THIRTY-EIGHTH PARLIAMENT

REPORT 39

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

ANNUAL REPORT 2009

Presented by Mr Joe Francis MLA (Chairman)

and

Hon Robin Chapple MLC (Deputy Chairman)

May 2010

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

Date first appointed:

28 June 2001

Terms of Reference:

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

"**3. Joint Standing Committee on Delegated Legislation**

3.1 A *Joint Standing Committee on Delegated Legislation* is established.

3.2 The Committee consists of 8 Members, 4 of whom are appointed from each House. The Chairman must be a Member of the Committee who supports the Government.

3.3 A quorum is 4 Members of whom at least one is a Member of the Council and one a Member of the Assembly.

3.4 A report of the Committee is to be presented to each House by a Member of each House appointed for the purpose by the Committee.

3.5 Upon its publication, whether under section 41(1)(a) of the *Interpretation Act 1984* or another written law, an instrument stands referred to the Committee for consideration.

3.6 In its consideration of an instrument, the Committee is to inquire whether the instrument -

(a) is authorized or contemplated by the empowering enactment;

(b) has an adverse effect on existing rights, interests, or legitimate expectations beyond giving effect to a purpose authorized or contemplated by the empowering enactment;

(c) ousts or modifies the rules of fairness;

(d) deprives a person aggrieved by a decision of the ability to obtain review of the merits of that decision or seek judicial review;

(e) imposes terms and conditions regulating any review that would be likely to cause the review to be illusory or impracticable; or

(f) contains provisions that, for any reason, would be more appropriately contained in an Act.

3.7 In this clause -

"**adverse effect**" includes abrogation, deprivation, extinguishment, diminution, and a compulsory acquisition, transfer, or assignment;

"**instrument**" means -

(a) subsidiary legislation in the form in which, and with the content it has, when it is published;

(b) an instrument, not being subsidiary legislation, that is made subject to disallowance by either House under a written law;

"**subsidiary legislation**" has the meaning given to it by section 5 of the *Interpretation Act 1984*."

Members as at the time of this inquiry:

Mr Joe Francis MLA (Chairman)	Ms Janine Freeman MLA
Hon Robin Chapple MLC (Deputy Chairman)	Hon Alyssa Hayden MLC
Hon Jim Chown MLC	Mr Paul Miles MLA
Hon Jock Ferguson MLC	Mr Andrew Waddell MLA

Staff as at the time of this inquiry:

Christine Kain, Advisory Officer (Legal)	Irina Lobeto-Ortega, Advisory Officer (Legal)
Felicity Mackie, Advisory Officer (Legal)	David Driscoll, Committee Clerk

Address:

Parliament House, Perth WA 6000, Telephone (08) 9222 7222
lcco@parliament.wa.gov.au
Website: http://www.parliament.wa.gov.au

ISBN 978-1-921634-32-1

CONTENTS

REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

ANNUAL REPORT 2009

1 INTRODUCTION

Scrutiny of subsidiary legislation

1.1 The role of the Joint Standing Committee on Delegated Legislation (**the Committee**) and its approach to the scrutiny of subsidiary legislation was discussed in the Committee's Sixth Report.[1]

1.2 The Committee holds a standing referral from the Legislative Council to consider all instruments of subsidiary legislation that are published,[2] whether under section 41(1)(a) of the *Interpretation Act 1984* or another written law. As a result, the Committee is able to scrutinise and report to the Parliament on a huge volume of instruments. However, due to statutorily imposed deadlines and limited resources, the Committee resolved shortly after its establishment to consider only those instruments that are subject to disallowance under section 42 of the *Interpretation Act 1984* or another written law, together with any other instruments that were noted by individual members.

2 REPORTING PERIOD

2.1 This report covers the period of activity between 5 December 2008 and 1 December 2009 (the last day of sitting for 2009), spanning the first full year of the 38th Parliament.

Members

2.2 The Committee was served by the following members:

- Mr Joe Francis MLA (Chairman);
- Hon Robin Chapple MLC (Deputy Chairman);
- Hon Jim Chown MLC;
- Hon Jock Ferguson MLC;

---

1 Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *Sessional Report June 28 2001 to August 9 2002*, Report No. 6, March 2003, Chapters 1-2.

2 As defined in section 5, *Interpretation Act 1984.*

- Ms Janine Freeman MLA;
- Hon Alyssa Hayden MLC;
- Mr Paul Miles MLA; and
- Mr Andrew Waddell MLA.

2.3 The Committee is assisted by legal advisory officers who examine and report to the Committee on every disallowable instrument, attend meetings and draft correspondence. In the event that the Committee decides to report to the Parliament, the advisers prepare a draft report for the Committee's consideration. The Committee's advisers during 2009 were:

- Ms Christine Kain, Advisory Officer (Legal);
- Ms Felicity Mackie, Advisory Officer (Legal) (from 4 May 2009);
- Ms Susan O'Brien, Advisory Officer (Legal) (to 1 August 2009);
- Ms Andrea McCallum, Advisory Officer (Legal) (to 21 August 2009);
- Ms Irina Lobeto-Ortega, Advisory Officer (Legal) (from 31 August 2009);
- Ms Anne Turner, Advisory Officer (Legal) (as required); and
- Ms Denise Wong, Advisory Officer (Legal) (as required).

2.4 Mr David Driscoll, Committee Clerk, provided administrative and clerical support. Mrs Lorraine Murray, Clerical Assistant, provided internet and reception services.

3 COMMITTEE ACTIVITIES

Reports presented to the Parliament

3.1 In 2009 the Committee presented the following reports to both the Legislative Council and the Legislative Assembly, in accordance with its terms of reference:

- Report Number 28 - *Local Laws Regulating Signs and Advertising Devices*, tabled on 2 April 2009;
- Report Number 29 - *City of Armadale - Signs Amendment Local Law 2008*, tabled on 2 April 2009;
- Report Number 30 - *Annual Report 2008*, tabled on 14 May 2009;

- Report Number 31 - *Issues of Concern Raised by the Committee between 1 May 2007 and 30 April 2009 with respect to Local Laws*, tabled on 14 May 2009;

- Report Number 32 - *Supreme Court (Fees) Amendment Regulations (No.2) 2008, Children's Court (Fees) Amendment Regulations (No.2) 2008, District Court (Fees) Amendment Regulations 2008, Magistrates Court (Fees) Amendment Regulations (No.2) 2008, Fines, Penalties and Infringement Notices Enforcement Amendment Regulations (No.2) 2007 and Other Court Fee Instruments*, tabled on 14 May 2009;

- Report Number 33 - *State Administrative Tribunal Rules Amendment (No.2) 2008*, tabled on 21 May 2009;

- Report Number 34 - *City of Joondalup Cats Local Law 2008*, tabled on 10 September 2009;

- Report Number 35 - *Fish Resources Management Amendment Regulations (No.3) 2009*, tabled on 19 November 2009;

- Report Number 36 - *Tabling of Subsidiary Legislation in the Legislative Council*, tabled on 19 November 2009; and

- Report Number 37 - *Unauthorised Disclosure of Confidential Committee Correspondence by the City of Joondalup*, tabled on 26 November 2009.

Government Responses

3.2 During the reporting period the Committee received Government responses to:

- Report Number 28 - *Local Laws Regulating Signs and Advertising Devices*, tabled on 2 April 2009;

- Report Number 29 - *City of Armadale - Signs Amendments Local Law 2008*, tabled on 2 April 2009; and

- Report Number 34 - *City of Joondalup Cats Local Law 2008*, tabled on 10 September 2009.

3.3 The Government's response to Report Number 35 was received by the Committee on 26 March 2010.

3.4 Copies of the Government responses can be viewed at http://www.parliament.wa.gov.au. Follow the links to *Committees*, then *Current*

Committees, then *Delegated Legislation Committee*, then *Report*. Open the report and then click on *Government response*.

3.5 The Committee noted that, in relation to the Government responses provided, as at 19 April 2010:

- a Cat Bill had not been introduced into the Parliament; and
- as recommended by Report Number 29, the *City of Armadale Signs Local Law 2007* had not been repealed.

3.6 The Committee has written to the Minister for Local Government seeking an update on the progress of the Governor's repeal of the *City of Armadale Signs Local Law 2007*.

Statistics

3.7 The table below provides an indication of the volume of the Committee's workload in 2009.

3.8 The figures in the table below do not demonstrate that many of the instruments considered by the Committee are often lengthy documents. Irrespective of their size, the instruments often involve complex issues that span a diverse range of subject matters.

Calender Year	**2009**	**2008**
Total number of disallowable instruments referred	493	477
Total number of local laws referred	89	142
Total number of instruments referred that were local laws	18%	30%
Total number of notices of motion for disallowance given	50	20
Total number of notices of motion for disallowance withdrawn	48	19
Total number of hearings held by the Committee	2	0
Total number of undertakings provided to the Committee to amend/repeal an instrument	37	12
Total number of reports tabled (information and disallowance)	10	4
Total number of instruments disallowed on recommendation of the Committee	2	1

Undertakings

3.9 The figure in the last row of the above table indicates that two instruments were disallowed on the recommendation of the Committee in 2009. Prior to recommending disallowance the Committee will seek to obtain a written undertaking from the responsible Minister, Department or local government to amend or repeal the instrument in question. When such undertakings are given, the Committee does not

usually proceed with any motion to disallow the instrument. As indicated above, 37 such undertakings were provided to the Committee.

Disallowance

3.10 Unless satisfied by a Government undertaking, the Committee may resolve to report to the Parliament, recommending the disallowance of an instrument in the Legislative Council.[3]

3.11 The Committee recommended disallowance of the *City of Armadale Signs Amendment Local Law 2008* and that instrument was subsequently disallowed by the Legislative Council on 7 May 2009.[4] This is reported in the Committee's Report Number 29 - *City of Armadale Signs Amendment Local Law 2008.*

3.12 The Committee also recommended that Amendment Rule 5 of the *State Administrative Tribunal Amendment Rules (No.2)* be disallowed. This is reported in the Committee's Report Number 33 - *State Administrative Tribunal Rules Amendment (No.2) 2008.* This amendment rule was not disallowed.

3.13 The Committee also recommended disallowance of the *City of Joondalup Cats Local Law 2008* and that instrument was subsequently disallowed by the Legislative Council on 15 September 2009.[5] This is reported in the Committee's Report Number 34 - *City of Joondalup Cats Local Law 2008.*

4 UNAUTHORISED DISCLOSURE OF CONFIDENTIAL COMMITTEE CORRESPONDENCE

4.1 As noted in its Report Number 34, a series of letters ensued between the Committee and the City of Joondalup. Each letter sent from the Committee to the City expressly stated that the contents of the letter was not to be disclosed without the authorisation of the Committee.

4.2 On 14 August 2009 *The West Australian* newspaper, on page 3, published an article titled 'New cat laws to force de-sexing, microchips'. The article made reference to contents of correspondence sent from the Committee to the City.

4.3 Following publication of the newspaper article the Committee became aware that an agenda for a public briefing session to be provided by the City on 11 August 2009 was published on the City's website. The agenda referred in detail to the contents of correspondence sent from the Committee to the City.

---

3 Either House of Parliament may pass a motion disallowing a regulation, provided that notice of that motion has been given within 14 sitting days after tabling of the regulation. (Section 42 of the *Interpretation Act 1984*).

4 Legislative Council, *Parliamentary Debates (Hansard)*, 7 May 2009, p3531.

5 Legislative Council, *Parliamentary Debates (Hansard)*, 15 September 2009, p6866.

4.4 On 18 August 2009 the Committee wrote to the City of Joondalup advising of a possible breach of privilege and noting that a matter of this nature could be referred to the Legislative Council Procedure and Privileges Committee.

4.5 The Committee tabled an information report on this matter to ensure local governments are aware of their obligations in relation to confidential correspondence. This is the Committee's Report Number 37 and can be viewed at http://www.parliament.wa.gov.au. Follow the links to *Committees*, then *Current Committees*, then *Delegated Legislation Committee*, then *Reports*, and click on the title to Report 37.

5 *FISH RESOURCES MANAGEMENT AMENDMENT REGULATIONS (NO.3) 2009*

5.1 This instrument was published in the *Western Australian Government Gazette* on 11 February 2009.

5.2 The amendment regulations effected changes to the fees payable for access licences in relation to seven managed fisheries for 2008/2009.

5.3 The Committee formed the preliminary view that the component of the fees which is raised for the purposes of contributing to the Development and Better Interest Fund (**DBIF**) is an unauthorised tax. Notice of motion to disallow the *Fish Resources Management Amendment Regulations (No.3) 2009* (**Amendment Regulations**) was given in the Legislative Council on 19 May 2009.

5.4 The Committee raised its concerns with the Minister for Fisheries and the Department of Fisheries. The Department responded to the Committee attaching a copy of advice from the State Solicitor's Office. This material did not allay the Committee's concerns.

5.5 Despite this, the Committee resolved to move a motion to remove the disallowance motion from the Notice Paper in the Legislative Council and prepare an information report for the Parliament. The Committee's decision in this instance was based on the following:

- the Committee's view had ramifications for all managed fishery access licence fees prescribed in the *Fish Resources Management Regulations 1995*, not just those amended by the Amendment Regulations;
- the disallowance of the Amendment Regulations would have little effect on the new fees, the vast majority of which had already been paid; and
- managed fishery access licence fees prescribed in the *Fish Resources Management Regulations 1995* have been calculated according to a

longstanding fee-setting model introduced in 1995, which was being reviewed at the time of the Committee's inquiry.

5.6 The information report became the Committee's Report Number 35 which was tabled on 19 November 2009 and can be viewed at http://www.parliament.wa.gov.au. Follow the links to *Committees*, then *Current Committees*, then *Delegated Legislation Committee*, then *Reports*, and click on the title to Report 35.

5.7 The Committee made three recommendations in its report:

- That the Government cease imposing the DBIF component of the managed fishery access licence fees prescribed in the *Fish Resources Management Regulations 1995* as soon as is practicable.

- If the Government did not agree with that recommendation, then Schedule 1, Part 3, item 3 of the *Fish Resources Management Regulations 1995* be deleted by both Houses of Parliament.

- That the Government consider and accept the findings and recommendations in its Report as part of its review of the fee-setting model under *Future Directions for Fisheries Management in Western Australia*, released jointly by the Minister for Fisheries and the Chairman of the Western Australian Fishing Industry Council in September 1995.

5.8 The Committee sought a Government response to Report 35 which was provided on 26 March 2010.

6 *PERTH PARKING MANAGEMENT AMENDMENT REGULATIONS (NO.2) 2009*

6.1 The Committee first considered these amendment regulations in September 2009. The amendments increased annual non-residential parking bay licence fees within the Perth Parking Management Area (**PPMA**), where the fees were payable, by between 176 percent and 204 percent. The licence fees were for:

- public short stay and on street parking bays; and

- public long stay and tenant parking bays.

6.2 The Committee noted the *Perth Parking Management (Taxing) Act 1999*, which authorises the quantum of the increase.

6.3 The *Perth Parking Management Act 1999* (**Parking Act**) requires revenue from licence fees to be credited to the Perth Parking Licensing Account (**Account**)[6]. In

[6] Created under section 23 of the *Perth Parking Management Act 1999.*

accordance with that section, monies standing to the credit of the Account may be expended within the boundaries of the PPMA on projects and services that:

- promote accessibility and amenity of the central city area; and
- which give effect to the Perth Parking Policy developed under the Act.

6.4 The use of monies for these purposes must be approved by the Minister, after consultation with the City of Perth.

6.5 Examples of existing services include the Perth Central Area Transit (**CAT**) bus services and the Perth Free Transit Zone.

6.6 The Committee received a submission from Hon Ken Travers MLC dated 15 July 2009 in relation to the amendments. The submission expressed concern about several matters including that the expenditure of the funds raised by the proposed fee increases might not be in accordance with the powers authorised by section 23 of the Act.

6.7 After considering the matters raised in the submission, the Committee resolved on 14 September 2009 to give notice of motion in the Legislative Council to disallow the amendments.

6.8 The Committee also wrote to the Department of Transport seeking:

- a breakdown of the purposes for which the funds raised by the increase to the licence fees have been allocated for the 2008/09 and 2009/10 financial years; and
- details of the consultation undertaken with the City of Perth in relation to the fee increases including consultation as to the manner in which the funds raised by the fee increases are proposed to be expended.

6.9 The Committee received several letters from the Department which did not satisfy its concerns. The Committee subsequently held a hearing with the Department of Transport on 9 November 2009. A transcript of the hearing can be viewed at http://www.parliament.wa.gov.au. Follow the links to *Committees*, then *Current Committees*, then *Delegated Legislation Committee*, then *Past Inquiries*, and then *Perth Parking Management Amendment Regulations (No.2) 2009*.

6.10 After consideration of the material before it, the Committee resolved to move a motion to remove the disallowance motion in the Legislative Council and to take no further action in relation to the amendment regulations.

7 *FOOD REGULATIONS 2009*

7.1 The Committee first considered the *Food Regulations 2009* (**Regulations**) in November 2009. The regulations were made under the *Food Act 2008* (**Food Act**).

7.2 The Committee was concerned that the sections of the Food Act authorising regulations 52 and 53 had not commenced at the time that the Regulations came into force on 24 October 2009. On this basis the Committee considered that the fees were not authorised by the Food Act.

7.3 Regulation 52 prescribed a fee for the approval of a person as a food safety auditor.[7]

7.4 Regulation 53 prescribed modified penalties for five offences under the Food Act.[8]

7.5 Following correspondence with the Minister for Health, the Committee sought written undertakings that the relevant regulations would not be enforced until the authorising sections of the Food Act commenced.[9]

7.6 Section 154 of the Food Act authorises the making of transitional regulations and provides as follows:

> *(1) If this Act does not provide sufficiently for a matter or issue of a transitional nature that arises as a result of the amendment of an Act by this Act or the coming into operation of this Act, the Governor may make regulations prescribing all matters that are required, necessary or convenient to be prescribed for providing for that matter or issue.*

7.7 Regulations 62 and 63 were transitional regulations which provided for deemed approvals of interstate laboratories and analysts for a limited period of time prior to the Chief Executive Officer's actual grant or refusal of approval:[10]

> ***62. Approved laboratories***
>
> *(1) In this regulation —*

---

7 In conjunction with Schedule 2, Item 3 of the *Food Regulations 2009*.

8 In conjunction with Schedule 3, Items 10 to 14 of the *Food Regulations 2009*.

9 Section 94(3) of the *Food Act 2008*, when read with section 144(1) of the *Food Act 2008*, authorises the prescription of the fee which is prescribed in Regulation 52 and Schedule 2, Item 3 of the *Food Regulations 2009*. Section 94(3) has been proclaimed to commence on 23 April 2010. Sections 96(1), 99(2) and 106(1), (2) and (3) of the *Food Act 2008* prescribe the offences for which modified penalties are prescribed in Regulation 53 and Schedule 3, Items 10 to 14 of the *Food Regulations 2009.* Sections 96(1), 99(2) and 106(1), (2) and (3) have been proclaimed to commence on 23 April 2010 and section 99(2) has been proclaimed to commence on 23 October 2010.

10 Section 8 *Food Act 2008:* ***CEO*** means the chief executive officer of the department of the Public Service principally assisting in the administration of this Act;.

corresponding provision *means a provision of a law of another State or a Territory that corresponds to section 82 of the Act.*

(2) A laboratory that, immediately before the commencement day, was approved under a corresponding provision is to be taken to have been approved by the CEO under section 82 of the Act until —

(a) the CEO grants or refuses an application for approval of the laboratory under section 82 of the Act; or

(b) the day 12 months after the commencement day,

whichever occurs first.[11]

63. Approved analysts

(1) In this regulation —

corresponding provision *means a provision of a law of another State or a Territory that corresponds to section 88 of the Act.*

(2) An individual who, immediately before the commencement day —

(a) …

(b) was approved under a corresponding provision, is to be taken to have been approved by the CEO under section 88 of the Act until —

(c) the CEO grants or refuses an application by the individual for approval under section 88 of the Act; or

(d) the day 12 months after the commencement day,

whichever occurs first.[12]

7.8 The Committee's view was that if the affected interstate analysts and laboratories were already approved under the *Health Act 1911*, the regulations would be transitional in nature and be authorised by section 154 of the Food Act. The

[11] Under section 82 of the Act, the CEO may approve laboratories for the purposes of carrying out analyses under the Act. Regulation 62 provided for interstate laboratories to be deemed to be approved under the Act for a limited period.

[12] Under section 88 of the Act, the CEO may approve analysts for the purposes of carrying out analyses under the Act. Among other things, regulation 63 provided for interstate analysts to be deemed to be approved under the Act for a limited period.

Committee was subsequently advised by the Department of Health that there had not been any approvals of interstate analysts and laboratories under the *Health Act 1911*. On this basis, the Committee's view was that Regulations 62 and 63 were not of a transitional nature. The regulations were not, therefore, required, necessary or convenient for a transitional matter and so were not authorised by section 154.

7.9 The Committee sought written undertakings that Regulations 62 and 63(1) and (2)(b):

- would be deleted as soon as is practicable, and in any event, within two years of the date of the Committee's request; and
- would not be enforced in the meantime.

7.10 All the undertakings sought in relation to the *Food Regulations 2009* were provided on 10 March 2010.

8 *CHILDREN AND COMMUNITY SERVICES AMENDMENT REGULATIONS 2008*

8.1 These amendment regulations were made under sections 124C(3)(e) and 248 of the *Children and Community Services Act 2004* (**Children and Community Services Act**). They amended the *Children and Community Services Regulations 2006.*

8.2 The regulations came into effect upon proclamation of the *Children and Community Services Amendment (Reporting Sexual Abuse of Children) Act 2008,* which occurred on 1 January 2009.

8.3 The Children and Community Services Act requires doctors, nurses, midwives, police officers and teachers to report to the Department for Child Protection (**Department**) if they form a belief on reasonable grounds, during the course of their work (paid or unpaid) that:

- a child has been the subject of sexual abuse on or after the commencement of the Children and Community Services Act; or
- a child is the subject of ongoing abuse.

8.4 Section 124C(3) of the Children and Community Services Act requires that a report contain certain information about the reporter, the child who is the subject of the report and the grounds for the reporter's belief that the child has been or continues to be the subject of sexual abuse. Section 124C(3)(e) provides that a report is to contain *"any other information that is prescribed."*

8.5 New regulation 9A(2) is made under section 124C(3) and requires reporters to provide, to the extent that is known by them, in respect of any person alleged to be responsible for the sexual abuse of the child, the person's name, contact details and relationship to the child.

8.6 According to the explanatory material provided to the Committee this information will assist the Department and Western Australian Police to undertake thorough and timely safety assessments, identify any immediate risk to a child, and respond appropriately.

Provision appropriate for Regulations

8.7 The Committee considered that the requirement for reports made under section 124C(3) of the Children and Community Services Act to contain information as prescribed in regulation 9A(2) about the person alleged to be responsible for the sexual abuse (to the extent that is known to the reporter) should be contained in the principal Act as opposed to the regulations.

8.8 The Committee was concerned that although regulation 9A(2) was authorised under section 124(3)(e) of the Children and Community Services Act as constituting "any other information that is prescribed", it was unclear whether the regulation was contemplated by the principal enactment. The Committee closely examined the supporting information accompanying the Children and Community Services Amendment (Reporting Sexual Abuse of Children) Bill 2008, and the full debate of the Bill in Parliament. No reference was made to the requirement for, or appropriateness of, reports to contain information regarding the person alleged to be responsible for the sexual abuse.

8.9 Committee staff were informally advised by a Departmental officer that when section 124C(3) of the Children and Community Services Act was being drafted, none of the agencies consulted at the time raised the need for an express clause in the principal Act dealing with this issue, as they envisaged that any information known to the reporter about the identity of the person alleged to be responsible for the sexual abuse of a child would be covered adequately by sub-clause (d) which states that a report is to contain:

> *the grounds for the reporter's belief that the child has been the subject of sexual abuse or is the subject of ongoing sexual abuse.*

8.10 The Committee wrote to the Department seeking advice as to whether it was prepared to seek an amendment of the Children and Community Services Act to include the content of regulation 9A(2) in section 124C(3) and provide a written undertaking to delete regulation 9A(2).

8.11 The Department wrote to the Committee providing the requested undertakings. It undertook, however, to delete regulation 9A to take effect upon commencement of the amendment.

8.12 Given the serious implications of regulation 9A(2), the Committee was concerned about the length of time that it may take for the amendment to section 124C(3) to be passed and considered that regulation 9A(2) should not be used in the interim. For

this reason, the Committee sought a written undertaking from the Department that it would delete Regulation 9A(2) with immediate effect.

8.13 The Minister responded to the Committee's request, stating that while she intended to seek the amendment requested by the Committee, she was not prepared to provide an undertaking to delete regulation 9A(2) immediately in view of the importance of that regulation. She stated that *"If the amendment is not left in the regulations until the act is amended then little children will be placed at risk."*[13]

8.14 The Minister concluded her letter by stating that the effect of deleting regulation 9A(2) immediately would have a detrimental effect of the ability of the Department and Western Australian Police to carry out their functions properly and expeditiously to protect children.

8.15 The Committee remained of the view that it was arguable whether regulation 9A(2) is authorised. Notwithstanding its concerns regarding the validity of the regulation, the Committee resolved not to recommend that the Parliament disallow the instrument due to the potential implications of disallowance in this particular instance.

8.16 The Committee accepted the initial undertakings provided by the Department to seek an amendment of the *Children and Community Services Act 2004* to include the content of regulation 9A(2) in section 124C(3) of that Act and delete regulation 9A, to take effect upon commencement of the above amendment. The Committee urged the Minister that the amendments be expedited by being accorded high legislative priority to be introduced into the Parliament.

8.17 The Committee resolved to include a summary of this instrument in its Annual Report in order to alert Members of the problems with addressing issues of such significant public interest in delegated legislation that are more appropriately dealt with in principal legislation.

8.18 At the time of reporting, the amendments to the *Children and Community Services Act 2004* as required by the Committee had not been made. The Committee has followed this matter up with the Minister.

9 FEES AND CHARGES

9.1 The consideration of fees and charges imposed by regulations continues to occupy a significant amount of the Committee's time. The Committee's scrutiny of fees generally involves identifying whether the impost in question is a fee or whether it is actually a tax. The Committee will scrutinise the fee to determine whether it is

[13] Letter from Hon Robyn McSweeney MLC, Minister for Child Protection, 16 June 2009.

expressly or impliedly authorised by the primary Act. If so, the Committee attempts to identify whether the quantum of the fee:[14]

- bears a reasonable relationship to the costs of providing that service (where the fee is to be paid for a service); or

- bears a reasonable relationship to the costs incurred in establishing or administering the scheme or system under which the licence is issued, or is incurred in respect of matters to which the licence relates (where the fee is to be paid for a licence).

9.2 The Committee tabled its Report Number 32 *Supreme Court (Fees) Amendment Regulations (No.2) 2008, Children's Court (Fees) Amendment Regulations (No.2) 2008, District Court (Fees) Amendment Regulations 2008, Magistrates Court (Fees) Amendment Regulations (No.2) 2008, Fines, Penalties and Infringement Notices Enforcement Amendment Regulations (No.2) 2007 and Other Court Fee Instruments* on 14 May 2009. The report can be viewed at http://www.parliament.wa.gov.au. Follow the links to *Committees*, then *Current Committees*, then *Delegated Legislation Committee*, then *Reports*, and click on the title to Report 32.

9.3 The central issue in that inquiry was whether four types of imposts, found in eight instruments increasing court fees, were authorised or contemplated by the empowering legislation in the circumstance that the imposts were significantly over-recovering the cost of provision of the services in respect of which they were imposed. In the case of the application for grant of probate fees, for example, the over-recovery was up to 291 percent.

9.4 As the Committee has previously reported, where:

- the empowering legislation authorises the imposition of a "*fee*"; and

- the Committee receives evidence that the quantum of an impost does not bear a "*reasonable relationship*" to the costs of providing the relevant services (or the costs incurred in establishing or administering a licence scheme)[15] in respect of which it is imposed,

---

14 Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report Number 10, *Report of the Joint Standing Committee on Delegated Legislation in relation to the Overview of the Committee's Operations: Second Session of the Thirty-Sixth Parliament (August 2002 to November 2004),* 19 November 2004, p7.

15 As defined by section 45A of the *Interpretation Act 1984*.

the Committee views the impost as being of the nature of a tax, regardless of its label of "*fee*".[16]

9.5 There was no legislation authorising the imposition of a tax by way of the relevant imposts. The Committee, therefore, recommended disallowance of the instruments which increased the over-recovering fees, including probate fees.

9.6 As a secondary issue, the Committee noted that due to the practice of the Department of the Attorney General of estimating its costs at either Registry or whole-of-court level,[17] the Committee was unable to reach a conclusion as to whether the balance of the imposts under consideration in the inquiry were authorised or contemplated by the empowering legislation.

9.7 As the Committee outlined in Chapter 5 of its report, the transparency of cost recovery models used by government departments and agencies, and in particular in respect of court fees, has long been a concern of the Committee. The Committee stated its intention to continue its meetings with the Auditor General in respect of this matter.

Instruments amended

9.8 Prior to tabling its report, the Committee wrote to the Attorney General seeking an undertaking to amend or repeal the unauthorised fees and not to enforce them in the interim.

9.9 On 19 May 2009 the Committee received a letter from the Attorney General agreeing to amend the court fees so that the new fees would result in cost recovery of no more than 100 percent and that this would be done within 21 days. The Attorney General provided a breakdown of the costs of each fee to be amended.

9.10 The Committee agreed to accept the Attorney General's undertaking and resolved to seek leave to discharge the motion for disallowance from the Notice Paper. After some debate, that discharge was granted.

Cost Recovery

9.11 The Committee remains concerned about the adequacy of cost recovery models used by government departments as a basis for calculation of their fees. Advice that a fee has increased in order to facilitate cost recovery or that overall, the Department is under recovering its costs does not, without further detail, enable the Committee to adequately perform its scrutiny role.

---

16 This is also the legal approach. See, for example, Isaacs J in *Commonwealth and the Central Wool Committee v Colonial Combing, Spinning and Weaving Co. Ltd* (1922) 31 CLR 421 at pp 463-4.

17 Western Australia Auditor General's - *Second Public Sector Report 2006*, Report No. 8, 30 August 2006, p35.

9.12 The Committee has developed a practice of seeking further information where a department seeks to justify a fee increase on the basis of Consumer Price Index (**CPI**). Following Report Number 32, the Committee now routinely seeks advice as to:

- whether, prior to any annual CPI increase which may have occurred, the 'base' fees to which CPI has been annually applied were calculated on the basis of the cost to the Department of provision of the particular services;
- If so, the year in which that original 'base' cost was ascertained; and
- If not, the basis on which the current fees have been calculated.

9.13 In some cases the Committee has received advice that Departments were unable to provide details of how the base fee in question was calculated.

Meeting with Auditor General - August 2009

9.14 The Committee has a history of meeting with the Auditor General to discuss cost recovery models. At the Committee's request the Auditor General inquired into this in 2004 and tabled reports in 2004 and 2006.

9.15 In 2004 the Auditor General made a number of recommendations in relation to the setting of fees including that agencies should *"…ensure their fees are appropriately set and reasonably relate to the cost of the service."*[18] In 2006 the Auditor General reported an improvement in agency costing and fee setting practices but noted *"…further improvement was still needed."*[19]As part of its ongoing inquiry into cost recovery the Committee met with Mr Colin Murphy, Auditor General and Mr Glen Clarke, Deputy Auditor General, who appeared before the Committee on 3 August 2009.[20] It provided the opportunity for the Committee to share its concerns in relation to the calculation of fees and charges with the Auditor General.

9.16 In discussing his role, the Auditor General advised the Committee that a normal financial audit did not address the issues of identifying whether fees are over or under recovering or are in accordance with legislation. He also advised that in certain situations, however, cost recovery may be examined.

> *However, I hasten to add that financial audits are risk based and involve looking at a range of issues that are happening within the*

---

18 Auditor General for Western Australia, Report 6, *Third Public Sector Performance Report 2004*, September 2004, p5.

19 Auditor General for Western Australia, Report 8, *Second Public Sector Performance Report 2006*, August 2006, p29.

20 A transcript of the hearing can be viewed at http://www.parliament.wa.gov.au. Follow the links to *Committees*, then *Current Committees*, then *Delegated Legislation Committee*. Under *Current Inquiries* click on *Cost Recovery*. The related transcripts of evidence then appear.

> *entity at any particular time. If a matter was drawn to our attention or if our audit work discovered something that required further investigation, it may prompt us to look into a matter in more detail….*
>
> *… As a consequence, we have done specific audits of compliance in this area. I can think of two audits. One was done in report 6 of 2004—setting fees and the extent of cost recovery. As is the case with many of those reports, we did a follow-up report in 2006 to gauge whether the situation had improved and whether the recommendations had been addressed and also to consider a number of additional agencies in that report. So those specific reports did examine the issue of cost recovery. In my view there are some issues within the sector that would require us on a regular basis to examine. As an example, credit card expenses… I would see our examinations of cost recovering being in a similar vein, and that from time to time we would conduct a specific examination and produce a report.*

9.17 The Auditor General advised that he does not consider rises to the CPI to be an adequate basis on which to increase fees. He stated[21]:

> *…CPI is not a good basis for establishing increases because the cost of a fee will be related to the costing within the agency. There are a large number of components that go into the cost of any particular fee, and it can be quite involved to actually calculate and arrive at what the appropriate fee should be. However, the requirements are such that there needs to be a sound methodology for arriving at a fee. In my view, it would not be unreasonable for somebody to use the CPI as an example to say that the fee calculation that has been made is largely consistent with general price movements within the sector. But CPI is not a good basis, of itself, to make fee increases.*

Request to Auditor General

9.18 Shortly after the Committee's meeting with the Auditor General, it scrutinised the *Public Trustee Scale of Fees 2009-10*. The Committee had concerns with admissions and disclosures in the explanatory memoranda which it received for the instrument, which attempted to justify either the setting of new fees or increasing existing fees.

9.19 Following the Committee's meeting with the Auditor General on 3 August 2009, it resolved to write to the Auditor General seeking his comments on whether the *Public Trustee Scale of Fees 2009-10* had been reliably costed and whether he was of the opinion that an audit was necessary.

---

21 Ibid, p6.

9.20 In his reply to the Committee, the Auditor General stated that[22]:

- agencies generally should be able to supply information about the specific costs of the different services for which a fee is charged. He noted that a costing system may not be justified for services of a small number or value;

- the Public Trustee's references to pricing considerations such as under-cutting the private profession, deterrence and the ability to pay are sometimes a necessary input to price setting, and that he expected that the Public Trustee would be able to justify their reasons for incorporating these factors into their pricing decisions; and

- in relation to whether a compliance audit is required of the Public Trustee, the Auditor General's forward program included the undertaking of another audit of the Costing and Pricing of Government Services. He indicated that the audit is likely to commence in early 2010 and a decision will be made at that time as to which agencies will be examined.

9.21 The Committee's concerns in relation to one of the fees[23] were not allayed by further information requested and received from the Public Trustee. The Committee remained of the view that the fee did not bear a reasonable relationship to the cost of the actual work involved in providing the service and was an unauthorised tax. The Committee sought an undertaking from the Public Trustee to reduce the fee to a level commensurate with 100 percent cost recovery.

9.22 This undertaking was provided by letter dated 27 October 2009.

Navigable Waters Amendment Regulations (No.2) 2009

9.23 The *Navigable Waters Regulations 1958* make provision for safe vessel operation in the State's navigable waters. The amendments increased the fees payable in relation to dealer trade plates, registration of private pleasure craft and boat registration recording fees. The fees were increased by between 4.2 percent (equivalent to the increase in the CPI) and 49.83 percent, which the Department of Transport advised is a move towards full cost recovery for providing the relevant services. No new fees were introduced.

9.24 The Committee wrote to the Department seeking further information about the fees in relation to registrations of private pleasure craft and the boat registration recording fee. The Committee was concerned that the fees were above the cost of service per unit and may be unauthorised taxes.

---

22 Letter from Mr Colin Murphy, Auditor General, 25 September 2009.

23 Schedule 14: Fee to prepare a complex Will in which the Public Trustee is not named as executor for a single client who is not a pensioner: minimum fee $385.

9.25 The Committee was satisfied with the explanation provided by the Department of Transport in relation to the fees for registrations of private pleasure craft. The Committee accepted the Department's justifications for imposing a higher registration fee on larger vessels based on the administrative costs caused by such vessels.

9.26 However the Committee remained of the view that the boat registration recording fee did not bear a reasonable relationship to the cost of the actual administrative work involved in providing the service. The Committee was of the view that the recording fee was an unauthorised tax.

9.27 The Committee sought an undertaking from the Department that, when the fees are next amended, the boat registration recording fee will be amended to reflect the cost of providing the service.

9.28 The Department provided this written undertaking to the Committee on 12 September 2009.

Various Department of Mines and Petroleum fee increases

9.29 The Committee considered a package of amendment regulations which were gazetted in June 2009, among them the *Petroleum Amendment Regulations 2009*, *Petroleum Pipelines Amendment Regulations (No.2) 2009* and the *Petroleum (Submerged Lands) Amendment Regulations 2009*.

9.30 The instruments provided for a CPI increase to petroleum and geothermal fees of 4.2 percent. The explanatory material provided to the Committee stated that the CPI fee increase was to align with CPI adjustments in Commonwealth fees. The last CPI adjustment of State petroleum fees occurred on 1 March 2003. As with the Commonwealth, Western Australia has adjusted the fees every few years in order to avoid unnecessary regulation amendments.

9.31 The power to impose fees is in section 138 of the *Petroleum and Geothermal Energy Resources Act 1967* which states:

> *138. Licence fees*
>
> *(1) There is payable to the Minister by a licensee, in respect of each year of the term of the licence, a fee calculated at the prescribed rate for each of the blocks to which the licence relates at the commencement of that year.* [A "block" is an area of land]
>
> *(2) The Minister may, on application made by a licensee, for reasons the Minister thinks sufficient, by notice in writing reduce or waive the fee payable under subsection (1).*

> *(3) A reduction or waiver of a fee under subsection (2) may apply for an indefinite period of time or for a limited period specified in the notice and may apply subject to such conditions as the Minister specifies in the notice.*

9.32 Regulation 3(8) of the *Petroleum and Geothermal Energy Resources Regulations 2009* states that for the purposes of section 138 (above), the prescribed rate is a rate of $26 884. The Committee concluded that the rate (although prescribed) was over recovering the cost of the service.

9.33 After a number of enquiries with the Department of Mines and Petroleum the Committee concluded that there was clear evidence of over recovery (147 percent and 205 percent) with respect to the annual fees for a Production Licence and Pipeline Licence in all three instruments and that therefore the increases were unauthorised taxes. All other fees were at a level below full cost recovery and therefore were authorised by the principal Act.

9.34 The Committee sought a written undertaking from the Department of Mines and Petroleum that it would amend the relevant fees to reflect the cost of service and not enforce them in the interim.

9.35 The Department provided this written undertaking on 1 October 2009.

9.36 The Committee's inquiry into cost recovery is ongoing.

10 CONFERENCES ATTENDED

10.1 Mr Joe Francis MLA (Chairman), Hon Robin Chapple MLC (Deputy Chairman), Hon Jim Chown MLC, Hon Jock Ferguson MLC, Hon Alyssa Hayden MLC, Mr Paul Miles MLA, and Mr Andrew Waddell MLA attended the biennial Australia-New Zealand Scrutiny of Legislation Conference in Canberra from 6-8 July 2009.

10.2 The Committee members were accompanied by Ms Christine Kain, Ms Andrea McCallum, Ms Susan O'Brien (Advisory Officers (Legal)) and Mr David Driscoll (Committee Clerk).

10.3 The subject of the conference was *Scrutiny and Accountability in the 21st Century*.

10.4 The total cost of the attendance of Members and staff at this conference was $41,031.

11 PUBLICATION OF UNDERTAKINGS

11.1 Subsidiary legislation has an effect on the lives of all Western Australians. In order to increase public access to the Committee's decisions, the Committee implemented an initiative to publish undertakings provided to it by local governments and government departments on the Parliament of Western Australia website.

11.2 This initiative serves two further purposes:

- it is a point of reference for local governments and their advisers to ascertain systemic problems with a particular local law and which amendments the Committee has required a local government to make in order for the local law to be valid; and

- it enables the Department of Local Government to trace local governments' compliance with undertakings and thus enhance good governance.

11.3 The website may be viewed at http://www.parliament.wa.gov.au. Follow the links to *Committees*, then *Current Committees*, then *Delegated Legislation Committee*, then at *Committee Details*, scroll down to *Departmental Undertakings* or *Local Government Undertakings*.

12 ISSUES FOR THE COMMITTEE IN 2010

Issues arising in local laws

12.1 The Committee tabled a Local Laws Report on issues arising from its scrutiny of local laws from 1 May 2009 to 31 December 2009. The report can be viewed at http://www.parliament.wa.gov.au. Follow the links to *Committees*, then *Current Committees*, then *Delegated Legislation Committee*, then *Reports*, and click on the title to Report 38.

12.2 The Local Law Working Group did not meet during 2009. The Committee anticipates that the group will meet in 2010 and looks forward to that opportunity.

12.3 The Committee's inquiry into cost recovery is ongoing.

Mr Joe Francis MLA

Chairman

6 May 2010