DELEGATED LEGISLATION COMMITTEE

Appointment - Motion

Committee

The President (Hon J.A. Cowdell) in the Chair.

Hon KIM CHANCE: I seek leave to move the motion with amended text in clause 6.6.

Leave granted.

Hon KIM CHANCE: I move -

Schedule 1 of Standing Orders is amended by adding the following clause -

6. Delegated Legislation Committee

6.1 A Delegated Legislation Committee is established.

6.2 The Committee consists of 8 members, 4 of whom are appointed from each House. The Chairman must be a member of the Committee who supports the Government.

6.3 A quorum is 4 members of whom at least 1 is a member of the Council and 1 a member of the Assembly.

6.4 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.

6.5 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.

6.6 In its consideration of an instrument, the Committee is to inquire whether the instrument -

(a) is authorised or contemplated by the empowering enactment;

(b) has an adverse effect on existing rights, interests, or legitimate expectations beyond giving effect to a purpose authorized or contemplated by the empowering enactment;

(c) ousts or modifies the rules of fairness; or

(d) deprives a person aggrieved by a decision of the ability to obtain review of the merits of that decision or seek judicial review; or

(e) imposes terms and conditions regulating any review that would be likely to cause the review to be illusory or impracticable;

(f) contains provisions that, for any reason, would be more appropriately contained in an Act.

6.7 In this clause -

"adverse effect" includes abrogation, deprivation, extinguishment, diminution, and a compulsory acquisition, transfer, or assignment;

"instrument" means -

(a) in subclause 6.5:

(i) subsidiary legislation in the form in which, and with the content it has, when it is published;

(ii) a document, not being subsidiary legislation, made for a public purpose under a written law or other lawful authority by the Crown, its servants, agents, or instrumentalities;

(b) in subclause 6.6, an instrument within the meaning of paragraph (a)(i) or (ii) 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.

I thank honourable members for their facilitation of the changes. The Delegated Legislation Committee was first recommended as a serious proposition by the Ferry committee - otherwise known as the committee on

committees - in 1985. The committee was established in 1987 as a joint committee with equal membership from both Houses. Lower Houses generally dominate membership of joint House committees in other Australian Parliaments. It was adopted as a committee with equal representation by ordinary resolution, which was passed by both Houses. The rules under which Assembly members are appointed and serve are now incorporated into the Legislative Assembly's standing orders. Until now, the Legislative Council has continued to revive the committee and appoint its members by resolution. The committee conducts its proceedings under specific rules; that is, its terms of reference. From its inception, its general rules are the Council's standing orders governing select committee proceedings. The committee has been, and still is, administered and serviced by the department of the Legislative Council. The Clerk of the Legislative Council was the first advisory officer.

As the committee grew in experience, its ability and confidence increased. It has expressed frustration with the narrowness of its current terms of reference, which largely confine it to examining subsidiary legislation that is subject to disallowance by either House. These disallowable instruments are only one species of subsidiary legislation that is made by Executive Government. In recent years it has taken advantage of the definition of "regulation" in section 42 of the Interpretation Act to scrutinise local laws made by local governments. A disproportionate number of local laws have been recommended for disallowance. The committee has real concerns that involve systemic issues about local government and the quality and content of local laws that are made under the Local Government Act. The committee has also sought to have the power to scrutinise all subsidiary legislation, as defined in the Interpretation Act, regardless of whether a particular instrument is subject to disallowance.

The committee has been an active participant in national and international, regular and occasional, gatherings of parliamentary committees with similar functions. In Western Australia its persistence has resulted in ministerial directives that require all disallowable instruments to be accompanied by an explanatory memorandum. The committee uses the disallowance procedure in the Council to jog departments and local governments that either forget to supply the explanatory memorandum or supply one that is deficient in its explanations. The proposal before the Committee of the Whole is a combination of the way the committee has evolved and it is appropriate, with the establishment of the Council's revised committee system, that the committee should be given permanent and equal status with the other committees. The opportunity presented has been taken to apply the Council's standing orders to the committee and to redraft the core terms of reference so as to meet the requests made by the committee itself.

Clause 6.1 of schedule 1 of the standing orders establishes the committee. Clause 6.2 defines the membership: four members from each House with a government chairman, who can come from either House. Clause 6.3 defines the quorum in that each House must be represented in any quorum. Clause 6.4 explains the reporting requirements; that is, that reports go to each House. Section 41(1)(a) of the Interpretation Act, requires that all subsidiary legislation be published in the *Gazette.* Clause 6.5 refers all subsidiary legislation for the committee's consideration. By doing so, the clause incorporates and increases the scope of the previous term of reference No 7, which permitted the committee to report to the Parliament on "any other matter relating to any regulation". The committee may now report to Parliament on a broader range of instruments due to the definition of the instrument in clause 6.7(a). It should be understood that the clause does not require the committee to look at every instrument referred to it under the subclause. How much time and attention it gives is a matter for the judgment of the committee. However, I am assured that some 99 per cent of the committee's time will be taken up with regulations and local laws because of their importance and because they are instruments that are subject to disallowance. I must stress that the subclause is no more than an automatic referral mechanism. It is for the committee to decide the level and type of consideration that it will give to those instruments; that is, those instruments that are not subject to disallowance. I point out that this extension of the committee's jurisdiction has been sought by the committee itself.

Clause 6.6, which is the committee's bread and butter, is restricted by clause 6.6(b) of the definition of "instrument" to those made subject to disallowance by either House under a written law, in contrast to the wider definition given to "instrument" for clause 6.5 referral purposes. Clause 6.6(a), (b) and (c), which are now moved in the amended form, restate the terms of reference more accurately. Clause 6.6(a) replaces the ultra vires reference.

The danger in the committee pronouncing whether a regulation is made within the delegated power is a collateral attack; that is, the same issue is litigated with the attendant danger that the Supreme Court will take an opposite view to the committee's because the court must make a decision between contending parties, whether it wants to disagree with the committee or not. The new provision allows the committee to express an opinion about whether the regulation is one that Parliament would accept as a proper exercise of the power, but it does not have to go to the next step and declare whether the regulation is intra vires or ultra vires. That is a question of law, and we have courts to deal with those matters.

Clause 6.6(b) replaces the old words "does not unduly trespass on personal rights or liberties". Those words create enormous issues of interpretation; for example, how is the word "unduly" to be qualified in that context? Is it by the circumstances presented, or does some overarching concept attach to the word in the context in which it is used? What are the "personal rights or personal liberties?" Is that a concept that should evolve from a non-existent Bill of Rights? Does it have the meaning that the committee says it is to have? What external sources should be used to inform the committee about where to draw that line?

The new subclause accepts that there will be interference; that is, "adverse effect", as designed in clause 6.7, with ascertainable legal rights or interest and whether they are existing or to be found in legitimate expectation. The latter is a concept best described as a work in progress in the courts, as they flesh out on a case-by-case basis what is to be included or excluded from that concept.

Clause 6.7 redirects the committee to deal with real issues that arise from the application of a regulation in actual concrete circumstances. The committee must decide whether the adverse effect in a given case goes beyond that which is necessary to achieve the object or intent of the Act of Parliament under which the regulations are made. In other words, are the requirements of the regulations proportionate to the ends intended by the parent Act? Clause 6.6(c)(i) requires the committee to ensure that the regulations do not try to extinguish or modify the judicial definition of what procedural fairness requires; for example, an opportunity to be heard and to have decisions made by a person without bias -

Hon Peter Foss: Was that speech written before we made the amendment?

Hon KIM CHANCE: It has been modified since then.

Hon Peter Foss: That little bit was not quite right.

Hon KIM CHANCE: Clause 6.6(c) has been modified by the amendment.

Hon Peter Foss: The amendment should require you to change your speech slightly. I think what you said is consistent with what it said beforehand.

The PRESIDENT: The leader should continue; debate can ensue on this matter if there is a need for it.

Hon Peter Foss: I thought I should draw the minister's attention to it.

Hon KIM CHANCE: I think we are dealing with clause 6.6(c).

Hon Peter Foss: The numbering might have been changed without changing the words.

Hon KIM CHANCE: That is the new clause 6.6(c) - the rules of fairness.

Hon Peter Foss: The next one after that. They have to determine not whether it doesn't but whether it does.

The PRESIDENT: I did not know that the Leader of the House had got to clause 6.6(d) yet.

Hon KIM CHANCE: I am still on clause 6.6(c).

Hon Peter Foss: Whether it does or does not; it used to say that it does; now it says that it does not.

Hon KIM CHANCE: Clause 6.6(c) requires the committee to ensure that regulations do not try to extinguish or modify the judicial definition of what procedural fairness requires.

Hon Peter Foss: That is what it used to do; now they must find out whether it does.

Hon KIM CHANCE: Certainly I am on the right section.

Hon Peter Foss: Yes, but the difference is -

Hon KIM CHANCE: You are raising a matter of debate.

Hon Peter Foss: No, I am raising -

The PRESIDENT: Order! It is a matter of debate. Hon Peter Foss does not have the floor; the Leader of the House does.

Hon KIM CHANCE: I will explain it so that people are not confused. If I were speaking on this point - the unamended version of the proposed standing order - I would have referred to 6.6(c)(i).

Hon Peter Foss: I am saying that the number has been changed, not the words. The numbering was correctly changed, but not the words.

Hon KIM CHANCE: We will work our way through that. Clause 6.6 also alerts the committee to provisions that might either prevent or impede a decision from being reviewed on its merits or by the courts for want of jurisdiction, lack of procedural fairness or other reasons that might vitiate the proceedings.

Lastly, although there is every appearance that there is no interference with an ability to obtain merit or judicial review, the hurdles that are placed in the way of an aggrieved person getting a review make it hard for all but the most determined person. Although it is true that the regulations allow for review, in practice, the procedures that must be followed in getting there, including the expense, ensure that there is little light at the end of the tunnel.

Clause 6.6(d) - I will check these off now to make sure I have it right.

Hon Peter Foss: The numbers have been done perfectly.

Hon KIM CHANCE: Clause 6.6(d) retains the existing provision. As might be expected, it provides a fall-back position when all else has failed under the preceding terms of reference. Clause 6.7 is a definition provision referred to in this explanation where relevant.

The PRESIDENT: The Leader of the House has moved that proposed new clause 6 be added. For the information of members, although members can speak generally, I will perhaps put it into sections; that is, that proposed new clauses 6.1 to 6.6 be added to schedule 1; and proposed new clause 6.7 may then be amended if members want to amend it. I will put the question before the Chair that proposed new clauses 6.1 to 6.6 be added to schedule 1.

Hon GEORGE CASH: I appreciate the explanation given by the Leader of the House. It seems to be a fairly complete explanation of the proposition before the Chair. It is true that the purpose of the motion is to establish a Delegated Legislation Committee. That committee is to comprise four members of the Legislative Council and four members of the Legislative Assembly. It is to be a joint committee of both Houses and is to be administered by the Legislative Council in accordance with and subject to the standing committee rules of the Legislative Council. The functions have been set out in the motion and the Leader of the House has advised the House on the intention of those various functions.

We do not currently have a Delegated Legislation Committee because it has not been formed for this year. Members will be interested to know that the former Delegated Legislation Committee operated under a resolution of the House and came into effect in 1987, and it has operated under select committee rules. Prior to the establishment of the old Delegated Legislation Committee a statutory committee known as the Legislative Review and Advisory Committee had the function of examining subordinate legislation. The role of the Legislative Review and Advisory Committee was one of the issues examined by the Ferry committee. That committee reported to this House in 1985. It is important to refer to some of the issues raised by the Ferry committee in 1985 about a Delegated Legislation Committee. The committee said -

> We are firmly of the view that the Legislative Review and Advisory Committee's functions are properly those of the Legislative Council exercised per medium of a standing committee, particularly when it is considered that the House has the power of disallowance. Without wishing to interfere with the rights of members to move a motion for disallowance, we would prefer to see a situation develop wherein motions for disallowance flow from the standing committee's consideration of regulations and its recommendations.

In practice that is not the way the Delegated Legislation Committee that was later established worked. Paragraph 5.1.3 of the Ferry committee report stated -

> Your committee, in formulating its recommendations as to the scrutiny of delegated legislation, has been influenced by the experience of the Senate's Regulations and Ordinances Committee which has amassed an impressive and well-deserved reputation since its inception in 1932. That committee has undoubtedly caused successive federal governments to exercise caution in the construction and effects of subordinate legislation. Evidence given to your committee suggests that the work of this committee has now reached the stage where federal government departments and agencies pay close attention to the committee's pronouncements and try to meet its expectations at the drafting stage.

Paragraph 5.1.4 stated -

> We submit that the House should appoint a standing committee charged with the scrutiny of delegated legislation with functions akin to those of the Senate committee and the Legislative Review and Advisory Committee. We see no reason to try and improve on the Senate model, given its reputation, performance and suitability.

The old Delegated Legislation Committee operated under the rules of a resolution of this House, and the rules of the Joint Standing Committee on Delegated Legislation, in part, stated its functions as -

5. It is the function of the Committee to consider and report on any regulation that:

It was restricted to regulation. It continued -

(a) appears not to be within power or not to be in accord with the objects of the Act pursuant to which it purports to be made;

(b) unduly trespasses on established rights, freedoms or liberties;

(c) contains matter which ought properly to be dealt with by an Act of Parliament; or

(d) unduly makes rights dependent upon administrative, and not judicial, decisions.

The Leader of the House has outlined the functions of the new Delegated Legislation Committee and they are, in the main, contained in clause 6.6. To avoid any confusion about the changes that were made, by leave, at the beginning of the speech by the Leader of the House, the original motion as presented by the Leader of the House was considered by some members of the Opposition and, on the advice and at the insistence of the former Attorney General, Hon Peter Foss, was reworded in a form, in my view, which gave a better flow to the proposed functions. It was agreed by the Leader of the House that the motion should be moved in that amended form. The Opposition has no problems with that. In due course I want to speak about the proposed amendment to clause 6.7, but we are not dealing with that at this stage. It is important to note that new clause 6.5 reads -

> 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.

"Instrument" has been defined in clause 6.7, and for the time being, because the amendment has not yet been moved, although I anticipate the Leader of the House may move an amendment, "instrument" means -

(a) in subclause 6.5:

(i) subsidiary legislation in the form in which, and with the content it has, when it is published;

(ii) a document, not being subsidiary legislation, made for a public purpose under a written law or other lawful authority by the Crown, its servants, agents, or instrumentalities;

(b) in subclause 6.6, an instrument within the meaning of paragraph (a)(i) or (ii) that is made subject to disallowance by either House under a written law;

As I understand it, an amendment has been proposed that will delete clause 6.7(a)(ii), and some consequential amendments in clause 6.7(b), but we can discuss that in due course.

On "subsidiary legislation", the motion states -

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

So that we understand what "subsidiary legislation" means, the Interpretation Act 1984 states -

> "subsidiary legislation" to mean any proclamation, regulation, rule, local law, by-law, order, notice, rule of court, town planning scheme, resolution or other instrument made under any written law and having legislative effect.

Section 41(1) of the Interpretation Act is referred to in clause 6.5, and states -

> Where a written law confers power to make subsidiary legislation, all subsidiary legislation made under that power shall:
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> (a) be published in the *Gazette*.

It is clearly outlined in clause 6.5 that such legislation will stand referred to the committee for its consideration.

I do not see any need to further debate the proposition as it is before us at the moment. The Opposition supports the establishment of the Delegated Legislation Committee. It is a committee that in my view has worked particularly well since its establishment originally in 1987, and it has made some very impressive reports to this House over a number of years, notwithstanding the political party of the Government in power. On many occasions the Deputy Chairman of the Delegated Legislation Committee was a member of a political party, not a supporter of the Government, and he often rose to give notice of disallowance of matters that had been identified by the Delegated Legislation Committee. It has worked in a bipartisan way for a long period. I hope and expect that will continue. It is unquestionably one of the best committees that new members can join if they want to

learn about the legislative process. However, so that I do not cause a rush of members wanting to join that committee, I will say no more at this stage.

When we discuss the proposed amendment to clause 6.7, I will raise a number of issues about why the parameters to be considered by the committee are to be substantially narrowed. I support the motion to include clauses 6.1 to 6.6.

Hon PETER FOSS: I join with Hon George Cash in supporting this amendment. It is appropriate to regularise this committee. Generally speaking, the clause has been well set out. I suggested the change to clause 6.6 because it was inconsistent with what the Leader of the House said about the committee's role. It is not the committee's role to act like a court and find whether a piece of subsidiary legislation falls inside or outside a parameter. It is to inquire of the existence of various matters to determine what, if any, action the House should take. For instance, if the committee were to find that the subsidiary legislation was not authorised or contemplated by the empowering enactment, we could allow it to pass through to the keeper, that is, to the Supreme Court, to allow it to disallow it as being ultra vires. On the other hand, we might say that rather than put the members of the public to the expense of taking it to court, we will disallow it now because we think it is ultra vires. Similarly, it would be wrong if the committee had to satisfy itself that a regulation did not have any adverse effect on existing rights. Once we know about that we can make a decision about it. What would the committee do if it could not be satisfied about it? The most important thing is that we know the committee's view so that we can make a decision.

The situation is similar with regard to whether the instrument ousts or modifies the rules of fairness. Often, rules do oust procedural fairness. That is why they are passed. We may not agree with that, but it may be why a rule is passed and the courts have said that the rules could be changed. When people take advantage of situations, they are subject to rules. A classic example is the Western Australian Turf Club, which sets certain rules for how it will conduct its inquiries. The Turf Club's rules do not fit the usual idea of natural justice, the reasons for which are clear. If the Turf Club were to observe the rules that apply in a court of criminal law, it would not be able to warn people off a racetrack. Those rules are very important to the "clean" running of races. As has been established around the world, some tricky people are involved in racing. The stewards must be able to be satisfied as to what happened on a racetrack. Membership of the WATC determines the basis on which owners race, jockeys ride and trainers train, and if they do not like it, they do not have to join, even though the rules modify procedural fairness. It is appropriate that they do so.

It is important that Parliament be informed about whether regulations oust the rules of fairness. However, it is not necessary for the Delegated Legislation Committee to be satisfied if they do not do so. Similarly, we are interested to know about matters described in paragraphs (d) and (e). A committee may have its internal rules for when a matter is brought into the House under a disallowance motion. However, the House must make the decision. It is not bound by the law; it is bound by the views of the House of what is appropriate. A matter may be intra vires, but the committee may be of the view that it is not contemplated by the empowering enactment; it might be authorised by it due to the wide wording of the empowering legislation. It is possible for Parliament to enact legislation that has an enormous amount of coverage, which could make something intra vires. However, if the House decided that was not what the legislation intended, it would disallow the regulation. I am happy with that.

I am pleased to see that the committee is well established. Although we have not reached the definition, I am pleased to see that the committee will have referred to it much more than was referred to it previously. I have always expressed considerable concern that metropolitan region schemes are not scrutinised before coming to the House. They will now be regularly reviewed. The Delegated Legislation Committee will also pick up many other matters that are not disallowable, which is also a good thing. Although we may not be able to disallow them, we will know what is happening. We may then wish to pass legislation that brings a matter within the purview of the House. On the other hand, we may think it is fairly reasonable subsidiary legislation that should not be reviewed. These amendments will put the committee on a very sound basis. It is good to see.

Clauses 6.1 to 6.6 put and passed.

The PRESIDENT: The question now is that clause 6.7 be agreed to.

Hon KIM CHANCE: I move -

> In the definition of "instrument" -
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> > In paragraph (a) - To delete "(i)", and subparagraph (ii).
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> > In paragraph (b) - To delete "(i) or (ii)" immediately following "paragraph (a)".

Hon GEORGE CASH: The Opposition supports clause 6.7 in its original form. It does not agree with the amendment proposed by the Leader of the House. It is my understanding that one of the points of establishing the new Delegated Legislation Committee in its proposed form, was to extend the opportunities that would be available to it for consideration of disallowable legislation. In the past, and in the main, it has caught the Greens (WA) party - and not the Liberal or the Labor Party, although it caught the Labor Party a few times in the last period of government - when special procedures in some Acts need to be followed if disallowance is to be made available. As these particular instruments were laid on the Table of the House, but were not referred to the Delegated Legislation Joint Standing Committee, they were often considered or identified late in the day, and I recall the Greens trying to have them disallowed. As a particular procedure was not put into practice, the opportunity to disallow was not available. I will provide an example.

In the Land Administration Act 1997, the heading of section 43 is "Special procedure in relation to certain changes to class A reserves and conservation reserves". Subclause (1) states -

> (1) If, after a proposal is laid before each House of Parliament under section 42 (4), 44 (1) or 45 (4) notice of a resolution disallowing the proposal -

It then sets out the procedure that must be followed to disallow something -

> (a) is not given in either House of Parliament within 14 sitting days of that House after the proposal was laid before it, the proposed reduction, excision, cancellation, change, grant or permission may be implemented by order after the last day of the later of those periods of 14 sitting days;

I mention that point because, as I recall, excisions from A-class reserves were probably causing the problem at that stage of the game. It continues -

> (b) is given in either or both of the Houses of Parliament within 14 sitting days of that House, or each of those Houses, after the proposal was laid before it, but that resolution is not lost in that House or each of those Houses within 30 sitting days after the proposal was laid before it, the proposed reduction, excision, cancellation, change, grant or permission lapses; or
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> (c) is given in either or both of the Houses of Parliament within 14 sitting days of that House, or each of those Houses, after the proposal was laid before it, but that resolution is lost in that House or each of those Houses within 30 sitting days after the proposal was laid before it, the proposed reduction, excision, cancellation, change, grant or permission may be implemented by order after that loss or after the later of those losses, as the case requires.
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> (2) It does not matter whether or not a number of sitting days referred to in subsection (1) or some of them occur during -
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> (a) the same session of Parliament; or
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> (b) the same Parliament,
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> as that in which the relevant proposal is laid before the House of Parliament concerned.

A number of other Acts of Parliament set out the special procedure required if disallowance of a particular order or instrument is to be carried out. One of the arguments advanced in the last session of Parliament, was that there was a need for these matters to be sent to the Delegated Legislation Joint Standing Committee so that the officers could keep an eye out for when these things hit the Table of the House. That was on the basis that not every member of Parliament reads every instrument placed on the Table in this place. Often it was not until the last moment, that is, until the specified number of sitting days had nearly expired, that some members of the House were advised of the intended effect of these various proposals.

From an opposition point of view, we believe that it is quite proper that these special instruments or other orders tabled in respect of these special procedures be referred to the Delegated Legislation Committee for scrutiny, along with all the other subsidiary legislation, which was referred to before. To now delete what only a few moments ago the Government obviously thought was a good thing raises the question of what it is all about. What is the Government trying to hide by now narrowing the opportunity to consider these particular disallowance orders or instruments under the special procedures that are set out in a number of Acts of Parliament?

Hon B.K. DONALDSON: I am a little concerned with the deletion of clause 6.7(a)(ii). About six years ago the Ministry of Justice had prison rules under the Young Offenders Act. If I remember correctly, there was a long,

protracted argument between the Delegated Legislation Committee and the ministry over some of the rules that were transferred. The ministry did not believe the committee had any right of inquiry. However, it was pointed out clearly that some of the rules that had legislative effect needed to be scrutinised. At the end of the day, the Ministry of Justice removed some of those prison rules because they did have legislative effect. Can the Leader of the House explain to me whether the deletion of this paragraph will capture those particular prison rules or the rules that have legislative effect? It was a long, protracted argument six years ago, and I am finding it difficult to refresh my memory completely. I know we had a win, because those prison rules were removed when they were transferred from the Prisons Act as part of the prison rules under the Young Offenders Act.

Hon KIM CHANCE: I thank Hon George Cash and Hon Bruce Donaldson for the points they have raised. I am far from an expert on delegated legislation, so members must bear with me on this issue. I am particularly grateful to Hon George Cash for raising the issues that he did, because he used exactly the same example of section 43 of the Land Administration Act that I was going to use to demonstrate my point, even though I have come to a different conclusion. There is no contradiction in the matters of fact. The scope of instruments that are referred to the committee under the terms of clause 6.5 - that is, the capturing of instruments at large - are defined by clause 6.7. A different group of subsidiary instruments, or instruments generally, are captured under clause 6.6. Hon George Cash is correct, the amendment restricts the scope of capture to those instruments that are disallowable in their own right, but are not subsidiary legislation. That is an important point, because in the example of section 43 of the Land Administration Act, given by Hon George Cash, the Act makes its own specific provision for disallowance at some length under its own special procedures in relation to the effect of that particular section of the Act. My concern is that where there are instruments for which specific provision for their disallowance is made within the Act we are making two sets of rules. I would assume that is one of the reasons the proposal to take them out of the scope of clause 6.5 was introduced in the first place.

Hon George Cash: If you take them out, they are not captured by any other provision within your original 6.1 to 6.6.

Hon KIM CHANCE: That is correct; they are captured under the effect of the Act itself.

Hon George Cash: That is right, but they are not automatically referred to the Delegated Legislation Committee. The problem we have had in the past is that members have found out too late to do anything about it, and that should not be the case.

Hon KIM CHANCE: I accept that point. However, the amendment does not restrict all subsidiary legislation from going to the committee. That begins to answer the question asked by Hon Bruce Donaldson. We must be careful not to confuse the process of disallowance procedures that take place in the House with the type of instrument that is to be considered by the committee. We must separate those two issues very clearly. A process for disallowance in the House exists and, for example, is provided for in the Land Administration Act. That does not have any impact on the type of instrument to be considered by the Delegated Legislation Committee. The fast track procedures for disallowance in the House do not apply to section 43 of the Land Administration Act relating to class A excisions. That is because they apply only to disallowable subsidiary legislation; that is, an instrument under section 5 of the Interpretation Act that has legislative effect. That is the point that the Hon Bruce Donaldson was making. Class A excisions - the example that we have used in section 43 of the Land Administration Act - do not have legislative effect. That is entirely appropriate, given that the committee is a delegated legislation committee and not a disallowable instruments committee. This is where we have to decide on the definition. The reason the Government has moved for this amendment in terms of those subsidiary and otherwise disallowable instruments is that they are not necessarily always instruments that have a legislative effect. Perhaps it is a fine point, but it is a point of significant difference. This is a committee that deals with delegated legislation. Even though one of the many outcomes of the Delegated Legislation Committee is a recommendation for disallowance, it is not a committee about disallowance procedures; it is a committee about delegated legislation.

Hon RAY HALLIGAN: I also have some concerns. I heard the Leader of the House explain about the proposal to amend that subclause and its removal. Having had experience on the Delegated Legislation Committee, I found that although section 5 of the Interpretation Act sets out the definitions of subsidiary legislation, some agencies have found other terminology. One in particular that comes to mind is "code". For all intents and purposes the code that I am speaking of was subsidiary legislation; it was a regulation. However, because "code" is not defined as subsidiary legislation, initially it was felt that it could not be disallowed. For that reason it is important for the subclause to remain. I cannot anticipate the terminology that agencies might use in future to circumvent the deficiencies in the Interpretation Act. I accept the argument of the Leader of the House that the Delegated Legislation Committee is exactly that: a committee to view delegated legislation, not to specifically disallow instruments. However, disallowing instruments is in fact and in practice a major part of its

task and one that cannot be ignored. For that reason, its powers must have the broadest interpretation so that it can view any type of delegated legislation, disallowable or otherwise.

Hon Kim Chance: If you use those words and say whether they have legislative effect, we might not be in agreement but we would at least be arguing the right point. If you want instruments to be referred to the Delegated Legislation Committee that do not have legislative effect, you should argue for that, because that is essentially the line you are arguing now.

Hon RAY HALLIGAN: Yes, the Leader of the House is correct; they must have legislative effect, and that must come from the Bills themselves. If the Bill does not define in detail the way in which it will operate, invariably those details come from regulations. In many instances Bills are worded broadly and provide for regulations, whether they are called regulations or some other name. The difficulty is that the Interpretation Act is subsidiary legislation. In my experience some government agencies, for whatever reason, have given the subsidiary legislation or the instrument that has legislative effect another name which at first glance suggests it is no longer subsidiary legislation and therefore not disallowable. I am unsure whether that is their intent but that has, unfortunately, created a difficult situation. It is important for that subclause to remain to overcome that situation so that it can create a safety net which the committee, as an instrument of this Chamber, should have to protect the people of Western Australia. To me, it is as simple as that.

Hon GEORGE CASH: I want to take up one point made by the Leader of the House. He said that section 43 of the Land Administration Act does not have legislative effect. I say clearly that section 43 of the Land Administration Act has very much legislative effect; that is, if the House does not carry a notice of resolution disallowing a proposal under section 43, it becomes law and cannot be disallowed. A specific procedure is laid down and if it is not followed, the legislation cannot be disallowed and will come into effect at the expiration of the days allowed for the procedure. That is the reason that some parties have lost out in the past. I raise that issue because I do not want any member of this House to believe that section 43 of the Land Administration Act does not have legislative effect; it does.

Hon J.A. SCOTT: I can confirm that, as I have moved such a disallowance in the past. The Parliament was prorogued before it was debated, so it was then allowed.

This amendment would lead to a winding back of the democratic process and would remove executive scrutiny. A raft of issues comes before the Delegated Legislation Committee that could be caught up. Hon Ray Halligan might remember some peculiarities relating to racing club rules that made it difficult for the House to scrutinise the situation. This would prevent proper scrutiny and examination of those rules and codes by the Executive.

The reserve that was the subject of my disallowance motion is now not a reserve - it is used for industrial purposes. If that is not a legislative effect, I do not know what is.

Hon KIM CHANCE: I understand what is being said and I do not believe our arguments are too far apart. However, we are beginning to waste time unnecessarily. We are close to a resolution.

Hon George Cash: Can you tell me how close that is when at the moment we are 180 degrees apart?

Hon KIM CHANCE: If we keep travelling in the same direction, we will eventually meet.

The PRESIDENT: The Leader of the House could request me to vacate the Chair until the ringing of the bells.

Hon KIM CHANCE: That was my intention.

The PRESIDENT: In response to that request - whether or not we are at 180 degrees and closing - I will leave the Chair until the ringing of the bells.

Sitting suspended from 8.52 to 9.12 pm

Hon KIM CHANCE: I seek leave to withdraw the amendment before the Chair in order that I may substitute that with a further amendment.

Amendment, by leave, withdrawn.

Hon KIM CHANCE: I move a new amendment to clause 6.7 as follows -

> To amend the definition of "instrument" -
>
> by deleting subparagraph (ii) of paragraph (a); and
>
> amending paragraph (b) to read -
>
> an instrument, not being subsidiary legislation, that is made subject to disallowance by either House under a written law.

Effectively, this means that in the example given - that is, section 43 of the Land Administration Act 1997 - the proposal that is laid before each House of Parliament in accordance with the special procedures under section 43 would be caught by this amendment, because it is an instrument which is not subsidiary legislation but which is subject to disallowance by either House. It removes from the original wording of the motion the nonsense of any document, not being subsidiary legislation, which could mean something as far removed from an instrument of subsidiary legislation or an instrument having legislative effect as an annual report. I think that was a nonsense.

The further amendment that I have moved is very much a compromise. The Government is not altogether pleased with it, but I think it is far better than the originally proposed 6.7(a)(ii), and therefore I seek the committee's support for the amendment.

Hon GEORGE CASH: The Opposition had an opportunity during the adjournment to consider the proposal now put forward by the Leader of the House. I believe that it now better identifies those instruments that are intended to go to the Delegated Legislation Committee. I agree with the Leader of the House that the original wording allowed the interpretation of the words "a document" to be fairly wide. The Opposition accepts the amendment in its present form. For those members who are using the business program paper, clause 6.7(e) should read 6.7(b). That has caused some confusion. In its amended form, the Opposition agrees with clause 6.7.

Hon J.A. SCOTT: The Greens (WA) support this amendment. The initial clause 6.7(a)(ii) enabled far too wide a catchment area, and I am sure the Delegated Legislation Committee, which is already weighed down with a huge raft of delegated legislation waiting to be dealt with, will not really want to go through all the reports of various agencies. The Greens (WA) believe that this amended amendment will catch those instruments that should be scrutinised by the committee. We also have an opportunity to consider this for a while, and if we find that anything escapes the clause, we can come back and talk to the Leader of the House, and perhaps convince him to amend it. The Greens (WA) support the new amendment.

Hon GEORGE CASH: I just want to place on record that, during the adjournment the Opposition also had the opportunity to speak to the Greens (WA) about this proposed amendment. A commitment was given by the Opposition to the Greens (WA) to the extent that, if it were found that the amendment did not achieve what both the Greens (WA) and the Opposition believe it should, we would join forces to ensure that the Delegated Legislation Committee was given such additional power as is necessary to cover anything that might have been missed. I do not believe that will be necessary, but it is important that that rather unique agreement between the Greens (WA) and the Opposition at least be recorded.

Amendment put and passed.

Clause, as amended, put and passed.

Report

Resolutions reported, and the report adopted.