JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

REVIEW

OF

OPERATIONS

1991 - 1992

Eleventh Report

December 1992

Eleventh Report of the Joint Standing Committee on Delegated Legislation

It is the function of the Joint Standing Committee on Delegated Legislation to consider and report on any regulation that:

(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 and 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 Committee is also empowered under Rule 7 of its Standing Rules to report to the House:

> *"If [the Committee] is of the opinion that any other matter relating to any regulation should be brought to the notice of the House, it may report that opinion and matter to the House."*

Under Rule 7 of its Standing Rules, the Joint Standing Committee on Delegated Legislation presents the following report on its operations during 1991 and 1992.

HON TOM HELM MLC
Chairman
December 1992

Review of Operations 1991-92

At the present time, the Joint Standing Committee on Delegated Legislation is the only body charged with the scrutiny and monitoring of subordinate legislation in Western Australia. It is a committee which rarely receives any media attention but its role was acknowledged in the Second Report of the Royal Commission into Commercial Activities of Government and Other Matters at paragraph 5.7.9:-

> "*5.7.9 The least visible law making activity undertaken in this State is that by which statutory rules are made. These have a pervasive effect upon the lives and livelihood of the community. The Joint Standing Committee on Delegated Legislation and the Interpretation Act 1984 constitute significant checks in the processes through which rules are given legal effect. The Commonwealth Administrative Review Council in its Report No 35, "Rule Making By Commonwealth Agencies", has given extensive consideration to rule making procedures. We understand that the Joint Standing Committee had initiated consideration of this issue prior to that report and is currently pursuing the matter. Public participation in rule making is a goal which should be pursued in this State."*

During the course of 1991 and 1992, the Joint Standing Committee on Delegated Legislation has examined 563 regulations, rules and selected bylaws gazetted between January 4 1991 and November 24, 1992. Due to constraints on the time available for meetings, local authority bylaws have not formed part of the routine scrutiny although members are grateful to the Department of Local Government for providing the required explanatory memoranda for members' reference and information. Statistical data for the past two years is summarised in the tables at pages 5-8 and the Advisory/Research Officer's Reports to the Committee for 1991 and 1992 are attached as Appendices I and II.

In addition to its routine scrutiny role, the Committee acted as hosts to the Third Conference of Australian Delegated Legislation Committees in May 1991 and was pleased to welcome delegates from the Commonwealth, States and Territories, Kiribati and New Zealand. The Conference attracted interest from government departments within Western Australia and from Parliamentary Counsels' offices in Perth, Canberra, Sydney and Brisbane plus representatives from universities, the legal profession and the Commonwealth Administrative Review Council. The keynote address

was given by the Chief Justice of Western Australia, the Honourable David Malcolm who graciously also agreed to respond to the many questions from delegates and observers.

In 1992 the Committee took the new step of holding a public seminar to discuss its role and proposed new legislation for the making and review of subsidiary legislation. The seminar was well attended by departmental officials and representatives of the legal and academic professions. The Committee was also pleased to welcome members and staff of the New South Wales Regulation Review Committee to the seminar.

The exchange of views and experiences with other committees and the liaison with government departments in Western Australia has been an important factor in expanding the Committee's knowledge and expertise in carrying out its role of scrutinising delegated legislation on behalf of the parliament.

The seminar proved beneficial to those who attended and resulted in a greater appreciation of the different roles of those involved in the making, drafting and scrutiny of delegated legislation and the difficulties each party faces.

The frank discussion on the legislative proposals and the likely implications of their implementation will form the basis of a detailed report on the making, review and repeal of regulations to be published by the Committee in 1993. A draft Bill proposing the introduction of regulatory impact statements for principal regulations and a system of staged review and repeal of existing regulations put forward by the then Office of Economic Liaison and Regulatory Review, has also been referred to the Committee for consideration.

The experiences of Committees, and legislation operating in other States, was discussed by a delegation from the Committee on a study tour in August to Brisbane, Sydney, Canberra and Melbourne. The discussions provided an insight into the advantages and pitfalls of similar legislation in other states and will assist the Committee in its deliberations and recommendations for changes to the current procedures for the making, review and repeal of delegated legislation in Western Australia.

Members would also like to take this opportunity to thank departments and the Office of Parliamentary Counsel for their co-operation and assistance during the past two years. We look forward to a continuing working relationship in the next Parliament.

1991

Committee Membership	Hon Tom Helm MLC (Chairman) Hon Margaret McAleer MLC (Deputy Chair) Hon Reg Davies MLC Hon Garry Kelly MLC *until 29 August* Hon Beryl Jones MLC *from 29 August* Dr Judy Edwards MLA Hon Eric Ripper MLA *until February 1991* Mr Phil Smith MLA *from March 1991* Mr Bob Wiese MLA The late Hon Andrew Mensaros MLA *to May 1991* Mrs Cheryl Edwardes MLA *6 June-17 October* Mr Bob Bloffwitch *from 17 October*
Committee Staff	Mrs Jane Burn, Advisory/Research Officer Ms Jan Paniperis, Committee Clerk
Number of Meetings	20
Number of Witnesses	22[1]
Items of Delegated Legislation examined	314
Items requiring no further action	229
Items requiring further action	85
Items moved for disallowance	6
Motions withdrawn	3
Number of tabled reports	3
Miscellaneous	Hosts of the Third Conference of Australian Delegated Legislation Committees May 21-23.

[1] See page 6

1991

2 May	Assistant Commissioner Len Thickbroom, Police
9 May	Dr Christopher Back, Mr Colin Sanders, Rottnest Island Authority
6 June	Ms Aileen Murrell & Mr Tom Cyster, WA Farmers Federation
	Mr Harry Neesham & Mr Steven Smith, Workers Compensation and Rehabilitation Commission
13 June	(informal) Mr Alan Pallott, Fisheries
22 August	Dr Richard Lugg & Dr Paul Psaila-Savona, Health
	Mr Bruce Kennedy, Mr Geoff Penno, Environmental Protection Authority
29 August	Mr Roger Underwood, Mr Kevin McNamara, Mr David Hampton, Conservation and Land Management
26 September	Mr Merv Mason, private individual
17 October	Mr David Mulcahy, Mr John Gladstone, Department of Land Administration
14 November &	
27 November	Mr Don Doig & Mr Jon Frame, Crown Law

1992

Committee Membership	Hon Tom Helm MLC (Chairman) Hon Margaret McAleer MLC (Deputy Chair) Hon Reg Davies MLC Hon Beryl Jones MLC Mr Bob Bloffwitch MLA Dr Judy Edwards MLA Mr Phil Smith MLA Mr Bob Wiese MLA
Committee Staff	Mrs Jane Burn, Advisory/Research Officer Ms Jan Paniperis, Committee Clerk
Number of meetings	21
Number of witnesses	32[2]
Items of Delegated Legislation examined	249 (to November 24)
Items requiring no further action	189
Items requiring further action	60
Items for which Notice of Motion of disallowance was given	4
Number of tabled reports	4
Miscellaneous	A seminar on May 8 to receive public submissions on proposed legislation to change the procedures for the making, review and repeal of delegated legislation.

[2] See page 8

1992

2 April	Mr L B Marquet, Clerk of the Legislative Council
2 April	Acting Inspector Christopher Mabbott, Detective Sergeant Charles Perejmibida, Police
9 April	Dr Cashel Holman, Ms Valerie Gardner, Dr Judith Stratton, Mrs Kim Macey, Mrs Barbara Edwards, Health
	Ms Noel Barber - Health Action Group
	Dr Ann Ghisalberti - Women's Electoral Lobby
	Ms Marie Oakley - YMCA
	Mrs Helen Armstrong - Country Women's Association
28 May & 11 June	Dr Paul Schapper, Mr Paul Tzaikos, Office of Economic Liaison and Regulatory Review
3 August	Dr Paul Psaila-Savona, Mr Michael Jackson, Ms Sylvia Griffiths, Health
	Mr Barry Jones, Mr John Looby, Ms Heather Brayford, Fisheries
4 November	Dr Paul Psaila-Savona, Dr Vivienne Wardell, Dr Peter DiMarco, Mr Ian Hamilton, Mrs Joyce Luke, Mr Brian Patman, Health
	Dr Martyn Forrest, Ms Jennie Bunbury, Consumer Affairs
5 November	Mr Trevor Maughan, Mr Haydn Smith, Marine and Harbours

Committee Membership

The Committee's membership changed quite significantly in 1991. The Committee was deeply sorry to lose the Honourable Andrew Mensaros as one of its members in May 1991. Andrew had been a member of the Committee since 1989 and gave the Committee a depth of expertise from his long political career and extensive legal background. His commitment to Parliamentary democracy was a strong guide to the committee's direction. He could also be relied on to add a philosophical perspective and a selection of amusing anecdotes to the Committee's discussions. Mrs Cheryl Edwardes replaced the Honourable Andrew Mensaros until her many other commitments forced her to resign. The Committee welcomed Mr Bob Bloffwitch as her replacement on October 17, 1991.

The Honourable Eric Ripper resigned following his appointment as Minister of Community Services. Eric had for some time also carried the responsibility of Chairman of the Public Accounts and Expenditure Review Committee and his commitment to this committee was much appreciated. Members welcomed the appointment of Mr Phil Smith as his replacement.

Members were equally sorry to find that the Honourable Garry Kelly's responsibilities as Chairman of the Legislative Council's Standing Committee on Legislation forced him to resign from the Committee. It is untrue that the more civilised meeting times of the Legislation Committee influenced his decision in any way! Garry also took away 2 years' experience and his weekly joke. The Committee was pleased to welcome the Hon Beryl Jones as Garry's replacement.

The wide range of expertise and interest brought by all new members has proved an asset to the Committee.

The membership of the Committee has remained unchanged throughout 1992 but will lose one of its original members, the Hon Margaret McAleer, and the Honourable Beryl Jones upon their retirement at the end of this Parliament.

Margaret has been Deputy Chairman since the establishment of the Committee in 1987. Her experience and expertise will be sadly missed and the Committee would like to take this opportunity to thank Margaret for her valuable contribution over the years and to express its appreciation of Beryl's full commitment and contribution to the Committee's deliberations. We wish them both a long and happy retirement.

Committee Staff

The Committee has been fortunate to retain the services of Mrs Jane Burn as Advisory/Research Officer and Ms Jan Paniperis as Committee Clerk for the duration of this Parliament. Continuity is an important facet in the accumulation of the depth of expertise required in the review of delegated legislation.

Jane's "terrier-like" attitude has contributed to the Committee's effectiveness and ensures that members are well informed in their deliberations.

Members would also like to thank Jan for her hard work and for providing breakfast at those early meetings.

Number of Meetings

The Committee met 20 times during 1991 and 21 times during 1992.

As indicated during its 1990 program, meetings have been scheduled for 8am and 8.15am in order to accommodate the different sitting times of the Legislative Assembly and the Legislative Council.

Members have accepted that one meeting per week is insufficient to deal with their heavy workload and twice-weekly meetings have been scheduled during the 1992 program to accommodate routine scrutiny of regulations, the hearing of evidence from witnesses and the consideration of draft reports. One of the major obstacles to more frequent meetings is, undoubtedly, the different sitting times of the two Houses. However, members are unanimous in their support for the current composition of the Committee and would strongly oppose any suggestion that the Committee should become a Committee of only one House, or that two separate Committees should be established. In members' considered opinion, there is nothing to be gained and much to be lost by any change to the Committee's current composition. One of the Committee's great strengths is its reputation for apolitical debate and decisions that derives in part from the bi-cameral and multi-party composition of its membership. Members are firmly convinced after 5 years of operation that its current composition should remain unchanged.

Number of Witnesses

It has been the Committee's practice to meet with departmental representatives where it has serious concerns that a particular regulation may infringe one of its Terms of Reference. The Committee aims to make the hearings "non-confrontational" and finds that "face to face" discussion often irons out problems and clears up misunderstandings. The problems and difficulties of each side become apparent and frequently the Committee's comments are accepted as valid and the Department or the

Minister agrees to introduce the necessary amendments without the Committee having to resort to move for disallowance.

It is the Committee's aim to hold more hearings in the future and to encourage greater participation by interested parties. In its discussion of the consultation process undertaken by departments prior to proceeding with regulatory amendments, the Administrative Review Council[3] stated:-

> *"Most agencies in submission to the Council claimed that, even where not obliged by law to do so, they consulted extensively with identified interest groups. The Council has no reason to doubt that consultation often occurs! In practice, however, in the absence of a more general requirement, consultation tends to take place with sectional interests. Probably also in these circumstances, agencies will hear what they want to hear from the bodies they choose to consult".*

In the five years of its operation, the Committee has received evidence from only one private individual, whose graphic and practical demonstration with a pallet of bricks in relation to the Manual Handling Regulations left a lasting impression on members.

Delegated legislation often has the potential to impinge upon the everyday lives of individuals to a greater extent than primary legislation and it is important that the general public becomes more aware of the role of the Committee and that greater input from the community at large is encouraged.

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[3] Report on Rule-Making by Commonwealth Agencies May 1992 para 5.7

Items of Delegated Legislation Examined

Between January 4, 1991 and November 24, 1992 563[4] regulations, rules and bylaws were examined by the Committee.

The volume of delegated legislation is perhaps more significant when viewed in the context of the number of Acts assented to in each of those years and the steady decline in the primary legislation dealt with by Parliament.

In 1991 there were **82** Acts and **314** regulations. In 1992 **44** Acts have received Royal Assent[5] and **249** regulations were gazetted for the corresponding period.

By contrast in 1976 **147** Acts were passed and **246** regulations and rules were gazetted.

The volume is not as important as the content and subject matter of the regulations. The Committee has noticed more frequent inclusion of matter which it believes is more appropriately dealt with in primary legislation.

The original concept of another strata of legislation delegated by Parliament to a specified authority was introduced in recognition of the fact that Parliament had neither the time nor the resources to deal with all legally binding rules. It was envisaged that matters of an administrative nature or complex technical detail were more appropriately dealt with by the Executive and relevant experts and introduced as delegated legislation.

One of the earliest examples of delegation was the *Statute of Proclamations 1539* which provided that:-

> *"The King for the time being, with the advice of his Council, or the more Part of them, may set forth Proclamations under such Penalties and Pains as to him and them shall seem necessary, which shall be observed as though they were made by Act of Parliament."*

The standard empowering clause to be found in most legislation today on first reading seems to be very similar in intent and application to the provision in the *Statute of Proclamations*.

> *"The Governor may make regulations prescribing all matters that are required or permitted by this Act to be prescribed, or are necessary or convenient to be prescribed for giving effect to the purposes of this Act..."*

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4 314: 1991 249: 1992

5 up to November 30

The major difference is the *practice* governing current delegation and the introduction and maintenance of safeguards such as gazettal and tabling requirements and the facility for Parliamentary scrutiny.

Throughout history, over-enthusiastic use by the Executive of the powers of delegation has resulted in an assessment of the nature and extent of delegated power and a corresponding response from Parliament to redress any perceived imbalance. The monarch's increasing use of "delegated" and "arbitrary" power without reference to parliament was a major cause of the English Civil War. Execution of the perpetrator of this blatant disregard for the supremacy of parliament is perhaps an extreme illustration of "reassessment". The 1932 Committee on Ministers' Powers - the Donoughmore Committee - was established as a response to allegations by the then Lord Chief Justice of England, Lord Hewart, of a bureaucratic conspiracy to usurp the supremacy of Parliament.[6] Although the UK parliament did not actively respond to Lord Hewart's criticisms until 1943, the Senate Standing Committee on Regulations and Ordinances was established in 1932 and became the model for scrutiny committees in Australia.

However, whilst Parliament maintains its control over the *exercise* of delegated legislative power by establishment of scrutiny committees, it appears to be more difficult to maintain a similar control over the *scope* and *content* of delegated power.

In the 1970's the *Economist* published a lengthy condemnation of the decline in the scrutiny and review role of parliament in the United Kingdom:-

> *".....As Britain's executive has done more, as its involvement in economic life has grown and its impact on citizens' powers and freedoms has widened, the capacity of the House of Commons to investigate its activities has diminished. Students of parliamentary institutions all over the world accept that this kind of scrutiny for keeping officials alert and accountable is as effective as its system of regular committees."*

Administrative and technical detail may still represent the bulk of subsidiary legislation but the Committee is finding numerous examples of delegated legislation where there is potentially undue trespass on individual rights and liberties and where there appears to be an extraordinarily wide delegation of power with neither the opportunity for full parliamentary debate nor the facility for public comment on the proposals. "Convenience" and "emergency" are becoming common justification for the inclusion in delegated legislation of measures more appropriately dealt with by

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[6] The New Despotism

primary legislation.

For example, members queried the **Misuse of Drugs (Amount of Prohibited Drugs) Order**, gazetted on November 29, 1991. Section 42 of the *Misuse of Drugs Act* empowers the Governor by Order in Council to amend Schedule III, IV, V or VI by

> *" (a) amending thereto or deleting therefrom -*
>
> *(i) any prohibited drug on any quantity specified in relation thereto; or*
>
> *(ii) any prohibited plant of a particular species or genus or any number specified in relation thereto, as the case requires*
>
> *(b) deleting and substituting all or any of the items therein; or*
>
> *(c) altering any item therein."*

Under s.42(2) the Order takes effect on gazettal and has the same force as if it had been effected by Act, although s.42(4) requires the Order to be tabled within 14 days of gazettal and s.42(5) provides the facility for disallowance of the Order by either House within 14 sitting days of tabling. In this instance, the Order amended the Schedules to the **Misuse of Drugs Act** by including the prohibited drug *ephedrine*, a precursor for the manufacture of amphetamines, and thereby created the offences of possession, presumption of intent to sell or supply and trafficking with penalties of from 2 - 25 years imprisonment and fines of from $2,000 - $100,000.

A clause in an Act which permits that Act to be amended by subordinate legislation is known as a *"Henry VIII clause"* and although usually restricted to administrative matters is considered, in general terms, an undesirable practice.[7] However, when such a method is used to introduce penalties including long terms of imprisonment or large fines, the Committee believes that it is important that the proposal receive the full attention of Parliament through formal debate. Theoretically the nomination of *any* substance could be included in the Schedule of prohibited drugs by means of an Order and it is unlikely that there would be any debate other than by this Committee.

Members can accept that there are occasions when "emergency" measures are necessary but are concerned that perceived urgency does not unduly infringe on personal liberties. This whole issue was the subject of the Committee's *Sixth Report on Emergency Powers*[8]. Emergencies are by definition

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[7] see pages 34-37 for further explanation and illustrations

[8] tabled November 1991

rare; a situation should not be defined as an emergency for the purposes of "convenience" when the end result may be the circumvention of parliamentary scrutiny. The generality of the standard empowering clause certainly permits a wide interpretation of the delegated power but can give rise to the need for the Committee to assess the subject matter based on its perceived affect on individual rights and liberties.

At risk of contributing to the list of codes or guidelines, the Committee finds merit in the suggestion that a Legislative Code of Practice, set of Legislative Standards or Legislation Handbook be produced for the guidance of both departments and members. The Commonwealth and some of the other States have followed this course.

The Legislation Handbook, prepared by the Department of Prime Minister and Cabinet in Canberra sets down the following guidelines for the use of regulations:-

> *"5.33 Matters of detail, or matters liable to frequent change should be dealt with by regulation, for example -*
>
> *(a) prescribing fees to be paid for various services*
>
> *(b) prescribing forms for use in connection with legislation*
>
> *(c) addresses where applications should be lodged*
>
> *(d) time within which certain steps should be taken.*
>
> *5.34 The Office of Parliamentary Counsel needs to be aware of the general scope of any intended regulations so that a sufficiently wide regulation making power is included in the legislation. For example, where regulations are to confer judicial power, require the charging of fees or require the furnishing of a statutory declaration, express provision conferring power for these purposes must be included in the Act."*

The Senate Standing Committee on Regulations and Ordinances included in its Seventy Seventh Report guidelines for determining whether a matter was more appropriate for primary legislation.

> *"15. The Committee will look carefully at delegated legislation, including any ordinance, which -*
>
> - *manifests itself as a fundamental change in the law, intended to alter and redefine rights, obligations and liabilities;*

- *is a lengthy and complex legal document;*
- *introduces innovation of a major kind into the pre-existing legal, social or financial concepts;*
- *impinges in a major way on the community;*
- *is calculated to bring about radical changes in relationships or attitudes or people in a particular aspect of the life of the community;*
- *is part of a major uniform, or partially uniform, scheme which has been the subject of debate and analysis in one or more of the State or Territory Parliaments but not in the Commonwealth Parliament; and*
- *takes away, reduces, circumscribes or qualifies the fundamental rights and liberties traditionally enjoyed in a free and democratic society.*

16. Where any of these characteristics are present the Committee may recommend to the Senate that it disallow the delegated legislation. It will invite the Minister to introduce a Bill for debate and analysis. The more of these criteria that are present, the greater the likelihood that such a recommendation will be made."

The *Legislative Scrutiny Manual* published by the Senate Procedure Office provides further guidance and states that the Senate Standing Committee for the Scrutiny of Bills Committee will examine closely any clauses where the delegation of legislative power:-

- is vague or imprecise;
- goes beyond the mere filling of details; or
- deals with matters which are not in principle suitable to be dealt with otherwise than by parliamentary enactment.

In its comments on the effectiveness of the guidelines in practice, the Administrative Review Council concluded that in spite of the existence of guidelines,

"...the division of content between primary and secondary legislation does not presently follow standard criteria but is often haphazard depending on such factors as the legislative history of the scheme in question." [9]

Under s.4 of the *Queensland Legislative Standards Act 1992* the following "fundamental legislative principles" have been introduced:-

*"(1) For the purposes of this Act, "**fundamental legislative principles**" are the principles relating*

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[9] Rule-Making by Commonwealth Agencies May 1992

to legislation that underlie a parliamentary democracy based on the rule of law.[10]

(2) The principles include requiring the legislation has sufficient regard to -

(a) rights and liberties of individuals; and

(b) the institution of Parliament.

(3) Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation -

(a) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and

(b) is consistent with principles of natural justice; and

(c) allows the delegation of administrative power only in appropriate cases and to appropriate persons; and

(d) does not reverse the onus of proof in criminal proceedings without adequate justification; and

(e) confers power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer; and

(f) provides appropriate protection against self-incrimination; and

(g) does not adversely affect rights and liberties, or impose obligations, retrospectively; and

(h) does not confer immunity from proceeding or prosecution without adequate justification; and

(i) provides for the compulsory acquisition of property only with fair compensation; and

(j) has sufficient regard to Aboriginal tradition and Island custom; and

(k) is unambiguous and drafted in a sufficiently clear and precise way.

(4) Whether a Bill has sufficient regard to the institution of Parliament depends on whether, for example, the Bill -

(a) allows the delegation of legislative power only in appropriate cases and to appropriate persons; and

(b) sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly; and

(c) authorises the amendment of an Act only by another Act.

(5) Whether subordinate legislation has sufficient regard to the institution of Parliament depends on whether, for example, the subordinate legislation -

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[10] Under section 7 a function of the Office of the Queensland Parliamentary Counsel is to advise on the application of fundamental legislative principles to proposed legislation.

*(a) is within the power that, under an Act or subordinate legislation (the "**authorising law**"), allows the subordinate legislation to be made; and*

(b) is consistent with the purposes and intent of the authorising law; and

(c) contains only matter appropriate to subordinate legislation; and

(d) amends statutory instruments only; and

(e) allows the subdelegation of a power delegated by an Act only -

(i) in appropriate cases and to appropriate persons; and

(ii) if authorised by the Act itself."

Although concerned at the greater volume and subject matter of regulations, rules and bylaws, of far greater significance to the Committee is the increase in the use of statutory instruments which fall *outside* the definition of subsidiary legislation given in s.5 of the *Interpretation Act* -

> *" `Subsidiary legislation' means any proclamation, regulation, rule, by-law, order, notice, rule of court, town planning schedule, resolution, or other instrument made under any written law and having legislative effect. "*

- and are therefore subject to **no** parliamentary scrutiny.

There is a seemingly endless list of instruments, only limited by the imagination of the public service, from which scrutiny by the Committee is precluded. Notices, determinations, directions, guidelines, Codes of Practice, rulings, instructions and declarations are just a sample of the range of phrases appearing in departmental jargon and usage.

Nationally, Delegated Legislation Committees have expressed concern at these attempts by the Executive -

> *"to create the pretence that the species of legislative or quasi-legislative instrument in question is different in kind from a statutory rule and therefore warrants different treatment by way of drafting, presentation and promulgation under the complete control of the relevant policy department."*[11]

It was the subject of two papers[12] at the Third Conference of Australian Delegated Legislation

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[11] O'Keeffe "Who is Watching the Regulators?" Business Council Bulletin (5B) October 1989, at page 35

[12] "Quasi-legislation and Departmental Decision Making", Senator Giles, Chairperson, Senate Standing Committee on Regulations and Ordinances and "A Regulation by any Other Name", Mr Bob Wiese, Member W.A. Joint Standing Committee on Delegated Legislation.

Committees held in Perth in May 1991 and much informal discussion, and appears on the agenda of most conferences and seminars where scrutiny of legislation is considered.

In his report on *"Parliamentary Scrutiny of Quasi-legislation"*[13] Stephen Argument, Secretary to the Senate Standing Committee for the Scrutiny of Bills, has used the collective term *"quasi-legislation"* to describe this genre of instruments in common usage. He further defines "quasi-legislation" as an instrument "*resembling* a law or which is *seemingly* a law", but "not *actually* legislation". Nevertheless, from the Committee's informal consideration of examples of "quasi-legislation" it can impose as many obligations and be as enforceable at law as many regulations.

For instance, the authority on which the *Health (Asbestos) Regulations 1992*[14] is based stems from the *Health Act* ***Notice*** *1911-1982* and the *Health Amendment* ***Notice*** *1992*[15] which increases the regulation-making power under s.134(53) of the *Health Act 1911* by including disposal of material containing asbestos. Non-compliance with the regulations can attract a maximum penalty of $1000 and a minimum penalty of $100 for the first offence, $200 for the second offence and $500 for a third or subsequent offence. The issue of "minimum penalties" and the Committee's concern at the potential to over-ride judicial discretion by the use of this concept are discussed at pages 37-38.

The Notice[16] which had the effect of amending the *Health Act* was subject to no parliamentary scrutiny in 1984 nor in 1992, although this Committee has expressed its concern to representatives of the Health Department.

As evidenced by this brief summary of the potential degradation of parliamentary supremacy engendered by the proliferation of this species of statutory instrument, the crux of the problem lies in the promotion of the view that the terminology used defines the *character* of an instrument, and not its actual *effect*. This is, unfortunately, far from the reality of the situation.

Scrutiny Committees are restricted in their operation by encouragement of this perception and find themselves confined to scrutiny of only the traditionally classified instruments - regulations, rules and by-laws as defined by the *Interpretation Act*; occasionally an order, made "disallowable" by express statutory provision may fall within their jurisdiction.

Those instruments with ingenious names are outside the Committee's scope *regardless of the nature of*

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13 Department of the Senate, Canberra, May 1992

14 Gazetted 22 May 1992

15 gazetted 6 July 1984 and 22 May 1992 respectively

16 see also section on Henry VIII clauses

their operation and the Committee is of the opinion that scrutiny of subordinate legislation generally, is seriously hampered by that limitation. There is a need for all instruments, which have legislative effect and the potential to trespass on personal liberties, to be subject to some form of scrutiny whether by way of publication in draft with an invitation for general public comment, or by way of express inclusion within the Committee's Terms of Reference.[17]

To avoid further encroachment on the supremacy of parliament, awareness of the further implications of enabling clauses, particularly with regard to the extent and nature of the powers delegated and the safeguards included with the originating power, should attract a higher profile in parliamentary debate on new legislation than in the past.

[17] Legislative amendments to deal with these concerns have been proposed and will be the subject of a detailed report on the making, review and repeal of subordinate legislation, for publication by the Committee in 1993.

Items Requiring No Further Action

As indicated in the previous statistics, approximately 73% of all delegated legislation considered requires no further action by the Committee, usually for the reason that the regulations or amendments are straightforward and within the power vested by the parent legislation. Occasionally, more sensitive or complex issues also attract no further comment from members after closer examination, but this is largely dependent on the explanatory material provided by departments. Circulars to Ministers[18] in 1989 and 1990 requested Ministers to provide the Committee with copies of the regulations and an explanatory memorandum explaining the background and rationale of regulations and amendments and giving details of the consultation process undertaken at the time of gazettal. The information provided by departments is vital to the Committee's understanding of regulatory changes, particularly in the light of procedural time restraints imposed by the *Interpretation Act* on the tabling and scrutiny of delegated legislation.

For the most part, the explanatory memoranda system has worked well and the Committee receives adequate information at the appropriate time. A number of departments are to be congratulated on the standard of information provided and members would like to take this opportunity to thank departments for their co-operation and willingness to assist the Committee. There are still a number of departments, however, which need to be reminded of their obligations, and yet others who seem to be unaware of the Committee's requirements. Whether for reasons of deliberate obstruction, or through lack of knowledge, failure to supply the requisite information at the time regulations are gazetted, can only hinder the performance by the Committee of the function with which it has been charged by Parliament, to the detriment of the regulatory process.

[18] 58/89 (27 October 1989) and 45/90 (25 May 1990)

Items requiring further action

Inevitably, there are issues which even the most detailed explanatory memoranda cannot address. Most of those issues would in some way contravene the general principles summarised in the Committee's Terms of Reference in the form of a regulation which -

(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;*

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

(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

This Term of Reference is based on the legal doctrine of *ultra vires* and is a reason for which delegated legislation may be invalid. A regulation may be considered *ultra vires* where it purports to perform some function not contemplated by the parent legislation or in excess of the power given or contemplated by the parent legislation.

In the United Kingdom, Australia and New Zealand the doctrine of *ultra vires* is limited to this interpretation and does not include invalidity on the grounds of unreasonableness or of unauthorised sub-delegation.

There are no general guidelines for establishing the validity of a regulation; examination of the enabling legislation in each case is necessary. In cases where a "blanket" power is given to make regulations for prescribing -

> *"all matters that are required or permitted by this Act to be prescribed, or are necessary or convenient to be prescribed for giving effect to the purposes of this Act..."*

it becomes necessary to look to certain fundamental principles such as whether the provision is unconstitutional or inconsistent with general legal principles.

Application of the doctrine of *ultra vires* is complicated and requires interpretation of the nature and effect of the provision under scrutiny. The Committee has therefore reported assertions of invalidity under this Term of Reference infrequently and only after detailed discussion and consultation.

At the end of 1991, the Committee tabled its *Seventh Report* on a number of regulations prescribing

Court fees and fees for lodgement of documents and searches under Department of Land Administration legislation.

Members were concerned that the inclusion of a surcharge in those fees for the purposes of funding the *Courts Modernisation Fund* and the Department of Land Administration *Register 2000* computerisation fund was outside the power delegated in the enabling legislation to collect and charge fees for the provision of various court and land registration services.

The Committee was of the opinion that the surcharge component of the fees was not consequential upon the Minister's decision to exercise his power to charge a fee for cost recovery of the service, but depended upon the decision, in each case, to computerise the Courts and land registration system and was a means of raising revenue to cover the capital cost of computerisation. To that extent, the surcharge constituted imposition of a *tax* which is not only beyond the power delegated in the enabling legislation, but is also constitutionally improper under S.72 of the *Constitution Act 1889* and S.46 of the *Constitution Acts Amendment Act 1899*.

S.72 requires that the Consolidated Revenue Fund be appropriated by Act of the legislature.

S.46 provides that appropriations shall not be made unless the *purpose* of the appropriation has been recommended by message of the Governor. Appropriations, therefore, cannot be made *except* by primary legislation.

Motions of disallowance of the *Local Court Amendment Rules (No.2)* the *Justices Act (Court of Petty Sessions Fees) Regulations* and the *Justices (INREP) Amendment (No.3) Regulations* were withdrawn following receipt of an undertaking from the Attorney-General that the *Courts Modernisation Fund* would be dismantled.

The Department of Land Administration Regulations have however been the subject of a further report[19] and Notices of Motion of disallowance of the *Transfer of Land Amendment Regulations, Strata Titles General Amendment Regulations, Registration of Deeds Regulations and Land Amendment Regulations* have been given in the Legislative Council, following failure by the responsible Minister to accept the Committee's arguments and legal advice, and address the concerns. The matter is yet to be resolved.

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

The general principles of fairness and reasonableness contained in this Term of Reference are the most frequently used by the Committee and underlie members' interpretation of all subsidiary legislation. When the power to make a regulation has been clearly established, the Committee must determine

[19] Tenth Report, tabled November 1992

whether the impact of the provision on the community is justifiable and reasonable in terms of *inter alia*:-

- the restrictions it imposes
- the extent of the consequential financial burden
- alteration or removal of established rights
- denial of access to the Courts
- lack of compensation for compulsory acquisition of property
- lack of any adequate appeal procedure
- rights of entry, search and seizure of property without warrant
- removal of the facility for Parliamentary scrutiny
- retrospectivity
- appropriate delegation of authority

Some regulations may cause initial concern of infringement of personal liberties but on receipt of further information, the Committee has been satisfied that either there was no trespass on individual rights or that the circumstances justify the steps taken.

Alteration or removal of established rights

The *Blood and Tissue (Transmissible Diseases) Amendment Regulations* (gazetted May 17, 1991) introduced questions on the forms for donors of blood requiring information as to a donor's sexual orientation, habits and record of imprisonment. Given the intrusiveness of the questions and the potential invasion of privacy, members were concerned at the confidentiality of the information. Having received assurances from the Health Department, the Committee formed the opinion that the potential infringement of individual rights, was balanced by the dangers of blood infected with the Aids virus.

Similarly the *Casino Control (Burswood Island) (Licensing of Employees) Amendment Regulations* (gazetted on September 9, 1991) which permitted the issue of a provisional licence to an applicant known to have committed an imprisonable offence, were considered acceptable following clarification by the Office of Racing and Gaming of circumstances in which this discretion would be used, and that it was subject to the approval of the Gaming Commission.

The Committee was concerned at the apparent disregard of the rules of natural justice with regard to the *Electrical (Licensing) Regulations* (gazetted October 14, 1991). For example, the Electrical

Licensing Board is not bound by its previous decisions or by legal or industrial technicalities. It is also not bound by the rules of evidence and may cancel a permit at any time if it believes there are reasonable grounds for so doing. Following consultation with Union representatives, members were satisfied that the practical operation did not unduly disadvantage affected parties.

The potential for uncertainty caused by the provision in the *Industrial Relations Commission Amendment Regulations* (gazetted November 8, 1991) that:-

> *"The Tribunal may waive any of the requirements of this regulation or vary the procedure at any time."* *{Reg 38(8)}*

- was discussed by the Committee in terms of the use of an unfettered discretion. Although not happy, in general terms, with the inclusion of unfettered discretions in subsidiary legislation, members accepted the explanation from the Department of Productivity and Labour Relations that all interested parties had been consulted and were happy with the operation of the regulations.

A number of members of Parliament expressed concern to the Committee at the potential for invasion of privacy by the establishment of a register of patients under the *Health (Cervical Cytology Register) Regulations* (gazetted January 3, 1992).
Following extensive consultation with the Health Department and representatives from womens' groups the Committee was satisfied that the introduction of the register may assist in the prevention of cervical cancer and that its establishment should not be hindered, on condition that the *voluntary* nature of inclusion in the register was more widely publicised and that sufficient funding was available for an intensive publicity campaign about the register and the need for early detection of cervical cancer. The Committee reported its findings in its *Eighth Report*, tabled April 1992.

There are regulations expressly designed to deal with extraordinary or unusual situations where infringement of individual rights is unavoidable for the protection of the community. In those instances, the Committee is required to examine whether the unusual measures taken to cater for the particular circumstances were excessive and constituted *undue* trespass on individual rights.

As discussed in its *Sixth Report on Emergency Powers*,[20] the Committee has become concerned at the increasing use of so-called "emergency powers" and corresponding draconian measures.
The regulations specifically examined by the Committee arose under powers delegated in the *Health Act* to safeguard public health. Each time the power was invoked, the duration of the powers to deal

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[20] Tabled November 1991

with the "emergency" was increased and following detailed examination of the situation and consultation, the Committee decided to move for disallowance of the regulations gazetted to deal with the unloading of ammonia at Kwinana.
It is interesting to note that following the disallowance, a shipment of ammonia was unloaded without incident at Kwinana using the simple safeguards of *informing* the general public of the unloading and of the procedure to be followed should any problem or danger arise.

Members have some difficulty with the use of subsidiary legislation for potentially draconian measures particularly if the authority for making the regulations has been based on a gazetted Notice, not subject to any form of parliamentary scrutiny as was the case with the *Health (Disposal of Asbestos) Regulations* gazetted in May 1992. This is discussed more fully at page 36.

Unreasonable financial burden

The question of whether an unreasonable financial burden has been imposed on an individual or on the community at large has application to approximately 50% of the regulations considered by the Committee to the extent that at least *half* of all subsidiary legislation in Western Australia imposes either a fee, a charge or a penalty, or all three.
To date the Committee has avoided criticism of fees on the grounds that a fee is unreasonable or excessive. Frequently that type of assessment involves policy and political issues which the Committee will not contemplate. Nevertheless, members are aware that fees and charges are issues of great concern to, and impact on, the community and it is the Committee's intention to report to Parliament its observations on the way in which fees are established, the disparity in the criteria used by different departments in setting the level of fees, with particular emphasis on the lack of consensus on the appropriate Consumer Price Index to be used and the apparent lack of consultation with interested parties prior to establishing new fee levels.

Issues other than the actual level of a particular fee have been discussed and reported by the Committee with regard to the composition or effect of a fee.
The Committee's concern with the fees under various Court rules and within the responsibility of the Department of Land Administration has been discussed in the preceding section on the doctrine of *ultra vires*. The Committee has argued that a *component* in those fees was unauthorised by the parent legislation and constituted a tax. Harbour Improvement Dues under the *Esperance Port Authority Regulations* are under consideration by the Committee for the same reason.

Complaints brought to the Committee's attention with regard to the imposition of fees in the *Road*

Traffic (Events on Roads) Regulations (gazetted February 1, 1991) resulted in detailed examination of all the provisions and intensive consultation with the Police Department.
Members would like to take this opportunity of thanking the Police Department for their unfailing and willing co-operation with the Committee and for the high standard of the explanatory material supplied to members. The Committee has always found the Department most receptive to suggestions for amendments to regulations. The *Events on Roads Regulations* were no exception and amendments to meet the majority of concerns have been forwarded to the Minister for approval.

Members were interested to note a large increase in fees under the *Pharmacy Regulations* (gazetted April 1, 1992) at the request of the Institution of Pharmacists in return for a reduction in fees charged by the Institution because there would have been no means of enforcing a reduction by the Institute if they had decided not to introduce the corresponding reduction.

A similar discrepancy arose in the *Fisheries Amendment Regulations (No.6)* (gazetted June 5) where recreational licence fees were introduced for abalone, trout, redfin perch and freshwater cobbler following recommendations by the Recreational Fishing Advisory Council but *conditional* on the use of the funds for the exclusive purposes of recreational fishing management.
The regulations were introduced *before* the necessary statutory amendment was in place although a trust account was established informally through Treasury. The issue was discussed in the Committee's Ninth Report. The Minister agreed to introduce the amendment to the *Fisheries Act 1905* before the end of the current session.

A further cause for concern under the *Transfer of Land Regulations* (gazetted on July 10, 1992) was the apparent increase in a fee to compensate for the loss of revenue following the repeal of the relevant statutory provision. The amendment to the legislation was not introduced but the fee increase was gazetted. The Committee has reported on this matter in its *Tenth Report* (tabled November 1992) and is awaiting the Minister's response.

The Committee met with the Executive Director of the Ministry of Consumer Affairs to discuss fees for provision of evidence of hearings in the Commercial Tribunal as it was of the opinion that the level of the fees may have the effect of denying access to the Courts by deterring application to the Commercial Tribunal. The Minister has agreed to amend the fees to reflect the Committee's concerns.

Having looked at amendments to fees under the *Health (Meat Inspection and Branding) Regulations*

over the past two years, the pattern which has emerged appears to highlight a potential deficiency in the operation of the statutory provision under which these regulation are made. Under S.246 F (2) of the *Health Act* the revenue derived from the imposition of fees for the inspection of meat must not exceed the cost of provision of the service by a local authority.

Most amendments to the regulations appear to arise because of the need to adjust the scale of fees to cater for either a surplus or shortfall in the account; several of the adjustments up or down relate to the same health districts.

Although there is a provision in the *Health Act* prohibiting the accumulation of a surplus, there is no corresponding provision relating to *disposal* of a surplus should one occur. This has led to problems in several areas, notably the Shires of Harvey/Waroona which resulted in the introduction of the *Transfer and Use of Funds (Shires of Harvey and Waroona) Act 1991* to legislate for the disposal of surplus funds. Whilst it is commendable to legislate to control the level of fees, it is impractical not to have a corresponding ability to deal with a surplus should it arise, and which seems to occur with reasonable frequency.

The Committee recommends that this issue be considered in the redrafting of the *Health Act*.

Inspectors' Powers

An area that the Committee intends to make the subject of a special report is that of inspectors' powers. To date, examples of the nature and extent of powers delegated to inspectors have been considered by the Committee in the routine scrutiny of regulations in the areas of Health, Fisheries, Marine and Harbours and Meat Inspection. Other areas have not yet been examined but the Committee suspects that inspectorial powers are to be found in a surprising range of legislation.

The Committee's *Ninth Report on Fisheries Regulations* (tabled November 1992) briefly comments on the powers of Fisheries inspectors with particular emphasis on the powers of entry and search without warrant. The Report went on to compare the powers of a Fisheries inspector when searching for undersized crayfish, to those of the police when searching for illegal drugs. In the first instance, the officer has unlimited powers of entry and search without warrant at any time of the day or night. In the second, the police officer is required to produce a properly executed and authorised judicial warrant, having justified to a magistrate the reason for the warrant to authorise the search at the time specified in the warrant. The paradox of the situation is that if a police officer acting as an *ex officio* Fisheries inspector empowered to enter and search premises without a warrant, finds illegal goods in the course of the search - for which, as a police officer, he would have required a search warrant - production of those goods may be permissible as evidence in prosecution of an offence relating to possession of the goods.

Fisheries inspectors are also empowered under S.40 of the Act to:-

> *"...with or without warrant arrest any person who the inspector has reason to believe has committed an offence against any of the provisions of this Act or the regulations."*

Although the powers of Fisheries inspectors have been used to illustrate the problem, these powers appear to be common to legislation providing for inspectors. The Minister for Fisheries has indicated that he shares the Committee's concerns and will take them into consideration in the redrafting of the *Fisheries Act*.

With the increasing use of "consistency" as an excuse for the introduction of change, it would be a retrograde step if the excessive powers vested in inspectors generally are used as the lowest common denominator to dilute the current stringent police search warrant procedures.

Inspectorial powers are also frequently delegated to *"authorised persons"*. These may be honorary positions but there is usually no distinction in the legislation between full-time, fully qualified inspectors, and temporary or honorary inspectors with regard to the extent of the powers of inspection. Whilst appreciating that authority would usually be delegated to persons with the appropriate skills and training, members are concerned at the unlimited discretion implied by the general term *"authorised persons"* and would prefer to see the term *"person"* more clearly and specifically defined, or the delegated powers qualified to reflect the lesser status of an honorary inspector.

Underlying the Committee's concern at the extent of inspectorial powers, is the belief that the potential for gross infringement of individual liberties is a strong indication that the provisions should be dealt with by primary and not delegated legislation. It is unlikely that such fundamental powers would need to be changed with great frequency and the details could in no way be described as "administrative" or "technical". The Queensland *Legislative Standards Act 1992*[21] and the Administrative Review Council *Report on Rule Making*[22] support this view.

Removal of Parliamentary Scrutiny

Removal of parliamentary scrutiny has never been an openly admitted reason for using delegated rather than primary legislation to enact a legislative measure. From members' experience, however, that is precisely the rationale behind many provisions in Acts. Notices, Determinations and other non-disallowable instruments and the ability to amend Acts by delegated legislation are clear evidence of that contention.

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[21] s.4 (3) (e)

[22] Chapter 2, *"Distinction between Primary and Delegated Legislation"* paragraphs 2.19 - 2.20 page 16

Where provisions of this nature have been included in Acts passed by Parliament, this Committee is powerless other than to report its concern to the Department and to the Parliament, and to discourage the inclusion of similar provisions in new legislation.

However, the Committee will not tolerate attempts by Departments to change the status of existing provisions in regulations to some form of "tertiary" legislation and has moved to disallow regulations under the *Rottnest Island Authority Act*, the *Conservation and Land Management Act* and the *Mines Regulation Act*,[23] which purported to introduce such amendments.

In all of these cases, the Department had proposed to remove fees from regulations, subject to tabling and Parliamentary scrutiny, and place the provisions in either a Notice or a Determination, subject to neither scrutiny nor disallowance. The Committee is pleased to note no further instances of this practice since the disallowances of last year. However, this form of removal of Parliamentary scrutiny has been replaced, or perhaps overshadowed, by an issue of potentially far greater significance - that of uniform legislation. The problems and dangers for individual Parliaments were discussed in some detail in the excellent report by the *Select Committee on Parliamentary Procedures for Uniform Legislation Agreements*.[24]

However, as the Committee, charged by this Parliament to scrutinise and report on subsidiary legislation, it is encumbent on members to emphasise the curb placed on the ability of this Committee to perform this function adequately when members are presented with a *fait accompli* in the form of subsidiary legislation open to neither comment nor amendment. The *Health (Adoption of Food Standards Code) Regulations 1992* are a case in point.

The regulations were gazetted on May 15 and tabled on May 26, and came before the Committee as part of its routine scrutiny of all gazetted regulations.

Western Australia is a signatory to the *National Food Standards Agreement* of July 1990 under which all States and Territories are required to adopt the *Food Standards Code* (the Code). Section 6 of the *Commonwealth National Food Authority Act 1991* established the *National Food Authority*.

The functions of the Authority include:-

- the preparation of proposals and drafts for the development or variation of standards;
- to make recommendations to the Council in respect of those draft standards or draft

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23 *Rottnest Island Amendment Regulations 1990* (gazetted November 9, 1990)
Conservation and Land Management (Miscellaneous Fees) Regulations 1991 and *Forest Amendment Regulations 1991* (gazetted May 31, 1991)
Mines Regulation Amendment (No.2) Regulations 1991 (gazetted June 28, 1991)

24 Tabled in the Legislative Assembly August 27, 1992

variations;

- to review standards and in consultation with the States and Territories, or on its own initiative, to co-ordinate the surveillance by the States, the Territories and any other bodies or persons of food available in Australia;
- to co-ordinate at the request of the States and Territories, action by the States and Territories to recall food under State and Territory laws;
- to develop assessment policies in relation to food imported into Australia;
- to provide advice to the Minister on matters in relation to food;
- to develop codes of practice for industry on any matter that may be included in a standard.

Food standards developed by the Authority are put forward for consideration and approval to the National Food Standards Council - a Council of Commonwealth, State and Territory Health Ministers. The Authority has power to do all things necessary or convenient to be done in connection with the performance of its functions and, under S.8 (2) may exercise those powers within or outside Australia.

The statutory framework at State level is established under Section 247 of the *Health Act 1911* which empowers the Governor, on the advice of the Food Advisory Committee established under s.246H of the *Health Act*, to make regulations for the purposes of *Part VIII (Food Generally)* of the Act.
Section 247(3) provides for the adoption of codes by reference with or without modification.
The previous regulations *(The Health (Food Standards) (General) Regulations 1987)* reproduced the Food Code with modifications to suit Western Australian requirements; amendments to the Code were therefore formerly tabled and subject to scrutiny.

The Health Department has informed the Committee that the previous format had proved difficult to maintain in an up-to-date form because of frequent amendments. This difficulty had motivated the department to adopt the current format whereby only *modifications* to the Code and penalties for non-compliance with the Code are gazetted by regulation and subject to Parliamentary scrutiny.
The Code itself, though adopted by reference into the regulations, is subject to *neither* gazettal nor scrutiny. The procedures for amendments or modifications to standards in the Code are provided for under ss.12-30 of the *National Food Authority Act*. Draft standards are published in the Commonwealth *Government Gazette* and *The Australian* newspaper.
As indicated above, *modifications* to suit particular Western Australian circumstances are made by regulations *subject to the usual gazettal and tabling requirements and to Parliamentary scrutiny.*

Exemptions from the operation of the regulations are published by *Notice* in the Government Gazette but are subject to neither tabling nor to Parliamentary scrutiny.

The problems for this Committee engendered by uniform regulations relate primarily to the lack of any facility for examination of the provisions and of any opportunity or power to register any objections to the provisions.

From its knowledge of the procedural requirements for delegated legislation in the Commonwealth and other States and Territories, the Committee believes that the differences are more evident than the similarities. Complex arguments as to the validity of an instrument could arise where, for example, it would be invalid in Western Australia because it was not gazetted or because it was not tabled within 6 sitting days of gazettal, but in the jurisdiction in which it was promulgated, those procedures are not required.

Members have found representatives of the Health Department receptive to their comments. They agreed that publication of changes to the *Food Standards Code* in the WA *Government Gazette* was not only possible but would greatly improve the dissemination of information regarding changes to the *National Code*. With no formal facility for objection by interested parties, the better publication of information is the best option remaining.

Health Department representatives were also receptive to the suggestion that exemptions from the operation of the Code were more appropriately dealt with by regulation than by Notice. Members consider exemption from compliance with legislation fundamental to the whole intent of the legislation and should, at very least, be subject to tabling and parliamentary scrutiny.

Members have discussed the question of parliamentary scrutiny of uniform regulations with their counterparts in other jurisdictions and a proposal by the Committee that Chairmen and research staff of all scrutiny committees should meet at regular intervals to discuss current uniform legislation and other matters of mutual interest has been favourably received and supported.

The Administrative Review Council devoted a chapter of its *Report on Rule Making* to consideration of nationally uniform legislation and made the following comments:-

> *"10.16 <u>Parliamentary Scrutiny</u>: A significant defect in the promulgation of instruments to give effect to uniform schemes is that Commonwealth, State and Territory parliaments generally have no opportunity to see and examine subordinate*

rules either before or after they are made. In the case of complex legislative schemes such as the national food standards scheme, there is no requirement for tabling and disallowance in any parliament. In other more straightforward schemes for uniform legislation, instruments may be tabled but parliaments are discouraged from taking action upon them in the interests of preserving the uniformity of the scheme.

10.17 The reasons why there is minimal or no parliamentary scrutiny of delegated legislative instruments under schemes of this kind is that the principles for scrutiny differ between parliaments and uniformity will not be achieved if a rule is disallowed in one parliament. The Council accepts that it is impracticable to apply the normal mechanisms for parliamentary scrutiny to them. Nevertheless, it points out that the result is to leave the executive branch alone with power to make binding rules of general application."

Whilst recognising the difficulty of permitting the facility for scrutiny because of the risk of degradation of uniformity, the Council recommended that the same procedures as apply to State subordinate legislation should be applied to nationally uniform schemes *wherever possible*. Where it is impractical to apply those procedural safeguards, *minimum* standards should be established to ensure *professional drafting* of regulations, *mandatory* consultation, notified in each parliament, when a standard is made, amended or revoked, *publication* of the regulation in a Subordinate Legislation Register and *sunsetting* ten years after the making of the principal regulation.

The Committee is aware that these brief comments do not adequately address the fundamental concerns underlying the implications for legislative scrutiny Committees of the increasing use of uniform legislation and regulations but uses the issue as an illustration of the expanding role of the Committee and the increasing number of obstacles it faces in the proper discharge of its function to *"constitute significant checks in the processes through which rules are given legal effect"*.[25]

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

This principle has already been discussed briefly in other areas of the Report. It is an area of concern which arises in consideration of the validity of provisions and also in the area of infringement of personal liberties where the potential infringement is so excessive as to deserve full parliamentary debate.

The concern relating to the contention that it is *not possible* to utilise delegated legislation, as the

[25] Royal Commission into Commercial Activities of Government and Other Matters: Part II para 5.7.9

proposal is *ultra vires* the parent legislation, is more clearcut than that which requires an assessment of whether the subject matter has such likely implications that it would be more *appropriately* dealt by an Act. Nevertheless, there is a large amount of consensus and expert opinion on the range of subjects appropriate for primary enactment only.

A practice universally frowned upon as a purpose of delegated legislation is its use to amend primary legislation - the *Henry VIII* clause.

The concept acquired its name from the 1542 *Statute of Wales*, under which Henry VIII was empowered to *"alter the laws of Wales and to make ordinances for Wales, such alterations and new laws and ordinances to be published under the great seal and to be of as good strength, virtue and effect as if made by authority of Parliament."*

The Donoughmore Committee on Ministers' Powers recommended in 1932 that the use of this device should be discontinued in all but the most exceptional cases and then only for the purpose of bringing an Act into operation with a finite life of one year after the passing of the Act. That Committee based its findings on the *potential* for abuse such a provision allowed rather than on actual *evidence* of abuse of the power.

Professor Dennis Pearce in his authoritative text on *Delegated Legislation in Australia and New Zealand* states:-

> *" This is an approach to legislating that should be resisted. Parliamentarians pay too little heed to the regulation-making sections of Acts. If "Henry VIII" clauses are allowed to pass by default, the parliamentary institution is placed in jeopardy."*[26]

In his keynote address at The Third Conference of Australian Delegated Legislation Committees[27] held in Perth in May 1991, the Chief Justice, the Honourable David Malcolm commented on the continued use of the *"Henry VIII"* clause not withstanding its universal condemnation.

He cited the example of the UK *European Communities Act 1972* which delegated the power to make orders in council and regulations for giving effect to Community Law which are to prevail over all Acts of Parliament, whether past or future, subject to safeguards against increased taxation retrospective operation and excessive, and also quoted from s.88 of the *Corporations (Western Australia) Act 1990*:-

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[26] 1977 at para 15

[27] Report of the Third Australian Conference of Australian Delegated Legislation Committees 1991, pages 15-27

"(1) Regulations under section 80 may provide that a specified co-operative scheme law, or specified provisions of a co-operative scheme law, has or have effect with such modifications as the regulations prescribe."

Delegates at the Conference also passed the following resolution.

"While noting that there may be a rare, justifiable use of a Henry VIII clause where such use would be subject to tabling and disallowance, this Conference believes that Henry VIII clauses have no legitimate general application in the legislative process."

The Committee has noted the number of regulations which are empowered to amend parent legislation by the addition of items in a schedule. Often these are of a purely administrative nature. However where inclusion by regulation in a schedule will vest all the statutory functions and powers under the parent legislation in a person or body, members are of the view that that goes far beyond an administrative purpose.

The *Trustee Companies (Designation of Trustee Companies) Regulations 1990* (gazetted November 9, 1990) are a good illustration of this excessive delegation of power in the parent Act. Under the *Trustee Companies Act 1987*, approval of new Trustee Companies and the consequential vesting of all the statutory powers may be given by regulation. The *Misuse of Drugs (Amount of Prohibited Drugs) Order* (gazetted November 29, 1991), already discussed, is a further example. In this instance the simple "administrative" procedure of inclusion in a schedule had the effect of imposing a prison sentence of from 2-25 years or a fine of $2,000 - $100,000.

Perhaps the example which has caused the Committee greatest concern relates to the *Health Amendment Notice 1992*. The Committee had cause to consider this Notice in conjunction with its routine scrutiny of the *Health (Asbestos) Regulations 1992* (gazetted 22 May 1992).

The regulations are made under the *Health Act* 1911, but this Act does *not* contain specific power to regulate the use or disposal of asbestos. S.134 (53) of the Act makes the following provision authorising a local authority to make by-laws with respect to a wide range of specific areas, and in addition -

"any other purpose which the Governor deems necessary and notifies in the Government Gazette as calculated to safeguard the public health."

S.343 (5) extends the power with regard to by-laws to regulations.

The *Health Amendment Notice 1992* amended the definition of asbestos in the previous 1984 *Notice*

which had authorised the making of by-laws:-

> *"For regulating and controlling the disposal of asbestos waste, for prescribing in relation to asbestos waste disposal the matters and things that shall be observed, the manner of their observance and the penalties for such non-observance."*

In summary, the enabling provision in the *Health Act 1911* regarding the *nature* of regulations or by-laws which could be made, is permitted under the Act to be amended or, extended by gazetted Notice, *subject to no procedural requirements and no parliamentary scrutiny*.

Theoretically the purpose for which regulations could be made under this head of power are limited only to the interpretation of "necessary" in S.134 (53) of the *Health Act*.

To quote the Administrative Review Council -

> *"It is clearly inappropriate for a body subordinate to Parliament to amend or alter an Act made by Parliament. This is particularly so when changes affect the essential elements of a scheme, alter the ambit of legislation, place restrictions on rights, or alter obligations."*[28]

The Committee is of the view that Regulation 4 of the *Spent Convictions Regulations 1992* (gazetted June 26, 1992) also falls within the category of inappropriate delegation as it adds a schedule to the *Spent Convictions Act 1988*, listing *exceptions* to the operation of Part 3 of the Act. Part 3 provides for disclosure of convictions which would otherwise have been spent, in applications for certain areas of employment such as that of Parole Board member, prison officer, security guard etc. These exceptions appear to the Committee to be fundamental to the intent of the legislation and to be more appropriate for primary enactment.

A common reason given for use of the "Henry VIII" clause is the shorter length of time taken to promulgate delegated legislation compared to the parliamentary procedure required to amend an Act. There are longstanding and traditional reasons why the procedures for enactment of legislation is structured in the way that it is, not least of which is the fact that the monarch after whom the circumvention of this process has been named *"is regarded popularly as the impersonation of executive autocracy"*.[29]

The introduction of an alternative *affirmative* procedure, where the need to use delegated legislation

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[28] Report on Rule-Making 1992 para 2.33

[29] Donoughmore Committee on Ministers' Powers 1932 at p.61

for the purposes of amending an Act can be reasonably justified, merits consideration.

Using this procedure, regulations would be subject to parliamentary *approval or affirmation*, rather than disallowance, within 14 days of tabling. This process would allow the opportunity for public comment and parliamentary debate without unduly delaying the regulatory process. Currently regulations may be disallowed unitil 14 sitting days *after* tabling have elapsed.

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

This fourth Term of Reference is not one frequently used by the Committee to date although members acknowledge it is of fundamental importance to the whole doctrine of Administrative Law. It is perhaps for this reason, that instances of breaches of this principle appear infrequently in the delegated legislation thus far examined.

Examples have been cited in other sections of this report and relate mainly to attempts to deny access to the Courts or to limit the exercise of judicial discretion.

The *Emergency Provisions (Satellite Debris Collection) Regulations 1988* undoubtedly purported to deny access to the Courts by precluding the granting of compensation for compulsory requisitioning of property.

The inclusion of minimum penalties for non-compliance with the regulations in the *Health (Adoption of Food Standards Code) Regulations 1992* has the effect of denying the Courts the discretion to impose a lesser, or no, penalty in the presence of mitigating circumstances.

A further example is where the final arbiter in a dispute between an individual and a government department is the Minister. For example, Regulation 101B in the *Jetties Act Regulations 1940* provides -

> *"If any dispute shall arise between the owner or master and the Department, such dispute shall be referred to and be determined by the Minister whose decision shall be final and binding upon the Department and the owner or master of the vessel."*

Similar examples are to be found across the Statute book.

One of the Committee's major concerns is the lack of easily accessible appeal and review procedures readily available to individuals who wish to object or overturn administrative decisions which have, or could have, substantial impact. Delegated legislation is the most pervasive of all forms of legislative measures and is often the most obscure and most resistant to challenge.

Without embarking on a lengthy treatise of possible remedies, the Committee directs attention to the Royal Commission's Second Report and the Law Reform Commission's *Report on Judicial Review of Administrative Decisions*, and is itself evaluating significant and far-reaching proposals for both

judicial and merits review in draft legislation currently on its agenda. A detailed report on the whole procedure for making, review and repeal of delegated legislation will be tabled in 1993.

Standing Rule 7

An important function of the Committee is contained in Standing Rule 7:-

> *"If [the Committee] is of the opinion that any other matter relating to any regulation should be brought to the notice of the House, it may report that opinion and matter to the House."*

As will have become clear from the preceding discussion of issues considered by the Committee in the past two years, issues raised by delegated legislation frequently encompass the enabling legislation or require consideration of wider principles of a constitutional, legal, civil liberties or simple common sense nature.

One of the Committee's prime responsibilities is to keep members informed of trends in delegated legislation, the emergence of any new or undesirable practices, or issues that have come to light merely through the asking of the right questions. The Committee believes that Departments have also become more aware of the undesirability of certain practices which have become so entrenched by traditional usage that their inappropriateness or unfairness only becomes clear when someone not so familiar with the process asks a simple question.

Examples of this function are scattered throughout the report but the Committee has selected the following illustrations of issues which are not easily categorised:-

The *Financial Institutions Duty Amendment Regulations (No.2)* were gazetted on June 21, 1991 shortly after the legislation, proclamation of which would give effect to the regulations, received its Second Reading in the Legislative Assembly. The Act came into operation on November 23, 1991. The regulations have no validity until the Act is proclaimed and a number of regulations are gazetted in anticipation of proclamation of the parent Act. The Committee accepts the practical reasons for this practice, but members are concerned, however, in this instance at the length of time between the gazettal and operation of the regulations.

The *Companies (Co-operative) (Fees) Regulations* (gazetted November 8, 1991) were gazetted with the omission of a decimal point thus increasing a fee for a copy of a document from 20 cents to $40. The Office of Corporate Affairs was informed of the error but, to date, amending regulations have not been gazetted. Undoubtedly, the correct 40 cents fee would have been charged by the Department, but

should have been gazetted as soon as the error was drawn to the Department's attention.

Members have noted that the *Weights and Measures Regulations*, reported upon in the Committee's *Annual Report for 1989-90*, have still not been reprinted. Given the significant changes in the past 2 years to the structure of many of the regulations and the lack of apparent progress in the proposed uniform legislation, members remain firmly of the view that the principal regulations should be reprinted in the interests of clarity and certainty.

Members registered a similar concern regarding the *Betting Control Amendment Regulations* (gazetted July 10, 1992) which had been substantially amended, and were pleased to note that the regulations have been reprinted and are available from State Print.

Other regulations on which the Committee has reported under Standing Rule 7, in the past 2 years relate to the Committee's conclusions with regard to the *Health (Cervical Cytology Register) Regulations*, (gazetted on January 3, 1992)[30] and the *Ninth Report on Fisheries Regulations (No.5 and No.6)* tabled November 1992.

Disallowance

The power to move that a regulation be disallowed is available to all members of parliament and has been used with increasing frequency in the past 2 years.

Although the Committee has recommended that a number of regulations be disallowed since the beginning of 1991, disallowance is still viewed by the Committee as a last resort, only to be used where members have failed to negotiate the necessary amendments or withdrawal of the proposal after discussion and consultation with the Department and the responsible Minister.

The Committee sees its prime role as a bridge between informed opinion, interest groups and the executive assisting the process of government by exercising its powers in the following way:-

> *"Control means influence, not direct power; advice not command; criticism not obstruction; scrutiny not initiation; publicity not secrecy."*[31]

For the sake of completeness the regulations moved for disallowance are listed below:-

1. *Rottnest Island Amendment Regulations 1990*

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30 Eighth Report Tabled April 1992

31 Bernard Crick "Reform of Parliament"

The regulations unduly trespassed on established rights, freedoms and liberties by purporting to remove parliamentary scrutiny.

Disallowed May 28, 1991.

2. *Emergency Provisions (Ammonia Unloading) Regulations 1991*

Members were of the opinion that the regulations:-

(a) unduly trespassed on established rights, freedoms and liberties

(b) contained matter which ought properly to be dealt with by an Act of Parliament

(c) unduly made rights dependent on administrative, and not judicial decisions

Disallowed October 16, 1991

3. *Conservation and Land Management (Miscellaneous Fees) Regulations*

4. *Forest Amendment Regulations*

The regulations unduly trespassed on established rights, freedoms and liberties by purporting to remove parliamentary scrutiny.

Disallowed October 22, 1991.

5. *Mines Regulation Amendment Regulations (No.2)*

The regulations unduly trespassed on established rights, freedoms and liberties by purporting to remove parliamentary scrutiny.

Disallowed October 22, 1991.

6. *WA Meat Industry Authority Amendment Regulations*

The regulations unduly trespassed on established rights, freedoms and liberties by inclusion of excessive inspectorial powers.

Disallowed October 22, 1991.

7. *Justices Act (Court of Petty Sessions Fees) Amendment Regulations*

8. *Justices (INREP) Amendment (No.3) Regulations*

9. *Local Court Amendment Rules (No.2)*

The regulations were *ultra vires* to the extent that an unauthorised levy for the Courts Modernisation Fund which constituted a tax was included in fees for provision of Court services.

Motions of disallowance were withdrawn on receipt of an undertaking from the Attorney-General to dismantle the Fund.

10. *Transfer of Land Amendment Regulations*

11. *Strata Titles (General) Amendment Regulations*

12. *Registration of Deeds Amendment Regulations*

13. *Land Amendment Regulations*

The regulations are *ultra vires* to the extent that they purport to include in fees a levy to fund the Register 2000 computerisation project.

Motion for disallowance not yet dealt with.

14. *Navigable Waters Amendment Regulations (No.4)*

The regulations unduly trespass an established rights, freedoms and liberties by requiring the display of a personal buoy by persons snorkelling from the shore with a penalty of $500 for non-compliance.

Motion for disallowance not yet dealt with.

15. *Commercial Tribunal Amendment Regulations*

The regulations unduly trespass on established rights, freedoms and liberties by imposing an unreasonable financial burden in the form of fees for provision of copies of evidence and thereby potentially denying access to the courts.

Motion for disallowance not yet dealt with.

Report of the Third Conference of Australian Delegated Legislation Committees

Background

At the Second Conference of Australian Delegated Legislation Committees held in Canberra in April 1989, all delegates acknowledged the benefit of the holding of such conferences and accepted the offer of the Western Australian Joint Standing Committee on Delegated Legislation to host the Third Conference in Perth in 1991.

The Conference was scheduled for the recess week of May 21-23 and Committees from around Australia and the Pacific were invited to attend. A notice was also placed in the journal of the Commonwealth Parliamentary Association resulting in enquiries from the Canadian Standing Joint Committee for the Scrutiny of Regulations. Unfortunately this delegation had to withdraw at the last moment.

In a departure from previous Conferences, and recognising the inter-relationship of government departments and Parliamentary Counsel with, and the interest of the legal and academic community in, the work of the Committees, it was also decided to invite observers from those sections of the community. The response was overwhelming and observers from government departments, Parliamentary Counsel, the Law Reform Commission and the Deputy President of the Administrative Appeals Tribunal in Perth and Parliamentary Counsel from the ACT, Canberra, Queensland and New South Wales, attended. The legal profession was represented by the Executive Director of the Law Society and members of two leading legal firms in Perth, and academia by the Deans of Law of the University of Western Australia and Murdoch University and members of the Administrative Review Council in Canberra. It was unanimously agreed that observers should be accorded full speaking rights.

In the weeks leading up to the Conference, numbers of likely delegates reached a total of 80 but in the inevitable unpredictability of political life, 11 Parliaments were ultimately represented by 51 delegates. An unexpected General Election in New South Wales resulted in the withdrawal of the members from that Parliament but they were ably represented by the staff of their Committee. Having been the newcomer on the scene at the previous Conference in Canberra, the Western Australian Committee was pleased to welcome the newly formed Standing Committee for the Scrutiny of Bills and Subordinate Legislation from the ACT. It is pleasing to note the continued growth and recognition of the important function performed by scrutiny and review committees.

A number of innovations were introduced into the agenda of this Conference.

The Committee was honoured to secure as keynote speaker, the Chief Justice of Western Australia, the Honourable David Malcolm, whose thought-provoking and frank address set the tone for the Conference.

In a further departure from the format of the previous Conferences, the Committee decided to incorporate informal workshops in the program to enable coverage of a wider range of topics and encourage a greater interchange of ideas. Though treated with some initial apprehension, the workshops stimulated much productive debate and it was subsequently agreed that the trial had been a success.

Recognising the unique opportunity for members of Parliament and departmental officials to discuss areas of mutual interest with Parliamentary drafters, one of the sessions was taken up by a panel of the delegates from the various Parliamentary Counsel offices around the country. Again the innovation proved popular and produced some lively, if at times heated, debate, and a greater awareness of the function performed by both parties in the scrutiny equation.

CONFERENCE PROCEEDINGS

The Opening

The Speaker of the Legislative Assembly, the Honourable Mike Barnett, opened the Conference and welcomed delegates. In his opening remarks, the Speaker applauded the growth of Parliament-to-Parliament contact based on mutual interest and the advances made in keeping the law-making aspects of Government under continual scrutiny irrespective of party politics.

The Keynote Address

The Chief Justice's paper was entitled *"The Limitations, if any, on the Powers of Parliament to Delegate the Power to Legislate"* and encompassed the doctrine of the supremacy of Parliament and the application of that doctrine in the context of the powers which could be delegated to the Executive. The ensuing paper and its discussion of the relationship and possible imbalance between the Executive and the Legislature set the theme for the Conference and has provided a current reference work for those involved with the scrutiny of delegated legislation. Members were particularly appreciative of the opportunity to address questions to the Chief Justice after the presentation of his paper and informally during luncheon.

Report on the Resolutions of the Second Conference

At the Second Conference, delegates were asked to report to the next Conference on three major issues. Those issues were :

(i) *the proliferation of subsidiary legislation;*
(ii) *the extent to which enabling provisions in Bills have been monitored and improved;*
(iii) *the progress of staged repeal of delegated legislation, if any, and any problems associated with that process.*

During the course of this session, chaired by Senator Colston of the Regulations and Ordinances Committee, all Committees presented reports outlining the situation within their particular jurisdictions.

Most expressed concern at the proliferation of subsidiary legislation and at the diversity of nomenclature, chosen sometimes in order to confuse and, in some instances, to frustrate the function of Parliament by attempting to remove or diminish the opportunity for scrutiny. Most also reported a good record of co-operation and understanding between themselves and the departments whose legislation had been reviewed, and at times, rejected.

The issue of scrutiny of Bills, however, produced a rather more varied response as currently the Senate Scrutiny of Bills Committee is the only Committee with the sole function of scrutinising the provisions of Bills. Some Committees discharged this function as part of their wider review of delegated legislation; others have subcommittees for this purpose. It was clear that all Committees believed that the wording of the initial authority to delegate was often the source of future problems and as such deserved greater attention by Parliament than it now received.

With regard to the staged review and repeal of regulations, the process had begun in Victoria, New South Wales, Queensland and South Australia while in New Zealand the program had progressed to the review and repeal of the parent legislation.

Other Speakers

The Conference was addressed by speakers from most of the representative Committees either in plenary session or in workshops. All of the sessions produced lively debate and some differences of opinion which were usually continued informally after the completion of the session. Again departing from previous practice, and with the prior agreement of delegates, the chair of each Committee was

elected as chairperson for a formal session or workshop. A full transcript of all the proceedings is available from the Legislative Council Committee Office.

Mr Greg Hogg - New South Wales

A General Election in New South Wales caused the withdrawal from the Conference of the members of the New South Wales Regulation Review Committee which was represented by its staff. Mr Greg Hogg, legal officer for the Committee, presented the first paper entitled *"Regulatory Review: A Catalyst for Broader Legislative Reform"*.

The paper contained a more detailed response to the resolutions of the previous conference and focussed on the *Subordinate Legislation Act 1989*. This Act provided for the staged repeal of all regulations over a 5-year period and the requirement that a *Regulatory Impact Statement* containing a cost benefit analysis and consultation with the community should accompany all principal statutory rules. The paper outlined some of the problems encountered by the Committee during the institution of the ensuing changes and indicated the likely cost implications for departments. Mr Hogg concluded with the exhortation to all committees to consider the general procedures for making regulations with the aim of improving public consultation and cost benefit implications and to ensure consistency in the quality of all legislation.

Senator Pat Giles

Speaking on *"Quasi-Legislation and Departmental Decision-Making"*, Senator Giles highlighted the difficulty in finding a common and meaningful definition of the term *'quasi-legislation'*, and in identifying the characteristics of instruments which should fall within the definition. It was noted that what had previously been a move towards the use of regulations rather than Acts for the detail of the legislation was now a move towards the use of other instruments for such detail rather than regulations. From this growing practice had emerged the concern that governments may prefer quasi-legislation in order to circumvent the checks and balances inherent in Parliamentary procedure for the scrutiny of delegated legislation. Senator Giles illustrated some of the problems faced, and the action taken by the Regulations and Ordinances Committee in order to thwart this circumvention by the Executive and concluded by reporting the existence of extensive safeguards in the Commonwealth through the vigilance of that Committee together with that of the Scrutiny of Bills Committee, the Administrative Appeals Tribunal and the Ombudsman.

Mr Ken Jasper - Victoria

Speaking to his paper entitled *"The Changing Nature of Subordinate Legislation and the Ramifications for Scrutiny Committees: A Victorian Perspective"*, Mr Jasper continued his update of the Victorian Subordinate Legislation Subcommittee's activities and the effect on its function of the increased powers vested in it under the *Subordinate Legislation (Review and Revocation) Act 1985*. He highlighted the concern of the Committee at the increasing use of subsidiary legislation by governments and the need for the powers of scrutiny committees to be enhanced accordingly especially in the area of disallowance where the work of committees could be severely thwarted by the operation of Standing Orders.

Having initiated the requirement for *Regulatory Impact Statements* now being adopted in New South Wales and under consideration in other States and Territories, and with several years' practical experience of the operation of this scheme, the Victorian Committee was in a position to assess the merits of the statements provided and to report the success of the scheme as a whole.

Mr Jasper concluded by drawing attention to the inherent dangers in the consideration by Committees of policy matters and the limitations on the effectiveness of any Committee caused by inflexible Standing Orders or the inability to enforce appropriate action by Ministers.

Hon David Caygill - New Zealand

The Honourable David Caygill addressed the Conference on the subject of *"Fees and Taxes"*, a topic dealt with in a recent report by the New Zealand Regulations Review Committee. He focussed on the difficult distinction between a fee and a tax and the reason for the importance of that distinction. He indicated a belief that the historical reason for the distinction - the need to curb the autocratic tendencies of the Crown - had become diminished by the common modern perception that Parliament was indistinguishable from the Executive. The need for review committees to resurrect the distinction in order to reinforce the weakened supremacy of Parliament had prompted the New Zealand Regulations Review Committee to recommend that the Executive should identify the estimated revenue expected to be recovered from fees and whether that revenue was likely to exceed cost recovery. This recommendation had not been adopted and in hindsight seemed to be problematical; on the one hand it may not be extensive enough to ensure the protection of the rights and liberties of the individual; on the other hand it may stray too far into possible policy areas. The discussion led to the extent of the leverage provided by disallowance motions and the implications for the effectiveness of committees, and the relative success or otherwise of those motions in bicameral legislatures as opposed to unicameral legislatures.

Hon Tom Helm - Western Australia

It is interesting to note that the inherent theme of this Conference - the growing imbalance between the powers of the Executive and those of the Legislature - had arisen quite by accident. Each Committee had suggested a theme for a paper independently of any other, but the sum total of those topics indicated an overwhelming anxiety by all delegates that such an imbalance existed. It was also purely accidental that the topic chosen by the Chairman of the Western Australian Committee summed up those inherent concerns in its title -*"The Executive vs the Legislature : Restoring the Balance"*.

Evidence of the growing imbalance was illustrated by reference to specific regulations dealt with by the Western Australian Committee, which was no longer the newcomer in the field of scrutiny of delegated legislation. The Honourable Tom Helm identified certain activities and procedures adopted by departments which were felt by the Committee to be an attempt by the Executive to detract from the supremacy of the Parliament and to move towards government by regulation with little accountability. He commented on the need for all members of Parliament to be increasingly vigilant in scrutinising legislation, both primary and subsidiary, and concluded by suggesting that the maxims of *education, assistance and persistence* could usefully be included in the *modus operandi* of scrutiny committees.

Formal Close

The Conference was closed by the President of the Legislative Council, the Honourable Clive Griffiths, who echoed the Speaker's support for increased Parliament-to-Parliament contact in a move towards mutually accepted standards among Parliaments and committees. The President highlighted the important educative and deterrent effect of committees on government departments and other agencies which devise or administer delegated legislation, and the hope that the end result would be a higher standard of compliance with the intention of the parent legislation and the acceptance of limits to the use of delegated legislation.

Conclusion

It is not possible to give special mention to all the significant comments or statements made during the deliberations of the Conference. Each session and workshop produced debate and interchange of ideas and the valuable contribution from the many observers of the Conference was an integral part of the overall benefit of this type of Parliament-to Parliament contact. The transcript of proceedings is therefore as important a part of that benefit and will undoubtedly supply a source of valuable reference material for the future.

Two 'negatives', if that is the correct terminology, emerged from the proceedings. Both are worthy of note. The first was a repetition of the observation at the Second Conference held in Canberra, that the Press were conspicuous by their obvious absence. This is a problem which makes the task of all scrutiny committees more difficult, if only in that the importance of the work of the Committees is underestimated by the public and Parliament alike. For the initiated, it is perhaps a further indication that the powers of Committees need to be, at worst, not eroded, and at best, strengthened.

The second comment which related to the 'productivity' of the Conference, may perhaps be interpreted as a reminder that no Committee can afford to "rest on its laurels" and that the absence of a public profile as highlighted by the lack of publicity of Conferences such as these is all the more reason for Committees to be dynamic and unintimidated in their approach to the scrutiny of subsidiary legislation.

To conclude with a purely Western Australian view, but hopefully one which is shared, this Committee looks forward to the next Conference in Victoria and to continued contact and communication in the interim.

CONFERENCE RESOLUTIONS

(1) That Delegated Legislation Committees should be allowed to scrutinise regulations during periods of prorogation of Parliament.

(2) That the following topic be the subject of a workshop at the Delegated Legislation Conference to be held two years from now -

> *That Delegated Legislation Committees be allowed to suspend regulations during any time when Parliament is not sitting.*

Workshop on the effect of prorogation on committees
Chaired by the Hon HJ Hiscutt

(3) While noting that there may be a rare, justifiable use of a *Henry VIII* clause where such use would be subject to tabling and disallowance, this conference believes that *Henry VIII* clauses have no legitimate general application in the legislative process.

Workshop on Henry VIII clauses
Chaired by Mr R Barber

(4) That there must be safeguards built into primary legislation to ensure that all subordinate instruments of a legislative nature should be subject to the scrutiny of Parliament and the option of disallowance and that in addition there be ample opportunity provided for the instrument to be available for public access and scrutiny.

Workshop entitled "A regulation by any other name"
Chaired by Mr Bob Wiese

(5) A future agenda item should include an analysis of the arguments for and against the power to amend delegated legislation, including papers on experiences of committees which have that power.

(6) That the next Delegated Legislation Conference consider and report on the issues raised by the forthcoming Administrative Review Council's report on rule-making.

(7) That the next conference be held in Victoria in 1993

(8) The participants in the workshop on *"The impact of delegated legislation on the community and the public profile of review committees"* resolved to present a final summary of what they had discussed rather than any formal resolutions.

(i) Regulations must be available because of their impact and volume. New technologies eg. computers should be used to make them available immediately. Community access to regulations must be protected and improved.

(ii) Delegated Legislation Committees play a very valuable role. They need to be adequately resourced to do this.

(iii) The community needs to be aware of what the Committees do. They need to know how to get access to the Committee. The Committee's role includes being a facilitator, the last arbiter between departments and community groups.

(iv) Publicity of the Committee as such is not desirable. It should "bubble along in obscurity". The bipartisan work is to be commended. Intervention in the area of "policy" must be avoided.

(vi) Greater community participation is required in framing/changing regulations. Regulatory Impact Statements appear to help this situation.

(vii) Community education about regulations is needed.

The impact of delegated legislation on the community and the public profile of review committees
Chaired by Dr Judy Edwards

PROGRAM

Tuesday May 21

am

9.15 **Registration and morning tea**

10.00 **Opening and welcome to delegates** by the Speaker of the Legislative Assembly, the Honourable Mike Barnett
Introduction of the Honourable David Malcolm, Chief Justice of Western Australia.

10.15 **Keynote Address by the Chief Justice:**
"The Limitations, if any, on the Powers of Parliament to Delegate the Power to Legislate."
Chairman: Hon Tom Helm, Chairman, Joint Standing Committee on Delegated Legislation, Western Australia.
Response to the Chief Justice
Open forum

pm *lunch*

1.45 **Report on Resolutions from the Second Conference**
Chairman: Senator Colston, Senate Standing Committee on Regulations and Ordinances.

2.45 ***"Regulatory Review: A Catalyst for Broader Legislative Reform."***
Mr. Greg Hogg, Legal Officer, Regulation Review Committee, NSW.
Chairman: Hon. H.J. Hiscutt, Subordinate Legislation Committee, Tasmania.

4.00 **Workshops**
The Effect of Prorogation on Committees
Opened and chaired by the Hon H.J. Hiscutt, Chairman, Subordinate Legislation Committee, Tasmania.
Henry VIII clauses
Opened and chaired by Mr R.D. Barber, Chairman, Committee of Subordinate Legislation, Queensland.

Wednesday May 22

am

9.15 **Reports and Resolutions** from Workshops
The Hon H.J. Hiscutt and Mr R.D. Barber

9.45 ***"Quasi-legislation and Departmental Decision-Making"***
Senator Giles, Chairperson, Senate Standing Committee on Regulations and Ordinances.
Chairman: Mr R.D. Barber, Chairman, Committee of Subordinate Legislation, Queensland.

11.00 **Workshops**
A Regulation by Any Other Name
Opened and chaired by Mr R. L. Wiese, Joint Standing Committee on Delegated Legislation, Western Australia.
The Executive and Parliamentary Scrutiny of Delegated Legislation
Opened and chaired by Senator Bronwyn Bishop, Deputy Chairman, Senate Standing Committee on Regulations and Ordinances.

12.00 **Parliamentary Counsel Panel and discussion**
Parliamentary Counsel from Western Australia, the Office of Legislative Drafting, Canberra,

Queensland, ACT and New South Wales.

pm *lunch*

2.00 **Reports and Resolutions** from Workshops
Mr R.L. Wiese and Senator Bronwyn Bishop

2.30 ***"The Changing Nature of Subordinate Legislation and the Ramifications for Scrutiny Committees : a Victorian Perspective."***
Mr K.S. Jasper, Chairman, Subordinate Legislation Subcommittee of the Legal and Constitutional Committee, Victoria.
Chairman: The Hon. J.C. Burdett, Chairman, Joint Committee on Subordinate Legislation, South Australia.

4.00 **Workshops**
Towards Greater Efficiency: Standardisation of Regulations and the Adoption of a Fee Unit System.
Opened and chaired by Ms Patricia Azarias, Project Officer, Regulations Review Committee, New South Wales
The Impact of Delegated Legislation on the Community and the Public Profile of Review Committees.
Opened and chaired by Dr. Judy Edwards, Joint Standing Committee on Delegated Legislation, Western Australia.

Thursday May 23

pm

9.15 **Reports and Resolutions** from Workshops
Ms Patricia Azarias and Dr Judy Edwards

9.45 ***" Fees and Taxes - a New Zealand Perspective"***
Hon David Caygill, Chairman, Regulations Review Committee, New Zealand.
Chairman: Mr Rick Setter, Chairman, Subordinate Legislation and Tabled Papers Committee, Northern Territory.

11.00 ***"The Executive vs. the Legislature : Restoring the Balance"***
Hon. Tom Helm, Chairman, Joint Standing Committee on Delegated Legislation, Western Australia.
Chair: Ms Carmel Maher, Chairperson, Standing Committee for the Scrutiny of Bills and Subordinate Legislation, ACT.

pm *lunch*

2.00 **Open Forum and Final Comments**
Chairman: Hon. Reg Davies, Joint Standing Committee on Delegated Legislation, Western Australia

3.45 **Conference Resolutions**
Formal Close by the President of the Legislative Council, the Honourable Clive Griffiths.
Chairman: Hon. Tom Helm, Chairman, Joint Standing Committee on Delegated Legislation, Western Australia

7.00 End of Conference Dinner

DELEGATES

***WESTERN AUSTRALIA**: JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION*

members

Hon Tom Helm *(Chairman)*
Hon Reg Davies
Hon Garry Kelly
Hon Margaret McAleer
Dr Judy Edwards
Mr. Phil Smith
Mr Bob Wiese

staff

Mrs Jane Burn
Ms Jan Paniperis

***AUSTRALIAN CAPITAL TERRITORY**: STANDING COMMITTEE ON THE SCRUTINY OF BILLS AND SUBORDINATE LEGISLATION*

members

Ms Carmel Maher *(Presiding Member)*
Mr Bill Stefaniak

staff

Mr. Tom Duncan

***KIRIBATI**: SUBORDINATE LEGISLATION COMMITTEE*

Mr Tetabo Nakara
Mr Nanda Wijesekera

***NEW SOUTH WALES:** REGULATION REVIEW COMMITTEE*

staff

Mr. Greg Hogg
Ms. Patricia Azarias
Ms. Helen Minnican

***NEW ZEALAND:** REGULATIONS REVIEW COMMITTEE*

members

Hon David Caygill *(Chairman)*
Mr Murray McCully

***NORTHERN TERRITORY:** SUBORDINATE LEGISLATION AND TABLED PAPERS COMMITTEE*

member

Mr. Rick Setter *(Chairman)*

The Speaker of the Legislative Assembly

The Hon Nicholas Dondas

staff

Ms Helen Allmich

***QUEENSLAND**: COMMITTEE OF SUBORDINATE LEGISLATION*

members

Mr. Ray Barber *(Chairman)*
Mr. Gary Fenlon
Mr. Tony Fitzgerald

Mr. Ray Hollis
Mr. Len Stephan
Mr. Jon Sullivan
staff
Ms Madeleine Cook
Ms. Sally Munro

SENATE: *STANDING COMMITTEE ON REGULATIONS AND ORDINANCES*
members
Senator Patricia Giles *(Chairman)*
Senator Bronwyn Bishop
Senator Mal Colston
Senator Kay Patterson
staff
Mr. David Creed
Ms. Janice Paull
Professor Douglas Whalan

SENATE: *STANDING COMMITTEE ON SCRUTINY OF BILLS*
members
Senator Barney Cooney *(Chairman)*
staff
Mr Stephen Argument

SOUTH AUSTRALIA: *JOINT COMMITTEE ON SUBORDINATE LEGISLATION*
members
Hon. John Burdett *(Chairman)*
Mr. John Meier
staff
Mrs. Jan Davis

TASMANIA: *SUBORDINATE LEGISLATION COMMITTEE*
members
Hon. Hugh Hiscutt *(Chairman)*
staff
Miss Wendy Peddle

VICTORIA: *SUBORDINATE LEGISLATION SUBCOMMITTEE OF THE LEGAL AND CONSTITUTIONAL COMMITTEE*
members
Mr Ken Jasper *(Chairman)*
Mr David Lea
Hon. Richard Long MLC
Mr Victor Perton
Mr Hayden Shell
staff
Mr. Marcus Bromley
Ms Zara Officer

OBSERVERS

WA GOVERNMENT, DEPARTMENTAL OFFICERS AND ACADEMIC REPRESENTATIVES

Police Department	Senior Sergeant Chris Mabbott
Dept of Agriculture	Mr John Patterson
Dept of Local Government	Mr Darrel Schorer and Mr Tim Fowler
Attorney-General's Office	Dr. Jim Thomson
Law Reform Commission	Dr Peter Handford
Dept of State Services	Mr John Strijk and Mr Garry Duffield
Dept of Community Services	Mr Graham Wimbridge

PARLIAMENTARY COUNSEL: WA

Mr Greg Calcutt
Mr Jeremy Talbot
Ms Lee Harvey
Mr Doug Brown
Mr Tim Binning
Mr David Taylor
Mrs Valerie Frazer
Ms Jenny Bowman
Mr Tony Dowling

UNIVERSITY OF WESTERN AUSTRALIA

Professor Stan Hotop

MURDOCH UNIVERSITY

Professor Ralph Simmonds
Ms Gaye Landsell

LAW SOCIETY OF WESTERN AUSTRALIA

Mr. Peter Fitzpatrick (Executive Director)

ADMINISTRATIVE APPEALS TRIBUNAL

Deputy President Peter Johnston

AND

Hon Bob Hetherington	former Chairman, WA Joint Standing Committee on Delegated Legislation
Mr Ian Oi	Blake, Dawson, Waldron
Dr.Steven Churches	Jackson McDonald

INTERSTATE OBSERVERS

ACT GOVERNMENT LAW OFFICE

Mr David Hunt - Legislative Counsel

FEDERAL OFFICE OF LEGISLATIVE DRAFTING

Ms Jean Baker - Principal Legislative Counsel

PARLIAMENTARY COUNSEL: QUEENSLAND

Mr Arthur Keates
Mr Steve Berg
Ms Susan Larsen

PARLIAMENTARY COUNSEL: NEW SOUTH WALES

Mr Michael Orpwood

ADMINISTRATIVE REVIEW COUNCIL

Mr Stephen Bourke
Mr Bert Mowbray

PAPERS PRESENTED BY MEMBERS OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

A REGULATION BY ANY OTHER NAME

Presented by Mr Bob Wiese MLA

Looking back through the papers and resolutions from the last Conference in 1989, which unfortunately I did not attend, and the thrust of the papers and workshops at this Conference, I am struck by the thought that the trend towards proliferation of delegated legislation is not a new thing. I am also struck by the thought that the variety of terminology we are faced with is perhaps not a surprise either. Members of Parliament might begin to realise the extent of subsidiary legislation if the responsible Ministers required trolleys to wheel in all the papers for tabling!

I think that what is perhaps unfortunate is that most people believe regulations do not apply to them and that many of them relate to the technical detail of listed poisons or prohibited flora and fauna or the intricacies of Health and Safety control. I think that what is equally unfortunate is that many members of this Parliament have no idea of the content and impact of some of the regulations and the extent of administrative discretion which they exercise.

Parliament has chosen to delegate its powers in the past with a broad brush. Wholesale delegation that leaves departmental officers with few, if any, guidelines as to the limits of the delegation undermines parliamentary government and makes assessment by committees set up to review the content of each instrument more difficult. In addition, it is a matter for real concern that government departments will knowingly seek to reduce a parliamentary committee's jurisdiction by adopting forms of statutory instrument that are not caught by the definition "regulation" in the empowering Act. Delegated legislation should not be a game to be played by bureaucrats and Ministers with the object of how best to avoid parliamentary review procedures.

The obvious solution, namely to make all statutory instruments subject to review and disallowance or to make all instruments subject to affirmative action, would, however, make a mockery of the distinctions that need to be drawn and maintained between regulations, rules, orders, bylaws, notices, instructions, determinations, codes of practice and the like. Not all of those instruments were intended to enact law under authority derived from Parliament. Some were supposed to be confined to administrative matters and this is the crux of the whole problem. If the distinctions are to be blurred, Parliament must be an informed party to the changes and must have the opportunity to nullify any decisions which appear to go beyond the spirit of the parent legislation. If the effect of an instrument is the same whether it be called a regulation or a notice, then it is certainly a matter of *'a regulation by any other name would impinge as much'* and the supposed test of *"administrative" or "legislative"* has become completely irrelevant. The only difference is that in one case Parliament has a right of veto and in the other, none.

It is the blurring of function and the apparent ease with which this blurring takes place that causes the problems. The test of *'legislative effect'* seems to be losing its edge.
Where I begin to feel even more uncomfortable is where there may be a penalty for not obtaining a licence, the fee for which is effected by notice. If my interpretation of *'legislative effect'* is correct, then logically, there is no legislative means by which a notice, which is an administrative instrument, may be enforced. We have not yet come across a notice which attempts to set a penalty. I would be grateful to hear your experiences in this area.

The route of delegation was, I thought, fairly straightforward. Enabling clauses were enacted to allow the administrative framework for the implementation of the 'nuts and bolts' technical detail of the

legislation to be spelt out or amended without too much reference to Parliament but with the safeguard that all such instruments would be tabled so that scrutiny and disallowance was theoretically possible even if it did not always take place. However, there appears to be a growing practice amongst departments to institute a tertiary layer of legislation whereby certain administrative instructions may now be effected by instruments such as notices or determinations which are able to bypass completely the parliamentary process. I am not sure whether departments themselves have actually established any criteria for deciding what might be appropriate for tabling, scrutiny and possible disallowance by Parliament and what did not require that treatment. Perhaps it is merely a case of what is administratively convenient? I would like to hear that that was not the case but I may take some convincing.
Two recent examples which have come before my Committee immediately spring to mind.

The ***Rottnest Island Amendment Regulations*** have caused us some considerable discomfort. These regulations, which were cited in our Report on the resolutions from the last Conference, attempted to change the way in which fees were imposed from regulations to gazetted notices. The power to charge fees by regulation was clearly given in the parent Act and regulations had laid down the actual fees operating. The amending regulations to which I refer attempted to alter the way in which those fees would in future be imposed from regulation to gazetted notice. The Authority's reasoning for this departure from normal practice was certainly spurred on by the statutory duty to be self-funding, but the administrative inconvenience of using a regulation which involved tabling and was subject to disallowance was paramount. These regulations have become the first for which we have recommended disallowance. The potential precedent which permitting this practice to go unchallenged was one which the Committee was not prepared to condone.

The second set of regulations which has raised questions which we are yet to address fully are the ***Pearling (General) Regulations 1991.*** These regulations presented a different set of problems. They were not changing an existing process with relation to fees but establishing a new one. The annual fees for several different kinds of licence are authorised under section 27 of the *Pearling Act*, some by regulation and some by gazetted notice. Section 27(7) prescribes that some of the fees gazetted by notice are paid into the Consolidated Revenue Fund and some into the Fisheries Research and Development Fund; the prescribed fees are similarly dispersed. The Committee has yet to untangle this one!!

These are just 2 examples that have been discussed in depth by the Committee. No doubt others will arise. What is even more disturbing is that there is a whole array of notices and the like that have been in place for some time that may well give rise to the same concerns and with regard to which we need to undertake an independent study. I believe there needs to be an independent study to ascertain the extent of the usage of forms of subordinate legislation which are not subject to parliamentary scrutiny and the effect those kinds of instrument actually have.

Having listened to the reports of other Committees on this topic, I am convinced that we are only at the tip of the iceberg and need to look in greater depth at the nature of the instruments in the *Government Gazette.* Our Committee's Terms of Reference enable us to report to Parliament on any matter relating to a regulation which should, in the Committee's opinion, be drawn to Parliament's attention. If there is a trend away from Parliamentary scrutiny then Parliament should know.

THE IMPACT OF DELEGATED LEGISLATION ON THE COMMUNITY AND THE PUBLIC PROFILE OF REVIEW COMMITTEES

Presented by Dr Judy Edwards MLA

The role of the media in public information and a decline in the interest in parliamentary debate was noted by the Governor-General at the Second Conference

> *"...parliamentary committees, of which yours are such shining examples, to some extent are undertaking those public investigative, reporting and 'watchdog' roles about government, in which the media was formerly much more active."*

This is perhaps not the case in Western Australia at present but that in itself is a good illustration of the point I am making. The scope and effect of a good few of the regulations my Committee has looked at are far more intrusive in the life of the ordinary individual than the events which are currently front page news - most days!!! The Royal Commission has revived public interest in government but the executive arm rarely rates a mention.

The watchdog role of the Committee in WA is perhaps becoming more obvious as far as government departments are concerned. We are certainly asking questions that have not been asked before and raising issues that have not been raised before. Often things have always been done in a certain way. The reasons for one method rather than another are long buried and whether those methods are still applicable today is rarely considered.

As far as the general public and many of my fellow members of Parliament are concerned we are very much the unsung heroes. Perhaps this is partly as a result of being fairly new on the scene. We do not have the history of the Regulations and Ordinances Committee and the changes we have made - so far- are not front page news. We would like to see that change but not because what we have done is sensational or earth-shattering - there seems to be an increasing view that those are the only news-worthy items - but because it is important information and the media is the prime source of information for the community. We need to raise our profile.

We have instigated amendments to regulations after consultation with departments and have also been influential in changing the way in which departments deal with regulations. For example, the Police Department has now adopted a policy of 'bulk gazettal' of amending regulations following criticism by the Committee on the number of times the same regulations were being changed. With the recent increase in charges for gazettal which we know are passed to on the consumer, this could have a significant impact on the level of a fee.

However, whether the general public is aware that we or any of us 'go into bat' on their behalf is another matter. I suspect the answer would be an unqualified 'no'.

If the media are no longer interested in this field of legislation, then it is time that the impact of delegated legislation on the individual was given some publicity.

The imbalance of primary and secondary legislation was highlighted in our recent report-

> *"In the eighteen months from the end of May 1989 to the end of August 1990 the Committee looked at 399 regulations - this excludes bylaws and rules - but only 67 Acts received the Royal Assent in the same period.*"

We need not only to make the community aware of the Committee's existence and draw attention to the problems that we are beginning to identify, but also to make ourselves easily accessible to the

public to find out what the individual wants/expects/dislikes about the regulatory process in general or to deal with any specific problems. We as a Committee may be no more accessible to the ordinary individual than information about the regulations, the access to which we criticise so regularly.

We have already identified a number of areas for improvement in addition to the more legalistic basis of the Committee's Terms of Reference.

(i) the poor accessibility of information for the individual consumer

The Committee experienced some difficulty in obtaining a copy of the principal *Weights and Measures Regulations* whilst investigating some amendments put forward by the Ministry of Consumer Affairs. Our Advisory/Research Officer tried State Print and was told they were out of print but we should be able to obtain a copy from the Battye Library of WA History! The Ministry eventually supplied a copy which they had obtained from Parliamentary Counsel as their own was so ancient as to be of dubious accuracy.

This state of affairs is unacceptable. The consumer must be able to rely on the 'parent' department for information.

(ii) the lack of explanatory material other than 'media releases' made available by departments.

It was a long process to set into train a system whereby the Committee is provided automatically with explanatory memoranda from departments when regulations are gazetted. Many of the memoranda we receive make further enquiries unnecessary and would probably be of tremendous help to the general public as problems are frequently caused by a basic lack of misunderstanding. There seems little point in shrouding the content of regulations in mystery.

Recently we dealt with regulations from the Rottnest Island Authority who assured us that the existence of an admission fee to the Island was well known to the travelling public. We were unable to find anyone amongst a fairly wide sample who knew that part of their ferry or plane ticket included a sum for admission to the Island. It would be fair comment that these regulations are less complex than many others we have dealt with.

(iii) where is the best place to publish regulations ?

The jokes about the readership of the *Government Gazette* are too old to repeat. Nevertheless, provided it is generally known that amendments to regulations, bylaws, notices etc will be published in the *Gazette* and there is some notification in the daily newspapers by departments in the interests of providing greater information to the public, an entry in the *Gazette* may be the best way to ensure adequate publication. Coupled with more explanatory material from departments in the form of leaflets, brochures etc the information system may start to take some shape and clarity.

I would be interested to hear how the system operates in New Zealand following the privatisation of your State Printing Services.

(iv) an 'idiot's' guide of how to read legislation.

One of the problems with regulations is that not only do people not read them but many would not be able to even with a passing knowledge of Administrative law!!!

On the intelligibility testing program, Right Writer, suggested in the Victorian Law Reform Commission Report *"Access to the Law: the Structure and Format of Legislation"* many pieces of delegated legislation our Committee has dealt with would require 10-14 years of university education. As the Commissioners point out it is not just that the language is difficult to understand and I quote from the report:

> *"Like other legal documents, Acts and Regulations create enforceable rights and duties. For that reason, they must be as accurate or 'precise' as possible. However, precision is not the only goal of legislative drafting. Legislation*

must also be intelligible."

Causes for 'unintelligibility' may be:

longwindedness, complexity, artificial concepts, too much reliance on words.

All of those criticisms apply frequently to subsidiary legislation.

We have queried the costs of publication. The 'costs' of unintelligibility are not usually considered and yet they could be far greater.

> *"The unintelligibility of many of the laws now in force is not just a theoretical problem. It gives rise to substantial social and economic costs which the community cannot afford to bear.*
> *The social costs lie in the risk of laws being enacted without properly being understood; of people committing offences unknowingly; and of people being unaware of benefits and opportunities which are legally available to them. Participation by people in the life of the community and in decision making which affects their lives is substantially diminished."*

We have also experienced regulations where the only way to establish the legality of a regulation making power was to read the regulations then the parent act then the *Interpretation Act.* Anyone who gets that far deserves a medal. If ever an Act was badly named it is the *Interpretation Act*!

We have made a start in identifying some of the areas where we need to take on a more consultative role with the general public and are looking at ways to achieve that. Raising the Committee's profile is one way and we would be interested to hear of other Committees' experiences in this field.

THE EXECUTIVE VS. THE LEGISLATURE: RESTORING THE BALANCE

Paper presented by the Hon. Tom Helm MLC (Chairman)

First of all let me say how much we have enjoyed the opportunity of meeting with you all this week. It is good to see so many people at a conference of this kind. It is also heartening to see so many familiar faces from the departments. It makes me wonder if we have aptly titled this session as from our experience in Perth, it is often not a question of 'them and us' but rather a joint effort in the interests of fairness. However we also know that fairness is not always the ultimate result of, to coin a phrase, executive action and that there appears to us to be a growing tendency for the scales to tilt more one way than the other.

Looking back over the agenda for this conference, perhaps a few of my fellow delegates may have noted a recurring theme and may have wondered why we chose not to give the Conference a subtitle. I trust you would not be too disappointed if I were to tell you that the theme which is finally embodied in the title of this paper evolved as the topics of papers for plenary sessions and workshops filtered through. Independent of each other, each Committee has focussed on the problem, albeit from different aspects, that is of greatest concern.

Plainly there is growing concern that the problem of imbalance is weighing fairly heavily in favour of the executive at the moment. Plainly there is concern, grave concern that subsidiary legislation is quietly taking over. I don't believe that the interest in this conference stems only from the attraction of Perth's weather or the forthcoming Golden Oldies Tournament!!!

With your indulgence I would like to quote a passage from the Honourable Bob Hetherington's speech at the Second Conference held in Canberra in April 1989:

> *"The appointment of any committee to scrutinize executive acts must be seen as a response to a collective sense of the dangers inherent in executive power. The response can also be seen by the cynically minded as executive sleight of hand; create the watchdog but, while it is still a pup, make sure it knows who its master really is."*

I can honestly say that from the Committee's perspective this has not been our experience in Western Australia. The cynics would have been wrong.

The Committee's consistently heavy workload does not stem from a lack of resources, shortage of explanatory memoranda or limited terms of reference but rather from the increasing use and changing nature of subsidiary legislation. I am pleased to say that the 'administrative' issues identified as problems in the Committee's effective operation by our former Chairman when the Committee was the "newcomer on the scene", have been addressed.

I can say also say with a degree of confidence that the Joint Standing Committee in Western Australia is no longer "the newcomer on the scene".
We are a "reality" and have been fairly well initiated in the past 2 years. We have acquired some experience and a versatile array of expertise and have been around now long enough to recognise that things are changing in the field of delegated legislation and that the imbalance in the impact of the executive and the legislature on the community generally is becoming more marked.

It has been said that a consumer to a politician is a complainant. In other words, for us, the rule of the squeaky wheel prevails. As a Committee we aim to disprove that theory and try to identify areas where

the executive can unduly impinge on people's lives before the complaints are necessary. We aim to change things at the source if at all possible. I say 'can impinge' as this paper is not intended as wholesale condemnation of the executive. We have a good working relationship with the "executive".

We are frequently reassured that the executive is there to help and advise the consumer and has given adequate thought to the impact of their actions on the individual. I am sure that if the general public received the benefit of the advice and explanatory material to which members of this Committee have access, the information would not only lead to better understanding by the community but might also, to a certain extent do the Committee out of a job. However we have also been assured that certain rather dubious - in our view - powers are either -

A: never used in the manner in which they could be used
or **B**: affect so few people as to be irrelevant
or **C**: will be changed at the next rewrite of the regulations
or **D**: that an amendment of an admitted error is not really necessary.

Needless to say, on those occasions, the watchdog might bite.

Let me also say that there is a growing belief amongst members of the Western Australian Committee that we as politicians are not as vigilant as we might be. After all, we have the opportunity to scrutinise enabling clauses of the parent legislation. I suspect that many of us believe that function of legislation to be unimportant. Subsidiary legislation is primarily designed to embody technical and administrative detail. What it actually contains in many instances is part of the problem and yet enabling clauses are rarely the provisions in Bills which attract much, if any debate. The Honourable David Malcolm in his keynote address provided some thought-provoking observations on that topic.

Disallowance represents the ultimate 'bite' of watchdog committees. Here in Perth, we have not yet been faced with the situation where disallowance has been the only course open. Some major changes to subsidiary legislation have been achieved through direct negotiation with departments.

The Committee was instrumental in the amendment to the *Child Welfare (Detention Centres) Regulations* which now places communications from lawyers and members of parliament on the same privileged footing as those from the Ombudsman and visiting justices.

There is now a provision under the *Casino Control (Burswood Island) (Licensing of Employees) Regulations* for fingerprints, required from each applicant for a licence as a Casino Key Operator, to be returned by the Commissioner of Police to the Chief Casino Officer and which imposes an obligation on the Chief Casino Officer to destroy those fingerprints as soon as practicable.

Fees increased in error have been reduced to the appropriate level at the Committee's insistence. One amendment to rectify a retrospective provision in a regulation remains despite the Committee's insistence. This has not gone unnoticed by members!!

My emphasis on the behind the scenes achievements should not be seen as reluctance to use the power of disallowance if necessary, but rather that it is a last resort where the interests of fairness are unable to be served in any other way. Mastery was not an issue in the negotiations mentioned earlier. Objectivity merely prevailed on both sides.

The Committee is very conscious of its 'watchdog' role and that it is not only the only body empowered to safeguard the interests of the individual but is probably the only Committee that reads the Government Gazette from cover to cover!! That probably also accounts for the unwarranted

reputation for "weirdness' - I think is the term used in the past - of members of this Committee and why members draw lots not to get sent to the 'salt mines' of the Delegated Legislation Committee!! I think I can say almost unreservedly that members so transcripted have been pleasantly surprised after attending a few meetings and become very much aware of the importance of the function the Committee fulfills.

To the initiated, the pages of the Government Gazette contain evidence of a growing encroachment not only on the 'rights, liberties and freedoms of the individual' - a term of reference engraved on the hearts of most of us, but also on the ability of Parliament to pull in the reins and literally say "Whoa".

Examples of where this seems to be evident have been discussed during the course of the past few days. I would endorse the concerns felt by my colleagues with regard to prorogation which hampers the work of the Committee but places no such veto on the executive. We will be investigating in some detail the practice of permitting amendment of primary legislation by regulation with particular reference to the *Trustees Act*. The underlying theme and the area in which we are experiencing most concern and most work is that of fees and charges. Nearly half of all the regulations we have examined relate to fees and the administrative practices involved are nearly as numerous.

I think we all face much the same sort of problems which is in itself a cause for concern. I would like to add to the list, however, a couple more which have cropped up in the course of my Committee's investigations and which have been on our agenda for some time.

The first relates to ***emergency powers***
This was one of the first major investigations which we undertook and from our subsequent enquiries appears to be more or less unique to Western Australia, certainly in terms of the frequency with which the power is invoked.
The power under s. 15 of the *Health Act 1911* has been used three times since the promulgation of the Act and all within the last 3 years. This section provides:

(1) In any emergency or necessity, of the existence of which emergency or necessity the Commissioner shall be sole or final judge, the Commissioner may - .....
(c) Make such other regulations as he may deem necessary to cope with the emergency or necessity.

This in itself begs the question of which is the appropriate body to decide whether or not the State is faced with an emergency. The first application of the regulations this century was to cater for the possible crash of the Soviet satellite *Cosmos 1900* and the potential hazard from radioactive debris and the next two - one only a fortnight ago - to make provision for the unloading of ammonia at Kwinana. In its report on the *Satellite Debris Regulations,* the Committee found that the regulations did not trespass unduly on individual rights, freedoms and liberties given the potential life-threatening situation. This has been the conclusion with regard to the subsequent applications of this section of the *Health Act*.
A greater concern has been that the decision that a state of emergency exists to justify subsidiary legislation which gives extensive powers of search, removal by force and detention to *"authorized officers"*, who may be police officers of any State or the Commonwealth, any person designated by the Executive Director or any person acting in place of such an officer or any other body authorized by the Executive Director rests with the executive without any further reference to the Legislature. There is little doubt in my mind that this function should be returned to the Legislature.

The second relates to ***proclamation dates.***
Quite early in our operation it came to our notice that a number of regulations were gazetted with

commencement dates dependent on parent legislation which had not yet been proclaimed. Our first concern was that this practice imbued regulations with a high degree of uncertainty. As far as the department was concerned, its obligations for publication and tabling were fulfilled by gazettal and there appeared to be little acceptance of any further responsibility to publish the date when those regulations actually started to take effect. Given the limited attraction of the *Government Gazette* it is unlikely that interested parties would be avidly rifling its pages to ascertain when their fees were going to be increased or liabilities changed. We are aware of the administrative convenience of preparing regulations at the same time as legislation and would not criticise that practice but would equally be disturbed if the maxims of implementation suggested by Judge Hal Jackson, President of the Perth Childrens' Court were part of the executive code of practice -

"..... the easy drives out the hard, the urgent drives out the important, the bureaucracy burdens others before it burdens itself and economics overwhelms all."

It has been suggested that by leaving the decision on the date of proclamation in the hands of the executive, legislation by proclamation is the result and that laxity with regard to proclamation dates is a device to delay legislation to the convenience of the executive. If that were the case it would be akin to the much criticised practice of the induction of babies for the convenience of hospital staff. We are not concerned with the wider implications of proclamation but rather that dependence on some unknown date in the future adds yet another veil of obscurity over an already cloudy area as far as the general public is concerned.

It is heartening that at the recent Constitutional Centenary Conference the solutions proposed by us at this Conference were to a large extent confirmed. Respect for the opinion of the individual, the view that elected governments should face checks and balances and that the role of parliaments should be strengthened vis-a-vis the executive were almost unanimously endorsed although with little guidance on how those aims should be achieved. As the appointed clearing house for subsidiary legislation and the buffer between the executive and the community, it is likely that the impetus for change must come from scrutiny committees such as ours.

That Westminster system, to which we all owe so much, felt itself under attack for much the same reasons that we are debating today. In the economic crises of the 1970s, there was criticism that the current system was moving away from the four roles of Parliament summarised by *Bagehot* in 1867 . Those four roles were:

(i) ***scrutiny and review*** *- watching and checking Ministers of the Crown*
(ii) ***expressive*** *- all public opinions widely held in the community were entitled to be aired publicly before this forum*
(iii) ***teaching*** *- Parliament should contribute to public learning*
(iv) ***source of intelligence about public opinion*** *- it should be the authoritative forum for the registration of political claims*

At that time, the *Economist* published a lengthy condemnation of the decline in the scrutiny and review role of parliament.

> *".....As Britain's executive has done more, as its involvement in economic life has grown and its impact on citizens' powers and freedoms has widened, the capacity of the House of Commons to investigate its activities has diminished. Students of parliamentary institutions all over the world accept that this kind of scrutiny for keeping officials alert and accountable is as effective as its system of regular committees...."*

These concerns eventually led to the Select Committee system in operation in the UK today. This is not the place to go into the merits or otherwise of the British Select Committee system but it is one method that has been tried and tested and I would suggest that the perceived imbalance between the powers and functions of the Legislature and the Executive which led to the inception of the new system there has a parallel here and that it is time for a reassessment of the situation.

I do not think that we are necessarily in favour of straightening the imbalance by diverting current regulatory power into primary legislation although a review of new enabling provisions and of the subject matter of certain regulations would certainly have that effect. Tighter scrutiny of administrative discretion may well result in clearer instructions and the need for less paperwork.

In his book *"Reform of Parliament"*, Bernard Crick advocated a system of pre-legislation committees to act as a bridge between informed opinion, interest groups and the executive. He did not envisage that these Commitees would present a challenge to government but would assist in the following way:

> *"Control means influence, not direct power; advice not command; criticism not obstruction; scrutiny not initiation; and publicity not secrecy."*

I believe that those maxims are valid in today's climate and that with the addition of *education assistance and persistence* the imbalance will gradually return to an even keel.

Proposed Legislative Changes

Members of the Committee held a public seminar on Friday May 7 in the Legislative Council Chamber. The seminar was attended by members of parliament, a delegation from the NSW Regulation Review Committee, representatives from the judiciary, legal, academic professions and government departments and members of the public.

The purpose of the Seminar was two-fold. The first part was devoted to an exchange of views between the various parties involved in the making and review of delegated legislation. The aim of the Committee was to inform delegates of the problems and difficulties it faced in the scrutiny of delegated legislation, and to discuss the difficulties experienced by Departments in meeting the Committee's requirements, particularly with regard to the provision of explanatory material.

The second part was aimed at obtaining public comment on the draft proposals put forward as a discussion paper in the form of the *Interpretation (Subsidiary Legislation) Bill*. This Bill proposes significant changes to the current procedures for the making and review of delegated legislation. The key proposal would require delegated legislation to be published in draft form with an invitation for public comment and where necessary, public hearings, to ensure a more open process and to reduce the risk of selective consultation. Preliminary consultation also has the advantage of identifying potential problem areas prior to gazettal thus avoiding possible costly and inefficient revision of measures after the gazettal and scrutiny processes.

Other major provisions would establish an adjudication process to enable assessment of the merits of an administrative decision and would transfer jurisdiction for judicial review from the Supreme to the District Court with the aim of making review of administrative decisions both more accessible and more affordable.

The proposals attracted considerable comment which will aid the Committee in its deliberations and the formulation of a submission on the legislation.

Those who attended the seminar, commented favourably on the concept of such gatherings which provided the opportunity to meet with others involved in the regulatory process.

Since the seminar, the Commonwealth Administrative Review Council has made similar recommendations with regard to the need for public comment and hearings prior to the introduction of delegated legislation. The Royal Commission's Second Report at paragraph 5.7.9 has commended the concept in the interests of open and accountable government.

A report and draft Bill from the Office of Economic Liaison and Regulatory Review proposing the introduction of regulatory impact statements and staged repeal of regulations has been put forward to the Committee for consideration; the Bill is based on New South Wales and Victorian legislation.

A subcommittee of the Committee travelled to Brisbane, Sydney, Canberra and Melbourne in August and met with members of delegated legislation committees, Business Regulation Review Units, the Electoral and Administrative Review Commission and the Commonwealth Administrative Review Council for the purpose of discussing the operation of the legislation in New South Wales and Victoria and new legislative proposals for Queensland and the Commonwealth.

A detailed report will be tabled next year. In the interim the Committee would draw the attention of the House to a number of issues which appear to be of universal concern:-

(i) the proliferation in the number, nature and nomenclature of statutory instruments;

(ii) the need for more openness in the regulation-making process to be achieved by, *inter alia*,

  (a) wider consultation by departments

  (b) provision of more detailed information by departments for public comment

  (c) the opportunity for public comment and hearings where necessary

(iii) the need for the continuation and higher profile of legislative scrutiny committees

Future Directions

A priority for the newly-formed Committee in the next Parliamentary session will be the finalisation of its investigations and formulation of recommendations for the future procedures for the making, review and repeal of delegated legislation.

The course of action chosen by the Government of the day after consultation with the many interested parties, and the ensuing legislation, may have a significant effect not only on delegated legislation in Western Australia but on the operation of this Committee in the future. It would not be appropriate for the Committee to speculate at this juncture, but, without pre-empting the findings of the next Committee, and based solely on the experience of 5 years in operation, members would hope to see the adoption of the following practice and principles:-

1. An expansion of the Committee's role to enable it to scrutinise all instruments of legislative effect and to remove the semantic limitations imposed by the *Interpretation Act* in favour of a definition of delegated legislation based on its nature and effect.

2. A more clearly defined distinction between matters which can be dealt with by subordinate legislation and those more appropriate for an Act of Parliament.

3. An increasing awareness by members of the significance of enabling clauses in legislation and the need to incorporate adequate safeguards where delegation is necessary.

4. A continuation and enhancement of the explanatory memorandum system.

5. A continuation and expansion of the Committee's working relationship with government departments and Parliamentary Counsel.

6. The ability for the Committee to sit during recesses and after prorogation in recognition of the continuous nature of the gazettal of delegated legislation.

7. A rationalisation of the sitting times of both Houses to enable Joint Standing Committees to meet more frequently.

8. The production of a database of subsidiary legislation to improve its accessibility and assist the Committee in its operation.