SUBMISSION

to the inquiry of the

Select Committee on the Subordinate Legislation (Miscellaneous Amendments) Bill 2010

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Introduction

Legislation is the most powerful way to protect, create or change the rights of citizens and to enforce, create or change personal and collective obligations. Legislation can establish a framework for action, coerce or prohibit behaviours, and create and govern institutions.

The Parliament of Tasmania occupies a central and fundamental position in our system of government. Foremost among its functions is the making of legislation. Subject to certain constitutional limits, the Parliament's power to make law is supreme, and the Parliament will often delegate the making of the operational detail of the law to another entity, such as the Executive. These laws are referred to as delegated or subordinate legislation and include regulations, rules and by-laws.

Tasmanian Government agencies on behalf of their portfolio Ministers prepare subordinate legislation in accordance with the express powers delegated by the Parliament as provided for by various Acts. Most commonly, subordinate legislation is required to be made by the Governor, or approved, confirmed or consented to by the Governor. The focus of this paper is regulation making.

The making of subordinate legislation is governed by the *Subordinate Legislation Act 1992*. The *Subordinate Legislation (Miscellaneous Amendments) Bill 2010* seeks to amend the current subordinate legislation making processes. The adoption of the additional scrutiny processes that this Bill proposes would represent a significant departure from the current practice in Tasmania and other Australian jurisdictions. The changes set out in the Bill are not without major impact on Government agencies and statutory authorities, the Office of Parliamentary Counsel, the general community and the Parliament.

This paper has been prepared by the Department of Premier and Cabinet and the Department of Treasury and Finance in consultation with other State Service agencies, the Office of Parliamentary Counsel and the Solicitor-General. Specifically, this paper will examine the purpose of subordinate legislation, the current processes for making subordinate legislation, the role of the Subordinate Legislation Committee, and comment on the likely effect of the Amendment Bill.

What is subordinate legislation?

Generally, subordinate legislation is made to give effect to the operation of an Act, including to -

- prescribe detail that would clutter the primary legislation and make it lengthy and difficult to interpret;
- give a regulatory scheme a measure of flexibility and responsiveness - particularly for where there may need to be changes made from time to time to fees, benchmarks or standards;
- allow for swift action in the case of an emergency - for example to deal with quarantine matters and biosecurity concerns;

- allow routine and procedural requirements to be prescribed to give effect to the operation of an Act - such as stipulating what form an application must take, information to be included in the form and setting time limits;
- allow the Parliament to concentrate on the essential elements of the legislative scheme, thereby saving valuable Parliamentary time - it is not necessary for non-policy matters, such as time limits and classifications, to be debated by the Parliament; and
- relieve the Parliament of the need to be directly involved with each and every minor adjustment to a regulatory scheme.

The Subordinate Legislation Act sets out the procedures to be followed and matters to be taken into account when making regulations. These are discussed in more detail below.

Section 47 of the *Acts Interpretation Act 1931* provides that regulations take effect from the date specified in the regulations or the date of publication or notification in the *Gazette* (whichever is applicable). Retrospective regulations are prohibited. Regulations that are not notified or published are void (section 47(3A)(c)).

Further, under the Acts Interpretation Act it is a requirement that subordinate legislation is laid before each House of Parliament within 10 sitting days after the regulations are made (ie 10 days from the date of notification in the Gazette). This ensures that the Parliament is advised of the content of the subordinate legislation made under the delegated authority of the Parliament. The Parliament then has the capacity to disallow all or part of the regulations.

The Subordinate Legislation Committee has power to examine each piece of subordinate legislation and the ability to report its findings to the Parliament as a whole. Its scrutiny is primarily a technical, rather than a policy, exercise. The constitution and role and function of the Committee are outlined further below.

After tabling, any Member of Parliament may, during the next 15 sitting days, give notice of a motion that all or part of the subordinate legislation be disallowed.

A motion to disallow, if passed, renders the regulation void from the date of the resolution by the Parliament. While partial disallowance is allowed there is no mechanism for disallowance by the effluxion of time. If the regulation, or a part of a regulation, has been disallowed, no regulation of similar effect can be made within 12 months of the original regulation having been disallowed unless the later regulation is either tabled in the Parliament and 30 sitting days have elapsed or the House has passed a resolution explicitly allowing the remaking of regulations (section 47(7)).

The Subordinate Legislation Act 1992

The object of the *Subordinate Legislation Act 1992* is to ensure that only effective, efficient and necessary subordinate legislation is made. The Act seeks to reduce the burden of regulation on the Tasmanian community and reflects the priority that the Tasmanian Government places on clear and effective regulation, regulatory reform and its National Competition Policy objectives.

The Act has two key features, namely -

- to provide a structured quality assurance mechanism for subordinate legislation that seeks to ensure that such legislation is effective, efficient and imposes only necessary burdens on the community (or a part of the community) where is it demonstrated that it is in the public interest to do so; and
- to ensure a systematic update of Tasmania's statute books by establishing a staged repeal of subordinate legislation and automatic repeal of subordinate legislation after 10 years.

The Act provides that when subordinate legislation is made (or remade), it is within the powers conferred by the relevant Act and that any impact the legislation may have on the community is justified.

The Department of Treasury and Finance is responsible to the Treasurer for administering the Subordinate Legislation Act. This work is undertaken by the Economic Reform Unit within the Economic Policy Branch whose responsibilities also include -

- economic reform, such as ensuring compliance with the principles of National Competition Policy and implementation of the national economic reform agenda; and
- the State Government's Legislative Review Program which is aimed at ensuring that legislation does not unnecessarily restrict competition.

A number of key staff are responsible for undertaking assessments under the Subordinate Legislation Act, preparing guidelines and for providing advice and assistance to other Government agencies. The Department has recently revised the *Subordinate Legislation Act 1992 Administrative Handbook* (May 2012) which sets out the steps to be undertaken in preparing subordinate legislation and guidance notes.

Schedule 1 of the Subordinate Legislation Act establishes guidelines for the preparation of subordinate legislation. Ministers (the Executive) are responsible for ensuring that regulations, as far as reasonably practicable, comply with these guidelines.

The Department of Treasury and Finance plays a significant gatekeeper role in scrutinising subordinate legislation. It does this by -

- certifying compliance with guidelines set out in the Act; and
- ensuring regulatory impacts are addressed and justified.

These processes are aimed at justifying any burden, cost or disadvantage to the public (or a sector of the public) and ensuring consultation has occurred with affected parties. It should be noted that consultation as part of assessing regulatory impacts does not necessarily give rise to a right of action or review against the legislative authority (Craven 1988).

The Chief Parliamentary Counsel has a statutory role to examine proposed subordinate legislation to ensure it is not outside the power set out in the principal Act and that the subordinate legislation is expressed clearly and unambiguously (section 7).

The Subordinate Legislation Committee

In all Australian jurisdictions, parliamentary review of subordinate legislation is undertaken assisted by the work of designated parliamentary committees. In Tasmania, the Subordinate Legislation Committee is established under the *Subordinate Legislation Committee Act 1969*. The functions of the Committee are set out in section 8 of the Act and require the Committee to examine the provisions of tabled subordinate legislation and to consider whether -

- the regulation appears to be within the regulation-making power conferred by, or in accordance with the general objects of, the Act pursuant to which it is made;
- the form or purport of the regulation calls for elucidation;
- the regulation unduly trespasses on personal rights and liberties;
- the regulation unduly makes rights dependent on administrative decisions and not on judicial decisions; or
- the regulation contains matters that, in the opinion of the Committee, should properly be dealt with by an Act and not by regulation.

The Committee is also required to examine whether the requirements of the Subordinate Legislation Act have been complied with to the extent that they are applicable (eg whether a regulatory impact statement has been required and what consultation may have occurred with affected parties as part of that process).

The Committee may make such reports and recommendations to the Legislative Council and the House of Assembly as it thinks desirable following its examination of regulations.

The role of the Committee (and similar committees in other jurisdictions) is to conduct a high level technical review of delegated legislation, that is, concentrating on matters such as adherence to form and process on one hand and whether the basic rights of people have been given due consideration on the other. As a general rule, questions of policy are to be avoided by the Committee, these questions having been resolved by the Parliament in the enabling legislation.

Therefore, given that disallowance of subordinate legislation is intrinsically a matter of policy, it is a matter for the entire Parliament. Parliamentary convention recognises that policy and political issues remain matters for the Houses of the Parliament to consider, not a Committee. This is because the role of the Parliament, being a democratically elected representative body, is broader than that of any Committee of the Parliament. One of the fundamental rationales for the parliamentary process of debate is to allow the community's elected representatives to assess competing interests and make informed decisions about the 'public interest'. The Committee has an important role to play in scrutiny of the processes that lead to the making of a regulation. It contributes to the Parliament's informed decision-making by referring any concerns about regulations or the making of regulations, to Parliament for its consideration. However, the Committee's views and recommendations cannot and should not bind the Parliament.

As disallowance is vested in the Parliament it would seem inappropriate that the Committee should have a role in the making of subordinate legislation through additional public consultation, pre-scrutiny processes, and the capacity to defer the making of subordinate

legislation. It would appear that such steps could result in effective disallowance of subordinate legislation if the Committee saw fit.

Technical process v policy scrutiny by the Subordinate Legislation Committee

The distinction between 'technical process and rights scrutiny' and 'policy scrutiny' is subtle, but important. It reflects the distinction between the roles of the Executive and the Legislature. The Subordinate Legislation Committee is able to look into how the rights and liberties of citizens may be affected, but its scrutiny should be limited to whether those rights and liberties have been adversely affected in any way that has not been authorised by the Parliament and whether there has been a robust process to consider the extent of any impingement on rights and liberties. The Committee may also examine a regulation to ensure that it is made within the scope of powers granted by the empowering enactment (principal Act). In essence the Committee's role should not involve commenting on or reconsidering the policy intent of the principal Act (under which the regulations are made) or the opinions of individuals who may be aggrieved by the regulations.

The Committee's role and processes are not meant to re-open a consultation process which then re-examines the views of stakeholders and policy alternatives. This will already have occurred in both the formulation of the principal Act and the regulation-making processes set out in the Subordinate Legislation Act and certified by the Department of Treasury and Finance under Part 2 of the Subordinate Legislation Act. The Committee may criticise the consultation process eg it was not wide or robust enough, but should not reopen the debate. Any criticism may form the basis of a motion to disallow the regulations thereby giving the Parliament the opportunity to vote down or uphold the regulations.

Furthermore it should be noted that there is no general common law requirement that persons affected by the making of subordinate rules should be heard by the rule-maker (Craven, 1988). The starting point for this proposition is set out in *Kioa* v *Minister for Immigration and Ethnic Affairs* (1985) 62 ALR 321 at 373 per Brennan J -

> "The legislature is not likely to intend that a statutory power of strictly legislative nature be conditioned on the observance of the principles of natural justice, for the interests of all members of the public are affected in the same way by the exercise of such a power."

As noted above, the role of the Parliament is very much broader than that of the Subordinate Legislation Committee (or of any Parliamentary Committee) because it has the fundamental role of assessing competing interests and making informed decisions about whether legislation is in the public interest. The Subordinate Legislation Committee has a legitimate and significant role to play by contributing to the Parliament's informed decision-making and by referring identified concerns to the Parliament for its consideration, but it does not reflect the views of all Parliamentarians and their constituents.

An Example – Policy v Technical Scrutiny

An Act may establish a body to regulate and discipline a profession. The Act may require membership of that body in order to practise in that field. The Act may also state that to gain membership the person must have obtained certain qualifications as may be prescribed (the

regulations then set out the level of education and training). The Act may also provide that the application process, including any fees to paid, is to be prescribed by regulations.

It would be inappropriate for the Subordinate Legislation Committee to express a view that the application process should be abandoned or that certain qualification standards should apply over others or that fees should not be charged when these are clear policy intents of the principal Act.

Subordinate Legislation Committee scrutiny is limited to the provisions of section 8 of the Subordinate Legislation Committee Act. That is, it may enquire into the scope of power, whether the consultation process was robust and the impact of the regulations has been properly considered in accordance with the guidelines set out in the Subordinate Legislation Act. It should not however revisit these issues with a view to setting new policy in relation to application processes, qualification standards or fees. The proper place for the reopening of policy debate is the Parliament.

Subordinate Legislation (Miscellaneous Amendments) Bill 2010

The following paragraphs discuss the major aspects of the *Subordinate Legislation (Miscellaneous Amendments) Bill 2010*. The Bill has been privately drafted and does not necessarily reflect the standard or conventions of the drafting of the Office of Parliamentary Counsel.

Clauses 4 and 5 - Amendments to the Acts Interpretation Act - Tabling requirements for regulations

The Bill proposes that if regulations are not tabled in either House of Parliament within the 10 sitting days following notification in the *Gazette*, then they are automatically revoked. While currently the Acts Interpretation Act specifies timeframes for tabling, there are no penalties or consequences for any breach of this requirement.

The Committee's attention is drawn to the following comments:

- There are few examples in recent times of regulations having not been tabled in accordance with the requirements of the Acts Interpretation Act (note the second reading speech of Ms Forrest MLC or Subordinate Legislation Committee Reports). The scale of the problem may be small.
- In 1981, a similar provision was introduced by the *Acts Interpretation Amendment Act 1981* (no. 39 of 1981). By 1982, 16 pieces of subordinate legislation had to be validated by the *Regulations (Validation) Act 1982* (no. 94 of 1982) because of failure to be laid before the Parliament during the 10 day period. Again in 1984, 20 pieces of subordinate legislation (including 16 sets of by-laws) had to be validated under the *Statutory Instruments and Appointments (Validation) Act 1984* (101/1984).
- By 1985 it was clear that the provision was creating administrative issues and as a result of these problems, which could only be overcome by validation Acts, it was decided to repeal the provision by the *Acts Interpretation Amendment Act 1985* (no. 40 of 1985). For this reason alone Government agencies and the Chief Parliamentary Counsel caution against the use of such an arbitrary clause. Any benefit that such peremptory revocation may be thought to provide may be far outweighed by the work required to

retrospectively validate an administrative oversight and to deal the inconvenience and uncertainty arising from the application of regulations before their revocation.

- Subordinate legislation contains the detail necessary to ensure the successful operation of the principal Act. Therefore, automatically disallowing regulations may remove provisions from the legislative framework that impose important restrictions, provide the capacity to regulate behaviour to achieve social, health and environmental objectives and/or to raise the revenue required to resource the activity involved. For example, disallowance could result in -

  - an inability to recover fees and charges – these fees make up an important revenue stream for regulatory bodies and contribute to programs and education eg workplace health and safety, registration fees for professionals;
  - an inability to make urgent changes to prohibit dangerous conduct - for example banning the use of synthetic cannabinoids;
  - negative social and community behaviour due to the rescinding of active penalties - such as enforcement of living marine resource quotas and protection of workplace safety;
  - unregulated conduct and activity that would have detrimental consequences for the community - such as species protection and tobacco control initiatives; and
  - an inability to penalise offenders through fines and infringement notices.

- Once a regulation is disallowed it may be some time before it could be remade, particularly if the provisions in the Amendment Bill for that process are adopted. This may result in Tasmania, for a period, being without important public safety and environmental regulations, or in persons affected by the regulations losing rights to review or appeal following revocation under these circumstances.
- If subordinate legislation is disallowed there is no means by which to activate expired regulations and this can leave a gap in the law.
- The time period related to this proposal may be variable due to the sitting schedule. Ultimately whether Parliament sits or not is a matter for the Parliament and is not fixed in any real sense as changes may occur to the Parliamentary timetables to respond to matters as they arise. The Houses have different sitting days and although ten days could expire in one House, it may not have commenced in the other. There may also be times when the Parliament does not sit for a long period. The time it takes to reach ten sitting days does in part mean Ministers have longer to have their regulations tabled, but it is still an unknown period which in some cases may be 3 weeks and in others more than 3 months from the date of notifying the making of the regulation in the Gazette.
- An alternative approach to the perceived problem of failure to table may lie in an administrative solution, such as reminder systems, that could be included in any guidelines produced on the preparation of subordinate Legislation.

Clause 7 – inserting new definitions Subordinate Legislation Act

The Bill suggests a number of changes to definitions. The current definition of Subordinate Legislation Committee (rather than Committee) is preferred, as it makes it clear when reading the Act which Committee of the Parliament is being referred to.

It is suggested that the definition of 'Relevant Act' is not required in this section but should remain in section 7 of the principal Act as it is only utilised in this section and not referred to elsewhere in the Act. It is usual drafting policy for the definition of words which appear only once in an Act to be inserted in the relevant part, division or section rather than in the general interpretation or definition section of the Act.

Clause 8 – Guidelines

As a matter of style, retaining the current wording of section 3A is preferred.

Clause 9 – Compliance with guidelines

It would be preferable that the words "issued under section 3A" be retained to identify and define the guidelines.

Clause 10 – Regulatory impact statements

This change is not considered necessary.

Clause 11 – Examination of draft subordinate legislation – use of the term 'draft'

The definition of 'Relevant Act' could remain in section 7 as it is not required in other parts of the Act.

It is the statutory role of the Chief Parliamentary Counsel to certify that subordinate legislation is within the legislative power contained in the Act and expressed in clear language. This ensures that the legislative power delegated by the Parliament to the Executive is exercised within the scope conferred by the Parliament. It recognises that subordinate legislation which purports to regulate matters beyond the scope of the principal Act will be *ultra vires*.

The regulation or instrument considered by the Chief Parliamentary Counsel is not the law as such, it is a reflection of the proposed delegated law to be made. Although there might appear to be no substantive difference in the use of the word "proposed" or "draft", it is the strong preference of Government agencies to retain the use of the term "proposed" as expressing the intention of a Minister (Executive Government) to regulate a particular matter through subordinate legislation in accordance with the delegated power.

Further, the use of the term "a draft of" could imply that agencies will have drafted their own legislative instrument. This is not generally the case as the legislative drafting skills that would be required for tasks seldom exists in government agencies. Subordinate legislation is generally drafted by qualified Parliamentary Counsel for government agencies, or by legal practitioners for Councils or other public authorities such as the Ports Corporation or Forestry Tasmania.

It is also considered that the use of the term "draft" in clause 9B may not be acceptable to His Excellency the Governor. This use of the term draft presumes that the subordinate legislation is only a draft and not finalised in any sense. The Governor does not consider draft legislation or instruments and acts on advice of the Executive Council. The practice reflected in the current language of the Subordinate Legislation Act is that proposed (ie recommended, suggested or offered) regulations be submitted to the Governor. The nuance is fine but important.

The term "proposed" has been used throughout the current Act and it would be preferable to continue to use that term.

Clause 12 – New sections 8 and 9 – examination by the Committee

This clause substantially amends sections 8 and 9 of the Act and markedly alters the role of Subordinate Legislation Committee, which may lead to a number of unintended or perverse consequences.

Specifically, under the amendments, the Committee would be given the role of examining whether "draft" subordinate legislation complies with the guidelines set out in the Subordinate Legislation Act prior to the subordinate legislation being made. This could potentially involve the Committee considering matters of policy as part of its inquiry into the impact of regulation and its consistency with the objectives of the other Acts and Government policy. The Guidelines as set out in Schedule 1 of the Subordinate Legislation Act require a number of matters to be considered before subordinate legislation is made, such as whether the proposed regulation imposes a significant burden, cost or disadvantage on a sector of the public. How the Committee intends to undertake this analysis without venturing into economic and policy analysis is unclear.

The role of overseeing the regulatory impact considerations and general regulation-making process is currently assigned to the Department of Treasury and Finance. The proposed amendments duplicate this process and the Committee would require additional resourcing to undertake these functions. The time and resources required to undertake this task are not insignificant. It is envisaged that the Committee would need to meet at least weekly for several hours to undertake deliberations, take evidence from witnesses and make assessment about competing public interests including assessments about the economic, social, environmental and cultural needs of the community. The cost of this would be large and it is difficult to conclude that it will achieve any significant additional benefit when processes are already in place to undertake these assessments.

Furthermore there is no evidence that the existing scrutiny by the Department of Treasury and Finance is unsatisfactory. There have been no cases, for example, where the Committee has advised the Department that its assessment of any subordinate legislation has been inadequate, even in cases where the Committee has recommended that subordinate legislation be disallowed. It is therefore difficult to see how an additional layer of scrutiny against the guidelines in the Subordinate Legislation Act by the Committee would improve the quality of subordinate legislation.

It is also noted that although the Second Reading Speech asserts that the amendments will not permit the Committee to comment on or assess subordinate legislation based on matters of policy, Ms Forrest MLC states in her second reading speech that the Bill will "enable input and scrutiny at the front end of the process, rather than after regulations have been made and are operational. It will also enable the Subordinate Legislation Committee to consult with key stakeholders that may believe draft regulations will adversely impact on them, prior to these regulations becoming operational". This statement seems to imply some form of policy scrutiny and an opportunity for individual citizens to have their views heard and presumable taken into account. It is not the role of the Parliament (and much less, of a committee of the Parliament) to function as a court and provide persons with the right to be heard. Any extension of the principles of natural justice into the area of law and policy-making should be closely considered and confined to special circumstances.

This approach extends the role of a select number of parliamentarians beyond what is currently intended by the Subordinate Legislation Act, namely to ensure that regulations are made within the scope of powers delegated by the Parliament and meet the objectives of the principal Act. The Committee may be able to delay or prevent subordinate legislation progressing based on the grounds that it is not satisfied that the guidelines have been met or that relevant stakeholders have been appropriately consulted or their views taken into account. This could extensively delay and even prevent regulations being made, when Parliament has already authorised their preparation by the passing of the principal Act.

The proposed amendments do not appear to take account of existing consultation processes, particularly in areas subject to numerous regulations. For example, under the *Inland Fisheries Act 1995*, a Ministerial Advisory Council representing key stakeholders is responsible for reviewing all new and amended regulations and provides comment directly to the Minister regarding the impact of proposed regulations. Where the amendments to regulations are significant, a consultation process is routinely exercised to gain stakeholder input regarding potential impacts. This involves the engagement of peak industry bodies and the general public. Agencies are best placed to make decisions about stakeholder consultation based on their intimate understanding of their day-to-day business and portfolio responsibilities, policy issues, and the views of industry and lobby groups.

The proposed amendments also increase the potential that an individual or organisation that has a particular perspective, not consistent with that of the majority of stakeholders consulted by the agency during the regulation making process, may attempt to significantly influence the Committee's view of the appropriateness of the regulations and cause debate on the regulations to be re-opened.

Ms Forrest also claims that the proposed Bill would overcome the potential adverse impact of a subsequent disallowance of subordinate legislation that could have been operating for several months. In the small number of cases where subordinate legislation has been disallowed, there have been no cases of which agencies are aware in which this has been due to the subordinate legislation not meeting the guidelines. It would appear instead, that motions to disallow have been referred to the Parliament only where the Committee has not supported the policy content of the subordinate legislation (eg plumbers registration fees and fisheries permits).

There are also no timeframes in the Bill within which the Committee is obliged to consider subordinate legislation. Clauses 9(2) and (3) provide that the Committee must report on whether the draft subordinate legislation complies with the guidelines "as soon as practicable". In regard to this proposal the Committee's attention is drawn to the following points.

- Firstly, what "as soon as practicable" means could be subject to abuse through vague interpretation. This could be critical at certain times of the year, such as between the Spring Session of Parliament and the end of the year, when agencies only have a small window of opportunity to manage the proposed process and enable the relevant Minister to present the subordinate legislation to the Executive Council, and the Governor-in-Council, for approval in a timely manner for the commencement at the intended date.

- Secondly, there is a specific and serious practical issue when legislation for a new principal Act is being prepared. In cases where new subordinate legislation is required to underpin the operation of new law that is being considered by the Parliament, it would be presumptuous to present the draft subordinate legislation to the Committee for scrutiny before Parliament has passed the Bill empowering the making of the regulations. Yet this would be an outcome of the proposed amendments. In practice regulations are often prepared in parallel with the development of a Bill, particularly if the intended commencement of the Bill is imminent. If the matter is urgent it would be impossible to adhere to the proposed processes that would necessarily require the regulations to be drafted before the Bill itself was complete. A Bill may not be finalised until very close to its introduction into the Parliament.

- Thirdly, often subordinate legislation needs to be made urgently (for example, to implement a public health or consumer protection response). The processes contemplated by the Bill do not appear to be able to accommodate urgent changes, particularly given that the Committee only meets periodically and members may be away or unable to meet (especially when Parliament is not sitting). More generally, agencies would have to start preparing subordinate legislation earlier than under the current arrangements. Once again this is particularly problematic when new primary legislation is also required (eg as a result of a nationally agreed law reform initiative).

The net effect would be a delay in making subordinate legislation and an increase in the administrative burden on agencies, the Office of Parliamentary Counsel and the Economic Reform Unit of the Department of Treasury and Finance, with the potential for an almost endless cycle of subordinate legislation review.

In 2010 and 2011, agencies developed over 200 pieces of subordinate legislation. The development of legislation is resource-intensive and changes to the process suggested in the Bill will further delay and complicate its making. The increased delay could also act as a disincentive for agencies to maintain up-to-date contemporary legislation. It will also constrain the ability of the Executive to participate in nationally-agreed or uniform law projects, potentially leaving Tasmania out of step with other jurisdictions and creating loopholes or gaps in national schemes.

The Bill will also create additional challenges for agencies in the management of their legislation, particularly in respect of managing the expiry of regulations under the Subordinate Legislation Act. This may increase the need to prepare bills to postpone the repeal of subordinate legislation under the Act. This would place additional pressure on agencies, the Office of Parliamentary Counsel and the Parliament.

The proposal to enable the Committee to review all draft subordinate legislation and report to both Houses of Parliament before that subordinate legislation becomes operational is a significant departure from the practices of all other States and Territories.

The Subordinate Legislation Committee may inquire into whether subordinate legislation is made within the scope of the principal Act and take into account a number of principles as set out in the guidelines and schedules of the Subordinate Legislation Act. However, the Committee's role should be confined to scrutinising what the Executive has done under the delegated authority of the Parliament, not what it may intend to do, and nor should the Committee seek to assume the functions of the Executive in executing its duties under a principal enactment. These would all appear to be probably outcomes of the Bill.

Finally, if the proposed amendments proceed, it may encourage a practice whereby matters normally included in regulations or other subordinate instruments would be included in the principal Act. This could then make principal Acts overly detailed, cumbersome and lengthy, and result in the loss of the flexibility that subordinate legislation provides.

Proposed role of Solicitor-General

The amendment Bill also introduces a process whereby the Solicitor-General must certify certain elements of proposed subordinate legislation. This presents yet another scrutiny process and another element of delay in making subordinate legislation. The scrutiny of the Solicitor-General would be in addition to the Department of Treasury and Finance and Chief Parliamentary Counsel certification as well as the proposed Committee scrutiny of subordinate legislation.

The value of the additional scrutiny is questionable. It is also not clear how the Solicitor-General would determine whether a particular piece of subordinate legislation is "substantially similar" to another; eg does that mean that a fee unit has increased or decreased to only a small degree or that some percentage of the current draft regulations are the same as the previous draft? There would probably have to be quite detailed provisions setting out precisely when one draft is to be regarded as being "substantially similar" to another.

The Chief Parliamentary Counsel certification is aimed at ensuring that the regulations are within clear and express power conferred by the principal Act and the general objectives of the principal Act, as well as expressed in clear and unambiguous language. The role of the Chief Parliamentary Counsel is concerned with the legal drafting and it is difficult to see why another law officer should be involved in such scrutiny.

There are also other fundamental concerns with this proposed amendment. Principal among them is that the Solicitor-General does not ordinarily advise the Parliament unless directed by the Attorney-General to do so. The role of the Solicitor-General is to provide legal advice to

Ministers, agencies and instrumentalities of the Crown. It also includes the important function of representing the State of Tasmania in any Constitutional litigation.

It could be problematic if the Solicitor-General were required to undertake the proposed certification function on behalf of a Parliamentary Committee as it could potentially create a conflict between the Solicitor-General's duty of confidence to the Crown and his proposed statutory duty to the Parliament. In addition, there are also resource issues to consider. The added layer of scrutiny would require additional resources in the Office of Solicitor-General to undertake these functions, which will only duplicate what is already done by others.

Clauses 13 – Procedure when Committee not in office

This clause amends the principal Act to pick up the proposed amendments to definitions. These amendments are not considered necessary.

Clause 14 – Regulations and orders

This provision provides for the repeal of the Governor's power to amend Schedule 2 (Provisions Applying to Regulatory Impact Statements) and Schedule 3 (Exempt Matters and Categories). It should be noted that these powers of the Governor were limited insofar as they were not exercisable after 31 December 1995.

Clause 15 - Guidelines

This clause makes a change to the Guidelines for the preparation of Subordinate legislation. It inserts a new subsection (ba) and mirrors the proposed changes to section 3A (clause 8). This current wording of the section is preferred.

Part 4 clauses 16 to 24 Subordinate Legislation Committee Act 1969 amended

The general amendments to the Subordinate Legislation Committee Act to insert gender neutral terminology and amend some operational aspects of the Committee may have merit, but they are not considered sufficient reason to introduce a new Bill.

Provisions of amendment Bill

Any amendments that the Executive may choose to support should be drafted by the Office of Parliamentary Counsel to ensure that the Bill is drafted in the style of Tasmanian legislation and adheres to the standards of Parliamentary drafting.

Conclusion

In conclusion it is submitted that in considering whether the amendments should proceed the following matters should be taken into account by the Committee -

- The amendments have the potential to significantly prolong and complicate the subordinate legislation making process, without any guarantee of improved governance.
- The public interest may not necessarily be served by additional scrutiny, delays and uncertainty.

- The amendments may create further administrative burden both in terms of delays in making subordinate legislation and in the level of resources required to service the new process both within Government and the Parliament.

- The Bill effectively extends the role of the Subordinate Legislation Committee role to include policy review and consultative functions, which is inappropriate as power would then reside with a select few Parliamentarians rather than each House of Parliament.

- The costs of introducing these amendments across the Executive and Parliament would be significant and it is unclear if there would be any additional benefit to the quality of subordinate legislation.

- Ultimately these amendments may be a disincentive to making regulation due to time delays, perceived interference, over-consultation and potential for policy paralysis.

End Note

This response does not cover the impact across government businesses, state owned companies, statutory authorities and councils that may be authorised to make subordinate legislation and that may have an interest in any change to the current processes.

References

G J Craven, "Legislative Action by Subordinate Authorities and the Requirement of a Fair Hearing" (1988), vol 16, *Melbourne University Law Review*, p 569

G J Craven, "Consultation and the Making of Subordinate Legislation – A Victorian Initiative" (1989), vol 15, *Monash University Law Review*, p 95

Department of Treasury and Finance, *Subordinate Legislation Act 1992 Administrative Handbook*, Tasmanian Government, May 2012

D Pearce and S Argument, *Delegated Legislation in Australia*, third edition, LexisNexis Butterworths, Australia 2005

Parliamentary Standing Committee on Subordinate Legislation website www.parliament.tas.gov.au/ctee/Joint/subord.htm, accessed 31 May 2012

Snell R et al, "The Tasmanian Subordinate Legislation Committee-Lifting the Scrutiny Veil by Degrees", *Deakin Law Review*, vol 4(2), pp 1-38

Tasmanian Parliament Hansard, Subordinate Legislation (Miscellaneous Amendments Bill) 2010 (no 55), 18 November 2010 and 24 November 2010

Tasmanian Parliament Hansard, Subordinate Legislation (Miscellaneous Amendments Bill) 2009 (no 76), 10 November 2009

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