PARLIAMENT OF WESTERN AUSTRALIA

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

SIXTEENTH REPORT:

THE SUBORDINATE LEGISLATION FRAMEWORK IN WESTERN AUSTRALIA

Presented by the Hon Bruce Donaldson (Chairman)

16 November 1995

Joint Standing Committee on Delegated Legislation

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Terms of Reference

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.*

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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List of Recommendations

Recommendation 1:

The Committee recommends that the Parliament of Western Australia establish and maintain a scrutiny of Bills function in an existing or new Parliamentary Committee.

Recommendation 2:

The Committee recommends that:

(a) it be re-named the "Subordinate Legislation Committee"; and

(b) the rules of the Committee be amended as set out in Appendix 4.

Recommendation 3:

The Committee recommends that the Western Australian Government consider establishing an Office of Regulatory Review for a fixed term to:

(a) develop a "Subordinate Legislation Manual" describing the purpose and function of subordinate legislation and incorporating administrative procedures and guidelines for agencies to follow for the purposes of implementation of the *SLB*;

(b) assist agencies in their compliance with the *SLB*; and

(c) monitor the operation of the *SLB* from an agency perspective.

Recommendation 4:

The Committee recommends that the Office of Regulatory Review reviews the State's existing subordinate legislation and recommends:

(a) a timetable for its staged repeal; and

(b) an appropriate period for sunsetting of all new subordinate legislation.

Recommendation 5:

The Committee recommends that the Government introduce a subordinate legislation Bill in terms of the substance of the proposed Subordinate Legislation Bill appended to

this report. The Committee recommends that it be invited to comment on the draft Bill after its introduction to Parliament.

Report of the Joint Standing Committee on Delegated Legislation

in relation to

The Subordinate Legislation Framework in Western Australia

1 Foreword

1.1 In February/March 1995 the Joint Standing Committee on Delegated Legislation travelled to Washington, London and Paris to investigate systems of making, scrutinising and reviewing subordinate legislation. The Committee reported on its investigations in July 1995[1] ("the Investigations Report"). In the Investigations Report the Committee foreshadowed that it would be making recommendations for reform of the statutory framework for the making, scrutinising and reviewing of subordinate legislation in Western Australia. Those recommendations are contained in this report.

1.2 The Committee's visit to Washington, London and Paris was the culmination of a long process of examining means of and proposals for reform of the subordinate legislation framework in Western Australia. In terms of the Committee's role in examining proposals for change, the process has been complicated and drawn out by an unfortunate high turnover in the Committee's advisory staff since 1993 (see paragraph 3.14).

2 Introduction

System of government

2.1 The system of government in Western Australia is that of a parliamentary democracy based on the rule of law[2]. It is subject to a written constitution which comprises a number of statutes, the 2 main ones being the *Constitution Act 1889* and the *Constitutional Acts Amendment Act 1899* (collectively referred to as the State Constitution). The position is complicated by the fact that Western Australia is one of the States in the federation of the Commonwealth of Australia and is therefore subject to the Commonwealth Constitution[3].

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[1] Western Australian Joint Standing Committee on Delegated Legislation, *Report on the Committee's Investigations in Washington, London and Paris*, 15th Report, July 1995.

[2] In simple terms, the "rule of law" is the idea that law is supreme and replaces arbitrary force. For a more detailed explanation of the rule of law, see Allars, M, *Introduction to Australian Administrative Law*, Butterworths, 1990, pp14 *et seq*.

[3] *Commonwealth of Australia Constitution Act 1900* (63 & 64 Vic, ch 12).

2.2 Modern governmental functions are frequently divided into 3 classes:

2.2.1 legislative - the power to make general rules of conduct (ie the power to make laws);

2.2.2 executive - the power to put into effect in individual cases the general rules made under the legislative power; and

2.2.3 judicial - the power to judge, or to resolve disputes.

2.3 The 3 arms of the system of State government in Western Australia are represented by:

2.3.1 Parliament - the legislature;

2.3.2 the Executive Council, also known as the "Cabinet" - the executive; and

2.3.3 the judiciary (in relation to which the Supreme Court is the highest court[4] and the Chief Justice of Western Australia the chief judicial officer[5]).

2.4 Although it is convenient to classify the functions of government in this way, there is in practice much overlap between the powers and functions exercised. For example, the legislature may delegate a law-making function to the executive (as in the case of delegated or subordinate legislation), in Western Australia the Chief Justice also may be the Lieutenant Governor and consequently may exercise judicial and executive functions, and Parliament may commit for contempt of Parliament (a judicial function). The overlap of functions is a reality of the modern democratic state and exists even where there is a formal separation of powers, such as in the United States of America.

The administration[6]

2.5 In the Investigations Report the Committee noted that the French separation of civil and administrative systems of law recognises administration as, in terms of the model outlined above, a fourth arm of government. This reflects the fact that, in the modern democratic state which provides services to its citizens, the administration has an existence quite distinct from, though interdependent with, the legislature, the executive and the judiciary. In her text on

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4 It is, however, possible to appeal from the Supreme Court of Western Australia to the High Court of Australia.

5 *Supreme Court Act 1935*, s 7.

6 The term "the administration" is used in contradistinction to "the executive" as a means to differentiate between the executive power of, for instance, Ministers and the Executive Council, and the bureaucracy. It is acknowledged that the term is imprecise.

administrative law, Margaret Allars says, in the context of the role of the judiciary in relation to the other organs of government:

> Statutory reform and the development of mechanisms other than judicial review for improving and checking administrative decision-making have shaken the dominant influence of the courts in defining the relationship between government and governed. The power to review administrative decisions has been distributed amongst a variety of institutions and access to the relief available from such institutions made available to a broad range of individuals. Although general legal principles can still be discerned, their content has become uncertain as courts and tribunals struggle to fashion responses to the challenge of the expansion and complexity of the executive branch of government[7]...
>
> Conventional theory, built upon premises such as the doctrines of ministerial responsibility and separation of powers, have lost their potency even in the judgment of the courts... Judicial recognition of political realities has forced new responses to the fundamental political questions of the relationship between courts and Parliament, between courts and administrators and whether there are fundamental rights of individuals at common law which the courts ought to protect...[8]

2.6 On the distinction between legislative policy and administration, Allars says:

> [A]dministrators play a vital role in the formulation of policies which find their ultimate expression in Acts of Parliament. They also make policies which fill in the detail of the broad discretionary powers conferred upon them. The task of choosing political goals and means for their achievement is not confined to Ministers. It may be entrusted to any of [a number of] types of administrators... in the form of discretionary power. Policy decisions are also made by the delegates of those formally entrusted with power and by their advisors [*sic*] within or outside the administrative body[9].

2.7 Recognition of the role of the administration requires that there be in place adequate mechanisms to scrutinise and control its actions. While a full consideration of such mechanisms is beyond the scope of this report[10], it is noted that one of those mechanisms is parliamentary scrutiny and review of

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7 Allars 1990, p1.

8 Allars 1990, p10.

9 Allars 1990, p8. See also paragraph 5.4.4 regarding the meaning of "legislative effect".

10 Some of these matters are being considered by the Legislative Council Standing Committee on Government Agencies.

subordinate legislation which is promulgated by the executive but is usually prepared on advice from the administration.

The role of Parliament

2.8 The Western Australian Parliament is comprised of the monarch of the United Kingdom, represented in Western Australia by the Governor, and the 2 Houses of Parliament - the Legislative Council and the Legislative Assembly[11]. While the authority of the Western Australian Parliament originated in the United Kingdom, it is not a delegate of the United Kingdom Parliament and, subject to the Commonwealth Constitution, it has plenary power, including power to amend the State Constitution (subject to compliance with manner and form requirements)[12].

2.9 In its first report, the Commission on Government described the role and responsibility of Parliament as follows:

> In Western Australia, Parliament is at the centre of our system of government and the heart of representative democracy...
>
> The evolution of parliament has depended upon two central democratic principles. These are representation and accountability. The former requires that parliament be an institution formed from representatives elected by and from the people...
>
> The principle of accountability requires that representatives in parliament should be responsible and accountable to those who elected them...[13]

2.10 The principal function of parliament is to make law. In Western Australia it is "to make laws for the peace, order and good Government of the Colony of Western Australia and its Dependencies"[14]. Parliament makes laws by enacting statutes or Acts of Parliament (which are also referred to as primary legislation).

Delegation of legislative power

2.11 It has long been established that parliaments may delegate their legislative powers. The earliest example of such a delegation in England occurred in

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[11] *Constitution Act 1889*, s 2(2).

[12] *Constitution Act 1889*, s 73.

[13] Western Australian Commission on Government, *Report No. 1*, August 1995, p272.

[14] *Constitution Act 1889*, s 2(1).

1385[15]. In Australia, the High Court held in *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan*[16] that Parliament could validly delegate legislative power. Legislation that is made under a delegation of power from the legislature is known as subordinate legislation.

2.12 The term "subordinate legislation"[17] postulates 2 concepts. The first relates to the fact that the legislation is *subordinate* or *delegated*. That is, it is legislation that is made by a body (such as a government department) other than the parliament under the authority of the parliament. The second concept is that of *legislation*. What is legislation? The English Donoughmore Committee[18] distinguished legislative activity from executive activity on the basis that legislative action constitutes the process of formulating general rules of conduct without reference to particular cases while executive action constitutes the process of performing particular acts which apply general rules to particular cases[19]. Thus subordinate legislation can be said to be general rules of conduct affecting the community at large which have been made by a body expressly authorized so to do by an Act of Parliament[20].

2.13 It should be kept in mind that subordinate legislation is law, no less so than is primary legislation made by Parliament itself. Members of Parliament are accountable to the people at election time and Parliamentary debates about Bills are a matter of public record. Subordinate legislation is formally made by the executive government. Practically speaking it is often made by bureaucrats. Whilst most subordinate legislation, like an Act of Parliament, is a matter of public record, the process of making it is, generally speaking, formally invisible to the public. In other words, members of Parliament and the laws made by them are accountable in that members are directly accountable to the people in elections and the record of making legislation, at least in so far as Parliamentary debates are concerned, is available to the public. The reasons for making subordinate legislation and information about the process by which it is made are not readily available to the public. At present the principal effective means of accountability in respect of subordinate legislation is its scrutiny by the Committee.

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15 Pearce, DC, *Delegated Legislation in Australia and New Zealand*, Butterworths, 1977, p 3.

16 (1931) 46 CLR 73; note that this was in the context of the Commonwealth Parliament which is subject to the separation of powers contemplated by the Commonwealth Constitution. See also *Deputy Federal Commissioner of Taxation (NSW) v WR Moran Pty Ltd* (1939) 61 CLR 735, 763.

17 Subordinate legislation is also known as delegated or subsidiary legislation. The term subordinate legislation has been chosen as it is the most grammatically correct and accurate description of the material it refers to. It is noted that the *Interpretation Act 1984* currently uses the term subsidiary legislation.

18 Committee on Ministers' Powers, Report, 1932 Cmd 4060.

19 This reflects the classification of governmental functions described in paragraph 2.2.

20 Pearce 1977, p 1-2. See also paragraph 5.4.4 in respect of the meaning of "legislative effect".

2.14 On the subject of delegation of legislative power generally, Garth Thornton, a former Parliamentary Counsel of Western Australia and the author of the leading text on legislative drafting, has noted, in the context of the traditional view that legislative power should be delegated in only the most exceptional circumstances, that:

> [T]he traditional views are based on the principle that it is of the essence of representative democracy that supreme legislative authority should be exercised by persons directly responsible to the electorate.
>
> However, the traditional rules do not allow adequately for the practical needs of modern government, for there are undoubtedly factors which in certain circumstances make delegated legislation on matters of substance and principle both legitimate and desirable...
>
> The traditional rules still hold good; but are subject to relaxation where this can be justified for sufficient reason. This is a matter for balanced consideration at the design stage of every major legislative scheme. The guidelines of legislative policy must be established by principal legislation. It is within the sphere of the draftsman's responsibility to make sure that extensive legislative power is not delegated for the wrong reasons.
>
> There are three common 'wrong' reasons.
>
> I Extravagant demands made by the executive; not inspired by a crazed thirst for power but made simply because "it is, after all, easier to administer a wide grant of power, and gaps in statutes can more readily be filled by delegated legislation when no real limitation is placed on the making of such legislation".
> II Incomplete preparatory work on the part of the instructing officer or department.
> III Over-reaction by the draftsman to the *ultra vires* doctrine.
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> The extent to which legislative power should properly be delegated in a particular case is not a matter which is capable of being considered in isolation. It should be considered in relation to -
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> (a) the identity of the delegate, and the extent, if any, to which it is desired to authorise him to sub-delegate;
> (b) consultation obligations to be imposed on the delegate; and
> (c) the nature and extent of parliamentary supervision intended to be exercised[21].

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[21] Thornton, GC, *Legislative Drafting*, Third Edition, Butterworths, London, 1987.

Reasons against subordinate legislation

2.15 Subordinate legislation, as a delegation of legislative power, has been criticised for a number of reasons. The first is that the use of subordinate legislation detracts from the supremacy of parliament. This can be refuted by noting that parliament can at any time withdraw its delegation of power under which the subordinate legislation was made[22], and subordinate legislation made in excess of the power conferred by parliament will be found to be invalid if challenged in a court. The second argument is that, if laws are made affecting a citizen, they should be approved by the citizen's elected representatives. This criticism can be answered if there is put in place mechanisms whereby there is adequate parliamentary scrutiny and review of subordinate legislation. However, the criticism has also been made that parliament does not have adequate means of scrutinising subordinate legislation. Another criticism of subordinate legislation that is made is that delegated powers may be so wide as to prevent citizens from protecting themselves from harsh executive action in the courts. Again, adequate parliamentary scrutiny powers may to a great extent address this problem. As Hon Peter Foss said in 1989:

> Historically, it has been the role of Parliament to rein back on the excesses of the Executive...
>
> I hope this House exercises its powers fully. I hope also that it sets up the appropriate committees and amends other procedures of the House to make sure members do their job properly[23].

Reasons for subordinate legislation

2.16 Reasons advanced for the use of subordinate legislation include:

2.16.1 it relieves pressure on parliamentary time and allows parliament to concentrate on issues of policy (rather than administrative detail) in legislation;

2.16.2 it can deal with matters of such a technical nature that parliament has neither the expertise nor the time to consider effectively;

2.16.3 it can provide for the necessary administrative machinery to implement large and complex schemes of reform, and to deal with unforeseen contingencies as they arise;

2.16.4 it can promote flexibility in legislation, enabling legislation constantly to adapt to unknown future conditions without the necessity to go

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22 See *Nott Bros & Co Pty Ltd v Barkley* (1925) 36 CLR 20, 29.

23 1989 WAPD 1651.

through the cumbersome and slow process of parliamentary legislative amendment; and

2.16.5 it enables legislative action to be taken swiftly in cases of emergency.

2.17 In the leading Australian work on subordinate legislation, under the heading *Legislation to deal with rapidly changing or uncertain situations,* Professor Dennis Pearce says:

> One of the consequences of limited parliamentary sittings is that Acts cannot be readily amended. And even where a parliament is sitting, the process for amending Acts is laborious and slow. Accordingly, if an Act attempts to deal with a fact situation that is fluid, it is likely to impose controls that are too rigid... The inflexibility of an Act makes it an unsatisfactory legislative instrument in such cases. One alternative would be to vest a broad discretion in an official or tribunal. But this then creates the problem that no statement of "the law" is available to the public. Nor is there any effective parliamentary control over the actions of the recipient of the power. The middle course between excessive rigidity and unfettered discretion is the adoption of delegated legislation. The parliament can check the rules laid down by its delegate; the public can turn to the rules for information[24].

2.18 It is generally accepted that, in the modern democratic state, it would be impossible for Parliament to legislate on all matters requiring legislation. However, it is also generally accepted that it is necessary to recognise the criticisms made of subordinate legislation and take steps to minimise the dangers that it poses. In particular cases of delegation, while it is the case that Parliament has approved subject matter on which subordinate legislation can be made, this does not and should not be assumed to grant to the executive or the administration an unfettered discretion to make whatever subordinate legislation it thinks fit. In the first place, the delegation of the legislative power should be (and sometimes is) specifically confined by enabling legislation, that is, given express jurisdictional limits. The discretion granted for the purposes of making subordinate legislation should be structured or subject to specific procedural requirements (such as those that currently exist and those that are recommended in this report). And there must be some means whereby innocent and inadvertent misuse (as well as abuse) of delegated powers can be reviewed and remedied. Consequently, although Parliament does not itself wish to legislate on a relevant subject, it nevertheless is essential that Parliament remain informed about the subordinate legislation that is made and have an opportunity to review it. These are the basic reasons for the recommendations contained in this report.

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[24] Pearce 1977, p6.

The legislative hierarchy

2.19 Some mention should be made here of the general legislative hierarchy from a more practical perspective. The legislative hierarchy is ordinarily such that the most important matters are dealt with in the statute, those matters of detail of lesser importance are dealt with by subordinate legislation and the minutiæ (in respect of which the greatest administrative flexibility is needed) are dealt with by administrative rules or policies. The Committee accepts that in some cases the lines between each of these categories (ie legislation, subordinate legislation and administrative rules) is not clear. However, there are legal principles which can be applied, particularly in respect of the distinction between subordinate legislation and administrative rules[25].

2.20 The Committee has, in the course of investigating matters relating to subordinate legislation, discovered rules made by agencies which the agencies have considered are administrative rules but which the Committee considers are subordinate legislation. As the agency considers them to be administrative rules they have not been *Gazetted* or tabled in Parliament, as is required by the *Interpretation Act 1984*, and consequently the Committee generally only discovers such errors in the course of investigating other related subordinate legislation. In the Committee's view, the consequence of a failure to publish and table such rules is that the rules are of no force or effect[26]. If the agency implements the rules, which have no legal foundation, this could have significant legal and financial consequences for the government. Whilst a determination as to whether or not a rule has legislative effect and should therefore be contained in subordinate legislation subject to *Gazettal* and tabling in Parliament can only finally be made by a court, the Committee is of the view that more attention needs to be given to this issue by agencies. It is also a matter to which Parliamentary Counsel may be able to give greater consideration when preparing legislative schemes and drafting specific legislation and subordinate legislation, particularly in the context of delegations of powers.

3 The Role of the Committee

3.1 There are a number of safeguards against abuse and inadvertent misuse of the use of subordinate legislation. They include:

3.1.1 *Requirements of publication of subordinate legislation*[27]. This is arguably the most important means by which subordinate legislation is made accountable to the people. It is also the proper means by which people

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[25] See paragraph 5.4.4 regarding the meaning of "legislative effect".

[26] *Interpretation Act 1984*, s 42.

[27] See *Interpretation Act 1984*, s 41.

become aware of and bound by subordinate legislation. In this context the Committee notes that, despite mandatory statutory publication requirements, the Committee has recently identified some cases in which agencies have failed to publish some subordinate legislation. In *Watson v Lee*[28] the High Court considered the question of a citizen's right to know the laws by which he or she is bound. Barwick CJ stated:

> To bind the citizen by a law, the terms of which he has no means of knowing, would be a mark of tyranny... That would be so fundamentally unjust that it is an intention I could not attribute to the Parliament unless compelled by intractable language to do so. In my opinion, no semantic quirks of the draftsman would lead me to that conclusion - a conclusion which would attribute to the Parliament an intention to act tyrannically[29]...
>
> No inconvenience in government administration can, in my opinion, be allowed to displace adherence to the principle that a citizen should not be bound by a law the terms of which he has no means of knowing[30].

Stephen J, with whom Gibbs and Aickin JJ agreed, said:

> ... But notification is a critical step in the statutory process of delegated law-making and without it that process is incomplete...
>
> Its great importance is apparent from the history of delegated legislation. That history reflects the tension between the needs of those who govern and the just expectations of those who are governed. For those who govern, subordinate legislation, free of the restraints, delays and inelasticity of the parliamentary process, offers a speedy and flexible mode of law-making. For the governed it may threaten subjection to laws which are enacted in secret and of whose commands they cannot learn: their reasonable expectations that laws shall be both announced and accessible will only be assured of realization by the imposition and enforcement of appropriate controls upon the power of subordinate legislators, whose

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[28] (1979) 144 CLR 374.

[29] (1979) 144 CLR 374, 379.

[30] (1979) 144 CLR 374, 381.

> power... requires an adequate measure of control if it is not to degenerate into arbitrary government...[31]

3.1.2 *Requirements relating to tabling of subordinate legislation in Parliament and the possibility of its disallowance by Parliament*[32]. This is the formal mechanism by which members of Parliament, as representatives of the people, maintain oversight of subordinate legislation. It is also another significant means of publication of subordinate legislation. Again the Committee notes that, while there are mandatory statutory tabling requirements, non-compliance with which renders subordinate legislation ineffective, there is in existence in this State subordinate legislation which is relied upon on a daily basis despite the fact that, in the Committee's view, it is deemed by statute to be of no effect[33]. Additionally, only "regulations", "rules" and "by-laws" are required to be tabled and are subject to scrutiny by the Committee and disallowance by Parliament. There is an increasing array of subordinate legislation that is not described as a regulation, rule or by-law, though formerly it would have been so described. Thus the principal means of control over such subordinate legislation has been bypassed.

3.1.3 *Choice of delegate.* Traditionally the Governor in Council is responsible for making subordinate legislation. In the Investigations Report the Committee noted that there is an increasing volume of subordinate legislation that is being made in forms (such as ministerial notices and orders) that are not subject to scrutiny by the Committee. Much of this is made by public servants in government agencies. There is no form of independent scrutiny or control over such subordinate legislation. In many cases it is not available to the public or even to members of Parliament.

3.1.4 *Scrutiny of excessive delegation.*

3.1.4.1 While the Commonwealth Parliament and the parliaments of some States have scrutiny of Bills committees, Western Australia does not. The functions of a scrutiny of Bills committee are different from and independent of the functions of the existing Legislative Council Legislation Committee, which has individual Bills referred to it for report in specific cases. The Committee noted in the Investigations Report that

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[31] (1979) 144 CLR 374, 393. See also *Blackpool Corporation v Locker* [1948] 1 KB 349.

[32] See *Interpretation Act 1984*, s 42.

[33] The Committee has chosen not to reveal, at this time, which subordinate legislation it considers is in this position on the basis that it currently would not be in the public interest to do so. Additionally, some matters are still under consideration by the Committee.

the recently established United Kingdom Delegated Powers Scrutiny Committee was modelled on the Australian Senate Standing Committee for the Scrutiny of Bills.

3.1.4.2 One of the functions of a scrutiny of Bills committee is to examine and report on clauses of Bills which inappropriately delegate legislative powers. In this context the Committee is cognisant of the principle, argued by the leading American commentator KC Davis, that unnecessary discretionary power should be eliminated[34]. Scrutiny of delegated legislative powers is an important function in relation to Henry VIII clauses, which are discussed later in this report (paragraph 5.24 *et seq*). The Committee considers that the lack of a scrutiny of Bills function in Western Australia is an impediment to adequate scrutiny of delegation of power in the context of subordinate legislation. While the Committee may report to Parliament on subordinate legislation made under an inappropriate delegation of legislative power, it is by this time too late to attempt to influence or moderate that delegation of power. Establishment of a scrutiny of Bills function would remedy this defect[35].

3.1.4.3 The establishment of a scrutiny of Bills function has been supported in the past by, for example, Hon Peter Foss, (currently the Minister for the Environment, Water Resources, the Arts and Fair Trading). In 1989 he said:

> Again I cite the Commonwealth which has a system of Standing Committees to consider

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[34] See, for instance, Allars 1990, p10.

[35] The terms of reference of the Senate Standing Committee for the Scrutiny of Bills (set out in Senate Standing Order 24) relevantly provide:

At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of Bills introduced into the Senate, and in respect of Acts of the Parliament, whether such Bills or Acts, by express words or otherwise

(i) *trespass unduly on personal rights and liberties;*

(ii) *make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;*

(iii) *make such rights, liberties or obligations unduly dependent upon non-reviewable decisions;*

(iv) *inappropriately delegate legislative powers; or*

(v) *insufficiently subject the exercise of legislative power to parliamentary scrutiny.*

> legislation. From a lawyer's point of view, I would like to point out some of the consequences of that. Over the years the Commonwealth legislation, like some of the States' legislation, had a tendency to impose a burden on citizens, to give rights of seizure and entry and to deprive people of their right to have matters properly deliberated upon before being decided. That has been stopped by reason of the institution of Senate Committees. What happened was that Parliamentary Counsel would draft legislation containing provisions which were totally unacceptable in terms of the rights of the citizen. The Senate committees had a system whereby they would regularly delete such matters from the legislation. It reached a stage where Parliamentary Counsel realised what would happen if certain aspects were included in legislation and so the practice ceased. If parliamentary committees of this nature are established in this House, initially they will have a large job correcting legislation, but after a period of time the habit will grow up and a new institution will be in existence. Many of the things desired by the Parliament will occur automatically because the committee will have the experience and the ability to bring these things about[36].

3.1.4.4 There are a number of options for establishing a scrutiny of Bills function. These include:

3.1.4.4.1 Give a scrutiny of Bills function to the existing Legislation Committee. This is the most practicable option and could be achieved by a resolution of the Legislative Council or an amendment to Standing Orders to the effect that all Bills stand referred to the Legislation Committee after their second reading. Alternatively, formal amendment could be made to the Legislation Committee's terms of reference to incorporate further terms of reference similar to those of the Senate Standing Committee for the Scrutiny of Bills.

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[36] 1989 WAPD 1650-1.

3.1.4.4.2 Establish a new Scrutiny of Bills Committee.

3.1.4.4.3 Give a scrutiny of Bills function to the Joint Standing Committee on Delegated Legislation.

Recommendation 1: The Committee recommends that the Parliament of Western Australia establish and maintain a scrutiny of Bills function in an existing or new Parliamentary Committee.

3.1.4.5 If the Parliament does not establish a scrutiny of Bills function it should require as a minimum, whenever the Government introduces legislation incorporating a delegation of legislative power, an explanatory memorandum summarising the intended nature and scope of that delegation of power. This would facilitate informed Parliamentary debate about the delegation. The memorandum should also be provided to the delegated agency to guide it in exercising the delegated power.

3.1.5 *Scrutiny of subordinate legislation*. It is the Committee's function to scrutinise subordinate legislation. This role is discussed in more detail in the following paragraphs.

3.1.6 *Judicial review of subordinate legislation*. The Committee made some observations on judicial review of subordinate legislation in the Investigations Report. The scope of judicial review of subordinate legislation (and other administrative action) in Western Australia is somewhat limited and judicial review is therefore not sufficient in itself to provide a safeguard against abuse regarding subordinate legislation (and other administrative action). In this report the Committee recommends increasing the scope of judicial review of subordinate legislation (see paragraph 5.21 *et seq*).

Scrutiny of subordinate legislation

3.2 The scrutiny of subordinate legislation by parliamentary committees is the principal means by which Australian parliaments keep themselves informed of matters regarding subordinate legislation. In conjunction with the requirements to table subordinate legislation and the parliamentary power to disallow subordinate legislation, such committees enable parliaments to exercise an essential and useful form of control over the making of subordinate legislation. The High Court has said:

> When a man becomes a member of Parliament, he undertakes high public duties. Those duties are inseparable from the position: he

> cannot retain the honour and divest himself from the duties. One of the duties is that of watching on behalf of the general community the conduct of the Executive, of criticizing it, and, if necessary, of calling it into account in the constitutional way by censure from his place in Parliament... That is the whole essence of responsible government, which is the keystone of our political system, and is the main constitutional safeguard the community possesses[37].

Thus the members of the Committee are, on behalf of the members of Parliament generally (who individually do not have the time necessary so to do), performing an important role in "watching... the conduct of the Executive" in the context of subordinate legislation.

3.3 As part of their scrutiny of subordinate legislation on behalf of parliaments, scrutiny committees also play a valuable role in identifying, at an early stage, possible grounds on which subordinate legislation can be challenged in the courts. This can result in: substantial savings in terms of avoidance of expensive litigation (which would otherwise also consume valuable court time); avoiding or reducing potential liability of governments for invalid action; and avoiding or reducing embarrassment of governments for invalid action.

3.4 Parliamentary committees for the scrutiny of subordinate legislation have existed in Australia since the first one was established by the Commonwealth Government in 1931. This was followed by South Australia in 1938, Victoria in 1956, New South Wales in 1960, Tasmania and the Northern Territory in 1969 and Queensland in 1975. In 1976, the Western Australian Parliament enacted legislation to create the Legislative Review and Advisory Committee, a statutory committee charged with the scrutiny of subordinate legislation[38]. It was not until 1987 that Western Australia abandoned the statutory committee and appointed a Parliamentary committee when it established the Joint Standing Committee on Delegated Legislation.

3.5 The Committee's terms of reference currently provide:

> *It is the function of the Committee to consider and report on any regulation that:*
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> *(a) appears not to be within power or not to be in accord with the objects of the Act pursuant to which is purports to be made;*
>
> *(b) unduly trespasses on established rights, freedoms or liberties;*

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[37] *Horne v Barber* (1920) 27 CLR 494, 500.

[38] *Legislative Review and Advisory Committee Act 1976.*

(c) contains matter which ought properly to be dealt with by an Act of Parliament; or

(d) unduly makes rights dependent upon administrative, and not judicial, decisions...

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.

Committee an effective mechanism

3.6 The Committee is satisfied that a parliamentary committee continues to be the most appropriate body to scrutinise subordinate legislation in Western Australia. However, it notes that much could be learned from the French separation of civil and administrative legal systems[39].

3.7 The Committee considers that, despite some of the impediments to its scrutiny function which require reform in the manner considered in this report, it is nevertheless an effective mechanism for scrutiny of subordinate legislation in Western Australia. Drawing equal representation from both Houses of Parliament, the Committee is proud of and carefully guards its ability to function with apolitical impartiality in its scrutiny of subordinate legislation. At the time of writing, the Government actually has minority representation on the Committee, there being 4 members from the Australian Labor Party, 3 from the Liberal Party and 1 member of the Committee who is a member of the Greens WA. Essentially a sub-committee of the whole of the Parliament, the Committee believes that it fairly represents Parliament. The Committee considers that it is important that this fully representational and impartial structure be maintained and supported by Parliament. If it is not, the Committee could become a political entity which merely rubber-stamps bureaucratic or government policy simply because "it is policy" or has executive support. This would undermine the role of Parliament and its members as representatives of the community and severely limit the effectiveness of the Committee.

3.8 The Committee is cognisant of the findings of the Commission on Government that:

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[39] In this context, and also taking into account the United States system of administrative law, the Committee has become aware of the need for substantial reforms to the system of administrative law in Western Australia. Consequently, the Committee is watching with interest the work of the Legislative Council Standing Committee on Government Agencies, the work of which may have an impact on administrative law and the making of subordinate legislation in this State. The Committee will also be watching with interest the work of the Commission on Government in respect of its specified matter 5, which relates to the functions and terms of reference of an administrative appeals tribunal.

> The Royal Commission concluded the rational and systematic use of parliamentary committees provided the best means of bringing the governmental system under the scrutiny of the Parliament... It also stated that effectiveness of committees would depend on them having ample powers [and] adequate resources...[40]

Impediments to scrutiny

3.9 The Committee notes, however, that currently there are a number of impediments to the effectiveness of its scrutiny function. These include:

3.9.1 the limitation that it may only scrutinise subordinate legislation described as "regulations", "rules" or "by-laws";

3.9.2 a poor understanding by many government agencies of the legal nature of subordinate legislation and the role of the Committee;

3.9.3 continuing difficulty in obtaining information about specific subordinate legislation from some government agencies;

3.9.4 the increasing volume and complexity of subordinate legislation; and

3.9.5 institutional and structural factors.

3.10 The first 4 of these concerns are addressed by the proposals for reform that appear later in this report. In respect of the institutional and structural factors which cause difficulties, the Committee is seeking review of these in the appropriate forums.

Committee staff

3.11 The Western Australian Committee has 2 staff (1 legally qualified advisory / research officer and 1 clerk), both of whom it shares with at least 1 other committee. The importance of committee staff should not be underestimated. Professor Pearce has said:

> It is not really practicable to expect a member of a committee, even though he be a lawyer, to undertake the time-consuming task of carefully perusing the [numerous] pieces of delegated legislation that are produced each year, reading them into the existing legislation if they are amending instruments, checking them against their empowering Acts, etc. This is something that should be done for the committee by a legal adviser who should be paid for his assistance. It does not seem appropriate that the adviser should be a governmental officer because conflicts of interest can too readily arise... Alternatively,

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[40] Western Australian Commission on Government, *Report No. 1*, August 1995, p210.

> as is the position in the United Kingdom, a legally trained member of the parliamentary staff could provide the requisite assistance to the committee[41].

3.12 When the establishment of the Committee was being debated in the Legislative Council in 1987, Hon VJ Ferry said:

> The best example in Australia is that of the Australian Senate in Canberra, which has been blessed over the years with having the benefit of very competent legal advice for what I consider to be a very low sum of money. The Senate committee system has been very fortunate in obtaining the services of very competent legal advisers from time to time for a very low reward in monetary terms. I admire the legal counsel who have made themselves available in a very dedicated way to assist the committee to work for the Senate. Similarly, in this State I believe that in order for this committee as proposed to be effective we need to have an independent legal adviser...

3.13 The Committee has been fortunate since its establishment in 1987 to secure the services of some competent and dedicated committee clerks and legal advisers who are members of Parliamentary staff. It is important to note that staff are employed by Parliament and not the Government and are therefore to a large extent insulated from partisan executive pressure - this is another important aspect of the Committee's impartiality and independence from executive control.

3.14 Unfortunately, in the last 2 years there has been a high turnover of legal advisers. For a short period of time in 1994 the Clerk of the Legislative Council himself filled the role of the Committee's advisory / research officer. There are a number of problems caused by the high turnover of legal advisers. The first is that it can take some time to become accustomed to the work of the Committee, which means the Committee is working under a disadvantage during that time. Another problem is that frequent changes in legal advisers mean a significant loss of "institutional memory" of the Committee. Legal advisers can keep track of subordinate legislation that repeatedly requires scrutiny by the Committee. Members do not have time to do this and, in any event, membership of the Committee also changes from time to time. Finally, a change in legal adviser often means that ongoing and planned projects of the Committee fall by the wayside as the new legal adviser learns how the Committee operates and develops the specific expertise required. That is one of the reasons that production of this report has been delayed since it was first conceived in about 1990. Whilst the Committee accepts that its staff will change from time to time, it considers that some continuity in its staff, particularly its legal advisers, needs to be encouraged.

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[41] Pearce 1977, pp 83-4.

Investigations Report findings

3.15 In the section on the Committee's Findings and Recommendations in the Investigations Report, the Committee made the following points which are repeated here for ease of reference[42].

3.16 Generally the Committee is of the view that there is both scope and a need for significant changes in the system of making and scrutinising subordinate legislation in Western Australia. There is a need to improve accountability in the system without necessarily imposing more restrictive and inflexible Parliamentary mechanisms. Some of the scrutiny techniques that the Committee investigated in Washington, London and Paris could usefully be adapted for application in Western Australia.

Accountability

3.17 The Committee is cognisant of the findings of the Standing Committee on Government Agencies that:

> ...there are many facets to what accountability is supposed to encompass and disparate opinions on where it should start and finish.
>
> For the committee, accountability has 2 aspects. First, it describes the duty of the executive to conduct its administration openly, fairly and in accordance with the Rule of Law. Second, it describes the duty of each agency to act always in conformity with its mandate, ensure that its functions are performed carefully, reliably and with due regard to costs, and report as and when required to Parliament[43].

3.18 The Commission on Government has noted:

> The Western Australian Royal Commission into Commercial Activities of Government... highlighted the role of information as a key accountability mechanism:
>
> > Openness in government is the indispensable prerequisite to accountability to the public. It is a democratic imperative...
>
> The findings of the Royal Commission highlight problems with the effectiveness of existing systems of public accountability. Democratic governance requires openness. Yet as the Royal Commission itself

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[42] Some material has been added.

[43] Legislative Council of Western Australia, Standing Committee on Government Agencies, *State Agencies - Their Nature and Function*, 36th Report, April 1994, p3. See also Allars 1990, pp18-19.

pointed out: 'To be a reality, open government must be a habit, a cast of mind. It is an attitude which must be encouraged at all times...[44]

For effective scrutiny of the public sector, parliament requires unimpeded access to information on public expenditure and the operation of government programs and services, including the role of public officials. As it was put by the Royal Commission:

> accountability can only be exacted where those whose responsibility it is to call government to account are themselves possessed of, or are able to obtain, the information necessary to make considered judgments. Information is the key to accountability. Given Parliament's role as the primary accountability agent of the public, accurate information is its lifeblood. Without it, Parliament can be neutralised, the public left vulnerable...[45]

3.19 One commentator in Washington DC has said:

> The notion that people, especially those in authority, should be held responsible for their actions sounds quaint these days, but nations ignore it at their peril... When accountability becomes irrelevant, trust shreds and social compacts crack like fresh eggs on pavement[46].

3.20 Part of the role of the Committee is to ensure accountability in rulemaking. Some subordinate legislation is prepared by government agencies without any form of public or external consultation having been undertaken. In such circumstances the only active external control exercised in respect of the relevant regulations is scrutiny of them by the Committee. Even where agencies have undertaken relevant consultations the Committee has limited resources to inquire into the views expressed and the conclusions drawn. In most cases the Committee is not aware of what records (if any) are maintained by the relevant agency and the information currently provided by many agencies to the Committee in explanatory memoranda is rudimentary. Additionally, the Committee does not in many cases have the resources to ascertain the effect and impact of many regulations. Consequently its scrutiny of some regulations is, at best, perfunctory. It is the Committee's view that this is not satisfactory.

3.21 The Committee is of the view that the maintenance of a rulemaking record by agencies is likely to significantly improve accountability in the rulemaking process. In this respect, the Committee supports the findings of the Standing

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[44] Western Australian Commission on Government, *Report No. 1*, August 1995, p39.

[45] Western Australian Commission on Government, *Report No. 1*, August 1995, p169.

[46] Ogden, Christopher, "A Dearth of Accountability", *Time*, 15 May 1995, p38.

Committee on Government Agencies that there are significant advantages to be had in maintaining a rulemaking record. They include:

- agency policy is developed on a consensual basis;

- interested persons are given an opportunity to be heard and rebut contra arguments...

- each interested party has the same opportunity to present its case; accusations of agency bias can be lessened if not extinguished...[47]

The Committee would elaborate on these by adding the reasons advanced for the maintenance of rulemaking records in the United States. These include: that the record is an aid to public participation in the rulemaking process; it forms a database of information for the agency; and it is a basis for judicial review of a rule or rulemaking.

3.22 In 1992 the Royal Commission into Commercial Activities of Government 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 processes through which rules are given legal effect. The Commonwealth Administrative Review Council in its Report No 35, "Rule Making and 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 this matter. Public participation in rule making is a goal which should be pursued in this State[48].

3.23 This report should be read in light of the entirety of the history of proposals for reform of the subordinate legislation system in Western Australia. In particular, it is assumed in the remainder of this report that it is not necessary to repeat details set out in the Investigations Report as justification for proposals or recommendations contained in this report.

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[47] Legislative Council of Western Australia, Standing Committee on Government Agencies, *State Agencies - Their Nature and Function*, 36th Report, April 1994, p17.

[48] Western Australia, *Report of the Royal Commission into Commercial Activities of Government and Other Matters*, Part II, 1992, para 5.9.7.

4 Proposals for Reform: Introduction

History of proposals for reform

4.1 Proposals of contemporary relevance for significant reform of the Western Australian scheme of regulatory review date back at least to 1985 when the government considered a proposal for a *Subordinate Legislation (Revocation and Review) Bill*. In 1992 the Office of Economic Liaison and Regulatory Review published a paper on *A Statutory Framework for Review of Subordinate Legislation in Western Australia*. That report was inadequate in a number of respects, some of which were considered by the Committee shortly after release of the report[49]. The report was revised by the Ministry of Premier and Cabinet in August 1993[50]. In the Committee's view the revised report improved upon the original, while still simply copying some of its proposed legislation from other States apparently without considering the Western Australian legislative framework in which it must operate. While the broad thrust of the report in respect of the making of subordinate legislation is similar to the approach taken by the Committee in this report, there are significant procedural differences between the approaches, largely based on the Committee's experience with subordinate legislation and the fact that the Committee has taken into account the current Western Australian legislative and procedural framework.

4.2 On 8 May 1992 the Committee organised a seminar to consider a draft *Interpretation (Subsidiary Legislation) Bill* that it had prepared for discussion purposes[51]. The proposals in that *Bill* have significantly evolved in light of comments received and the Committee's subsequent investigations.

4.3 Since 1984, States including Victoria, New South Wales, Tasmania and Queensland have recognised the need for significant reform to schemes of regulatory review and have accordingly enacted relevant laws and continue to consider proposals for further reform. In 1992, after undertaking substantial consultations, the Australian Administrative Review Council (ARC) published a comprehensive report on the need for reform of the Commonwealth government's regulatory review scheme[52]. The ARC report is the most comprehensive report of its kind prepared in this country. Many of its findings and recommendations are of direct relevance in Western Australia (though

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49 Western Australian Joint Standing Committee on Delegated Legislation, draft *Report on the Office of Economic Liaison and Regulatory Review Report "A Statutory Framework for Review of Subordinate Legislation in Western Australia" and on similar legislation in other States*, May 1992, unpublished.

50 Ministry of Premier and Cabinet Policy Office, *A Statutory Framework for Review of Subordinate Legislation in Western Australia*, 9 August 1993.

51 Western Australian Joint Standing Committee on Delegated Legislation, *Review of Operations 1991 - 1992*, 11th Report, December 1992, pp66-7.

52 Australian Administrative Review Council, *Report to the Attorney-General: Rule Making by Commonwealth Agencies*, Report No 35, March 1992.

equally, some of its findings and recommendations are not relevant to the situation in Western Australia). The ARC report resulted in the preparation of the Commonwealth *Legislative Instruments Bill* which, at the time of writing, is before the Commonwealth Parliament.

Current proposals

4.4 The Committee proposes that the Western Australian system of making subordinate legislation be reformed to take into account the following key concepts, each of which is required as a part of a system for maintaining relevant, efficient and effective subordinate legislation:

4.4.1 availability of information about subordinate legislation;

4.4.2 consultation in the making of subordinate legislation;

4.4.3 assessment of the impact of subordinate legislation;

4.4.4 adequacy of Parliamentary scrutiny of subordinate legislation;

4.4.5 maintenance of a rulemaking record by agencies;

4.4.6 judicial review of subordinate legislation and rulemaking procedures; and

4.4.7 staged repeal of existing subordinate legislation and "sunsetting" of new subordinate legislation.

4.5 The following proposals and recommendations as much as possible are set out in such a way as generally to reflect the process of making a typical piece of subordinate legislation from its conception to completion of the process. The process will, of course, require variation to take into account emergency or other unusual circumstances. There are also general provisions applying to all subordinate legislation which must be taken into account.

4.6 The Committee has drafted a proposal for a *Subordinate Legislation Bill* (*SLB*) which is attached to this report as Appendix 5. The proposed *SLB* has been drafted as a piece of legislation which covers the whole of the field relating to subordinate legislation, except for staged repeal and sunsetting (as to which see paragraph 5.23). It repeals provisions of the *Interpretation Act 1984* which dealt with subordinate legislation, many of which have been incorporated in the *SLB*. The *SLB* is nevertheless intended to be read with the *Interpretation Act 1984* in general terms. It has also been drafted with the intention that in the future it could be incorporated in, or be read with, any legislation prepared to regulate or reform government agencies, or administrative law and procedures generally. In this context it is noted that the Committee is aware of the work of the Legislative Council Standing Committee on Government Agencies and

supports that Committee's view that there needs to be reform in respect of the structure, processes and accountability of government agencies.

4.7 In the following comments, proposals and recommendations, reference is made to relevant clauses of the *SLB* (eg [*SLB* 1] refers to clause 1 of the *Bill*). The comments, proposals and recommendations that follow in many cases do not strictly follow the provisions of the *SLB*. They are intended as a guide to the general process of making a typical piece of subordinate legislation, in some cases elaborating on the provisions of the *SLB* and in others not commenting on the full ambit of the relevant provisions of the *Bill*. Consequently the following comments should be read in conjunction with the *SLB*. Flowcharts of an overview of a typical process of making subsidiary legislation under the *Interpretation Act 1984* and an overview of the proposed process of making subordinate legislation are attached as Appendix 2A and Appendix 2B respectively.

5 The Legislative Proposals

5.1 Terminology

CBA	=	cost-benefit analysis
CPI	=	Consumer Price Index
RIS	=	regulatory impact statement
SLB	=	*Subordinate Legislation Bill*

5.2 Relation of *SLB* to *Interpretation Act*

5.2.1 The *SLB* adopts Part VI of the *Interpretation Act 1984* as a base for its provisions. It expands on Part VI drawing on the Committee's experience and understanding of developments in other parts of Australia and processes in the United States, England and France. Its purpose is to clarify and make more accountable the subordinate legislation system in this State[53].

5.2.2 The *SLB* incorporates relevant provisions from the *Interpretation Act 1984*. Those provisions must therefore be deleted from the *Interpretation Act*. Table 1 sets out which provisions of the *Interpretation Act* equate to which provisions of the *SLB*. No further comment will be made on these provisions. Additionally, the *SLB* is expressly required to be read with the *Interpretation Act* [*SLB* 1].

5.2.3 A number of provisions which were included in the *Interpretation Act* have been omitted from the *SLB* on the basis that they are obsolete, merely state the common law position or are contrary to the spirit of the

[53] The statement of purposes in *SLB* 2 is derived from the *Subordinate Legislation Act 1994 (Vic)*.

subordinate legislation framework contemplated by the *SLB*. The omitted provisions include ss 43(2), (3), (4), (7), (8) and 45 of the *Interpretation Act*. No further comment will be made on these provisions.

Former section of *Interpretation Act*	Clause of *Subordinate Legislation Bill*
40	6
41	19
42	26
43(1)	7
43(5)	8
43(6)	10
44	9
46	11
47	12

Table 1

5.3 Commencement and application of *SLB*

5.3.1 The Committee, in accordance with scrutiny of Bills committees in other Australian jurisdictions, considers that commencement dates in Acts should be certain, and provision has therefore been made in that respect in *SLB* 3. The *SLB* is to apply to all subordinate legislation which comes into effect after the *SLB* commences operation.

5.4 Definition of "subordinate legislation" [*SLB* Part 7]

5.4.1 It has been noted that one of the impediments to the Committee's scrutiny function is the limitation that it may only scrutinise "regulations" having legislative effect which, by reason of s 42(8) of the *Interpretation Act 1984* include "rules" and "by-laws" having legislative effect. Similarly, while all "subsidiary legislation"[54] must be *Gazetted*, only "regulations" must be tabled in Parliament. Thus Parliamentary scrutiny of subordinate legislation can be avoided if it is called something other than "regulations", "rules" or "by-laws". This is not satisfactory. Subordinate legislation should be defined by reference to

[54] *Interpretation Act 1984*, s 5.

its purpose and effect, not by how it is nominally described in a particular case.

5.4.2 Consequently, the *SLB* deletes the definition of "subsidiary legislation" in s 5 of the *Interpretation Act 1984* and replaces it with the following definition of "subordinate legislation"[55]:

> "**subordinate legislation**" means any rule having legislative effect (howsoever it may be described) authorized or required to be made by or under an Act.

5.4.3 This definition contains a number of elements. First, it applies to any "rule". The Macquarie Dictionary definitions of "rule" include the following definition:

> a principle or regulation governing conduct, action, procedure, arrangement, etc.

Thus the term "rule" has, and is intended to have, a broad scope.

5.4.4 Second, for it to fall within the definition of subordinate legislation, a rule must have legislative effect. Thus it must involve the formulation of **general rules of conduct, usually operating prospectively, and will usually determine the content of the law rather than merely apply it**[56]. In this context the Committee notes that there appears to be much ignorance in some government agencies about the line between rules which have legislative effect and rules which are merely administrative policy. The Committee acknowledges that sometimes the distinction is not clear and that in some cases even senior lawyers may disagree on the character of a particular rule or rules. Consequently it is important that both government agencies and Parliamentary Counsel give consideration to whether or not particular rules have, or are intended to have, legislative effect. "Legislative effect" is the principle criterion to be used in a determination of what must be contained in subordinate legislation and what may be contained in administrative rules.

5.4.5 Third, the rule must be authorized or required to be made by an Act. This gives it its "subordinate" element.

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[55] As has already been noted, "subordinate legislation" is considered to be a more accurate term than "subsidiary legislation". Additionally, the term "subordinate legislation" is more consistent with practice elsewhere in Australia.

[56] See, for example: Australian Administrative Review Council, *Report to the Attorney-General: Rule Making by Commonwealth Agencies*, Report No 35, March 1992, p20; *Commonwealth v Grunseit* (1943) 67 CLR 58, 82; *Queensland Medical Laboratory v Blewett* (1988) 84 ALR 615, 633.

5.4.6 Finally, the definition applies to rules "howsoever described". This is to avoid the difficulty of anticipating all names by which a rule may be described and thereby to prevent the avoidance of application of the *SLB* to subordinate legislation simply by calling it something else. Thus the definition is intended to apply to rules whether they are described as regulations, rules, by-laws, proclamations, orders, notices, schemes, resolutions, policies, codes, guidelines or anything else.

5.4.7 It may be argued that, in broadly defining "subordinate legislation", some matters which may formerly have been the subject of administrative policies, guidelines or principles may now be considered to be subordinate legislation. However, Margaret Allars notes that "[p]olicies, whether described as guidelines, principles or in some other way are non-statutory rules"[57]. She goes on to say:

> [T]he law / policy distinction has in any event been placed under strain as the scope of procedural fairness has been extended to erode the doctrine that administrators should not be fettered in their exercise of discretion to change policy... Legislation has also made it increasingly difficult to distinguish non-statutory rules from statutory rules, creating a new category of rules, circulars, [guidelines], principles, codes, schemes and determinations lying in the uncharted territory between policy and law, sometimes described as "quasi-legislation[58].

5.4.8 Thus, the definition of "subordinate legislation" which replaces the definition of "subsidiary legislation" includes all rules having legislative effect. Exceptions (such as for rules of internal agency organisation and procedure) are made in appropriate cases.

5.5 Classification of subordinate legislation

5.5.1 An important point which must be kept in mind from the outset in a consideration of the Committee's proposals and recommendations is the proposed structure of classification of subordinate legislation. The purpose of classification is to assist an agency to identify the level of consultation and analysis required in the making of a piece of subordinate legislation. As a result of the desire to minimise cost and administrative burden whilst maintaining adequate levels of accountability, there is unfortunately a degree of complexity in determining how a piece of subordinate legislation should be classified. However, it is considered that the following proposed system of

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[57] Allars 1990, p336.

[58] Allars 1990, p337.

classification merely formalises and clarifies principles of classification, most of which already exist, and the main difficulty will therefore occur in adjusting to the formalisation of the principles.

5.5.2 There are 5 principal categories of subordinate legislation contemplated by the *SLB*. When an agency seeks to address a problem by proposing subordinate legislation, one of its first tasks should be to ascertain the likely category of the subordinate legislation in order that it may identify the procedures which must be followed in the making of that subordinate legislation. The mean categories of subordinate legislation contemplated by the *SLB* follow.

5.5.2.1 **Exempt rules** are rules which are exempt from the operation of the *SLB*.

5.5.2.2 **Ordinary rules** are subordinate legislation which does not fall within any of the following more specific categories. They are not subject to consultation or CBA procedures, but must be *Gazetted* and tabled in Parliament and are subject to scrutiny by the Committee. They include ordinary "substantial rules" as defined in *SLB 5*.

5.5.2.3 **Notice rules** are substantial rules other than those of a kind of subordinate legislation which is listed in Schedule 2 to the *SLB*. Notice rules are subject to the consultation procedures of the *SLB*, *Gazettal*, tabling in Parliament and scrutiny by the Committee.

5.5.2.4 **Economy rules** are substantial rules which significantly affect economic competition[59], impose a new fee, levy or charge or increase a fee, levy or charge by more than the corresponding increase in the CPI [*SLB 20*]. In addition to consultation, *Gazettal*, tabling in Parliament and scrutiny by the Committee, these rules require the preparation of a CBA.

5.5.2.5 **Urgent rules** are substantial rules which are required to be made urgently by reason of emergency, the requirements of the public interest or unforeseen events. An agency may obtain a certificate from the Governor for a temporary exemption from the requirements relating to consultation and preparation of a CBA and RIS.

5.5.3 In order to ascertain which kind of rule it is proposing to make, an agency should consider the following questions:

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[59] This concept is derived from principles originating in the Hilmer Report - see paragraph 5.13.2.

5.5.3.1 *Is it an exempt rule?* If YES, then the *SLB* generally will not apply; if NO, then next question.

5.5.3.2 *Is it subordinate legislation?* If NO, then *SLB* does not apply; if YES, then next question. (Note: This requires an assessment of whether the rule has legislative effect (see paragraph 5.4.4). Parliamentary Counsel will be able to assist an agency in determining if a rule has legislative effect at least at the time instructions are given for the drafting of the rule.)

5.5.3.3 *Is it a substantial rule?* If NO, then it is an ordinary rule; if YES, then next question.

5.5.3.4 *Is it a notice rule?* If YES, then the consultation requirements must be complied with; if NO, the consultation requirements need not be complied with; in either case, next question.

5.5.3.5 *Is it an economy rule?* If YES, then the CBA requirements must be complied with; if NO, the CBA requirements need not be complied with; in either case, next question.

5.5.3.6 *Is it an ordinary rule?* If it is a substantial rule, but is not a notice rule or an economy rule, then it is an ordinary rule.

5.5.4 Addressing these questions will assist an agency to identify the basic kind of subordinate legislation it is proposing to make, which will determine the procedures it must follow. An agency will also need to determine for the purposes of preparation of a RIS if the proposed subordinate legislation is a direct amendment or a principal rule.

5.6 Antecedent publicity for notice rules [*SLB* 13]

5.6.1 After it has been decided to make a notice rule[60] as a result of a need perceived by the community or an agency, or as a result of enactment of primary legislation, the Committee considers that the first step taken by an agency should be to publicise this fact. This will enable concerned people in the community to have an opportunity to take part in the consultation processes to follow.

5.6.2 It has been argued that few people will take an interest in the process of making subordinate legislation. The Committee considers that, unless and until people are given the opportunity to participate, the likely participation rate cannot be determined; and the argument is not sufficient to persuade the Committee that public participation should

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[60] "Notice rule" is defined in *SLB* 5. The definition includes most rules; the main exceptions are set out in *SLB* Schedule 2.

not be supported. The view of one of the experts with whom the Committee met in the United States was that, if you give people the opportunity, they will (eventually) use it. In any event, even it if were the case that few people wanted to participate, this does not mean that people should not have the opportunity of participating. An opportunity for public participation is an important, practical and efficient accountability mechanism.

5.6.3 Consequently it is recommended that a notice of a proposal to make a notice rule be published in the *Western Australian Government Gazette* [*SLB* 13(1)]. Where possible the notice should contain the full text of a draft of the proposed notice rule or a statement as to when and where a copy of the full text of a draft of the subordinate legislation may be examined or obtained. Implementation of this proposal will have resource implications for agencies.

5.6.4 In addition, a short notice[61] is to be published in a daily newspaper. The purpose of this notice is to alert the public generally to a proposal to make a notice rule and to direct them to sources of further information (which in the first instance will be the *Gazette* or the relevant agency). Publication of such a notice, proposal or text of a notice rule solely in the *Gazette* is considered to be insufficient. How many members of the public have convenient access to or regularly read the *Gazette*? Whilst the content of the notice to be published in a newspaper is kept short to minimise costs, implementation of this proposal will have resource implications for agencies.

5.7 Drafting

5.7.1 Wherever possible, drafting of subordinate legislation should be undertaken by Parliamentary Counsel or persons experienced in legal drafting. In relevant cases, persons responsible for drafting subordinate legislation should consult with appropriate technical experts.

5.8 Consultation [*SLB* 15]

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[61] Such a notice may simply provide, for example:

> Fish Resources Management Act 1995
>
> The Fisheries Department is proposing to make regulations under the above Act for the purpose of regulating certain fisheries. Further information may be obtained from the *Government Gazette* No. [number], [date] or by telephoning [number].

5.8.1 There is growing demand for participation by members of the community in government decision-making. In the context of subordinate legislation, informal consultation has long been undertaken by many government agencies. The Committee recommends formalisation of these consultation procedures in respect of notice rules. It notes, however, that consultation is merely one aspect of ensuring accountability and preventing arbitrary rulemaking.

5.8.2 The *SLB* provides that, following publication of the relevant notice there follows a period in which persons can make submissions on the proposed notice rule to the relevant agency [*SLB* 13(1)(e)]. The minimum period for this is 14 days. It is intended that these submissions must in all cases in the first instance be in writing, though a person with a sufficient interest in the subject matter, and only such a person, may request (and must be given) an oral hearing [*SLB* 15(2)].

5.8.3 An obligation is placed on agencies to make reasonable endeavours to identify persons who will be significantly affected by the relevant subordinate legislation and give them notice of it individually [*SLB* 14]. Thus, for example, organisations such as health and industry bodies must be given notice of proposed regulations that will significantly affect them.

5.8.4 These provisions may have resource implications for those agencies which do not currently undertake consultations in the making of subordinate legislation. However, the Committee considers that additional costs (if any) are justified by the necessity of this form of accountability.

5.9 Temporary exemptions [*SLB* 16]

5.9.1 Provision is made for an agency to seek from the Governor a temporary exemption (initially 3 months, which may be extended by a further 3 months) from consultation requirements in unusual or emergency circumstances. This process gives agencies flexibility to meet genuine emergency situations, while providing for an external assessment that the agency's evaluation of what constitutes an unusual or emergency situation is reasonable.

5.9.2 If granted, the exemption itself is nevertheless subordinate legislation which must be *Gazetted* and tabled and is subject to scrutiny by the Committee. This provides for accountability by means of an independent check on administrative use of the process.

5.9.3 Subordinate legislation made under such an exemption has a maximum life of 6 months. At the end of that time it must be re-made in accordance with the procedures set out in the *SLB*. It is anticipated that

agencies will, upon being granted an exemption, immediately commence re-making the relevant subordinate legislation in accordance with the full requirements of the *SLB*.

5.10 Agency record [*SLB* 17]

5.10.1 In making subordinate legislation, agencies may only rely on matters of which they have maintained records. This is considered to be a critical part of the reform package as it will significantly discourage agencies from making arbitrary or capricious subordinate legislation and from attempting to justify subordinate legislation simply on the basis that "it is policy". If an agency attempts to justify subordinate legislation on the basis that it is policy, or on any other basis, it must be able to identify precisely what is the policy or other basis. Preferably, the agency should be able to justify its policy by reference to relevant facts and circumstances.

5.10.2 While this provision is included to prevent arbitrary subordinate legislation and processes, it should be noted that most agencies base their proposed subordinate legislation on a rational analysis of a problem or issue that requires to be addressed. In these circumstances, the provision merely requires agencies to keep a record of that rational analysis so that the agency can at any time demonstrate how it arrived at its decision. The Committee considers that this is nothing more than a common sense approach to the making of subordinate legislation. In most cases maintenance of an agency record in respect of subordinate legislation should require no additional commitment of resources.

5.10.3 It is anticipated that each agency will maintain a copy of all subordinate legislation for which it is responsible as a part of its agency record.

5.11 Criteria to be considered [*SLB* 18]

5.11.1 In making subordinate legislation an agency must satisfy itself that it is not exceeding its powers, that it is not unduly affecting individuals' rights and that it is not, unless expressly authorised by its enabling legislation, prohibiting judicial review of administrative acts and decisions. These are matters which the Committee takes into account in its scrutiny process and this provision will require an agency to address them before the scrutiny stage. Hopefully this will establish within government agencies responsible for preparing subordinate legislation a consciousness of the purpose and functions of subordinate legislation, the fact that the capacity to make subordinate legislation is a secondary function which is delegated by Parliament and is subject to scrutiny by Parliament, and the fact that subordinate legislation is nevertheless law which affects people and does not just exist in a

"heaven of [administrative] conceptions"[62] in which every problem can be solved by a quick change to the rules.

5.12 Publication and commencement of subordinate legislation [*SLB* 19]

5.12.1 Generally subordinate legislation will come into operation upon its publication in the *Gazette*. Retrospective operation of subordinate legislation is prohibited unless expressly authorized in the enabling legislation.

5.12.2 If subordinate legislation is not *Gazetted* it will be of no force or effect [*SLB* 19(2)]. The reasons for this have already been considered - see paragraph 3.1.1. Essentially, people should not be bound by laws of which they have no reasonable means of knowing. Publication in the *Gazette* ensures that there is at least one reasonably accessible place in which people can ascertain the content of a piece of subordinate legislation.

5.13 Cost-benefit analysis (CBA) [*SLB* 20]

5.13.1 The Committee commented in the Investigations Report on the potentially enormous costs that could be involved in the preparation of RIS's in the United States. It seems that the bulk of the cost of preparation of an RIS is incurred in preparation of a CBA. The Committee has been informed by the Victorian Office of Regulatory Review that CBA's in that State can cost up to $50,000, though the vast majority of CBA's cost much less than this.

5.13.2 National competition policy requires that CBA's be undertaken in respect of subordinate legislation. This was recommended in the Hilmer Report[63] in August 1993 and confirmed by the Commonwealth-State Committee on Regulatory Reform[64] in April 1995.

5.13.3 The Committee has been informed that some agencies in Victoria, whilst they consider that CBA's are an important aid to decision-making and policy development, have a concern that they, or more particularly the quantitative economic costs and benefits that they

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62 See the description of von Ihering's satirical Heaven of Juristic Conceptions where "the sun is the source of life but concepts cannot accommodate themselves to life; they need a world of their own in which they may exist for themselves solely, remote from all contact with life" in Stone, J, *Legal System and Lawyer's Reasoning*, 1964, p226.

63 *National Competition Policy*, Report by the Independent Committee of Inquiry, August 1993, AGPS, pp 190 et seq.

64 Council of Australian Governments, Commonwealth-State Committee on Regulatory Reform, *Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standards Setting Bodies*, April 1995.

identify, can become the sole determinant of policy. The Committee, whilst agreeing that CBA's are a useful tool, considers that basing policy solely on a quantitative economic analysis is unsatisfactory as policy must often take into account matters which are not, despite the ideals of some economists, logically or reasonably economically quantifiable[65]. A solely quantitative analysis can lead to bad policy development. Furthermore, attempts to assign quantitative values to qualitative matters is often arbitrary and based on the current perceptions of the person assigning the value. These may not accord with the prevailing values of the community and may have long-term unforeseeable consequences. Additionally, there are inevitably gaps in the available information which lessen the accuracy and therefore the value of CBA's.

5.13.4 Margaret Allars says:

> The rational-comprehensive model[66] is the cornerstone of corporate management, the theory which now dominates public administration in Australia. This theoretical foundation tends to be extrapolated into a celebration of cost-benefit analysis which distorts the goals of administration, giving primacy to efficiency over all other goals... But the distinction between efficiency and effectiveness ought not to be forgotten. Rationality does not require that efficiency displace effective pursuit of legislative objectives and ultimate values associated with the rule of law...[67]

5.13.5 In all jurisdictions which the Committee has examined which require CBA's, attempts (whether explicit or implicit) are made to limit the circumstances in which CBA's are required to those where there is a clear need for or benefit to be gained from them. This is no doubt largely due to the costs and administrative burdens involved in preparing CBA's, as well as to the inflexibility in rulemaking that CBA requirements often entail. No jurisdiction, in the Committee's view, has been entirely successful in this respect. Consequently the Committee has proposed, whilst supporting the Hilmer-based requirements for CBA's in appropriate circumstances, what it believes to be a new approach in restricting the requirement for a CBA to:

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65 See, for example, Allars 1990, p8.

66 A model of decision-making which requires a consideration of alternative options and an evaluation of all of their consequences. This is the model adopted by Victoria in its requirements for cost-benefit analyses and regulatory impact statements.

67 Allars 1990, p6 (references omitted).

5.13.5.1 substantial rules which significantly affect economic competition; and

5.13.5.2 rules which impose new fees, levies or charges or increase fees, levies or charges by more than the change in the CPI since the imposition or last increase in the fees, levies or charges.

5.13.6 If these provisions of the *SLB* are accepted by the Parliament, the Committee will monitor the operation of the requirements for CBA's in the course of its ongoing scrutiny process. Monitoring of the CBA requirements will be necessary to ascertain their efficaciousness and their effect, beneficial or detrimental, on government's capacity to achieve legislative objectives. It may be that, in the future, the categories of subordinate legislation requiring a CBA need to be expanded, or it may be that they should be further restricted. This can only be ascertained in the light of experience.

5.13.7 Another problem with the requirement to prepare CBA's is that of establishing expertise in their preparation. It is the Committee's understanding that few CBA's in Victoria are prepared by agencies; rather, private consultants are engaged to prepare them. Additionally, the Victorian Office of Regulatory Review assists agencies in complying with their statutory duties in this respect. In Tasmania a Regulation Review Unit has been established in the Department of Treasury and Finance with functions similar to those of the Office of Management and Budget in the United States of America. Implementation of the Committee's recommendations in respect of CBA's may require establishment of an Office of Regulatory Review by the Western Australian Government (see paragraph 5.22).

5.14 Regulatory impact statements (RIS) [*SLB* 21]

5.14.1 Agencies are to be required to prepare a RIS in respect of all subordinate legislation other than exempt rules. RIS's are required to be sent to the Committee to assist the Committee to adequately scrutinise subordinate legislation[68]. Agencies are already required, under a 1993 directive from the Premier[69], to prepare an explanatory memorandum for use by the Committee. Some agencies are slow to provide the Committee with such memoranda which has resulted in the Committee being forced to give a protective notice of motion of disallowance in respect of relevant subordinate legislation, pending receipt of the memorandum. In most cases the subordinate legislation

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[68] It is anticipated that RISs will be subject to parliamentary privilege.

[69] Circular to Ministers No. 37/93, 30 September 1993.

does not violate the Committee's terms of reference but, without the explanatory memorandum, the Committee is often not able to determine that this is the case. Consequently it is considered desirable to make this requirement a statutory one. In many cases explanatory memoranda provided by agencies are inadequate for scrutiny purposes. Consequently, the provisions of the *SLB* require agencies to provide a minimum amount of information to the Committee in the RIS. Additionally, this requirement will have the effect of requiring agencies to consider those matters which must be included in the RIS.

5.14.2 Much of the information formally required by the *SLB* to be contained in the RIS is in fact already provided by some agencies to the Committee in explanatory memoranda. Furthermore, as was noted in the Investigations Report, the United States Supreme Court has said:

> [T]here can now be no doubt that implicit in the decision to treat the promulgation of rules as a "final event" in an ongoing process of administration is an assumption that an act of reasoned judgment has occurred, an assumption which further implicates the existence of a body of material - documents, comments, transcripts, and statements in various forms declaring agency expertise or policy - with reference to which such judgment was exercised...[70]

In other words, preparation of a RIS merely requires an agency to summarise the processes and reasoning by which it prepares subordinate legislation. Consequently, after the initial process of familiarisation with new procedures, the requirement to prepare RIS's should not result in a significant additional burden to agencies in the preparation of subordinate legislation. The exception to this is the requirement that agencies must prepare a CBA (which forms part of the RIS) in respect of certain kinds of subordinate legislation, as to which see paragraph 5.13. Therefore, this requirement should not have a significant resources impact.

5.15 It is anticipated that the requirement to prepare a RIS, in conjunction with other relevant provisions of the *SLB* (such as consultation and the requirement to maintain a rulemaking record) will in fact have a beneficial effect on the general quality of subordinate legislation by requiring agencies formally to address issues on a rational and logical basis.

5.16 Scrutiny by the Committee [*SLB* 22-23]

5.16.1 The Committee will continue with its role of scrutiny of subordinate legislation. Its terms of reference have been incorporated in the *SLB* in

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[70] *Home Box Office Inc v FCC* 567 F 2d 9 (DC Cir), 434 US 829 (1977).

a slightly amended form and expanded to include a power to comment on any contravention of the provisions of the *Bill*. The Committee's rules[71] (including its terms of reference) will require consequential amendment. Appropriate amendments are suggested in Appendix 4. Additionally the Committee should be re-named the "Subordinate Legislation Committee".

Recommendation 2: The Committee recommends that:

(a) it be re-named the "Subordinate Legislation Committee"; and

(b) the rules of the Committee be amended as set out in Appendix 4.

5.17 Suspension of subordinate legislation by the Committee [*SLB* 24]

5.17.1 The Committee has been given a power to suspend subordinate legislation in limited circumstances. Each of the Victorian *Subordinate Legislation Act 1994* (s 22) and the Tasmanian *Subordinate Legislation Committee Act 1969* (s 9) give the respective committees of those States a power to suspend subordinate legislation in certain circumstances. It is considered that a suspension power is required to attempt to prevent injustices that may occur in the event that subordinate legislation is disallowed. For example, an agency may seek to levy a fee by making subordinate legislation. The Committee may consider that the fee is invalid. Until such time as Parliament has an opportunity to consider the matter and disallow the relevant subordinate legislation, an agency would nevertheless be able to collect the fee, which may not be refundable to the persons who pay it before the fee is disallowed. This is the current situation, which is manifestly unjust. If the Committee has a power to suspend regulations in such circumstances, the potential for such injustice is much reduced. It is anticipated that the power would only be used in exceptional circumstances.

5.18 Power to amend subordinate legislation

5.18.1 The Tasmanian Subordinate Legislation Committee has power to instruct an agency to amend subordinate legislation[72]. The Committee does not consider that it should be given the power to amend subordinate legislation. This is a function of the Government and the administration under a delegation from Parliament for which the Committee is not necessarily equipped and which conceivably could

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[71] *Joint Rules of the Standing Committee on Delegated Legislation*, September 1987. The current rules are set out in Appendix 3.

[72] *Subordinate Legislation Committee Act 1969*, s 9.

compromise the non-partisan status of the Committee. If the Committee did consider that a particular amendment was desirable, it would still be open to the Committee to report that fact to Parliament, which could then amend the subordinate legislation[73] if it thought fit.

5.19 Advisory role of Committee [*SLB* 25]

5.19.1 The Committee's advisory role has been given statutory authority[74]. Hopefully this will encourage an understanding of the role of the Committee as well as assist agencies and Ministers in respect of questions regarding subordinate legislation.

5.20 Consequences of non-compliance with the *SLB*

5.20.1 The requirements of the *SLB* are, obviously, statutory. Whilst a failure to table subordinate legislation will render it ineffective [*SLB* 26(2)], a failure to comply with other provisions of the *SLB* will not necessarily have this effect, but may make the subordinate legislation subject to a recommendation for disallowance by the Committee and, ultimately, disallowance by one (or both) of the Houses of Parliament. Additionally, a substantial failure to comply with the requirements of the *SLB* is a ground for judicial review.

5.21 Judicial review [*SLB* Part 6]

5.21.1 As has already been noted, the scope of judicial review of subordinate legislation in Western Australia is limited. The reasons for the limitations are largely due to restrictive standing rules and the requirements that a specific remedy (such as a prerogative writ) is available for the alleged wrong. The Committee considers that the limitations on judicial review of subordinate legislation are too restrictive and make such review largely impracticable. At a Law Society seminar on 11 April 1995, Christine Wheeler QC said, in respect of the standing rules for prerogative writs:

> The rules of standing have been criticised in almost every text and Law Reform Commission Report as unduly narrow, complex, and technical[75].

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[73] *Interpretation Act 1984*, s 42(4), *SLB* 26(4).

[74] A similar provision is s 27 *Subordinate Legislation Act (Vic).*

[75] Wheeler, C, *Prerogative Writs and Judicial Review in the Supreme Court*, Law Society of Western Australia, 11 April 1995. It should be noted that Ms Wheeler does not entirely agree with the criticism and indicates that there are other difficulties which restrict the ability to obtain the remedies of the prerogative writs.

5.21.2 Consequently the Committee proposes that the District Court be invested with jurisdiction to hear applications for review under the *SLB*, that standing rules be liberalised and the requirements that a specific remedy be available for the alleged wrong be de-restricted. However, certain limitations have been preserved in order to prevent excessive litigation relating to procedural matters similar to that which causes unreasonable delay, inflexibility and expense in the United States. Furthermore, the Court is given a discretion to refuse relief where there has been no substantial miscarriage of justice.

5.21.3 In drafting its legislative proposals in respect of judicial review, the Committee gave consideration to, among other things:

5.21.3.1 *Administrative Decisions (Judicial Review) Act 1977 (Cth)*;

5.21.3.2 *Judicature Amendment Act 1972 (NZ)*, ss 4 - 13;

5.21.3.3 *Supreme Court Act 1981 (UK)*, s 5; and

5.21.3.4 *Supreme Court Rules (UK)*, O53.

5.22 Office of Regulatory Review

5.22.1 Whilst knowledge of the legal nature of subordinate legislation and the role of the Committee has, since 1987, slowly been filtering into many agencies, it is the Committee's experience that there is still much misunderstanding and many misconceptions about these things. Additionally it is the experience in other jurisdictions that agencies need assistance in adapting to the evolving nature of subordinate legislation systems. In particular agencies require assistance with compliance with CBA requirements and preparation of CBAs. In these contexts the Committee was impressed by the concept of the *Subordinate Legislation User's [*sic*] Guide* prepared by the Tasmanian Department of Treasury and Finance.

5.22.2 For these reasons the Committee is of the view that it would be useful if the Government re-constituted the Office of Economic Liaison and Regulatory Review (as the Office of Regulatory Review (ORR)) to prepare a *Subordinate Legislation Manual*, assist agencies in adapting to the requirements of the *SLB* and monitor the operation of the *Bill* from the perspective of agencies. The ORR should in the first instance be established for a fixed term to assist agencies during a transitional period, and could then be continued on a permanent basis if this proved to be necessary. The ORR should, where appropriate or necessary, consult the Committee.

Recommendation 3: The Committee recommends that the Western Australian Government consider establishing an Office of Regulatory Review for a fixed term to:

(a) develop a "Subordinate Legislation Manual" describing the purpose and function of subordinate legislation and incorporating administrative procedures and guidelines for agencies to follow for the purposes of implementation of the* SLB*;

(b) assist agencies in their compliance with the* SLB*; and

(c) monitor the operation of the* SLB *from an agency perspective.

5.23 Staged repeal and sunsetting

5.23.1 In 1989, Hon Peter Foss said:

> I would like to see all delegated legislation have a sunset clause; such legislation should not be set on the Statute books forever[76].

The 1993 report on subordinate legislation prepared by the Ministry of Premier and Cabinet[77] recommended that processes for staged repeal of existing subordinate legislation and sunsetting of new subordinate legislation should be implemented. The Committee supports this recommendation and notes that one government department (Conservation and Land Management) has advised the Committee that it intends to review its regulations approximately every 1 or 2 years in any event[78]. However, the Committee notes that the 1993 report simply adopted the New South Wales timetable for staged repeal and period for sunsetting without any apparent analysis of the existing situation in Western Australia or the impact (in terms of cost and administrative burden) that the proposal would have.

5.23.2 The Committee does not support this approach. It considers that the Western Australian situation should be analysed before such recommendations are made.

Recommendation 4

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[76] 1989 WAPD 1649.

[77] Ministry of Premier and Cabinet Policy Office, *A Statutory Framework for Review of Subordinate Legislation in Western Australia*, 9 August 1993.

[78] Telephone conversation with Don Keene, 14 June 1995; evidence of Mr Keene to Committee, 10 August 1995.

The Committee recommends that the Office of Regulatory Review reviews the State's existing subordinate legislation and recommends:

(a) a timetable for its staged repeal; and

(b) an appropriate period for sunsetting of all new subordinate legislation.

5.24 Henry VIII clauses [*SLB* 23(1)(c)]

5.24.1 A "Henry VIII clause" is a provision in an Act that authorises the amendment of the enabling legislation or another Act by means of subordinate legislation. The *Macquarie Dictionary of Modern Law* notes that it is "so named because of its autocratic flavour". The Committee has repeatedly expressed its concern at the use of Henry VIII clauses[79], as have other subordinate legislation committees throughout Australia[80] as well as in the United Kingdom[81] and New Zealand[82].

5.24.2 Following further consideration of the matter and after hearing evidence from Greg Calcutt, Parliamentary Counsel, in May 1995, the Committee has accepted the view that the use of Henry VIII clauses is necessary or desirable in some limited circumstances. However, the Committee considers that the use of Henry VIII clauses requires some specific form of Parliamentary scrutiny, such as that which would be provided by a scrutiny of Bills committee. Additionally, the Committee considers that Henry VIII clauses should be precisely delimited and perhaps be subject to a definite time limitation such as that suggested by the Donoughmore Committee (1 year)[83].

5.24.3 The Committee will continue to monitor subordinate legislation made under Henry VIII clauses. However, as has been stated before, scrutiny of such subordinate legislation is like "shutting the gate after the horse has bolted". Furthermore, the Committee notes that it is sometimes

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79 See, for example, Joint Standing Committee on Delegated Legislation, *Review of Operations: 1991-1992*, 11th Report, December 1992.

80 See, for example, Senate Standing Committee for the Scrutiny of Bills, *Ten Years of Scrutiny*, 25 November 1991.

81 See, for example, Westminster, *Third Commonwealth Conference on Delegated Legislation: Record of Proceedings*, 1989.

82 See, for example, New Zealand Regulations Review Committee, *Report on an Inquiry into the Resource Management (Transitional) Regulations 1994 and the principles that should apply to the use of empowering provisions allowing regulations to override primary legislation during a transitional period*, 1995.

83 UK Committee on Ministers' Powers, *Report*, 1932 (Cmd 4060), p61.

difficult to determine the precise effect of amendment of an Act by a regulation, particular in the absence of an opportunity for public debate. The consultation procedures in the *SLB* may to some extent address this problem.

5.25 General recommendation

5.25.1 It is anticipated that the *SLB* will have a similar beneficial effect on the making of subordinate legislation to the aims and effects described by Lockhart J in the context of the impact of the *Administrative Decisions (Judicial Review) Act 1977 (Cth)* on general administrative decisions:

> The ultimate aim of the... Act is to ensure that decisions of public servants and others which affect the rights, prospects and property of citizens, are made after giving careful consideration to the questions involved in the particular case, so that it is more likely that the decision will be right and justice done to the persons affected by it...
>
> The determination... of proper standards to be observed in decision making inevitably involves balancing the requirement of fair play to the citizen against the real problems that confront decision makers in the Public Service and calls for an approach... that is fair, practical and of common sense. There is no essential inconsistency between the duty of decision makers to be fair to those who may be affected by their decisions and the advancement and efficiency of the Public Service[84].

5.25.2 It is the goal of the *SLB* to achieve an appropriate balance between the requirements of flexible and efficient public administration in the context of subordinate legislation and the requirements of accountability and fairness to the citizen. The Committee considers that the *SLB* and the recommendations in this report substantially address these requirements.

Recommendation 5: The Committee recommends that the Government introduce a subordinate legislation Bill in terms of the substance of the proposed* Subordinate Legislation Bill *appended to this report. The Committee recommends that it be invited to comment on the draft Bill after its introduction to Parliament.

6 Uniform Legislation

[84] *Toy Centre Agencies Pty Ltd v Spencer* (1983) 46 ALR 351, 359.

6.1 Scrutiny of subordinate legislation made under national uniform legislation schemes is a vexed issue. Problems arise as to how individual jurisdictions may scrutinise subordinate legislation made under a national uniform legislation scheme given the principle that the subordinate legislation is designed to be uniform throughout Australia. The question arises as to what function, if any, a scrutiny committee has after such subordinate legislation is made. If a scrutiny committee identifies a problem, which may be based on local circumstances, what measures can be taken given that the subordinate legislation is required to remain uniform with that applying elsewhere in Australia? The desirability of uniformity must be balanced against the need to meet local circumstances and the requirements of accountability and Parliamentary scrutiny and control of subordinate legislation.

6.2 Scrutiny committees of the various Australian jurisdictions have each published a joint discussion paper on these issues[85]. The proposal preferred by a majority of the members of the working party which drafted the discussion paper was:

> That all Scrutiny Committees adopt the following separate Terms of Reference for the examination of **national scheme subordinate legislation**.
>
> - Whether the subordinate legislation is in accordance with the provisions of the Act under which it is made and whether it duplicates, overlaps or conflicts with other regulations or Acts;
>
> - Whether the subordinate legislation trespasses unduly on personal rights and liberties;
>
> - Whether, having regard to the expected social and economic impact of the subordinate legislation, it has been properly assessed.

6.3 The Committee is generally supportive of this proposal. If and when the proposal is implemented, the Committee recommends that its terms of reference be expanded by adding terms of reference substantially in the form of those proposed for the specific purpose of scrutiny of subordinate legislation made under national uniform legislation. The Committee's terms of reference (as recommended in this Report) for scrutinising ordinary subordinate legislation should remain in place.

6.4 Until such time as such a proposal is implemented, subordinate legislation made under national uniform legislation will be treated as ordinary subordinate

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[85] Western Australian Standing Committee on Uniform Legislation and Intergovernmental Agreements, *Discussion Paper No. 1 on the Scrutiny of National Scheme Legislation and the Desirability of Uniform Scrutiny Principles*, July 1995.

legislation (subject, of course, to consideration of the requirements of uniformity). Under the *SLB* it would be treated as an ordinary rule (assuming it first met the requirements of being a substantial rule).

6.5 The Committee will continue to monitor developments in this area.

Appendix 1

Delegated Legislation Seminar: 8 May 1992

List of Participants

Joint Standing Committee on Delegated Legislation

Hon Tom Helm MLC (Chairman)
Hon Margaret McAleer MLC (Deputy Chairman)
Hon Reg Davies MLC
Hon Beryl Jones MLC
Mr Bob Wiese MLA
Dr Judy Edwards MLA
Mr Phil Smith MLA
Mr Bob Bloffwitch MLA
Mrs Jane Burn (Research Officer)
Ms Jan Paniperis (Committee Clerk)

Members of Parliament (and representatives)

Hon Clive Griffiths MLC	*- President of the Legislative Council*
Ms Jill Fuller	*- for Hon George Cash MLC*
Hon Kim Chance MLC	
Hon Cheryl Davenport MLC	
Hon Muriel Patterson MLC	
Hon Derrick Tomlinson MLC	
Ms Sue Connor (Electorate Officer)	*- for Hon Ernie Bridge MLA*
Ms Denise Sussovitch (Executive Officer: NW)	*- ditto*
Ms Colma Keating (Policy Officer, Agriculture)	*- ditto*
Dr Liz Constable MLA	
Mr Matt Ngui	*- for Hon Judyth Watson MLA*
Mr Colin Campbell-Fraser	*- ditto*

Mr Adrian Cruickshank (Chairman)	*- NSW Regulation Review Committee*
Mr Kim Yeadon	*- NSW Regulation Review Committee*
Mr Greg Hogg	*- Legal Officer, NSW Committee*

Parliamentary Officers

Mr Laurie Marquet	*- Clerk, Legislative Council*
Mr Peter McHugh	*- Clerk, Legislative Assembly*

Departmental Officers

Mr Neville May	*- Aboriginal Affairs Planning Authority*	
Mr John Paterson		*- Agriculture*
Mr David Hampton		*- CALM*
Mr Simon Hancocks		*- CALM*
Mr Terry Simpson		*- Community Services*
Mr John Foulsham		*- Community Services*
Ms Penny Lipscombe		*- Community Services*
Messrs John Thurtell	*Tony Becker*	*- Consumer Affairs*
Mick Drover	*Lloyd Davies*	
Mark Bodycoat	*Gordon Gray*	
Ms Jennie Ibrahim	*Mary Devereux*	
Mr John Metaxas		*- Commissioner, Corporate Affairs*
Mr Gary Newcombe		*- Legal Officer, Corporate Affairs*
Mr Hubert Du Guesclin		*- Corrective Services*
Dr Jim Thomson		*- Crown Solicitor's Office*
Mr Glen Coffey		*- Crown Law*
Mr John Frame		*- Crown Law*
Mr Greg Calcutt		*- Parliamentary Counsel*
Mr John Gladstone		*- CEO, DoLA*
Mr David Mulcahy		*- Executive Director, DoLA*
Ms Alison Clarke		*- EPA*
Mr Richard Maisey		*- Education*
Ms Julie Harris		
Mr Barry Jones		*- Fisheries*
Mr Rod Simpson		*- Fisheries*
Ms Liza Newby		*- Health*
Mr Trevor Davies		*- Health*
Mr Brett Wakefield		*- Industrial Relations Commission*
Mr Darrel Schorer		*- Local Government*
Mr Des Warner		*- Director, Corporate Services, Main Roads*
Mr Trevor Maughan		*- Marine and Harbours*
Messrs Ray Dawson	*John Suda*	*- Mines*
Ken Price	*John Hanley*	
Gino Valenti	*Henry Zuidersma*	
Roger Pike	*Bill Phillips*	
Roy Burton	*Bob Stevens*	
Bob Hopkins	*Rob Ferguson*	
Peter Garland		
Ms Jeanette Dunkley		*- representing the Ombudsman*
Mr Brian Bradley		*- O.H.S.W.*
Dr Paul Schapper		*- Economic Liaison &*
Mr Paul Tzaikos	*- Regulatory Review*	
Inspector Chris Mabbott		*- Police*
Sgt Graham Harnwell		*- Police*
Mr Steve Oswald		*- Police*

Mr Noel Whitehead	*- Productivity & Labour Relations*
Dr Michael Woods	*- Public Service Commissioner*
Mr Mike Gelani	*- SECWA*
Mr Tom Paswanski	*- SECWA*
Dr W Cox	*- Managing Director, WAWA*
Mr Greg Scrivener	*- Manager, Corporate Divn, WAWA*
Mr Paul Brooks	*- Workers' Compensation*
Ms Erica Grundy	*- Workers' Compensation*

Judiciary and Legal Profession

His Honour Judge Heenan	*- Chief Judge, District Court*
His Honour Judge Hammond	*- District Court*
Mr Peter Johnston	*- Deputy President, Administrative Appeals Tribunal*
Mr Len Roberts-Smith QC	
Dr Steven Churches	*- Jackson MacDonald*
Mr Neil Douglas	*- Northmore Hale Davy Leake*

Universities

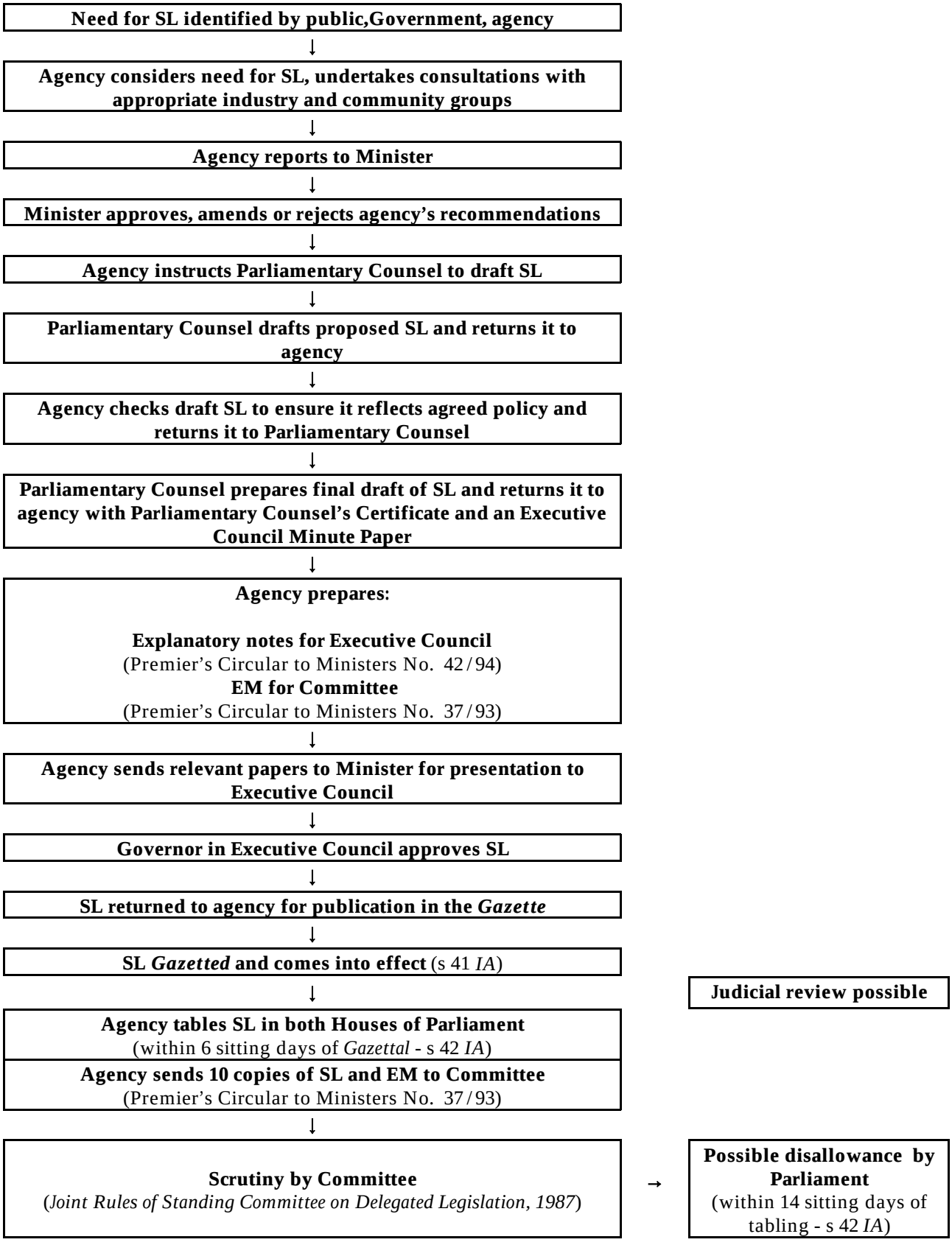
Prof K Brown	*- School of Business Law, Curtin*

Business Community

Dr Aubrey Birkelbach	*- Chamber of Commerce*
Mr Merv Mason	

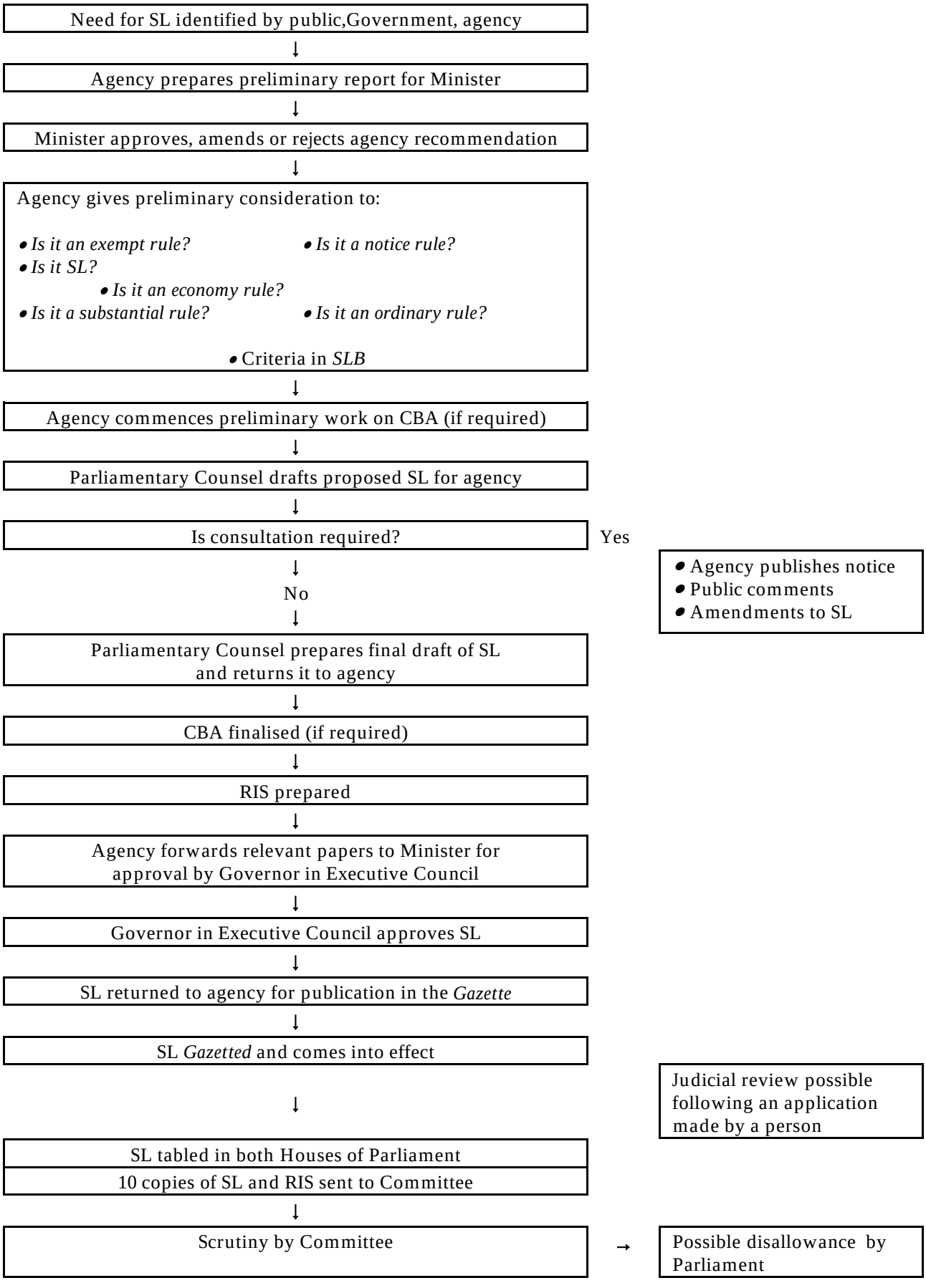
Appendix 2A

Flowchart of a typical process of making subsidiary legislation
(*Interpretation Act 1984*)



Appendix 2B

Flowchart of the process of making subordinate legislation under the *SLB*



Appendix 3

JOINT RULES OF THE STANDING COMMITTEE ON DELEGATED LEGISLATION

(in force September 1987)

1. The Standing Committee on Delegated Legislation (the "Committee") shall consist of 4 members of the Legislative Assembly and 4 members of the Legislative Council.

2. (1) The Assembly members of the Committee shall be chosen as the House may determine but, where there is a party in the Assembly of not less than 5 members, other than a party whose leader is either the Premier or the Leader of the Opposition, 1 of the Assembly members of the Committee shall be a member of that party.

(2) The term of office of each Committee member extends from the time of election to the Committee until the expiration of that Parliament during which he was elected.

(3) When a vacancy occurs on the Committee during a recess or a period of adjournment in excess of 2 weeks the President or the Speaker, as the case may be, may appoint a member to fill the vacancy until an appointment can be made by the Council or Assembly as the case may be.

(4) A member may resign from membership of the Committee at any time by writing addressed to the President or Speaker, as the case may require, and the appropriate Presiding Officer shall thereupon notify the House of the vacancy, and any member elected to fill that vacancy holds office for the balance of the vacating member's term and is eligible for re-election.

3. A person shall not be elected to, or continue as, a member of the Committee if that member is or becomes:

(a) a Minister of the Crown;
(b) the President of the Legislative Council;
(c) the Speaker of the Legislative Assembly; or
(d) the Chairman of Committees of the Legislative Council or of the Legislative Assembly.

4. At its first meeting and thereafter as occasion requires the Committee shall elect from its members a Chairman who belongs to a party or parties supporting the Government, and a Deputy Chairman.

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 is 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; or

(d) unduly makes rights dependent upon administrative, and not judicial, decisions.

6. (1) If the Committee is of the opinion that any of the Regulations ought to be disallowed, in whole or in part, it shall report that opinion and the grounds thereof to each House before the end of the period during which any motion for disallowance of those Regulations may be moved in either House, but if both Houses are not sitting, it may report its opinion and the grounds thereof to the authority by which the Regulations were made.

(2) Where a report is made to the regulation-making authority pursuant to rule 6(1), a copy of the report shall be delivered to the Clerk of each House who shall make it available to any member for perusal, and any such report shall be tabled in each House not later than 6 sitting days from the start of the next ensuing sitting of each House.

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.

8. A report of the Committee shall be presented in writing to each House by a member of the Committee nominated for that purpose by the Committee.

9. The Committee has power to send for persons, papers and records, and to sit during a recess or an adjournment of either House or of both Houses.

10. A quorum for the conduct of business is 4 members of whom not less than 2 shall be members of the Assembly and not less than 2 members of the Council.

11. Except to the extent that they impinge upon the functioning of the Committee, its proceedings shall be regulated by the standing orders applicable to Select Committees of the Legislative Council.

Appendix 4

Proposed Amendments to the "Joint Rules of the Standing Committee on Delegated Legislation"

1 Delete the heading and substitute therefor:

"RULES OF THE SUBORDINATE LEGISLATION COMMITTEE".

2 In paragraph 1, delete "The Standing Committee on Delegated Legislation" and substitute therefor:

"The Subordinate Legislation Committee".

3 Delete paragraphs 5, 6 and 7.

4 Insert the following paragraph after paragraph 4:

"5. The functions and powers of the Committee shall be those functions and powers conferred on it by the *Subordinate Legislation Act 199** and these rules."

5 Renumber the remaining paragraphs.

Appendix 5

Proposed Subordinate Legislation Bill

Subordinate Legislation Act 199*

A Bill for

An Act to authorize and regulate subordinate legislation.

The Parliament of Western Australia enacts as follows:

PART 1: PRELIMINARY

Short title

1 This Act may be cited as the *Subordinate Legislation Act 1995* and shall be read together with the *Interpretation Act 1984*.

Purpose

2 The purpose of this Act is to:

(a) regulate the preparation, making, publication, scrutiny and review of subordinate legislation;

(b) provide for public participation in the preparation, scrutiny and review of subordinate legislation; and

(c) to ensure that the power to make subordinate legislation is exercised subject to Parliament's authority and control.

Commencement

3 This Act comes into operation on **.

Application of Act

4 Unless expressly stated otherwise in an Act, this Act applies to subordinate legislation, or any part, amendment or repeal thereof, that comes into operation after the commencing day.

Interpretation

5 (1) In this Act, unless the contrary intention appears:

"**agency**" means a person on whom a duty or power is imposed or conferred by an enactment to make subordinate legislation and includes a delegate of that person, empowered to perform the duty or exercise

the power, but does not include either House of Parliament or any committee or officer of either or both Houses;

"**commencing day**" means the day that this Act comes into operation under section 2;

"**Committee**" means a committee of one or both Houses of Parliament constituted for the purpose of reviewing or scrutinising subordinate legislation;

"**cost-benefit analysis**", in relation to subordinate legislation, means the evaluation to be prepared by an agency under section 20;

"**Court**" means the District Court or a District Court Judge;

"**CPI**" means **;

[Parliamentary Counsel to provide definition]

"**direct amendment**" means an amendment that inserts, adds, alters or substitutes matter;

"**enabling legislation**", in relation to subordinate legislation, means the enactment that authorizes the making of the subordinate legislation concerned;

"**exempt rule**" means subordinate legislation of a kind listed in Schedule 1;

"**notice rule**" means a substantial rule other than subordinate legislation of a kind listed in Schedule 2;

"**regulatory impact statement**", in relation to subordinate legislation, means the statement prepared by an agency under section 21;

"**interested person**" means any person whose rights or interests are, or are likely to be, affected by subordinate legislation to an extent or degree that is demonstrably greater than or distinguishable from any effect on the rights or interests of the general public in the same circumstances;

"**principal rule**" means principal subordinate legislation that is made for the first time under an enactment, or under a particular head of power under an enactment, after the commencing day, but does not include any exempt rule;

[Parliamentary Counsel to review this definition to assess its efficaciousness]

"**substantial rule**" means subordinate legislation (including principal rules) that implements, alters, abolishes, interprets or describes agency policy or rules whether of general or particular application, but does not include any exempt rule.

(2) A reference in this Act to a duty or power created or delegated by Parliament in respect of an agency, includes a delegation of that duty or power by an agency to another agency.

PART 2: GENERAL PROVISIONS

Governor to make subordinate legislation

6 If an enactment provides that subordinate legislation may or shall be made and does not provide by whom the subordinate legislation may or shall be made, it shall be made by the Governor.

Subordinate legislation to be consistent with Acts

7 Subordinate legislation shall be invalid to the extent of any inconsistency with the provisions of its enabling legislation or any Act.

Special purpose not to derogate from general purpose

8 Where an enactment confers power on an agency to make subordinate legislation for any general purpose and also for any related special purposes, the enumeration of the special purposes shall not derogate from the generality of the powers conferred with reference to the general purpose.

Words and expressions in subordinate legislation

9 (1) Words and expressions used in subordinate legislation shall have the same respective meanings as are used in its enabling legislation.

(2) A reference in subordinate legislation to "the Act" shall be construed as a reference to the Act under which the subordinate legislation is made.

General penalty

10 Regulations, rules or by-laws made under a power conferred by an Act passed after the commencing day may provide that contravention of a provision thereof constitutes an offence and may provide for a penalty in respect of such a contravention not exceeding a fine of $1000.

Reference to an enactment to include subordinate legislation

11 (1) A reference in an enactment to another enactment shall be construed so as to include a reference to any subordinate legislation made under that other enactment.

(2) A reference in an enactment to an Imperial Act or a Commonwealth Act shall be construed so as to include a reference to any subordinate legislation made under that Act.

Acts under subordinate legislation deemed done under Act

12 Any act done under subordinate legislation shall be deemed to be done under the enabling legislation of the subordinate legislation.

PART 3: PUBLIC CONSULTATION

Certain substantial rules subject to notice

13 (1) An agency proposing to make a notice rule shall publish in the *Gazette*, in relation to that proposal, a notice that includes:

(a) as a heading, the name of the enabling legislation under which the proposed notice rule is to be made;

(b) a statement of the provisions of the enabling legislation or other authority under which the notice rule is to be made;

(c) the text, or an adequate description, of the proposed notice rule;

(d) a summary of the substance and effects of the proposed notice rule;

(e) an invitation to comment on the proposed notice rule within a specified time (which shall not be less than 14 days after publication of the notice); and

(f) a statement that an interested person may request an oral hearing to support a written submission to the agency and a statement of the time, date (which shall not be less than 14 days after publication of the notice), place and nature of the agency hearings on the proposed notice rule.

(2) If the text of the proposed notice rule is not published, the *Gazette* notice shall state where and when the text may be examined.

(3) An agency proposing to make a notice rule shall, in addition to the notice to be published in the *Gazette*, publish in a daily newspaper circulating throughout the State a notice that includes:

(a) as a heading, the name of the enabling legislation under which the proposed notice rule is to be made;

(b) a statement that the agency is proposing to make subordinate legislation under the enabling legislation and a concise statement of the purpose of the proposed subordinate legislation; and

(c) a statement indicating in which issue of the *Gazette* further information may be obtained.

Agency to give notice to affected persons

14 (1) An agency shall, in respect of a proposed notice rule, make reasonable endeavours to ascertain whether or not there is a person or persons who together sufficiently represent the interests of all those likely to be affected by the proposed notice rule.

(2) Where an agency determines that there is a person or persons who together sufficiently represents the interests of all those likely to be affected by a proposed notice rule it shall send a notice, in the same terms as the notice to be published in the *Gazette* under section 13, to that person or persons.

Consultation

15 (1) An agency shall not make a notice rule before considering evidence that may be provided in response to an invitation to comment.

(2) An agency is not obliged to take oral evidence except that of an interested person who has made a written submission and has requested an oral hearing in support of the submission.

(3) For the purposes of this section, an agency has power to:

(a) administer oaths or affirmations;

(b) order suppression absolutely, or for a specified period, publication of its proceedings or any evidence or document on the grounds that this is required by:

(i) legal profession privilege;

(ii) commercial confidentiality; or

(iii) the public interest;

(c) make orders, final or interim, relevant to its proceedings; and

(d) consistent with this Act, regulate its own procedure.

Temporary exemptions

16 (1) Where by reason of:

(a) emergency;

(b) requirements of the public interest;

(c) an unforeseen event,

an agency believes that it should make a substantial rule having immediate effect, it may apply to the Governor for an exemption from the requirements of sections 13, 15, 20 and 21.

(2) On being satisfied that the agency has reasonable grounds for its belief, the Governor may issue a Form 1 certificate granting the exemption sought conditionally or unconditionally.

(3) A substantial rule made under this section expires and ceases to have effect 3 months from the day on which it took effect, but a further exemption not exceeding 3 months may be granted if application is made before the expiry of the first exemption.

(4) An exemption granted by the Governor under this section is subordinate legislation which must be published in the *Gazette* and tabled in Parliament and is subject to scrutiny by the Committee in accordance with the relevant provisions of this Act.

PART 4: MAKING SUBORDINATE LEGISLATION

Agency record

17 (1) In making or deciding to make subordinate legislation, an agency may have regard to any relevant oral or written material received from any source and included by the agency in its record.

(2) All agency orders, records or transcripts of relevant agency meetings, and evidence, submissions and other documents received by the agency constitute the record of the agency.

Criteria to be considered

18 When making subordinate legislation an agency shall satisfy itself that the subordinate legislation:

(a) accords with the purpose and objects, and is within the power, of its enabling legislation;

(b) does not, without sufficient cause, abolish, modify or trespass on personal rights or liberties possessed or recognized by law, custom or usage; and

(c) does not, unless expressly authorised to do so by its enabling legislation, oust judicial review of administrative acts or decisions.

Publication and commencement of subordinate legislation

19 (1) All subordinate legislation shall:

(a) be published in the *Gazette* in its final form;

(b) subject to sections 23, 24 and 26, come into operation on the day of publication, or, where another day is specified or provided for in the subordinate legislation, on that day.

(2) Unless expressly provided otherwise in its enabling legislation, subordinate legislation shall be of no force or effect until it is published in the *Gazette* in accordance with sub-section (1).

(3) A power to fix a day on which subordinate legislation shall come into operation does not include power to fix different days for different provisions of the subordinate legislation unless express provision is made in that behalf in the enabling legislation.

(4) A power to fix a day on which subordinate legislation shall come into operation does not include power to fix a day prior to publication of the subordinate legislation in the *Gazette* unless express provision is made in that behalf in the enabling legislation.

Certain subordinate legislation requires cost-benefit analysis

20 (1) An agency shall prepare an evaluation of the costs and benefits of:

(a) any substantial rule which significantly affects economic competition; and

(b) any subordinate legislation which imposes a new fee, levy or charge or increases any fee, levy or charge by more than the change in the CPI since the later of the imposition or last change in the fee, levy or charge.

(2) An evaluation of costs and benefits required to be made under sub-section (1) shall take into account:

(a) direct and indirect, and tangible and intangible costs and benefits;

(b) the effect on economic competition of the relevant subordinate legislation;

(c) the relative costs and benefits of alternative approaches to the relevant subordinate legislation (including non-regulatory options); and

(d) the public interest.

Certain subordinate legislation requires regulatory impact statement

21 (1) An agency shall, in respect of subordinate legislation that is not an exempt rule, prepare a regulatory impact statement in respect of the subordinate legislation.

(2) The regulatory impact statement shall include:

(a) a statement of the authority under which the subordinate legislation is made;

(b) a statement of the reasons for making, and of the purpose and objects of, the subordinate legislation;

(c) in respect of a substantial rule which is a principal rule, a summary of the alternative approaches considered (including non-regulatory options) and a statement explaining why the chosen option is preferred;

(d) a statement identifying which persons or groups will be significantly affected by the subordinate legislation;

(e) if the subordinate legislation amends or alters an Act or the effect of a provision of an Act, a statement to that effect;

(f) if the subordinate legislation alters a fee, levy or charge, the amount of the fee, levy or charge before the alteration and the

date and amount of the last such alteration in the fee, levy or charge;

(g) if relevant, a statement of the agency's reasons that the subordinate legislation does not require compliance with the requirements of sections 13, 14 and 15;

(h) a list of the persons who responded to any invitation to comment on the subordinate legislation or proposal for subordinate legislation and the persons consulted by the agency for the purpose of making the subordinate legislation;

(i) in respect of subordinate legislation other than direct amendments, a summary of relevant comments and consultations and the agency's response to those comments and consultations;

(j) in respect of direct amendments, a table which is to contain, in respect of each such amendment, a column for each of:

(i) the text of the subordinate legislation before the amendment;

(ii) the text of the subordinate legislation as amended; and

(iii) the reasons for the amendment and a brief summary of any comments received by the agency in respect of the amendment and the agency's response to the comments;

(k) in respect of repeals, the text of the subordinate legislation before its repeal; and

(l) if relevant, the evaluation of costs and benefits prepared by the agency under section 20.

PART 5: SCRUTINY, SUSPENSION AND DISALLOWANCE

Certain subordinate legislation to be forwarded to Committee

22 (1) This section applies to subordinate legislation that is not an exempt rule.

(2) An agency shall, within 5 days after publication of the subordinate legislation in the *Gazette*, give to the Committee the number of copies required by the Committee of:

(a) the subordinate legislation; and

(b) the relevant regulatory impact statement.

Scrutiny of subordinate legislation by Committee

23 (1) The Committee may report to each House of Parliament if it considers that any subordinate legislation:

(a) appears not to be within power or not to be in accord with the purpose and objects of the enactment 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 or reveals an inappropriate delegation of legislative power;

(d) ousts judicial review of administrative action or decisions;

(e) contravenes, or the making of which contravened, any of the provisions of this Act; or

(f) should for any other reason be brought to the attention of Parliament.

(2) Notwithstanding section 4, the Committee may, in its discretion, examine, in accordance with sub-section (1) of this section, the provisions of any subordinate legislation that took effect before the commencement of this Act and make such reports and recommendations with respect thereto as it thinks fit.

Suspension of subordinate legislation

24 (1) If the Committee considers that subordinate legislation should be disallowed or amended or is of the opinion that considerations of justice and fairness require that the operation of subordinate legislation or any part thereof should be suspended pending its consideration by Parliament, the Committee may, by notice published in the *Gazette* within 10 sitting days of publication of the subordinate legislation in the *Gazette*, suspend the operation of the subordinate legislation.

(2) The Committee shall, within 4 sitting days of publication of a notice of suspension lay before each House of Parliament a report indicating why the subordinate legislation was suspended.

(3) A suspension of subordinate legislation under this section shall take effect the day after publication of the notice in the *Gazette* and remains in force until both Houses of Parliament have dealt with the Committee's report.

(4) While the operation of subordinate legislation is suspended under this section it is not enforceable.

Advisory role of Committee

25 The Committee may advise any person on any matter regarding subordinate legislation.

Laying subordinate legislation before Parliament, and disallowance

26 (1) Subordinate legislation that is not an exempt rule shall be laid before each House of Parliament within 6 sitting days of such House next following publication of the subordinate legislation in the *Gazette*.

(2) Notwithstanding any provision in any enactment to the contrary:

(a) if either House of Parliament passes a resolution disallowing any subordinate legislation of which resolution notice has been given within 14 sitting days of such House after the subordinate legislation has been laid before it; or

(b) if any subordinate legislation that is not an exempt rule is not laid before both Houses of Parliament in accordance with sub-section (1),

the subordinate legislation shall thereupon cease to have any effect, but without affecting the validity or curing the invalidity of anything done or of the omission of anything in the meantime.

(3) Sub-section (2) applies notwithstanding that the period of 14 days referred to in that sub-section, or part of that period, does not occur in the same session of Parliament or during the same Parliament as that in which the regulations are laid before the House concerned.

(4) Notwithstanding any provision in any enactment to the contrary, if both Houses of Parliament at any time pass a resolution originating in either House amending any subordinate legislation or substituting other subordinate legislation for that which has been disallowed by either House under sub-section (2), then on the passing of any such resolution:

(a) amending subordinate legislation, the subordinate legislation so amended shall, after the expiration of 7 days from the publication in the *Gazette* of the notice provided for in sub-section (5), take effect as so amended;

(b) substituting subordinate legislation in place of subordinate legislation disallowed, the subordinate legislation so substituted shall, after the expiration of 7 days from the publication in the *Gazette* of the notice provided for in sub-section (5), take effect in place of that for which the subordinate legislation is so substituted.

(5) When a resolution has been passed under sub-section (2) or (4), notice of the resolution shall be published in the *Gazette* within 21 days of the passing of the resolution.

(6) Notwithstanding section 37(1) of the *Interpretation Act 1984*, where:

(a) subordinate legislation is disallowed under this section or is not laid before both Houses of Parliament in accordance with sub-section (1); and

(b) that subordinate legislation amended or repealed subordinate legislation that was in operation immediately before the first-mentioned subordinate legislation came into operation,

the disallowance or failure to comply with sub-section (1) revives the previous subordinate legislation on and after the day of the disallowance or, in the case of failure to comply with sub-section (1), on and after the day next following the last day for compliance with sub-section (1).

(7) If an enactment authorizes or requires the making of subordinate legislation by an agency other than the Governor and requires that the subordinate legislation be confirmed or approved by the Governor or by any other person before having the force of law, sub-section (1) does not apply to the subordinate legislation unless it has been confirmed or approved as so required.

PART 6: JUDICIAL REVIEW

Jurisdiction of District Court

27 The Court has jurisdiction to hear and determine applications made to it under this Act.

Application for review

28 (1) Notwithstanding any rule of law or written law, any person may make an application for review to the Court in respect of subordinate legislation on any one or more of the following grounds:

(a) that the subordinate legislation is not authorized by its enabling legislation;

(b) that the making of the subordinate legislation was an improper exercise of the power conferred by its enabling legislation; and

(c) that there was a substantial contravention of a provision of this Act in relation to the making, publication or tabling in either House of the subordinate legislation.

(2) The provisions of sub-section (1) are in substitution for and exclude any proceedings including, without limitation, proceedings for a writ of or in the nature of mandamus, prohibition or certiorari, that might otherwise have been commenced in the Court in respect of subordinate legislation.

Court may make orders

29 On an application for review under this Act, the Court may, in its discretion, make all or any of the following orders:

(a) an order voiding the subordinate legislation;

(b) an order returning the subordinate legislation to the relevant agency for further consideration, subject to such directions as the Court thinks fit;

(c) an order declaring the rights of the parties in respect of the matter the subject of the application; and

(d) an order directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the Court considers necessary to do justice between the parties.

Court may refuse to grant relief

30 On an application for review under this Act where the sole ground of relief established is a defect in form or technical irregularity, the Court may, if it finds that no substantial wrong or miscarriage of justice has occurred, refuse to grant an order under section 29.

PART 7: CONSEQUENTIAL AMENDMENTS

Consequential amendments to *Interpretation Act 1984*

[Parliamentary Counsel to draft, and advise on any other necessary amendments.]

Section 5: delete definition of "subsidiary legislation" and substitute:

> "**subordinate legislation**" means any rule having legislative effect (howsoever it may be described) authorized or required to be made by or under an Act;

Delete Part VI - Subsidiary legislation.

Replace all remaining instances of "subsidiary legislation" with "subordinate legislation".

Miscellaneous consequential amendments

for example, ss 5 & 10 *Retail Trading Hours Act*

Schedule 1

Exempt rules
(Section 5)

1 Any standing orders, rules, regulations, by-laws, proclamations, orders, notices, subordinate legislation or other instruments made by either or both Houses of Parliament.

2 Subordinate legislation which is confined to matters of internal agency procedure, organization or practice.

[Parliamentary Counsel to consider other rules that may be appropriately exempted; eg University by-laws, matters relating to security in prisons, town planning schemes, workplace agreements?, etc.]

Schedule 2

Subordinate legislation which is not a notice rule (Section 5)

1 Subordinate legislation which will implement a Government policy that has already been the subject of significant public consultation which included an opportunity for the public to comment on the policy, and in respect of which an agency has records of the public consultation.

2 Subordinate legislation that is made under or pursuant to a scheme of national uniform legislation and that is subject to some other form or process of Parliamentary scrutiny.

3 Subordinate legislation which is made under an enactment which prescribes consultation requirements for subordinate legislation made under it comparable to those contained in this Act.

4 Subordinate legislation which is a rule of court made by a court of record.

5 Subordinate legislation made under and for the purposes of the *Financial Administration and Audit Act 1985*.

6 Subordinate legislation which corrects an error in existing subordinate legislation.

7 Subordinate legislation which alters a fee, levy or charge where that alteration does not increase the fee, levy or charge by more than the change in the CPI since the later of the imposition or last change in the fee, levy or charge.

[Parliamentary Counsel to consider other rules that may be appropriately excluded; eg town planning schemes, workplace agreements?, etc.]

Form 1

Subordinate Legislation Act 199*
(Section 16)

Governor's Certificate of Exemption

[Parliamentary Counsel to draft]

Select Bibliography

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