



THIRTY-SEVENTH PARLIAMENT

REPORT 11
STANDING COMMITTEE ON LEGISLATION
ANNUAL REPORT 2007

Presented by Hon Graham Giffard MLC (Chair)

December 2007

STANDING COMMITTEE ON LEGISLATION

Date first appointed:

17 August 2005

Terms of Reference:

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

“4. Legislation Committee

- 4.1 A *Legislation Committee* is established.
- 4.2 The Committee consists of 5 members.
- 4.3 The functions of the Committee are to consider and report on any Bill referred by the House or under SO 125A.
- 4.4 Unless otherwise ordered any amendment recommended by the Committee must be consistent with the policy of a Bill.”

Members during this reporting period:

Hon Graham Giffard MLC (Chair)

Hon Peter Collier MLC

Hon Giz Watson MLC (Deputy Chair)

Hon Dr Sally Talbot MLC

Hon Ken Baston MLC

Hon Donna Faragher MLC
(substitute Member for Hon Ken Baston
MLC on the inquiry into the Criminal Law
and Evidence Amendment Bill 2006)

Hon Helen Morton MLC
(substitute Member for Hon Ken Baston
MLC on the inquiry into the Acts
Amendment (Consent to Medical Treatment)
Bill 2006)

Hon George Cash MLC
(substitute Member for Hon Peter Collier
MLC on the inquiry into the jurisdiction and
operation of the State Administrative
Tribunal)

Hon Kate Doust MLC
(participating Member on the inquiry into the
Surrogacy Bill 2007)

Staff during this reporting period:

Ms Denise Wong, Advisory Officer (Legal)

Mr David Driscoll, Committee Clerk

Ms Anne Turner, Advisory Officer (Legal)

Ms Kerry-Jayne Braat, Committee Clerk

Dr Colin Huntly, Advisory Officer (Legal)

Mr Mark Warner, Committee Clerk

Ms Amanda Gillingham, Advisory Officer
(General)

Ms Lavina Mandy, Articled Clerk

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ISBN 1 921243 42 2

CONTENTS

1	INTRODUCTION	1
2	REPORTING PERIOD	1
3	ESTABLISHMENT OF THE COMMITTEE.....	1
4	TERMS OF REFERENCE.....	1
5	COMMITTEE MEMBERSHIP	2
6	STAFF AND SUPPORT SERVICES.....	3
7	INQUIRIES	3
	Biosecurity and Agriculture Management Bill 2006, Biosecurity and Agriculture Management (Repeal and Consequential Provisions) Bill 2006 and Biosecurity and Agriculture Management Rates and Charges Bill 2006	3
	Trans-Tasman Mutual Recognition (Western Australia) Bill 2005	4
	Criminal Law and Evidence Amendment Bill 2006	5
	Acts Amendment (Consent to Medical Treatment) Bill 2006	6
	Inquiry into the Jurisdiction and Operation of the State Administrative Tribunal.....	7
	Surrogacy Bill 2007	8
8	REPORTING TIMEFRAMES, REFERRAL TIMING AND MULTIPLE REFERRALS.....	8
9	CONCLUSION	9
	APPENDIX 1 FUNDAMENTAL LEGISLATIVE PRINCIPLES.....	11

REPORT OF THE STANDING COMMITTEE ON LEGISLATION

ANNUAL REPORT 2007

1 INTRODUCTION

- 1.1 Prior to the Thirty-Sixth Parliament, it was the usual practice for the Governor, on advice from the Executive, to prorogue and reopen the Parliament in August each year.¹ Reflecting this practice, parliamentary committees prepared 'sessional' reports on their work during that period for tabling in the Legislative Council.
- 1.2 In June 2003, the Government indicated that it did not intend to continue to ask the Governor to prorogue on an annual basis² and prorogation did not occur in August 2003 or August 2004 during the Thirty-Sixth Parliament. Reflecting this shift in practice, in the Thirty-Seventh Parliament, parliamentary committees of the Legislative Council table annual reports relating to their work during the calendar year.

2 REPORTING PERIOD

- 2.1 This report covers a 12-month period of activity by the Standing Committee on Legislation (**Committee**) between 8 December 2006 and 6 December 2007 (the last scheduled day of sitting for 2007) in the third year of the Thirty-Seventh Parliament.

3 ESTABLISHMENT OF THE COMMITTEE

- 3.1 The Committee was established on 17 August 2005 as part of a series of changes to the Legislative Council committee system.

4 TERMS OF REFERENCE

- 4.1 The Committee's terms of reference are published on the inside cover of this Report. On 20 September 2006, the Committee's terms of reference were amended by the Legislative Council. Previously, the Committee had discretion to consider the policy of a bill to a limited extent. Essentially, the new terms of reference have omitted former clause 4.4(a) in Schedule 1 of the Standing Orders which stated:

¹ Hon Kim Chance MLC, Minister for Agriculture and Leader of the House, Parliament of Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 25 June 2003, p9149. Parliament meets and transacts business for a period known as a 'session'. A session is terminated by a 'prorogation' of Parliament, which is effected by proclamation of the Governor on the advice of the Executive Council. Prorogation suspends meetings of each House and its committees.

² Hon Kim Chance MLC, Minister for Agriculture and Leader of the House, Parliament of Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 25 June 2003, p9150.

Unless otherwise ordered, the policy of a Bill ... may be considered by the Committee but only to the extent that the Committee is satisfied the provisions of the Bill ... are consistent with that policy and that the legislative intent can be given practical effect.

- 4.2 Effectively, the alteration means that the Committee is now absolutely prohibited from scrutinising the policy of a bill unless otherwise ordered by the House.³
- 4.3 The functions of the Committee are to consider and report on any bill referred by the Legislative Council or under Standing Order 125A (that is, referred by the Legislative Council at the recommendation of the Business Management Committee). Most bills can be referred by the Legislative Council to its committees, the general exceptions being appropriation, taxation and loan bills.
- 4.4 Unlike scrutiny of legislation committees of other Australian Parliaments, in Western Australia, the scrutiny of legislation is divided between the Joint Standing Committee on Delegated Legislation (scrutiny of subsidiary legislation), the Standing Committee on Uniform Legislation and Statutes Review (scrutiny of uniform legislation), and the Committee (scrutiny of primary legislation).
- 4.5 The Committee does not scrutinise all bills introduced into the Legislative Council as a matter of course; it only scrutinises bills if they are specifically referred by the Legislative Council. The Committee cannot amend a bill, but may make narrative-form recommendations and/or statutory-form recommendations to amend a bill in its report to the Legislative Council. Unless otherwise ordered by the Legislative Council, any amendment recommended by the Committee must be consistent with the policy of a bill.
- 4.6 The Committee is able to consider bills in more detail than would be possible in the limited time available in the Legislative Council itself, and to report its findings to the Legislative Council. This process allows for effective mediation of differing political views on issues. It also encourages interested members of the public to participate in an inquiry.
- 4.7 Under its terms of reference, the Committee's inquiries focus on the feasibility, clarity and technical competence of a bill. The Committee also considers any abrogation or curtailment of various, fundamental legislative principles.⁴

5 COMMITTEE MEMBERSHIP

- 5.1 The Committee consists of five Members:

³ See also Standing Order 230B.

⁴ These principles are attached in Appendix 1.

- Hon Graham Giffard MLC (Chair).
- Hon Giz Watson MLC (Deputy Chair).
- Hon Peter Collier MLC.
- Hon Dr Sally Talbot MLC.
- Hon Ken Baston MLC.

6 STAFF AND SUPPORT SERVICES

6.1 The Legislative Council Committee Office supports the Committee. During the reporting period, the Committee was staffed at various times by:

- Ms Denise Wong, Advisory Officer (Legal);
- Ms Anne Turner, Advisory Officer (Legal);
- Dr Colin Huntly, Advisory Officer (Legal);
- Ms Amanda Gillingham, Advisory Officer (General);
- Mr David Driscoll, Committee Clerk;
- Ms Kerry-Jayne Braat, Committee Clerk;
- Mr Mark Warner, Committee Clerk; and
- Ms Lavina Mandy, Articled Clerk.

7 INQUIRIES

Biosecurity and Agriculture Management Bill 2006, Biosecurity and Agriculture Management (Repeal and Consequential Provisions) Bill 2006 and Biosecurity and Agriculture Management Rates and Charges Bill 2006

7.1 The Biosecurity and Agriculture Management Bill 2006, Biosecurity and Agriculture Management (Repeal and Consequential Provisions) Bill 2006 and Biosecurity and Agriculture Management Rates and Charges Bill 2006 were referred to the Committee on 7 December 2006 with a reporting deadline of 3 April 2007. The policy of the bills was expressly referred to the Committee for inquiry.

7.2 The bills were intended to provide for the effective management of biosecurity⁵ and agriculture in Western Australia by:

- controlling the entry, establishment, spread and impact of harmful pests and diseases;
- controlling the use of agricultural and veterinary chemicals; and
- generally ensuring the safety and integrity of agricultural products.

7.3 It was the overarching purpose of the bills to modernise and integrate the majority of legislation dealing with agriculture in Western Australia. The bills were to repeal and replace 17 existing Acts which provided biosecurity measures, controls over the use of veterinary chemicals and controls over various agricultural activities.

7.4 In its report⁶, tabled on 3 April 2007, the Committee focused primarily on the Biosecurity and Agriculture Management Bill 2006 and made 31 narrative-form recommendations in relation to this bill (26 of these recommendations were made unanimously). The Committee also made three narrative-form recommendations in relation to the Biosecurity and Agriculture Management (Repeal and Consequential Provisions) Bill 2006 (all of these recommendations were made unanimously).

Trans-Tasman Mutual Recognition (Western Australia) Bill 2005

7.5 A 1999 version of this bill was referred to the Standing Committee on Constitutional Affairs (1989 to 2001), which recommended in its 46th report that all clauses of the 1999 bill be passed.⁷ After that bill lapsed from the Notice Paper (when the Third Session of the Thirty-Fifth Parliament prorogued on 4 August 2000), a 2002 version of this bill was introduced into the Parliament and referred to the Standing Committee on Uniform Legislation and General Purposes (2002 to 2005) for inquiry. That committee recommended in its fourth report that the 2002 bill be passed without amendment.⁸

⁵ Biosecurity is “*The prevention of the entry, establishment or spread of unwanted pests and infectious disease agents in people, animals, plants or the environment*”: Biosecurity Australia, Department of Agriculture, Fisheries and Forestry, *Import Risk Analysis Handbook*, Australian Government, Canberra, 2003, p44.

⁶ Parliament of Western Australia, Legislative Council, Standing Committee on Legislation, Report 7, *Biosecurity and Agriculture Management Bill 2006, Biosecurity and Agriculture Management (Repeal and Consequential Provisions) Bill 2006 and Biosecurity and Agriculture Management Rates and Charges Bill 2006*, April 2007.

⁷ Parliament of Western Australia, Legislative Council, Standing Committee on Constitutional Affairs, Report 46, *Trans-Tasman Mutual Recognition (Western Australia) Bill 1999*, November 1999.

⁸ Parliament of Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, Report 4, *Trans-Tasman Mutual Recognition (Western Australia) Bill 2002*, October 2002.

- 7.6 The Trans-Tasman Mutual Recognition (Western Australia) Bill 2005 was referred to the Committee on 3 May 2007 with a reporting deadline of 7 June 2007. An extension of the reporting deadline, to 26 June 2007, was subsequently granted.
- 7.7 The purpose of the bill is to implement, in Western Australia, the Trans-Tasman Mutual Recognition Arrangement which was signed by all Australian Heads of Government and the Prime Minister of New Zealand in 1996.⁹ Western Australia is the last jurisdiction to give legislative effect to the arrangement.
- 7.8 Comments which were made during the debate on the motion to refer the bill to the Committee revealed that the basis for the referral was the wish to clarify the bill's effect on the State's biosecurity or quarantine measures in relation to fruit imported from New Zealand. Consequently, the Committee's report¹⁰ on this bill concentrated largely on this issue. Five narrative-form recommendations were made, four of which were unanimous.

Criminal Law and Evidence Amendment Bill 2006

- 7.9 On 21 March 2007, the Criminal Law and Evidence Amendment Bill 2006 and the bill's policy were referred to the Committee for inquiry with a reporting deadline of 28 June 2007. Pursuant to the Committee's requests, the Legislative Council extended the reporting deadline to 30 August 2007.
- 7.10 The bill proposes to:
- make amendments to the prosecution of sexual assault cases;
 - introduce a limited prosecution right to appeal against acquittal verdicts in trials heard by Judge and jury; and
 - make other amendments which have been identified in various reviews of crime legislation as well as minor consequential amendments.
- 7.11 In its report¹¹, the Committee restricted its comments to specific clauses of the bill and made eight unanimous narrative-form recommendations.
- 7.12 Hon Donna Faragher MLC substituted for Hon Ken Baston on this inquiry pursuant to Standing Order 326A. The Committee extends its appreciation to Hon Donna Faragher for her contribution to the inquiry.

⁹ *Explanatory Memorandum* for the Trans-Tasman Mutual Recognition (Western Australia) Bill 2005.

¹⁰ Parliament of Western Australia, Legislative Council, Standing Committee on Legislation, Report 8, *Trans-Tasman Mutual Recognition (Western Australia) Bill 2005*, June 2007.

¹¹ Parliament of Western Australia, Legislative Council, Standing Committee on Legislation, Report 9, *Criminal Law and Evidence Amendment Bill 2006*, August 2007.

Acts Amendment (Consent to Medical Treatment) Bill 2006

7.13 This bill was referred to the Committee on 5 September 2007 for reporting by 18 October 2007. An extension of the reporting deadline, to 25 October 2007, was subsequently granted.

7.14 The bill proposes to amend the *Guardianship and Administration Act 1990*, the *Civil Liability Act 2002* and *The Criminal Code*. The main aims of the proposed amendments are to:

- establish a simple, flexible statutory scheme which will allow people (through the making of statutory advance health directives) to consent, or refuse consent, to any future health treatment if and when they do not have the capacity to make their own decisions about their health treatment;
- allow people to appoint an enduring guardian who will make personal and lifestyle decisions, including decisions about health treatment, in the event that they do not have the capacity to make their own decisions about these matters;
- determine who may become a substituted decision-maker (for the purposes of making decisions about health treatment) for a person who does not have the capacity to make their own decisions about their health treatment and who, in the event of such incapacity, has not left instructions for his or her future health treatment in an advance health directive and does not have an enduring guardian or a guardian; and
- clarify and expand the protections available to health professionals from civil and criminal liability whenever they treat a person who is unable to make their own decisions about their health treatment.

7.15 In its report¹², tabled on 25 October 2007, the Committee restricted its comments to specific clauses of the bill and made 12 unanimous recommendations, of which nine were narrative, and three were statutory, in nature.

7.16 Hon Helen Morton MLC substituted for Hon Ken Baston on this inquiry pursuant to Standing Order 326A. The Committee extends its appreciation to Hon Helen Morton for her contribution to the inquiry.

¹² Parliament of Western Australia, Legislative Council, Standing Committee on Legislation, Report 10, *Acts Amendment (Consent to Medical Treatment) Bill 2006*, October 2007.

Inquiry into the Jurisdiction and Operation of the State Administrative Tribunal

7.17 This inquiry was referred to the Committee on 7 June 2007 pursuant to section 173 of the *State Administrative Tribunal Act 2004*, which provides that:

As soon as practicable after the end of the period of 2 years after the day on which section 7 comes into operation [that period ended on 1 January 2007] an inquiry into the jurisdiction and operation of the [State Administrative] Tribunal is to be conducted by –

- (a) a committee of the Legislative Council established to conduct that inquiry; or*
- (b) an existing committee of the Legislative Council upon which the function of conducting that inquiry is conferred by that House.*

7.18 An advertisement was lodged by the Committee in *The West Australian* newspaper on 16 June 2007 advising the public of the inquiry and seeking public submissions in respect of the jurisdiction and operation of the State Administrative Tribunal (**Tribunal**) since its establishment. The Committee also issued a media statement on 22 June 2007 covering these matters and invited various interested members of the public (including people who, and organisations which, have been a party to proceedings in the Tribunal) to provide a submission by writing to them individually. In an effort to maintain the confidentiality of the contact details of parties to Tribunal proceedings, the Committee's letter of invitation to provide a submission was sent by an arrangement with the Tribunal without the Committee receiving any of the parties' contact details. A total of 2,429 letters were sent using this method.

7.19 The due date for submissions was 31 August 2007. The Committee has received 99 submissions, 84 of which have been accepted as public evidence.

7.20 In September 2007, the Committee attended and inspected the Tribunal's premises, where Members and staff were briefed by The Honourable Justice Michael Barker, President, and Mr Alex Watt, Executive Officer, State Administrative Tribunal. A public hearing was also held with the Tribunal's President, Executive Officer and His Honour Judge John Chaney SC, Deputy President, State Administrative Tribunal.

7.21 The Committee is still in the process of gathering information and intends to hold further public hearings in 2008.

7.22 Hon George Cash MLC has substituted Hon Peter Collier on this inquiry pursuant to Standing Order 326A. The Committee extends its appreciation to Hon George Cash for his contribution to the inquiry to date.

7.23 The Committee also acknowledges and thanks the State Administrative Tribunal for its assistance in this inquiry to date.

Surrogacy Bill 2007

7.24 The Surrogacy Bill 2007 was referred to the Committee on 14 November 2007 with a reporting deadline of 10 April 2008. The bill aims to provide for the regulation of surrogacy arrangements and for the parentage of children who are born as a result of these arrangements.

7.25 On 1 December 2007, the Committee lodged an advertisement in *The West Australian* newspaper advising the public that the Committee is inquiring into the bill and is seeking public submissions in respect of the bill. The Committee also invited various members of the public who may have an interest in the bill to provide a submission by writing to them individually. The due date for submissions is 1 February 2008.

7.26 Hon Kate Doust MLC is participating (with leave to deliberate) on this inquiry pursuant to Standing Order 326. The Committee extends its appreciation to Hon Kate Doust for her contribution to the inquiry to date.

8 REPORTING TIMEFRAMES, REFERRAL TIMING AND MULTIPLE REFERRALS

8.1 In order for the Committee to effectively and efficiently assist the Legislative Council with its role of scrutinising proposed legislation, the Committee wishes to highlight to the Legislative Council the time required to conduct inquiries into proposed legislation.

8.2 The short reporting timeframes imposed by the Legislative Council in relation to the Trans-Tasman Mutual Recognition (Western Australia) Bill 2005 (initially a five-week referral) and the Acts Amendment (Consent to Medical Treatment) Bill 2006 (initially a six-week referral) meant that the Committee was unable to produce reports which were as comprehensive as might otherwise have been possible.

8.3 The Committee was also faced with the task of undertaking:

- multiple inquiries during the majority of the reporting period; and
- inquiries which were referred immediately prior to, and spanned, sitting recesses.

8.4 All of the above factors meant that Members encountered difficulties with the scheduling of meetings, many of which were required to be held outside of the Legislative Council sitting timetable. It also resulted in significant work pressures for the Committee, its staff and members of the public and stakeholders who participated in the inquiries.

8.5 The Committee draws to the attention of the Legislative Council the need to give due consideration to:

- the adequacy of the reporting timeframes it imposes on the Committee;
- the timing of referrals it makes to the Committee; and
- the number of concurrent referrals it makes to the Committee,

in order to ensure adequate opportunity for public and stakeholder participation. This will also ensure that the Committee's work is of maximum assistance to the House.

8.6 The Committee also draws attention to the Committee's *Annual Report 2005*¹³ and *Annual Report 2006*¹⁴, which expressed the Committee's same reservations.

9 CONCLUSION

9.1 The Committee considers that:

- it has an important role in assisting the Legislative Council to consider and review proposed legislation and to inquire into any other matter which is referred; and
- in the time made available to the Committee for this function during the reporting period, it has operated efficiently and effectively.



Hon Graham Giffard MLC
Chair
6 December 2007

¹³ Parliament of Western Australia, Legislative Council, Standing Committee on Legislation, Report 2, *Annual Report 2005*, March 2006, p5.

¹⁴ Parliament of Western Australia, Legislative Council, Standing Committee on Legislation, Report 6, *Annual Report 2006*, December 2006, p5.

APPENDIX 1

FUNDAMENTAL LEGISLATIVE PRINCIPLES

Does the Bill have sufficient regard to the rights and liberties of individuals?

1. **Are rights, freedoms or obligations dependent on administrative power only if sufficiently defined and subject to appropriate review?**
2. **Is the Bill consistent with principles of natural justice?**
3. **Does the Bill allow the delegation of administrative power only in appropriate cases and to appropriate persons?**
4. **Does the Bill reverse the onus of proof in criminal proceedings without adequate justification?**
5. **Does the Bill confer power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer?**
6. **Does the Bill provide appropriate protection against self-incrimination?**
7. **Does the Bill adversely affect rights and liberties, or impose obligations, retrospectively?**
8. **Does the Bill confer immunity from proceeding or prosecution without adequate justification?**
9. **Does the Bill provide for the compulsory acquisition of property only with fair compensation?**
10. **Does the Bill have sufficient regard to Aboriginal and Torres Strait Islander tradition?**
11. **Is the Bill unambiguous and drafted in a sufficiently clear and precise way?**

Does the Bill have sufficient regard to the institution of Parliament?

12. **Does the Bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?**
13. **Does the Bill sufficiently subject the exercise of a proposed delegated legislative power (instrument) to the scrutiny of the Legislative Council?**

14. Does the Bill allow or authorise the amendment of an Act only by another Act?

15. Does the Bill affect parliamentary privilege in any manner?