



**Government
of South Australia**

Department of the Premier and Cabinet Circular

**PCO 34
PROCEDURES IN RELATION TO THE REFERRAL OF SUBORDINATE
LEGISLATION TO THE LEGISLATIVE REVIEW COMMITTEE**

2012

Procedures in relation to the referral of subordinate
legislation to the Legislative Review Committee

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DEPARTMENT OF THE PREMIER AND CABINET

PREMIER AND CABINET CIRCULAR

OCTOBER 2012

PC034 - Procedures in relation to the referral of subordinate legislation to the Legislative Review Committee

Purpose

This circular deals with the referral of subordinate legislation to the Legislative Review Committee ("the LRC"), in particular the procedures to be adopted by agencies in preparing submissions to the Committee. It complements and reinforces the more detailed practical guidance on the drafting and making of regulations contained in Cabinet Guide No 7: *Guide to Executive Council*.

The Legislative Review Committee

The Legislative Review Committee is a Standing Committee established under the *Parliamentary Committees Act 1991*. The Committee is comprised of three members from the House of Assembly and three from the Legislative Council. One of the three Members of the Legislative Council is to be appointed as the Committee's Presiding Member. The Committee Secretariat comprises the Secretary and the Research Officer.

Pursuant to section 10A of the *Subordinate Legislation Act 1978* (the Act), all subordinate legislation to be tabled in Parliament is referred to the Legislative Review Committee for consideration. Subordinate legislation includes all regulations, rules, by-laws and some codes made under an Act.

Under the Act the Committee must inquire into and consider all regulations referred to it.

To enable the LRC to properly perform this important statutory function the Committee has developed a set of procedures and requirements for the content of the reports on subordinate legislation referred to it. This circular sets out those requirements in detail.

All agency Chief Executives are responsible for ensuring that the requirements set out in this circular are complied with by their staff in preparing matters for presentation to the Committee.

Disallowance

Under section 10 of the Act, subordinate legislation may be disallowed within 14 sitting days of being laid before either House of Parliament. Disallowance results in the instrument ceasing to have effect from the date the motion is passed in either House.

The Committee does not have the power to disallow subordinate legislation of its own motion. However, if the Committee forms the opinion that it ought to be disallowed, it can report its opinion to both Houses of Parliament, which may lead to either House resolving to disallow the instrument.

It should be noted that disallowance of regulations is total: there can be no partial disallowance in cases where the Committee reports that only one regulation is offensive.

Consideration and scrutiny of subordinate legislation

The Committee has advised that it scrutinises regulations in accordance with the following principles:

- a. whether the regulations are in accord with the general objects of the enabling legislation
- b. whether the regulations unduly trespass on rights previously established by law or are inconsistent with the principles of natural justice, or make rights, liberties or obligations dependant on non-reviewable decisions
- c. whether the regulations contain matter which, in the opinion of the Committee, should properly be dealt with in an Act of Parliament
- d. whether the regulations are in accord with the intent of the legislation under which they are made and do not have unforeseen consequences
- e. whether the regulations are unambiguous and drafted in a sufficiently clear and precise way
- f. whether the objective of the regulations could have been achieved by alternative and more effective means
- g. whether the regulator has assessed if the regulations are likely to result in costs, which outweigh the likely benefits, sought to be achieved.

In addition, Local Government by-laws must be consistent with the principles outlined in sections 247 and 248 of the *Local Government Act 1999*.

Subordinate Legislation Reports

In accordance with section 10A(3) of the Act, the Committee must consider subordinate legislation within 14 sitting days of the instrument being tabled in both Houses, such tabling occurring within six sitting days of the subordinate legislation being made. After its consideration, the Committee provides a Report which is tabled in each House, advising of what action, if any, it has taken in relation to each item of subordinate legislation. If the Committee is satisfied with the content and explanation provided, it will move no action in relation to the item.

If the Committee needs to consider a regulation further, it may resolve that one of its members give notice of a motion to disallow the regulation. This is known as placing a "Holding Motion" on it. A Holding Motion appears on the Notice Paper as notice of a disallowance motion.

The Holding Motion effectively stops the clock in relation to the 14 sitting day time limit, preserving the Committee's right to move for disallowance in either

House. It allows the Committee further time to consider the instrument and to seek further information and advice. The notice of motion may be withdrawn after the Committee has finished its review of the instrument.

The Legislative Review Committee Subordinate Legislation Reports are usually tabled every sitting Wednesday in both Houses.

Content of Reports to the LRC

Each item must be accompanied by a supporting report when forwarded to the Committee. The report should outline in detail the specifics of the statutory instrument, including details about its history, any consultation undertaken, and detailed reasoning regarding early commencement, if relevant.

These reports are a very important part of the parliamentary process and the Legislative Review Committee places great reliance on their accuracy and comprehensiveness in deciding whether or not to take action.

If the reports fail to contain the necessary information, the Committee Secretariat must follow up agencies for the required information. This causes considerable inconvenience and is an inefficient use of Committee resources, causing delays in the Committee consideration of important statutory instruments. It also reflects poorly on agencies. If a report does not comply with the requirements set out below, the Committee will recommend disallowance of the relevant regulations on that basis.

Background

The report should provide a concise summary of any administrative, legal or other arrangements established under the proposed regulations. It should indicate the reason behind any proposed changes, including relevant policy considerations which resulted in the development of the proposal.

If available, appropriate information on the financial impact of the proposal should be provided (keeping in mind that this report is to a Standing Committee of the Parliament and not a report to Cabinet).

Particular attention should be paid to the report where the purpose of the proposed regulations is to vary a government fee or charge. In the case of any such regulations, the amount of the increase should be specified, as well as the basis of the variation, for example, to reflect changes in the Consumer Price Index, or to establish cost recovery.

Fee increases

Where there are changes to fees, including annual increases in line with the Consumer Price Index, a comprehensive list of all individual fee increases should be provided. The report should clearly state that the agency has calculated each individual fee increase and itemise which of these fees are within CPI and which are greater than the CPI increase.

If fees have been increased by an amount greater than CPI, these should be individually identified and reasons provided for the extraordinary increase. For example, a fee increase greater than CPI may have been approved as a cost recovery measure, or as part of an approved Budget policy.

Consultation

The Report should provide specific details of the process of consultation leading to the preparation of the regulations. This should include whether relevant government and non-government agencies and representative organisations have been consulted, their response to the regulations (if any), and what action was taken as a result of consultation.

It is not sufficient for reports to merely advise that consultation has occurred without advising the Committee of details about who was consulted, when they were consulted and their views. In the past, some reports have only referred to the fact that consultation had occurred in relation to the principal legislation, with no reference at all to any consultation process that might or might not have happened in relation to the regulations before the Committee.

Commencement

The report should indicate whether a Ministerial certificate for early commencement of the regulations has been issued pursuant to section 10AA(2) of the Act.

If such a certificate is issued, reasons must be provided for the issue of the certificate. It is not satisfactory that certificates be issued simply as a matter of convenience.

The four month period before which regulations come into operation, as specified in Section 10AA(1) of the Act, gives the Committee time to effectively scrutinise regulations. In contrast, when a section 10AA(2) certificate is issued, regulations have usually commenced before they come to the Committee's attention. Consequently, its recommendations may be more difficult to implement and any disallowance of the regulations is more problematical given the resulting disruption of their operation.

Contact details

The name and telephone number of an authorised officer who can be contacted about the regulations should be provided. This allows the Committee Secretariat to quickly resolve any queries the Committee may have, and to seek further information and advice on the regulations as needed.

Process of supplying reports to the LRC

Once regulations have been published in the Government Gazette, Government Publishing provides 17 copies to Cabinet Office. Cabinet Office then sends 14 copies of the instrument and the supporting report to the Committee, including the original Certificate of Validity. The remaining three copies are for tabling in Parliament.

More detail about the preparation and processing of regulations is contained in Cabinet Guide No 7: *Guide to Executive Council*.

Further information

Queries regarding the Committee should be directed to:

The Secretary
Legislative Review Committee
Parliament House
ADELAIDE SA 5000
Telephone: 8237 9583
Email: seclrc@parliament.sa.gov.au

Queries about the processing of subordinate legislation through Cabinet and Executive Council and its tabling in Parliament should be directed to:

Cabinet Coordination
Cabinet Office
Department of the Premier and Cabinet
State Administration Centre
200 Victoria Square Adelaide
South Australia 5000
Telephone: 8226 2908