JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

Thirty-ninth Report — "Annual Report 2009" — Tabling

MR J.M. FRANCIS (Jandakot) [11.10 am]: I present for tabling the thirty-ninth report of the Joint Standing Committee on Delegated Legislation, which is its annual report.

[See paper 2060.]

Mr J.M. FRANCIS: As members know, the Joint Standing Committee on Delegated Legislation has a standing referral to consider all instruments of subsidiary legislation that are published. Due to the committee's workload and statutory timelines, the committee currently considers only those instruments that are subject to disallowance or those that are noted by particular members for consideration. This report covers the period of activity between 5 December 2008 and 1 December 2009, spanning the first full year of the thirty-eighth Parliament. A total of 493 disallowable instruments were referred to the committee during this reporting period. That is a significant number. I have some general statistics that may be of some interest to members. Eighteen per cent of all instruments scrutinised by the committee in 2009 were local laws by local councils and shires, and 50 notices of motion for disallowance were given on the committee's behalf, of which 48 were withdrawn. This indicates that the committee was able to resolve those issues to its satisfaction by obtaining either further information or undertakings to amend instruments.

During the reporting period, the committee tabled a number of reports. Of these, the City of Armadale Signs Amendment Local Law 2008 and the City of Joondalup Cat Laws 2008 were disallowed by the Legislative Council. In 2009 the committee also tabled four information reports on local laws regulating signs and advertising devices; an unauthorised component of a managed fisheries access licence fee; the tabling of subsidiary legislation in the Legislative Council; and unauthorised disclosure of confidential committee correspondence by the City of Joondalup.

The consideration of instruments imposing fees and charges continues to occupy a significant amount of the committee's time. The committee tabled its thirty-second report in relation to a number of regulations increasing court fees. Some of the fees were significantly over-recovering the cost of providing a service. The central issue was whether the fees were either authorised or contemplated by the empowering legislation. The committee found that the fees were unauthorised taxes and recommended that they be disallowed. After the report was tabled, the committee received a letter from the Attorney General agreeing to amend the court fees so that new fees would not recover more than 100 per cent of the cost of providing the service. The committee agreed to accept that undertaking and sought leave to discharge the motion for disallowance from the notice paper, and leave was granted. We acknowledge the actions of the Attorney General in resolving that issue.

Following its thirty-second report, the committee now routinely seeks further information from a government department that wants to justify a fee increase on the basis of the consumer price index. In some cases, the committee has received advice that departments were unable to provide details of how the base fee in question was originally calculated. As part of the ongoing inquiry into cost recovery, the committee met with the Auditor General and the Deputy Auditor General, which provided an opportunity for the committee to share its concerns about the calculation of fees and charges with the Office of the Auditor General.

I acknowledge the work of the various staff who have served on this committee throughout this period. Some of those staff have left and we now have new staff members. In no particular order, I acknowledge Ms Christine Kain, Mrs Felicity Mackie, Ms Susan O'Brien, Ms Andrea McCallum, Ms Irina Lobeto-Ortega, Ms Anne Turner, Ms Denise Wong and our committee clerk, Mr David Driscoll.

MS J.M. FREEMAN (Nollamara) [11.13 am]: I would also like to speak about the report. In particular, I would like to thank the staff of the Joint Standing Committee on Delegated Legislation. The task of overseeing delegated legislation can be like watching paint dry for the staff. It is therefore important to acknowledge their good work of going into the legal specifics of delegated legislation and in ensuring that the delegated legislation is within the powers of the acts. One of the issues the committee considered was the fees and charges of government departments. The previous government had and this government has a policy of cost recovery for many government agencies. We have seen a proliferation of fees throughout government agencies, and therefore there has not been sufficient scrutiny of the fees. The thirty-second report showed that unauthorised taxes had been raised. If departments want to charge beyond cost recovery, they need to come to Parliament and argue why they need a taxing power. I draw the attention of Parliament to the two public hearings held on the issue of fees and charges, one of which was with Treasury officials and the other with the Auditor General. The Auditor General said that the consumer price index was not a good basis for establishing a fee increase because the cost of a fee will be related to the costing within the agencies. Treasury also said at the public hearing that the CPI is not necessarily a good way to calculate an adjustment to a fee, yet we are constantly given advice by departments that that is simply the process. That process does not take into account the many efficiencies that

can be achieved by new technology. The fees should not necessarily automatically be increased and we have a duty to consumers to ensure that the fees are charged on a cost-recovery basis and that one department does not cross-subsidise another.

Another issue I am keen to draw to the attention of Parliament is confidentiality, or the unauthorised disclosure of committee correspondence. That matter was raised with respect to the Joondalup cat laws. I have raised this issue before in the house, but I will do so again in the context of this report. Most delegated legislation relates to local government. We must look at whether local government has the capacity to make those types of local laws. The local government officers do very good work. That work goes before the Joint Standing Committee on Delegated Legislation and questions are asked, and sometimes local laws are disallowed. That is all done under a shroud of parliamentary privilege. Local government agencies have some difficulty with not being allowed to show to the general public the correspondence between the delegated legislation committee and the local government. The issue of cat laws was a good example because it was a very contentious issue. We want to work on that matter and seek some guidance because the issue of transparency places local government in a difficult situation because of their dealings with the delegated legislation committee. There seems to be a mismatch, which causes some concerns about our ability to work with local government in a way that does not look as though it is loaded with bureaucracy and secrecy.

I commend the report. It is a topic that no-one takes on with any great relish. It is not contentious like the previous reports that we have heard about, but it goes to the basic mechanics of how the parliamentary system operates.

MR A.J. WADDELL (Forrestfield) [11.19 am]: I rise to speak to the thirty-ninth report of the Joint Standing Committee on Delegated Legislation. It is quite a privilege to serve on the delegated legislation committee simply because it is one of the opportunities we get to see how the mechanisms of government play out in the real world and how legislation that comes through this place is in fact delivered to the people of Western Australia. It is a privilege to serve with my fellow members simply because it is an opportunity to work in a collegiate manner. It is not partisan; we are simply trying to get the best outcomes for everybody.

Over the year a number of scary moments have occurred when we have reflected on the nature of legislation that has come through this place, mostly under previous Parliaments, whereby through oversight or sometimes deliberately, regulatory powers that avoid the scrutiny of the delegated legislation committee have been enacted. This was brought home to us quite recently when we discussed whether a regulation is a regulation or an order. It seemed to us at the time that it merely came down to the title—it had the same effect. In one case we had the ability to scrutinise; in the other we did not. I do not claim to be an expert on this. As parliamentarians, when we pass legislation we need to be aware of the impact that the regulatory framework has on our ability to continue to scrutinise as time goes on. The interpretation of a bill or a subsequent act changes over time. It changes over time relative to community standards. It changes over time in terms of how the government of the day might interpret that act. We are often drawn to second reading debates to try to flesh out what the true meaning of a bill was at the time it was debated. It is certainly something that we all need to be very mindful of and be quite clear about when we are debating bills—what the assumptions and constraints will be when a bill is enacted. I do not think it is anybody's intention to give to some unelected person unlimited power to simply make a regulation that has a massive impact on the community in ways that we never contemplated. That is something that will certainly be on my agenda as we move forward.

The other issue that has caused me concern in previous years flows out of regulations that are made and implemented before they come before the delegated legislation committee for review. A local law is a classic example. A local government may pass a by-law, which is gazetted and advertised widely. It is implemented and finally works its way through the system until it comes before the committee. The committee might have some issue with that particular by-law and enter into some correspondence with the council, the city or whomever it might be. Over time there may be an agreement that some or all of it should stand. Local councils then give the committee undertakings. They say, "We will not enforce this law", or "We will, over this period of time, seek to change our by-laws in this way." That is an agreement made between us and them. We publish that information on our website.

What concerns me is that if an ordinary person who lives in, say, my electorate is keen to find the local by-laws for burning rubbish, the logical place for that person to find information is at the local council. In this example, it would be the Shire of Kalamunda's website. That person may contact the shire about it. If this by-law had been put in place and gazetted and the processes were run through properly, it is quite likely it would be on the shire's website to let people know those rules. As a member of the community, I will not be aware of the fact that there is a delegated legislation process of review. I will also not be aware of the fact that there may have been some correspondence between two bodies. I certainly am unlikely to be aware of the fact that there is a website somewhere deep in the bowels of Parliament that indicates there is an undertaking that this law will not become valid and should not be enforced. Being the good citizen I am, I would follow this law. I find that quite chilling.

This place, through its processes, has determined that somebody has exceeded his or her power to make a law, yet, on the other hand, we continue to allow somebody to de facto enforce that law illegally by not requiring that person to indicate to the general population, "Oops, we got it wrong. We're rescinding that; we're taking it back." In some instances I have noted it can take up to two years for a correction to come through. That is allowed. That is a long time. Somebody is asked to do something for which there was never a power to ask that person to do. That can have a drastic impact. I doubt it causes a great deal of angst in the community. It is certainly a problem and is something that I will be pursuing with the community to see whether we can come up with a mechanism whereby we can ensure that people are aware when these things happen. That of course takes us into difficult territory—whether we start advertising and put out press releases to let people know what we are doing. We are a behind-the-scenes committee. I do not think it is necessarily our role to be advertising per se or interfering with local government or anything like that. We may be left with no alternative but to do that in this instance.

The final point I make is that I have had a level of frustration with government departments that have presented explanatory memorandums and explanations as to why they have put fee increases before us. I have the distinct impression that government departments see appearing before the committee merely as a formality, a rubber-stamping exercise; that we are a nuisance and we get in the way of them doing their jobs. I do not think agencies fully understand the fact that regulation is really an expression of the Parliament's will; therefore, we have a full right to review. There have been a number of frank conversations and correspondence between various people that have resulted in who is going to blink first. Within the public sector we need to embark on an education program to help people more fully understand the nature of regulation, the nature of the powers of Parliament and the processes, and not simply rely on Treasury advice as to what they can and cannot do. Given the evidence that was provided to us by Treasury, there seems to be some general misunderstanding of the advice that Treasury provides, particularly in relation to, as the member for Nollamara said, the consumer price index. A number of departments believe that if they do not increase their fees by anything more than the CPI, they will get through with a rubber stamp, but that if they go over, they will need to have justification. That is certainly not the case. That is a matter that we hope to bring home bit by bit by taking a harder line on these things and providing the scrutiny that needs to occur.

The other problem we have is that an agency takes the view that if it receives X number of dollars from the totality of the fees it collects and it costs Y dollars to run the place, if Y is greater than X then it is under-recovering. That might be true in a general sense but it is certainly not true in an individual sense. Of course it means that there is great capacity for cross-subsidisation. That is something that cannot occur unless of course the original act intended that to occur, and in fact it is drawn up as a taxing act. There are a number of issues. It is a growing area and one that we all need to be quite aware of and careful of when we pass legislation.