SOME ACCOUNTABILITY ISSUES IN SCRUTINISING SUBSIDIARY LEGISLATION MADE UNDER SKELETAL ACTS

MR JOE FRANCIS, MLA

CHAIRMAN, JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION, WESTERN AUSTRALIA

Introduction

That there is a trend towards increasingly skeletal Acts, accompanied by increased delegated legislation - making power, appears obvious. Concern at this trend's impact on the Westminster system of representative democracy is not new.[1] As a result, Parliamentary Committees, such as ours - the Western Australian Joint Standing Committee on Delegated Legislation (the Committee) - have been established in most Westminster jurisdictions to monitor the Executive's use of delegated legislation - making power. Like most subsidiary legislation review committee's, the Committee's Terms of Reference require it to examine whether subsidiary instruments are authorised or contemplated by empowering legislation, but not the merits of the policy being implemented by the instrument (save to the extent that the instrument is inconsistent with any policy imperatives embedded in empowering legislation).[2]

Skeletal legislation is generally designed to leave policy decisions to the Executive.[3]

Concern at the increased use of skeletal legislation focuses on perceived infringement of the doctrine of separation of powers in the context of a society governed by 'rule of law' and representative democracy: that the representatives of the people – as a Parliament - make the laws governing the people; and that the Executive administers those laws. Of course, the Westminster system involves only a partial separation of powers and many argue that, in fact, the Executive controls both primary

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1 While Lord Hewart of Bury's 1929 book, *The New Despotism*, is generally cited as drawing those concerns to the attention of Westminster Parliaments, and leading to the 1932 Report on the (Donoughmore) Committee on Minister's Powers, Bagehot was expressing concerns at the impact of what he perceived to be the excessive use of delegated legislation as early as 1863. This time is now, of course, regarded as the halcyon days of minimal subsidiary legislation.

2 The JSCDL's Terms of Reference are attached at Appendix 1.

3 Submissions to the House of Commons Select Committee on Procedure in 1996, described skeletal Acts as those which are: "*in effect nothing more than vehicles for extensive delegated powers*" (the Study of Parliament Groups: Study Group on Legislation) and "*little more than a licence to legislate*" (the House of Lords Delegated Powers and Deregulation Committee cited in Tudor p152). This is seen as being in conflict with expectation that: "*All major principles should be clearly described in the enabling Act. … If the enabling Act contains no substance it is inconsistent with the principle of Parliamentary accountability*" (Murphy p163). In *Shanahan v Scott*, the High Court said of a 'necessary and expedient' regulation-making power: "*such a power does not enable the authority by regulations to extend the scope or general operation of the enactment but is strictly ancillary. It will authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provisions. But such a power will not support attempts to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary the plan which the legislature has adopted to attain its ends*". ((1956) 96 CLR 245 at 250)

and secondary legislation - making.[4] In Australia in particular, this is seen as an outcome of strong party discipline. Some argue this leads to an "*elected dictatorship*";[5] others that the elected "*government*" should not be impeded in implementing its "*mandate*" by an obstructive Parliament.[6]

Discussions of the trend to skeletal legislation rarely mention the fact that matters previously falling within the ambit of delegated legislation, are now often relegated to the purely administrative realm of bureaucratic policy and discretion. In that arena also, the response from bureaucrats to the Committee's questions concerning authorisation is often that the Committee (that is, the Parliament) is "*interfering*" in matters which are none of its business. Another common protest is that an unfettered discretion - such as to impose conditions on a license - is required because the department cannot anticipate the conditions it might want to impose.

The increased use of delegated legislation is alternatively seen as excluding law - making from democratic involvement and accountability; or as allowing more consultative and, therefore, democratic and accountable law - making.[7]

Rather than a review of the pros and cons of the various arguments, I raise some issues arising in my Committee's scrutiny of subsidiary instruments to see what light those issues throw on the debate.

Consultation

The Explanatory Memoranda (EM) in respect of the 220 disallowable pieces of delegated legislation gazetted in WA between 6 November 2008 and 19 May 2009, provide the following information on consultation:

- some 65 instruments were local laws. The *Local Government Act 1995 (WA)* requires "*consultation*" in the form of public advertisement calling for submissions prior to gazettal of a local law. In most cases, no submissions were received;

- for some 55 other instruments, the empowering Act required consultation with specified bodies, usually established under the Act.[8] In such cases, wider consultation

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4 For example, Brazier, Kalitowski et al state: "*Law is the framework within which a democratic state operates*" (p7) and "*The Westminster Parliament undertakes a range of functions …. Arguably its prime role, and certainly that which is best known, is to produce laws. However, the clarity of the stock constitutional phrase that 'Parliament makes the law' quickly blurs on the faintest of examinations, as it is the government that initiates and draws up legislative proposals* … [The government] *is usually able to rely on the MPs of the governing party to vote in its favour. Also the procedure (of the Houses) enshrine a significant degree of* [government] *dominance.* … [I]*t is more accurate to state that at best Parliament is, in Philip Norton's words, a 'law-effecting' rather that a 'law-making body'*" (pp10-11).

5 See, for example, Hamer and Beetham, the latter summarising the various arguments.

6 Read any newspaper article reporting a Federal government member's view of the Senate referring a Bill to a Committee.

7 For an enthusiastic public service endorsement of the potential of "*modern government*" [or is it 'post-modern'] - said to entail "*non-hierarchical, non-traditional relationships*" and "*citizen engagement*" in policy development and service delivery - to "*empower*" the public, see the Bourgon article noted in the references.

8 For example, section 65 of the *Fish Resources Management Act 1994* requires consultation with Advisory Councils designated in the management plan for any particular fishery (management plans are disallowable subsidiary instruments) prior to any non-urgent amendment to a Fish Resources Management Plan when that amendment is not minor.

occurred with peak body stakeholders on some three occasions[9] and with a broader group of stakeholders on some seven occasions. In this group of 55, there was general public consultation on only three occasions. Some of the EMs referred to the fact that the Act - established bodies had a "*community*" representative;

- of the remaining 110 instruments, there were:
    - six on which the public was consulted;
    - 12 on which stakeholders were consulted, six being peak body stakeholder consultation only;
    - 20 identified as being made in response to a stakeholder request.[10] Of these, there was only one instance where that request was subject to wider consultation.

      Many of these instruments were fee increases for local governments or professional bodies. However, at least four were required to address unanticipated problems in recently gazetted regulations which had been drawn to the Department's attention by the stakeholder.[11] This suggests lack of consultation in respect of earlier instruments; and
    - 20 were identified as instruments which clearly did not warrant consultation (updating terms used in the legislation, making amendments consequent on the passage of an amending Act or reflecting changes to related state/federal legislation).

Therefore, when it was not required by empowering legislation:

- stakeholder consultation occurred on only 22 occasions - some 13.3%; and
- public consultation occurred on only nine occasions - some 5.5%.

This sample group does not suggest that use of delegated legislation, rather than provision in an Act, results in broader consultation.

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9 This group included bodies such as the Western Australian Reproductive Technology Council, established under the *Human Reproductive Technology Act 1991*, which was "*consulted*" in respect of the *Surrogacy Regulations 2009*, which regulations dealt with matters that were the responsibility of that council under the *Surrogacy Act 2008*. As the EM advised that the council was "*consulted*", not that the regulations were initiated by it, this instrument was not considered as regulations made at stakeholder request.

10 For example, the tripartite (public servant, employer and worker representative) commission set up under section 6 of the *Occupational Safety and Health Act 1984* recommended the deletion of the requirement to hold a licence to test and tag portable electrical equipment on construction sites from the *Occupational Safety and Health Regulations 1996* (which is discussed below).

11 For example, an amendment was made to the *Legal Professional Rules 2009* to rectify the situation where a legal practitioner undertaking supervised practice after admission had to be supervised personally by the Director General of Legal Aid Commission of Western Australia for legal practice at the Commission to qualify the restricted practitioner for unrestricted legal practice.

Edward Page, a Professor of Public Policy at the London School of Economics, conducted a rigorous analysis of delegated legislation passed between 1987 and 1997 in the UK and concluded that Ministers devoted little attention to delegated legislation[12] (being more interested in broad ideological or policy issues) and that delegated legislation tended to be the responsibility of more junior staff in a bureaucracy. Page also concluded that where consultation occurred, civil servants were not interested in discussion of policy - which had been decided - but on technical issues.[13]

Amongst the instruments reviewed for this paper, there were four instruments amending newly introduced schemes due to the fact that other departments/agencies could not provide information required for implementation of the scheme. For example, the *Motor Vehicle Repairers Act 2003* required motor vehicle repairers to provide a planning certificate issued by a local government in making any application for a business license. However, local governments complained that - in the words of the responsible department - as "*some records*" were "*incomplete*", they could not issue planning certificates *"per"* the requirements of that Act. The *Motor Vehicle Repairers Regulations 2007* were amended to exempt existing businesses from the requirement to obtain a planning certificate, which preserved their licenses while requiring local governments to amend their record - keeping practices for new businesses.[14]

In addition, there were amendments delaying implementation, such as an amendment to the *Dangerous Goods Safety Order (No.1) 2009*, as the police did not have the capacity to process applications for dangerous good security cards within the prescribed timeframe for obtaining one.

These instruments suggested bureaucracies were not always aware of the legal or practical context of the laws that they are making.

Conflict between subsidiary legislation

Conflict between provisions of subsidiary legislation is a problem for the Committee and an accountability issue. Firstly, because there is so much subsidiary legislation, it is not possible to identify all conflicts.

Secondly, each provision may be authorised under the respective empowering legislation. The Committee can, therefore, only deal with an instrument on the basis that Parliament did not "*contemplate*" that the legislation - making power would be used to create conflicting regulations or under its other Terms of Reference dealing with procedural fairness, right of review etcetera.

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12 P101. In the 46 instruments subjected to detailed examination, Page found only: one instance of a Minister adding something to delegated legislation, one instance of a Minister successfully blocking an item and one instance of a Minister's unsuccessful attempt to block an item.

13 Pp145-6. Page states: *"Swallowing the principle and arguing the detail is an important ground rule for groups participating in everyday politics"* (p147). He notes that submissions that a regulation will not work or will not achieve the desired policy outcome are more likely to be given attention than those that protest the policy, but that civil servants are suspicious that a submission that a regulation will not work may be a ploy to subvert the policy (p151).

14 In fact, the Department incorrectly advised the Committee that the requirement for a planning certificate was imposed by the *Motor Vehicle Repairers Act 2003*.

Although it can report on a conflict at this level, the Committee can only recommend disallowance of the latter provision. (As the earlier provision is not before it, it has no power to require an undertaking to amend that provision even if it is of the view that the latter provision should stand.) Further, in identifying a particular provision as "*preferable*", the Committee may be straying into policy decisions. This is generally complicated by departmental (and, dare one say, Ministerial) competition for primacy in the relevant policy area.

This recently arose in consideration of amendments made to the *Occupational, Safety and Health Regulations 1996* (the OSH Regulations) to permit unlicensed persons to tag and test portable electrical equipment in workplaces. The Director of the relevant department had issued an order under section 19(2)(k) of the *Electricity (Licensing) Regulations 1991* excising certain electrical equipment from regulation 19(1), which required persons to hold a license to perform "*electrical work*". That term was defined to include tagging and testing of portable electrical equipment. The EM in respect of the amendment to the OSH Regulations advised that the amendments mirrored the excision effected by the Order. In fact, it was more broadly worded, so that it purported to allow unlicensed persons to tag and test equipment for which a license was still required under the *Electricity (Licensing) Regulations 1991*. The Committee took the view that the *Electricity Act 1945* provided minimum conditions of electrical safety and that the *Occupational Safety and Health Act 1984* authorised/contemplated regulations imposing higher, rather than lesser, standards of safety for a workplace. It obtained an undertaking to amend the OSH Regulations to be consistent with the *Electricity (Licensing) Regulations 1991* as amended by the relevant Order.

This matter also highlighted another issue - the increasing use of non - disallowable subsidiary instruments and 'administrative' documents to set general binding standards.

No Parliamentary scrutiny

Between May 2007 and May 2008, the Committee identified 665 gazetted instruments that, at first glance, appeared to be non-disallowable subsidiary legislation. This compares with some 525 disallowable instruments during the same period (and with some 54 Acts). Fifty-seven of the 665 non-disallowable instruments were orders/notices exempting entities/areas from operation of provisions of an Act or regulations (or other disallowable subsidiary legislation).

The Director's Electricity Order referred to earlier was made by way of exercise of a broad power, granted by the regulations, to declare that licensing requirements prescribed in those regulations, did not apply in the circumstances stated in an Order. The Electricity Order was gazetted but was not tabled or disallowable. It is not on the State Printer's website of subsidiary instruments.

In first looking at the amendment to the OSH Regulations, the Committee saw the apparent conflict with regulation 19(1) of the *Electricity (Licensing) Regulations 1991*. Other than search through the government gazettes, there was no way for the Committee to determine whether any orders had been made under regulation 19(2)(k) and, if so, whether they were relevant. It took the responsible department three pieces of correspondence before it identified the Director's Order as the "*amendment to the regulations*", which it asserted supported its amendment of the OSH Regulations. The Committee had reservations as to whether the *Electricity Act 1945* contemplated an Order made by the

Director in the terms of the Electricity Order but the Parliament had no power to disallow that instrument.

Another example of a significant policy decision being made without Parliamentary scrutiny is that of uranium mining.

In 2002 the former government banned uranium mining, announcing it would use section 110 of the *Mining Act 1978* to impose an "*exclusion clause*" on all mining leases stipulating that uranium could not be mined. No primary or subsidiary legislation was made and this ban was not the subject of debate in the Parliament. The current government has now announced that ban no longer applies. Again, there has been no legislation.

My personal view is that as this policy was debated during the election campaign, the government has a mandate for this change. However, this is an issue on which the community is divided and others may argue that there was no clear endorsement of this particular policy amongst the plethora of issues in the election.

Rule of policy not law - fees and taxes

Another common response to Committee inquiries on broad administrative discretionary powers is that the concerns raised by the Committee are addressed by a departmental policy, therefore there was no need to put safeguards or guiding principles in the law.[15] This correspondence often gets quite heated.[16]

CEOs have been known to demand a meeting with the Committee - presumably to explain (in words of one syllable, so that the Committee can grasp what is so clear to the Department) why the Committee should accept the Department's 'policy' (such as issuing written notice of exercise of a power to order production of documents, which notice specifies the class of documents to be produced and how production is to occur) is binding on the Department and, therefore, not necessary to state in a law but also that to require an invariable practice to be enshrined in a law would be impose such an unjustified fetter on the department that the world would end. Who knows when discretion to make "*innovative*" use of power to order production of levy records or impose a condition a license may be required to thwart a Dalek invasion?

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[15] See foonote 17 below. Also see Daintith, T and Page, E (1999). The Committee also experiences the attitude reported by Page in his review that: "*rightly or wrongly, civil servants handling Statutory Instruments, as well as the lawyers drafting them, generally feel that their own expertise and legal advice will overcome any problems of the wording and very fine details"*, which they "*dismissed as pedantic quibbles"*, (p147) and that the Committee's concerns as to authorisation are "*nitpicking*" (p163).

[16] After all, as Salembier observes: *regulatory rules are most often imposed by … the persons who will benefit most from the conferral of unchecked discretionary powers"* (p6).

The State Solicitor's Office generally argues that unguided discretion to impose conditions is not "*unfettered*", as the conditions must be consistent with the Act. However, there is often no accountability to ensure that this is the case.[17]

Where an Act is skeletal, there is nothing for a court to measure consistency against. Further, the State Administrative Tribunal held in *Farrell v The Department of Fisheries* [2005] WASAT 114, that the terms of the empowering Act rendered imposition of a condition on a license an "*administrative*" action not subject to review. Justice Barker left no doubt that he did not view that situation with favour.

A particular issue for the Committee in this policy/law dichotomy is the interaction between the "*cost recovery/user pays*" demands placed on government departments and agencies and the legal distinction between a 'fee for services', 'license fee' and tax.

The ability of Parliament to monitor and approve state revenue is generally seen as the fundamental bulwark of democratic representation.[18] You are all no doubt familiar with the general distinction - a tax is imposed to raise revenue for public purposes; a fee is imposed to recover the cost of provision of particular services to the person paying the fee and that a tax can only be imposed with the clear and unambiguous authority of Parliament. Like other jurisdictions, Western Australia has a constitutional provision - section 46(7) of the *Constitution Acts Amendment Act 1899* - stipulating that a Bill that imposes a tax must not deal with any other matter. There is a considerable body of case law holding that a "*fee*" that significantly over - recovers the cost of provision of the particular services in respect of which it is imposed is, in fact, a tax.

However, the Committee has recently been presented with an argument by the Executive that power to impose a fee conferred by an Act dealing with other matters authorises the imposition of a fee over-recovering the cost of provision of services to which the fee relates (by some 291% in the case of probate fees) as the relevant entity (a court) under - recovered its administration costs as a whole. State Solicitor's Office argued that the legal tax/fee for services distinction "*direct*[ed] *attention"* from the question of authorisation. The argument was that the Act did not prohibit fees being set a level

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17 In his doctoral dissertation, Glenn concluded: "*Holding executives accountable for how they exercise discretionary authority is a particularly difficult task in Westminster-based parliamentary systems. The principle of cabinet government, and the practice of party solidarity, effectively fuses the executive and legislative functions. This fusion permits the passage of legislation which grants executive decision-makers almost unbounded discretion in the policy implementation process. As illustrated in this dissertation, parliamentary executives use this discretion to vary - and at times even undermine - the spirit and intent of legislation.* ***Furthermore, because this legislation seldom spells out how discretion should be exercised, it is extremely difficult to hold parliamentary executives accountable for any abuse of discretion which may occur***". (My emphasis)

18 In *Commonwealth and the Central Wool Committee v Colonial Combing, Spinning and Weaving Co. Ltd,* Isaacs J said: … *the parliamentary guardianship of taxation and expenditure is the pivot of the Constitution and the keystone of the arch of personal liberty …. For centuries under responsible government, as any history will tell us, the insistence of the House of Commons on control of taxation was the basis of popular liberty"* ((1922) 31 CLR 421 at pp434 and 449). As Wade and Bradley note, in discussing the emergence of Parliament: "*If the Crown could not levy taxes without the consent of Parliament, the will of Parliament must in the long term prevail"* (p66).

designed to recover the operating cost of the court as a whole, rather than the cost of the services provided to the individual user group.[19]

With respect to section 46(7) of the *Constitution Acts Amendment Act 1899*, reliance was placed on that section being a rule of Parliamentary procedure which the courts could not enforce. The argument was not fully expressed, but the position seemed to be that the fee imposing power conferred on the executive by the various empowering Acts need not be interpreted consistently with section 46(7). In effect, that having been given a power to impose a "*fee*", the Executive might determine whether a "fee" should in fact be a tax.

You will not be surprised to hear that the Committee tabled a report recommending disallowance of the relevant instruments.[20] Literally immediately prior to debate, the Executive offered an undertaking to amend the fees on the condition that the Committee move to discharge its motions for disallowance.

The debate of the motion to discharge raised the issue at the heart of the debates surrounding separation of powers. In speaking, the Government's spokesperson, Hon Simon O'Brien MLC, noted the dilemma facing government members of the Legislative Council[21] - whether they should find the numbers to defeat the disallowance motion or act as members of a House of review and adopt the Committee's report, given the view of the government members of that House that the imposts were outside the parameters laid down in law.[22] Identifying the Executive's offer of an undertaking as acceptance of the principles in the Committee's report, the motion for discharge of the motions for disallowance was granted.

In this case, the House made a point of ensuring the motion for discharge was not granted without expression of House support for the Committee's conclusions and the need for members to act as Parliamentarians, rather than members of the Executive in considering subsidiary legislation.

However, raising government revenues is not necessarily an issue that divides the parties - both favour cost recovery/user pays policies and each is aware that they will be pushing the boundaries when in government and pulling them when in opposition. It is a 'swings and round-a-bouts' issue, where too great a victory in either government or opposition will be a problem when on the other side of the House.

More difficult for Committee members are divisive policy issues - for example, if the decision to permit uranium mining did require an amendment of delegated legislation, there would be party

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19 The full argument is set out in Western Australia, Joint Standing Committee on Delegated Legislation, Report 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*, 14 May 2009.

20 Ibid.

21 The Committee is established by the Standing Orders of the Western Australian Legislative Council and, in part due to the fact that the Legislative Council Standing Orders contain provisions not found in the Legislative Assembly's ensuring debate of motions for disallowance and granting them priority in that House's Order of Business, the Committee's motions for disallowance are moved in the Legislative Council.

22 See Hon Simon O'Brien MLC, Minister for Transport, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 19 June 2009, pp4136-9.

pressure on government Committee members to find that legislation authorised and on opposition members to find that it was not - regardless of the merits of the authorisation arguments. Term of Reference 3.6(f) - that the delegated legislation addresses a matter more appropriately dealt with in an Act - would also come into play, with government members who support uranium mining, but perhaps feeling that it should nonetheless be debated, being gagged by party politics and opposition members supporting uranium mining, or who consider that there is a mandate to permit it, being subject to party pressure to use that Term of Reference to recommend disallowance of the instrument.

One of the strengths of the Committee is its ability to act in a non-partisan manner. This is in large part due to its use of legal principles in scruntising legislation. Skeletal legislation narrows the scope of legal principles, weakening the position of members ability to defend a decision to disallow legislation that they consider not contemplated/unauthorised (or not to disallow legislation the party does not like) in the party room.

Reversal of onus of proof/strange impositions of criminal responsibility

I want to finally note the increasing efforts by local government and the Executive in Western Australia to reverse the onus of proof for criminal offences and create criminal liability in circumstances outside those recognised by the common law or the Criminal Code. This trend existed under the previous government and has continued under the current government.

With respect to reversal of onus of proof, the practice is to insert a provision in regulations stating: "*It is a defence to a charge of an offence"* and then set out a series of things that an accused bears the onus of establishing. That is, the prosecution bears the onus of establishing a prima facie case, the onus then shifts to an accused to establish one of the prescribed "*defences*".[23] While an accused has always born the responsibility for establishing facts within their sole knowledge, in responding to the Committee's concerns, Parliamentary Counsel's Office acknowledged that such provisions erode common law standards, by arguing they were not a "*full reversal*". Worryingly, Parliamentary Counsel's Office also stated:

> *Moreover it is unclear why the [Committee] thinks an Act needs to authorise any reversal of onus of proof in any offence created by the regulations made under the Act.*

Examples of unusual imposition of criminal liability are the offences of -

- on a public thoroughfare, riding a bike into a space that another person intends to use;[24]
- being an adult accompanied by a person apparently under 18, which "*child*" damages property in a parking station (regardless of whether there was any aiding, abetting etc or indeed any suspicion that the damage would occur);[25]

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[23] See, for example, the *Dangerous Goods Safety (Explosives) Regulations 2007, Poisons Amendment Regulations (No2) 2008* and the *Electricity Amendment Regulations 2009*. The *Poisons Amendment Regulations (No2) 2008* provided: "*In any proceedings under this Act or the Misuse of Drugs Act 1981, if it is proved that the system identifier of a person has been recorded in the system in respect of an entry, then, in the absence of proof to the contrary, that person is to be taken to have made the entry*".

[24] *City of Perth Thoroughfares and Public Places Local Law 2007.*

[25] *City of Fremantle Parking Local Law 2006.*

- being the owner of a property used for an outdoor eating house at which a patron smokes a cigarette (regardless of whether consent is given to smoking, the owner is present or, indeed, connected in any way with the business);[26] and
- in regulations introducing electronic prescriptions of drugs, of someone else using your ID number to forge an electronic prescription - when the regulations acknowledge that the system cannot be made secure, staff may need the ID number to process subscriptions and there is no element of supply of that number to the person forging the prescription, negligence or involvement in forging of the prescription.[27]

The justification is inevitably the difficulty in holding people responsible for things the department/local government does not want to happen.

However, the concern appears to be in holding someone responsible, rather than identifying who is responsible: "*with ensuring the accused are burned rather than ensuring the heretics are caught*".[28]

- Related provisions in subsidiary legislation as those such as a provision allowing "*undesirable*" persons to be removed from local government property[29] and banning "*indecent*" clothing at public pools.[30] The Committee spent hours at successive meetings trying to extract from the local governments what they meant by these provisions. While the Committee exchanged different views on topless sunbaking, Brazillians and mankinis, the real question was who thought a law on such an issue was a good idea?

Conclusion

Which brings us to the question for this discussion - if Parliamentary scrutiny of delegated legislation is to be meaningful, does there need to be more thought given to the expression of delegated legislation-making powers - particularly in what is otherwise a skeletal Act? Do Committees such as the one that I chair need to consider terms of reference that are less closely aligned to the court's consideration of the "*validity*" of an instrument? However, would this result in scrutiny being comprised by party discipline?

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26 *City of Joondalup Trading in Public Places Amendment Local Law 2008.*

27 *Poisons Amendment Regulations (No2) 2008.*

28 Brother William's explanation to the novice Adso as to what was occurring when a monk who clearly had not committed the murders under investigation was threatened with torture by Inquisitors to make him confess - in Umberto Ecco's *The Name of the Rose*.

29 *Town of Vincent Local Government Property Local Law 2008.*

30 *City of Gosnells Local Government Property Local Law 2009.*

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

APPENDIX 1

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 Delegated Legislation Committee* 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 1 is a Member of the Council and 1 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*."

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(References to case law, reports of the Joint Standing Committee on Delegated Legislation and Hansard are provided in the footnotes.)