

40TH PARLIAMENT



Report 3

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

*Procedures for dealing with consequential amendments to
delegated legislation following enactment of primary legislation*

Presented by
Ms Emily Hamilton MLA (Chair)

and

Hon Robin Chapple MLC (Deputy Chair)

October 2017

Joint Standing Committee on Delegated Legislation

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REPORT 3

**JOINT STANDING COMMITTEE ON DELEGATED
LEGISLATION**

**PROCEDURES FOR DEALING WITH
CONSEQUENTIAL AMENDMENTS TO
DELEGATED LEGISLATION FOLLOWING
ENACTMENT OF PRIMARY LEGISLATION**

Government Response

This Report is subject to Standing Order 191(1):

Where a report recommends action by, or seeks a response from, the Government, the responsible Minister or the Leader of the House shall provide its response to the Council within not more than 2 months or at the earliest opportunity after that time if the Council is adjourned or in recess.

The two-month period commences on the date of tabling.

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**EXECUTIVE SUMMARY AND RECOMMENDATION FOR THE
REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION
IN RELATION TO THE
PROCEDURES FOR DEALING WITH CONSEQUENTIAL AMENDMENTS
TO DELEGATED LEGISLATION FOLLOWING ENACTMENT OF PRIMARY LEGISLATION**

EXECUTIVE SUMMARY

- 1 Occasionally, the enactment or amendment of primary legislation will necessitate consequential amendments to a suite of statutory instruments, including delegated legislation. Some such amendments may simply replace old terminology or update references to statutory definitions from the old statute to the new.
- 2 In some circumstances, these consequential amendments affect delegated legislation administered by a diverse range of government departments and agencies (agencies). Under the usual procedures outlined in Premier's Circular 2014/01, explanatory memoranda would have to be produced by the various affected agencies for every amending instrument, all signed by the relevant ministers and chief executive officers. The Joint Standing Committee on Delegated Legislation (Committee) and the Parliamentary Counsel's Office (PCO) have come to an administrative arrangement whereby, in these limited scenarios, the affected agencies are able to supply explanatory memoranda to the Committee under modified procedures.
- 3 In essence, it has been agreed that, in circumstances where the passing of primary legislation (whether they be inaugural or amending Acts) results in consequential amendments to instruments of delegated legislation administered by agencies other than the one responsible for the new legislation, the Committee will accept explanatory memoranda:
 - signed by the chief executive officer of that responsible agency, acting in a coordinating role on behalf of other agencies
 - and
 - signed or initialed by the minister for that responsible agency.
- 4 Under the arrangement, the PCO and/or the responsible agency should advise the Committee's staff, either in advance or in the relevant explanatory memorandum, when explanatory material is being supplied pursuant to the arrangement.
- 5 The Committee in the 38th and 39th Parliaments entered into similar arrangements with the PCO.

RECOMMENDATION

- 6 The recommendation appears in the text at the page number indicated:

Recommendation 1: The Committee recommends that the Government amend Premier's Circular 2014/01 to incorporate the administrative arrangement, between the Committee and the Parliamentary Counsel's Office, described in this report.

REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION
IN RELATION TO THE
PROCEDURES FOR DEALING WITH CONSEQUENTIAL AMENDMENTS TO
DELEGATED LEGISLATION FOLLOWING ENACTMENT OF PRIMARY LEGISLATION

1 INTRODUCTION

- 1.1 Occasionally, the enactment or amendment of primary legislation will necessitate consequential amendments to a suite of statutory instruments, including delegated legislation. Some such amendments may simply replace old terminology or update references to statutory definitions from the old statute to the new. In some circumstances, these consequential amendments affect delegated legislation administered by a diverse range of government departments and agencies (agencies).
- 1.2 By way of example, the commencement of new road traffic legislation in 2014 during the 39th Parliament meant that the definitions for terms such as ‘roads’, ‘vehicles’ and the like in over 60 sets of regulations, administered by a range of agencies, had to be amended. References to the *Road Traffic Act 1974* were changed to references to the newly in-force collection of statutes. Under the usual procedures for delegated legislation, outlined in Premier’s Circular 2014/01 (Appendix 1), over 60 explanatory memoranda would have had to be produced by the various affected agencies, all signed by the relevant ministers and chief executive officers (CEOs).
- 1.3 This report informs the Parliament of an administrative arrangement between the Joint Standing Committee on Delegated Legislation (Committee) and the Parliamentary Counsel’s Office (PCO). The arrangement facilitates more efficient coordination and delivery of explanatory memoranda from agencies to the Committee (Arrangement).

2 HISTORY OF THE ARRANGEMENT

- 2.1 The PCO first proposed the Arrangement late in the 38th Parliament. The PCO’s proposal involved a modification to the accountability requirements of the Premier’s Circular 2014/01—that all relevant ministers and CEOs sign each explanatory memorandum. The Committee’s strong preference is for agencies to adhere strictly to the Premier’s Circular 2014/01. However, recognising that, sometimes, an unusually large number of agencies and instruments can be affected by consequential amendments (as in the scenario described in paragraph 1.2), the Committee agreed to the proposal in those limited circumstances.
- 2.2 In essence, it was agreed that, in circumstances where the passing of primary legislation results in consequential amendments to instruments of delegated legislation administered by agencies other than the one responsible for the new legislation, the Committee of the 38th Parliament would accept explanatory memoranda:
- signed by the CEO of that responsible agency, acting in a coordinating role on behalf of other agencies

and

- signed or initialed by the minister for that responsible agency.

2.3 The Arrangement operated for the remainder of the 38th Parliament and through the 39th Parliament and evolved over those years. Following its establishment on 15 June 2017, the Committee recently considered, and resolved to continue, the Arrangement for the 40th Parliament.

3 DETAILS OF THE ARRANGEMENT

3.1 The terms of the current Arrangement are as follows:

- 1. Where the passing of primary legislation (whether they be inaugural or amending Acts) results in consequential amendments to instruments of delegated legislation administered by agencies other than the one responsible for the new legislation, the Committee will accept explanatory memoranda:*
 - *signed by the CEO of that responsible agency, acting in a coordinating role on behalf of other agencies*
 - and*
 - *signed or initialed by the minister for that responsible agency*
- 2. The PCO and/or the responsible agency are required to advise the Committee's staff, either in advance or in the relevant explanatory memorandum, when explanatory material is being supplied pursuant to the Arrangement.*
- 3. It is acceptable for the amending instruments to include matters that are not merely consequential, such as other opportunistic 'tidying-up' measures to perfect the principal instruments.*
- 4. The inclusion of 'tidying-up' measures should also be pointed out to Committee's staff, either in advance (again, either by the PCO or the responsible agency) or in the explanatory memorandum provided to the Committee.*
- 5. Other amendments that are consequential on the coming into force of inaugural or amending Acts that were not already covered in the instrument of delegated legislation to be amended, but are directly related to and necessary for the effective operation of that Act, are also covered by the Arrangement.*

6. Instruments the subject of this Arrangement should not contain substantive legislative amendments.

4 RECOMMENDATION

- 4.1 The Committee notes that Premier's Circular 2014/01 was due to be reviewed and updated in February 2017. The Committee is aware that the Department of the Premier and Cabinet is in the process of reviewing the circular, among others. As part of that process, the department has contacted the Committee for its comments. In the meantime, the circular remains operative.¹
- 4.2 Given that the Arrangement modifies the procedures set out in the circular for the supply of explanatory memoranda relating to delegated legislation made by the State Government, the Committee makes the following timely recommendation:

Recommendation 1: The Committee recommends that the Government amend Premier's Circular 2014/01 to incorporate the administrative arrangement, between the Committee and the Parliamentary Counsel's Office, described in this report.

5 CONCLUSION

- 5.1 The Committee looks forward to the Arrangement continuing to be used to good effect where it is appropriate to do so.



**Ms Emily Hamilton MLA
Chair**

12 October 2017

¹ Department of the Premier and Cabinet, 10 May 2017, Government of Western Australia, Perth, viewed 31 July 2017, <<https://www.dpc.wa.gov.au/GuidelinesAndPolicies/PremiersCirculars/Lists/Circular/Attachments/257/2014-01%20Subsidiary%20Legislation%20-%20Explanatory%20Memoranda.pdf>>.

APPENDIX 1

PREMIER'S CIRCULAR 2014/01



Premier's Circular

Number:	2014/01
Issue Date:	15/02/2014
Review Date:	15/02/2017

TITLE

SUBSIDIARY LEGISLATION – EXPLANATORY MEMORANDA

POLICY

The Joint Standing Committee on Delegated Legislation (JSCDL) scrutinises all regulations, by-laws, rules, local laws, major metropolitan region schemes and other subsidiary legislation made by government departments and agencies on behalf of the Parliament of Western Australia.

The JSCDL requires the following documents within **10 working days** of the subsidiary legislation being published in the *Government Gazette* -

- One hard copy (double sided) and one electronic copy of the subsidiary legislation as published in the *Government Gazette*
- One hard copy (double sided) and one electronic copy of the explanatory memorandum, addressed to the JSDCL signed by the CEO and initialled or signed by the relevant Minister¹
- An electronic copy of the principal subsidiary legislation consolidated with all amendments up to the date immediately before the most recent amendments take effect
- An electronic copy of any new material called up (adopted) into regulations, including Australian / New Zealand Standards or other relevant external documents

Hard copies of documents, along with a covering letter, should be addressed to:

Committee Clerk
Joint Standing Committee on Delegated Legislation
GPO Box A11
PERTH WA 6000

Electronic copies of documents, in either Word or pdf format, must be emailed to the JSCDL (delleg@parliament.wa.gov.au). Each instrument must be sent by a separate email and clearly identified in the subject line of each email.

¹ In the event that an Act specifically allows an instrument to be created by a person or entity other than the Minister, relevant information may be provided directly to the Committee and without the Minister's initials. A copy of information provided to the Committee should be forwarded to the Minister for reference.

BACKGROUND

The JSCDL is established by the Parliament of Western Australia to assist with the scrutiny of subsidiary legislation made subject to section 42 of the *Interpretation Act 1984* or other written laws.

The JSCDL cannot properly fulfil its scrutiny role without timely provision of explanatory material for each instrument referred to it upon gazetta. Departments and agencies must be mindful of providing the required material in a timely manner.

Further information regarding the required content of explanatory memoranda is provided in the attached outline.

Colin Barnett MLA
PREMIER

For enquiries contact:	JSCDL Committee Clerk – (08) 9222 7300
Other relevant Circulars:	Nil
Circular/s replaced by this Circular:	2007/14

ATTACHMENT 1 - EXPLANATORY MEMORANDUM REQUIREMENTS

Ministers must ensure the JSCDL receives, within **10 working days** of the subsidiary legislation being published in the *Government Gazette*, the explanatory memorandum signed by the Chief Executive Officer of the Department or Agency and initialled or signed by the responsible Minister. In the event an Act specifically allows an instrument to be created by a person or entity other than the Minister, the explanatory memorandum must be signed by that person or the senior officer of that entity. A copy of information provided to the Committee should be forwarded to the Minister for reference.

AN EXPLANATORY MEMORANDUM MUST CONTAIN THE FOLLOWING -

- Title of the subsidiary legislation
- Date of publication of the instrument in the *Government Gazette*
- Express power(s) in the relevant Act that provides authority to make the subsidiary legislation
- Description of the purpose and effect of, and justification for, the subsidiary legislation (or any amendments to or repeals of it)
- Identification of any unusual or controversial provisions, with particular regard to the JSCDL's terms of reference (see <http://www.parliament.wa.gov.au>)
- Details of consultations undertaken including stakeholders consulted, a summary of their comments and any action taken in response
- Preliminary Impact Assessment lodged with the Department of Finance's Regulatory Gatekeeping Unit (if applicable)
- Rationale for changes in fees (including fee caps), charges and penalties, and details of the amount of the fee, charge or penalty immediately prior to the change (if applicable). This information should be summarised in table form, as shown –

Type of fee charged / fee cap imposed	Date last amended (Increase or Decrease)	Old fee / fee cap (\$)	New fee / fee cap (\$)	Increase / Decrease (%)	Increase / decrease (\$)	% of cost recovery achieved	Gross subsidisation (Yes / No)
Grant or renewal of fishing boat licence for							
• A boat less than 6.5 metres long	10.09.11 (decrease)	550.00	85.00	-84.55	465	25	No
• A boat 6.5 metres or longer	10.09.11 (Increase)	550.00	600.00	9.09	50	100	No

- Costing systems used to set the fee cap or used to achieve cost recovery (if applicable)²
- Any justifications for cross subsidisation, if applicable
- Contact details of relevant officers who may be contacted regarding the subsidiary legislation

Agencies must ensure the Explanatory Memorandum includes the printed names and signatures (or initial) of the responsible Minister and relevant Chief Executive Officer.

Colin Barnett MLA
PREMIER

² See Office of the Auditor General, *Second Public Sector Performance Report 2010*, Report 12, November 2010, page 7.

Joint Standing Committee on Delegated Legislation

Date first appointed:

15 June 2017

Terms of Reference:

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

'10. Joint Standing Committee on Delegated Legislation

- 10.1 A Joint Standing Committee on Delegated Legislation is established.
- 10.2 The Committee consists of 8 Members, 4 of whom are appointed from each House. The Chair must be a Member of the Committee who supports the Government.
- 10.3 A quorum is 4 Members of whom at least one is a Member of the Council and one a Member of the Assembly.
- 10.4 (a) 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.
- (b) Where a notice of motion to disallow an instrument has been given in either House pursuant to recommendation of the Committee, the Committee shall present a report to both Houses in relation to that instrument prior to the House's consideration of that notice of motion. If the Committee is unable to report a majority position in regards to the instrument, the Committee shall report the contrary arguments.
- 10.5 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.
- 10.6 In its consideration of an instrument, the Committee is to inquire whether the instrument -
- (a) is within power;
- (b) has no unintended effect on any person's existing rights or interests;
- (c) provides an effective mechanism for the review of administrative decisions; and
- (d) contains only matter that is appropriate for subsidiary legislation.
- 10.7 It is also a function of the Committee to inquire into and report on -
- (a) any proposed or existing template, *pro forma* or model local law;
- (b) any systemic issue identified in 2 or more instruments of subsidiary legislation; and
- (c) the statutory and administrative procedures for the making of subsidiary legislation generally, but not so as to inquire into any specific proposed instrument of subsidiary legislation that has yet to be published.
- 10.8 In this order-
- "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*.



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