

PARLIAMENT OF WESTERN AUSTRALIA

**JOINT STANDING COMMITTEE ON
DELEGATED LEGISLATION**

FIRST REPORT

(December 1987 – November 1988)

Laid on the Table November 1988

Members of the Committee

Robert Hetherington MLC (Chairman)
Hon M McAleer MLC (Deputy Chairman)
Dr Ian Alexander MLA
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Mr R L Wiese MLA

Secretary to the Committee

Mr Laurie Marquet

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1. INTRODUCTION

Your committee was established by resolution of the Legislative Council and the Legislative Assembly and held its first meeting on Wednesday December 16 1987 to elect a chairman and deputy chairman.

The existence of the committee arises from a policy determination of the Government to vest scrutiny of delegated legislation in a parliamentary committee rather than one created by Act of Parliament. Without in any way detracting from the role of the *Legislative Review and Advisory Committee*, your committee supports the Government's policy initiative. The statutory committee was abolished on April 26 1988 on the proclamation of the *Legislative Review and Advisory Committee Repeal Act 1987*.

It was immediately obvious to members of the committee that a rapid degree of familiarization with the nature of delegated legislation and the scope of the committee's brief was required. To this end, your committee held discussions with the members of the outgoing statutory committee and traveled to Canberra in February this year to observe the workings of the Senate's *Regulations and Ordinances Committee* over a 2 day period. En route to Canberra, your committee held discussions with the *Constitutional and Legal Affairs Committee* of the Victorian Parliament. Your committee was impressed by the operations of both committees and believes that there is much to be gained from frequent contact between similar committees in other jurisdictions. It would be useful if individual members of this committee were to attend the 2nd Conference of Subordinate Legislation Committees being held in Canberra in April/May of 1989.

We take this opportunity to record our sincere thanks to the members and officers of the various bodies consulted for the ready help and advice they gave..

2. PERCEPTIONS

The committee's role is to scrutinize and, where deemed necessary, to report on regulations subject to disallowance under s.42 of the *Interpretation Act 1984*. As such, your committee's brief is much narrower than that of the former statutory committee. Depending on how your committee functions, it may be necessary to suggest at a later time that our terms of reference be expanded. It seems to us that in performing our task we are entitled to take note of the wider context where citizen meets State.

If we are to subject delegated legislation for example, to a test of whether it trespasses unduly on personal rights, liberties or freedoms we must take time to find out what rights, liberties and freedoms are and which of them, under Western Australian law, are "established".

Similarly, is the committee concerned with notions of *vires*? Our first term of reference suggests that it is. If so, is the committee to construe *vires* in the manner of a court?

The committee is required to report on a regulation that it finds " ... unduly makes rights dependent upon administrative, and not judicial decisions". In a modern context, there is a much greater judicial willingness to review administrative decisions. At what level, therefore, does the committee apply the test? Additionally, does "rights", contextually, import "liberties" and "freedoms" and, must those "rights" however defined, be "established"?

Additionally, should the committee take formal notice of other mechanisms such as rights of appeal or review, custom and usage, and the role of bodies such as the Law Reform Commission? May the committee comment adversely on the form of empowering provisions in Acts? Should the committee, as part of its ongoing review, consider and make recommendations about the use of other forms of secondary legislation, eg, notices, ministerial orders?

It seems to us that these questions must be confronted if the committee is to do more than a mechanical examination of statutory prose and it is our intention to comment from time to time on how the committee will apply tests.

Another aspect is to the extent to which the committee should invite comment from persons affected by regulations. The committee is considering whether the public interest requires that it hear submissions on a given regulation from the framers of that legislation and those caught by it.

We believe that the ability of each committee member is enhanced by having a greater understanding of these issues and their effects on the development and application of the criteria by which the committee operates.

3. COMMITTEE MEETINGS 1988

The committee meets on Thursdays during the session at 9 am. Regulations are considered and discussed solely in terms of the applicable tests. Thus far, the committee has queried 4 regulations, 2 of which are still under review.

The committee has sought counsel's opinion on 1 occasion [*Emergency Provisions (Satellite Debris) Regulations 1988*] and its conclusions and recommendations about those regulations appear in item 6 of this report.

4. ADMINISTRATION AND RELATED MATTERS

The committee is far from satisfied about the form in which regulations are published, viz, in the *Gazette*. Time is wasted when amendments are considered by having to extract principal regulations from volumes of the *Gazette* and having them copied. The committee has sought assistance from the Government by requesting that it be supplied with sufficient copies of each regulation once it is made by the Governor in Council.

As well, the committee has requested that all regulations supplied have attached to them an explanatory note setting out the purpose and effect of the regulations.

The committee believes that a separate publication of statutory instruments would assist those affected by such legislation. Moreover, it should not be beyond the wit of those involved to arrange for electronic transmission of regulations to Parliament House. We understand that the Clerk's Office is trying to make electronic transmission a reality.

As mentioned, the committee has counsel in the person of Mr Peter Johnston of the WA Bar, a well-respected constitutional lawyer. With the departure of Ms Michele Cornwell in June to take up her appointment as Clerk Assistant in the Senate, the Clerk of the Council has acted as secretary. A change of personnel in the Council's committee secretariat during the forthcoming recess will result in the committee having a new secretary before the next session.

5. MODUS OPERANDI

The committee has determined that in cases where it thinks further investigation is warranted, the department or other promoting body will be invited to comment on the regulations generally as well as the specific concerns of the committee. If at the end of the consultation period the committee remains unconvinced, the chairman will approach the responsible minister with the intention that the minister intervene and enable amendment in line with the committee's opinion. Failing all else, the committee will recommend disallowance. Obviously, the committee does not have unlimited time in concluding its discussions; s.42 of the *Interpretation Act* imposes a time frame to which the committee must adhere. Accordingly, the committee will not view delaying tactics kindly. Our experience with the Commissioner of Occupational Health, Safety and Welfare suggests that relaxed and cooperative discussion will enable us to fulfill our obligations without unnecessary haste.

6. EMERGENCY PROVISIONS (SATELLITE DEBRIS) REGULATIONS 1988

These regulations took effect on September 30 1988 and expired 28 days later. The regulations applied if, and when, the Soviet satellite *Cosmos 1900* crashed in Western Australia or elsewhere but in such a way that it constituted a hazard to persons in the State.

The committee sought the views of the Executive Director (Public Health) on whose recommendation the regulations were made. The main object of the regulations was to ensure that a person did not touch, or remain in possession of, any part of the satellite debris. The committee was told that severe radiation burns would result from comparatively short contact with debris and it was this concern that prompted the regulations.

The committee is grateful for the cooperation and advice provided by the Executive Director and readily accepts that the regulations were made *bona fide* as a public health measure.

What is not apparent from a reading of the regulations is the manner in which they would have been implemented. The State's involvement would have lasted some 24 hours from the time that debris was detected; thereafter, federal authorities would have taken over, tracked debris and removed it.

It seems to the committee that the regulations were made in general terms to cater for a "worst case" situation. The administrative instructions providing for the methods to be employed and the actual persons to be involved provide a better picture and go a long way in allaying fears of arbitrary or capricious behavior being sanctioned by use of the regulations.

The committee believes that its examination highlights the potential for conflict that can exist in cases of civil emergency, between the public interest and private rights. The public interest, represented here in the form of a public health concern, was seen to prevail over rights of person and property.

The committee cannot say that the regulations make an unexpected use of the power conferred by s.15 of the *Health Act 1911*, ie, they are within the powers conferred by the Act on the Executive Director (Public Health). In light of what we say later on, whether the regulations should have been made on the Minister's recommendation rather than the Executive Director's is not important. Either way, the regulations were made by the Governor in Council and subject to disallowance.

There is no doubt that the regulations trespassed on " ... established rights, freedoms or liberties ... "; but we are asked to say whether they trespassed "unduly". We take this to mean that the abrogation of rights must be disproportionate to the mischief that the regulations seek to overcome or contain. The mischief was that radioactive debris, scattered down a corridor 1 000 kms long and 40 kms wide, posed an active danger to health if handled by unsuspecting persons, particularly children. It is immaterial in this context for us to consider whether the emergency, had it occurred, could have been dealt with under existing laws, including use of the prerogative powers. The appropriate authorities chose the path provided by the health legislation and it is not for us to impeach that method. We are left with the impression that the potential for encroachment on personal and property rights is significant but not disproportionate. Accordingly, your committee cannot say that there was an undue trespass.

We note that no attempt was made to oust the jurisdiction of the Supreme Court to review decisions made under the regulations or the validity of the regulations themselves. Obviously, judicial review in a civil emergency situation will tend to be after the event. The committee is satisfied that judicial intervention is in no way hampered. The question whether the regulations make rights "unduly" dependent on administrative rather than judicial decisions does not arise; the regulations do not purport to create "rights". The committee expresses no opinion as to the actual extent of that particular test (*cf Rules of the Joint Committee on Delegated Legislation. cl 5(d)*).

Finally, the committee must consider whether this type of situation is better dealt with by Act. This is not a question that we propose to answer at this stage. Your committee intends to solicit opinions from other sources and report once it has had the benefit of advice. The regulations under review were the first promulgated under s.15 of the 1911 Act. Nevertheless, it seems to us that consideration needs to be given to the prospective and contemporaneous roles of Parliament and the Government within the framework of a civil emergency. For example, does the power vested effectively in the Executive Director under s.15 cut across accepted notions of responsible government? Should emergency regulations be subject to ratification by resolution of the Houses? Should they expire within a certain time unless continued by parliamentary resolution? What if Parliament is adjourned or in recess – should it be recalled? How would recall be effected? Who decides what facts or circumstances constitute grounds for invoking emergency powers?

Your committee expects to report on this aspect in 1989.

7. OCCUPATIONAL HEALTH, SAFETY AND WELFARE REGULATIONS 1988

These regulations follow the proclamation on September 16 1988 of the commencement of the *Occupational Health, Safety and Welfare Amendment Act 1987* (cf *Gazette No.93/1988*). The regulations replace 22 separate regulations made under the authority of a number of Acts but are considerably more than a simple consolidation of previous regulatory provisions.

There were some parts of the regulations that we were unsure about and we thank the Commissioner and his senior officers for the explanations that they provided. It was the first time that the committee had asked officers to attend and explain various facets of regulations – if that exercise is an indication of future contacts, the committee can have no complaint. The explanations provided were full and we were left with the impression that the discussion had been useful to all concerned.

There is nothing in the regulations that would warrant any recommendation for disallowance. Thus, we are free to continue our perusal of the regulations without time constraints and a further report, detailing the points raised, will be made at a later time.

8. REGULATIONS CONSIDERED IN DETAIL

The following regulations were considered in detail:

- (a) Betting Control Amendment Regulations (No. 2) 1988;
- * (b) Occupational Health, Safety and Welfare Regulations 1988;
- * (c) Emergency Provisions (Satellite Debris) Regulations 1988;
- (d) Transport (Country Taxi–Car) Amendment Regulations (No. 4) 1988;
- (e) Taxi–Car Control Amendment Regulations (No. 2) 1988;
- * (f) Mines Regulation Amendment Regulations 1988;
- (g) Health (Offences and Penalties) Regulations 1988.

** still under consideration at time of presentation of this report.*

9. FUTURE PROGRAM

The forthcoming recess will bring the committee's activities to an end. We sincerely trust that the new Parliament will reappoint the committee. Your committee has no doubt that it will take another 2 or 3 years before the committee is fully proficient in its role. Questions raised earlier in this report remain largely unanswered; obtaining the answers is part of the learning period for the committee. As well, administrative difficulties that we have described stand in the way of overall efficiency of our operations. Accordingly, they exist to be overcome.

Your committee believes that to avoid any doubt legislation should be enacted which empowers committees, select or standing, to function during recesses caused by prorogation. We know that this is not the first time the issue has been raised but we make the point that the executive government suffers no such disability and remains capable of making regulations throughout the year. It seems illogical that the parliamentary committee charged specifically with scrutinizing the government's legislation is incapable of doing its job for weeks or months at a time.