

Australia-New Zealand Scrutiny of Legislation Conference
Perth, Western Australia
11—14 July 2016

Jurisdiction report for the Parliament of Western Australia (August 2011 to June 2016)

1. SCRUTINY OF LEGISLATION COMMITTEES

1.1. The Parliament of Western Australia has three scrutiny of legislation committees.

Joint Standing Committee on Delegated Legislation

1.2. This is a committee of both Houses which scrutinises 'instruments' of delegated legislation.

1.3. The current Committee has resolved to consider only those instruments which are subject to disallowance.

1.4. **Membership:** the Committee consists of eight Members—four from each House, with the Chair being a Government Member. The current Membership consists of four Members of the Liberal Party, three Members of the ALP and one Greens Member.

1.5. **Staffing:** the Committee is served by three Advisory Officers (one being a casual employee) and one Committee Clerk. All Committee staff are employed by the President of the Legislative Council.

1.6. **Terms of Reference:** although the Committee is comprised of Members from both Houses, it operates under Legislative Council Standing Orders. The Terms of Reference are reproduced in Appendix 1. The Committee's current Terms of Reference took effect on 23 May 2013.

1.7. Most of the Committee's work involves the scrutiny of disallowable instruments of delegated legislation and an evaluation of whether the instruments contravene any of the listed legislative principles (Term of Reference 10.6). The most commonly infringed principle is '(a) [whether the instrument] *is within power*'.

1.8. The Committee also has a self-referral power for inquiring into issues of a systemic nature in delegated legislation (Term of Reference 10.7).

1.9. **Standard inquiry timeframes and processes:** the usual process for scrutinising instruments of delegated legislation is summarised as follows:

- After the instrument is gazetted, copies of it and supporting explanatory material must be sent to the Committee within 10 business days.¹
- The Committee staff process and scrutinise the instrument, and present an analytical synopsis of the instrument and recommended action to the

¹ Premier's Circular No 2014/01: *Subsidiary legislation—explanatory memoranda* and Ministerial Circular No 04-2010: *Local laws explanatory memoranda directions 2010*.

Committee within 14 sitting days after the instrument is tabled in the Legislative Council. This is the time which is available for a MLC to give notice of motion to disallow the instrument.²

If there is a potential issue with the instrument, the Committee may choose, through an individual MLC, to give notice of motion to disallow the instrument in the Legislative Council. In the meantime, the Committee may seek information from the relevant delegated law-maker and/or department.

If the information allays the Committee's concerns, the Committee may then move to discharge the motion to disallow the instrument. If there are no potential issues, no further action is taken.

- After a notice of motion to disallow an instrument is introduced, it generally moves (pro forma) on to the Notice Paper three days afterwards³ and the motion must then be debated within the next 17 sitting days.⁴ Overall, therefore, the Committee must conclude its scrutiny of the instrument within 20 sitting days after giving notice of motion to disallow. The Committee's scrutiny of an instrument may conclude with the Committee seeking to discharge its motion to disallow or by reporting to both Houses of Parliament⁵ about its views on the instrument (usually, whether or not disallowance is recommended).
 - Depending on the scheduling of the Legislative Council's sitting days, the Committee usually has a minimum of three to four calendar months (34 sitting days), after the tabling of an instrument, to consider and, if necessary, report on the instrument.
- 1.10. **Reporting frequency:** there is no set reporting frequency. The Committee is obliged to report to both Houses whenever a Committee-initiated motion to disallow an instrument is due to be debated in the Legislative Council.⁶
- 1.11. The Committee has endeavoured to table an Annual Report for each calendar year.
- 1.12. The Committee has tabled 41 reports since July 2011.
- 1.13. **Scrutiny/inquiries undertaken:** refer to the comments under 'Terms of Reference' above and 'significant activity' below.
- 1.14. **Significant activity since the July 2011 conference:** some of the more significant reports were as follows:

² *Interpretation Act 1984*, s 42(2).

³ *Standing Orders of the Legislative Council*, Standing Order 67(3).

⁴ *ibid*, Standing Order 67(5).

⁵ *ibid*, Schedule 1, clause 10.4(b) (Term of Reference 10.4(b)).

⁶ *ibid*.

- Disallowance reports: Report 50—Hospital parking fees (not within power), Report 66—*Supreme Court Amendment Rules 2013* (not within power and containing a matter that is inappropriate for subsidiary legislation) and several reports recommending the disallowance of local laws which were not within power because of a failure by the local government to comply with mandatory, sequential local law-making procedures (for example, Report 76—*City of Greater Geraldton Animals, Environment and Nuisance Local Law 2014* and Report 79—*City of Fremantle Alfresco Dining Local Law 2014*).
- Explanatory reports: Report 67—Information report in relation to *City of Fremantle Plastic Bag Reduction Local Law 2012* and Report 81—Explanatory report in relation to the *School Education Amendment Regulations 2014* (unauthorised subdelegation of a fee-setting power; enabling the imposition of fees which over-recover costs).
- Systemic issues reports: Report 75—Identifying a systemic issue arising out of nine court and tribunal instrument (fees), Report 77—Inquiry into a proposed template waste local law and Report 84—Access to Australian Standards adopted in delegated legislation.

1.15. Some of the significant issues which have been considered by the Committee, but which did not result in the tabling of a dedicated report, include:

- a local law restricting smoking on beaches⁷
- a cat local law, the provisions of which, in the Committee's view, were not within power, and dealt with matters which were inappropriate for delegated legislation⁸
- regulations which, in the event of any inconsistency, sought to prevail over legislative instruments which had the status of Acts.⁹

1.16. **Constraints:**

- Standing Orders and legislative time limits (refer to 'standard inquiry timeframes' above).

Standing Committee on Legislation

1.17. This Legislative Council committee considers selected bills as and when they are referred by the House. The Committee is often referred complex and contentious bills. Committee inquiries into the bills referred usually involve public submissions, hearings and a substantial report on that bill.

⁷ See Report 83—Annual Report 2015, pp 14–15.

⁸ *ibid*, pp 15–16.

⁹ *ibid*, pp 7–8.

- 1.18. **Membership:** the Committee consists of five Members. The current Membership consists of two Liberal Party Members, one National Party Member, one ALP Member and a Member of the Greens.
- 1.19. **Staffing:** the Committee is served by an Advisory Officer and a Committee Clerk. Further staff are allocated if the Committee has been referred more than one inquiry at any time.
- 1.20. **Terms of Reference:** the Committee's Terms of Reference are reproduced in Appendix 2. They require the Committee '*to consider and report on any Bill referred by the Council*' and do not set out any legislative scrutiny principles. During the last three Parliaments, this Committee has often used the Queensland Fundamental Legislative Scrutiny Principles as a framework for scrutinising bills.
- 1.21. The Committee's Terms of Reference do not allow it to consider the policy of a referred bill. However, the Legislative Council may refer this to the Committee. The Terms of Reference require it to 'consider and report on' the bill and does not set out scrutiny principles to be applied in considering the bill. The Committee often adopts the Queensland Fundamental Legislative Principles as a scrutiny tool.
- 1.22. **Standard inquiry timeframes and processes:** the Legislative Council determines when the Committee must report on its inquiry. The inquiry period is usually a few months.
- 1.23. A typical bill inquiry would follow the usual inquiry process, which includes:
 - The Committee may advertise the inquiry, seek submissions from stakeholders and call for public submissions.
 - The Committee may hold hearings with stakeholders and members of the public.
 - The Committee researches and prepares, and deliberates on, a draft report.
 - The Committee tables a report with findings and recommendations.
- 1.24. **Reporting frequency:** this is dependent on the frequency of the referral of bills to the Committee.
- 1.25. The Committee has tabled 15 reports since July 2011, nine of which were substantive in nature.
- 1.26. **Significant reports since the July 2011 conference:**
 - Report 22—Workforce Reform Bill 2013 (skeletal legislation)
 - Report 26—Taxation Legislation Amendment Bill 2014 (relating to the taxation of fourth limb charities)

- Report 28—Demise of the Crown
- Report 30—Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015
- Report 31—Mining Legislation Amendment Bill 2015 (reliance on third party material that is not subject to Parliamentary scrutiny).

1.27. **Constraints:**

- House-imposed time limits.
- The Committee only considers bills and inquiries referred to it.
- Unless otherwise ordered by the Legislative Council, any amendment recommended by the Committee must be consistent with the policy of the bill (Term of Reference 4.4).

Standing Committee on Uniform Legislation and Statutes Review

1.28. This Legislative Council committee scrutinises ‘uniform legislation bills’ if and when they are referred by the House. A ‘uniform legislation bill’ is one which:

- (a) *ratifies or gives effect to a bilateral or multilateral intergovernmental agreement to which the Government of the State is a party; or*
- (b) *by reason of its subject matter, introduces a uniform scheme or uniform laws throughout the Commonwealth.*¹⁰

1.29. **Membership:** the Committee is comprised of four Members. Currently, there are two ALP and two Liberal Party Members on this Committee.

1.30. **Staffing:** the Committee is staffed by one Advisory Officer and one Committee Clerk but further staff are allocated if the Committee is conducting more than one inquiry at the same time.

1.31. **Terms of Reference:** the Committee’s Terms of Reference are reproduced in Appendix 3.

1.32. The Committee’s current Terms of Reference took effect on 1 December 2011. The main change was the restriction on the scope of the Committee’s scrutiny of uniform legislation bills, the proposals which will result in such bills, and treaties—the Committee is now limited to investigating whether a bill, a proposal or a treaty

¹⁰ *Standing Orders of the Legislative Council*, Standing Order 126(2).

impacts upon the sovereignty and law-making powers of the Parliament of Western Australia.¹¹

- 1.33. Another change was the removal of the Committee's power to consider and review, of its own motion, a proposal which will result in a uniform legislation bill(s).
- 1.34. **Standard inquiry timeframes and processes:** at least since the last conference in July 2011, the Committee has been required to report on uniform legislation bills within 45 calendar days after the referral of the bill, unless another deadline is ordered by the House.¹² Where the 45th day after referral falls on a non-sitting day, the Committee may table its report on the next sitting day.
- 1.35. A typical uniform legislation bill inquiry would proceed as follows:
- The Committee receives the explanatory material from the responsible Minister/agency.
 - The Committee is briefed by the responsible Minister/agency.
 - The Committee may advertise the inquiry and call for public submissions.
 - The Committee may hold hearings with stakeholders and members of the public.
 - The Committee researches and prepares, and deliberates on, a draft report.
 - The Committee tables a report with findings and recommendations.
- 1.36. **Reporting frequency:** this is largely dependent on the frequency of the introduction, into the Legislative Council, and referral of uniform legislation bills to the Committee.
- 1.37. The Committee has tabled 37 reports since July 2011, 32 of which were substantive in nature.
- 1.38. **Scrutiny/inquiries undertaken:**
- Uniform legislation bill inquiries (the majority of the Committee's work).
 - A treaties inquiry (rare): Report 68 (see below).
 - A statute book inquiry (rare): Interim Report 79 (see below) and Reports 87 and 99.
 - Other matters (rare): Reports 64 and 93 (see below).
- 1.39. **Significant reports since the July 2011 conference:**

¹¹ *ibid*, Schedule 1, clauses 6.4 and 6.3(c) (Terms of Reference 6.4 and 6.3(c)).

¹² *ibid*, Standing Order 126(7).

- Report 64—Information report on uniform scheme structures.
- Report 68—Information report in relation to the scrutiny of treaties.
- Report 69—Criminal Investigation (Covert Powers) Bill 2011.
- Report 70—Business Names (Commonwealth Powers) Bill 2011, Report 71—Education and Care Services National Law (WA) Bill 2011 and Report 81—Statutes (Repeals and Minor Amendments) Bill 2013 (inadequate explanatory memoranda).
- Interim Report 79—Inquiry into the form and content of the statute book (identifying obsolete legislation and statutes with royal assent but which have not yet been proclaimed).
- Report 88—Succession to the Crown Bill 2014 (the Committee recommended legislative amendments to ensure Constitutional certainty for the Parliament of Western Australia on the demise of the Crown).
- Report 93—Review of the *Planning and Development (Development Assessment Panels) Regulations 2011* (Executive interference with a Parliamentary inquiry; the regulations which were the subject of the review were amended by the Executive during the Committee's inquiry).

1.40. **Constraints:**

- Standing Order time limits for uniform legislation bill inquiries.
- The Committee is confined to considering the impact of the uniform legislation bill, the proposal for such a bill, or the treaty, upon the sovereignty and law-making powers of the Parliament of Western Australia (Terms of Reference 6.4 and 6.3(c)).

2. CONCERNS AND TRENDS NOTED SINCE JULY 2011

2.1. The concerns noted and the negative trends observed in primary legislation include:

- skeletal legislation
- the adoption of third party material, such as guidelines and other Executive instruments not subject to Parliamentary scrutiny
- Henry VIII clauses
- the time taken by the Executive to repeal obsolete legislation
- inadequate and/or inaccurate explanatory memoranda
- lack of review clauses

- the continuing prevalence of national scheme legislation, which impinges upon Western Australia's Parliamentary sovereignty.

2.2. The concerns noted and the negative trends observed in delegated legislation include:

- local governments making local laws which may contain matter that is inappropriate for delegated legislation
- local governments failing to adhere to, and comply with, mandatory, sequential local law-making procedures
- unauthorised subdelegation of already delegated legislative powers
- (related to subdelegation) skeletal delegated legislation and reliance on third party material, such as Australian Standards, guidelines and Executive instruments not subject to Parliamentary scrutiny
- regulations with an unauthorised Henry VIII effect.

2.3. The positive trends observed in the scrutiny of delegated legislation include:

- departmental compliance with the Premiers' Circular No 2014/01, '*Subsidiary legislation—explanatory memoranda*' and, in particular, the 'fee table' which sets out details of fee changes, including columns which provide the cost recovery percentage of each fee and whether the fee is cross-subsidised
- the apparent increased use, by local governments, of template local laws published by the Western Australia Local Government Association (WALGA) and improved departmental oversight of local laws during the drafting process.

2.4. The trends observed in the drafting practices of the Parliamentary Counsel's Office include:

- the use of acronyms, minimal punctuation, more reliance on spacing and more plain English in both primary and delegated legislation
- 'omnibus' delegated legislation, i.e. instruments of amending delegated legislation which amend more than one instrument of delegated legislation. These amending instruments have amended instruments authorised by several different Acts but have been confined to one Ministerial portfolio and related subject matter
- regulations in which the first two clauses commence operation on the day of gazettal and the remaining clauses commence operation on a different, later date.

Appendix 1: Terms of Reference for the Delegated Legislation Committee

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

‘10. Joint Standing Committee on Delegated Legislation

- 10.1 A *Joint Standing Committee on Delegated Legislation* is established.
- 10.2 The Committee consists of 8 Members, 4 of whom are appointed from each House. The Chair must be a Member of the Committee who supports the Government.
- 10.3 A quorum is 4 Members of whom at least one is a Member of the Council and one a Member of the Assembly.
- 10.4 (a) A report of the Committee is to be presented to each House by a Member of each House appointed for the purpose by the Committee.
- (b) Where a notice of motion to disallow an instrument has been given in either House pursuant to recommendation of the Committee, the Committee shall present a report to both Houses in relation to that instrument prior to the House’s consideration of that notice of motion. If the Committee is unable to report a majority position in regards to the instrument, the Committee shall report the contrary arguments.
- 10.5 Upon its publication, whether under section 41(1)(a) of the *Interpretation Act 1984* or another written law, an instrument stands referred to the Committee for consideration.
- 10.6 In its consideration of an instrument, the Committee is to inquire whether the instrument —
- (a) is within power;
- (b) has no unintended effect on any person’s existing rights or interests;
- (c) provides an effective mechanism for the review of administrative decisions; and
- (d) contains only matter that is appropriate for subsidiary legislation.
- 10.7 It is also a function of the Committee to inquire into and report on —
- (a) any proposed or existing template, *pro forma* or model local law;
- (b) any systemic issue identified in 2 or more instruments of subsidiary legislation; and
- (c) the statutory and administrative procedures for the making of subsidiary legislation generally, but not so as to inquire into any specific proposed instrument of subsidiary legislation that has yet to be published.
- 10.8 In this order —

‘instrument’ means —

- (a) subsidiary legislation in the form in which, and with the content it has, when it is published;
- (b) an instrument, not being subsidiary legislation, that is made subject to disallowance by either House under a written law;

‘subsidiary legislation’ has the meaning given to it by section 5 of the *Interpretation Act 1984*.’

Appendix 2: Terms of Reference for the Legislation Committee

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

‘4. Legislation Committee

- 4.1 *A Legislation Committee* is established.
- 4.2 The Committee consists of 5 Members.
- 4.3 The functions of the Committee are to consider and report on any Bill referred by the Council.
- 4.4 Unless otherwise ordered, any amendment recommended by the Committee must be consistent with the policy of a Bill.’

Appendix 3: Terms of Reference for the Uniform Legislation and Statutes Review Committee

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

‘6. Uniform Legislation and Statutes Review Committee

6.1 *A Uniform Legislation and Statutes Review Committee is established.*

6.2 The Committee consists of 4 Members.

6.3 The functions of the Committee are —

- (a) to consider and report on Bills referred under Standing Order 126;
- (b) on reference from the Council, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to Standing Order 126;
- (c) to examine the provisions of any treaty that the Commonwealth has entered into or presented to the Commonwealth Parliament, and determine whether the treaty may impact upon the sovereignty and law-making powers of the Parliament of Western Australia;
- (d) to review the form and content of the statute book; and
- (e) to consider and report on any matter referred by the Council.

6.4 In relation to function 6.3(a) and (b), the Committee is to confine any inquiry and report to an investigation as to whether a Bill or proposal may impact upon the sovereignty and law-making powers of the Parliament of Western Australia.’