

**PARLIAMENT OF WESTERN AUSTRALIA**

**FOURTEENTH REPORT**

**OF THE**

**JOINT STANDING COMMITTEE  
ON  
DELEGATED LEGISLATION**

**IN RELATION TO**

**SCRUTINY OF SUBORDINATE LEGISLATION  
IN DIFFERENT JURISDICTIONS**

**PRESENTED BY THE HON BRUCE DONALDSON (CHAIRMAN)**

**14  
JUNE 1994**

## ***Joint Standing Committee on Delegated Legislation***

### **Membership**

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  
Mrs June van de Klashorst MLA  
Mr Kevin Leahy MLA

### **Advisory/Research Officer**

Mary O'Donovan

### **Committee Clerk**

Ms Jan Paniperis

### **Terms of Reference**

5. *It is the function of the Committee to consider and report on any regulation that:*
  - (a) *appears not to be within power or not to be in accord with the objects of the Act pursuant to which it purports to be made;*
  - (b) *unduly trespasses on established rights, freedoms or liberties;*
  - (c) *contains matter which ought properly to be dealt with by an Act of Parliament;*
  - (d) *unduly makes rights dependent upon administrative, and not judicial decisions.*
  
7. *If the Committee is of the opinion that any other matter relating to any regulation should be brought to the notice of the House, it may report that opinion and matter to the House.*

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## BACKGROUND

### The Establishment of the Joint Standing Committee

Parliament's role of scrutiny and review of delegated legislation has, in almost all jurisdictions, been delegated to a Parliamentary Committee. The structure and the terms of reference of these Committees differ in each jurisdiction in Australia. The Senate *Standing Committee on Regulations and Ordinances* was first established in Australia in 1931 and is, to a certain extent, the model on which Committees dealing with delegated legislation have been based. Other bicameral states such as Victoria, Tasmania and South Australia, unlike the Senate, have joint committees which scrutinise delegated legislation very effectively. In Western Australia the Joint Standing Committee on Delegated Legislation took over the task of reviewing delegated legislation from the Legislative Review and Advisory Committee in 1987.

The Legislative Review and Advisory Committee was a creation of statute and its membership was not made up of members of Parliament. Recommendations made by that Committee for disallowance of regulations, it was found, were not taken up by the Parliament, and it was believed by the then Government, and recommended in the *Report of a Select Committee on a Committee System in the Legislative Council September 1985* ("*the Report on the Committee System*"), that it would be more appropriate to establish an "in House" committee to review delegated legislation.

*The Report on the Committee System* in fact proposed that the Committee should be a Legislative Council Committee as it was stated at *Part XIII* that

*"the Council maintain a system of standing committees independently of the Legislative Assembly in relation to all matters pertaining to its legislative and investigative functions".*

The Parliament gave consideration to the composition of the proposed standing committee on delegated legislation and it was decided that a joint standing committee would be the most effective. It was stated by the Honourable Mr Berinson MLC during the debate on the establishment of the Committee, that the purpose of having a **joint** standing committee on delegated legislation was

*"to secure a widely representative and well balanced parliamentary committee to serve the purposes of the Parliament. This is particularly necessary in respect of delegated legislation where each House of the Parliament has specific duties for review and where considered necessary, disallowance." (Hansard Tuesday 28 April 1987 page 641).*

The Joint Standing Committee on Delegated Legislation therefore came into existence in 1987. The Rules state, inter alia, that the Committee consist of four members from the Legislative Assembly and four from the Council. As this is a joint committee the number of members on the Committee is greater than those of any other Committee in Parliament. The representatives from both Houses play a vital role in keeping other members of Parliament informed of the impact and import of the delegated legislation which the Committee is required to scrutinise.

#### **THE ROLE OF THE COMMITTEE**

The Joint Standing Committee on Delegated Legislation is charged with scrutinising and monitoring subordinate legislation in Western Australia. During the course of 1991 and 1992 the Committee examined some 563 regulations, rules and selected by-laws. It is envisaged that this number will be exceeded during the 1993 to 1994 period.

With the escalating number of regulations, rules and by-laws being published in Western Australia the Committee's role is becoming increasingly important. The importance of the review process undertaken by the Committee was acknowledged in the Second Report of the Royal Commission into Commercial Activities of Government and Other Matters Part II (*"the Royal Commission Report"*) at paragraph 5.7.9 where it 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. The Commonwealth Administrative Review Council in its Report No. 35, "Rule Making By Commonwealth Agencies", has given extensive consideration to rule making procedures. We understand that the Joint Standing Committee had initiated consideration of this issue prior to that report and is currently pursuing the matter. Public participation in rule making is a goal which should be pursued in this State."*

The demands placed upon Committee members will increase substantially if and when legislation such as the Interpretation (Subsidiary Legislation) Bill is proclaimed in this State. Proclamation of this legislation will expand the current limits of scrutiny to include instruments such as Orders, Notices, Town Planning Schemes, Resolutions or any other instrument made under any written law and having effect.

Essentially, this means that the potential volume and diversity of subordinate legislation reviewed by the Committee will more than double in size. Furthermore, the Committee will be confronted with a new and ever increasing diversity of subordinate legislation which must be interpreted and scrutinised. The current levels of knowledge

and expertise amongst Committee members to scrutinise such subordinate legislation should continue to be augmented if the Committee is to remain an effective body accountable to the people of Western Australia. As the *Royal Commission Report* also stated at paragraph 5.7.4

*"The legislative responsibility of the Parliament is an onerous responsibility. The community has entrusted members with the capacity to interfere with the rights, liberty and livelihood of citizens. That capacity should only be exercised after Parliament has given the best consideration of which it is capable to a legislative proposal."*

For the Committee members to give their best consideration to the subordinate legislation put before them it is imperative that they gain more knowledge of the systems utilised in other jurisdictions and increase their level of expertise so that they can deal effectively and efficiently with the volume of delegated legislation.

It was observed at paragraph 1.3 of the *Report on the Committee System* that

*"In assessing the worth of any proposal it is instructive to observe, preferably first hand, the operations of systems already in existence and to try and adapt, where possible, features that are attractive, and to avoid those which have created problems or that would be unsuited to a Western Australian environment."*

Accordingly, the Committee is of the opinion that it would be most advantageous for members to meet with various government officials and committees in other jurisdictions for the purpose of acquiring a better understanding of the way in which these jurisdictions prepare and scrutinise delegated legislation. If the Committee members are exposed to new and innovative ideas the Committee believes it will gain a greater knowledge and a better understanding of alternative systems of reviewing legislation and their possible applicability in Western Australia. This is essential if the Committee is to remain accountable and discharge its parliamentary duty to effectively scrutinise delegated legislation.

## **WASHINGTON**

The Committee in travelling to the United States of America hopes to gain a better understanding of:

- (a) the extent of delegated legislation in the US;
- (b) the system of review/scrutiny of delegated legislation by Congress;
- (c) what and how matters are delegated by Congress;

- (d) statutory drafting of legislation, either allowing or limited delegation of power to the executive;
- (e) review of the exercise of delegated legislative discretion.

The Constitution of the United States of America maintains the strict separation of powers. Article 1 Section 1 of the Constitution of the United States provides that

*"All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives . . . "*

Article 1 Section 8 provides that

*"The Congress shall have Power*

*To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constituion in the Government of the United States, or in any Department or Officer thereof"*

and Article 2 Section 1 states

*"The executive Power shall be vested in a President of the United States of America".*

The Congress is therefore technically prohibited from delegating its law making powers to the Executive, although there is limited delegation due to the interpretation given by the Courts in relation to delegation. This is, on occasion, quite the reverse in Western Australia where legislation may give a broad outline of the matter being legislated on but provide that the Governor be empowered to make regulations prescribing all matters that are required or permitted by the Act, or necessary or convenient to be prescribed for the purpose of giving effect to the Act. This general formulation of the delegation of the power to make regulations to the executive is widespread in Western Australian legislation and does not necessarily specify the nature or extent of the the areas upon which the executive can regulate matters.

The non-delegation doctrine as formulated and enforced by the Supreme Court in the United States is firstly that it ensures that important choices of social policy are made by Congress which is the branch of Government most responsive to the popular will. It also guarantees that to the extent that Congress finds it necessary to delegate authority, it provides the recipient of that authority with an intelligible principle to guide the exercise of the delegated discretion. And finally it ensures that the courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards.

Therefore the legislation and the delegation of power pursuant to legislation in the United States is more detailed and the legislative drafting process more involved. The Committee believes that it would be in its best interests to review the drafting of legislation and the legislative processes followed in the United States and to this end it proposes to visit and meet with the following people and committees.

**William Kimberling** - Deputy Director, National Clearinghouse for Election Administration, Federal Elections Commission: Overview of federalism and separation of powers in the United States Government.

**Library of Congress, Congressional Research Service** - Overview of congressional structure, legislative process and responsibilities.

### **Congressional Committees**

**Senate Committee on Government Affairs**

**Senate Committee on Rules and Administration**

**House Rules Committee, Subcommittee on the Legislative Process**

**House of Representatives and Senate Office of the Legislative Counsel**

(who provide legislative drafting assistance to House and Senate members and Committees)

**Case Study of legislation in process of formulation**

(Possibly in congressional foreign relations committee dealing with Australia or other areas such as environment or housing )

**General Account Office** - to discuss its role in making recommendations for more effective government operations and greater efficiency in the legislative process.

**Supreme Court** - meeting with judicial fellow to discuss the review by the courts of the exercise of delegated legislative discretion and possibly a Judge of the Supreme Court, if available.

**Brookings Institution** - discussion with research expert on the legislative process

**State House Annapolis, Maryland** - to examine the process and technical aspects of drafting legislation

### **LONDON**

The Australian system of government is based on that of the United Kingdom. The structure of the Western Australian Parliament is similar to that of the United Kingdom



and their Committee system is similar to that of the Western Australian Parliament. With this in mind, the Committee is proposing to speak with parliamentary members and committees which scrutinise delegated legislation in the same way that it is scrutinised in Western Australia. The Committee will be able to exchange information with the Committees which deal with subordinate legislation in the United Kingdom. These Committees are the Joint Committee on Statutory Instruments and the Delegated Powers Scrutiny Committee. It is of interest to the Committee, which is currently only able to review regulations, rules and by-laws, and not other subordinate legislation, that the United Kingdom has two separate Committees with responsibility for review of subordinate legislation.

This is of further interest to the Committee with respect to the *Interpretation (Subsidiary Legislation) Bill 1991* which will extend the types of delegated legislation which the Committee can review to include all types of subordinate legislation. This will substantially increase the Committee's workload if implemented. Therefore it will be useful for the Committee to review the proceedings and terms of reference of the two United Kingdom Committees, in light of possible changes.

The Committee is also meeting with representatives from the House of Lords European Communities Committee and the House of Commons Select Committee on European Legislation. These Committees review treaties and protocols invested in the EC Commission and the delegation of the Commission's law making power. It has become obvious to the Committee that it will soon be required to deal with subsidiary legislation made pursuant to uniform legislation. In those circumstances, the Committee is fully cognisant of the impact that this will have on its role in reviewing delegated legislation made under uniform legislation. Visiting and speaking to the members of the United Kingdom Committees on European Legislation and the European Communities Committee will make the Committee aware of possible difficulties which may be faced in the future and the manner in which similar difficulties have been dealt with by the Committees in the United Kingdom.

The Committee is proposing to meet with the following Committees or representatives during its time in London:

**Mary Bloor** - Lord's Clerk to the Joint Committee on Statutory Instruments

**House of Lords European Communities Committee** represented by Lord Boston of Faversham and Michael Pownall

**House of Commons Select Committee on European Legislation** represented by Tim Pratt

**Joint Committee on Statutory Instruments** - meeting with Committee members for

discussion and attendance at a Committee meeting

**Deregulation Sub-Committee** - represented by Andrew Makower

**Delegated Powers Scrutiny Committee** - meeting with Committee members for discussion and attendance at a Committee meeting

## FRANCE

In France the legal system is based on Roman law. The Committee is vitally interested in the manner in which the French review delegated legislation, prospectively rather than retrospectively. The codified system of administration in France means that legislation, and the drafting thereof plays an extremely important role in government. The system of review in France is more structured than in Australia, and the administrative court system is well-established. Sections or departments of the Conseil d'Etat are involved in both the prospective review of legislation and delegated legislation and the review of administrative decisions.

The Committee's role of scrutinising delegated legislation involves concepts of administrative law including natural justice and ultra vires and speaking to representatives from the various 'arms' of the Conseil d'Etat would assist the Committee in their understanding of administrative law and the review process. The structure of the Conseil d'Etat would also present the Committee with a different approach to the drafting of delegated legislation and show them an administrative court system which has been in place for centuries.

The Committee proposes to have discussions with people involved in the following roles within the Conseil d'Etat.

A *rapporteur* attached to either the *Section des finances* or the *Section de l'interieur*. A *rapporteur* reviews legislation with respect to its legality, its general merits and may also redraft the legislation if necessary, all before the legislation is put before the Parliament. The Committee also reviews delegated legislation regarding, inter alia, its legality but any redrafting of the regulations or rules is not possible. The Committee only reviews the legislation after it has come into effect, it does not make recommendations to the Parliament prior to the making of the regulations. Therefore the role of the *rapporteur* is of great interest to the Committee.

The Committee also intends to sit, with a translator, in a meeting of the Conseil when it is reviewing legislation and considering the comments of the *rapporteur*. If the General Assembly of the Conseil d'Etat is meeting in a plenary session during its visit, the Committee will attend. As Western Australia does not have a structured

administrative court section, the Committee will visit the Section du Contentieux which is responsible for the judicial work of the Conseil d'Etat.

The Committee will also visit a representative from the Report Commission (*la Commission du Rapport et des Etudes*), which provides information about current problems in administration to the government of France. This would assist the Committee with the drafting of the legislation proposing reforms to the manner in which delegated legislation is made and administered in Western Australia. This will include administrative review of decisions, therefore any difficulties that are being encountered by the French system would be of interest to the Committee.

There are two levels of courts dealing with administrative matters in France, the Tribunaux Administratifs and the Conseil d'Etat. The Committee has requested to meet with a representative from either of these judicial bodies for an explanation of the French inquisitorial system in administrative matters and possibly a brief visit to one of the courts to see it in action.

## **MEMBERSHIP**

The following Committee members will be travelling to the various jurisdictions

Hon Bruce Donaldson MLC (Chairman)  
Hon Tom Helm MLC (Deputy Chairman)  
Hon Doug Wenn MLC  
Hon Reg Davies MLC  
Mr Bob Bloffwitch MLA  
Mrs June van de Klashorst MLA  
Mr Kevin Leahy MLA  
Mr Ted Cunningham MLA

The Committee will be assisted by one Advisory/Research Officer.

The cost of the airfares for the nine people travelling is estimated at \$55,000. The accommodation expenses plus \$60.00 per day for incidental expenses is estimated at \$68,000.