



THIRTY-EIGHTH PARLIAMENT

REPORT 36
JOINT STANDING COMMITTEE ON DELEGATED
LEGISLATION
IN RELATION TO THE
TABLING OF SUBSIDIARY LEGISLATION IN THE
LEGISLATIVE COUNCIL

Presented by Mr Joe Francis MLA (Chairman)

and

Hon Robin Chapple MLC (Deputy Chairman)

November 2009

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

Date first appointed:

28 June 2001

Terms of Reference:

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

3. Joint Standing Committee on Delegated Legislation

- 3.1 A *Joint Standing Committee on Delegated Legislation* is established.
- 3.2 The Committee consists of 8 Members, 4 of whom are appointed from each House. The Chairman must be a Member of the Committee who supports the Government.
- 3.3 A quorum is 4 Members of whom at least one is a Member of the Council and one a Member of the Assembly.
- 3.4 A report of the Committee is to be presented to each House by a Member of each House appointed for the purpose by the Committee.
- 3.5 Upon its publication, whether under section 41(1)(a) of the *Interpretation Act 1984* or another written law, an instrument stands referred to the Committee for consideration.
- 3.6 In its consideration of an instrument, the Committee is to inquire whether the instrument -
- (a) is authorized or contemplated by the empowering enactment;
 - (b) has an adverse effect on existing rights, interests, or legitimate expectations beyond giving effect to a purpose authorized or contemplated by the empowering enactment;
 - (c) ousts or modifies the rules of fairness;
 - (d) deprives a person aggrieved by a decision of the ability to obtain review of the merits of that decision or seek judicial review;
 - (e) imposes terms and conditions regulating any review that would be likely to cause the review to be illusory or impracticable; or
 - (f) contains provisions that, for any reason, would be more appropriately contained in an Act.
- 3.7 In this clause -
- “**adverse effect**” includes abrogation, deprivation, extinguishment, diminution, and a compulsory acquisition, transfer, or assignment;
- “**instrument**” means -
- (a) subsidiary legislation in the form in which, and with the content it has, when it is published;
 - (b) an instrument, not being subsidiary legislation, that is made subject to disallowance by either House under a written law;
- “**subsidiary legislation**” has the meaning given to it by section 5 of the *Interpretation Act 1984*.

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Mr Joe Francis MLA (Chairman)
Hon Robin Chapple MLC (Deputy Chairman)
Hon Alyssa Hayden MLC
Ms Janine Freeman MLA

Hon Jim Chown MLC
Mr Paul Miles MLA
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Government Response

This Report is subject to Standing Order 337:

After tabling, the Clerk shall send a copy of a report recommending action by, or seeking a response from, the Government to the responsible Minister. The Leader of the Government or the Minister (if a Member of the Council) shall report the Government's response within 4 months.

The four-month period commences on the date of tabling.

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REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

IN RELATION TO THE

TABLING OF SUBSIDIARY LEGISLATION IN THE LEGISLATIVE COUNCIL

1 BACKGROUND

- 1.1 This report addresses the procedure for tabling disallowable instruments in the Legislative Council and the process by which these instruments are referred to the Joint Standing Committee on Delegated Legislation (**Committee**) for scrutiny.
- 1.2 The procedure is set out in the *Interpretation Act 1984* and the Standing Orders of the Legislative Council.
- 1.3 The purpose of this report is to bring the attention of the Parliament to the significantly adverse effect that this procedure may have on the work of the Committee and the difficulties that the Committee faces when dealing with a large volume of subsidiary legislation.

2 ROLE OF THE COMMITTEE

- 2.1 The role of the Committee and its approach to the scrutiny of subsidiary legislation was discussed in the Committee's Sixth Report.¹
- 2.2 The Committee holds a standing referral from the Legislative Council to consider all instruments of subsidiary legislation that are published,² whether under section 41(1)(a) of the *Interpretation Act 1984 (Act)* or another written law³. As a result, it is the Committee's role to scrutinise and report to the Parliament on a potentially huge volume of instruments.
- 2.3 Due to statutorily imposed deadlines and limited resources, however, the Committee resolved shortly after its establishment to consider only those instruments that are subject to disallowance pursuant to section 42 of the Act or another written law, together with any other instruments that were noted by individual members.
- 2.4 The procedure for the tabling of disallowable instruments in Parliament under the Act is set out in section 42(1), which states that:

¹ Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *Sessional Report June 28 2001 to August 9 2002*, Report No 6, March 2003, Chapters 1-2.

² As defined in section 5, *Interpretation Act 1984*.

³ See the Committee's Terms of Reference, 3.5.

All regulations⁴ shall be laid before each House of Parliament within 6 sitting days of such House next following publication of the regulations in the Gazette.

- 2.5 This provision of the Act works in conjunction with Standing Order 153 of the *Standing Orders of the Legislative Council* which outlines the procedure for tabling and debating a motion to disallow an instrument of subsidiary legislation (**disallowance motion**).
- 2.6 According to Standing Order 153, the Legislative Council must debate a disallowance motion within 10 sitting days (exclusive of the day on which the motion was first moved) or the question must be put and determined on the next succeeding sitting day.

3 TIMEFRAME FOR DISALLOWABLE INSTRUMENTS

- 3.1 The Committee scrutinises hundreds of pieces of delegated legislation every year. Therefore, time is an important factor when considering the work of the Committee.
- 3.2 See below for a brief snapshot of the Committee's work since 2006:

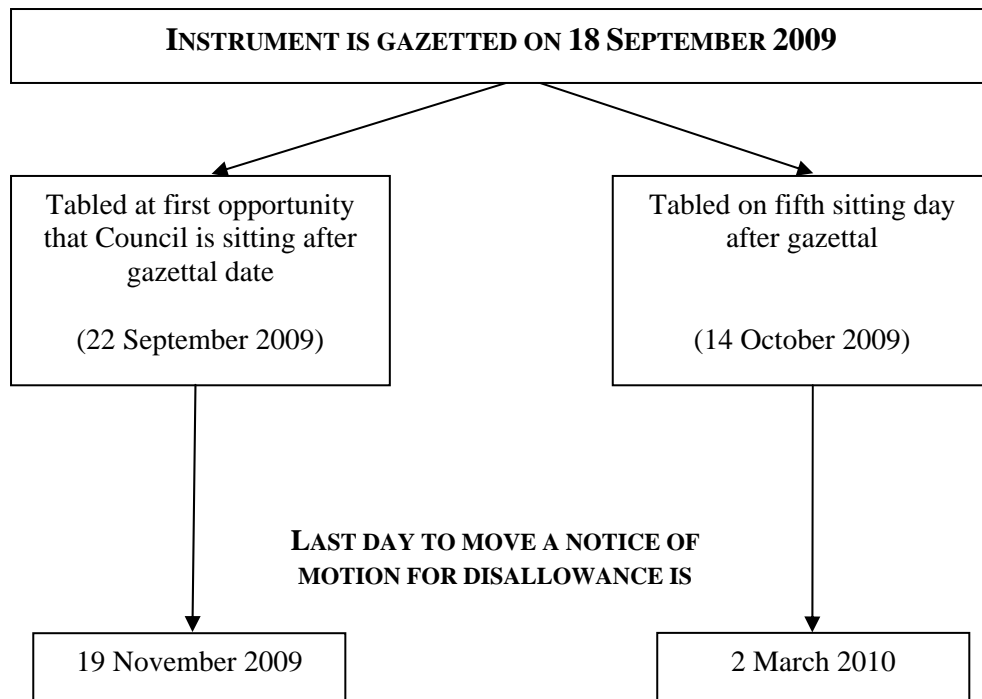
Year	2006	2007	2008	Jan - Sept 2009
Number of instruments	457	509	477	312

- 3.3 Although the volume of the Committee's work is large, the number of instruments scrutinised by the Committee still does not accurately reflect the varying levels of complexity and the issues arising from each instrument.
- 3.4 The Committee experiences periods in which large volumes of disallowable instruments are gazetted in a short period of time, usually following a break in the Legislative Council's sitting dates. If these instruments are all tabled at the first opportunity, this results in all the instruments having the same last date for the moving of a disallowance motion and consequently the same last date in which the disallowance debate must occur.
- 3.5 This situation occurred following the 2009 winter recess, between 25 June 2009 and 11 August 2009. In the space of two days (11 and 12 August 2009), there were a total of 100 disallowable instruments tabled in the House: 77 on 11 August 2009 and 23 on 12 August 2009.

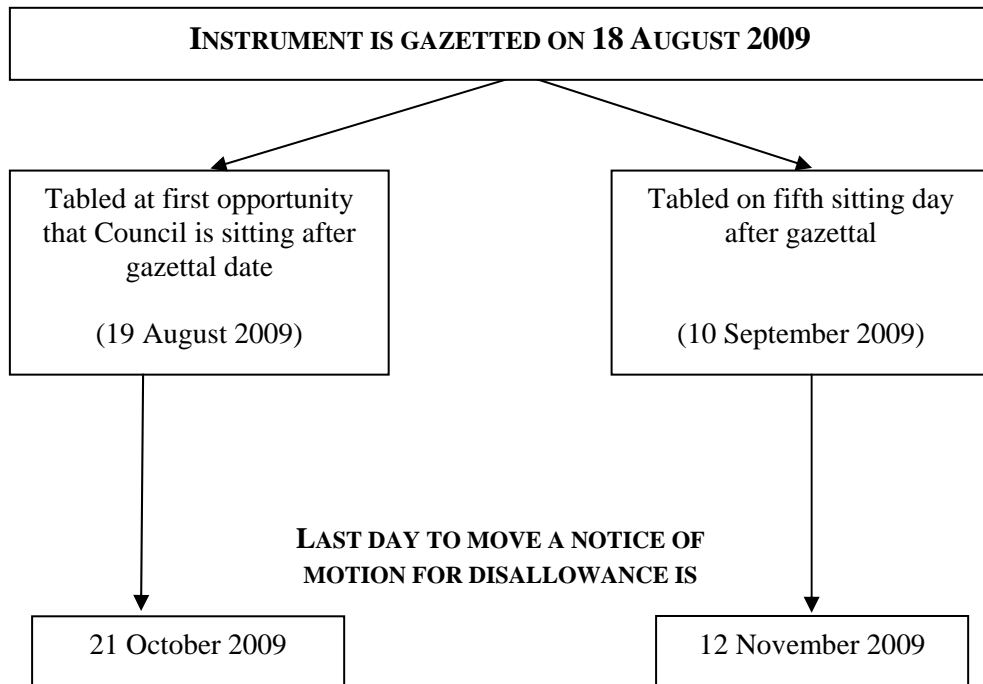
⁴ 'Regulation' is defined in section 5 of the Act to mean a regulation made under the Act in which the term is used, but in the context of the Committee's work, can include local government laws, rules and other disallowable instruments.

- 3.6 Instruments tabled on the same day will have the same last date for moving a disallowance motion. This can result in disallowance motions being moved preemptively at the instruction of the Committee on a number of instruments solely to enable the Committee to consult with agencies and local government.
- 3.7 If the Committee's concerns can be resolved, it must then remove the disallowance motion. These procedural motions can therefore result in an inefficient use of the House's valuable time. This can be avoided by increasing the time that the Committee has in which to properly scrutinise all disallowable instruments.
- 3.8 Government departments often prepare large numbers of amendments and subsidiary legislation in the second half of the year, which can also increase the volume of instruments before the Committee dramatically.
- 3.9 To illustrate the great variance which can occur when calculating the last date for disallowance, below are two examples of how a difference of four days can affect the time that the Committee has to scrutinise an instrument.

EXAMPLE 1 - SUMMER RECESS



EXAMPLE 2 - NORMAL SITTING PATTERN



3.10 By tabling an instrument on the fifth of the six sitting days (the maximum time period permitted under the Act), in the first example the Committee has an additional three months (due to the period between sitting days caused by the summer Parliamentary recess) in which to scrutinise the instrument and ascertain if it complies with the Committee’s Terms of Reference.

3.11 As section 42(1) of the Act permits a period of up to six sitting days for the tabling of a disallowable instrument in the Legislative Council, the Committee considers that the tabling of an instrument on a day other than the first possible opportunity, such as on the fifth sitting day, is still contemplated by the statute.

Effects of tabling instruments other than on the first possible opportunity

3.12 Agencies which table instruments of delegated legislation have an expectation that their instruments will be tabled at the first possible opportunity, notwithstanding the six day period prescribed in the legislation. Instruments are tabled based on the date of gazettal, not on the importance or controversial nature of the instrument, therefore it is reasonable for agencies and local governments to assume that Ministers and Parliamentary Secretaries in the House will table instruments as soon as is practicable and not according to other arbitrary factors.

3.13 The Committee also notes that Members may wish to give notice of a disallowance motion in the Legislative Council at the first available opportunity and therefore

should not be disadvantaged by any deliberate delay in an instrument coming before the Council.

- 3.14 The Committee has also considered the practical effect of the House's staff administratively holding back instruments until the fifth sitting day after gazettal and the possibilities that instruments may be misplaced or otherwise delayed under such an arrangement. While the Committee considers the risk of this occurring to be negligible, it acknowledges that this is a legitimate concern for both the House and the agencies tabling the instruments.
- 3.15 The Committee recognises that there are factors which are relevant to the Legislative Council and external stakeholders which necessitate the tabling of disallowable instruments on the first possible day after gazettal. It is therefore not appropriate, without the express authorisation of the House, for the Committee to request that the Clerk of the Legislative Council direct that the tabling of instruments be administratively delayed until the fifth sitting day after gazettal.
- 3.16 Further, in light of the legitimate concerns outlined above, the Committee does not see this as the most effective course of action to balance the interests of the Committee with the other parties involved in tabling delegated legislation before the House.

4 AMENDMENTS TO THE *INTERPRETATION ACT 1984*

- 4.1 The Committee has considered the operation of the Act and believes that there are several possible amendments that could be made to the Act which would give the Committee more time to scrutinise instruments.
- 4.2 One such amendment could be to section 42(1) of the Act to set out a prescribed period *during* which to table instruments in the House, rather than just a date *by* which the instruments must be tabled. By reversing the wording of the section, this gives the Committee greater flexibility in scrutinising instruments and, if necessary, more time in which to prepare a disallowance report for the House.
- 4.3 Possible re-wording for this section could read:

All regulations shall be laid before each House of Parliament no earlier than 5 sitting days, but within 10 sitting days of such House next following publication of the regulations in the Gazette.

- 4.4 This possible amendment does not, in the Committee's view, affect the interests of government departments or agencies. The Committee recognises, however, that such an amendment will delay an individual Member's opportunity to move a disallowance motion.

4.5 It is the Committee's experience that it is the Committee that is responsible for moving the majority of disallowance motions in the Legislative Council. Hence the Committee considers that such an amendment will be a minor inconvenience to Members. Importantly, this amendment will give the Committee more time to scrutinise instruments.

4.6 The Committee has also considered an amendment to section 42(2) of the Act which would allow more time in the House for a notice of a disallowance motion to be moved. Section 42(2) of the Act currently reads:

Notwithstanding any provision in any Act to the contrary, if either House of Parliament passes a resolution disallowing any regulation of which resolution notice has been given within 14 sitting days of such House after such regulations have been laid before it or if any regulations are not laid before both Houses of Parliament in accordance with subsection (1), such regulations shall thereupon cease to have effect, but without affecting the validity or curing the invalidity of anything done or of the omission of anything in the meantime.

4.7 Increasing the time for giving notice of a disallowance motion from 14 sitting days to 20 sitting days, for example, would give the Committee greater opportunity to scrutinise instruments and, if necessary, prepare a disallowance report.

4.8 The Committee does recognise the practical difficulties of amending the Act. Although the Committee notes that it is the possible solution which would most effectively address the problem of the Committee having insufficient time to scrutinise instruments.

5 AMENDMENTS TO THE STANDING ORDERS OF THE LEGISLATIVE COUNCIL

5.1 An alternative solution considered by the Committee is a possible amendment to the Standing Orders of the Legislative Council.

5.2 The Committee notes that a review of the Standing Orders of the Legislative Council is currently being undertaken by the Procedure and Privileges Committee. The Committee is of the view that amendments may be made to the Standing Orders to extend the time before which the House is required to debate a disallowance motion.

5.3 Standing Order 153(c)(i) currently prescribes that if the debate concerning a disallowance motion has not been resolved at the expiration of 10 sitting days after the day on which the motion was moved, then the motion automatically comes on for debate.

5.4 The Committee considers that amending the Standing Orders to extend the number of sitting days before a disallowance motion comes on for debate in the House will achieve a similar outcome as amending the Act (that is, to allow the Committee more time for scrutiny of instruments), but would be procedurally easier to implement than a statutory amendment.

5.5 The Committee notes that its proposal to amend the Standing Orders comes at a convenient time for the House, as it reviews its Standing Orders as a whole.

6 CONCLUSION

6.1 The Committee has considered the present situation regarding the timeframes prescribed under the relevant legislation and the Standing Orders and is satisfied that there are avenues available to the Parliament which will result in a more efficient and effective procedure for the Committee.

6.2 In light of the discussion of the various alternatives outlined in this report, the Committee accordingly makes the following recommendations:

Recommendation 1: The Committee recommends that Standing Order 153(c)(i) be amended by deleting the number '10' and substituting it with the number '16'.

OR

Recommendation 2: The Committee recommends that the House direct the Clerk to table all instruments of subsidiary legislation on the fifth sitting day following gazettal.

OR

Recommendation 3: The Committee recommends that the Government immediately introduce legislation to amend section 42(1) of the *Interpretation Act 1984* to read "All regulations shall be laid before each House of Parliament no earlier than 5 sitting days, but within 10 sitting days of such House next following publication of the regulations in the Gazette".

OR

Recommendation 4: The Committee recommends that the Government immediately introduce legislation to amend section 42(2) of the *Interpretation Act 1984* to increase the number of days by which time notice of a motion to disallow an instrument of subsidiary legislation must be given in the House after the instrument is tabled. This can be effected by deleting the number '14' in section 42(2) in the *Interpretation Act 1984* and substituting the number '20'.



Mr Joe Francis MLA
Chairman
19 November 2009