirement of consultation in connection with the making of a wide range of statutory rules. In fact, however, this fairly nebulous requirement is not the most significant consultative procedure provided for by the Act. Undeniably the outstanding feature of the Act in this respect is the regulatory impact statement process, which is required by the Act to be complied with in the making of a wide variety of statutory rules. As will be seen, the requirements of this process are far more specific (and therefore practically more onerous) than the vague command of guideline 3 (e) that there be adequate consultation. In outlining the regulatory impact statement process as provided for in the Act, it may be acknowledged at the outset that the legislative machinery is extremely complex, and that many of the relevant provisions are at best indifferently drafted. Nevertheless, these provisions form the heart of the consultative scheme erected by the Act.

[11] Infra pp. 103-4.

An appropriate point to begin is to inquire precisely what is a regulatory impact statement. The answer to this question is determined by the operation of sub-section 12 (2) in conjunction with Schedule 3 of the Act. Sub-section 12 (2) baldly provides that "Schedule 3 has effect with regard to regulatory impact statements." Schedule 3 then sets out in some detail the nature of such a statement.

Specifically, Schedule 3 requires that an impact statement be composed of four parts. The first of these involves a statement of the objectives of the proposed statutory rule.[12] Secondly, an impact statement must identify the different means by which these objectives may be achieved.[13] Thirdly, an assessment of the financial and social costs and benefits of each "alternative" must be provided, including an assessment as to resource allocation, administration and compliance costs.[14] Finally, an impact statement must contain a summary of any alternatives to the making of a statutory rule, and the reasons why such alternatives have not been considered appropriate.[15]

A number of points may be noted concerning the requirements of Schedule 3 as to the content of a regulatory impact statement. In the first place, the Schedule clearly uses the expression "objectives of a rule" in a wide sense, as denoting the actual policy objectives to be achieved by a proposed rule, rather than in a narrow sense as referring to the technical legislative effect of a rule. Thus, the objective of the *Proscribed Frogs (Cane Toad) Amendment Regulations* may well be the suppression of cane toads in Victoria, but certainly will not be merely "the amendment of the principal regulations".

Secondly, in demanding a cost-benefit analysis of each "alternatively", Schedule 3 is requiring that such an analysis be carried out in respect of each of the alternative means of achieving the objectives of a rule, which means must have been identified pursuant to paragraph 2 of the Schedule. Obviously, one such alternative will be the policy option embodied in the proposed rule itself, and thus a regulatory impact statement must contain a cost-benefit analysis of the implementation of that policy option, together with an assessment of any alternatives to the taking of such action.

Thirdly, it should be noted that Schedule 3 makes it clear that the cost-benefit analysis which it requires is not confined to "economic" and "financial" matters. The Schedule specifically requires that social costs and benefits also be taken into account. Fourthly, the last paragraph of Schedule 3 obviously directs the drafter of a regulatory impact statement to address the question of whether the policy objectives of a proposed statutory rule could be achieved without the intrusion of subordinate legislation, and to provide reasons why such a course of action has not been considered appropriate. The object of this requirement is clearly that of avoiding excessive regulation.

Finally, it may be noted that, to a very large extent, the requirements of Schedule 3 are reflective of some contained in Schedule 2. Thus, when para-

[12] Schedule 3, para. 1.
[13] Schedule 3, para. 2.
[14] Schedule 3, para. 3.
[15] Schedule 3, para. 4.

graph 1 of Schedule 3 requires an identification of objectives, it essentially mirrors guideline 3 (a) of Schedule 2. A similar relationship exists between paragraph 2 (identification of alternatives), paragraph 3 (cost-benefit analysis of alternatives) and paragraph 4 (alternatives to making a statutory rule), and different parts of guideline 3 (c). The effect of this is that, at least in theory, an authority in preparing a regulatory impact statement should be doing little more than recording the results of informed deliberations which it is already required by law to undertake pursuant to Schedule 2.

The basic nature of a regulatory impact statement is thus that of a document providing a cost-benefit analysis of the proposed rule to which it relates. Having stated the purpose of the rule, the statement will outline the "pros and cons" of making such a rule, together with those of possible alternative means of achieving the purpose in question. Two important general points may be made here. The first is that a properly prepared regulatory impact statement should provide any interested person with sufficient information to enable them to form a judgement as to whether the proposed rule is or is not, in whole or in part, an appropriate policy initiative. Secondly, such a statement is, in general terms, evidence that proper procedures have been followed by an authority in determining upon the course of regulatory activity involved, and in particular, is potent evidence of compliance with the relevant procedures of Schedule 2.

Having determined the nature of a regulatory impact statement, it is now possible to consider the use to which such a statement is to be put under the *Subordinate Legislation Act*. This matter is dealt with in sub-section 12 (1) of the Act. That sub-section imposes a number of requirements which are best dealt with sequentially.

Paragraph 12 (1) (a) is a basic notice and comment provision which revolves around the preparation of a regulatory impact statement. Whenever an impact statement is required to be prepared[16] a notice must be published in the Government Gazette, a daily newspaper and any relevant trade or professional journal. This notice must specify the reasons for the proposed statutory rule and the objectives to be achieved;[17] summarize the results of the regulatory impact statement;[18] advise where a copy of the statement may be obtained;[19] and invite public comment and submissions during a period of at least 21 days after the publication of the notice.[20]

Three matters should be noted of this provision. The first, is that the reference to the "reasons" for the proposed statutory rule is very obscure. It may relate to the objectives which it is suggested will be achieved by the proposed rule (in which case it is superfluous), or to the reasons why regulatory as opposed to non-regulatory action has been preferred; which of these interpretations is correct is profoundly unclear. What is clear, of course, is that the

[16] Infra pp. 102-4.
[17] Sub-paragraph 12 (1) (a) (i).
[18] Sub-paragraph 12 (1) (a) (ii).
[19] Sub-paragraph 12 (1) (a) (iii).
[20] Sub-paragraph 12 (1) (a) (iv).

"objectives" of a rule are those broad policy objectives previously considered in relation to the content of regulatory impact statements.

Secondly, a similar degree of vagueness attends the requirement that the "results of the impact statement" be "summarized". What are the "results" of an impact statement? On one level, the self-evident result of an impact statement will always be that the authority in question has decided that the relevant rule should indeed be made, as an impact statement will only be prepared and advertised where an authority believes this to be the case. This fatuous result cannot be that referred to in sub-paragraph 12 (1) (a) (ii). It would therefore appear that what is required is a brief summary of the cost-benefit analysis appearing in the statement, which in real terms is its main "result": at the very least, there will have to be an identification of the major policy alternatives considered, and the chief reasons why that provided for by the rule was considered to be superior. How such a summary is to be achieved within the constraints imposed by the costs of newspaper advertising space is a nice point.

Finally, it should be noted that an authority is obliged to receive submissions and comments for at least three weeks. Of course, the authority may choose to extend this period, and the more significant a proposed rule, the longer one would expect the comment period to be.

Paragraph 12 (1) (b) builds upon the opportunity of public comment provided by sub-paragraph 12 (1) (a) (iv) by requiring the Minister responsible for the administration of the Act under which the proposed statutory rule is to be made to cause all comments and submissions received to be considered before the rule is made. The language "cause to be considered" makes it clear that the Minister need not personally consider such submissions.[21]

Paragraph 12 (1) (c) requires that a copy of a regulatory impact statement be sent to two bodies. The first of these is the Department of Management and Budget, and specifically its Director-General. The purpose behind this requirement is that the Director-General is required under sub-section 13 (4) to assess such statements and to advise as to whether they adequately assess the impact of the rules to which they relate. The second body is the Legal and Constitutional Committee of the Victorian Parliament. The considerable role of this Committee in relation to impact statements is assessed in detail elsewhere in this article.[22] It may be noted at this point, however, that sub-paragraph 12 (1) (d) requires that copies of any comments and submissions received in connection with an impact statement also be forwarded to the Committee.

It is appropriate to pause at this point in order to note the fundamental character of the regulatory impact statement process as it has emerged so

[21] Guideline 7 of Schedule 2 has the effect that where, after the regulatory impact statement process has been completed, the decision has been taken to proceed with the making of a statutory rule, the responsible Minister must insert a notice in a daily newspaper and the Government Gazette. Guideline 8 requires that a similar notice be published where it is decided not to make a rule.

[22] Infra pp. 105-8.

far. Essentially, the process will impose a basic consultative requirement wherever it applies. "Consultation" in relation to a proposed action involves both notice of the proposal concerned and the opportunity to comment upon that proposal.[23] By way of notice, the process ensures that a proposal to make a rule to which it applies will be accompanied by a degree of publicity which it may be hoped would be sufficient to alert at least those sections of the community which would be most affected by the implementation of that proposal. Once a person has become aware of such a proposal, they are then in a position to obtain a copy of the prepared regulatory impact statement. This statement will contain the basic information necessary to enable such persons to critically assess the reasoning behind the proposed rule, and to form a view as to its appropriateness.

By way of comment, the process affords all persons aware of the proposal to make a rule the opportunity to make submissions concerning that proposal, with those making such submissions having had the benefit of the information contained in the regulatory impact statement in formulating their comments. The Minister responsible for the proposed rule is then compelled to cause such comments to be considered. Thus, where the regulatory impact statement process applies, it constitutes a basic notice and comment regime in relation to proposals for the making of statutory rules. The crucial question which remains to be answered concerns the class of proposed statutory rules to which the regulatory impact statement process is applicable.[24]

The applicability of the process is determined by a complex interrelationship between a number of provisions of the Act. The starting point is once again sub-section 11 (1), which provides that the Attorney-General may make guidelines concerning the preparation of statutory rules. As has been seen, no such guidelines have yet been made, and thus those contained in Schedule 2 continue to apply by virtue of sub-section 11 (5). It is guideline 3 (f) of Schedule 2 which in fact has the effect of defining the class of statutory rules which necessitate the preparation of a regulatory impact statement.[25]

Guideline 3 (f) provides as follows:

> "A regulatory impact statement shall be prepared under section 12, unless the proposed statutory rule relates only to matters which:
> (i) Are of a fundamentally declaratory or machinery nature; or
> (ii)Deal with relations, organization or procedures within or as between departments or statutory bodies; and
> (iii)Impose no appreciable burden, cost or disadvantage upon any sector of the public."

Two other guidelines are also relevant here. These are guideline 3A, which effectively exempts from the impact statement process statutory rules increas-

[23] Supra p. 95.

[24] It may also be noted that the impact statement process is also partly deregulatory in nature, as it forces authorities to consider the need for regulation at all.

[25] The requirement that an impact statement be prepared clearly flows from the Schedule 2 guidelines and section 11 which gives them force, and so much is recognized in sub-section 12 (1). This is despite the fact that the Act confusingly refers to impact statements as being prepared "under section 12" in guideline 3 (f).

ing fees and charges (or groups of fees and charges) only to the extent necessary to take account of the annual rate of inflation,[26] and guideline 3B, the thrust of which is to exempt rules of court to the extent that such rules do not deal with the imposition of fees and charges.[27] However, it is guideline 3 (f) which is of crucial importance in determining the class of rules to which the impact statement process applies, and as such this guideline is the lynchpin of that entire process.

A number of points must be made of guideline 3 (f). As a general matter, much of its language is imprecise to the point of vagueness. Words such as "appreciable", "declaratory" and "machinery" convey no immediately obvious meaning, yet on their application turns the efficacy of the entire impact statement process. Also by way of introduction, it may be noted that under guideline 3 (f), the requirement to prepare an impact statement is generally applicable to all statutory rules, and a rule will only evade that requirement if it is exempted by the operation of paragraphs (i), (ii) and (iii), or under guidelines 3A and 3B.[28]

Reasonably certain is the relationship between the exempting paragraphs (i), (ii) and (iii). It is suggested that the use of the word "or" between paragraphs (i) and (ii) and the word "and" between paragraphs (ii) and (iii) makes it clear that in order for a rule to fall outside the regulatory impact statement process it must come within either paragraph (i) or (ii), but in either case must be characterizable as imposing no "appreciable burden, cost or disadvantage" within the meaning of paragraph (iii).[29] Thus, it will ultimately be the fact of whether a rule has the effect specified in paragraph (iii) that will determine the applicability of the impact statement process to that rule. Consequently, the meaning of the phrase "appreciable burden, cost or disadvantage" (frequently referred to by those concerned with the operation of the Act as an "abcod") is one of the most important questions concerning the consultative requirements of the Act.

Unfortunately, the exact significance of the phrase is not entirely free from doubt. While few qualms could be felt towards the inclusion of the reasonably straightforward terms "burden", "cost" and "disadvantage", the word

[26] Guideline 3A provides:
"(a) A regulatory impact statement must be prepared under section 12, unless the proposed statutory rule relates only to matters which are an increase in fees and charges within a percentage increase in the Budget papers for the financial year in which the proposed statutory rule is intended to be made.
(b) Where under a statutory rule it is proposed to increase a group of fees and charges the percentage increase of the fees and charges may be calculated by reference to the expected increase in total revenue resulting only from the increase to the fees and charges in that group."

[27] Guideline 3B provides:
"A regulatory impact statement must be prepared under section 12 unless the proposed statutory rule is –
(a) a rule, order, form, scale or regulation which relates to any court or to the practice or costs of any court, and
(b) does not relate to court fees and charges".

[28] Or if a Premier's Certificate is granted in connection with the making of that rule, as to which see infra pp. 104-5.

[29] The interpretation placed upon guideline 3 (f) on this point in practice is considered infra pp. 109, 128.

"appreciable" is extraordinarily broad. On a literal interpretation, something is "appreciable" when it is of sufficient moment to be "appreciated", in other words, when it is not so absolutely insignificant as to be something which would not be noticed. Under such an analysis, it is difficult to imagine a burden or cost which would not be appreciable. Perhaps a more common sense approach to the expression is to regard it as comprehending costs, burdens or disadvantages which would be of at least some significance to the sector of the public to which they would attach. It should also be appreciated here that through the operation of guideline 1, a rule which imposes an appreciable social (as opposed to an economic or financial) burden, cost or disadvantage will also fall outside paragraph (iii), and thus be subject to the preparation of a regulatory impact statement.

A final matter which may be noticed in connection with the impact statement process is the potential difficulty posed by rules in place before the commencement of the *Subordinate Legislation (Review and Revocation) Act* which impose an appreciable burden, cost or disadvantage on a section of the public. The difficulty here is that without special provision being made in the Act, such rules would (on the assumption that they were not thereafter amended) never become subject to the regulatory impact statement process, regardless of their impact upon the public.

This difficulty is in fact resolved by section 3A of the Act, the so-called "sunset" provision. One effect of section 3A is that all statutory rules made before 1 July 1982 will be progressively revoked automatically, so that none will be in force (unless remade) after 30 June 1992.[30] Of course, if such a statutory rule is remade, and imposes an appreciable burden on a section of the public, the preparation of an impact statement will be required. In the case of rules made after I July 1982, section 3A has the effect that all such rules are automatically revoked ten years after the day upon which they came into operation.[31] Once again, if it is proposed to remake such a rule, and if that rule imposes an appreciable burden, an impact statement must be prepared. Thus, not only will every rule which imposes an appreciable burden, cost or disadvantage upon a sector of the public eventually become subject to the requirement that an impact statement be prepared, but in the case of all such rules a new statement will have to be prepared every ten years, thus ensuring that the impact of the rule concerned is regularly re-assessed.[32]

In concluding this outline of the regulatory impact statement process, it must be emphasized that while the class of rules requiring the preparation of a statement in accordance with the criteria identified above is broad, a variety of exempt classes of rules exist. Those which arise by virtue of paragraphs (i), (ii) and (iii) of guideline 3 (f) itself, and guidelines 3A and 3B,

[30] Rules made prior to 1 January 1962 had all been revoked by 1 July 1985 through the operation of paragraph 3A (1) (a) of the *Subordinate Legislation Act*, and the *Subordinate Legislation (Revocation) Act* 1984. Rules made between 1 January 1962 and 1 January 1972 were revoked on 30 June 1988 (paragraph 3A (1) (b). Rules made between 1 January 1972 and 1 July 1982 will be revoked on 30 June 1992 (paragraph 3A (a) (c)).

[31] Paragraph 3A (1) (d).

[32] Quite apart from its relationship with the impact statement process, section 3A is clearly a deregulatory provision, which forces authorities to regularly reassess the need for regulation.

have already been noticed. However, a further class of exempt rules is apparently[33] created by section 13 (3), which has the effect that a regulatory impact statement need not be prepared in connection with a rule where the Premier certifies in writing that the special circumstances of the case are such that it is not in the "public interest" that the regulatory impact procedures be followed.[34] The apparent intention behind this provision is to enable these procedures to be dispensed with in circumstances where some special urgency attends the making of a rule, and the public interest would therefore be harmed by the delay involved in following the procedures of the Act.[35]

Having outlined the consultative requirements of the *Subordinate Legislation Act*, it remains to consider the mechanism for their enforcement. Clearly, provisions demanding consultation are laudable, but unless backed by some means of enforcement would be open to the accusation of being merely pious expressions of good intention. In fact, the consultative requirements of the Act are backed by a quite complex system designed to ensure compliance.

This system is centred upon the Legal and Constitutional Committee, a Joint Investigatory Committee of the Victorian Parliament constituted under the *Parliamentary Committees Act* 1958. Under that Act, the Committee is composed of twelve members, drawn equally from each House of the Victorian Parliament. By inflexible custom, Joint Investigatory Committees are all-party committees, with numbers being evenly divided between Government and Opposition.

Sub-section 14 (1) of the *Subordinate Legislation Act* gives to the Committee the power to report to Parliament in respect of a statutory rule on a wide variety of grounds. Sub-section 14 (2) sets out the recommendations which the Committee can make to Parliament in such a report. These are that the rule be disallowed in whole or in part,[36] or that it be amended as suggested in the report.[37] Under section 6 of the Act, where Parliament is in receipt of such a report, a resolution may be passed by *both* Houses of Parliament[38] disallowing the rule in question.[39] Under sub-section 6A (1), disallowance has the same effect as revocation of the rule. The two most important points to be grasped here are that Parliament's power to take action concerning a rule on the basis of one of the grounds set out in sub-section 14 (1) is dependent upon the receipt of an adverse report from the Legal and

[33] Some doubt might be expressed as to whether a Premier's Certificate does indeed dispense with the requirement that an impact statement be prepared: see infra pp. 132-3.

[34] Sub-section 13 (1). Sub-section 13 (2) requires that such a certificate be submitted with the proposed rule when it is presented for making by the Governor in Council.

[35] *Deregulation Report*, 347.

[36] Sub-paragraph 14 (2) (a) (i).

[37] Sub-paragraph 14 (2) (a) (i).

[38] Strict time limits are imposed upon the giving of notice of such a resolution and its passage by sub-section 6 (2). Notice must be given within eighteen sitting days of the tabling of the rule in the house in question, and the motion must be passed within twelve sitting days.

[39] It would seem that the combined effect of sub-sections 6 (1), 6 (2A) and 14 (2) is that Parliament may also give effect to a recommendation for partial disallowance or amendment.

Constitutional Committee,[40] and that a resolution of *each* House of Parliament is required before a rule may be disallowed in whole or in part or amended.[41]

A further, novel power possessed by the Committee is that conferred by sub-section 6 (2B). This enables the Committee to propose the suspension of a statutory rule where it is of the opinion that this would be required in the interests of natural justice pending consideration of the rule by Parliament. Under sub-section 6 (2C), such a proposal takes effect after seven days, unless the Governor in Council, acting on the advise of the responsible Minister, vetoes the suspension by Order in Council published in the Government Gazette.[42] This power of suspension is a useful device where the Committee has formed an adverse opinion of a rule, but that opinion will not come before Parliament for some time because it is not sitting.

As stated above, sub-section 14 (1) contains a number of grounds upon which the Legal and Constitutional Committee can report and recommend in respect of a rule to Parliament. As regards enforcement of the consultative procedures of the Act, the crucial ground is that set out in paragraph 14 (1) (j). This provides that the Committee may report to Parliament where it considers that a rule 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;"

It follows from this that a failure to undertake adequate consultation (a breach of guideline 3 (e)), a failure to prepare an impact statement where the preparation of such a statement is required (a breach of guideline 3 (f)), the preparation of a deficient impact statement (a breach of Schedule 3 and thereby sub-section 12 (2)), or a failure to comply with the notice, publicity and comment procedures concerning impact statements (a breach of section 12) will all render the rule concerned subject to report and recommendation by the Committee, and to consequent disallowance or other appropriate action by Parliament.

There is also one other ground contained in sub-section 14 (1) which is at least indirectly relevant in the present context. This is the very curious one contained in paragraph 14 (1) (k), which provides that the Committee may report in respect of a rule which it considers 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 . . ."

This paragraph would seem to enable the Committee to report adversely upon a rule purely as a matter of policy. Such action would be most likely

[40] With the very limited exception that Parliament may act on its own initiative and on any grounds if the Act under which a rule is made confers a special power of disallowance: paragraph 6 (1) (a).

[41] This is unusual in Australia: see Campbell, E., *Rules of Court* (Sydney, Law Book Co., 1985) p.206. For example, in the Commonwealth sphere, subordinate legislation cannot survive the disapproval of either House: section 48 *Acts Interpretation Act* 1901.

[42] Sub-section 6 (2D).

to be taken on the basis of an impact statement prepared in connection with a rule and comments received upon that statement, and so the existence of paragraph 14 (1) (k) is noticed here.

Thus, the vital factor in relation to enforcement of the consultative procedures of the Act is that a breach of those procedures will trigger the powers of the Legal and Constitutional Committee, and thus expose a rule to the possibility of action by Parliament: enforcement is, in a word, Parliamentary. Accordingly, it is upon the Parliamentary Committee that the primary responsibility devolves for the detection of relevant breaches.

A number of obvious points emerge in relation to the system of enforcement outlined above. The first, is that the role of the Legal and Constitutional Committee is critical: unless it diligently discharges its functions, there is every possibility that the consultative requirements of the Act could be ignored whenever this proved convenient. Secondly, the recommendatory powers of the Committee are extensive. It may recommend not only disallowance, but also partial disallowance and amendment. Its further power of suspension subject to gubernatorial veto is also significant.

Beside the wide recommendatory powers of the Committee, however, must be set the fact that no recommendation of the Committee will be implemented without the concurrence of both Houses of Parliament. This requirement that each House act against a rule is unusual in Australia, and raises the obvious danger that the government-dominated Legislative Assembly will refuse to take action in relation to a politically sensitive rule, regardless of the strength of any report against it. This matter is taken up elsewhere in this article.[43]

Finally, it may be noted here that detection of some breaches of consultative procedure by the Committee will inevitably be easier than others. Thus, a failure to prepare the requisite impact statement will be fairly readily apparent simply through an application of guideline 3 (f), whatever legal difficulties might be involved in the interpretation of that provision. Likewise, a deficient impact statement should be identifiable upon close scrutiny, particularly when it is recalled that the Committee receives copies of all comments and submissions[44] (which are highly likely to be critical of a deficient statement), as well as the certificate of the Director-General of the Department of Management and Budget as to the adequacy of the impact assessment contained in the statement.[45] However, general deficiencies in consultation, involving a breach of guideline 3 (e), are likely to be far less obvious, and unless brought to the Committee's attention through comments received in connection with an impact statement, or communications by interested members of the public, may well pass undetected: there is nothing in the Act requiring that an authority furnish the Committee with details of its consultative program in respect of a rule.

This concludes an outline of the consultative requirements of the Subordinate Legislation Act as they are set out in that Act. It is now possible to

[43] Infra pp. 124-5.
[44] Paragraph 12 (1) (d).
[45] Sub-paragraph 12 (1) (c) (i); sub-section 13 (4).

pass to a consideration of the practical operation of those requirements during the period in which they have been in force.

OPERATION OF CONSULTATIVE REQUIREMENTS OF THE SUBORDINATE LEGISLATION ACT

In considering the practical operation of the consultative requirements of the Act, this article will concentrate upon three critical matters: the regulatory impact statement process; the issue of Premier's certificates; and the functioning of the Legal and Constitutional Committee as a mechanism of scrutiny and enforcement. The information and statistics which provide the basis for this analysis have been drawn from the records of the Legal and Constitutional Committee. As that body lies at the centre of the consultative scheme of the Act, and considers the compliance of each statutory rule with that scheme, these records are an invaluable resource in determining the operation of the relevant legislative provisions. Indeed, they comprise the only centralized collection of pertinent data.[46]

Before commencing this analysis, some few preliminary points should be made regarding the sample of rules upon which it is based. The consultative provisions of the *Subordinate Legislation Act* took effect upon the commencement of operation of the *Subordinate Legislation (Review and Revocation) Act* on 1 July 1985. All rules made after that date are required to comply with those provisions, and are subject to scrutiny by the Legal and Constitutional Committee on this point. Between 1 July 1985 and 31 December 1985, 162 statutory rules were made. In 1986 and 1987, 400 and 406 statutory rules were made respectively. At the time of writing, the Legal and Constitutional Committee has considered 120 rules made during 1988.[47] Thus, information exists in the form of the records of the Committee concerning the operation of the consultative procedures of the Act in respect of some 1088 rules. It is upon this body of rules that the figures referred to in this article are based.

1. Operation of the Regulatory Impact Statement Process

The initial matter to be addressed here is the application of the criteria by which it is determined that a statutory rule does or does not necessitate the preparation of an impact statement. It will be recalled that the most basic of these criteria is set out in guideline 3 (f), which provides that a statement must be prepared unless a rule is "declaratory or machinery", or relates (loosely) to matters of internal government organization, and imposes no

[46] For this reason, the operation of the general requirement of consultation will not be addressed in detail. Unlike the other matters considered here, no records relating to this matter are kept by the Legal and Constitutional Committee, and there has thus been no centralized collation of relevant data. As to the difficulties posed by the enforcement of the general consultation requirement, see infra p.132.

[47] December, 1988: scrutiny was interrupted by the 1988 Victorian election, which automatically terminated the membership of the Committee, pending appointment of members by the new Parliament.

"appreciable burden, cost or disadvantage upon any sector of the public".[48] This provision might charitably be described as "vague", and its precise operation clearly depends greatly upon the way in which it is interpreted. In particular, much will depend upon the perceived relationship between paragraphs (i), (ii) and (iii) – is a rule automatically exempted because it is (i) machinery or (ii) governmental, or must it in either case also (iii) impose no appreciable burden – and also upon the precise meaning of that most nebulous phrase "appreciable burden, cost or disadvantage": at what point is the adverse impact of a rule "appreciable"?

In this context, it must be remembered that the primary responsibility for the interpretation of guideline 3 (f) in practical terms rests not with the courts, but with the Legal and Constitutional Committee. It is the Committee which is responsible to Parliament for the scrutiny of rules in order to ensure that the requirements of the impact statement process are met, and it is the Committee which can trigger the power of Parliamentary disallowance in the event that those requirements are breached. Thus, from the point of view both of those who make and those who are affected by statutory rules, what the Committee thinks is meant by the words of guideline 3 (f) is likely to be of pre-eminent importance, as that view will be backed by the threat of imminent adverse report and consequent disallowance.[49]

In fact, the Committee has wasted little time in enunciating its view of guideline 3 (f). In its *First Report on Subordinate Legislation*[50] the Committee disposed of probably the most important threshold issue concerning the guideline, by determining (after advice from the Solicitor-General and Chief Parliamentary Counsel) that a rule was not exempt from the preparation of a regulatory impact statement merely because it was "machinery or declaratory" or "governmental" in nature: before a rule is immune from the general requirement that an impact statement be prepared, it must in any case impose no appreciable burden, cost or disadvantage upon any sector of the public.[51]

As a result of this early determination by the Committee, it is this concept of "appreciable burden" which has become the fundamental yardstick in determining the applicability of the impact statement process. While it is still true to say that a rule must be characterizable as "machinery or declaratory" or "governmental" in order that it may escape the process, the starting point must be to inquire whether it imposes an appreciable burden, cost or disadvantage, in which case the requirement that an impact statement be prepared inevitably follows.[52] All this is subject, of course, to the specific exemption of certain classes of rules by Guidelines 3A and 3B.[53]

[48] Of course, guidelines 3A and 3B specifically exempt certain other classes of rule: see supra p.102.

[49] A recommendation for disallowance by the Committee will ordinarily meet with Parliamentary approval: see infra p.122. The question of whether a breach of consultative requirements may lead to judicial review is considered infra pp.136-7.

[50] Legal and Constitutional Committee, *First Report on Subordinate Legislation* (April, 1986): hereafter referred to as *First Report*.

[51] Id. p.2.

[52] Unless a Premier's certificate has been granted under sub-section 12 (3).

[53] Supra, p.102.

The Committee's reports reveal that it has not attempted to enunciate a comprehensive definition of the phrase "appreciable burden, cost or disadvantage", preferring to adopt what is essentially a case-by-case approach. Nevertheless, it has made certain important statements of principle. The first of these concerns the so-called zero impact argument. It was suggested by some authorities early in the operation of the consultative requirements of the Act that an impact statement need not be prepared where a new statutory rule merely re-imposed costs or burdens which had previously been imposed by another statutory rule.[54] This situation would most commonly arise where a new statutory rule revoked a rule or rules, and then proceeded to re-make the relevant provisions with comparatively minor amendments, a reasonably frequent occurrence. The argument was that as the burdens in question had always existed, and were merely being re-imposed, the "net" impact of the rule was zero, and therefore no impact statement was required.

This argument was decisively rejected by the Committee in its *First Report*, where it stated that in determining whether a rule imposed an appreciable burden, cost or disadvantage, the effect of that rule was to be assessed entirely without reference to that of any previously existing rule.[55] As the Committee correctly pointed out, were this course not to be followed, the automatic revocation of rules under section 3A would not have the effect that all rules imposing burdens eventually became subject to the impact statement process, for so long as those rules were re-made in their existing form, they would be regarded as imposing no burden whatsoever. Thus, in order to ensure that rules are regularly exposed to the requirement of public justification and consideration embodied in the impact statement process, the Committee rejected the argument based on zero impact.

The Committee also early rejected the argument that the only burdens, costs, and disadvantages which are relevant for the purposes of guideline 3 (f) are those of an economic or financial nature. In determining that a rule which imposed a purely social burden required the preparation of a regulatory impact statement, the Committee pointed to guideline 1 of Schedule 2, which provides that wherever costs, benefits, advantages or disadvantages are referred to in the guidelines, social costs, benefits and disadvantages shall be given due consideration.[56] The effect of this decision is that a rule need not impose an actual financial burden before it becomes subject to the impact statement process: the imposition of an entirely social burden will suffice.

While the Committee has made no attempt to define exhaustively the allied phrase "sector of the public", it is clear that it takes a broad view of that term, and that a rule which imposes an appreciable burden upon even a very small group of people will necessitate the preparation of a regulatory impact statement. Thus, for example, the Committee was prepared to regard the collectors of deactivated machine-guns as comprising a sector of the public for the purposes of guideline 3 (f).[57] It is also clear that the fact that all

[54] Id. p.8.
[55] Ibid.
[56] Id. pp.12-14.
[57] Id. p.3.

members of an affected class are affected by virtue of their employment by a government authority – as where a rule effects disadvantageous changes in the superannuation scheme of a statutory body – will not prevent the class in question from being viewed as a sector of the public.[58] Particular industries, such as the tobacco industry,[59] have also been seen as constituting sectors of the public.

It is instructive at this point to list by way of example some few of the rules which the Committee has regarded as imposing an "appreciable burden, cost or disadvantage upon a sector of the public", and thus requiring the preparation of an impact statement. These relate to a wide variety of matters, and include rules increasing fees for the registration of certain food premises;[60] setting fees in respect of the adoption of children from overseas;[61] preventing the use of certain radiographical apparatus in a particular category of private hospital;[62] setting aside parts of a lake for the exclusive use of certain groups;[63] altering the health warnings to appear on packages of tobacco;[64] exempting certain authorities from freedom of information requests;[65] altering superannuation schemes of statutory authorities;[66] and widening the category of deaths reportable under the Coroners Act 1985.[67] It would be difficult to imagine a more diverse group of statutory rules, and their presence together strikingly illustrates the range of rules in connection with which the preparation of a regulatory impact statement will be required under guideline 3 (f), in accordance with the interpretation of that guideline by the Legal and Constitutional Committee.

One question which logically arises here is as to the proportion of statutory rules which are thus regarded by the Committee as being subject to the impact statement process.[68] In 1985, 22 rules or 13.6% of the 162 made (after the commencement of the relevant provisions) were so regarded. In 1986 the figure was 87 out of 400 (21.7%); in 1987, 98 out of 406 (24. 1%); and in 1988 (to date) 29 out of 120 (24.2%). It would thus seem a reasonable approximation to say that between one in four and one in five rules will necessitate the preparation of a regulatory impact statement under the

[58] Id. pp.4-7. The rule concerned here altered the superannuation scheme of the Port of Melbourne Authority, a statutory body with some hundreds of employees. The Committee specifically rejected the argument that the Authority's employees did not constitute a sector of the public.

[59] Legal and Constitutional Committee, *Fourth Report on Subordinate Legislation* (September, 1986) 4: hereafter referred to as *Fourth Report*.

[60] *First Report* 10.

[61] Legal and Constitutional Committee, *Third Report on Subordinate Legislation* (May, 1986) 7-8: hereafter referred to as *Third Report*.

[62] *First Report* 11.

[63] Id. 12-13.

[64] *Fourth Report* 4.

[65] Legal and Constitutional Committee, *Seventh Report on Subordinate Legislation* (November, 1986) 4-5: hereafter referred to as *Seventh Report*.

[66] Legal and Constitutional Committee, *Eighth Report on Subordinate Legislation* 3-4: hereafter referred to as *Eighth Report*.

[67] Legal and Constitutional Committee, *Sixth Report on Subordinate Legislation* (November 1986) 3-6: hereafter referred to as *Sixth Report*.

[68] Rules which are the subject of a Premier's certificate are included here, as such rules fall within the impact statement process, but are exempted from compliance.

Committee's present approach. The question of whether this is an excessive proportion is considered elsewhere in this article.[69] Two further matters may here be noted in connection with the above figures. The first is that the number of rules requiring an impact statement in 1988 may have been increased by the fact that 30 June 1988 was the automatic revocation date for rules made between 1 January 1962 and 1 January 1972 under paragraph 3A (1) (c), thus necessitating the re-making of some long-standing rules. The second is that the exceptionally low figure for 1985 is probably due at least partly to logistical difficulties experienced by the Committee in the initial setting up of its system of scrutiny.

It is apparent from the above figures that some three-quarters of all statutory rules are exempted, on one basis or another, from the requirement that an impact statement be prepared. It is interesting to note the numbers of rules falling within each exempt category.[70] In general terms, rather over one-half of exempted rules fall outside the regulatory impact statement process on the basis that they impose no appreciable burden and are "machinery or declaratory" within the meaning of paragraph (i) of guideline 3 (f). The figures in 1985 were 102 rules out of 140 (72.8%); in 1986, 160 out of 313 rules (51.1%); in 1987, 181 out of 308 rules (58.8%); and in 1988, 47 out of 91 rules (51.6%).

Of the remaining exempted rules, the vast majority since 1987 has been comprised of rules exempted under guideline 3A, which (loosely speaking) excludes rules increasing fees in line with inflation. Thus, in 1985, 26 rules (18.6% of those exempted) fell within guideline 3A; in 1986, 124 (39.6%); in 1987, 110 (35.7%); and in 1988, 40 rules (44%). Comparatively few rules were exempted under paragraph (ii) of guideline 3 (f) (internal government organization) and guideline 3B (court rules). The relevant figures are: in 1985, respectively, 1 rule (.07% of exempted rules) and 11 rules (11%); in 1986, 37 rules (11.8%) and 24 rules (7.7%); in 1987, 15 rules (4.9%) and 20 rules (6.5%); and in 1988, 1 rule (1.1%) and 3 rules (2.5%). Thus, the overwhelming majority of exempted rules in a given year will be comprised of those which are machinery or declaratory (and which impose no appreciable burden), and those which increase fees by no more than the specified annual rate of inflation.

To what extent is the requirement that a regulatory impact statement be prepared complied with by responsible authorities? The short answer would seem to be "to an increasing extent." In 1985, out of the 12 rules which the Committee believed fell within the regulatory impact statement process, and which were not the subject of a Premier's certificate, only one was accompanied by the preparation of such a statement, representing a compliance rate of only 8.3%. In response to this situation, some 8 of the 12 non-complying rules were recommended for disallowance by the Committee, and all were duly disallowed by Parliament, an extraordinary occurrence when it is remembered that the exercise of the power of disallowance has traditionally been

[69] Infra p.127.
[70] Excluding those exempted by way of Premier's certificate, as to which see infra pp.118-9.

very rare indeed.[71] Three other rules were the subject of adverse report to Parliament in connection with the failure to prepare an impact statement, but disallowance was not recommended.

In 1986, of the 56 rules determined by the Committee to fall within the impact statement process, and in connection with which no Premier's certificate was issued, 22 did in fact comply with that requirement. While a compliance rate of 39.2% can hardly be regarded with satisfaction, it clearly represents a dramatic improvement over the previous year's position. Once again, the Victorian Parliament reacted with considerable firmness to non-compliance with the regulatory impact statement process: 6 rules were recommended for disallowance by the Legal and Constitutional Committee for their failure in this regard, and 4 were disallowed. The remaining 2 rules were the subject of corrective action by the authority concerned. Four further rules were formally reported to Parliament on the basis that the required impact statement had not been prepared, but disallowance was not recommended.

The following year sees a marked improvement in the compliance rate with the impact statement process. In 1987, of the 72 rules requiring the preparation of such a statement, where no Premier's certificate was issued, 63 met that requirement, a compliance rate of 87.5%. Again, while it is obvious that a significant number of rules still failed to comply with the requirements of the Act concerning impact statements, it is equally obvious that the 1987 compliance rate represents a vast improvement over that of 1985 and 1986. In line with this improvement no rules were subject to formal report to Parliament by the Committee in connection with the failure to prepare a regulatory impact statement.[72] A similar picture appears from the figures for 1988, where of the 24 rules requiring the preparation of an impact statement, 19 (79.2%) have complied with that requirement. Again, no rules have been reported to Parliament in connection with the failure to prepare a regulatory impact statement.

Drawing upon the above figures, it is possible to make at least two important points. The first is that initial compliance by authorities with the impact statement process was clearly woeful, to the point where one is tempted to believe that many authorities would, if possible, have chosen simply to ignore the relevant requirements of the *Subordinate Legislation Act*. Indeed, even after over three years of the operation of those requirements, one-fifth of the rules requiring the preparation of an impact statement continue to be made in breach of the law. This is hardly a tribute to Victorian Government authorities.

Secondly, however, the steady growth in the compliance rate is nonetheless encouraging. Three and a half years after the commencement of the *Subordinate Legislation (Review and Revocation) Act*, nearly four-fifths of those statutory rules which impose an appreciable burden, cost or disadvan-

[71] Pearce, D., *Delegated Legislation in Australia and New Zealand* (Sydney, Butterworths, 1988) pp.49-51.

[72] It may be noted here that it is possible for the committee to take other action than reporting a rule to parliament where a breach of the *Subordinate Legislation Act* or its guidelines has occurred. This question is considered infra pp.121-2.

tage (with the exception of those in connection with which a Premier's certificate has been granted) are subjected to regulatory impact analysis.

Particularly in light of the virtual non-compliance with the impact statement process in the early stages of its operation, it is difficult to believe that the compliance rate would now be so high were it not for the resolute action of the Legal and Constitutional Committee in identifying deficient rules and recommending them for disallowance. Also crucial here is the fact that such a recommendation is generally acted upon by the Victorian Parliament – of the 14 rules recommended for disallowance for failure to prepare a regulatory impact statement, 12 (85.7%) were in fact disallowed, while the remaining 2 were the subject of corrective action by the authority concerned. The threat of disallowance, or even of public criticism by a widely respected Parliamentary Committee, is a potent incentive to an authority to comply with the requirement that an impact statement be prepared. That threat was made very real by the disallowance of some ten 1985 and 1986 rules during the period May – December 1986. Of course, authorities also necessarily take time to adapt to new procedures, and a significant proportion of the increased compliance rate is doubtless due to the gradual familiarization of authorities with the requirements of the Subordinate Legislation Act – a process made all the more imperative by the activities of the Parliamentary Committee.

As regards the content of regulatory impact statements, it may again be noted that the fundamental responsibility for the interpretation of the requirements set out in Schedule 3 rests with the Legal and Conititutional Committee – just as it can act to secure the disallowance of a rule where the required impact statement has not been prepared, so it can take action against a rule in connection with which a defective statement has been prepared.

However, the Committee has not expressed its views concerning the requirements of Schedule 3 in the same degree of detail which has attended its statements regarding the operation of guideline 3 (f). The most detailed consideration by the Committee of the requirements relating to the contents of regulatory impact statements occurs in its *Fourth Report*, where a statutory rule providing for the imposition of more stringent health warnings on tobacco packages was recommended for disallowance on the basis of what was clearly a grossly deficient impact statement.[73] In its report, the Committee made two important points concerning the contents of impact statements.

The first related to the requirement of paragraph I of Schedule 3, that a statement of the "objectives of the proposed statutory rule" be given. Here, the Committee adopted the view expressed earlier in this article, that the objectives referred to are the broad policy objectives to be achieved by the statutory rule, and not some narrow description of the legislative change to be effected thereby.[74]

[73] A copy of this impact statement is reproduced in an Appendix to the *Fourth Report* 23-6. The rule was ultimately not disallowed, as it was voluntarily revoked by the department concerned before the Parliament had the opportunity to consider the report of the Committee. The operation of the rule had already been suspended pursuant to sub-section 6 (2C).

[74] Id. pp.6-7.

In the case of the statutory rule which formed the subject of the *Fourth Report*, the objective upon which the accompanying impact statement had proceeded was essentially that of "prescribing new health warnings for tobacco packages". The Committee firmly rejected this exceedingly narrow statement of objectives, and found that a proper formulation would have been some variation of "the increasing of public awareness of the health effects of smoking tobacco."[75] The Committee noted that once an impact statement had identified an invalid set of objectives, it was quite impossible for that statement to comply with the further requirements of Schedule 3 that alternative means of achieving the (true) objectives of the statutory rule be identified, and subjected to cost benefit analysis.[76] The Committee concluded that, in the circumstances of the case before it, the purported "impact statement" was in fact no such thing, and that the rule should be disallowed.[77] Thus, the *Fourth Report* clearly establishes both that an impact statement must include an identification of the broad policy objectives of the relevant rule, and that a statement which is deficient in this respect will be regarded as irredeemably flawed.

The second point of general importance made by the Committee in the *Fourth Report* concerned the broad approach to be adopted by authorities in drawing up impact statements. The Committee was at pains to stress that the preparation of a complex economic document was not necessary. It stated:

> The *Subordinate Legislation Act* does not compel the preparation of an elaborate economic thesis in connection with every statutory rule which necessitates the preparation of a regulatory impact statement; it merely requires the writing of a common sense document which adequately addresses the issues raised in Schedule 3. Of course, the greater the impact of a given statutory rule, the more careful and detailed such an assessment would need to be."[78]

Thus, the Committee's approach to impact statements, while properly rigorous, is not excessively pedantic. It is clear that what is required is a document that will allow ordinary members of the public to intelligently judge the merits of a proposal, rather than one which is preeminently a work of economic sophistication. This attitude is to some extent born out by the fact that the Committee has only reported adversely upon a rule on the basis of a deficient impact statement on three occasions,[79] and has only once recommended disallowance specifically upon this ground. The Committee thus adopts a far harsher stance where no attempt has been made to comply with the impact statement process, than where such an attempt has been made, but proved lacking.

The Committee has (probably wisely) never attempted to authoritatively lay down what is involved in an identification of alternative means of achieving the objectives of a statutory rule (paragraph 2 of Schedule 3), although

[75] Ibid.
[76] Ibid.
[77] Id. pp.14-15, 18.
[78] Id. pp.12-13.
[79] *Third Report* 7-8; *Fourth Report*; *Eleventh Report* 12.

it would appear that the possibility of self-regulation should always be at least addressed,[80] and that the enactment of primary legislation by Parliament itself may sometimes be viewed as a relevant alternative.[81]

Nor has the Committee set out in detail the approach to be followed in assessing the costs and benefits of each alternative, though some guidance may be drawn from the specific criticisms levelled at the impact statement which was the subject of the *Fourth Report*.[82] On the basis of these criticisms, it would at least appear that where financial or economic costs are identified, these costs will have to be quantified (so far as is possible) in monetary terms; that statistical evidence may well be indispensible to a proper cost-benefit analysis of particular alternatives; and that a wide range of costs and benefits, tangible and intangible, direct and indirect, social and economic, will be relevant.[83] Thus, in the case of a rule imposing more stringent health warnings on tobacco products, an analysis would apparently have to be made of such diverse matters as the effect of the rule upon employment in the tobacco industry, upon the livelihood of tobacco growers, and upon State revenues, to name just a few.[84]

One question which necessarily arises in the context of any assessment of the regulatory impact statement process concerns the degree to which the preparation and publication of such a statement does indeed attract submissions from interested members of the public. While the receipt of submissions cannot be regarded as an absolute determinant of the success or otherwise of the process – many rules so publicized may be entirely uncontroversial and so attract little public comment – it is clearly a matter of some interest to consider the public response to the major mechanism of consultation provided for in the Act.

In general terms, it is clear both that the majority of impact statements prepared will be the subject of some (though often limited) public comment, and that this proportion of statements in connection with which submissions are received is increasing. In 1985, the one impact statement which was prepared attracted no submissions. In 1986, of 22 impact statements, 14 (63.6%) attracted submissions; in 1987, the figure was 42 out of 63 (66.7%); and in 1988, 14 out of 19 impact statements (73.7%) were the subject of at least one submission. Thus, it would appear that as the regulatory impact statement process becomes increasingly established, so the rate of public response improves.

The numbers of submissions received in connection with an impact statement vary widely from rule to rule. Obviously, the more controversial the policy option represented by the rule, the more probable it is that a large number of submissions will be received. Thus, in the case of some, comparatively "unexciting" rules, no submissions, or only one or two may be

[80] *Fourth Report* 8-9.
[81] *Eleventh Report* 12.
[82] *Fourth Report* 10-11.
[83] Ibid.
[84] Ibid.

received. In the case of rules which are the subject of real controversy within some section of the community, many submissions may be made, with 58 being the greatest number of submissions so far received in connection with a given impact statement. Overall, the average number of submissions for each impact statement prepared during the years in which the process has been in operation is not extraordinarily high, nor ludicrously low: the figure was 0 in 1985 (no submissions, only one impact statement); 6.3 in 1986 (147 submissions, 22 statements); 2.5 in 1987 (163 submissions, 63 statements); 11 in 1988 (210 submissions, 19 statements).[85]

As to the nature and quality of submissions received, it need hardly be said that these were almost infinitely variable. Submissions may range from, at one extreme, highly professional and lengthy documents produced with extensive advice from both economic and legal experts and submitted on behalf of entire sectors of industry, to short hand-written letters from individual members of the public. Points made in submissions vary, as might be expected, from the highly persuasive to the almost inarticulate.

As regards the question of the proportion of submissions which favour or oppose the making of a rule, or ultimately express no concluded opinion, it may first be noted that, overall, unfavourable submissions received in connection with impact statements in a given year will tend to outnumber those which are favourable, while there is a surprisingly high number of what might be termed "neutral" submissions. Overall, in 1986 of 147 submissions 65 (44.2%) were unfavourable, 19 (13%) were favourable, and 63 (42.8%) were neutral. In 1987, 67 out of 161 submissions (41.6%) were unfavourable, 54 (33.6%) favourable, and 40 (24.8%) neutral. In 1988, of the 210 submissions received, 92 (43.8%) were unfavourable, 24 (11.4%) favourable, and 94 (44.8%) neutral.

A similar picture appears from an examination of submissions received on a rule by rule basis. In 1986, 9 of the 14 rules in connection with which statements were prepared (64.3%) received more submissions which were unfavourable than the total of those which were favourable or neutral; 4 (28.6%) received more which were favourable; and in the case of one rule (7.1%), only neutral submissions were received. In 1987, overall submissions were unfavourable to 20 out of 42 rules (47.6%), favourable to 17 rules (40.5%), while neutral submissions predominated in the case of 5 rules (11.9%). In 1988, the figures were, out of 14 rules, 10 (71.4%), 2 (14.3%) and 2 (14.3%) respectively.

As one purpose of the impact statement process is to provide authorities with information from the public which might prompt the alteration of a proposed statutory rule, it is important to note (so far as is possible) the number of occasions upon which such alterations have been made. While the figures of the Legal and Constitutional Committee may not be comprehen-

[85] This figure is to some extent artificially high, as 47 submissions were received in respect of each of three closely related rules, which really represented one extensive policy initiative. Were these 141 submissions concerning 3 rules to be regarded as 47 submissions concerning 1 rule, the average figure for 1988 would be 6.9.

sive upon this point, it would appear that in 1987, at least 3 rules (13.5% of those in connection with which an impact statement was prepared) were so altered. In 1987, the figure was 7 rules (11.1%), and in 1988 2 rules (10.5%). While not prodigiously high, these figures do reveal that a not insignificant proportion of proposed rules are in fact improved in response to public submissions. It is interesting to note that, when a rule is not altered in response to critical submissions, the authority concerned will frequently go to the trouble of providing an explanation to the Legal and Constitutional Committee why this course was followed. This occurred in the case of 5 of the 14 rules made during 1986 in connection with which submissions were received (35.7%), 15 out of 42 in 1987 (35.7%), and 8 out of 14 in 1988 (57%).

2. Issue of Premier's Certificates

After the above fairly lengthy account of the regulatory impact statement process, the operation of the Premier's certificate may be dealt with comparatively briefly. It will be recalled that the certificate may be issued by the Premier under sub-section 13 (3) whenever the Premier is of the opinion that it is not in the "public interest' that a rule be required to comply with the procedures of sub-section 12 (1). The practical effect of the issue of a certificate is that the rule to which that certificate relates is exempted from the regulatory impact statement process.[86]

The clearest thing about the practical operation of the Premier's certificate is the number of such certificates that have been issued. In 1985, the issue of a Premier's certificate accompanied the making of 10 rules, which represented 6.25% of all rules and a disturbing 45% of rules falling within the impact statement process. In 1986, 31 Premier's certificates were issued in connection with rules making up 7.75% of all rules and 36% of those requiring an impact statement, once again a disturbing figure. The position has improved somewhat in the last two years, however, with 1987 seeing 26 Premier's certificates (6.4% of all rules, 26.5% of those requiring impact statements), and 1988 producing 5 certificates (4.2% of rules generally, 17% of rules requiring statements).

It remains the case, however, that over one in six rules which would otherwise require the preparation of an impact statement are currently exempted through the issue of a Premier's certificate. It is difficult to accept that quite so high a number of rules would properly qualify as "emergencies" requiring to be made in the public interest without delay. This was the view adopted by the Legal and Constitutional Committee in its *Tenth Report on Subordinate Legislation*[87], when it stated that certificates were sometimes being issued not because of the exigencies of time but also:

> "for other reasons including the sensitivity of the issues in the rules or the complexity of the subject matter."[88]

[86] But see infra pp.132-3.
[87] Legal and Constitutional Committee, *Tenth Report on Subordinate Legislation Concerning: Premier's Certificates* (November, 1987).
[88] Id. p.3.

The use of the Premier's certificate for such purposes clearly constitutes an abuse of the power to issue such a certificate, and has the potential to seriously subvert the operation of the impact statement process.

It is not suggested here that Premier's certificates are routinely issued whenever the requirements of the impact statement process appear to be at all onerous. Quite apart from the manifest impropriety of such an approach, it would in fact militate against the interests of the Premier and his officers by encouraging authorities to constantly besiege the Department of Premier and Cabinet with petitions for exempting certificates. Indeed, directives have occasionally left the Premier's office warning authorities that Premier's certificates will not be issued, save in exceptional circumstances. This said, however, it would seem excessively naive to argue with the proposition that if adherence to the regulatory impact statement process would produce a sufficient degree of governmental (and especially political) inconvenience, the issue of a Premier's certificate will be at the very least seriously considered.

It should be noted at this point that while the Premier will always purportedly issue his certificate "in the public interest", he is not required to give any statement of the reasons which underlie his decision. Thus, it will ordinarily be virtually impossible to determine in a given case whether there were or were not considerations which would objectively justify a dispensation from the impact statement process.[89]

The First Appendix to the Legal and Constitutional Committee's *Tenth Report* contains a brief description of the 65 rules in respect of which Premier's certificates had been granted up to 11 November 1987, and while one can all too readily appreciate that many of these rules would have had a significant public impact, one can only attempt to imagine the compelling "public interest" which necessitated their exclusion from the impact statement process.

It remains to observe that there is no particular pattern apparent among the class of rules in respect of which certificates have been issued. Consultation of the First Appendix to the Committee's *Tenth Report* reveals an enormous variety of subordinate legislation, with no linking thread other than that each rule would indeed have imposed an appreciable burden on a sector of the public, and so would have fallen within the requirements of the impact statement process. Deficiencies in the Act as it relates to the issue of Premier's certificates will be considered in the final section of this article.[90]

3. Functioning of the Legal and Constitutional Committee

What is addressed here is the practical operation of the Legal and Con-

[89] On balance, it would seem that the Legal and Constitutional Committee would not have the power to recommend the disallowance of a rule on the basis that a Premier's Certificate had been invalidly issued, and that a breach of the Act was thus involved within the meaning of paragraph 14 (1) (j). Sub-section 12 (3) speaks only of the Premier's "opinion" as to the public interest, and it is difficult to see how the Committee could dispute the formation of such an opinion. However, the intention behind the Act on this point, as revealed in the Committee's own *Report on the Subordinate Legislation (Deregulation) Bill* (September, 1984) 346-7 is obscure.

[90] Infra pp.132-3.

stitutional Committee as a Parliamentary mechanism for the enforcement of the consultative requirements of the *Subordinate Legislation Act*. As has already been seen, the effective functioning of the Committee is of crucial importance in this context.

It is necessary to begin with a brief general account of the internal administrative process by which the Committee seeks to discharge its responsibilities. That process commences when the Committee receives the relevant documentation in connection with the making of a rule. Where a rule has not been the subject of a regulatory impact statement, this documentation will consist merely of the rule in question and (usually) an explanatory memorandum, unless a Premier's certificate has been issued, in which case the practice is that a copy of that certificate will also be sent to the Committee. Where an impact statement has been prepared, a rather more complex set of documents will be received. These will include the impact statement itself (under sub-paragraph 12 (1) (c) (ii)), any submissions made on the impact statement (under paragraph 12 (1) (d)), and the certificates of the Director-General of the Department of Management and Budget and of Chief Parliamentary Counsel (as a matter of invariable practice). It may be noted that, ordinarily, the Committee will receive no document evidencing satisfaction with the wider consultative requirement of guideline 3 (e).

It is worth pausing at this point in order to assess what the Committee will be able to deduce from the documentation before it concerning the compliance or otherwise of a rule with the consultative requirements of the Act. In the first place, it is clear that the Committee will be well able to form at least a prima facie opinion as to whether a rule in connection with which an impact statement has not been prepared should in fact have been accompanied by the making of such a statement. This will simply involve the application of the relevant criteria set out in the guidelines, and as has been seen, the Committee has developed for itself a number of guiding principles in this context. If there is any question as to the practical impact of a rule, this may be resolved with reasonable ease through the making of appropriate inquiries.

Secondly, where a regulatory impact statement has been prepared, the Committee should be in a fair position to judge the adequacy of that statement. Before it will be the statement, the Director-General's certificate (or its absence) and, most importantly, any submissions received in connection with the statement. The submissions in particular will be of great use to the Committee in detecting a statement which does not undertake an adequate impact analysis. Of course, the Committee is also able to rely on its own common sense and general knowledge (and that of its staff): an assessment of a deficient statement by an intelligent layperson will frequently be all that is needed to detect such matters as costs unidentified and alternatives unaddressed. All this is not to suggest that deficient statements never elude the scrutiny of the Committee, particularly where no submissions have been made, but rather that the Committee will generally be in a good position to detect such a statement.

However, it must be appreciated that in the case of the general consultative requirement imposed by guideline 3 (e), the Committee will ordinarily be in no position on the basis of the information before it to form any opinion as to whether that requirement has or has not been met. This is because there is no provision of the Act or guidelines which requires an authority automatically to provide details of consultation to the Committee, and the Committee is not in the practice of demanding that an authority furnish such details.[91] Thus, in ordinary circumstances, the Committee will have no information whatsoever before it concerning the question of whether an adequate consultative program was carried out in respect of a rule, although submissions on an impact statement might coincidentally reveal a deficiency in a particular case. The result of this is that while the Committee has every opportunity to detect a failure to prepare a requisite impact statement, or the preparation of a deficient statement, it will generally be incapable of detecting a breach of the general requirement of consultation. This is a major deficiency in the operation of the Act which is returned to elsewhere in this article.[92]

The Committee's internal procedure for the scrutiny of a rule and its accompanying documentation for compliance with the consultative requirements of the Act is quite complex. After a rule has been received by the Committee's assistant-secretary in charge of subordinate legislation, it will be passed to the subordinate legislation research officer. This person is a qualified lawyer acting under the direction of the Committee's director of research. The research officer will consider the rule and its documentation, and may make inquiries of the relevant department, before forming an opinion whether the consultative requirements have met with compliance.

In the event that the research officer believes that a breach has occurred, the director of research will be alerted, and the offending rule will be placed at the earliest opportunity before the Subordinate Legislation Sub-committee, which (as its name suggests) is a sub-committee of the Legal and Constitutional Committee, and is composed of six members drawn from all parties.[93] The Sub-committee will then form its own views as to whether a breach has occurred. At this stage, the Sub-committee may require that an authority furnish specified information, either in writing or through the appearance of its officers. It may also offer an authority the chance to put forward any information which it believes to be relevant, in either written or oral form. Occasionally, the Sub-committee will afford interested members of the public the opportunity to express their views.

In the event that the Sub-committee is satisfied that a breach has indeed occurred, it has a variety of courses open to it, all of which are discussed

[91] In practical terms, there would be no difficulty in the Committee requiring that it be satisfied of compliance with guideline 3 (f) through the provision of a "consultative return" by a department; and see infra p.132.

[92] Infra p.132.

[93] Interestingly, the combined opposition parties have always had a majority of members on this sub-committee.

in detail below. The most drastic of these involves setting in train the making of a report by the Committee to Parliament recommending the disallowance or amendment of the rule in question. Should the Sub-committee determine on this course, an appropriate draft report will be prepared under the direction of the Committee's director of research. This report must then be adopted by the Sub-committee. Only after this does the full Committee enter the picture, when it considers the report of the Sub-committee, which it is free to accept, reject or amend. In practice, that report is usually accepted (sometimes after amendment), and what is now the report of the Committee is tabled in Parliament to await whatever action that body may see fit.

It is important to appreciate the range of options open to the Committee (and to some extent the Sub-committee) in deciding upon the action to be taken in respect of a rule made in breach of the consultative requirements of the Act. Some of these options flow directly from provisions of the Act itself (and have thus been outlined earlier in this article), while others are more informal and have developed as a result of Committee and Sub-committee practice.

Flowing directly from the Act is the power to recommend disallowance in whole or in part (sub-section 6 (1)), to recommend amendment (sub-paragraph 14 (2) (a) (ii)), and to propose suspension in the interests of natural justice pending consideration of the Committee's report by Parliament (sub-sections 6 (2C)-(2E)). The Committee's less formal options are varied. First, the Committee quite frequently reports to Parliament in respect of a rule which is in breach of the consultative requirements of the Act, and in that report formally reprimands the officers of the authority responsible for the breach, but does not recommend disallowance of the rule in question. Such a reprimand is intended by the Committee both to place on record its disapproval of the action of the relevant authority, and to put that authority on notice that further breaches will not be tolerated.[94]

Secondly, and even further removed from any specific provision of the Act, the Committee (or more usually the Sub-committee) may enter into an agreement with the responsible authority, sometimes at ministerial level, that the offending rule will at a later date be revoked, and remade in full compliance with the applicable consultative procedures. Such a course may be appropriate, for example, where a rule has been made without the requisite impact statement, but the Committee is concerned by the possible consequences of disallowance. The making of such an agreement may or may not be the subject of a formal report to Parliament.[95] Finally, and at the other end of the scale from disallowance, the Sub-committee may decide to informally reprove an authority by letter, without taking any further action. In these circumstances, the matter practically will be dealt with at Sub-committee level without the involvement of the full Committee.

The figures of the Committee show that, while it is prepared to resort to such sanctions as disallowance in defence of the consultative requirements

[94] See e.g. *First Report* 4.
[95] For an example of such a report see *Fifth Report* 3-4.

of the Act, it uses them with considerable restraint. Some of the figures concerning disallowance for breach of consultative requirements have already been given,[96] but may usefully be referred to again. In 1985,[97] out of 12 rules in connection with which there had been a breach of the consultative requirements (7.4% of all rules made, and in each case a failure to prepare the required impact statement), 8 (75%) were recommended for disallowance, and all were duly disallowed. A further 3 (25%) were the subject of formal reprimands contained in reports to Parliament, and one of these was also the subject of a formal agreement to revoke and remake.

In 1986, the files of the Committee show that 36 out of 400 rules (9%) failed to comply with the consultative requirements of the Act. Thirty-four of these cases involved a failure to prepare an impact statement, while two involved deficient statements. Six of the rules in respect of which no impact statement had been prepared were recommended for disallowance, and 4 were disallowed. Corrective action was taken in respect of the remaining two rules by the responsible authority. One of the rules which had been the subject of a faulty impact statement was recommended for suspension and disallowance. It was suspended, and subsequently revoked. Thus, of 36 erring rules, only 7 (19.4%) were recommended for disallowance. A further 4 (11.1%), all involving a failure to prepare an impact statement, were the subject of formal report to Parliament, with the remainder being dealt with informally by the Committee. It may be noted that during 1986, six rules were the subject of an agreement between the Committee and the responsible authority that they be altered, or revoked.[98]

In 1987, 20 out of 406 rules (4.9%) breached the consultative requirements of the Act. Of these, 9 involved a failure to prepare an impact statement, 10 a deficient impact statement, and 1 – uniquely – a failure to adequately consider submissions. Of these rules, only one (in connection with which an inadequate impact statement had been prepared) was the subject of a recommendation for disallowance, and this recommendation was specifically based upon other grounds. None of the rules were formally reported to Parliament, with all (save that previously mentioned) being dealt with informally by the Committee.

In 1988,[99] out of 120 rules, 4 (3.3%) breached the consultative requirements of the Act. The breach in each case concerned a failure to prepare a regulatory impact statement. None of these rules were recommended for disallowance or reported to Parliament.

The above figures provide a number of insights into the Committee's handling of its responsibilities in connection with the enforcement of the consultative requirements of the Act. In the first place, it is quite clear that the

[96] Supra p.113.

[97] It will be recalled that only rules made after 1 July 1985 fell within the consultative requirements introduced by the *Subordinate Legislation (Review and Revocation) Act* 1984.

[98] At the time of writing, figures as to how many of these agreements related to rules which had breached the consultative provisions of the Act (as opposed to rules which were subject to report for other breaches of the Act) are not available.

[99] Up to early December.

Committee is not afraid to recommend disallowance for breach of these requirements: 9 such recommendations in the past three and a half years, some of which have related to rules which were of considerable political sensitivity, comprise eloquent testimony to the Committee's resolve in this regard.

This said, it is equally clear that the Committee does not exercise the power to recommend disallowance in a cavalier fashion, or without regard to the consequences of such action. As the above figures show, in any given year, the Committee will decline to recommend the disallowance of a large number of errant rules. Thus, in 1985, 75% of rules made in breach of the consultative requirements were recommended for disallowance, in 1986 the figure was 19.4%, and in both 1987 and 1988, none of the rules which had breached the consultative requirements of the Act were so recommended. As to the further suggestion above, that the Committee has regard to the practical consequences of disallowance before recommending such action, this is born out by the Committee's reports. On a number of occasions, these reports show the Committee contenting itself with the mere reprimand of an authority specifically on the basis that the consequences of disallowance would be unacceptable.[100] Moreover, on virtually every occasion upon which the Committee has recommended disallowance, it has expressly indicated that it has formed the opinion that such action would not involve excessively onerous consequences.[101]

Further, the Committee has gone to some trouble to develop a flexible range of responses to breaches of the consultative requirements of the Act, which will enable it to deal adequately with those breaches without resorting to the drastic sanction of disallowance. The most obvious examples of this approach are the use of the Committee's power to report to Parliament for the purpose of formally and publicly reprimanding an erring authority, together with the practice of the Committee in entering into agreements with authorities for the revocation and remaking of particular rules. Finally, it should be noted that Parliament will usually respond positively to a recommendation of the Committee for disallowance of a rule on the basis that it has breached a consultative requirement: of the 14 such recommendations which have been made, 12 have been accepted.

Two further issues remain to be considered in relation to the functioning of the Committee. The first concerns the important matter of its reporting practice. On each occasion that the Committee reports to Parliament recommending the disallowance of a rule for breach of a consultative requirement (or for breach of some other requirement of the Act), or formally reprimanding an authority, that report will be published by order of the Parliament, and will be readily available to both government officers and members of the public. These reports form a readily identifiable series, and at the time of writing there have been some twelve reports on subordinate legislation, each bound in a characteristic red cover.

[100] E.g. *First Report* 4; *First Report* 9; *Fifth Report* 2.
[101] E.g. *Second Report* 4; *Fourth Report* 17-18; *Eighth Report* 4.

Whenever such a report concerns the breach of a consultative requirement, it will carefully elaborate the basis upon which the Committee has found that breach to have occurred. Where appropriate, the Committee will make statements of general relevance concerning the principles which it will adopt in the application of particular provisions of the Act and the guidelines.[102] The result of this is that the reports of the Committee effectively constitute a body of precedent for the guidance of government officers in the discharge of their responsibilities under the Act. Anyone seeking the attitude of the Committee, for example, to the class of rules necessitating the preparation of a regulatory impact statement need only consult the Committee's reports to obtain a very considerable degree of guidance.

To this extent, the Committee's operations to some rudimentary extent resemble those of a "court", whereby the formulation of principles and their application in particular instances serve as guiding precedents to those concerned with the operation of the Act, and the Committee's reporting function is thus one of its most important. It may be noted that the Committee is not confined to the making of reports concerning specific rules, but can also report upon matters of general interest concerning the operation of the Act, with the example in point being the Committee's *Tenth Report* concerning Premier's certificates.[103]

The final matter which may be mentioned here concerns the extent to which the operations of the Committee and the Sub-committee may be said to be subject to party-political influence. Clearly, a recommendation for the disallowance of a politically sensitive rule may be the source of considerable embarrassment for a government, and thus encourage it to bring pressure to bear upon its members on the Committee to vote against such a proposal. Likewise, an Opposition might seek to harry the government through proposals for the disallowance of rules embodying controversial policy initiatives on what were essentially specious grounds.

This matter obviously is not one which lends itself to simple statistical analysis. Nevertheless, while it would be naive to suggest that party politics never influenced the judgment of Committee members, there is encouraging evidence that the Committee approaches its task in a broadly apolitical fashion. Thus, of the Committee's reports recommending disallowance of a rule (on any ground), the overwhelming majority contain no expression of dissent by Committee members.

The Committee has, since 1 July 1985, recommended the total or partial disallowance of 18 statutory rules. Its reports reveal that only in respect of 3 of these rules were minority reports delivered. In each case, these minority reports were signed by government members opposed to the disallowance of rules which were undeniably of considerable political sensitivity.[104] It may be noted, however, that in all of these instances at least one government mem-

[102] See e.g. *First Report* 1-3; *Fourth Report* 6-7.

[103] The authority of the Committee to make such general reports derives from section 4F of the *Parliamentary Committees Act* 1968.

[104] *Fourth Report* 29-48; *Eleventh Report* 54-8.

ber supported disallowance, so that the split among Committee members was not entirely along party lines.[105] In the case of one other rule, which was the subject of formal reprimand in a report to Parliament, a minority report signed by members of the Opposition parties supported disallowance of the rule in question. Thus, while it would appear that politics has occasionally (and unavoidably) significantly influenced the deliberations of the Committee, the overall picture is one of the discharge of its duty of scrutiny relatively free from the pressures of party politics.

THE CONSULTATIVE PROCEDURES OF THE ACT – ISSUES AND PROBLEMS

The main purpose of this article has been simply to outline the novel consultative procedures of the *Subordinate Legislation Act*, and to observe the practical functioning of some important aspects of those procedures. It is thus not the place to attempt an exhaustive critique of the relevant provisions of the Act, or their operation. However, some necessarily brief account may be given of the more important problems and issues which arise both out of the provisions of the Act and its accompanying guidelines, and their application. Some of these matters relate solely to the provisions of the Act concerning consultation, while others relate to more general provisions which are nevertheless of relevance to the consultative scheme.

By way of introduction, it is clear that many parts of the Act and the guidelines are, at best, indifferently drafted. The language used is often vague, and at times is extremely ambiguous. Some pertinent examples have already been given. What is the "summary of the results" of an impact statement referred to in sub-paragraph 12 (1) (a) (ii)? What is meant by a rule which is "machinery" or "declaratory" in guideline 3 (f) (i)? Does sub-section 6 (2B) permit the Legal and Constitutional Committee to propose the suspension of part only of a statutory rule, as opposed to the whole of a rule?[106] The list could be extended almost indefinitely. These, and many other infelicities of language scattered throughout the Act and its guidelines are in urgent need of consideration; if the Act is to operate smoothly, it requires a major legislative overhaul.

Another matter which needs to be addressed is whether many legislative instruments currently falling outside the *Subordinate Legislation Act* should be made subject to the consultative requirements of that Act. As stated above,[107] the delegated legislation made by a wide variety of bodies including municipal authorities[108] (to name just one relevant class) does not fall

[105] In the case of the *Fourth Report*, Mr. Landeryou (Labour) voted with members of the Opposition in favour of disallowance. In the case of the *Eleventh Report*, Ms. Coxsedge (Labour) and Mr. Hockley (Labour) took similar action.

[106] See *Fourth Report* 21-2.

[107] Supra pp.95-6.

[108] The Victorian Parliament is the only one in Australia which is absoloutely precluded from the review of delegated legislation made by local authorities: Pearce, op. cit. p.82.

within the ambit of the Act, and thus need not comply with such requirements as that necessitating the preparation of a regulatory impact statement. Yet delegated legislation of this type may vitally affect the interests of large sections of the public, and the public interest in ensuring adequate consultation is correspondingly strong. While there may well be special arguments that the legislation of particular classes of bodies ought not be brought within the scope of the *Subordinate Legislation Act* (for example, it might be suggested that municipal authorities are directly accountable to those who elect them, and their actions thus adequately supervised through the ballot box) the whole question deserves a rather more considered approach than the Act's present blanket exemption for "local authority rules" and rules which are not subject to approval by the Governor in Council. A general review of the classes of delegated legislation should be undertaken in this connection.

An obvious area for consideration concerns the class of rules requiring the preparation of a regulatory impact statement. A number of issues arise here. The first relates simply to the number of rules which the Legal and Constitutional Committee has regarded as being subject to the impact statement process on the basis that an appreciable burden, cost or disadvantage is imposed. Has this number been unreasonably high?

Certainly, there has been no shortage of suggestions in Victorian Government circles that the Committee has taken a bizarrely broad view of what amounts to an appreciable burden, and that under this view "every statutory rule needs an impact statement". Hard figures, however, do not bear this out. As has been seen,[109] no more than 24% of rules made in a given year have ever been regarded as requiring the preparation of an impact statement, and this does not seem to be a ridiculously high figure. Certainly, it is not "every statutory rule", but rather one in every four. Significantly in this context, before the passage of the *Subordinate Legislation (Review and Revocation) Act*, the Victorian Government's Director of Finance estimated that a quarter of the rules made in 1983 would have had "a significant impact on some part of the private sector", which strongly suggests that the Committee's most recent figure of 24% is eminently reasonable.

The other major issue here is whether the criteria supplied by guideline 3 (f) for determining whether an impact statement is necessary are satisfactory. As has been seen, guideline 3 (f) operates primarily through its third paragraph, which introduces the concept of an "appreciable burden, cost or disadvantage upon any sector of the public". This phrase, while undeniably imprecise, is probably not open to serious objection. The underlying idea is clearly that of the imposition of some reasonably significant burden upon citizens, and rules imposing such a burden are logically just the class of rules which should be subject to requirements of public consultation. Were the wording of guideline 3 (f) (iii) to be altered in this respect, all that would be achieved would probably be the substitution of equally vague synonyms for "appreciable", "burden" et cetera, which would carry the matter no

[109] Supra, pp.111-2.

further, while destroying the advantage of familiarity. It would thus seem that the concept of the "abcod" is as good a general statement of the applicability of the impact statement process as any.

However, paragraphs (i) and (ii) of guideline 3 (f), with their vague and almost meaningless references to rules which are "machinery or declaratory" or which deal with internal government organization are superfluous, and should be deleted. It is quite clear that the (unavoidable) approach of the Committee to guideline 3 (f) has been to assess the application of the impact statement procedure almost exclusively by reference to the imposition of an appreciable burden, cost or disadvantage, and then to locate a rule within or without the categories provided by paragraphs (i) or (ii) simply in accordance with the result of that assessment. Under such an approach, the conclusion that a rule is (most commonly) machinery or declaratory follows almost automatically from the determination that it imposes no appreciable burden. No ill effects would seem to follow from a recognition of this practical position, and the recasting of guideline 3 (f) so that the only relevant criteria here is whether a rule imposes an appreciable burden, cost or disadvantage upon a sector of the public.

Of course, experience may show that specific classes of rules should be exempted from the requirement that an impact statement be prepared, and as the necessity arises, the guidelines should be appropriately amended by the Attorney-General (in consultation with the Legal and Constitutional Committee) under sub-section 11 (1). Extant examples of such specific exclusions are comprised in guidelines 3A and 3B. Exclusions should, however, delineate as clearly as possible the class of rules to be exempted, and not rely upon compendious but inherently vague expressions such as those found in paragraphs (i) and (ii) of the present guideline 3 (f). Of course, the temptation to exclude large classes of statutory rules for administrative convenience or political gain should be rigorously avoided, and in this connection it is possible to wonder whether the class of rules in respect of which an impact statement must be prepared should be amenable to contraction merely at the whim of the Attorney-General. It is strongly arguable that the criteria delimiting this class should be contained within the Act itself, and thus be alterable only by Parliament, or at the very least that the consent of the Legal and Constitutional Committee be required before such an alteration is made.

One final point which may be noted in connection with the class of rules requiring the preparation of an impact statement is that there are certain types of rule which the Legal and Constitutional Committee may find extremely difficult to recommend for disallowance even where there has been a total failure to comply with the consultative requirements of the Act. The most problematic of these are rules which form part of a concerted regulatory scheme between more than one State, and sometimes the Commonwealth as well. The difficulty here is that disallowance in Victoria will prejudice the entire scheme, a consequence not lightly to be contemplated. The Committee will sometimes feel itself under considerable pressure not to jeopardise a uniform national scheme, and parliamentary scrutiny may be sacrificed upon the altar of uniformity. A further difficulty in this context is that it

will sometimes be far from easy for the Committee to determine the exact details of the less formal type of scheme, or even whether such a scheme exists at all.[110]

Quite apart from any issue as to the number of rules necessitating the preparation of an impact statement are questions concerning the worth of that process as such. Perhaps the broadest and most common complaint here is simply that the entire process is "too expensive". It cannot be denied that the impact statement process "costs" money will necessarily be expended in paying staff to prepare statements and to consider submissions, and in fulfilling the advertisement requirements of section 12. However, whether it costs "too much" depends entirely on one's priorities.

The assumption behind the consultative provisions of the Act is that money spent in this way is well spent, not only on the grounds that more accountable and participative decision-making is a good in itself, but also on the basis that citizens thus consulted may well have something to say which will be of actual value in the process of policy formulation. While these benefits are essentially intangible, and the costs involved in procuring them all too tangible, this is not to say that impact statement process therefore costs more than it is worth. It may be noted here that it would be odd for a society which devotes lavish resources to ensuring that individual interests are not adversely affected without natural justice, to refuse to accept the very modest price of the impact statement process in the cause of properly protecting the (often equally vital) interests of classes of individuals.

Rather more specific charges have also been levelled against the utility of the impact statement process. Thus, it is suggested that the process "wastes time", in the sense that it delays the making of necessary rules, and that it diverts resources from the important task of policy-making into the sterile one of policy justification.

As to the suggestion that the process "wastes time", it may again be noted that, to a large extent, one's attitude here will ultimately depend upon the value attached to public consultation as such. Quite apart from this, however, it should be recognized that most of the work involved in the preparation of an impact statement will already have been done by any authority possessed of even basic skills in the area of policy development. What responsible authority would embark on a course of regulatory activity without having clearly identified the objects to be achieved, alternative courses, relative costs and benefits and so forth, all of which information will then readily be available for inclusion in the impact statement. Thus, while the preparation of an impact statement will obviously take some time, one might well suspect that an authority which viewed such a task as truly Herculean would be unlikely to have properly formulated its policy initiative in the first place. It may be noted that scrutiny by the Legal and Constitutional Committee cannot delay the making of a rule: that scrutiny only takes place after a rule is made. Thus, the main time delay necessarily arising out of the impact statement process is that involved in the advertising requirements of section 12,

[110] See e.g. *Fourth Report* 15-16.

which ordinarily need only be a matter of a few weeks.[111] Of course, for really urgent rules, the Premier's certificate is available.

Similar points may be made in respect of the allegation that the preparation of impact statements diverts scarce resources. Again, if public consultation is an acknowledged good then it merits the allocation of resources, and again, while a not inconsiderable amount of staff time will have to be devoted to the preparation of impact statements, that time should not be inordinately long if the relevant policy initiative was properly formulated in the first place. The preparation of an impact statement should not be seen as a tedious task divorced from the area of policy formulation; rather, the statement is (or should be) the formal record of the deliberations which led up to the making of the policy initiative concerned, which is advanced by way of public justification and explanation of that initiative.

One further allegation often made against the impact statement process is that the response to statements in the form of submissions is so negligible that the process represents a large outlay for virtually no return. The colloquial expression of this view is to the effect of: "What's the point of preparing impact statements when no-one bothers to respond?" Against this view, a number of points should be made.

In the first place, it is simply not true that no submissions are made in connection with impact statements. As has been seen,[112] submissions are in fact received in connection with most impact statements, and particular statements will be the subject of a great many submissions. Of course, some statements do not attract submissions, but it does not follow from this that the impact statement process has served no purpose. The authority in question has still been required to publicly justify its proposal, and the public has had the opportunity to comment: government is thereby made more accountable. The fact that no submissions are received in connection with a particular statement may well mean nothing more than that interested members of the public are entirely satisfied with the proposed statutory rule, and assume (quite correctly) that in the absence of objection the regulatory process will simply take its course.

It should be noted that where submissions are received they will sometimes be of high quality, as is evidenced by the occasions upon which proposed rules have been altered in response to submissions.[113] These occasions, while not numerous, are sufficient in number to justify the assertion that the impact statement process has resulted in the improvement of a significant number of statutory rules. Of course, the mere fact that a particular group of submissions is not distinguished does not mean that affording the opportunity

[111] One unnecessary delay which does often occur, however, is in connection with the issue of the certificate of the Director-General of the Department of Management and Budget. While some delays here are unavoidable (for example, where an authority has presented an impact statement which lacks vital information), there is evidence to suggest that the Department has frequently been painfully slow in processing statements to which no objection ultimately is taken. A lack of available staff would seem to be the problem.

[112] Supra pp.116-17.

[113] Supra p.117.

to make submissions was a waste of time: the essence of consultation is that people are entitled to have their say, even if what they say is unconvincing.

One very real problem, however, does arise out of the mechanics of the impact statement process. As has been seen, the question of whether an impact statement is required practically rests with the Legal and Constitutional Committee: from the point of view of an authority, it is the opinion of the Committee which ultimately will matter. Yet this opinion will not be expressed until after the rule has actually been made. The result of this is that an authority may genuinely but mistakenly believe that the preparation of an impact statement is not required, and make the rule in question in reliance upon this belief, only to discover some months later to its horror that an impact statement was required, and that disallowance is proposed, with all the adverse consequences that this will involve. The above scenario is a very real one in circumstances where it is not entirely clear that an appreciable burden will be imposed, and presents the possibility of a great deal of wasted effort both by the authority concerned and by the Committee, where if the authority had only known of its obligation the difficulty would not have arisen.

Fortunately, there would seem to be a solution to this problem. All that would be required would be an amendment to the Act so that (absent the situation of a Premier's certificate) proposed statutory rules were required to be placed before the Legal and Constitutional Committee before being made for an assessment as to whether they required the making of an impact statement. In this way, an authority would never need to be in doubt upon the issue. A similar, though less satisfactory, solution could even be achieved informally, without the amendment of the Act, were the Committee prepared to adopt the practice of giving what would be in effect a preliminary opinion upon the question of whether an impact statement need be prepared.[114]

The adoption of either of these schemes would not only have the advantage of removing all doubt as to whether an impact statement should be prepared, but would also improve the position of the Committee whenever a failure to prepare an impact statement occurred. Whereas at present the Committee may be inhibited in recommending disallowance because authorities plead a combination of innocent mistake and adverse consequences, an authority could hardly make a convincing plea for lenience in circumstances where it either should or could have obtained a definitive prior opinion upon the matter in issue. In this context, it will be recalled that the non-compliance rate with the impact statement requirement is still 31%. Adoption of one of the schemes outlined above, and particularly that involving the amendment of the Act, would have the potential to dramatically decrease this figure. It would not be unreasonable to expect the Committee to shoulder this extra task: the question of whether an impact statement must be prepared has to be considered by the Committee at some stage, and it should occur at the

[114] The Committee currently refuses to give such opinions, and naturally will not allow its officers to give them on its behalf.

point of the process which causes the least, rather than the greatest amount of dislocation.

Another problem, already adverted to in passing,[115] relates not to the impact statement process, but to the general requirement of consultation imposed by guideline 3 (e), and more specifically to its enforcement. As has been seen, while the Legal and Constitutional Committee is in a reasonably good position to detect breaches of the impact statement process, it ordinarily will not have the information necessary to determine whether the general requirement of consultation has been met. Again, a comparatively simple solution is at hand. It would be perfectly possible for the Committee to require that a "consultative return" be made in respect of each statutory rule (or at least in respect of each rule imposing an appreciable burden) setting out the steps which had been taken to satisfy the general requirement of consultation. The adoption of such a position by the Committee would not even require the amendment of the Act or the guidelines, and would enable the Committee to effectively enforce the requirements of guideline 3 (e).

The issue of the Premier's certificate poses further problems. As has already been suggested,[116] there is evidence to suggest that the Premier's certificate has been issued too readily, and sometimes for reasons that have little to do with the urgency of the rule concerned. This said, however, there clearly does need to be some "fast-track" procedure whereby urgent rules may be made quickly, and thus the existence of the mechanism of the Premier's certificate is justifiable. However there seems to be no justification for the fact that an "urgent" rule, once made under a certificate, should continue in operation for ten years before it is automatically revoked, and the preparation of an impact statement required. A better system would be one under which a rule made under a Premier's certificate was automatically revoked at the expiry of one or two years. This would mean that although the urgency of the initiative in question was recognized, the preparation of an impact statement would be required within a reasonably short period.

It may be noted that, due to the form in which the Act is drafted, there are real doubts as to the exact obligations from which an authority is exempted when a Premier's certificate is issued. Hitherto, it has been assumed that sub-section 13 (3) has the effect of exempting a rule from compliance with all aspects of the impact statement process, including preparation, advertisement and consideration of submissions. However, sub-section 13 (3) in fact provides an exemption only in respect of compliance with the requirements of sub-section 12 (1), which relate to advertisement of statements and consideration of submissions, but not to the actual requirement for the preparation of a statement, which flows not from sub-section 12 (1), but from sub-section 11 (5), via guideline 3 (f) of Schedule 2.[117] Accordingly, it is arguable that a rigorous reading of the Act produces the result that a Premi-

[115] Supra pp.107, 121.
[116] Supra p.118.
[117] Supra p.102.

er's certificate does not exempt from the requirement that an impact statement be prepared, but merely that it be advertized.[118]

In any event, it is entirely clear that the Premier's certificate does not exempt an authority from compliance with the remainder of the Schedule 2 guidelines. Thus, objectives must be formulated, alternatives considered and costs and benefits weighed. As always, enforcement of these requirements falls to the Committee, but in the absence of an impact statement that body lacks the evidence necessary to decide whether those requirements have been met. It would be possible, however, for the Committee to require in respect of each rule in connection with which a Premier's certificate is issued a "regulatory return" showing compliance with the Schedule 2 guidelines. Indeed, given the fact that the guidelines and the requirements of Schedule 3 concerning the contents of impact statements are mutually reflective,[119] such a document would closely resemble a formal impact statement.

A further issue concerns the power of the Committee pursuant to subsection 6 (2B) to propose the suspension of a statutory rule in the interests of natural justice pending its consideration by Parliament. The question here is whether this power of suspension should be subject to veto by the Governor in Council acting on the recommendation of the responsible Minister as it presently is under sub-section 6 (2D).

The existence of this power of veto means that regardless of how strongly the Committee believes that natural justice impels the suspension of a rule until Parliament has had the opportunity to consider its legitimacy, that belief may be overridden with impunity by executive fiat. Indeed, upon one of the two occasions that the Committee has proposed suspension, this is precisely what occurred.[120] Surely, if an all-party Parliamentary Committee is prepared to report that natural justice requires that a rule not operate until Parliament, as the delegating authority, has had the opportunity to consider the actions of its agents, that report should take effect. This question is of particular importance in the context of the consultative requirements of the Act, as a flagrant disregard of these requirements will be precisely the sort of consideration which may prompt the Committee to recommend suspension on the grounds of natural justice. Clearly, it ordinarily will be manifestly unjust that a measure affecting persons which is required by Act of Parliament to be made only after compliance with a consultative regime is made without such compliance.

It might be suggested that the difficulty being discussed is in any event entirely theoretical, on the grounds that if the Government of the day is prepared to veto suspension of a rule through the Governor in Council, it will equally be prepared to block disallowance by use of its majority in the Legislative Assembly. Here it will be recalled that disallowance in Victoria

[118] See *Tenth Report* 2.

[119] Supra pp.99-100.

[120] The proposal of the Committee in its *Thirteenth Report* to suspend the operation of two rules which had the effect of narrowing the scope of the Victorian Freedom of Legislation regime was displaced by the making of an Order in Council under sub-section 6 (2D).

requires the passage of an appropriate motion in each, rather than either, House of Parliament (section 6).[121] This, however, far from excusing the existence of the executive veto of suspension, only points to an even more serious flaw in the general system of Parliamentary scrutiny of subordinate legislation in Victoria.

This follows from the fact that just as a refusal by *either* House of Parliament to consent to a bill which delegated a particular legislative power to the executive would prevent the delegation of that power, so, logically, should the refusal of *either* House to countenance a specific exercise of a delegated legislative power be fatal to that exercise. On this analysis, the passage of a motion by either House should be sufficient for the disallowance of a statutory rule. As has been seen, this is the position in the Commonwealth sphere under section 48 of the *Acts Interpretation Act* 1901, and may fairly be said to represent the general Australian position.[122] As Pearce comments, the Victorian requirement for a motion of disallowance in each House is "most unreasonable, as it is difficult to obtain enough time in one chamber, let alone two."[123] Accordingly, the *Subordinate Legislation Act* should be amended so that disallowance may occur upon the passage of a motion by either House.[124]

Further difficulties attend the Victorian Parliament's power of disallowance. Not only is the consent of both Houses required for disallowance, but there is no provision of the Act which requires that an adverse report of the Legal and Constitutional Committee be considered by a House. The effect of this is that an appropriately minded government could ensure that a statutory rule was not disallowed merely by preventing the report of the Committee from ever being dealt with in the Legislative Assembly. In this context, it would seem that the very least that may be demanded of a Government determined to override the report of an all-party Committee is that it make known its position formally and publicly inside the Parliament.

This problem is avoided in the Commonwealth sphere, where a regulation is automatically disallowed 15 sitting days after a notice of motion for disallowance has been tabled, thus necessitating affirmative action within Parliament to save an impugned regulation.[125] A similar provision in the Victorian legislation would not only avert the problem identified above, but would also mean that where there was broad cross-party agreement that a rule should be disallowed (as will frequently be the case) the time of Parlia-

[121] This is the position under the *Subordinate Legislation Act*, which will be overwhelmingly the most common source of motions for disallowance. It is important to note, however, that particular Acts do occasionally confer a power to disallow rules made under that Act upon *each* House of Parliament acting individually: see e.g. sub-section 43 (3) *Tobacco Act* 1987. Indeed it is the current practice of the Victorian Opposition to foster the inclusion of such provisions.

[122] Pearce, op.cit. p.87.

[123] Ibid; and see Campbell, op.cit. p.206.

[124] This course was in fact recommended by the Committee in the *Deregulation Report* 296-7; however, the recommendation was not acted upon. Naturally, were such an amendment to be made, the objection canvassed above to the removal of the executive veto of the Committee's power of suspension would disappear.

[125] *Acts Interpretation Act* 1901, sub-section 48 (5).

ment is not wasted by having to go through the motions of a disallowance debate.[126]

A final problem which may be noted in the specific context of the power of disallowance is that there is nothing to prevent a government from immediately making a regulation identical to one that has just been disallowed, and then to go on making such a regulation ad infinitum in the face of successive disallowances. While this is essentially a moot point so long as disallowance is by the will of both Houses, the matter would be of importance were the Act to be amended so that the power of disallowance adhered to each House individually. Moreover, there are some (very few) Acts which do confer a specific power to disallow regulations made under them upon either House of Parliament, and thus the question is not entirely theoretical.[127] This deficiency would be cured by an amendment to the *Subordinate Legislation Act* which was to the same effect as section 49 of the *Commonwealth Acts Interpretation Act*, so that no rule which was substantially identical to one which had been disallowed could be made within six months of that disallowance.

Yet another general flaw in the Victorian system for Parliamentary scrutiny of rules lies in the fact that, while statutory rules are subjected to rigorous scrutiny by the Legal and Constitutional Committee, there is no corresponding Committee charged with the scrutiny of Bills introduced into Parliament. The danger here is that authorities who wish to exercise regulatory powers without the inconvenience of being subjected to Legal and Constitutional Committee scrutiny, and without the further inconvenience of having to comply with the consultative procedures of the *Subordinate Legislation Act*, will seek to secure the passage of Bills which, rather than conferring a power to regulate by statutory rule, will confer wide powers to be exercised by ministerial or sub-ministerial order, which will thus fall outside the scope of the Act.

The likelihood of such provisions escaping the detection of Parliament is greatly increased by the absence of a Parliamentary committee for the scrutiny of Bills, which would act to alert already over-burdened members to more subtle transgressions. Here it may be noted that such a Committee does operate in the Commonwealth sphere in the form of the Senate Scrutiny of Bills Committee, and one of the bases upon which that Committee may report to the Senate is that a Bill "inappropriately delegates legislative power". The Legal and Constitutional Committee has twice recommended the creation of a Victorian scrutiny of Bills committee which would, inter alia, report upon the inappropriate delegation of legislative power, but the Victorian government has not acted upon these recommendations.[128]

Two matters may briefly be noted of the functioning of the Legal and Constitutional Committee itself. The first concerns the extent to which the

[126] The inclusion of such a provision was recommended by the Committee in the *Deregulation Report* 296-7. The recommendation was not accepted.

[127] Supra n. 123.

[128] *Deregulation Report* 149-50; Legal and Constitutional Committee, *Report on the Desirability or Otherwise of Legislation Defining and Protecting Human Rights* (April, 1987) 125-131.

discharge of those functions is subject to the influence of party politics. As has been seen,[129] the Committee has generally been able to avoid the pitfalls presented by a rigid adherence to party position, while Parliament itself has usually (though not always) responded to the reports of the Committee on a cross-party basis.[130] Whether either of these things will always be true, however, is a matter of speculation.

The second matter concerns the administrative efficiency of the Committee in its operations. This is an important issue, as unless the Committee keeps up to date in its scrutiny of rules, the time during which disallowance may be moved will elapse. It may be stated at the outset that the Committee is serviced by a highly efficient legal and administrative staff which makes every effort to ensure that the process of scrutiny runs smoothly. Difficulties do arise, however, from the very nature of the Committee as a Parliamentary institution: members have many demands on their time, and quorums may be difficult to secure; country members will find it particularly trying to attend meetings outside sessions of Parliament; and the dissolution of Parliament will also involve the dissolution of the Committee, so that scrutiny will not recommence until a new Committee is appointed by the new Parliament.[131] The effect of all these factors is that the Committee will sometimes fall somewhat behind subordinate legislators, but it is almost invariably able to ensure that suspect rules receive priority treatment, so that their disallowance may be moved (if necessary) within the disallowance period.

The final issue which may be considered is the vexing one of whether a breach of the consultative requirements of the *Subordinate Legislation Act* are subject to judicial, as well as parliamentary review. Thus for example, could a declaration be obtained that a rule made without the preparation of the requisite regulatory impact statement, or with the preparation of a deficient statement was void for procedural ultra vires? The answer to this fascinating question is profoundly unclear.

In favour of the view that judicial review would be available it may be observed that the various requirements of the Act and the guidelines are all expressed in mandatory language. Thus, impact statements "shall be prepared" (guideline 3 (f)), such statements "shall include" certain matters (Schedule 3), while the advertising requirements of sub-section 12 (1) "shall apply". Against such a view it might be suggested that the scheme of the Act is such as to evince an intention that its provisions were to be enforced by Parliament itself with the aid and advice of the Legal and Constitutional Committee; and some reliance might be placed upon the use of the word "guidelines", rather than some stronger term. Campbell would seem to be of the view that a failure to prepare an impact statement at least might be the subject of judicial review, while doubting that breaches of all the Schedule 2

[129] Supra pp.125-6.

[130] But the Legislative Assembly did decline to disallow two rules relating to freedom of information recommended in the Committee's *Thirteenth Report*. The Opposition controlled Legislative Council voted for disallowance.

[131] Of course, time will not run for the purposes of the expiry of disallowance period, because Parliament is not sitting.

guidelines would be similarly justiciable,[132] on the basis that the enforcement of some would involve the determination of questions not suited to judicial adjudication.

The issue has only once come before the courts, in the case of *Phillip Morris* v. *State of Victoria*. In that action, the plaintiff sought to argue that the preparation of a deficient impact statement invalidated the rule in connection with which that statement was prepared. The State of Victoria applied to have the plaintiff's statement of claim struck out, on the ground that it disclosed no cause of action. In refusing this application,[133] King J. held that the question of whether an impact statement complied with Schedule 3 was justiciable, although compliance with the Schedule 2 guidelines was not.

The central and rather dubious basis of this decision was that sub-section 12 (2) states that Schedule 3 "has effect" with regard to impact statements, whereas sub-section 11 (5) merely says that the Schedule 2 guidelines "shall apply". King J. concluded that the former language was sufficient to warrant enforcement by the courts, whereas the latter was not. One odd result of this is that whereas the preparation of a deficient impact statement will be subject to judicial review, it would appear that the total failure to prepare such a statement, being only a breach of the Schedule 2 guidelines, will not. However, the authority of *Phillip Morris* is slight, and the issue cannot be regarded as having been finally determined.

If all or some of the consultative procedures of the Act are judicially enforceable, a novel avenue of legal attack against Victorian subordinate legislation will be opened to the legal profession. Indeed, it is strange this avenue has not already been further explored. It may be noted that even if judicial review is not available, there is nothing to prevent legal representatives from making formal written submissions on behalf of their clients to the Legal and Constitutional Committee, with the prospect of disallowance being as effective as any legal remedy which might be sought. On at least one occasion, legal representatives have received an oral hearing by the Committee.

CONCLUSION

This article has sought to outline the novel consultative requirements imposed in connection with the making of a broad class of subordinate legislation in Victoria, and to examine the operation of those requirements in practice. It has also sought to identify some of the issues and problems which arise in connection with this consultative regime. The relevant requirements of the *Subordinate Legislation Act* have been in operation for less than four years, but it is suggested that they have already had a significant effect upon

[132] Campbell, op. cit. pp.169-70.

[133] The impact statement in question was subsequently adjudged by the Legal and Constitutional Committee in its *Fourth Report* to be grossly deficient, and recommended for disallowance. The rule was revoked before its consideration by Parliament, and as a consequence judicial proceedings did not proceed.

the processes for the making of subordinate legislation in Victoria. These requirements are far less well known and, to the public mind at least, far less exciting than those which arise under legislation relating to, for example, freedom of information. However, in their own quiet way, they are part of the same crucial process of enforcing accountability from government to citizen.