

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

*Thirtieth Report — “Annual Report 2008” and
Thirty-first Report — “Issues of Concern Raised by the Committee Between 1 May 2007 and 30 April 2009
with respect to Local Laws” — Tabling*

MR J.M. FRANCIS (Jandakot) [11.37 am]: I thank you, Mr Speaker, for your cooperation in allowing me to table these reports. I present for tabling the thirtieth and the thirty-first reports of the Joint Standing Committee on Delegated Legislation, “Annual Report 2008” and “Issues of Concern Raised by the Committee Between 1 May 2007 and 30 April 2009 With Respect to Local Laws”.

[See papers 889 and 891.]

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 volume of subsidiary legislation gazetted and the strict statutory time lines involved, the committee currently considers only those instruments that are subject to a disallowance under section 42 of the Interpretation Act 1984 or another written law, or those that are noted by particular members for consideration.

Thirtieth Report — “Annual Report 2008”

Mr J.M. FRANCIS: I will deal first with the thirtieth report, the “Annual Report 2008”. A total of 477 disallowable instruments were referred to the committee in 2008. This is a significant number of instruments, particularly given that the committee did not reconvene until 3 December 2008 following the election. At the time, some 250 instruments were still awaiting the committee’s consideration. I have some special general statistical information that may be of interest to members: 30 per cent of all instruments scrutinised by the committee in 2008 were local laws; and 20 notices of motion for disallowance were given on the committee’s behalf, and 19 of these were withdrawn, indicating that the committee was able to resolve the issues to its satisfaction through either obtaining further information or securing undertakings to amend instruments from the relevant minister, department or local government authority.

In 2008, the committee tabled two information reports that raised issues of concern regarding university statutes and health local laws. In both instances, the government responded by accepting the committee’s recommendation.

The 2008 annual report provides an example of an issue of concern that arose during the committee’s scrutiny process. That issue involves attempts to use necessary and convenient regulation-making powers to authorise subsidiary legislation that abrogates a fundamental common law right. That discussion is set out at part 4 of that report.

In 2008, the committee continued to see a number of signs local laws that raised questions regarding the powers of local government to make laws relating to signage and advertising devices. The committee’s work in this area accumulated in an information report that members may recall was tabled this year. The annual report for 2008 notes the briefing session on the Interpretation Act, which was provided by committee members to both houses in May 2008. The committee envisages that further briefing sessions of this nature will be made available to members.

Consideration of instruments imposing fees and charges continues to occupy a significant amount of the committee’s time. As always, the committee examines whether the impost in question is authorised. This will often involve consideration of whether a fee or a tax is being imposed. The committee continued to work towards consolidating its views in this area and anticipates tabling a detailed information report on this subject later this month.

Members will also note reference to a new initiative to increase public access to the committee’s decisions. Undertakings provided to the committee by local government authorities and government departments since 1 January 2009 will soon be published on the parliamentary website to enable easy reference by members and interested members of the public.

*Thirty-first Report — “Issues of Concern Raised by the Committee Between 1 May 2007 and 30 April 2009 with
respect to Local Laws”*

Mr J.M. FRANCIS: I will now deal briefly with the thirty-first report titled “Issues of Concern Raised by the Committee between 1 May 2007 and 30 April 2009 with Respect to Local Laws”. This report covers issues arising in local laws scrutinised by the committee over a two-year time frame, spanning the thirty-seventh and thirty-eighth Parliaments. Between 1 May 2007 and 30 April 2009, the committee considered a total of 212 local laws. Of these, the committee requested and obtained 27 written undertakings to amend particular clauses of the local laws identified by the committee as having problems relevant to the committee’s terms of reference. A number of examples of problematic laws are set out in the thirty-first report. These issues will be discussed at the

next meeting of the working group of local law stakeholders, which comprises committee staff, representatives of the Department of Local Government and Regional Development, the Western Australian Local Government Association and the Western Australian division of Local Government Managers Australia.

Between 1 May 2007 and 30 April 2009, the committee recommended that the Parliament disallow only two local laws. As members are aware, the disallowance of an instrument is a last resort. Most problems with government laws that the committee identified are addressed by seeking undertakings from the local government authorities to remedy the relevant clauses of local government laws by either amending them or repealing them altogether with an undertaking to not enforce the relevant clauses in the interim. The committee monitors compliance with undertakings on a regular basis and is concerned about the length of time local government authorities take to comply with written undertakings. The report sets out a number of undertakings that remain outstanding since 2005.

Most of the work done for the thirtieth and thirty-first reports, which were tabled today, was performed by the committee during the thirty-seventh Parliament. I acknowledge the work done by Mr Paul Andrews, the former member for Southern River who was the chair; Hon Vince Catania, who is now the member for North West; Mr Murray Cowper, the member for Murray-Wellington; Mr Tony McRae, the former member for Riverton; Mr Christian Porter, the member for Bateman and now Attorney General; Mr Tony Simpson, who is now the member for Darling Range; Dr Graham Jacobs, the member for Eyre; Hon Ken Travers, MLC; and retiring members Hon Barbara Scott and Hon Ray Halligan. I also thank the members of the current committee, Hon Kim Chance, the deputy chairman; the retiring members whom I previously mentioned; Hon Shelley Eaton; Mr Paul Miles, the member for Wanneroo; Ms Janine Freeman, the member for Nollamara; Mr Andrew Waddell, the member for Forrestfield; and the committee staff, Ms Christine Kaine, Ms Susan O'Brien, Ms Andrea McCallum and Mr David Driscoll.

Thirty-second Report — “Supreme Court (Fees) Amendment Regulations (No. 2) 2008, Children’s Court (Fees) Amendment Regulations (No. 2) 2008, District Court (Fees) Amendment Regulations 2008, Magistrates Court (Fees) Amendment Regulations (No. 2) 2008, Fines, Penalties and Infringement Notices Enforcement Amendment Regulations (No. 2) 2007 and Other Court Fee Instruments” — Tabling

MR J.M. FRANCIS (Jandakot) [11.45 am]: I present for tabling the thirty-second report of the Joint Standing Committee on Delegated Legislation.

[See paper 890.]

Mr J.M. FRANCIS: This report recommends the disallowance of four instruments and increasing four types of fees in the Supreme, District, Children’s and Magistrates Courts that over-recover the cost of providing the services for which the fees are imposed. The reason for this recommendation is that these instruments impose unauthorised taxes. Members may be particularly interested to note that probate fees in the Supreme Court over-recover the cost of probate services by up to 291 per cent.

As members will be aware from the committee’s previous reports, the committee has repeatedly tabled reports in which it has stated that a fee-for-service that over-recovers the cost of providing the service for which that fee is imposed is in fact a tax. In circumstances when there is no applicable tax act and the empowering legislation does not otherwise unambiguously authorise the tax, the committee concludes that the fee is in fact an unauthorised tax. There is no tax act for the relevant fees outlined in the thirty-second report.

The executive has argued that empowering legislation that confers the power to impose fees should be interpreted so as to permit the imposition of fees only for the purpose of recovering the general costs of operating the court as a whole, without regard to whether the fee is a tax. Section 46(7) of the Constitution Acts Amendment Act 1889 requires a bill that authorises the imposition of a tax to deal with that matter only. The committee has therefore rejected that argument, which it considers is inconsistent with legal principles and case law. Importantly, the committee also believes that it is inconsistent with the way the Parliament has authorised and contemplated that the power to impose a fee that is delegated to the executive by way of the various court acts is to be exercised. The committee’s position is supported by the opinion of eminent counsel, Mr Robert O’Connor, QC, who is a recognised expert in the area of taxation law.

The committee considers that this is an important report, as the thrust of the argument put forward by the executive is that the executive may choose whether an impost will be a tax, whereas that decision, throughout centuries of struggle for power between the Crown and the Parliament, remains the prerogative of the Parliament. The report refers to that history in the executive summary at chapter 3. Consistent with the general structure of this report, additional information is to be found in the appendices.

The report commences with an executive summary. Chapter 1 identifies the terms of reference, pursuant to which the committee’s inquiry was conducted and the instruments scrutinised, and in paragraph 1.20 isolates the

fees acknowledged by the executive to be over-recovering from fees that the executive has not determined whether there has been any over-recovery. There is a distinct difference.

The report proceeds on the basis that the committee's inquiry was into over-recovering of fees only, although much of the argument put forward by the executive appears to be directed at its difficulty with precisely costing the balance of fees. As is explained in the report, the committee proposes to continue its hearings with the Auditor General regarding this issue.

The process of the committee's inquiry is set out in chapter 2, which identifies the various legal advices provided to the executive and the committee. These are all annexed to the report. Chapter 2 reports the committee's preliminary view, its conclusions on the arguments put forward by the executive, and its recommendations. Chapter 3 is a more detailed analysis of the executive's argument and the committee's reasons for reaching a different conclusion. Chapter 4 contains a short explanation of the terms "fee for services", "tax" and "cost recovery" used in the report, legal advices, and cases considered by the committee. Chapter 5 provides some background information on the Auditor General's review of court fees.

I urge all members to read this report. It is a rather important report. Due to the prorogation of Parliament, this inquiry has spanned two Parliaments. I thank the former members of the committee, Mr Paul Andrews; Hon Vince Catania, MLC, as he was then; Dr Graham Jacobs; Tony McRae; Mr Christian Porter; and Hon Ken Travers. I also thank the members of the two subcommittees. Hon Vince Catania and Christian Porter were on the first subcommittee and the member for Nollamara, Ms Janine Freeman, and Hon Ray Halligan were on the second.

In conclusion, I again express my thanks to the committee staff, who always go over and above the call of duty to assist members. They work many late nights and have done so again this week. We are especially grateful for their current efforts considering the extreme workload of this committee. I thank Ms Christine Kaine, Ms Susan O'Brien, Ms Andrea McCallum and Mr David Driscoll, the clerk of the committee.