



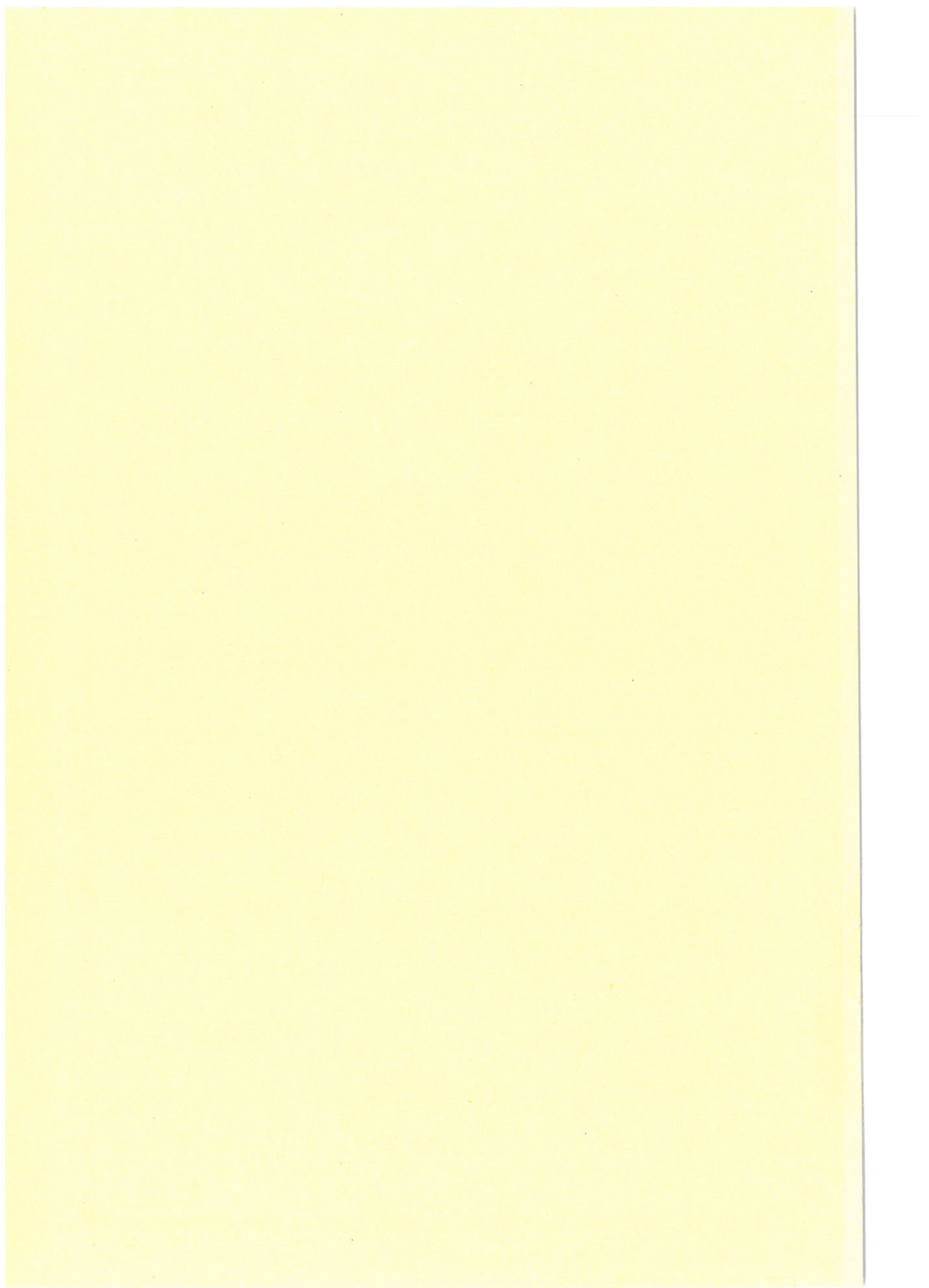
LEGISLATIVE INSTRUMENTS BILL 1994

GOVERNMENT RESPONSE

**TO
THE REPORT ON THE BILL BY
THE HOUSE OF REPRESENTATIVES
STANDING COMMITTEE**

Report tabled: 9 February 1995

**Government Response tabled: 27 September 1995
(Note: response received by Committee - 25 September 1995)**





RECEIVED
25 SEP 1995

Attorney-General

The Hon. Michael Lavarch
Parliament H
Canberra ACT

Mr D Melham
Chairman
House of Representatives Standing Committee
on Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600

Dear Mr Melham

I am writing in response to the Committee's report on the Legislative Instruments Bill 1994, tabled in the House on 9 February 1995. I would like to thank the Committee for its detailed consideration of the Bill, and for its helpful suggestions for amendment.

A copy of the Government's response is attached. Not all of the Committee's recommendations are able to be accepted at this time, although those not accepted will be considered in the course of the review of the legislation.

Yours sincerely

A handwritten signature in black ink, appearing to read 'M Lavarch', written in a cursive style.

MICHAEL LAVARCH

**THE REPORT BY THE HOUSE OF REPRESENTATIVES STANDING
COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS ON THE
LEGISLATIVE INSTRUMENTS BILL 1994
(AUGUST 1995)**

GOVERNMENT RESPONSE - PRINCIPLES

1. The Government thanks the Committee for its most comprehensive report on this matter and welcomes the report's positive approach to the passage of the Bill. The Government is pleased that it is able to accept a significant number of recommendations for amendment to the Bill. Although some recommendations raise significant issues of principle which cannot be accepted at this stage, the principles underlying the recommendations are generally acceptable to Government. The Government has agreed that there will be a review of the legislation after three years of operation. In response to the Committee's report, the Government proposes that a number of important issues, including recommendations not accepted at this time, be considered in the review.

Background

2. The Legislative Instruments Bill 1994 represents the Government's implementation of the Administrative Review Council's ("the ARC") Report No. 35 "Rule Making by Commonwealth Agencies". The Bill was introduced into the Senate on 30 June 1994 and considered by the Senate Standing Committee on Regulations and Ordinances, which reported on the 17 October 1994. That Committee endorsed the objectives of the Bill and generally supported its main principles. On 9 November 1994 the Bill was read a second time in the Senate but consideration of the Bill by the Senate in Committee of the Whole was deferred and the Bill was referred to the House of Representatives Standing Committee on Legal and Constitutional Affairs ("the Committee") on 10 November 1994.

3. The Committee's report on the Bill was tabled in the House on 9 February 1995. A total of 39 submissions were received on the proposed Bill. In addition, 3 public hearings were held. Each of the submissions made and the evidence given supported the Bill. Recommendation 1 of the Committee's report is that the Legislative Instruments Bill be passed by the Parliament following due consideration of the recommendations of its report.

4. The Government considers that the Legislative Instruments Bill 1994 is a vitally important reform of the making and scrutiny of delegated legislation. The Bill will change in a significant way the relationship between the Parliament and the Executive by enhancing the Parliament's control of delegated legislation. In enacting the Legislative Instruments Bill, the Government intends to facilitate open government, accountability and public access to

delegated legislation. These principles are the foundation of the Government's response to both the ARC's and the Committee's reports. The Government is aiming for the highest possible standards in this regard but acknowledges that considerations of practicality, achievability and cost-effectiveness will also influence outcomes. The Government proposes to review the effectiveness of the regime in achieving those objectives after three years of operation. The Government does not wish to prejudice the result of the review but expects that the ambit of the legislation will be considerably widened—particularly in respect of the current limitation on consultation to instruments affecting business.

Consultation

5. The Committee's report follows the division of the Bill into various Parts. Of its 38 recommendations, a total of 16 relate to the consultation provisions of Part 3 of the Bill. The Committee adopts a view similar to the Administrative Review Council's recommendation that consultation should apply to all legislative instruments rather than being restricted to instruments directly affecting business. It is central to the Committee's views that consultation requirements of like legislation in both New South Wales and Victoria have general application.

6. However, extrapolating from the State experience to the Commonwealth involves considering two entirely different situations. First, the States have significantly less delegated legislation than the Commonwealth. Therefore the burden of consultation is significantly reduced. Secondly, a threshold test restricts the application of the States' legislation to limited classes of instruments. In New South Wales this is achieved by a schedule of exemptions, and in Victoria by extending the coverage by regulation. This more limited coverage reduces, or can reduce, the numbers of consultations required. In contrast, the Commonwealth legislation has much broader general coverage, but restricts the consultation process, at present, to instruments directly affecting business with limited exemptions.

7. Although the Commonwealth consultation regime will only be mandatory for legislative instruments directly affecting business, the Bill will be amended to encourage the voluntary use of the consultation processes where consultation is not mandatory. The range of instruments covered by the Bill is so broad that the Legislative Instrument Proposal ("LIP") approach to consultation may not always be the most appropriate form to be utilised. Under the LIP approach the consultation focuses both on the policy of the proposals and the cost-effectiveness of its implementation. With some proposals, such as those which provide a benefit only, the cost-effectiveness may not necessarily be a deciding factor.

8. The dual functions of the consultation proposals, allied with the significant costs of consultation, caused considerable concern about implementation of the ARC's

recommendations. This was a significant reason that the Government decided that the legislation would be evaluated after three years of operation. The review will reconsider the application of the consultation mechanism to all legislative instruments.

9. The Committee expressed concerns about the ambit of a number of specific exemptions from the consultation process in clause 19 of the Bill. The Government appreciates that the scope for exemption should be limited and has always intended clause 19 to be narrowly drafted. Whilst maintaining the need for the exemptions in clause 19, the Government will re-examine the drafting in light of the Committee's concerns to ensure that the clause reflects the limited application of those exemptions.

Definition

10. The ARC in its report recommended that a legislative instrument not be defined for the purposes of the legislation. This was a view also expressed in a number of submissions and expounded upon at the public hearings.

11. The Government did not follow the ARC recommendation and provided a definition to enable departments and agencies to have certainty as to the coverage of the legislation. Notwithstanding the existence of a definition, the Government recognised that there would be some instances where it may be difficult for agencies to categorise an instrument as either legislative or administrative. Accordingly, the Bill provides a mechanism by which the Attorney-General can issue a certificate determining the character of the instrument (clause 7). The Bill provides for these determinations to be included on the Register and for Parliamentary scrutiny of the Attorney's certificate.

12. The Committee has recommended that a definition be retained but that it be recast as an inclusive formulation. This would be similar to the approach to administrative decisions under the *Administrative Decisions (Judicial Review) Act 1977* ("ADJR Act"). The Government has significant difficulties with the Committee's approach. It believes that this approach would reduce the certainty which the current definition provides, and correspondingly increase the need for use of the clause 7 mechanism to resolve the uncertainty.

13. The use of the Attorney-General's certificate gives rise to two particular problems. First, there will be increased resources used in the formal process of seeking and obtaining the Attorney-General's certificate. Secondly, the process of seeking such a certificate forestalls the agency from commencing both its policy development and its making of an instrument until the determination is made. A department or agency is unlikely to speculate on the

Attorney's decision and commence the consultation and other processes required under the Bill.

14. The Government will closely monitor the operation of the definition and the certificate provisions and will ensure that their retention or some alternative is specifically considered in the review.

Sunsetting

15. The Committee was persuaded by the evidence before it that the ARC's proposals for sunseting should be adopted. Nevertheless, the Committee acknowledged the difficulties in giving effect to sunseting at this time. Accordingly it recommended that sunseting be introduced as soon as possible. The Government expects that the experience of the first three years of operation of the legislation will dispel some of the concerns that agencies have expressed in relation to sunseting and that the review will be able to establish the desirability and cost-effectiveness of sunseting.

Registration, access and scrutiny

16. The Committee made a number of recommendations regarding access to particular documents, or to consolidated documents, and Parliamentary scrutiny. The Government accepts the thrust of many of these recommendations and will ensure that, where acceptance of the recommendations is impeded by technological limitations, as technology advances sufficiently the recommendations will be implemented.

**GOVERNMENT RESPONSE TO
INDIVIDUAL RECOMMENDATIONS**

GENERAL AND DEFINITION ISSUES

GENERAL

Recommendation 1

The Committee recommends that the Legislative Instruments Bill be passed by the Parliament following due consideration of the recommendations of this report (page 8).

Response: The Government welcomes this recommendation of support for this very important piece of legislation. The Government appreciates the Committee's contribution to improving the Bill, and is able to accept most of the report's recommendations. The review of legislation after three years of operation will consider those recommendations that have not been accepted at this time.

Recommendation 2

The Committee recommends that the Administrative Review Council or other body independent of government should review the Legislative Instruments Bill after three years' operation and that the Attorney-General report to Parliament on the results of the review (page 9).

Response: The Government accepts this recommendation. In order to reflect the significance of the review, the Government considers that a suggestion made during the course of the Committee's hearings that a clause providing for the review should be included in the Bill should be adopted. The Government accepts that the Administrative Review Council should be involved in the review in conjunction with appropriate representatives from Government, business and the public.

DEFINITION ISSUES

Recommendation 3

The Committee recommends:

- the definition of 'legislative instrument' in clause 4 of the Legislative Instruments Bill should be amended to provide that a legislative instrument is an instrument in writing of a legislative character that is or was made in the exercise of a power delegated by the Parliament; and
- the definition should retain proposed paragraphs 4(1)(b) to (d) of the definition, but only as indicia of a legislative instrument; and
- the definition should expand paragraph 4(1)(c) to include imposing a liability, creating a power and affecting a privilege or interest; and
- the definition should provide that it does not include an instrument of a administrative character within the meaning of the *Administrative Decisions (Judicial Review) Act 1977* (page 28).

Response: The Government acknowledges the Committee's concern regarding the definition, and is able to accept most of this recommendation. The definition represents a balancing of the needs for certainty and complete coverage. The Government considers that the changes recommended by the Committee in dot points 3 and 4 could be implemented without compromising that balance. However, it is not possible to accept the change recommended in dot points 1 and 2, as this would have an adverse effect on the certainty the definition is intended to provide.

The definition will be amended to include the words "affecting a privilege or interest". However, the meaning of the words "imposing a liability" and "creating a power" are, in the Government's view, included in the phrases "imposing an obligation" and "creating a right". These additional words would therefore add nothing to the definition and it is not proposed to amend the definition to include them. The definition will also be amended to provide that it does not include an instrument of an administrative character within the meaning of the *Administrative Decisions (Judicial Review) Act 1977*. These amendments will help to clarify the scope of the definition.

The Government considers that the amended definition represents the best possible balance between certainty and complete coverage. However, the Government does not support the move to an inclusive definition as recommended by the Committee, rather than the current exhaustive definition. Such a change would significantly reduce the certainty the present definition provides. Currently an instrument must satisfy all the criteria set out in clause 4(1). If the definition was amended as recommended, these criteria would be indicative only. An instrument which was in writing and made in the exercise of a power delegated by the Parliament, but which satisfied only one or two of the other criteria could arguably qualify as legislative under this approach. There is already a degree of uncertainty regarding the classification of some instruments and the suggested amendment would significantly increase this uncertainty. As a consequence there would be greater use of the clause 7 solution to the problem of reduced certainty, giving rise to an increased role for the Attorney-General, one of the primary concerns of the Committee.

Recommendation 4

The Committee recommends that guidelines and principles of interpretation should be developed by the Attorney-General's Department in conjunction with other agencies and departments to assist them in applying the definition of legislative instrument in the Legislative Instruments Bill (page 28).

Response: The Government accepts this recommendation. The Government certainly proposes to assist agencies as much as possible in applying the definition to their instruments. Guidelines and other aids to interpretation will be developed and will be included in the proposed Legislative Instruments Handbook.

Recommendation 5

The Committee recommends that a decision by the Attorney-General to give a certificate under clause 7 of the Legislative Instruments Bill be reviewable under the *Administrative Decisions (Judicial Review) ACT 1977* (page 32).

Response: The Government does not accept this recommendation because it considers that the Parliamentary scrutiny provided for in the Bill is the most appropriate method of review of these decisions. Parliamentary scrutiny permits clause 7 decisions to be reviewed, and if necessary disallowed, with the minimum negative impact on certainty. On the other hand, the provision of ADJR relief would significantly increase uncertainty in the operation of the legislation. The Bill provides for regulation of the relationship between Parliament and the executive. It is considered inappropriate to have the judicial arm of government reviewing

such matters. The judicial arm sits in judgement on the executive and the Parliamentary arms of government separately, but should not arbitrate between the two. In addition, the easier to use ADJR regime might raise judicial challenge in a way which would provide uncertainty on the operation of the instrument where the Parliament had no concerns with it. Due to the detrimental effect on certainty, the Government considers that judicial review of consultation decisions, although possible under s 75(5) of the Constitution (including by the Federal Court under s 39B of the *Judiciary Act 1903*), should not be encouraged by making ADJR Act review available.

Recommendation 6

The Committee recommends that subclause 7(5) of the Legislative Instruments Bill should be omitted if a decision by the Attorney-General to give a certificate under clause 7 of the Legislative Instruments Bill is to be reviewable under the *Administrative Decisions (Judicial Review) ACT 1977* (page 33).

Response: Because the Government does not accept recommendation 5, it consequently does not accept this recommendation.

CONSULTATION ISSUES AND BACKCAPTURING

Recommendation 7

The Committee recommends that mandatory public consultation requirements be put in place in relation to the making of all legislative instruments as soon as possible (page 43).

Response: The Government accepts this recommendation in principle and acknowledges the importance and benefits of consultation in the legislative process. It is the Government's policy that consultation will eventually be extended to all legislative instruments, with limited exceptions. However, the Government has decided that consultation should be introduced gradually, to allow departments and agencies time to become accustomed to the procedures and adjust to the resource implications. For this reason, the Bill currently limits consultation to instruments affecting business. This group was chosen because it is relatively easy to define, and instruments affecting business are reasonably easy to identify. However, this is intended to be a temporary measure only, and the review will consider the extension of the ambit of consultation.

In the meantime, the Government believes that departments and agencies should be encouraged to consult on their proposed legislative instruments wherever possible and that such consultation should follow the provisions of Part 3. Part 3 will be amended to include an objects clause to promote that voluntary consultation.

Recommendation 8

The Committee recommends that the review of the legislation by the Administrative Review Council should proceed on the basis that mandatory consultation will be introduced and should also focus on how it will be implemented (page 43).

Response: The Government accepts this recommendation in principle. It is the Government's policy that consultation will eventually be extended to all legislative instruments, with certain limited exceptions. It is intended that the review should consider the operation of the initial consultation scheme, and focus on how it should be extended to provide for wider consultation.

Recommendation 9

The Committee recommends that clause 18 of the Legislative Instruments Bill 1994 be amended to provide for an assessment of the relative costs and benefits to the Government, and the affected public, of the proposed legislative instrument and of any other means of achieving the same objective.

The assessment should include an assessment of the social, economic and environmental costs and benefits, both direct and indirect, and of the costs and benefits relating to resource allocation, administration and compliance costs (page 44).

Response: The Government accepts this recommendation in part. The Government agrees that clause 18 should indicate the kind of factors that should be considered in assessing the costs and benefits of a proposed legislative instrument. It is appropriate that a rule-maker should consider the likely social and environmental effects of a proposal rather than limit consideration to economic factors. These factors will be added to clause 18 to provide guidance to rule-makers.

However, the Government does not propose to accept the latter part of this recommendation. The Government is convinced that a requirement to give only a broad indication of relative costs and benefits is the most appropriate standard of assessment for a Legislative Instrument Proposal. Existing checks and balances may require a more detailed analysis in particular cases. However, for many instruments, a more detailed cost/benefit analysis would be disproportionate to the value of the instrument. Where a proposed legislative instrument would significantly affect the public, departments and agencies will be encouraged to undertake a fuller assessment. The cost/benefit issue will be reconsidered in the review.

Recommendation 10

The Committee recommends that the assessment of the costs and benefits required under a Legislative Instruments Proposal under clause 18 of the Legislative Instruments Bill should be quantified wherever possible.

If this is not possible, the anticipated impact of the proposed action and of each alternative should be set out in a way that permits a comparison of the costs and benefits (page 45).

Response: The Government acknowledges the Committee's concern that the assessment of costs and benefits should be accurate, but cannot accept this recommendation at this time.

Clause 18 as amended will provide for an appropriate level of assessment for the purposes of the LIP, while avoiding duplication of other assessment processes and wasted resources. The review will reconsider the issue of quantification when agencies and departments have had experience with the current regime.

Recommendation 11

The Committee recommends that the Legislative Instrument Bill should be amended to provide that the responsible Minister:

must obtain independent advice on the adequacy of the Legislative Instrument Proposal under clause 18

must also certify as to the adequacy of it and that the Act and the guidelines (if any) so far as they relate to a Legislative Instrument Proposal have been complied with.

The Minister should attach a copy of the certificate to the explanatory statement prepared under clause 32 of the Bill (page 45).

Response: The Government accepts this recommendation in part. It is appropriate that the responsible Minister should certify that the Legislative Instrument Proposal is adequate for the purposes of consultation. Clause 32 will be amended to include certification and the reasons for it as a requirement for lodging with the explanatory material.

However, the Government does not accept that the Bill should require a rule-maker to obtain independent advice. The Government believes that the public consultation process and Parliamentary scrutiny are better ways of ensuring the adequacy of the LIP. A requirement for independent advice would be superfluous and an unnecessary duplication of work for little or no benefit. Further, there is the question of who would provide such advice, and the issue of increased costs to be considered. It is always open to a rule-maker to seek advice on a proposal where it is considered appropriate. However, generally the department or agency developing the proposal is in the best position of ensuring that it is within government policy.

Recommendation 12

The Committee recommends that clause 18 of the Legislative Instrument Bill be amended to provide for public notification by advertisement in all cases where consultation is required by the Bill (page 46).

Response: The Government accepts this recommendation. This amendment will ensure that all those potentially affected by a proposed legislative instruments will have the opportunity to make comments.

Recommendation 13

The Committee recommends that clause 17 of the Legislative Instruments Bill be amended to make it clear that, even if the Minister identifies certain organisations that are to be consulted, the Minister is still required to consult with other relevant organisations (page 47).

Response: The Government accepts this recommendation. Organisations other than representative groups may have comments that could enhance the quality of the proposed legislative instrument. This recommendation is consistent with the Government's view that broad consultation is desirable and beneficial.

Recommendation 14

The Committee recommends that clause 18 of the Legislative Instruments Bill be amended to provide that if at any time up to 14 days after the closing date for submissions it becomes apparent that a proposed instrument is controversial or sensitive, then the Minister must consider whether a public hearing is appropriate and make a written decision.

Clause 32 of the Bill should also be amended to include the decision in the explanatory statement and, if a public hearing is held, details of the hearing (page 48).

Response: The Government accepts this recommendation. Good administration should ensure that controversy is recognised at an early stage and that appropriate consultation, through public hearings testing the competing views, is obtained before final decisions are made.

The Government accepts also that where a Minister decides about the necessity for, or refuses, a public hearing, that the explanatory material should include the reasoning of the Minister.

Recommendation 15

The Committee recommends that guidelines about the method of consultation be developed for use in conjunction with the Legislative Instruments Bill (page 49).

Response: The Government accepts this recommendation and will develop such guidelines for inclusion in the Legislative Instruments Handbook. Because the current focus of mandatory consultation relates to instruments affecting business, the Office of Regulation Review will be consulted in relation to the development of those guidelines.

Recommendation 16

The Committee recommends that clause 19 of the Legislative Instruments Bill should be amended to provide that instruments exempted under paragraph (1)(b) should remain in force for only 12 months (page 52).

Response: The Government does not accept this recommendation. Issues which would give rise to the application of this provision would have such public interest sensitivity that consultation would impede the proper regulation of the particular matter involved. To limit regulation of that activity as recommended would mean that effective regulation would be difficult to achieve, and create uncertainty as to the continued regulation at the expiration of the twelve month period. In the present circumstances, where consultation is being limited to matters directly affecting business, this could have serious economic consequences for business and the economy in general.

Additionally, the Government is concerned that implementation of this recommendation would result in these instruments being subject to sunseting. This would prejudice the results of the review which will specifically consider sunseting and the associated costs/benefits.

Recommendation 17

The Committee recommends that subparagraph 19(1)(a)(i) of the Legislative Instruments Bill be omitted (page 53).

Response: The Government understands the underlying principle behind this recommendation and will seek to have this provision redrafted to reflect the narrow scope of this exemption. However, the Government is not able to accept the recommendation. The exemption only operates where an international agreement requires the preparation of an instrument in a fixed form and with specific consequences, as provided for in the international agreement. The exemption does not apply where the content or consequences of the instrument is not fixed by that agreement.

For example, paragraph 228(1)(e) of the *Patents Act 1990* authorises the making of regulations for the purposes of carrying out or giving effect to the Patent Cooperation Treaty (the text of which is required, under subsection 228(5), to be set out in regulations). The regulations under the Patent Cooperation Treaty set certain patent application fees in Swiss francs. Those fees are reflected in Part 4 of Schedule 7 to the Patents Regulations. If those fees are changed by the international body, the Schedule to the Commonwealth regulations must also be changed. There is no point in consulting on a regulation increasing these fees, as the fees are set by an international body under an international agreement to which Australia is a party. As the level of fees cannot be changed, provision for a consultation process would only serve to confuse and mislead the public, and would not be an efficient use of resources. An instrument made under an international agreement which requires an instrument to be made in general, flexible terms would not be exempt under this provision.

Recommendation 18

The Committee recommends that subparagraph 19(1)(a)(ii) of the Legislative Instruments Bill should be amended to include only legislative instruments that provide for an increase or decrease in fees or charges and the increase or decrease does not exceed the amount set by the Budget (page 54).

Response: The Government acknowledges the Committee's concern about the potential breadth of this exemption. The exemption will be redrafted to clarify and narrow its scope. However, the Committee's recommendation cannot wholly be accepted. The Budget contains decisions other than alterations to fees and charges that could not be changed without upsetting the Budget scheme, for example variations to entitlements or obligations. The ARC's reasons for recommending an exemption for fee increases or decreases set by the Budget can be extended to consultation regarding an instrument giving effect to this kind of decision. Consultation in these circumstances would be inappropriate and an inefficient use of time and resources. Further, providing for consultation on decisions which are unlikely to change undermines the integrity of the consultation process. The public will legitimately have little faith in providing input to a process which results in no change.

Recommendation 19

The Committee recommends that subparagraph 19(1)(a)(iii) of the Legislative Instruments Bill be amended to limit the reasons of urgency to those matters listed in that subparagraph (page 55).

Response: The Government accepts the need for some modification to the drafting of this exemption, but does not accept this recommendation. The exemption is designed to protect the public interest, and will be redrafted to reflect this focus more accurately. The exemption will include circumstances where an instrument is required urgently for reasons related to public safety or health or national security. It is impossible to provide for all the circumstances in which urgency may require reliance on the exemption, but the wording will be changed to make it clear that it is only to be used in exceptional cases, and where the public interest or special considerations requires it. If the subparagraph were limited in the manner suggested, it would be very difficult for bodies such as the Australian Quarantine Inspection Service to make instruments with immediate effect to protect public health. There would be insufficient time for consultation in the situations of urgency that the exemption is intended to cover, and consultation in such circumstances would be contrary to the public interest.

Recommendation 20

The Committee recommends that subparagraph 19(1)(a)(iv) of the Legislative Instruments Bill should be amended to provide for an exemption from consultation if significant public consultation similar to that which would have occurred under the Bill has already taken place (page 56).

Response: The Government accepts this recommendation, and will amend the provision to reflect this.

Recommendation 21

The Committee recommends that the Legislative Instruments Bill should be amended to provide that a rule-maker should consult with the Office of Regulation Review in the Industry Commission if the exemption in subparagraph 19(1)(a)(vii) is to be relied upon. Details of this should be included in the explanatory statement under clause 32 of the Bill (page 56).

Response: The Government accepts the principle involved in this recommendation, but considers that it would be more appropriately placed in the guidelines in the Legislative Instruments Handbook. This approach is supported by the Office of Regulation Review. The Legislative Instruments Handbook will contain detailed guidelines and principles governing the making of legislative instruments, and it is expected that rule-makers will refer to the Handbook throughout the process of making an instrument.

Recommendation 22

The Committee recommends that decisions under Part 3 of the Legislative Instruments Bill be reviewable under the *Administrative Decisions (Judicial Review) Act 1977* (page 58).

Response: The Government does not accept this recommendation. It considers that Parliamentary scrutiny is the most effective and appropriate mechanism for reviewing decisions taken in relation to consultation. Parliamentary scrutiny permits consultation decisions to be reviewed with the minimum negative impact on certainty. However, the provision of ADJR Act relief would significantly increase uncertainty in the operation of the legislation. For the reasons outlined in respect of a like recommendation on clause 7, implementation of this recommendation would be detrimental to the scheme of the legislation. In addition, clause 20 of the Bill provides that a failure to comply with the requirements of Part 3 does not affect the validity or enforceability of the instrument. Due to the detrimental effect on certainty, the Government considers that judicial review of consultation decisions, although possible under s 75(5) of the Constitution (including by the Federal Court under s 39B of the *Judiciary Act 1903*), should not be encouraged by making ADJR Act review available.

Recommendation 23

The Committee recommends that a sunseting regime be introduced in relation to all existing and future legislative instruments as soon as possible (page 66).

Response: The Government supports this recommendation in principle, subject to the outcome of the review of the legislation. The backcapturing regime included in the Bill goes a considerable way to achieving the aims of sunseting, and is intended to be an initial step in updating the Commonwealth's delegated legislation. Backcapturing will ensure that instruments made prior to the enactment of the Bill are placed on the Register if they are intended to remain in force. The practical implications of introducing sunseting at the Commonwealth level remain unclear. Currently Departments and agencies do not have a

clear picture of how much legislation will be subject to the backcapturing regime, let alone sunseting. This uncertainty precludes an accurate assessment of the costs and burdens that would be incurred by Departments and agencies under a sunseting regime. However, by the time of the review, the results of the backcapturing process will enable a much clearer assessment of what sunseting will involve. After the review has considered all the relevant issues, the implementation of sunseting will be considered.

REGISTRATION AND ACCESS ISSUES

Recommendation 24

The Committee recommends that consideration be given to amending the Legislative Instruments Bill to allow the registration of a consolidation of a legislative instrument as part of the back capturing process if the Principal Legislative Counsel is satisfied that the consolidation is accurate and the rule-maker can establish that it is preferable to remaking the instrument (page 68).

Response: The Government acknowledges the importance of availability of consolidations. In practical terms the Government will be giving effect to the principle of this recommendation by making accurate and up to date consolidations available on the SCALE legal information database made available by the Attorney-General's Department. However, it is not proposed to accept this recommendation in relation to the Register. The Register is intended to be a permanent record of each instrument made, just as the numbered Acts series is a permanent record of all Acts passed by the Parliament. There are difficulties in providing for consolidations to be registered, including that:

- to register a consolidation may be a cause of uncertainty—if a consolidation was inaccurate, it would not be a true statement of the law
- the only way the Principal Legislative Counsel could be satisfied that a consolidation accurately sets out the law is by examining each individual instrument from which the consolidation is derived, and thus each of those instruments would therefore be available for registration.

In considering this recommendation, the Government notes that:

- unless a remake is exempt from consultation, a rule maker would always consider registering a consolidation as preferable to remaking
- there is no obligation to register instruments whose operation is exhausted
- the Bill permits registration of a copy if the original cannot be located.

Recommendation 25

The Committee recommends that departments and agencies should include in their annual reports statements of their review and revision programs for legislative instruments (page 69).

Response: The Government supports the principle of reporting on review and revision programs for legislative instruments. The mechanism to give effect to this will be determined once the programs for regulation review and revision are settled. The Government notes

however that the annual report requirements for departments have recently been simplified and shortened with the agreement of the JCPA and it has been agreed that further specific across the board reporting requirements will not be added.

Recommendation 26

The Committee recommends that extracts from the Federal Register of Legislative Instruments authorised by the Government Printer should be available through government bookshops and from the Principal Legislative Counsel (page 74).

Response: The Government accepts this recommendation.

Recommendation 27

The Committee recommends that:

- **the format of the Index to the Federal Register of Legislative Instruments should be designed in such a way as to present the Register in the most understandable way possible**
- **the Index should be available on a daily or weekly basis and should be published in the *Gazette* and in as many other publications as practicable**
- **the Index should be prefaced in any publication in which it appears by a clear description (written with non-users of computers in mind) of how to use a computer terminal and a modem to access the Register and SCALE**
- **this description should be included in the proposed Legislative Instruments Handbook (page 77).**

Response: The Government supports these recommendations, subject to the Index being a stand-alone document (not included in the *Gazette*). While hard copies of the Index will be available from Australian Government Publishing Service and the Office of Legislative Drafting (and the Index will also be available through SCALE), it is not proposed that it will be published as part of the *Gazette*.

Recommendation 28

The Committee recommends that if, within a reasonable period after registration of a legislative instrument, the Index to the Federal Register of Legislative Instruments has not been updated and the update published in print the Attorney-General should table in each House of the Parliament, within six sitting days of the end of that period a statement explaining the delay (page 77).

Response: The Government supports this recommendation, noting that it is intended that every instrument lodged for registration will be registered within 24 hours of its receipt and the Index containing its entry will be available no later than 24 hours after the instrument's registration.

Recommendation 29

The Committee recommends that:

- the largest possible number of locations across Australia should be provided for public access to the Register and SCALE
- up to date listing of public access points should be maintained and published regularly as widely as possible
- the staff at public access points should receive training that will equip them to provide assistance to Register and SCALE users (page 79).

Response: The Government accepts the thrust of this recommendation. The Attorney-General's Department in upgrading its SCALE system is seeking to provide the broadest possible accessibility to legislation. Such expansion may require the provision of additional resources, including resources for training, and will be considered in a Budgetary context. SCALE will also be available on the Internet, providing for even wider access to instruments and to the Index to the Register than was originally planned. The review will consider the adequacy of the ambit of access.

SCRUTINY AND MISCELLANEOUS ISSUES

SCRUTINY ISSUES

Recommendation 30

The Committee recommends that the Legislative Instruments Bill should be amended to provide for the registration of documents, other than Acts and other legislative instruments, incorporated by reference into a legislative instrument and for the tabling of such documents. Any changes to the incorporated document should also be registered. An exception should apply in relation to large-volume materials which should be made available to the Parliament for inspection on request (page 84).

Response: Like recommendation 31, this recommendation has substantial technological, legal and cost ramifications that warrant further consideration. The Government undertakes to give these matters further consideration in the review when the full extent of the problem is known.

Recommendation 31

The Committee recommends that legislation be introduced to provide an exception to infringement of copyright, to permit reproduction of private copyright materials that have been incorporated into a legislative instrument, for tabling in Parliament or inclusion in the Register established under Part 4 of the Legislative Instruments Bill (page 85).

Response: Like recommendation 30, this recommendation has substantial technological, legal and cost ramifications that warrant further consideration. The Government undertakes to give these matters further consideration in the review when the full extent of the problem is known.

Recommendation 32

The Committee recommends that subclause 48(4) of the Legislative Instruments Bill should be amended to provide for a notice of motion for disallowance to be passed and for its operation to be deferred for a period of up to six months (page 86).

Response: The Government has carefully considered this proposal, but does not accept this recommendation. The provision for deferred disallowance is new and is designed to

overcome a current difficulty frequently confronted by the Senate Standing Committee on Regulations and Ordinances of non-disallowance of instruments which have raised concerns because the responsible Minister has given an undertaking to make changes. These undertakings are not always met. Under the Bill as drafted, the deferral period allows the Minister to make the necessary changes without disallowance having occurred. If these changes are not made or are not satisfactory, the Parliament has to consider whether the notice of disallowance should proceed.

In contrast, the Committee's recommendation means that the disallowance motion has already been passed and will automatically come into effect at the end of the deferral period. Because the Parliament needs to pass another motion to prevent the disallowance motion taking effect, there is the possibility of automatic disallowance occurring accidentally or unintentionally, after the concerns with the instrument have been corrected. The Government considers that the current deferred disallowance mechanism achieves largely the same effect as the Committee's recommendation, but is safer and less vulnerable to error or oversight.

Recommendation 33

The Committee recommends that consideration should be given to expanding the terms of reference of the Senate Standing Committee on Regulations and Ordinances to include failure by a rule-maker to consult in accordance with the provisions of Part 3 of the Legislative Instruments Bill (page 89).

Response: While this recommendation is a matter for the Senate, the Government supports it in principle.

MISCELLANEOUS ISSUES

Recommendation 34

The Committee recommends that legislative instruments of the Australian National University and of the University of Canberra relating to the content of academic courses should not be subject to disallowance under the Legislative Instruments Bill (page 93).

Response: Consultation between officers of the Attorney-General's Department and the Australian National University (ANU) have agreed upon an exemption from Parliamentary disallowance of instruments made under the ANU Courses and Degrees Statute to ensure protection of academic freedom. Equivalent provisions will be made in respect of rules and orders made under statutes of the University of Canberra.

Recommendation 35

The Committee recommends that Australian Capital Territory Ordinances made by the Governor-General under section 12 of the *Seat of Government (Administration) Act 1910*, and instruments made under those Ordinances, should be legislative instruments for the purposes of the Legislative Instruments Bill (page 95).

Response: The Government accepts this recommendation.

Recommendation 36

The Committee recommends that subclause 43(2) of the Legislative Instruments Bill should be omitted (page 95).

Response: The Government understands the Committee's concern, but does not support this recommendation as the provision is a revenue protection measure.

The Government notes that this provision only applies to instruments to be backcaptured. In order to address the Committee's concern, the provision will be amended to require the Commissioner of Taxation or other relevant officials to take all reasonable steps to identify all instruments which are required to be registered. This will clarify the Government's intention that the provision is only to be used in exceptional circumstances, and that the Commissioner's obligations under the Bill are not greatly reduced.

Recommendation 37

The Committee recommends that the commencement provisions for legislative and non-legislative disallowable instruments that do not specify their own commencing days or times should be consistent, at least to the extent that they should result in the commencement of both kinds of instruments at the end of a particular day (page 97).

Response: The Government supports this recommendation in the interests of uniformity. This will necessitate a change to the *Acts Interpretation Act 1901* to bring it into line with clause 8 of the Bill. The effect of the provision is that there is no retrospective application of an instrument unless that is specifically brought about by that instrument.

Recommendation 38

The Committee recommends that proposed section 46B of the *Acts Interpretation Act 1901* should allow for the enabling legislation under which a non-legislative disallowable instrument is made to modify the application of section 46B to the instrument (page 98).

Response: The Government supports this recommendation.

