



**THIRTY-EIGHTH PARLIAMENT**

**REPORT 34**

**STANDING COMMITTEE ON UNIFORM  
LEGISLATION AND STATUTES REVIEW**

**INTERIM REPORT- THE STATUTES REVIEW  
INQUIRY**

Presented by Hon Adele Farina MLC (Chairman)

December 2008

# STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

## Date first appointed:

17 August 2005

## Terms of Reference:

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

### “8. Uniform Legislation and Statutes Review Committee

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

8.2 The Committee consists of 4 Members.

8.3 The functions of the Committee are -

- (a) to consider and report on Bills referred under SO 230A;
- (b) of its own motion or on a reference from a Minister, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to SO 230A;
- (c) to examine the provisions of any instrument that the Commonwealth has acceded to, or proposes to accede to, that imposes an obligation on the Commonwealth to give effect to the provisions of the instrument as part of the municipal law of Australia;
- (d) to review the form and content of the statute book;
- (e) to inquire into and report on any proposal to reform existing law that may be referred by the House or a Minister; and
- (f) to consider and report on any matter referred by the House or under SO 125A.

8.4 For a purpose relating to the performance of its functions, the Committee may consult with a like Committee of a House of the Parliament of the Commonwealth, a state or a territory, and New Zealand and similarly, may participate in any conference or other meeting.”

## Members as at the time of this inquiry:

Hon Simon O’Brien MLC, (Chairman) resigned 23 September 2008	Hon Matt Benson-Lidholm MLC, resigned 11 November 2008
Hon Adele Farina MLC, (Chairman) appointed 11 November 2008	Hon Brian Ellis MLC, appointed 11 November 2008
Hon Donna Faragher MLC, resigned 8 September 2008	Hon Sheila Mills MLC
Hon Nigel Hallett MLC, appointed 11 November 2008	

## Staff as at the time of this inquiry:

Ms Jan Paniperis, Committee Clerk	Dr Colin Huntly, Advisory Officer (Legal)
	Ms Anne Turner, Advisory Officer (Legal)

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**REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES  
REVIEW**

**INTERIM REPORT IN RELATION TO THE STATUTES REVIEW INQUIRY**

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**1 THE STATUTES REVIEW INQUIRY**

1.1 On 28 November 2005 the Standing Committee on Uniform Legislation and General Purposes (**Committee**) resolved to inquire into and report on:

- *the purpose and nature of Statutes Repeals and Minor Amendments Bills;*
- *the process for the drafting and enactment of Statutes Repeals and Minor Amendments Bills and, if relevant, the comparative process in other Australian jurisdictions; and*
- *any related issues the Committee considers appropriate.*

1.2 Statutes Repeals and Minor Amendment Bills are also known as ‘omnibus bills’ and are a mechanism by which the statute book is reviewed. Given the perennial nature of omnibus bills and their close connection to the overall statutes review project, the Committee formed the view that this inquiry must be in the nature of an open, watching brief. In the absence of a direction from the Legislative Council to the contrary, it is the Committee’s intention to pursue this term of reference in an ongoing manner.

1.3 The Committee anticipates that there may be occasion for further interim reports on matters of particular significance relating to omnibus bills, but in the normal course, the Committee proposes to use the additional vehicle of the Annual Report to advise the Legislative Council of its inquiries.

**2 BENEFITS OF STATUTES REVIEW**

2.1 In its December 2006 Report to the Council of Australian Governments “*Potential Benefits of the National Reform Agenda*”, the Productivity Commission noted:

*The Regulation Taskforce identified a number of ways that excessive compliance costs can arise, including:*

- *overlaps and inconsistency between jurisdictions;*

- *inconsistencies in definitions and criteria; and*
- *regulation that is redundant or not justified by policy intent.*<sup>1</sup>

2.2 The national efficiency losses associated with excessive compliance costs, and the potential for reform-based savings were summarised by the Commission as follows:

*Based on domestic and international evidence, Australian compliance costs could be as high as 4 per cent of GDP per annum. It is considered that National Reform Agenda-consistent reforms have the potential to reduce these costs by up to 20 per cent (0.8 per cent of GDP per Annum or as much as \$7 billion in 2005-06 values).*<sup>2</sup>

2.3 According to the Australian Bureau of Statistics, Western Australia's Gross State Product in - 2007-08 was \$156.8 billion.<sup>3</sup> Taking the percentages used by the Productivity Commission as indicative for Western Australia, the comparative compliance costs could amount to \$6.27 billion, and the potential cost savings could be as high as \$1.25 million. The direct relevance of this problem to the Committee's terms of reference will be readily appreciated.

### **3 RECEPTION OF UNITED KINGDOM LAW AS A PARTICULAR ISSUE OF STATUTORY REFORM**

#### **Western Australia and Reception**

3.1 Prior to the formal establishment of the colony, at least some of Western Australia was notionally part of New South Wales following the establishment of a settlement at Albany by Major Edmund Lockyer in 1827. Lockyer was acting under orders from New South Wales Governor Ralph Darling. One of Lockyer's junior officers, Captain James Stirling explored the south-west corner of the State and concluded that there was potential for a self-sustaining colony on the West coast.

3.2 Captain Stirling returned to England to garner support for such a project. Stirling, as the Chief Naval Officer in the Swan River Settlement, was commissioned on 30<sup>th</sup> December 1828 with the title of Lieutenant-Governor. On 2<sup>nd</sup> May 1829, Stirling's 2<sup>nd</sup> in command, Captain Charles Fremantle formally took possession of the "Western side of New Holland" in the name of King George III.

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<sup>1</sup> Productivity Commission 2006, *Potential Benefits of the National Reform Agenda*, Report to the Council of Australian Governments, Canberra, p141-2.

<sup>2</sup> Productivity Commission 2006, *Potential Benefits of the National Reform Agenda*, Report to the Council of Australian Governments, Canberra, p156. No update to this report is available for 2007 or 2008.

<sup>3</sup> [http://www.dtf.wa.gov.au/cms/uploadedFiles/gsp\\_2007-2008.pdf](http://www.dtf.wa.gov.au/cms/uploadedFiles/gsp_2007-2008.pdf) (viewed on 21 November 2008) .

- 3.3 Stirling's Proclamation of the Settlement specifically made reference to the reception of law as follows:

*“... by the Establishment of His Majesty's Authority in the Territory aforesaid, the Laws of the United Kingdom as far as they are applicable to the Circumstances of the Case, do therein immediately prevail ...”*

- 3.4 The New South Wales possessions in the south were transferred to the settlement when it obtained the formal status of a Colony by Letters Patent dated 4 March 1831. These letters reached the now Governor Stirling in December 1831 and the legislative machinery required by the Letters Patent was established by the first week in February 1832.
- 3.5 On the formal establishment of the Colony of Western Australia, any legislative or administrative link between New South Wales and Western Australia was severed.
- 3.6 Prior to responsible self government in 1893, the legislative machinery of the Colony was subject to the approval of the Westminster Parliament. Given that the introduction of steamer ships slashed the average transit postal time from London to Perth via Albany from three months to 55 days, the ability of the Legislative Council to be proactive in its legislative programme was severely limited. This became less problematic in December 1877 with an indirect telegram service to the UK via Adelaide and Darwin. The new “*wire service*” allowed 48 hour return communications - virtually instantaneous by comparison. This service became more direct and even faster from 1889 via Broome's “*Cable-Beach*” telegraph station.
- 3.7 The common law doctrine of “*received law*” states that the establishment of a colony carries with it all of the law of England until it is repealed or amended by the legislative machinery of the colony. It follows that the body of United Kingdom law prior to colonisation continues to be of relevance in Western Australia.
- 3.8 The doctrine of reception was convenient, perhaps essential, in 1829. Local legislators would have found it almost impossible to create a functioning legal system without it. However, with the passage of time and changed social conditions, the utility of the received law has declined.

### **Legislative Response to Imperial Legislation in Western Australia**

- 3.9 In October 1994 the Law Reform Commission of Western Australia (LRCWA) published a report on the issue of Imperial Statutes in force at that time.<sup>4</sup> Some of those specifically identified as warranting express repeal by the Parliament include:

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<sup>4</sup> Law Reform Commission of Western Australia, Project No 75 “United Kingdom Statutes in Force in Western Australia: Report”, October 1994.

- A statute of 1485 which provides specific punishment of clergy for adultery, “*fornication, incest, any other fleshly incontinency*”.<sup>5</sup>
  - A statute of 1541 providing that any powers belonging to a corporation can be exercised by a majority of the corporators, notwithstanding any directions to the contrary in their foundation statutes.<sup>6</sup>
  - A statute of 1660 which declares all loans at more than 6%pa to be usurious and unlawful.<sup>7</sup>
  - A statute of 1738 fixing the price of, among other things, a loaf of bread.<sup>8</sup>
- 3.10 Other obscure Acts which have been identified by the Committee which at least warrant revision include:
- A statute of 1313 which forbids coming armed to parliament.<sup>9</sup>
  - A statute of 1324 declaring all whales and sturgeon “*taken in the sea or elsewhere in the Realm*” to be the property of the crown.<sup>10</sup>
- 3.11 The LRCWA recommended that “*most United Kingdom statutes which have been inherited should cease to be in force in Western Australia.*”<sup>11</sup> The LRCWA summarised its recommendations as follows.<sup>12</sup>
- *One hundred and forty-two UK statutes that applied by reception should cease to be in force in Western Australia.*
  - *Twenty-three UK statutes should be repealed and re-enacted in whole or in part as they contain provisions that are still an important part of the law of Western Australia. This includes 13th century statutes that form the basis of the private landowning system and a provision of a statute that ensures that Parliament, and not the Crown, may levy a tax.*

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<sup>5</sup> “*Clergy Act*” 1 Henry VII c.4 (1485).

<sup>6</sup> “*Leases by Corporations Act*” 33 Henry VIII c.27 (1541).

<sup>7</sup> “*An Act for restraining the takeing of Excessive Usury*”<sup>12</sup> Charles II c.13 (1660).

<sup>8</sup> “*An Act to fix the Price of bread, etc*” 12 George II c.13 (1738).

<sup>9</sup> Statute 7 Edward II c.2.

<sup>10</sup> Statute “*Prerogativa Regis*” 17 Edward II c.11. Presumably this Act was referred to in December 2005 when a pygmy blue whale was washed onto Rottenest Island’s Strickland Bay.

<sup>11</sup> Law Reform Commission of Western Australia, Project No 75 “United Kingdom Statutes in Force in Western Australia: Report”, October 1994, p4.

<sup>12</sup> Law Reform Commission of Western Australia, Project Summary, Project No 75, “United Kingdom Statutes in Force in Western Australia”, pp200-1.

- *Eleven UK statutes, including the Magna Carta and the Bill of Rights 1688, should be preserved because of their historical value.*
- *Forty UK statutes should be preserved pending a review.*

3.12 Although a number of these statutes have subsequently been repealed or amended in omnibus type bills<sup>13</sup>, the 1994 LRCWA's report has not resulted in substantial legislative action. However, the Parliamentary Counsel Office has advised that a bill, dedicated to repealing imperial legislation is contemplated for 2009.<sup>14</sup>

#### **4 REFORM OF RECEIVED LAW IN OTHER FORMER DEPENDENCIES**

##### **Canada**

4.1 According to the Law Reform Commission Of Saskatchewan's May 2006 "*Report On Disposal Of English Statute Law In Saskatchewan*":

*Review of received English statute law in Commonwealth countries began at least as early as 1881, when the New Zealand statutes included a list of 'selected Imperial Acts in force'. The first legislative effort to conclusively dispose of received law was adopted by the Australian State of Victoria in 1922. The Imperial Acts Application Act, based on an examination of more than 7,000 English statutes, included a list of statutes in force, and repealed most of the remaining received law. New legislation in 1980 substantially reduced the number of received statutes remaining in force in that state. New Zealand, New South Wales, the Australian Capital Territory, Queensland and South Australia have all followed Victoria's lead.<sup>15</sup>*

*Saskatchewan is the only [Canadian] province in which a review of the received law comparable to the work done in Australia and New Zealand has been completed.*

<sup>13</sup> For example, the Statutes (Repeals and Minor Amendments) Bill 2006. This particular bill lapsed on the prorogation of the Parliament on 7 August 2008 for the State Election. Although a replacement bill, the Statutes (Repeals and Miscellaneous Amendments Bill) 2008 re-introduced the same content as the Statutes (Repeals and Minor Amendments) Bill 2006, it deliberately excluded the subject matter of imperial statutes.

<sup>14</sup> Telephone discussion between Ms Nicki Armstrong, Parliamentary Draftsperson and the Committee's Advisory Officer, 21 November 2008.

<sup>15</sup> See *The Commonwealth Law Bulletin*, 1982 at 226 for a brief history of Imperial statutes research and disposal legislation in New Zealand and Australia.

## **Ireland**

- 4.2 In late 2004, the Irish Taoiseach outlined a project to repeal and, where necessary, restate all the legislation remaining on the statute book which was enacted prior to Irish independence in 1922.
- 4.3 On 9 January 2007, the Taoiseach officially launched the Statute Law Revision Bill 2007. This measure is the culmination of the “*Pre-Independence Project*” which operates within the Irish Attorney General’s Office. This phase of the Project involved a review of some 26,370 enactments. The following is a summary of the findings of the Project with respect to pre-independence enactments received into the Republic of Ireland’s statute book:
- A total of 12,460 Acts were assessed as not having applied to Ireland.
  - A total of 9,259 Acts assessed as having applied (or potentially applied) to Ireland, but were assessed as having been already repealed.
  - A total of 1,413 Acts are in force and have (or may have) continuing effect.
  - A total of 3,366 Acts are in force but are obsolete or have ceased to have effect.

## **5 TRAVEL**

- 5.1 As part of its inquiry, the Committee travelled to the United Kingdom and the Republic of Ireland between 26 October and 9 November 2007. This travel also related to the Committee’s Term of Reference 8.3(d) “*to review the form and content of the statute book*”.
- 5.2 Members and staff who participated in the travel were:
- Hon Simon O’Brien MLC (Chairman);
  - Hon Matt Benson-Lidholm MLC;
  - Hon Sheila Mills MLC;
  - Jan Paniperis, (Committee Clerk); and
  - Dr Colin Huntly, Advisory Officer (Legal).
- 5.3 Hon Donna Faragher MLC was unavailable to travel.

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**Travel to the United Kingdom**

- 5.4 In London the Committee had the benefit of the advice and assistance of a number of senior officers of the Westminster Parliament, including:
- Mr Matthew Hamlyn, Head of the House of Commons Committee Office Scrutiny Unit;
  - Mr Mick Hillyard, Clerk of the House of Commons Regulatory Reform Committee;
  - Mr Gordon Clarke, Clerk of the House of Commons Modernisation Committee; and
  - Mr David Beamish, Clerk Assistant and Clerk of Legislation in the House of Lords.
- 5.5 The Committee also conferred with The President of the Law Commission for England and Wales and the First Parliamentary Counsel for England and Wales.
- 5.6 The Committee particularly extends its appreciation to Ms Sue Pamphlett, House of Commons Inward Visits Manager, for her assistance in preparing the schedule of meetings for this visit. The outcomes and benefits of these meetings are outlined elsewhere in this report.
- 5.7 The Committee inspected the Palace of Westminster and observed the House of Commons proceedings. The Clerk of the Records hosted a visit to the Parliamentary Archives where the Committee handled originals of the *Commonwealth Constitution*; *Western Australian Constitution*; *1689 Bill of Rights*; and other ancient documents.

**Travel to the Republic of Ireland**

- 5.8 In the Republic of Ireland the Committee was briefed by:
- the Director General of the Republic of Ireland's Department of the Attorney General;
  - the Better Regulation Unit, Department of the Taoiseach; and
  - the President and Commissioner of the Law Reform Commission of Ireland.
- 5.9 The Committee was given a tour of the Irish Parliament and met with the Parliamentary Counsel for Ireland.
- 5.10 The cost of the travel was \$85,686.13, which included airfares for all participants, accommodation in London and Dublin and related expenses.

## **6 OVERVIEW OF STATUTORY REVIEW MECHANISMS**

6.1 Broadly speaking, statutory review processes can be conceptualised in terms of:

- pre-legislative review;
- legislative scrutiny; and
- post legislative review.

### **Pre-legislative review processes in Western Australia**

6.2 A legislative proposal is typically considered and approved by Cabinet at the instance of a particular Minister. In practice the relevant instructing officer within a given agency of Government co-ordinates the preparation of drafting instructions for a particular bill. The degree of stakeholder consultation in this process varies widely according to such variables as the nature and urgency of the subject matter, complexity of issues involved and the whole of government implications.

6.3 The Parliamentary Counsel's Office produces draft bills for individual departments as instructed by the relevant Minister, on advice from the principal instructing officer. In rare cases, a draft bill might be published in the form of a "Green Paper" for a given time period to allow detailed community submissions.<sup>16</sup> These submissions may affect the form that the final draft bill will take when tabled in the Parliament by the relevant Minister.

6.4 It is more common for a draft bill to be tabled in the Parliament by the relevant Minister without a "Green Paper" phase. During travel to the United Kingdom, the Committee observed the following:

#### *Case Study: Pre-Legislative Statutory Review in the United Kingdom*

- The Westminster Parliament has a formal system of Committee-based pre-legislative scrutiny, focussing on non-controversial legislation. This requires the Government to publish draft bills on non-controversial matters prior to their formal introduction to the Parliament. The Government then nominates the draft measures for pre-legislative scrutiny. Pre-legislative scrutiny is then undertaken by departmental Committees of the House of Commons, or by

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<sup>16</sup> A recent example of this can be seen in the "Associations Incorporation Draft Bill". See <http://www.docep.wa.gov.au/ConsumerProtection/Content/Business/Associations/index.htm> (viewed on 18 march 2008).

Joint Select Committees. This system has met with widespread approval and many proposals for improvement have been made since its adoption.<sup>17</sup>

- Since 1997, the Modernisation Committee of the House of Commons and the Joint Liaison Committee have introduced numerous procedural innovations that have radically impacted the operation of the Westminster Parliament. Notably, in 2004 the House of Lords Constitution Committee published a report entitled “Parliament and the Legislative Process”.<sup>18</sup> The impact of this report and the on-going reform of the House of Lords as a House of Review are still being evaluated in the UK.<sup>19</sup>
- The Committee was briefed extensively on the operation of pre-legislative scrutiny and other modernisation innovations by Mr Gordon Clarke, Clerk of the House of Commons Modernisation Committee, and Mr Chris Shaw, Deputy Principal Clerk, Public Bill Office.
- Following the visit to the United Kingdom, the Committee resolved to pursue the question of pre-legislative scrutiny with the Department of Premier and Cabinet in greater detail in 2008. The Committee has further resolved to raise matters of procedural modernisation in connection with non-controversial legislation with the President and Clerk of the Legislative Council in 2008.

### Legislative Scrutiny in Western Australia

6.5 Bills tabled in the Western Australian Parliament are scrutinised by a Committee of the Whole House, with or without amendments, prior to being passed into law. In many instances bills will be scrutinised by a special purpose Standing or Select Committee for detailed scrutiny. These Committees report their findings to a House prior to it being considered in detail by a Committee of the Whole House.

<sup>17</sup> “Pre-Legislative Scrutiny” Kelly, R, Holden, H, and Parry, K, House of Commons Library Standard Note: SN/PC/2822, UK, Parliament and Constitution Centre. (<http://www.parliament.uk/commons/lib/research/notes/snpc-02822.pdf> - accessed 01/05/07)

<sup>18</sup> 14<sup>th</sup> Report, Constitution Committee, UK HL 173, July 2004. (<http://www.publications.parliament.uk/pa/ld200304/ldselect/ldconst/173/173.pdf> - accessed 01/05/07).

<sup>19</sup> Note: “Parliament and the Legislative Process: The Government's Response” 6<sup>th</sup> Report, Constitution Committee, UK HL 114, April 2005. (<http://www.publications.parliament.uk/pa/ld200405/ldselect/ldconst/114/114.pdf> - accessed 01/05/07). See also “The Legislative Process” Modernisation of the House of Commons Select Committee, UK HC 1097, September 2006.

(<http://www.publications.parliament.uk/pa/cm200506/cmselect/cmmodern/cmmodern.htm> - accessed 01/05/07).

See also the range of independent reports produced by the UK Hansard Society at: <http://www.hansardsociety.org.uk/publications/archive>.

6.6 During travel to the United Kingdom, the Committee was briefed by Mr Matthew Hamlyn, Head of the House of Commons Committee Office Scrutiny Unit regarding the work of the Unit in producing non-partisan briefing papers on proposed bills for the information of all members of parliament. This is a relatively recent phenomenon within the House of Commons and the model may be worth considering in Western Australia to augment present research services offered by the Parliamentary library if adequate funding could be made available.

### **Post legislative review processes in Western Australia**

6.7 The Department of Premier and Cabinet's Public Sector Management Division coordinates the preparation of drafting instructions for omnibus statutes review bills based on submissions from across Government. The Office of the Parliamentary Counsel for Western Australia produces omnibus statutes review bills for introduction to the Parliament by the Premier.

6.8 The Law Reform Commission of Western Australia reports on references made to it by the Attorney General of the day. In many cases this involves reviewing existing legislation. With a few exceptions, it has not been standard practice by the Law Reform Commission to include draft legislation in its reports.

6.9 In discharging its terms of reference, this Committee scrutinises all omnibus statutes review bills following their introduction to the Legislative Council by the Minister representing the Premier.

## **7 AUSTRALIAN POST LEGISLATIVE STATUTORY REVIEW BY LAW REFORM COMMISSIONS**

### **Western Australia**

7.1 At present the LRCWA operates to investigate and report on references made to it, or otherwise approved by the Attorney General of the day.<sup>20</sup> It is rare for a report of the LRCWA to contain draft legislation. Essentially the same model is adopted in all other states and territories.<sup>21</sup>

7.2 The Committee notes that in the six financial years 2001-7, the total revenue received by the LRCWA from the State Government was reported at \$5,734,504.<sup>22</sup> Total revenue received in the 2007-2008 financial year was \$973, 993.<sup>23</sup> This increased

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<sup>20</sup> *Law Reform Commission Act 1972* (WA) s 11.

<sup>21</sup> For example, *Law Reform Commission Act 1967* (NSW) s 10; and, *Victorian Law Reform Commission Act 2000* (Vic) s5.

<sup>22</sup> This figure is derived from a compilation across the Annual reports for the relevant years.

<sup>23</sup> Law Reform Commission of Western Australia, Annual Report 2007-2008, p14.

from a reported \$954, 794 in the previous 12 months.<sup>24</sup> Of 98 projects reported as having been commenced by the LRCWA since its inception in 1972, 62 have resulted in legislative action and 36 none.

## Victoria

7.3 The Victorian Parliament Law Reform Committee is a bi-partisan investigatory Committee of both Houses. The functions of the Committee, as defined by the *Parliamentary Committees Act 2003* (Vic) s 12, are:

- 1) *To inquire into, consider and report to the Parliament on any proposal, matter or thing concerned with*
  - a. *Legal, constitutional or parliamentary reform;*
  - b. *The administration of justice;*
  - c. *Law reform.*

## New South Wales

7.4 In New South Wales, the Legislative Council Standing Committee on Law and Justice has as one of its functions to inquire into, consider and report to the Legislative Council on:

- (a) *matters concerned with legal and constitutional issues including law reform, parliamentary matters, criminal law and administrative law;*

## Queensland

7.5 Section 80 of the *Parliament of Queensland Act 2001* (Qld) established the Legal, Constitutional and Administrative Review Committee as a Committee of the Queensland Parliament with a broad range of law reform responsibilities listed at section 89.

## 8 POST LEGISLATIVE STATUTORY REVIEW IN OTHER JURISDICTIONS.

### New Zealand

8.1 According to section 5 of the *Law Commission Act 1985* (NZ), the principal functions of the Law Commission as an independent statutory authority are -

<sup>24</sup> Law Reform Commission of Western Australia, Annual Report 2007-2008, p14.

(a) *To take and keep under review in a systematic way the law of New Zealand:*

(b) *To make recommendations for the reform and development of the law of New Zealand.*

## Canada

- 8.2 In an expression of its unique version of federalism, the Law Commission of Canada was abolished in December 2006. The provincial law reform agencies now collaborate through a peak Federation on matters of significant national law reform.
- 8.3 The Senate of Canada's Standing Committee on Legal and Constitutional Affairs has, as part of its mandate to "*examine legislation and matters relating to legal and constitutional matters generally, including ... administration of justice, law reform and all related matters*".<sup>25</sup>
- 8.4 On 22 July 2006, the Senate gave the 3<sup>rd</sup> Reading to Bill S-202 "*An Act to repeal legislation that has not come into force within ten years of receiving royal assent*" following the tabling of the Standing Committee on Legal and Constitutional Affairs' most recent law-reform based report.

## United Kingdom

- 8.5 During travel to the United Kingdom, the Committee was briefed by Mr Mick Hillyard, Clerk of the House of Commons Regulatory Reform Committee on the *Regulatory Reform Act 2001*, the Regulatory Reform Orders and the *Legislative and Regulatory Reform Act 2006*. The Committee will give consideration of the extent to which these innovations might be a useful model for post legislative reform in Western Australia.
- 8.6 The Law Commission for England and Wales is structured with greater autonomy to investigate and report matters of law reform than is the case with its typical Australian counterparts.<sup>26</sup> For example, it is usual for the United Kingdom body to report its findings in the form of draft legislation.<sup>27</sup>
- 8.7 The first function of the Law Commission of England and Wales under the *Law Commissions Act 1965* c 22 (UK) s3 is as follows:

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<sup>25</sup> [http://www.parl.gc.ca/common/Committee\\_SenHome.asp?Language=E&Parl=39&Ses=1&comm\\_id=11](http://www.parl.gc.ca/common/Committee_SenHome.asp?Language=E&Parl=39&Ses=1&comm_id=11).

<sup>26</sup> *Law Commissions Act 1965* (UK) c.22 s3.

<sup>27</sup> For example, "Termination Of Tenancies For Tenant Default" The Law Commission for England and Wales, Report No. LC 303, October 2006 ([http://www.lawcom.gov.uk/lc\\_reports.htm](http://www.lawcom.gov.uk/lc_reports.htm) - accessed 01/05/07).

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*It shall be the duty of each of the Commissions to take and keep under review all the law with which they are respectively concerned with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law.*

8.8 The Law Commission is an independent agency and this independence is highlighted by the fact that its Chairman is required to be a High Court judge. The Law Commission develops its own programme of law reform which is submitted to the Lord Chancellor for approval.

8.9 Provisions commonly repealed by *Statute Law (Repeals) Acts* include:

- (a) *references to bodies, organisations, etc. that have been dissolved or wound up or which have otherwise ceased to serve any purpose;*
- (b) *references to issues that are no longer relevant as a result of changes in social or economic conditions (e.g. legislation about tithes or tin mines);*
- (c) *references to Acts that have been superseded by more modern (or EU) legislation or by international Convention;*
- (d) *references to statutory provisions (i.e. sections, schedules, orders, etc.) that have been repealed;*
- (e) *repealing provisions e.g. “Section 33 is repealed/shall cease to have effect”;*
- (f) *commencement provisions once the whole of an Act is in force;*
- (g) *transitional or savings provisions that are spent; and*
- (h) *provisions that are self-evidently spent - e.g. a one-off statutory obligation to do something becomes spent once the required act has duly been done;*
- (i) *powers that have never been exercised over a period of many years or where any previous exercise is now spent.*

8.10 The Law Commission published its 17<sup>th</sup> draft Bill on Statutes Revision on 16<sup>th</sup> December 2003 and this was given Royal assent on 22nd July 2004. The 18<sup>th</sup> Report

and Draft Bill was completed at the end of 2007. The Law Commission published its Report on “Post-Legislative Scrutiny” on 25 October 2006.<sup>28</sup>

- 8.11 In 2005, the Law Commission’s reported total cost of operation was 4,180,400 pounds<sup>29</sup> which, using the 2005 conversion rate, equated to \$AU 9,883,000. Given the population of England and Wales was 52,041,916 million at that time<sup>30</sup>, the cost of operating the Law Commission was \$AU 190,000 for every million people. This compares to the Western Australian figure of approximately \$435,758 for every million people.<sup>31</sup>
- 8.12 In 2008, the Law Commission’s reported total cost of operation was 4,121,000 pounds<sup>32</sup> which, using the 2008 conversion rate, equates to \$AU 9,601,930. The population of England and Wales (statistically) remained the same at 52,041,916 million.<sup>33</sup> The cost of operating the Law Commission was \$AU 184,503 for every million people. This compares to the Western Australian figure of approximately \$461,843 for every million people.<sup>34</sup> These statistics indicate that Western Australia spends more per capita progressing law reform, than its counterpart United Kingdom commission.
- 8.13 During travel to the United Kingdom, the Committee was briefed by the Chairman of the Law Commission, the Honourable Mr Justice (Sir Terrence) Etherton QC and his senior staff in their London offices. Of particular interest to this Committee was the in-house presence of a seconded senior Parliamentary Counsel draftsman. This officer is responsible for translating law reform instructions into draft legislation for inclusion in Reports. It was of interest to the Committee that one of the principle challenges facing the Law Commission was the absence of a coherent online statute book in the United Kingdom. Even the vellum archives of the House of Lords are an incomplete repository of hard-copies of primary legislation given that nearly all remaining original pre-sixteenth century statutes are held by the National Archives.

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<sup>28</sup> The Law Commission for England and Wales, Report No. LC 302, October 2006 ([http://www.lawcom.gov.uk/lc\\_reports.htm](http://www.lawcom.gov.uk/lc_reports.htm) - accessed 01/05/07).

<sup>29</sup> The Law Commission for England and Wales, 40<sup>th</sup> Annual Report No. LC 299, June 2006 ([http://www.lawcom.gov.uk/ann\\_reports.htm](http://www.lawcom.gov.uk/ann_reports.htm) - accessed 01/05/07).

<sup>30</sup> National Statistics, <http://www.statistics.gov.uk/census2001/pyramids/pages/727.asp> (viewed 18 November 2008).

<sup>31</sup> The Law Commission for England and Wales, 40<sup>th</sup> Annual Report No. LC 299, June 2006 ([http://www.lawcom.gov.uk/ann\\_reports.htm](http://www.lawcom.gov.uk/ann_reports.htm) - accessed 01/05/07). The population of Western Australia being 2,010,000. From [www.lrc.justice.wa.gov.au/2publications/reports/annual/LRC\\_04-05.pdf](http://www.lrc.justice.wa.gov.au/2publications/reports/annual/LRC_04-05.pdf), the total revenue received from the State Government was \$876,276.

<sup>32</sup> [www.lawcom.gov.uk/docs/LC310-web.pdf](http://www.lawcom.gov.uk/docs/LC310-web.pdf).

<sup>33</sup> The United Kingdom only conducts its census every decade.

<sup>34</sup> Insert FN 29. The population of WA being 2,150,000. From [www.lrc.justice.wa.gov.au/2publications/reports/annual/LRC\\_04-05.pdf](http://www.lrc.justice.wa.gov.au/2publications/reports/annual/LRC_04-05.pdf), the total revenue received from the State Government was \$992,962.

- 8.14 The Law Commission was interested in the Western Australian State Law Publisher's online resources as a possible model on which to develop a coherent United Kingdom statute book.
- 8.15 A recent incumbent in this position was the First Parliamentary Counsel for England and Wales, Mr Stephen Laws CB. The Committee was briefed by Mr Laws and of particular interest, were the following three matters.
- Parliamentary Counsel's Office in London prides itself on having retained the services of a number of experienced Australian Parliamentary draftspersons in that they are regarded as among the best trained in the profession.
  - The previous Justice Minister had recognised the impact of staffing levels within the Parliamentary Counsel's Office on the legislative process. She had further recognised that Parliamentary Counsel take a long period of time to train. A strategic increase in resources over five years to the Parliamentary Counsel's office to train, obtain and retain a sufficient corps of Parliamentary draftspersons was developed and implemented to meet this need.
  - Delegated legislation and other subsidiary legislative instruments in England and Wales are drafted by the departments and not the Parliamentary Counsel's Office. In this regard the Committee notes that the Parliamentary Counsel for Western Australia advised this Committee that "*in the five years from 1997 to 2001, the pages of acts passed totalled nearly 8 300, whereas in the five years from 2002 to 2006, just over 15 000 pages were passed.*"<sup>35</sup> The Committee notes that this doubling of workload for Parliamentary Counsel does not include figures on subsidiary legislation passed or disallowed in the same period. The Committee has been unable to determine what budgetary growth has occurred in the Parliamentary counsel's Office over the same time period.

## Ireland

- 8.16 As in the case of Western Australia, the Irish statute book includes United Kingdom laws enacted prior to the creation of the modern Republic of Ireland in 1922, and since the coming into force of Ireland's 1937 Constitution. Legislation on any particular topic may be spread across a series of Acts each amending its predecessor. In 1998, the Irish Government decided to establish a special Unit in the Office of the Attorney General to draw up a programme of statute law revision and consolidation.<sup>36</sup> This has come to be known as the "Restatement Initiative".

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<sup>35</sup> Mr Greg Calcutt AM SC, Parliamentary Counsel for Western Australia, *Transcript of Evidence*, 30 May 2007, p3.

<sup>36</sup> See: [http://www.attorneygeneral.ie/slru/pre\\_ind\\_project.html](http://www.attorneygeneral.ie/slru/pre_ind_project.html).

- 8.17 The desire to make the statute book more coherent and accessible was articulated in *Towards Better Regulation* (a consultation document on better regulation) published by the Department of the Taoiseach, February 2002.<sup>37</sup> The restatement process has seen a succession of Statute Law Revision measures since 2002, including the *Statute Law Revision (Pre-1922) Bill 2004* (Ie) which repealed over 200 statutes pre-dating the modern Republic of Ireland.
- 8.18 During travel to the Republic of Ireland, the Committee was briefed by Ms Finola Flanagan, Director General of the Republic of Ireland's Department of the Attorney General and her staff in the Taoiseach's Offices. The scale of the Irish Restatement Initiative is remarkable and the on-going regulatory reform programme is visionary. The Committee intends to use these innovative projects as a reference point as it proceeds to implement its statutes review mandate in 2008.
- 8.19 The Committee was also briefed on law reform issues by Mrs Justice Catherine McGuinness, (President), Ms Patricia Rickard-Clarke, (Commissioner), and senior staff of the Law Reform Commission of Ireland in their Dublin Offices. The Committee took particular note of the independence of the Commission and the difficulties it faces in its reform agenda given the lack of a comprehensive, uniform statute book in hard-copy or online. Once again the Committee was able to suggest the Western Australian State law Publisher's website as a potential model on which to base a re-stated Irish statute book.

## **9 CONCLUSION**

- 9.1 The Committee anticipates further interim reports on matters of particular significance relating to omnibus bills and will continue its inquiries beyond 2008. This will also enhance the Committee's continuing inquiry into its express term of reference to review the form and content of the statute book.



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**Hon Adele Farina MLC**  
**Chairman**

**4 December 2008**

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<sup>37</sup> See: <http://www.betterregulation.ie/index.asp?locID=17&docID=-1>.