



PROCEDURE AND PRIVILEGES COMMITTEE

DISALLOWANCE PROVISIONS FOR SUBSIDIARY LEGISLATION

**Report No. 6
in the 38th Parliament**

2009

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Procedure and Privileges Committee: Disallowance Provisions for Subsidiary Legislation

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***PROCEDURE AND PRIVILEGES
COMMITTEE***

**DISALLOWANCE PROVISIONS FOR
SUBSIDIARY LEGISLATION**

Report No. 6

Presented by:
Mr Michael Sutherland, MLA
Deputy Speaker of the Legislative Assembly
Laid on the Table of the Legislative Assembly
on 19 November 2009

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COMMITTEE'S POWERS, FUNCTIONS AND TERMS OF REFERENCE

Legislative Assembly Standing Order No. 284 provides the following functions, powers and terms of reference to the Procedure and Privileges Committee –

Procedure and Privileges Committee

284. (1) A Procedure and Privileges Committee will be appointed at the beginning of each Parliament to –

- (a) examine and report on the procedures of the Assembly; and
- (b) examine and report on issues of privilege; and
- (c) wherever necessary, confer with a similar committee of the Council.

(2) The Procedure and Privileges Committee will have the powers of a select committee.

(3) Membership of the committee will consist of the Speaker and four other members as the Assembly appoints.

(4) Standing Order 278 will apply except that where possible any report of the committee will be presented by the Deputy Speaker.

(5) When consideration of a report from the committee is set down as an order of the day it will be considered using the consideration in detail procedure.

RECOMMENDATIONS

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Recommendation 1

That section 42 of the *Interpretation Act 1984* be amended to provide that at the expiration of 15 sitting days after notice of a motion to disallow any regulation has been given in either House of Parliament, being a notice given within 14 sitting days after the regulation has been laid before the House, the notice has not been withdrawn or called on and finally determined, the regulation specified in the notice of motion will be deemed to have been disallowed.

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Recommendation 2

That the Attorney General arrange for the tabling in the Legislative Assembly of a schedule detailing disallowance provisions in Acts other than the *Interpretation Act 1984* and outlining the changes necessary to bring them within the spirit of the amendments proposed in recommendation No. 1.

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Recommendation 3

That the Legislative Assembly adopt the following Temporary Order,

“Temporary Order

That for the duration of the 38th Parliament, Standing Order 74 will not apply to any notice of disallowance motion given in accordance with section 42 of the *Interpretation Act 1984* or any other Act. ”.

MINISTERIAL RESPONSE

In accordance with Standing Order 277(1) of the Standing Orders of the Legislative Assembly, the Procedure and Privileges Committee directs that the Leader of the House after consultation with the Attorney General report to the Assembly as to the action, if any, proposed to be taken by the Government with respect to the recommendations of the Committee.

1.1 Introduction

The Procedure and Privileges Committee's terms of reference include the examination and reporting to the Legislative Assembly on matters of procedure. Your Committee has undertaken a review of Standing Order 74 where it applies to notices of motion for disallowance of subsidiary legislation as provided for in section 42 of the *Interpretation Act 1984*.

The Procedure and Privileges Committee of the 36th and 37th Parliaments undertook reviews of Standing Order 74 where it applies to disallowance motions on two separate occasions, and recommended to the Legislative Assembly that the *Interpretation Act 1984* be amended to provide for disallowance motions to be dealt within a timely manner.

In report No. 4 of 2003, the Procedure and Privileges Committee of the 36th Parliament identified the potential consequence of extended sessions by enabling a notice of motion to disallow subsidiary legislation to remain on the Notice Paper for up to four years, meaning it would be possible that subordinate legislation could be disallowed by the Legislative Assembly after it has been in force for some considerable time. In that report the Procedure and Privileges Committee recommended that Standing Order 74 be amended to remove notices of motion that had not been moved for 30 sitting days but noted the potential conflict in this process whereby a member could not renew a notice of motion for disallowance as it would be outside the statutory limitation of 14 sitting days given in section 42 of the *Interpretation Act 1984*.

For the purposes of this report the definition of 'subsidiary legislation' in the *Interpretation Act 1984*, section 5 is adopted:

any proclamation, regulation, rule, local law, by-law, order, notice, rule of court, local or region planning scheme, resolution, or other instrument, made under any written law and having legislative effect.

1.2 Interpretation Act 1984

Part VI of the *Interpretation Act 1984* (the Act) establishes the main statutory provisions for the publication, tabling and disallowance provisions of subsidiary legislation.

Section 42 of the Act establishes the disallowance procedures for subsidiary legislation. Section 42(1) provides that subsidiary legislation must be laid on the Table of each House of Parliament within 6 sitting days of the publication in the *Gazette*. Section 42(2) provides that a resolution notice (notice of motion) of disallowance must be given within 14 sitting days from the date the subsidiary legislation is tabled in that House of Parliament. The resolution notice must be moved and the House must agree to the resolution before disallowance can occur. Section 42(3) provides that section 42(2) still applies even if all or part of the 14 sitting days time period does not occur in the same session of Parliament or during the same Parliament that the subsidiary legislation was laid before each House of Parliament.

As a consequence of extended sessions and the potential for notices of motion of disallowance to remain on the Notice Paper for a longer period of time there is potential for confusion in the administration of Government and the effect on some statutory instruments. To remove any confusion when dealing with disallowance motions your Committee proposes that the *Interpretation Act 1984* be amended to provide for a specific timeframe in which disallowance motions should be dealt with similar to those provided in the Commonwealth's *Legislative Instruments Act 2003*.

1.3 Section 42 of the Commonwealth's Legislative Instruments Act 2003

Section 42 of the *Legislative Instruments Act 2003* establishes the disallowance procedures for legislative instruments (subsidiary legislation) in the Commonwealth Parliament. Once an instrument is tabled, a notice of motion to disallow the instrument or provision must be given within 15 sitting days in either House of Parliament. The same applies in Western Australia under section 42(2) of the *Interpretation Act 1984* where the notice of motion must be given within 14 sitting days of the subsidiary legislation tabling date.

Disallowance occurs in the Commonwealth legislation if either House of Parliament passes a resolution to disallow the instrument or provision within 15 sitting days of the tabling of that instrument or provision. Section 42 of the *Legislative Instruments Act 2003* provides for a period of 15 sitting days from the instrument for dealing with disallowance motions. If, after 15 sitting days, the motion is not moved, called upon or withdrawn the statutory instrument or provision ceases to have effect. This has the effect of ensuring that the Government of the day must act in relation such motions to ensure that legislative instruments are not disallowed.

Section 42 of the Commonwealth's *Legislative Instruments Act 2003* is as follows:

42 Disallowance of legislative instruments

(1) If:

- (a) notice of a motion to disallow a legislative instrument or a provision of a legislative instrument is given in a House of the Parliament within 15 sitting days of that House after a copy of the instrument was laid before that House; and
 - (b) within 15 sitting days of that House after the giving of that notice, the House passes a resolution, in pursuance of the motion, disallowing the instrument or provision;
- the instrument or provision so disallowed then ceases to have effect.

(2) If:

- (a) notice of a motion to disallow a legislative instrument or a provision of a legislative instrument is given in a House of the Parliament within 15 sitting days of that House after a copy of the instrument was laid before that House; and
- (b) at the end of 15 sitting days of that House after the giving of that notice of motion:
 - (i) the notice has not been withdrawn and the motion has not been called on; or
 - (ii) the motion has been called on, moved and (where relevant) seconded and has not been withdrawn or otherwise disposed of;

the instrument or provision specified in the motion is then taken to have been disallowed and ceases at that time to have effect.

(3) If:

- (a) notice of a motion to disallow a legislative instrument or a provision of a legislative instrument is given in a House of the Parliament within 15 sitting days of that House after a copy of the instrument was laid before that House; and
- (b) before the end of 15 sitting days of that House after the giving of that notice of motion, the House of Representatives is dissolved or expires, or the Parliament is prorogued; and
- (c) at the time of the dissolution, expiry or prorogation, as the case may be:

- (i) *the notice has not been withdrawn and the motion has not been called on; or*
- (ii) *the motion has been called on, moved and (where relevant) seconded and has not been withdrawn or otherwise disposed of;*

the legislative instrument is taken, for the purposes of subsections (1) and (2), to have been laid before the first-mentioned House on the first sitting day of that first-mentioned House after the dissolution, expiry or prorogation, as the case may be.

Unlike the Commonwealth Parliament there is no greater importance given to notices for disallowance under section 42 of the *Interpretation Act 1984* that any other notice of motion that is published on the Legislative Assembly Notice Paper. The only provision under section 42(2) is that notice for disallowance must be given within 14 sitting days of the tabling of the subsidiary legislation. Currently, under Standing Order 74 a notice of motion can remain unmoved on the Legislative Assembly Notice Paper for 30 sitting days. At this time the notice of motion can either be removed or the member who gave notice can request that it be renewed for a further period of 30 sitting days before it is finally removed. Given the statutory limitations on notices of disallowance it would not be possible for a member to renew their notice of motion for disallowance. If the Government of the day simply waited out the 30 sitting day period it would be a disincentive for members to give notice for disallowance and no obligation on the relevant Minister to debate the disallowance motion.

It would be beneficial to provide for a specific time period for the notice of motion for disallowance to be dealt with in the Legislative Assembly. This can be achieved by amending the *Interpretation Act 1984* to provide for an automatic disallowance of subordinate legislation if a notice of motion is not debated within 15 sitting days after notice is given. This has several effects. It will:

- introduce a finite period for dealing with disallowance motions;
- effectively create an obligation on the relevant Minister in the Legislative Assembly to ensure a disallowance motion is dealt with; and
- potentially increase the number of disallowance motions in the Legislative Assembly.

Recommendation 1

That section 42 of the *Interpretation Act 1984* be amended to provide that at the expiration of 15 sitting days after notice of a motion to disallow any regulation has been given in either House of Parliament, being a notice given within 14 sitting days after the regulation has been laid before the House, the notice has not been withdrawn or called on and finally determined, the regulation specified in the notice of motion will be deemed to have been disallowed.

Other disallowance provisions provided for in legislation

It will be necessary to identify all the individual disallowance provisions presently in legislation, apart from the *Interpretation Act 1984*, to ensure they are also dealt with appropriately. The Attorney General's department is best placed to undertake this role, and it would be convenient if a schedule could be presented to the House detailing the provisions and what amendment is necessary to bring them into accord with the spirit of these proposed changes.

Recommendation 2

That the Attorney General arrange for the tabling in the Legislative Assembly of a schedule detailing disallowance provisions in Acts other than the *Interpretation Act 1984* and outlining the changes necessary to bring them within the spirit of the amendments proposed in recommendation 1.

1.4 Standing Order 74 and notices for disallowance

The procedure for giving notices of motion to disallow subsidiary legislation varies between the Legislative Assembly and the Legislative Council, although both Houses must give a notice of motion for disallowance within 14 sitting days of the legislation being tabled. Disallowance motions are rarely moved in the Legislative Assembly as no precedence is given to them under the Legislative Assembly Standing Orders.

Standing Order 74 provides:

If a notice of motion has remained on the Notice Paper for 30 sitting days without being moved the Speaker will announce it will be removed from the Notice Paper on the next sitting day. A member may require the notice given by them to be continued by written notification to the Clerk prior to it being removed. A member may renew a notice of motion only once.

Notices of motion for disallowance of subsidiary legislation are treated in the same manner as general notices of motion in the Legislative Assembly. These notices of motion do not receive any priority in the sitting schedule and potentially can remain on the Legislative Assembly Notice Paper for an extended period of time. Standing Order 74 provides that notices of motion can remain on the Notice Paper for up to 30 sitting days without being moved. General notices can then be renewed for a further 30 sitting days before the notice is removed.

Given the legislative restrictions on giving notices of motion for disallowance under section 42 of the *Interpretation Act 1984* a member would not be able to renew the notice of motion after 30 sitting days. This could potentially lead to the Government of the Day ‘waiting out’ the 30 sitting day period and allowing the notice of motion to be removed from the Notice Paper automatically without debate. The difference with notices of disallowance is that a member is unable to renew the notice of motion as the period for notices under the legislation is only 14 sitting days from the tabling date.

If legislative amendments are proposed it would require the House to adopt a Temporary Order similar to those already passed by the Legislative Assembly in relation to Standing Order 74 whilst the legislation progresses through both Houses of Parliament.

Given the statutory limitations on notices of motion for disallowance the Procedure and Privileges Committee of the 36th and 37th Parliaments recommended that Standing Order 74 should not apply to notices of motion given in accordance with section 42 of the *Interpretation Act 1984*. The Procedure and Privileges Committee agrees with this recommendation to allow time for the Attorney General to review Recommendation No. 1 in relation to proposed amendment to section 42 of the *Interpretation Act 1984*.

Recommendation 3

That the Legislative Assembly adopt the following Temporary Order,

“Temporary Order

That for the duration of the 38th Parliament, Standing Order 74 will not apply to any notice of disallowance motion given in accordance with section 42 of the *Interpretation Act 1984* or any other Act. ”.

HON. GRANT WOODHAMS, MLA
CHAIRMAN OF THE COMMITTEE
19 November 2009