FOCUS ARTICLE

Rule Making by Commonwealth Agencies

Prepared by Charles Beltz

Introduction

This article is a synopsis of the Council's most recent report to the Attorney-General, *Rule Making by Commonwealth Agencies*, which was tabled in Parliament on 6 May 1992 and is available from the Australian Government Publishing Service (AGPS). The aim of the synopsis is to inform people of both the release of the report and the thrust of the Council's recommendations about the processes involved in making delegated legislation. As such there is no intention to dwell here on matters of detail and definition, which are provided in the report. Rather a basic outline of the report will be given with an emphasis on the general nature of the Council's proposals for reform. Some of the more significant specific recommendations are also included in the text at appropriate junctures, in italics and within boxes.

Background and summary of existing problems

The Australian system of government is premised on the existence of a distinction between legislative, executive and judicial functions, with the legislative function involving the making of legally binding rules, usually of wide or general application. It has long been recognised that it is impracticable for all rules to be made by Parliament. Thus, Parliament has delegated legislative powers to others, principally members of the executive.

The traditional form of delegated instrument has been the statutory rule, most commonly the regulation, made by the Governor-General in Council, for which a framework for making, scrutiny and publication has developed over time. However, in recent years there has been a vast growth in the volume and diversity of delegated legislative instruments. Different and often inconsistent practices for drafting, consultation, scrutiny and publication apply. The extension of some of the procedures associated with statutory rules has overcome some anomalies caused by new forms of delegated instruments, but significant problems remain.

Among the problems noted in the report were:

- the absence of any clear view of the distinction between matter appropriate for delegated and for primary legislation;
- the absence of any view of the reasons why different forms of delegated legislative instruments are used;
- the poor quality of drafting of some delegated legislative instruments;
- the anomaly that primary legislation receives wide public exposure before enactment, at least in theory, whereas delegated legislation does not;
- an element of chance in the application of the tabling and disallowance procedures of Parliament to delegated legislative instruments which are not statutory rules;
- the inaccessibility of delegated legislation; and
- the existence of instruments that under present arrangements are not treated as being either legislative or executive in character.

The framework of principles for the making of delegated legislative instruments is patchy, dated and obscure, and can be contrasted with the comprehensive, integrated regime introduced by the Commonwealth in the 1970s for the exercise and scrutiny of executive power. The three central components of the administrative law system, the Administrative Appeals Tribunal, the *Administrative Decisions (Judicial Review) Act 1977* (AD(JR) Act) and the Ombudsman, apply to decisions of an administrative character. It was therefore thought timely to develop a complementary regime for decisions of a legislative character made under authority delegated by statute. As detailed in the report, the Commonwealth has in this regard failed to keep pace with developments in procedures for the making and scrutiny of delegated legislation that have occurred in certain State jurisdictions.

A new regime

The Council has therefore proposed a new regime for the making, scrutiny and publication of delegated legislation, with significantly improved procedures. The underlying rationale of the principles and procedures in this area suggests that they should apply to all delegated instruments that are legislative in character, called 'rules' in the report. A similar approach is taken

in the AD(JR) Act with respect to administrative decisions. Under this approach, the class of a delegated legislative instrument will no longer control the procedures to be applied to it. As a vehicle for the new regime, the Council recommends the enactment of a new statute to be called the Legislative Instruments Act, which should apply to all rules except those expressly exempted by their parent Act of Parliament.

Recommendation 1 (1) A new Act to be called the Legislative Instruments Act should be enacted to prescribe procedures for the making, publication, and supervision of delegated legislative instruments in accordance with this report.

The principal elements of the proposed new regime are:

- better guidance on matters appropriate for inclusion in Acts of Parliament and on matters which can be included in rules;
- improved practices to ensure high quality drafting for all Commonwealth rules;
- mandatory consultation with the community prior to the making of important rules;
- procedures for parliamentary scrutiny and control which should apply to all rules;
- sunsetting of all rules on a ten-year rotating basis;
- the establishment of a Legislative Instruments Register in which all rules should be published, with rules unenforceable if not published in this way; and
- special adaptations of these general procedures for rules of court and rules made under intergovernmental schemes for nationally uniform regulations.

Each of these broad areas of reform will be dealt with under separate headings in this synopsis, following the description below on the ambit of the proposed new Act.

Ambit of the new Act

In broad terms, legislative action involves the formulation of general rules of conduct, usually operating prospectively. Executive or administrative action, by contrast, applies general rules to particular cases. Three characteristics might be used to help identify legislative action: the extent to which rules determine the content of the law; the extent to which rules are of a binding quality; and the extent to which rules are of general application. The first is likely to be conclusive. The presence of the second and third in combination is also a very strong indicator that an instrument is legislative in character.

The Council has decided to recommend that all delegated instruments of a legislative character should be subject to the new Act unless specifically excluded by their enabling Act. Agencies would be required to make decisions about exemptions at the time of drafting of the enabling Act. The major advantage of this approach is the comprehensive coverage it would give the Legislative Instruments Act and the consequent simplicity of the scheme. It could be expected that a provision expressly excluded from the operation of the new Act would be looked at closely by the Senate Standing Committee for the Scrutiny of Bills, and agencies might be required to justify their decision to exclude.

Recommendation 3 (1) The Legislative Instruments Act should apply to every delegated instrument that is legislative in character, unless expressly excluded by its enabling provision. (2) The definition of 'legislative' should not be set out in the Act. (3) To assist agencies in deciding whether an instrument is legislative, the essential characteristics of legislative instruments should be set out in the Legislation Handbook.

Distinction between primary and delegated legislation

The procedures for the making of an Act mean that a proposed new law receives some public exposure during its passage through both Houses of Parliament. Delegated legislation, however, does not necessarily have to be exposed publicly before becoming law. Notice of the making of delegated legislation, if provided at all, is generally contained only in the government *Gazette*. Where required, tabling in Parliament can take as long as three months. Despite this, most delegated legislation takes effect on notification that it has been made. These differences make it desirable that there be clear guidelines about the matters appropriate for delegated legislation.

At present, guidance on the appropriate division of content between primary and other forms of legislation comes from at least three sources – the *Legislation Handbook* published by the AGPS and the sets of guidelines used by the Senate Standing Committee on Regulations and Ordinances and the Senate Standing Committee for

the Scrutiny of Bills. The Council found that the practices followed in applying these various guidelines revealed considerable discrepancies in the nature of the rules implemented through primary and delegated legislation respectively.

The Council has therefore proposed a set of criteria for a more useful distinction between primary and delegated legislation to be set out in the *Legislation Handbook*. A theme common to most criteria is the presence or absence of significant policy, which is suggested as a separate criterion but which underlies some of the others as well. The Council accepts that it will not be possible to develop criteria to guide law makers with precision in every circumstance.

Recommendation 2 The following criteria for the division of content between primary and other forms of legislation should be incorporated into the Legislation Handbook;

'The following matters should be implemented only through Acts of Parliament:

- *significant questions of policy including a new policy or fundamental changes to existing policy;*
- *rules which have a significant impact on individual rights and liberties;*
- *provisions creating offences which impose significant criminal penalties (imprisonment or fines of more than $1000 for individuals or more than $5000 for corporations);*
- *administrative penalties for regulatory offences;*
- *provisions imposing taxes;*
- *significant fees and charges (more than $1000);*
- *procedural matters that go to the essence of the legislative scheme; and*
- *amendments to Acts of Parliament.'*

Drafting and preparation of delegated legislative instruments

The quality of and responsibility for the drafting of delegated instruments were issues commonly raised with the Council throughout the course of this project. There are both many different types and large numbers of delegated legislative instruments in current use. The Council takes the view that instruments that are of a legislative kind must meet high drafting standards in presentation, expression and consistency. They should be drafted so that they are clear, concise and unambiguous.

The Council therefore is of the view that the Office of Legislative Drafting in the Attorney-General's Department should be given statutory responsibility for ensuring that all delegated legislative instruments are prepared to an appropriate standard. Having regard to the number of instruments involved – 1424 in 1990 as against 144 Commonwealth Acts for the same period – it would not be easy to centralise the drafting of all delegated legislative instruments. Nor is this necessarily desirable, given the diverse range of subject matter covered. The preparation requires an extensive contribution from the agencies concerned. The Office of Legislative Drafting could fulfil its responsibility by drafting instruments itself or by allowing agencies to prepare instruments under arrangements with the Office.

Recommendation 5 (1) Where an instrument is legislative in character, it should be drafted by the Office of Legislative Drafting or arrangements for drafting should be made with that Office. (2) Better drafting in agencies should be encouraged by:

- *'settling' arrangements where the agency undertakes primary drafting and then sends it to the Office of Legislative drafting for clearance;*
- *the supply of drafting precedents by the Office of Legislative Drafting;*
- *temporary placement of agency drafters in the Office of Legislative Drafting; and*
- *temporary placement of drafters from the Office of Legislative Drafting in agencies.*

Consultation

At present, there is no general statutory requirement for consultation prior to the making of Commonwealth delegated legislative instruments. Although individual Acts may require some form of consultation before the making of certain delegated legislation, and some agencies submitted that they consulted extensively with identified interest groups, the Council is of the view that in the absence of a more general requirement, consultation tends to take place with particular sectional interests to the possible exclusion of other interested persons.

Consultation prior to law making is consistent with the principles of procedural fairness as it

enables individuals and groups with a particular interest to put their views. It serves the public interest by enabling decisions to be made in the light of competing interests and requires a government to account for its proposals. The Council is of the view that the benefits of a guaranteed opportunity for interested parties to participate in rule making, and the preparation of better instruments as a result, will outweigh the costs involved in formalising consultation arrangements. It therefore considers that the proposed new Act should provide general consultation requirements for the making of all delegated legislative instruments, subject to limited exceptions listed in the recommendation which follows. Developments in Victoria and New South Wales concerning consultation, and the circumstances in which it is not required, were taken into account in reaching this conclusion.

Recommendation 9 The Legislative Instruments Act should provide for mandatory public consultation before any delegated legislative instrument is made, subject to the following exceptions:

- *where the instrument provides for an increase or decrease in fees or charges and the increase or decrease does not exceed the amount set by the budget;*
- *where the instrument is of a minor machinery nature, including savings and transitional provisions, and it does not fundamentally alter the existing arrangements;*
- *where the Attorney-General certifies that an Act empowering the making of delegated legislation provides for consultation comparable to that required by the Legislative Instruments Act;*
- *where advance notice of a particular legislative rule would enable individuals to gain advantage that would otherwise not accrue;*
- *where the Attorney-General certifies that the public interest requires that consultation should not be undertaken in a particular case; and*
- *where the instrument contains rules of court which in accordance with recommendation30 the court has determined in the public interest should be made without consultation.*

The Act will require 'first round consultation' only. If an instrument is altered following initial consultation, any further consultation will be at the discretion of the agency concerned. Proposed consultation procedures and questions relating to the effect of consultation requirements on the commencement of provisions are dealt with in some detail in the report.

Scrutiny of legislative instruments

It has long been accepted that as a matter of constitutional principle delegated legislation should be tabled in each House of the Parliament and may be disallowed by either House. Under the Council's proposals all instruments to which the Legislative Instruments Act would apply should be subject to such parliamentary scrutiny and control.

The tabling of instruments in both Houses provides Parliament with an opportunity to scrutinise delegated legislation. This is the current practice for regulations and disallowable instruments. The Council proposes that this opportunity be extended to all legislative instruments. It is also of the view that, as well as having a responsibility regarding the preparation of all delegated legislative instruments, the Office of Legislative Drafting should be given the function of forwarding these to the Tabling Offices of Parliament.

Recommendation 15 (1) All instruments to which the Legislative Instruments Act applies should be subject to tabling in Parliament. An instrument which is not tabled within six sitting days should cease to have effect. (2) The Office of Legislative Drafting should be required to forward all instruments to which the Legislative Instruments Act applies to the Tabling Offices of Parliament.

The question of time limits for tabling was raised in submissions to the Council. The existing law in relation to regulations and disallowable instruments, contained in the *Acts Interpretation Act 1901*, allows fifteen sitting days from the making of a regulation within which that regulation must be tabled before each House of Parliament. A notice of motion to disallow it may be given in either House within fifteen sitting days of tabling. If that notice of motion is not withdrawn or called on within fifteen sitting days of the giving of the notice, the instrument is

deemed to be disallowed. Concern over the potential length of time involved in accumulating this number of parliamentary sitting days, given that fifteen sitting days can involve a period of three calendar months or possibly longer, has resulted in the Council recommending that instruments be tabled within six sitting days. The period for moving disallowance of an instrument should remain fifteen days, however, as there is an increasing number of instruments being made which are subject to disallowance and these may not receive adequate scrutiny if that period were shortened.

Recommendation 19 The period within which legislative instruments should be tabled in each House of Parliament should be six sitting days from publication in accordance with the Legislative Instruments Act.

Parliamentary control of delegated legislation is exercised in two general ways. The first is the disallowance procedure referred to above, which can be exercised by either House of Parliament. The second way is approval, whereby an instrument laid before both Houses of Parliament does not come into operation until a resolution affirming it has been passed by both Houses. The disallowance procedure has the advantage that the operation of a legislative instrument is not delayed pending parliamentary approval. This enables the executive to respond quickly to urgent situations and to get on with the day-to-day business of government. The disapproval procedure is currently the norm and the Council is not persuaded that any change is required. The approval procedure would remain available for use by Parliament if considered desirable in a particular case.

Recommendation 16 (1) All instruments to which the Legislative Instruments Act applies should be subject to control by the Parliament. (2) Disallowance by either House of Parliament rather than approval should remain the norm for parliamentary control of delegated legislation and should be prescribed by the Legislative Instruments Act.

The existence of a specialist parliamentary committee to examine delegated legislation is considered essential to the effectiveness of the regime proposed in the report. This role is currently performed by the Senate Standing Committee on Regulations and Ordinances. The role of the Committee would become even more significant under the Council's proposals because all delegated legislation within the ambit of the Legislative Instruments Act would come before it.

Under its existing terms of reference the Senate Standing Committee on Regulations and Ordinances scrutinises delegated legislation to ensure:

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

More detail on these terms is contained in the *Legislative Scrutiny Manual*, which explains some of them in greater depth and expands others by giving examples of previously disallowed instruments. The Council has come to the view that having regard to this additional material and the greater detail contained in the terms of reference of scrutiny committees in New South Wales, Victoria and the Northern Territory, there is scope for more detail in the terms of reference of the Senate Standing Committee on Regulations and Ordinances. Under the Council's proposed new regime there would in any case be an additional matter for the Committee to consider in relation to possible disallowance, namely whether the consultation requirement had been complied with by agencies.

Recommendation 18 The terms of reference of the Senate Standing Committee on Regulations and Ordinances should be expanded to include failure by an agency to consult in accordance with the procedures set out in the Legislative Instruments Act as an additional matter to which the Committee may have regard.

There can be times when a disallowance motion may not proceed because removal of the offending provision may affect the overall operation of a legislative scheme, by creating a gap in it or by rendering it ineffective. To obviate this type of

situation without allowing the objectionable provision to survive, the Council supports the idea that the disallowance motion be allowed to proceed but that its effect be deferred to allow the sponsoring agency sufficient time to correct the provision.

Recommendation 20 The Legislative Instruments Act should permit a deferral of the effect of a disallowance motion for up to six months.

Whereas the existing law probably does not permit a part of a regulation to be disallowed, the Council recommends that this be possible. The fact that only a discrete, individually numbered regulation may be disallowed can be used to exert pressure not to proceed with a disallowance motion, on the basis that in removing an entire objectionable provision, much that is of benefit to the community will be lost. The Council is of the view that partial disallowance, which is available in the case of ordinances under the *Seat of Government (Administration) Act 1910*, should be allowed for all Commonwealth delegated legislation.

Recommendation 21 The proposed Legislative Instruments Act should provide for partial disallowance of delegated legislative instruments by either House of Parliament.

Under existing law regulations may apply, adopt or incorporate the provisions of any Act or regulations in force at a particular time or as in force from time to time or any matter contained in any other instrument existing at the time the regulations took effect. The following three problems can ensue. First, whereas the regulation is required to be published, the incorporated material may not be readily available. Secondly, where the incorporated document is not an Act or regulation, Parliament does not examine it and it becomes part of the law despite not being subject to parliamentary scrutiny. Lastly, the effect of the incorporated material is not always clear, it having perhaps not been drafted by a skilled drafter. The Council therefore has recommended that material given legal effect by delegated legislation should be tabled in Parliament, and that the delegated legislation involved should be subject to disallowance.

Recommendation 22 (1) The Legislative Instruments Act should require the text of any document applied, adopted or incorporated by reference to be tabled with the delegated legislation. Failure to table the incorporated document with the legislative instrument should mean that the incorporating provision should cease to have effect. (2) The document that is applied, adopted or incorporated by reference should be scrutinised to allow the Parliament to determine whether the provision allowing for the application, adoption or incorporation should be disallowed.

Sunsetting of delegated legislation

All legislation needs to be periodically reviewed to ensure that it is still achieving its aims and that it has not become outdated. 'Sunsetting' is the practice of providing for legislation to cease to have effect on a specified day or after it has been in force for a designated period of time. The procedures for the making and supervision of Commonwealth delegated legislation currently do not contain a mechanism to ensure that it is kept up to date. The numbers of delegated instruments made annually, for example 484 statutory rules and 1161 disallowable instruments in 1990-91, mean that without a mechanism to review the instruments they can become quickly outdated.

Four Australian jurisdictions, namely Victoria, Queensland, South Australia and New South Wales, have responded by introducing legislation for the general sunsetting of delegated legislation. The normal sunsetting period introduced in these States ranges from five to ten years. The Council considers that a general sunsetting requirement should apply to all existing principal instruments in the Commonwealth sphere. It believes that it is sound administrative practice to have a mechanism to ensure that instruments are reviewed. In general, all instruments should have a maximum life of ten years. They can then be reviewed to determine whether they are still required and if so, whether they meet current drafting standards. The Council proposes that the instruments should be divided into the following categories for the purpose of sunsetting, for reasons detailed in the report.

Recommendation 23 All existing principal instruments of a legislative character and all instruments subject to the Legislative Instruments Act should be sunsetted as follows:

Date prior to 1 Jan 1992 of last change to the principal Instrument	*Date of sunsetting*
Before 1 Jan 1980	*1 Jan 1995*
1 Jan 1980 to 31 Dec 1986	*1Jan 1997*
1 Jan 1987 to 31 Dec 1991	*1 Jan 2000*
Date of first making of principal instrument After 1 Jan 1992	*Ten years after commencement of the principal instrument*

Access to delegated legislation

Access to law is important given the principle that ignorance of its terms does not excuse the citizen from complying with it. The Council was told that many delegated legislative instruments are very difficult to obtain. The material is not always physically available and, where it is, access is often impeded because the material is not kept in any systematic series. These concerns are additional to any problems of comprehension due to the quality of drafting. The growth in numbers of delegated instruments, as referred to earlier, makes the issue of access increasingly important.

Regulations are required, under Section 48 of the Acts Interpretation Act to be notified in the *Gazette*. Section 5 (3) of the *Statutory Rules Publication Act 1903* provides:

(3) Where any statutory rules are required by any Act to be published or notified in the *Gazette*, a notice in the *Gazette* of the rules having been made, and of the place or places where copies of them can be purchased, shall be sufficient compliance with that requirement.

A majority of the High Court in *Watson v Lee* (1979) 144 CLR 374 held that this provision was satisfied only if the instrument could be purchased at the designated place on the date of notification. The Act in question was amended in 1978, however, by the addition of a requirement that copies of a statutory rule should be available for purchase 'at the time of publication or as soon as practicable thereafter'. This amendment appears to have qualified the requirements set out in *Watson v Lee* in that availability 'as soon as practicable' will be sufficient. A member of the public can thus be obliged to comply with the law, the text of which is not immediately available. Even under *Watson v Lee* there was no obligation to maintain availability of copies of the instrument.

The Statutory Rules Publication Act also covers such matters as the numbering, citation and reprinting of statutory rules. All statutory rules are published as part of the Statutory Rules Series for which the Office of Legislative Drafting is responsible. This series is available through all outlets of the AGPS, although it may not always be possible to purchase copies of a particular rule. The main shortcoming of the Act is that it applies only to rules of court, regulations, and by-laws made under an enactment by the Governor-General, a Minister or any department. Legislative instruments other than statutory rules, such as disallowable instruments, are in general not required to comply with the provisions of the Statutory Rules Publication Act for numbering, printing and sale by the AGPS. Access to these instruments is consequently dependent upon other statutory requirements, including those imposed by the enabling Act, or upon the good graces of the sponsoring agency. Although some agencies make efforts to ensure that instruments are accessible to the public, the Council is concerned to see that consistent standards for access to delegated legislative instruments should apply irrespective of their class or existing arrangements for access.

In the Council's view, it would be preferable to establish a new series to cover all instruments that are legislative in character. Starting with a 'clean slate', this approach would gather all instruments currently distributed or published by agencies into one series and be a single reference point for all delegated legislative instruments. It would also mean that with sunsetting, as recommended by the Council, all existing instruments would be brought within this series as they are reviewed and updated over a period of time.

Recommendation 24 The Statutory Rules Series should be replaced by a new series to cover all delegated legislative instruments that are subject to the Legislative Instruments Act.

It is likely that the proposed series would contain in excess of 1500 instruments each year. A comprehensive register would seem to be the best means of ensuring an orderly compilation of such a large number of instruments. The possibility of publication being undertaken by commercial publishers was raised in some submissions, but the Council is not satisfied that legislation for which there is no great commercial demand, such as in the veterans' affairs and social security areas, would be adequately serviced. The Council is of the view that a single, comprehensive register for all legislative instruments is both desirable and feasible. The use of new forms of technology to improve access to the register, simplify the registration process and reduce costs should be investigated, and the Office of Legislative Drafting should be responsible for the establishment and maintenance of the register.

Recommendation 25 Under the Legislative Instruments Act, a Legislative Instruments Register should be established in which all delegated legislative instruments covered by the Act should be published.

Recommendation 26 (1) Responsibility for the establishment and maintenance of the Legislative Instruments Register, including publication of instruments, should be with the Office of Legislative Drafting.

The Acts Interpretation Act provides that all regulations made under an Act require notification in the *Gazette* in the absence of a contrary intention in that Act. They may be specified to take effect from a date, or time on a date, or on the date of commencement of an Act or a provision of an Act. Where the regulations are silent as to when they take effect, they will be effective from the date of their notification.

Under the Council's proposals, all instruments will be covered by the same rule for publication under the Legislative Instruments Act. They should commence on the date of publication in the Legislative Instruments Register and take effect at the same time unless a different date or time is specified. The existing arrangement in relation to regulations expressed to take effect from a date earlier than the date of notification, namely that these are of no effect where they prejudicially affect the existing rights of a person or impose liabilities for previous acts or omissions, should be continued under the Legislative Instruments Act in relation to all instruments covered by the Act.

Recommendation 27 (1) Under the Legislative Instruments Act, a delegated legislative instrument should commence on the date on which it is published in the Legislative Instruments Register and take effect immediately unless a different time is specified in the instrument. ...(3) A legislative instrument should be unenforceable until it is published in the Legislative Instruments Register.

Under existing law, on the very rare occasions where there is a difference between an original, definitive instrument and the published version, it is no excuse that a published version of an instrument relied on is incorrect. While it is true that the published version of an instrument is not the definitive statement of the law, the Council considers that a person should not be subject to prejudice by reliance upon the version published in the proposed register.

Recommendation 28 Under the Legislative Instruments Act, a person shall not be subjected to any prejudice by reason of their reliance on the text of a legislative instrument as published in the Legislative Instruments Register where that text differs from that in the original instrument made by the relevant authority.

As mentioned under the scrutiny heading, the incorporation of material into delegated instruments can create problems of access. Where the material is contained in an Act or regulation, it may be incorporated either as it is in force at a particular time or as in force from time to time. Where it is contained in any other document, the material may only be incorporated as it exists at the time the incorporating regulation takes effect. On occasion provision is expressly made for matter other than part of another Act or regulation to be incorporated by reference as that matter exists from time to time. It can be quite difficult to establish what the law is at a particular time. Changes to incorporated material may not be brought to the attention of the people affected. For this reason the Council believes that the text of all incorporated material should be published, and updated when altered, on the Legislative Instruments Register.

Recommendation 29 (1) Under the Legislative Instruments Act, the text of any document, other than an Act, applied adopted or incorporated in a legislative instrument by reference should have no effect until published in the Legislative Instruments Register. (2) Changes to any material, apart from Acts and other legislative instruments, applied, adopted or incorporated from time to time should be placed on the Legislative Instruments Register and to the extent that they are not, they should be unenforceable.

Special procedures – rules of court and nationally uniform regulations

The question whether the recommendations contained in the report should apply to both rules of court, which are in many ways distinct from other forms of delegated legislation, and delegated legislation made under intergovernmental schemes, where additional issues are raised, will be dealt with only very briefly. This synopsis is geared to issues of general application, so for more detail on these subjects reference will need to be made to the report itself.

In essence, insofar as rules of court are made under statutory enactment rather than by virtue of the inherent power of courts to make rules governing their procedures, the Council takes the view that they should be subject to the regime proposed for all Commonwealth delegated legislation. Courts would, however, have the ability to determine in rare, particular cases that in the public interest no consultation need be undertaken prior to the making of a rule.

Recommendation 30 (1) Subject to recommendation 30 (2), rules of court should be covered by the comprehensive regime for making, publication and review of delegated legislation proposed for the Legislative Instruments Act. (2) Consultation need not be undertaken in a particular case for rules of court if the court determines that the public interest so requires. In such a case, the court should be required to explain its reasons and the grounds of public interest relied upon in its Annual Report.

Rules made under intergovernmental schemes for nationally uniform regulations raise separate special considerations. In particular there are problems in providing for parliamentary scrutiny of such rules. The Council has therefore suggested the following principles to ensure a parliamentary role in the making of this type of rule.

Recommendation 31 (1) Where possible, the procedures recommended in this report for making, publication and review of delegated legislation should apply to legislative instruments made under intergovernmental schemes for nationally uniform regulation. (2) Where this is not possible, the following minimum standards should apply:

- *the instruments should be drafted by or settled with professional drafters;*
- *there should be mandatory consultation along the lines of that set out in the National Food Authority Act when a new instrument is made or when an existing instrument is revoked or varied;*
- *this consultation should include notice to the parliament for each participating jurisdiction;*
- *the instruments should be published in the Legislative Instruments Register; and*
- *the instruments should be subject to a sunsetting requirement ten years after the principal instrument is first made.*

Conclusion

The Council's report has been provided to the Attorney-General. Prior to taking action, if any, to implement the recommendations contained in the report, his department is conducting consultations with Commonwealth agencies that might be affected by the implementation of any of those recommendations. It is interesting to note that the Council has recently been informed that similar broad-ranging questions about delegated legislation as were considered in the report are being examined in two States – by the Legal and Constitutional Committee of the Victorian Parliament and by the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament.

REGULAR REPORTS

Administrative Review Council

Reports, submissions and letters of advice

Since the last regular issue of *Admin Review*, the Council has provided:

- a report to the Attorney-General: Report No 35 *Rule Making by Commonwealth Agencies;*
- letters of advice to the Attorney-General on
  - the Review of the Administrative Appeals Tribunal;
  - the Review of the Office of the Commonwealth Ombudsman;
  - the draft Broadcasting Services Bill; and
  - proposed conscientious objection decision appeal provisions; and
- letters of advice to the Australian Law Reform Commission on
  - customs and excise matters; and
  - administrative penalties.

Current work program – developments

Community Services and Health

The Council has recently redirected this project towards investigating the scope of merits review of decisions made under Commonwealth funding programs.

Intellectual property

A draft discussion paper on review of patents decisions is being prepared by a consultant, Dr Margaret Allars of Sydney University.

Specialist tribunals

It is expected that the Council will circulate a draft report on tribunal procedures late in 1992. Preparations are under way for the second Conference of Commonwealth Review Tribunals, to be held in Sydney in October.

Government business enterprises

The Council is working on a draft report on the extent to which GBEs should be subject to administrative review. This is expected to be available towards the end of this year. Anyone interested in obtaining a copy of the draft report should contact Robyn Johansson, the responsible Project Officer at the Council, phone number (06) 257 6115.

Environmental decisions

The Council is currently arranging the engagement of a consultant to examine the issue of merits review of environmental decisions.

Administrative Appeals Tribunal

New jurisdiction

Since the last issue of *Admin Review* jurisdiction has been conferred on the AAT, or existing AAT jurisdiction has been amended, by the following legislation:

- Australian Horticultural Corporation (Export Control) Regulations
- Australian Wool Corporation Regulations
- Customs and Excise Legislation Amendment Act 1992
- Defence Legislation Amendment Act 1992
- Development Allowance Authority Act 1992
- Federal Court of Australia Regulations
- Health, Housing and Community Services Legislation Amendment Act 1992
- High Court of Australia (Fees) Regulations
- Industrial Chemicals (Notification and Assessment) Regulations
- Insurance Laws Amendment Act 1991
- Law and Justice Legislation Amendment Act (No 2) 1992
- Life Insurance Policy Holders' Protection Levies Collection Act 1991
- Ozone Protection Amendment Act 1992
- Pooled Development Funds Act 1992
- Taxation Laws Amendment (Self-Assessment) Act 1992

AAT decisions

Order of giving evidence

Re Department of Social Security and Spoolder (5 September 1991) involved an application to the AAT, constituted by Deputy President Forgie, for a direction that Mrs Spoolder, the respondent, give evidence prior to the applicant Department presenting its case. The principal matter was an application for review of a decision by the Social Security Appeals Tribunal to the effect that Mrs Spoolder was not a de facto spouse and thus was qualified to receive an invalid pension as a single person.

The essence of the Department's submission was that Mrs Spoolder's credibility was a vital