

PARLIAMENT OF WESTERN AUSTRALIA

**JOINT STANDING COMMITTEE
ON
DELEGATED LEGISLATION**

NINETEENTH REPORT:

*The Committee's Response to the Final Report
of the Legislative Assembly Select Committee on Procedure*

Presented by the Hon Bruce Donaldson MLC (Chairman)

**19
September 1996**

Joint Standing Committee on Delegated Legislation

Members

Hon Bruce Donaldson MLC (Chairman)
Hon Tom Helm MLC (Deputy Chairman)
Hon Jim Scott MLC
Hon Cheryl Davenport MLC
Mr Bob Bloffwitch MLA
Mr Kevin Leahy MLA
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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.

Report of the Joint Standing Committee on Delegated Legislation

in relation to

The Committee's Response to the Final Report of the Legislative Assembly Select Committee on Procedure

1 Introduction

- 1.1 The Legislative Assembly Select Committee on Procedure tabled its *Final Report* on 27 June 1996¹. The *Report* contains a number of recommendations relevant to the work of the Joint Standing Committee on Delegated Legislation (JSCDL).
- 1.2 The JSCDL draws to the reader's attention its 18th Report² which contains a description of the Committee's operations and procedures and explains the importance of maintaining parliamentary scrutiny of subordinate legislation.

2 Recommendation 11

- 2.1 The Select Committee's recommendation 11 (pp 24-26) provides for amendments to the Assembly Standing Orders and the *Interpretation Act 1984* which are designed to have a similar effect to the amendments to the Council Standing Orders that were made in October 1995³. Essentially the amendments, if implemented, will accord priority to motions of disallowance and generally require them to be dealt with within 15 sitting days. If the motion is not dealt with in the 15 sitting days, it will be deemed, by the amendment to the *Interpretation Act 1984* to be disallowed. The reason for this is that:

Where a motion for disallowance is on the Notice Paper, there may be a reluctance for those affected by the delegated legislation to operate under its provisions, notwithstanding that they are valid until disallowed.

- 2.2 In requiring motions of disallowance to be dealt with in a strict time frame, uncertainty in application of subordinate legislation subject to a disallowance motion is quickly resolved. The Committee therefore supports this initiative.
- 2.3 However, the proposal in one respect goes in the opposite direction to the procedures in the Council. The Select Committee recommends that the *Interpretation Act 1984* be amended to provide that, if the Assembly is dissolved or expires or Parliament is prorogued within

¹ Western Australia, Legislative Assembly, Select Committee on Procedure, *Final Report*, 27 June 1996.

² Western Australia, Joint Standing Committee on Delegated Legislation, *1995 Review of Operations*, 18th Report, May 1996.

³ See Western Australia, Legislative Council, Standing Orders Committee, *Report on Motions for Disallowance of Regulations, Documents Quoted from by Members and Uniform Legislation "120 Day" Rule*, September 1995.

the 15 sitting days following the giving of a notice of motion of disallowance, then the subordinate legislation is deemed to be laid on the table on the first sitting day after the dissolution, expiry or prorogation. In contrast, the Council Standing Orders (SO 153) provide that if Parliament is prorogued before the expiration of 10 sitting days following the motion, and the motion has not been dealt with, the subordinate legislation is deemed to be disallowed.

- 2.4 The difference between the approach of the Council and the proposed approach of the Select Committee is that the Council deems subordinate legislation to be disallowed if a motion for disallowance is not dealt with before prorogation, and the Select Committee would see the motion carried over to the next session or Parliament.
- 2.5 The Council's procedure removes the uncertainty that applies to subordinate legislation which is subject to a disallowance motion at the time of prorogation by rendering the subordinate legislation invalid. It must then be re-made by the relevant government agency. The Select Committee's recommended procedure, to be implemented by amending the *Interpretation Act 1984*, would override the Council's procedure and prolong the uncertainty hanging over the validity of the subordinate legislation (whilst preserving the operativeness of the subordinate legislation until the question of its disallowance has been dealt with by Parliament). This is in fact contrary to the first stated goal of the Select Committee to remove uncertainty, which is otherwise reflected in the first part of its procedural forms (requiring disallowance motions to be dealt with within 15 sitting days).
- 2.6 In other words, the two reforms proposed by the Select Committee have competing objectives. On the one hand, it is sought to reduce the period of uncertainty over the validity of challenged subordinate legislation; and, on the other, it is sought to prolong the period of time in which Parliament has to scrutinise the subordinate legislation.
- 2.7 The JSCDL considers that the Select Committee has not given these matters adequate consideration. The JSCDL notes that the Select Committee did not at any time consult with the JSCDL, or any of its members, about the reforms it has proposed. Furthermore, the JSCDL is not aware if the Select Committee gave consideration to the substantial recommendations of the JSCDL in its 16th Report⁴, including a recommendation for the enactment of a *Subordinate Legislation Act*.

Recommendation 1:

The JSCDL recommends that the Select Committee's Recommendation 11 not be proceeded with and the question of procedures regarding motions for disallowance be re-considered after consultations with the JSCDL.

3

Recommendation 12

- 3.1 Recommendation 12 (pp 26-28) proposes that the Premier seek to amend the *Constitution Act 1889* to permit standing committees to operate during periods when Parliament is prorogued.

⁴ Western Australia, Joint Standing Committee on Delegated Legislation, *The Subordinate Legislation Framework in Western Australia*, 16th Report, November 1995.

- 3.2 The JSCDL has a continuous work load: government agencies continue to make subordinate legislation when Parliament is not sitting. If there is a long period of prorogation, the JSCDL is required to scrutinise an enormous volume of subordinate legislation in a short period of time. Generally in this situation the JSCDL is then under pressure for the whole of the next sitting or session of Parliament. Consequently, the JSCDL supports Recommendation 12 of the Select Committee in so far as it relates to the work of the JSCDL⁵.

4 **Joint Standing Committee on Delegated Legislation**

- 4.1 At page 43 of its *Final Report*, the Select Committee recognises the vital role of the JSCDL.
- 4.2 The JSCDL welcomes this recognition of its important functions, which also have been recognised by the Western Australian Royal Commission into the Commercial Activities of Government and, more recently, by the Commission on Government⁶.

5 **Recommendation 18**

- 5.1 Recommendation 18 (pp 43-44) provides that the Standing Committee on Uniform Legislation and Intergovernmental Agreements (SCULIA) should be amalgamated with the JSCDL. The only apparent substantive reason for the amalgamation which is offered is⁷:

As the Delegated Legislation Committee is concerned with the use of legislative power for regulations, and SCULIA deals with the issue of legislative power between the Australian jurisdictions, the two should be amalgamated.

- 5.2 Some general comments are also made about avoiding duplication of effort and conflicting work loads of Members of committees.
- 5.3 The reason stated by the Select Committee for the amalgamation of the functions of JSCDL and SCULIA reflects a fundamental misconception of the respective roles of the two committees and, if implemented in its current form, has great potential to undermine the apolitical impartiality fought long and hard for by JSCDL.
- 5.4 The first and most important difference between the two committees is that SCULIA is required by its terms of reference:

⁵ The JSCDL is not in a position to comment on whether or not Recommendation 12 is appropriate for other standing committees of the Parliament.

⁶ See Western Australia, Joint Standing Committee on Delegated Legislation, *1995 Review of Operations*, 18th Report, May 1996, pp 5, 7-8.

⁷ Western Australia, Legislative Assembly, Select Committee on Procedure, *Final Report*, 27 June 1996, p 44.

... to inquire into, consider and report on matters relating to proposed or current intergovernmental agreements and uniform legislative schemes...

- 5.5 Thus SCULIA is empowered to inquire into matters of **policy**. Questions of policy technically are outside the terms of reference of the JSCDL. The terms of reference of the JSCDL are:

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.

- 5.6 These (or similar) terms of reference have been applied and interpreted throughout the Commonwealth as relating to review of process as opposed to review of substance (or policy). One of the reasons that the JSCDL is able to retain its impartiality is because it does not inquire into policy matters. If the Select Committee's recommendation were to be implemented without also amending the terms of reference of SCULIA, this situation would be altered. As Pearce says in *Delegated Legislation in Australia and New Zealand*⁸:

It is noteworthy, however, that the terms of reference of these committees all contemplate a distinction between review of the policy on which the legislation is based and review of the way in which that policy has been implemented. The committees are not empowered to question the reasons for implementing the legislation: their power of scrutiny is limited to the form of the legislation only.

Later in his book, Pearce says⁹:

[The report seemed to contemplate that the committee] should review the policy underlying the exercise of delegated powers. This could well destroy the present satisfactory working relationship that the committees have established with the executive.

⁸ Pearce, D, *Delegated Legislation in Australia and New Zealand*, Butterworths, 1977, p 30.

⁹ *Id.*, p 83.

- 5.7 In other words, the JSCDL only looks at the way in which things are done, not what is actually done. By doing this, it preserves a working relationship with the executive and avoids infringing on powers delegated by Parliament to the executive.
- 5.8 The JSCDL reviews subordinate legislation **after** it comes into operation. It is therefore not involved in the executive process of **making** the subordinate legislation¹⁰. SCULIA is empowered to inquire into proposed or current intergovernmental agreements and uniform legislative schemes. It is therefore able to comment during the executive process of the making of primary (and subordinate) uniform legislation. Again, to amalgamate the functions of the two committees whilst maintaining SCULIA's current terms of reference would fundamentally alter the operation of the JSCDL and involve it in policy issues. Potentially it could destroy the ability of the JSCDL to be a non-partisan reviewer of executive action (in the context of subordinate legislation). This would fundamentally be contrary to the intentions behind the establishment of both of the committees.
- 5.9 The second major difference between SCULIA and the JSCDL is that SCULIA reviews **proposed primary legislation** while the JSCDL reviews **operative subordinate legislation**. This is a significant difference which appears to have been overlooked by the Select Committee. The JSCDL has limited terms of reference to inquire into subordinate legislation made under Acts of the State Parliament. SCULIA is more concerned with proposed primary legislation made at a national level. It would seem to be quite incongruous for the JSCDL to be able to review operative subordinate legislation and proposed primary national uniform legislation: what is the functional connection? In this context, the terms of reference of SCULIA are much more compatible with the terms of reference of the Legislative Council Legislation Committee and it would therefore make more sense to amalgamate SCULIA with the Legislation Committee.
- 5.10 If the JSCDL is to be given a role in reviewing proposed primary legislation, why isn't it proposed to give it a general scrutiny of bills function? If it were to be given a scrutiny of bills function with specifically limited terms of reference compatible with its current terms of reference, it could then review bills for uniform legislation in a manner similar to the review undertaken in other jurisdictions. It could not, of course, inquire into such bills beyond its terms of reference (which, would, in all likelihood, exclude consideration of pure policy issues). This kind of change would be compatible with the current terms of reference of the JSCDL, but would completely change the nature of SCULIA. Again, this is an indication of the functional differences between the two committees.
- 5.11 If SCULIA has outlived its usefulness in terms of inquiring into national uniform legislation **procedures**, then its role in reviewing matters of substantive policy would more appropriately be transferred to a scrutiny of bills committee or the Legislation Committee. In its 16th Report the JSCDL made recommendations regarding the creation of a scrutiny of bills committee or the conferral of a scrutiny of bills function on the JSCDL¹¹. These do not appear to have been taken into account by the Select Committee.

¹⁰ The power to make subordinate legislation is delegated to the executive by the Parliament.

¹¹ Western Australia, Joint Standing Committee on Delegated Legislation, *The Subordinate Legislation Framework in Western Australia*, 16th Report, November 1995, pp 11-14.

- 5.12 Parliamentary scrutiny committees from all Australian jurisdictions have been considering the question of scrutiny of national schemes of uniform legislation for over 3 years. That consideration gave rise to a discussion paper¹² published by a scrutiny committee in every Australian jurisdiction. Following consideration of public comments received in response to the discussion paper, it is anticipated that a position paper will be published in the near future. The potential for parliamentary scrutiny committees to become embroiled in policy issues in conflict with the executive has been one of the stumbling blocks in finalisation of the proposed *Position Paper on the Scrutiny of National Schemes of Legislation*. Again, this problem does not appear to have been taken into account by the Select Committee.
- 5.13 In making its recommendation to amalgamate the functions of SCULIA and JSCDL in the JSCDL, the Select Committee does not appear to have given consideration to the substantial work of 10 parliamentary scrutiny committees around Australia, including SCULIA and JSCDL themselves. This is an unfortunate omission.

Recommendation 2

The JSCDL recommends that the Select Committee's Recommendation 18 not be proceeded with until further consideration is given to the consequences of the amalgamation of functions of SCULIA and JSCDL, after taking into account:

the recommendations of the JSCDL in its 16th Report regarding establishment of a scrutiny of bills committee or function;

the anticipated Position Paper on the Scrutiny of National Schemes of Legislation to be published by parliamentary scrutiny committees in all Australian jurisdictions in the near future; and

whether or not it would be more appropriate to amalgamate SCULIA with the Legislative Council Legislation Committee.

¹² Western Australia, Standing Committee on Uniform Legislation and Intergovernmental Agreements, *Scrutiny of National Scheme Legislation and the Desirability of Uniform Scrutiny Principles*, 31 August 1995.