



SCRUTINY OF LEGISLATION COMMITTEE

REVIEW OF PART 7 OF THE *STATUTORY INSTRUMENTS ACT*

INTERIM REPORT AND CALL FOR PUBLIC SUBMISSIONS

OCTOBER 2009

This interim report provides information about ten key issues on which the committee invites public discussion and submissions. The closing date for submissions is **Friday, 11 December 2009**. Details on how to make a submission and/or contact the committee are on the final page.

Scrutiny of Legislation Committee

53rd Parliament

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Interim report and call for public submissions

Subordinate legislation is made by the Executive under power delegated by the Parliament. Control over legislation made in this way is exercised by both the courts, which may rule on the legality of subordinate legislation, and the Parliament by way of legislative and procedural mechanisms of accountability.

In Queensland, the *Statutory Instruments Act 1992* governs subordinate legislation. Part 7 of the Act requires review of most instruments of subordinate legislation on a regular basis: if an instrument is not re-made each ten years, it will lapse. As instruments which are remade are tabled in the Parliament, this 'sunsetting' mechanism in part 7 is one way in which Parliament retains control of delegated legislative power.

Statutory requirements for periodic review and remaking of subordinate legislation were first enacted in Queensland in 1986. Review of those original requirements led to legislative reform. Part 7 of the *Statutory Instruments Act* (Staged automatic expiry of subordinate legislation) commenced operation on 1 December 1994.

The Scrutiny of Legislation Committees of the 52nd and 53rd Parliaments have examined the practical operation of the statutory framework in part 7 and related administrative practices regarding subordinate legislation. This committee, by way of its review, seeks to ensure that the periodic review of subordinate legislation produces legislation of the highest standard.

Review of recent reports and publications suggests that the quality and effectiveness of review of subordinate legislation should be administrative priorities. Viewed in this way, automatic expiry under part 7 of the *Statutory Instruments Act* would not be regarded as an administrative burden but as an important way in which to achieve the administrative priorities. Available data has been examined by the committee, together with information regarding the operation of part 7 provided by the Premier of Queensland. Relevant research, data and information has been collated in this interim report.

The committee invites discussion and submissions regarding the operation of part 7 of the *Statutory Instruments Act*. Information and views received will be examined by the committee prior to a final report to Parliament.

In particular, the committee invites submissions regarding ten key issues relevant to the operation of part 7 and related matters.

Key issues:

1. automatic expiry
2. expiry on 1 September
3. expiry each ten years
4. delay of an expiry date
5. notice of expiry
6. evaluation and review prior to expiry
7. review of subordinate legislation exempt from expiry
8. administrative policies and practices related to expiry
9. the relationship between parts 5 and 7 of the *Statutory Instruments Act*
10. public consultation undertaken to meet the objectives of part 7 of the *Statutory Instruments Act*

1 The committee's review

The committee

- 1.1 The Scrutiny of Legislation Committee is a permanent statutory committee of the Queensland Parliament, established under section 80 of the *Parliament of Queensland Act 2001*. The main object of the provisions of the *Parliament of Queensland Act* regarding parliamentary committees is to enhance the accountability of public administration in Queensland.
- 1.2 Section 103(1) of the *Parliament of Queensland Act* provides that the committee's area of responsibility is to consider, by examining all bills and subordinate legislation:
 - the application of fundamental legislative principles to particular bills and subordinate legislation; and
 - the lawfulness of particular subordinate legislation.
- 1.3 Section 103(2) of the *Parliament of Queensland Act* additionally confers the committee with responsibility to monitor generally the operation of:
 - provisions of the *Legislative Standards Act 1992*—
 - section 4 (meaning of 'fundamental legislative principles');
 - part 4 (explanatory notes); and
 - provisions of the *Statutory Instruments Act 1992*—
 - section 9 (meaning of 'subordinate legislation');
 - part 5 (guidelines for regulatory impact statements);
 - part 6 (procedures after making of subordinate legislation);
 - part 7 (staged automatic expiry of subordinate legislation);
 - part 8 (forms); and
 - part 10 (transitional).

Conduct of the review

- 1.4 Pursuant to the statutory responsibility to monitor the staged automatic expiry of subordinate legislation, the committee is examining the practical operation of the:
 - expiry and periodic review requirements in part 7 of the *Statutory Instruments Act*; and
 - related matters – administrative policies and practices, regulatory impact analysis and public consultation.
- 1.5 Part 7 of the *Statutory Instruments Act* was enacted following recommendations by the Electoral and Administrative Review Commission (EARC) and the parliamentary committee with oversight of EARC reports. One recommendation was for review each seven years of any legislative scheme for staged automatic expiry, with the review to be undertaken by the parliamentary committee with responsibility for scrutiny of legislation.¹
- 1.6 The committee's review seeks to ensure that the automatic expiry of subordinate legislation meets the objectives of part 7:
 - substantial reduction in the regulatory burden on the people of Queensland without compromising law and order and essential economic, environmental and social objectives;
 - the relevance of subordinate legislation to the economic, social and general wellbeing of the people of Queensland; and
 - a Queensland statute book consisting of subordinate legislation of the highest standard.

¹ EARC, *Report on Review of Parliamentary Committees* (October 1992) 4. 106, 114.

- 1.7 The interim report contains information gathered by the committee to date, including information received from the Queensland Government. It invites discussion and submissions regarding the operation of part 7 of the *Statutory Instruments Act* and, in particular, regarding ten key issues.

Element of review	Relevant date
Interim report tabled and submissions invited	October 2009
Last date for receipt of submissions	11 December 2009
Public hearings	February 2010
Report tabled	March 2010

2 Legislation made under delegated power

Parliamentary authorisation of subordinate legislation

- 2.1 The *Queensland Legislation Handbook: Governing Queensland* provides the following information about subordinate legislation:²

Generally speaking, subordinate or delegated legislation is legislation the making of which is authorised by an Act of Parliament. The Act must delegate authority to a body or person to make the subordinate legislation.

Authorisation from Parliament is therefore central to the consideration of the validity of particular subordinate legislation.

In this context, it is helpful to understand that the word 'legislation' usually means a statutory instrument of legislative character.

- 2.2 Given the busy schedule of legislatures, it is not possible for parliaments to pass all legislation required in a jurisdiction. Accordingly, a subordinate, or delegated role, is played by the executive – the parliament delegates an authority to an executive agency to make rules of general application. A rule made in this way is called 'subordinate' or 'delegated' legislation.

- 2.3 When parliament delegates power to make legislation dealing with a particular subject matter, it does not give the executive government absolute discretion to make whatever legislation thought fit to deal with the subject matter. In *Giris Pty Ltd v Federal Commissioner of Taxation* (1969) 119 CLR 365 at 373, Barwick CJ stated that, while there was 'no doubt that ... the Parliament may delegate legislative power it may not abdicate it'.

- 2.4 The legal framework for the making of delegated legislation was outlined by Kirby J in *Pfeiffer v Stevens* (2001) 209 CLR 57, a decision of the High Court regarding a delegated law-making power found in the *Local Government Act 1993* (Qld):

It is a ... constitutional postulate that a "law of a State" is made by, or under the authority of, a law having democratic legitimacy. In the Australian Commonwealth, laws are made by or under the authority of parliaments, not by Ministers as such. For Ministers to make laws, they must have the authority of law to do so. Similarly, for a Minister to extend the life of a law, the Minister must have clear power from Parliament to do so.

In our system of government, Ministers are not entitled to ignore, or waive compliance with, the law. For similar reasons, they cannot impose legal obligations, still less penal sanctions, upon other persons without demonstrable authority to do so.

Subject to the federal Constitution, the State Constitution and any other applicable law, a State Parliament may permit a law of a State to be made, or its life extended, by delegation. But such are the presuppositions of the Constitution that the courts are vigilant for any democratic deficit.

- 2.5 In Queensland, an Act of Parliament generally contains a provision allowing for subordinate legislation to be made about specific matters. Such 'a regulation-making power' is read with provisions in the *Statutory Instruments Act*, including sections 21 to 31 ensuring that subordinate legislation is made within the legislative power delegated by the relevant Act.

- 2.6 Section 22(1) provides, for example:

(1) If an Act or statutory instrument (the authorising law) authorises or requires the making of a statutory instrument under the authorising law or an Act or statutory instrument (the other law), the power enables a statutory instrument to be made with respect to any matter that—

(a) is required or permitted to be prescribed by the authorising law or other law; or

(b) is necessary or convenient to be prescribed for carrying out or giving effect to the authorising law or other law.

² Productivity Commission, *Annual Report Series: Regulation and its Review 2005-2006* (2006) 90.

Accountability for legislation made under delegated power

- 2.7 Subordinate legislation made by the executive is not subject to the same parliamentary and public checks as primary legislation. Therefore, common law, statutory and administrative mechanisms ensure the accountability of those who make subordinate legislation. Expiry and the related periodic review required by part 7 of the *Statutory Instruments Act* are one accountability mechanism. Others include:³
- the statutory framework governing subordinate legislation;
 - public consultation regarding legislation made under delegated power;
 - executive controls;
 - publication of subordinate legislation;
 - examination of delegated legislation by parliament, including committees of the parliament; and
 - judicial scrutiny of the validity of subordinate laws.
- 2.8 Generally, in Queensland, the mechanisms have been given statutory force in the *Statutory Instruments Act*.

Statutory framework governing subordinate legislation

- 2.9 In Queensland, section 9(1) of the *Statutory Instruments Act* states that the following documents are 'subordinate legislation':
- a statutory rule that is a regulation, rule, by-law, ordinance or statute;
 - a statutory rule that is an order in council or proclamation of a legislative character;
 - any statutory instrument (including an order in council or proclamation) that is declared to be subordinate legislation by an Act or a regulation made under this Act;
 - any other statutory instrument that fixes or otherwise determines the commencement of—
 - (i) an Act or a provision of an Act; or
 - (ii) an instrument, or a provision of an instrument, mentioned in paragraph (a), (b) or (c).
- 2.10 Section 9(2) further provides that the following documents are not 'subordinate legislation':
- a local law or other statutory instrument made by a local government;
 - a rule, order, direction or practice of the Legislative Assembly;
 - a statutory rule (other than a regulation) that is mentioned in schedule 1A to the *Statutory Instruments Act* or declared not to be subordinate legislation by—
 - (i) an Act; or
 - (ii) in the case of a statutory rule made under a provision commencing before the commencement of the *Statutory Instruments Act*—a regulation made under the *Statutory Instruments Act*.
- 2.11 The main form that subordinate legislation takes in Queensland is the first class of documents identified in section 9(1), 'a statutory rule that is a regulation, rule, by-law, ordinance or statute'. The term 'statutory rule' is itself defined in section 8 of the *Statutory Instruments Act* as a statutory instrument that is:
- made by the Governor or Governor in Council; or
 - made by another person or body but subject to the approval or disapproval of the Governor or Governor in Council.
- 2.12 The *Queensland Legislation Handbook: Governing Queensland* states:⁴

In Queensland, some particular instruments or types of instruments made under Acts are specially defined by Acts to be 'subordinate legislation'. If an Act gives an instrument this label, it means that it must be tabled in the Legislative Assembly (that is, laid before the Assembly) and can be disallowed by it.

³ See: R Creyke and J McMillan, *Control of Government Action – Text, Cases & Commentary* (2005) 6.1.1, 264 and 6.1.19, 272.

⁴ Department of the Premier and Cabinet, *The Queensland Legislation Handbook: Governing Queensland* (2004) 1.5.2.

The most familiar example of subordinate legislation is a regulation made by the Governor in Council. However, many other statutory instruments are expressly declared to be subordinate legislation by the Statutory Instruments Act 1992 or the Act that authorises them to be made.

- 2.13 The Office of the Queensland Parliamentary Counsel website includes a list of current subordinate legislation in its 'Acts, SL as in force'. As at 6 October 2009, the number of instruments of 'subordinate legislation' available in this way was 468.

Public consultation

- 2.14 The opportunity for proposed subordinate legislation to be examined by the people allows those with an interest and those who may be affected by the legislation to:⁵
- consider its likely impact;
 - assess costs and benefits;
 - influence the shape of a proposed regulatory regime; and
 - comment on matters of drafting and technical detail.
- 2.15 In Queensland, part 4 of the *Legislative Standards Act* requires that an explanatory note be tabled with 'significant subordinate legislation' (section 22(2)), and that it include information regarding the consultation carried out or, if consultation did not take place, a statement of the reason for no consultation (section 24(2)). 'Significant subordinate legislation' is defined in section 2 to mean 'subordinate legislation for which a regulatory impact statement must be prepared under the *Statutory Instruments Act*'.
- 2.16 Section 43 of the *Statutory Instruments Act* requires that an administering department prepare a regulatory impact statement in respect of subordinate legislation 'likely to impose appreciable costs on the community or a part of the community'.

Executive controls

- 2.17 In most Australian jurisdictions, statutory or administrative procedures control the preparation and drafting of subordinate legislation.
- 2.18 In Queensland, provisions of the *Statutory Instruments Act* and the *Legislative Standards Act* govern preparation and drafting, including part 2 of the *Legislative Standards Act* (Legislative standards). In addition the *Queensland Legislation Handbook*, the *Queensland Cabinet Handbook* and the *Queensland Executive Council Handbook*, the *Queensland Policy Handbook* and the *Queensland Parliamentary Procedures Handbook* are all relevant to the progress of legislative proposals within government.
- 2.19 The Office of the Queensland Parliamentary Counsel drafts subordinate legislation, other than 'exempt subordinate legislation'.⁶ Ordinarily, the authority to draft is received from a Cabinet decision or the relevant Minister or chief executive.⁷ Once drafted, the Office of the Queensland Parliamentary Counsel will certify subordinate legislation if it is satisfied that the proposed legislation:⁸
- is lawful; and
 - has sufficient regard to fundamental legislative principles.

Publication

- 2.20 All Australian jurisdictions require specified forms of subordinate legislation to be accessible. In practice, this traditionally meant publication in the government *Gazette*. More recently, subordinate legislation has been made more accessible to many people via publication in electronic form.

⁵ R Creyke and J McMillan, *Control of Government Action – Text, Cases & Commentary* (2005) 6.1.20, 272.

⁶ *Legislative Standards Act 1992* (QLD) s 2.

⁷ Department of the Premier and Cabinet, *The Queensland Legislation Handbook: Governing Queensland* (2004) 6.2.

⁸ Department of the Premier and Cabinet, *The Queensland Legislation Handbook: Governing Queensland* (2004) 6.8.

- 2.21 In Queensland, section 47 of the *Statutory Instruments Act* (Notification) requires that subordinate legislation be notified in the *Gazette*. In addition, subordinate legislation made since 1991 is published by the Office of the Queensland Parliamentary Counsel on its legislation website.⁹

Parliamentary review

- 2.22 Subordinate legislation made, or remade, is tabled in the parliament. The parliament may then examine the way in which delegated legislative power has been exercised. If necessary, the parliament may ask the relevant minister to provide information regarding the use of the power. Where appropriate, the parliament may examine the exercise of delegated power by way of a 'disallowance' process.

- 2.23 Parliamentary examination of subordinate legislation is assisted by parliamentary scrutiny committees which conduct a 'technical' review, examining matters such as observance of statutory requirements and protection of the rights of citizens:¹⁰

The terms of reference of such committees commonly focus on whether the content and operation of a subordinate law is compatible with cardinal public law standards, for example, whether it has a retrospective operation, trespasses unduly on common law rights, or confers powers that should be subject to merit review. A breach of those standards may result in an adverse report by the committee, followed by disallowance by either house of the legislature.

- 2.24 Queensland's *Statutory Instruments Act* requires subordinate legislation be tabled in the Legislative Assembly within 14 sitting days of its notification (section 49(1)) and states that subordinate legislation will cease to be effective if it is not tabled (section 49(2)).

- 2.25 Section 50(1) states that the Legislative Assembly may pass a resolution disallowing subordinate legislation tabled in the Assembly if notice of a disallowance motion is given by a Member of Parliament within 14 sitting days of the legislation being tabled. If the resolution of the Assembly is passed, the subordinate legislation will cease to have effect (section 50(3)).

- 2.26 Section 51 provides that, if the subordinate legislation is not tabled as required or is disallowed, it is taken never to have been made or approved. Any law or provision of a law repealed or amended by the legislation is revived. However, anything done or suffered under the legislation before it ceased to have effect will not be affected by the cessation.

- 2.27 The *Parliament of Queensland Act* confers the Scrutiny of Legislation Committee with responsibility regarding the examination of subordinate legislation, as set out in paragraphs 1.2 and 1.3 of this report. To meet the responsibility, once subordinate legislation is tabled in the Parliament, the committee examines and reports in its *Legislation Alert*.

- 2.28 Should the committee's examination identify a matter within its areas of responsibility, or should the committee require information to finalise its examination, the committee will write to the relevant minister. The information provided to the committee by the minister is then included in the *Legislation Alert*. Where appropriate, the committee may:

- table a separate report to Parliament on the subordinate legislation; and/or
- give notice of a motion to disallow an instrument.

Judicial review

- 2.29 Courts may, upon application for judicial review, determine whether the executive has acted within the scope of statutory powers. Accordingly, courts may examine whether a statutory instrument was validly made or has commenced legal operation. In *Evans v New South Wales* (2008) 168 FCR 576, for example, a declaration was sought that delegated legislation made in New South Wales prior to World Youth Day was beyond the scope of the regulation-making power in the *World Youth Day Act 2006* (NSW). In its decision, the Full Federal Court declared invalid a 'causing annoyance' limb of section 7(1)(b) of the World Youth Day Regulation 2008 (NSW).

⁹ See: www.legislation.qld.gov.au

¹⁰ R Creyke and J McMillan, *Control of Government Action – Text, Cases & Commentary* (2005) 6.1.20, 272; D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (6th ed., 2006) 1.27, 19.

Expiry and periodic review

2.30 In most Australian jurisdictions, statutory schemes require the executive to conduct regular reviews of subordinate legislation prior to automatic expiry. These ‘sunsetting’ requirements aim to ensure ‘consideration of whether an existing situation should continue and the taking of a positive step to cause it to continue’.¹¹ Expiry and periodic review aims to:

- reduce the regulatory burden;
- ensure subordinate legislation has continuing relevance;
- ensure subordinate legislation is well drafted; and
- provide an opportunity for public and industry involvement in the review of subordinate legislation.

2.31 Consistent with these objectives, a 1997 report of the Victorian Parliament’s Law Reform Committee stated that expiry and review of subordinate legislation is:¹²

... an invaluable mechanism for reducing the volume of regulations applying [in a jurisdiction]. Part of the rationale behind this assertion is that, in deciding whether to re-make regulations that have been repealed, government departments are forced to consider whether or not the regulations in question are really necessary.

2.32 In Queensland, section 54 of the *Statutory Instruments Act* provides for subordinate legislation to ‘expire’ on 1 September after it has been in existence for ten years. It will not expire if:

- the subordinate legislation has been repealed or has already expired (in the latter case, generally because of express statutory provision); or
- a regulation has been made exempting the subordinate legislation from expiry (in accordance with sections 56 or 56A of the *Statutory Instruments Act*).

2.33 Sections 56 and 56A outline grounds for the limited exemption of subordinate legislation from expiry. Section 56A provides subordinate legislation may be exempted from expiry for periods of not more than one year if:

- replacement subordinate legislation is being drafted;
- the subordinate legislation is not proposed to be replaced when it expires at the end of the exemption period; or
- the empowering Act is subject to review.

2.34 Section 56 provides that subordinate legislation which is uniform or complementary with legislation of the Commonwealth or another State may be exempted from expiry for periods of not more than five years.

2.35 To allow for review prior to expiry, section 55 of the *Statutory Instruments Act* requires the Office of Parliamentary Counsel to give departments and agencies at least six months’ notice of imminent expiry dates. However, subordinate legislation will automatically expire even if notice is not given.

2.36 It should be noted that these provisions in part 7 have no application to subordinate legislation:¹³

- requiring a resolution of the Legislative Assembly before it may be repealed or the status of the land to which it applies may be changed (under some Acts, such as the *Nature Conservation Act 1992*, a resolution of the Legislative Assembly is necessary before action can be taken to revoke a dedication of land or change its status to a lesser category of protection); or
- mentioned in schedule 2A.¹⁴

¹¹ *Pfeiffer v Stevens* (2001) 209 CLR 57, [24] (Gleeson CJ and Hayne J).

¹² Parliament of Victoria Law Reform Committee, *Regulatory Efficiency Legislation* (October 1997) chapter 6.19 <www.parliament.vic.gov.au/lawreform> at 06-10-09.

¹³ *Statutory Instruments Act*, s 57.

¹⁴ These are the Drugs Misuse Regulation 1987, Nature Conservation (Protected Areas) Regulation 1994, Superannuation (State Public Sector) Deed 1990; Traffic Regulation 1962, Weapons Categories Regulation 1997 and a management plan under the *Wet Tropics World Heritage Protection and Management Act 1993*.

3 Previous reforms in Queensland

Overview

- 3.1 During the past 25 years in Queensland, a number of review bodies have made recommendations for reform regarding subordinate legislation. The Queensland recommendations have been influenced by three waves of reform. As in all Australian jurisdictions, generally, the waves of reform followed 'successive attempts to improve the quality of processes by which regulation is made and amended by government in conjunction with various stakeholders and interests'.¹⁵

Enactment of the *Regulatory Reform Act*

Savage Committee

- 3.2 In 1985, a Committee of Review of Business Regulations was established in Queensland to remove unnecessary government red tape. Known as the 'Savage Committee', its terms of reference included that it should:
- identify regulatory requirements which the business sector considered unnecessary, or in need of reform; and
 - in respect of both existing and future regulations, recommend consultation procedures and administrative arrangements which would ensure:
 - thorough assessment of the need for a particular regulation;
 - thorough assessment of the full costs and benefits of proposed regulations;
 - full consultation with those individuals and organisations likely to be affected by regulations prior to their promulgation;
 - that the efficiency and effectiveness of regulations were regularly re-assessed, and unnecessary or ineffective regulatory regimes were repealed.
- 3.3 In December 1985, the Savage Committee reported that it had identified 500 statutory instruments in force.¹⁶ The Savage Committee concluded that there was an over-use of regulations by government to solve problems within industry and the community. It reported also on inadequate identification of public policy objectives and insufficient consideration of alternatives to regulation. The Savage Committee recommended greater attention be given to the issue of individual rights and freedoms potentially affected by regulation:¹⁷

The content of many regulations suggest a need to question whether there are ethical, as well as practical limits to what a government should do in interfering with the lives of individuals.

- 3.4 The Savage Committee made 31 recommendations for reform, including for a Regulation Revocation Program to:¹⁸
- identify and repeal all unnecessary State regulations;
 - identify and repeal (or replace) State regulations which were inefficient, ineffective or impose undue costs on business;
 - enhance the efficiency and effectiveness of essential State regulations; and
 - identify opportunities for rationalisation of State and local regulatory requirements.

¹⁵ Peter Carroll et al, *Minding the Gap, Appraising the Promise and Performance of Regulatory Reform in Australia* (2008) ix.

¹⁶ Committee of Review of Business Regulations, *First Report* (1985) 12.

¹⁷ Committee of Review of Business Regulations, *First Report* (1985) 9.

¹⁸ Committee of Review of Business Regulations, *First Report* (1985) 9.

Regulatory Reform Act

- 3.5 The recommendations of the Savage Committee were given effect in the *Regulatory Reform Act 1986* (Qld). It commenced on assent, on 26 March 1986, and established a mechanism to review and revoke outdated subordinate legislation. The review mechanism had the objectives of:¹⁹
- substantially reducing the accumulated regulatory burden on business without compromising law and order and essential economic, social and environmental objectives;
 - providing a regulatory framework which eliminated unnecessary costs on business and minimised unavoidable costs;
 - improving the effectiveness of essential regulatory activity;
 - improving the efficiency of the formulation and administration of regulatory requirements; and
 - providing a regulatory framework which could accommodate changes in economic circumstances, social standards and technology.
- 3.6 Accordingly, the *Regulatory Reform Act* provided for the mandatory repeal of groups of regulations based on the date of their gazettal. Section 5 stated that subordinate legislation made after 30 June 1986 would expire on the seventh anniversary of the day on which it was made. Section 7 of the *Regulatory Reform Act* (as passed) provided for the expiry of the Act on 31 December 1993.
- 3.7 In June 1986, at the commencement of the *Regulatory Reform Act*'s mandatory repeal regime, there were 778 regulations in force in Queensland.²⁰ However, little information is available about the effect of the regime in the period 1986 to 1994. This is due to a combination of factors including:
- absence of a comprehensive central register of subordinate legislation in Queensland prior to 1998;
 - many instruments of subordinate legislation were in paper form only prior to 1998; and
 - many instruments of subordinate legislation in existence in 1986 did not impose an ongoing regulatory regime, but were 'one off', minor instruments.

Review of the Regulatory Reform Act

Fitzgerald Inquiry

- 3.8 In 1989, the *Report of a Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct* was tabled in the Queensland Parliament. It drew attention to the importance of parliamentary scrutiny of legislative activity in Queensland:²¹

Parliament is meant to be the forum in which the necessity and worth of proposed laws ... can be debated. It should also serve as an inquest in which all or any aspects of public administration can be raised...

Elsewhere, the effective and efficient operation of Parliament has been enhanced by the setting up of all-party policy and investigatory committees. The committees have become a vital and energetic part of giving effect to the democratic process particularly in respect of complex issues. They serve as Parliament's research arm and as an independent source of information to aid proper Parliamentary debate.

Scrutiny of Government legislative activity and of public administration is more effective as a consequence.

- 3.9 The Fitzgerald Inquiry report indicated that the corruption and misconduct identified during the course of the Commission's investigations were due, in part, to the inability of the Queensland Parliament to review effectively the Government's legislative activity and its public administration. A factor contributing to the decline in the accountability of the Government to the Parliament included absence of a 'comprehensive system of Parliamentary Committees to enhance the ability of Parliament to monitor the efficiency of Government'.²² The report recommended establishment of an independent

¹⁹ *Regulatory Reform Act 1986* (rep), s 2.

²⁰ Advice of Committee of Subordinate Legislation to Conference of Australian Subordinate Legislation Committees, Brisbane, June 1986: *Fifteenth Report of the Committee of Subordinate Legislation* (1986) 4.

²¹ GE Fitzgerald, *Report of a Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct pursuant to Orders in Council*, dated 26 May 1987, 24 June 1987, 25 August 1988, 29 June 1989 (1989) 123.

²² GE Fitzgerald, *Report of a Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct Pursuant to Orders in Council*, dated 26 May 1987, 24 June 1987, 25 August 1988, 29 June 1989 (1989), 124-5.

commission, the Electoral and Administrative Review Commission (EARC), to put in place reforms including implementation and supervision of 'a comprehensive system of Parliamentary Committees'.²³

EARC

3.10 In 1992, EARC conducted a review of parliamentary committees, including whether a committee of the Parliament should carry out scrutiny of primary and subordinate legislation. In the context of the inquiry, EARC examined the operation of the *Regulatory Reform Act*. General information regarding the operation of the *Regulatory Reform Act* included:²⁴

- in the first five years of operation, approximately 123 sets of regulations had expired and approximately 144 sets were redrafted and remade; and
- a survey of all Queensland Government regulatory activity during 1 July 1986 to 31 June 1988 found no real evidence of a reduction in the regulatory burden in real terms – 26% of regulations reviewed were exempted from expiry and a further 27% were remade in the same form.

3.11 EARC found that:²⁵

- the objectives of the *Regulatory Reform Act* had been disregarded by departments;
- rather than the Regulation Revocation Program being undertaken by a government and industry representatives as recommended by the Savage Committee, it was undertaken by the then Department of Business, Industry and Regional Development;
- doubts existed as to the continuation of the Regulation Revocation Program following the expiry of the *Regulatory Reform Act* on 31 December 1993;
- as objectives of the Savage Committee recommendations and *Regulatory Reform Act* had continuing relevance, periodic review mechanisms were needed beyond 31 December 1993; and
- the *Regulatory Reform Act* was much wider in its application than the recommendations of the Savage Committee which had been directed to regulations affecting business and industry.

3.12 EARC recommended the establishment of a parliamentary scrutiny of legislation committee and new procedures to ensure greater transparency and accountability in the making of subordinate legislation.²⁶ Recommendations included the redrafting of section 5 of the *Regulatory Reform Act* to address confusion about the expiry of that Act.²⁷

PCEAR

3.13 In 1993, the Parliamentary Committee for Electoral and Administrative Review (PCEAR), an all party committee of the Legislative Assembly, conducted a review of the EARC report and recommendations. The recommendations regarding regulatory reform were considered and, generally, endorsed by the PCEAR. In addition, the committee agreed about the need for a scrutiny of legislation committee.²⁸

Reforms to improve legislative standards

3.14 Implementation of the above recommendations led to enactment of the:

- *Statutory Instruments Act 1992*;
- *Regulatory Reform Amendment Act 1993*;
- *Statutory Instruments and Legislative Standards Amendment Act 1994*; and
- Statutory Instruments Regulation 2002.

²³ GE Fitzgerald, *Report of a Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct Pursuant to Orders in Council*, dated 26 May 1987, 24 June 1987, 25 August 1988, 29 June 1989 (1989), 370-1.

²⁴ Tait in EARC, *Report on Review of Parliamentary Committees Volume 1* (October 1992) 4.116, 115.

²⁵ EARC, *Report on Review of Parliamentary Committees Volume 1* (October 1992) chapter 4.

²⁶ EARC, *Report on Review of Parliamentary Committees Volume 2* (October 1992) 13.3 - 13.5.

²⁷ EARC, *Report on Review of Parliamentary Committees Volume 2* (October 1992) 13.6 - 13.12.

²⁸ PCEAR, *Report on Review of Parliamentary Committees* (1993).

Statutory Instruments Act

3.15 The *Legislative Standards Act 1992*, *Reprints Act 1992* and *Statutory Instruments Act* formed a trilogy of Acts passed with the intention 'to improve the standard and accessibility of legislation in Queensland'.²⁹

3.16 In respect of the *Statutory Instruments Bill 1992*, then Premier, Hon WK Goss, stated in his second reading speech:³⁰

The Statutory Instruments Bill is intended to give Queensland a satisfactory framework for defining and dealing with statutory instruments. This framework has, up until now, been lacking in this State. This Bill defines subordinate legislation and clarifies what are the statutory instruments used, be they regulation, Order in Council, by-law or ordinance.

3.17 The object of the Act, as indicated by the former Premier, was to clarify and consolidate requirements regarding subordinate legislation. In addition, the Act aimed to ensure accountability in the subordinate law-making process by providing:

- a definition of the statutory instruments to which the Act applies;³¹
- formal procedures controlling how subordinate legislation was prepared and drafted;³²
- public consultation on proposed law-making and publication of subordinate legislation;³³
- parliamentary oversight;³⁴ and
- staged automatic expiry of subordinate legislation.³⁵

3.18 The *Statutory Instruments Act* received assent on 1 June 1992. It commenced on the date of assent.

Regulatory Reform Amendment Act

3.19 The *Regulatory Reform Act Amendment Act 1993* delayed the expiry of the *Regulatory Reform Act* until 31 December 1994.

Amendment of the Statutory Instruments Act

3.20 Part 7 of the *Statutory Instruments Act* was inserted by the *Statutory Instruments and Legislative Standards Amendment Act 1994* (the 1994 Act) which commenced on receiving assent on 1 December 1994.

3.21 Section 4 of the 1994 Act omitted parts 5 and 6 of the *Statutory Instruments Act* as enacted and inserted new parts 5 to 10:

- part 5 – Guidelines for regulatory impact statements;
- part 6 – Procedures after making subordinate legislation;
- part 7 – Staged automatic expiry of subordinate legislation;
- part 8 – Forms;
- part 9 – Miscellaneous (including section 59 (Regulation-making power)); and
- part 10 – Transitional.

3.22 The new part 7 provided for an initial round of automatic expiry of subordinate legislation on 1 July 1997. Subsequently, the initial expiry date was extended to 1 July 1998.

²⁹ Queensland Parliament, *Hansard* (6 May 1992) 5006.

³⁰ Queensland Parliament, *Hansard* (6 May 1992) 5005.

³¹ *Statutory Instruments Act 1992* (Qld) s 9.

³² See: Department of the Premier and Cabinet, *The Queensland Legislation Handbook: Governing Queensland* (2004) www.legislation.qld.gov.au.

³³ *Statutory Instruments Act 1992* (Qld) parts 5 and 6.

³⁴ *Statutory Instruments Act 1992* (Qld) s 49.

³⁵ *Statutory Instruments Act 1992* (Qld) part 7.

Statutory Instruments Regulation

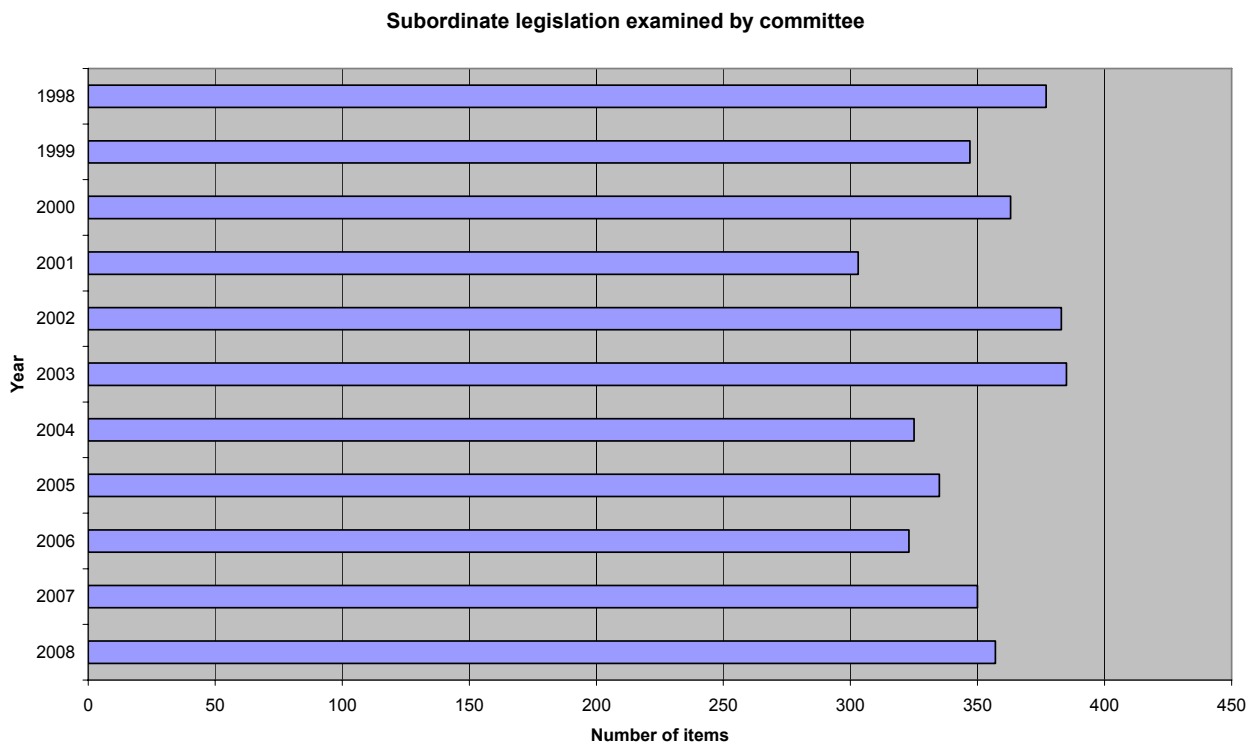
- 3.23 The Statutory Instruments Regulation 2002 was made by the Governor in Council on 29 August 2002 and notified in the *Gazette* on 30 August 2002.³⁶ It commenced operation on 1 September 2002 and is due to expire on 1 September 2012.
- 3.24 The regulation supports the *Statutory Instruments Act* in a number of respects. Part 3, for example, identifies instruments of subordinate legislation exempt from expiry under part 7 of the Act.

³⁶ Queensland Government, *Gazette* (30 August 2002) 1557-61.

4 Expiry and periodic review under part 7

Available data – general

- 4.1 In Queensland, the number of instruments examined by the committee provides an indication of the number made each year. The number examined from 1998 to 2008 is represented below.



- 4.2 Data provided by the Queensland Government regarding expiry of subordinate legislation during the years from 1998 to 2008 indicates that initial rationalisations of the statute book took place following enactment of the 1994 Act.³⁷ Some departments made significant reductions. More recently, the data suggests it has been unusual for an instrument to expire without first being replaced. The number of instruments of subordinate legislation in Queensland clearly increased during the period 1998 to 2008.
- 4.3 An Act generally requires regulations. Generally, subordinate legislation is an element of a good regulatory regime on a given subject. With an average of 73 Acts passed annually by the Queensland Parliament during 1998 to 2008, it cannot be expected that the number of statutory instruments would have decreased in that decade. While it is a separate question whether the overall regulatory burden in Queensland increased or diminished, evaluation cannot be made solely on numbers of instruments.

Available data – expiry

1994-1998

- 4.4 Although part 7 of the *Statutory Instruments Act* commenced on 1 December 1994, the initial round of automatic expiry of subordinate legislation took place on 1 July 1998. Due to a lack of reliable data prior to 1998, it is impossible to determine relevant factors. These include, for example, the number of instruments of subordinate legislation:
- removed from the statute book in the years prior to the first round of expiry in 1998; or
 - which lapsed on 1 July 1998 but were replaced by new instruments.

³⁷ See appendix A.

- 4.5 Information regarding the early operation of the current scheme was provided to the committee by the Hon AM Bligh MP, Premier of Queensland. The information was collated in 1997 and is based on data from the Queensland Legislation Annotations and historical records of Queensland Government departments. A copy of the letter from the Premier is attached as **appendix A**.

1998 - 2008

- 4.6 The Premier of Queensland also provided information (see **appendix A**) regarding:
- the operation of the legislative scheme in part 7 of the *Statutory Instruments Act*; and
 - outcomes of periodic review of subordinate legislation undertaken since 1998.

Overview of requirements regarding expiry and periodic review

- 4.7 Section 54 of the *Statutory Instruments Act* provides for subordinate legislation to ‘expire’ or ‘sunset’ on 1 September after it has been in existence for ten years. Accordingly, section 54 has the following elements:
- automatic expiry;
 - expiry on 1 September; and
 - a ten-year life span for subordinate legislation.
- 4.8 These provisions are not absolute:
- sections 56 and 56A of the *Statutory Instruments Act* allow the life of specified subordinate legislation to be extended by a regulation made prior to the expiry date; and
 - section 57 provides that part 7 of the *Statutory Instruments Act* does not apply to subordinate legislation –
 - requiring a resolution of the Legislative Assembly before it may be repealed or the status of land to which it applies may be changed; or
 - mentioned in schedule 2A.

Key issue 1: automatic expiry

Automatic expiry

Current provision

- 4.9 Section 54 of the *Statutory Instruments Act* provides for the automatic expiry, on a specific date, of all subordinate legislation of a particular age. It follows EARC and PCEAR recommendations for the continuation of a regulation repeal regime established under the *Regulatory Reform Act*. Under the regime, groups of regulations expired automatically on the seventh anniversary of their gazettal date. The objective was to ensure that there was an ongoing review of government regulations.³⁸
- 4.10 In its report to the Queensland Parliament, PCEAR advised that it had received a submission suggesting that, rather than automatic repeal, legislation should provide for a mandatory review process.³⁹

The committee sought the views of the Department of Business, Industry and Regional Development (DBIRD) and the Office of the Cabinet on the issue of sunset legislation. DBIRD considered that the mandatory termination of regulation on their seventh anniversary had the potential to cause significant problems if important regulations were automatically terminated. To avoid this DBIRD suggested a mandatory review process instead of automatic repeal:

³⁸ EARC, *Report on Review of Parliamentary Committees Volume 1* (October 1992) 4.106, 114; PCEAR, *Report on Review of Parliamentary Committees* (1993) 65.

³⁹ PCEAR, *Report on Review of Parliamentary Committees* (1993) 66.

“To ensure a review requirement is effective, it would be necessary to develop appropriate mandatory processes. These might include standards, similar to those proposed for Regulatory Impact Statements, which are specified in legislation” (Boyle 18 June 1993);

and the following options for overviewing that process:

- i) providing authority to a public sector body to oversight the process;*
- ii) providing for Cabinet to consider completed reviews and for Ministers to report to Parliament; and*
- iii) providing for a parliamentary committee to monitor the process.*

4.11 However, PCEAR observed that automatic expiry ensured parliamentary review of subordinate legislation.⁴⁰

This Committee does not support the notion of the simple review of subordinate legislation after a certain period, particularly where the executive or a public sector body would be assigned this task. Subordinate legislation is made through Parliament delegating its law making power to the executive. To allow supervision of this delegated arrangement, all subordinate legislation must be tabled in the Legislative Assembly within 14 sitting days of its publication in the Gazette, or it ceases to have effect. Further, any Member of the Legislative Assembly can move to disallow subordinate legislation with a further 14 sitting days (Statutory Instruments Act 1992 ss43 and 44). Given the disregard departments have shown for the current Regulatory Reform Act 1986, it would be untenable to suggest that departments would conduct more thorough reviews of their subordinate legislation if left to their own devices. Through automatic repeal provisions and controlled exemptions the Legislative Assembly can at least be sure that at regular intervals subordinate legislation again must come before it.

Matters for consideration

4.12 Both the remaking of subordinate legislation prior to automatic expiry and the making of a regulation to delay automatic expiry enliven part 6 *Statutory Instruments Act*. It requires subordinate legislation be tabled in the Parliament (section 49). A tabled instrument then becomes subject to disallowance procedures (section 50). Accordingly, automatic expiry requirements in part 7 and tabling requirements in part 6 ensure parliamentary review of subordinate legislation.

Key issue 2: expiry on 1 September

Expiry on 1 September

Current provision

4.13 Section 54 provides for subordinate legislation to expire on the 1 September first occurring after the tenth anniversary of its making.

4.14 Information received by the committee from the Queensland Premier and Queensland Government ministers did not identify any concerns regarding all subordinate legislation expiring on the same day each year. The letter from the former Minister for Communities, Minister for Disability Services, Minister for Aboriginal and Torres Strait Islander Partnerships and Minister for Multicultural Affairs, Seniors and Youth, for example, stated:⁴¹

I am advised that the staged automatic expiry of subordinate legislation is considered to provide an efficient and effective means to ensure that subordinate legislation is periodically reviewed. In particular, the provision for staged expiry on 1 September first following the 10th anniversary of the making of the regulation (section 54) is considered appropriate.

Other Australian jurisdictions

4.15 In other jurisdictions, the expiry of subordinate legislation occurs on a staggered basis throughout the year. Under the *Legislative Instruments Act* (Cth), the staged automatic expiry of Commonwealth instruments will commence in 2015, with instruments to expire on either 1 April or 1 October.

⁴⁰ PCEAR, *Report on Review of Parliamentary Committees* (1993) 66.

⁴¹ Hon Lindy Nelson-Carr MP, correspondence received, 21 November 2007; see appendix A.

Matters for consideration

- 4.16 Provision for expiry on the one day each year provides a clear timeframe for review of subordinate legislation. Expiry on 1 September has been in operation for some years now.

Key issue 3: expiry each ten years

Ten-year life span

Current provision

- 4.17 Section 54 of the *Statutory Instruments Act* provides for expiry on the 1 September first occurring after the tenth anniversary of the making of an instrument of subordinate legislation.

- 4.18 Originally, regulation review in Queensland under the *Regulatory Reform Act* required remaking of regulations on their seventh anniversary. EARC supported continuation of this requirement, but PCEAR recommended the current ten years.⁴²

- 4.19 Information received from the Premier of Queensland included the following advice:⁴³

An automatic expiry period for subordinate legislation of ten years acknowledges the often significant work involved in replacing subordinate legislation within the broader context of Government policy objectives and the three-year electoral cycle.

- 4.20 Similarly, the former Minister for Education and Training and Minister for the Arts advised the committee that:⁴⁴

The current 10 year sunset period is considered appropriate to ensure regulations are up to date and relevant. Given the time and resources required to review and remake a regulation, and the fact that regulations are continuously amended and updated throughout their life, my department would not support a period less than 10 years.

Other Australian jurisdictions

- 4.21 Generally, in other Australian jurisdictions with relevant legislative schemes, current requirements for remaking of subordinate legislation provide for a ten-year life span. The exception is New South Wales where subordinate legislation ceases operation five years after its commencement, with provision for postponement of the expiry. Annulment may be postponed up to five times by order of the Governor and published in the New South Wales Government Gazette. However on the third and subsequent occasions, at least one month's notice must be given to the Regulation Review Committee, which may then provide advice regarding the postponement to the Minister and the Parliament.⁴⁵ In New South Wales, postponement is considered only where:⁴⁶

- Cabinet has approved a review, including a National Competition Policy review, of the primary legislation or the regulations themselves;
- the statutory rules to be reviewed are lengthy and complex – nevertheless, postponement will be allowed only where the review is expected to result in new statutory rules within the 12 months' extension; and
- the principal legislation or statutory rules are subject to national review and the timetable does not extend beyond 1 September the following year.

- 4.22 In September 2002, the Victorian Parliament's Scrutiny of Acts and Regulations Committee tabled a report following an inquiry involving an evaluation of the existing Victorian regulatory system and an

⁴² PCEAR, *Report on Review of Parliamentary Committees* (1993) 68.

⁴³ Hon Anna Bligh MP, Premier of Queensland, *correspondence* received 12 December 2007; see appendix A.

⁴⁴ Hon Rod Welford MP, Minister for Education and Training and Minister for Arts, *correspondence* received 10 October 2007; see appendix A.

⁴⁵ *Subordinate Legislation Act 1989* (NSW), ss 10 and 11.

⁴⁶ Premier of New South Wales, *Memorandum 98-34* (18 November 1998).

analysis of regulatory systems in other Australian jurisdictions and in six jurisdictions in the United States.⁴⁷ One issue raised in public submissions to the Victorian inquiry was the appropriateness of the ten-year expiry period. The Victorian Bar strongly endorsed the existing period, as:⁴⁸

... a process preventing the persistence of antiquated regulation. There is the apocryphal story of the only recent repeal of an ancient road traffic regulation requiring motor vehicles going down St. Kilda Road to be preceded by a man carrying a red flag. Automatic sunseting provides a chance to comprehensively review regulations, without which, many regulations would not be reviewed for long periods.

- 4.23 Most other submissions to the Victorian inquiry, particularly those from Government, opposed a reduction from ten to five years. The following, for example, was said in a submission to the Victorian Committee:⁴⁹

Five years is far too short – from my experience, the rewriting of a major set of regulations can take up to 2 years and sometimes longer from planning to completion. A five year turn around would impose an even more significant burden on limited Departmental resources.

- 4.24 The Victorian committee considered the five-year period operating in New South Wales and concluded ten years was an appropriate lifespan for subordinate legislation:⁵⁰

There is strong evidence that the postponement mechanism has been used repeatedly and in doing so has frustrated the intent of the Subordinate Legislation Act 1989 (NSW) for statutory rules to automatically cease at the end of five years. In 1998, of the 101 regulations which were sunseting, 70% were postponed “for the third, fourth, fifth or sixth time”. The average life span of statutory rules is thus much longer than five years and is probably somewhere between eight and ten years. This suggests that ten years is a more appropriate time for the life of statutory rules.

- 4.25 The Victorian committee recommended that the period of time after which regulations must be remade should continue to be ten years.

- 4.26 Federally, the *Rethinking Regulation* report of the Australian Government’s Taskforce on Reducing Regulatory Burdens on Business recommended the *Legislative Instruments Act* (Cth) be amended to provide for a five-year, rather than ten-year, expiry period. Submissions to the Taskforce had expressed broad support for a shorter timeframe than the existing ten-year period.⁵¹ Subsequently, a committee reviewing the Commonwealth *Legislative Instruments Act* was asked to consider reduction in the expiry period. The report on that committee stated:⁵²

Some industry stakeholders supported the proposal. Almost all agencies expressed concerns about the resource and other implications of a shorter sunseting cycle.

The LIA’s 10-year sunseting period is consistent with comparable regimes for the management of delegated legislation in Victoria, Queensland, South Australia and Tasmania. Only New South Wales has a shorter sunseting period of five years, although sunseting can be postponed.

On the evidence available, the present period of 10 years appears appropriate and is supported by the Committee. It will, in any event, be reviewed during the 2017 statutory review of the LIA’s sunseting provisions when the impact of sunseting can be better appreciated.

Matters for consideration

- 4.27 Due to requirements in part 6 of the *Statutory Instruments Act* requiring tabling of subordinate instruments once made, parliamentary scrutiny of subordinate legislation follows the making or remaking of subordinate legislation. Generally, therefore, expiry and parliamentary examination of any remade subordinate legislation occur each ten years.

⁴⁷ Scrutiny of Acts and Regulations Committee, *Inquiry into the Subordinate Legislation Act 1994, Report* (September 2002).

⁴⁸ M Durham, Submission no 21 in Scrutiny of Acts and Regulations Committee, *Inquiry into the Subordinate Legislation Act 1994, Report* (September 2002) 112.

⁴⁹ H Race, Submission no 3 in Scrutiny of Acts and Regulations Committee, *Inquiry into the Subordinate Legislation Act 1994, Report* (September 2002) 113.

⁵⁰ Scrutiny of Acts and Regulations Committee, *Inquiry into the Subordinate Legislation Act 1994, Report* (September 2002) 164.

⁵¹ Australian Government, *Rethinking Regulation, Report of the Taskforce on Reducing Regulatory Burdens on Business* (January 2006) 173.

⁵² Legislative Instruments Act Review Committee, *2008 Review of the Legislative Instruments Act 2003* (31 March 2009) 49.

- 4.28 Following its inquiry into the Victorian regulatory system, the Victorian Scrutiny of Acts and Regulations Committee recommended that Victorian Government departments review the effectiveness of regulations part-way through their ten-year existence, with a report to be tabled in Parliament and to be publicly available.

Key issue 4: delay of an expiry date

Extensions of expiry period

Current provisions

- 4.29 In the *Statutory Instruments Act*, sections 56 and 56A enable an expiry date to be delayed. Therefore, the life of subordinate legislation is extended, as set out in the table below.

Section 56	Section 56A
'uniform subordinate legislation'	other subordinate legislation
extensions of five years	extensions of one year
by regulation made before the expiry date	by regulation made before the expiry date
no grounds required	grounds for extension: • replacement being drafted and to be ready within a year • no replacement, subordinate legislation to lapse • governing Act subject to review
unlimited number of repeat extensions	unlimited number of repeat extensions (available where Act under review)
number of instruments extended in 2007: 13	number of instruments extended in 2007: 27 (22 on ground that Act under review)
number of instruments extended in 2008: 16	number of instruments extended in 2008: 16

- 4.30 Data provided by the Premier of Queensland regarding extensions of the expiry period is contained in **appendix A**.

Other Australian jurisdictions

- 4.31 In other jurisdictions, provision made for expiry of non-uniform subordinate legislation includes:
- postponement of expiry for two years in South Australia;
 - on the certificate of the minister, the Victorian Governor may extend the operation of a regulation for a period not exceeding 12 months; and
 - on issue of a certificate by the Commonwealth Attorney-General, the life of a legislative instrument may be extended for six or 12 months.
- 4.32 Limited extensions are available:
- in South Australia, where expiry may be postponed for two years (to a maximum of four years); and
 - in Victoria, where a regulation may be extended once only (for one year).

Matters for consideration

- 4.33 Over some years, in annual reports tabled in the Queensland Parliament, the committee has noted extensions of significant numbers of statutory instruments, often minor in nature. For at least some of these, it is arguable that the subordinate legislation could reasonably have been remade prior to expiry. The committee has requested information from ministers regarding the progress of reviews. Advice received regarding one instrument was that a review had been in progress for seven years.

- 4.34 Expiry should not take departments and agencies by surprise. Good administrative practice and efficiency should require departments and agencies to consistently evaluate and review subordinate legislation throughout the life of each instrument.

Key issue 5: notice of expiry

Key issue 6: evaluation and review prior to expiry

Notice of expiry

Current provision

- 4.35 Section 55 of the *Statutory Instruments Act* requires the parliamentary counsel provide administering departments and agencies with at least six months' notice of the expiry of subordinate legislation. However, failure to give the notice will not affect the expiry of a statutory instrument.
- 4.36 Section 55 was enacted following a recommendation by EARC in the same terms.⁵³ The recommendation was supported by PCEAR.⁵⁴
- 4.37 To meet the responsibility, the Office of the Queensland Parliamentary Counsel publishes a record of subordinate legislation due to expire.⁵⁵ The Premier of Queensland and the then Minister for Communities, Minister for Disability Services, Minister for Aboriginal and Torres Strait Islander Partnerships and Minister for Multicultural Affairs, Seniors and Youth provided information regarding the role of the Office of the Queensland Parliamentary Counsel: see **appendix A**.

Matters for consideration

- 4.38 The EARC recommendation on which section 55 is based was made within a wider recommendation for expiry of subordinate legislation at the end of a seven-year lifespan. Although PCEAR recommended a ten-year lifespan, it did not increase the minimum notice period regarding expiry. A longer minimum notice period might better accord with contemporary best practice in administration, including the need to ensure adequate consultation and good drafting.
- 4.39 While section 55 imposes obligations on the Office of the Queensland Parliamentary Counsel to provide notice of impending expiry, it does not impose any obligations on departments to evaluate and review a statutory instrument.

Key issue 7: review of subordinate legislation exempt from expiry

Exclusion of subordinate legislation from requirements of part 7

Current provision

- 4.40 Under section 57, part 7 does not apply to subordinate legislation:
- requiring a resolution of the Legislative Assembly before it may be repealed or the status of land to which it applies may be changed;⁵⁶ or
 - mentioned in schedule 2A (Drugs Misuse Regulation 1987, Nature Conservation (Protected Areas) Regulation 1994, Superannuation (State Public Sector) Deed 1990; Traffic Regulation 1962, Weapons Categories Regulation 1997 and a management plan under the *Wet Tropics World Heritage Protection and Management Act 1993*).

⁵³ EARC, *Report on Review of Parliamentary Committees* (October 1992), 4.127, 118.

⁵⁴ PCEAR, *Report on Review of Parliamentary Committees* (1993), 10.6.1, 79.

⁵⁵ See: www.legislation.qld.gov.au

⁵⁶ One example is the *Nature Conservation Act 1992* (Qld).

- 4.41 In their reviews of the *Regulatory Reform Act*, EARC and PCEAR found that a significant volume of subordinate legislation had been excluded from the regulation repeal regime in that Act. EARC said that ‘within five years 355 sets of regulations had been exempted’. Subordinate legislation excluded in this way was excluded for all time. In addition, the *Regulatory Reform Act* allowed the revival of repealed regulations by way of Proclamation made by the Governor in Council. EARC and PCEAR reports each noted that neither exemption nor revival process was subject to parliamentary scrutiny.⁵⁷

Other Australian jurisdictions

- 4.42 During a review of the Commonwealth *Legislative Instruments Act*, submissions were sought as to whether all regulations, including those not subject to automatic expiry should be subject to a review process. This followed a recommendation of the Australian Government’s Taskforce that:⁵⁸

At least every 5 years, all regulation (not subject to sunset provisions) should, following a screening process, be reviewed, with the scope of the review tailored to the nature of the regulation and its perceived performance.

- 4.43 In its report, following consideration of submissions received, the Review Committee stated:⁵⁹

A number of instruments have been exempted from the LIA’s sunset provisions. Periodic review of these instruments might nonetheless be beneficial even if automatic sunset is not appropriate. In this context, the Committee notes the work of the Office of Best Practice Regulation in implementing the Government’s decision to require five-yearly reviews of business regulation not subject to statutory review or sunset.

The Committee recommends that legislative instruments exempt from sunset be periodically reviewed.

- 4.44 Accordingly, the *Legislative Instruments Act* Review Committee recommended review of such instruments each five years.

Matters for consideration

- 4.45 In the past, a large number of statutory instruments were excluded, for all time, from the operation of part 7 of the *Statutory Instruments Act*.

⁵⁷ EARC, *Report on Review of Parliamentary Committees* (October 1992); PCEAR, *Report on Review of Parliamentary Committees* (1993).

⁵⁸ Australian Government, *Rethinking Regulation, Report of the Taskforce on Reducing Regulatory Burdens on Business* (January 2006) 174.

⁵⁹ Legislative Instruments Act Review Committee, *2008 Review of the Legislative Instruments Act 2003* (31 March 2009) 52.

5 Related matters

Key issue 8: administrative policies and practices related to expiry

Administrative policies and practices

Executive guidelines regarding review

- 5.1 In Queensland, requirements to be observed by departments and agencies regarding the development and making of subordinate legislation are contained in:
- legislation – the *Statutory Instruments Act* and *Legislative Standards Act*, including part 2 of the *Legislative Standards Act*; and
 - administrative guidelines – the *Queensland Legislation Handbook*, the *Queensland Cabinet Handbook*, the *Queensland Executive Council Handbook*, the *Queensland Policy Handbook* and the *Queensland Parliamentary Procedures Handbook*.
- 5.2 The Minister for Education and Training and Minister for the Arts provided information regarding observance of the legislation and guidelines: see **appendix A**.

Drafting of subordinate legislation

- 5.3 The Premier of Queensland provided information regarding the role of the Office of the Queensland Parliamentary Counsel in the drafting of subordinate legislation: see **appendix A**.

Co-ordination of extensions to expiry

- 5.4 The Premier of Queensland also outlined a role prior to expiry played by the Department of the Premier and Cabinet. It coordinates biannual Statutory Instruments Amendment Regulations extending subordinate legislation due to expire: see **appendix A**.

Audit by Queensland Audit Office

- 5.5 Recently, the Queensland Audit Office conducted a performance management systems audit with the objective of determining:⁶⁰
- whether Queensland Government agencies have appropriate systems in place to assess options or alternatives to regulation; and
 - the need for, and impact of, proposed regulations and amendments to existing regulations.
- 5.6 During that audit, the level of compliance of explanatory notes and regulatory impact statements with requirements in the *Legislative Standards Act* and the *Statutory Instruments Act* was examined also.
- 5.7 The Auditor-General's recommendations, included in his report tabled on 18 August 2009, were that:⁶¹

Line agencies

- agencies develop and implement policies and procedures to enable them to fully address the requirements of the Legislative Standard Act 1992 and Statutory Instruments Act 1992 (SIA) when developing EN and RIS for proposed regulation
- agencies incorporate into their policies and procedures, the 2007 COAG's Principles of Best Practice to fully inform Parliament and aid in its decision making processes when considering regulatory solutions.

Central agencies

- central agencies review their guidance materials to align them with the principles of best practice regulation

⁶⁰ Queensland Audit Office, *Auditor General of Queensland Report to Parliament no 6 for 2009, Providing the information Required to Make Good Regulation* (18 August 2009) www.qao.qld.gov.au at 06-10-09.

⁶¹ Queensland Audit Office, *Auditor General of Queensland Report to Parliament no 6 for 2009, Providing the information Required to Make Good Regulation* (18 August 2009) 5, www.qao.qld.gov.au at 06-10-09.

- *Department of the Premier and Cabinet work with Treasury Department to facilitate the development of a training framework for policy officers developing regulations*
- *central agencies collaborate to identify and develop the role of a regulatory gatekeeper to ensure a smooth and consistent governmental approach to developing quality regulation (both primary and subordinate).*

5.8 The Government responses to the Auditor-General's report (from the four departments audited) indicated general support for the thrust of the recommendations. The response received from the Director-General of the Department of Premier and Cabinet advised that the recommendations would be implemented in the following ways:⁶²

- development of Whole-of-Government policies and procedures –
 - the Department of the Premier and Cabinet to develop guidelines and templates for explanatory notes for inclusion in guidance material to ensure requirements of the *Legislative Standards Act* are met;
 - the Queensland Office of Regulatory Efficiency to update existing policies and procedures to support agencies in fully addressing the requirements of the *Statutory Instruments Act*; and
 - both the Department of the Premier and Cabinet and Queensland Office of Regulatory Efficiency to establish systems requiring agencies to demonstrate proper consideration of best practice in developing proposed regulation and that statutory requirements have been addressed;
- updating of existing Whole-of-Government policies and procedures to explicitly incorporate the Council of Australian Governments (COAG) Principles of Best Practice and establishment of Whole-of-Government systems requiring agencies to demonstrate proper consideration of regulatory best practice principles;
- review of guidance materials by the Department of the Premier and Cabinet and Queensland Office of Regulatory Efficiency to ensure alignment with principles of best practice regulation;
- the Department of the Premier and Cabinet and Queensland Office of Regulatory Efficiency to ensure an appropriate training framework for policy officers; and
- the Department of the Premier and Cabinet and Queensland Office of Regulatory Efficiency to further promulgate regulatory best practice through appropriate guidance materials and advisory support.

Matters for consideration

5.9 Although 'regulatory best practice' relates to all legislative and non-legislative forms of government control of industry or the community, automatic expiry and periodic review of subordinate legislation operates within this wider framework. Consistent with best practice, the quality of processes by which subordinate legislation is made and remade and the quality and effectiveness of the legislation produced should be administrative priorities. Within this framework, automatic expiry by way of part 7 of the *Statutory Instruments Act* should be regarded as a mechanism to promote government efficiency and accountability:

- where review identifies a need for new subordinate legislation, the operation of part 7 should facilitate best practice, allowing design of legislation to operate for a defined period of time; and
- throughout the period of operation, evaluation undertaken to meet best practice requirements provides useful information about effectiveness of legislative policy.

Key issue 9: the relationship between parts 5 and 7 of the *Statutory Instruments Act*

Regulatory impact analysis

5.10 On 10 February 2006, COAG agreed a National Reform Agenda 'to help underpin Australia's future prosperity'. It comprises three streams: human capital, competition and regulatory reform. The

⁶² Queensland Audit Office, *Auditor General of Queensland Report to Parliament no 6 for 2009, Providing the information Required to Make Good Regulation* (18 August 2009) 5-18, www.gao.qld.gov.au at 06-10-09

regulatory reform stream of the COAG National Reform Agenda aims to reduce the regulatory burden imposed by the three levels of government in Australia. On 10 February 2006, COAG agreed that:⁶³

... effective regulation is essential to ensure markets operate efficiently and fairly, to protect consumers and the environment and to enforce corporate governance standards. However, the benefits from each regulation must not be offset by unduly high compliance and implementation costs.

COAG agreed to a range of measures to ensure best-practice regulation making and review, and to make a "downpayment" on regulatory reduction by taking action now to reduce specific regulation "hotspots". It is expected that further action to address burdensome regulation and red tape will be taken as the Commonwealth considers and responds to the report of the Taskforce on Reducing the Regulatory Burden on Business, and as State, Territory and local governments undertake their own regulation review processes.

5.11 It was agreed all Australian Governments would:⁶⁴

- establish and maintain effective arrangements to maximise the efficiency of new and amended regulation and avoid unnecessary compliance costs and restrictions on competition;
- undertake targeted public annual reviews of existing regulation to identify priority areas where regulatory reform would provide significant net benefits to business and the community;
- identify further reforms that enhance regulatory consistency across jurisdictions or reduce duplication and overlap in regulation and in the role and operation of regulatory bodies; and
- in-principle, aim to adopt a common framework for benchmarking, measuring and reporting on the regulatory burden.

5.12 In 2006, the Queensland Office for Regulatory Efficiency was established in the Queensland Treasury to lead a program of regulatory reform. The reform program was designed to increase the productivity and competitiveness of Queensland, and to enhance the attractiveness of Queensland to individuals and business investment.⁶⁵

5.13 Queensland Office for Regulatory Efficiency responsibilities are:⁶⁶

- the COAG reform agenda (business regulation and competition);
- regulatory reviews and audits; and
- regulatory impact assessment and advice.

5.14 In relation to the last of these, regulatory impact assessment and advice, the Queensland Office for Regulatory Efficiency's role is to:⁶⁷

- harmonise and streamline regulatory impact statement and public benefit test requirements and processes;
- provide best practice advice to agencies; and
- assess and advise on all significant regulatory proposals.

5.15 The Queensland Office for Regulatory Efficiency website provides information regarding the conduct of regulatory impact analysis in Queensland.⁶⁸

5.16 Guidelines regarding the preparation of regulatory impact statements are contained in part 5 of the *Statutory Instruments Act*. Section 43 states that, prior to the making of subordinate legislation an administering department must prepare a regulatory impact statement in respect of subordinate legislation 'likely to impose appreciable costs on the community or a part of the community'.

5.17 Section 44 requires the statement to include information regarding:⁶⁹

- the authorising law;

⁶³ See: www.coag.gov.au/coag_meeting_outcomes/2006-02-10/index.cfm#reform

⁶⁴ See: www.coag.gov.au/coag_meeting_outcomes/2006-02-10/index.cfm#reform

⁶⁵ See: www.treasury.qld.gov.au/office/branches/qore.shtml

⁶⁶ See: www.treasury.qld.gov.au/office/branches/qore.shtml

⁶⁷ See: www.treasury.qld.gov.au/office/branches/qore.shtml

⁶⁸ See: www.treasury.qld.gov.au/office/branches/qore.shtml

⁶⁹ Defined in *Legislative Standards Act 1992* (Qld) s 4.

- the policy objectives of the proposed legislation and the reasons for them;
- the way the policy objectives will be achieved by the proposed legislation and why this way of achieving them would be reasonable and appropriate;
- consistency of the proposed legislation with the policy objectives of the authorising law (or, in the case of inconsistency, an explanation);
- if appropriate, rejected alternative measures;
- benefits and costs of implementation; and
- consistency with 'fundamental legislative principles'.

5.18 Section 40 provides:

- (1) This part provides, in division 2, guidelines for regulatory impact statements about proposed subordinate legislation.
- (2) Division 2 is directory only and does not create rights or impose legally enforceable obligations on the State, a Minister or anyone else.
- (3) However, it is Parliament's intention that the guidelines in division 2 be complied with before subordinate legislation is made.

5.19 The guidelines are based upon recommendations made by EARC and the PCEAR that:⁷⁰

Before subordinate legislation is made, the Minister must ensure that consultation commensurate with its likely impact takes place with groups likely to be affected by the subordinate legislation.

5.20 EARC recommendations had included an additional requirement for a 'rule-making proposal' to be circulated to assist consultation.⁷¹

Matters for consideration

5.21 An Australian Government Taskforce on Reducing Regulatory Burdens on Business found that in the last two decades, 'Australia has experienced a dramatic rise in the volume and reach of regulation, in response to a variety of social, environmental and economic issues'.⁷² The Taskforce recommended that the review of the Commonwealth *Legislative Instruments Act* consider inclusion of requirements for good regulatory process in that Act. However, the Commonwealth *Legislative Instruments Act* Review Committee recommended that such requirements not be included in the *Legislative Instruments Act*. The Review Committee stated that regulatory impact analysis is largely concerned with the impacts of regulation on business or the economy and is undertaken in respect of all forms of regulation, whether in an Act or legislative or non-legislative instrument.⁷³

Key issue 10: public consultation undertaken to meet the objectives of part 7 of the *Statutory Instruments Act*

Public consultation

Current provision

5.22 In Queensland, part 4 of the *Legislative Standards Act* requires that an explanatory note be tabled with 'significant subordinate legislation' (section 22(2)), and that it include information regarding the consultation carried out or, if consultation did not take place, a statement of the reason for no consultation (section 24(2)).

⁷⁰ PCEAR, *Report on Review of Parliamentary Committees* (1993) 10.4.16, 72.

⁷¹ EARC, *Report on Review of Parliamentary Committees Volume 1* (October 1992) 4.211, 139.

⁷² Australian Government, *Rethinking Regulation, Report of the Taskforce on Reducing Regulatory Burdens on Business* (January 2006) i.

⁷³ Legislative Instruments Act Review Committee, *2008 Review of the Legislative Instruments Act 2003* (31 March 2009).

- 5.23 'Significant subordinate legislation' is defined in section 2 of the *Legislative Standards Act* to mean 'subordinate legislation for which a regulatory impact statement must be prepared under the *Statutory Instruments Act*'.
- 5.24 Section 43 of the *Statutory Instruments Act* requires, prior to the making of subordinate legislation, preparation of a regulatory impact statement. An administering department is required to prepare a statement in respect of subordinate legislation 'likely to impose appreciable costs on the community or a part of the community'.
- 5.25 A notice about the proposed legislation must be published in order to provide interested people and organisations an opportunity to provide comment (section 45(1)). Should the proposed subordinate legislation be likely to have a significant impact on a particular group of people, the notice must be published so as to ensure members of the group have the opportunity to understand the purpose and content of the notice (section 45(2)). At least 28 days must be allowed for public comment (section 45(4)). A copy of the statement must be freely available 'or on payment of a reasonable price' (section 45(5)).

Current consultation

- 5.26 Committee data regarding explanatory notes and regulatory impact statements differ: one is in calendar years, the other financial years. However, the data is illustrative. In 2007, 15 instruments of subordinate legislation were accompanied by explanatory notes. In 2008, explanatory notes were prepared on a further 15 occasions. In respect of regulatory impact statements, in 2007-2008, 328 pieces of subordinate legislation were published in the Queensland Subordinate Legislation Series and 11 statements were prepared.
- 5.27 Accordingly, when subordinate legislation is made, explanatory notes and regulatory impact statements are uncommon. Generally the only document tabled in the Parliament is the statutory instrument itself.
- 5.28 The recent performance management systems audit of compliance with the *Legislative Standards Act* and *Statutory Instruments Act* conducted by the Queensland Audit Office found that:⁷⁴

The systems of the agencies audited are not resulting in explanatory materials that provide full and comprehensive information against the legislative requirements. The key areas for improvement are in the provision of information in the following areas:

- *costing information*
- *analysis of consistency with fundamental legislative principles*
- *providing clear and useful objectives.*

Other Australian jurisdictions

- 5.29 Each year in Victoria, 30 to 35 regulatory impact statements are produced and 15 business impact assessments. In respect of regulatory impact statements in particular, the Victorian Competition and Efficiency Commission ensures departments and agencies conduct regulatory impact analysis by way of an effective process related to the development of policy, resulting in little practical burden on departments and the running of the government imposed because of regulatory impact analysis. The process followed is set out in a guide to regulation published by the Victorian Competition and Efficiency Commission.⁷⁵

In order to replace sunseting regulations, it is important to provide a strong and clear demonstration that each restriction imposed by regulation is still required.

When replacing a sunseting regulation, whether in similar or modified form, particular attention should be given to the following requirements during the preparation of the RIS [regulatory impact statement]:

- *demonstrating that the nature and extent of the problem still require a regulatory response;*
- *evaluating the effectiveness of the regulatory regime to be reintroduced;*
- *substantiating that the particular regulatory responses remains the best solution; and*

⁷⁴ Queensland Audit Office, *Auditor General of Queensland Report to Parliament no 6 for 2009 Providing the information Required to Make Good Regulation* (18 August 2009) 3, www.qao.qld.gov.au at 06-10-09.

⁷⁵ *Victorian Guide to Regulation* (April 2007), www.vcec.vic.gov.au at 06-10-09.

- *conducting the cost-benefit analysis in terms of comparison with the base case of an unregulated solution (i.e. starting from a 'zero base'), where possible, while also highlighting any difference between the proposed regulations and those sunseting and their likely effects.*

Matters for consideration

- 5.30 The relevant provisions of the *Legislative Standards Act* and the *Statutory Instruments Act* tie public consultation and the provision of explanatory notes to the regulatory impact process. The threshold question in each case is whether 'significant subordinate legislation' will impose an 'appreciable cost' on the Queensland community.
- 5.31 Currently, based on the numbers of explanatory notes and regulatory impact statements prepared, it may be inferred that public consultation is not undertaken in respect of much subordinate legislation.
- 5.32 In report no 18, the Scrutiny of Legislation Committee of the 50th Parliament recommended that section 22(2) of the *Legislative Standards Act* be amended to require the provision of explanatory notes for all subordinate legislation.⁷⁶
- 5.33 The Government response to the recommendation in report no 18 did not support a uniform requirement for explanatory notes for subordinate legislation, stating that, 'To extend the requirement beyond its current application would impose significant additional administrative burden on departments'.⁷⁷

⁷⁶ Scrutiny of Legislation Committee, *Report 18, Monitoring of the Operation of the Explanatory Notes System* (9 August 2001) 42.

⁷⁷ Queensland Government, *Response to the Scrutiny of Legislation Committee Report No. 18, August 2001* (3 January 2002).

Appendix A – Correspondence received regarding review



Premier of Queensland

For reply please quote: 143545/CN04/ES
Your reference: *Inq-Sunsetting*

- 5 DEC 2007

Mrs Carryn Sullivan MP
Chair
Scrutiny of Legislation Committee
Parliament House
George Street
BRISBANE Q 4000

SCRUTINY OF

12 DEC 2007

LEGISLATION COMMITTEE

Inq-sunsetting.

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Thank you for your letters of 6 September 2007 and 30 October 2007 concerning the Scrutiny of Legislation Committee's inquiry into the operation of Part 7 of the *Statutory Instruments Act 1992* (the Act). I apologise for the delay in responding to the Committee. As the machinery of Government changes since 1998 complicated the collation of the historical information requested by the Committee by individual departments, my response is provided on behalf of the Government. My Department has undertaken a comprehensive examination of the operation of the subordinate legislation extension regime since 1998 in order to provide the following whole of Government information.

It should be noted that in developing this response, my Department has made every effort to ensure the accuracy of the figures provided. The process of collating this data was impacted by the significant volume of subordinate legislation in question, historical variations in monitoring processes by individual departments and the passage of time since the initial expiry. However, I trust that the information provided will assist the Committee in its consideration of this matter.

Expiry of subordinate legislation on 1 July 1998

As the Committee would be aware, the current expiry regime for subordinate legislation was introduced in 1994 based on recommendations of the Parliamentary Committee of Electoral and Administrative Review. The original date for expiry of subordinate legislation less than ten years old was set at 1 July 1997 and subsequently extended to 1 July 1998. At that time there was a significant volume of active subordinate legislation that had not been progressively expiring and which had not been centrally monitored or recorded.



**Queensland
Government**

In November 1997, all Ministers were requested to provide the then Premier with a list of all subordinate legislation within their portfolio that would expire on 1 July 1998 and to detail the action proposed by each department to manage the expiry process. The table at **Attachment 1** summarises the information provided by Ministers at that time regarding the number of items of subordinate legislation identified as being due to expire on 1 July 1998.

The Committee should note that these details were collated in 1997 based on information from the Queensland Legislation Annotations and departments' historical records but that, due to the significant period of time over which subordinate legislation had been made and differing approaches to reporting, the number of instruments listed should not be considered definitive.

The number of items of subordinate legislation subsequently extended by the *Statutory Instruments Amendment Regulation (No. 1) 1998* is also listed by portfolio at **Attachment 1**. This regulation extended 40 items of subordinate legislation on the basis that replacement legislation was being drafted, 46 items which were not proposed to be replaced and 13 items of uniform subordinate legislation for five years. The remainder of the subordinate legislation that was due to expire was either remade, repealed, or allowed to lapse. As the Committee would appreciate, the simultaneous expiry of such a large volume of subordinate legislation created a unique circumstance for departments and the Office of the Queensland Parliamentary Counsel in managing the expiry process and the consequent workload in reviewing, redrafting and remaking of subordinate legislation.

The number of extensions of subordinate legislation and the grounds under which the extensions were granted since 1998 is listed at **Attachment 2**. This information is sourced from the Statutory Instruments Amendment Regulations for the period from June 1998 to August 2007. These figures indicate that, since 1998, there has been a generally consistent annual decrease in the number of extensions to expiry of subordinate legislation being granted. This is reflective of the fact that the introduction of the automatic expiry provisions in 1994 have allowed for more systematic management of subordinate legislation. These figures should also be considered within the broader context of the overall amount of subordinate legislation in place in Queensland.

Based on an analysis of subordinate legislation extensions since 1998, my Department has calculated the percentages of items which have been extended once, twice, three times or more than three times, as detailed at **Attachment 3**. This analysis indicates that over 75% of subordinate legislation extended received only one or two exemptions from expiry. Subordinate legislation which received three or more exemptions from expiry often formed part of a statutory regime subject to significant review by the Government. Reports on specific legislative reviews which have necessitated multiple extensions to subordinate legislation have been tabled in the Legislative Assembly by relevant Ministers in accordance with the requirements of section 56A(4) of the Act.

Systems in place to ensure the processes under the Act are complied with.

The Government has in place a number of processes to ensure compliance with the Act's requirements in relation to automatic expiry of subordinate legislation. In accordance with section 55 of the *Statutory Instruments Act 1992*, the Office of the Queensland Parliamentary Counsel notifies all departments in writing at least, and usually more than, six months in advance of the expiry of subordinate legislation. This notification details all subordinate legislation listed in the Queensland Subordinate Legislation Series due to expire for each portfolio and reinforces the requirements of the Act, including the need for timely provision of drafting instructions for subordinate legislation which is proposed to be remade. This notification process provides a mechanism to ensure departments are aware of the impending expiry of subordinate legislation to supplement internal departmental monitoring and planning processes.

The Department of the Premier and Cabinet is responsible for coordinating biannual Statutory Instruments Amendment Regulations to extend subordinate legislation which expires on either 30 June or 31 August each year. As part of this process, my Department liaises with all departments to obtain instructions on the subordinate legislation for which extensions are being requested, for collation at a whole of Government level. The validity of the grounds for extensions are confirmed by my Department and the Office of the Queensland Parliamentary Counsel as part of the drafting process to ensure compliance with the requirements of the Act. For example, where departments seek to extend subordinate legislation under section 56A(1)(a)(i) on the basis that replacement subordinate legislation is being drafted, drafting instructions are required to have been lodged with the Office of the Queensland Parliamentary Counsel by the relevant department prior to extension, to ensure that this ground for extension is valid.

Where exemptions from expiry have been granted on the basis of a legislative review, the Director-General of the Department of the Premier and Cabinet notifies all relevant departments of the requirement under section 56A(4) of the Act for the responsible Minister to table a report in the Legislative Assembly on the status of the review within seven sitting days of the extension being granted.

Drafting of subordinate legislation

Resources are allocated within individual departments through, for example, legislative units to manage reviews of subordinate legislation within the broader context of the portfolio's legislative priorities. The length of time taken to review subordinate legislation can vary greatly depending on factors including the complexity of the issues involved, the necessity for consultation with community and/or industry and the requirement to undertake Regulatory Impact Statement processes, time required to draft the legislation and the processes of obtaining Cabinet (if considered significant subordinate legislation) and Governor in Council approval.

The Office of the Queensland Parliamentary Counsel is responsible for drafting legislation and, as such, ensures that subordinate legislation is up-to-date in terms of concepts, mechanisms and drafting practice, including the application of fundamental legislative principles, in accordance with its charter and responsibilities under the *Legislative Standards Act 1992*. The Office of the Queensland Parliamentary Counsel also advises departments about the appropriateness of using subordinate legislation as opposed to primary legislation for a matter and about the adequacy of the legislative authority under which the subordinate legislation is made.

The purpose of the introduction of the current regime for extensions to subordinate legislation, as set out in the Act, was to reduce the regulatory burden on the people of Queensland while ensuring subordinate legislation remains relevant and to the highest standard. This rationale remains valid today. The Government has an obligation to balance the requirements of regular maintenance of the statute book with avoiding unnecessary regulatory burden on Queenslanders.

The current system recognises that subordinate legislation can be affected by broader legislative reviews and provides a mechanism for extensions without the necessity for duplicating effort and processes in implementing replacement legislation. It also ensures that the community is not unnecessarily consulted on proposed new subordinate legislation through Regulatory Impact Statement processes, if more significant changes to a regulatory framework are concurrently under consideration by the Government. An automatic expiry period for subordinate legislation of ten years acknowledges the often significant work involved in replacing subordinate legislation within the broader context of Government policy objectives and the three-year electoral cycle.

I trust this information is of assistance to the Committee in its consideration of this matter.

Yours sincerely



ANNA BLIGH MP
PREMIER OF QUEENSLAND

SUBORDINATE LEGISLATION EXPIRING ON 30 JUNE 1998

Minister	No of items expiring*	No of items extended*	No of items remade*	Comments
Premier	1	1	0	One expiring item extended for one year before being replaced.
Deputy Premier, Treasurer and Arts	13	7	6	All items extended or replaced.
Families, Youth and Community Care	6	2	4	All items extended or replaced.
Attorney-General and Justice	47	20	11	Remaining items repealed by new legislation or allowed to expire.
Police, Corrective Services and Racing	5	2	0	Remaining items no longer required and allowed to expire.
Health	18	10	1	Remaining items repealed or allowed to expire. Additional six items were due to expire but extended under own sunset provisions in subordinate legislation.
Education	72	4	0	Majority of expiring items were university statutes or by-laws which were either repealed or remade in primary legislation following a major review of university legislation.
Economic Development and Trade	0	0	0	No subordinate legislation due to expire.
Tourism, Small Business and Industry	0	0	0	No subordinate legislation due to expire.
Environment	11	5	1	Remaining items no longer required and were allowed to expire.
Mines and Energy	15	12	0	Remaining items no longer required and were repealed.
Primary Industries, Fisheries and Forestry	14	13	5	Additional items identified as requiring extension were included in extension regulation.
Local Government and Planning	9	2	1	Remaining items no longer required and were allowed to expire.
Training and Industrial Relations	0	0	0	No subordinate legislation due to expire.
Natural Resources	119	5	53	Majority of expiring items constituted water supply areas and boards from 1910s onwards which were remade under a single regulation. Items constituting boards no longer required were allowed to expire.
Transport and Main Roads	19	15	0	Items extended while replacement subordinate legislation was being drafted. Remaining items no longer required and were allowed to expire.
Emergency Services and Sport	3	1	1	Other items lapsed.
Public Works and Housing	3	0	3	All items remade prior to expiry.
TOTAL	355	99	81	

* Sourced from information provided by Ministers as at December 1997 and in some instances reported as groups of subordinate legislation (eg multiple Orders in Council) made under the same primary legislation

Sourced from exemptions from expiry granted under the *Statutory Instruments Amendment Regulation (No. 1) 1998* and includes all individual items extended

**EXEMPTIONS FROM EXPIRY UNDER STATUTORY INSTRUMENTS REGULATIONS
1998 TO 2007**

Statutory Instruments Amendment Regulation	Replacement being drafted s.56A(1)(a)(i)*	Not proposed to be replaced s.56A(1)(a)(ii)*	Principal Act under review s.56A(1)(b)*	Further exemption s.56A(2)*	Uniform legislation s.56(1)*	Further exemption s.56(2)*	Total
No.1 1998	40	46	0	0	13	0	99
No. 2 1998	1	0	0	0	0	0	1
1998 Total							100
No. 1 1999	0		44	0	0	0	44
No. 2 1999	10		10	0	1	0	21
1999 Total							65
No. 1 2000	0		27	0	0	0	27
No. 2 2000	10		27	0	6	0	43
2000 Total							70
No. 1 2001	0		13	0	0	0	13
No. 2 2001	1		10	26	5	0	42
2001 Total							55
No. 1 2002	0	0	0	8	0	0	8
No. 2 2002	6	2	12	19	1	0	40
2002 Total							48
No. 1 2003	0	0	0	7	0	6	13
No. 2 2003	3	0	4	20	4	0	31
2003 Total							44
No. 1 2004		0	0	4	0	0	4
No. 2 2004	5	0	9	19	0	0	33
2004 Total							37
No. 1 2005	0	0	0	1	0	0	1
No. 2 2005	6	0	6	21	0	0	33
2005 Total							34
No. 1 2006	0	0	0	1	0	0	1
No. 2 2006	5	0	4	17	1	5	32
2006 Total							33
No. 1 2007	0	0	0	1	0	0	1
No. 2 2007	2	0	9	19	1	0	31
2007 Total							32
TOTAL							518

*Current provision of *Statutory Instruments Act 1992* under which extensions are granted

CALCULATION OF NUMBER OF EXTENSIONS TO SUBORDINATE LEGISLATION*

Number of times subordinate legislation extended	Number of items extended	Percentage of total items extended
Once	122	50%
Twice	62	25.4%
Three times	22	9%
More than three times	38	15.6%
TOTAL	244[#]	100%

* Information calculated by the Department of the Premier and Cabinet based on the number of times individual items of subordinate legislation have appeared in *Statutory Instruments Amendment Regulations* since 1998

244 separate items of subordinate legislation have been extended a total of 518 times

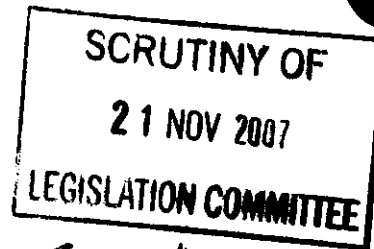


Lindy Nelson-Carr MP
Member for Mundingburra



**Queensland
Government**

Our reference: COM 04862-2007



Sunsetting

**Minister for Communities
Minister for Disability Services
Minister for Aboriginal and
Torres Strait Islander Partnerships
Minister for Multicultural Affairs,
Seniors and Youth**

20 NOV 2007

Mrs Carryn Sullivan MP
Chair
Scrutiny of Legislation Committee
Parliament House
George Street
BRISBANE QLD 4000

Dear Mrs Sullivan

Carryn

Thank you for your letter of 6 September 2007, concerning the Scrutiny of Legislation Committee's inquiry into the operation of Part 7 of the *Statutory Instruments Act 1992* (the SI Act).

I am pleased to assist the Committee with its inquiry, by providing my portfolio's views on the sunseting process, and a table (attached) that identifies current portfolio subordinate legislation and expiry dates, and historical information on regulations that have been replaced or have automatically lapsed.

I am advised that the staged automatic expiry of subordinate legislation is considered to provide an efficient and effective means to ensure that subordinate legislation is periodically reviewed. In particular, the provision for a staged expiry on 1 September first following the 10th anniversary of the making of the regulation (section 54) is considered appropriate, as are the exemption from expiry provisions set out in section 56 (five years for uniform subordinate legislation) and section 56A (one year for other subordinate legislation).

These provisions help ensure the Queensland statute remains relevant and of a high standard, while providing the necessary flexibility to enable departments to seek an exemption from automatic expiry in particular circumstances, such as if a review of the enabling Act is underway. The process provides an opportunity to ensure that subordinate legislation is current, relevant, accords with contemporary policy and drafting practices, and is in line with community expectations.

The role of the Policy Coordination and Intergovernmental Unit legislation team in the Department of Communities includes monitoring and reviewing sunseting subordinate legislation and ensuring the department fulfils the requirements of the SI Act. Similarly, the Legal Policy Branch in Disability Services Queensland has a role in ensuring that subordinate legislation administered by Disability Services Queensland continues to be relevant to disability services portfolio responsibilities.

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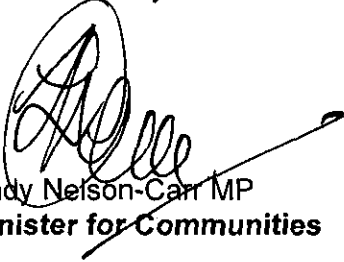
Within the portfolio, reviews of sunseting subordinate legislation would generally commence approximately six to 12 months prior to its expiration. The nature of the subordinate legislation and the complexity of the *policy issues to be examined are critical* to determining whether the subordinate legislation should be remade, and the length of time needed to undertake the legislative process.

The requirement for the Parliamentary Counsel to notify administering departments of sunseting subordinate legislation at least six months prior to expiry (section 55) is seen as providing an additional safeguard to ensuring their impending expiry is assessed in a timely way.

If you require any further information or assistance in relation to this matter, please contact Ms Andrea Oliver, Principal Policy Officer (Legislation), Policy Coordination and Intergovernmental Unit, Strategic Policy and Evaluation Directorate, Department of Communities on 3405 6756.

I trust this information is of assistance.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Lindy Nelson-Carr', with a long horizontal stroke extending to the right.

Lindy Nelson-Carr MP
Minister for Communities

Table of subordinate legislation currently administered by the Minister for Communities, Minister for Disability Services, Minister for Aboriginal and Torres Strait Islander Partnerships, Minister for Multicultural Affairs, Seniors and Youth.

Portfolio subordinate legislation	Commencement date	Automatic expiry date (s.54 of the Statutory Instruments Act)	Notes
Disability Services Queensland			
<i>Guide Dog Regulation 1997</i>	19 December 1997	1 September 2008	- On 15 May 2007, Cabinet authorised the preparation of the Guide Hearing and Assistance Dogs Bill 2007, which is intended to repeal the <i>Guide Dog Act 1972</i>, and the <i>Guide Dogs Regulation 1997</i>. - Subject to further Cabinet and Parliamentary processes, the new legislation is expected to be in force before 1 September 2008.
<i>Disability Services Regulation 2006</i>	1 July 2006	1 September 2016	Made under the <i>Disability Services Act 2006</i>.
Department of Communities			
<i>Aboriginal Communities (Justice and Land Matters) Regulation 1998</i>	26 June 1998	1 September 2008	- Made under the <i>Aboriginal Communities (Justice and Land Matters) Act 1984</i>, which is jointly administered with the Minister for Main Roads and Local Government, and the Attorney-General. - The Department of Communities only has direct responsibility for administering Part 3 (section 5) of the Regulation. Therefore, it is anticipated that the Department of Justice and the Attorney-General (DJAG) will assess the need to renew the regulation in consultation with the Department of Communities.
<i>Community Services (Torres Strait) Regulation 1998</i>	26 June 1998	1 September 2008	- Made under the <i>Community Services (Torres Strait) Act 1984</i>, which is jointly administered with the Minister for Main Roads and Local Government, and the Attorney-General. - The Department of Communities will not have direct responsibility for assessing the need to renew the regulation. It is anticipated that DJAG and the Department of Main Roads and Local Government will make this assessment.

Portfolio subordinate legislation	Commencement date	Automatic expiry date (s.54 of the Statutory Instruments Act)	Notes
<i>Child Protection Regulation 2000</i>	15 December 2000	1 September 2011	Made under the <i>Child Protection Act 1999</i>.
<i>Child Care Regulation 2003</i>	1 September 2003	1 September 2013	- New subordinate legislation made under the <i>Child Care Act 2003</i> which commenced on 1 September 2003. - Subordinate legislation under the repealed <i>Child Care Act 1991</i> expired as follows:- - <i>Child Care (Child Care Centres) Regulation 1991</i> (automatically lapsed on 31 August 2003) - <i>Child Care (Family Day Care) Regulation 1991</i> (automatically lapsed on 1 September 2002).
<i>Domestic and Family Violence Protection Regulation 2003</i>	10 March 2003	1 September 2013	- Made under the <i>Domestic and Family Violence Protection Act 1989</i>. - Replaced the <i>Domestic Violence (Family Protection) Regulation 1993</i> (repealed), prior to its expiry.
<i>Juvenile Justice Regulation 2003</i>	1 July 2003	1 September 2013	- Made under the <i>Juvenile Justice Act 1992</i>, which is currently under review. - Replaced <i>Juvenile Justice Regulation 1993</i> (repealed), prior to its expiry.



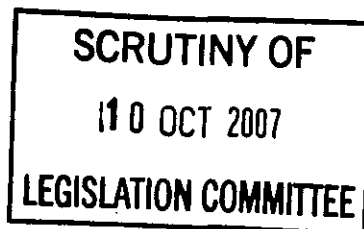
The Honourable Rod Welford MP



Queensland
Government

4 OCT 2007

Mrs Carryn Sullivan MP
Chair
Scrutiny of Legislation Committee
Parliament House
George Street
BRISBANE QLD 4000



Inq - sunsetting

Minister for Education and Training
Minister for the Arts

Dear Mrs Sullivan

Thank you for your letter dated 6 September regarding the staged automatic expiry of legislation.

Departmental records indicate nine regulations, and a series of statutes and by-laws made under the university Acts administered by the department, were current immediately prior to the first round of sunsetting on 1 July 1998.

None of the regulations were due to expire on 1 July 1998 and therefore continued beyond this date. However, approximately 40 of the university statutes and by-laws automatically expired on 1 July 1998. It appears four other university statutes and by-laws were saved from automatic expiry by the granting of a one year extension until 30 June 1999 by the Statutory Instruments Amendment Regulation (No. 1) 1998.

All the 44 university statutes and by-laws that lapsed were not remade. This was due to the fact new Bills for each of the universities had been passed by Parliament throughout 1998 and 1999, meaning new statutes and by-laws were made.

Since the first round of sunsetting on 1 July 1998, this department has had nine other regulations on its staged automatic expiry review program.

Of these nine regulations, six were replaced following a single one year extension. No action was taken in relation to the other three regulations because they were repealed well before the date they were due to expire.

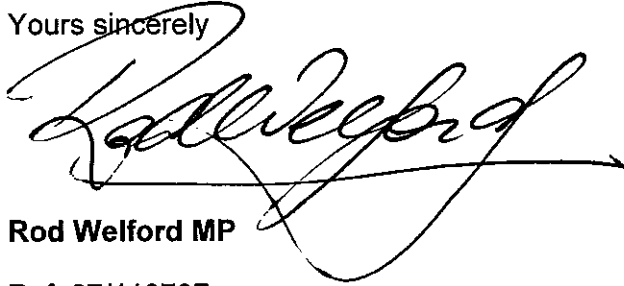
With regard to the systems that are in place to ensure that processes under the *Statutory Instruments Act 1992* are complied with, an officer within the Legislative Services Unit of this department maintains a staged automatic review program which identifies when particular regulations are due to expire. The department also receives advice from time to time from the Office of the Queensland Parliamentary Counsel regarding any regulations that are due to expire.

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In order to determine the need for a particular regulation, the Legislative Services Unit conducts a review. This review, which considers the relevancy of both the regulation and the terms and concepts used in it, is generally undertaken in conjunction with the relevant policy or operational area of the department and can involve consultation with external stakeholders. On average, each review takes six months, although this period can be significantly longer if the review of the regulation forms part of a wider review of the primary Act or it is necessary to prepare a Regulatory Impact Statement.

The current 10 year sunseting period is considered appropriate to ensure regulations are up to date and relevant. Given the time and resources required to review and remake a regulation, and the fact that regulations are continuously amended and updated throughout their life, my department would not support a period less than 10 years.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Rod Welford', with a long horizontal flourish extending to the right.

Rod Welford MP

Ref: 07/119797

Your Ref: Inq-Sunsetting



The Honourable Margaret Keech MP
Member for Albert



Queensland
Government

Our Reference: CSM05357

Minister for Child Safety
and Minister for Women

23 OCT 2007

Ms Carryn Sullivan MP
Chair
Scrutiny of Legislation Committee
Parliament House
George Street
BRISBANE QLD 4000



Inq - sunseting

Dear Ms Sullivan

Carryn

I refer to your letter of 6 September 2007 to the former Minister for Child Safety, the Honourable Desley Boyle MP, seeking the Department of Child Safety's views regarding the operation of Part 7 of the *Statutory Instruments Act 1992*, specifically the staged automatic expiry of subordinate legislation in Queensland.

In particular, you have advised that the Scrutiny of Legislation Committee has sought information regarding how the department fulfils processes detailed under Part 7 of the *Statutory Instruments Act*. A response to the specific questions raised in your letter are detailed below.

1. **How many regulations administered by the department were current immediately prior to the first round of sunseting on 1 July 1998?**

The Adoption of Children Regulation 1988 (repealed) and the Children's Services Regulation 1966 (repealed) were current immediately prior to 1 July 1998.

2. **How many of these simply lapsed on 1 July 1998 and were not replaced?**

Nil.

3. **How many lapsed on 1 July 1998 and were not extended, but were immediately replaced?**

Nil.

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- 4. Since 1998, what percentage of initially-expiring subordinate legislation has been extended once/twice/three times/more?**

Adoption of Children Regulation 1988

The *Adoption of Children Regulation 1988* was extended once, for one year.

In accordance with s 5 and Schedule 4 of the *Statutory Instruments Regulation 1992* (repealed), the *Adoption of Children Regulation 1988* was exempt from expiry under Part 7 of the *Statutory Instruments Act* for the period ending at midnight on 30 June 1999.

The *Adoption of Children Regulation 1988* subsequently expired on 1 July 1999 and was replaced by the *Adoption of Children Regulation 1999* which came into effect on 2 July 1999.

Children's Services Regulation 1966

In accordance with s 5 and Schedule 4 of the *Statutory Instruments Regulation 1992* (repealed), the *Children's Services Regulation* was exempted from expiry for the period ending at midnight on 30 June 1999.

Subsequently, in accordance with s.260 of the *Child Protection Act 1999*, the *Children's Services Regulation* did not expire at the end of 30 June 1999 but remained in force for a further period, expiring on 31 December 1999.

- 5. What systems are in place to ensure that processes under the Act are complied with? (for example, how many staff are allocated to ensure that regulations are reviewed by the relevant date?)**

The Department of Child Safety employs three full-time employees in its Strategic Policy and Research Branch to manage the legislative program of the Minister for Child Safety. Among other things, these officers are responsible for ensuring compliance with the *Statutory Instruments Act*.

- 6. How is the need for particular regulations assessed?**

I am responsible for the administration of two regulations, namely, the *Adoption of Children Regulation 1999* and the *Child Protection Regulation 2000*. Given the small number of regulations within my portfolio, the need for particular regulations is assessed on an ongoing basis.

- 7. How is it ensured that legislation is up to date in terms of concepts, mechanisms and drafting?**

In light of the relatively small portfolio of legislation, the legislation is regularly reviewed to ensure it is up to date in terms of concepts, mechanisms and drafting. Close links are established between the operational and policy arms of the agency, which provides ongoing feedback about the operation of the legislation in practice.

The *Child Protection Act 1999* and corresponding regulation has undergone significant reform between 2004 and 2006 as a result of the recommendations of the Crime and Misconduct Commission (CMC) in its report "*Protecting Children: An inquiry into abuse of children in foster care*". Furthermore, the Act was assented to in 1999 and is due for an extensive review after ten years of operation commencing in 2009.

The other principal legislation is the *Adoption of Children Act 1999* and corresponding Regulation. The adoption legislation is currently undergoing a comprehensive review.

8. How long on average does the review of legislation process take?

Timeframes for review depend on the priority given to the project. The three stages of amendments to the *Child Protection Act* and *Child Protection Regulation* were developed and implemented between 2004 and 2006 but were given urgent government priority because of their genesis in the CMC recommendations and Government's commitment to implement these in accordance with an established timeframe, as set out in the "*Blueprint for Implementing the Recommendations of the January 2004 Crime and Misconduct Commission Report*".

The current review of the Adoption legislation has been ongoing since 2002 but has been subject to several interruptions and necessarily placed in abeyance for periods of time. A significant interruption to the review timeframe arose in respect of Federal Parliament's inquiry and report "*Overseas adoption in Australia: report on the inquiry into adoption of children from overseas*", released in late 2005.

9. Is the five year sunset period regarded as appropriate?

There is no uniform subordinate legislation within the Child Safety portfolio. Accordingly, I am unable to comment regarding whether the five year sunset period for uniform subordinate legislation under s.56 of the *Statutory Instruments Act* would appear to be appropriate.

10. Are the current procedures generally regarded as being satisfactory?

I am of the view that the current procedures regarding automatic expiry of legislation are satisfactory.

Thank you for the opportunity to provide comments in respect of the operation of Part 7 of the *Statutory Instruments Act*. Should you require any further information, Anne Fiddes, Senior Advisor, Legislation, Strategic Policy and Research Branch, can be contacted on 3237 9669.

Yours sincerely



Margaret Keech MP
Minister for Child Safety
and Minister for Women
Member for Albert

Call for Public Submissions

The closing date for submissions is **Friday, 11 December 2009**.

Guidelines for making submissions

General

- There is no set form for a submission to the committee. Submissions may take the form of an email, a letter, a substantial paper or a short document and may include appendices. The most useful submissions are to the point.
- The committee would prefer written submissions, but will also accept submissions on audio tape. Where possible, typed or printed text is preferable, though legible hand-written submissions are acceptable. Numbered pages and, for submissions in excess of 20 pages, a brief summary and a table of contents is also helpful.
- All submissions must include the name and contact details of the person making the submission. A submission from an organisation should indicate at what level the submission has been authorised (for example, subcommittee, president, chair).
- Public officers may make submissions as private individuals. However, if reference is made in a submission to an official position, it should also be made clear that the submission is made in a private capacity. Submissions from government departments should be authorised in accordance with normal departmental procedure.

Content and Relevance

- A submission should be directed to the key issues. It is helpful if submissions make clear reference to the relevant key issue.
- The committee's usual procedure is to publicly release and table submissions in the Legislative Assembly. The committee reserves the right not to publish or table confidential submissions, or submissions which are irrelevant, contain scurrilous or defamatory material, or are otherwise not suitable for publishing. The committee will inform a person if it decides not to accept and/or or authorise the publication of his or her submission.

Confidentiality

- Submissions received by the committee become 'proceedings of the Parliament'. Legal requirements of confidentiality and parliamentary privilege mean that, until the committee advises a person who has made a submission that the committee has authorised publication of the submission, its content should not be published or communicated to anyone.

Unauthorised Release

- Once the committee receives a submission, it should not be published without the committee's authorization. A publication of a submission without committee authorization may not be protected by parliamentary privilege and might amount to a contempt of Parliament.

All submissions should be sent to:

The Research Director
Scrutiny of Legislation Committee
Parliament House
George Street
BRISBANE QLD 4000

Alternately, submissions may be emailed to: scrutiny@parliament.qld.gov.au

Committee publications are available via the committee's home page at: www.parliament.qld.gov.au/SLC