

PARLIAMENT OF WESTERN AUSTRALIA

THIRTEENTH REPORT

OF THE

**JOINT STANDING COMMITTEE ON
DELEGATED LEGISLATION**

IN RELATION TO THE

**EDUCATION AMENDMENT REGULATIONS
(NO.4) 1993**

Presented by the Hon Bruce Donaldson (Chairman)

**13
APRIL 1994**

Members of the Committee :

Hon Bruce Donaldson, MLC (Chairman)
Hon Tom Helm, MLC (Deputy Chairman)
Hon Reg Davies, MLC
Hon Doug Wenn, MLC
Mr Bob Bloffwitch, MLA
Mr Ted Cunningham, MLA
Mr Ross Ainsworth, MLA (ceased April 7, 1994)
Ms Diana Warnock, MLA (ceased March 30, 1994)
Mr Kevin Leahy, MLA (commenced April 7, 1994)
Mrs June van de Klashorst, MLA (commenced April 7, 1994)

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1. INTRODUCTION

On Thursday, April 7, 1994, at a meeting of the Joint Standing Committee on Delegated Legislation, Mr Bob Bloffwitch, MLA, moved the following motion, which was passed by the Committee :-

"That, pursuant to Standing Rule 5(b) and (c), the Education Amendment Regulations (No.4) 1993 be disallowed and that a report be tabled in the Parliament supporting the notice of motion for disallowance moved by the Hon John Halden, MLC on March 23, 1994."

2. RECOMMENDATION

As a result of its examination of the Education Amendment Regulations (No.4) 1993 the Joint Standing Committee on Delegated Legislation recommends as follows :-

That the Education Amendment Regulations (No.4) 1993 be disallowed.

3. COMMITTEE MEETINGS

The Joint Standing Committee on Delegated legislation met on the following occasions to examine, inter alia, the Education Amendment Regulations (No.4) 1993:-

Wednesday, March 9, 1994 from 1.50 pm to 2.40 pm
Monday, March 21, 1994 from 2.10 pm to 3.25 pm
Thursday, March 24, 1994 from 9.20 am to 10.25 am
Thursday, March 31, 1994 from 12.35 pm to 1.40 pm
Thursday, April 7, 1994 from 8.35 am to 9.58 am
Tuesday, April 12, 1994 from 10.20 am to 11.30 am

4. WITNESS TESTIMONY

The following witnesses appeared before the Committee and gave oral testimony :-

Mr Greg Black, Director General, Education Department of Western Australia;
Mr Peter Hamilton, Acting Executive Director Corporate Development, Education Department of Western Australia.

5. EDUCATION AMENDMENT REGULATIONS (NO.4) 1993

The Education Amendment Regulations (No.4) 1994 ("Amendment Regulations") were gazetted on December 7, 1993 and tabled on December 8, 1993.

The Amendment Regulations provide that :-

"Exemption from requirements of regulations

4A. (1) The chief executive officer may exempt a person or school from a requirement of these regulations.

(2) The power in subregulation (1) shall not be exercised unless the chief executive officer is satisfied that the exemption is necessary for the participation of the person or school in a pilot education project.

(3) An exemption under this regulation shall be for a limited period of time specified by the chief executive officer.

(4) An exemption under this regulation shall be evidenced in writing signed by the chief executive officer, stating -

(a) the persons to whom (whether named or designated by office) or the schools to which exemption is granted;

(b) the regulations or provisions from which exemption is granted; and

(c) the period of exemption.

(5) At any time, the chief executive officer may in writing revoke an exemption under this regulation.

(6) In this regulation -

"a pilot education project" means a project undertaken by the department in which changes to -

- (a) terms and conditions of teachers' employment;
- (b) teaching practices and methods; or
- (c) management of, and responsibility in, schools,

are researched, practised or assessed to ascertain whether the changes may contribute to an improvement in the quality of education of students."

In effect, regulation 4A provides that the Chief Executive Officer may exempt a "person or school" from a requirement of the Education Act Regulations 1960 ("Regulations") in circumstances where the Chief Executive Officer is satisfied that such exemption is "necessary for the participation of the person or school in a pilot education project".

Members of the Committee were concerned that the Amendment Regulations were *ultra vires* section 28 of the *Education Act 1928*. Accordingly, the Committee invited Mr Greg Black and Mr Peter Hamilton to appear before the Committee for the purpose of determining the *vires* of regulation 4A.

The parliamentary function of legislative scrutiny of subsidiary legislation, delegated by the Parliament to the Joint Standing Committee on Delegated Legislation, was explained to Mr Black and Mr Hamilton, and the Committee's concerns with the Amendment Regulations.

Primarily, the Committee is opposed to the fact that the Amendment Regulations remove from the Committee, and therefore Parliament, the power to scrutinise any exemptions to the Regulations. The passage of this amendment will preclude the Committee from scrutinising any exemption of the Regulations, thereby bestowing upon the office of Chief Executive Officer an unfettered power not envisaged by the legislature.

The importance of the review process undertaken by the Committee was acknowledged in the Report of the Royal Commission into Commercial Activities of Government and Other Matters at paragraph 5.7.9 where the following was stated :-

"The least visible law making activity undertaken in this State is that by which statutory rules are made. These have a pervasive effect upon the lives and livelihood of the community. The Joint Standing Committee on Delegated Legislation and the Interpretation Act 1984 constitute significant checks in the process through which rules are given legal effect ... "

It is imperative that this review process not be undermined. The Committee submits that the provisions of Regulation 4A are matters which ought properly be dealt with by an Act of Parliament and be subject to debate. Members of the Committee are not opposed to the philosophy and general thrust of the Amendment Regulations, however, they are opposed to the method of enactment, namely, by regulation.

A solution to this problem was sought by the Committee in an endeavour to facilitate the introduction of the Amendment Regulations. However, notwithstanding various undertakings by Mr Black, the Committee will ultimately relinquish its power of scrutiny if this amendment is to proceed. Mr Black undertook the following :-

"If the Committee approved of this amendment the department would undertake that at the end of the calendar year all those {persons and schools} certified as being amended under this regulation would cease and that we would report back to the Committee on the action and effect of applying the omnibus regulation during the course of 1994 prior to any proposal to extend the use of the regulation in 1995 and beyond.

...

... there would be a sunset clause that we revert to the normal regulations at the end of this year, and also each time this omnibus regulation is utilised it will be reported to the Committee. if the Committee has any concerns about it at all we would come and report on it to the Committee."

The Committee was mindful of the undertakings given by Mr Black, they displayed a willingness on his behalf to facilitate, and not jeopardise, the role of scrutiny delegated by the Parliament to this Committee. However, the fact remains that the passage of the Amendment Regulations will remove any power of the Committee to prevent an exemption from being implemented by the Chief Executive Officer, regardless of any undertaking.

The Committee was provided with a copy of advice from the Crown Solicitor's Office pertaining to the method by which exemptions from the Regulations could be facilitated. The advice stated that sections 43(7) and (8) of the *Interpretation Act 1984* would provide the legal basis for such exemptions. In particular, section 43(8) which states that :-

"(8) Subsidiary legislation may be made -

...

(c) so as to confer a discretionary authority on a specified person or body or a specified class of person or body; and

(d) so as to provide, in a specified case or class of case for the exemption of persons or things or a class of persons or things from the provisions of the subsidiary legislation, whether unconditionally or on specified conditions or conditions additionally imposed and either wholly or to such an extent as is specified or otherwise determined."

Further advice from the Crown Solicitor's Office to the Education Department suggested that section 28 of the *Education Act 1928*, in particular, section 28 (1)(q) provided the necessary

legislative authority to enact the Amendment regulations. Accordingly, an opinion was sought from Queens Counsel for the purpose of determining the *vires* of the amendment Regulations.

In summary, Counsel opinion provided the following :-

- (1) **Regulation 4A is *intra vires* the power granted by section 43(8) of the *Interpretation Act 1984*. The terms of subsections (c) and (d) are apposite to cover regulation 4A.**
- (2) **Neither subsection (1)(q) of section 28 of the *Education Act 1928* nor any other provision of that section gives the Minister power to make regulation in the form of regulation 4A. That is, there is no express power in section 28 to grant exemptions by regulation, and the common law does not regard a general rule-making power such as that in section 28(1)(q), that being the power to make regulations for "any other purpose that may be necessary or convenient for carrying out the provisions of the Act", as ordinarily stretching to the relaxation of, or immunity from, prohibitions and regulations. Furthermore, the general expression does not normally extend to a further delegation of powers by the authority to which the initial delegation was made in the principal legislation.**
- (3) **The Committee might form a view that the amendment unduly trespasses on established rights, freedoms and liberties, at least in the sense of rights established by the Regulations from which the Chief Executive Officer may grant exemption. There is no requirement for any exemption to be made in consultation with any person who would be affected by it, much less their consent. Regulation 4A has the very real potential to allow the Chief Executive Officer unilaterally to displace by exemption, and so trespass upon individual rights, freedoms and liberties established or recognised by the Regulations in the areas of terms and conditions of teachers' employment, teaching practices and methods and management of, and responsibility in, schools.**
- (4) **The Committee might also consider the nature and width of the power to exempt are such that it is a matter which ought properly to be dealt with by amendment of the *Education Act 1928* itself, rather than of the Regulations.**
- (5) **The Committee might further see the amendment as such an unexpected use of the power given by section 43(8) of the *Interpretation Act 1984* as to consider it should be brought to the attention of Parliament for that reason.**

6. CONCLUSION

Notwithstanding the *intra vires* of the Amendment Regulation, for reasons outlined in this report the Committee recommends that the Amendment Regulations be disallowed.

Given the potential impact upon the practice of education in Western Australia the provisions contained within the Amendment Regulations are matters which ought properly be dealt with by an Act of Parliament.

The Committee is fully supportive of, and commends, the Government's initiative to implement legislation which will enable much needed changes to the education system in this State. However, as repeatedly stated in this report, the appropriate forum for such change is not by amendment to the Regulations but by amendment to the *Education Act 1928*. Accordingly, the Committee recommends to the Minister for Education, the Hon Norman Moore, MLC, that he pass an amendment to the *Education Act 1928* to facilitate changes to the system of education such as those envisaged by the Amendment Regulations.
