Subordinate Legislation (Miscellaneous Amendments) Bill 2009

I move the second reading of the Bill

Madam President, Honourable Members would be aware that Subordinate legislation is a collective term for statutory rules, regulations, ordinances, by-laws and rules. It is made by persons or bodies to whom Parliament has delegated some of its law-making powers (often a government department).

The authority to make subordinate legislation is conferred by an Act of Parliament, known as an enabling or delegating Act. Many principal Acts are also enabling acts and these enabling Acts may, and often do, stipulate requirements about the way the subordinate legislation is to be made.

Generally speaking, Acts are general in nature, establishing broad principles whilst Subordinate legislation contains the many details necessary to ensure that the Act will operate successfully and often referred to as the rules.

Whilst Acts of Parliament are scrutinised by both Houses of Parliament, delegated or subordinate legislation is scrutinised only by the Joint Standing Committee on Subordinate Legislation. Many Honourable Members have previously or currently sit on this important committee.

It is important that we do not overlook the impact of delegated or subordinate legislation on the daily lives of so many Tasmanians. As our role and responsibility as legislators is to scrutinise all Bills that come before this House, this legislation that I am bringing in today is intended to amend the Act that describes and enables the process of scrutiny of subordinate legislation.

Madam President, Subordinate legislation whether it be in the form of a regulation, rule or bylaw, has the potential to impact more on the daily lives

of ordinary Tasmanians or those seeking a livelihood than the principal Act itself.

A review of the statutes across the country clearly indicates that the number of delegated instruments far exceeds the enactments of parliament. According to noted Australian legal commentators and researchers Professor Dennis Pearce and Stephen Argument, subordinate legislation is both legitimate and desirable to save pressure on parliamentary time, to include the technical and specific details which would otherwise make the principal act too voluminous and complicated and to provide flexibility to deal with rapidly changing or uncertain situations.

The volume and scope of subordinate legislation is increasing week by week and this makes the duty of parliament to scrutinise all the more important.

Madam President, in drafting this Bill, I have sought input and comment from Stephen Argument and other legal advisors to the Senate Standing Committee on Regulations and Ordinances and Senate Standing Committee for the Scrutiny of Bills, following discussions at the Australia-New Zealand Scrutiny of Legislation Conference held at Parliament House in Canberra in July this year. They were of the view that the proposed amendments were appropriate and well considered.

It is important Madam President that the sovereignty of Parliament is retained and that the ability particularly of this independent House to scrutinise legislation is not weakened in any way.

Currently, subordinate legislation is only examined by the Subordinate Legislation Committee after it has been made, approved, confirmed or consented to by the Governor, gazetted and in operation, often for many weeks or months before it is tabled in Parliament and referred to the Committee for scrutiny.

The intent of this Bill is to amend the Subordinate Legislation Act, to enable the scrutiny of draft regulations prior to the approval, confirmation or consent of the Governor, much the same way as a Bill before the Parliament proceeds.

This Bill will enable scrutiny or examination of any draft regulations by the Subordinate Legislation Committee prior to Gazettal and therefore prior to the regulations becoming operational. This will address the problems experienced when a decision to disallow regulations or rules under legislation currently in force, occurs many months after the regulations have become operational. It is of course undesirable that the impugned regulations are valid until disallowance but void after disallowance.

The primary purpose behind this Bill is to address this issue that Honourable Members may recall was highlighted during the recent debate of a disallowance motion on 26th May this year regarding the Fisheries (Scalefish) Amendment Rules 2008. Members may recall that this disallowance motion was supported and that during the course of the scrutiny and examination of those rules and the subsequent decision to disallow sections of those rules, it became clear that rules, including the sections that were being disallowed had been in operation for almost ten months.

This situation created another dilemma for the committee and made it difficult to fully consider all options for disallowance in light of the flow-on impacts to another group of fishermen as disallowance of the entire rules, had that been determined by the Committee to be the most appropriate decision, would have disadvantaged a number of other fishermen who had invested in their businesses as a result of the introduction and many months of operation of these rules.

It is important to note that regulations or rules become operational on Gazettal. The rules in question were gazetted on 30 July 2008 and parts 1 and 2 commenced on 1 August 2008. Part 3 commenced on 1 October 2008 and these rules were then tabled in Parliament on 2 October 2008, after all the parts had commenced. The Subordinate Legislation Committee does not currently scrutinise the regulations until after these processes have occurred and in this case the rules had been operational for between seven and ten months.

Madam President, due to the delay in tabling these particular rules following gazettal, which incidentally the Department had to be reminded about by the efficient Committee Secretary, this period of time for the rules to be operational prior to scrutiny by the Subordinate Legislation Committee was longer that it should have been.

Madam President, if this were to occur in some jurisdictions it would result in those rules no longer were valid because they had not been tabled in a timely manner. That is not the case in Tasmania, as there is no penalty if this occurs.

If this Bill is supported and the regulations have been fully scrutinised by the Committee and the Governor, there should be no delay following gazettal to table the regulations to ensure all Members of Parliament are kept fully informed in this area.

In view of this issue and the fact that there is currently no penalty for late tabling of regulations, the amendments to section 47 of the Acts Interpretation Act, will address this issue such that if regulations are not tabled in each House of Parliament within the prescribed period they will cease to have any effect after that period. This should ensure that all

Honourable members have the opportunity to peruse promptly all subordinate legislation.

A sanction such as this currently exists in other jurisdictions, including Western Australia, where I am informed, it has resulted in consistently timely tabling of regulations.

This Bill seeks to redress the issue of regulations becoming operational for an extended time before scrutiny of the Subordinate Legislation Committee by altering the time when the subordinate legislation is examined by the committee and also to provide a process to ensure that any delegated legislation will comply with the requirements of the Subordinate Legislation Act 1992, before it becomes operational.

Effectively, 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 the draft regulations will adversely impact on them, prior to these regulations becoming operational.

These amendments will overcome the potential adverse impact of a subsequent disallowance of regulations that could have been operating for several months under the current legislation.

The Subordinate Legislation Committee will examine draft regulations after the relevant Department has carried out the usual processes for the preparation of regulations, under the current provisions of the Act. If the Subordinate Legislation Committee considers after examining any draft regulation that it does comply with the guidelines, and thus the provisions of the Act, a report will be provided to the responsible Minister who will subsequently submit the regulations to the Governor for approval, confirmation or consent, under the requirements of Section 9A of the Bill.

If the Subordinate Legislation Committee considers after examining any draft regulation that it does not comply with the guidelines, and thus the provisions of the Act, a report will be tabled in both Houses of Parliament and provided to the responsible Minister.

The Department will then be required to reconsider the regulations and resubmit draft regulations for examination by the Subordinate Legislation Committee. The Committee at that time will again determine whether the regulation complies with the guidelines and thus the provisions of the Act. The same process as I have described will apply at this point.

Madam President, I believe that the number of times this will actually occur will be minimal, as is the case with the current process where scrutiny occurs after the event with the potential problems I have raised. I would expect that by far the majority of draft regulations would be found to comply with the provisions of the Bill, and reported as such. Only a very small number are likely to be found non-compliant and reported as such to the responsible Minister.

Clause 9A of the Bill does provide for the Treasurer, in a case where the public interest so requires, to override the decision of the Subordinate Legislation Committee.

This means that if the draft regulations, containing substantially similar provisions, have been examined twice by the Committee over a period of three months and have been found to not conform with the guidelines contained in the Act and if the Solicitor-General certifies that the third draft contains substantially similar provisions to the previous drafts, the Treasurer may, if satisfied that the public interest requires that the subordinate legislation be made without delay, certify accordingly. The

regulations can then be made and the new section 9 of the Bill will not apply.

If this were to occur, a disallowance motion could be put to the Parliament. Prior to this, two reports from the Subordinate Legislation Committee would have been previously tabled providing details of the non-compliance of the regulations when scrutinised by the Committee. Honourable members will then be aware of the perceived deficiencies in the regulations in a timely manner.

Madam President, it is important to note that this Bill does not alter the scope of the Subordinate Legislation Committee's examination from that contained in the existing Act with the exception of the removal of provisions of section 9(1) of the current Act that enables the Treasurer, by notice published in the *Gazette*, to declare an instrument of a legislative character that is made under the authority of an Act to be subordinate legislation for the purposes of the current Act. This subsection has been removed as any notice issued by the Treasurer that deems any other legislative instrument to be subordinate legislation for the purposes of the current Act, other than those instruments already defined as such in section 3, should be of such significance that scrutiny by the Committee is warranted.

The amendments will, however, enable scrutiny of all subordinate legislation prior to the approval of the Governor and thus prior to gazettal and the regulations becoming operational.

The Bill also contains a number of other amendments to the Subordinate Legislation Committee Act 1969. This Act has aged over time and is gender specific. It refers to the Chair of the committee as male, likewise in the case of the Committee secretary. I am sure most Members would be aware that for many years we have had both a female Chair and a female Secretary of the Subordinate Legislation Committee. It is time this legislation was

contemporised and made relevant to today. All references to specific gender have been removed.

Madam President, this Bill will also not affect the power of Parliament to disallow regulations.

Madam President, this Bill will address the issue of regulations and other disallowable instruments being operational for up to many months before potentially being disallowed, with the inherent risks of such a decision adversely impacting on another sector of, or group within, the community.

This is a matter in which other jurisdictions also experience challenges, and as I stated previously, the proposed amendments that this Bill contains were considered to be an appropriate and sensible approach to addressing this issue by delegates at the Australia-New Zealand Scrutiny of Legislation Conference with whom I discussed this matter in July this year including Stephen Argument and other legal advisors to the Senate Standing Committee on Regulations and Ordinances and Senate Standing Committee for the Scrutiny of Bills.

Madam President, I commend the Bill to the Council.