



REPORT OF THE  
CONSTITUTIONAL AFFAIRS COMMITTEE  
IN RELATION TO

**A Petition Regarding the Application for Registration as a Painter  
Under the *Painters' Registration Act 1961* of James Allison**

Presented by the Hon Murray Nixon (Chairman)

## STANDING COMMITTEE ON CONSTITUTIONAL AFFAIRS

### **Date first appointed:**

21 December 1989

### **Terms of Reference:**

1. A standing committee under the name of “*Constitutional Affairs*” is established.
2. The committee consists of 3 members.
3. The functions of the committee are to inquire into and report on:
  - (a) the constitutional law, customs and usages of Western Australia;
  - (b) the constitutional or legal relationships between Western Australia and the Commonwealth, the States and Territories,  
and any related matter or issue;
  - (c) a bill to which SO 230 (c) applies but subject to SO 230 (d);
  - (d) any petition.
4. A petition stands referred after presentation. The committee may refer a petition to another standing committee where the subject matter of the petition is within the terms of reference of that standing committee. A standing committee to which a petition is referred shall report to the House as it thinks fit.

### **Members as at the date of this report:**

Hon M D Nixon MLC  
Hon T R Helm MLC  
Hon R J Halligan MLC

### **Staff as at the date of this report:**

Ms Penny Griffiths, Advisory/Research Officer  
Mr Chris Richards, Acting Advisory/Research Officer (October 1997)  
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## 1. Introduction

The Standing Committee on Constitutional Affairs was first appointed on 21 December 1989. Under its Terms of Reference, the Committee is required, *inter alia*, to consider and report on any petition.

### 1.1 The Petition

On 6 March 1996, Hon Derrick Tomlinson MLC tabled a petition (*TP #21 of 1997*) from Mr James Allison requesting that the Legislative Council consider his prayer for relief regarding the refusal by the Painters' Registration Board to register him as a painter pursuant to section 12(1) of the *Painters' Registration Act 1961*.

## 2. Background to the Petition

In December 1993, Mr James Allison ("Mr Allison") applied for registration as a painter with the Painters' Registration Board (the "Board") under section 12(1)(c) of the *Painters' Registration Act 1961* (the "Act").

Section 12(1)(c) of the Act requires the Board to be satisfied that an applicant has attained a degree of proficiency as a painter comparable with that ordinarily obtained by persons who have completed the course of training prescribed under the Act, passed the examinations laid down by the Board and had five (5) years practical experience in the painting trade. At that time, the Board satisfied itself of the requirements outlined in section 12(1)(c) by requiring all applicants to sit and pass assessment papers in Painting Technology, Recording and Costing, and Estimating.

Mr Allison sought an exemption from having to undertake the assessment papers on the basis that he had completed an apprenticeship and had been actively engaged in the industry for the past fifteen (15) years. However, his exemption request was rejected and he was informed that it was necessary for him to sit the assessment papers. He sat the assessment but passed only one of the three papers. As a result, his application for registration was rejected by the Board in March 1994.

In March 1995, Mr Allison made another application and resat the two assessment papers which he had previously failed. On this occasion, he passed the Recording and Costing assessment paper but failed the Estimating assessment paper. Following the Board's decision to decline registration, Mr Allison made a complaint to the Parliamentary Commissioner for Administrative Investigations (the "Ombudsman") concerning the handling of his application.

The Ombudsman's initial findings were that he was satisfied with the manner in which the Board had dealt with Mr Allison's application. However, the Ombudsman received additional information from Mr Allison and reopened the case in November 1996. As a result of further enquiries, the Ombudsman recommended that the Board seek a legal opinion concerning the legality of the Board's stipulation that Mr Allison should complete additional examinations for the purposes of applications under section 12(1)(c) of the Act.

On receipt of the legal opinion, the Board accepted that it had no power to require Mr Allison to undergo examinations prior to his application being considered under section 12(1)(c) and that he was entitled to have his application considered on its merits whether or not he had undertaken

the examinations. Accordingly, the Board agreed to reconsider Mr Allison's application taking into account his practical experience in the painting industry and without consideration of his examination results.

In June 1997, the Board reconsidered Mr Allison's application having regard to his practical experience which was supported by personal references. However, the Board was not satisfied that the information provided by Mr Allison demonstrated that he had attained the necessary degree of proficiency as a painter as required by section 12(1)(c) of the Act. Accordingly, on 8 July 1997, the Board handed down its Reasons for Decision in which it rejected Mr Allison's application for registration.

### **3. Issues Raised by the Petition**

In his petition, Mr Allison has made a number of allegations against the Board which are as follows -

1. the Registration Application Forms provided to him by the Board contained unlawful irregularities;
2. the Board's requirement for completion of the Assessment Papers for a section 12(1)(c) application was unlawful; and
3. the Board's decision to reject his 1997 application for registration requires review.

#### **3.1 Irregularities in the Application Forms**

Mr Allison has alleged that his application for registration as a painter has been adversely affected or prejudiced by a number of irregularities relating to the Application Forms.

In relation to these irregularities, Mr Allison has provided evidence to the Committee that:

1. in the course of his two applications for registration, he has been issued with two different Application Forms which placed different requirements on him as an applicant;
- ii. that upon making his second application for registration as a painter in March 1995, he was issued with a registration form that was not in accordance with the prescribed Registration Form as laid down under Rule 7 of the Painters' Registration Board Rules; and
- iii. he was issued with an Application for Examination Exemption upon making his initial application for registration as a painter in December 1993.

##### **3.1.1 Difference in Application Forms**

In relation to the matter of the Application Forms, the Board has conceded that between the respective dates of Mr Allison's applications, different forms were issued. The major difference between the forms was that the second application form contained an additional requirement that

an applicant under section 12(1)(c) must "intend to pass the additional examinations laid down by the Board".

The Committee is of the opinion that, while the respective application forms did contain differences in drafting, these differences did not substantially alter or materially affect the core requirements for registration as a painter for three reasons:

1. the requirements for registration as a painter are legally delineated in section 12(1) of the Act, not in the application forms;
2. the Board has since acknowledged the invalidity of a requirement that applicants under section 12(1)(c) must intend to pass the additional examinations. Accordingly, Mr Allison's most recent unsuccessful application for registration did not involve any reference to these Assessment Papers; and
3. the mere fact of difference between registration forms does not necessarily connote any disadvantage accruing to the applicant, particularly in the context of the overriding requirement of proof of proficiency contained in section 12(1)(c).

### **3.1.2 Second Application not in Prescribed Form**

The Board has also acknowledged that the Application Form issued to the petitioner in March 1995 did not accord with the prescribed application form as required by section 41 and 42 of the *Interpretation Act 1984*.

However, in this regard, the Committee notes the operation of section 74 of the *Interpretation Act 1984* which provides:

74. *Where a form is prescribed or specified under a written law, deviations therefrom not materially affecting the substance nor likely to mislead shall not invalidate the form used.*

As outlined above, the Committee does not believe that the deviations from the prescribed form contained in the second application form were either material or misleading and, therefore, do not invalidate the handling of the application.

### **3.1.3 Application for Examination Exemption**

The petitioner has also claimed that, at his initial application for registration, he was issued with an Application for Examination Exemption and that this exemption should have been granted with regard to the Assessment Papers.

The Committee does not accept the validity of this claim for two reasons:

1. the existence of an exemption application form does not automatically give rise to a right to such an exemption; and
2. the Committee questions the validity of the exemption in the first instance as it is not provided for in either the Act or the regulations.

### **3.1.4 Conclusion**

The Committee is satisfied that Mr Allison was not adversely affected or prejudiced by the above mentioned irregularities in the Application Form. Accordingly, the Committee does not propose to take this matter any further.

### **3.2 Requirement for Completion of Assessment Papers**

Mr Allison has claimed that the Board unlawfully required completion of the additional examinations known as the *Assessment Papers* before proceeding with registration.

Subsequent to the Ombudsman's investigations into these matters, the Board obtained legal advice on the extent of its powers to *require* the completion of assessment papers in relation to applications under section 12(1)(c) of the Act.

Upon receipt of that advice, the Board acknowledged that its powers under section 12(1)(c) do not include the power to require the completion of additional assessment papers as a prerequisite to its acceptance of an application for registration under that section. In other words, the Board conceded that it cannot refuse to consider or to accept, an application for registration merely because an applicant declines to take their examinations.

#### **3.2.1 Conclusion**

The Committee notes that the Board did not require Mr Allison to sit the Assessment Papers in relation to his application for registration in 1997. The Committee therefore does not propose to take this matter further.

### **3.3 Review of the Board's decision to Reject Mr Allison's 1997 Application for Registration**

In June 1997, the Board agreed to re-examine Mr Allison's application for registration pursuant to section 12(1)(c) without regard to his examination results.

As mentioned above, the question to be answered in applications under section 12(1)(c) is whether the applicant has attained a degree of proficiency as a painter comparable to that ordinarily attained by persons who have completed the Board's prescribed course of training and passed the prescribed examinations laid down by the Board for persons who have had five (5) years experience in the painting trade. In other words, the applicant is required to have attained a degree of proficiency comparable to that ordinarily attained by a person who has satisfied the requirements of section 12(1)(a). The onus of proof as to proficiency is on the applicant.

The difficulty for the Board in undertaking this exercise in Mr Allison's case was that the Board normally used the Assessment Papers' results as the basis for their decision on proficiency. Accordingly, the Board was obliged to rely solely upon evidence concerning Mr Allison's apprenticeship as a painter, professional and character references and his subsequent experience to demonstrate that he has attained the required degree of proficiency.



The Board proceeded on the basis of considering Mr Allison's level of proficiency in relation to each separate requirement of section 12(1)(a). This means that Mr Allison was required to demonstrate the following:

1. a minimum of five (5) years experience; and
2. comparable proficiency to a person who has completed and passed the prescribed examinations, being Registration Regulations and Quality Assurance, Paint Technology, Painters' Business Management, and Painters' Estimating and Specifications.

### 3.3.1 Minimum of five (5) years experience

The Board said that Mr Allison's experience was at least as good as the five years practical experience in the painting trade mentioned in Section 12(1)(a). In this regard, the Board was satisfied that Mr Allison probably had the level of proficiency ordinarily attained by a person being registered under Section 12(1)(a).

### 3.3.2 Comparable Proficiency

In its Reason for Decision, the Board considered the meaning of "comparable proficiency" when noting that:

*"We are required to compare Mr Allison's personal skills with those ordinarily attained by successful candidates under section 12(1)(a). The subsection requires that the level of proficiency be "comparable". We consider that requires skills of substantially (but not exactly) the same kind and at substantially (but not exactly) the same level as that usually obtained by a successful candidate under section 12(1)(a). **This is a higher standard than a bare pass.**" [Emphasis added]*

Accordingly, in assessing Mr Allison by this standard, the Board found that he had a comparable level of proficiency with a person ordinarily registered under section 12(1)(a) with regard to practical experience and Paint Technology. However, the Board did not accept that Mr Allison's skills were comparable to a successful candidate registered under section 12(1)(a) in relation to the remaining requirements of Registration Regulations and Quality Assurance, Painters' Business Management, and Painters' Estimating and Specifications.

The Board did not consider Mr Allison's skills to be comparable in these areas for the following reasons:

1. the mere fact that Mr Allison has continued to trade as a painter in partnership with his father for a period of ten years does not demonstrate to the Board's satisfaction that Mr Allison has the required levels of proficiency, as purely economic factors can bear upon whether a business continues to trade;
2. the Board did not accept the evidence put forward by Mr Allison concerning his business acumen, experience and decision-making powers. The Board was of the opinion that Mr Allison did not exercise these skills without contribution from his father and partner in the painting business;

3. the Board pointed to the operation of section 14B of the Act which requires that where any painting is carried out by a partnership, the painting, the standards of workmanship and the materials used in the painting are to be managed and supervised by one of the partners who is registered under this Act. Consequently, the Board considered that the subsection clearly imposes upon Mr Allison a duty to ensure that the very functions being examined in the registration application had to be performed by someone other than himself; and
4. the Board was not satisfied with what it termed "a mere description of evidence unsupported by some external assessment" of proficiency Mr Allison had achieved with regard to the final three criteria.

On the basis of this reasoning, the Board concluded that Mr Allison had failed to satisfy the requirements of section 12(1)(c) and refused to grant him registration. Mr Allison has asked the Committee for relief against the refusal of the Board to grant him registration as a painter under section 12(1) of the Act.

### **3.4 Analysis of the Board's Reasons for Decision**

In the course of its investigations, the Committee was impressed with the degree of cooperation and opportunity that the Board displayed towards Mr Allison. The Committee also considers the administrative process adopted by the Board up until its final review of Mr Allison's application in June 1997 to have been fair and possibly even favourable to Mr Allison.

However, in reviewing the Reasons for Decision handed down by the Board in June 1997, the Committee has the following concerns:

1. the imposition of a "higher standard" by the Board for a person to show "comparable" skill under section 12(1)(c);
2. the Board's reliance on section 14B of the Act as a basis for the refusal; and
3. the Board's reliance on the lack of external assessment of Mr Allison's proficiency as a basis for rejecting his evidence as to professional experience and business acumen.

#### **3.4.1 Higher Standard to Show "Comparable" Skill**

In relation to "1" above, the Board contended that in order for an applicant to be held to have "comparable" skills under section 12(1)(c), they must demonstrate skills of substantially (but not exactly) the same kind and at substantially (but not exactly) the same level as that usually attained by a successful candidate under section 12(1)(a). The Board went on to say that the standard for comparable skills is a *higher standard than a bare pass*.

The Committee takes no issue with regard to the Board's understanding of the word "comparable". However, the Committee is not convinced of the fairness of requiring this higher standard in relation to applications for registration under section 12(1)(c) compared to those under sections 12(1)(a) or 12(1)(aa). Under these subsections, a "bare pass" is still a pass and would constitute a successful completion of the examinations.

In reviewing the wording of section 12(1)(c), the Committee could not find any reason for increasing the standard of skills required for registration in this way. Furthermore, the Committee does not believe that the section 12(1)(c) provides the Board with a discretion regarding the standards required for registration. Any discretionary power contained in section 12(1)(c) is limited solely to the investigation of whether the applicant's skills are "comparable" with that "ordinarily attained" by successful applicants under section 12(1)(a).

### 3.4.2 The Board's reliance on Section 14B of the Act as a basis for the refusal

As mentioned, the Board referred to Section 14B in assessing Mr Allison's professional experience. In this regard, the Committee does not accept the relevance of the Board's reliance on section 14B of the Act as a basis for denying Mr Allison's claims regarding his professional experience. Section 14B provides that:

*Where any painting is carried out by a partnership, the partners therein shall cause -*

- (a) *the painting to be managed and supervised by one of the partners who is registered under this Act or by an employee of the partners who is so registered, and shall cause the standards of workmanship and the materials employed in the painting to be those determined by the partner or the employee so registered...*

The Board suggested that the very existence of section 14B precluded Mr Allison from possessing the necessary skills for registration under section 12(1)(c) because section 14B clearly imposed a duty to ensure that the functions described in the section - and which form the basis of the application criteria - are performed by someone other than himself.

While the Committee recognises the operation of section 14B, it does not accept that it has any relevance to the issue of Mr Allison's registration under the Act for the following reasons:

1. Section 14B should not be intended to act as a bar against registration as this would result in virtually all applicants under section 12(1)(c) being refused registration on the basis that they have previously been managed or supervised by a registered painter. Clearly, the true intention of section 14B is to protect the consumers of Western Australia by ensuring that painting (as defined under the Act) is not carried out by unsupervised and unqualified painters;
2. Section 14B does not form part of the stated test for registration under section 12(1)(c) and, therefore, consideration of its effects in the Board's Reasons for Decision may constitute an abuse of procedural fairness; and
3. Section 14B expressly refers to the management or supervision of "painting", which is defined in Section 2 of the Act.<sup>1</sup> However, the definition of painting refers only to the

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<sup>1</sup> *the application by any method recognized or adopted by the painting trade of paint, varnish or stain or any substance or preparation of a composition similar thereto or recognized by the trade as a substitute therefore to the whole or any part of building or other structure of a kind recognized by law as a fixture) but not being a floor, path or drive-way composed of concrete or other similar substance) and -*

(a) *includes such processes or treatments as are commonly known to the trade as graining, kalsomining, marbling,*

application of paint and paint-like substances. It does not include any reference to skills related to business decisions or commercial acumen. The Committee therefore believes that section 14B cannot be taken into account in assessing the professional experience and business acumen of Mr Allison, as the Board has attempted to do.

### 3.4.3 Reliance on Lack of External Assessment

The Committee also took note of the Board's comments at pages 7 and 8 of the Reasons for Decision where it was said that:

*"... the Board is not satisfied that a mere description of experience unsupported by some external assessment of the levels of proficiency involved is capable of demonstrating the level of proficiency with sufficient clarity to enable the Board to make the required comparison even if the specific difficulties we have mentioned were overcome."*

The Committee found itself in general agreement with the Board's requirement for some form of external assessment to satisfy the evidential requirements of applications under section 12(1)(c). However, Mr Allison has informed the Committee that he has difficulties with the requirement to sit a written examination in a limited time frame. Furthermore, Mr Allison indicated that he found it difficult to express his thoughts in writing and became extremely anxious. In these circumstances, the Committee is concerned that Mr Allison did not have the opportunity to demonstrate his skills to the Board, in some other manner rather than the usual means of sitting a written examination.

### 3.5 Conclusion

As outlined above, the Committee has concerns with the Board's Reasons for Decision in regard to its reliance on Section 14B of the Act and the requirement that an applicant should obtain more than a bare pass. The Committee considers that it was unfair for the Board to refer to section 14B as evidence that Mr Allison did not have the required skills when, at the same time, the Act required adherence to this section. Likewise, the Committee does not agree with the Board's opinion that Mr Allison should obtain a result which is higher than a bare pass. However, the Committee considers that these concerns were not central factors in the Board's refusal to grant Mr Allison registration as a painter and, as such, does not intend to pursue these matters.

It is the Committee's belief that the central factor in the Board's refusal of Mr Allison's application was simply that Mr Allison was unable to satisfy them that he had obtained the required business acumen, experience and decision-making powers which were comparable with that ordinarily obtained by another applicant. The Committee appreciates the difficulties that the

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*distempering, gilding colour-washing, staining, varnishing and plastic relieving;*

- (b) includes the hanging of wall-paper and any substitute therefore;*
- (c) does not include painting which consists of application of a protective coating to part of a building or other structure (not being a dwelling-house or like building or structure) which has first been treated by a process known as abrasive blasting or mechanical cleaning under a contract whereby the same contractor undertook both that process and the application of the protective coating;*
- (d) does not include painting work in the nature of signwriting;*

Board may have experienced in attempting to assess Mr Allison's skills by means other than a formal written examination. However, the Committee has noted Mr Allison's comments that he experiences difficulties in sitting written examinations within a limited time frame and becomes extremely anxious in such an environment.

In these circumstances, the Committee believes that the opportunity for Mr Allison to undertake an *oral assessment* may be the most appropriate manner in which Mr Allison is able to demonstrate his proficiency to the Board. The Committee believes that an oral assessment may achieve a balance between the need for the Board to properly assess Mr Allison's skills and the need to offer Mr Allison an alternative means of assessment to a formal written examination. The Committee also believes that the Board could give consideration to extending the time frame in which Mr Allison is permitted to undertake the assessment.

#### **4. Recommendations**

- 4.1** The Committee recommended to the Board that they consider an application from Mr Allison to undertake an oral assessment on reapplying for registration as a painter. The Committee also recommended to the Board that they extend the time frame in which Mr Allison is permitted to undertake the assessment.
- 4.2** The Board has advised the Committee that they are agreeable to considering an application from Mr Allison to sit an oral assessment on reapplying for registration as a painter.
- 4.3** The Committee has advised Mr Allison that it is open to him to apply to the Board to sit an oral assessment on reapplying for registration as a painter.