



THIRTY-SEVENTH PARLIAMENT

REPORT 15
JOINT STANDING COMMITTEE ON
DELEGATED LEGISLATION
ANNUAL REPORT 2005

Presented by Mr Peter Watson MLA (Chairman)

and

Hon Ray Halligan MLC (Deputy Chairman)

November 2005

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

Date first appointed:

June 28 2001

Terms of Reference:

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

“3. Joint Standing Committee on Delegated Legislation

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

Members as at the time of this inquiry:

Mr Peter Watson MLA (Chairman)

Mr Tony Simpson MLA

Hon Ray Halligan MLC (Deputy Chairman)

Ms Judy Hughes MLA

Hon Barbara Scott MLC

Hon Shelley Archer MLC

Dr Graham Jacobs MLA

Hon Vincent Catania MLC

Staff as at the time of this inquiry:

Mr Paul Grant, Advisory Officer (Legal)

Kerry-Jayne Braat, Committee Clerk

Felicity Mackie, Advisory Officer (Legal)

Irina Lobeto-Ortega, Articled Clerk

Address:

Parliament House, Perth WA 6000, Telephone (08) 9222 7222

delleg@parliament.wa.gov.au

Website: <http://www.parliament.wa.gov.au>

ISBN 1 9208 8661 3

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REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

ANNUAL REPORT 2005

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 Parliament in August each year. Reflecting this practice, parliamentary committees prepared sessional reports to report to the Legislative Council on their work during that period.
- 1.2 In June 2003, the Government indicated that it did not intend to continue to ask the Governor to prorogue on an annual basis, 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 will table annual reports relating to their work during the calendar year.
- 1.3 The role of the Joint Standing Committee on Delegated Legislation (**Committee**) and its approach to the scrutiny of subsidiary legislation has been discussed in the Committee's Sixth Report.¹
- 1.4 The Committee holds a standing referral from the Legislative Council to consider all instruments of subsidiary legislation,² and other instruments made under delegated legislative authority that are subject to parliamentary disallowance. As a result, the Committee is able to scrutinize and report to Parliament on a huge volume of instruments. However, due to the tight deadlines that are statutorily imposed on the Committee and the limited resources available to it, the Committee resolved shortly after its establishment to consider only those instruments that are subject to disallowance and any other instruments that were noted by individual members.

2 MEMBERS

- 2.1 The Committee underwent a number of changes to its member constitution over the course of 2005 as a result of the State General Election. The Committee has been served by the following members this year:
- Mr Martin Whitely MLA (Chairman to January 23 2005);
 - Mr Peter Watson MLA (Chairman from May 4 2005);

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

² As defined in section 5 of the *Interpretation Act 1984*.

- Hon Ray Halligan MLC (Deputy Chairman);
- Hon Barbara Scott MLC;
- Hon Robin Chapple MLC (to May 21 2005);
- Mr Rod Sweetman MLA (to January 23 2005);
- Mr Terry Waldron MLA (to January 23 2005);
- Dr Graham Jacobs MLA (from April 7 2005);
- Mr Tony Simpson MLA (from April 7 2005);
- Ms Judy Hughes MLA (from April 7 2005);
- Hon Shelley Archer MLC (from May 26 2005); and
- Hon Vincent Catania MLC (from May 26 2005).

2.2 The Committee takes this opportunity to acknowledge the contribution of Mr Martin Whitely MLA, Hon Robin Chapple MLC, Mr Rod Sweetman MLA and Mr Terry Waldron MLA to the work of the Committee and wishes them well.

3 STAFF

3.1 The Committee is assisted by up to two advisers who examine and report to the Committee on every disallowable instrument, provide advice on all correspondence received, write letters, prepare draft reports for consideration by the Committee before tabling in the Parliament, and attend meetings of the Committee. The Committee's advisers during 2005 were:

- Mr Paul Grant, Advisory Officer (Legal); and
- Ms Felicity Mackie, Advisory Officer (Legal) (from September 2005).

3.2 Additional advisory officer support was provided to the Committee at various times throughout the year by Ms Anne Turner, Advisory Officer (Legal) and Ms Denise Wong, Advisory Officer (Legal). From time to time, the Committee's advisers are assisted in their role by Articled Clerks. In 2005, the Articled Clerk assisting the Committee was Ms Irina Lobeto-Ortega. Ms Kerry-Jayne Braat, Committee Clerk, provided administrative and clerical support. Mrs Kay Sampson, Clerical Assistant, and Ms Sheena Hutchison, Clerical Assistant/Committee Clerk, provided technical, Internet and reception services.

4 REPORTS PRESENTED TO THE HOUSE

4.1 In 2005 the Committee presented the following reports to both the Legislative Council and the Legislative Assembly, in accordance with its terms of reference:

- Report number 11 - *Shire of Nannup Local Law Parking and Parking Facilities* - tabled on August 23 2005;
- Report number 12 - *Spent Convictions (Act Amendment) Regulations 2005* - tabled on September 22 2005;
- Report number 13 - *Road Traffic (Fees for Vehicle Licences) Regulations (No.2) 2004; Road Traffic (Licensing) Amendment Regulations (No.4) 2004* - tabled on November 24 2005; and
- Report number 14 - *Section 3 of the Interpretation Act 1984* - tabled on November 24 2005.

5 STATISTICS

5.1 The following table provides a purely numerical indication of the Committee's workload in 2005:

	Calendar Year 2005
Total number of instruments scrutinized	523
Total number of local laws scrutinized	90
Percentage of instruments scrutinized that were local laws	17.2
Total number of notices of motion for disallowance given	24
Total number of notices of motion for disallowance withdrawn	21
Total number of instruments disallowed on recommendation of the Committee	1

5.2 These figures do not demonstrate that many of the instruments considered by the Committee are often lengthy documents. Irrespective of their size, the instruments often involve complex issues that span a diverse range of subject matters.

5.3 The figure in the last row of the above table indicates that only one instrument has been disallowed on the recommendation of the Committee in 2005. However, this figure does not illustrate the process by which the Committee can, and does, obtain undertakings from the responsible Minister, Department or local government to amend or repeal instruments with which the Committee has raised a concern. When such undertakings are given, the Committee often does not proceed with any motion to

disallow that may have been tabled. The Committee only recommends the disallowance of instruments as a last resort.

6 A SAMPLE OF SPECIFIC CONCERNS RAISED IN RELATION TO INSTRUMENTS SCRUTINIZED BY THE COMMITTEE

Reversal of the Onus of Proof in Subsidiary Legislation

- 6.1 The Committee considered the following provision in a new reg 18E inserted into the *Local Government (Administration) Regulations 1996* by the *Local Government (Administration) Amendment Regulations (No.2) 2005*:³

“...a statement made, or information given, in connection with an application for employment with a local government as to academic, or other tertiary level, qualifications held by the applicant is to be taken to have been made, or given, by the applicant, in the absence of proof to the contrary.”

- 6.2 The Committee has adopted a consistent position in recent years with respect to the reversal of the onus of proof in subsidiary legislation made under the *Local Government Act 1995*.

- 6.3 The general principle of the common law reflected in The Criminal Code is that the onus of proof in establishing the elements of an offence is on the prosecution.⁴ It is settled law that, when interpreting statutes, common law doctrines will not be altered by statute unless there are clear and express words (or necessary implication) to show that the Parliament had intended to do so.⁵ This presumption extends to subsidiary legislation, so that where an instrument of subsidiary legislation attempts to depart from common law principles, it will be invalid unless there is clear authority in an empowering Act to the contrary.⁶

- 6.4 The Committee observes that a shift in onus of proof in regulations or local laws does not appear to be authorised by the *Local Government Act 1995*. The only shift in onus permitted under the *Local Government Act 1995* is in relation to vehicle offences and is provided for expressly in s 9.13 of the Act. In the Committee’s view this indicates

³ *Western Australian Government Gazette*, No.50, March 31 2005, p1037.

⁴ For example, see *Proudman v Dayman* (1941) 67 CLR 536, *He Kaw Teh v The Queen* (1985) 157 CLR 523, *Pennings v Williams*, unreported, Supreme Court of Western Australia, 13 September 1996.

⁵ *Daniels Corporation International Pty Ltd and Another v Australian Competition and Consumer Commission* (2002) 77 ALJR 40 at 43 per Gleeson CJ, Gaudron, Gummow and Hayne JJ, at 49 per McHugh J, and at 65-66 per Callinan J; *Coco v R* (1994) 120 ALR 415 at 419; *Bropho v State of Western Australia* (1990) 93 ALR 207 at 215; *Potter v Minahan* (1908) 7 CLR 277 at 304.

⁶ Pearce, D & Argument, S, *Delegated Legislation in Australia*, 2nd Ed, Butterworths, Sydney, 1999, p 137, citing for example, *CJ Burland Pty Ltd v Metropolitan Meat Industry Board* (1968) 120 CLR 400; *Willoughby Municipal Council v Homer* (1926) 8 LGR 3; *Ex parte Aston Investments Pty Ltd Re Hall* [1960] SR (NSW) 620; and *Willcocks v Anderson* (1970) 124 CLR 293.

that the scheme of the Act is that the common law doctrine is not to be displaced other than in the specific circumstances provided for in s 9.13.

- 6.5 The Committee formed the view that the reversal of the onus of proof in reg 18E(2) was not authorised by the relevant enabling Act and was invalid. The Committee subsequently received an undertaking from the Department of Local Government that reg 18E(2) would be repealed.⁷

Averment and Ouster Clauses in Local Laws

- 6.6 The Committee continues to see the use of averment and ouster clauses in new local laws, despite their removal from the most recent Western Australian Local Government Association *Local Laws Manual* templates.⁸ Clauses that the Committee most commonly requests be deleted from local laws include the following clauses which have been identified in parking local laws and health local laws, respectively:

“Averment on complaint as to clause [X] agreement

An averment on a complaint that this Local Law applies to a parking facility or a parking station under an agreement referred to in clause [X], shall be sufficient proof that this Local Law applies to that facility or station, unless there is proof to the contrary that such an agreement does not exist.”

and

“Council may Execute Work and Recover Costs

The Council shall not be liable to pay compensation or damages of any kind to the person referred to in subsection (1) in relation to any action taken by the Council under this Section.”

7 PREMIER’S CIRCULAR 2005/06 - SUBSIDIARY LEGISLATION - EXPLANATORY MEMORANDA

- 7.1 On June 13 2005 the Premier issued Premier’s Circular 2005/06 - *Subsidiary Legislation - Explanatory Memoranda*. This circular replaced Premier’s Circular 2002/04.
- 7.2 The Committee was consulted by the Department of Premier and Cabinet during the drafting of Premier’s Circular 2005/06. The Committee made a number of

⁷ Regulation 18E(2) was subsequently repealed by the *Local Government (Administration) Amendment Regulations (No.4) 2005*, published in the *Western Australian Government Gazette*, No.157, August 19 2005, p3871.

⁸ Western Australian Local Government Association, *Local Laws Manual*, April 2005.

suggestions in relation to administrative matters, and these suggestions were incorporated into the final circular.

- 7.3 The Committee continues to note that a number of agencies are not fully complying with the requirements of the Premier's Circular. In particular, the absence of tables providing details of fee changes in subsidiary legislation is a common problem.

8 FOLLOW-UP HEARING ON THE AUDITOR GENERAL'S *THIRD PUBLIC SECTOR PERFORMANCE REPORT 2004*

- 8.1 On September 14 2005 the Committee held a hearing with Mr Des Pearson, Auditor General, and Mr Glen Clarke, Executive Director, Office of the Auditor General, as a follow up to a hearing held on November 10 2004 to discuss the Auditor General's *Third Public Sector Performance Report 2004*. The Committee was particularly interested in receiving feedback on the response of public sector agencies to the Auditor General's findings and recommendations with respect to cost recovery in fees imposed by subsidiary legislation.

- 8.2 The Committee requested that the Auditor General report back to the Committee in June 2006 with more detailed information as to whether agencies have been calculating costs and fees in a manner that complies with the recommendations set out in the *Third Public Sector Performance Report 2004*.

9 CONFERENCES ATTENDED

Ninth Australasian and Pacific Conference on Delegated Legislation and Sixth Australasian and Pacific Conference on the Scrutiny of Bills

- 9.1 Hons Ray Halligan, Barbara Scott and Robin Chapple MLCs attended the Ninth Australasian and Pacific Conference on Delegated Legislation and the Sixth Australasian and Pacific Conference on the Scrutiny of Bills in Canberra between March 2 and 4 2005.
- 9.2 Hon Ray Halligan MLC also attended the Working Group of Chairs of Scrutiny Committees meeting in Canberra on March 1 2005.
- 9.3 The Committee members were accompanied by Ms Denise Wong, Advisory Officer (Legal) and Ms Kerry-Jayne Braat, Committee Clerk, who both also attended the conference and the Chairs' meeting.
- 9.4 The total cost of the attendance of Members and staff at this conference was \$12,721.79.
- 9.5 The conference papers are available on the Internet at: <http://www.legassembly.act.gov.au/conferences/scrutiny/scrutiny.htm>.

10 WORKING GROUP OF LOCAL LAW STAKEHOLDERS

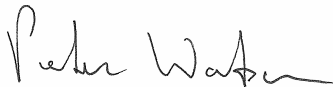
10.1 One of the major initiatives that the Committee was involved in during the Thirty-Sixth Parliament was the establishment of the working group of local law stakeholders (**Working Group**), which are the:

- representatives from the Department of Local Government and Regional Development;
- representatives from the Local Government Managers Australia (WA Division);
- representatives from the Western Australian Local Government Association; and
- staff members of the Committee.

10.2 The Working Group met once this year, on July 11 2005. The list of participants also included one member of the Committee (Hon Ray Halligan MLC) and a representative from the Department of Health, which monitors and vets proposed health local laws.

10.3 So as to improve the dissemination of the previously informal information reports that were prepared by the Committee for the Working Group to identify and discuss issues of concern, the Committee has, since 2003, tabled these information reports in both the Legislative Council and the Legislative Assembly. Whereas those information reports used to be confidential to the Working Group participants, the tabled information reports are now publicly available on the Internet at www.parliament.wa.gov.au. The Committee's Eighth and Ninth Reports are examples of the tabled information reports.⁹

10.4 Although the Committee did not table an information report in 2005, the Committee intends to present a report specifically addressing issues that have arisen over the last twelve months with respect to local laws in early 2006.



Mr Peter Watson MLA
Chairman
November 24 2005

⁹ Western Australia, Legislative Assembly and Legislative Council, Delegated Legislation Committee, Report 8, *Issues of concern raised by the Committee between June 9 2003 and December 19 2003 with respect to Local Laws*, April 19 2004; Western Australia, Legislative Assembly and Legislative Council, Delegated Legislation Committee, Report 9, *Issues of concern raised by the Committee between December 20 2003 and June 30 2004 with respect to Local Laws*, August 31 2004.