The Western Australian Parliament's Relationship with the Executive: Recent Executive Actions and Their Impact on the Ability of Parliamentary Committees to Undertake Scrutiny[1]

Alex Hickman

Advisory Officer (Legal), Committee Office of the Western Australian Legislative Council

Introduction

This paper examines two examples to demonstrate the effect that Executive action can have on the ability of parliamentary committees to undertake their scrutiny function. The two examples are:

- The Executive amending regulations during a statutory review of the Western Australian Planning and Development (Development Assessment Panels) Regulations 2011 by the Standing Committee on Uniform Legislation and Statutes Review (Uniform Legislation Committee).
- A Minister's decision pursuant to the *Western Australian Financial Management Act 2006* that it was reasonable and appropriate not to provide to the Parliament certain information concerning the conduct or operation of an agency to the Standing Committee on Estimates and Financial Operations (Estimates Committee) on the ground of Cabinet confidentiality.

In the first example, I will provide a brief overview of statutory reviews of legislation as well as some commentary on the Executive's action during the Uniform Legislation Committee's review. In the second example, I will highlight the non-provision of information by the Executive to the Estimates Committee of the Western Australian Parliament and the response of the Auditor General of Western Australia. I will also draw attention to an interesting contrast between the powers to obtain this information of the Auditor General and the Information Commissioner. Arguably, these examples reinforce the imbalance of power between the Executive and the Parliament,[2] which can have an adverse impact on effective parliamentary scrutiny.

The Rationale for Statutory Review of Legislation

Garth Thornton, a former Parliamentary Counsel of Western Australia and author of one of the leading texts on legislative drafting, has defined statutory review clauses as those that 'oblige the responsible Minister or some other identified authority or person to review the operation of legislation after a specified period and to report to Parliament with appropriate recommendations'.[3] One important consequence of a statutory review clause is that '[Parliament] does not attempt to speculate on the years ahead on the likely state of affairs'.[4] The review of the operation of legislation enables an assessment of how it has operated in practice, whether it is having the effect intended by its drafters (through processes such as

[1] I would like to thank my colleagues at the Legislative Council Committee Office Anne Turner, Andrew Hawkes and Christine Kain for their reviews and commentary on a draft of this paper. I would also like to thank my colleagues in other jurisdictions who undertook research to identify examples of statutory reviews of legislation.

[2] In a paper presented at the 2016 Australian Study of Parliament Group National Conference, *Addressing the Balance: The Executive and the Parliament*, John Seal-Pollard explored the imbalance of power between the Executive and the Parliament, highlighting some worrying legislative trends. https://www.parliament.sa.gov.au/ASPG/Documents/Paper%20Seal-Pollard.pdf

[3] G. C. Thornton, *Legislative Drafting*. London: Butterworths, fourth edition, 1996, p. 216.

[4] Thornton, *Legislative Drafting*. See also Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 84, *Medicines, Poisons and Therapeutic Goods Bill 2013*, 18 February 2014, p. 51.

consultation with relevant stakeholders), and whether any **inadequacies can be overcome by** amendments.

As the Hon Kate Doust MLC stated when remarking on the lack of a review clause in the *Directors' Liability Reform Bill 2015*:

> We enable parliamentary scrutiny to apply so that we can actually see whether or not it has worked. That is quite often why we like to have review provisions in, so that inquiries can be conducted, reports tabled and we can see whether it is actually doing what it was meant to do.[5]

In its 96th Report Co-operatives Amendment Bill 2015, the Uniform Legislation Committee stated 'review clauses are an important mechanism for Parliamentary accountability and oversight of legislation' and recommended the Bill be amended to provide for a review of the legislation after five years.[6] While the Government did not support the inclusion of such a clause on that occasion, the then responsible Minister, Hon Michael Mischin MLC, stated 'I accept entirely that there is a legitimate use for such provisions.'[7]

Statutory review clauses might require an initial review after a fixed period and then further reviews after fixed intervals.[8] The clause may also set out matters to consider as part of the review.[9] The review period varies in Western Australian legislation, for example, from specific time periods to the more general '*as soon as practicable*'.

The Reviewer: Minister or Parliamentary Committee?

In most cases in Western Australia, a review of the operation of legislation is carried out by the responsible Minister or their delegate and a copy is tabled in the Parliament. However, on occasion, the legislation provides for a standing Legislative Council committee, chosen by the Legislative Council at the relevant time, to carry out a review.[10] While it is outside of the scope of this paper to undertake a detailed comparative analysis of whether it is more appropriate for statutory reviews to be undertaken by the responsible Minister or a parliamentary committee, I make the following, competing, observations:

- Parliamentary committees may have limited capacity to undertake statutory reviews given the sheer volume of statutory review clauses in Western Australian legislation as well as their often-heavy workload.

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[5] Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 92, *Directors' Liability Reform Bill 2015*, 21 April 2015, pp. 15-16.

[6] Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 96, *Co-operatives Amendment Bill 2015*, 25 February 2016, pp. 17-18.

[7] Hon Michael Mischin MLC, Minister for Commerce, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 22 March 2016, p. 1495.

[8] See *Auditor General Act 2006* (WA) s 48(1), which provides: 'The Joint Standing Committee on Audit is to carry out a review of the operation and effectiveness of this Act a*s soon as is practicable after* the fifth anniversary of its commencement; and the expiry of each 5-yearly interval after that anniversary'. The Economic Regulation Authority Act 2003 (WA), s 64, contains similar wording, referring to 'a Joint Standing Committee of both Houses of Parliament'.

[9] See *Auditor General Act 2006* (WA) s 48(2), which provides: '(2) In the course of a review under subsection (1) the Joint Standing Committee on Audit is to consider and have regard to —whether there is a need for this Act to continue; and how the process for appointing an Auditor General has operated in practice; and whether the Auditor General's information gathering powers are adequate, particularly in relation to claims of legal professional privilege and Cabinet documents; and the impact of any exercise of the power to audit certain accounts of related entities; and the efficiency and effectiveness of the provisions for dealing with confidential information; and any other matters that appear to the Joint Standing Committee on Audit to be relevant to the operation and effectiveness of this Act'.

[10] See, for example, *State Administrative Tribunal Act 2004* (WA) s 173. This was undertaken by the Standing Committee on Legislation. See Western Australia, Legislative Council, Report 14, *Inquiry into the Jurisdiction and Operation of the State Administrative Tribunal*, 20 May 2009); *Planning and Development Act 2005* (WA) s 171F.

- The relevant government agency responsible for the oversight of the legislation will have a considerable amount of operational expertise to enable it to carry out reviews.[11]
- Parliamentary committees are well equipped to inquire into the operation of legislation, having a variety of evidence collection tools at their disposal as well as experience in legislative scrutiny.
- Parliamentary committees can bring an element of objectivity to a review of legislation that may be lacking in a ministerial review given the Minister's role in the oversight and operation of the legislation. This may become an important consideration if the legislation is particularly controversial.
- Committee reports can trigger further parliamentary scrutiny in a way that a Ministerial report may not by being automatically considered and debated after tabling in the Parliament.[12]

If a Parliament were minded to allocate more statutory reviews to its committees, one method of addressing any capacity issues might be to establish a dedicated committee or committees with this responsibility. This would depend on the extent of any capacity issues in the jurisdiction as well as the wording of the statutory review clause.

Examples in some other Australian jurisdictions of parliamentary committees undertaking reviews of legislation are set out in Table 1. It would appear, as is the case in Western Australia, statutory review clauses more often than not provide for the review to be undertaken by the responsible Minister, rather than a parliamentary committee.

Table 1: Mechanisms for Statutory Review in Selected Australian Jurisdictions

Jurisdiction	Minister or parliamentary committee?	Examples of statutory review by a parliamentary committee
Commonwealth	The responsible Minister is most commonly allocated the role of undertaking statutory reviews.	Section 29 of the *Intelligence Services Act 2001* provides that the Parliamentary Joint Committee on Intelligence and Security is to review the operation, effectiveness and implications of various pieces of legislation, including Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979*.
New South Wales	The responsible Minister is most commonly allocated the role of undertaking statutory reviews. Parliamentary committee reviews are rare.	Schedule 4, clause 12 of the *State Insurance and Care Governance Act 2015*, provides that a designated committee of the Legislative Council review the Act two years after its commencement. Section 72C(5) of *the Independent Commission Against Corruption Act 1988* provides that a 'designated committee is to review a code of conduct adopted by the Legislative Council at least once every 4 years' (the Privileges Committee having been designated for this purpose).
Victoria	It is rare for legislation to provide for a statutory review. When it does, the clauses generally stipulate either 'The	During debate in the Legislative Council on the Sex Offenders Registration Amendment Bill 2016, a Member moved an amendment providing for statutory review of the legislation by an independent body after two

[11] See Hon Helen Morton MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 22 September 2011, p. 7582.

[12] See Standing Orders 110 and 188 of the Legislative Council of Western Australia.

	Minister is to review'[13] or 'The Minister must cause an independent review of the operation of this Act'.[14]	years of operation. The Minister for Training and Skills made the following statement in response: 'Statutory review provisions are … generally limited to extraordinary pieces of legislation such as the Charter of Human Rights and Responsibilities Act 2006 and the Terrorism (Community Protection) Act 2003. We believe that it is sufficient that the Department of Justice and Regulation monitors the scheme informally and in consultation with relevant stakeholders …'.[15] The Scrutiny of Acts and Regulations Committee undertook a review of the *Charter of Human Rights and Responsibilities Act 2006* pursuant to a Governor-in-Council Order in 2011.[16]
Queensland	Statutory reviews of legislation are typically performed by the relevant government department for the responsible Minister. There are numerous examples, such as s 132 of the *Food Production (Safety) Act 2000*; s 121 of the *Biodiversity Act 2004* and s 90A of the *Farm Business Debt Mediation Act 2017*.	No contemporary examples were found of a parliamentary committee undertaking a statutory review of legislation.[17]

Effects of Executive Action – Case Study 1: The Review of the Planning and Development (Development Assessment Panels) Regulations 2011

Development Assessment Panels (DAPs) are decision-making bodies comprised of three technical experts (appointed by the Minister for Planning) and two local government members, nominated by the relevant local government. They are responsible for determining certain planning approval applications in the place of the relevant responsible authority, most often the local government. DAPs were established in Western Australia on 1 July 2011 after the enactment of the *Approval and Related Reforms (No. 4) (Planning) Act 2010* in August 2010 (which introduced a new Part 11A into the *Planning and Development Act 2005*) and the publication of the Planning and Development (Development Assessment Panels) Regulations 2011 (Regulations) in the Government Gazette on 24 March 2011.

Section 171F of the *Planning and Development Act 2005*, which was introduced by an amendment moved by Hon Dr Sally Talbot MLC on 29 June 2010, provides:

> 171F. Review of regulations
> (1) An appropriate Standing Committee of the Legislative Council is to carry out a review of the operation and effectiveness of all regulations made

[13] *Professional Standards Act 2003* (Vic).

[14] *Gene Technology Act 2001* (Vic).

[15] Hon Steven Herbert MLC, Minister for Training and Skills, Victoria, Legislative Council, *Parliamentary Debates (Hansard)*, 14 April 2016, pp. 1839.

[16] Victoria, Legislative Council, Scrutiny of Acts and Regulations Committee, *Review of the Charter of Human Rights and Responsibilities Act 2006*. http://www.parliament.vic.gov.au/images/stories/committees/sarc/charter_review/report_response/20110914_sarc.charterreviewreport.pdf. Section 44(1) of the Act provides 'The Attorney-General must cause a review to be made of the first 4 years of operation of this Charter', so it was a decision of the Executive to refer the inquiry to this committee.

[17] Queensland Parliamentary Library and Research Service, Research Brief, 31 August 2017.

> under this Part as soon as practicable after the expiry of 2 years from the day on which regulations made under this Part first come into operation.
>
> (2) The Standing Committee is to prepare a report based on the review and, as soon as practicable after the report is prepared, is to cause the report to be laid before each House of Parliament.

During the Second Reading debate in the Legislative Council on the *Approvals and Related Reforms (No. 4) (Planning) Act 2010* (WA), Hon Dr Sally Talbot MLC gave the following justification for the insertion of section 171F:

> I want to put to the minister my argument for having a statutory review that is carried out by an upper house standing committee rather than by the minister. To cite reasons, I need go no further than many of the reports that the government has received just in the relatively short time that I have been in the Parliament. We receive reports that have an enormous amount of detail in them. A report that is prepared by a standing committee is often a report that will rely on the evidence of witnesses. It is not always possible for a minister conducting a review to either have the breadth of input into who might be a stakeholder or, indeed, have the resources to consult those stakeholders in the way that a standing committee can. There is also the consideration that those hearings can be made public. A review by a standing committee of the Legislative Council would certainly be preferable to a ministerial review. Therefore, that is the amendment that I will move when we get to the appropriate place in the bill.[18]

The Government agreed with the Honourable Member's reasons.[19] Her remarks reinforce those made above regarding the various evidence collecting tools at a parliamentary committee's disposal, which can enable a very comprehensive analysis of the operation of legislation. The Legislative Council referred the Regulations 2011 to the Uniform Legislation Committee on 21 October 2014. An extension of time to report from 14 May 2015 to 8 September 2015 was granted on 17 March 2015. By this time, the Department of Planning (the Department) had undertaken its own review of the Regulations, which foreshadowed a number of changes to the DAP system.[20]

Regarding the implementation of the changes, the Department stated:

> Implementation of the changes summarised above will be via modifications to the DAP Regulations and supporting documentation, including updates to communication and training material for all current and future DAP members.
>
> Modifications to the DAP Regulations will be drafted immediately following release of this outcomes report, and the revised legislation will be

[18] Hon Dr Sally Talbot MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 24 June 2010, p. 4595. On another occasion, during the Second Reading debate for the *Approvals and Related Reforms (No. 1) (Planning) Act 2010* (WA) the Government did not agree to a similar amendment. See Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 9 September 2010, pp. 6241-6247.

[19] Hon Robyn McSweeney MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard),* 29 June 2010, p. 4737.

[20] Department of Planning, *Planning makes it happen: phase two, Review of the Development Assessment Panels*, September 2013. http://www.planning.wa.gov.au/dop_pub_pdf/DAPs_Review_final.pdf Department of Planning, *Review of the Development Assessment Panels, summary of submissions and outcomes of review*, August 2014. http://www.planning.wa.gov.au/dop_pub_pdf/Review_of_DAPs.pdf. See also Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 93, *Review of the Planning and Development (Development Assessment Panels) Regulations 2011*, 8 September 2015, pp. 21-23.

> progressed through the statutory process as soon as possible once it is ready.[21]

On 21 April 2015, the Planning and Development (Development Assessment Panel) Amendment Regulations 2015 (Amendment Regulations) were tabled in the Legislative Council.[22] This was the first the Uniform Legislation Committee heard about the introduction of the Amendment Regulations. During a hearing with the Department, the Chair of the Committee stated:

> Perhaps the tidiest way [to proceed] might have been for the government to have waited until after this inquiry was finished to see what it came up with before it rolled out the new regulations.[23]

Hon Brian Ellis MLC, a member of the Committee, expressed his concern as follows:

> I am concerned that there is not much point looking at the old regulations. The new ones have only just come in, so we can ask at different hearings what people think about those new regulations, but they will not have been in long enough to get an idea whether they are positive or negative.[24]

The then Minister expressed regret the Committee was not advised in advance of the introduction of the Amendment Regulations.[25] However, he was of the view their introduction had not interfered with the Committee's inquiry:

> I understand this information [the Department's review] was available to the Committee upon commencement of its review on 21 October 2014 and it was anticipated that this information would be included in or inform the scope of the Committee's review. I also understand that the Committee was briefed on the review when Department of Planning officers attended briefings with the Committee on 17 November 2014.
>
> The … Amendment Regulations are consistent with the review outcomes and contain nothing which hampers the Committee's ability to conduct the statutory review provided for by Section 171F of the Planning and Development Act 2005.[26]

Notwithstanding this response, it is clear from its report that the Committee was of the view that the Amendment Regulations should not have been introduced until the conclusion of its inquiry:

> The Committee is of the view that the introduction of the Amendment Regulations by the Executive Government has hampered the work of the Committee and should have been postponed until the conclusion of the Committee's inquiry into the Regulations. It is important to note that:

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[21] Department of Planning, *Review of the Development Assessment Panels, summary of submissions and outcomes of review*, August 2014, p .21. http://www.planning.wa.gov.au/dop_pub_pdf/Review_of_DAPs.pdf

[22] The Explanatory Memorandum for the Amendment Regulations was signed by the Director General of the Department on 9 March 2015 and by the Minister for Planning on 11 March 2015.

[23] Hon Kate Doust MLC, Chair, Standing Committee on Uniform Legislation and Statutes Review, *Transcript of Evidence*, 4 May 2015, p. 4.

[24] Doust, *Transcript of Evidence*, p. 3.

[25] Hon John Day MLA, Minister for Planning, Letter, 18 May 2015.

[26] Day, Letter, 18 May 2015.

- The Committee was undertaking a Statutory Review required under section 171F of the Act, an Act which the Department administers. Amending regulations being considered during the course of the review interfered with the Committee's ability to properly undertake the review.
- The Executive Government was aware of the Committee's inquiry into the Regulations but failed to alert it of its intention to introduce the Amendment Regulations and obtain the Committee's views on how it may affect its inquiry.
- The Amendment Regulations amended and replaced a number of the regulations the Committee was considering during the course of its inquiry.
- It is not possible to conduct a meaningful inquiry into the operation and effectiveness of the Regulations amended by the Amendment Regulations as these would have only been in force for a few months prior to the tabling of this report (by 8 September 2015).
- Stakeholders providing submissions to the Committee did so in good faith on the basis that the Committee was inquiring into the Regulations as they were at the time.[27]

The Uniform Legislation Committee's position and reasoning is cogent. By failing to wait for the outcome of the inquiry, the Executive displayed, at best, a lack of courtesy and an indifference towards the work of the Uniform Legislation Committee, insofar as it may impact upon the Amendment Regulations and, at worst, disrespect towards the institution of Parliament. The following additional commentary by the Committee reinforces this view:

> It is also relevant to note that, had the Committee not been required to seek an extension of time to report from the Legislative Council on 17 March 2015 and tabled its report on 14 May 2015, the introduction of the Amendment Regulations on 1 May 2015 would have rendered parts of its report obsolete. The Committee would have reviewed the operation and effectiveness of out-dated regulations.[28]

It also leaves the Executive open to the criticism that it placed greater weight on a departmental review, which was an administrative process not compelled by statute, than on a statutory review by a parliamentary committee. The former is clearly subservient to the latter. This is despite the statutory review commencing at least a year later than required under section 171F of the Act. The Department was well aware of the commencement of the statutory review before the Amendment Regulations were tabled in Parliament.

The Uniform Legislation Committee also noted the then Minister subsequently agreed to delay the introduction of further amendments to the Regulations to address a notice of motion to disallow the Amendment Regulations tabled by the Joint Standing Committee on Delegated Legislation until after the conclusion of its inquiry. This contrasts glaringly with the timing of the tabling of the Amendment Regulations.[29] While this may have been a matter of administrative convenience, it could also be seen as a tacit admission of the appropriateness of waiting for the outcome of the statutory inquiry.

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[27] Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 93, *Review of the Planning and Development (Development Assessment Panels) Regulations 2011*, 8 September 2015, pp. 140-141. This view was shared by some witnesses who gave evidence to the Committee. See Standing Committee on Uniform Legislation and Statutes Review, Report 93, p. 140.

[28] Standing Committee on Uniform Legislation and Statutes Review, Report 93, p. 141. There was no mention by the Committee of the action potentially constituting a possible contempt of the Parliament. Any such allegation would have been reported to the Legislative Council, recommending it refer this question to the Procedure and Privileges Committee.

[29] Day, Letter, 18 May 2015.

This is not to say that there was any deliberate action on the part of the Executive to frustrate the work of the Uniform Legislation Committee or that the Executive breached the doctrine of the separation of powers by not having the power and, indeed, the right, to introduce legislation at a time of its choosing.[30] The absence of a recommendation by the Uniform Legislation Committee that the Executive delay the introduction of legislation until the conclusion of a statutory inquiry carried out by a committee of the Legislative Council could be seen as implicitly recognising this.[31] It is also clear the Executive's action did not derail the Committee's inquiry.

What it does say, in my opinion, is that the Executive needs to take care, when considering the timing of the introduction of legislation, to ensure the conduct of any relevant, parallel parliamentary process is respected. The Executive's actions in this instance pre-empted the outcome of a parliamentary inquiry and resulted in a missed opportunity to assess the Committee's findings regarding the operation of those regulations the Executive had already committed to amending.[32]

Suggestions for Reform

While I am not aware of similar Executive action having occurred during an inquiry by a parliamentary committee in recent history in Western Australia, the fact remains there is nothing, currently, to prevent this issue from recurring. If the timing of introduction of the Amendment Regulations is considered to be an undesirable outcome, consideration should be given to addressing this.

One option might be the formulation of a directive, applying on a whole-of-government basis, requiring the Executive to wait until the outcome of a statutory review conducted by a parliamentary committee is known before proceeding with any relevant legislation. A Premier's Circular might be the appropriate source for such a directive, as it binds Ministers as well as public servants and relates to whole-of-government legislative and policy requirements.[33] This would enhance respect for the institution of Parliament and its committees.

It is acknowledged there is sometimes a need for urgent legislative action by government. Any directive could reflect this and contain relevant guidelines governing the circumstances in which this could occur, if necessary.

The Effects of Executive Action—Case Study 2: The Estimates Committee and Access to Strategic Asset Plans

[30] An interesting analogy is the well accepted principle that legislation which alters substantive rights, even if those rights are in issue in pending litigation, does not involve an interference with judicial power contrary to Chapter III of the *Commonwealth Constitution* and hence the separation of powers, unless it purports to direct the courts as to the manner and outcome of the exercise of their jurisdiction. See *Duncan v Independent Commission Against Corruption* [2015] HCA 32 [24-26] (French CJ, Kiefel, Bell and Keane JJ).

[31] See Standing Committee on Uniform Legislation and Statutes Review, Report 93, p. 141.

[32] It must also be remembered that it is the Parliament that has delegated to the Executive and other bodies the role of making subsidiary legislation and that the latter is accountable to the former as the law-making body in the Westminster system of government.

[33] https://www.dpc.wa.gov.au/GuidelinesAndPolicies/PremiersCirculars/Pages/Default.aspx.

During 2016, the Estimates Committee sought access to Strategic Asset Plans[34] from various agencies to fulfil its role of scrutinising the financial operations of the Executive, including its long-term capital needs and the maintenance of existing capital works.[35]

Almost every agency gave the following generic response:

> Strategic Asset Plans (SAPs) are prepared for Treasury as part of the Budget process to inform decision making by the Economic and Expenditure Reform Committee and Cabinet. Disclosure of these plans would reveal the deliberations and decisions of both bodies and are therefore considered Cabinet-in-Confidence. Until such time as specific programs within a SAP have been considered and approved to proceed they remain indicative. Additionally, and understandably 10-year SAPs are subject to a wide variety of exigencies including but not limited to priorities of the government of the day; changes in circumstances; changes in technologies and external events.[36]

Notices pursuant to section 82 of the *Financial Management Act 2006*[37] tabled in the Legislative Council stated disclosure of the Strategic Asset Plan would 'reveal Budget-related advice to both bodies which is Cabinet-in-confidence.'[38]

The Auditor General, as part of his role under section 24 of the *Auditor General Act 2006* to provide an opinion to Parliament whether the Minister's decision was reasonable and appropriate, made the following findings on refusals by various Ministers to provide copies of Strategic Asset Plans:

- The decision by certain Ministers not to provide Parliament with a copy of their department's Strategic Asset Plan was not reasonable and therefore not appropriate.
- The information contained in the Strategic Asset Plan was not prepared solely for consideration by Cabinet and some of the information it contains is publicly available.
- The Ministers did not consider whether a redacted version of the Strategic Asset Plan could be provided.
- The Department's advice to the Minister was brief and did not contain analysis or explore options to provide parts of the information to Parliament.
- It should not be assumed that all information associated with the Strategic Asset Plan is confidential.[39]

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[34] See Western Australia, Legislative Council, Standing Committee on Estimates and Financial Operations, 67th Report, *Budget Estimates Hearings 2016-17*, 15 September 2016, pp. 21-22, where the Committee stated that this document 'looks 10 years ahead to show how an agency intends to deliver practical services to the public using Government infrastructure, buildings, other assets, and related demand management initiatives'. See also Western Australian Auditor General's Report, Opinions on Ministerial Notifications, Report 18, August 2016 p. 6. https://audit.wa.gov.au/reports-and-publications/reports/

[35] This was sought as part of the 2014-15 Annual Report and 2016-17 Budget Estimates hearings processes. See Western Australia, Legislative Council, Standing Committee on Estimates and Financial Operations, 67th Report, *Budget Estimates Hearings 2016-17*, 15 September 2016, pp. 24-25.

[36] Western Australia, Legislative Council, Standing Committee on Estimates and Financial Operations, 67th Report, *Budget Estimates Hearings 2016-17*, 15 September 2016, p. 22.

[37] Section 82, which is unique in Australia, contains a procedure which requires 'a Minister to notify the Parliament and the Auditor General of a decision not to provide certain information to the Parliament and provide reasons for why that information was withheld'. These notices are often known as 'section 82 notices'. The Auditor General is required to form an opinion on whether the Minister's decision to withhold information from the Parliament is 'reasonable and appropriate' and to report that opinion to the Parliament. These reports are titled 'Opinions on Ministerial Notifications'.

[38] Standing Committee on Estimates and Financial Operations, 67th Report, *Budget Estimates Hearings 2016-17*, n37, p. 23.

[39] Western Australian Auditor General's Report, *Opinions on Ministerial Notifications*, Report 18, August 2016. https://audit.wa.gov.au/reports-and-publications/reports/

The departments of Treasury and Premier and Cabinet committed to providing guidance to agencies regarding the issue of the Cabinet-in-confidence status of Strategic Asset Plans following the recommendation made by the Auditor General to this effect.[40]
There is no doubt the Estimates Committee could make a significant contribution to the scrutiny of Western Australia's financial administration by having access to Strategic Asset Plans, enabling it to assess the adequacy of ten year forward financial planning by individual agencies and question them accordingly. On the other hand, the State's budget cycle includes forward estimates extending four, rather than ten, financial years, with planning for expenditure for the remaining six years part of the Cabinet decision making process and not usually subject to public dissemination.

This is not to say that all information sought by the Estimates Committee contained in Strategic Asset Plans was limited to information such as long-term capital needs outside of the budget cycle. For instance, the Committee asked for the dollar value of maintenance backlog for police facilities by year and was informed by the then Minister for Police that '[the requested] information is a component of the WA Police Strategic Asset Plan, which is Cabinet in Confidence and, therefore not able to be released'.[41]

Of course, there is nothing to prevent the Executive from making Strategic Asset Plans public, at least in a redacted version, or for the Estimates Committee to receive them in private (although the scrutiny of budget estimates has always been a mostly public process).[42] Successive governments do not appear to have availed themselves of these options.

Access Through Freedom of Information Applications

Despite the difficulties faced by the Estimates Committee in obtaining the information contained in Strategic Asset Plans, there is another avenue by which it can be sought. As in many other jurisdictions, in Western Australia a person can request access to documents held by the State and local governments under the *Freedom of Information Act 1992* (FOI Act).

Whereas the Auditor General has the power to give an opinion on the Minister's decision not to release information, the Information Commissioner, after forming an opinion, can also order the release of information subject to an application under the FOI Act. Such an application could be, and has been, made by Members of Parliament, which can include members of parliamentary committees.

Regarding any application for the release of a Strategic Asset Plan, clause 1(1)(b) of Schedule 1 of the FOI Act provides that information is exempt if its disclosure would reveal the deliberations or decisions of an Executive body. This includes information that contains policy options or recommendations prepared for possible submission to an Executive body (which is defined in subclause 6 as Cabinet; a committee of Cabinet; a subcommittee of Cabinet or the Executive Council).[43]

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[40] Auditor General's Report, *Opinions on Ministerial Notifications*.

[41] Hon Liza Harvey MLA, Minister for Police, Answer to question on notice asked at hearing held 7 December 2015, dated 13 January 2016, p. 13.

[42] As the Committee has the power to make documents it receives public, despite previously having a private status, one reason may be the Executive not wanting to risk the release of the information.

[43] For an example of where the Information Commissioner found information to be exempt under clause 1(1)(b) of the FOI Act, see *Re Ravlich and Department of the Premier and Cabinet* [2011] WAICmr 3, where the Information Commissioner found two of the documents sought by the applicant related to a policy option or recommendation prepared for possible submission to the Economic and Expenditure Review Committee, which is a Cabinet body. See also the discussion on Cabinet Confidentiality and Freedom of Information in Beverly Duffy, 'Orders for Papers and Cabinet Confidentiality Post Egan v Chadwick', *Australasian Parliamentary Review*, 21(2), 2006, pp. 99-102. Sven Bluemmel, Freedom of Information: Lessons and Challenges in Western Australia. A paper presented at the 2010 Australian Institute of Administrative Law Forum, Sydney, 23 July 2010, p. 38, states that '[i]nformation is … not protected from disclosure merely because it was submitted to an Executive body, unless it was originally brought into existence for the purpose of such a submission'.

While I am not aware of any decision by the Information Commissioner on an application for access to a Strategic Asset Plan of a government agency or similar document, it is interesting to highlight this alternative method. Any order to release a Strategic Asset Plan to an applicant would enable them, presumably, to use the information for whatever purpose they saw fit.

It is important to emphasise that both the Auditor General and Information Commissioner have separate decision-making processes to follow regarding the release of information subject to a claim of Cabinet confidentiality. Accordingly, the Auditor General may be of the opinion a Minister's decision not to release a Strategic Asset Plan was reasonable and appropriate, while the Information Commissioner may decide it does not fall within the exemption contained in clause 1(1)(b) of the FOI Act and order its release.

Conclusion

The two examples discussed in this article of Executive action having an impact on the scrutiny function of committees of the Western Australian Legislative Council serve as an important reminder of how an imbalance can develop in the relationship between the Executive and the Parliament.

In the first example, the power of the Executive to introduce legislation at a time of its choosing, which resulted in the effective pre-emption of the outcome of a parliamentary inquiry, demonstrates the need for the Executive to ensure parallel parliamentary processes are respected. In the second example, claims of Cabinet confidentiality by the Executive over certain documents prevented a parliamentary committee from assessing information regarding the financial administration of the State, despite such claims being open to challenge through freedom of information processes that may result in an order for public release of the documents.

While existing accountability mechanisms, such as section 82 of the Western Australian *Financial Management Act 2006* and the ability of parliamentary committees to draw Executive action to the attention of Parliament, are useful in seeking to address this imbalance, challenges and opportunities remain for reform to further strengthen Executive accountability to the Parliament and the people of Western Australia.

One possible reform suggested here—a whole-of-government directive requiring the Executive to wait until the outcome of any statutory review conducted by a parliamentary committee is known before proceeding with any relevant legislation—is worthy of consideration. It would represent a clear recognition by the Executive of the importance of respecting parliamentary processes.

Finally, I would welcome readers sharing any information they have on the following issues in their own jurisdictions:

- Examples of statutory reviews of legislation (both primary and subsidiary) undertaken by parliamentary committees, as well as any commentary on committee versus ministerial review.
- Whether there has been any Executive action during a parliamentary committee inquiry similar to that described in this article.
- Whether the Executive has granted access to Strategic Asset Plans or similar documents.
- Whether the Information Commissioner or equivalent office holder has ordered access to Strategic Asset Plans or similar documents. If so, under what, if any, conditions.